The Arbitration Bootstrap

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I. THE THREE EXPANSIONS OF ARBITRATION CLAUSES 269
A. The Expanding Number of Arbitration Clauses 269
B. The Expanding Reach of Arbitration Clauses......................... 271
C. The Expanding Content of Arbitration Clauses 274
1. Class Action Waivers 275
2. Unconscionable and Unenforceable Terms in Arbitration Clauses 282
3. Concepcion *as a Blueprint for Bootstrapping*.................... 292
D. State Efforts to Protect Consumers 296
II. THE ROLE OF LEGISLATIVE INTENT IN THE EXPANSION OF ARBITRATION CLAUSES... 297
III. REVISITING THE LEGISLATIVE HISTORY OF THE FAA 300
A. The Legislative History of the FAA 300
B. How Courts Misconstrue Legislative Intent in Arbitration Cases 307
1. The Scope of Arbitration Clauses...................................... 307
2. Consumer and Employment Contracts.............................. 308
3. Deference to Unconscionable Terms 312
4. Preemption of State Laws to Protect Consumers............... 314
C. The Policy Consequences of Misconstruing the Legislative History of the FAA 316
IV. RECONCILING THE LEGISLATIVE INTENT AND THE PRACTICAL REALITY OF ARBITRATION CLAUSES 320
A. Bootstrap.. 322
B. Sever 324
C. Strike.. 327
CONCLUSION 329

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> [I]t is difficult to overstate the strong federal policy in favor of arbitration . . . .
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> —*Arciniaga v. General Motors Corp.*[1]

The Second Circuit erred when it claimed difficulty in overstating the federal policy favoring arbitration. Courts overstate this policy regularly, often with disastrous consequences for consumers, workers, and the bodies of law designed to protect their interests.

Arbitration clauses have become ubiquitous. Arbitration clauses require consumers and employees to waive their rights to bring litigation in court, leaving private arbitration as their only avenue to seek redress for violations of any law, including consumer protection laws, antitrust law, and anti-discrimination laws. The arbitration process is less protective of consumers and employees in many ways than the litigation process in public courts. Yet for consumers in many markets, arbitration clauses are unavoidable because firms impose contracts of adhesion that include mandatory arbitration clauses, which require individuals to waive their rights to sue in court.

As the Supreme Court has expanded the categories of legal claims that are subject to mandatory arbitration, firms have begun to load their mandatory arbitration clauses with unconscionable contract terms. This is arbitration bootstrapping. Arbitration bootstrapping describes situations where firms insert terms unrelated to arbitration into an arbitration clause in the hopes that judges will be more likely to enforce terms embedded in arbitration clauses. For example, firms insert terms into their arbitration clauses to shorten statutes of limitations, to reduce damages, or to prevent injunctive relief.[2] These contract terms are considered unconscionable—and, thus, unenforceable—in many states. However, the Supreme Court has interpreted the Federal Arbitration Act of 1925 (the FAA)[3] to require deference to arbitration clauses; consequently, many courts allow firms to bootstrap unenforceable contract terms into an arbitration clause in order to make unconscionable contract terms enforceable.

In theory, legal doctrines exist to protect consumers and workers from arbitration clauses that are unconscionable or that eliminate an individual's ability to seek redress for violations of the law. Most notably, state contract law makes unconscionable contracts—and unconscionable contract terms—

1. 460 F.3d 231, 234 (2d Cir. 2006).
2. *See infra* section I(C)(2).
3. The original 1925 law was called the United States Arbitration Act, but Congress changed the name to the Federal Arbitration Act in 1947 without amending the substance of the Act. To avoid any confusion, this Article follows the accepted convention of referring to the law as the Federal Arbitration Act or FAA at all times.

unenforceable.[4] With respect to federal statutory rights, the Effective Vindication Doctrine provides that the "arbitration of the claim will not be compelled if the prospective litigant cannot effectively vindicate his statutory rights in the arbitral forum."[5]

The Supreme Court, however, has recently undermined both of these mechanisms—the unconscionability defense and the Effective Vindication Doctrine—in cases involving class action waivers in arbitration clauses. A class action waiver is a contract term that requires consumers and workers to promise neither to bring nor to participate in class action litigation against the firm.[6] By eliminating the possibility of class actions, firms can essentially immunize themselves from judicial scrutiny because the cost of bringing an individual action often exceeds the maximum potential damage award.[7] Despite this, in 2011, in *AT&T Mobility LLC v. Concepcion*,[8] the Supreme Court held that the FAA preempted state laws that treated certain class action waivers embedded in arbitration clauses as unconscionable.[9] The ruling meant that firms could evade otherwise applicable state laws against an unconscionable class action waiver simply by inserting the waiver into an arbitration clause. In 2013, the Supreme Court in *American Express Co. v. Italian Colors Restaurant*[10] considered a Second Circuit opinion that struck down a class action waiver for violating the Effective Vindication Doctrine

4. Because contract law is state law, the unconscionability doctrine is a function of state law and varies across states. Unconscionability has two aspects: substantive and procedural. Substantive unconscionability refers to the actual terms of the contract, such as price, obligation, waiver of rights, or consequences of breach. Procedural unconscionability focuses on the process by which the contract is made, including such issues as whether the parties had equal bargaining power and whether the contract is a contract of adhesion.Most states require a combination of substantive unconscionability and procedural unconscionability before declaring a contract or a contractual term unconscionable. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (stating that under California law unconscionability requires both a procedural and a substantive element). However, under certain circumstances, some states allow a finding of unconscionability based on substantive unconscionability alone. *See, e.g.*, Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51, 59 (Ariz. 1995) (concluding that under Arizona's adoption of the Uniform Commercial Code a claim of unconscionability can be established by showing substantive unconscionability alone). In the context of arbitration clauses, the procedural unconscionability is often established because the contract is adhesive. *See, e.g.*, Gatton v. T-Mobile USA, Inc., 61 Cal. Rptr. 3d 344, 355 (Cal. Ct. App. 2007) (noting that there is inherent inequality of bargaining power associated with contracts of adhesion). Individual terms within the arbitration agreement can be considered substantively unconscionable, as discussed in *infra* section I(C)(2).If a court determines that a contract—or contract term—is unconscionable, it can invalidate the entire contract, strike the unconscionable term, or reform the contract to avoid an unconscionable result. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

5. *In re* Cotton Yarn Antitrust Litig., 505 F.3d 274, 282 (4th Cir. 2007).

6. *See infra* section I(C)(1).

7. *See infra* notes 67–72 and accompanying text.

8. 131 S. Ct. 1740 (2011).

9. *Id.* at 1746, 1753; *see infra* notes 67–72 and accompanying text.

10. 133 S. Ct. 2304 (2013).

because the cost of bringing an individual claim could exceed $1 million while the maximum possible recovery was less than $40,000.[11] The Supreme Court reversed, holding that "a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[12] Consequently, the *Italian Colors* opinion substantially undermined the Effective Vindication Doctrine as a doctrine for protecting individuals from unfair mandatory arbitration clauses.[13]

In tandem, these two decisions operate to dismantle entire fields of law, including laws against fraud, deception, predatory conduct, antitrust violations, and employment discrimination. Although *Concepcion* and *Italian Colors* both involved class action waivers, this Article demonstrates how firms are harnessing the reasoning of these opinions in order to insert a variety of unconscionable contract terms into arbitration clauses. Based on the so-called federal policy favoring arbitration, many courts feel compelled to enforce these otherwise illegal contract terms so long as the terms reside in a contract's arbitration clause.

In the wake of *Concepcion* and *Italian Colors*, judges who have upheld anti-consumer terms in arbitration clauses claim to be merely implementing the will of Congress. Yet the senators and representatives who voted for the Federal Arbitration Act would not recognize today's arbitration clauses that courts are enforcing in the name of the 1925 Congress. This Article explains how enforcement of current arbitration clauses, both as to their reach and their content, is inconsistent with the purpose and text of the Federal Arbitration Act.

Part I examines how, six decades after the FAA's enactment, the Supreme Court claimed that Congress intended the FAA to cover federal statutory rights, such as antitrust and employment discrimination claims. This Part also explores how—after courts upheld the expanded reach of arbitration clauses—companies more aggressively inserted anti-consumer terms into their arbitration clauses. Firms now use arbitration clauses as a bootstrap, a mechanism to impose contract terms that would otherwise be unenforceable as a matter of contract law. For example, many state laws—as well as the contract doctrine of unconscionability—condemn contract provisions that purport to forbid class actions, truncate statutes of limitations, limit damages, preclude injunctions, or manipulate fee shifting, among other anti-consumer terms. While courts enforce these state laws in traditional contracts cases, some judges have exhibited a willingness to defer to the same terms when they are inserted into an arbitration provision. This provides a

11. *Id.* at 2308.

12. *Id.* at 2307.

13. Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 4 (2015).

strong incentive for retailers and employers to use arbitration clauses as a vehicle for imposing anti-consumer terms that would otherwise be unenforceable.

Part II explains how the Supreme Court has invoked the legislative intent of the 1925 Congress in order to justify opinions that apply the FAA to all claims, including federal statutory claims and consumer-initiated lawsuits. Courts have further suggested that Congress intended arbitration clauses to be enforced as written, which provides a justification for deference to anti-consumer terms that would be found unconscionable under state law. Finally, the Supreme Court has asserted that the FAA preempts all state efforts to police arbitration clauses, including basic notification requirements.

Part III examines the actual legislative history of the Federal Arbitration Act. It explains that Congress was exclusively concerned with the enforceability of arbitration agreements between sophisticated businesses in commercial disputes. Congress never considered the possibility that retailers would impose mandatory arbitration clauses on their customers, let alone that these arbitration clauses would be structured to limit damages, to truncate statutes of limitations, or to otherwise remove procedural protections from consumers. The congressional intent that courts employ to enforce anti-consumer terms in arbitration clauses is an imagined one. Exploring the legislative history of the FAA shows that the 1925 Congress would not recognize the FAA that today's courts claim to be honoring.

Part IV argues that courts should stop asserting that the FAA mandates deference to—let alone strict enforcement of—contract terms as long as the terms are buried in an arbitration clause. When confronting unconscionable terms in arbitration clauses, courts can take one of three actions: enforce the unconscionable terms, sever the unconscionable terms, or strike the arbitration clause as a whole because it is so permeated by unconscionable terms. This Part explains why only the latter two options are consistent with Congressional intent and good public policy.

I. The Three Expansions of Arbitration Clauses

A. *The Expanding Number of Arbitration Clauses*

Well before the Supreme Court's decision in *Concepcion*, American businesses imposed arbitration clauses on their customers and employees.[14]

14. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 499–503 (2011); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–85 (2008); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 116 (2010).

The Court's recent endorsements of arbitration clauses have seemingly spurred more firms to adopt this tactic.[15] Mandatory arbitration clauses have come to dominate entire industries, such as cell phone service, credit cards, and cable service.[16] For example, the Consumer Financial Protection Bureau (CFPB) arbitration study found that "[s]even of the eight largest facilities-based mobile wireless providers (87.5%), covering 99.9% of subscribers, used arbitration clauses in their 2014 customer agreements."[17] Professor Jean Sternlight notes that arbitration clauses are common when consumers "purchase or rent certain products (e.g., computers, items bought through Amazon or Zappos, Starbucks gift cards, or rental equipment), enroll in schools, rent movies, or purchase auto parts."[18] Brokerage firms have made pre-dispute arbitration clauses standard in their account agreements with customers.[19] Similarly, over 98% of licensed storefront payday operations impose arbitration clauses on their borrowers.[20]

Arbitration clauses are increasingly found in both consumer and employment contracts because firms insert the clauses into contracts of adhesion. Buyers are unable to preserve their right to sue in court because firms refuse to sell goods or services unless such rights are relinquished.[21] Similarly, many workers—indeed, all workers in some industries—must waive their right to litigate violations of employment law, including illegal

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15. Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 459–60 (2014) ("And it is a fair bet that the number of companies relying on arbitration clauses has spiked since the Court's 2011 decision in *Concepcion*, where the majority lauded AT&T's arbitration clause as being fundamentally fairer and better for consumers than litigation.").

16. Homa v. Am. Express Co., 494 Fed. App'x 191, 197 (3d Cir. 2012); CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 1.4.1, at 10 (2015) [hereinafter CFPB ARBITRATION STUDY] ("In the private student loan and mobile wireless markets, we found that substantially all of the large companies used arbitration clauses."); *id.* § 1.4.1, at 9 ("Tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses.").

17. CFPB ARBITRATION STUDY, *supra* note 16, § 2.3, at 7.

18. Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 95 (2012) (footnotes omitted).

19. Jill I. Gross, AT&T Mobility *and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47, 48 n.6 (2012).

20. CFPB ARBITRATION STUDY, *supra* note 16, § 2.3.4, at 22; *see also id.* § 2.3, at 7 ("Six of the seven private student loan contracts in our sample (85.7%) from 2014 included arbitration clauses . . . .").

21. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 [http://perma.cc/9M7L-ADBP] ("Over the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home.").

discrimination.[22] These contracts of adhesion change the calculus of contracting because the weaker party has no voice in the contents of the contract, including in the terms within the arbitration clause. Many, if not most, consumers and workers are largely unaware that they are signing away their rights to court access.[23] And the Supreme Court has forbidden states from requiring firms to provide upfront notice of arbitration clauses.[24]

The imposition of arbitration clauses will likely increase in the coming years. Those arbitration clauses that pre-dated *Concepcion* are changing to include anti-consumer provisions such as class action waivers.[25] The Court's decisions in *Concepcion* and *Italian Colors* have signaled a judicial willingness to enforce all manner of arbitration clauses, even if the clause includes provisions that would violate state law or make effective vindication of one's rights impossible.

B. The Expanding Reach of Arbitration Clauses

Courts initially limited arbitration to use for resolving commercial disputes between merchants.[26] Businesses, however, realized that by inserting arbitration clauses into their consumer contracts, they could prevent their customers from suing them in court for alleged violations of the law. The federal courts initially resisted these attempts to subject individuals to mandatory arbitration.[27]

For decades, federal courts precluded pre-dispute arbitration clauses from covering federal statutory claims. For example, in the context of federal securities law, the Supreme Court in 1953's *Wilko v. Swan*[28] invalidated

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22. *See, e.g.*, Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1185 (9th Cir. 1998) (noting that "employers . . . require as a mandatory condition of employment . . . [as a] broker-dealer in the securities industry—that all employees waive their right to bring Title VII and other statutory and non-statutory claims in court and instead agree in advance to submit all employment-related disputes to binding arbitration"), *overruled by* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 745 (9th Cir. 2003).

23. *See* Lemley & Leslie, *supra* note 13, at 44–45 (arguing that arbitration clauses are often imposed on unaware consumers and that as a result consumers are forced to give up the right to sue in federal court).

24. *See infra* note 202 and accompanying text.

25. Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 718 (2012) ("In the near future, we can expect that even more companies will impose arbitral class action waivers as a means to insulate themselves from class actions because *Concepcion* has changed the calculus.").

26. Andrea Doneff, *Is* Green Tree v. Randolph *Still Good Law? How the Supreme Court's Emphasis on Contract Language in Arbitration Clauses Will Impact the Use of Public Policy to Allow Parties to Vindicate Their Rights*, 39 OHIO N.U. L. REV. 63, 69 (2012) ("For a number of years after the FAA's passage, the Supreme Court was careful to make a distinction between consumer/individual arbitration and business-to-business arbitration.").

27. *Id.* at 68–69.

28. 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989).

mandatory arbitration agreements, reasoning that Congress "enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights."[29] Acknowledging that while arbitration may work for inter-merchant contractual disputes, the Court concluded, "the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act."[30]

Applying the *Wilko* reasoning to antitrust law, the federal circuits uniformly held that antitrust claims were non-arbitrable. Most notably, in 1968, the Second Circuit concluded in *American Safety Equipment Corp. v. J.P. Maguire & Co.*[31] that pre-dispute arbitration agreements did not apply to antitrust litigation.[32] The court reasoned that subjecting antitrust claims to private arbitration would reduce plaintiffs' incentives to investigate and pursue antitrust actions, result in antitrust cases being decided by arbitrators who may be unqualified to understand complex antitrust issues or too biased to reach fair outcomes, and conflict with the congressional intent that federal judges decide and apply antitrust law.[33] For two decades, all circuits that considered the issue followed *American Safety* and held that antitrust claims were non-arbitrable.[34]

Similarly, courts had long held that the FAA did not apply to employment contracts or claims of employment discrimination.[35] Title VII protects "equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."[36] Although government officials enforce Title VII, the Supreme Court has recognized that "the private right of action remains an essential means of obtaining judicial enforcement of Title VII."[37] More importantly, the Supreme Court in 1974's *Alexander v. Gardner-Denver Co*.[38] held that employees could not prospectively waive their right to litigate Title VII claims by signing employment contracts with arbitration clauses.[39]

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29. *Id.* at 438.
30. *Id.*
31. 391 F.2d 821 (2d Cir. 1968).
32. *Id.* at 827–28.
33. *Id.* at 826–28.
34. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 620–21 (1985) (highlighting the uniformity of the circuit courts).
35. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 40 (1991) (Stevens, J., dissenting) (citing cases); Textile Workers v. Lincoln Mills of Ala., 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting) ("[W]hen Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts.").
36. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).
37. *Id.* at 45.
38. 415 U.S. 36 (1974).
39. *Id.* at 52, 59–60.

The Court explained that "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."[40] In particular, the Court noted that the arbitral process was less capable of protecting workers' rights, in part because "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."[41] Ultimately, the Court concluded that "the informality of arbitral procedure" that works well for commercial disputes "makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts."[42]

After decades of holding that arbitration clauses did not apply to federal statutory claims, the Supreme Court changed course in the 1980s. The Court acted incrementally, first holding that some federal securities fraud claims could be decided in private arbitration.[43] The Court then held that antitrust claims could be arbitrated in international fora,[44] which the lower courts expanded to all domestic antitrust claims as well.[45] Building on its prior securities and antitrust opinions, the Court next held that arbitration clauses could cover civil Racketeer Influenced and Corrupt Organization (RICO) claims, reasoning the court's "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights."[46] The Court then reasoned that all private federal securities claims could be arbitrated, reversing its holding in *Wilko*.[47]

Invoking all of its prior extensions of the FAA to federal statutory claims, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*[48] held that employees could not bring individual claims of employment discrimination that violated federal law in federal court if the employee's securities registration application included an arbitration clause.[49] One commentator characterized *Gilmer* as "a surprising reversal of [the Court's] prior refusal

40. *Id.* at 56.
41. *Id.* at 57–58.
42. *Id.* at 58.
43. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 215, 223–24 (1985).
44. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985).
45. *See* Lemley & Leslie, *supra* note 13, at 8 n.27 (collecting cases).
46. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226, 242 (1987) ("The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims.").
47. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483–85 (1989).
48. 500 U.S. 20 (1991).
49. *Id.* at 25 n.2, 26, 28 ("The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration.").

to require arbitration of statutorily protected individual rights."[50] After *Gilmer*, federal employment discrimination claims—whether brought pursuant to Title VII, the Americans with Disabilities Act, or other statutory regimes—were covered by arbitration clauses.[51] The Court has similarly required enforcement of arbitration clauses in the context of state employment discrimination claims brought in state court despite the fact that the FAA explicitly exempts employment contracts from the Act's reach.[52]

In short, despite the absence of new evidence, the Court disavowed the reasoning of all its prior opinions that had explained the deficiencies of the arbitration process and the inability of consumers and workers to protect their statutory rights through arbitration. Instead, the Court invoked a newly created Congressional intent to make all federal claims arbitrable.[53]

C. *The Expanding Content of Arbitration Clauses*

The expansion of mandatory arbitration to cover consumer and employment contracts, and all causes of action that may arise from them, fundamentally undermines the expansive body of state and federal law designed to protect consumer and worker interests. Scholars have explained how arbitration as a process of resolving consumer conflicts unfairly favors business defendants.[54] For example, arbitration substantially limits discovery.[55] Consumers need more discovery than the firms that they are suing.[56] Similarly, plaintiff employees in employment disputes generally require more discovery to establish their claims than defendant employers need to defend themselves.[57] In addition to these procedural aspects of arbitration

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50. Doneff, *supra* note 26, at 75.

51. *See, e.g.*, Austin v. Owens–Brockway Glass Container, Inc., 78 F.3d 875, 885–86 (4th Cir. 1996) (holding that the disposal of Title VII and Americans with Disabilities Act (ADA) claims through summary judgment was correct because the plaintiff failed to submit her claims to mandatory arbitration as required in a collective bargaining agreement).

52. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (confining the FAA employment exemption to transportation workers); *infra* notes 300–13 and accompanying text.

53. *See infra* notes 300–13 and accompanying text.

54. *See, e.g.*, Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1093 (2011) (giving an example of this preferential treatment, specifically that FAA jurisprudence gives contract drafters the power to draft rules tantamount to the Federal Rules of Civil Procedure).

55. *See* Lemley & Leslie, *supra* note 13, at 14–15.

56. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 683–84 (1996).

57. *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 683 (Cal. 2000) ("The employees argue that employers typically have in their possession many of the documents relevant for bringing an employment discrimination case, as well as having in their employ many of the relevant witnesses. The denial of adequate discovery in arbitration proceedings leads to the de facto frustration of the employee's statutory rights."). The court subsequently rejected this argument, instead holding that consent to an arbitration agreement necessarily implies consent to adequate

that undercut consumer and employee interests, many businesses specifically structure their arbitration clauses to undermine or displace laws designed to protect consumers and workers.

1. Class Action Waivers.—Class action litigation is often necessary for the victims of business misconduct to secure any recovery for their injuries.[58] Congress created the class action vehicle "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[59] Class action litigation spreads litigation costs across a large number of plaintiffs, significantly reducing the cost per litigant.[60] The Supreme Court has recognized that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."[61] Without class actions, individuals may be unable to protect their rights and to deter illegal conduct.[62] Indeed, Professor Myriam Gilles has argued that "class actions and aggregate litigation represent the law's best-effort at procedural democracy, at providing access to courts for groups—consumers, employees, small business owners—that would otherwise be unable to have their claims openly adjudicated."[63]

In recognition of the importance of class action litigation in holding firms responsible for their illegal conduct, many firms have sought to eliminate class actions by imposing class action waivers on their customers.

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discovery for their claim—albeit not the full discovery available in court—but that this adequacy is to be determined by the arbitrator and subject only to limited judicial review. *Id.* at 684.

58. McKenzie Check Advance of Fla., LLC v. Betts, 112 So. 3d 1176, 1184 (Fla. 2013) ("[M]any potential claims may go unprosecuted unless they may be brought as a class.") (quoting Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1212 (11th Cir. 2011)).

59. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

60. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402–03 (1980) ("The justifications that led to the development of the class action include . . . the facilitation of the spreading of litigation costs among numerous litigants with similar claims."); Fiser v. Dell Comput. Corp., 188 P.3d 1215, 1219 (N.M. 2008) ("The class action device allows claimants with individually small claims the opportunity for relief that would otherwise be economically infeasible because they may collectively share the otherwise prohibitive costs of bringing and maintaining the claim.").

61. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

62. *See* Salvas v. Wal-Mart Stores, Inc., 893 N.E.2d 1187, 1215 (Mass. 2008) ("Class actions were designed not only to compensate victimized group members, but also to deter violations of the law, especially when small individual claims are involved." (quoting 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.36, at 314 (4th ed. 2002))); Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 514 (1996) (noting that the class action is an "effective mechanism for privately enforcing the law, deterring wrongful conduct, and compensating victims").

63. Myriam Gilles, *Procedure in Eclipse: Group-Based Adjudication in a Post-*Concepcion *Era*, 56 ST. LOUIS U. L.J. 1203, 1205 (2012).

A class action waiver requires consumers to promise not to initiate or participate in any class action against a firm.[64] The popularity of class action waivers increased in 1999

> when the National Arbitration Forum ("NAF"), a for-profit arbitral body designated in the arbitration provisions of many large companies, disseminated marketing materials cautioning corporate attorneys that the only way to insulate their clients from class action liability in general . . . was to implement arbitration provisions containing terms that expressly waive the right to class treatment.[65]

Class action waivers are now common boilerplate in many contracts.[66]

Class action waivers often render litigation prohibitively expensive for plaintiffs because the expected costs of bringing an individual claim exceed the highest possible damages award.[67] Because of the economics of individual action, frequently "the class action waiver effectively bars these claims from being brought in *any* forum."[68] The New Mexico Supreme Court has observed that "[b]y preventing customers with small claims from attempting class relief and thereby circumscribing their only economically efficient means for redress, [a] class action ban exculpates the company from wrongdoing."[69] Similarly, the New Jersey Supreme Court has explained that "[i]n addition to their impact on individual litigants, class-action waivers can functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action. Class-action

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64. The language of class action waivers is not always clear. *See* Gay v. Creditinform, 511 F.3d 369, 375 (3d Cir. 2007) ("Any claim arising out of or relating to the Product shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association on an individual basis not consolidated with any other claim."); Provencher v. Dell, Inc., 409 F. Supp. 2d 1196, 1199 (C.D. Cal. 2006) ("The arbitration will be limited solely to the dispute or controversy between Customer and Dell . . . .").

65. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 397 (2005).

66. *See, e.g.*, Hopkins v. World Acceptance Corp., 798 F. Supp. 2d 1339, 1343 (N.D. Ga. 2011); Clerk v. First Bank of Del., 735 F. Supp. 2d 170, 174 (E.D. Pa. 2010).

67. Muriithi v. Shuttle Express, Inc., 712 F.3d 173, 178 (4th Cir. 2013) ("[I]f 'class actions are prohibited by the [Franchise Agreement], the realistic alternative would be that no individual suits are brought given that the costs of each individual arbitration has the potential to exceed any recovery.'" (alteration in original)); Muhammad v. Cty. Bank of Rehoboth Beach, 912 A.2d 88, 99 (N.J. 2006) ("In most cases that involve a small amount of damages, 'rational' consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit, even if competent counsel was willing to take the case.").

68. Gilles, *supra* note 63, at 1224; *see also, e.g.*, Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011) (explaining that without a class action the plaintiff "would be required to spend approximately $200,000 in order to recover double her overtime loss of approximately $1,867.02," and that "[o]nly a 'lunatic or a fanatic' would undertake such an endeavor"), *rev'd and remanded*, 726 F.3d 290 (2d Cir. 2013).

69. Fiser v. Dell Comput. Corp., 188 P.3d 1215, 1221 (N.M. 2008) ("On these facts, enforcing the class action ban would be tantamount to allowing Defendant to unilaterally exempt itself from New Mexico consumer protection laws.").

waivers prevent an aggregate recovery that can serve as a source of contingency fees for potential attorneys."[70] Consequently, class action waivers ultimately allow firms to insulate themselves from all liability and even scrutiny.[71] Firms have used class action waivers to prevent plaintiffs from pursuing a wide range of legal claims.[72]

Recognizing the danger posed by class action waivers, many state courts had invalidated them.[73] Courts had used primarily two methods to do so. First, some courts held that class action waivers could be held unconscionable.[74] Most notably, the California Supreme Court created the *Discover Bank*[75] rule, which held that class action waivers "in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally uncon-

70. *Muhammad*, 912 A.2d at 100.

71. Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) ("Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small-value claims."); Sternlight, *supra* note 25, at 725 ("If we allow companies to insulate themselves from class actions, we are effectively allowing companies to escape many legal regulations and thereby eliminating a great deterrent to company misconduct.").

72. *See, e.g.*, Anderson v. Comcast, Corp., 500 F.3d 66, 68 (1st Cir. 2007) (involving the "Massachusetts Consumer Protection Act, . . . and various common law tort theories"); Hopkins v. World Acceptance Corp., 798 F. Supp. 2d 1339, 1342 (N.D. Ga. 2011) (involving a "breach of contract, unjust enrichment, conversion, violation of Georgia RICO, violation of Georgia's Deceptive Trade Practices Act, and violation of the Truth in Lending Act").

73. *See, e.g.*, *Fiser*, 188 P.3d at 1218 ("[T]he class action ban is contrary to fundamental New Mexico public policy."); Gentry v. Superior Court, 165 P.3d 556, 569 (Cal. 2007) ("The principle that in the case of certain unwaivable statutory rights, class action waivers are forbidden when class actions would be the most effective practical means of vindicating those rights is an arbitration-neutral rule: it applies to class waivers in arbitration and nonarbitration provisions alike."), *abrogated by* Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129 (Cal. 2014). Other state courts have found class action waivers in arbitration clauses to be enforceable. *See, e.g.*, Gay v. Creditinform, 511 F.3d 369, 392 (3d Cir. 2007); Tsadilas v. Providian Nat'l Bank, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004); AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 199–201 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Courts in some states were split. *Compare* Schwartz v. Alltel Corp., No. 86810, 2006 WL 2243649, at *5 (Ohio Ct. App. June 29, 2006) (finding a class action waiver established substantive unconscionability, regardless of arbitration context), *with* Hawkins v. O'Brien, No. 22490, 2009 WL 50616, at *5 (Ohio Ct. App. Jan. 9, 2009) (finding a class action waiver did not establish substantive unconscionability).

74. Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002) ("The manifest one-sidedness of the no class action provision at issue here is blindingly obvious."); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 278 (Ill. 2006) ("In sum, we hold that under the circumstances of this case, the waiver on class actions is unconscionable."); *Muhammad*, 912 A.2d at 100 ("We hold, therefore, that the presence of the class-arbitration waiver in Muhammad's consumer arbitration agreement renders that agreement unconscionable.").

75. Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

scionable."[76] Several courts followed suit,[77] though many did not.[78] Second, some federal courts held class action waivers unenforceable under the Effective Vindication Doctrine.[79] This judicial hostility toward class action waivers caused many companies to reform their arbitration clauses to make them less aggressive.[80]

The calculus fundamentally changed in 2011, when the Supreme Court in *Concepcion* overruled the *Discover Bank* rule. *Concepcion* prevented lower courts from following those jurisdictions that had condemned certain class action waivers in arbitration clauses as unconscionable.[81] Professor Maureen Weston has noted that "[a]fter *Concepcion*, a rubber-stamp effect seemed to ensue in the courts addressing the enforceability of class action

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76. Discover Bank v. Superior Court, 113 P.3d 1100, 1109 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

77. *See, e.g.*, *Kinkel*, 857 N.E.2d at 271 ("Our research reveals that other state courts have invalidated class action waivers when the contract containing the waiver is burdened by other unfair features, rendering it substantively unconscionable when taken as a whole."); Feeney v. Dell Inc., 989 N.E.2d 439, 441 (Mass. 2013) ("[W]e conclude that a court is not foreclosed from invalidating an arbitration agreement that includes a class action waiver where a plaintiff can demonstrate that he . . . effectively cannot pursue a claim against the defendant in individual arbitration according to the terms of the agreement, thus rendering his . . . claim nonremediable."), *abrogated by* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013), *as recognized in* Machado v. System4 LLC, 993 N.E.2d 332, 333 (Mass. 2013); Gilles, *supra* note 63, at 1214 ("At first, courts were skeptical of these unconscionability challenges leveled at the class action waivers, and the vast majority of early decisions upheld the waivers against this challenge. The tide turned in 2005, when the California Supreme Court decided . . . *Discover Bank* . . . .").

78. *E.g.*, Lipuma v. Am. Express Co., 406 F. Supp. 2d 1298, 1321 (S.D. Fla. 2005) ("Federal courts have . . . not hesitated to enforce arbitration agreements that precluded class action relief."); *In re* Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237, 259–60 (S.D.N.Y. 2005) (collecting cases); Rains v. Found. Health Sys. Life & Health, 23 P.3d 1249, 1253 (Colo. App. 2001) ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable."); *see also* 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 2:14, at 97 n.30 (11th ed. 2014) (collecting cases).

79. *In re* Am. Express Merchs.' Litig., 634 F.3d 187, 198–99 (2d Cir. 2011); Kristian v. Comcast Corp., 446 F.3d 25, 29, 37, 50 (1st Cir. 2006); *In re* Elec. Books Antitrust Litig., No. 11 MD 2293, 2012 WL 2478462, at *3 (S.D.N.Y. 2012) ("Plaintiffs' affidavits demonstrate that it would be economically irrational for any plaintiff to pursue his or her claims through an individual arbitration."); *see also* Gillette v. First Premiere Bank, No. 3:13-CV-432, 2013 WL 3205827, at *4 (S.D. Cal. 2013) (noting split among courts); Lemley & Leslie, *supra* note 13, at 8–9.

80. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1458 n.141 (2008) ("[G]iven the recent successes of unconscionability challenges, the most aggressive arbitration clauses are now being scaled back."); Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 847 (2012) ("In other words, at the height of unconscionability's success in beating back arbitration clauses, companies responded by redrafting their provisions to make them less vulnerable to that challenge.").

81. Sternlight, *supra* note 25, at 708–09 ("As interpreted by most courts, *Concepcion* is destroying virtually all possible attacks on arbitral class action waivers.").

waivers in arbitration agreements."[82] Even judges that recognize the folly of the *Concepcion* opinion feel compelled to follow it, as one district judge noted with regret: "There is no doubt that *Concepcion* was a serious blow to consumer class actions and likely foreclosed the possibility of any recovery for many wronged individuals."[83] Dozens of courts have since upheld class action waivers in arbitration clauses.[84]

Firms responded to the *Concepcion* opinion by inserting class action waivers into their arbitration clauses.[85] Professor Gilles predicted that in the aftermath of *Concepcion*,

> class action waivers will soon seep into every contract—whether signed, clicked, mass-emailed, posted on a website, or otherwise "consented to"—until aggregate litigation itself becomes a procedural relic examined only briefly in courses on the legal history of the twentieth century, that long-ago era where legal claims were actually adjudicated in public courts of law.[86]

Her prediction has proven prescient.[87] These precluded claims include "cases brought regarding consumer fraud, consumer debt, violations of federal and state wage and hour legislation, and unpaid wages."[88]

It is important to remember, however, that *Concepcion* is not an endorsement of contractual class action waivers writ large; rather, the Court

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82. Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 U. KAN. L. REV. 767, 782 (2012).

83. Bernal v. Burnett, 793 F. Supp. 2d 1280, 1288 (D. Colo. 2011).

84. CHRISTINE HINES ET AL., PUB. CITIZEN & NAT'L ASS'N OF CONSUMER ADVOCATES, JUSTICE DENIED: ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT'S *CONCEPCION* DECISION ARE PLAINLY EVIDENT 4, app. at 32–34 (2012), http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf [http://perma.cc/MDM7-YGLW] (noting "76 potential class action cases where judges cited *Concepcion* and held that class action bans within arbitration clauses were enforceable").

85. Arbitration clauses also regularly forbid classwide arbitration. *See* CFPB ARBITRATION STUDY, *supra* note 16 § 2.5.5, at 44–45 ("[I]n our samples, class arbitration was unavailable for 99.9% of arbitration-subject credit card loans outstanding, 97.1% of arbitration-subject insured deposits, essentially 100.0% of arbitration-subject prepaid card loads, 98.2% of arbitration-subject payday loan storefronts, and 99.7% of arbitration-subject mobile wireless subscribers."); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 884 (2008) ("[E]very consumer contract with an arbitration clause also included a waiver of classwide arbitration.").

86. Gilles, *supra* note 63 at 1208 (footnotes omitted); *see also* Gilles, *supra* note 80, at 853 ("[A]ll the clauses I examined contained class action waivers.").

87. *See, e.g.*, Jeremy B. Merrill, *One-Third of Top Websites Restrict Customers' Right to Sue*, N.Y. TIMES (Oct. 23, 2014), http://www.nytimes.com/2014/10/23/upshot/one-third-of-top-websites-restrict-customers-right-to-sue.html?_r=1 [http://perma.cc/L3T3-JUBC] (noting doubling of class action waivers); Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in* AT&T Mobility LLC v. Concepcion, 45 LOY. L.A. L. REV. 435, 448 (2012) (noting that businesses quickly adapted online arbitration clauses to block the possibility of collective redress in both judicial and arbitral forums).

88. Sternlight, *supra* note 25, at 709 (footnotes omitted).

based its decision on deference to arbitration clauses. As a result, arbitration agreements have become a safe harbor for otherwise unenforceable class action waivers.[89] Absent the judicial deference to the terms in arbitration agreements, class action waivers would not be protected by *Concepcion*;[90] the *Discover Bank* rule still invalidates class action waivers contained in contracts without arbitration agreements.[91] However, in those states that make class action waivers unenforceable under certain circumstances, would-be defendants can evade these state laws by inserting their class action waivers into arbitration clauses.

After *Concepcion*—with the unconscionability defense no longer a viable tool to invalidate class action waivers in arbitration clauses—some courts turned to the Effective Vindication Doctrine to address the issue. The Supreme Court created this arbitration-specific doctrine when it held that federal statutory claims were subject to arbitration.[92] While reversing the *American Safety* rule that antitrust claims were non-arbitrable,[93] the *Mitsubishi*[94] Court held that federal statutory claims could be arbitrated "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[95] Justice Kagan has explained the importance of the Effective Vindication Doctrine:

> The effective-vindication rule furthers the statute's goals by ensuring that arbitration remains a real, not faux, method of dispute resolution. With the rule, companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless.[96]

The tension between the Effective Vindication Doctrine and class action waivers is illustrated by class action litigation brought by a group of

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89. Gilles & Sebok, *supra* note 15, at 459 ("Most recently, in *American Express Co. v. Italian Colors Restaurant*, a 5–3 majority held that class action waivers embedded in arbitration clauses are enforceable even where proving the violation of a federal statute in an individual arbitration would prove too costly to pursue.").

90. *See* Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 192–93 (2012) ("[C]orporations and the Court are merely making opportunistic use of arbitration and the FAA's protective shield, to camouflage the 'troll' of class waiver.").

91. Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 112–13 (2012) (citing *In re* Yahoo! Litig., 251 F.R.D. 459, 465–67 (C.D. Cal. 2008)).

92. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, 640 (1985).

93. *See supra* notes 31–34 and accompanying text.

94. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

95. *Mitsubishi*, 473 U.S. at 637.

96. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2315 (2013) (Kagan, J., dissenting).

merchants against American Express. In *Italian Colors*, the merchants alleged that American Express had violated antitrust laws and brought their class action in federal court despite the fact that they had all signed contracts with arbitration clauses that contained class action waivers.[97] They argued that they could not effectively vindicate their rights through individual arbitration.[98] The plaintiffs' economist noted that the median-volume merchant in the class could expect $5,252 in trebled damages, yet the out-of-pocket expenses for bringing an individual arbitration or lawsuit "just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million."[99] Even the largest volume named plaintiff merchant could only achieve $38,549 in damages after trebling, far less than the nonrecoverable costs necessary to retain the required economic testimony.[100] The Second Circuit agreed with the merchants, concluding that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action."[101]

The Supreme Court reversed.[102] Conceding that the class action waivers made individual arbitration prohibitively expensive, the majority asserted that "a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[103] As a result of *Italian Colors*, firms can use arbitration clauses to prevent class actions[104] even when participation in class action litigation is the only possible mechanism to effectively vindicate one's federal rights.[105]

The combination of *Concepcion* and *Italian Colors* makes it exceedingly difficult for the victims of illegal conduct to challenge the enforceability of class action waivers.[106] This alone fundamentally undermines access to any adjudicatory forum. But the opinions also invite firms to impose other questionable contract terms that courts may be unable to declare unconscionable or unenforceable if found in an arbitration clause, as the following section explains.

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97. *Id.* at 2308 (majority opinion).

98. *Id.*

99. *In re* American Express Merchs.' Litig., 667 F.3d 204, 217–18 (2d Cir. 2012) (quoting Dr. French's affidavit), *rev'd sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

100. *Id.* at 218.

101. *Id.*

102. *Italian Colors*, 133 S. Ct. at 2312.

103. *Id.* at 2307.

104. *Id.* at 2311.

105. Lemley & Leslie, *supra* note 13, at 12.

106. *See* Sternlight, *supra* note 25, at 798–09 ("As interpreted by most courts, *Concepcion* is destroying virtually all possible attacks on arbitral class action waivers.").

2. Unconscionable and Unenforceable Terms in Arbitration Clauses.— In addition to class action waivers, firms have regularly inserted other anti-consumer and anti-employee provisions in their contracts and arbitration clauses, with varying degrees of success. Some of these terms are considered unconscionable under the common law unconscionability doctrine while others are prohibited by state statutes; in either case, some courts will not enforce these terms. This section will discuss several types of these terms: (1) truncated statutes of limitations, (2) damage limitations, (3) anti-injunction clauses, (4) fee-shifting provisions, (5) forum-selection clauses, and (6) non-coordination agreements. Each of these provisions undermines consumer protection and employment law. More importantly, these provisions would be contractually unenforceable in at least some jurisdictions but for the fact that they reside in an arbitration clause.

a. Statutes of Limitations.—Statutes of limitations serve multiple purposes. They protect defendants against unfair surprise and they preclude fraudulent or stale claims.[107] But limitations periods must be long enough to afford victims of illegal conduct sufficient time to develop the facts necessary to plead and prove their case; otherwise wrongdoers will not be held accountable and deterrence suffers.[108] The Alaska Supreme Court has explained that "[s]tatutes of limitations attempt to strike a balance between ensuring that claimants have enough time to file a claim and protecting persons from due process concerns that arise when subjected to stale charges."[109] The U.S. Supreme Court has articulated this balance as "a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."[110]

Many consumer protection laws have relatively generous statutes of limitations.[111] And, in general, the law limits the ability of businesses to contractually require their customers and employees to truncate the applicable statute of limitations. Some states allow contracting parties to reduce the prescribed statute of limitations,[112] but parties may not agree to a

107. Christopher R. Leslie, *Den of Inequity: The Case for Equitable Doctrines in Rule 10b-5 Cases*, 81 CALIF. L. REV. 1587, 1590 (1993).

108. *See id.* at 1591 (discussing how if the "statute of limitations is too short, victims are less likely to bring suit in time, wrongdoers are less likely to be held accountable, and deterrence of the initial crime is diminished").

109. Brotherton v. Brotherton, 142 P.3d 1187, 1191 n.19 (Alaska 2006).

110. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463–64 (1975).

111. *See, e.g.*, 15 U.S.C. § 15b (2012) (providing a four-year statute of limitations for antitrust claims).

112. *See, e.g.*, Sanders v. Comcast Cable Holdings, LLC, No. 3:07-CV-918-J-33HTS, 2008 WL 150479, at *12 (M.D. Fla. Jan. 14, 2008) ("[T]he class action waiver and truncated statute of limitations do not render the Arbitration Notice substantively unconscionable."); Blue Shield of Cal. Life & Health Ins. Co. v. Superior Court, 120 Cal. Rptr. 3d 713, 720 n.11 (Cal. Ct. App. 2011)

limitation period that is "unreasonably short."[113] Other states prohibit altogether the shortening of statutes of limitations.[114] For example, under Florida law, "[a]ny provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void."[115] Some courts have found contractual restrictions on limitations periods to be substantively unconscionable.[116] Even when speaking deferentially about parties' ability

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(noting "the well-established principle that the parties to a contract may agree to shorten or extend the statute of limitations"); Wilson Fertilizer & Grain, Inc. v. ADM Milling Co., 654 N.E.2d 848, 853 (Ind. Ct. App. 1995) ("Indiana law specifically permits parties to a contract for sale to reduce the time for filing claims to one year, and Wilson has not shown that the one-year limitation is not within the customary limits of the trade."); Nez v. Forney, 783 P.2d 471, 473 (N.M. 1989) ("[P]arties can put their own statute of limitations period in a contract, and our courts will honor it.").

113. Henning Nelson Const. Co. v. Fireman's Fund Am. Life Ins. Co., 383 N.W.2d 645, 651 (Minn. 1986); *see also* Order of United Commercial Travelers of Am. v. Wolfe, 331 U.S. 586, 608 (1947) ("[I]t is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period."); Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 266 (3d Cir. 2003) ("We recognize that a provision limiting the time to bring a claim or provide notice of such a claim to the defendant is not necessarily unfair or otherwise unconscionable. But such a time period must still be reasonable."); Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc., 46 Cal. Rptr. 2d 33, 43 (Cal. Ct. App. 1995) ("As for shortening the limitations period, the courts will enforce the parties' agreement provided it is reasonable."); Kraly v. Vannewkirk, 635 N.E.2d 323, 329 (Ohio 1994) ("[A] provision in a contract of insurance which purports to extinguish a claim for uninsured motorist coverage by establishing a limitations period which expires before or shortly after the accrual of the right of action for such coverage is *per se* unreasonable and violative of the public policy of the state of Ohio . . . ."); Bd. of Supervisors v. Sampson, 369 S.E.2d 178, 180 (Va. 1988) (parties may alter a statute of limitations "if the contractual provision is not against public policy and if the agreed time is not unreasonably short"); Yakima Asphalt Paving Co. v. Wash. State Dep't of Transp., 726 P.2d 1021, 1023 (Wash. Ct. App. 1986) ("Parties to a contract can agree to a shorter limitations period than that called for in a general statute.").

114. ALA. CODE § 6-2-15 (2015) ("Except as may be otherwise provided by the Uniform Commercial Code, any agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void."); *In re* Cotton Yarn Antitrust Litig., 505 F.3d 274, 287 n.8 (4th Cir. 2007) (noting that South Carolina law "prohibits contractual shortening of statutes of limitation"); Honeywell, Inc. v. Ruby Tuesday, Inc., 43 F. Supp. 2d 1074, 1078 (D. Minn. 1999) (describing shortening of statutes of limitations as "illegal per se").

115. Palma Vista Condo. Ass'n of Hillsborough Cty., Inc. v. Nationwide Mut. Fire Ins. Co., No. 8:09-CV-155-T-27EAJ, 2010 WL 4274747, at *6 (M.D. Fla. Oct. 7, 2010) (quoting FLA. STAT. § 95.03) (alteration in original).

116. Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461, 463 (9th Cir. 2014) ("[T]he contract's sixth-month limitations period is substantively unconscionable."); *see also* Shahin v. I.E.S. Inc., 988 N.E.2d 873, 875 (Mass. App. Ct. 2013) ("The limitations period set out in the contract is one year from the date of the contract . . . . The limitations period thus expired one year from the date of the contract—regardless of the date of any alleged breach or its discovery. . . . [I]t is therefore invalid and unenforceable.").

to shorten statutes of limitations, courts sometimes override a contractual statute of limitations.[117]

Many businesses attempt to circumvent these rules by including shortened statutes of limitations in arbitration clauses. Attorneys advise their clients (and other attorneys) to use arbitration clauses as a mechanism for shortening the statute of limitations.[118] Unlike judges, arbiters do not have to apply the same considerations of reasonableness and have more latitude to enforce business-imposed reductions of the statute of limitations.[119] Although "reasonableness" limits the contractual ability to shorten statutes of limitations, arbitrators may not honor these limits.[120]

b. Damage Limitations.—Many laws allow successful plaintiffs to recover more than mere compensatory damages. Exemplary damages serve many important purposes, such as "to punish reprehensible conduct and to deter its future occurrence."[121] Some states—and some federal laws—limit the ability of defendants to require their consumers and employees to waive exemplary damages.[122] For example, when a federal statute provides for treble or punitive damages, parties cannot contractually waive them.[123] When a contractual limitation of damages conflicts with damages available pursuant to a state law, courts often invalidate the contract provision.[124] Independent of statutorily provided damages, courts also disallow damage caps, as well as liquidated damage clauses that have the effect of fixing

117. *Nez*, 783 P.2d at 473.

118. *See* Edward J. Underhill, *Statutes of Limitation and Arbitration: Limiting Your Client's Exposure*, 101 ILL. B.J. 244, 244 (2013) ("Contrary to what many lawyers think, it's not safe to assume general statutes of limitation automatically apply to Illinois arbitration claims. That's why you should consider including a clause limiting your client's exposure in your arbitration agreements.").

119. *See* Lemley & Leslie, *supra* note 13, at 17 (discussing that in the context of antitrust disputes, which involve consumers suing dominant firms, selecting arbitrators from the business community creates the possibility of weakened antitrust scrutiny of defendants).

120. *See id.* at 24 (arguing that in the "new world of arbitration, plaintiffs may be forced to bring an underdeveloped case or risk losing their claims forever").

121. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

122. *See, e.g.*, Gessa v. Manor Care of Fla., Inc., 86 So. 3d 484, 493 (Fla. 2011) ("Thus, these limitation of liability provisions, which place a $250,000 cap on noneconomic damages and waive punitive damages, violate the public policy of the State of Florida and are unenforceable.").

123. *See, e.g.*, Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 154 (Cal. Ct. App. 1997) (asserting that the right to punitive damages under Title VII "ha[s] never been deemed prospectively waivable in the context of an employment dispute").

124. *See, e.g.*, Capital Equip., Inc. v. CNH Am., LLC, 471 F. Supp. 2d 951, 958 (E.D. Ark. 2006) (holding that a contractual limitation of damages provision is inapplicable to the extent that such provisions limit the statutory protections afforded to the plaintiff under the state law).

damages before breach.[125] Courts have rejected attempts to enforce contract provisions that claim to ban money damages altogether.[126]

In response to laws that allow plaintiffs to recover noncompensatory damages, many firms use arbitration clauses to attempt to limit damages. Arbitration clauses commonly prohibit punitive damages, incidental damages, and any other type of damage beyond mere compensatory damages.[127] Some arbitration clauses also claim to cap damages irrespective of actual damages.[128] Finally, some clauses claim to strip arbiters of any "authority to award any punitive or exemplary damages" or "extra contractual damages of any kind."[129]

While these terms may be unenforceable in a traditional contract interpreted by a judge, an arbiter gets to determine whether the damage-limitation provision in an arbitration clause is enforceable.[130] It is not clear

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125. *See, e.g.*, Gross v. McKenna, No. E2005-02488-COA-R3-CV, 2007 WL 3171155, at *5 (Tenn. Ct. App. Oct. 30, 2007) ("[L]iquidated damages . . . clauses are unenforceable where the actual damages caused by a breach are 'readily susceptible to accurate proof . . . .'"); Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc., 285 P.3d 1193, 1202 (Utah 2012) ("[T]he court's underlying goal is to avoid enforcement of *unconscionable* liquidated damages clauses.").

126. *See, e.g.*, Health Net of Cal., Inc. v. Dep't of Health Servs., 6 Cal. Rptr. 3d 235, 249 (Cal. Ct. App. 2003) (invalidating the clause insofar as it exculpated the defendants "from liability for any money damages for statutory and regulatory violations").

127. CFPB ARBITRATION STUDY, *supra* note 16, § 2.5.6, at 47 ("Damages limitations in prepaid card contracts with arbitration clauses were more frequent, and almost always precluded recovery of both punitive and consequential damages."); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1025 (1996); *see, e.g.*, Anderson v. Comcast, Corp., 500 F.3d 66, 68 (1st Cir. 2007) (explaining that arbitration agreement prohibited attorney's fees and double or treble damages); O'Quinn v. Comcast Corp., No. 10 C 2491, 2010 WL 4932665, at *2 (N.D. Ill. Nov. 29, 2010) ("All parties also waive claims to punitive damages unless provided for by statute."); Gatton v. T-Mobile USA, Inc., No. SACV 03-130, 2003 WL 21530185, at *1 (C.D. Cal. Apr. 18, 2003) ("[N]o lost profits, punitive, incidental or consequential damages, other than the prevailing party's direct damages, may be awarded . . . ."); Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp., 123 Cal. Rptr. 3d 547, 555 (Cal. Ct. App. 2011) ("[T]he arbitration provision limits recovery to actual compensatory damages and does not allow for noneconomic and punitive damages.").

128. *See, e.g.*, Crewe v. Rich Dad Educ., LLC, 884 F. Supp. 2d 60, 67–68 (S.D.N.Y. 2012) (reviewing an arbitration agreement that limited the maximum amount the arbitrator can award to "the amount paid by you to us under the Agreement plus the fees and costs provided for in this paragraph").

129. PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 405 (2003); *see also* Captain Bounce, Inc. v. Bus. Fin. Servs., Inc., No. 11-CV-858, 2012 WL 928412, at *2 (S.D. Cal. Mar. 19, 2012) ("The arbitrator at such arbitration shall not be entitled to award punitive damages to any party, and the costs and fees of such arbitration shall be borne by the losing party.").

130. *PacifiCare*, 538 U.S. at 406–07 ("[S]ince we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. . . . [T]he proper course is to compel arbitration."); *Anderson*, 500 F.3d at 72 (discussing *PacifiCare*); *In re* Universal Serv. Fund Tel. Billing Practices Litig., 300 F. Supp. 2d 1107, 1127 (D. Kan. 2003) ("[T]he extent to which the limitation of liability on punitive or exemplary damages

whether arbiters are bound to follow statutory damage rules.[131] Furthermore, some courts have held that "[a]rbitrators may award punitive damages only where the parties have expressly agreed to the arbitrator's authority to award punitive damages."[132] Arbitration creates the possibility that arbiters will enforce damage-limitation provisions that judges would invalidate.[133] Indeed, some courts have acknowledged that firms can limit damages in arbitration in ways that they cannot limit them in court.[134]

c. Anti-Injunction Clauses.—Many areas of law provide for injunctive relief.[135] Injunctive relief is often critical to remedy violations of the law. For example, in the context of antitrust law, injunctions may be necessary to restore the competitive marketplace and to eliminate the "lingering effects" of illegal anticompetitive conduct.[136] In general, businesses cannot require their customers and employees to preemptively waive their right to injunctive relief. In expanding the reach of arbitration clauses, the Supreme Court explicitly assumed that "arbitrators do have the power to fashion equitable relief."[137] Businesses, however, sometimes use arbitration clauses to limit injunctive remedies.[138] Some lawyers encourage their colleagues to use

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actually bans a treble damage award on plaintiffs' antitrust claim is . . . . [an] issue [that] must first be resolved by the arbitrator.").

131. Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. LAW. 395, 410 n.85 (1993) ("It is not clear whether arbitration tribunals are obliged to award mandatory treble damages by virtue of the Clayton Act."); Robert Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072, 1079 (1969) (regarding mandatory treble damages and attorney's fees, "neither of those statutory provisions would be binding on the arbitrator").

132. 7-Eleven, Inc. v. Dar, 757 N.E.2d 515, 523 (Ill. App. Ct. 2001) ("Therefore, if the arbitrator awarded punitive damages in this case, he would have exceeded his authority.").

133. *See* Larry's United Super, Inc. v. Werries, 253 F.3d 1083, 1085–86 (8th Cir. 2001) (allowing arbiter to determine whether a damage-limitation provision is unenforceable because it violates public policy).

134. *See, e.g.*, Stark v. Sandberg, Phx. & Von Gontard, P.C., 381 F.3d 793, 800 (8th Cir. 2004) (discussing punitive damages and recognizing that "the FAA allows parties to incorporate terms into arbitration agreements that are contrary to state law").

135. *See, e.g.*, 15 U.S.C. § 26 (2012) (authorizing injunctive relief "against threatened loss or damage by a violation of the antitrust laws").

136. *See, e.g.*, Wilk v. Am. Med. Ass'n, 895 F.2d 352, 366–67 (7th Cir. 1990) (upholding the grant of an injunction against an unlawful boycott).

137. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991).

138. Norfolk S. Ry. Co. v. Fla. E. Coast Ry., LLC, No. 3:13-cv-576-J-34JRK, 2014 WL 757942, at *2 (M.D. Fla. Feb. 26, 2014) (noting that an arbitration provision stated that "the arbitrator will not determine violations of criminal law and will not issue injunctive relief").

arbitration clauses "to exclude injunctive relief" that would otherwise be available to plaintiffs.[139]

Even without explicit provisions that preclude injunctive relief, arbiters are less capable of fashioning and enforcing injunctive remedies. Sometimes, arbiters simply lack the authority to enjoin defendants from illegal activity.[140] Even when an individual plaintiff in arbitration can get relief, she is generally unable to get a market-wide injunction.[141]

d. Fee-Shifting Provisions.—Many statutes have pro-plaintiff fee-shifting provisions to protect consumers. For example, antitrust law requires judges to award the successful private plaintiff—but not the successful defendant—reasonable attorneys' fees and costs.[142] Some state consumer protection and employment laws have similar protections.[143] One-way fee shifting is an important component of many statutory schemes. If the winning plaintiff cannot recover her attorneys' fees, then her costs of pursuing her claim may exceed the maximum possible award.[144] This also makes it unlikely that any attorney would take the case.[145]

Firms cannot contractually forbid statute-directed fee shifting in many states. For example, the New Mexico Supreme Court held that parties could not contract around an attorneys' fee-shifting provision that encourages private plaintiffs to enforce a statute.[146] Similarly, Ohio courts have held that contract provisions that impose one-sided fee shifting in favor of business are not enforceable.[147]

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139. James J. Calder et al., *A New Alternative to Antitrust Litigation: Arbitration of Antitrust Disputes*, ANTITRUST, Spring 1989, at 18, 19–20.

140. Gilles & Sebok, *supra* note 15, at 465 ("[B]ecause arbitrators lack the authority to enjoin ongoing wrongful activity, each claimant bringing a separate claim has no overall impact on policy or practices that have widespread effect.").

141. Doneff, *supra* note 26, at 76 ("Also, the arbitrator cannot enjoin the wrongdoer from committing the same wrong against every consumer and simply paying the consequences to the few who seek damages in arbitration.").

142. 15 U.S.C. § 15(a) (2012).

143. *See, e.g.*, Kirby v. Immoos Fire Prot., Inc., 274 P.3d 1160, 1166 (2012) (referring to "one-way fee-shifting provision" in CAL. LAB. CODE § 1194 (West 2015)).

144. Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 548–49 (S.D.N.Y. 2011) *rev'd*, 726 F.3d 290 (2d Cir. 2013).

145. *Id.* at 550–52.

146. First Baptist Church of Roswell v. Yates Petroleum Corp., 345 P.3d 310, 314–15 (N.M. 2015).

147. Scotts Co. v. Cent. Garden & Pet Co., 403 F.3d 781, 787 (6th Cir. 2005) ("[F]ee-shifting provisions on preprinted commercial contracts are generally held unenforceable by the Ohio courts . . . ."); Columbus Check Cashers, Inc. v. Rodgers, No. 08AP-149, 2008 WL 4684781, at *3–5 (Ohio Ct. App. Oct. 23, 2008).

Some firms try to evade pro-plaintiff statutory fee-shifting laws. For example, they draft their arbitration clauses to preclude all fee shifting.[148] Some arbitration clauses mandate two-way fee shifting, requiring whichever party loses to pay the winner's costs.[149] Finally, some arbitration clauses attempt to impose one-way fee shifting in favor of defendants, of the sort that Ohio law prohibits.[150]

Some courts have found the use of arbitration clauses to manipulate rules regarding fee shifting to be unconscionable or unenforceable in various settings. First, some courts have condemned arbitration-imposed two-way fee shifting provisions as unconscionable. For example, in the Ninth Circuit a "'loser pays' arbitration term was found substantively unconscionable because it put the plaintiffs in arbitration 'at risk of incurring greater costs than they would bear if they were to litigate their claims in federal court.'"[151] Second, other courts have found provisions that preclude a successful

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148. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) ("The agreement precludes any shifting of costs to Amex, even if Italian Colors prevails."); Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1247 (9th Cir. 1995) (evaluating the validity of an arbitration clause that "provides that each party will bear its own attorney's fees"); Valentine v. Wideopen W. Fin., LLC, No. 09 C 07653, 2012 WL 1021809, at *1 (N.D. Ill. Mar. 26, 2012) ("The parties expressly waive any entitlement to attorneys' fees or punitive damages to the fullest extent permitted by law."); Gatton v. T-Mobile USA, Inc., No. SACV 03-130, 2003 WL 21530185, at *1 (C.D. Cal. Apr. 18, 2003) ("[E]ach party will pay the fees and costs of its own counsel, experts and witnesses."); *see also* CFPB ARBITRATION STUDY, *supra* note 16, § 2, at 66 ("A significant share of credit card arbitration clauses directed that the parties bear their own attorneys' fees either without qualification or unless the law or contract requires otherwise (27 clauses, or 40.9%; 46.9% of arbitration-subject credit card loans outstanding).").

149. *E.g.*, *In re* Pharmacy Benefit Managers Antitrust Litig., 700 F.3d 109, 113 (3d Cir. 2012) ("[T]he expenses of the arbitration, including attorneys' fees, will be paid by the party against whom the award of the arbitrator is rendered."); Captain Bounce, Inc. v. Bus. Fin. Servs., Inc., No. 11-CV-858, 2012 WL 928412, at *2 (S.D. Cal. Mar. 19, 2012) ("[T]he costs and fees of such arbitration shall be borne by the losing party."); O'Quinn v. Comcast Corp., No. 10 C 2491, 2010 WL 4932665, at *2 (N.D. Ill. Nov. 29, 2010) ("Only if Comcast prevails in the arbitration does the customer have to reimburse Comcast for fees and costs advanced up to the extent awardable in a judicial proceeding."); *see also* CFPB ARBITRATION STUDY, *supra* note 16, § 5, at 80 ("Companies were awarded attorneys' fees in 14.1% of the 341 disputes resolved by arbitrators."); Gilles, *supra* note 79, at 859 ("[C]ustomers who are unsuccessful in arbitrating claims against Comcast and Time Warner cable must pay those companies' costs and attorneys' fees, as well any costs of appealing the judgment.").

150. *See, e.g.*, Samaniego v. Empire Today LLC, 140 Cal. Rptr. 3d 492, 499–500 (Cal. Ct. App. 2012) (finding arbitration clause unconscionable, in part, because it "require[d] plaintiffs to pay any attorneys' fees incurred by [the defendant], but impose[d] no reciprocal obligation on [the defendant]").

151. *Captain Bounce, Inc.*, 2012 WL 928412, at *11 (quoting Pokorny v. Quixtar, Inc., 601 F.3d 987, 1004 (9th Cir. 2010)); *see also* Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461, 463 (9th Cir. 2014) (holding a costs-and-fee-shifting clause substantively unconscionable because it unreasonably and unexpectedly allocated risks); *In re* Checking Account Overdraft Litig., 485 F. App'x 403, 406 (11th Cir. 2012) (finding fee-shifting provision unconscionable because it required "customer to pay the bank's costs in any dispute between the customer and the bank regardless of who prevail[ed]").

plaintiff from recovering attorneys' fees to be unconscionable.[152] Third, in pre-*Italian Colors* cases, some courts invoked the Effective Vindication Doctrine to invalidate arbitration clauses that blocked pro-plaintiff statutory fee shifting, reasoning that "the ban on the recovery of attorney's fees and costs in the arbitration agreements would burden Plaintiffs here with prohibitive arbitration costs, preventing Plaintiffs from vindicating their statutory rights in arbitration."[153]

In contrast, some courts invoke the Supreme Court's call for deference to arbitration clauses in order to accept firm-imposed interference with pro-plaintiff fee-shifting regimes.[154]

e. Forum-Selection Clauses.—State rules can limit judicial deference to forum-selection clauses. The location of dispute resolution is often critical. The plaintiff is afforded the choice of forum to level the playing field in situations in which a small plaintiff is suing a large corporate defendant.[155] The parties can, however, pre-designate the court in which litigation will occur by including a forum-selection clause in their contract. Absent "extraordinary circumstances," courts generally enforce forum-selection clauses.[156]

In nonarbitration contexts, however, judges can decline to enforce a forum-selection clause if they conclude that it is unconscionable or otherwise against public policy. For example, California courts can refuse to enforce a forum-selection clause that would send cases to jurisdictions—like Utah—that do not permit enhanced damages or have shorter statutes of limitations than California provides.[157] Judges in California can also prevent transfer of

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152. *Overdraft Litig.*, 485 F. App'x at 406 ("[W]e affirm the district court's finding that the cost-and-fee-shifting provision was unconscionable under North Carolina law."); Delta Funding Corp. v. Harris, 912 A.2d 104, 112 (N.J. 2006); LaCoursiere v. Camwest Dev., Inc., 339 P.3d 963, 970 (Wash. 2014) (citing cases); *see also* Valentine v. Wideopen W. Fin., LLC, No. 09 C 07653, 2012 WL 1021809, at *5–6 (N.D. Ill. Mar. 26, 2012) (recognizing theoretical possibility that the denial of attorneys' fees to a successful plaintiff could make an arbitration clause unconscionable); Schwartz v. Alltel Corp., No. 86810, 2006 WL 2243649, at *5 (Ohio Ct. App. June 29, 2006) (finding that an arbitration provision eliminating statutorily authorized attorney fees "establish[ed] a quantum of substantive unconscionability").

153. Kristian v. Comcast Corp., 446 F.3d 25, 52–53 (1st Cir. 2006). In *Kristian*, the court severed the fee clause because the governing contract had a savings clause. *Id.* at 53.

154. *See* Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 232 (Tex. 2014) (stating that the unconscionability of a fee-shifting provision is for the arbiter to decide).

155. John J. Finn, Comment, *Private Arbitration and Antitrust Enforcement: A Conflict of Policies*, 10 B.C. INDUS. & COM. L. REV. 406, 415 (1969).

156. *See* Valspar Corp. v. E.I. DuPont de Nemours & Co., 15 F. Supp. 3d 928, 934 (D. Minn. 2014) (noting that the Supreme Court has held that forum-selection clauses should be upheld absent "extraordinary circumstances").

157. *See, e.g.*, Sawyer v. Bill Me Later, Inc., No. CV 10-04461, 2010 WL 5289537, at *6 (C.D. Cal. Oct. 4, 2010) (holding that the Court may not enforce a forum-selection clause if it works

a case from California courts to Virginia courts because Virginia does not provide for class actions.[158] Consequently, a forum-selection clause that requires litigation take place in Virginia is unenforceable against California citizens.[159]

Firms can evade laws like California's by embedding their forum-selection clause in an arbitration provision.[160] Arbitration clauses often specify the site where any arbitration arising from the contract shall take place, locations that are sometimes thousands of miles away from the plaintiff.[161] Although some states would invalidate such provisions,[162] state prohibitions on out-of-state arbitration may be considered preempted by the FAA in light of the Supreme Court's pro-arbitration jurisprudence.[163]

f. Non-Coordination Clauses.—Some arbitration clauses forbid not only class actions, but all coordination among the victims of illegal conduct. Arbitration clauses commonly contain confidentiality requirements.[164] This can prevent cost sharing or even information sharing among plaintiffs seeking to recover for their injuries. For example, the agreement at issue in *Italian Colors* precluded the plaintiffs from even informally arranging among themselves to pay for a common expert report that each could use in

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against an important public policy interest in California, such as the ability to commence a class action suit).

158. Doe 1 v. AOL LLC, 552 F.3d 1077, 1084 (9th Cir. 2009) ("As to such California resident plaintiffs, *Mendoza* holds California public policy is violated by forcing such plaintiffs to waive their rights to a class action and remedies under California consumer law.").

159. *Id.*; Am. Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 712 (Cal. Ct. App. 2001) ("The unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement of the TOS forum-selection clause.").

160. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause . . . ."); Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 229 (Tex. 2014) ("[A]rbitration agreements typically function simply as forum-selection clauses . . . .").

161. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 617, 640 (1985) (involving a Puerto Rican corporation that had to submit to arbitration in Japan because of the arbitration clause to which it had agreed).

162. Ware, *supra* note 125, at 1026 ("Another example of an arbitration clause that might be substantively unconscionable is one requiring arbitration far from the non-drafting party's home."); *see, e.g.*, Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc., 680 A.2d 618, 626 (N.J. 1996) ("[F]orum-selection clauses in contracts subject to the Franchise Act . . . . are presumptively invalid because they fundamentally conflict with the basic legislative objectives of protecting franchisees from the superior bargaining power of franchisors and providing swift and effective judicial relief against franchisors that violate the Act.").

163. Ware, *supra* note 125, at 1028 ("[S]tate statutes denying enforcement to clauses providing for arbitration outside the state are also preempted by the FAA.").

164. Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 490–96 (2008); Philip Rothman, *Psst, Please Keep It Confidential: Arbitration Makes It Possible*, DISP. RESOL. J., Sept. 1994, at 69, 69.

individual arbitration proceedings.[165] Such coordination would be absolutely necessary in the absence of class actions—which the contract explicitly prohibited—because no individual victim alone could afford to pay for an expert report.[166] As Justice Kagan noted in dissent, the agreement imposed by Amex "cut[] off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs. Amex has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights."[167] Despite the proffered efficiency justifications for arbitration, this provision was designed to create *inefficiency* in order to make claims against the defendant cost prohibitive.[168]

Prior to *Concepcion*, some state courts refused to enforce non-coordination agreements in arbitration clauses. For example, Ohio courts can invalidate confidentiality agreements where sharing information regarding consumer claims is important for the public at large.[169] Professor Jon Bauer has noted that judges in courts "increasingly insist that protective orders provide for discovery sharing with plaintiffs in similar cases and refuse to enforce private noncooperation agreements when they interfere with discovery or informal investigation in another proceeding."[170] Arbitrators are not similarly reticent, given their penchant for confidentiality. Firms, indeed, have argued that "*Concepcion* prevents state courts from disturbing confidentiality agreements included within arbitration agreements."[171]

g. Multiple Unconscionable Terms.—Sometimes a combination of the above terms can make an arbitration agreement unconscionable. When a class action waiver is coupled with a bar on awarding attorneys' fees to successful plaintiffs, courts may be more inclined to find the provisions unenforceable than they would if the agreement contained only one of the two provisions.[172] For example, the Ninth Circuit found "an arbitration

165. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) ("The agreement also disallows any kind of joinder or consolidation of claims or parties. And more: Its confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report.").

166. *See supra* notes 97–101 and accompanying text.

167. *Italian Colors*, 133 S. Ct. at 2316 (Kagan, J., dissenting).

168. *See* Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 578 (Ky. 2012) ("Further, the potential obstacles to arbitration presented by the forbidding of class action waivers are simply not present in the case of confidentially [sic] provisions.").

169. Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1180–83 (Ohio Ct. App. 2004); *see also* Ting v. AT&T, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (finding confidentiality provision in arbitration clause unconscionable).

170. Bauer, *supra* note 164, at 494–95 (footnotes omitted).

171. *Schnuerle*, 376 S.W.3d at 578 (rejecting this argument).

172. *See* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877–78 (11th Cir. 2005) (rejecting the argument that a class action waiver renders an arbitration clause unconscionable

agreement substantively unconscionable upon review of the agreement's provisions, including claims subject to arbitration, its statute of limitations, class actions, fee and cost-splitting arrangements, remedies available, and termination/modification of the agreement."[173] Thus, even if an individual anti-consumer term does not make a contract (or its arbitration clause) unconscionable, the aggregate effect may be to do so.

3. Concepcion *as a Blueprint for Bootstrapping.*—Although *Concepcion* specifically struck down only California's rule against certain class action waivers, the opinion has potential implications beyond those waivers. By holding that judges cannot use the unconscionability doctrine to invalidate a term embedded in an arbitration agreement, *Concepcion* risks limiting the ability of courts to hold other unconscionable contract terms unenforceable. Some judges have lamented that "post-*Concepcion*, courts may not apply state public policy concerns to invalidate an arbitration agreement even if the public policy at issue aims to prevent undesirable results to consumers."[174] So long as a firm inserts an otherwise unenforceable, unconscionable term in an arbitration agreement, *Concepcion* could prevent lower courts from invalidating that unconscionable term.[175]

The unconscionable terms detailed above have more vitality in a post-*Concepcion* environment. For example, before *Concepcion*, some states held that firms could not use arbitration clauses to circumvent the prescribed statute of limitations, and that to do so would be unconscionable.[176] A California court, for instance, held that "[t]he shortened limitations period provided by [the] arbitration agreement is unconscionable and insufficient to protect [the company's] employees' right to vindicate their statutory rights."[177] Such holdings may not survive *Concepcion*, as courts have speculated that *Concepcion* may preempt state laws against shortening

because attorneys' fees were still available and "when the opportunity to recover attorneys' fees is available, lawyers will be willing to represent such debtors in arbitration").

173. Perez v. Apollo Educ. Grp., Inc., No. 1:14–cv–00605, 2014 WL 5797148, at *4 (E.D. Cal. Nov. 6, 2014) (citing Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1180 (9th Cir. 2003)); *see also* Newton v. Am. Debt Servs., Inc., 549 F. App'x 692, 694 (9th Cir. 2013) (finding arbitration clause unconscionable in part because it required California residents to arbitrate in Oklahoma).

174. Robinson v. Title Lenders, Inc., 364 S.W.3d 505, 515 (Mo. 2012).

175. *See infra* notes 187–87 and accompanying text; *see also* Muriithi v. Shuttle Express, Inc., 712 F.3d 173, 180 (4th Cir. 2013) (*Concepcion* "was not merely an assertion of federal preemption, but also plainly prohibited application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement under these circumstances").

176. *E.g.*, *Apollo Educ. Grp.*, 2014 WL 5797148, at *5 ("Generally, provisions strictly requiring employees to bring all claims within one year are unconscionable."); Jewelers Mut. Ins. Co. v. ADT Sec. Servs., Inc., No. C 08-02035, 2008 WL 5383371, at *3 (N.D. Cal. Dec. 22, 2008) ("Thus, the Court finds, as a matter of law, that the contractual period of limitation is unconscionable and unenforceable.").

177. Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 672 (Cal. Ct. App. 2004).

statutes of limitations from being applied to arbitration clauses.[178] In one recent case, although the Maryland district court found that an arbitration clause's reduced one-year statute of limitations was unconscionable under the applicable state contract law, the Fourth Circuit reversed, holding that *Concepcion* generally preempts unconscionability arguments against arbitration clauses.[179] The implications are staggering: simply by placing an unconscionable contract term in an arbitration agreement, firms can make unconscionable terms enforceable.

Concepcion could also make it more difficult for lower courts to enforce state and federal rules against damage-limitation clauses. Before *Concepcion*, courts split on whether and when businesses could use arbitration agreements to limit damages.[180] Those courts that held damage limitations in arbitration clauses to be unenforceable did so primarily based on the doctrine of unconscionability.[181] For example, Florida courts had found damage-limitation provisions to be an "indicator of substantive unconscionability" when an "arbitration clause expressly limits [a defendant's] liability to actual damages, thereby precluding the possibility that [the defendant] will ever be exposed to punitive damages, no matter how outrageous its conduct might be."[182] Similarly, California courts held that "[a] damages limitation may be unconscionable if it contravenes public policy by limiting remedies available in the statute under which a plaintiff proceeds, or if it is one-sided."[183] But because *Concepcion* casts doubt on courts' ability to invalidate arbitration clause provisions based on uncon-

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178. *See* D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 330–31 (D. Conn. 2011) (noting that if arbitration agreements with provisions to shorten the statute of limitations were deemed unconscionable as a matter of state law, the FAA might preempt such a state law in light of *Concepcion*'s preemption analysis).

179. *Muriithi*, 712 F.3d at 178, 180.

180. *Compare* Inv. Partners, L.P. v. Glamour Shots Licensing, Inc., 298 F.3d 314, 318 n.1 (5th Cir. 2002) ("Provisions in arbitration agreements that prohibit punitive damages are generally enforceable."), *and* McKee v. AT&T Corp., 191 P.3d 845, 860 (Wash. 2008) ("We hold the limitation on punitive damages is not unconscionable."), *with* Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 83 (D.C. Cir. 2005) ("[A]rbitration agreement's bar on punitive damages is unenforceable . . . ."), *and In re* Poly-Am., L.P., 262 S.W.3d 337, 352 (Tex. 2008) ("Permitting an employer to contractually absolve itself of this statutory remedy [(punitive damages)] would undermine the deterrent purpose [of the law].").

181. *See, e.g.*, Gatton v. T-Mobile USA, Inc., No. SACV 03-130, 2003 WL 21530185, at *11 (C.D. Cal. Apr. 18, 2003) ("The damages limitation, therefore, while not determinative, is among the group of factors that may contribute to a finding of unconscionability."); Harper v. Ultimo, 7 Cal. Rptr. 3d 418, 423 (Cal. Ct. App. 2003) (listing courts rejecting arbitration clauses based on substantive unconscionability); Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 409–10 (Ill. Ct. App. 1980) (noting that under the UCC consequential-damage limitations were prima facie unconscionable where personal injuries are involved).

182. Powertel, Inc. v. Bexley, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999).

183. Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp., 123 Cal. Rptr. 3d 547, 555 (Cal. Ct. App. 2011).

scionability, courts have suggested that, in light of *Concepcion*, such holdings may no longer be valid.[184]

And *Concepcion* could make it easier for firms to use arbitration clauses as a mechanism to prevent injunctive relief. Before *Concepcion*, courts invalidated anti-injunction clauses in arbitration agreements as unconscionable.[185] Some courts, however, have read *Concepcion* to preclude such invalidation of anti-injunction clauses in arbitration.[186] For example, lower courts have interpreted *Concepcion* as invalidating California's law that prohibited arbitration of claims requesting public injunctive relief.[187] Thus, California courts can refuse to enforce anti-injunction clauses in a contract without an arbitration clause. However, if a firm wishes to preclude certain injunctive relief, it can put that same—previously unenforceable—term in an arbitration clause and state judges are powerless to invalidate the term. Judges reason that after *Concepcion*, "the FAA 'preempts California's preclusion of public injunctive relief claims from arbitration . . . .'"[188] More broadly, some courts have held that plaintiffs' arguments challenging prohibitions on injunctive relief and punitive damages as "unconscionable because they undermine pro-consumer policies . . . are not viable post-*Concepcion* because state laws advancing those policies are preempted by the FAA."[189]

The combination of *Italian Colors* and *Concepcion* may inhibit judges' ability to reject oppressive forum-selection clauses. Courts previously relied on the Effective Vindication Doctrine and the unconscionability doctrine to constrain firms' ability to use an arbitration provision to impose an anti-plaintiff forum-selection clause. For example, in *Mitsubishi*, the Supreme

184. Alvarez v. T-Mobile USA, Inc., No. Civ. 2:10-2373, 2011 WL 6702424, at *7 (E.D. Cal. Dec. 21, 2011).

185. *E.g.*, *Powertel, Inc.*, 743 So. 2d at 576; *see also* Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (striking down provisions in arbitration clauses that denied arbiters the power to grant injunctive relief).

186. *E.g.*, Arellano v. T-Mobile USA, Inc., No. C 10-05663, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) ("[T]he Act preempts California's exemption of claims for public injunctive relief from arbitration, at least for actions in federal court."); *see also* Schatz v. Cellco P'ship, 842 F. Supp. 2d 594, 613 (S.D.N.Y. 2012) ("[T]he Court would be hard-pressed to say that the plaintiffs' inability to obtain 'general injunctive relief' on behalf of others would render the arbitral forum inadequate.").

187. *See, e.g.*, Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947, 960 (9th Cir. 2012) ("We hold that the *Broughton–Cruz* rule does not survive *Concepcion* because the rule 'prohibits outright the arbitration of a particular type of claim'—claims for broad public injunctive relief." (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011))), *aff'd on reh'g*, 718 F.3d 1052 (9th Cir. 2013); Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, Jr., *Arbitration Developments: Post-*Concepcion*—The Supreme Court Expands Upon Its Landmark Decision*, 69 BUS. LAW. 647, 652 n.45 (2014) (collecting cases).

188. Hendricks v. AT&T Mobility, LLC, 823 F. Supp. 2d 1015, 1024 (N.D. Cal. 2011) (quoting *Arellano*, 2011 WL 1842712, at *1).

189. *Alvarez*, 2011 WL 6702424, at *7.

Court noted that if "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy."[190] This is an application of the Effective Vindication Doctrine. To similar effect, applying the unconscionability doctrine, one California court invalidated a forum-selection clause because the "plaintiffs were required to travel [from California] to Washington, D.C. to litigate a claim worth 'a couple of hundred dollars.'"[191] Because the Court in *Italian Colors* and *Concepcion* undermined the Effective Vindication Doctrine and the unconscionability doctrine, respectively, prior opinions striking down forum-selection clauses are weakened. In the wake of *Concepcion*, courts are already less receptive to the argument that forum-selection clauses that make plaintiffs travel great distances to arbitration are unconscionable and, thus, unenforceable.[192]

Finally, in light of the above post-*Concepcion* holdings that pare back the ability of courts to protect consumers and employees from unconscionable—or otherwise unenforceable—terms in arbitration agreements, the legal landscape does not bode well for other anti-plaintiff terms. For example, courts have speculated that *Concepcion* may prevent courts from invalidating fee-shifting provisions in arbitration clauses that judges would otherwise find to be unenforceable due to unconscionability.[193] Courts are also more likely to uphold the insertion of anti-coordination terms into arbitration clauses in light of *Italian Colors*, in which the Supreme Court endorsed enforcement of an arbitration clause that contained an aggressive non-coordination requirement.[194] Even when firms load their arbitration clauses with a multitude of unconscionable terms, courts have suggested that *Concepcion* may preempt state laws that would use the unconscionability doctrine to strike down either the individual terms or the arbitration clause as a whole.[195]

In sum, by limiting the ability of courts to use the unconscionability doctrine as a method of constraining anti-plaintiff terms in an arbitration

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190. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).

191. Gillette v. First Premiere Bank, No. 3:13-CV-432, 2013 WL 3205827, at *4 (S.D. Cal. June 24, 2013) (quoting Chavez v. Bank of Am., No. C 10-653, 2011 WL 4712204, at *11 (N.D. Cal. Oct. 7, 2011)).

192. *See, e.g.*, Carrell v. L & S Plumbing P'ship, No. H-10-2523, 2011 WL 3300067, at *1, *4 (S.D. Tex. Aug. 1, 2011) (compelling arbitration and dismissing case in favor of arbitration).

193. *See* D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 331 (D. Conn. 2011) (explaining that Connecticut unconscionability law may be preempted by the FAA post-*Concepcion*).

194. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) (emphasizing the aggressiveness of the non-coordination requirement in the arbitration clause before the Court).

195. *E.g.*, *D'Antuono*, 789 F. Supp. 2d at 330–31.

clause, *Concepcion* encourages firms to load their arbitration agreements with otherwise unenforceable provisions.

D. State Efforts to Protect Consumers

Many states have sought to protect their citizens from overreaching arbitration provisions. States have tried three approaches, all of which the Supreme Court has invalidated as inconsistent with the FAA. First, some states had made certain categories of disputes non-arbitrable. For example, California law made worker actions for unpaid wages non-arbitrable[196] and the West Virginia Supreme Court held that arbitration agreements in nursing-home contracts did not apply to lawsuits for "personal injury or wrongful death."[197] The U.S. Supreme Court held that the FAA preempted California's law to protect workers.[198] The Court similarly characterized West Virginia's rule as "contrary to the terms and coverage of the FAA" and thus invalid.[199] States, in short, cannot make specific claims non-arbitrable.

Second, states sought to apply the contract doctrine of unconscionability to make certain anti-consumer terms in arbitration clauses unenforceable.[200] The *Concepcion* opinion blocked these efforts with respect to class action waivers. Lower courts have expanded *Concepcion* in order to prevent states from invalidating a variety of unconscionable contract terms, so long as the terms are coupled with an arbitration clause.[201]

Third, unable to cordon off areas of law from arbitration or to address specific anti-consumer terms, some states sought to insure that their citizens were at least informed that they were waiving their right to sue in court. A Montana statute, for instance, rendered arbitration clauses unenforceable unless the first page of the contract contained a notice "typed in underlined capital letters" that alerted readers to the arbitration clause contained within.[202] The Supreme Court invalidated the Montana law because "Montana's first-page notice requirement, which governs not 'any contract,'

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196. CAL. LAB. CODE § 229 (West 2011) ("Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate."), *invalidated by* Discover Bank v. Superior Court, 129 Cal. Rptr. 2d 393, 407–08 (Cal. Ct. App. 2003).

197. Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 292 (W. Va. 2011) ("We therefore hold that, as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence."), *vacated sub nom.* Marmet Health Care Ctr. v. Brown, 132 S. Ct. 1201, 1204 (2012).

198. Perry v. Thomas, 482 U.S. 483, 491 (1987).

199. *Marmet Health Care Ctr.*, 132 S. Ct. at 1204.

200. *See supra* notes 74–81 and accompanying text.

201. *See supra* notes 187–87 and accompanying text.

202. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996).

but specifically and solely contracts 'subject to arbitration,' conflicts with the FAA and is therefore displaced by the federal measure."[203] Other state laws requiring consumer notice of arbitration clauses were subsequently struck down as well.[204] The Court's approach precludes states from even experimenting with methods to minimize the negative consequences of anti-consumer arbitration clauses.[205]

This illustrates the clout of arbitration clauses in the landscape of contract law. In the absence of arbitration clauses, states have the power to prevent firms using contractual provisions to waive class actions, limit damages, truncate statutes of limitations, or preclude injunctions. But, according to some case law, the mere inclusion of these same provisions in an arbitration clause saps the states of their ability to protect their citizens. Similarly, the state's traditional power to require notices in consumer contracts recedes in the face of an arbitration clause.

II. The Role of Legislative Intent in the Expansion of Arbitration Clauses

We now have a legal regime where consumers and workers are forced to sign away their right to sue in court and states are essentially powerless to protect their citizens. We have arrived here because the Supreme Court has repeatedly asserted that "'[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered,' a concern which 'requires that we *rigorously* enforce agreements to arbitrate.'"[206] The Supreme Court has claimed three distinct intentions of the 1925 Congress that passed the FAA: an intent that the FAA apply to all federal and state claims unless explicitly exempted by Congress; an intent that the terms of arbitration clauses should be enforced *as written*; and an intent that states cannot do anything that would disfavor arbitration clauses or interfere with their enforcement. This Part presents the Supreme Court's construction of this legislative intent.

For over the first half century of the FAA's existence, courts held that federal statutory rights were non-arbitrable.[207] Beginning in the 1980s, however, the Court began to assert that Congress intended the FAA to create an "emphatic federal policy in favor of arbitral dispute resolution."[208] This congressional intent, in turn, required that "questions of arbitrability must be

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203. *Id.*

204. *See, e.g.*, Affiliated Foods Midwest Coop., Inc. v. Integrated Distribution Sols., LLC, 460 F. Supp. 2d 1068, 1072 (D. Neb. 2006) (striking down NEB. REV. STAT. § 25–2602.02).

205. Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 276–77.

206. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985) (emphasis added) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

207. *See supra* notes 28–30 and accompanying text.

208. *Mitsubishi Motors Corp.*, 473 U.S. at 631.

addressed with a healthy regard for the federal policy favoring arbitration."[209] Thus, in 1983, the Court asserted for the first time that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[210] This presumption of arbitrability could only be rebutted by proof that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."[211] The burden of proving this rests on the party seeking to avoid arbitration.[212]

In addition to discovering a congressional intent to broaden the scope of the FAA, courts have held that they must enforce anti-consumer terms in arbitration clauses because Congress intended this. Most notably, the Supreme Court has claimed that Congress intended the FAA to preempt state laws against class action waivers in arbitration clauses.[213] In forbidding states from treating class action waivers in arbitration clauses as unconscionable, the Supreme Court asserted that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced *according to their terms*.'"[214] In requiring lower courts to enforce class action waivers in arbitration clauses, the Court held that all "courts must 'rigorously enforce' arbitration agreements *according to their terms*."[215]

Since the Supreme Court pro-arbitration era began in the 1980s, the Court has claimed in over a dozen opinions that Congress intended arbitration clauses to be enforced "as written" or "according to their terms."[216] For

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

210. *Id.* at 24–25; *see also Mitsubishi Motors*, 473 U.S. at 627–28 ("[T]he congressional policy manifested in the Federal Arbitration Act . . . requires courts liberally to construe the scope of arbitration agreements covered by that Act.").

211. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 227 (1987).

212. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

213. Aton Arbisser & Darya Pollak, Concepcion *and the Future of Pre-Dispute Arbitration Agreements*, 13 SEDONA CONF. J. 207, 208, 209 n.17 (2012) (collecting cases).

214. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (second alteration in original) (emphasis added) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

215. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

216. *E.g.*, *Italian Colors*, 133 S. Ct. at 2309; CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012); *Concepcion*, 131 S. Ct. at 1754; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67–68 (2010); Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 301 n.8 (2010); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 593 (2008); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 454 (2003); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947 (1995); *Volt*, 489 U.S. at 476; *see also, e.g.*, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 87 (2002) (Thomas, J., concurring) ("[C]ourts must enforce private agreements to arbitrate just as they would ordinary contracts: in accordance with their terms."); J. Alexander Sec., Inc. v. Mendez, 511 U.S. 1150, 1151 (1994) (O'Connor, J., dissenting from denial of certiorari).

example, the *Concepcion* Court asserted that "[t]he 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."[217] Thus, if an arbitration clause term forbids class actions and classwide arbitrations, Congress—according to the *Concepcion* majority—intended judges to defer to that term.[218] To treat such a term as unconscionable under state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[219] Under this approach, courts defer to all manner of anti-consumer contract terms, as long as the terms are situated within an arbitration clause.

State efforts to protect their citizens from overreaching arbitration clauses have also butted up against the Supreme Court's vision of the congressional intent behind the FAA. In *Southland Corp. v. Keating*,[220] the Supreme Court asserted that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[221] Thus, the *Southland* Court construed the FAA to require *state* courts to enforce agreements to arbitrate *state* law claims. Almost sixty years after the enactment of the FAA, *Southland* was the first time that the Justices ever even considered whether the FAA applied to state courts and, by extension, state consumer protection laws.[222]

In addition to expanding the reach of the FAA in the 1980s to include federal statutory claims, the Court also asserted that Congress intended to forbid states from making any state claims non-arbitrable.[223] For example, the *Southland* opinion asserted: "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[224] The Court has further claimed that Congress intended to prevent states from doing anything to protect their citizens from unconscionable arbitration clauses imposed through contracts of adhesion.

217. *Concepcion*, 131 S. Ct. at 1748.

218. *Id.*

219. *Id.* at 1753 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) ("California's *Discover Bank* rule is preempted by the FAA."). State courts have reasoned similarly. *See, e.g.*, AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 200 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("[T]he primary purpose of the FAA is to overcome courts' refusals to enforce agreements to arbitrate and to ensure that private agreements to arbitrate are enforced according to their terms.").

220. 465 U.S. 1 (1984).

221. *Id.* at 16. The Supreme Court inferred that Congress must have intended to preempt state law because the legislators could not bother "to address a problem whose impact was confined to federal courts," and it claimed that "the House Report contemplated a broad reach of the Act, unencumbered by state-law constraints." *Id.* at 13.

222. *Id.* at 24 (O'Connor, J., dissenting) ("Today's case is the first in which this Court has had occasion to determine whether the FAA applies to state-court proceedings.").

223. *See* Perry v. Thomas, 482 U.S. 483, 490–91, 491 n.8 (1987).

224. *Southland*, 465 U.S. at 10.

For example, in striking down Montana's requirement that contracts must clearly state if they contain an arbitration clause, the Court reiterated "we have several times said, Congress precluded States from singling out arbitration provisions for suspect status . . . ."[225] Abiding by the Supreme Court's pronouncements, courts have asserted that Congress intended the FAA to prevent states from requiring that judges, not private arbiters, hear claims for injunctive relief.[226]

In sum, judges have constructed a regime where the legal claims of consumers and employees must be decided in private arbitration, not in court. Judges have achieved this by invoking a legislative history of the FAA in which Congress intended to favor private arbitration over public litigation; Congress intended arbitration to cover federal statutory claims; Congress intended firms to be able to use contracts of adhesion to force consumers and employees to waive their rights to sue in court; Congress intended firms to be able to impose arbitration clauses that prevent class actions, that limit damages, that truncate statutes of limitations, and that preclude injunctive relief; and Congress intended to prevent states from being able to protect their citizens from arbitration clauses and their unconscionable terms even if that eliminated the ability of injured individuals to seek redress in any forum. Part III will show that each of these claims of legislative intent is false.

III. Revisiting the Legislative History of the FAA

A. *The Legislative History of the FAA*

Even before the founding of the country, some American businesses sought to resolve their disputes through private arbitration instead of public litigation.[227] However, the holdings of private arbiters had no legal power absent court enforcement.[228] Under the so-called revocability doctrine, either party could, at its will, refuse to honor the arbitration agreement.[229] While

225. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

226. *E.g.*, Arellano v. T-Mobile USA, Inc., No. C 10-05663, 2011 WL 1842712, at *1 (N.D. Cal. May 16, 2011).

227. James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 748 (2009).

228. *Id.*

229. *Southland*, 465 U.S. at 32 (O'Connor, J., dissenting) (noting that judicial "hostility [to arbitration agreements] was reflected in two different doctrines: 'revocability,' which allowed parties to repudiate arbitration agreements at any time before the arbitrator's award was made, and 'invalidity' or 'unenforceability,' equivalent rules that flatly denied any remedy for the failure to honor an arbitration agreement" (footnotes omitted)); Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 239–41 (1929) (comparing the law of arbitration agreements under common law with statutes); Wilson, *supra* note 91, at 98–99 ("If one party to the arbitration agreement decided it no longer wanted to arbitrate, courts refused to compel arbitration, allowing the objecting party to revoke its agreement. This rule, followed by most state and federal courts, was referred to as the 'revocability doctrine.'"); *see also* Berger & Sun, *supra* note 227, at

such revocation was problematic to the party desiring to enforce an arbitration agreement, American courts followed the English rule that "traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction" and, thus, unenforceable.[230] The Supreme Court, for example, had held in the late nineteenth century that "parties cannot by contract oust the ordinary courts of their jurisdiction."[231] Supporters of the FAA characterized the English rule as founded on "the jealousy of the English courts for their own jurisdiction."[232] American courts, nonetheless, felt obliged to follow the well-established rule. One district court judge in New York opined in 1915 that American "courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute."[233]

In 1920, the New York legislature responded to the judge's invitation to "compel action" by enacting a statute that made arbitration agreements enforceable.[234] Although states like New York and New Jersey passed laws that made arbitration agreements enforceable in state court, these laws could not reach claims that sounded in admiralty—which was governed by federal law—or cases that wound up in federal court through diversity jurisdiction.[235] Because federal courts treated arbitration agreements as revocable, mer-

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750–51 ("Finally, without reliable support from the courts, adherence to an arbitration award was often privately enforced by extra-judicial means, such as threats to a merchant's reciprocal arrangements or reputation.").

230. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974). On the English courts' hostility to private arbitration, see David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 444–45 (2011).

231. Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) ("[A man] cannot, however, bind himself in advance by an agreement, which may be specially enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.").

232. H.R. REP. NO. 68-96, at 1–2 (1924) ("This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts."); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts . . . .").

233. U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1010–11 (S.D.N.Y. 1915).

234. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 39 (1924) [hereinafter *Joint Hearings*]; Berger & Sun, *supra* note 225, at 750; Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101 (2006) ("The New York statute made all arbitration agreements enforceable, including agreements to arbitrate future disputes.").

235. *See Joint Hearings*, *supra* note 232, at 16 (statement of Julius Henry Cohen) (explaining that state arbitration laws did not apply to cases that "came into the Federal court").

chants that entered pre-dispute agreements to arbitrate could not be certain that their agreements would be enforced.

The push for federal legislation to make arbitration agreements enforceable was spearheaded by two New Yorkers—Julius Cohen and Charles Bernheimer—who sought to replicate at the federal level their success in shepherding through New York State's law. Both men worked for the New York State Chamber of Commerce—the primary mover behind New York's arbitration law—Cohen as its general counsel and Bernheimer as the chair of its arbitration committee, a position he had been elected to twelve times.[236] Cohen was also a member of the Committee on Commerce, Trade, and Commercial Law of the American Bar Association (ABA),[237] which actually drafted the FAA.[238] In 1924, Bernheimer was the primary private witness who testified before Congress. In addition to representing the Importers and Exporters' Association and the Merchants' Association of New York, he spoke as a representative of "73 business men's organizations that have added their names in formal indorsement" of the FAA.[239] Together, Cohen and Bernheimer presented the case to Congress for why arbitration agreements should be enforceable in federal court.[240]

In urging Congress to enact the FAA, Cohen and Bernheimer argued that arbitration held many advantages over traditional litigation. First, arbitration was less expensive than litigation. Cohen asserted that "the bar associations of the country" were aligned with the community in supporting arbitration as a way "to make the disposition of business in the commercial world less expensive."[241] Typical of the business community's support of the FAA, the American Bankers' Association presented a resolution to Congress that "arbitration offers the best means yet devised for an efficient,

236. Moses, *supra* note 234, at 101.

237. *Joint Hearings*, *supra* note 232, at 13 (statement of Julius Henry Cohen).

238. The House Report noted that the FAA was drafted by an American Bar Association committee. H.R. REP. NO. 68-96, at 1 (1924) ("[This bill] was drafted by a committee of the American Bar Association and is sponsored by that association and by a large number of trade bodies whose representatives appeared before the committee on the hearing."). The proposed bill was unanimously passed by the ABA. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) [hereinafter *Arbitration Hearings*] (statement of W.H.H. Piatt).

239. *Joint Hearings*, *supra* note 232, at 5–6 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of New York).

240. The testimony of Cohen and Bernheimer is important, as the modern Supreme Court has relied upon their testimony in interpreting the FAA. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274, 279 (1995).

241. *Joint Hearings*, *supra* note 232, at 13 (statement of Julius Henry Cohen).

expeditious, and inexpensive adjustment of such disputes."[242] Congress was influenced by the testimony in praise of the efficiency of arbitration.[243]

Second, supporters argued that the FAA was necessary to speed up dispute resolution in commercial matters. Bernheimer praised arbitration as more expeditious than litigation.[244] Arbitration would be quicker because issues could be

> decided upon motion papers, affidavits and such exhibits as the party chooses to submit, obviating the necessity of appearance in court, together with the calling of witnesses and the opportunity for other preliminary motions and proceedings. The whole matter should be disposed of within a few days after the application is made.[245]

Noting a three-year backlog in civil courts, supporters championed arbitration as a mechanism to remove inter-merchant disputes from state and federal courts, in order to reduce court congestion.[246] Cohen further argued that removing inter-merchant disputes from court dockets would free courts to handle other cases "without waiting for a year or two for it to be reached. In other words, you would take out all these matters of business and leave the courts free to handle the business that ought to be handled with dispatch."[247] Herbert Hoover, as the Secretary of Commerce, urged Congress to adopt the FAA because "[t]he clogging of our courts is such that the delays amount to a virtual denial of justice. . . . I believe the emergency exists for prompt action and I sincerely hope that this Congress may be able to relieve the serious situation."[248] These arguments proved influential, as Congress expressed concern about the timeliness of dispute resolution.[249]

The speed of dispute resolution was seen as particularly important in the context of disputes involving perishable goods. W.H.H. Piatt, Chairman of

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242. *Id.* at 31 (resolution of American Bankers' Association).

243. *See* David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 61 (2007) ("After the 1923 and 1924 hearings, the House Judiciary Committee and the Senate Judiciary Committee each generated a report recommending passage of the FAA. Those reports make clear that, when it enacted the FAA, Congress understood arbitration to be something inherently prompt, inexpensive, and streamlined—in other words, just the type of proceeding that had been described by the witnesses during the pre-enactment hearings.").

244. *See Arbitration Hearings*, *supra* note 238, at 5 (statement of Charles L. Bernheimer) ("But the merchant finds that arbitration is a very direct and very expeditious method. Our courts are so clogged that it is sometimes years before they can reach a settlement: but the arbitration makes a prompt settlement . . . .").

245. *Joint Hearings*, *supra* note 234, at 35–36 (statement of Julius Henry Cohen) (quoting "brief on the proposed Federal arbitration statute," submitted by Mr. Cohen).

246. *Id.* at 26 (statement of Alexander Rose, Arbitration Society of America).

247. *Id.* at 18 (statement of Julius Henry Cohen).

248. *Id.* at 21 (letter from Herbert Hoover, Secretary of Commerce).

249. *See* H.R. REP. NO. 68-96, at 2 (1924) ("It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation.").

the Committee on Commerce, Trade, and Commercial Law of the American Bar Association, testified that the FAA "would offer such opportunities for saving perishable products. A man ships a carload of potatoes in and a creditor attaches it, and the potatoes stand there on a side track and freeze or rot. Under the arbitration proposition he could save them."[250] Representatives of producers and shippers of vegetables and fruits testified in favor of the bill, asserting that arbitration would benefit business and "the whole country."[251] For example, Gray Silver, representing the American Farm Bureau Federation, told Congress that "arbitration in commercial matters . . . will be helpful in speeding business generally."[252]

The supporters of the FAA cobbled together the above arguments to suggest that the legislation was pro-consumer, but not because consumers would be in arbitration themselves. Rather, consumers would benefit, Bernheimer argued, for at least three separate reasons. First, he argued that the high costs of litigation between merchants would necessarily be passed on to consumers in the form of higher prices, and thus, enforcement of arbitration clauses in commercial contracts would ultimately redound to the benefit of consumers.[253] Second, Bernheimer argued that the relative speed of arbitration would reduce merchant costs—and ultimately consumer prices—because the FAA "will help to conserve perishable and semi-perishable food products, and save many millions of dollars in foodstuffs now wasted because of the lack of legally binding arbitration facilities."[254] Third, consumers would pay less in taxes to maintain state courthouses that were busy with intra-merchant litigation.[255]

250. *Arbitration Hearings*, *supra* note 238, at 11 (statement of W.H.H. Piatt).

251. *Joint Hearings*, *supra* note 234, at 28–29 (statement of Henry L. Eaton).

252. *Id.* at 11–12 (statement of Gray Silver, American Farm Bureau Federation).

253. *Id.* at 7 (statement of Charles L. Bernheimer) ("The litigant's expenses—that is, whatever is necessary to cover the annual outlay for litigation or the fear of litigation, consultations with lawyers, the possibility of cancellations, and so forth, eventually creeps into the selling price as well. It is a part of the overhead of a business, and finds its reflection in the price of the articles sold, and consequently the prices of commodities involved are correspondingly increased."); *Arbitration Hearings*, *supra* note 236, at 7 (statement of Charles L. Bernheimer) ("The merchants want this very badly. It adds to the cost to the consumer if the merchant has in the calculation of his prices to consider, in his overhead, possible litigation, possible claims. All of these expenses go into the overhead running expenses of the business. No matter how little it is, it will have the result of reducing the cost, without taking it out of the purchaser or anybody.").

254. *Arbitration Hearings*, *supra* note 238, at 3 (statement of Charles L. Bernheimer); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) ("Congress, when enacting this law, had the needs of consumers, as well as others, in mind.").

255. *Joint Hearings*, *supra* note 232, at 6 (statement of Charles L. Bernheimer) ("The expense to the State and the counties in the final analysis, comes out of taxes. Taxes are paid by the consumer, big and little. I know there may be a difference of opinion on that subject but let me exemplify it: In the seller's market the seller has the advantage, and he is able to prorate his taxes into his products. He has control. In the buyer's market the reverse holds good.").

These arguments in favor of the FAA carried the day. Not a single senator or representative voted against it.[256] This is not surprising; nobody spoke or wrote in opposition to the legislation.[257]

The most important fact about the testimony, hearings, and reports leading up to congressional enactment of the FAA is that every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants. Cohen spoke of "the disposition of business in the commercial world."[258] The judicial opinions that Cohen cited as necessitating the FAA all involved contract disputes between businesses.[259] Throughout his testimony, he described arbitration as only between businesspeople.[260] Similarly, the representative of the American Bankers' Association praised arbitration for linking bankers' interests with those of "merchants and business men."[261] Wilson J. Vance, Secretary of the New Jersey State Chamber of Commerce, praised arbitration because "few cases . . . have come actually to trial in the arbitration tribunals [because] business men have adopted the practice of getting together and settling their business differences."[262] Bernheimer, too, praised arbitration because it would "enable business men to settle *their* disputes expeditiously and economically."[263] He argued that arbitration "preserves business friendships."[264] Witnesses without contradiction described the FAA as involving situations involving "a contract *between merchants* one with another, buying and selling goods."[265] Furthermore, the New York arbitra-

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256. Moses, *supra* note 234, at 110 ("Having been passed without a single negative vote in either the House or the Senate, the Federal Arbitration Act was signed into law in 1925 and became effective January 1, 1926.").

257. *Joint Hearings*, *supra* note 234, at 24.

258. *Id.* at 13 (statement of Julius Henry Cohen).

259. *Id.* at 33 (statement of Julius Henry Cohen) (citing cases); *see also* Moses, *supra* note 234, at 106 ("The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations. All of the examples given by Bernheimer as to cases he knew about or cases he had personally been involved with through the New York Chamber of Commerce were cases between merchants.").

260. *See, e.g.*, *Joint Hearings*, *supra* note 234, at 41 (statement of Julius Henry Cohen) (quoting "brief on the proposed Federal arbitration statute," submitted by Mr. Cohen) ("If business men desire to submit their disputes to speedy and expert decision, why should they not be enabled to do so?").

261. *Id.* at 31 (statement of Thomas B. Paton, American Bankers' Association).

262. *Id.* at 30–31 (statement of Wilson J. Vance, Secretary, New Jersey State Chamber of Commerce).

263. *Arbitration Hearings*, *supra* note 236, at 2 (statement of Charles L. Bernheimer) (emphasis added); *see also Joint Hearings*, *supra* note 232, at 6 (statement of Charles L. Bernheimer) (describing litigation as unprofitable).

264. *Joint Hearings*, *supra* note 234, at 7 (statement of Charles L. Bernheimer).

265. *Arbitration Hearings*, *supra* note 238, at 10 (statement of W.H.H. Piatt) (emphasis added).

tion law that served as the template for the FAA was designed for arbitration between merchants.[266]

All of the examples cited of the efficacy of arbitration involved disputes between merchants. Many involved international contracts,[267] most notably disputes between British merchants and New York merchants.[268] R.S. French—who testified as a representative of the National League of Marine Merchants of the United States, the Western Fruit Jobbers' Association of America, and the International Apple Shippers' Association of America—noted the importance of enforceable arbitration agreements for large exporters and importers of perishable goods.[269] In addition to international disagreements, domestic business interests wanted their arbitration agreements among each other enforced. Trade organizations praised the FAA as facilitating arbitration among merchants in the same trade.[270] Cohen testified that "one of the rules of the trade is that if you belong to a trade you shall arbitrate your differences with them."[271]

A wide range of merchant associations endorsed the FAA. These included fruit jobbers; wholesale grocers; raisin growers; poultry, dairy, and egg producers; peach and fig growers; canners; music publishers; and coffee, sugar, and lumber producers.[272] Beyond specific industries, chambers of commerce of various cities, states, and territories gave their official support to the FAA.[273] One reason that merchant associations across disparate industries supported arbitration was the perception that merchants in contract disputes with each other would be best served by an arbiter who knew their industry.[274]

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266. Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 148–51 (1921).

267. *See, e.g.*, *Arbitration Hearings*, *supra* note 238, at 7 (statement of Charles L. Bernheimer) ("The New York Steamship Co. had a dispute with a firm of shippers in Halifax on a shipment of $17,000 worth of codfish to Para, Brazil.").

268. *Joint Hearings*, *supra* note 234, at 8 (statement of Charles L. Bernheimer) ("We handled in 1921 about 150 cases between British merchants and New York merchants, the result of the slump of 1920, when every one tried his best to get out from under by putting his load on the other fellow's shoulders if he could.").

269. *Id.* at 12 (statement of R.S. French).

270. *See, e.g.*, *id.* at 13 (statement of C.G. Woodbury of the National Canners' Association and of the Canners' League of California) (testifying that the Canners' organizations supported passage of the FAA).

271. *Id.* at 29 (statement of Julius Henry Cohen).

272. *Id.* at 21–22 (list submitted by Charles L. Bernheimer).

273. *Id.*

274. *Id.* at 27 (statement of Alexander Rose); Moses, *supra* note 232, at 111 ("Arbitration was a remedy that was well-suited, according to Cohen, 'to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or [related] questions of

Most explicitly of all, when clarifying that the FAA did not reach labor disputes, the ABA's Piatt explained that the FAA "is purely an act to give *the merchants* the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this."[275]

B. How Courts Misconstrue Legislative Intent in Arbitration Cases

Courts have repeatedly upheld both arbitration clauses and anti-consumer terms within them—as well as striking down states' ability to protect consumers—based on a claimed fealty to legislative intent. Despite Supreme Court claims to the contrary, the FAA does not reflect "a congressional declaration of a liberal federal policy favoring arbitration agreements."[276] Rather, this "so-called policy favoring arbitration appears to be one created by the judiciary out of whole cloth."[277] This subpart explains how each individual aspect of the Court's proffered Congressional intent behind the FAA is incorrect.

1. The Scope of Arbitration Clauses.—In passing the FAA, Congress intended to allow arbitration for only a narrow set of legal claims: inter-merchant contract disputes sounding in breach and maritime claims.[278] The Supreme Court opinions extending the FAA to cover federal statutory claims find no support in either the text or legislative history of the Act.[279] The Court converted an absence of evidence regarding congressional intent into proof of congressional intent.[280] It is hardly surprising, however, that neither legislators nor witnesses expressed an intent to exclude statutory claims; no one had ever conceived that future judges would misinterpret a law written for contract disputes to apply to federal statutory claims, which were not

law.'" (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926))).

275. *Arbitration Hearings*, *supra* note 238, at 9 (statement of W.H.H. Piatt) (emphasis added); *see also* Moses, *supra* note 234, at 106 (describing Piatt's statement as "the central concept behind the Act: to provide for enforceability of arbitration agreements between merchants").

276. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The Court provided no citation for this critical proposition. *Id.*

277. Moses, *supra* note 233, at 123 ("The 1925 Congress never indicated in the slightest way that arbitration was to be favored over judicial resolution of disputes. It simply made arbitration of commercial and maritime agreements enforceable in federal court because, until 1925, such agreements had essentially been revocable at will by the parties.").

278. *Id.* at 139 ("Moreover, the FAA was never described in the legislative history as applying to any claims other than contract and maritime claims.").

279. *Id.* at 138–39.

280. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985); Moses, *supra* note 234, at 141.

discussed at all.[281] Arbitration was not intended for statutory problems, like antitrust, but for routine commercial matters of contract interpretation, breach, and remedy.[282]

Congress intended to allow arbitration for contract disputes between merchants in the federal jurisdiction where the parties disagreed about such facts as the trade custom applied to interpret a particular contract provision.[283] Arbitrators who knew a particular trade, it was argued, were well situated to decide such factual issues quickly. Immediately after the enactment of the FAA, Cohen and a co-author noted that "[n]ot all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like."[284]

Arbitration was not intended for complex legal issues, such as those involving statutory claims. Cohen himself noted that arbitration was "not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes."[285] Instead, legal questions of statutory interpretation were "better left to the determination of skilled judges with a background of legal experience and established systems of law."[286] In short, the Supreme Court constructed a false narrative of an expansive FAA that applied to all manner of statutory claims, when the drafters, proponents, and enacting legislators designed a law intended only for addressing contract disputes between merchants.

2. Consumer and Employment Contracts.—The Supreme Court has repeatedly held that the FAA requires enforcement of arbitration clauses in consumer contracts. The Court has invoked legislative intent to justify its holdings. Congress, however, intended the FAA to allow enforcement only of arbitration agreements between merchants.[287] Congress did not intend the FAA to apply to consumer contracts. The witnesses spoke only of merchants

281. Moses, *supra* note 234, at 139 ("Nor is there evidence that anyone at the time believed the FAA made statutory claims arbitrable.").

282. Cohen & Dayton, *supra* note 272, at 281 ("[Arbitration] is not the proper method for deciding points of law of major importance involving . . . policy in the application of statutes.").

283. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1759 (2011) (Breyer, J., dissenting) (citing substantial authority indicating that Congress intended arbitration to primarily resolve disputes of fact between merchants).

284. Cohen & Dayton, *supra* note 272, at 281.

285. *Id.*

286. *Id.*

287. *See supra* subpart (III)(A); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) ("There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities.").

having arbitrators, not consumers.[288] Arguments against the FAA within the ABA—which debated and drafted the statutory language that became the FAA—said nothing about consumer contracts.[289]

In particular, Congress did not intend the FAA to facilitate firms imposing arbitration clauses on consumers through contracts of adhesion. In the context of take-it-or-leave-it contracts between businesses, Cohen testified that the FAA would not facilitate adhesive contracts because regulations protected the weaker merchant.[290] The FAA's advocates repeatedly indicated that the Act would not apply to contracts of adhesion.[291] For example, in colloquy, when senators raised the issue of contracts of adhesion, the bill's supporters testified that the FAA would not apply to such situations.[292] Indeed, Piatt—the Chair of the ABA committee that drafted the FAA—testified that he would oppose legislation that would allow mandatory arbitration clauses in contracts of adhesion.[293]

Consumer contracts are different than the arbitration agreements that the 1925 Congress considered. The 1925 Congress assumed that it was addressing arbitration between businesspeople who knowingly and voluntarily agreed to arbitrate.[294] Supporters testified that arbitration was not intended to replace courts and was "purely voluntary."[295] Consumer contracts are not the product of arm's-length negotiations between parties of relatively equal bargaining power.[296] Not only are consumers denied input into the contract terms, they are often unaware that their contracts include mandatory arbitration provisions.[297] Although modern courts assume that consumers knew that they were waiving their right to participate in class

288. *See, e.g.*, *Arbitration Hearings*, *supra* note 238, at 4 (statement of Charles L. Bernheimer).

289. *Id.* at 8 (statement of W.H.H. Piatt).

290. *Joint Hearings*, *supra* note 234, at 15 (statement of Julius Henry Cohen).

291. Moses, *supra* note 232, at 107 ("Cohen and his fellow supporters thus indicated that this bill would not apply in adhesion contracts for several reasons. First, there were protections written into law; second, protective requirements were issued by federal agencies; and third, that was simply not the intent of the legislation, which was specifically aimed at voluntary resolution of disputes between merchants.").

292. *Arbitration Hearings*, *supra* note 238, at 9 (statements of Sen. Walsh of Montana and W.H.H. Piatt) (discussing take-it-or-leave-it insurance contracts).

293. *Id.* at 10 (statement of W.H.H. Piatt) ("Speaking for myself, personally, I would say I would not favor any kind of legislation that would permit the forcing a man to sign that kindof [sic] a contract. I can see where that could be, right now.").

294. Moses, *supra* note 234, at 108 ("As Representative Graham noted in the House floor debate in 1924, '[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when *voluntarily* placed in the document by the parties to it.'"); *see also* Horton, *supra* note 228, at 447 ("[E]ven a cursory review of the FAA's legislative history reveals that Congress did not want the [FAA] to apply to contracts between parties with unequal bargaining power.").

295. *Joint Hearings*, *supra* note 234, at 26 (statement of Alexander Rose).

296. Tracey & McGill, *supra* note 87, at 461–62.

297. *Id.* at 462.

action,[298] such knowledge does not generally exist in contracts of adhesion that include arbitration clauses.[299] And the Supreme Court has forbidden states from trying to require businesses to inform consumers about arbitration clauses in their contracts.[300]

In business contracts, both parties have a similar incentive to structure a neutral arbitration process that favors neither plaintiff nor defendant because each party bears a similar risk of being the plaintiff or the defendant.[301] In contrast, in consumer contracts, the business entity is far more likely to be the defendant and thus has a strong incentive to design and impose an arbitration process that is anti-plaintiff. Consumers cannot prevent this because they have no say in designing the arbitration process. Thus, not surprisingly, the arbitration terms discussed in Part I—waiving class actions, limiting damages, truncating statutes of limitations, precluding injunctions—are all decidedly pro-defendant.

The Supreme Court has made the same errors that it made regarding consumer contracts when it has considered the arbitrability of employment contracts. When the Justices claim that Congress intended the FAA to cover employment contracts,[302] they are again misreading the legislative history.[303] During the earliest hearings for the FAA, concerns were expressed that the Act could cover employment contracts for stevedores, seamen, and railroad workers because their occupations involved interstate and foreign commerce, which was within the authority of Congress to regulate.[304] The Act's text was amended to provide that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[305] In addition to endorsing this

298. *See, e.g.*, Walther v. Sovereign Bank, 872 A.2d 735, 750–51 (Md. 2005) (holding that a "conspicuously presented" provision in an arbitration agreement waiving class action rights was valid and enforceable).

299. *See* Lemley & Leslie, *supra* note 13, at 44–45 (discussing the imposition of arbitration clauses on unaware consumers).

300. *See infra* notes 352–56 and accompanying text.

301. Supporters of antitrust arbitration assume that antitrust litigation is between merchants who know the arbiter and are equally likely to be plaintiff or defendant; they ignore consumer-initiated antitrust litigation. *E.g.*, Mark R. Lee, *Antitrust and Commercial Arbitration: An Economic Analysis*, 62 ST. JOHN'S L. REV. 1, 27 (1987).

302. Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1363–72 (1997).

303. *See id.* (discussing general principles of unequal bargaining power); Horton, *supra* note 228, at 446–47 (explaining that Congress did not intend for the FAA to apply to "contracts between parties with unequal bargaining power").

304. *Arbitration Hearings*, *supra* note 238, at 9 (statements of W.H.H. Piatt and Sen. Sterling).

305. 9 U.S.C. § 1 (2012).

explicit exception—as did Secretary of Commerce Herbert Hoover[306]—Piatt testified that it

> is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.[307]

The amendment appeased labor interests, who removed their opposition to the bill.[308]

The Supreme Court has misinterpreted the labor exception to the FAA. The Supreme Court asserted that the law "exempts from the FAA only contracts of employment of transportation workers."[309] The statutory exception was not intended to imply that employment contracts for other workers did fall within the FAA. Rather, if a worker was not engaged in interstate or foreign commerce, then Congress did not consider itself to have the authority to legislate as to the arbitrability of the worker's employment contract.[310] As Professor Moses notes, "no one in 1925—not the drafters, the Secretary of Commerce, organized labor, nor members of Congress—believed that the FAA applied to employment contracts."[311] By misreading the FAA, the Supreme Court has effectively preempted any efforts to limit arbitration of employment contracts.[312]

Furthermore, employment contracts have none of the hallmarks of the business contracts whose arbitration clauses Congress intended to make enforceable. As with consumers, the Supreme Court mischaracterizes workers' submission to mandatory arbitration as "voluntary."[313] For exam-

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306. *Arbitration Hearings*, *supra* note 238, at 14 (statement of Herbert Hoover, Secretary of Commerce).

307. *Id.* at 9 (statements of W.H.H. Piatt).

308. Moses, *supra* note 234, at 112 n.81 ("Earlier opposition by seamen and railroad employees had been diffused when a provision was added excluding them from coverage of the Act.").

309. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

310. *Id.* at 136 (Souter, J., dissenting) ("When the Act was passed (and the commerce power was closely confined) our case law indicated that the only employment relationships subject to the commerce power were those in which workers were actually engaged in interstate commerce."); Moses, *supra* note 234, at 106 ("Under the view of the Commerce Clause at that time, the Act did not apply to contracts of most workers. It only applied to contracts of workers actually engaged in interstate or foreign commerce, such as seamen or railroad employees, and those workers were specifically excluded.").

311. Moses, *supra* note 234, at 147; *see also Circuit City Stores*, 532 U.S. at 128 (Stevens, J., dissenting) ("[N]o one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts.").

312. *See* Arbisser & Pollak, *supra* note 211, at 209 (describing multiple Supreme Court rulings which found that the FAA preempted state supreme court decisions invalidating arbitration agreements).

313. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32–33 (1991) (rejecting inequality of bargaining power between employers and employees as a reason to categorically reject arbitration agreements in employment contracts).

ple, the Court in *Gilmer* asserted that the employee—"an experienced businessman"—was not coerced into signing an arbitration agreement despite the fact that he could not work in the industry without waiving the right to litigate.[314] In contrast to the facts of *Gilmer*, most of the workers whose legal claims are blunted by arbitration clauses with class action waivers are not "experienced businesspeople" but blue collar workers who are effectively prevented from suing for illegal discrimination.[315] By failing to appreciate the limited reach that Congress intended for the FAA, the Justices have "eviscerate[d] the important role played by an independent judiciary in eradicating employment discrimination."[316]

3. Deference to Unconscionable Terms.—In over a dozen opinions, the Supreme Court has asserted—without evidence—that Congress enacted the FAA with the intent of compelling courts to enforce arbitration clauses "according to their terms" or "as written."[317] This "according to their terms" language facilitates the arbitration bootstrap because firms can put anti-consumer terms in the arbitration clause and, judges reason, the FAA requires enforcement of those terms.[318] The Court has converted its judge-made presumption of arbitrability into a presumption of contract terms being enforceable as long as they are inserted into an arbitration clause. When legislators in 1925 discussed the enforceability of arbitration agreements, they limited their inquiry—and their legislation—to the issue of allowing merchants to remove their contract disputes from federal courts to private arbitral tribunals. Congress gave no thought to the possibility that decades later firms would laden arbitration clauses with terms that were unconscionable, inequitable, or otherwise unenforceable under applicable state law.

The Supreme Court has claimed that Congress intended arbitration clauses to trump "public policy" concerns of the states, such as protecting citizens from unconscionable contract terms.[319] Thus, courts have held that precluding class action waivers would impermissibly "undermine the FAA."[320] These policy concerns do not undermine the FAA because the Act was never intended to apply to these situations. Congress did not intend the FAA to make individual terms in an arbitration clause enforceable, especially

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314. *Id.* at 33.

315. *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251–53 (2009) (describing the claims of maintenance and cleaning employees who had agreed to arbitrate discrimination claims).

316. *Gilmer*, 500 U.S. at 42 (Stevens, J., dissenting).

317. *See* cases cited *supra* note 214.

318. *See* Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1212–13 (11th Cir. 2011) (referring to "the FAA's objective of enforcing arbitration agreements according to their terms").

319. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011).

320. Coneff v. AT&T Corp., 673 F.3d 1155, 1159 (9th Cir. 2012).

if those terms violated state law when not incorporated into an arbitration clause.

First, although courts invoke the legislative history of the FAA to uphold class action waivers in arbitration clauses,[321] Congress did not desire enforcement of class action waivers embedded in arbitration clauses in contracts of adhesion.[322] Congress never considered class actions, waivers, or the possibility that firms would manipulate the terms of arbitration clauses in order to nullify state-law doctrines designed to protect consumers and workers. Congress never envisioned—or desired—the holdings of *Concepcion* and its progeny because Congress intended the FAA to apply only to inter-merchant disputes, not consumer contracts or consumer-initiated litigation.[323] Thus, when courts assert that they must enforce class action waivers in arbitration clauses lest they create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[324] they are wrong.

Second, courts incorrectly invoke congressional intent when they use the FAA to uphold arbitration clause provisions that shorten statutes of limitations.[325] Congress expressed no such intention. Indeed, the only apparent reference to statutes of limitations occurred when one senator praised the fact that "most of the States have legislated . . . that no provision in the contract shortening the time of the statute of limitations shall be valid."[326] Neither the congressional reports, supporting documents, nor hearing testimony ever hinted that statutes of limitations were too long or that arbitration clauses could be used to shorten statutes of limitations. Certainly Congress never considered firms doing so in consumer contracts. Congress was concerned only with inter-merchant disputes; the claims of consumer fraud and other statutory violations that consumers are forced to arbitrate are fundamentally different than the commercial disputes that prompted Congress to enact the FAA.

Third, when courts claim that arbitration provisions limiting damages or injunctive relief must be enforced,[327] they are misreading the legislative history of the FAA. Congress did not intend the FAA to be a mechanism that firms could use to limit remedies—whether damages or injunctive relief—to

321. *See supra* note 213 and accompanying text.

322. *See* Tracey & McGill, *supra* note 86, at 461–62 (contending that "[i]ncluding a class action waiver in a modern-day adhesion contract raises an unconscionability 'red flag' that Congress hardly could have anticipated when it adopted the FAA").

323. *See id.* (explaining that "[c]onsumer arbitration agreements lack the fundamental foundation of contractual arbitration that Congress likely anticipated: equal bargaining power").

324. *Concepcion*, 131 S. Ct. at 1753 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

325. *See supra* subpart III(A).

326. *Arbitration Hearings*, *supra* note 238, at 10 (statement of Sen. Walsh of Montana).

327. *See supra* note 189 and accompanying text.

consumers and workers.[328] Congress conceived of arbitration as a decision-making process. Supporters of the FAA championed arbitration as a more efficient mechanism for fact-finding—especially regarding trade custom—not as a device that defendants could use to preemptively cap their damages.

4. Preemption of State Laws to Protect Consumers.—Although courts hold that Congress intended the FAA to prevent states from enacting laws to protect their citizens, Congress did not intend the FAA to preempt state law. The supporters made a point of noting that the FAA did not affect state laws or state courts but rather "declares simply the policy of recognizing and enforcing arbitration agreements *in the Federal courts*[.] [I]t does not encroach upon the province of the individual States."[329] To accompany his testimony to Congress, Cohen submitted a brief that declared: "There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. The statute can not have that effect."[330] Cohen promised that the FAA would not "infringe upon the provinces or prerogatives of the States."[331] Writing immediately after the law's enactment, Cohen reiterated that the FAA was a procedural law for federal courts and that state law determined whether arbitration agreements were enforceable in state courts.[332]

In addition to clear statements of intent that the FAA should apply neither to state courts nor state laws, other contextual evidence points to the same conclusion. First, leading up to congressional consideration of the FAA, the ABA drafted both the FAA and the Uniform State Arbitration Act (USAA),[333] which would apply to state courts in states that adopted the USAA. The latter would have been entirely unnecessary if the FAA had the reach that the Supreme Court ascribed to it sixty years later. Second, witnesses testified that they hoped that the FAA would be a model for states to follow to enact their own legislation to make arbitration clauses

328. Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 154 (Cal. Ct. App. 1997).

329. Comm. on Commerce, Trade and Commercial Law, *The United States Arbitration Law and its Application*, 11 A.B.A. J. 153, 155 (1925) (emphasis added); *see also Joint Hearings*, *supra* note 232, at 38 (brief of Julius Henry Cohen) ("Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts."); H.R. REP. NO. 68-96, at 1 (1924) ("The purpose of this bill is to make valid and enforcible [sic] agreements for arbitration . . . in the Federal courts.").

330. *Joint Hearings*, *supra* note 232, at 40 (brief of Julius Henry Cohen); *see also* Southland Corp. v. Keating, 465 U.S. 1, 26 (1984) (O'Connor, J., dissenting) ("If characterizing the FAA as procedural was not enough, the draftsmen of the Act, the House Report, and the early commentators all flatly stated that the Act was intended to affect only federal-court proceedings.").

331. *Joint Hearings*, *supra* note 232, at 39 (brief of Julius Henry Cohen).

332. Cohen & Dayton, *supra* note 272, at 275–76 ("The statute as drawn establishes a procedure in the Federal courts . . . . It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws.").

333. Moses, *supra* note 234, at 127 n.187.

enforceable.[334] This argument makes no sense if the FAA required states to enforce arbitration clauses, as the *Southland* opinion asserted. Finally, the drafters and supporters of the FAA pronounced that "[t]he statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."[335] Indeed, while some scholars have defended the *Southland* opinion,[336] "almost all of the commentators who have written about *Southland* agree that this case was wrongly decided and inconsistent with congressional intent."[337] In short, the FAA should not affect state legislators' efforts to protect consumers in their states from anti-consumer arbitration provisions.

In sum, the Supreme Court Justices did not simply misread the legislative history of the FAA; they made it up out of whole cloth.[338] Misreading would have required the Justices to review the pertinent hearings and reports, and then to misinterpret that record. But the Justices cite nothing from the legislative history when they assert how the 1925 Congress would have wanted the FAA applied. This is not surprising because there is nothing in the legislative record to indicate that Congress intended the FAA to apply to consumer contracts or to statutory claims; nor did Congress seek to create a federal policy that "favored" arbitration, especially a policy that prevented states from enforcing their consumer protection laws and applying their contract doctrines to arbitration clauses. Instead, all of the evidence from the historical record shows that Congress either did not consider or did not intend any of these outcomes.

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334. *Joint Hearings*, *supra* note 234, at 28 (statement of Alexander Rose).

335. Comm. on Commerce, Trade and Commercial Law, *supra* note 326, at 154; *see also id.* ("A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts.").

336. Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 169 (2002).

337. Moses, *supra* note 234, at 125–26 ("To reach its decision, the Court had to virtually ignore the legislative history that it nonetheless claimed to rely upon."); Horton, *supra* note 228, at 445–46 ("[T]he vast majority of scholars believe that Congress understood the [FAA] to be a federal procedural rule that neither applied in state court nor preempted state law."); *see also* Southland Corp. v. Keating, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting) ("One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.").

338. *See* Moses, *supra* note 232, at 113 (contending that, in reference to the FAA, "[t]he Court has, step by step, built a house of cards that has almost no resemblance to the structure envisioned by the original statute").

C. The Policy Consequences of Misconstruing the Legislative History of the FAA

The Supreme Court's misreading of congressional intent has created a deeply flawed policy regarding mandatory arbitration clauses. The Court-facilitated steady expansion of mandatory arbitration beyond the bounds intended by Congress has served to undermine entire bodies of both federal and state law, while leaving state legislators unable to protect their citizens.

The Supreme Court justified its expansion of the FAA's scope to include statutory claims by asserting that requiring plaintiffs to submit those claims to mandatory arbitration was not tantamount to waiving their statutory rights.[339] Even if that were true at some point in the past, it no longer holds true. With the Court's evisceration of the Effective Vindication Doctrine in *Italian Colors*, when the arbitration clause includes a class action waiver, it is, in fact, tantamount to a prospective waiver of rights.[340] Arbitration clauses that preclude classwide procedures effectively prevent consumers from pursuing relatively low-value claims, especially because attorneys generally refuse to represent individual plaintiffs in such actions.[341] Thus, it is not surprising that when defendants win motions to compel arbitration, plaintiffs generally do not arbitrate, instead letting their claims expire without remedy.[342] Even when a firm's arbitration process can be characterized as relatively "consumer friendly," few consumers exercise their contractual right to individual arbitration.[343] Several courts have recognized that forcing consumers to arbitrate individually instead of litigate effectively waives important statutory remedies.[344]

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339. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 265 (2009).

340. Lemley & Leslie, *supra* note 13, at 11. Furthermore, in many instances, a class action waiver can effectively prevent meaningful equitable relief because an arbiter's injunction applies only to the individual plaintiff, allowing a firm to continue its misconduct against other consumers. *See* Schatz v. Cellco P'ship, 842 F. Supp. 2d 594, 610–11 (S.D.N.Y. 2012) ("This clause would seem to prohibit the arbitrator from ordering Verizon to lower the prices being charged to a group of customers based on the claim of an individual customer.").

341. McKenzie Check Advance of Fla., LLC v. Betts, 112 So. 3d 1176, 1184 (Fla. 2013).

342. *See* CFPB ARBITRATION STUDY, *supra* note 16, § 6.7.1, at 59–60 ("For the 46 class cases and six individual cases in our set in which a motion to compel arbitration was granted, we reviewed the court dockets . . . for indications of a subsequent filing in arbitration. For the 46 class cases, we found 12 subsequent arbitration filings . . . . For all of the six federal individual cases in which the court granted an arbitration motion, we found no evidence in the court record that a subsequent arbitration proceeding was filed." (footnotes omitted)).

343. *See* Gilles, *supra* note 63, at 1224 ("Despite how 'quick [and] easy' AT&T's arbitration process in the *Concepcion* case may have been, 'few consumers invoked [that] process'—and one wonders if any did. Certainly, individual arbitrations of consumer claims will have a difficult time attracting lawyers, who will find little profit in representing a handful of small-claims clients." (footnotes omitted)).

344. *See* Crewe v. Rich Dad Educ., LLC, 884 F. Supp. 2d 60, 84 n.13 (S.D.N.Y. 2012) (collecting cases).

This situation is made even worse when firms employ arbitration clauses to bootstrap all manner of anti-plaintiff terms in their contracts. Shortened statutes of limitations reduce the likelihood of plaintiffs filing their claims in time. Damage-limitation provisions reduce the incentive to sue and increase the risk that even successful plaintiffs will not be fully compensated for their proven injuries. The manipulation of fee-shifting provisions increases the problem. Judges have asserted that two-way fee-shifting provisions encourage plaintiffs to bring suit.[345] While one-way pro-plaintiff fee-shifting statutes may have this effect, pro-defendant fee-shifting provisions can deter plaintiffs from bringing any action,[346] even a meritorious one, due to the fear that adjudicator error could result in significant financial penalties for the plaintiff.[347] Forum-selection clauses included in arbitration provisions can render arbitration costs prohibitive. Finally, confidentiality and related clauses can prevent victims of mass misconduct from coordinating their efforts to seek relief.

The Supreme Court seems unconcerned by these anti-plaintiff terms because, the Justices assert, consumers and employees are voluntarily agreeing to mandatory arbitration and the attendant terms. Consumers, however, are often unaware that their contracts include an arbitration clause.[348] One study out of St. John's University "found that 87% of respondents who said that they had never entered a consumer contract with an arbitration clause had indeed entered into at least one consumer contract that included a

345. *Id.* at 83–84 ("Further, the fee- and cost-shifting provision of the Agreement here gives counsel a substantial incentive to bring a genuinely meritorious claim: It provides that 'the prevailing party shall be entitled to obtain all reasonable costs, including its reasonable attorney fees at the trial and appellate levels.'").

346. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 645 (2012) ("[B]ounty and fee-shifting clauses are plainly intended to avoid liability and not to select an alternative forum for the resolution of disputes.").

347. Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 160–61 (2006) (noting that the pro-defendant English rule may "deter[] meritorious litigation, particularly by litigants with limited resources."). Some courts have held that the possibility of fee shifting undermines arguments that class action waivers are unconscionable. *See, e.g.*, Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638–39 (4th Cir. 2002) (holding that a class action waiver in an arbitration clause was not unconscionable because the plaintiff could recover her attorney's fees under the prevailing fee-shifting statutes); Brueggemann v. NCOA Select, Inc., No. 08-80606-CIV, 2009 WL 1873651, at *3 (S.D. Fla. June 30, 2009) ("The Eleventh Circuit has held that class action waivers in arbitration agreements are valid and enforceable, especially when the plaintiff would still be entitled to attorney's fees awards."); *id.* (collecting cases). However, if courts enforce class action waivers in arbitration clauses, then the "availability of attorney's fees is illusory if it is unlikely that counsel would be willing to undertake the representation." Muhammad v. Cnty. Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006).

348. Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 547 (2005) ("The courts are permitting the removal of large numbers of disputes from our system of justice into private forums, without the consent, agreement, or knowledge of the participants.").

pre-dispute arbitration clause."[349] Of those consumers who claimed to look for arbitration clauses and who claimed to never enter contracts that included them, "85% had . . . entered at least one contract with an arbitration clause."[350]

The relatively complex language employed in arbitration clauses exacerbates the problem. The CFPB study found that in many industries, arbitration clauses required a significantly higher level of education to understand than the remainder of the contract.[351] Even when consumers are aware that their contracts include an arbitration clause, they do not comprehend the details. Over one-third of respondents in one study believed that they could litigate their claims despite the presence of pre-dispute arbitration clauses in their contracts.[352] In another study, fewer than one in five respondents recognized that a contract that included an arbitration clause "could impact their right to a jury trial."[353] Furthermore, a majority of consumers believed—incorrectly—that they could still participate in a class action lawsuit.[354]

That mandatory arbitration is imposed on an unaware public further magnifies the harm caused by the Court's misreading the FAA to prevent states from ensuring knowing waiver of the right to litigate. The Court has claimed that states can "protect[] consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. . . . under general contract law principles,"[355] but then ignores and invalidates any state laws designed to do so.[356] The Supreme Court struck down Montana's requirement that the first page of a contract provide notice if the contract includes an arbitration clause because the law applies "specifically and solely [to] contracts 'subject to arbitration,' [and thus] conflicts with the FAA."[357]

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349. CFPB ARBITRATION STUDY, *supra* note 16, § 3.2, at 8 (citing Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, *'Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements* 60 (St. John's School of Law Legal Studies Research Paper Series, Paper No. 14-0009)), http://ssrn.com/abstract=2516432 [http://perma.cc/B66N-4WHV].

350. *Id.* § 3.2, at 8.

351. *See id.* § 2.4, at 28 (In market for GPR prepaid card contracts, "the arbitration clauses . . . in most cases were written at a higher grade level (with an average Flesch-Kincaid grade level of 15.0, as compared to 11.8 for the rest of the contract) and had worse readability scores . . . ."); *id.* § 2.4, at 29 ("Storefront payday loan arbitration clauses almost always were more complex and written at a higher grade level than the rest of the payday loan contract.").

352. *Id.* § 3.1, at 3–4.

353. *Id.* § 3.2, at 7–8 (citing Sovern et al., *supra* note 347).

354. *Id.* § 3.1, at 3–4 ("When we asked consumers if they could participate in class action lawsuits against their credit card bank, more than half of those whose agreements had pre-dispute arbitration clauses thought that they could participate (56.7%).").

355. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995).

356. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006) ("[W]e cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contract law.'").

357. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996).

Under this reasoning, states cannot require any notice regarding arbitration, because any law requiring notice of arbitration, by definition, targets contracts with arbitration provisions. Nothing in the legislative history of the FAA even remotely suggests that Congress intended to interfere with state law at all, let alone prevent states from ensuring that their citizens enter arbitration agreements knowingly.[358] In short, the Supreme Court arbitration jurisprudence affirmatively thwarts truly consensual arbitration by preventing consumers from being informed that they are waiving their rights to litigate and to participate in class actions.[359]

By upholding arbitration clauses in contracts of adhesion and enforcing otherwise unenforceable contract terms as long as they are inserted into arbitration provisions, courts have dismantled the apparatus of consumer protection in the United States. Arbitration allows firms to circumvent mandatory rules, which are designed to protect consumers, by forcing consumer claims into arbitration systems that may not recognize these rules.[360] After *Concepcion*, firms can successfully preclude both class action litigation and class-wide arbitration.[361] Qualified private attorneys are unlikely to take cases to individual arbitration.[362] Professor Sternlight has explained that "[b]y permitting companies to use arbitration clauses to exempt themselves from class actions, *Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued."[363] Similarly, Public Citizen predicted that *Concepcion* will cause "more hidden fees and charges on your cellphone bill, more predatory lending, more discrimination—in short, a less just society."[364]

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358. *See* Casarotto v. Lombardi, 886 P.2d 931, 935 (Mont. 1994), *vacated sub nom.* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (describing how Montana legislators "did not want Montanans to waive their constitutional right of access to Montana's courts unknowingly").

359. *See* Moses, *supra* note 346, at 542 (critiquing the Court's opinion in *Casarotto*).

360. Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1285 (2000) ("[U]nder the current system, the parties to a transaction are, indeed, able to convert mandatory laws into default laws through the use of arbitration—making the use of arbitration to resolve issues related to mandatory laws problematic.").

361. Gross, *supra* note 19, at 54 ("Academics and the media viewed *AT&T Mobility* as signaling the death of class arbitration as a method to redress small dollar value claims.").

362. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1210 (2012) ("[I]t is inconceivable that a private attorney, who might have sufficient expertise in consumer fraud, will have the economic incentive to root out consumer fraud if the only economic gain to be had is through individual arbitrations. The significant investment of resources required to identify wronged individuals and to pursue their small claims on an individualized basis likely will not justify any eventual gains.").

363. Sternlight, *supra* note 25, at 704.

364. Deepak Gupta, *Congress Must Undo Damage of U.S. Supreme Court's Latest Anti-Consumer Decision*, PUB. CITIZEN (May 17, 2011), http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3346 [http://perma.cc/8DE4-M2VM].

The claim that firms impose arbitration because it is more efficient than litigation is disproven by examining the contents of their non-consumer and non-employment contracts. Firms that impose mandatory arbitration clauses in their consumer contracts do not include such terms in their contracts with other businesses. In their empirical study, Professors Theodore Eisenberg, Geoffrey Miller, and Emily Sherwin show for firms that impose arbitration clauses on their customers and employees, "less than 10% of their negotiated non-consumer, non-employment contracts included arbitration clauses."[365] The authors conclude that "companies value, even prefer, litigation as the means for resolving disputes with peers. . . . [This] casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses."[366] This suggests that arbitration in consumer contracts is designed to hurt consumers, blunt class actions, and deter consumers from pursuing their rights.

The Supreme Court has essentially held that the contract defense of unconscionability does not apply to arbitration because Congress wanted to preempt anything that would hamper arbitration. But that risks eliminating all contract defenses because whenever a contract defense is applied to a term in an arbitration clause, it prevents the strict enforcement of the arbitration clause and thus, in the Court's view, hampers arbitration.

IV. Reconciling the Legislative Intent and the Practical Reality of Arbitration Clauses

The Supreme Court's misreading of the FAA and congressional intent has created a legal regime in which firms can immunize themselves from lawsuits brought by their customers and employees. A proper, comprehensive solution would require unraveling the chain of mistakes that the Supreme Court has made regarding the FAA over the past three decades: courts would not interpret the FAA to apply to federal statutory claims;[367] courts would not use the FAA to make arbitration clauses in consumer and employment contracts enforceable; courts would not apply the FAA to state courts; and courts would not interpret the FAA to invalidate any state laws designed to regulate arbitration clauses. All of these holdings are inconsistent with the text and legislative history of the FAA. After over three decades of misrepresenting congressional intent, the Supreme Court is unlikely to see the error of its ways on any or all of these points.

Congress has been silent for far too long on the issue of arbitration. One can appreciate that legislators may be reticent to respond to every Supreme Court decision that arguably misperceives legislative intent or misapplies a

365. Eisenberg et al., *supra* note 14, at 876.

366. *Id.*

367. *See* Moses, *supra* note 232, at 144 (explaining "why arbitration of statutory rights is simply wrong").

federal statute. In interpreting the FAA, however, the Supreme Court has for decades—over the course of more than a dozen opinions—incorrectly asserted that Congress intended to enact a national policy favoring private arbitration over public litigation (even of federal statutory rights); that Congress intended to prevent state legislatures from protecting their residents from hidden, poorly written, and overreaching arbitration clauses; and that Congress intended to prevent courts from applying the otherwise applicable unconscionability doctrine to arbitration clauses and their terms. This series of judicial mistakes necessitates a congressional response. For the past few Congresses, a group of senators and representatives has introduced the Arbitration Fairness Act (the AFA).[368] As currently envisioned, the AFA would prevent enforcement of pre-dispute agreements to arbitrate employment claims, consumer disputes (including securities claims), civil rights claims, and alleged antitrust violations.[369]

While a step in the right direction, the AFA is no panacea for the problems detailed in Parts I and II. First, the AFA is unlikely to pass in the foreseeable future. Second, as written the AFA is a partial solution at best. While it pares back the reach of the FAA—which the Supreme Court improperly expanded—to reflect the intent of the 1925 Congress, the AFA does not address all of the mistakes that the Supreme Court has made with respect to the FAA. For example, the AFA does not restore the right of state legislatures to require effective notice of arbitration provisions or of state courts to apply unconscionability doctrine to the terms of an arbitration clause.[370] So long as Congress is addressing the problems created by the Supreme Court's arbitration jurisprudence, Congress should remedy all of the problems, including the arbitration bootstrap and the high court's intrusion into state prerogatives.

Short of congressional action, lower courts can still address the problem of the arbitration bootstrap by which firms insert unconscionable—or otherwise unenforceable—terms into arbitration clauses in an effort to insulate the terms from judicial invalidation. This is a relatively new front in the battle over arbitration clauses. Lower courts can still prevent *Concepcion* from being applied in an overly broad fashion that further undermines consumer protection and employment discrimination laws.

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368. *E.g.*, Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015); Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013).

369. Congress has already engaged in targeted arbitration reform. For example, Congress has barred defense contractors and subcontractors from imposing mandatory pre-dispute arbitration clauses in their employment contracts. Weston, *supra* note 81, at 793 (citing Department of Defense Appropriations Act of 2010, Pub. L. No. 111-18, 123 Stat. 3409 (2009)).

370. Of course, such protections would be less necessary if pre-dispute arbitration agreements were generally unenforceable, as the AFA would provide, but these state laws may still be necessary in contract disputes between merchants. The 1925 Congress never intended the FAA to preempt the ability of states to protect merchants where appropriate.

Faced with an arbitration clause that contains unconscionable terms, courts can take one of three approaches. First, courts can enforce the arbitration clause as written, unconscionable terms and all. This approach is the arbitration bootstrap. Second, courts can sever the unconscionable terms and enforce the remainder of the arbitration clause. Third, courts can conclude that so many unconscionable terms permeate the arbitration clause that severing the terms is impractical, and consequently, the arbitration clause as a whole is unenforceable. Each of these approaches will be discussed in turn. This Part concludes that only the latter two options are consistent with Congressional intent and good public policy.

A. Bootstrap

Bootstrapping refers to firms inserting unconscionable terms into an arbitration clause in the hopes that judicial deference to arbitration clauses will extend to otherwise unconscionable or unenforceable terms buried within these clauses. The *Concepcion* Court has seemingly laid the groundwork for firms to employ the arbitration bootstrap by forbidding California courts from applying that state's neutral unconscionability doctrine to arbitration clauses. Building on *Concepcion*, the *Italian Colors* opinion implicitly accepted the arbitration bootstrap by requiring enforcement of an arbitration clause that contained both a class action waiver and a non-coordination provision, which combined to make any arbitration economically irrational.

Courts should recognize when arbitration clauses are being used to bootstrap other terms into enforceability. Arbitration clauses have become firms' go-to mechanisms for inserting into contracts unconscionable terms that would otherwise be unenforceable. These terms have little—and usually nothing—to do with the arbitration process itself, whose efficiency is a function of informality, limited discovery, and streamlined proceedings.[371] Firms are essentially exploiting the following loophole created by courts: (1) certain anti-plaintiff terms are unenforceable; (2) courts should defer to arbitration clauses and uphold their provisions; thus, (3) anti-plaintiff terms inserted into arbitration clauses will benefit from this judicial deference.[372] Thus, businesses use the cover of an arbitration clause to impose anti-plaintiff terms that have nothing to do with arbitration as such and, but for their inclusion in a so-called arbitration clause, would be unenforceable.

Arbitration bootstrapping is inconsistent with the purpose of the FAA. Before the 1980s-era push by the Supreme Court to make all claims arbitrable, the Justices correctly noted that "the purpose of Congress in 1925

371. *Id.*, at 787.

372. Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 232 (Tex. 2014) ("Courts should also use care not to intrude upon arbitral jurisdiction under the guise of an unconscionability defense.").

was to make arbitration agreements as enforceable as other contracts, but not more so."[373] The 1924 House Report noted that under the FAA, "[a]n arbitration agreement is placed upon the same footing as other contracts, where it belongs."[374] Even as the Supreme Court expanded the FAA beyond the vision of Congress, the Justices repeatedly acknowledged that Congress intended the FAA "to place arbitration agreements upon the same footing as other contracts."[375] To restore equal footing, the Supreme Court would have to recognize its incorrect assertion of a national policy favoring arbitration is not only false, it is inconsistent with the Court's own admission that the FAA merely put arbitration agreements on the same footing as other contracts.[376] The Court often asserts both that the FAA puts arbitration clauses on *equal* footing and that the FAA *favors* arbitration. For example, the *Concepcion* Court asserted both that the FAA requires courts to "place arbitration agreements on an equal footing with other contracts"[377] and that the Act "embod[ies] [a] national policy favoring arbitration."[378] Yet the Court seems blind to the inherent contradiction between these assertions, let alone to the fact that only the former finds support in the legislative history of the FAA.

The arbitration bootstrap creates problems of unequal footing, in that unconscionable terms are treated differently depending on whether or not they reside in a contract with an arbitration clause. The *Concepcion* Court ignored that the *Discover Bank* rule applied to all class action waivers and did not treat arbitration clauses unequally.[379] California was not alone. For example, the courts of New Mexico invalidated unconscionable class action waivers, regardless of whether the underlying contract contains an arbitration clause.[380] It would be incongruous for these courts to be blocked from

373. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967).

374. H.R. REP. NO. 68-96, at 1 (1924).

375. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 275 (1995) ("[A] broad interpretation of this language is consistent with the Act's basic purpose, to put arbitration provisions on 'the same footing' as a contract's other terms.").

376. Moses, *supra* note 346, at 539.

377. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

378. *Id.* at 1749 (second alteration in original) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)); *see also Gilmer*, 500 U.S. at 24, 26 (claiming both that the FAA "place[d] arbitration agreements upon the same footing as other contracts" and created "a healthy regard for the federal policy favoring arbitration").

379. *Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting) ("The *Discover Bank* rule is consistent with the federal Act's language. It 'applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.'"); *id.* at 1756 ("California law sets forth certain circumstances in which 'class action waivers' in *any* contract are unenforceable."); Tracey & McGill, *supra* note 87, at 459–60.

380. Fiser v. Dell Comput. Corp., 188 P.3d 1215, 1218–19 (N.M. 2008).

enforcing their rules so long as the waiver is buried in an arbitration clause.[381] Although class action waivers remain unenforceable in many states in a nonarbitration context,[382] firms can easily employ arbitration clauses to circumvent these state laws. Thus, "opting for arbitration, corporations can always opt out of class actions, despite a generally applicable state-law doctrine that would limit such opt outs."[383] This asymmetry is the antithesis of the equal footing that the FAA requires.[384]

B. Sever

Instead of facilitating the arbitration bootstrap, courts can sever unconscionable terms and enforce the remainder of the arbitration clause. When a contract or arbitration provision has a severability clause, it is relatively straightforward for the courts to "strike the offending unconscionable provisions to preserve the contract's essential term of arbitration."[385] Judges, however, have the power to sever unconscionable terms even if the contract does not contain a severability clause.[386] Both before and after *Concepcion*, some courts have embraced severability as a solution to unconscionable terms in arbitration clauses. For example, courts have severed from arbitration clauses provisions that unconscionably shift fees,[387] limit remedies,[388] select an unsuitable forum,[389] or shorten statutes of

381. *See* THI of N.M. at Hobbs Ctr., LLC v. Patton, 741 F.3d 1162, 1164 (10th Cir. 2014) (holding that the FAA preempts New Mexico state law concerning the enforceability of compulsory arbitration provisions).

382. *See, e.g.*, Figueroa v. THI of N.M. at Casa Arena Blanca LLC, 306 P.3d 480, 485 (N.M. Ct. App. 2012) (discussing New Mexico public policy concerning the unenforceability of class action waivers).

383. Wilson, *supra* note 91, at 123 ("After *Concepcion*, class waivers may be invalidated as unconscionable if they are in an agreement that does not have an arbitration clause, but they may not be invalidated under the same doctrine if they are in an agreement that *does* have an arbitration clause.").

384. *Id.* ("This result is not consistent with the purpose of the FAA that is reflected in the text and legislative history: eliminating judicial hostility by ensuring that arbitration agreements are enforced on *equal* footing with other contracts."); *see also* Ware, *supra* note 125, at 1026 ("If a contract clause waiving punitive damages in court is unconscionable, then an arbitration clause prohibiting arbitral punitive damages awards is unconscionable.").

385. Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 768 (Wash. 2004); *see also* Long v. BDP Int'l, Inc., 919 F. Supp. 2d 832, 846 (S.D. Tex. 2013) ("This severability provision demonstrates the parties' intent to sever unconscionable provisions.").

386. CAL. CIV. CODE § 1670.5 (West 2011); Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 219 (3d Cir. 2003); 2 RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

387. *In re* Checking Account Overdraft Litig., 485 F. App'x 403, 406 (11th Cir. 2012).

388. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 675 (6th Cir. 2003) (holding that unconscionable fee-splitting and remedies provisions could be severed).

389. *See* Willis v. Nationwide Debt Settlement Grp., 878 F. Supp. 2d 1208, 1221 (D. Or. 2012) (stating that the court "may sever the forum-selection provision from the arbitration clause and require arbitration in Oregon while enforcing the remainder of the clause").

limitations.[390] The original drafters of the FAA believed that arbitration clauses would be severable if found unenforceable.[391]

The *Concepcion* Court ruled against severing the class action waiver at issue in that case. This decision was in error. The class action waiver was unconscionable under applicable state law, which the FAA text explicitly states should govern. The *Concepcion* majority asserted that striking the class action waiver would fundamentally undermine the arbitration process, making it less efficient and less likely to be utilized. This is incorrect because the parties can engage in classwide arbitration. As Justice Breyer explained in his dissent, "a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the *Discover Bank* rule would reinforce, not obstruct, that objective of the Act."[392]

Even given the *Concepcion* precedent, the other anti-consumer terms embedded in arbitration clauses are sufficiently distinguishable from class action waivers that courts can sever them without running afoul of *Concepcion*. The *Concepcion* Court opined that state law cannot declare contracts—including arbitration agreements—unconscionable for not providing for "judicially monitored discovery" or use of the Federal Rules of Evidence.[393] Even when state laws are facially neutral, the Court suggested that such laws would be preempted by the FAA because these laws "would have a disproportionate impact on arbitration agreements."[394]

These "disproportionate impact" arguments do not apply to the other anti-consumer terms that firms embed in arbitration clauses. Congress enacted the FAA based on representations that arbitration—for inter-merchant disputes—can be more efficient than traditional litigation.[395] None of the anti-consumer terms discussed in subpart I(C) enhance the efficiency of the arbitration process. First, truncating statutes of limitations does not make the process of arbitration efficient; it simply makes it happen sooner—and often not at all, as victims of misconduct are less likely to file their claims in time. Second, limiting remedies—whether it be a cap on damages or prohibition on equitable relief—does not make dispute resolution more efficient; it simply diminishes the likelihood that successful plaintiffs will

390. *See Long*, 919 F. Supp. 2d at 846 (concluding that a one-year limitation period as applied to Fair Labor Standards Act claims is unconscionable and that severance is appropriate).

391. Cohen, *supra* note 264, at 156 ("[I]n the legal sense the arbitration provision is severable, in that, though unenforceable itself, it does not avoid the rest of the contract . . . ."); *see also* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 70–71 (2010) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006))).

392. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1759–60 (2011) (Breyer, J., dissenting).

393. *Id.* at 1747 (majority opinion).

394. *Id.*

395. *See supra* subpart III(A).

receive relief similar to what they could get in court. Third, provisions to override statutory fee-shifting provisions do not aid in fact-finding or arbiter decision making; they merely reduce the plaintiffs' incentive to pursue arbitration, even when plaintiffs have suffered a legal wrong. Fourth, forum-selection clauses can increase inefficiencies when the designated forum is thousands of miles away from the parties and necessary witnesses. Finally, non-coordination clauses not only fail to enhance the efficiency of arbitration; they are a major source of inefficiency. Such clauses significantly increase the cost of arbitration, to the point where individual arbitration is prohibitively expensive because the costs exceed the maximum award available at arbitration. Non-coordination clauses, like other terms that are unconscionable (in at least some jurisdictions), are neither designed nor intended to increase the efficiency of arbitration. Rather, each of these anti-consumer terms is designed to reduce the probability of arbitration actually happening because rational plaintiffs realize that the expected benefits of pursuing their claims are dwarfed by the likely costs. Because attorneys perform a similar cost–benefit analysis, these clauses also reduce the likelihood that consumers and employees can find qualified attorneys willing to take their cases to arbitration. Each of these terms is severable because none go to "the conduct of arbitration itself,"[396] which refers to how arbiters manage discovery, take evidence, and run the adjudication. The appropriate way to implement the congressional mandate of equal footing for arbitration clauses would require courts not to give more deference to anti-consumer terms if they reside in an arbitration clause.

Furthermore, the Supreme Court's "disproportionate impact" rationale creates a risk of improperly striking down consumer-protective laws that have a disproportionate effect on anti-consumer arbitration clauses. For example, the Ninth Circuit upheld the enforceability of an arbitration provision that violated Montana's rule against "adhesive agreements running contrary to the reasonable expectations of a party."[397] The court claimed to "take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA."[398] When courts treat neutral rules that reduce the perceived incentive to arbitrate as necessarily disfavoring arbitration—and, thus, forbidden by the FAA—this creates incentives for firms to structure their arbitration clauses in a manner that makes consumer-protective rulings appear to disfavor arbitration. Firms have tried to artificially tie arbitration clauses to their terms by including "[a] so-called blow-up clause [that] provides that if the class action waiver 'is

396. Clay v. N.M. Title Loans, Inc., 288 P.3d 888, 901 (N.M. Ct. App. 2012).

397. Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151, 1153–54 (9th Cir. 2013).

398. *Id.* at 1159.

found to be unenforceable, then the entirety of [the] arbitration provision shall be null and void.'"[399] The fact that a judicial decision holding that a class action waiver is unconscionable would, pursuant to the contract, move any dispute from arbitration to litigation does not make the state law—or the precipitating judicial opinion—anti-arbitration. Firms cannot hold their own arbitration clauses hostage and then assert that failure to enforce any other—unconscionable—terms in the clause would nullify the arbitration clause and thus courts must enforce the unconscionable terms. Courts should not reward such attempts to circumvent state law. Unfortunately, as it currently stands firms may be able to use poison pills to make unconscionable terms enforceable if courts are loath to enforce neutral state laws that have the incidental effect of nullifying a particular arbitration clause.

Severing unconscionable terms is not anti-arbitration. Some courts seem to treat invalidation of individual anti-consumer terms as an impediment to arbitration altogether. But the process of arbitration and the terms within the arbitration clause are separate. Provisions that shorten statutes of limitations, limit damages, or preclude injunctive relief are not inherently part of the agreement to arbitrate rather than bring claims in court; they are tangential. Firms bury them in the arbitration clause because these terms are unenforceable otherwise. There is a difference between hostility to arbitration and hostility to anti-consumer terms when they are contained within an arbitration clause. It is not anti-arbitration to enforce a general rule that invalidates particular contract terms regardless of whether they appear in an arbitration clause or not.

C. Strike

While severing an individual contract term is relatively straightforward, severing becomes more complicated when an arbitration clause has several unconscionable terms. Some arbitration clauses have unconscionable provisions woven throughout them.[400] In these cases, courts conclude that "severance is inappropriate when the entire clause represents an 'integrated scheme to contravene public policy.'"[401] Courts reason that striking an arbitration clause down in its entirety is appropriate when "one-sided arbitration provisions" are "central to the overall arbitration scheme and, therefore, the unconscionable provisions could not be severed from the arbitration provisions so as to save the parties' general agreement to

399. Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1207 (11th Cir. 2011); *see also* CFPB ARBITRATION STUDY, *supra* note 16, § 1.4.1, at 10, § 2.5.5, at 46 (stating that most arbitration clauses with class prohibitions also contain an "anti-severability" provision).

400. *See, e.g.*, Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1248–49 (9th Cir. 1994) (explaining that a highly integrated arbitration clause contained three different illegal provisions).

401. *Id.* at 1249 (quoting 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.8, at 70 (1990)).

arbitrate."[402] Other courts worry that trying "to ameliorate the unconscionable aspects of [an] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter."[403] For these reasons, the California Supreme Court held in *Armendariz*[404] that—instead of severing individual unconscionable terms—trial courts could strike down an arbitration clause entirely when it is "'permeated' by unconscionability."[405] Under the *Armendariz* rule, California "courts will not sever when the 'good cannot be separated from the bad.'"[406]

Some courts have questioned whether the *Armendariz* rule—and other states' versions of it—survives *Concepcion*.[407] In *Zaborowski*,[408] for instance, the Ninth Circuit applied the *Armendariz* principles to strike down an arbitration agreement that had five unconscionable clauses because severing would require the district judge to "assume the role of contract author rather than interpreter."[409] The dissent, however, argued that *Armendariz* was reversed by *Concepcion* because "[t]he reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has 'a disproportionate impact on arbitration agreements' and should have been preempted by the Federal Arbitration Act."[410]

Common law rules that permit courts to strike unconscionable arbitration clauses—when severability is not practical—are not preempted by the FAA. Congress explicitly wanted judges to apply the same contract

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402. Ruppelt v. Laurel Healthcare Providers, LLC, 293 P.3d 902, 909 (N.M. Ct. App. 2012).

403. Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1180 (9th Cir. 2003); *see also* Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 84–85 (D.C. Cir. 2005) ("If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." (citation omitted)); Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 911 (N.M. 2009) ("[W]e must strike down the arbitration clause in its entirety to avoid a type of judicial surgery that inevitably would remove provisions that were central to the original mechanisms for resolving disputes between the parties.").

404. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000).

405. *Id.* at 695.

406. Abramson v. Juniper Networks, Inc., 9 Cal. Rptr. 3d 422, 438 (Cal. Ct. App. 2004); *see also* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 271 (3d Cir. 2003) ("The cumulative effect of so much illegality prevents us from enforcing the arbitration agreement.").

407. James v. Conceptus, Inc., 851 F. Supp. 2d 1020, 1032–33 (S.D. Tex. 2012) ("The general *Armendariz* rule is in serious doubt following *Concepcion*."); Ruhe v. Masimo Corp., No. SACV 11–00734, 2011 WL 4442790, at *2 (C.D. Cal. Sept. 16, 2011) ("Although the Northern District of California has indicated that some portion of *Armendariz* has been abrogated by *Concepcion*, it did not clarify what portion of *Armendariz* was abrogated.").

408. Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461 (9th Cir. 2014).

409. *Id.* at 464 (quoting Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1180 (9th Cir. 2003)).

410. *Id.* (Gould, J., dissenting) (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011)).

doctrines to arbitration clauses that they applied to other contracts.[411] Courts have interpreted Supreme Court precedent to hold that "[s]pecial state rules for interpreting arbitration agreements cannot coexist with the FAA because Congress intended the act as its response to a 'longstanding judicial hostility to arbitration agreements.'"[412] Striking down an arbitration clause that is overburdened with nonseverable unconscionable terms is not a "special rule" for arbitration clauses; it is an application of basic contract law principles that permit judges to refuse to enforce contracts—or contract clauses—that contain unconscionable terms.[413]

Finally, it is good public policy to strike arbitration clauses in their entirety when they contain multiple unconscionable terms. If the unconscionable terms cannot be effectively severed, courts can either strike the arbitration clause or enforce it as written, unconscionable terms and all. If courts are prohibited from striking arbitration clauses entirely, then firms have a greater incentive to weave multiple unconscionable terms throughout the arbitration provisions in order to make severing too difficult. If a firm so burdens its arbitration clause with unconscionable terms that the unenforceable terms cannot be severed in a fashion that leaves behind a functioning arbitration provision, the firm should not be rewarded.[414] Ironically, if a court does not have the power to strike a clause permeated with unconscionable terms, then the more individually unenforceable terms that the firm puts in its arbitration clause, the more likely the unconscionable terms will be enforced. Allowing unconscionable arbitration clauses to be struck provides better incentives to firms to not intentionally insert unconscionable terms throughout their arbitration agreements.[415]

Conclusion

When courts enforce anti-plaintiff terms in arbitration clauses, they claim to be honoring the will of the 1925 Congress that enacted the FAA. Such assertions are wrong for several related reasons. First, the 1925 Congress did not intend the FAA to reach statutory rights. Second, Congress did not intend the FAA to apply to consumer contracts. Third, Congress did not intend arbitration clauses in contracts of adhesion to be enforceable.

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411. 9 U.S.C. § 2 (2012) (arbitration agreements enforceable except "upon such grounds as exist at law or in equity for the revocation of any contract").

412. Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 227 (Tex. 2014) (quoting Green Tree Fin. Corp.–Ala. v. Randolph, 531 U.S. 79, 89 (2000)).

413. 2 RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

414. *See* Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1249 (9th Cir. 1994) ("Our decision to strike the entire clause rests in part upon the fact that the offensive provisions clearly represent an attempt by ARCO to achieve through arbitration what Congress has expressly forbidden.").

415. *See* Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 84–85 (D.C. Cir. 2005) ("[T]he more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause . . . .").

Fourth, Congress did not intend arbitration clauses to serve as vehicles for non-negotiable terms that systematically undermine the rights and remedies of plaintiffs, including plaintiffs' ability to meaningfully enforce their rights. We now have a legal regime completely at odds with the modest goal that Congress did intend: to make agreements between merchants to arbitrate in order to resolve commercial disputes enforceable. Instead we have a legal system where courts are complicit in allowing firms to effectively prevent consumers and workers from protecting their rights.

If a contract term would not be enforceable if it were outside of an arbitration clause, it should not become enforceable because it is inserted into an arbitration clause. Unenforceable terms should remain unenforceable regardless of where they appear in a contract. Courts must cut the arbitration bootstrap. If a state contract rule applies to all contracts, that rule should apply equally to the contents of arbitration clauses. If courts stopped treating arbitration clauses as a legitimate vehicle for anti-consumer terms, businesses would probably stop doing so as well.

In order to implement the will of Congress, courts should either sever the unconscionable terms in an arbitration clause—or strike the arbitration clause altogether—so long as this is what the court would do when confronted with the same unconscionable terms in a contract without an arbitration clause.