FORM OVER FAIRNESS: HOW THE SUPREME COURT'S MISREADING OF THE FEDERAL ARBITRATION ACT HAS LEFT CONSUMERS IN A LURCH

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INTRODUCTION

Imagine, after decades together, your parents have decided that they can no longer live independently.[1] Your elderly father has been diagnosed with dementia and Alzheimer's disease, and your mother is struggling to provide all the care that he needs. She has come to a painful realization: he needs to be placed in a nursing home. After investigating the options, your mother chooses a facility that specializes in caring for adults with your father's diagnoses.

After informing you of her plan, your mother reluctantly accompanies your father to the nursing home for admission. The administrative intake manager welcomes her with a pile of paperwork to review and sign, including a thirteen-page "Admissions Agreement" to make everything official. Overwhelmed by the reality of the task before her, your mother quickly signs next to each line marked with an "X" and returns the documents to the intake manager. The remainder of the day is spent unpacking your father's things and getting acquainted with this unfamiliar place that he will now call home.

Although you can tell the transition is difficult for both of your parents, they remain strong and optimistic. But when your mother calls to tell you that your father has just been admitted to the hospital, you immediately know that this could be a life-threatening illness. Your mother confirms your suspicion when she informs you that your father has an infection and that the nursing home staff thinks it might be quite serious.

The following days melt together in a blur of hospital visits, diagnostic tests, treatments, and meetings with doctors. Although they assure you that they are doing everything they can, it does not look promising. Less than three weeks after being admitted, the very worst happens: your father passes away. Heartbroken at the loss of her husband, your mother suffers a rapid decline in health until she, too, soon passes.

In the months following your parents' deaths, you learn more about the nursing home and the circumstances leading to your father's passing. It

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[1] This fact pattern is loosely based on the events in *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011).

doesn't all add up to what you had anticipated for your father's final days, and you grow increasingly concerned. Having finally heard enough, you decide to file a wrongful death and negligence action against the nursing home under the state's Nursing Home Act.

In response, the nursing home files a motion to dismiss the lawsuit, stating that the admissions agreement your mother signed contained a binding arbitration agreement. Your lawyer assures you that the arbitration agreement cannot be enforced, since it violates the Nursing Home Act's prohibition against waivers to the right to litigate. Besides, your mother didn't have the authority to waive your father's rights anyway.

You soon learn that your lawyer might be wrong. After the court dismisses the case, appeal follows appeal until the case ends up in the U.S. Supreme Court. When a decision finally comes, your family is devastated to learn that there will be no guarantee of a trial. The Court, instead, determined that federal arbitration law preempts the state law upon which you brought a claim. Now, the only way out of the arbitration agreement is to prove that the agreement is unconscionable. The fight continues.

As in the above scenario, many people enter into arbitration agreements at some point in their lives without ever realizing what they are agreeing to. Whether they involve buying a cell phone, opening a credit card, or taking out a loan, commercial contracts of all varieties now contain arbitration provisions that restrict a consumer's right to seek a remedy in court.[2] Unfortunately, many of these provisions are buried deep within the terms of a lengthy contract, so that most consumers do not recognize that they are entering into a binding agreement to arbitrate.[3]

Consumer arbitration in the United States has a contentious and oftentimes befuddling past. Decades of judicial resistance to enforcing predispute arbitration agreements prompted Congress to enact the Federal Arbitration Act ("FAA") in 1925, mandating enforcement of commercial arbitration agreements on the same footing as any other contract provision.[4] Subsequently, the Supreme Court has declared a national policy favoring arbitration, reflected in its more recent decisions.[5] Far from its historical resistance to arbitration, the Court now enforces arbitration in previously unimaginable situations.

This Comment argues that the current judicial misreading and expansion of the FAA undermine consumer arbitration as an institution. Having disregarded the original intent of the FAA, the Supreme Court has created, and consistently applied, an overreaching policy of arbitration enforcement

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2 *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637-38 (1996).

3 *See id.*

4 *See* 9 U.S.C. § 2 (2012).

5 *See* Thomas A. Manakides, Note, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. CAL. L. REV. 433, 437-48 (2003).

that impinges upon both consumers' and states' rights. As modern commerce evolves, the courts are confronted with contractual scenarios—such as cell phone service contracts—that did not exist at the time of the FAA's passage. By applying increasingly antiquated arbitration laws to new types of consumer contracts, the Court has created some objectionable results. For these reasons, federal agencies, members of Congress, and arbitration administration bodies have all recognized the urgent need for reform.[6] As arbitration rules and proceedings develop to address contemporary issues in consumer contracting, it is time for Congress to modernize the law. Similarly, federal agencies and private arbitration administration entities must adopt necessary procedural safeguards both to avert a potential collapse and to ensure the durability of consumer arbitration.

Part I begins with a discussion of the history and development of the FAA. It then examines a series of pivotal Supreme Court decisions that have resulted in an expansive national policy favoring arbitration enforcement. Part II provides a brief discussion of whether parties may contract around the FAA for application of state arbitration law. Subsequently, Part III highlights two areas in which the Court's interpretation of the FAA has caused undesirable results for consumers. This Comment then suggests, in Part IV, several possible means of improving the current state of consumer arbitration law.

I. HISTORY OF AMERICAN ARBITRATION AND THE FEDERAL ARBITRATION ACT

Commercial arbitration is a private means of dispute resolution where the parties submit their dispute to a third party adjudicator and agree to be bound by its decision.[7] Because arbitration's consensual nature affords parties great flexibility in tailoring the arbitration agreement to their needs, courts must take care to discern the parties' intent when enforcing such agreements.[8] Far from its early days as a determinedly unpopular dispute resolution method, commercial arbitration has become a favored alternative to litigation and has garnered increased support from the federal courts.[9]

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6 *See id.* at 454-55; Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 976-91 (1999).

7 *See* Joshua R. Welsh, Comment, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in* Void Ab Initio *Contracts*, 86 MARQ. L. REV. 581, 581 (2002).

8 *See* Sternlight, *supra* note 2, at 702; Van Wezel Stone, *supra* note 6, at 961-62.

9 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:1 (4th ed. 2001).

A. *Paving the Way: The New York Arbitration Act of 1920 and the Federal Arbitration Act of 1925*

Although arbitration as a form of dispute resolution has existed at least since medieval England, Americans warmed slowly to the idea of submitting their disagreements to an arbitrator for a binding decision.[10] Prior to the 1920s, most states lacked formal arbitration laws and post-award enforcement mechanisms.[11] Predispute agreements to arbitrate were revocable at common law.[12] Most courts, while enforcing mutually amenable parties' arbitration agreements, refused to otherwise require any unwilling party to submit to arbitration regardless of a valid agreement to do so.[13] In the face of this widespread judicial hostility toward arbitration, the state legislatures were left to enact laws requiring enforcement of binding arbitration agreements.[14]

The New York Arbitration Act ("NYAA") of 1920 signaled the coming of a new trend in American dispute resolution.[15] It was the first act of its kind to put teeth into arbitration proceedings: it made contractual arbitration clauses enforceable with regard to future disputes.[16] It required parties to fulfill their agreements to arbitrate, rather than resort to the courts.[17] Within thirteen years of the NYAA's passage, twelve additional states enacted arbitration laws modeled after the New York statute.[18]

Meanwhile, similar efforts were underway for legislation at the federal level.[19] The booming economy of the early twentieth century prompted businessmen and commercial attorneys to lobby for a binding federal arbitration law.[20] They viewed arbitration as a vital alternative to the rising

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10 *See* KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION 11-14 (2010).

11 *See* Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 478 n.21 (1990).

12 *See* Kenneth F. Dunham, *Sailing Around* Erie*: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 202-04 (2006); Jiang, *supra* note 11, at 478 & n.20; Van Wezel Stone, *supra* note 6, at 985-87.

13 *See* Welsh, *supra* note 7, at 584.

14 *See* Jiang, *supra* note 11, at 478-79.

15 *See* Van Wezel Stone, *supra* note 6, at 985. Within four years of the NYAA's passage, more than sixty-five trade groups and one thousand businesses joined the Arbitration Society of America. *Id.* By 1933, twelve additional states had enacted arbitration legislation modeled on the New York statute. *Id.*

16 N.Y. C.P.L.R. § 7501 (MCKINNEY 2013); *see also* Angelina M. Petti, Note, *Judicial Enforcement of Arbitration Agreements: The Stay-Dismissal Dichotomy of FAA Section 3*, 34 HOFSTRA L. REV. 565, 571 (2005); Van Wezel Stone, *supra* note 6, at 982-84 (discussing how the New York statute was the first of its kind to make arbitration agreements as binding as other contractual provisions).

17 N.Y. C.P.L.R. § 7503 (MCKINNEY 2013).

18 Van Wezel Stone, *supra* note 6, at 985.

19 *See* Sternlight, *supra* note 2, at 644-46; Van Wezel Stone, *supra* note 6, at 985-87.

20 Sternlight, *supra* note 2, at 645; Van Wezel Stone, *supra* note 6, at 985.

costs and lengthy duration of traditional litigation in the increasingly congested federal courts.[21] In response, the American Bar Association proposed the United States Arbitration Act.[22] Congress unanimously passed that proposal as the Federal Arbitration Act ("FAA") in 1925.[23]

By enacting the FAA, Congress intended to establish the finality and enforceability of contractual arbitration provisions and ensure that arbitration agreements would be on equal footing with other contractual agreements.[24] Supporters of the law envisioned it as a procedural statute applying only to mutually agreed-upon commercial contracts.[25]

B. *Relevant Provisions of the FAA*

Section 2 of the FAA is considered the substantive provision of the law.[26] It provides that:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[27]

Excepted from the definition of commerce are employment contracts "of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[28] Sections 3 and 4 comprise the procedural framework for enforcement.[29] Section 3 allows a court to issue a stay of litigation pending arbitration, while Section 4 provides the district courts with jurisdiction to compel arbitration.[30] Although Section 2 contains no

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21 *See* Petti, *supra* note 16, at 572-73 (discussing congressional intent in enacting the FAA, an intent that presumably was shared by those lobbying for the bill).

22 *Id.* at 572.

23 Sternlight, *supra* note 2, at 645-46; Van Wezel Stone, *supra* note 6, at 986.

24 Petti, *supra* note 16, at 572-73.

25 *See* Manakides, *supra* note 5, at 451; Welsh, *supra* note 7, at 585.

26 9 U.S.C. § 2 (2012); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 is the primary substantive provision of the Act . . . . ").

27 9 U.S.C. § 2.

28 *Id.* § 1.

29 *Id.* §§ 3-4.

30 Section 3 reads:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id. § 3. Section 4 states in pertinent part:

limiting language on that section's applicability to federal courts, Sections 3 and 4 explicitly provide for their application within "any of the courts of the United States" and within "any United States district court," respectively.[31] Justice O' Connor, in a dissent, interpreted this language to mean federal, not state, courts.[32]

Notably, the drafters of the FAA included a savings clause in Section 2, which allows for nullification of an arbitration agreement based on established grounds for contract revocation.[33]

C. Prima Paint *and the Shift Toward Expansionism*

The FAA's enactment did not trigger an immediate shift toward broad enforcement of arbitration agreements within the federal courts.[34] Early decisions from the U.S. Supreme Court indicated the Court's intention to restrict the application of the FAA to commercial contracts containing a consensual arbitration provision.[35] The Court recognized a strong public policy interest in favor of enforcing arbitration only in situations where both parties knowingly agreed to submit.[36]

Early on, uncertainty about the nature of the FAA further constrained its widespread application.[37] Although Congress specifically referenced its power to regulate interstate commerce when enacting the FAA, it also plainly noted that the Act was intended to function as a procedural—not a

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> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

Id. § 4.

31 *Id.* §§ 3-4; *see also* Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 123-24 (2002).

32 *See* Southland Corp. v. Keating, 465 U.S. 1, 29 & n.18 (1984) (O'Connor, J., dissenting).

33 9 U.S.C. § 2.

34 *See generally* Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1256-58 (2011) (discussing lingering anti-arbitration sentiment among the courts and state legislatures); Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 129-36 (2012) (discussing the gradual shift in federal courts toward enforcement of arbitration agreements).

35 *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 200-02 (1956); Wilko v. Swan, 346 U.S. 427, 438 (1953), *overruled as stated in* Harter v. Iowa Grain Co., 220 F.3d 544 (7th Cir. 2000).

36 *See* Sternlight, *supra* note 2, at 647.

37 *See generally* Preston Douglas Wigner, Comment, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499 (1995) (discussing the historical development of the Supreme Court's interpretation and application of the FAA).

substantive—rule.[38] Because state laws governing the enforceability of arbitration agreements were then viewed as procedural rules, federal courts saw no reason to apply state arbitration laws.[39]

1. *Erie* and the Procedural-Substantive Arbitration Law Quandary (1938-1967)

After the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*,[40] federal courts were required to apply state substantive law in diversity cases where a conflict between federal and state law would significantly affect the result of the litigation.[41] Although the FAA's legislative history reflected that "[w]hether an agreement for arbitration shall be enforced or not is a question of procedure . . . and not one of substantive law," the question arose whether the FAA was purely a federal procedural rule, or if it instead constituted a federal substantive law.[42]

Nearly two decades later, the U.S. Supreme Court considered whether arbitration "touched on substantive rights" and thus, under *Erie*, required application of state arbitration law in diversity suits.[43] The Court skirted application of the FAA by categorizing the contract at issue as an employment contract not evidencing a transaction involving commerce, and thus not within the scope of the FAA.[44] Reading Sections 1 and 2 together with the FAA's procedural sections, the Court determined that substantive state law governed arbitration agreements contained within contracts falling outside of FAA Sections 1 and 2.[45] The Court, however, did not address

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38 H.R. REP. NO. 68-96, at 1 (1924); *see* Wigner, *supra* note 37, at 1504 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

39 Drahozal, *supra* note 31, at 126.

40 304 U.S. 64 (1938).

41 *See id.* at 78-79; *see also Federal Arbitration Act and Application of the "Separability Doctrine" in Federal Courts*, 1968 DUKE L.J. 588, 595 [hereinafter *Separability Doctrine*]. The Supreme Court's post-*Erie* decision in *Guaranty Trust Co. v. York* generated the "outcome-determinative" test subsequently applied in diversity cases. *See Separability Doctrine*, *supra*, at 596.

42 H.R. REP. NO. 68-96, at 1; Wigner, *supra* note 37, at 1505.

43 Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956).

44 *See id.* at 201 n.3 ("Since no transaction involving commerce appears to be involved here, we do not reach the further question whether in any event petitioner would be included in 'any other class of workers' within the exceptions of § 1 of the Act."); *see also* 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, 115-16 (2006).

45 *Bernhardt*, 350 U.S. at 202-03 ("For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action."); *see* Drahozal, *supra* note 31, at 126; *Separability Doctrine*, *supra* note 41, at 596-97.

whether the FAA's application to contracts coming within Sections 1 and 2 was a procedural matter until several years later.[46]

The Court's *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*[47] decision in 1967 conclusively answered this question and signaled a shift in the Court's approach toward the scope of the FAA.[48] The Court clarified that Congress relied on its Commerce Clause powers rather than its Article III powers in enacting the FAA.[49] The Court avoided taking the Article III approach that had been recently examined in *Hanna v. Plumer*.[50] In 1965, the *Hanna* Court held that when a state procedural law directly conflicts with a federal procedural law, the federal rule controls.[51] Had the *Prima Paint* Court used this reasoning to determine that the FAA applied as a controlling procedural rule, it could have limited the preemptive scope of the FAA and allowed state substantive arbitration statutes to govern non-diverse proceedings.[52] Instead, through grounding the FAA in the Commerce Clause, the Court opened the doors for its expanded application as substantive law by the post-*Erie* judiciary.[53]

2. In the Wake of *Prima Paint*: The FAA in State Courts (1968-2011)

The decisions coming out of the U.S. Supreme Court since *Prima Paint* precisely reflect such an expansion.[54] Since *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[55] in which the Court clarified its intention to resolve issues about the scope of arbitration in favor of arbitration,[56] the Court has proceeded to consistently reinforce a national policy favoring arbitration. In the 1984 *Southland Corp. v. Keating*[57] case, the Court confronted head-on the issue of whether the FAA applied in state

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46 *See* Wigner, *supra* note 37, at 1516-17 & n.107.

47 388 U.S. 395 (1967).

48 *Id.* at 404-05; Welsh, *supra* note 7, at 591-92.

49 *Prima Paint*, 388 U.S. at 405; *see also* Sternlight, *supra* note 2, at 656-57.

50 380 U.S. 460 (1965); *see* Moses, *supra* note 44, at 117-18.

51 *Hanna*, 380 U.S. at 473-74 ("*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.").

52 *See* Moses, *supra* note 44, at 116-18.

53 *See Prima Paint*, 388 U.S. at 405; Welsh, *supra* note 7, at 592.

54 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995); Southland Corp. v. Keating, 465 U.S. 1, 13 (1984); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 29 (1983).

55 460 U.S. 1 (1983).

56 *Id.* at 23; *see* Cunningham, *supra* note 34, at 130.

57 465 U.S. 1 (1984).

courts.[58] Pointing to *Prima Paint*'s conclusion that Congress relied on its Commerce Clause powers in adopting the FAA, the Court determined that the *Prima Paint* decision "clearly implied that the substantive rules of the Act were to apply in state as well as federal courts."[59] By further opining that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," the Court also appeared to preclude enforcement of state statutes designed to promote specific public policy goals through the use or restriction of arbitration.[60] *Southland* immediately elicited strong reactions from academics and practitioners due to its obvious expansion of the FAA.[61]

Shortly thereafter, the Court continued this course in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[62] where it held that agreements to arbitrate federal statutory claims must be enforced under the FAA.[63] Three years later, in *Perry v. Thomas*,[64] the Court held that the FAA preempted a California labor law that provided for maintenance of wage collection actions "without regard to the existence of any private agreement to arbitrate."[65] Even as it advanced this national policy of enforcing arbitration, the Court lacked unanimity on the appropriate scope of the FAA.[66] In his *Perry* dissent, Justice Stevens argued that "the Court has effectively rewritten the [FAA] to give it a pre-emptive scope that Congress certainly did not intend," as "the States' power to except certain categories of disputes from arbitration should be preserved unless Congress decides otherwise."[67]

Throughout the past half century, the Court has persisted in expanding the application of the FAA to situations not contemplated or existent at the time of the Act's passage.[68] Notably, arbitration agreements contained in contracts for employment and consumer services (such as cell phones and

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58 *Id.* at 3.

59 *Id.* at 12.

60 *Id.* at 16.

61 *See, e.g.*, Cunningham, *supra* note 34, at 131-133.

62 473 U.S. 614 (1985).

63 *Id.* at 625-27; *see* Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 732 (2012).

64 482 U.S. 483 (1987).

65 *Id.* at 484, 490-91 (quoting CAL. LAB. CODE ANN. § 229 (West 1971)) (internal quotation marks omitted).

66 *Id.* at 493-94 (Stevens, J., dissenting); *id.* at 494-95 (O'Connor, J., dissenting).

67 *Id.* at 493-94 (Stevens, J., dissenting). Justice O'Connor shared this view in her dissent, stating that even if the FAA did preempt the state statute, "California's policy choice to preclude waivers of a judicial forum for wage claims is entitled to respect." *Id.* at 495 (O'Connor, J., dissenting).

68 *See* Petti, *supra* note 16, at 572-73; *see also* Gregory Huffman & Matthew M. Mitzner, *The Tension Between Opposites in Supreme Court Arbitration Decisions*, 31 CORP. COUNS. REV. 63, 66-68 (2012).

credit cards) are now enforceable under the FAA.[69] The Court's recent decisions indicate that it is poised to continue even further down this road of overly broad application of the FAA.[70]

D. *The Current Scope of the FAA in Light of Recent Supreme Court Decisions*

In 2011, the Court confronted the issue of unconscionability of class action waivers in consumer arbitration agreements.[71] The resulting judicial prioritization of preserving contractual choice over protecting consumer rights left many scholars and commentators unsettled.[72]

1. *Concepcion* Kills Class Arbitration Under the FAA

AT&T Mobility LLC v. Concepcion[73] involved a putative class action lawsuit alleging false advertising and fraudulent behavior by AT&T.[74] The couple who filed suit, the Concepcions, along with the other class members, had entered into cellular service contracts as part of an AT&T promotion advertising free cell phones with purchased service.[75] Subsequently, they were all charged sales tax on the "free" phones.[76] Although the Concepcions' taxes amounted only to $30.22, they filed suit in federal district court to recoup money on behalf of the class.[77]

In response, AT&T moved to compel arbitration of the Concepcions' claims, in accordance with the arbitration agreement in their contract.[78] Alt-

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69 *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (holding that the Federal Arbitration Act generally applies to employment contracts); *see also* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 ("[T]he enforceability of consumer arbitration agreements is often criticized.").

70 *See* Welsh, *supra* note 7, at 582, 592; *see also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011); *Circuit City*, 532 U.S. at 109; Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268-70 (1995).

71 *Concepcion*, 131 S. Ct. at 1746.

72 *See id.* at 1748-49; *see* Huffman & Mitzner, *supra* note 68, at 69; *see generally* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 627-28 (2012) (discussing the uncertain future of class arbitration after the *Concepcion* decision); Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 U. KAN. L. REV. 767, 770-71 (2012) (examining whether the *Concepcion* decision effectively ended class arbitration).

73 131 S. Ct. 1740 (2011).

74 *Id.* at 1744.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* at 1744-45.

hough the agreement included a class action waiver, many of the arbitration agreement's terms were notably consumer-friendly.[79] They provided that AT&T would bear the cost of arbitrating "nonfrivolous claims," required arbitration to occur in the customer's county of billing, and allowed the customer to opt for arbitration by phone if the claim was for $10,000 or less.[80] The agreement precluded AT&T from recovering attorneys' fees and even required AT&T to pay a $7,500 premium plus twice the amount of the claimant's attorneys' fees if the claimant ultimately won an arbitration award greater than AT&T's final settlement offer.[81] Despite the consumer-friendly provisions, the district court found the arbitration agreement unconscionable "because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions,"[82] relying on the California Supreme Court's holding in *Discover Bank v. Superior Court*.[83] Under the *Discover Bank* rule, consumer class action waivers could be invalidated if the plaintiff demonstrated that the damages claimed were predictably small and "the party with the superior bargaining power ha[d] carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[84] Subsequently, the Ninth Circuit concluded that the agreement was unconscionable based on California law as articulated in *Discover Bank*, and it thus affirmed the district court.[85]

The Supreme Court reversed, holding that Section 2 of the FAA preempts contrary state law invalidating class action arbitration waivers or otherwise restricting arbitration contrary to the FAA's purpose.[86] Although the *Discover Bank* rule did not single out arbitration, the Court found that it would have a disproportionate impact on arbitration agreements.[87] The Court then enumerated three reasons why class arbitration is inconsistent with the FAA.[88]

First, the Court noted that class arbitration eliminates the informality of bilateral arbitration while increasing costs and slowing down the resolution process.[89] Second, it asserted that class arbitration inherently requires procedural formality, contravening the purposefully less formal procedures

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79 *Concepcion*, 131 S. Ct. at 1744-45.

80 *Id.* at 1744.

81 *Id.*

82 *Id.* at 1745.

83 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

84 *Discover Bank*, 113 P.3d at 1110.

85 *Concepcion*, 131 S. Ct. at 1745 (citing Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (9th Cir. 2009)).

86 *Id.* at 1753.

87 *Id.* at 1747.

88 *Id.* at 1751-52.

89 *Id.* at 1751.

of individual arbitration.[90] Lastly, the Court opined that class arbitration "greatly increases risks to defendants" because it could potentially result in unappealable error for thousands of plaintiffs.[91]

In light of these incompatibilities between class arbitration and the FAA's conception of arbitration, the Court found the *Discover Bank* rule to be an obstacle to the FAA's purpose and therefore preempted.[92] The Court thus required the state to enforce class action waivers included in arbitration agreements.[93]

2. The Right to Sue Becomes the Right to Arbitrate Liability

More recently, in *CompuCredit Corp. v. Greenwood*,[94] the Court continued to rebuff restrictive application of the FAA, further reinforcing its pro-enforceability position.[95] The plaintiffs "filed a class action lawsuit against CompuCredit" for fraudulent credit lending practices under the Credit Repair Organizations Act ("CROA").[96] The CROA requires companies like CompuCredit to inform potential customers of their "right to sue" a credit repair organization for CROA violations.[97] It also contains a nonwaiver provision that renders any waiver of this right void and unenforceable by any court.[98] The Ninth Circuit read the "right to sue" provision as preserving a consumer's "right to bring an action in a court of law."[99] Since the arbitration clause waived the plaintiffs' right to sue CompuCredit in court, the Ninth Circuit determined that the arbitration provision was unenforceable.[100]

The Supreme Court disagreed.[101] It viewed the disclosure provision as merely creating a consumer right to receive the disclosure statement.[102] The "right to sue" was not an entitlement to bring an action in federal court; rather, it was assurance that the consumer would have a right to impose liability should a credit repair organization violate any provision of the

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90 *Id.*

91 *Concepcion*, 131 S. Ct. at 1752.

92 *Id.* at 1746-48 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

93 *Id.* at 1748 ("The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.").

94 132 S. Ct. 665 (2012).

95 *Id.* at 673.

96 *Id.* at 668.

97 15 U.S.C. § 1679c(a) (2006); *CompuCredit*, 132 S. Ct. at 669.

98 15 U.S.C. § 1679f(a); Greenwood v. CompuCredit Corp., 615 F.3d 1204, 1208 (9th Cir. 2010), *rev'd*, 132 S. Ct. 665.

99 *Greenwood*, 615 F.3d at 1208.

100 *Id.* at 1209.

101 *CompuCredit*, 132 S. Ct. at 669-70.

102 *Id.*

CROA.[103] The Court held that "[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."[104]

As these and other recent decisions demonstrate, the Court has not indicated any intent or willingness to restrict the FAA's application in state courts, especially in the face of congressional silence.

II. CONTRACTING AROUND THE FAA

In light of these developments, it is becoming increasingly unclear how or even if parties can contract around the FAA if they so choose. For instance, may parties contract for the application of state law to their arbitration agreements?[105] In a 2007 opinion addressing the enforceability of expanded judicial review in arbitration agreements, the U.S. Supreme Court cursorily noted the parties' ability to attain judicial review of an arbitration award elsewhere.[106] According to the Court, "[t]he FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."[107] This is not as easy as the Court suggests.

Decades before *Concepcion*, the Court acknowledged that "[t]he FAA contains no express pre-emptive provision" and that its drafters did not intend it to displace all state arbitration law.[108] In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[109] an owner and a contractor entered into a construction contract containing an arbitration agreement and a choice-of-law clause naming California state law as controlling.[110] When a dispute arose, the contractor demanded arbitration pursuant to the contract, while the owner sought to litigate against the contractor and several third parties.[111] The owner moved to stay arbitration.[112] Applicable California law allowed the trial court to issue such a stay pending resolution of the dispute between the owner and the third parties, who were not bound by the arbitration agreement.[113]

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103 *Id.* at 670-71.
104 *Id.* at 673.
105 *See* Huffman & Mitzner, *supra* note 68, at 69-70.
106 Hall Street Assocs., L. L. C. v. Mattel, Inc., 552 U.S. 576, 590 (2008).
107 *Id.*
108 Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).
109 489 U.S. 468 (1989).
110 *Id.* at 470.
111 *Id.* at 470-71.
112 *Id.* at 471.
113 *Id.*

The trial court stayed the proceedings, and the California Court of Appeal affirmed.[114] On review, the Supreme Court considered whether the FAA preempted state law to the extent that it applied to contracts involving interstate commerce.[115] Pointing to congressional intent and the language of the FAA, it determined that the federal law did not preempt the state law.[116] The goal of the FAA was to enforce arbitration agreements according to their terms, and since the parties clearly expressed their choice of applicable law, the specified state law controlled.[117] To hold otherwise would be "quite inimical to the FAA's primary purpose of" contractual enforcement according to the parties' intent.[118]

Volt seemed to signal the Court's willingness to limit the scope of the FAA in deference to the parties' intent as evinced by the contract terms.[119] Within the decade, however, this respect for intent took a backseat to the Court's policy toward enforcement of arbitration agreements. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[120] the parties' contract contained an arbitration provision adopting the rules of a private industry association, as well as a choice-of-law provision establishing that New York law governed the contract.[121] A disagreement between the parties (a brokerage firm and its clients) resulted in the arbitral award of punitive damages to the clients, and the firm subsequently attempted to vacate the award.[122] Under New York law, only judicial tribunals may award punitive damages.[123] The U.S. Supreme Court, seeking to harmonize the applicable arbitration rules and New York law, construed the choice-of-law provision "to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators."[124] Punitive damages were consequently permitted.[125] The *Mastrobuono* decision created uncertainty about *Volt*'s viability since it seemed to preclude party autonomy from controlling.[126]

The Court further obfuscated the primacy of party autonomy when it extended its *Mastrobuono* view to contracts in which the parties never con-

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114 *Id.*

115 *Volt*, 489 U.S. at 476.

116 *Id*. at 477-79.

117 *Id.* at 478-79.

118 *Id.*

119 *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 64 (1995) (Thomas, J., dissenting) (examining the holding in *Volt*).

120 514 U.S. 52 (1995).

121 *Id.* at 53-54.

122 *Id.* at 54-55.

123 *Id.* at 55.

124 *Id.* at 63-64.

125 *Id*. at 64.

126 *See* Joshua M. Barrett, Note, *Federal Arbitration Policy After* Mastrobuono v. Shearson Lehman Hutton, Inc., 32 WILLAMETTE L. REV. 517, 519, 535-36 (1996).

templated the FAA's application at the time of contracting. In *Allied-Bruce Terminix Cos. v. Dobson*,[127] a homeowner contracted with a local pest extermination company to inspect its home in preparation for sale of the home, obtaining a "clean bill of health."[128] Immediately upon taking possession of the home, the buyers discovered a termite infestation.[129] The previous homeowner filed suit against the extermination company, which then sought to stay litigation and compel arbitration pursuant to the terms of the contract.[130] The state court denied the stay, finding that a state statute invalidating predispute arbitration agreements controlled.[131] The court determined that the FAA did not preempt unless the parties had "contemplated substantial interstate activity" at the time of contract formation.[132] The extermination contract between a local homeowner and a local business did not satisfy that standard.[133]

The U.S. Supreme Court reversed, choosing to read the FAA far more broadly.[134] Relying on *Southland* and its national policy favoring arbitration, the Court rejected the contemplation test in favor of a "commerce in fact" formulation.[135] It opined that, so long as the transaction constituted interstate commerce in fact (as the Court itself defined such commerce), then the contemplation of the parties was essentially irrelevant.[136] This dismissal of the parties' contemplation at the time of contract formation made room for wider application of the FAA, even when neither party to an agreement believed that the federal law would govern their contract.[137]

Reading these cases together, it seems that unless parties explicitly and undeniably indicate that only state arbitration law governs their agreement, the courts must assume that the Supreme Court's national policy toward arbitration surpasses the parties' intent.[138] Despite the Court's repeated recognition that the FAA's aim is to enforce arbitration agreements pursuant to the terms of the contract, it has also ignored parties' intent, when convenient, in favor of furthering a judicially created policy preference

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127 513 U.S. 265 (1995).

128 *Id.* at 268-69.

129 *Id.*

130 *Id.*

131 *Id.* at 269.

132 *Id.* (emphasis omitted) (quoting Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 387 (2d Cir. 1961) (Lumbard, C.J., concurring)) (internal quotation marks omitted).

133 *Allied-Bruce*, 513 U.S. at 269-70.

134 *Id.*

135 *Id.* at 280-81 (internal quotation marks omitted).

136 *Id.* at 281.

137 *See id.* at 295 (Thomas, J., dissenting) (discussing the possible implications of overturning *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

138 *See id.* at 282-84 (O'Connor, J., concurring) (concurring due to the wisdom of a uniform national arbitration policy); *see also supra* text accompanying notes 107-135.

toward enforcement of arbitration.[139] As such, both contracting parties and the lower courts are left questioning how a choice-of-law provision should and will be applied.[140]

III. POST-*CONCEPCION* PREDICAMENTS IN CONSUMER ARBITRATION AGREEMENTS

The tension between the legislative intent of the FAA and the Supreme Court's expansive enforcement of arbitration agreements beyond those envisioned by Congress has left the door open for disparate application of arbitration law among the circuits. These discordant views are apparent when examining various circuits' positions on whether fairness and effective vindication of individuals' rights should factor into the court's application of the FAA to a particular case.

A. *Class Action Arbitration Waivers for Statutory Claims*

In the months since *Concepcion*, circuit courts have had numerous opportunities to apply its holding to arbitration provisions within consumer contracts.[141] While there appears to be consensus about *Concepcion*'s preemptive effect on state law unconscionability challenges based on state statutory rights, a split has emerged when those claims are based on federal statutory rights. A number of circuit courts are inclined to enforce arbitration even when it ultimately results in the plaintiff's loss of an effective avenue to pursue a remedy.[142]

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139 *Compare* Volt Info. Scis., Inc. v. Bd. of. Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."), *with Allied-Bruce*, 513 U.S. at 281 (enforcing an arbitration clause because the transaction in question actually involved "interstate commerce, even if the parties did not contemplate an interstate commerce connection").

140 *See* CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION 270-71 (2d ed. 2006).

141 *See, e.g.*, Homa v. Am. Express Co., 494 F. App'x 191, 194-98 (3d Cir. 2012); Pendergast v. Sprint Nextel Corp., 691 F.3d 1224, 1230-33 (11th Cir. 2012); *In re* Checking Account Overdraft Litig., 685 F.3d 1269, 1276-79 (11th Cir. 2012); Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947, 956-58 (9th Cir. 2012), *remanded on reh'g en banc by* 718 F.3d 1052 (9th Cir. 2013); Coneff v. AT&T Corp., 673 F.3d 1155, 1158-61 (9th Cir. 2012); *In re* Am. Express Merchs.' Litig. (*Amex III*), 667 F.3d 204, 212-14 (2d Cir. 2012), *rev'd,* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

142 *See infra* Part III.A.2-.4.

1. The Eleventh Circuit's Preemption of Nonexistent State Law

Recently, the Eleventh Circuit took *Concepcion*'s preemption holding a step further in *Pendergast v. Sprint Nextel Corp.*,[143] where a wireless customer brought a class action against his provider for improper roaming fees.[144] The customer argued that the arbitration clause contained within his service contract was unconscionable under Florida law because it would effectively shield the defendant from liability for claims that were economically impractical to bring individually.[145] The contract also lacked the consumer-friendly terms that were contained within the *Concepcion* plaintiffs' arbitration agreement.[146] The district court rejected this argument and compelled arbitration, from which the plaintiff appealed.[147] On appeal, the Eleventh Circuit determined that the state unconscionability law was too unsettled on how the court should proceed in its analysis and certified four related questions to the Florida Supreme Court.[148]

Before the Florida Supreme Court could respond, the *Concepcion* decision was issued.[149] The Florida court returned the case to the Eleventh Circuit, which then examined the district court's ruling "in light of *Concepcion*."[150] The court concluded that *Concepcion* plainly required the FAA's preemption of Florida law, regardless of whether the clause at issue was unconscionable under state law or if the defendant would be shielded from liability.[151] Under its reading of *Concepcion*, the plaintiff's argument that his claims could not be cost-effectively pursued individually must fail.[152] So long as Florida law would invalidate the class action waiver contained within the arbitration agreement, the FAA would preempt.[153] Oddly, the Eleventh Circuit's decision appears to require preemption of a state law that does not yet exist.[154]

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143 691 F.3d 1224 (11th Cir. 2012).

144 *Id.* at 1225.

145 *Id.* at 1234.

146 *Compare id.* at 1226-29 (describing the terms of the arbitration agreement in *Pendergast*), *with* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744-45 (2011) (describing the terms of the arbitration agreement in *Concepcion*).

147 *Pendergast*, 691 F.3d at 1229.

148 *Id.* at 1229-30.

149 *Id.* at 1230.

150 *Id.*

151 *Id.* at 1235-36.

152 *Id.*

153 *Pendergast*, 691 F.3d at 1236.

154 *Id.* at 1229-30 (demonstrating that the lack of clarity of the issue under Florida law was not settled because the Florida Supreme Court returned the case to the Eleventh Circuit).

2. Legislative Intent Trumps Fairness in the Third Circuit

The Third Circuit expressed a similar view in a recent unpublished decision. The plaintiffs in *Homa v. American Express Co.*[155] filed a class action against American Express for alleged violations of the New Jersey Consumer Fraud Act related to a credit card contract.[156] The contract contained both an arbitration clause and a class action waiver.[157] American Express moved to compel arbitration, which the district court granted.[158] On appeal, the Third Circuit reversed after finding that the clause as applied to the plaintiff was unconscionable.[159] While the district court was hearing the case on remand, the Supreme Court issued its decision in *Concepcion*.[160] Predictably, American Express moved to reinstate the district court's original arbitration order, and the court of appeals got another chance to review the case in light of recent developments.[161]

The Third Circuit affirmed the order to arbitrate, understanding *Concepcion* as mandating preemption of state law that limited restrictions on arbitration agreements.[162] The potential for unfairness as a result of this interpretation was not lost on the court.[163] It recognized that "[e]ven if [the plaintiff] cannot effectively prosecute his claim in an individual arbitration that procedure is his only remedy, illusory or not."[164] The court justified this unfortunate outcome by pointing to the legislative intent of FAA Section 2 as construed by the *Concepcion* Court to require preemption of any state law interfering with the accomplishment of the FAA's objectives.[165]

It then seemed to invite a constitutional challenge to the post-*Concepcion* application of Section 2 while deferring to binding precedent.[166] Although addressed only fleetingly, the Third Circuit's acknowl-

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155 494 F. App'x 191 (3d Cir. 2012).

156 *Id.* at 192-93.

157 *Id.* at 193.

158 *Id.* at 192.

159 *Id.* at 193.

160 *Id.* at 194-95.

161 *Homa*, 494 F. App'x at 195.

162 *Id.* at 197.

163 *Id.* at 196.

164 *Id.*

165 *Id.* at 197.

166 *Id.* at 196-98. After concluding that *Concepcion* required preemption that would effectively result in a lack of remedy for the plaintiff, the court noted:

> Though some persons might regard our result as unfair, 9 U.S.C. § 2 requires that we reach it. In this regard, we point out that when Congress makes a law the court must enforce the law as Congress has written it regardless of the court's view of the law. Of course, we realize that a court need not enforce an unconstitutional law but Homa does not raise any constitutional issues in this case and thus we do not address that possibility.

Id. (footnote omitted).

edgement that it need not enforce an unconstitutional law might indicate a willingness to limit *Concepcion* in this type of case.[167]

3. The Second Circuit's Preference Toward Effective Vindication of Rights Over Categorical Enforcement of Arbitration Agreements

In contrast with the Third and Eleventh Circuits' interpretations, the Second Circuit has read *Concepcion* less broadly.[168] In *In re American Express Merchants' Litigation*,[169] the plaintiff credit card holders brought an action against American Express, alleging that a provision within their card agreements amounted to a "tying arrangement" under the Sherman Act.[170] Upon its third review of the case—the first, however, after the *Concepcion* decision—the Second Circuit considered whether the FAA preempted all state law holding class action arbitration waivers unconscionable.[171] While recognizing that *Concepcion* provided a binding analysis to determine when the FAA preempts state law, the court reached its holding through "a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability."[172] It found that binding precedent did not deem all class action waivers per se unenforceable; rather, it relied on an earlier Supreme Court decision indicating that a party may be able to invalidate an arbitration agreement if it could show that the costs of arbitrating would be prohibitively expensive.[173] As such, the practical effects of such a waiver bore heavily on whether the waiver was enforceable or not.[174]

Proceeding down this path of analysis, the Second Circuit found that the plaintiffs' evidence sufficiently established that individual arbitration of

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167 *See Homa*, 494 F. App'x at 196-97. Although constitutional due process concerns necessarily implicate state action, scholars disagree about whether arbitration can be bound by due process requirements when the state endorses and is involved in the enforcement of arbitration awards. *See* Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 215-16 (2006). The Supreme Court has yet to rule on this issue. *Id.* at 216.

168 *In re* Am. Express Merchs.' Litig. (*Amex III*), 667 F.3d 204, 212-13 (2d Cir. 2012), *rev'd*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

169 667 F.3d 204 (2d Cir. 2012), *rev'd*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

170 *Id.* at 208.

171 *Id.* at 210-12.

172 *Id.* at 213 (quoting *In re* Am. Express Merchs.' Litig. (*Amex I*), 554 F.3d 300, 320 (2d Cir. 2009)) (internal quotation marks omitted).

173 *Id.* at 214, 216 ("We continue to find *Green Tree* controlling here to the extent that it holds that when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." (quoting *In re* Am. Express Merchs.' Litig. (*Amex II*), 634 F.3d 187, 197 (2d Cir. 2011)) (internal quotation marks omitted)).

174 *Id.* at 214.

each claim would be cost-prohibitive.[175] Emphasizing the need for a case-by-case evaluation of the waiver's effect, the court held that "if the provision were enforced it would strip the plaintiffs of rights accorded them by statute," thus rendering the clause unenforceable.[176] *Concepcion*, the court reasoned, doesn't require enforcement of class action waivers if the practical effect would be to preclude plaintiffs from vindicating their federal statutory rights.[177] Despite the general policy toward arbitration, agreements to arbitrate must only be enforced "so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum."[178]

The Supreme Court has ultimately disagreed with the Second Circuit's stance on the necessary availability of an effective remedy.[179] In *American Express Co. v. Italian Colors Restaurant*,[180] its recently issued opinion in this case, the Court remained unconcerned with a plaintiff's practical inability to pursue a remedy when faced with the inordinate expense of doing so individually instead of as part of a class.[181] The Court rested on its reasoning in *Concepcion* and held that class action waivers are enforceable according to their terms even if a class action provides the only economically viable means of pursuing a remedy.[182] It reemphasized the importance of preserving the fundamental attributes of arbitration—swift resolution of issues, lower costs than litigation, procedurally informal proceedings—over an individual's economic ability to pursue a remedy through arbitration.[183] The Court maintained its position that the FAA "reflects the overarching principle that arbitration is a matter of contract" and, thus, courts must enforce arbitration agreements according to their terms, absent a contrary congressional command.[184]

This decision, although unsurprising, foretells a frustrating future for plaintiffs subject to similar arbitration agreements. As the dissent notes, *Italian Colors* appears to have paved the way for monopolists like American Express to effectively shield themselves from certain liabilities through cleverly crafted arbitration agreements, leaving no practical means for an individual plaintiff to seek redress for the company's unlawful actions.[185] The individual in such a case, having little bargaining power to begin with,

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175 *Amex III*, 667 F.3d at 217.

176 *Id.* at 219.

177 *Id.* at 214, 216-17, 219.

178 *Id.* at 214 (quoting Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 637 (1985)) (internal quotation marks omitted).

179 Am. Express Co v. Italian Colors Rest. (*Amex IV*), 133 S. Ct. 2304, 2310-11 (2013).

180 133 S. Ct. 2304 (2013).

181 *Id.* at 2311.

182 *Id*. at 2311-12.

183 *Id*. at 2312.

184 *Id*. at 2309 (citing Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010)).

185 *Id*. at 2313 (Kagan, J., dissenting) ("The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.").

is forced to accept the terms offered by a sophisticated commercial entity, then is left essentially hand-tied if those terms do not allow that individual to pursue a class action remedy.[186] While this hardly seems consistent with the concept of arbitration envisioned in the FAA, it is at the very least bad public policy.

4. The Ninth Circuit's Unconcern for a Lack of Effective Remedy

The Ninth Circuit has taken a different view of the availability of an effective remedy.[187] In *Coneff v. AT&T Corp.*,[188] the plaintiff customers filed a class action against AT&T alleging breach of contract and unjust enrichment arising from their cell phone contracts.[189] Despite the inclusion of an arbitration agreement within the contracts, the plaintiffs brought various claims under state consumer protection statutes and the Federal Communications Act.[190] AT&T appealed the district court's decision holding that the arbitration agreement was unconscionable under state law.[191]

On appeal, the plaintiffs made three arguments to distinguish their case from *Concepcion* and prevent preemption of the state law.[192] Their first argument relied on the same precedent cited by the Second Circuit in *Green Tree Financial Corp.-Alabama v. Randolph*[193] and its predecessors requiring enforcement of arbitration agreements only when the prospective litigant may effectively vindicate his rights in an arbitration proceeding.[194] Next, the plaintiffs argued that the state unconscionability law required a case-by-case analysis of each arbitration clause, unlike the state law in *Concepcion*, which effectively banned class action waivers; thus, *Concepcion* did not apply here.[195] Finally, they argued that where the state law in *Concepcion* would have compelled the parties to engage in nonconsensual, class-wide arbitration, the state law at issue would invalidate the entire arbitration agreement.[196]

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186 *Amex IV*, 133 S. Ct. at 2313, 2316.

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

188 673 F.3d 1155 (9th Cir. 2012).

189 *Id.* at 1157.

190 *Id.*

191 *Id.*

192 *Id.* at 1158-60.

193 531 U.S. 79 (2000).

194 *Coneff*, 673 F.3d at 1158. The plaintiffs relied on *Green Tree* to argue that "Supreme Court precedents require arbitration of statutory rights only if a prospective litigant effectively may vindicate those rights in the arbitral forum." *Id.* (quoting *Green Tree*, 531 U.S. at 90) (internal quotation marks omitted).

195 *Id.* at 1159-60.

196 *Id.* at 1160.

The court was not convinced of any meaningful difference between the state law addressed in *Concepcion* and that in the current case.[197] Rejecting the plaintiffs' first argument, the court concluded that *Concepcion* had expressly rejected the argument that the lack of an effective remedy through arbitration was sufficient grounds for invalidating an arbitration agreement.[198] Though the policy reasons for allowing class actions were logical and perhaps worthwhile, they were insufficient to override the objectives of the FAA.[199] Arbitration agreements must be enforced even if plaintiffs would be left with insufficient incentive to vindicate their rights.[200]

The court similarly rejected the other arguments, reasoning that *Concepcion* mandated preemption of any state law contravening the broad enforcement policy of the FAA.[201] Ultimately, the court did not distinguish between the federal and state causes of action in deciding to compel arbitration of all claims.[202] Although *Concepcion* did not involve any federal claims, the Ninth Circuit has read the decision broadly as applicable to both state and federal claims.[203]

B. *Conflicts with a State's Public Policy Goals Beyond Private Interests*

The broad presumption of state law preemption creates a significant impediment to states desiring to enact legislation to protect citizens from the potential pitfalls of consumer arbitration. Consistent with its prior holdings, the *Concepcion* Court stated that the FAA preempts state statutes that contravene its intent, even when those statutes exist for desirable policy reasons.[204] Although *Concepcion* affirmed the validity of generally applicable state law contract defenses, it requires application of such defenses in a way that does not disproportionately disfavor arbitration agreements.[205] When a state law grounded in public policy conflicts with the Court's policy toward categorical enforcement of arbitration agreements (either facially

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197 *Id.* at 1158-60.

198 *Id.* at 1158-59.

199 *Id.* at 1159.

200 *Coneff*, 673 F.3d at 1159.

201 *Id.* at 1159-60.

202 *See id.* at 1161.

203 *See id.* at 1158, 1161.

204 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). In a concurring opinion, Justice Thomas elaborated that "[i]f § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to 'any contract.' There must be some additional limit on the contract defenses permitted by § 2." *Id.* at 1753 (Thomas, J., concurring).

205 *Id.* at 1760 (Breyer, J., dissenting).

or as applied), the state law must give way.[206] Although a party may still pursue a remedy through arbitration, practically, the cost of arbitrating is often prohibitive. While the Court may be striving only to limit a party's choice of forum, it often functionally eliminates the remedy altogether.

At first glance, the equal application rule appears to align with the FAA's original purpose to ensure enforcement of arbitration agreements on equal footing with other contracts within the states.[207] Upon examining the legislative history, however, the Court's interpretation and application of the FAA as substantive law fails.[208] Despite an admittedly brief historical record, that history indicates the drafters' intent that the FAA would function purely as a procedural reform.[209] Proponents of the proposed legislation viewed it as "[a] Federal statute providing for the enforcement of arbitration agreements" which relates "solely to procedure of the Federal courts," explicitly noting that the act would present "no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws."[210] Decades later, the dissenting Justices in *Southland* recognized the unambiguously procedural nature of the legislation as enacted.[211] Yet, through interpreting Section 2's interstate commerce language as grounding the act in the Commerce Clause, the Supreme Court has allowed for the creation of federal substantive law that belies the original purpose of the FAA and encroaches upon states' ability to implement law in areas historically reserved to them, like commercial contracts.[212]

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206 *See id.* at 1753 (majority opinion).

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

208 *See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 2 (1923).

209 *Id.* at 2 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, N.Y. Chamber of Commerce) ("[T]he adoption of . . . the Federal statute and the uniform State statute will put the United States in the forefront in this procedural reform." (alteration in original)); *Arbitration of Interstate Commercial Disputes: J. Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 37 (1924) (statement of W. W. Nichols, President of the Am. Mfrs.' Export Ass'n of N.Y.) ("The statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements. . . . So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power."); *see also* Manakides, *supra* note 5, at 451 ("[T]he FAA was supposed to pronounce new procedural rights, not substantive ones.").

210 *Arbitration of Interstate Commercial Disputes: J. Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 37 (1924) (statement of W. W. Nichols, President of the Am. Mfrs.' Export Ass'n of N.Y.).

211 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.").

212 *See* Sternlight, *supra* note 2, at 656-57 (discussing the Court's early concern with impinging upon states' rights and the subsequent decisions that did precisely that).

Pursuant to the Court's interpretation of the FAA, states now lack the authority to create substantive law safeguarding consumers from potentially unfair mandatory arbitration clauses.[213] Even legitimate public policy justifications cannot override the pro-arbitration policy put in place by the Supreme Court.[214] This has understandably created friction between state policies and district courts in cases where a plaintiff seeks public injunctive relief in addition to personal damages.[215] The clash has been most evident in California.

Prior to *Concepcion*, numerous federal district courts deemed claims for representative relief inarbitrable as a matter of public policy.[216] In *Broughton v. Cigna Healthplans of California*,[217] the Supreme Court of California reinforced that position when confronted with a claim for public injunctive relief brought under the state's Consumers Legal Remedies Act ("CLRA").[218] Echoing the *Mitsubishi Motors* sentiment that "not . . . all controversies implicating statutory rights are suitable for arbitration," the court evaluated whether an inherent conflict existed between the statutory right and the arbitration process.[219] The CLRA was enacted to broadly protect consumers from unfair and deceptive business practices while providing an economical and effective remedy.[220] The *Broughton* plaintiff argued that the arbitrators lacked authority to issue a permanent injunction protecting the public from the deceptive business practices in question.[221]

While avoiding the broader question of whether an arbitrator ever has authority to issue a permanent injunction, the court determined that the injunction sought by the plaintiff was beyond the arbitrator's power to grant.[222] Because the "plaintiff . . . [was] functioning as a private attorney general, enjoining future deceptive practices on behalf of the general public," arbitration was not a suitable forum to obtain that relief.[223] The court inferred that the state legislature could not have intended for the arbitrators to have such power in cases seeking public injunctive relief.[224] Although

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213 *See id.* at 639-40.

214 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").

215 *See* Manakides, *supra* note 5, at 456-57.

216 *See* Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947, 959-60 (9th Cir. 2012) (discussing various district courts opinions in which judges determined that public injunctive relief is too important to be arbitrated), *remanded on reh'g en banc by* 718 F.3d 1052 (9th Cir. 2013).

217 988 P.2d 67 (Cal. 1999), *superseded by statute as stated in* Ferguson v. Corinthian Colls., Inc., No. 11-56956, 2013 WL 5779514 (9th Cir. Oct. 28, 2013).

218 *Id.* at 76.

219 *Id.* at 73 (alteration in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)) (internal quotation marks omitted).

220 *Id.* at 74.

221 *Id.* at 75.

222 *Id.* at 76.

223 *Broughton*, 988 P.2d at 76.

224 *Id.*

some courts allow arbitrators to issue injunctions, modifying or vacating the injunction requires instigation of a new arbitration proceeding, creating a more cumbersome process for the parties.[225] Additionally, "[i]n some cases, the continuing supervision of an injunction is a matter of considerable complexity."[226] After balancing the desire to promote a pro-arbitration policy with the need to effectively offer public injunctive relief, the court compelled arbitration of the plaintiff's other claims while keeping the CLRA injunctive relief issue for the court.[227] The court later extended this policy to public injunctive relief claims brought under California's Unfair Competition Law in *Cruz v. Pacificare Health Systems, Inc.*[228]

While these considerations have not changed, *Concepcion* eliminated their relevance in cases where the plaintiff seeks some form of representative relief.[229] The Ninth Circuit recently recognized the unsustainability of arguments against arbitrability of public injunctive relief claims in the wake of *Concepcion*.[230] In *Kilgore v. KeyBank, National Ass'n*,[231] the court was faced with deciding whether *Concepcion* precluded the *Broughton-Cruz* rule prohibiting arbitration of claims for public injunctive relief.[232] The plaintiffs brought a claim under California's Unfair Competition Law, seeking injunctive relief (but no damages) for KeyBank's allegedly unfair competition practices within the student loan market.[233] Each plaintiff had signed a promissory note containing an arbitration provision with KeyBank.[234]

Applying the *Broughton-Cruz* rule, the district court held that the public injunctive relief claim was inarbitrable.[235] The Supreme Court issued its decision in *Concepcion* while KeyBank was awaiting judgment in the district court.[236] The Ninth Circuit then had little choice but to determine whether the *Broughton-Cruz* rule survived. It validated the lower courts' view that there may be "legal constraints external to the parties' agreement [which] foreclosed the arbitration of those claims," but limited those constraints to only those found in other federal statutes.[237] Pointing to the sev-

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225 *Id.* at 77.

226 *Id.*

227 *Id.* at 82.

228 30 Cal. 4th 303, 315-16 (2003).

229 *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748-49, 1752 (2011).

230 Kilgore v. Keybank, Nat'l Ass'n, 673 F.3d 947, 951 (9th Cir. 2012), *remanded on reh'g en banc by* 718 F.3d 1052 (9th Cir. 2013).

231 673 F.3d 947 (9th Cir. 2012), *remanded on reh'g en banc by* 718 F.3d 1052 (9th Cir. 2013).

232 *Id.* at 951.

233 *Id.* at 953-54.

234 *Id.* at 952.

235 *Id.* at 954.

236 *Id.* at 959.

237 *Kilgore*, 673 F.3d at 961 (quoting Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 628 (1985)) (internal quotation marks omitted).

eral cases taken up by the Supreme Court, the court noted that only federal statutory claims where Congress expressly intended to keep that claim from arbitration could be considered unsuitable for arbitration.[238] Begrudgingly, the court overturned the *Broughton-Cruz* rule and applied the FAA to conclude that the injunctive relief claims must be arbitrated pursuant to the agreements.[239] Although the state rule was based in sound public policy, state policy alone cannot best the FAA when that policy specifically targets arbitration of a category of claims.[240]

It is yet to be seen how other circuits will weigh in on the FAA as applied to claims for representative relief, but it is likely that they, like the Ninth Circuit, will find no way around *Concepcion*'s preemptive effect here.

IV. REINING IN THE EXPANSIVE ENFORCEMENT OF ARBITRATION AGREEMENTS

Despite its contentious history and current susceptibility to misuse, consumer arbitration is worth saving. Arbitration can still provide a cost-effective, flexible alternative to litigation while lessening the load on courts. Although the Supreme Court will hear more arbitration cases in the future, it is unwise to believe that the Court will self-correct or restrain its consistently expanding view of the FAA. Recognizing the need to otherwise ensure fairness in the dispute resolution process, numerous entities with a stake in preserving consumer rights or commercial arbitration have taken, and should continue to take, action to save both.[241]

A. *Procedural Safeguards Within Arbitration Administration Bodies*

Several arbitration administration agencies have implemented and enforced procedural safeguards in consumer arbitration. In 1998, the American Arbitration Association ("AAA") adopted the Consumer Due Process Protocol ("Protocol") to address due process issues accompanying the increasing use of mandatory arbitration provisions in consumer contracts.[242] Concerned that many of those contracts were offered on a take-it-or-leave-it basis, with little to no negotiation of terms, the AAA developed the Protocol to ensure that unwitting consumers would not be left without an unbi-

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238 *Id.* at 962.

239 *Id.* at 965.

240 *Id.* at 963.

241 *See infra* Part IV.A.

242 *See* AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL (1998), *available at* https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_005014&RevisionSelectionMethod=LatestReleased [hereinafter CONSUMER DUE PROCESS PROTOCOL].

ased, effective means to vindicate their rights and obtain remedies.[243] It applies to a broad range of consumer contracts, from financial and healthcare services to vehicle leases.[244]

The Protocol consists of fifteen principles crafted to ensure neutrality, accessibility, and reasonableness of arbitration proceedings.[245] Additionally, the Protocol requires adequate notice to consumers at the time of contract formation and carves out a small claims exception to otherwise mandatory arbitration.[246] When arbitration does occur, the Protocol mandates that it take place in a convenient location to the consumer, at a reasonable cost, and in an expeditious manner.[247] The arbitrator should have authority to grant any relief that would otherwise be available in court at law or in equity.[248]

The National Arbitration Forum likewise promulgated its twelve-principle Arbitration Bill of Rights to ensure a "fair, affordable, and efficient" arbitration process.[249] These principles address nearly identical concerns as the AAA Protocol. The arbitration process must be efficient, affordable, and timely.[250] Remedies granted "must conform to the law."[251] Although the principles stress fundamental fairness, they notably do not mention consumer notice of the arbitration agreement at contract formation.[252]

Though less exhaustive, Judicial Arbitration and Mediation Services ("JAMS") adopted its own Minimum Standards of Procedural Fairness ("Minimum Standards") for consumer arbitrations in 2009.[253] Like the AAA and National Arbitration Forum principles, the Minimum Standards require clear notice to the consumer, as well as a reasonable, neutral, and accessible arbitration process.[254] They ensure reasonableness of costs to the consumer by capping the consumer's fee at $250 for claims he or she brings; when the claim is brought by a company, the company must bear all costs of the arbi-

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243 *See id.*

244 *See id.*

245 *Id.*

246 *Id.* at princs. 5, 11.

247 *Id.* at princs. 6-8.

248 CONSUMER DUE PROCESS PROTOCOL, s*upra* note 242, at princ. 14.

249 NAT'L ARBITRATION FORUM, ARBITRATION BILL OF RIGHTS WITH COMMENTARY (2007), *available at* http://www.adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf.

250 *See id.* at princs. 6-7.

251 *Id.* at princ. 12.

252 *See id.* at princ. 1.

253 *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness*, JAMS (July 15, 2009), http://www.jamsadr.com/consumer-arbitration/.

254 *Id.*

tration.[255] Remedies that would otherwise be available in court should also be available in arbitration.[256]

All of these protocols and principles offer valuable protections to consumers and help bolster the credibility and equity of arbitration. However, the protections only apply insofar as the company mandating arbitration has agreed to be bound by an agency's set of rules. It is entirely possible that, in the case of a large corporation with vast resources, the arbitration may be conducted under an association's rules but not administered by that association. Even when the arbitration is administered by an agency, agency rules may not specifically address the circumstances at hand.[257] In addition, the arbitration agreement itself may contain opt outs or modifications of an association's rules.[258] Enforcement of consumer rights and due process principles becomes markedly difficult when the arbitrator issuing a binding decision is not acting under the auspices of an administering body.[259]

While they assuredly play a vital role in protecting consumers' rights, the limited applicability of arbitration administration entities' rules leaves a gap that only federal legislation is likely to fill. Also, even the most promising and enforceable rules are only as strong as the body that applies them. This was eminently apparent in July 2009 when the Minnesota attorney general sued the National Arbitration Forum for alleged consumer fraud, deceptive trade practices, and false advertising.[260] Though the suit quickly settled, a similar class action against the National Arbitration Forum, alleging bias in arbitration and improper ties to the debt collection industry, worked its way through the courts until an eventual settlement in 2011.[261] As a result of these lawsuits, the National Arbitration Forum no longer ad-

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255 *Id.*

256 *Id.*

257 *See* INT'L CHAMBER OF COMMERCE, ARBITRATION AND ADR RULES art. 41 (2012), *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/ (indicating that the organization's rules will not cover everything).

258 For a discussion of the extreme variety of terms within arbitration agreements in the payday loan industry, see Michael A. Satz, *How the Payday Predator Hides Among Us: The Predatory Nature of the Payday Loan Industry and Its Use of Consumer Arbitration to Further Discriminatory Lending Practices*, 20 TEMP. POL. & CIV. RTS. L. REV. 123, 150 (2010); see also Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1240 n.13 (2001) (noting commonly used arbitration clause language for which consumers cannot negotiate).

259 *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 130 (2012).

260 *See* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 39-40 (2010), *available at* http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf [hereinafter FTC, BROKEN SYSTEM].

261 *In re* Nat'l Arbitration Forum Antitrust Litig., 682 F. Supp. 2d 1343, 1345 (J.P.M.L. 2010).

ministers arbitrations for debt collection disputes.[262] The collateral damage from the litigation, however, is more unfortunate. When the neutrality and fairness of a large arbitration administrator is called into question, arbitration as an effective method of dispute resolution is similarly doubted. In this era of eroding confidence in consumer arbitration, administrative entities should vigilantly and publicly enforce high ethical standards while working to restore faith in the process.

B. *Amending the FAA*

Administrative rules can only go so far in ensuring that consumers' rights are effectively vindicated; the terms of the arbitration agreement itself should dictate the actual substance of the proceeding.[263] Recognizing the limitations of private sector efforts to reform arbitration law, various members of Congress have introduced legislation over the past few years aimed at rectifying consumers' plight.[264] Congress, however, has proven slow to enact any change in the federal arbitration law.

In May 2011, Senators Al Franken (D-Minn.) and Richard Blumenthal (D-Conn.), along with other members of Congress, proposed one bill that has garnered attention.[265] The Arbitration Fairness Act of 2011 is an attempt to amend the FAA to categorically invalidate all predispute arbitration agreements in consumer contracts.[266] Several months after introducing the bill, Senators Blumenthal and Franken (joined by Senator Sheldon Whitehouse (D-R.I.)) presented a companion bill known as the Consumer Mobile Fairness Act of 2011.[267] Similar to its predecessor, the Consumer Mobile Fairness Act seeks to invalidate any predispute arbitration agreements contained in contracts for cellular phone service.[268]

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262 FTC, BROKEN SYSTEM, *supra* note 260, at 39-40. As a result of the National Arbitration Forum litigation, the AAA voluntarily suspended its own debt collection arbitration services until uniform safeguards were put in place. *Id.* at 40-41. Numerous banks thereafter followed suit in eliminating predispute arbitration agreements in their credit card contracts. *Id.* at ii.

263 *See* 9 U.S.C. § 4 (2012) (stating that a court, upon finding the arbitration agreement itself to be valid, "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement").

264 *See* Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1332 ("Between 1995 and 2010, members of Congress introduced 139 bills that sought either to (a) eliminate mandatory arbitration for certain categories of disputes or (b) restrict the ways in which companies can use it.").

265 *See* Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); David Lazarus, *Bill Aims to Restore Consumers' Right to Sue*, L.A. TIMES (Oct. 18, 2011), http://articles.latimes.com/2011/oct/18/business/la-fi-lazarus-20111018.

266 S. 987 § 3.

267 Consumer Mobile Fairness Act of 2011, S. 1652, 112th Cong. (2011).

268 *Id.* § 3 ("Notwithstanding any other provision of law, a predispute arbitration agreement between a covered individual and a provider of mobile service shall not be valid or enforceable.").

While both acts recognize the need for consumer safeguards in arbitration, as well as the Supreme Court's misinterpretation of the FAA, the senators' approach is misguided.[269] A modernized national arbitration policy would provide a coherent, effective dispute resolution scheme in areas where uniformity is most desirable—like consumer contracts. Adopting a bill that invalidates all consumer arbitration clauses would fail to ameliorate the federalism concerns raised by *Concepcion*.[270] Prior to that holding, states took different approaches to enforcing consumer arbitration agreements, reflecting their own policy choices and preferences.[271] Categorically prohibiting predispute consumer arbitration provisions merely reframes the *Concepcion* problem from one of overly broad enforcement to total lack of enforcement.[272] States would continue to lose out, remaining unable to form and implement their own arbitration policies.[273] Party autonomy would be equally diminished, as consumers would lose a meaningful choice of law.

Additionally, this type of general prohibition would present a practical workload issue. Disputes that would have previously been settled privately through arbitration would now have to go through the courts. The FAA was enacted in part to help alleviate overcrowded federal dockets through arbitration.[274] It continues to serve functions beyond just the resolution of a dispute between parties.[275] Parties may choose to forgo potentially complex and lengthy litigation in favor of a resolution on their own terms.[276] Party autonomy is respected, and judicial resources are allocated elsewhere.

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269 *See* S. 987 § 2. Section 2 of the proposed Arbitration Fairness Act articulates the congressional findings behind the bill. It reads:

> The Congress finds the following:
> (1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
> (2) A series of decisions by the Supreme Court of the United States have changed the meaning of the Act so that it now extends to consumer disputes and employment disputes.
> (3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.
> (4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.
> (5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.

Id. Similar findings are noted in the Consumer Mobile Fairness Act. S. 1652 § 2.

270 Christopher Drahozal, Concepcion *and the Arbitration Fairness Act*, SCOTUSBLOG.COM (Sept. 13, 2011, 11:46 AM), http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act/.

271 *See id.*

272 *See id.*

273 *See id.*

274 *See* Imre S. Szalai, *An Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure*, 2010 J. DISP. RESOL. 391, 400.

275 *See id.* at 424.

276 *See id.* at 425.

Numerous other bills limiting the FAA have been introduced in recent years, most specific to one particular type of consumer dispute.[277] Many of the proposed bills fail to address the issues enumerated above and, like the Arbitration Fairness Act of 2011, seek only to unconditionally invalidate some category of predispute arbitration agreements.[278] A more viable approach, however, is reflected in the Fair Arbitration Act of 2011.[279] Rather than proposing a blanket prohibition on consumer arbitration, the Fair Arbitration Act aims to codify many of the safeguards already embraced by arbitration administration agencies like the AAA.[280] It requires fair notice to the consumer, neutrality of the process, and conveniently located hearings.[281] It preserves an opt out for small claims and, notably, requires that the arbitrator "be governed by the same substantive law that would apply under conflict of laws principles applicable in a court of the State."[282] This approach is more reasonable and ultimately more deferential to the purposes of arbitration and both state and party autonomy.

Congress, as yet, has remained hesitant to embrace large-scale arbitration reform. Of the 139 bills introduced into Congress between 1995 and 2010 that sought to restrict or eliminate various uses of mandatory arbitration, only five were eventually passed into law.[283] This congressional reticence toward arbitration reform allows the arbitration process to continue losing credibility while leaving many consumers without an effective way to obtain relief. At a minimum, the FAA needs to be amended to allow states to implement their own arbitration regulations.

C. *Action from Federal Agencies*

While waiting for Congress to address the quagmire of mandatory consumer arbitration, some federal agencies can begin the reform process. When the Wall Street Reform and Consumer Protection Act (commonly

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277 *See, e.g.*, Arbitration Fairness for Students Act, S. 3557, 112th Cong. (2012) (prohibiting higher education institutions from including arbitration agreements in their student enrollment contracts); Fair Debt Collection Practices Clarification Act of 2012, H.R. 5794, 112th Cong. (2012) (amending the Fair Debt Collection Practices Act to prohibit predispute arbitration of consumer debt collections); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. (2009) (invalidating predispute arbitration agreements between long-term care facilities and their residents); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (prohibiting predispute arbitration agreements in consumer, employment, or franchise contracts or disputes arising from civil rights violations); Consumer Fairness Act of 2009, H.R. 991, 111th Cong. (2009) (invalidating predispute arbitration agreements in consumer contracts); *see also* Burch, *supra* note 264, at 1355.

278 *Supra* note 277.

279 Fair Arbitration Act of 2011, S. 1186, 112th Cong. (2011).

280 *See id.*

281 *Id.* § 2.

282 *Id.*

283 Burch, *supra* note 264, at 1333-34.

known as the "Dodd-Frank Act") was passed in 2010, it established the Consumer Financial Protection Bureau ("Bureau") to, among other functions: regulate, supervise, and enforce federal consumer financial protection laws; restrict unfair or deceptive practices in consumer finance; and enforce laws that prohibit such unfair practices.[284] The Dodd-Frank Act explicitly authorized the Securities and Exchange Commission ("SEC") to "prohibit, limit or reaffirm [mandatory predispute arbitration agreements] in the securities context."[285] It then gave "similar authority to the Consumer Financial Protection Bureau in the non-securities context."[286]

Though by no means an ultimate solution to the broader issues within consumer arbitration, this grant of authority to the SEC and the Bureau is a step in the right direction. In April 2012, the Bureau began a public inquiry into the effects of predispute arbitration agreements on consumers and financial services companies, as dictated by the Dodd-Frank Act.[287] Presumably, the Bureau will eventually act upon the information it receives to ensure that consumer rights are carefully preserved in mandatory arbitration. Though the results of the inquiry (or its subsequent study) have not yet been released, the undertaking in itself indicates the federal executive's acknowledgement of the need for arbitration reform and a willingness to begin the process. Perhaps movement from the executive branch will be just the prompt that the legislature requires to make more widely applicable changes to federal arbitration. At the very least, neither branch can any longer claim ignorance of the current array of problems presented by mandatory consumer arbitration.

Although not given the same authority under the Dodd-Frank Act, the Federal Trade Commission ("FTC") has been doing its own homework.[288] In 2010, the FTC issued an in-depth report on necessary reforms in debt collection arbitration and litigation.[289] After highlighting a lack of consumer choice, notice, and participation, the report suggested several changes that

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284 *About Us*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/ (last visited Nov. 9, 2013).

285 BINGHAM, SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 9 (2010), *available at* http://www.bingham.com/News/2010/10/~/media/11BB58A5CAEE4479B0B3DD38494024B1.pdf; *see* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376 (2010).

286 BINGHAM, *supra* note 285, at 9; *see* Pub. L. No. 111-203, § 1028(b).

287 Press Release, Consumer Fin. Prot. Bureau, CFPB Launches Public Inquiry into Arbitration Clauses (Apr. 24, 2012), http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/. The SEC conducted a similar study. *See* Carter Dougherty, *Consumers May See New Limits on Mandatory Arbitration*, BLOOMBERG BUS. WK. (May 21, 2012), http://www.businessweek.com/news/2012-05-21/consumers-may-see-new-limits-on-mandatory-arbitration.

288 *See* FTC BROKEN SYSTEM, *supra* note 260, at 37-70 (discussing arbitration proceedings throughout Chapter 3 of the FTC report).

289 *Id.* at i.

arbitration forums should make to increase consumer participation, ensure access to and affordability of the process, and allow for consumers to have a choice about agreeing to arbitrate.[290] Among the various process improvements, it urged adoption of strong ethical standards for arbitrators, improvement of notice to consumers that they are agreeing to arbitrate, issuance of reasoned opinions, and creation by Congress of a nationwide system for reporting debt collection arbitration awards to provide more transparency.[291]

While these suggestions are worthwhile, they are almost all directed toward changing the process through arbitration agencies; few urge congressional action.[292] The reality of the current state of consumer arbitration law requires a concerted effort among the private sector and the federal government; the burden cannot be placed solely upon private arbitration administrators. Different stakeholders bring a diversity of perspectives to identifying consumer arbitration's pitfalls while recognizing and preserving its benefits. For example, while the FTC suggests increased transparency through nationwide award reporting, a private arbitration agency may be more concerned with maintaining the privacy of arbitral proceedings and results. While federal agencies' burgeoning efforts to understand and correct issues in consumer arbitration are necessary and encouraging, the agencies cannot do it alone.

CONCLUSION

Consumer arbitration serves a valuable role within the framework of private dispute resolution. It is not, however, without its limitations. Despite the U.S. Supreme Court's best intentions, its contemporary interpretation of the FAA poses significant risks to the continued viability and fairness of consumer arbitration as an institution. The FAA in its current form also fails to account for developments in modern commerce. In order to protect contractual parties and preserve the benefits of consumer arbitration, arbitration administration bodies should work with Congress to implement federal arbitration safeguards and amend the FAA accordingly. Federal agencies must also do their part to reform the current state of consumer arbitration and prevent unconstrained expansion of federal arbitration law.

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290 *Id.* at ii, iv-v.

291 *Id.* at 53, 59, 64, 69.

292 *Id.* at 53. The report suggested that if the private sector would not develop, comply with, and enforce fair debt collection arbitration practices, then Congress should prohibit debt collection arbitration. *Id.* In furtherance of transparency, it also proposed that Congress should create a national reporting and disclosure system for debt collection arbitration awards. *Id.* at 69.