

## CLASS ARBITRATION WAIVERS CANNOT BE FOUND UNCONSCIONABLE: A PERVASIVE AND COMMON “MIS-CONCEPCION”

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**ABSTRACT**—In 1925, Congress enacted the Federal Arbitration Act (FAA) as a means of quelling judicial hostility towards arbitration agreements, providing a mechanism for the enforcement of such agreements. The Supreme Court’s treatment and application of the FAA has evolved over time, and in recent decades the FAA has been massively extended to cover not only arm’s-length commercial transactions, but consumer and employment contracts as well. The Supreme Court, its previous hostile stance long forgotten, has created a policy of favoring arbitration and striking down many an argument that may interfere with that policy. In particular, the Court solidified its position in *AT&T Mobility LLC v. Concepcion* that class arbitration waivers may not be found substantively unconscionable. As a result, large corporations have extraordinary latitude to insulate themselves from liability to their customers and employees, who often cannot hope to take on the time commitments and economic burdens of individual arbitration.

This Note reexamines the *Concepcion* holding in light of the FAA’s purpose and text, contemporary ramifications, and social justice considerations. Ultimately, this Note makes a case for constraining the Court’s treatment of class arbitration waivers in order to allow for a finding of substantive unconscionability when circumstances demand it.

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INTRODUCTION

In 2007, Patricia Rowe signed a one-year telephone contract with AT&T.<sup>1</sup> In 2012, when she sought to terminate her contract, she was informed that she would be charged a \$600 cancellation fee because her service had been automatically set to renew every thirty-six months.<sup>2</sup> Ms. Rowe had not at any point opted in to the automatic renewal of her service, though AT&T claimed to have informed her of it in 2010 in one of her monthly bill statements.<sup>3</sup> Ms. Rowe initiated a class action lawsuit against AT&T in 2014 on behalf of herself and 900 similarly situated customers, contesting the fee as excessive.<sup>4</sup> When the class action was disbanded under her contract’s individual-arbitration mandate, Ms. Rowe had no choice but to pay the exorbitant fee, because individual arbitration of her claim “would have cost far more.”<sup>5</sup>

Arbitration is an alternative form of dispute resolution to traditional litigation. It typically takes place in a conference room, witnesses and lawyers may or may not be involved, and the arbitrator or panel of arbitrators—the presiding third party—can be virtually any neutral person the parties select.<sup>6</sup> Many of the procedural elements characteristic of litigation, such as the guidance of the Federal Rules of Civil Procedure or

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<sup>1</sup> Rowe v. AT&T, Inc., No. 6:13-cv-01206-GRA, 2014 WL 172510, at \*1 (D.S.C. Jan. 15, 2014).

<sup>2</sup> *Id.* at \*2.

<sup>3</sup> *Id.*

<sup>4</sup> See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/K2ER-HH97>].

<sup>5</sup> See *id.*

<sup>6</sup> See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL’Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 5 (2015), <https://files.epi.org/2015/arbitration-epidemic.pdf> [<https://perma.cc/ZEE7-6YGU>]; see also AM. ARB. ASS’N, CONSUMER ARBITRATION RULES 7 (2014), <https://www.adr.org/sites/default/files/Consumer-Rules-Web.pdf> [<https://perma.cc/4P9F-3WU4>] (classifying arbitrators as “neutral and independent decision makers”).

Evidence or the presence of a jury, are absent from an arbitration proceeding.<sup>7</sup> It is the arbitrator’s role to hear any and all evidence each side may seek to submit, and then render a binding decision.<sup>8</sup> Thus, the proceeding is characterized by greater informality and flexibility than litigation, forcing the parties to rely heavily on the expertise and fairness of the arbitrator to reach a “just outcome.”<sup>9</sup> When the parties are merchants of equal bargaining power and knowledge, they can codesign a procedure and select an arbitrator whom they both trust.<sup>10</sup> Indeed, Congress enacted the Federal Arbitration Act (FAA) in 1925 to provide such an alternative for commercial actors to resolve their business disputes swiftly and without the delay and cost that can accompany litigation.<sup>11</sup>

Arbitration’s well-meaning nature begins to crumble, however, in the context of a mandatory-arbitration agreement between a corporation and a consumer who is required to enter the agreement in order to purchase a product or avail herself of a service. Without the knowledge, resources, and experience of their commercial counterparts, and without the formal protections of litigation, these consumers are susceptible to manipulation and unjust outcomes.<sup>12</sup> These consumers’ vulnerability expands massively when a given arbitration provision includes a clause requiring that all arbitration must be individual, preventing multiple plaintiffs from aggregating similar claims.<sup>13</sup> These clauses are known as class arbitration waivers.<sup>14</sup>

Aggregation is one of the only avenues consumers have to seek redress when they are harmed in some way because of a company’s product or service. The likelihood that a consumer can individually achieve relief is extremely slim because attorneys will not take on cases involving small-sum claims—which are typical in these situations<sup>15</sup>—or because the singular plaintiff cannot take on the financial burden or time away from work to

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<sup>7</sup> See STONE & COLVIN, *supra* note 6, at 5; AM. ARB. ASS’N, *supra* note 6, at 7 (noting that the arbitrator makes all procedural decisions in the case that are not mutually decided by the parties).

<sup>8</sup> See STONE & COLVIN, *supra* note 6, at 5.

<sup>9</sup> *Id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See infra* Part I.

<sup>12</sup> See STONE & COLVIN, *supra* note 6, at 3–5.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> Zachary R. Brecheisen, *Making the Withdrawal: The Effect AT&T Mobility v. Concepcion Will Have on State Laws Similar to California’s Discover Bank Rule*, 4 YEARBOOK ON ARB. & MEDIATION 429, 429 (2012) (referring to class action waivers in the arbitration context as class arbitration waivers).

<sup>15</sup> STONE & COLVIN, *supra* note 6, at 16, 21–22 (“Given the relatively small amounts of many consumer financial transactions and the similarity across claims, the availability of class actions is a crucial element in providing access to justice for consumer financial claims.”).

participate in the arbitration process.<sup>16</sup> While some have pointed to data evidencing larger rewards for consumers in arbitration than in class action lawsuits, such data ignore the massive gulf between consumer and corporate wins in arbitration.<sup>17</sup> In other words, “[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”<sup>18</sup>

This Note joins the legal discourse on the subject of class arbitration waivers and the FAA. First, this Note calls for a careful textualist<sup>19</sup> interpretation of the FAA. Subsequently, it places the statute’s legislative history and the Supreme Court’s line of case law with respect to arbitration in conversation with each other to highlight the serious flaws in the Court’s interpretation and application of the FAA. The examination of those flaws supports a statutory purposivist<sup>20</sup> argument that the FAA was never intended to enforce arbitration provisions that would bar consumers from seeking relief from corporations. From there, this Note advocates for a legal realist<sup>21</sup> application of the statute. It discusses the consequences of the Court’s current treatment of the FAA and the harms that forced arbitration inflicts upon consumers in contemporary practice. This Note further contemplates the disparately harsh impact arbitration and its encumbrances have on socioeconomically deprived and marginalized consumers. Under legal realism—which calls for interpreting and furthering the law in the way that

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<sup>16</sup> See *Consumer Arbitration Fact Sheet*, AM. ARB. ASS’N, <https://go.adr.org/consumer-arbitration> [<https://perma.cc/S7QM-546M>] (finding the length of the average arbitration proceeding to be about seven months).

<sup>17</sup> See Heidi Shierholz, *Correcting the Record: Consumers Fare Better Under Class Actions Than Arbitration*, ECON. POL’Y INST. (Aug. 1, 2017), <https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/> [<https://perma.cc/SLA3-B7BU>] (noting that the average consumer recovers \$5,389 in arbitration but only 9% of consumers obtain *any* relief in an arbitration against a company, whereas 93% of companies win in arbitrations against consumers in both individual and aggregated arbitrations).

<sup>18</sup> *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

<sup>19</sup> Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1762 (2010) (explaining that the textualist approach to statutory interpretation “centers on the primacy of enacted text as the key tool in statutory interpretation” and “emphasizes textual analysis, interpretive predictability, and cabined judicial discretion”).

<sup>20</sup> *Id.* at 1764 (defining the purposivist approach as one that considers “an array of extrinsic interpretive aids, including legislative history” to interpret the statute’s language and effectuate its purpose); see also *Purposivism*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “purposivism” as “[t]he doctrine that texts are to be interpreted to achieve the broad purposes that their drafters had in mind; specif., the idea that a judge-interpreter should seek an answer not only in the words of the text but also in its social, economic, and political objectives”).

<sup>21</sup> *Legal Realism*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “legal realism” as “[t]he use of policy analysis to resolve a legal problem based on what best promotes public welfare”).

best serves the public welfare<sup>22</sup>—courts must consider these practical realities when interpreting and administering the FAA, a statute intended to instill efficiency in business-to-business dealings with an explicit carveout for equitable considerations. Thus, regardless of which theory of statutory interpretation one adopts, the Supreme Court’s treatment of the FAA in the class arbitration context is unjustifiable. Finally, this Note concludes with a proposal to revive the unconscionability doctrine—an equitable defense a party in breach of a contract can raise to have the contract, or a portion of it, invalidated<sup>23</sup>—with respect to class arbitration waivers. This Note uniquely contributes to the scholarly landscape, in which commentators tend to dismiss unconscionability as a possible defense to these waivers’ validity because of existing jurisprudence.<sup>24</sup> In hopes of changing that jurisprudential course, this Note calls upon textualism, purposivism, and realism to solve the problem that is the current legal position of the FAA.

Part I begins with a brief examination of the FAA’s origins and the legislative intent underlying its enactment. Part II surveys the evolution of the Supreme Court’s application of the FAA to an ever-expanding array of contractual disputes. This Note focuses on the major cases of the last decade in particular, as therein lies the “most pernicious development in arbitration”<sup>25</sup>: pairing mandated arbitration with class arbitration waivers, which the Court has left essentially untouchable. Finally, Part III presents three interrelated jurisprudential avenues through which future litigants can and should attack the Court’s decisions—particularly *AT&T Mobility LLC v. Concepcion*,<sup>26</sup> which, along with its progeny, has almost impermeably sheltered class arbitration waivers for the past decade. On textualist, purposivist, and legal realist grounds, future litigants ought to be able to claim unconscionability as a defense with measurable success, especially when social justice concerns insist upon it.

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<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 764 (2014) (explaining that, depending on the state, courts have a range of remedies under the unconscionability doctrine, from excising unconscionable provisions from contracts to refusing to enforce the contracts altogether).

<sup>24</sup> See *infra* notes 101–103 and accompanying text.

<sup>25</sup> STONE & COLVIN, *supra* note 6, at 4.

<sup>26</sup> 563 U.S. 333 (2011).

## I. THE FEDERAL ARBITRATION ACT: ORIGINS AND ENACTMENT

The push for a national arbitration act was a product of the surging industrial growth taking place from 1890 to 1920 in the United States.<sup>27</sup> As mass production accelerated and demand grew, businesses and commercial actors found themselves increasingly in need of an alternative form of dispute resolution that would allow them to resolve typical issues more efficiently than was often possible in traditional litigation.<sup>28</sup> Arbitration seemed a natural choice, given that it did away with many of the procedural elements that contributed to the length of litigation, such as compliance with federal procedural and evidentiary rules.<sup>29</sup> In the early twentieth century, however, U.S. common law furnished no mechanism to enforce arbitration agreements, making it easy for the more reluctant commercial party to avoid arbitrating disputes.<sup>30</sup> The federal courts possessed a “judicial hostility”<sup>31</sup> towards arbitration inherited from English courts that consistently held that “performance of a written agreement to arbitrate would not be enforced in equity, and . . . if an action at law were brought . . . such agreement could not be pleaded in bar of the action.”<sup>32</sup> To push the courts in a more arbitration-friendly direction, various business lobbyists and members of the American Bar Association’s Committee on Commerce, Trade, and Commercial Law drafted and promoted the New York Arbitration Act.<sup>33</sup> The same key players subsequently used the New York statute as a model for the Federal Arbitration Act, which Congress enacted in 1925.<sup>34</sup> The drafters’ stated purpose was to make written agreements to arbitrate enforceable.<sup>35</sup>

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<sup>27</sup> See Rachel M. Schiff, Note, *Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases*, 53 U.C. DAVIS L. REV. 2693, 2723 (2020).

<sup>28</sup> *Id.* at 2724.

<sup>29</sup> See sources cited *supra* note 7.

<sup>30</sup> See STONE & COLVIN, *supra* note 6, at 7; 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, 101 (2006) (“Before the enactment, a party to an arbitration agreement could at any time prior to the award simply refuse to arbitrate and courts would not enforce the agreement.”).

<sup>31</sup> Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 323 (2013).

<sup>32</sup> Moses, *supra* note 30, at 102 (quoting S. REP. NO. 68-536, at 2 (1924)); see also Gabriel Herrmann, Note, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 784 (2003) (noting that courts often justified revoking arbitration agreements because they ran counter to public policy by “oust[ing] the jurisdiction” of the courts).

<sup>33</sup> See Moses, *supra* note 30, at 101; *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 16 (1924) [hereinafter *Joint Hearings*] (statement of Julius Cohen).

<sup>34</sup> *Joint Hearings*, *supra* note 33, at 99, 102; Comm. on Com., Trade and Com. L., *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 153, 155 (1925).

<sup>35</sup> See Moses, *supra* note 30, at 128.

At the Joint Hearings of the Senate and House Subcommittees regarding the FAA, a congressman highlighted that arbitration “saves time, saves trouble, saves money[,] . . . preserves business friendships[,] . . . raises business standards,” and prevents contracting commercial partners from facing “unnecessary” litigation.<sup>36</sup> Julius Cohen, the American Bar Association (ABA) member credited with drafting the FAA,<sup>37</sup> emphasized that businesses required faster and simpler solutions to their disputes and that the statute would not infringe upon states’ rights to establish their own jurisdictional contract law.<sup>38</sup> The hearings demonstrated that the focus of the FAA was merchant-to-merchant, not merchant-to-consumer, arbitrations.<sup>39</sup> Specifically, the initial promoters of the FAA sought to make enforceable only those arbitration agreements “voluntarily placed in the document by the parties to it.”<sup>40</sup> During the hearings, one Senator raised the question of “whether the legislation would apply to contracts which were not really voluntary”—in other words, in contracts where one party’s bargaining power dwarfed that of the other, enabling it to offer a contract on a “take-it-or-leave-it” basis.<sup>41</sup> In response, the others on the Committee refused to endorse such an application because the primary aim of the FAA would be to enforce agreements between merchants.<sup>42</sup> In short, while Congress largely planned for the FAA to make arbitration agreements enforceable, thereby placing them on “equal footing with other contractual agreements,”<sup>43</sup> Congress did

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<sup>36</sup> *Id.* at 102 (quoting *Joint Hearings*, *supra* note 33, at 7).

<sup>37</sup> *See id.*

<sup>38</sup> *See id.* at 103. This Note does not focus on the intended breadth of the FAA or whether the statute should span both federal *and* state law issues. However, Cohen’s arguments about separating state jurisdiction serve to illustrate the Court’s distortion of the scope of the FAA, as discussed below. *See infra* notes 49–58 and accompanying text.

<sup>39</sup> *See Moses*, *supra* note 30, at 106.

<sup>40</sup> *Id.* at 108 (quoting 65 CONG. REC. 1931 (1924)).

<sup>41</sup> *Id.* at 106; *see also Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9* (1923) [hereinafter *Sales and Contracts*] (providing that the Senator expressed that in reality, such agreements “are really not voluntar[y] things at all”).

<sup>42</sup> *Sales and Contracts*, *supra* note 41, at 10 (noting that such an outcome “ought to be protested against, because it is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods”); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1642–43 (2018) (Ginsburg, J., dissenting) (“The business community’s aim was to secure to merchants an expeditious, economical means of resolving their disputes. . . . The legislative hearings and debate leading up to the FAA’s passage evidence Congress’ aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes.” (citing 65 CONG. REC. 11,080 (1924) (remarks of Rep. Mills))).

<sup>43</sup> Herrmann, *supra* note 32, at 785 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995)); *see also* Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees’ Contractual Rights?—Legal and Empirical Analyses of Courts’ Mandatory Arbitration*

not intend to allow a party with greater bargaining power to force the weaker party into arbitration.<sup>44</sup>

Unanimously passed in Congress,<sup>45</sup> the FAA represented a major victory for business and commercial actors. The 1925 text of § 2 of the statute—its operative provision—provided:

a written provision *in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration* a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*<sup>46</sup>

In essence, the FAA's plain language states that arbitration provisions in transactional agreements will be enforced "save upon," or except for, when the circumstances of the agreement satisfy a basis in either law or equity that would allow for the revocation of a contract. The drafters, then, believed that supporting arbitration was paramount. Notably, however, they still expressly included a carveout for situations in which enforcing an arbitration agreement would be inequitable and perhaps unjust.

Operating under the understanding that the FAA applied to neither consumer nor employment contracts, courts interpreted the FAA conservatively from 1925 into the 1980s, only invoking it in the narrow context of "commercial cases involving federal law that were brought in federal courts on an independent federal ground."<sup>47</sup> Starting in the 1980s, however, the Supreme Court handed down a series of decisions that massively expanded the scope of the FAA's reach, culminating in the statute's present-day application to all contracting parties.

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*Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800–2015*, 25 B.U. PUB. INT. L.J. 143, 165 (2016) (noting that the congressional record reveals Congress's reasons for enacting the FAA to include allowing merchants of equal sophistication and power to "fashion voluntary arbitration agreements," encouraging courts to enforce those agreements, increasing efficiency in resolution of trade disputes between merchants, and preserving business relationships).

<sup>44</sup> Moses, *supra* note 30, at 108.

<sup>45</sup> *Id.* at 110.

<sup>46</sup> Act of Feb. 12, 1925, Pub. L. No. 68-401, § 2, 43 Stat. 883, 883 (codified at 9 U.S.C. § 2) (emphasis added).

<sup>47</sup> STONE & COLVIN, *supra* note 6, at 7.

## II. SUPREME COURT APPLICATIONS OF THE FEDERAL ARBITRATION ACT

As previously mentioned, the FAA’s initial influence was minimal, applying only to the kinds of transactions discussed in the enacting congressional hearings: commercial contracts between businesses.<sup>48</sup> Throughout the latter half of the twentieth century and into the early twenty-first century, however, the Supreme Court issued a series of decisions that completely transformed the scope of the FAA to include all kinds of contracts,<sup>49</sup> beginning with *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*<sup>50</sup> The *Prima Paint* Court introduced the new characterization of the FAA, holding that the FAA was a source of federal substantive law under the Commerce Clause, and thus rendering state law powerless to displace the FAA under the Supremacy Clause.<sup>51</sup> In other words, after *Prima Paint*, situations where a state’s contract law might have exempted an arbitration provision from the FAA’s protection were less likely to occur. That finding “planted a seed that blossomed”<sup>52</sup> in *Southland Corp. v. Keating*, just under twenty years later.<sup>53</sup>

In *Keating*, a group of 7-Eleven franchisees sued their franchisor, Southland, in California state court.<sup>54</sup> Southland moved to compel arbitration under their franchise agreement, and the Court upheld the agreement despite the California Franchise Investment Law,<sup>55</sup> which theoretically negated

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<sup>48</sup> Schiff, *supra* note 27, at 2723. For examples of courts applying the FAA to agreements between two merchants in this period, see *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985–92 (2d Cir. 1942); *Kanmak Mills, Inc. v. Soc’y Brand Hat Co.*, 236 F.2d 240, 250–52 (8th Cir. 1956); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 409–12 (2d Cir. 1959); and *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 181 F. Supp. 130, 133 (S.D.N.Y. 1960).

<sup>49</sup> See Schiff, *supra* note 27, at 2723 (“The FAA no longer merely stands for the right of commercial parties engaging in interstate commerce to manage their disputes out of the court system. Instead, the FAA extends to cover almost every contract including credit-card agreements, pay-day loans, . . . and computer purchases.” (footnotes omitted)).

<sup>50</sup> 388 U.S. 395 (1967).

<sup>51</sup> *Id.* at 405; see also Alex Brunino, Comment, *A Modest Proposal: Review of the National Consumer Law Center’s Model State Consumer and Employee Justice Enforcement Act*, 95 OR. L. REV. 569, 575 (2017) (“[I]n *Prima Paint*, the Court held that, in federal court, the FAA is a source of federal substantive law under the Commerce Clause of the Constitution . . . . *Prima Paint* thus established that the FAA would henceforth be interpreted and applied as substantive law . . . .”). *But see Prima Paint*, 388 U.S. at 422 (Black, J., dissenting) (“Even if Congress intended to create substantive rights by passage of the Act, I am wholly convinced that it did not intend to create such a sweeping body of federal substantive law completely to take away from the States their power to interpret contracts made by their own citizens in their own territory.”).

<sup>52</sup> Schiff, *supra* note 27, at 2718.

<sup>53</sup> 465 U.S. 1 (1984).

<sup>54</sup> *Id.* at 3–4.

<sup>55</sup> *Id.* at 4–5, 17.

arbitration provisions in franchise agreements.<sup>56</sup> In so doing, the Court held that the FAA was substantive federal law that preempted the contrary California statute.<sup>57</sup> The *Keating* Court also claimed that by enacting the FAA, “Congress declared a national policy favoring arbitration.”<sup>58</sup> From the framework erected in *Keating*, the Court took up a staunchly pro-arbitration stance, in stark contrast to lower courts’ prior hesitance to uphold arbitration contracts. Over thirty years later, the Court has not once looked back.

As time went on, in light of the Court’s freshly favorable position with regard to arbitration provisions, arbitration agreements began cropping up in increasing numbers.<sup>59</sup> In response, states began exerting legislative efforts to protect consumers and employees from “oppressive” arbitration agreements, though these were met with great resistance from the Court.<sup>60</sup> Commercial actors and businesses came to realize that the new pro-arbitration legal world in which they found themselves gave them tremendous license to effectively insulate themselves from liability to their consumer clients, especially through the use of mandatory arbitration agreements with class arbitration waivers.<sup>61</sup>

For a while, consumer plaintiffs were able to effectively plead their cases under long-standing state contract law principles such as the

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<sup>56</sup> See Schiff, *supra* note 27, at 2718.

<sup>57</sup> See *id.* at 2718–19.

<sup>58</sup> 465 U.S. at 10. The Court pulled this holding from its 1983 opinion involving an arbitration agreement between a hospital and a construction contractor, wherein the Court declared that the FAA manifests a “liberal federal policy favoring arbitration,” and that any contractual ambiguities ought to be resolved in favor of arbitration. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>59</sup> See, e.g., Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (Jan. 30, 2020), <https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/> [<https://perma.cc/DQH4-22YL>] (noting that arbitration clauses have become significantly more common in recent decades—first in the financial and telecommunications industries and more recently in consumer products and services); see also ALEXANDER J.S. COLVIN, ECON. POL’Y INST., *THE GROWING USE OF MANDATORY ARBITRATION* 3 (2017), <https://files.epi.org/pdf/135056.pdf> [<https://perma.cc/JRD5-7UJ8>] (noting that arbitration was expanding in the 1990s and that by the early twenty-first century, nearly 25% of the American workforce was subject to forced arbitration).

<sup>60</sup> See STONE & COLVIN, *supra* note 6, at 8–9 (discussing an attempt by the Montana legislature to ensure that consumers knew that they were consenting to arbitration when they contracted with large companies, and reporting that the Supreme Court struck down the attempt, holding that the law was “restrictive of arbitration and therefore preempted”).

<sup>61</sup> See Silver-Greenberg & Gebeloff, *supra* note 4 (stating that class arbitration waivers provide “companies like American Express . . . a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tools citizens have to fight illegal or deceitful business practices”).

unconscionability doctrine<sup>62</sup> and cause some courts to invalidate such class arbitration waivers. Unconscionability can be measured by whether, in the context of a particular transaction or commercial setting, the provisions of the contract are extremely one-sided at the time of formation.<sup>63</sup> Under the unconscionability doctrine, depending on the jurisdiction, a court could invalidate an arbitration agreement if it was substantively or procedurally unconscionable.<sup>64</sup> An agreement is *procedurally* unconscionable if it arises from stark inequality in bargaining power and lack of negotiation between the parties.<sup>65</sup> An agreement is *substantively* unconscionable, on the other hand, if it arises from unfair or one-sided terms favoring the party of greater bargaining power.<sup>66</sup>

The Supreme Court drew a firm line in the sand with respect to unconscionability arguments in *AT&T Mobility LLC v. Concepcion*.<sup>67</sup> There, the Concepcions purchased cellphones and service plans from AT&T, entering a contract that provided for arbitration of all disputes on an individual basis.<sup>68</sup> The phones were advertised as free, yet the Concepcions

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<sup>62</sup> For an example of a court using the state contract law principle of unconscionability, see *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005). In *Discover Bank*, the Supreme Court of California created a rule that held that when a consumer contract contains a class arbitration waiver in a setting “in which disputes between the contracting parties predictably involve small amounts of damages,” and when the consumer alleges that the corporation “has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,” then the waiver is “unconscionable under California law and should not be enforced.” *Id.*

<sup>63</sup> Landrum, *supra* note 23, at 763.

<sup>64</sup> See Colleen McCullough, Comment, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 781–82 (2016) (describing procedural unconscionability as arising out of issues in contract formation—including lack of literacy or sophistication, hidden or unduly complex terms, or nefarious bargaining tactics—and substantive unconscionability as arising from terms so one-sided “as to shock the court’s conscience” (quoting *Rodriguez v. Raymours Furniture Co.*, 93 A.3d 760, 767 (N.J. Super. Ct. App. Div. 2014))).

<sup>65</sup> *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1093–94 (9th Cir. 2009).

<sup>66</sup> *Id.* at 1094. Some states, such as Oregon, require only a showing of substantive unconscionability, *see id.*, whereas others, such as California, judge unconscionability on a sliding scale, *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (noting that “[e]ssentially a sliding scale is invoked which disregards” the degree of procedural unconscionability “in proportion to the greater harshness or unreasonableness of the substantive terms themselves” (quoting 15 WILLISTON ON CONTRACTS § 1763A (Walter H.E. Jaeger ed., 3d ed. 1972))). While a minority of states, including Washington and Kansas, require a showing of *either* procedural or substantive unconscionability, many others, including Pennsylvania, Florida, Georgia, South Carolina, and Wisconsin, require showings of both. *See Romero v. Allstate Ins. Co.*, 158 F. Supp. 3d 369, 380 (E.D. Pa. 2016); *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 284 (Fla. Dist. Ct. App. 2003); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 165 (Wis. 2006); *York v. Dodgeland of Columbia, Inc.*, 749 S.E.2d 139, 148 (S.C. Ct. App. 2013); *Mullis v. Speight Seed Farms, Inc.*, 505 S.E.2d 818, 820 (Ga. App. 1998); *Adams v. John Deere Co.*, 774 P.2d 355, 357 (Kan. App. 1989); *McKee v. AT&T Corp.*, 191 P.3d 845, 857 (Wash. 2008).

<sup>67</sup> 563 U.S. 333 (2011).

<sup>68</sup> *See id.* at 336.

were each charged \$30.22 in sales tax.<sup>69</sup> When AT&T moved to compel arbitration in response to their putative class action,<sup>70</sup> the Concepcions cited the California unconscionability doctrine as a ground that “exist[s] at law or in equity for the revocation of any contract.”<sup>71</sup> In other words, the Concepcions claimed that their contract’s arbitration provision should be exempted from the FAA’s enforcement because of the statute’s savings clause.<sup>72</sup> They argued that the class arbitration waiver was unlawfully exculpatory and unfairly favored AT&T, making the arbitration provision the kind that ought not stand.<sup>73</sup>

In a five–four majority, Justice Antonin Scalia, writing for the Court and citing the same broad federal policy favoring arbitration as in *Keating*,<sup>74</sup> held that the FAA’s savings clause did not permit defenses that either only apply to arbitration or “derive their meaning from the fact that an agreement to arbitrate is at issue” to invalidate an arbitration provision.<sup>75</sup> Justice Scalia asserted that the “overarching purpose” of the FAA, as evidenced by its text, “is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”<sup>76</sup> He added that to require the availability of class-wide arbitration would be to interfere with the “fundamental attributes of arbitration,” thus creating “a scheme inconsistent with the FAA.”<sup>77</sup> Put another way, Justice Scalia’s opinion hinged on the idea that finding a class arbitration waiver within an arbitration provision unconscionable would run counter to the very essence of arbitration and would therefore undermine the purpose of the statute. In his concurrence, Justice Clarence Thomas argued that the text of the savings clause in § 2 of the FAA suggests that the savings clause encompasses only a subset of defenses—specifically, defenses related to the formation of the contract.<sup>78</sup> Thus, according to Justice Thomas, claiming that a class arbitration waiver is *substantively*—as opposed to *procedurally*—unconscionable cannot act as grounds for exception from the statute’s coverage because substantive unconscionability speaks to the nature of the contract terms themselves, not the manner in which the agreement was made.<sup>79</sup>

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<sup>69</sup> See *id.* at 337.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 341 (quoting 9 U.S.C. § 2).

<sup>72</sup> See *id.* at 339–40.

<sup>73</sup> See *id.* at 337–38.

<sup>74</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>75</sup> *Concepcion*, 563 U.S. at 339.

<sup>76</sup> *Id.* at 344.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 354–55 (Thomas, J., concurring).

<sup>79</sup> See *id.* at 355. For further discussion of the issues with this logic, see *infra* Part III.

The impact of the *Concepcion* decision was profound. It paved the way for the Court to continue transforming the FAA’s scope and, in particular, essentially rendered class arbitration waivers impervious to the kinds of challenges that would permit a court to invalidate them, such as an unconscionability claim. This impact is evidenced by case law that followed closely in *Concepcion*’s wake.<sup>80</sup> Shortly after *Concepcion*, the Court—in light of both its now highly deferential and resolute positions on class arbitration waivers and its creation of the effective vindication doctrine in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>81</sup>—decided *American Express Co. v. Italian Colors Restaurant*.<sup>82</sup> When the plaintiff-merchants in *American Express* brought a class action suit alleging that their agreements with American Express violated the Sherman Act,<sup>83</sup> American Express moved to compel individual arbitration pursuant to the arbitration provision therein.<sup>84</sup> Arguing under *Mitsubishi*’s effective vindication doctrine, the plaintiffs demonstrated that it would cost an exorbitant amount—one far greater than any potential recovery amount—for any one of them to pursue the arbitration individually, thus preventing them from “effectively vindicating their rights under the Sherman Act.”<sup>85</sup> Knocking most, if not all, of the teeth out of the effective vindication doctrine, the Court held, for purposes of honoring precedent and the FAA, that effective vindication was only dicta in *Mitsubishi* and that as long as the plaintiff *could* effectively vindicate its statutory cause of action in the forum of arbitration, the economic feasibility of doing so did not matter.<sup>86</sup> In other words, the Court read the language of *Mitsubishi* so literally as to mean that if any plaintiff could bring its statutory claim in arbitration, the doctrine was

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<sup>80</sup> See, e.g., *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1160 (9th Cir. 2012) (noting that “invalidating arbitration agreements for lacking class-action provisions” would run directly counter to the FAA and *Concepcion*); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013) (finding that arbitration agreements containing class waivers are enforceable absent a “contrary congressional command” that the right to aggregate overrides the FAA’s mandate in favor of arbitration).

<sup>81</sup> 473 U.S. 614 (1985). The Court established the so-called “effective vindication doctrine” in holding that the presumption in favor of arbitration extends to circumstances “where a party bound by an arbitration agreement raises claims founded on statutory rights,” “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.” Thomas J. Lilly Jr., *The Use of Arbitration Agreements to Defeat Federal Statutory Rights: What Remains of the Effective Vindication Doctrine After American Express v. Italian Colors Restaurant?*, 61 WAYNE L. REV. 301, 310–11 (2016) (quoting *Mitsubishi*, 473 U.S. at 626, 637). In other words, provided the plaintiff could *effectively*, not just *technically*, vindicate her statutory rights through arbitration, courts would defer to arbitration.

<sup>82</sup> 570 U.S. 228 (2013).

<sup>83</sup> The Sherman Act is a core federal antitrust law that outlaws “[e]very contract, combination . . . or conspiracy, in restraint of trade,” as well as any monopolization or effort to do so. 15 U.S.C. §§ 1–2.

<sup>84</sup> *Am. Express*, 570 U.S. at 231.

<sup>85</sup> Lilly, *supra* note 81, at 315.

<sup>86</sup> *Am. Express*, 570 U.S. at 235–36.

satisfied even though the costs of arbitration would ensure their rights would *not* be *effectively* vindicated. Thus, the Court did away with yet another potential obstacle to the enforcement of class arbitration waivers within arbitration agreements.

Finally, two cases—*Epic Systems Corp. v. Lewis*<sup>87</sup> and *Lamps Plus, Inc. v. Varela*<sup>88</sup>—are the most recent examples of the Supreme Court’s application of the FAA. In *Lewis*, the Court considered whether employment agreements could mandate individual arbitration and prohibit class action lawsuits and then interpreted the FAA to answer in the affirmative.<sup>89</sup> Employees involved in the case had signed employment contracts that contained provisions mandating the resolution of disputes via bilateral arbitration.<sup>90</sup> The employees raised the defense that the National Labor Relations Act’s protection of employees’ right to “concerted activities” included protection of the ability to form a plaintiff class.<sup>91</sup> The Court relied on *Concepcion* to conclude that the alleged defense could not stand because it “impermissibly disfavor[ed] arbitration.”<sup>92</sup>

Shortly thereafter, the Court decided *Varela*, answering the question of “whether the FAA . . . bars an order requiring class arbitration when an agreement is not silent, but rather ‘ambiguous’ about the availability of such arbitration.”<sup>93</sup> In that case, Varela’s personal tax information was stolen as a result of a corporate data breach at his place of employment.<sup>94</sup> When a false tax return was filed in his name, he brought a putative class action in a California federal district court against his employer, Lamps Plus, which subsequently moved to compel individual arbitration pursuant to the employment agreement.<sup>95</sup> The Ninth Circuit decided in Varela’s favor because the agreement was ambiguous as to whether the parties had agreed to allow for class arbitration.<sup>96</sup> In ruling for Varela, the circuit court implemented California’s contract doctrine of construing any ambiguities against the drafter—in this case, Lamps Plus.<sup>97</sup> The Supreme Court, however, reversed the Ninth Circuit, reiterating that regardless of any ambiguity, class-wide arbitration diverged prominently from “traditional individual

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<sup>87</sup> 138 S. Ct. 1612 (2018).

<sup>88</sup> 139 S. Ct. 1407 (2019).

<sup>89</sup> 138 S. Ct. at 1619.

<sup>90</sup> *Id.* at 1619–20.

<sup>91</sup> *Id.* at 1624 (quoting 29 U.S.C. § 157).

<sup>92</sup> *Id.* at 1623.

<sup>93</sup> 139 S. Ct. at 1412.

<sup>94</sup> *Id.* at 1412–13.

<sup>95</sup> *Id.* at 1413.

<sup>96</sup> *Id.*

<sup>97</sup> *See id.*

arbitration,”<sup>98</sup> and it held that “arbitration is strictly a matter of consent.”<sup>99</sup> Further, because the state’s doctrine would “thwart[] implementation of the purposes and objectives of the FAA, it [was] preempted.”<sup>100</sup>

Considering this series of decisions that the Court has handed down on the scope of the FAA, one could argue that there is little room for any doubt or change—and indeed some commentators have. For example, Rachel Schiff, in her student note, explores the possibility of solving the problem that the Court’s application of the FAA created with respect to employees who are bound to individual arbitration and wish to bring sexual harassment claims.<sup>101</sup> She concludes that *Concepcion* and its progeny have “foreclosed” unconscionability as an avenue for invalidating class arbitration waivers.<sup>102</sup> Similarly, in another student note, Jonathon Serafini even advocates for using the unconscionability doctrine to render arbitration agreements unenforceable, but he acquiesces to the doctrine’s precedential mootness as applied to class action waivers.<sup>103</sup> Commentators seem to agree that the Court has made its position clear: Congress, in passing the FAA, enacted a national policy favoring arbitration, and virtually no challenge—be it state, statutory, or equitable—will supersede the Act. However, the Court’s stance results from a decades-in-the-making distortion of the FAA that cannot be left alone without doing an immense disservice to the Sixty-Eighth Congress’s legislative intent and to those who bear the burden of this distortion the most.

### III. CORRECTING THE “MIS-CONCEPCION”

Since *Concepcion*, the Court has been fairly consistent regarding the status of class arbitration waivers’ vulnerability—or lack thereof—under the FAA. However, the Court’s opinions, particularly those beginning with and following *Concepcion*, were born out of an intensely flawed understanding of the FAA’s intent and scope. Exploring the points of divergence between the Court’s opinions and the FAA’s legislative history and text reveals that

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<sup>98</sup> *Id.* at 1415.

<sup>99</sup> *Id.* at 1418 (quoting *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010)).

<sup>100</sup> Colleen M. Baker & Daniel T. Ostas, *Ethics of Legal Astuteness: Barring Class Actions Through Arbitration Clauses*, 29 S. CAL. INTERDISC. L.J. 399, 413 (2020); see also *Varela*, 139 S. Ct. at 1418 (noting that a generally applicable rule cannot save an arbitration provision from FAA preemption if it “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA” (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011))).

<sup>101</sup> See Schiff, *supra* note 27, at 2727.

<sup>102</sup> *Id.* at 2722.

<sup>103</sup> See Jonathon L. Serafini, *The Deception of Concepcion: Saving Unconscionability After AT&T Mobility LLC v. Concepcion*, 48 GONZ. L. REV. 187, 212–13 (2013); see also Sam Cleveland, Note, *A Blueprint for States to Solve the Mandatory Arbitration Problem While Avoiding FAA Preemption*, 104 MINN. L. REV. 2515, 2539 (stating that “for various reasons [doctrines such as unconscionability] have become inapplicable to arbitration provisions”).

the repercussions of this misunderstanding and the realities of arbitration today are disparately harsh and too severe to leave unaddressed. This exploration of the statute reframes precedent and proposes a solution through the doctrine of unconscionability.

*A. The Court's Strained Textualism in Concepcion*

The Court's strained textualism in *Concepcion* and its progeny is fundamentally at odds with the FAA's intent. Recall the discussion in Part I about the enactment of the FAA. Many commentators have written about the FAA's history and the congressional intent behind it, and most have concluded, as does this Note, that the enacting Congress passed the FAA to institute a mechanism for enforcing the terms of arbitration agreements that are mutually consented to in commercial, arm's-length transactions between two merchants of relatively equal bargaining power.<sup>104</sup> In Professor Imre Szalai's detailed exploration of the FAA's history, he discovered that the "Supreme Court ha[d] grossly erred in interpreting the statute," for the FAA was "intended to provide a framework for federal courts to support a limited, modest system of private dispute resolution for commercial disputes," not the Court-created system "involving both state and federal courts and covering virtually all types of non-criminal disputes."<sup>105</sup> In other words, the outcome that the FAA would come to supersede preexisting state contract law was not the enacting Congress's plan. Nor was, according to Professor Margaret L. Moses, enforcing arbitration provisions between merchants and consumers. Professor Moses contends that the "central concept behind the Act" was to provide for the enforceability of merchant-to-merchant arbitration agreements, which bind parties of approximately equal bargaining strength in need of an efficient and inexpensive means for resolving disputes.<sup>106</sup>

There are other scholars who argue against this reading of the legislative history, such as Professor Christopher R. Drahozal. Following the Court's *Southland Corp. v. Keating* decision, which established the FAA's ability to

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<sup>104</sup> See, e.g., Schiff, *supra* note 27, at 2723 ("Most commentators conclude that the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power."); Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 135 (2016) (noting that the FAA's drafters not only "had a genuine, sincere, good faith belief" that arbitration provided a streamlined and efficient method to resolve commercial disputes in a "non-acrimonious setting," but also sought to create "a system where commercial parties, with meaningful consent," would arbitrate their contractual disputes without "caus[ing] harm [to] or disadvantage[ing] a weaker party" (emphasis added)).

<sup>105</sup> Szalai, *supra* note 104, at 117.

<sup>106</sup> Moses, *supra* note 30, at 106; see also *id.* at 107 (noting that the enacting legislators indicated that the FAA would not apply in adhesion contracts and that instead their intent behind the FAA was voluntary resolution of disputes between merchants).

preempt state law,<sup>107</sup> Professor Drahozal critiqued the Court’s reasoning but ultimately found that the text of the Act, as well as its history, confirmed that the statute permitted preemption.<sup>108</sup> For example, Professor Drahozal pointed to § 2, the operative section of the statute, and noted that its mention of maritime transactions and transactions in interstate commerce demonstrated an intended scope that covered proceedings in both state and federal court.<sup>109</sup> The language of § 2 thus undermined arguments that the FAA was never intended to apply in state court, according to Professor Drahozal.<sup>110</sup>

Of course, discussions of legislative history will nearly always lend themselves to cherry-picking, whereby a given speaker can choose pieces of the record to support his or her argument. This Note does not purport to suggest that a complete understanding of a statute can ever entirely rest on legislative history. Still, taking into consideration the statute’s plain language *alongside* much of its history,<sup>111</sup> this Note aligns with the work of Professors Szalai and Moses. After all, “grounds as exist at law . . . for the revocation of any contract”<sup>112</sup> would likely originate from state common law,<sup>113</sup> indicating that the Act explicitly provided a means of state contract law superseding the FAA—the opposite of the result the Supreme Court has created.

When the Senate Committee considered to which transactions the FAA ought to apply, some members expressed concerns that arbitration agreements offered on take-it-or-leave-it bases to “captive” customers are not really voluntary because customers have no choice but to sign.<sup>114</sup> These members were met with reassurance from the FAA’s supporters that the Act was not meant to cover “such unequal situations.”<sup>115</sup> Further, Julius Cohen, the principal drafting ABA member, wrote after the FAA’s passage that the statute was meant to provide a method of dispute resolution “peculiarly suited to the disposition of the ordinary disputes between merchants as to

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<sup>107</sup> See *supra* notes 49–52 and accompanying text.

<sup>108</sup> See Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 124 (2002).

<sup>109</sup> See *id.*

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

<sup>111</sup> See *supra* note 49 and accompanying text.

<sup>112</sup> 9 U.S.C. § 2.

<sup>113</sup> Mikio Yamaguchi, *The Problem of Delay in the Contract Formation Process: A Comparative Study of Contract Law*, 37 CORNELL INT’L L.J. 357, 361–62 (2004) (“In the American legal system, contract law is primarily common law, consisting of court decisions, which differ from state to state.”).

<sup>114</sup> See Schiff, *supra* note 27, at 2723–24 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967)).

<sup>115</sup> Schiff, *supra* note 27, at 2724; see *Sales and Contracts*, *supra* note 41, at 10.

questions of fact—quantity, quality, time of delivery . . . and the like.”<sup>116</sup> While a consumer–merchant transaction may involve similar questions, the consumer does not possess, as the merchant does, the expertise and regular susceptibility to frequent, reoccurring issues that call for a flexible, less formal option for resolution like arbitration. Simply put, the legislative history of the FAA indicates that it was enacted with the limited purpose of overcoming the “judicial hostility” to arbitration over contract disputes between businesses.<sup>117</sup>

Trying to reconcile these findings with the holdings of the Supreme Court is a difficult, if not Herculean, task. In the words of Justice Sandra Day O’Connor, “[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation.”<sup>118</sup> Rather than endeavor to administer the FAA to its intended subjects—commercial actors—the Court’s judge-made policy of favoring arbitration has extended to all corners of the realm of consumer and employment contracts.<sup>119</sup>

Under the pretense of abiding by the statute’s intent through textualist interpretation, Justice Scalia misconstrued its text and purpose. The Court’s decision in *Concepcion* instilled in large corporations the audacity to institute class arbitration waivers on an involuntary basis, taking their liability to customers off the table.<sup>120</sup> At the core of Justice Scalia’s holding is his insistence that the primary purpose of the FAA, “evident in the text of §§ 2, 3, and 4,” is to ensure that arbitration agreements are enforced “so as to facilitate streamlined proceedings.”<sup>121</sup> Nowhere in the text of the statute, however, is efficiency or streamlining of procedure mentioned. The text of § 2, for instance, simply states that a provision in any interstate commerce transaction “to settle by arbitration a controversy thereafter arising out of

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<sup>116</sup> Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926).

<sup>117</sup> Miller, *supra* note 31, at 323; see also *Joint Hearings* at 16 (“What does this bill do? It destroys the anachronism in the law.”).

<sup>118</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

<sup>119</sup> See Miller *supra* note 31, at 324 (“*Concepcion* strikingly exemplifies the extraordinary judicial extension of the Act’s application to a vast array of consumer contracts that are characterized by their adhesive nature and by the individual’s complete lack of bargaining power (as well as a probable lack of understanding of the arbitration clause’s significance).”).

<sup>120</sup> See Christopher Boran, Kenneth Kliebard, Steven Reed, Sam Shaulson, James Looby, Michael Cumming & Heather Nelson, *The Use and Enforceability of Class Action Waivers in Arbitration Agreements in the United States*, MORGAN LEWIS (2020), <https://www.morganlewis.com/-/media/files/publication/outside-publication/article/2020/theuseandenforceabilityofclassactionwaiversinarbitrationagreementsintheunitedstates.pdf> [<https://perma.cc/7WA4-Q8MD>] (explaining that courts’ initial hostility towards class arbitration waivers vanished in the wake of *Concepcion*).

<sup>121</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

such contract or transaction . . . shall be valid, irrevocable, and enforceable.”<sup>122</sup> Much of the legislative history certainly does make mention of the desire to allow businesses or merchants to resolve their disputes in a quicker and less costly fashion than in traditional litigation.<sup>123</sup> However, for the Court to have gathered as much, it would have needed to consult the legislative record—and in doing so, the Court would have discovered a great deal of discussion crystallizing the idea that the FAA was intended to apply to and impact commercial parties of equivalent knowledge and bargaining power.<sup>124</sup> Picking and choosing the pieces of legislative history that support a manufactured, desired interpretation is a deeply troubling means for determining the scope of a federal statute like the FAA.<sup>125</sup> The Court’s repeated substitution of its own preferences for those of the legislature “constitutes a bald-faced usurpation of the legislature’s rightful policymaking function.”<sup>126</sup>

The *Concepcion* majority also relied on the premise that the FAA places contracts with arbitration clauses on “equal footing with all other contracts,” and may not be disfavored under any circumstances.<sup>127</sup> The majority contended that to apply the *Discover Bank v. Superior Court* rule that allowed for finding class arbitration waivers unconscionable would be to subvert equality between arbitration and other kinds of agreements.<sup>128</sup> On the contrary, the rule did not invalidate all class arbitration waivers as per se unconscionable. Instead, the rule applied equally to class arbitration waivers in arbitration agreements as it did to class *action* waivers in contracts without

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<sup>122</sup> 9 U.S.C. § 2.

<sup>123</sup> See *Moses*, *supra* note 30, at 103; see also *Joint Hearings*, *supra* note 33, at 16 (explaining that businesses favored the FAA “because when business men know that they do not have to get a lawyer in California to enforce a case that does not involve more than four or five hundred dollars they will do more business”).

<sup>124</sup> See *supra* notes 36–44 and accompanying text.

<sup>125</sup> See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 25 (2006) (noting that a common complaint of textualists regarding purposivism, ironically, was that when courts “purport to find . . . a true underlying purpose,” they are prioritizing their policies over those of Congress).

<sup>126</sup> Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 863–64 (1994) (“A judge who methodically and selectively searches for an ambiguous clause or phrase, or who simply ignores clear language outright, has engaged in nothing more than disingenuous, result-oriented lawmaking disguised as interpretation.”).

<sup>127</sup> *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

<sup>128</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–343 (2011) (contending that rules such as the *Discover Bank* rule “would have a disproportionate impact on arbitration agreements” and noting that “California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts”).

arbitration provisions.<sup>129</sup> Establishing the impossibility of finding such provisions unconscionable in fact *elevates* them above other contracts.<sup>130</sup> Further, Justice Scalia, a steadfast textualist, seemed to entirely disregard the text of the savings clause of § 2, which provides that arbitration agreements will presumably be enforced under the FAA, “save upon such grounds as exist at law *or in equity* for the revocation of any contract.”<sup>131</sup> The Court admitted that its own precedent had frequently established that the clause allowed arbitration agreements to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability.”<sup>132</sup> Yet, Justice Scalia refused to apply the savings clause as written,<sup>133</sup> essentially writing a portion of the FAA’s text out of the statute for the purposes of his preemption analysis.<sup>134</sup> In doing so, Justice Scalia greatly diminished his own credibility as a textualist, for while he staked his approach to statutory construction in “the principle of faithful agency—the idea that interpretation ought to effect the will of Congress”<sup>135</sup>—he abandoned Congress’s text and achieved a result contrary to Congress’s intent, trapping consumers in individual arbitration against corporate actors.

Perhaps the most egregious misconception Justice Scalia put forth was his statement that class arbitration waivers may not be found unconscionable under the savings clause of § 2 of the FAA because doing so would allow plaintiffs to assert a defense targeted at “fundamental attributes” of arbitration itself.<sup>136</sup> The Court claimed that the *bilateral*—or singular party versus singular party—nature of individual arbitration is a cornerstone of the general institution.<sup>137</sup> Though the Court pointed to reasons why class

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<sup>129</sup> *Id.* at 358–60 (Breyer, J., dissenting); see also Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 137 (2012) (“The *Discover Bank* Rule is a generally applicable state law. It does not target arbitration. Its impact is not limited to arbitration agreements.”).

<sup>130</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (noting that protecting an arbitration agreement from challenges applicable to all other contracts would actually “elevate it” over other contracts).

<sup>131</sup> 9 U.S.C. § 2 (emphasis added).

<sup>132</sup> *Concepcion*, 563 U.S. at 339 (quoting *Dr.’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

<sup>133</sup> See *id.*

<sup>134</sup> See Wilson, *supra* note 129, at 125 (“[T]he Court refused to apply the savings clause because doing so would conflict with that statutory purpose. In effect, the Court wrote the savings clause out of the FAA for purposes of its preemption analysis.”).

<sup>135</sup> Michael Francus, *Digital Realty, Legislative History, and Textualism After Scalia*, 46 PEPP. L. REV. 511, 514 (2019) (footnote omitted) (citing William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650 (1990)).

<sup>136</sup> *Concepcion*, 563 U.S. at 343–44 (holding that the savings clause does not permit invalidation of an arbitration agreement by a defense that derives its meaning from the fact that arbitration itself is at issue).

<sup>137</sup> *Id.* at 347–48.

arbitration is less efficient and more procedurally complex,<sup>138</sup> in no portion of the FAA did Congress classify arbitration as a bilateral activity.<sup>139</sup> “Arbitration” is defined in the legal context as a “dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.”<sup>140</sup> Thus, the dictionary definition does not classify arbitration as a bilateral activity either. It is therefore doubtful that Justice Scalia drew this conclusion from any kind of legislative or textual support. He attempted to shore up his statement with an analogy: if the plaintiff claimed that an arbitration agreement was unconscionable because it did not allow for judicially monitored discovery or jural intervention, the allegation would clearly be impermissible under the FAA.<sup>141</sup> This is because judicially monitored discovery and jural intervention are just the type of lengthy proceedings that arbitration is intended to avoid; their absence from arbitration proceedings is a fundamental attribute of arbitration. Similar reasoning would befall an unconscionability defense as it pertains to class arbitration waivers, according to Justice Scalia.<sup>142</sup> In other words, permitting an unconscionability defense to invalidate class arbitration waivers—provisions that protect the “fundamental” bilateral aspect of arbitration—would amount to voiding arbitration agreements based on a core element of arbitration, thus failing to put arbitration agreements on equal footing with other contracts.<sup>143</sup> However, as discussed previously, an aggregated arbitration does not defy the nature of arbitration itself. Unfortunately, this misconception has carried through to recent holdings and substantively impacts plaintiffs’ outcomes today.<sup>144</sup>

The Court’s flawed reasoning in *Concepcion* gave it license to continue the pattern of broadening the FAA’s reach in *Varela*. The majority recites an old mantra that “[c]onsent is essential” when it comes to arbitration,<sup>145</sup> subconsciously acknowledging that arbitration is meant to apply to voluntary, commercial contracting partners. It rings hollow to feign that consent between the parties is at the forefront of the Court’s mind when

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<sup>138</sup> See *id.* at 348 (“Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher states. Confidentiality becomes more difficult. . . . [A]rbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.”).

<sup>139</sup> See 9 U.S.C. §§ 2–4.

<sup>140</sup> *Arbitration*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>141</sup> *Concepcion*, 563 U.S. at 342.

<sup>142</sup> See *id.* at 344.

<sup>143</sup> See *id.*

<sup>144</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (“But *Concepcion*’s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties’ consent.”).

<sup>145</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019).

administering the statute in consumer–corporation agreements that waive the right to class arbitration. Instead, the Court snubs entirely the intent of the FAA’s drafters. In consumer–corporation agreements, the party with weaker bargaining power—the consumer—has no meaningful choice in the matter because she does not cocreate the arbitration provision; the vendor or corporation alone lays out the terms. In addition, Justice Sonia Sotomayor highlights an important point in her dissent in *Varela*: when an agreement is ambiguous as to whether or not class arbitration is disallowed, a plaintiff who signs such an agreement “should not be expected to realize that she is giving up access” to class arbitration.<sup>146</sup> Once again, the Court’s pro-arbitration policy, inordinately expanded as a result of its *Concepcion* opinion, tipped the ambiguity determination against justice.

In the face of overwhelming evidence to the contrary, the Court has, over the past decade in particular, interpreted the FAA to apply to a wide variety of contracts and to preserve class arbitration waivers at virtually all costs. The practical costs of this framework are extensive. This Note aims to demonstrate that the modern-day application of the FAA delivers a disparately harsh impact on socioeconomically deprived and marginalized consumers and, therefore, must be abolished.

#### B. *The Repercussions of the Court’s Expansion of the FAA*

The Court’s framing of the FAA with respect to class arbitration waivers has generated stark results outside the courthouse. In recent years, it has become increasingly difficult to “apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration.”<sup>147</sup> Couple that with the fact that “[t]ens of millions of consumers” engage in contracts with predispute arbitration clauses and it starts to become clear how vast of an impact the current FAA interpretation has had.<sup>148</sup> In addition, the Consumer Financial Protection Bureau (CFPB) found 85% to 100% of arbitration agreements studied across markets contained class arbitration waivers.<sup>149</sup> When questioned, corporations have been quick to respond that class actions are rendered unnecessary because arbitration enables individuals, not just businesses, to “resolve their

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<sup>146</sup> *Id.* at 1427 (Sotomayor, J., dissenting).

<sup>147</sup> The same can be said for renting a car or putting a relative in a nursing home. Silver-Greenberg & Gebeloff, *supra* note 4.

<sup>148</sup> CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY 9 (2015) [hereinafter CFPB ARBITRATION STUDY], [https://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [https://perma.cc/WG42-LXXV].

<sup>149</sup> *Id.* at 10.

grievances easily.”<sup>150</sup> But court records indicate that in reality, most would-be claimants drop their search for redress once blocked from aggregating as a class.<sup>151</sup> By contrast, corporations stand to reap tremendous financial reward by slipping relatively minor fees or charges into large quantities of customer agreements and removing those customers’ ability to band together to voice their claims.<sup>152</sup>

Additionally, businesses have a “built-in adjudicatory and tactical advantage in arbitration” because they have far more extensive resources and experience than their consumer opponents do.<sup>153</sup> That advantage is even bigger for businesses who are repeat players in the arbitral arena, as arbitrators may feel pressured to rule in favor of the company in order to be employed for future matters.<sup>154</sup> Even if arbitrators do not rule for the companies, companies still may come to garner an understanding of how various arbitrators operate, which provides them with a strategic advantage in future proceedings.<sup>155</sup> In addition, because parties to an agreement theoretically write into the arbitration clause whatever rules they prefer, when the arbitration provision is involuntary or mandatory—as it so often is in consumer cases—the corporation controls the rules of the procedure and the consumer has virtually no choice in the matter.<sup>156</sup> Studies show that a majority of full- or part-time arbitrators in employment arbitrations—who are, incidentally, usually chosen by corporations—have previously worked as legal counsel for employers.<sup>157</sup> As a result, plaintiff-employees are left facing “neutral” third parties who have experience advocating for the opposing side.<sup>158</sup> Because corporations also set the rules of the arbitration proceeding, there is little opportunity to curb any biases these former-lawyer

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<sup>150</sup> Silver-Greenberg & Gebeloff, *supra* note 4.

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

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

<sup>153</sup> Miller, *supra* note 31, at 329.

<sup>154</sup> STONE & COLVIN, *supra* note 6, at 23.

<sup>155</sup> *See id.*

<sup>156</sup> *Id.* at 17; *see also* Baker & Ostas, *supra* note 100, at 401 (“Recent judicial trends, however, unambiguously enhance corporate prerogatives, tilting economic power to the lawyers who draft—and to the executives who approve—arbitration clauses that bar class actions.”).

<sup>157</sup> *See* STONE & COLVIN, *supra* note 6, at 18.

<sup>158</sup> *See* Jeremy McManus, Note, *A Motion to Compel Changes to Federal Arbitration Law: How to Remedy the Abuses Consumers Face When Arbitrating Disputes*, 37 B.C. J.L. & SOC. JUST. 177, 197–98 (2017) (“Average consumers do not frequently arbitrate, and are therefore less knowledgeable about arbitration and are not similarly able to offer repeat business to potential arbitrators.”); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/3UDL-BCTW>] (“Private judging is an oxymoron . . . . This is a business and arbitrators have an economic reason to decide in favor of the repeat players.” (internal quotation marks omitted)).

arbitrators may have in favor of the employer. There is little reason to think the same would not be true with regard to corporation–consumer disputes. Research also indicates that consumers face a steep uphill climb if they hope to secure any kind of remedy through individual arbitration.<sup>159</sup>

Corporations and courts operate under the presumption that arbitration will always be more cost-effective, simpler, and quicker than traditional litigation, and they use this notion to further bolster the rationale behind upholding class action waivers. In doing so, corporations and courts ignore the inherent inconsistency with this argument: if arbitration *genuinely aided* consumers in seeking redress individually, thousands of separate proceedings for similar, if not identical, claims would plainly be far less efficient and more burdensome for the corporation than would be a single class proceeding for the same matter.<sup>160</sup> Additionally, while it is often true that arbitration will span a shorter period than litigation will, the difference is not vast.<sup>161</sup> Some even argue that whether litigation or arbitration is a better fit for a given dispute is a case-by-case inquiry, and that neither choice is inherently better or worse because delays and costs are concerns in either setting.<sup>162</sup> Moreover, arbitration can, at times, exceed litigation’s burdens with substantial filing and administrative fees<sup>163</sup> and a longer duration, as

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<sup>159</sup> See CFPB ARBITRATION STUDY, *supra* note 148, at 12 (showing that 32 out of 341 cases where outcome could be ascertained and that were resolved via arbitration in 2010–2011 resulted in the consumer receiving relief, and of the 19 consumer affirmative claims for less than \$1000 resolved via arbitration in the same period, 4 resulted in consumer relief); *see also* STONE & COLVIN, *supra* note 6, at 19 (noting that employees win in arbitration “about a fifth of the time (21.4 percent), which is 59 percent as often as in the federal courts and only 38 percent as often as in state courts”).

<sup>160</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 362 (2011) (Breyer, J., dissenting). Recently, DoorDash, a widely used food-delivery company, learned this uncomfortable truth the hard way—when three thousand employees brought individual arbitrations under the umbrella of a law firm willing to represent them, the court denied DoorDash the option to insist upon a class action suit, as DoorDash, too, was bound by the individual arbitration clause. Michael Hiltzik, *DoorDash Thought It Was Smart to Force Workers to Arbitrate but Now Faces Millions in Fees*, L.A. TIMES (Feb. 11, 2020, 2:48 P.M.), <https://www.latimes.com/business/story/2020-02-11/doordash-arbitration-blunder> [<https://perma.cc/KJ5J-S364>].

<sup>161</sup> See CFPB ARBITRATION STUDY, *supra* note 148, at 13–14 (comparing the average seven-month span of a class action suit to the potential five-month span of an arbitration). But the American Arbitration Association clocks the average arbitration proceeding at seven months—the same length as the CFPB’s finding for a class action. See *Consumer Arbitration Fact Sheet*, *supra* note 16.

<sup>162</sup> E. Norman Veasey, *The Conundrum of the Arbitration vs. Litigation Decision*, AM. BAR ASS’N (Dec. 15, 2015), [https://www.americanbar.org/groups/business\\_law/publications/blt/2015/12/07\\_veasey/](https://www.americanbar.org/groups/business_law/publications/blt/2015/12/07_veasey/) [<https://perma.cc/7FG8-EPNJ>].

<sup>163</sup> See CFPB ARBITRATION STUDY, *supra* note 148, at 13; *see also* *Arbitration vs. Litigation: The Choice Matters*, WARNER NORCROSS & JUDD (Feb. 8, 2018) [hereinafter *Arbitration vs. Litigation*], <https://wnj.com/Publications/Arbitration-vs-Litigation-The-Choice-Matters> [<https://perma.cc/9E3M-4RZL>] (“And while there are potential cost savings with respect to discovery [in arbitration], it is important to remember that, *unlike litigation*, arbitration often requires substantial filing and advanced

arbitrators will generally allow parties to change their claims and arguments more often.<sup>164</sup>

A pro-corporation commentator might claim that consumers benefit from mandatory arbitration because corporations potentially price their implicated products and services lower, knowing that they will not have to face the financial burden of litigation in the future. However, a 2015 CFPB study showed that, in a comparison of credit card companies that maintained their implementation of arbitration clauses and companies that eliminated those clauses from their agreements, no statistically significant increase in prices occurred in the latter group.<sup>165</sup> At base, for this pro-corporation argument to have any strength at all, the reduction in price would need to be sizable enough to the consumer to justify the possibility that she would have to take on the fees and travel expenses of individual arbitration. These expenses can at times be quite substantial, particularly when the consumer is a low-level employee.<sup>166</sup> In other words, if a consumer’s limited options for redress are to be justified under a reduced cost of doing business, that reduced cost should at least be commensurate with the consumer’s sacrifice.<sup>167</sup> The likelihood, then, of justifying the choice to institute mandatory arbitration by offering a product or service at a slightly lower price is slim, at best.

The Court’s attitude towards, and implementation of, the FAA in the past decade would suggest that its primary concern lies with avoiding the burdens litigation places on corporations. But what of the considerable burdens mandatory arbitration, coupled with class arbitration waivers, places on consumers? The concerns behind this question reach a fever pitch when taking into account the disparately harsh impact the FAA’s current application has on socioeconomically deprived and marginalized consumers.

Socioeconomic status can point to an individual’s “unequal access to resources, privilege, power, and control in a society.”<sup>168</sup> Recent labor

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administrative fees—typically in the thousands or tens of thousands—at the outset, as well as significant daily or hourly fees for the arbitrator’s . . . time.” (emphasis added)).

<sup>164</sup> See *Arbitration vs. Litigation*, *supra* note 163.

<sup>165</sup> See CFPB ARBITRATION STUDY, *supra* note 148, at 18.

<sup>166</sup> Rice, *supra* note 43, at 197–98; see also Albert H. Choi & Kathryn Spier, *The Economics of Class Action Waivers*, 38 YALE J. ON REGUL. 543, 556 (2021) (noting that “it is well documented that consumers fail to read the fine print in contracts that they sign,” and that when “consumers’ willingness to pay for a product is relatively invariant to the inclusion or exclusion of a class action waiver” in the contract at issue, “firms cannot capture the social benefits of class action litigation and are therefore more likely to require class action waivers as a cost-saving measure”).

<sup>167</sup> This could be mitigated or impacted by the company’s litigation or dispute-resolution history.

<sup>168</sup> REGINALD A. NOËL, U.S. BUREAU OF LAB. STAT., RACE, ECONOMICS, AND SOCIAL STATUS 1 (2018), <https://www.bls.gov/spotlight/2018/race-economics-and-social-status/pdf/race-economics-and-social-status.pdf> [<https://perma.cc/9Q3Z-2JEH>].

statistics show a gulf between the average household pretax income in America—\$70,448—and that of the average Black or African-American household—\$48,871.<sup>169</sup> The gulf widens when accounting for gender pay gaps.<sup>170</sup> Further, in 2016, 72% of white families owned their homes, whereas only 44% of Black families did.<sup>171</sup> Because homeownership provides families a major source of untaxed income, this statistic further signifies the socioeconomic disparity across groups.<sup>172</sup> It stands to reason, then, that consumers belonging to marginalized groups have a far greater chance of being harmed financially by the FAA’s refusal to exempt class arbitration waivers from their agreements, as these consumers will face the tallest financial obstacles should they attempt to seek relief on their own. In addition to the economic concerns, household occupations influence household social networks. For instance, a recent study found that 23% of Hispanic or Latinx households were supported by a member who worked in childcare, food preparation or service, janitorial service, or maid service,<sup>173</sup> and that 11.6% of Black households were supported by a single female parent.<sup>174</sup> Consumers from Black or Latinx households may face greater difficulty in having to miss work to attend their arbitration hearings, which can go on for months,<sup>175</sup> than someone whose occupation is more flexible or who has a social network that may encompass a lawyer who could advocate on her behalf—maybe even free of charge.

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<sup>169</sup> *Id.* (discussing data from the 2014–2016 period); see also *Racial Economic Inequality*, INEQUALITY.ORG, <https://inequality.org/facts/racial-inequality/> [<https://perma.cc/8AYU-B3L4>] (stating that as of the last quarter of 2020, the median white worker’s income surpassed that of the median Black worker and median Latinx worker by 27% and 36%, respectively).

<sup>170</sup> See *Median Usual Weekly Earnings of Full-Time Wage and Salary Workers by Selected Characteristics, Quarterly Averages, Not Seasonally Adjusted*, U.S. BUREAU OF LAB. STAT. (Apr. 16, 2021), <https://www.bls.gov/news.release/wkyeng.t02.htm> [<https://perma.cc/2492-A54Z>] (showing that in the second quarter of 2021, the median weekly earnings for white women was \$921 compared to \$1,115 for white men, whereas for Black or African-American women and men the numbers were \$746 and \$877, respectively, and for Hispanic or Latinx women and men, \$714 and \$825, respectively).

<sup>171</sup> See *Racial Economic Inequality*, *supra* note 169 (noting additionally that while the homeownership rate among Latinx families increased by nearly 40% between 1983 and 2016, it remains at 45%, far below the rate for white families); see also NOËL, *supra* note 168, at 6 (finding that 41% of Native Hawaiians or Pacific Islanders owned rather than rented their homes in 2014–2016, as compared to 71% of white households during the same time period).

<sup>172</sup> For example, homeowners do not count the rental value of their homes as taxable income, though it is a return on investment much like stock dividends, and homeowners can exclude (up to a point) proceeds from the sale of their homes as capital gains. See *What Are the Tax Benefits of Homeownership?*, TAX POL’Y CTR. (May 2020), <https://www.taxpolicycenter.org/briefing-book/what-are-tax-benefits-homeownership> [<https://perma.cc/9QJ6-VKXQ>].

<sup>173</sup> NOËL, *supra* note 168, at 7.

<sup>174</sup> *Id.* at 9.

<sup>175</sup> See Shierholz, *supra* note 17.

That at least some corporations exploit particular consumer groups’ vulnerability is a near certainty. One example is predatory lenders who charge racial-minority borrowers more for loans and other services than similarly situated white borrowers, otherwise known as “price discrimination.”<sup>176</sup> Race-based price discrimination spiked prior to the 2008 housing crisis, but existed before then and has since been a widespread practice.<sup>177</sup> The severity of predatory lending practices is further exposed when lenders are put in a position to be able to foist emergency payday loans with annual interest rates as high as 700% on already-vulnerable communities.<sup>178</sup>

Simply put, given the occurrence of corporate exploitation of certain consumer groups, the legal system needs to take social realities into account to temper the rampant appearances of class arbitration waivers.<sup>179</sup> Doing so is not without precedent. For example, in recognition of the discriminatory impact of predatory lending practices, members of Congress introduced the Loan Shark Prevention Act in early 2019 to protect consumers “already burdened with exorbitant credit-card interest rates” from predatory lending practices.<sup>180</sup>

Courts often approach contracts cases with a particular mindset—that contracting parties should be able to look out for their own interests and protect themselves accordingly, avoiding unfair bargains by simply doing

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<sup>176</sup> Alexandra Twin, *Price Discrimination*, INVESTOPEdia (Apr. 18, 2021), [https://investopedia.com/terms/p/price\\_discrimination.asp](https://investopedia.com/terms/p/price_discrimination.asp) [<https://perma.cc/42S8-FU3Z>]. The factor on which a business bases different pricing schemes need not be race or another protected category. For example, charging different prices for personal, education, and business licenses of a software program is a form of price discrimination. *Id.*

<sup>177</sup> Larry Schwartztol, *Predatory Lending: Wall Street Profited, Minority Families Paid the Price*, ACLU (Sept. 16, 2011, 4:35 PM), <https://www.aclu.org/blog/racial-justice/race-and-economic-justice/predatory-lending-wall-street-profited-minority> [<https://perma.cc/4R7Q-UVPH>] (pointing out that Wall Street and banks also contributed to the problem by encouraging lenders to “maximize volume at all costs—including by peddling loans with abusive terms and an elevated risk of ending in foreclosure”); Neil Howe, *A Special Price Just for You*, FORBES (Nov. 17, 2017, 5:56 PM), <https://forbes.com/sites/neilhowe/2017/11/17/a-special-price-just-for-you/?sh=7705724890b3> (noting that it is only illegal to practice price discrimination based on race if it causes another company “competitive injury”).

<sup>178</sup> Lori Teresa Yearwood, *Many Minorities Avoid Seeking Credit Due to Generations of Discrimination. Why that Keeps Them Back*, CNBC (Sept. 1, 2019, 9:30 AM), <https://www.cnbc.com/2019/09/01/many-minorities-avoid-seeking-credit-due-to-decades-of-discrimination.html> [<https://perma.cc/F7S8-2QN3>].

<sup>179</sup> Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. ST. U. L. REV. 313, 345 (2015).

<sup>180</sup> This legislation, which is currently in review with House Committee on Financial Services, would “cap interest rates at 15%, likely benefiting many consumers of color.” Yearwood, *supra* note 178; Loan Shark Prevention Act, H.R. 2930, 116th Cong. (2019).

the requisite information gathering.<sup>181</sup> This narrative is only effective, however, in a world where the parties encounter each other on approximately equal social and economic footing.<sup>182</sup> In the Supreme Court cases previously discussed, this was not the case.

The Court's recent opinion in *Bostock v. Clayton County* is relevant here. In *Bostock*, the issue was whether Title VII of the Civil Rights Act's prohibition against discrimination on the basis of sex encompassed homosexual and transgender individuals.<sup>183</sup> The majority applied a textualist interpretation of the statute to conclude that discrimination against one's sexual orientation is inextricably linked to one's gender.<sup>184</sup> Though the Court's holding rests on textualism, rejecting the need for other arguments because the statute's language was unambiguous, the Court also addressed *purposivist* arguments—considering the text in light of the enacting Congress's legislative intent—in response to those who would argue that the 1964 Congress would not have intended to protect transgender and homosexual employees.<sup>185</sup> Ultimately, the Court concluded that Congress intentionally worded the statute broadly, and thus refused to read Title VII as excluding homosexual and transgender individuals from its protection. If the Court had chosen instead to “tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons” are entitled to the same treatment under the law, the Court would not be carrying out its role faithfully.<sup>186</sup> To read and apply the FAA as the Court has does not provide everyone equal treatment under the law. Instead, the Court has tipped the scales of justice in favor of the strong and delivered a disparately harsh punch to the marginalized.

*Bostock* is not the only recent Supreme Court statutory interpretation opinion to discuss, albeit briefly, a statute's context and purpose. In *Bond v. United States*, a chemist discovered that her friend was pregnant by the chemist's husband, and in seeking revenge, the chemist spread two potentially lethal chemicals on her friend's car door, mailbox, and door knob.<sup>187</sup> She was subsequently prosecuted for and convicted of violating the Chemical Weapons Convention Implementation Act<sup>188</sup> by “possess[ing]” and

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<sup>181</sup> See Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 45 (2008).

<sup>182</sup> See *id.*

<sup>183</sup> 140 S. Ct. 1731, 1737 (2020).

<sup>184</sup> See *id.* at 1749.

<sup>185</sup> See *Bostock*, 140 S. Ct. at 1749–50.

<sup>186</sup> *Id.* at 1751–53.

<sup>187</sup> 572 U.S. 844, 852 (2014).

<sup>188</sup> 18 U.S.C. § 229(a).

“us[ing]” a “chemical weapon.”<sup>189</sup> The statute defines “chemical weapon” as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation, or permanent harm to humans.”<sup>190</sup> Though both of the substances the chemist used fell under the literal, plain meaning of the statute, the Supreme Court reversed the conviction,<sup>191</sup> in part because the statute was a “product of years of worldwide study . . . and multinational negotiation [that] arose in response to war crimes and acts of terrorism.”<sup>192</sup> As such, the Court reasoned that it was highly unlikely that the drafters were concerned about a “common law assault” like this one.<sup>193</sup>

Similarly, *Yates v. United States* also involved the prosecution of an individual under a criminal statute,<sup>194</sup> this time the Sarbanes-Oxley Act.<sup>195</sup> The defendant had, during a federal investigation, thrown back to sea undersized fish because catching them violated conservation regulations.<sup>196</sup> When the defendant’s actions came to light, the government charged him with knowingly “destroying, concealing, and covering up undersized fish to impede a federal investigation.”<sup>197</sup> Because the statute prevented tampering with “any record, document, or tangible object,”<sup>198</sup> the question was whether an undersized fish constituted a “tangible object” under the statute.<sup>199</sup> After conceding that a fish *is* a tangible object under the ordinary meaning of the words,<sup>200</sup> the Court’s plurality noted that, because the statute’s intent was to curb “corporate and accounting deception and coverups,” to free the phrase “tangible object” from its “financial-fraud mooring” would be to misinterpret the enacting Congress’s words.<sup>201</sup>

That the plurality then turned its reasoning to semantic, or text-based, canons of statutory interpretation<sup>202</sup> does not negate the role that purposivism played in the opinion. If anything, these opinions serve to highlight the Court’s willingness to pair textualism with purposivist elements to reach a

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<sup>189</sup> *Bond*, 572 U.S. at 852–53.

<sup>190</sup> 18 U.S.C. § 229F(8)(A).

<sup>191</sup> *Bond*, 572 U.S. at 866.

<sup>192</sup> *Id.* at 856.

<sup>193</sup> *Id.*

<sup>194</sup> 574 U.S. 528, 534 (2015) (plurality opinion).

<sup>195</sup> 18 U.S.C. § 1519.

<sup>196</sup> *Yates*, 574 U.S. at 533–34 (plurality opinion).

<sup>197</sup> *Id.* at 534.

<sup>198</sup> 18 U.S.C. § 1519.

<sup>199</sup> *Yates*, 574 U.S. at 532 (plurality opinion).

<sup>200</sup> *Id.* (“A fish is no doubt an object that is tangible; fish can be seen, caught, and handled . . .”).

<sup>201</sup> *Id.* at 532, 539–40.

<sup>202</sup> *See, e.g., id.* at 544 (noting that in the context of the series of words in which it falls, the phrase “tangible object” refers “specifically to the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information”).

more holistically reasoned outcome.<sup>203</sup> Thus, future litigants seeking to dismantle a class arbitration waiver despite the FAA should feel confident in launching attacks with both textualist and purposivist bases. As previously discussed, the FAA's text plainly allows for a finding of unconscionability in arbitration provisions. Furthermore, should there be any remaining ambiguity, the statute's history elucidates that the enacting legislature would never have intended for the statute to allow corporate predatory tactics to flourish unchecked.

Given the considerable harms today's arbitration practices and application of the FAA have inflicted on consumers, and in particular on the most socioeconomically deprived and marginalized, some kind of intervention is past due. One potential avenue for intervention is bringing the unconscionability doctrine out of retirement in the class arbitration waiver context.

### C. *A Legal Realism Case for an Unconscionability Defense*

The task ahead involves finding a way to effectively respond to the enforcement of class arbitration waivers against parties of disparate bargaining power. Though this question has spurred bountiful scholarly discussion, most scholars seem to feel limited by the Supreme Court's precedents to date. Even those scholars who propose solutions often summarily state that unconscionability is no longer a possible avenue for escaping a class arbitration waiver after *Concepcion*.<sup>204</sup>

A recent effort that seemed promising but ultimately failed was a rule the CFPB promulgated in 2017 pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>205</sup> The rule covered, among other things, specific consumer financial products and services agreements, wherein covered providers would be prohibited from including pre-dispute class arbitration waivers.<sup>206</sup> However, in November 2017 President Trump signed a joint resolution passed by Congress disapproving of the rule.<sup>207</sup>

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<sup>203</sup> Redish & Chung, *supra* note 126, at 815 (defining the goal of purposivism as "giving effect to the wishes of the enacting legislature" by "identify[ing] the statute's broader purposes and . . . resolv[ing] the interpretive question in light of those purposes").

<sup>204</sup> See *supra* notes 101–103 and accompanying text.

<sup>205</sup> 12 C.F.R. § 1040 (2017).

<sup>206</sup> See *Final Rule: Arbitration Agreements*, CONSUMER FIN. PROT. BUREAU (Nov. 22, 2017), <https://www.consumerfinance.gov/rules-policy/final-rules/arbitration-agreements/> [<https://perma.cc/8NKE-VQ6E>].

<sup>207</sup> See *id.*; 82 Fed. Reg. 55,500 (Nov. 22, 2017); see also MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 13–14 (2020), <https://sgp.fas.org/crs/misc/R43992.pdf> [<https://perma.cc/Q4MZ-G2Y2>] (describing the process by which a joint resolution of disapproval passes through Congress under the Congressional Review Act).

Other proposed solutions include recommending true amendments to the FAA’s text. Jeremy McManus, for example, suggested an amendment that would include express permissions allowing states to implement their own contract laws to remove an arbitration agreement from the statute’s coverage.<sup>208</sup> While such a result would likely pave a smoother route to remediation, there are no indicia of such legislative action on the horizon.

On the other hand, some recent developments have potential for success. For example, some companies no longer require employees to arbitrate sexual harassment claims,<sup>209</sup> which may suggest a decrease in the pervasiveness of arbitration (and, by extension, class arbitration waivers). More importantly in the consumer context, the House of Representatives passed the Forced Arbitration Injustice Repeal Act (FAIR Act) in September 2019.<sup>210</sup> The FAIR Act is specifically meant to prohibit pre-dispute arbitration agreements containing class arbitration waivers in the consumer, employment, antitrust, or civil rights dispute contexts.<sup>211</sup> The FAIR Act has been received by the Senate and referred to the Committee on the Judiciary.<sup>212</sup>

Despite these discrete, still-pending attempts, there remains a need for a framework that can stave off at least some of the current exploitation that corporations inflict on vulnerable consumers. This Note presents a novel proposal to pursue an unconscionability defense grounded in legal realist notions—those that look at contemporary policy considerations and shape doctrine accordingly.<sup>213</sup>

The contract law doctrine of unconscionability would fit the mold. Notwithstanding the recent spike in its use, the doctrine dates back to the seventeenth-century English courts of equity.<sup>214</sup> In their earlier days, U.S. courts of law adopted and implemented England’s equitable doctrines—including fraud, duress, mistake, and unconscionability—to craft more complete justice.<sup>215</sup> For the most part, however, unconscionability was not

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<sup>208</sup> See McManus, *supra* note 158, at 206–08; see also William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT’L ARB. 75, 77–78 (2002) (proposing an amendment to specifically address international arbitration).

<sup>209</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1422 (Ginsburg, J., dissenting).

<sup>210</sup> Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019).

<sup>211</sup> See *id.* at § 2.

<sup>212</sup> *Id.* (referred on Sept. 24, 2019).

<sup>213</sup> See *supra* notes 21–23 and accompanying text.

<sup>214</sup> See McCullough, *infra* note 64, at 787–88.

<sup>215</sup> Rice, *supra* note 43, at 159; see also *Equity*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining equity as “[t]he recourse to principles of justice to correct or supplement the law as applied to particular circumstances; specifi., the judicial prevention of hardship that would otherwise ensue from the literal

recognized as a valid contract defense until the widespread adoption of the Uniform Commercial Code (UCC) in the mid-twentieth century.<sup>216</sup> Thereafter, courts applied the doctrine to invalidate many types of provisions in adhesive contracts and as a tool to protect the poor, in particular, from abusive agreements.<sup>217</sup> Even so, courts applied the doctrine sparsely from the mid-twentieth century through the 1990s.<sup>218</sup> Since the turn of the millennium, however, unconscionability has increasingly been brought as a defense in contract disputes, provided that, in most jurisdictions, elements of both procedural and substantive unconscionability are at play.<sup>219</sup>

One potential issue that could arise in applying the unconscionability doctrine to exempt class arbitration waivers from the FAA, however, is the argument Justice Thomas raised in his concurrence in *Concepcion*. Recall that Justice Thomas argued that only defenses that deal strictly with the making of a contract would fall under the savings clause of § 2.<sup>220</sup> But, quite often, “procedural and substantive unconscionability occur simultaneously”—unfairness begets unfairness—and some judges will consider the same factors in establishing each strain.<sup>221</sup> In other words, substantive unconscionability is “linked inextricably with the process of contract formation” because it is at formation that the injured party would have had to agree to the objectively unreasonable term or terms.<sup>222</sup>

Some scholars, such as Professor Deborah Zalesne, may also take issue with the notion of using unconscionability as a defense in circumstances involving marginalized or socioeconomically deprived consumers. These

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interpretation of a legal instrument”). Thus, in aiming to provide relief that is fair and just, courts have discretion, particularly in the realm of contracts, to grant equitable remedies or accept equitable defenses to prevent an unfeeling, harsh outcome that might result from following the common law to the letter. See Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 610 (1997).

<sup>216</sup> Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor,”* 102 GEO. L.J. 1383, 1390 (2014); Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 149–50 (2005) (“[Unconscionability’s] acceptance as a mainstream doctrine, a ready aid in contract limitation, dates back only to its inclusion in the UCC.”); see also Fleming, *supra*, at 1403–04 (“Section 2-302 [of the UCC] allowed judges to refuse to enforce ‘unconscionable’ terms in sales contracts. The Code did not define ‘unconscionable.’ Rather, it directed judges to evaluate the objectionable clause in light of the ‘general commercial background’ and the ‘needs of the particular trade or case.’”).

<sup>217</sup> See McCullough, *supra* note 64, at 795–96.

<sup>218</sup> See *id.* at 786.

<sup>219</sup> See *id.* at 781–82; see also Rice, *supra* note 43, at 161–63 (discussing the various approaches to the procedural/substantive calculus in different jurisdictions).

<sup>220</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 355 (2011) (Thomas, J., concurring); *supra* notes 78–79 and accompanying text.

<sup>221</sup> Rice, *supra* note 43, at 169.

<sup>222</sup> *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 493 (Mo. 2012).

scholars claim that “discussions about an individual party’s vulnerability often promotes raced reasoning in which the reader is encouraged to conflate social and economic marginalization with incompetence, lack of education, and an absence of savvy.”<sup>223</sup> In other words, Professor Zalesne’s concern seems to be that raising an unconscionability defense that claims a racial minority consumer had the wool pulled over his eyes at the formation of the contract due to, for instance, his substandard education, furthers negative racial stereotypes. It is true that the elements of procedural unconscionability are usually satisfied in these cases, wherein the consumer is made to sign a credit card or phone agreement, for instance, without any opportunity to negotiate or discuss terms. In addition, more likely than not, consumers do not possess enough awareness of the repercussions of entering an agreement with a class arbitration waiver to have given the “consent” that is so “essential” to arbitration.<sup>224</sup> These procedural elements are not necessarily “raced,” but rather exist for virtually every consumer who enters such a deal.

Further, the application of the unconscionability doctrine that this Note proposes zeroes in on the substantively unconscionable, or harsh and one-sided, nature of class arbitration waivers that *is* particularly prevalent in marginalized communities for the reasons pertaining to the United States’ socioeconomic reality described in Section III.B, not because of the paternalistic undertones Professor Zalesne warns against. With the inclusion of a class arbitration waiver, the arbitration agreement is inherently one-sided and oppressive against a consumer hoping to seek redress. The substantive unconscionability of class arbitration waivers, in other words, is uniquely potent when waivers are used to further corporations’ predatory practices against members of socioeconomically deprived and marginalized communities. There is, then, strong realist support for the argument that unconscionability should be used to shield plaintiffs from the FAA when circumstances insist upon it—not because marginalized plaintiffs are uniquely ill-equipped to defend themselves, but because jurisprudence in the United States ought never be permitted to facilitate corporate predation.

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<sup>223</sup> Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23, 33–35 (2013) (discussing the issues with *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), one of the earliest prominent unconscionability cases in U.S. courts).

<sup>224</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019); *see also* *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (“Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must ‘give effect to the contractual rights and expectations of the parties.’ In this endeavor, ‘as with any other contract, the parties’ intentions control.” (internal citations omitted) (quoting *Volt Info Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989))); CFPB ARBITRATION STUDY, *supra* note 148, at 11 (describing how credit card consumers generally are either unaware of the existence of an arbitration clause in their contracts and/or are mistaken about their ability to seek redress in class actions in the future).

Unconscionability would serve as a useful vehicle for combatting class arbitration waivers on realist grounds because it is one of the broadest equitable doctrines.<sup>225</sup> The framework would apply consistently across states—despite jurisdictional variances as to what quantum of procedural or substantive unconscionability is required to assert an effective defense, there is by and large uniformity in understanding of those elements among the jurisdictions.<sup>226</sup>

Furthermore, because many contract disputes today invoke the unconscionability doctrine, it is not surprising that it has been successfully asserted in litigation against arbitration provisions—albeit for reasons unrelated to the ability to aggregate as a class.<sup>227</sup> In these cases, courts have declared arbitration provisions substantively unconscionable for their cost-prohibitive aspects related to forced venue or forum selection clauses that placed too great of a travel-related burden on the consumer. Remember Justice Scalia’s conclusion that, like unconscionability arguments based on the lack of available discovery or jural intervention, unconscionability arguments arising from the class arbitration waiver would destroy a fundamental attribute of the FAA and arbitration itself, and are therefore impermissible.<sup>228</sup> Whereas Justice Scalia drew no meaningful connection whatsoever between the lack of traditional litigation benefits and the class arbitration waiver, there are clear points of convergence between an argument for unconscionability in a class arbitration waiver and an argument for unconscionability in a forum selection clause. Both clauses can be considerably costly and burdensome for the consumer on whom such provisions are forced. Of course, there might be cases in which neither clause would be burdensome to a particular plaintiff, such as if the potential reward the plaintiff stands to receive merits an individual case or if the plaintiff lives in the selected forum. Such plaintiffs would not succeed in bringing this kind of unconscionability defense, but the possible existence of such plaintiffs does not diminish the benefit the unconscionability defense would provide for the vast majority of other consumers.

Finally, perhaps the simplest and strongest rationale for creating an unconscionability exception to the FAA’s scope when social justice concerns

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<sup>225</sup> Keren, *supra* note 179, at 355 (mentioning that “each of the other three [equitable doctrines] has a more specific focus (threat for duress, fraud for misrepresentation, and abuse of dependency for undue influence),” whereas unconscionability belongs to no one particular manifestation).

<sup>226</sup> *Id.* (noting that there is uniformity across jurisdictions in the test on two elements—procedural and substantive—and the nature of those elements).

<sup>227</sup> See *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197, 1202–03 (Wash. 2013); *Magno v. Coll. Network, Inc.*, 1 Cal. App. 5th 277, 289 (2016); *Newton v. Am. Debt Servs., Inc.*, 549 F. App’x 692, 694 (9th Cir. 2013).

<sup>228</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343–44 (2011).

insist upon it is that such an exception already exists in the plain language of the FAA’s operative provision. Section 2 of the Act provides for the enforcement of arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>229</sup> The Supreme Court has already included unconscionability in the class of “generally applicable contract defenses”<sup>230</sup> that fall under the savings clause. It is the job of a given court, when deciding whether to grant or deny a motion to compel arbitration, to apply state laws governing contract formation and related defenses.<sup>231</sup> As such, when presented with a contract dispute regarding whether or not to uphold a class arbitration waiver between a commercial entity and a consumer, a court should, without great difficulty, be able to apply an unconscionability analysis to determine whether the term’s harshness or one-sidedness to the particular consumer is too great to ignore. Put that way, it seems self-evident that the savings clause of the FAA, or at least its mention of grounds at equity, was written into the statute for precisely the circumstances in which social justice concerns are so significant that they overwhelm any interest in enforcing the class arbitration waiver.

#### CONCLUSION

A viable unconscionability defense against class arbitration waivers in the corporation–consumer context will follow as a natural result if litigants attack or seek to constrain *AT&T Mobility LLC v. Concepcion* on textualist, purposivist, and legal realist grounds. Beginning with a textualist approach suits the current Supreme Court’s statutory construction practices; it considers the text of the statute to be “the best evidence of legislative purpose and the only product of the Constitution’s requirements of bicameralism and presentment.”<sup>232</sup> The text of the FAA’s § 2 savings clause unambiguously provides for an unconscionability finding and makes no mention of efficiency or bilaterality. If the Court remains unpersuaded, it may put on its purposivist hat, turn to the history and purpose of the statute, and find that the FAA was not intended to act as a vehicle for corporate absolution and dominance over consumers, but rather to assist commercial contracting parties in their arm’s-length transactions. This purposivist reading of the FAA leads inexorably to the realist conclusion that the disproportionately harmful impact the FAA’s current application has on socioeconomically

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<sup>229</sup> 9 U.S.C. § 2.

<sup>230</sup> *Dr.’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

<sup>231</sup> Rice, *supra* note 43, at 224.

<sup>232</sup> Redish & Chung, *supra* note 126, at 809.

deprived and marginalized consumers is exactly what the drafters aimed to avoid. On these bases, litigants' path to redress is very much within reach.

With the jurisprudence as it currently stands, the Patricia Rowses of the world face a lose–lose choice between paying steep, unfair fees, or pursuing even more costly individual dispute resolution. The vast majority opt for the former because the latter comes with the additional indeterminate burdens of financial cost and time investment. Consumers are entitled to have their claims meaningfully heard. Corporations, in fact, need consumers with whom to contract in order to survive. For corporations to take hold of consumers' finances and exploit their vulnerabilities by ensnaring them in the inherently losing scenario that is an arbitration agreement with a class arbitration waiver is, in essence, inequitable. With that in mind, the inequities of arbitration as it is currently forced upon consumers should “shock the conscience” of the community,<sup>233</sup> thereby opening the door to an unconscionability defense as permitted by the FAA.

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<sup>233</sup> See *supra* note 64 and accompanying text.