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*New York Law School, 2014*

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## Breaking “Too Darn Bad”: Restoring the Balance Between Freedom of Contract and Consumer Protection

59 N.Y.L. SCH. L. REV. 603 (2014–2015)

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## BREAKING “TOO DARN BAD”

### I. INTRODUCTION

In a 1943 *Columbia Law Review* article, legal scholar Friedrich Kessler addressed freedom of contract—a bastion of contract law that justifies both treating contracts as exclusively “private affair[s]” and limiting courts to interpreting, not creating, contractual terms.<sup>1</sup> Kessler posited that, when an individual contracts with a large-scale enterprise, freedom of contract is an illusion because the parties’ vastly unequal bargaining power allows the enterprise to impose contractual terms on the individual.<sup>2</sup> This disparity, coupled with the rise of “standardized mass contract[s],”<sup>3</sup> meant that enterprises could “legislate by contract . . . in a substantially authoritarian manner without using the appearance of authoritarian forms.”<sup>4</sup> And consumers in particular were faced with accepting an enterprise’s unilaterally prescribed terms or forgoing needed goods and services.<sup>5</sup>

Kessler warned that this new kind of contract—the adhesion contract<sup>6</sup>—if left unregulated in the hands of “industrial and commercial overlords,”<sup>7</sup> would lead to abuse of power to the detriment of individual consumers and the public at large.<sup>8</sup> Kessler argued that judges had to accept that sometimes “legal certainty and sound principles of contract law [like freedom of contract] should . . . be sacrificed to dictates of justice or social desirability.”<sup>9</sup> Only then could the judiciary recognize that standardized contracts (particularly adhesion contracts) were a different breed

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1. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943). Kessler was an authority on contract law who fled Nazi Germany in 1934 and taught for most of his decades-long career at Yale Law School. George L. Priest, *Contracts Then and Now: An Appreciation of Friedrich Kessler*, 104 YALE L.J. 2145, 2146 (1995); Friedrich Kessler, 96, *Law Professor*, N.Y. TIMES, Feb. 9, 1998, <http://www.nytimes.com/1998/02/09/nyregion/friedrich-kessler-96-law-professor.html>.

2. Kessler, *supra* note 1, at 640.

3. *Id.* at 631 (“The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable—the standardized mass contract.”).

4. *Id.* at 640.

5. *See id.* at 632.

6. *See id.* At the time of Kessler’s writing, “the term ‘contract of adhesion’ . . . ha[d] not even found general recognition in our legal vocabulary.” *Id.* at 633. Kessler attributed the term to a *Harvard Law Review* article published in 1919. *Id.* at 632 n.11 (citing Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919)). Contract of adhesion—or adhesion contract—refers to:

[A] standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a ‘take it or leave it’ basis, without opportunity for bargaining and under such conditions that the ‘adherer’ cannot obtain the desired product or service save by acquiescing in the form agreement.

*Steven v. Fid. & Cas. Co.*, 377 P.2d 284, 297 (Cal. 1962).

7. Kessler, *supra* note 1, at 640.

8. *Id.* at 641.

9. *Id.* at 637 (internal quotation marks omitted).

requiring different applications of contract law, and that the courts had a responsibility to adapt the common law to protect weaker parties.<sup>10</sup>

The good news is that, since his article was published in 1943, “Kessler’s approach has prevailed . . . [and] [o]ur courts have become self-conscious social engineers” that consider economic realities when shaping the law.<sup>11</sup> As technological and industrial progress led to increased mass production, and forces of capitalism funneled smaller entities into horizontally and vertically integrated oligopolies,<sup>12</sup> the courts have adjusted contract law to account for “differential economic power, the allocation of risks in the context of unequal bargaining ability, and relative informational advantages.”<sup>13</sup> The bad news is that U.S. Supreme Court decisions concerning the enforceability of arbitration agreements<sup>14</sup> have resurrected inequities that had been more or less extinguished under the common law. These decisions have expanded the preemptive effect of the Federal Arbitration Act (FAA), giving enterprises renewed power to “legislate by contract” through the use of arbitration agreements in adhesion contracts. As Justice Elena Kagan’s dissent in *American Express Co. v. Italian Colors Restaurant* illustrates:

The owner of a small restaurant . . . thinks that [an enterprise] has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision[,] . . . but the same contract’s arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool’s errand. So if the arbitration clause is enforceable, [the enterprise] has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.

And here is the nutshell version of [the Supreme Court’s majority] opinion, admirably flaunted rather than camouflaged: *Too darn bad*.<sup>15</sup>

This note contends that the Supreme Court decisions interpreting the preemptive reach of the FAA, culminating in *AT&T Mobility LLC v. Concepcion*,<sup>16</sup> allow enterprises to use mandatory individual-arbitration agreements in adhesion contracts to insulate themselves from consumer claim liability because such agreements force

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10. *See id.* at 638.

11. Priest, *supra* note 1, at 2151.

12. *See generally* Louis Galambos, *The U.S. Corporate Economy in the Twentieth Century*, in 3 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES: THE TWENTIETH CENTURY 927, 927–67 (Stanley L. Engerman & Robert E. Gallman eds., 2000).

13. Priest, *supra* note 1, at 2151.

14. *See infra* text accompanying notes 18–30 for an explanation of arbitration and arbitration agreements.

15. 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting) (emphasis added). Justice Elena Kagan was responding to the Supreme Court’s majority opinion in a case involving a mandatory arbitration provision that prevented the vindication of federal statutory rights. *See id.* But Justice Kagan’s characterization applies with equal force to the Court’s decisions on Federal Arbitration Act (FAA) preemption.

16. 131 S. Ct. 1740 (2011).

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consumers to either pursue claims individually (which is rarely cost-effective) or abandon them entirely.<sup>17</sup> Part II of this note provides a brief description of arbitration and the history of the FAA. Part III explains how *Concepcion* expanded the FAA’s preemptive reach; how this expansion limits the application of the common law of contracts in addressing economic realities; and how, as a result, enterprises can now effectively contract around consumer liability. Part IV argues that Congress should amend the FAA to grant states the authority to legislate the enforceability of arbitration agreements, thereby restoring the balance between freedom of contract and consumer protection.

## II. ARBITRATION AND THE FEDERAL ARBITRATION ACT

Arbitration is a form of alternative dispute resolution in which parties appoint a neutral decisionmaker (an arbitrator or panel of arbitrators) to adjudicate their dispute.<sup>18</sup> Arbitration is similar to litigation in that it is adversarial, the parties make legal arguments supported by evidence, and a final decision is issued in favor of one side.<sup>19</sup> But unlike litigation, private arbitration is consensual: The parties must agree to arbitrate.<sup>20</sup> As such, the parties exercise control over the size and shape of the arbitration,<sup>21</sup> including what issues are arbitrable,<sup>22</sup> the selection of the arbitrator(s),<sup>23</sup> and the formality of the proceedings.<sup>24</sup> Arbitration also differs from litigation in that arbitrators are generally not bound by precedent,<sup>25</sup> and arbitration awards are final and binding—that is, they cannot be appealed for review on the merits.<sup>26</sup>

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17. See *infra* text accompanying notes 86–89.

18. JAY E. GRENIG, *ALTERNATIVE DISPUTE RESOLUTION* § 6:1 (3d ed. 2005).

19. See LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 553 (4th ed. 2009).

20. *Id.* at 554. Parties can agree to arbitrate after a dispute arises or in advance by including an arbitration clause in their contract. *Id.* This note focuses on contractual agreements to arbitrate, but litigants can also find themselves in court-ordered arbitration, which has different characteristics. See *id.* at 774–75 (describing court-annexed non-binding arbitration).

21. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (“[P]arties are generally free to structure their arbitration agreements as they see fit.”); RISKIN ET AL., *supra* note 19, at 554.

22. Parties can agree to arbitrate all disputes arising between them or to limit arbitration to certain topics. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010) (“[Parties] may agree to limit the issues arbitrated . . . .”); see also GRENIG, *supra* note 18, § 7:1 (“A party may be required to arbitrate only those disputes that the party has agreed to submit to arbitration.”).

23. Parties can name the arbitrator(s) in the arbitration agreement or instead provide for a procedure for selecting the arbitrator(s). RISKIN ET AL., *supra* note 19, at 554; see also *Stolt-Nielsen S.A.*, 559 U.S. at 683 (“[Parties] may choose who will resolve specific disputes.”).

24. Parties can agree whether and to what degree the rules of evidence shall apply. See *Stolt-Nielsen S.A.*, 559 U.S. at 683 (citation omitted) (“[P]arties . . . may agree on rules under which an arbitration will proceed.”).

25. See GRENIG, *supra* note 18, § 6:2 (“Arbitrators do not have to follow the law, and there are fewer checks and balances.”).

26. RISKIN ET AL., *supra* note 19, at 554; see also GRENIG, *supra* note 18, § 6:2 n.7 (“If [the state] allowed every alleged misinterpretation of an arbitration agreement by an arbitrator to be litigated and appealed[,] arbitrations would be a mere prelude to litigation and would, in the end, prove more time-consuming and

Due to these differences, arbitration can be more expeditious and less expensive than litigation.<sup>27</sup> Additionally, arbitration permits parties to choose a decisionmaker with experience and expertise in a particular industry or field,<sup>28</sup> as well as maintain the confidentiality of the proceedings and outcome.<sup>29</sup> These factors have made arbitration an increasingly attractive alternative to litigation, especially for enterprises in the consumer context, and in recent years the use of arbitration has increased exponentially, particularly with respect to commercial, employment, and consumer contracts.<sup>30</sup>

The FAA is the principle statute governing arbitration.<sup>31</sup> Congress adopted the FAA in 1925 to reverse what the Supreme Court has characterized as “centuries of judicial hostility to arbitration agreements.”<sup>32</sup> Under old English (and by adoption old American) common law, courts consistently refused to give effect to arbitration agreements, initially to avoid competition from a non-judicial forum and eventually as a matter of practice.<sup>33</sup> As a result, parties with contractual agreements to arbitrate could never be certain that courts would enforce them.<sup>34</sup>

To correct this mischief, Congress adopted the FAA and, in § 2’s saving clause, provided that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>35</sup>

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expensive than litigation.”). For arbitrations covered by the FAA, judicial review of arbitral awards is limited to narrow, specific circumstances. 9 U.S.C. § 10(a)(1)–(4) (2013); *see also* DAVID ST. JOHN SUTTON ET AL., RUSSELL ON ARBITRATION, 23D §§ 6-004 to -008 (2008). While parties may agree to non-binding arbitration depending on their circumstances and desired outcome, *see, for example*, RISKIN ET AL., *supra* note 19, at 774–75 (discussing voluntary and non-binding court-annexed arbitration), this note and the Supreme Court cases discussed herein are concerned only with binding arbitration.

27. GRENIG, *supra* note 18, § 6:2.
28. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (“Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations.”); RISKIN ET AL., *supra* note 19, at 710–11.
29. RISKIN ET AL., *supra* note 19, at 711.
30. *Id.* at 555; *see also* George Padis, Note, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 679–80 (2013) (citing statistics from the Bureau of National Affairs and the U.S. General Accounting Office, as well as independent studies showing increase in the use of arbitration agreements in commercial, employment, and consumer contracts).
31. *See* RISKIN ET AL., *supra* note 19, at 563.
32. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974). This note adopts the Supreme Court’s history of the FAA because (1) the Court has repeatedly attempted to discern the intent of the 68th Congress from available sources and developed a consistent narrative for the interpretation of the FAA, and (2) as a practical matter, whether the Court is right or wrong about the statute’s history, it is the Court’s version that has ultimately controlled and shaped the FAA’s development.
33. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).
34. “[T]he purpose of the [FAA] was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures.” *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) (alteration in original) (quoting *Metro Indus. Painting Corp. v. Terminal Constr. Corp.*, 287 F.2d 382, 387 (2d Cir. 1961) (Lumbard, C.J., concurring)).
35. 9 U.S.C. § 2 (2013). The FAA also provides for federal court hearings to compel arbitration, *id.* § 4; an equivalent of subpoena power for arbitrators that allows them to summon witnesses and records, *id.* § 7;

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The Supreme Court has repeatedly held that § 2 reflects a “liberal federal policy favoring arbitration”<sup>36</sup> and has interpreted the FAA broadly to effectuate it.<sup>37</sup> In 1984, the Court held in *Southland Corp. v. Keating* that the FAA requires federal and state courts to rigorously enforce arbitration agreements according to their terms<sup>38</sup> and preempts state laws that frustrate the FAA’s purpose of placing arbitration agreements “upon the same footing as other contracts.”<sup>39</sup> The following year, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, the Court held that agreements to arbitrate federal statutory claims must be enforced under the FAA, absent evidence that Congress intended to preserve judicial remedies under the statute at issue.<sup>40</sup> Then in 1995, the Court confirmed in *Allied-Bruce Terminix Cos. v. Dobson* that the FAA reaches the

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the vacating of awards in narrow, prescribed circumstances, such as where an award is fraudulent or an arbitrator exceeds his or her powers, *id.* § 10(a)(1)–(4); the entering of court judgments upon awards, *id.* § 9; etc.

36. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *Hall St. Assocs. L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); *Perry v. Thomas*, 482 U.S. 483, 489 (1987).
37. The Supreme Court and lower federal courts have been primarily responsible for the development of the FAA since its enactment, as the statute itself has remained “substantially unchanged since 1925.” Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining In Judicial Expansion and Mandatory Use*, 8 Nev. L.J. 385, 390 (2008).
38. 465 U.S. at 13 (noting that Congress “contemplated a broad reach of the [FAA], unencumbered by state-law constraints”); *see also Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (“It is well settled that the substantive law the [FAA] created is applicable in state and federal courts.” (internal quotation marks omitted)).
39. *Southland Corp.*, 465 U.S. at 16 (quoting H.R. REP. NO. 68-96, at 1 (1924)); *see also Perry*, 482 U.S. at 492 (holding that the FAA preempted a California statute allowing workers to bring wage-collection actions without regard to private arbitration agreements); *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that the FAA preempted a Montana statute requiring arbitration agreements to be in underlined capital letters on the first page of the contract in order to be enforceable).
40. 473 U.S. 614, 626–27 (1985) (“[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. . . . [T]he Act itself provides no basis for disfavoring agreements to arbitrate statutory claims . . .”). Additionally, “[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue,” *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987), and this burden is a heavy one. In *CompuCredit Corp. v. Greenwood*, the Court held that the language of the Credit Repair Organizations Act (CROA) did not evidence congressional intent to ensure a federal judicial forum. 132 S. Ct. at 672–73. The CROA required credit repair organizations to inform consumers that they “have a right to sue a credit repair organization that violates the [CROA].” *Id.* at 669 (internal quotation marks omitted) (emphasis added). The Court reasoned that “most consumers would understand” that the language was merely “a colloquial method of communicating to consumers that they have the legal right” to hold credit repair organizations accountable, but that the CROA did not create a legal right to a judicial forum. *Id.* at 670, 672.

fullest extent of congressional power under the commerce clause, in part, because the FAA “seeks broadly to overcome judicial hostility to arbitration agreements.”<sup>41</sup>

Notwithstanding the FAA’s expansive preemptive effect, the saving clause allows for the invalidation of arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>42</sup> Accordingly, “generally applicable contract defenses, such as fraud, duress, or unconscionability”—which are available under state contract law—may be used to invalidate arbitration agreements.<sup>43</sup> But their application is not without restrictions. Under the FAA, states may not “singl[e] out arbitration provisions for suspect status,”<sup>44</sup> and a “state law principle [may not take] its meaning precisely from the fact that a contract to arbitrate is at issue.”<sup>45</sup> The Supreme Court has articulated the limitations of the saving clause as follows:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the [FAA]’s language and Congress’ [sic] intent.<sup>46</sup>

In short, since the 1980s the Court has consistently expanded the FAA’s preemptive effect and narrowed the circumstances under which arbitration agreements may be invalidated.<sup>47</sup> And in 2011, the Court’s decision in *Concepcion* further expanded FAA preemption with respect to the common law of contracts.<sup>48</sup>

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41. 513 U.S. 265, 272 (1995). The scope of the FAA has been interpreted as co-extensive with Congress’s commerce clause power because the act, by its terms, applies to any “*contract evidencing a transaction involving commerce . . .*” *Id.* at 273 (citing 9 U.S.C. § 2 (2013)); *see also* EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 66 (2006).

42. 9 U.S.C. § 2.

43. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (quoting *Doctor’s Assocs.*, 517 U.S. at 686–87 (“[S]tate law may be applied, ‘if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.’”)).

44. *Doctor’s Assocs.*, 517 U.S. at 687.

45. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

46. *Allied-Bruce Terminix Cos.*, 513 U.S. at 281; *accord* *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (“The central purpose of the FAA is to ensure that private agreements to arbitrate are . . . [placed] upon the same footing as other contracts.” (internal quotation marks omitted)); *Doctor’s Assocs.*, 517 U.S. at 682 (“Montana’s [statute] directly conflicts with [the FAA] because the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.”).

47. Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 *LAW & CONTEMP. PROBS.* 129, 129 (2012); *see also* David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 *IND. L.J.* 239, 243 (2012).

48. *Concepcion*, 131 S. Ct. 1740.

### III. EXPANSION OF FAA PREEMPTION AND DECLENSION OF CONSUMER PROTECTION

Prior to *Concepcion*, it was clear that any state law directly conflicting with the FAA was preempted. “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”<sup>49</sup> The state law at issue in *Concepcion*, however, did not directly conflict with the FAA.<sup>50</sup> Rather, the case concerned a common-law rule stating that arbitration agreements with collective-action waivers in certain consumer adhesion contracts were unconscionable and, therefore, unenforceable.<sup>51</sup> The issue, then, was whether the application of a state common-law rule—in this case, the generally applicable contract defense of unconscionability—*indirectly* conflicted with the FAA such that the state law would be preempted.<sup>52</sup>

Vincent and Liza Concepcion purchased cell phone service from AT&T, which had been advertised as including free phones.<sup>53</sup> As a condition of service, the Concepcions signed AT&T’s standard service agreement, which included a mandatory individual-arbitration clause.<sup>54</sup> The Concepcions received phones, but AT&T charged them \$30.22 in sales tax on the phones’ retail price, which the Concepcions argued was not “free.”<sup>55</sup> They filed a complaint in federal district court, which was consolidated with a class action alleging similar claims of false advertising and fraud.<sup>56</sup> AT&T moved to compel arbitration pursuant to the service agreement,<sup>57</sup> whereas the Concepcions argued that the individual-arbitration clause was unconscionable and should not be enforced.<sup>58</sup>

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49. *Concepcion*, 131 S. Ct. at 1747 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)). The Court reaffirmed this holding ten months later in a three-page per curiam opinion. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012). There, the highest court of West Virginia had found that the FAA did not apply to personal injury or wrongful death claims and, as a matter of public policy, “held unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes.” *Id.* The Supreme Court reversed the West Virginia Supreme Court on the grounds that its reasoning and decision were inconsistent with *Concepcion*. *Id.* at 1203–04.

50. *See Concepcion*, 131 S. Ct. at 1747 (“[T]he inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.”).

51. *Id.* at 1746. Recall that unconscionability is a generally applicable contract defense (i.e., a recognized exception to the enforcement of arbitration agreements under the FAA). *See supra* text accompanying notes 42–43.

52. *See Concepcion*, 131 S. Ct. at 1747.

53. *Id.* at 1744.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1744–45.

58. *Id.* at 1745. The arbitration clause required arbitration in “the parties’ individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” *Id.* at 1744 (internal quotation marks omitted).

To determine whether the arbitration agreement was enforceable, the Ninth Circuit applied the “*Discover Bank* rule,”<sup>59</sup> which was a California common-law application of the unconscionability doctrine to collective-arbitration waivers in consumer adhesion contracts.<sup>60</sup> Under California law, “[a] finding of unconscionability requires a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.”<sup>61</sup> Over time, this doctrine had evolved with respect to arbitration agreements and, in *Discover Bank v. Superior Court*, the California Supreme Court synthesized the following rule: Unconscionability exists as a matter of law in cases where (1) a consumer adhesion contract contains a collective-arbitration waiver; (2) potential damages in disputes subject to the waiver “predictably involve small amounts of damages”; and (3) the consumer alleges that a party with greater bargaining power had “carried out a scheme” intending to cheat many consumers.<sup>62</sup> Because the facts of *Concepcion* satisfied this rule, the Ninth Circuit found the arbitration agreement between the Concepcions and AT&T unconscionable and therefore unenforceable.<sup>63</sup>

The U.S. Supreme Court reversed, holding that the *Discover Bank* rule was preempted because it conflicted with the FAA, albeit indirectly.<sup>64</sup> The Court reasoned that, while the rule stemmed from the generally applicable defense of unconscionability, it (1) disproportionately impacted arbitration agreements<sup>65</sup> and (2) failed to enforce arbitration agreements according to their terms by effectively requiring class proceedings when the parties agreed to bilateral arbitration.<sup>66</sup> Thus, the state rule was preempted because it conflicted with the FAA’s primary purpose

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59. *Id.* at 1745–46.

60. *Id.* at 1750.

61. *Id.* at 1746 (internal quotation marks omitted).

62. 113 P.3d 1100, 1110 (Cal. 2005).

63. *Concepcion*, 131 S. Ct. at 1745.

64. *See id.* at 1753 (“Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California’s *Discover Bank* rule is preempted by the FAA.” (citation omitted) (internal quotations marks omitted)).

65. *See id.* at 1747 (“An obvious illustration of this point would be a case finding unconscionable . . . consumer arbitration agreements that fail to provide for judicially monitored discovery. . . . In practice, . . . the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.”).

66. *Id.* at 1748–49. The Court reasoned that class arbitration is fundamentally different from bilateral arbitration because class arbitration: (1) requires greater formality, sacrificing the speed and lower costs of bilateral arbitration; (2) is not formal enough to adequately protect absent class members; and (3) burdens defendants with greater risk than they bargained for, in that they may find themselves in bet-the-company class adjudication without the possibility of review on the merits. *Id.* at 1750–52. Therefore, requiring class arbitration could not be reconciled with the parties’ agreement to arbitrate individually. *Id.* at 1752. This analysis was consistent with the Court’s holding in *Stolt-Nielsen* that the availability of class procedures could not be read into an arbitration agreement that was silent on the issue. *Id.* at 1750 (“[T]he ‘changes brought about by the shift from bilateral arbitration to class-action arbitration’ are ‘fundamental.’” (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686 (2010))).

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of enforcing arbitration agreements according to their terms.<sup>67</sup> The Court also observed that limiting the *Discover Bank* rule to adhesion contracts was not a limitation at all, given that “the times in which consumer contracts were anything other than adhesive are long past.”<sup>68</sup> In short, although California contract law supported a finding of unconscionability, consistent with the substantive and procedural safeguards of its generally applicable unconscionability doctrine, the *Concepcions* were simply out of luck.

With the addition of this expansive holding to the Court’s FAA jurisprudence, enterprises can now insulate themselves from consumer claim liability. It works like this: If an enterprise includes a bilateral-arbitration agreement in its consumer adhesion contract, the agreement will be enforced in all but the most extreme circumstances,<sup>69</sup> thereby insulating the enterprise from *collective* consumer action; and the enforcement of the bilateral-arbitration agreement would in turn discourage consumers from pursuing independent claims, thereby insulating the enterprise from *individual* consumer action. That is, enterprises post-*Concepcion* have the power to contract around most consumer liability as a legal matter and any remaining liability as a practical matter.

The hallmark of an adhesion contract is that one party has all the power to dictate the contract’s terms, while the other party must “take it or leave it.”<sup>70</sup> Every consumer in today’s world of mass-produced, mass-marketed goods and services is familiar with this arrangement: If you want a bank account, insurance policy, computer, or cell phone, you must agree to the fine print. But this concept is hardly new. In his 1943 article, Kessler explained:

Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all. Thus, standardized contracts are frequently contracts of adhesion . . . .<sup>71</sup>

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67. *Id.* at 1748.

68. *Id.* at 1750.

69. The generally applicable contract defenses of fraud, duress, and unconscionability are technically still available post-*Concepcion*, but it is unclear what type of conduct would be sufficiently egregious for a court to find an arbitration agreement unenforceable on those grounds.

70. *Steven v. Fid. & Cas. Co.*, 377 P.2d 284, 297 (Cal. 1962) (“[Contract of adhesion] refers to a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a ‘take it or leave it’ basis, without opportunity for bargaining and under such conditions that the ‘adherer’ cannot obtain the desired product or service save by acquiescing in the form agreement.” (footnote omitted)).

71. Kessler, *supra* note 1, at 632.

In theory, and often in practice, the use of standardized contracts is advantageous to both enterprises and consumers.<sup>72</sup> Standardized contracts eliminate the need for individual negotiations, saving the parties time and money.<sup>73</sup> Uniformity also allows enterprises to better mitigate risks, including those associated with litigation, which in turn reduces business costs.<sup>74</sup> These cost savings are then passed on to consumers in the form of lower prices and “society as a whole ultimately benefits.”<sup>75</sup>

This theory assumes that the dominant party will not take advantage of its position, either inadvertently or intentionally.<sup>76</sup> Yet in reality, enterprises are *expected* to act to their advantage (and to consumers’ disadvantage);<sup>77</sup> Congress and all fifty states have enacted various consumer protection laws in anticipation of such behavior.<sup>78</sup> The FAA, by its own terms, recognizes that there are circumstances “as exist at law or in equity” where agreements to arbitrate should not be enforced.<sup>79</sup> As previously discussed, the contract defenses of fraud, duress, and unconscionability serve as common-law rules of consumer protection: when faced with inequities resulting from disparate bargaining power and unilaterally imposed contractual terms, courts can use equitable remedies to protect the weaker party.<sup>80</sup>

The FAA has always preempted state laws that directly interfere with the enforcement of arbitration agreements but, post-*Concepcion*, any state law that directly *or indirectly* interferes with the enforcement of arbitration agreements is preempted. For example, state statutes mandating the availability of class proceedings have always been preempted by the FAA.<sup>81</sup> But *Concepcion* goes one step further by precluding courts from consistently applying generally available contract defenses—

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72. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981).

73. *See id.*

74. Kessler, *supra* note 1, at 632 (“Standardized contracts have . . . become an important means of excluding or controlling the ‘irrational factor’ in litigation.”).

75. *Id.*

76. *See id.* at 640.

77. *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 377 (2005) (“[I]t [is] inevitable that firms will ultimately act in their economic best interests, and those interests dictate that virtually all companies will opt out of exposure to class action liability.”).

78. For example, all fifty states have statutory safeguards against deceptive trade practices, 50 *State Statutory Surveys: Business Organizations: Consumer Protection—Deceptive Trade Practices*, 0015 SURVS. 6 (2007), and all fifty states and the federal government have restrictions on advertising and marketing practices, 50 *State Statutory Surveys: Financial Services: Loan Funding—Advertising and Marketing Restrictions*, 0090 SURVS. 18 (2013).

79. 9 U.S.C. § 2 (2013); *see also* AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1746 (2011).

80. *See* Priest, *supra* note 1, at 2151 (“Our courts have become self-conscious social engineers. The reality of differential market power, informational advantages, and relative risk-bearing abilities have become foundational elements of modern contractual interpretation.”).

81. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008) (“[W]hen parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.”).

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which by definition are generally applicable and therefore do not single out arbitration agreements—to invalidate mandatory arbitration provisions in adhesion contracts. While the defense of unconscionability is technically still available, a finding of unconscionability cannot rely on: (1) any inference derived from the fact that an arbitration agreement is at issue, such as the inference that enforcing the agreement would preclude meaningful relief; or (2) the fact that the arbitration agreement is a term in an adhesion contract, which courts often find persuasive in making unconscionability determinations.<sup>82</sup> In this way, the Supreme Court has gone beyond placing arbitration agreements on “equal footing with other contracts”<sup>83</sup> and, in fact, has placed arbitration agreements on superior footing.

But the final nail in the coffin for the unconscionability defense is that, post-*Concepcion*, courts are also prevented from consistently applying the defense in cases with substantially similar, or even identical, facts.<sup>84</sup> To illustrate: A court is asked to decide whether an arbitration agreement is unconscionable. It applies its jurisdiction’s unconscionability doctrine, finds that the arbitration agreement is unconscionable, and refuses to enforce it. So far, so good. Subsequently, the court is confronted with a second case involving an allegedly unconscionable arbitration agreement. Because the second case is factually similar to the first, the court relies on its prior holding and accordingly refuses to enforce the second arbitration agreement. This pattern repeats itself until enough cases have been decided that the court and parties before the court can synthesize a rule (e.g., under X, Y, Z circumstances, arbitration agreements are unconscionable as a matter of law). Now there is a problem because, under *Concepcion*, the court is no longer applying the generally applicable contract defense of unconscionability. Rather, the court has created a common-law rule that disfavors arbitration agreements, and laws that disfavor arbitration agreements are preempted by the FAA.<sup>85</sup> Ultimately, courts are precluded from relying on precedent to invalidate arbitration agreements and, by extension, from developing common-law rules in favor of consumers.

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82. See *Concepcion*, 131 S. Ct. at 1747.

83. *Id.* at 1745 (“In line with [FAA] principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” (citation omitted)).

84. See *id.* at 1747–48. Some scholars argue that *Concepcion* can be read narrowly: The *Discover Bank* rule was invalidated because it was overbroad and reduced the unconscionability analysis to a bright-line test. See, e.g., Jerett Yan, *A Lunatic’s Guide to Suing for \$30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551, 558–59 (2011). But nothing in the Supreme Court’s FAA jurisprudence indicates that the Court would limit its holding in this fashion. The Court’s clear and consistent trend of expansively interpreting the FAA suggests that a broad reading of *Concepcion* is more appropriate.

85. See *Concepcion*, 131 S. Ct. at 1747–48 (“But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. . . . Although [the FAA’s] saving clause preserves generally applicable contract defenses, . . . [it] cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.” (internal quotation marks omitted)).

Secure in the knowledge that bilateral-arbitration agreements in consumer adhesion contracts are virtually impervious to statutory and common-law contract defenses,<sup>86</sup> enterprises can let the practical effects of such agreements discourage individual consumer actions. While arbitration is potentially cheaper than litigation, it is not free. And the private nature of arbitration generally means that claimants cannot share information or otherwise pool their resources—even consumers with identical claims must individually bear the costs associated with discovery, experts, drafting, and so forth.<sup>87</sup> Meanwhile, “rational lawyer[s]” will not represent individual claims where potential awards and fees are relatively small.<sup>88</sup> Thus, in cases like *Concepcion* involving small amounts of money, the cost-benefit analysis usually weighs against pursuing individual claims: “The *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>89</sup>

To summarize, enterprises can—and will—use adhesion contracts to their advantage and to consumers’ disadvantage. And legislatures, as well as the courts, have recognized that, in certain instances, consumers should be protected from such opportunistic behavior. But the Supreme Court’s interpretation of the FAA undermines consumer protection by allowing enterprises to insulate themselves from consumer claim liability and its “too darn bad.”

#### IV. DE-FEDERALIZING THE FAA

The Supreme Court has made it clear that limitations on FAA preemption will not come from the Court, regardless of the “dictates of justice or social desirability.”<sup>90</sup> Furthermore, the FAA’s preemptive scope, as construed in *Concepcion*, prevents state legislatures and, effectively, state and federal courts from invalidating arbitration agreements. As such, the only body potentially willing and able to act is Congress. This note contends that Congress should amend the FAA to allow state legislatures

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86. See Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 730–31 (2012) (“Perhaps the most common criticism [of the Supreme Court’s FAA jurisprudence] is that this simple procedural statute enacted to require enforcement of arbitration agreements in federal court has been transformed . . . into a source of substantive federal arbitration law that governs and favors the enforcement of virtually every arbitration agreement . . . and displaces otherwise applicable state law.” (internal quotation marks omitted)).

87. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2314 (2013) (Kagan, J., dissenting). For example, in *Italian Colors Restaurant*, an arbitration clause required bilateral arbitration and prohibited the plaintiffs from formally *or* informally sharing information and, therefore, precluded them from splitting the cost of the expert report that was required for their antitrust claims. *Id.* at 2316 (Kagan, J., dissenting). The cost of the expert report would have potentially eclipsed \$1,000,000, but recovery for individual plaintiffs would not have exceeded \$40,000. *Id.* at 2308. While that case is an extreme example due to the nature of the claim, it illustrates the Hobson’s choice that consumers often face.

88. *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting).

89. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 699 (2010) (Ginsburg, J., dissenting) (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

90. See Kessler, *supra* note 1, at 637; see also *Concepcion*, 131 S. Ct. at 1753.

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to govern the enforceability of arbitration agreements.<sup>91</sup> Such an amendment would allow states, consistent with principles of federalism, to strike the proper balance between freedom of contract and the need for consumer protection. And, as a practical matter, such an amendment would be more likely to succeed in limiting the scope of the FAA than any existing efforts.<sup>92</sup>

The Constitution embodies principles of federalism, imposing limits on the federal government and reserving “substantial sovereign authority” to the states.<sup>93</sup> In addition to acting as a check on federal power:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>94</sup>

Historically, these values have weighed heavily in favor of upholding state authority “in subject matter areas traditionally occupied by the states,”<sup>95</sup> which include contract law.<sup>96</sup> But, as discussed in Part III, the FAA precludes state legislatures from exercising their traditional authority over contract law to the extent that it frustrates the enforcement of arbitration agreements.

Amending the FAA to reverse its preemptive effect on state statutes governing the enforceability of arbitration agreements would restore federalism values that have been marginalized by the Court’s FAA jurisprudence.<sup>97</sup> First, every state—in response to the needs of its citizens—has enacted consumer protection laws,<sup>98</sup> but FAA preemption allows enterprises to insulate themselves from many of the effects of such laws by simply including arbitration agreements in their consumer adhesion contracts. In this way, federal law gives enterprises more control over the rights of consumers than the states in which they live. Providing state legislatures with the authority to determine when and under what circumstances arbitration agreements

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91. This amendment would only affect § 2 of the FAA, which governs the enforceability of arbitration agreements. It would not alter the remaining provisions concerning stays, orders to compel, appointment of arbitrators, vacatur or confirmation of awards, etc. See 9 U.S.C. §§ 1–16 (2013).

92. See *infra* notes 115–23 and accompanying text.

93. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

94. *Id.* at 458.

95. Kristopher Kleiner, *AT&T Mobility L.L.C. v. Concepcion: The Disappearance of the Presumption Against Preemption in the Context of the FAA*, 89 DENV. U. L. REV. 747, 750 (2012) (internal quotation marks omitted) (describing how *Southland Corp. v. Keating* and its progeny run contrary to federalism principles and the Supreme Court’s usual application of the preemption doctrine).

96. BRUNET ET AL., *supra* note 41, at 63; see also David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law*, 16 WASH. U. J.L. & POL’Y 129, 138–39 (2004).

97. See BRUNET ET AL., *supra* note 41, at 63.

98. See *supra* note 78 and accompanying text.

should be enforced—and when they should yield to contrary state policy—would reverse this perverse result.

Second, moving the arbitration debate back to the state level would increase opportunities for interested parties to influence arbitration policy and legislation. Enterprises and their allies have deep pockets and generally have little problem lobbying federal representatives for favorable legislation, but individuals and consumer-rights advocates are typically not as well funded and, thus, stand a better chance of being heard by state lawmakers. And, while relegating the debate to state legislatures would increase the cost of legislative advocacy across all fifty states, it would decrease the costs and resources needed to effect change in any one state.<sup>99</sup> Stakeholders are also more likely to actively engage in the state legislative arena where they have a chance of success,<sup>100</sup> as opposed to lobbying Congress where partisan politics and special interest groups make the legislative process far more cumbersome.<sup>101</sup> Thus, de-federalizing arbitration policy would ensure that parties on both sides of the debate have meaningful opportunities to influence legislation and that the democratic process is, in fact, democratic.

Third, the states are best suited to “serve as . . . laborator[ies]”<sup>102</sup> and test creative solutions to the adhesion-contract and arbitration-agreement problem, for which there is currently no clear solution. Pro-enterprise advocates may argue that giving this power to the states is just opening the door for state legislatures to frustrate the enforcement of arbitration agreements. But, given the proliferation of arbitration agreements in recent decades,<sup>103</sup> as well as the potential and realized benefits of arbitration and standardized contracts,<sup>104</sup> foreclosing arbitration entirely would be regressive and unlikely to succeed.<sup>105</sup> More likely, state legislatures would balance the benefits of arbitration against the need to safeguard consumer interests. For example, political parties might gridlock on the issue of class arbitration, but class arbitration is not the only way to make pursuing small consumer claims worthwhile: joinder, consolidation, and other means of information sharing can also decrease the burden

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99. See BRUNET ET AL., *supra* note 41, at 183 (“State-by-state regulation may be the most feasible [option] to the extent that business interests control the legislature . . .”).

100. Twenty-one states and the District of Columbia have enacted laws to prohibit employment discrimination based on sexual orientation and/or gender identity. See *Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act> (last updated Mar. 9, 2015). Meanwhile, it will likely take years for Congress to pass parallel federal protections. See *H.R. 1755 (113th): Employment Non-Discrimination Act of 2013*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/hr1755#overview> (last visited Apr. 25, 2015).

101. See, e.g., *infra* text accompanying notes 115–23.

102. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

103. See *supra* note 30 and accompanying text.

104. See *supra* notes 18–30, 72–75 and accompanying text.

105. Consider, for example, how little support the sweeping Arbitration Fairness Act (AFA) has received in Congress. See *infra* text accompanying notes 115–23 (linking the AFA’s repeated failure in Congress to broad language that would eliminate the enforcement of arbitration agreements in specific contexts).

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on individual consumers and encourage the pursuit of individual claims.<sup>106</sup> Likewise for shifting some or all costs associated with consumer arbitration to the enterprise; requiring arbitration in a location convenient for the consumer; and ensuring that consumers have access to appropriate remedies, including injunctions and punitive damages.<sup>107</sup> Arguably, mandatory arbitration can be structured to account for disparate bargaining power so that consumers with small claims will actually fare better in arbitration than litigation, while enterprises continue to enjoy the benefits of standardized arbitration agreements.<sup>108</sup> Finding the right balance, though, will require trial and error, and the states, being more flexible and less dangerous than the federal government,<sup>109</sup> are the appropriate place for such experimentation.

Of course, this will mean that the enforceability of arbitration agreements will vary from state to state, and enterprises will have to adjust their standardized contracts accordingly—an inefficient and burdensome process.<sup>110</sup> But contract law has always been the province of the states, and enterprises have developed methods of addressing jurisdictional variations.<sup>111</sup> Also, enterprises will not bear the entirety of this additional burden: The expenses will be factored into the cost of doing business and passed on to consumers in the form of higher prices. Consumers may have to pay slightly more for a good or service, but they will be protected from the unexpected and unrecoverable losses concomitant with the abuse of standardized contracts. Further, it is unlikely that each of the fifty states will adopt unique laws

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106. *See* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting).

107. For example, the arbitration agreement challenged in *Concepcion* was arguably fair to consumers. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011). It required AT&T to “pay all costs for non-frivolous claims,” required the arbitration to “take place in the county in which the customer [was] billed,” and allowed the arbitrator to “award any form of individual relief.” *Id.*

108. *See generally* Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems and Alternatives*, DISP. RESOL. J., May–July 2012, at 32, 37 (arguing that arbitration may be better than litigation for consumers with small claims); *see also* Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 Hous. L. Rev. 457, 494–95 (2011) (noting that the Association of Conflict Resolution has identified benefits for consumers in certain arbitration processes).

109. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

110. *See* BRUNET ET AL., *supra* note 41, at 182.

111. *See id.* at 182. “Nonuniformity is, in fact, an unavoidable reality in a federalist system of government.” *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008). For example, every state has Blue Sky Laws that operate in conjunction with federal securities laws. Robert Rapp, *Blue Sky Regulation: A Primer for Accredited Investors*, ACCREDITED INVESTOR MARKETS, <http://www.accreditedinvestormarkets.com/ai-basics/securities-laws-for-beginners/blue-sky-regulation-a-primer-for-accredited-investors/> (last visited Apr. 25, 2015). While each state’s laws are modeled on the same basic principles, entities involved in issuing, buying, or selling securities must ensure compliance in each state independently. *Id.* Likewise, any employer operating in more than one state must ensure compliance with the wage and hour laws of each state, in addition to federal wage and hour laws. *See, e.g., Minimum Wage Laws in the States—January 1, 2015*, U.S. DEP’T LABOR, <http://www.dol.gov/whd/minwage/america.htm> (last updated Feb. 24, 2015) (providing interactive graphic with the minimum wage requirements for all fifty states).

governing the enforceability of arbitration agreements. States may co-opt legislation from one another, with or without variations;<sup>112</sup> they may draw from the same authorities;<sup>113</sup> or they may adopt all or part of a model code drafted by the Uniform Law Commission, as with the Uniform Arbitration Act.<sup>114</sup>

In addition to promoting principles of federalism, amending the FAA to grant power to the states has the practical benefit of being more likely to succeed where previously proposed amendments have failed. To date, the most prominent attempt to limit the FAA has been the Arbitration Fairness Act (AFA), first introduced in 2007 and then reintroduced in 2009, 2011, and 2013.<sup>115</sup> Each time the bill failed to

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112. Consider, for example, how Washington State's youth concussion legislation was co-opted by many other states (albeit to poor effect). See generally Erin P. Andrews, *Avoiding the Technical Knockout: Tackling the Inadequacies of Youth Concussion Legislation*, 58 N.Y.L. SCH. L. REV. 417 (2013–2014). Similarly, after Florida enacted its “Stand Your Ground” law in 2005, many other states adopted identical or similar statutes. Marc Fisher & Dan Eggen, *‘Stand Your Ground’ Laws Coincide with Jump in Justifiable-Homicide Cases*, WASH. POST (Apr. 7, 2012), [http://www.washingtonpost.com/national/stand-your-ground-laws-coincide-with-jump-in-justifiable-homicide-cases/2012/04/07/gIQA52v51S\\_story.html](http://www.washingtonpost.com/national/stand-your-ground-laws-coincide-with-jump-in-justifiable-homicide-cases/2012/04/07/gIQA52v51S_story.html). More recently, after California enacted the country's first “affirmative consent” law, other states began proposing similar laws. Ashe Schow, *Affirmative Consent Laws Spreading Across the US*, WASH. EXAMINER (Oct. 14, 2014), <http://www.washingtonexaminer.com/affirmative-consent-laws-spreading-across-the-us/article/2554754>.
113. For example, the American Law Institute is currently drafting a third *Restatement of the Law, Consumer Contracts*, which will focus “on aspects of the law unique to consumer contracts and on regulatory techniques that are prominently applied in consumer protection law.” *Current Projects: Restatement of the Law, Consumer Contracts*, AM. L. INST., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=25](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=25) (last visited Apr. 25, 2015). Given the prestige and influence of the American Law Institute and the existing restatements, state legislators drafting consumer protection laws would likely consult such secondary sources.
114. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM ARBITRATION ACT (2000), available at [http://www.uniformlaws.org/shared/docs/arbitration/arbitration\\_final\\_00.pdf](http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf). As of this writing, eighteen states have enacted the Uniform Arbitration Act (2000), with three more states having introduced it for adoption. *Legislative Fact Sheet—Arbitration Act (2000)*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20\(2000\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(2000)) (last visited Apr. 25, 2015). The drafters of the 2000 revisions to the Uniform Arbitration Act were very aware of the “significant and preemptive presence of the [FAA]” and drafted the revisions to avoid preemption. *Arbitration Act (2000) Summary*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Arbitration%20Act%20%282000%29> (last visited Apr. 25, 2015). Thus, if the FAA were amended, the National Conference of Commissioners on Uniform State Laws would likely revisit the Uniform Arbitration Act in whole or in part to revise it accordingly.
115. S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007); S. 931, 111th Con. (2009); H.R. 1020, 111th Cong. (2009); S. 987, 112th Cong. (2011); H.R. 1873, 112th Cong. (2011); S. 878, 113th Cong. (2013); H.R. 1844, 113th Cong. (2013). An alternative attempt—the Fair Arbitration Act—would have required arbitration clauses to contain certain procedural safeguards to be enforceable. S. 1135, 110th Cong. (2007); S. 1186, 112th Cong. (2011). The bill was introduced in the Senate in 2007 and reintroduced in 2011 and died in committee both times. S. 1135; S. 1186; see also S. 1135 (110th): *Fair Arbitration Act of 2007*, GovTRACK, <https://www.govtrack.us/congress/bills/110/s1135> (last visited Apr. 25, 2015); S. 1186 (112th): *Fair Arbitration Act of 2011*, GovTRACK, <https://www.govtrack.us/congress/bills/112/s1186> (last visited Apr. 25, 2015).

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make it out of committee,<sup>116</sup> partly due to its broad language and sweeping effect.<sup>117</sup> If enacted, the AFA would institute a wholesale reversal of the FAA with respect to consumer, employment, antitrust, and civil rights disputes<sup>118</sup>—categories that do not have precise legal meanings—and would thus categorically invalidate pre-dispute arbitration agreements without the benefit of case-by-case consideration.<sup>119</sup> While the measure is supported by some Democrats, it has garnered little to no Republican support.<sup>120</sup> The 2013 bill died in Congress like its predecessors,<sup>121</sup> which was unsurprising given that, as of November 2013, GovTrack.us estimated that the bill had a 44% chance of leaving committee with a 6% chance of passing in the Senate,<sup>122</sup> and a 9% chance of leaving committee with a 3% chance of passing in the House.<sup>123</sup>

Yet Congress has passed legislation limiting the FAA in certain, specific instances, such as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.<sup>124</sup> This suggests that amending the FAA in a less expansive way would be more likely to gain traction. Accordingly, instead of adopting the AFA’s wholesale repudiation of arbitration, this note argues for an amendment reinstating the states’ traditional control over contract law. Such an amendment would reflect a more measured approach than the AFA because it would not automatically produce substantive changes in the law. Rather, any future limitations on the enforceability of arbitration agreements would come from duly elected state legislatures. Thus, federal lawmakers who reject the AFA as anti-business may nonetheless support an

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116. See Bennett, *supra* note 108, at 35 (“That the AFA has been introduced repeatedly in Congress without progressing past the committee stage suggests that the legislation lacks any real chance of adoption.”). The 2013 bill is pending but unlikely to pass. See *infra* notes 121–23 and accompanying text.

117. See Cole, *supra* note 108, at 491–97.

118. See S. 1782; H.R. 3010; S. 931; H.R. 1020; S. 987; H.R. 1873; S. 878; H.R. 1844.

119. See S. 1782; H.R. 3010; S. 931; H.R. 1020; S. 987; H.R. 1873; S. 878; H.R. 1844; see also Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 402 (2012) (arguing that, while limiting the enforceability of arbitration agreements “may be appropriate in the context of certain categories of contracts that are normally adhesive, such as employment or consumer contracts, it is wholly inconsistent with expectations in the typical business-to-business setting”).

120. See Bennett, *supra* note 108, at 35 (“Republican control of the House is a factor disfavoring passage.”).

121. *H.R. 1844 (113th): Arbitration Fairness Act of 2013*, GOVTRACK, <http://www.govtrack.us/congress/bills/113/hr1844> (last visited Nov. 16, 2013); *S. 878 (113th): Arbitration Fairness Act of 2013*, GOVTRACK, <http://www.govtrack.us/congress/bills/113/s878> (last visited Nov. 16, 2013). As of the date of publication, GovTrack.us has been updated to omit the passage-rate estimates due to the bill’s failure to make it past the committee level.

122. *S. 878 (113th): Arbitration Fairness Act of 2013*, *supra* note 121.

123. *H.R. 1844 (113th): Arbitration Fairness Act of 2013*, *supra* note 121. The AFA has yet to be introduced in the 114th Congress. See *Text of the Arbitration Fairness Act of 2013*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/s878/text> (last visited Apr. 25, 2015).

124. Bennett, *supra* note 108, at 35–36 (describing three legislative proposals passed in 2009 that limit the FAA’s reach in certain employment and consumer settings).

amendment that promotes states' rights and limits federal power, consistent with their political agendas.<sup>125</sup>

Lastly, proposing a less expansive amendment is more likely to lead to real discussion: the AFA's all-or-nothing approach is not an invitation to negotiate. For both sides of the aisle to support a bill, there must be room—and a genuine willingness—to compromise. An amendment proposal granting states authority to legislate the enforceability of arbitration agreements would signal an interest in bargaining because the amendment could take many shapes. For example, instead of applying to contracts in general, the amendment could be structured to grant states control over specific categories of contracts, the definitions of which would also be subject to negotiation. Alternatively, instead of allowing states to legislate the enforceability of arbitration agreements for all claims, state authority could be limited to cases where an individual's potential recovery falls below a certain dollar amount (i.e., an amount in controversy), also to be negotiated. In short, there is plenty of room for movement between repealing the FAA and “too darn bad,” and a serious proposal should welcome that debate.

## V. CONCLUSION

Recall that when Kessler prophesied about the dangers of adhesion contracts, it was 1943. There were no credit cards or credit card agreements, no computers or software licenses, no cell phones or service contracts—the world was, in many ways, a very different place. But the fundamental motivations of enterprises and consumers, rooted as they are in human nature, have not changed. And so, seven decades later, Kessler's observations concerning freedom of contract have lost none of their validity or force:

With the decline of the free enterprise system due to the innate trend of competitive capitalism towards monopoly, the meaning of contract has changed radically. Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege.<sup>126</sup>

In many—perhaps even most—ways, courts heeded Kessler's warning all those years ago and took measures to temper the economic benefits of arbitration with fairness and equity. Today, though, much of the law that was developed as a bulwark against the exploitation of consumers has been dismantled by the Supreme Court's expansive interpretation of the FAA. With respect to consumer adhesion contracts, enterprises can benefit at the expense of the consumer, with the full support and

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125. See BRUNET ET AL., *supra* note 41, at 181 (“[Amending the FAA] to allow states to regulate with respect to consumer arbitration . . . will appeal to those legislators who favor states' rights and oppose extensive federal interference with business matters.”)

126. Kessler, *supra* note 1, at 640.

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protection of federal law, provided they remember to include carefully crafted arbitration agreements in their consumer adhesion contracts.<sup>127</sup>

For consumers, then, freedom of contract is again an illusion and it’s “too darn bad.” But it does not have to be. Congress has the power to amend the FAA and give state legislatures the authority to protect consumers. Such an amendment would be consistent with the ideals of federalism and a more realistic response to the problem because it would allow state legislatures to impose workable limitations on arbitration agreements by restoring the balance between enterprises and consumers within an appropriately democratic framework. Seventy years ago, when Kessler cautioned against allowing the disparity between enterprises and individuals to go unchecked, the courts responded. Now, to ensure that enterprises and consumers alike can prosper, Congress must do the same.

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127. See Gilles, *supra* note 77 (“[F]irms will ultimately act in their economic best interests, and those interests dictate that virtually all companies will opt out of exposure to class action liability [by including class waivers in consumer contracts]. Why wouldn’t they? Once the waivers gain broader acceptance and recognition, it will become malpractice for corporate counsel not to include such clauses in consumer and other class-action-prone contracts.” (footnote omitted)).