One "Like" Away: Mandatory Arbitration for Consumers

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Introduction

Imagine it is a routine Tuesday morning in the Johnson household. Little Jimmy is eating his Cheerios at the kitchen table as his mom prepares her grocery list. She sees that General Mills has just posted a coupon on its Facebook page. She quickly downloads the coupon to her smartphone so that she can use it later when she is at the store. Suddenly, she hears a loud crash behind her. She turns to find the bowl of Cheerios splattered on the floor and her son holding his throat and beginning to turn blue as he frantically gasps for air. Jimmy, who is extremely allergic to peanuts, is having an allergic reaction and has to be rushed to the emergency room. The family discovers that the Cheerios he ate that morning negligently contained a trace of peanuts. Later, the Johnsons decide they want to bring suit against General Mills, the owner of Cheerios, for the harm Jimmy suffered because of the company's negligence. What do the Johnsons discover? Because Mrs. Johnson downloaded a General Mills coupon earlier that Tuesday morning, she unknowingly gave up all rights to sue. Instead, the Johnson family must submit their claim to mandatory arbitration for all the harm Jimmy suffered.

While the above scenario is fictional, there is a large probability of a similar scenario occurring in thousands of U.S. households as a result of a pervasive amount of hidden online mandatory arbitration clauses. People access the Internet and use downloaded apps every single day.[1] In fact, studies show that Americans spend 30.25 hours

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[1] *See* Ewan Spence, *More People Are Opening More Mobile Apps Every Single Day*, Forbes (Apr. 24, 2014, 8:25 PM), http://www.forbes.com/sites/ewanspence/2014/04/24/more-people-are-opening-more-mobile-apps-every-single-day/; *see also Smartphones: So Many Apps, So Much Time*, Nielsen (July 1, 2014), http://www.nielsen.com/us/en/insights/news/2014/

per month on average playing on apps on their smartphones.[2] Yet, what do people do on their devices? They often scan through social networking sites, seeing what their friends are up to or getting the latest news and activities from their "liked" pages such as Huffington Post, ABC, General Mills, or Lays Potato Chips.[3] If people are not scrolling through a social networking site, they are probably using an app to catch up on a TV show or to download a coupon before they head to the store.[4] Every day thousands of people use their devices to interact on these mobile apps; unbeknownst to them, they also could be giving up their right to sue.[5]

Mandatory arbitration in online Terms of Services is not a new concept.[6] For instance whenever a user signs up to use Facebook or make a purchase on Amazon, the user must generally click "I agree" to these companies' Terms of Services before proceeding.[7] This action is known as a "clickwrap" agreement.[8] For many of these clickwrap agreements, it is quite common for companies to try to include a provision that mandates forced arbitration.[9] In fact, large companies, such as Facebook, have been in the news for such clickwrap Terms of Services and specifically for these provisions that attempt to force consumers to give up their right to sue.[10] Public backlash has mostly

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smartphones-so-many-apps—so-much-time.html [hereinafter *Smartphone App Usage*]; Kevin Rawlinson, *Daily internet use has more than doubled in past seven years*, THE INDEPENDENT (Aug. 8, 2013), http://www.independent.co.uk/life-style/gadgets-and-tech/news/daily-internet-use-has-more-than-doubled-in-past-seven-years-8752987.html.

2 *Smartphone App Usage*, *supra* note 1.

3 *Cf. Mobile Technology Fact Sheet*, PEW RESEARCH (January 2014), http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/ (stating that "63% of adult cell owners use their phones to go online" and "34% of cell internet users go online *mostly* using their phones") (emphasis in original).

4 *See Ban the use of forced-arbitration clauses in consumer and employment contracts*, CONSUMER REPORTS (May 9, 2014, 2:45 PM), http://www.consumerreports.org/cro/news/2014/05/ban-the-use-of-these-forced-arbitration-clauses-in-consumer-and-employment-contracts/index.htm [hereinafter *Ban the Use of Forced-Arbitration Clauses*].

5 *Id.*

6 *See, e.g.*, Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 24 (2d Cir. 2002).

7 Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009), *aff'd*, 380 F. App'x 22 (2d Cir. 2010).

8 *Id.*

9 Jeremy B. Merrill, *One-Third of Top Websites Restrict Customers' Right to Sue*, N.Y. TIMES (Oct. 23, 2014), http://www.nytimes.com/2014/10/23/upshot/one-third-of-top-websites-restrict-customers-right-to-sue.html?_r=0&abt=0002&abg=1.

10 Greg Beck, *Facebook Dumps Binding Mandatory Arbitration*, PUB. CITIZEN CONSUMER L. & POL'Y BLOG (Feb. 26, 2009), http://pubcit.typepad.com/clpblog/2009/02/facebook-dumps-binding-mandatory-arbitration.html.

kept large companies from introducing mandatory arbitration clauses to their Terms of Service.[11] The process usually goes like this: a large company updates its Terms of Service with a banner advertisement on its site saying the terms have changed. A few consumers actually read the new terms and then start a campaign against the large company. The company then reverts its Terms of Service or privacy policy back to its old wording without a mandatory arbitration clause. This happened to Facebook in 2009[12] and General Mills in early 2014.[13]

While it has been argued that this sort of clickwrap agreement is unconscionable,[14] it is still up to the consumer to read these terms before clicking the "I agree" button. However, in a new wave of online Terms of Services, users rarely ever have to click an "I agree" button, and sometimes the only place they can find out that the Terms of Service have changed is through a press release.[15] Consumers may only encounter Terms of Service agreements in areas of the website they might not think to check.[16] These sites are arguably hiding the most important Terms of Service from their users. Users hop on their favorite sites and download a coupon or "like" the page so that they can see updates; without even knowing it, they give up their rights to sue and are forced into arbitration.[17] AOL's updated Terms of Service

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[11] Kenneth Hilario, *General Mills Reverses "No Sue" Facebook Policy After Backlash*, PHILA, BUS. J. (April 21, 2014, 11:37 AM), http://www.bizjournals.com/philadelphia/news/2014/04/21/general-mills-reverses-no-sue-facebook-policy.html?page=all (citing Mark Reilly, *After Outcry, General Mills Scraps New "No Sue" Private Policy*, MINNEAPOLIS/ST. PAUL BUS. J. (Apr. 20, 2014, 9:16 PM), http://www.bizjournals.com/twincities/morning_roundup/2014/04/after-outcry-general-mills-scraps-new-no-sue.html).

[12] *See* Beck, *supra* note 10.

[13] *See* Hilario, *supra* note 11.

[14] Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 590 (2007) (citing Bar-Ayal v. Time Warner Cable Inc., No. 03 CV 9905 (KMW), 2006 WL 29900032, at *16 (S.D.N.Y. Oct. 16, 2006)).

[15] AOL INC., *Frequently Asked Questions Regarding Our Recent Changes*, (Sept. 15, 2014), https://web.archive.org/web/20140915162904/http://privacy.aol.com/faq [hereinafter *AOL FAQ*].

[16] *See, e.g.*, Eric Goldman, *How Zappos' User Agreement Failed In Court and Left Zappos Legally Naked*, FORBES (Oct. 10, 2010, 12:52 PM), http://www.forbes.com/sites/ericgoldman/2012/10/10/how-zappos-user-agreement-failed-in-court-and-left-zappos-legally-naked/ (citing In re Zappos.com, Inc., 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012)) (examining the court's discussion of hidden "terms of use" where they appear as browsewrap).

[17] *See, e.g., AOL FAQ*, *supra* note 15 ("AOL's Terms of Service now includes a binding arbitration clause and class action waiver. AOL's arbitration clause can be found in our Terms of Service in the section entitled 'How to resolve disputes with us.'"); *See, e.g.*, *Dropbox Terms of Service*, DROPBOX, INC. (Jan. 22, 2015) https://www.dropbox.com/terms2014 ("You and Dropbox agree to resolve any claims relating to these Terms or the Services through final and binding arbitration); *see also* Merrill, *supra* note 9 ("[T]ucked into the dense legalese of their terms-of-

from September 2014 are an example of one of these.[18] AOL's website says, "AOL's Terms of Service now includes a binding arbitration clause and class action waiver. AOL's arbitration clause can be found in our Terms of Service in the section entitled 'How to resolve disputes with us.'"[19]

This Comment will inspect this quickly growing use of mandatory arbitration clauses, and how commonplace it is for consumers to waive their right to a trial without ever knowing about it.[20] As *Consumer Reports* says, mandatory arbitration clauses "shine a spotlight on an anti-consumer practice that's becoming all too prevalent. There is probably not a single adult in the United States who is not subject to at least one binding mandatory arbitration clause; you just might not know that you've agreed to it."[21] This Comment will discuss the current judicial landscape around online mandatory arbitration clauses and how most courts, including the Supreme Court, continue to uphold online mandatory arbitration clauses. It will argue that while Supreme Court precedent favors arbitration, the Court should favor the consumer, rather than the corporation, when and if a case involving a hidden arbitration clause comes before it. Every consumer or user has the right to a jury trial, as outlined in the Seventh Amendment, and this Constitutional right deserves adequate protection from the courts.

Part I of this Comment discusses the evolution of contractual arbitration and mandatory arbitration. It will discuss what is needed to form a valid contract and how clickwrap Terms of Services became authoritative. This Part will also look at some district court cases that have responded to large companies' Terms of Service that require mandatory arbitration through clickwrap agreements and how state laws generally favor the consumer. Part I of this Comment will also look directly at Supreme Court precedent in the area of mandatory arbitration, which has historically leaned in favor of arbitration, ever since the enactment of the Federal Arbitration Act of 1925 (FAA).[22]

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service rules, many of the Internet's most popular sites have inserted language that forbids users from suing if something goes wrong").

18 *Id.*

19 *Id.*

20 *Cf. Ban the Use of Forced-Arbitration Clauses*, *supra* note 4.

21 *Id.*

22 9 U.S.C. §§ 1-14 (2012).

This analysis will include discussion of class arbitration, general consumer arbitration,[23] and the development of the FAA.

Next, Part II of this Comment will attempt to reconcile the rationale behind the Supreme Court's precedents and favoritism towards arbitration, with the unfairness of current mandatory arbitration clauses including ones that consumers are not even aware of when simply interacting on a website. Most importantly, this Comment will explain how the current use of mandatory arbitration is different from clickwrap Terms of Services where consumers must click "I agree." Despite the Supreme Court's preference to enforce arbitration clauses, in this instance the Supreme Court should side with the consumer, and not enforce such mandatory arbitration because the right to a jury trial is a Constitutional right given to all citizens; citizens should not be giving up that right unknowingly in our current technological era.

I. BACKGROUND

A. *Contractual Arbitration*

Contractual arbitration is not new to the legal world.[24] Courts have long upheld arbitration agreements and clauses when two parties of equal bargaining power agree that their disputes should be decided by arbitration rather than in court.[25] Contractual parties can view arbitration as a cheaper, easier, and all-around better solution than court.[26]

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[23] *See* American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 671 (2012), AT&T v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

[24] Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 111-12 (2002) (citing Southland Corp. v. Keating, 465 U.S. 1, 6-8, 12-13 (1984)) (discussing the Supreme Court's analysis of arbitration agreements in *Southland*, noting quotations by the majority opinion taken from Senate hearings in the early 1920s).

[25] *Id.* at 111 (citing Southland Corp. v. Keating, 465 U.S. 1, 6-8, 16 (1984)) ("The U.S. Supreme Court found the case to be within its appellate jurisdiction[ ] and held that the FAA applied in state court and preempted the California law.").

[26] Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.").

1. The Origins of Mandatory Arbitration

Mandatory arbitration clauses have been in company and consumer contracts for years now.[27] Companies found it cheaper and more convenient for them if all of their contracts with users or consumers contained terms such as a forum selection clause or mandatory arbitration clause.[28] Just like forum selection clauses, a company will typically add a mandatory arbitration clause into a contract with a consumer, and if the consumer does not carefully read the contract or the fine print, and signs it, the consumer will be bound to those terms.[29] In these instances, consumers have the ability to read the contract or terms before signing.[30] As a result, courts will generally find such contracts not unconscionable because consumers arguably have had the opportunity to read these terms prior to signing the agreement.[31]

2. Mandatory Online Arbitration

The concept of arbitration has evolved as technology has evolved, especially since the late 20th century when the Internet was invented.[32] Once people started virtually interacting with businesses online, contractual arbitration took on a new form.[33] Expressions such as "browsewrap" and "clickwrap" Terms of Services sprang up to describe agreements which customers entered into when when ordering a product or signing up for a service on the Internet.[34] Terms of Service usually include ordinary terms such as their inappropriate language policy, or defining other ways users are allowed to interact on the website.[35] These terms also include more important items, such as

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[27] *See* Woodrow Hartzog, *Website Design As Contract*, 60 AM. U. L. REV. 1635, 1641-42 (2011).

[28] Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 685 (2010).

[29] *See* Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366-67 (E.D.N.Y. 2009), *aff'd*, 380 F. App'x 22 (2d Cir. 2010).

[30] *See Id.* at 367 (citing Southwest Airlines Co. v. BoardFirst, L.L.C., No. 06-CV-0891-B, 2007 WL 4823761, at *5 (N.D. Tex. Sept. 12, 2007)) ("In ruling upon the validity of a browsewrap agreement, courts consider primarily 'whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site.'").

[31] *See* Hartzog, *supra* note 27, at 1643-44.

[32] *See, e.g.*, *Hines*, 668 F. Supp. 2d at 366.

[33] *See* Hartzog, *supra* note 27, at 1650-53.

[34] *See id.* at 1641-42.

[35] *See Facebook Statement of Rights and Responsibilities*, FACEBOOK (Nov. 15, 2013) https://web.archive.org/web/20131115221152/https://www.facebook.com/legal/terms.

a forum selection clause if you chose to sue, and other important terms affecting a lawsuit, including an arbitration clause.[36] On the Internet, the main way companies started forming contracts was through clickwrap agreements, "in which website users typically click[ed] an 'I agree' box after being presented with a list of terms and conditions of use, and the 'browsewrap' agreements, where website terms and conditions . . . are posted on the website typically as a hyperlink at the bottom of the screen."[37] Such browsewrap agreements became so commonplace on the Internet that consumers grew accustomed to clicking the "I agree" button without reading much of what they were agreeing to.[38] Clickwraps do not allow a consumer to proceed at all unless they click "I agree."[39] Despite the rise of these browsewrap or clickwrap agreements as a result of the advent of the Internet, the making of contracts online, however, "has not fundamentally changed the principles of contract."[40] For example, whether a contract is made over the Internet or in person, both parties still need notice and manifestation of mutual assent for the contract to be valid.[41]

3. Notice

In order for any terms of a contract to be legally enforced, there first must be proper notice given to the consumer about what the terms are.[42] This is true for contracts formed online as well.[43] Consumers must have notice of the offer being presented, including online "offers."[44] Courts have upheld "inquiry notice" as a form of notice for online consumers.[45] With inquiry notice "where there is no actual

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36 *Ban the Use of Forced-Arbitration Clauses*, *supra* note 4.

37 *Hines*, 668 F. Supp. 2d at 366.

38 *See id.* (citing Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004)); *see also Ban the Use of Forced-Arbitration Clauses*, *supra* note 4 (discussing the casual manner in which consumers click away their right to a trial).

39 *See Hines*, 668 F. Supp. 2d at 366.

40 *Id.* (quoting Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004)).

41 RESTATEMENT (SECOND) OF CONTRACTS §§ 18, 54, 56-57 (AM. LAW INST. 1981).

42 Michael H. Laven, *Notice and Manifestation of Assent to Browse-Wrap Agreements in the Age of Evolving Crawlers, Bots, Spiders and Scrapers: How Courts Are Tethered to Their Application of* Register *and* Cairo *and Why Congress Should Mandate Use of the Robots Exclusion Standard to Prevent Circumvention of Responsibility*, 30 SYRACUSE J. SCI. & TECH. L. REP. 56, 57-59 (2014).

43 Schnabel v. Trilegiant Corp., 697 F.3d 110, 120 (2d Cir. 2012).

44 *See* Laven, *supra* note 42, 57-58.

45 *Schnabel*, 697 F.3d at 120, 126.

notice of the term, an offeree is still bound by the provision if he or she is on *inquiry* notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent." Inquiry notice may not actually alert a person to a specific term, but it gives a reasonable person enough information to know whether they should ask about the term.[46] Notice is key when many important terms such as an arbitration clause are not blatantly seen or known to the consumer. Hidden mandatory arbitration clauses in our present modern technological setting fail to give consumers adequate notice because consumers are viewing content through websites or other technologies, such as apps or a social networking sites; reasonable consumers would not think that they are being held to additional contract terms when they have already agreed to the Terms of Service on the original website or app.[47]

4. Manifestation of Assent

Not only must there be notice under traditional rules of contract law, there must also be the manifestation of assent to form a valid contract.[48] Manifestation of assent means that there is a "meeting of the minds" and both parties know they are agreeing to the terms of the proposed contract.[49] In traditional contract terms, this generally means that two parties have negotiated and know the terms of their contract prior to any legal commitment.[50] In today's clickwrap agreements, assent is typically obtained by having a consumer click "I agree" before continuing.[51] For a browsewrap agreement, however, the manifestation of assent is even less action oriented. Here, "[u]nlike a clickwrap agreement, a browsewrap agreement 'does not require the user to manifest assent to the terms and conditions expressly . . . [a] party instead gives his assent simply by using the website.'"[52] When a website requires no affirmative action, courts

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46 *Id.* at 120 (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30 n.14 (2nd Cir. 2002)).

47 *Ban the Use of Forced-Arbitration Clauses*, *supra* note 4.

48 RESTATEMENT (SECOND) OF CONTRACTS § 18 (AM. LAW INST. 1981).

49 *Id.*

50 *See* Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366-67 (E.D.N.Y. 2009), *aff'd*, 380 F. App'x 22 (2d Cir. 2010).

51 *Id.*

52 *Id.* at 366 (quoting Sw. Airlines Co. v. BoardFirst, L.L.C., No. 06-CV-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007)).

judge manifestation of assent based on the actual or constructive knowledge the consumer had of the website's Terms of Service.[53] The court will usually consider where the website's Terms of Service hyperlink is placed and how visible it is to the consumer.[54] Courts have held that most clickwrap and browsewrap agreements contain proper manifestation of assent from both the company and the consumer because they claim a reasonable user would be aware of the terms.[55]

B. *Present Day Mandatory Arbitration Dilemmas*

Given that both mandatory arbitration clauses[56] and the Internet have been around for a while, why are mandatory arbitration clauses becoming a big deal now? Currently, many companies and websites interact with consumers in a multitude of ways on the Internet, such as on their own websites,[57] Facebook, Twitter, Instagram, or Pinterest, to name a few. This means that people are frequently at risk of entering into mandatory arbitration agreements without even knowing it, simply by interacting on one of these Internet applications. As previously noted, courts have held that most browsewrap agreements are enforceable because users have inquiry notice of the terms.[58] Generally, if one is browsing a company's website, the court will find that person has inquiry notice about its Terms of Service.[59] However, what if you are simply scanning through that company's Facebook fan page and decide to "like" that page? Yes, you have agreed to Facebook's Terms of Service through a clickwrap agreement, but has that put you on notice that you are also binding yourself to each specific company that you "like" or interact with on Facebook?

This year, at least two major companies, General Mills and AOL, updated their Terms of Service to include language that would bind consumers to mandatory arbitration for simply interacting with them

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53 Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014).

54 *See* Laven, *supra* note 42, 57-59.

55 *See Hines*, 668 F. Supp. 2d at 366-67.

56 *See* Laven, *supra* note 42, 57-59.

57 *See*, *e.g.*, GENERAL MILLS, www.generalmills.com (A "Join the conversation with General Mills" banner entices visitors to interact with General Mills through social media links on its home page.).

58 *See* Laven, *supra* note 42, at 57-59.

59 *Id.*

online.[60] First, in April 2014, General Mills tried to change its online Terms of Service without consumers noticing.[61] Once consumers realized they were giving up their rights to a jury trial simply by downloading a Cheerios coupon, or worse, just by "liking" the General Mills Facebook page, consumers voiced their anger and disappointment with General Mills.[62] While General Mills was "quietly" changing its policy, consumers actually noticed. Because of consumers' reactions, General Mills reversed their course and went back to their previous Terms of Service that did not require mandatory arbitration.[63] The mandatory arbitration clause of the Terms of Service is what most upset General Mills consumers.[64]

C. *The Danger with Clickwraps*

As technology continues to pervade our lives, it becomes even more important that consumers and online users are aware of the rights they may be unknowingly giving up by simply browsing the Internet. When a company sneaks a mandatory arbitration clause into an "agreement," they do so knowing that most consumers will not read these kinds of terms,[65] thereby, taking a Constitutional right away from those consumers: the right to a trial by jury.[66] One of the central rights granted to Americans in the Constitution is the right to a jury trial in the Seventh Amendment which states:[67]

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[68]

This Amendment ensures that citizens' legal rights are protected and not unknowingly taken from them without a trial by jury. Mandatory arbitration in online browsewrap agreements is not just a consumer

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60 *See Ban the Use of Forced-Arbitration Clauses*, *supra* note 4; Hilario, *supra* note 11.

61 *Ban the Use of Forced-Arbitration Clauses*, *supra* note 4.

62 *Id.*

63 *Id.*

64 *Id.*

65 Thomas J. Maronick, *Do Consumers Read Terms of Service Agreements When Installing Software? A Two-Study Empirical Analysis*, 4 INT'L J. OF BUS. AND SOC. RES. 137, 144 (2014).

66 See U.S. CONST. amend. VII.

67 *Id.*

68 *Id.*

rights issue, but also one grounded in the very origins and nature of our federal government. Such provisions arguably implicate a fundamental right that demands protection just as much as free speech or the right to vote.

Nevertheless, courts continue to uphold clickwrap and browsewrap agreements, reasoning that consumers have, in fact, had the opportunity to read the Terms of Service before clicking "I agree," and may have voluntarily chosen not to read what they are agreeing to. However, when a website adds a mandatory arbitration clause to its Terms of Service merely because a user interacts with the website online, such as downloading a coupon, or "liking" the company's page on Facebook, and the user does not have to click the "I agree" button, consumers are not even given the opportunity to read such terms before proceeding.[69] The fundamental right to trial by jury is not something that online users should be able to sign away simply by interacting on a website. Almost half of online arbitration clauses are less than 200 words long and do not explain their terms in plain language.[70] Every consumer or user has the right to a jury trial, as outlined in the Seventh Amendment, and this fundamental right deserves adequate protection from the courts.

D. *The Federal Arbitration Act*

While the right to a jury trial has been around since the founding of our federal government, arbitration was not always a concept on the government's radar. Arbitration evolved as our society evolved. Arbitration came to Congress' attention in 1925.[71] Congress wanted to encourage the use of private dispute resolution through arbitration and make binding arbitration agreements legal,[72] so it enacted the Federal Arbitration Act (FAA).[73] The FAA says that when two parties agree to arbitrate a dispute before a dispute arises, they must arbitrate rather than go to court.[74] Both parties must still agree upon

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[69] *Hines,* 668 F. Supp. 2d at 366.

[70] Michael L. Rustad et. al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 656 (2012).

[71] 9 U.S.C. §§ 1-14 (2012).

[72] *See* Drahozal, *supra* note 24, at 112 (quoting Southland Corp. v. Keating, 465 U.S. 1, 12-13 (1984)).

[73] 9 U.S.C. § 2.

[74] *Id.*

arbitration clauses, while notice and manifestation of mutual assent must be present just like any other contract term.[75] Federal arbitration awards are considered final judgments synonymous with conventional court judgments.[76] The FAA also contains a savings clause, which lists instances where arbitration clauses would not be upheld.[77] This Comment will discuss the savings clause in more detail below since it is critical to the issue of online mandatory arbitration clauses.

The FAA was lobbied for, crafted, and drafted by business groups and the American Business Association (ABA).[78] The ABA drafted the bill and Congress enacted the ABA's version with very few amendments.[79] Interestingly enough, *Swift v. Tyson*, holding that federal courts sitting in diversity could determine their own substantive federal common law and did not have to follow relevant state law substantive precedent,[80] was still good law at the time of the FAA's enactment;[81] arbitration agreements were seen as purely procedural, not substantive law.[82] Because arbitration agreements were seen as procedural, state law governed them.[83] This meant that state law governed arbitration agreements, and federal courts sitting in diversity *did* have to follow state precedent.[84] Also important to note is how much the federal government landscape has changed since 1925. The judicial landscape changed with *Erie R. Co. v. Tompkins*,[85] which held that federal courts did not have the right to create federal common law when sitting in diversity.[86] This change in the judicial landscape of federal and state law affected how the FAA was interpreted caused it to have larger effects than perhaps originally intended.[87] Meaning, that when the FAA was enacted, it was seen as a procedural law, and one that the states would still have the discretion and ability to enforce as they saw fit. However, after *Erie*, the judicial landscape of

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75 RESTATEMENT (SECOND) OF CONTRACTS § 18 (AM. LAW INST. 1981).

76 Southland Corp. v. Keating, 465 U.S. 1, 6 (1984).

77 9 U.S.C.A. § 2.

78 Drahozal, *supra* note 24, at 125-26.

79 *Id.*

80 Swift v. Tyson, 41 U.S. 1, 19 (1842).

81 *Id.*

82 *Id.*

83 *See* Drahozal, *supra* note 24, at 120, 125.

84 *See Swift*, 41 U.S. at 18.

85 Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

86 *Id.* at 79-80.

87 *See* Drahozal, *supra* note 24, at 106.

the country changed. Federal courts now have the right to interpret the FAA, and their interpretations trump any state court's interpretation of it.[88] This is important because historically states have favored the consumer when online mandatory arbitration clauses have come before state courts,[89] only to later be overturned by a federal court in favor of supporting the mandatory arbitration clause under the FAA.[90]

Over the course of the past ninety years, the FAA has been shaped by a number of key Supreme Court decisions, and those decisions have been based on the Court's understanding of the FAA.[91] Because the Court has interpreted the FAA as a strong indication of the desire to promote arbitration, the FAA has influenced the Court to uphold all recent arbitration clauses that have come before it.[92] In *Southland Corp. v. Keating*, the Supreme Court held that the FAA applies to both state and federal courts.[93] This holding entirely quashed the role state law and courts played in contract interpretation, as the FAA would always preempt whatever state law might conflict with it.[94] A few years later, in *Perry v. Thomas*, the Supreme Court again ruled in favor of the arbitration clause.[95] These cases show that even in the 1980s, before the birth of the Internet, the Court already favored mandatory arbitration clauses. However, in his *Perry* dissent, Justice Stevens discussed a 1973 Supreme Court case that never even once considered that the FAA could preempt state laws, saying:[96] "It is only in the last few years that the Court has effectively rewritten the statute to give it a preemptive scope that Congress certainly did not intend."[97] Justice Stevens went on to say that while the dicta in recent Court cases was extensively broad, the holdings of

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[88] *Id.* at 102-03.

[89] *See e.g.* Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) (holding a class action waiver in a customer contract unconscionable), *abrogated by* AT&T v. Concepcion, 131 S. Ct. 1740 (2011).

[90] *Id.*

[91] *See* American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013).

[92] *Id.* at 2308-09.

[93] Southland Corp. v. Keating, 465 U.S. 1, 15-16 (1984).

[94] *See* American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 671 (2012); AT&T v. Concepcion, 131 S. Ct. 1740, 1753 (2011) ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").

[95] Perry v. Thomas, 482 U.S. 483, 492 (1987).

[96] *Id.* at 493 (Stevens, J., dissenting).

[97] *Id.* (citing Southland Corp. v. Keating, 465 U.S. 1, 18-21 (1984)).

those cases were not.[98] Therefore, in Justice Stevens' mind, stare decisis was not controlling on this issue.[99]

However, the FAA does contain a "savings clause" that protects parties from arbitration clauses that were not fairly agreed to by both parties.[100] This clause states that contracts with arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[101] This clause refers to traditional reasons for voiding contracts, such as fraud, duress or unconscionability.[102] While the savings clause is a glimmer of hope for a consumer to avoid an unfair arbitration clause, no recent Supreme Court case holding has ever fallen within the savings clause limits.[103] Because of the importance and prevalence of the FAA in the consideration of contract formation and with the development of technological advancements, it is important to examine how the lower federal courts have recently applied the FAA in modern, technological settings. State courts and lower federal courts usually favor the consumer when ruling on mandatory arbitration clauses.[104]

E. *State Laws and District Courts Mostly Favor the Consumer*

This section discusses the application of mandatory arbitration clauses in state and district courts, and highlights the reasoning each court used when discussing a mandatory arbitration clause.

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98 *Id.*

99 *Id.*

100 9 U.S.C.A. § 2 (2012).

101 *Id.*

102 *See* AT&T v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (Thomas, J., concurring) (citing 9 U.S.C. §§ 2, 4 (2012)) ("As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress.").

103 *See* American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013) (Thomas, J., concurring); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 671 (2012); *AT&T*, 131 S. Ct. at 1753.

104 *See, e.g.*, Specht v. Netscape Commc'ns Corp., 306 F.3d 17 (2nd Cir. 2002) (affirming district court's refusal to compel defendant's motion to arbitrate); Discover Bank v. Super. Ct., 113 P.3d 1100 (Cal. 2005) (holding a class action waiver in a customer contract unconscionable), *abrogated by* AT&T v. Concepcion, 131 S. Ct. 1740 (2011) (holding that a class action waiver in a customer contract was unconscionable).

1. *Specht v. Netscape Communications Corp*.[105]

America Online was one of the first well-known e-mail and Internet providers.[106] Most adults remember the announcement "You've Got Mail" when a user signed on.[107] Since the early days of Internet service, consumers have been fighting online Terms of Service because they have increasingly become more complex and hidden from the consumer.[108] In 2002, the Second Circuit ruled in favor of the consumer in *Specht v. Netscape Communications Corp*.[109] Writing for the court, Judge Sotomayor stated that "contract law measures assent by an objective standard that takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted."[110] In *Specht*, the consumers downloaded a program from Netscape,[111] and users could not see the Terms of Service unless they scrolled below the "download" button.[112] Even if the users were aware there was a portion of the Netscape screen left to scroll through after the download button, no reasonable, prudent user would have thought that the Terms of Service they were bound by would be included there.[113] The court held that "where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms."[114] The court also noted that websites that had delivered adequate notice were websites that gave much clearer notice of their Terms of Service.[115]

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105 Specht v. Netscape Commc'ns Corp., 306 F.3d 17 (2nd Cir. 2002).

106 *About AOL: Overview*, AMERICA ONLINE, http://corp.aol.com/about-aol/overview (last visited Oct. 9, 2014).

107 *Id.*

108 *Specht*, 306 F.3d at 30.

109 *Id.*

110 *Id.*

111 *Id.* at 20.

112 *Id.*

113 *Id.* at 31-32.

114 Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 32 (2nd Cir. 2002).

115 *Id.* at 32-33.

2. *E.K.D. v. Facebook, Inc.*[116]

When Facebook was created in 2004, it was a little known site open to university students only.[117] The Facebook society knows eleven years later in 2015 is very different and has an online omnipresence across the globe.[118] Over the course of the past eleven years, Facebook has been involved in a number of lawsuits.[119] Studies and articles show the timeline of Facebook's Privacy Policies and Terms of Service as well as how they have changed and become more restrictive on the user over time.[120] Courts in other countries have found that Facebook's forum selection clause was invalid because such a clause must be highly visible and is generally only valid among businesses.[121] Typically, these forum selection clauses allow a contract party to specify in advance where any potential litigation will take place.[122] These are often reviewed similarly to arbitration clauses because companies will hide them in their Terms of Service in a location that is most friendly to the company, and inconvenient for the consumer.[123]

Yet, in *E.K.D. v. Facebook, Inc.*, the consumer was not as lucky. In this case, the plaintiffs sued Facebook over the forum selection clause that was hidden in Facebook's Terms of Service.[124] The Terms of Service were in a browsewrap agreement, which meant the plaintiffs must have had actual or constructive knowledge of Facebook's terms and conditions.[125] Because Facebook's Terms of Service were hyperlinked on every Facebook page and in a contrasting font color, the court held that the plaintiffs were reasonably put on notice of

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116 E.K.D. *ex rel.* Dawes v. Facebook, Inc., 885 F. Supp. 2d 894 (S.D. Ill. 2012).

117 Daniel Zeevi, *The Ultimate History of Facebook*, SOCIAL MEDIA TODAY (Feb. 21, 2013), http://www.socialmediatoday.com/content/ultimate-history-facebook-infographic.

118 *See id.*

119 *See, e.g.*, Selena Larsen, *Facebook Hit With Another Lawsuit After People Finally Catch Onto False Likes*, READWRITE (Jan. 10, 2014), http://readwrite.com/2014/01/10/facebook-false-likes-lawsuit.

120 *E.g.* Kurt Opsahl, *Facebook's Eroding Privacy Policy: A Timeline*, ELECTRONIC FRONTIER FOUNDATION (Apr. 28, 2010), https://www.eff.org/deeplinks/2010/04/facebook-timeline.

121 *E.g.* Pau Appeals Court 1st Chamber Judgment of 23 March 2012, LEGALIS (Mar. 23, 2012), http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3382 (translated from French to English via Google).

122 *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596-97 (1991) (enforcing a forum selection clause that required cruise ship passengers to bring their claims against the cruise line in Florida).

123 E.K.D. *ex rel.* Dawes v. Facebook, Inc., 885 F. Supp. 2d 894 (S.D. Ill. 2012).

124 *Id.* at 896-98.

125 *Id.* at 901.

Facebook's Terms of Service.[126] The court noted that it was the plaintiffs' responsibility to read the Terms of Service, and thus they would be held to those terms even if they did not read them.[127] Despite the court's holding in favor of the company and against the consumer, this case is important to note because forum selection clauses are considered very similarly to mandatory arbitration clauses, especially in the Internet context.[128] While the outcome here was not in favor of the consumer, this case proves a useful point of showing what sorts of Terms of Service courts deem acceptable. The next examples show when courts did not deem mandatory arbitration clauses valid.

3. *Nguyen v. Barnes & Noble Inc.*[129]

While discussions on hidden Terms of Service usually refer to social networking sites such as Facebook, many websites or retail companies can have similarly "hidden" Terms of Service.[130] Online users can be subject to Terms of Service on many sites they interact on or purchase from.[131] In *Nguyen v. Barnes & Noble Inc.*, a consumer purchased a tablet from Barnes & Noble, and through a series of incidents, later sued Barnes & Noble.[132]

Barnes & Noble made a motion to compel arbitration because of their website's Terms of Service, which included a mandatory arbitration clause.[133] Ngyuen argued that he never assented to the terms, and the court noted that "[t]he defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing

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126 *Id.* at 901-02.

127 *Id.*

128 *See* Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366-67 (E.D.N.Y. 2009), *aff'd*, 380 F. App'x 22 (2d Cir. 2010). Forum selection clauses, like mandatory arbitration clauses, affect consumers' legal rights. While mandatory arbitration clauses effect whether or not a consumer *can* sue, forum selection clauses affect a consumer's choice as a plaintiff on *where* they want to sue.

129 Nguyen v. Barnes & Noble Inc., 763 F.3d 1171 (9th Cir. 2014).

130 *See* Rustad et al., *supra* note 70, at 656.

131 *See Nguyen*, 763 F.3d at 1173-75 (Barnes & Noble's terms of use stated, "By visiting any area in the Barnes & Noble.com Site, creating an account, [or] making a purchase via the Barnes & Noble.com Site . . . a User is deemed to have accepted the Terms of Use.") (alteration in original) (internal quotation marks omitted).

132 *Id.* at 1173.

133 *Id.*

that such a webpage exists."[134] Because there was no evidence that Ngyuen had actual knowledge of the mandatory arbitration clause, the case turned on whether or not the website put a "reasonably prudent user on inquiry notice of the terms of the contract."[135] The court held that the hyperlinked Terms of Service, even though it was near other hyperlinks the user must click on, was not enough to give rise to constructive notice.[136] The website carried the responsibility to put users on notice of the terms that bind the users.[137] *Nyguen* is a seemingly rare case that shows the ordinary user winning a mandatory arbitration clause dispute against a large company.[138]

F. *Recent Supreme Court Precedent Does Not Favor the Consumer*

Despite the apparent trend among the lower courts to favor the consumer in cases regarding the legality of Terms of Service, the Supreme Court appears to go the opposite route. In fact, the Supreme Court has made a number of important FAA-related decisions in more recent years.[139] While many of them have focused on mandatory class arbitration, the Supreme Court's opinions give us vital insight into what the Court thinks about arbitration in general, especially in our modern, technological world. The cases discussed below help shed light on what the Supreme Court might do if a case involving an arbitration clause like General Mills' reached the Supreme Court.

1. *AT&T Mobility v. Concepcion*.[140]

In *AT&T Mobility v. Concepcion*, the Concepcions sued on behalf of a class of consumers who alleged that AT&T conducted false advertising and fraud by charging sales tax on "free" phones.[141] The

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134 *Id.* at 1176 (quoting Be In, Inc. v. Google Inc., No. 12-CV-03373-LHK, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013)) (internal quotation marks omitted).

135 *Id.* at 1177 (citing Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30-31 (2d Cir. 2002)).

136 *Id.* at 1178-79.

137 Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1179 (9th Cir. 2014).

138 *See* AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

139 *See* American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 671 (2012); *AT&T*, 131 S. Ct. at 1753.

140 131 S. Ct. 1740.

141 *Id.* at 1744.

Concepcions' contract with AT&T contained an arbitration clause.[142] AT&T moved to compel arbitration, and the Concepcions opposed the motion, saying the clause was unconscionable under California law.[143] Both the District Court and the Ninth Circuit agreed with the Concepcions that the arbitration agreement was unconscionable because it did not allow class suits.[144] The Ninth Circuit based its decision on California law under *Discover Bank v. Superior Court*.[145] When the case went up to the Supreme Court, the Court noted that the FAA savings clause allowed for general contract defenses but not those defenses that applied only to arbitration or issues that stem directly from the arbitration issue.[146] As previously discussed, *Southland v. Keating* established that the FAA preempts state law, and if there is a conflicting rule, the FAA applies.[147] In *AT&T Mobility v. Concepcion*, the Supreme Court based its analysis on this holding, and additionally found that the "FAA's preemptive effect might extend even to grounds traditionally thought to exist 'at law or in equity for the revocation of any contract.'"[148] Though the Court then went on to discuss possibilities where a state law might make a contract unconscionable, Supreme Court ultimately followed the FAA.[149]

During its analysis of the case, the Court also discussed the purpose of the FAA and the arbitration process.[150] The Court mentioned that the importance of giving parties discretion in "designing arbitration processes" is to allow for effective procedures for any dispute.[151] However, Justice Scalia, writing for the Court, held that California's *Discover Bank* rule was inconsistent with the FAA because it allowed for a defense that was not considered in the FAA.[152] The *Discover Bank* Court had put forth a test that made arbitration clauses with class action waivers unenforceable under circumstances that showed

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142 *Id.* at 1744-45.

143 *Id.* at 1745.

144 *Id.*

145 *Id.* at 1745; Discover Bank v. Sup. Ct., 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T v. Concepcion, 131 S. Ct. 1740 (2011).

146 AT&T v. Concepcion, 131 S. Ct. 1740, 1746 (2011).

147 Southland Corp. v. Keating, 465 U.S. 1, 6-8, 16 (1984).

148 *AT&T*, 131 S. Ct. at 1747 (internal quotation marks omitted).

149 *Id.* at 1747-48.

150 *Id.* at 1748-49.

151 *Id.* at 1749.

152 *See id.* at 1753.

unequal bargaining power and coercion.[153] Because the Court here overruled *Discover Bank*, the Concepcions were bound by the arbitration clause.[154] In his concurrence, Justice Thomas said that contract defenses "–such as public policy–could not be the basis for declining to enforce an arbitration clause."[155] The dissent noted that Congress' intent when enacting the FAA requires the Court to apply its terms whether or not the result is inefficient, and that because efficiency is not a factor under the FAA, the Court should not be taking it into consideration.[156] The *AT&T* decision was later dubbed, "a tsunami that is wiping out existing and potential consumer and employment class actions."[157]

AT&T gives us a modern look at how the Supreme Court treats the FAA and also shares some more specific insights into how certain justices might decide a mandatory arbitration clause based on modern technologies such as a "like" on Facebook.[158] After *AT&T* in 2011, the Supreme Court again addressed an arbitration dispute in 2012.[159]

2. *CompuCredit Corp. v. Greenwood*.[160]

In 2012, the Supreme Court again looked at the FAA and its preemptive powers and again held in favor of enforcing the FAA.[161] In *CompuCredit v. Greenwood*, the issue arose out of the Credit Repair Organizations Act (CROA), which the petitioners argued was a congressional command that overrode the FAA.[162] CROA regulated the practices of credit repair organizations – organizations that offer services to improve a consumer's credit history.[163] CROA explicitly told such organizations that they had to provide a statement and that one

153 Discover Bank v. Sup. Ct., 113 P.3d 1100, 1112 (Cal. 2005), *abrogated by* AT&T v. Concepcion, 131 S. Ct. 1740 (2011).

154 *See* AT&T v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

155 *Id*. at 1755 (Thomas, J., concurring).

156 *Id.* at 1758 (Breyer, J., dissenting) (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985)).

157 Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012).

158 *See* AT&T v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (Thomas, J. concurring).

159 CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668 (2012).

160 132 S. Ct. 665.

161 *Id.*

162 *Id.* at 669.

163 *Id.* at 673.

sentence of that statement must say consumers have the right to sue any organization that violated CROA.[164] The Ninth Circuit based its reasoning off of this explicit term and ruled in favor of the consumer petitioners.[165] Again, Justice Scalia, writing for the Court, found that the Ninth Circuit's reasoning was faulty.[166] Under the Court's reasoning, this statement provision did not give a blanket right for consumers to sue.[167] The Court even went on to say that while the dissent believed that the CROA provision was misleading to consumers, the majority did not, and believed it laid out the law in a way comprehensible to the consumer.[168] The Court also noted that arbitration clauses such as the one in dispute were common at the time CROA was enacted in 1996.[169] If Congress had wanted to restrict the use of arbitration under CROA, it could have done so quite obviously.[170] In her concurrence, Justice Sotomayor stated, that while she concurred, the judgment was a much closer call than the majority made it seem.[171] Because CROA was written for people of limited economic means who might think that the wording "right to sue" actually means sue in a court, it was possible to think Congress intended such a construction.[172] On the other hand, Justice Ginsburg dissented and agreed with the Ninth Circuit's ruling.[173] Because CROA was enacted to curb deceptive processes, she believed the "right to sue" should be construed just as it sounded.[174]

In the end, the Court's interpretation of the FAA overrode the CROA language.[175] The consumer was once again at a disadvantage when up against business organizations that knew how to get away with the arbitration terms they wanted enforced.[176]

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164 *Id.* at 669.

165 *Id.*

166 CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012).

167 *Id.*

168 *Id.* at 669-71.

169 *Id.* at 672.

170 *Id.*

171 *Id.* at 675 (Sotomayor, J., concurring).

172 CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 675 (2012) (Sotomayor, J., concurring).

173 *Id.* at 676 (Ginsburg, J., dissenting).

174 *Id.*

175 *Id.* at 669 (majority opinion).

176 *See id.* at 673 (Ginsburg, J., dissenting).

3. *American Express v. Italian Colors Restaurant*.[177]

Once again, in 2013, the Supreme Court addressed an arbitration dispute case.[178] Once again, Justice Scalia issued the opinion of the Court.[179] *American Express v. Italian Colors Restaurant* involved a number of businesses that tried to sue American Express but ultimately failed when their case reached the Supreme Court.[180] American Express made a motion to compel arbitration under each business's contract with American Express; each contract also included a waiver of class arbitration.[181] The businesses argued that the class waiver was unconscionable because the cost of each individual pursuing their claim exceeded the potential recovery.[182] During its discussion of the FAA, the Court reasoned that in order to be consistent with the text of the FAA, "courts must 'rigorously enforce' arbitration agreements according to their terms[.]"[183] The Court held that the businesses were bound by American Express's arbitration clause and turned back to their holding in *AT&T Mobility v. Concepcion* to decide the issue in this case.[184] The Court quoted *Concepcion* and said, "[w]e specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'"[185]

However, the consumer was given hope by Justice Thomas' concurrence when he said that because Italian Colors Restaurant did not give any grounds for revocation of the contract, the arbitration agreement should have been enforced.[186] Perhaps this means that if a mandatory consumer arbitration clause that appeared unconscionable were to come before Justice Thomas, he would side with the consumer.

The dissent by Justices Kagan, Ginsburg, and Breyer, began its analysis by stating that if the arbitration agreement were enforceable,

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177 American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

178 *See id.* at 2307.

179 *Id.*

180 *Id.* at 2308.

181 *Id.*

182 *See id.* at 2307.

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

184 *Id.* at 2312.

185 *Id.* (quoting AT&T v. Concepcion, 131 S. Ct. 1740, 1753 (2011)).

186 *Id.* at 2313 (Kagan, J. dissenting).

American Express would be able to evade the nations' anti-trust laws and insulate itself from such laws.[187] The dissent went on to say that while the FAA prefers arbitration to litigation, it did not prefer arbitration to immunity.[188]

Also important to note, Justice Sotomayor did not participate in this case,[189] so we are left to wonder how she might rule in a consumer arbitration dispute, given she sided with the consumer when she ruled in *Specht v. Netscape Communications Corp*.[190]

4. Making Sense of the Supreme Court's Reasoning

From the above-mentioned precedents, it is clear that the Supreme Court has published a remarkable number of arbitration dispute cases in a short amount of time.[191] These cases center around the FAA, and the preemptive hold the FAA has on state laws, and even other federal statutes.[192] What is important to note about these cases is the fact that in each and every one, the arbitration agreement was found valid, even if it meant that a company such as American Express could evade anti-trust laws in the process.[193] However, after looking at each opinion, concurrence and dissent, one can see that the Court is vastly split on the ideas behind the FAA, where each majority gets its support for its conclusion.[194] Mandatory arbitration clauses and the FAA raise a number of concerns about online contract terms, unconscionability, and federalism. Not only are consumers possibly giving up their rights unknowingly, but many state laws are deemed preempted by the FAA.[195] So, even if a state tries to protect its unsuspecting citizens from online sites and companies that hide mandatory arbitration clauses, such state laws will have no effect when up against the FAA. This is important because even in consumer-friendly states, such as California, citizens are not protected from FAA standards.

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187 *Id.*

188 *Id.* at 2315.

189 American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2305, 2312 (2013).

190 Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 32 (2d Cir. 2002).

191 *See American Express Co.* 133 S. Ct. at 2313; CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 671 (2012); AT&T v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

192 *See supra* note 191 and accompanying citations.

193 *Id.*

194 *Id.*

195 *See* AT&T v. Concepcion, 131 S. Ct. 1740, 1753 (2011); Discover Bank v. Sup. Ct., 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T v. Concepcion, 131 S. Ct. 1740 (2011).

According to current Supreme Court precedent, the FAA trumps all.[196]

II. ANALYSIS

This section attempts to reconcile the rationale behind the Supreme Court's precedents favoring arbitration and the FAA with the unfairness of current online mandatory arbitration clauses. The recent Supreme Court reasoning in favor of mandatory arbitration appears to clash with the fact that consumers today are not even aware they are signing away fundamental legal rights – such as a right to trial by jury – simply by interacting on a website or app. The FAA has a savings clause for a reason, and this section argues that the FAA should finally be narrowed in scope when and if a case involving an online mandatory arbitration clause comes before the Supreme Court.

While the FAA preempts most other state and federal laws, we are now at a time where the consumer should be protected by finally limiting the FAA. There is a substantial amount of Supreme Court precedent that favors arbitration clauses; however, because of the current technological trend, when and if a consumer mandatory arbitration clause comes before the Supreme Court under a Terms of Service similar to the General Mills example, the Supreme Court should break from its precedent and side with the consumer. The consumer should win in this fight because the right to trial by jury is a Constitutional right in our country and should not be so easy to discard through an online transaction, or worse, just by unknowingly browsing a website with a mandatory arbitration clause. This ruling would prevent online companies from escaping our nation's laws and courts by springing a hidden arbitration clause on an unsuspecting consumer.

A. *Mandatory Online Arbitration: What the Court Should Do and Why*

As previously discussed, technology has greatly affected the use of mandatory arbitration clauses.[197] Not only are mandatory arbitration clauses more pervasive now because of technological develop-

196 *See* American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 671 (2012); AT&T v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

197 *See supra* Section I.A.2.

ments, but they are also hidden in corners of websites that a reasonable user or consumer most likely never visits.[198] Even more importantly, the mandatory arbitration clauses are also hidden within the fine print of a company's Terms of Service.[199] These terms are usually written in a confusing manner that would not make sense to a consumer, even if they did find the proper Terms of Service to read before interacting with the company online.[200]

Although courts have upheld most clickwrap agreements as valid and not unconscionable,[201] these modern browsewrap agreements, such as the ones General Mills attempted to implement, are a dangerous step in the wrong direction for consumer and civil rights because consumers are unaware they are giving up a vital right. What makes the General Mills Terms of Service different from the mandatory arbitration clauses upheld in Supreme Court cases such as *AT&T v. Concepcion*? The 2014 General Mills Terms of Service changes takes the use of a mandatory arbitration clause one step further against an unsuspecting consumer because the consumer has already agreed to Facebook's Terms of Service and most online users would never assume that by liking a page on Facebook they are then agreeing to completely different Terms of Service – especially ones they have never seen. For example, when users sign up for Facebook, Twitter, or iTunes, they must enter into a clickwrap agreement by clicking "I agree."[202] Then those users usually will go about their daily business, conversing with friends, and getting the latest updates. Meanwhile, online companies are marketing their pages directly to consumers based on their online interests,[203] and so a user goes ahead and "likes" the General Mills page that is advertised on his Facebook page. No reasonable consumer would then believe that they are entering into a whole new contract with General Mills, when they have already agreed to the Facebook Terms of Service. This is problematic because it shows that consumers are giving up fundamental rights without ever

198 *See Ban the Use of Forced-Arbitration Clauses*, *supra* note 4 (discussing how fine print is often difficult to see and found in many different types of contracts).

199 *Id.*

200 *See* Rustad et al., *supra* note 70, at 659.

201 *See* Davis, *supra*, note 14, at 583.

202 *See generally* FACEBOOK, *supra* note 35.

203 *How to target Facebook Ads*, FACEBOOK, INC., https://www.facebook.com/business/a/online-sales/ad-targeting-details (last visited Jan. 7, 2015).

knowing they are entering into a valid contract, let alone one that contains a clause as limiting as a mandatory arbitration clause.

B. *Unconscionability*

Courts have long stated that unconscionability "include[s] an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[204] The unconscionability doctrine gives courts the opportunity to strike down terms that are "one-sided, oppressive and surprising."[205] The General Mills example shows why such terms are one-sided and deprive the consumer of a meaningful choice in the terms of their so called "contract" with a company or website. Users must have notice, or at a minimum, inquiry notice, when they interact on a website and subject themselves to that website's Terms of Service.[206] While the presence of banner announcements and different font colors have been upheld as sufficient notice,[207] in today's busy and technological world, that should no longer be considered sufficient adequate notice because consumers are accessing these websites through all different channels and are no longer directly typing a company's URL into a web browser.[208] Instead, consumers are clicking around from app-to-app, website-to-website, not even realizing that each website they visit in the matter of minutes might contain a mandatory arbitration clause.[209]

Mandatory arbitration clauses were upheld like any other contract term where two parties formed a valid contract and both signed on the dotted line.[210] From new technology came the idea of online contracts, where users entered into browsewrap or clickwrap agreements with the websites and companies they interacted with online.[211] However, society has now reached a new moment in the life of the

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204 Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

205 U.C.C. § 2-302, cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 1977); *see also* See Rustad et al., *supra* note 70, at 643.

206 Schnabel v. Trilegiant Corp., 697 F.3d 110, 120 (2d Cir. 2012).

207 E.K.D. *ex rel.* Dawes v. Facebook, Inc., 885 F. Supp. 2d 894, 901-02 (S.D. Ill. 2012).

208 For an example of such a banner, see the "Join the conversation with General Mills" graphic on the General Mills website including links to social media platforms, GENERAL MILLS, http://www.generalmills.com/ (last visited 21 Aug. 2015).

209 *Ban the Use of Forced-Arbitration Clauses*, *supra* note 4.

210 *See* Hartzog, *supra* note 27, 1640-45.

211 *Id.*

mandatory arbitration clause. Many consumers use their smartphones and the apps on those phones for hours every single day. Unlike a hard copy written contract that a person takes seriously before signing or even an "I agree" button before continuing on, people are not focusing their attention on the fine print of the Terms of Service; they are merely seeing what their favorite news site has to say or getting the newest update from their favorite brand. In doing so, they are often unknowingly entering into agreements that bind them into forced arbitration. It is unreasonable for courts to believe that consumers are given adequate notice of such terms when they are simply viewing a page and then automatically binding themselves to terms they have never even seen.

C. *Power Lies in the Court's Hands*

It is important to note that the power to strike down a case such as the General Mills scenario is completely within the hands of the courts. The FAA is just that – an Act of Congress – not a constitutional term that the Supreme Court *must* enforce.[212] Because the FAA is just a statute and only involves statutory interpretation, the Court could very well read the savings clause of the FAA to apply in this technological setting. This clause states that contracts with arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[213] As discussed throughout this Comment, while previous holdings have not found mandatory arbitration clauses unconscionable, a case such as the General Mills scenario fits much more squarely into the FAA's savings clause than anything else that has come before the Court. As Justice Stevens pointed out in *Perry v. Thomas*, the majority of Supreme Court decisions have included overbroad dicta, not controlling law.[214] The Court would not have to overrule itself to rule in favor of the consumer in a General Mills scenario.

On the other hand, if the Court does not find this case unconscionable, it will set a dangerous precedent that would greatly hurt consumer and civil rights. The right to a jury trial is a right given to every American citizen, written directly into our Constitution.[215]

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212 9 U.S.C.A. §§ 1-14 (2012).
213 9 U.S.C.A. § 2 (2012).
214 Perry v. Thomas, 482 U.S. 483, 493 (1987) (Stevens, J. dissenting).
215 U.S. CONST. amend. VII.

Allowing companies to hide mandatory arbitration clauses from consumers, and thus dispossess citizens of their rights to a jury trial is a serious concern today, based on the Supreme Court's current trends. When a Constitutional right is at stake, civil rights are at stake.[216] Just as websites and companies are hiding their mandatory arbitration clauses away from consumers, the Supreme Court is currently hiding behind the FAA and allowing businesses to hurt the individual consumer.[217] This is a dangerous precedent that supports neither the purpose of the FAA nor its enactor's intentions.[218] The Supreme Court should break from its precedent of favoring arbitration; when and if a case of this nature reaches the Court, it should side with the consumer and the Seventh Amendment, and not favor arbitration in a setting that so clearly violates a citizen's fundamental right.

CONCLUSION

Arbitration and the use of mandatory arbitration clauses have evolved over time just as technology has evolved. With the rise of the Internet also came the rise of clickwrap and browsewrap agreements. While these were initially fair to both companies and consumers, these concepts have also evolved into a dangerous mechanism where companies can control consumers' legal rights without a consumer ever realizing. While the FAA is the controlling law in almost all arbitration disputes, there is an important limit to it – the saving clause. Evolution in technology makes it time for the savings clause finally to be invoked. If a case such as the General Mills scenario ever reaches the Supreme Court, the Supreme Court should strike down mandatory arbitration clauses unknowingly agreed to as unconscionable. The "Imagine this" scenario with little Jimmy Johnson from the beginning of this Comment would not only come true, but the company would have even more control over people's Seventh Amendment rights to a jury trial if the Supreme Court validated such a practice. While Supreme Court precedent greatly favors mandatory

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216 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390 (1971) (establishing a precedent for private claims against federal agents who violate persons' constitutional rights); *see also* 42 U.S.C. § 1983 (2012) (codifying The Civil Rights Act of 1871 and creating a private cause of action against state officers for violating constitutional rights).

217 American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

218 Drahozal, *supra* note 24, at 112.

arbitration, the Supreme Court should break from its precedent and finally find a case that falls within the Federal Arbitration Act's savings clause – and protect the individual citizen.