

AN EMPIRICAL STUDY OF PREDISPUTE MANDATORY
ARBITRATION CLAUSES IN SOCIAL MEDIA TERMS OF SERVICE
AGREEMENTS

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ABSTRACT

By incorporating predispute mandatory arbitration clauses into their terms of service, a large and growing number of social networking sites (SNSs) are divesting users of their rights to civil recourse against providers who violate their privacy, commit torts, or infringe their intellectual property rights. SNS users around the world are required to agree to predispute mandatory arbitration as a condition of joining social networking communities. Consumers that enter into clickwrap or browsewrap terms of service agreements waive their right to a jury trial, discovery, and appeal, without reasonable notice that they are waiving these important rights. The U.S. Supreme Court's arbitration jurisprudence has made it difficult for consumers to challenge these unfair and deceptive contractual clauses and practices. The Roberts Court's latest decisions, including *AT&T Mobility, LLC v. Concepcion*¹ and *CompuCredit Corp. v. Greenwood*,² make it clear that the Court favors a broad enforcement of consumer arbitration agreements stripping the state and private plaintiffs of the ability to police these documents. These decisions are, in effect, a federal takeover of arbitration, preventing the states and private plaintiffs from challenging one-sided and oppressive consumer arbitration clauses. This Article is the first empirical study of the use of predispute mandatory arbitration clauses by SNSs and sheds light on whether SNSs are using arbitration clauses strategically in order to complete a "liability-free" zone in cyberspace. Our empirical findings reveal that SNS arbitration clauses contravene many of the basic principles deemed indispensable for a fundamentally fair process for consumers to obtain civil recourse for recognized torts and remedies for contract disputes. Congress needs to prohibit predispute mandatory arbitration clauses in terms of service agreements and privacy policies.

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INTRODUCTION

Over the past few years, a quiet revolution has begun as many social networking sites (SNSs) impose predispute mandatory arbitration on consumers. Senator Patrick Leahy (D. Vt.) stated, “Mandatory arbitration makes a farce of the right to a jury trial and the due process guaranteed to all Americans.”³ SNSs generally require users to enter into two kinds of contractual relationships, terms of service agreements and privacy policies, as a condition for accessing their websites. Hundreds of millions of consumers enter into mandatory arbitration clauses with SNSs through browsewrap,⁴ clickwrap,⁵ or registration forms. After a consumer has registered or accessed a site, SNSs reserve the right to modify substantive terms, sometimes without notifying users.⁶ An SNS, website, or other brick-and-mortar company can reduce transaction costs by using a predispute mandatory arbitration clause because it need not defend lawsuits in state or federal court but in a forum where it can choose the arbitral provider and rules to govern the dispute.

A social media company can dodge jury verdicts, punitive damages, class actions, consequential damages, and any other meaningful remedy by requiring their users to submit to arbitration. One-sided terms of use that, in effect, divest consumers of fundamental rights raise serious concerns of procedural and substantive unfairness. “Users of ADR are entitled to a process that is fundamentally fair.”⁷ Social networking sites have designed arbitration agreements that operate as poison pills that eliminate minimum adequate rights and remedies for consumers, while preserving the full array of remedies for these virtual businesses.

SNSs require users to resolve any controversy or claim against them in inconvenient forums where they are shorn of their Seventh Amendment jury right, the right to discovery, the right to appeal, and the right to open proceedings. For example, the sexual fetishism site FetLife requires consumers to settle their claims by binding arbitration in accordance with the rules of the Arbitration and Mediation Institute of Canada (AMIC).⁸ Gays.com’s terms of service establishes the site of arbitration in Hong Kong, and requires arbitrators to apply Hong Kong law.⁹ If a U.S. court enforces this arbitration clause, the social media user will technically have legal rights, but no way to exercise them because of the exorbitant cost of appearing in Hong Kong. These one-sided choice of forum clauses ensure that the avenue

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of civil recourse is blocked for consumers with a grievance against social media providers.

Despite the growing popularity of SNSs, researchers have yet to study contracting practices. Meanwhile, SNSs are routinely burying mandatory arbitration clauses deep within their terms of service to achieve what is, in effect, an unqualified shield from claims users may make for breach of contract, intellectual property infringement, the invasion of privacy, or other torts.¹⁰ Nevertheless, Amy Schmitz notes the battle over consumer arbitration is based upon rhetoric, not hard data: “Consumer advocates call for abolition of predispute arbitration clauses, while industry groups oppose any regulation of contractual freedom. The problem is that policymakers on both sides of the debate stake their positions and design proposed reforms in the dark by clinging to politically-motivated statements and limited studies supporting their views. They rarely reflect on a full range of behavioral and empirical research necessary for crafting cost-effective regulations.”¹¹

This Article is the first empirical study shedding light on the use and abuse of predispute arbitration in social networking websites. This empirical study examines predispute mandatory arbitration clauses in the broader context of private tort reforms,¹² including the incorporation of provisions like class action waivers, choice of law clauses, caps on damages, penalties for challenging arbitration, and loser-pay rules. Many of these provisions limit rights and remedies and thus are a form of tort reform in disguise rather than a genuine remedy provided aggrieved consumers. Part I describes the SNS sample selection and research methods for examining arbitration agreements incorporated in terms of service agreements and privacy policies. Part II explains the attributes of the entire sample of SNSs, which include terms of service incorporating standard remedies as well as those incorporating ADR clauses. Part III presents the central findings from our statistical analysis of the social media site arbitration clauses, covering both their form and content. Part IV analyzes the policy implications of the data, concluding that SNSs violate key principles of consumer due process. Our central finding is that social media users do not have a reasonable opportunity to evaluate the consequences of agreeing to arbitration nor do they typically receive any information on costs or the rules that arbitrators will apply to their case. Part V explains how the Supreme Court of the United States has stretched the meaning of the Federal Arbitration Act (FAA) to broadly extend to consumer transactions, thus creating, in effect, a presumption that these one-sided agreements are broadly enforceable. In Part VI, we contend that Congress

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needs to enact a federal statute to prohibit social networking sites from including predispute mandatory arbitration clauses in their terms of service or privacy policies. Senator Al Franken introduced such a bill, The Arbitration Fairness Act of 2011, which would prohibit companies from incorporating predispute mandatory arbitration agreements in consumer transactions. Finally, we conclude with an overview of some key policy issues drawn from the data in our study.

PART I: RESEARCH METHODS

A. Selecting the Sample

SNSs appeared in the 1990s as a way for users to develop personal profiles and communicate with each other based upon affinities such as family, friendship, interests, hobbies, and race or culture.¹³ Social media sites such as Facebook,¹⁴ Habbo,¹⁵ Twitter,¹⁶ YouTube,¹⁷ Flickr,¹⁸ and Second Life¹⁹ are enrolling hundreds of millions of new users around the world. Facebook alone claims more than eight hundred million active members, and because it is available in seventy languages it qualifies as a global multilingual business.²⁰ Two out of three of the world's online population regularly uses social networking sites.²¹ "Online social networking is the practice of using a website or other interactive computer service to expand one's business or social network."²²

To obtain a more comprehensive understanding of the incidence of mandatory arbitration clauses in the rapidly evolving arena of SNSs, we selected a sample of 157 United States and international SNSs based in large part on Wikipedia's list of Social Networking Sites.²³ Each site from the Wikipedia list was accessed and reviewed by the research team to determine whether it was predominantly an SNS at the time of coding.²⁴ In addition to the Wikipedia master list, we included two of the most popular social media sites, YouTube and Second Life, and popular online dating sites Match.com and eHarmony.²⁵ The websites chosen in the sample all provide users with a place to form networks and connect with persons with shared interests or other affinities.²⁶ Social networking enables consumers to reach out and form connections with friends, families, colleagues, and persons sharing interests or attributes. While there is no exhaustive listing of the social media universe, it is likely this sample is broadly representative of the universe of social networking sites in late 2011 and early 2012.

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B. Coding Variables

Next, the research team created a codebook with variables classifying all 157 sites as well as the sample of sites with arbitration clauses. As described in the next section, we developed a typology of eight SNSs, and placed each site into one of those categories. Table One and Figure One depict the typology of SNSs based upon the research team's coding of social media websites.²⁷

PART II: RESEARCH FINDINGS FOR ENTIRE SAMPLE

Table One and Figure One present a content analysis for the typology of SNSs used in the study.²⁸ The SNSs included in this study were diverse and sometimes created thorny coding decisions.²⁹ Some SNSs bridged several niche areas or changed their business mission over time.³⁰ For example, Hi5, founded in 2003, was once a social media site dedicated to “connecting with friends of friends, two or three degrees outward.”³¹ However, in 2009, Hi5 shifted its focus to a social gaming platform—jettisoning its earlier business model.³²

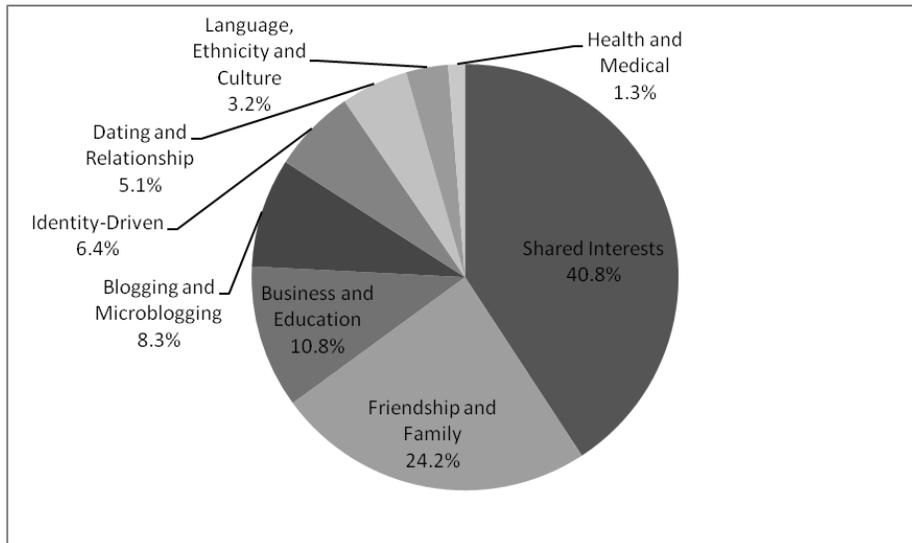
The SNS sample contained a complete representation of the universe of the large generalist sites as opposed to a sample. Generalist sites, such as Facebook and MyLife, target connections between friends, family, and acquaintances. In contrast, niche sites include those designed for educational, career, or professional development such as LinkedIn. Sites that enable meetings in major cities for shared interest groups are included in the sample. Social media websites targeting specific age, racial, cultural, or status-oriented groups are also part of the SNS sample. Sites appealing to rating, dating, mating, and sexual fetishism are included in the sample, as are sites dedicated to entertainment (anime, video sharing, book reviews, and movies) and highlighting talent.

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Table One: Types of SNSs for Whole Sample

Category	Frequency	Percent
Shared Interests	64	40.8
Friendship and Family	38	24.2
Business and Education	17	10.8
Blogging and Microblogging	13	8.3
Identity-Driven	10	6.4
Dating and Relationship	8	5.1
Language, Ethnicity and Culture	5	3.2
Health and Medical	2	1.3
Total	157	100

Figure One: Types of SNSs for Whole Sample



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A. Typology of SNSs

1. *Shared Interests*

Forty-one percent (n=64) of the SNSs sampled were classified as shared interest sites. These SNSs target individuals with interests in specific hobbies, entertainment, and amusements, such as photography,³³ film,³⁴ gaming,³⁵ artistic talent,³⁶ and fiber arts.³⁷ Shared interest sites in our sample represented truly diverse niches, ranging from sexual fetishism³⁸ to reading.³⁹

2. *Friendship and Family*

Friendship and family SNSs constituted twenty-four percent of the sample (n=38). These sites are used by members as a way to keep in touch with friends and family members or establish new friendships. Facebook—probably the best-known site in this category—is the ubiquitous friendship and family site. “Facebook’s mission is to give people the power to share and make the world more open and connected.”⁴⁰ Friendship and family sites in this category enable users to share thoughts, links, and pictures with other selected users or the entire world.

3. *Business and Education*

Business and education sites made up eleven percent (n=17) of the SNSs in the social media sample. The sites in this category, such as LinkedIn, Academia, and MeetUp, are used primarily for career or professional development. Examples of business and education sites include Academia, which describes itself as “a platform for academics to share research papers,”⁴¹ and LinkedIn⁴²—a site for professionals to network with other professionals.

4. *Blogging and Microblogging*

One in ten of social networking sites were classified as blogging or microblogging sites (8%, n=13). In general, blogs are composed of narrative posts and commentary posted in reverse chronological order, while microblogging is a variant of blogging that allows users to send and follow brief text updates.⁴³ Bebo, which stands for *Blog Early, Blog Often*, is an

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example of a blogging site that permits users to post blogs, photographs, music, videos, and questionnaires for other users.⁴⁴ Twitter is a well-known microblogging site on which each entry must be no longer than 140 characters.

5. *Identity-Driven*

Identity-driven sites encompass six percent of the sample (n=10). Sites in this category join users with affinities based upon identity characteristics such as age, race, gender, and sexual orientation. This affinity category encompasses sites for teenagers,⁴⁵ mothers,⁴⁶ and African-Americans,⁴⁷ among other identity-oriented groups.

6. *Rating, Dating, and Mating*

Five percent of the sample (n=8) consisted of social media sites devoted to rating, dating, and mating. The dating sites were predominately subscription sites such as Match.com, but the sample also included free niche sites like Don'tStayIn—a clubbing site. The dating sites typically charged for subscriptions and premium services. The vast majority of non-dating sites in the sample did not require users to pay licensing or other fees.

7. *Other*

Two other categories represented a small percentage of sites in the sample: Language, Ethnicity, and Culture (three percent) and Health and Medical (one percent). This category includes sites for foreign language instruction. Social network sites for patients seeking medical information, such as PatientsLikeMe, are also included in the residual category.

PART III: PREDISPUTE ARBITRATION CLAUSES

Nearly one in four SNSs in the sample incorporated some form of arbitration clause either in the terms of service agreement or in the privacy policy (37 of 157 or 24%, Appendix A provides links to the terms of service agreements that include arbitral clauses). To gain perspective, social media sites appear to have a greater incidence of arbitration clauses than the ten percent found in a previous study of retail Internet sites,⁴⁸ but a somewhat

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lower percentage of arbitration clauses than uncovered in a study of California businesses.⁴⁹

A. Typology of Social Media Sites with Arbitral Clauses

There were no perceptible differences between the distribution of social network sites with arbitral clauses and the larger sample as Table Two below confirms. SNSs that employed arbitration clauses had roughly the same distribution as those sites that did not employ arbitration. Thus, there appears to be no perceptible bias based upon type of site and whether the provider incorporated arbitration, mediation, or other ADR options.

Table Two: Typology of SNSs—Entire Sample vs. Sites with Arbitration Clauses

	Entire Sample		Sites with Arbitration Clauses	
	Frequency	Percent	Frequency	Percent
Shared Interests	64	40.8	18	48.6
Friendship and Family	38	24.2	10	27.0
Business and Education	17	10.8	4	10.8
Blogging and Microblogging	13	8.3	1	2.7
Identity-Driven	10	6.4	2	5.4
Dating and Relationship	8	5.1	1	2.7
Language, Ethnicity and Culture	5	3.2	0	0
Health and Medical	2	1.3	1	2.7
Total	157	100	37	100

As Table Two reveals, shared interest sites predominated both in the arbitration subsample and the overall sample, accounting for approximately one out of two sites. As with the larger sample, the generalist category of friends and family ranked second. The percentage of SNSs classified as business and education was eleven percent, which is the same as the percentage found in the subsample. The subsample of arbitral clauses had comparable distributions of lesser categories such as blogging, identity-driven sites, medical sites, and dating sites.

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B. Empirical Findings About Predispute Mandatory Arbitration Clauses Used by Social Networking Sites

Table Three: Type of Arbitration

	Frequency	Percent
Mandatory	17	45.9
Elective for Claims Under Specified Amounts	10	27.0
Elective	5	13.5
Mandatory if Mediation Fails	2	5.4
Mandatory for Certain Geographic Areas	2	5.4
Mandatory if Court Refuses to Enforce Venue Clause	1	2.7
Total	37	100

Table Four: Elective Arbitrations

	Frequency	Percent
Party Requesting Relief May Elect for Claims Under Specified Amounts	8	53.3
Either Party May Elect	5	33.3
SNS Alone May Elect	2	13.3
Total	15	100

Finding #1: Predispute Mandatory Arbitration Is Most Common

Table Three shows that mandatory arbitration is the exclusive dispute resolution mechanism by forty-six percent (n=17) of the terms of service and privacy policies that contained arbitral clauses. Sixty-two percent of the terms of service agreements including arbitral clauses incorporated some form of mandatory agreement (n=23). Four arbitral clauses permitted either party to elect arbitration, and ten others allowed the election if the claim is below a threshold amount. These clauses may take the form of an elected remedy, but if the SNS “elects” arbitration, they are functionally equivalent to pure mandatory arbitration clauses.

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Finding #2: The American Arbitration Association (AAA) Is the Arbitration Provider Chosen by SNSs

Table Five: Arbitration Provider Specified

	Frequency	Percent
American Arbitration Association (AAA)	16	43.2
US Arbitral Provider TBD	12	32.4
Judicial Arbitration and Mediation Services (JAMS)	3	8.1
Foreign Provider TBD	3	8.1
United States Arbitration & Mediation (USA&M)	1	2.7
Arbitration and Mediation Institute of Canada (AMIC)	1	2.7
Hong Kong International Arbitration Center (HKIAC) or Singapore International Arbitration Center (SIAC)	1	2.7
Total	37	100

Only sixty percent of the arbitration clauses specify which arbitration provider will resolve disputes. The American Arbitration Association (AAA) is the most commonly specified provider, appearing in forty-three percent of the clauses. Social networking sites specified no other non-AAA provider more than three times. Forty percent of the arbitral clauses either did not address the issue of who would conduct the arbitration or stated that the parties would later determine the provider. Sites headquartered in the United States specified the provider in roughly two-thirds of the sample. Nevertheless, in one-third of the terms of use agreements, the arbitral provider was not chosen. Three of the foreign SNSs (eight percent of the sample) did not make known the arbitral provider. One foreign SNS specified a Hong Kong or Peoples Republic of China-based provider depending upon the geographical origin of the user.

Finding #3: In-Person/Appearance Arbitration Is Most Common

Table Six: Form and Location of Arbitration

	Frequency	Percent
Appearance, Location Designated for SNS Convenience	13	35.1

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	Frequency	Percent
Non-Appearance	10	27.0
Form and Location Not Addressed	10	27.0
Appearance or Non-Appearance, Location Designated for SNS Convenience if Appearance	2	5.4
Appearance, Location Designated for Customer Convenience	2	5.4
Total	37	100

Social networking sites structure arbitration proceedings as either in-person or non-appearance proceedings. In appearance arbitration, the parties convene in person with the arbitrator. In nonappearance arbitrations, the arbitrator does not meet the parties or hear testimony but makes a decision after reviewing documents they submit, speaking to the parties on the phone, or communicating with them online. Forty-three percent of the SNS arbitration clauses were in-person or appearance arbitrations (n=16) as compared to twenty-seven percent that were nonappearance. (n=10). Twenty-four percent of the arbitration clauses did not address the issue of whether the arbitration was to be appearance or nonappearance.

For three of the arbitration clauses, the proceedings may be either appearance or nonappearance. It is unclear who makes the choice of ADR method from the terms of service. Thirteen of the arbitration clauses in the sample (thirty-five percent) mandate in-person arbitration and pre-select a forum that is not based on the location of the consumer. Only two of the clauses (five percent) set a location for in-person arbitration based on the consumer’s home court or where they reside.

Finding #4: Arbitration Clauses Tend to Be Cryptic and Unhelpful in Explaining the Mechanics of This ADR Method

The word count for arbitration clauses in the sample ranges from 50 to 2565 words. The average (mean) arbitration clause is 318 words in length whereas the median is 204 words. Forty-six percent of the arbitral clauses are under 200 words and did not explain rights in clear terms.

Finding #5: Most Arbitration Clauses Appear in the Middle or Towards the End of the Terms of Service or Privacy Policy

The social networking developers’ placement of arbitration clauses in the terms of service varied from being situated beginning at word 290 (of a

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4918-word document) to word 10,305 (of an 11,421-word document). The average terms of service agreement placed the arbitration clause after 4041 words of text. Half of social media users would have to read at least 3640 words into the document before encountering the arbitration clause. Only six arbitration clauses (16.2%) appear in the first half of the document. The typical arbitration clause was located deep within the interior of the privacy policy or terms of service agreement.

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**Finding #6: Most Arbitration Clauses Do Not Specify What
Arbitral Rules Will Apply**

Arbitration agreements drafted by social networking sites did not typically explain which arbitral provider's rules applied to arbitration proceedings. Five terms of service agreements specified that the American Arbitration Association (AAA) consumer rules would apply. Nevertheless, twelve other clauses mentioned the AAA, but did not specify whether the AAA's consumer or commercial rules applied. Two SNSs require that the mandatory arbitration be conducted according to the AAA commercial arbitration rules, even though most users will be consumers. The failure of SNSs to provide minimum adequate disclosures about the ground rules for arbitration is evidenced by the provider's failure to specify whether consumer or commercial rules applied.⁵⁰

**Finding #7: Few Arbitral Clauses Were Presented in a
Conspicuous Manner**

The research team completed a content analysis of each terms of service agreement to determine whether the arbitration clause was presented in a conspicuous manner according to the standards of the Uniform Commercial Code (UCC),⁵¹ which is the chief statute governing commercial transaction in the United States. An arbitration clause was conspicuous if it met any of the UCC guideposts, such as contrasting type, font, color, or language that called attention to the clause.⁵² Our content analysis of the placement of arbitral clauses revealed that only six of the thirty-seven clauses (sixteen percent) met any of the minimal UCC standards for conspicuousness. The preponderance of social media websites were inconspicuous because they did not attempt to draw the social media user's attention to the provisions of arbitration clauses.

**Finding #8: Only One Site Explained That Consumers Waived Their
Rights to Liberal Discovery**

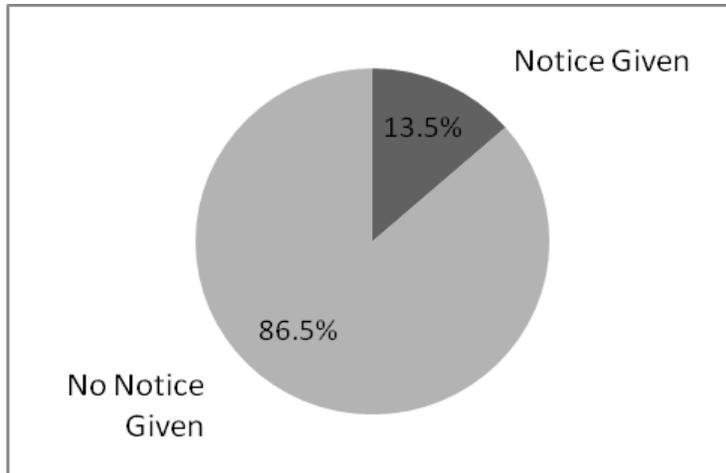
Users of SNSs who submit to arbitration waive their right to discovery entirely or may have limited discovery at the sole discretion of the arbitrator.⁵³ Only one of the thirty-seven arbitration clauses (three percent) men-

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tioned that by agreeing to arbitration users waived their right to unconditional discovery.⁵⁴

Finding #9: Few Arbitration Clauses Explained How Users Lose Their Right to a Jury Trial

Figure Two: Notice of Jury Trial Waiver Given to User



It is an understatement to say that SNSs did not explain in clear and unmistakable terms that consumers waived important rights. Only five of the thirty-seven arbitration clauses (thirteen and one-half percent) explained that, by agreeing to arbitration, the consumer gives up their Seventh Amendment right to a jury trial. The Eleventh Circuit upheld an arbitration clause that failed to point out that the consumers were waiving their right to a jury trial, reasoning, "the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate."⁵⁵ A New Jersey appeals court is emblematic of most United States courts in approving arbitration provisions even where the arbitration clause does not explicitly refer to the consumer's waiver of his or her Seventh Amendment right to a jury trial.⁵⁶ Thus, it is not unexpected that not many SNSs mentioned important rights foreclosed, let alone explained them in terms an average consumer would understand. Reasonable social media users have no advance notice that they are foregoing important rights when agreeing to a terms of service or privacy policy.

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Finding #10: More Than a Quarter of the Arbitration Clauses Prohibit Users from Joining Class Actions

Table Seven: Class Action Preclusion

	Frequency	Percent
Class Actions Prohibited	10	27.0
Class Actions Not Prohibited	26	70.3
Class Actions Prohibited for Users but Not SNS	1	2.7
Total	37	100

Absent a class action waiver, individuals with functionally equivalent complaints against a company may join in a class suit or representative action where a federal court consolidates the complaints into a single proceeding.⁵⁷ Only by specifically agreeing to a class action waiver can a social media user lose the right to initiate or join a class action. Eleven of the thirty-seven arbitration clauses (thirty percent) included such waivers, which essentially divests users of their right to recourse where the monetary damages are slight.⁵⁸

Finding #11: Three Arbitration Clauses Allow Consumers to Pursue Small Claims Actions

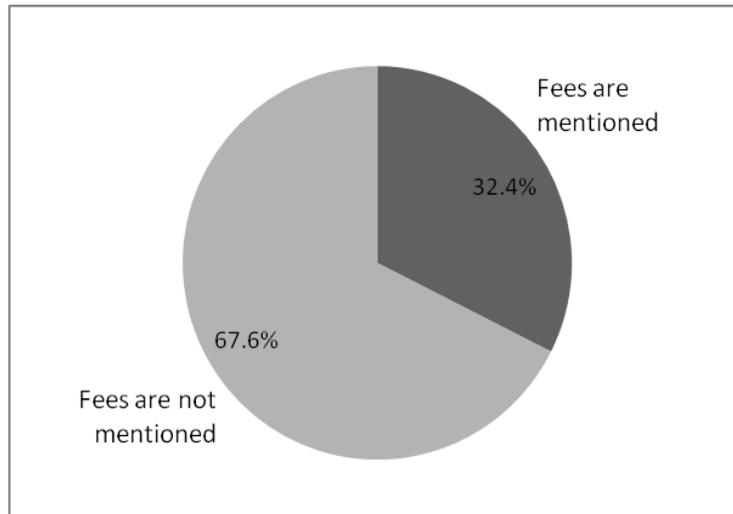
Social networking site users who agree to resolve disputes by arbitration give up the right to pursue relief in small claims courts as well as state and federal courts of general jurisdiction. Only three out of the thirty-seven arbitral clauses (eight percent) allowed consumers to retain the right to pursue small claims actions. The proscription on small claims is essentially a death sentence for many consumer claims because many grievances, such as the misuse of tracking software, the invasion of privacy, breach of the service agreement, or online contractual disputes, will typically not involve large monetary damages.

Finding #12: Few Arbitral Clauses Explain the Costs of Pursuing Arbitral Remedies

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In greater than two-thirds of the SNS arbitration clauses (sixty-eight percent, n=25), the costs of filing claims was not mentioned anywhere in the terms of service or privacy policies. In one-third of the sample where fees were mentioned (thirty-two percent, n=12), the agreements did not give users notice of the approximate cost of filing for arbitration, any notice that the costs were non-refundable, and did not disclose the average costs of retaining arbitrators. No arbitration agreement gave users any estimated costs of arbitration.

Figure Three: Mention of Fees in Arbitral Clauses



PART IV: ANALYSIS OF THE RESEARCH FINDINGS: SOCIAL NETWORKING SITES VIOLATE KEY PRINCIPLES OF CONSUMER DUE PROCESS

The predispute mandatory arbitration agreement was by far the most popular choice for alternative dispute resolution for social media sites in the sample. Sixty-two percent of the terms of service agreements with arbitral clauses incorporated some form of mandatory agreement clause (n=23). Five arbitral clauses allowed either party to elect arbitration, while two others allowed the SNS to elect arbitration. In effect, these agreements were the functional equivalent of a mandatory agreement because if the SNS has the right to elect arbitration, this election is, in effect, a form of mandatory arbitration for the consumer.

Eight SNS sites permitted the party requesting relief to elect arbitration for claims under a specified dollar amount (ranging from \$1000 to \$10,000). Six of eight such clauses mandated that absent the election of non-appearance arbitration, the only forum for claims was the courts of a specified jurisdiction. The following clause from the Goodreads Terms of Use is typical: “Any claim or dispute between you and Goodreads that arises in whole or in part from the Service shall be decided exclusively by a court of

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competent jurisdiction located in Los Angeles County, California, unless submitted to arbitration as set forth in the following paragraph.”⁵⁹ Again, for most consumers this is an illusory choice.⁶⁰ Of the various forms of arbitration,⁶¹ predispute mandatory arbitration is the most skewed in favor of the SNS in all of its important terms. Mandatory arbitration requires consumers to agree in advance to submit disputes to a private arbitral provider and divests consumers of important rights that would otherwise be available, such as their Seventh Amendment right to a jury trial, discovery, and appeal.⁶² In addition, arbitrators conducting consumer arbitrations have perverse incentives to favor repeat corporate player clients over individual users.⁶³ A federal bankruptcy court described the abuses of mandatory arbitration in consumer transactions as a “putrid odor which is overwhelming to the body politic.”⁶⁴

Predispute mandatory arbitration contravenes the possibility that consumers have any civil recourse for the invasion of privacy, defective software, inadequate security, or other causes of action arising out of the use of social networking sites. Nevertheless, United States courts rarely police mandatory arbitration provisions in consumer transactions even when they make it impossible for consumers to vindicate their rights.⁶⁵

To address the universal problem of unfair alternative dispute resolution procedures, the National Consumer Disputes Advisory Committee developed a Consumer Due Process Protocol, which has been adopted by the American Arbitration Association. The National Commission acknowledged that businesses present consumer arbitration clauses on a take-it-or-leave-it basis without any possibility of negotiation.⁶⁶ This one-sided bargaining process raises serious concerns of unfairness because “consumers are often unaware of their procedural rights and obligations until the realities of out-of-court arbitration are revealed to them after disputes have arisen.”⁶⁷ The National Commission observed that arbitration “may also fall short of consumers’ reasonable expectations of fairness and have a significant impact on consumers’ substantive rights and remedies.”⁶⁸ Our empirical findings reveal that the social media sites disregard many principles of the Consumer Due Process Protocol.

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A. The Social Networking Sites Do Not Provide Consumers with Full and Accurate Information About Arbitration

The AAA's Consumer Due Process Protocol requires social media providers to "undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs."⁶⁹ To comply with this standard, a social media site employing consumer arbitration must give the consumer "(1) clear and adequate notice regarding the ADR provisions, including a statement indicating whether participation in the ADR Program is mandatory or optional, and (2) reasonable means by which Consumers may obtain additional information regarding the ADR Program."⁷⁰ Nearly every social media arbitral clause specifies whether the arbitration is compulsory or voluntary, though several of the agreements in our sample were indefinite. With few exceptions, however, the social media sites do not provide consumers with a means of obtaining additional information regarding the ADR provider, fees, or the rights affected by the arbitral clause.⁷¹

The SNS arbitration clauses in our sample are not only brief but often indeterminate, making it all but impossible for the ordinary consumer to understand.⁷² The SNS arbitral clauses fall short of the AAA's protocol standard because they fail to provide a cogent explanation of arbitration and its consequences. Forty-six percent of the arbitral clauses are 181 words or less. The vast majority of terms of service provide no elucidation of the consequence of arbitration except self-serving declarations that the proceedings were more efficient and cost-effective than court resolutions. The typical social media site neither attempts to explain what arbitration involves nor does it provide links to access additional information. Only five out of thirty-seven providers surveyed attempted to explain any aspect of arbitration. The arbitral provider is named in nearly two-thirds of the cases (sixty-two percent, n=23). In fourteen cases, the social media arbitral clause did not specify or even make mention of the provider. In fewer than one in three cases, social media sites centered in the United States did not disclose the arbitral provider. Three of the foreign SNSs (eight percent of the sample) did not identify the provider. One foreign SNS specified a Hong Kong or Chinese provider, depending upon the geographical area of the user.

Arbitration agreements drafted by SNSs did not minimally give consumers notice of the ground rules for conducting arbitration. Five social media providers chose the AAA consumer rules to govern arbitration pro-

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ceedings. Twelve of the social media site agreements mentioned the AAA, but did not explain whether consumer or commercial rules were applicable. A few social networking sites required that mandatory arbitration be settled according to commercial arbitration rules. Fetlife's arbitration clause, for example, provides disputes "shall be settled by binding arbitration in accordance with the commercial arbitration rules of the Arbitration and Mediation Institute of Canada."⁷³ Focus, a photo-sharing site, required arbitrations to be conducted in San Francisco under the AAA's commercial law rules.⁷⁴

At present, users of SNSs do not have minimum access to the information they need to make a rational decision about whether to agree to arbitration, which violates the AAA's consumer due process principle of full and adequate disclosures. Only three SNSs provide basic answers to frequently asked questions, links for further information, or links to website addresses for the arbitral provider. None of the minimalist arbitration clauses attempts to explain the advantages and disadvantages of arbitration in a balanced way.

Our study affirms Linda J. Demaine and Deborah Hensler's empirical study of arbitration agreements, which found that consumers were not given adequate information about what rights they waived when agreeing to a mass-market arbitration clause: "Given the lack of information available to consumers in predispute arbitration clauses, and the difficulty of obtaining and deciphering these clauses, it is likely that most consumers only become aware of what rights they retain and what rights they have waived after disputes arise."⁷⁵

Our content analysis of the SNS arbitration clauses concluded that social networking sites provided consumers with almost no explanation of arbitration or what rights they were foreclosing.⁷⁶

B. The Arbitration Clauses Do Not Give Users Adequate Notice of the Arbitration Procedure and Its Consequences.

Our empirical research demonstrates that most social networking providers fail to give consumers "adequate notice of the arbitration provision and its consequences" and "related costs."⁷⁷ SNSs placed these clauses deep within the interior of the terms of service agreements. Overall, these clauses were not conspicuous, nor presented in a way that gave users reasonable notice that they were waiving important legal rights and remedies. None of

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the social media agreements gave consumers either an estimate of the cost of filing an arbitration request or information stating whether the deposits were refundable. No SNS gave consumers an estimate of the hourly rate of arbitrators.

Eighty-four percent of the SNS arbitral clauses are located in the second half of the terms of service agreements. Because these agreements are relatively lengthy, averaging 6078 words, most consumers would have to read several thousand words to get to the first word of a particular arbitration clause. The average arbitration clause appeared after 4041 words, with the median after 3640 words. This is the equivalent of roughly sixteen and fourteen printed pages, respectively, before users encounter the arbitral clause, making it unlikely that they reviewed the terms prior to clicking yes to the agreement or browsing the website.⁷⁸

Since the SNS arbitration clauses are rarely conspicuously set off in a manner that a reasonable SNS user will notice them, it is unlikely that they will even be noticed, let alone read. As mentioned before, all but six of the 157 sites surveyed fail the tests for conspicuousness, which is a well-honed test developed by the Uniform Commercial Code drafters. Thirty-one sites (eighty-four percent) did not attempt to draw the user's attention to the arbitration clause by contrasting it from the text around it. Five clauses (fourteen percent) mention the waiver of the right to a jury trial; three clauses (eight percent) indicate the waiver of the right to appeal, and only one clause (three percent) discloses the waiver of the right to discovery. One SNS, MeetUp, highlights all three waivers, and another, Match.com, notes the waivers of appeal and jury trial. Four other sites denote a single waiver. Nevertheless, these social media sites are the exception to the overall pattern of arbitral agreements by stealth.

Absent a contractual waiver, all consumers located within the jurisdiction of the United States enjoy a Seventh Amendment right to a jury trial in a court of law as a fundamental constitutional right. As opposed to closed arbitration proceedings, jury trials are open proceedings with balanced rules of evidence, liberal discovery procedures beneficial to plaintiffs, and the right to appeal unfavorable rulings. Under our civil justice system, discovery is an essential process that enables plaintiffs to secure documents and testimony that are in the possession of the social media site or other company.⁷⁹ The Federal Rules of Civil Procedure and state codes have adopted a policy of free and open discovery. The process of discovery is essential to consumers because ordinarily the social media site has a monopoly on access to

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information about its policies and practices. As noted in our findings, less than one-third of the SNS arbitration clauses (n=12) addressed the issue of costs, and none of those gave even a rough estimate of how much a consumer would have to pay to vindicate their rights. Three SNSs stated that the site would be responsible for the costs of arbitration (sometimes conditionally),⁸⁰ while nine stated that costs would be split or allocated according to the arbitration provider's rules.⁸¹

As a practical matter, arbitration costs to the consumer can easily exceed the compensatory damages at stake so that pursuing arbitration is not cost-effective.⁸² Under the AAA's Consumer Arbitration Rules, a consumer would pay a maximum fee of \$125 when the claim or counterclaim is \$10,000 or less.⁸³ Under the Judicial Arbitration and Mediation Services (JAMS) rules, a consumer initiating arbitration pays a total of \$250, while a consumer against whom arbitration is initiated pays nothing.⁸⁴ Combined, however, the AAA and JAMS are the designated arbitration provider in just over half (nineteen out of thirty-seven) of the arbitration clauses. These are only the administrative costs and do not include the price for retaining an arbitrator or travel expenses. Social media users pursuing an arbitral remedy have no protection from exorbitant costs that deprive them of an avenue of recourse they would ordinarily have.

Small claims courts, for example, often offer a much less expensive forum for consumers to resolve disputes. Filing fees fluctuate by state (and sometimes by county within a state), but the cost to bring a case in small claims court is often nominal. For example, New Jersey charges fifteen dollars to file a claim against a single defendant, and another seven dollars for service by mail.⁸⁵ It costs forty dollars to file a claim in small claims courts in Alaska.⁸⁶ Only three of the arbitration clauses allow consumers to choose to file suit in small claims courts.⁸⁷ Small claims courts typically allow prevailing plaintiffs to recoup filing costs, which is not generally the case with arbitration.

Fees paid to the arbitration provider are not the only costs to consumers. Forty-three percent of the arbitration clauses command in-person arbitration, and all but two providers chose a location for the arbitration advantageous to the SNS. Consumers would have to travel—at their own expense—to take part in the arbitration proceedings. A cursory review of the locations specified in arbitral clauses demonstrates that travel expenses can be considerable.

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For example, CafeMom requires all registrants to submit to mandatory arbitration in New York City.⁸⁸ Arbitrations under MyYearbook's Terms and Conditions are held "in or near New Hope, PA."⁸⁹ Mouthshut.com requires its users to arbitrate all disputes in Mumbai, India.⁹⁰ Habbo, a SNS for teenagers, makes an attempt to locate the arbitration for the convenience of the user, at least in form—"The arbitration will be held in Los Angeles, California or Chicago, Illinois, whichever is closest to your place of residency"⁹¹—but this small concession provides little relief to the vast majority of users with no proximity to one of those two cities. Requiring consumers to arbitrate in a far-off forum functions as an absolute immunity for the social networking site where the cost and inconvenience of filing a claim far exceed what can be recovered if they prevail.

Parties who agree to resolution of disputes exclusively through arbitration also relinquish their right to petition a court for injunctive relief. Claims for injunctive relief can be explicitly exempted from arbitration, which is done in seventy percent (n=26) of the terms of service agreements. Remarkably, more than one-fifth of the sites (n=8) reserve the right to seek injunctive relief for themselves but not consumers. Six of these exemptions are broadly written, covering injunctive relief sought on any claim,⁹² while two are limited to protecting intellectual property rights.⁹³ The trend is clear in this dataset; SNSs use contract law to exact every advantage should a user sue them.

C. Many Arbitration Clauses Require Consumers to Waive Additional Rights, Further Limiting Their Ability to Obtain Full Compensation

Despite the empirical fact that consumers agreeing to mandatory arbitration are waiving important legal rights, many SNSs go even further and require that consumers waive additional rights that would not otherwise be automatically foreclosed by arbitration. The most pernicious of the waivers are those against joining class actions. As noted in our findings section, eleven of the thirty-seven arbitration clauses preclude consumers from initiating or joining class actions. Class action waivers have the practical effect of denying justice to a large number of consumers by divesting them of the right to join with other aggrieved social media users to pursue relief under state consumer law. Many of the first generation lawsuits against SNSs were class actions or collective proceedings because the damages for any one individual user were too small to make the lawsuit cost-justified.⁹⁴ Immunity

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breeds irresponsibility in the information-age economy where an increasing number of companies are divesting consumers of any civil recourse by including class action waivers in their terms of service.

Consumer class actions are often the only practical alternative in securing legal representation under the contingency fee system in cases where actual compensatory damages are small or nominal. Class actions enable litigants with slight monetary damages claims to combine actions in a representative action.⁹⁵ Representative actions are necessary to teach fraudulent Internet companies "tort does not pay." Without class actions, social networking sites are effectively immunized from judicial process and may continue unfair practices with impunity.⁹⁶ Plaintiffs will not have a remedy for social media sites that improperly track their users' Internet activity, misuse tracking cookies, or collect information without the user's consent. The shield of an arbitration agreement combined with insidious class action waivers deprives consumers of any prospect for finding a contingency fee attorney willing to represent them. Arbitration agreements in social networks are a premeditated attempt to reallocate the risk of litigations by functionally eliminating any meaningful rights or remedies.⁹⁷

The class action waivers in the arbitration clauses are clear in prohibiting consumers from joining class actions. For example, users of Match.com "may not under any circumstances commence or maintain against Match.com any class action, class arbitration, or other representative action or proceeding."⁹⁸ MyYearbook states, "To the fullest extent permitted by applicable law, no arbitration under these TOS shall be joined to an arbitration involving any other party subject to these TOS, whether through class arbitration proceedings or otherwise."⁹⁹

While the majority of class action waivers are symmetrical, some were one-sided reserving the SNS's right to a representative action while strictly prohibiting the consumer's right to join a class.¹⁰⁰ For example, Tagged users "voluntarily and intentionally waive[] . . . any and all right to participate in a class action;" however:

AT ANY TIME AND IN ITS SOLE DISCRETION TAGGED MAY DIRECT THE AAA TO CONSOLIDATE ANY AND ALL PENDING INDIVIDUAL ARBITRATION CLAIMS THAT (i) ARISE IN SUBSTANTIAL PART FROM THE SAME AND/OR RELATED TRANSACTIONS, EVENTS AND/OR OCCURRENCES, AND (ii) INVOLVE A COMMON QUESTION OF LAW AND/OR FACT WHICH, IF RESOLVED

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IN MULTIPLE INDIVIDUAL AND NON-CONSOLIDATED ARBITRATION PROCEEDINGS, MAY RESULT IN CONFLICTING AND/OR INCONSISTENT RESULTS. IN SAID EVENT, YOU HEREBY CONSENT TO CONSOLIDATED ARBITRATION, IN LIEU OF INDIVIDUAL ARBITRATION, OF ANY AND ALL CLAIMS YOU MAY HAVE AGAINST TAGGED AND THE AAA RULES SET FORTH HEREIN SHALL GOVERN ALL PARTIES.¹⁰¹

By reserving the right, Tagged can compel consolidation of actions when it is beneficial to them but bar consolidation of claims when it would be beneficial to consumers.

The AAA Consumer Due Process Protocol requires providers to “make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.”¹⁰² Ninety-two percent of the social media sites breach this fundamental principle of good faith and fair dealing in consumer arbitration agreements.¹⁰³ Only three out of the thirty-seven sites with arbitral clauses grant consumers the right to pursue actions in small claims courts.¹⁰⁴

On top of all the rights consumers give up by agreeing to arbitration, seven SNSs penalize consumers who seek judicial review of the issue of whether arbitral clauses are enforceable. These seven sites include text in their arbitration clauses that give them the right to recoup related costs and fees should social media users file suit for a court determination of whether a given arbitral clause is enforceable. The amount of the penalty specified in these oppressive social media agreements ranges from paying their attorney’s fees and costs up to \$1000¹⁰⁵ to reimbursing the provider for all costs and expenses including attorney’s fees.¹⁰⁶ At a minimum, these provisions will have a chilling effect on consumers’ abilities to challenge pernicious contracting practices.

Consumers bound to arbitration are highly unlikely to seek civil recourse for contractual or tort-based claims. Arbitration proceedings are not publicly disclosed, so it is difficult to determine with certainty how often consumers file for arbitration against social media sites. The AAA is the most popular arbitral provider for social networking sites. Our search of more than 60,000 consumer cases from April 2007 to March 2012 uncovered not a single case where a social networking site and user of a service arbitrated a claim.¹⁰⁷ Mandatory arbitration has the desired effect of giving social networking sites a liability-free zone.

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PART V: THE U.S. SUPREME COURT'S ARBITRATION JURISPRUDENCE

This part of the article explains why social media users will be unlikely to prevail when they seek a judicial review of one-sided arbitration agreements. The U.S. Supreme Court's federal takeover of arbitration agreements has made it almost impossible for social network user to challenge the one-sided and oppressive arbitration clauses found in the SNS sample. Over the last two decades, the Supreme Court has evidenced an undue interest in arbitration cases—especially those involving consumers. Between the 1997 and 2010 terms, the Court decided more cases on arbitration (n=22, 1.85%) than on the death penalty (n=21, 1.77%) or abortion (n=6, .5%).¹⁰⁸ From 1998 to February 2012, the Court decided twenty-four cases involving arbitration, which is a significant segment of its docket.¹⁰⁹ As revealed in Table Eight, of these twenty-four cases, a disproportionate number (fifty-eight percent) related to disputes between a consumer and a business as opposed to business, employment, or labor disputes.

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Table Eight: Case Distribution for U.S. Supreme Court Arbitration Jurisprudence: 1998 to February 2012

Type of Arbitration Agreement	Frequency	Percent
Business to Consumer (B2C)	14	58
Employer to Employee (E2E)	4	17
Labor Collective Bargaining Agreement (Labor)	4	17
Business to Business (B2B)	2	8
Total	24	100

The U.S. Supreme Court’s arbitration jurisprudence that presumes that consumer arbitration agreements are enforceable makes it unlikely that consumers can successfully challenge even the most one-sided provisions such as predispute mandatory arbitration. In a progression of cases from 1983 to early 2012, the Court has stretched the original intent of the Federal Arbitration Act of 1925 (FAA)¹¹⁰ to eradicate protections afforded to consumers under state and federal law.

A. Honey We Blew Up the Federal Arbitration Act (FAA)

Over the last two decades, the U.S. Supreme Court has interpreted the FAA so expansively to favor arbitration that businesses routinely include these one-sided clauses in settings that policy-makers and corporations had previously never dreamed possible.¹¹¹ The Court’s jurisprudence favoring liberal enforcement of arbitration provisions has been constructed against a Congressional legislative history that makes it “extremely clear”¹¹² that the original intended use of the FAA was “for the business community to regulate . . . among its members” and not for businesses to regulate contracts with their employees or consumers.¹¹³ The FAA was intended solely for commercial—not consumer—use. When Congress passed the FAA, it was highly unlikely that it intended the Act to apply to “captive consumers or employees.”¹¹⁴ In fact, the legislative hearings leading up to the passage of the FAA have been characterized as being “a love-fest of commercial arbitration proponents; no consumer groups were even represented.”¹¹⁵ As a

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bankruptcy court lamented, “When it comes to arbitration, we appear to have lost our sense of history.”¹¹⁶

After the passage of the FAA, the commercial world readily embraced arbitration, largely because it allowed businesses to select the arbitrators and because they perceived it would be “quicker and cheaper than court resolution.”¹¹⁷ The success of arbitration agreements in the commercial realm eventually led to “wholesale encroachment of arbitration agreements into the realm of the private citizen, employment dispute arbitration.”¹¹⁸ Once arbitration became routinized in the labor and employment realms, it was only a matter of time before corporations imported them into the realm of business-to-consumer transactions. This expansion of mandatory arbitration to consumer transactions could not have occurred without the U.S. Supreme Court’s arbitration jurisprudence.

B. The U.S. Supreme Court’s Nationalization of Consumer Arbitration

A transformative series of Supreme Court decisions, beginning three decades ago, paved the way for arbitration agreements to be included in consumer transactions. In 1983, the Court clarified that federal policy favored arbitration of commercial disputes,¹¹⁹ and in 1984, held that the FAA preempts state laws restricting arbitration.¹²⁰ The Court enforced mandatory arbitration agreements between investors and their brokerage firm in 1989¹²¹ and in an employment discrimination case in 1991.¹²² The latter decision “shocked many employers and employees, who had previously assumed that public policy concerns would prevent courts from compelling employees to resolve employment discrimination claims through binding arbitration.”¹²³ The Court’s audacious statement that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context”¹²⁴ set the stage for the expansive application of the FAA to disputes between consumers and businesses, where there is a similar inequality in bargaining power.

The Supreme Court took a colossal step toward divesting consumers of minimal protections in mandatory arbitration in 1995 when it determined “that Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind.”¹²⁵ The Court interpreted the FAA text as not “carv[ing] out an important statutory niche in which a State remains free to apply its antiarbitration law or policy.”¹²⁶ The Court furthered the enforce-

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ment of mandatory arbitration against employees in 2001 when it held that the FAA validates arbitration in most employment contracts.¹²⁷

In two of its latest arbitration decisions, the Court continued to legitimate one-sided arbitration clauses divesting consumers of procedural and substantive rights. In *AT&T Mobility v. Concepcion*,¹²⁸ the Court held that the FAA preempted California state case law that held class action waivers to be unconscionable and void.¹²⁹ The Court's takeover of state law is evident by its prohibition against California courts refusing to enforce mandatory consumer arbitration clauses that contain class action waivers.¹³⁰ The *Concepcion* Court reasoned that it is important that "arbitration agreements [be] on an equal footing with other contracts [and that they be] enforce[d] . . . according to their terms."¹³¹ The Court's validation of class action waivers makes it difficult for consumers to challenge one-sided provisions in SNSs. The empirical reality after *Concepcion* is that consumers will have limited doctrinal tools to challenge class action prohibitions in SNSs.

In *CompuCredit Corp. v. Greenwood* the Court considered whether the Credit Repair Organizations Act (CROA) precluded enforcement of an arbitration agreement in a lawsuit alleging violations of that Act.¹³² Consumers filed a class action asserting that they were charged fees that reduced their credit limit and were misled about whether they could use their credit cards.¹³³ The Court reversed the Ninth Circuit's judgment, remanded the case, and concluded that the Federal Arbitration Act required that the arbitration agreements the consumers signed be enforced according to their terms.¹³⁴

In his majority opinion, Justice Scalia noted, "At the time of the CROA's enactment in 1996, arbitration clauses in contracts of the type at issue here were no rarity. . . . Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest."¹³⁵ In her dissent, Justice Ginsburg asserted that Congress meant to curb deceptive practices when they passed CROA and:

did not authorize credit repair organizations to make a false or misleading disclosure—telling consumers of a right they do not, in fact, possess. If the Act affords consumers a nonwaivable right to sue in court, as I believe it does, a credit repair organization cannot retract that right by making arbitration the consumer's sole recourse.¹³⁶

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Most recently, in February 2012 the Supreme Court issued a succinct *per curiam* opinion in *Marmet Health Care Ctr., Inc. v. Brown* that illustrates just how far the Court is willing to go to legitimate consumer arbitration agreements.¹³⁷ The litigation arose from a consolidation of three West Virginia negligence suits against nursing homes alleging injuries or harm resulting in death to a family member.¹³⁸ The Supreme Court of Appeals of West Virginia had found that as a matter of public policy under state law “an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence.”¹³⁹ The Court vacated the state court judgment in reliance on the fact that the FAA’s text does not include an exception for personal injury or wrongful-death claims.¹⁴⁰ The Court found the prohibition against predispute arbitration in personal injury or wrongful-death claims to be a categorical rule prohibiting arbitration of a particular type of claim, which is contrary to the terms and coverage of the FAA.¹⁴¹ On remand, the court must consider whether absent such general public policy, the arbitration clauses in the agreements are unenforceable under state common law principles that are not specific to arbitration and preempted by the FAA.¹⁴²

While the Supreme Court has continued to increase the scope of the FAA, some state courts have resisted stretching the FAA far beyond its original purpose of resolving disputes between businesses. One court noted the “multitude of cases which detail the horror stories of corporate abuse of ordinary citizens and small business people by way of the inclusion of mandatory arbitration clauses in contracts of adhesion.”¹⁴³ Another court observed that predispute arbitration “reveals yet another vignette in the timeless and constant effort by the *haves* to squeeze from the *have nots* even the last drop.”¹⁴⁴

C. Analysis of Supreme Court Arbitration Decisions

A review of the Court’s arbitration decisions over time and its more recent holdings in *Concepcion* and *CompuCredit* reveals a clear progression and suggests that the Court will continue to expand and use the FAA to preempt state consumer protection. The path of consumer arbitration law is leading to an era of broad enforceability. Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas have shown that they “are in favor of rigorously enforcing arbitration agreements and tend to construe arbitration pro-

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visions in such a way as to render them enforceable. As such, these four justices are unlikely to void an entire arbitration agreement that contains discrete illegal provisions.”¹⁴⁵ In the five to four *Concepcion* decision, “the votes divided along traditional ideological lines, with the Justices volleying arguments about the FAA and the state’s role in shaping arbitration procedures.”¹⁴⁶

One empirical study concluded, “(a) there is now a measurable degree of judicial hostility to arbitration in state courts, (b) federal and state courts do not provide uniform or even similar results, [and] (c) the FAA may be contributing to forum shopping for the enforcement of arbitration awards.”¹⁴⁷ The long-tail trend is that consumers will find it difficult to challenge one-sided procedural and substantive arbitration clauses found in the first generation of SNS terms of service agreements.

PART VI: THE TIME FOR A FEDERAL STATUTE IS NOW

In direct response to the U.S. Supreme Court’s decision in *Concepcion*, Senator Al Franken (D. Minnesota) and fellow members of Congress introduced the Arbitration Fairness Act of 2011.¹⁴⁸ In a press release that circulated just days after the *Concepcion* decision was handed down, Franken stated, “This ruling is another example of the Supreme Court favoring corporations over consumers ... The Arbitration Fairness Act would help rectify the Court’s most recent wrong by restoring consumer rights.”¹⁴⁹ According to the Congressional findings, the FAA:

(1) . . . was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power. (2) A series of decisions by the Supreme Court of the United States have changed the meaning of the Act so that it now extends to consumer disputes and employment disputes. (3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.¹⁵⁰

If passed, the proposed legislation would amend Title 9 of the United States Code with respect to arbitration.¹⁵¹ The bill declares, “No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute,”¹⁵² and

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that “the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator.”¹⁵³

Proconsumer legislation, like the Arbitration Fairness Act of 2011, is just the kind of Congressional action that is needed to restore the rights of social media users who are targeted by unfair arbitration agreements. If the federal statute is enacted, no predispute arbitration agreement will be enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute, and the validity and enforceability of an agreement will be determined by a court, not an arbitrator. This federal statute would give consumers a real choice to elect arbitration post-dispute, if its advantages outweigh its disadvantages, but otherwise allows consumers to retain all the rights necessary to obtain justice.¹⁵⁴ Since most social media users are classified as consumers, the statute would restore their right of recourse.

CONCLUSION

Social networking sites are creating, in effect, a liability-free zone in cyberspace by employing arbitration clauses coupled with class-action waivers and other one-sided provisions. Class action waivers preclude Internet users from filing a class action or even joining an existing one. This de facto immunity shields social networking sites from class actions for violations of privacy, contract, tort, or intellectual property rights that would otherwise be recognized in federal and state courts. The arbitral clauses employed by social networking sites not only take away the consumers’ key to the courthouse but also preclude the possibility of redress for small dollar claims such as violations of the Stored Communications Act, Electronic Communications Privacy Act, promissory fraud, breach of contract, or the invasion of privacy. Users of social networking sites essentially have no avenue of recourse when a social media site intentionally transmits personal information about them to third party advertisers without their consent. Social networking sites that combine mandatory arbitration with anti-class action waivers ensure that these powerful entities will not be accountable for failing to secure and safeguard their users’ sensitive personally identifiable information. Social media sites can use the names, likenesses, and personal information of their users with impunity because they are increasingly operating in a “no liability” zone.

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While there are advantages to the use of mandatory arbitration of social networking disputes, those advantages predominantly favor the dominant party—the SNS. An attorney testifying before Congress on behalf of the United States Chamber of Commerce attributed the rise of predispute mandatory arbitration clauses to market forces and contended that “[b]anning or otherwise limiting the use of predispute arbitration clauses would ignore these market dynamics, and likely force consumers to pay more for products or services.”¹⁵⁵ An SNS can save substantial legal fees and costs by employing mandatory arbitration clauses. Consumers will accrue greater savings by pursuing their claims in our judicial system, not expensive and secretive rent-a-judge proceedings.

The questionable contracting practices of social media sites create a certainty that consumers enter into these agreements without understanding that they are forfeiting important legal rights. The National Consumer Law Center states that the misuse and abuse of consumer arbitration agreements is the number one consumer problem of the new century.¹⁵⁶ With Supreme Court jurisprudence bringing the full force of the Federal Arbitration Act to bear on consumer arbitrations, it is time for Congress to step in and protect social networking site users from one-sided contracts.

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Appendix A: Social Networking Sites in the Study with Arbitration Clauses	
Site Name	URL to Terms of Service Agreement
Academia	http://www.academia.edu/terms
Audimated	http://www.audimated.com/legal.php
Blogster	http://www.blogster.com/terms
CafeMom	http://www.cafemom.com/about/tos.php
CaringBridge	http://www.caringbridge.org/termsfuse
Couchsurfing	http://www.couchsurfing.org/terms.html
Fetlife	https://fetlife.com/fetlife/tou
Focus	http://www.focus.com/about/tos/
Fotki	http://help.fotki.com/terms/
Gays	http://gays.com/termsAndConditions.html
Geni	http://www.geni.com/company/terms_of_use
Goodreads	http://www.goodreads.com/about/terms
Habbo	https://help.habbo.com/entries/278067-terms-and-conditions-us
Hi5	http://hi5.com/friend/displayTOS.do
Italki	http://www.italki.com/static/tos.htm
Lafango	http://lafango.com/legal
LinkedIn	http://www.linkedin.com/static?key=user_agreement
LiveMocha	http://www.livemocha.com/pages/terms
Match	http://www.match.com/registration/membagr.aspx
MeetUp	http://www.meetup.com/terms/
Mouthshut	http://www.mouthshut.com/help/tos.php
Mubi	http://mubi.com/terms_of_service
MyAnimeList	http://www.craveonline.com/termsfuse?site=www.MyAnimeList.net
MyLife	http://www.mylife.com/UserAgreement.pub

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MyYearbook	http://www.myearbook.com/terms.php
PureVolume	http://www.purevolume.com/terms_of_use
Quechup	http://www.quechup.com/help/terms/conditions
Ravelry	http://www.ravelry.com/about/terms
ReverbNation	http://www.reverbnation.com/main/terms_and_conditions
SecondLife	http://secondlife.com/corporate/tos.php
Stickam	http://www.stickam.com/viewUniversalTerms.do
StumbleUpon	http://www.stumbleupon.com/terms/
Tagged	http://www.tagged.com/terms_of_service.html
Teachstreet	http://www.teachstreet.com/terms-of-service
VampireFreaks	http://vampirefreaks.com/termservice.php
Windows Live	http://explore.live.com/microsoft-service-agreement?mkt=en-us
WriteaPrisoner	http://www.writeaprisoner.com/?AspxAutoDetectCookieSupport=1

Appendix B: The U.S. Supreme Court's Arbitration Jurisprudence, 1998-2012		
Case Name and Citation	Type ¹⁵⁷	Holding
Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203-04 (2012)	B2C	Holding <i>per curiam</i> that “West Virginia’s prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.”
CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 672-73 (2012)	B2C	Holding in part that consumer claims arising under the Credit Repair Organizations Act (CROA) are subject to mandatory arbitration because Congress was silent on whether CROA claims were arbitrable.

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<p>AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)</p>	<p>B2C</p>	<p>Holding that California state law, the <i>Discover Bank</i> rule, requiring the availability of classwide arbitration is inconsistent with the FAA and therefore a class action waiver coupled with a plaintiffs' arbitration agreement is enforceable under the FAA.</p>
<p>Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2862 (2010)</p>	<p>Labor</p>	<p>Holding in part that a court rather than arbitrator must decide when a collective bargaining agreement (CBA) is ratified. It is beyond the scope of the arbitration agreement to determine the starting date of a CBA.</p>
<p>Rent-a-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2779 (2010)</p>	<p>E2E</p>	<p>Holding that under the FAA, where decisions regarding the enforceability of an arbitration agreement have been assigned to an arbitrator, a district court may hear challenges on the enforcement provision specifically but challenges to the validity of the agreement as a whole must be heard by the arbitrator.</p>
<p>Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010)</p>	<p>B2B</p>	<p>Holding in part that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.</p>
<p>Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 633 (2009)</p>	<p>B2C</p>	<p>Holding that the Sixth Circuit has jurisdiction over appeal from a district court order refusing stay of action, and a litigant who is not a party to the arbitration agreement may invoke § 3 of the FAA if the relevant state contract law allows him to enforce the agreement.</p>
<p>14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009)</p>	<p>Labor</p>	<p>Holding that an arbitration provision in a CBA that clearly and unmistakably requires union members to arbitrate all claims of employment discrimination is enforceable as a matter of federal law.</p>

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Vaden v. Discover Bank, 556 U.S. 49, 53 (2009)	B2C	Holding that a federal court may “look through” an FAA § 4 petition (to compel arbitration) and order arbitration if, save for the arbitration agreement, the court would have federal-question jurisdiction over the underlying controversy between the parties.
Hall Street Assocs., LLC v. Mattel, 552 U.S. 576, 583-84 (2008)	B2C	Holding that FAA §§ 10-11 are the exclusive grounds for expedited vacatur and modification of awards and may not be supplemented by contract.
Preston v. Ferrer, 552 U.S. 346, 359 (2008)	B2C	Holding that “When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.”
Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006)	B2C	Holding that regardless of whether it is filed in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause contained within it, must go to the arbitrator and not the court.
Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451-53 (2003)	B2C	Holding that the arbitration provision in question in the state-law class action suit does not clearly preclude class arbitration, and the issue is one of state-law contract interpretation for the arbitrator, not the courts, to decide.
Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-58 (2003)	B2C	Holding that since the FAA encompasses a wider range of transactions than those actually “in commerce” (i.e. within the flow of interstate commerce), the debt-restructuring agreements do satisfy the “involving commerce” test even though they were executed in Alabama by Alabama residents and therefore the arbitration clauses were enforceable pursuant to the provision of the FAA.

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<p>PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 406-07 (2003)</p>	<p>B2B</p>	<p>Holding that physicians could be compelled to arbitrate claims, even though the agreements could be construed to limit arbitrator’s authority to award statutory treble damages.</p>
<p>Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85-86 (2002)</p>	<p>B2C</p>	<p>Holding that interpretation of NASD § 1034’s time limit rule is a matter presumptively for the arbitrator, not for the judge, and the parties’ contract did not call for judicial determination of whether arbitration was time-barred.</p>
<p>Equal Emp. Opportunity Comm’n v. Waffle House, Inc., 534 U.S. 279, 297-98 (2002)</p>	<p>E2E</p>	<p>Holding that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief in an ADA enforcement action.</p>
<p>Major League Baseball Players Ass’n v. Garvey, 532 U.S. 504, 511 (2001)</p>	<p>Labor</p>	<p>Holding that the Ninth Circuit Court of Appeals usurped the arbitrator’s role when it resolved the arbitration dispute and barred further proceedings instead of remanding for further arbitration proceedings.</p>
<p>C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 423 (2001)</p>	<p>B2C</p>	<p>Holding that by signing the agreement that contained an arbitration clause, the Tribe consented to arbitration, thereby waiving its immunity from suit in state court and agreeing to enforcement of arbitral awards in Oklahoma state courts.</p>
<p>Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001)</p>	<p>E2E</p>	<p>Holding that the Ninth Circuit erred in interpreting § 1 of the FAA, which excludes from the FAA’s coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,” to exempt all employment contracts from the reach of the FAA. The exemption in § 1 applies only to transportation workers, as all of the other Courts of Appeals that have addressed this have held.</p>

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<p>Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 88-92 (2000)</p>	<p>B2C</p>	<p>Holding that an order compelling arbitration and dismissing a party's underlying claims is a final decision with respect to arbitration in accordance with FAA § 16(a)(3) and thus immediately appealable; holding that silence in the agreement on the issue of arbitration fees does not render the agreement per se unenforceable for failing to affirmatively protect a party from potentially high arbitration costs.</p>
<p>Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 195 (2000)</p>	<p>B2C</p>	<p>Holding that §§ 9-11 of the FAA, the venue provisions, are permissive (allowing a motion to confirm, vacate, or modify an arbitration award either where the award was made or in any district proper under the general venue statute) rather than restrictive (allowing such a motion to be brought only in the district in which the award was made).</p>
<p>Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 879-80 (1998)</p>	<p>Labor</p>	<p>Holding that when a union adopts an arbitration process for challenges to the charging of an agency fee, non-union members are not required to exhaust the arbitral remedy before bringing claims in federal court unless they have agreed to do so.</p>
<p>Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 81-82 (1998)</p>	<p>E2E</p>	<p>Holding that a general arbitration clause in a CBA to arbitrate matters under dispute, without further explicit incorporation of statutory antidiscrimination requirements, does not constitute a waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination.</p>

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1. 131 S. Ct. 1740 (2011).

2. 131 S. Ct. 2874 (2011).

3. *Arbitration: Is It Fair When Forced?: Hearing on S. 987 and S. 1652 Before the S. Comm. on the Judiciary*, 112th Cong. 112 (2011) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71582/pdf/CHRG-112shrg71582.pdf>.

4. Browsewrap agreements dictate that additional browsing past the homepage constitutes assent. Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635, 1642 (2011).

5. With a clickwrap agreement, the user manifests assent to the user agreement by clicking the acceptance or registration button. Michael L. Rustad & Diane D'Angelo, *The Path of Internet Law: An Annotated Guide to Legal Landmarks*, 2011 DUKE L. & TECH. REV. 12, 39 (2011). By way of example, the FOCUS social networking site takes this form. See FOCUS, <http://www.focus.com/signup/#> (last visited Apr. 10, 2012).

6. For example, CafeMom's terms of service apply to all users of the site, and the provider reserves the right to change terms by simply posting them to the site. *Terms of Service*, CAFEMOM, <http://www.cafemom.com/about/tos.php> (last visited Apr. 10, 2012) ("CafeMom reserves the right to update or change these TOS at any time by posting the most current version of the TOS on the Site. Your continued use of the Site after we post any changes to the TOS signifies your agreement to any such changes.").

7. *Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes Advisory Committee*, AMERICAN ARBITRATION ASSOCIATION, at 9, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 (last visited Apr. 10, 2012).

8. *Terms of Use*, FETLIFE, <https://fetlife.com/fetlife/tou> (last visited Apr. 10, 2012) ("Any controversy or claim arising out of or relating to these Terms and Conditions or any user's use of the Products and Services shall be settled by binding arbitration in accordance with the commercial arbitration rules of the Arbitration and Mediation Institute of Canada.").

9. *Terms and Conditions*, GAYS, <http://gays.com/termsAndConditions.html> (last visited Apr. 10, 2012) ("The arbitration shall take place in Hong Kong, in the English language and the arbitral decision may be enforced in any court.").

10. *Arbitration: Is It Fair When Forced: Hearing on S. 987 and S. 1652 Before the S. Comm. on the Judiciary*, 112th Cong. 60 (2011) (statement of F. Paul Bland, Senior Attorney, Public Justice, noting that "[i]n many cases, mandatory arbitration clauses have the effect of immunizing corporations from any liability or accountability even when they have blatantly violated consumer protection or civil rights laws."), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71582/pdf/CHRG-112shrg71582.pdf>.

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11. Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOTIATION L. REV. 115, 126 (2010).
 12. “Private tort reform” refers to the ways that companies use contract law to limit the rights of consumers through class action waivers, caps on damages, or other restrictions on the right to recover.
 13. Matthew Weber & Peter Monge, *Network Evolution*, in ENCYCLOPEDIA OF SOCIAL NETWORKS 600 (George A. Barnett ed., 2011).
 14. FACEBOOK, <http://www.facebook.com/> (last visited Apr. 10, 2012).
 15. HABBO, <http://help.habbo.com/home> (last visited Apr. 10, 2012).
 16. TWITTER, <http://twitter.com/> (last visited Apr. 10, 2012).
 17. YOUTUBE, <http://www.youtube.com/> (last visited Apr. 10, 2012).
 18. FLICKR, <http://www.flickr.com> (last visited Apr. 10, 2012).
 19. SECONDLIFE, <http://secondlife.com> (last visited Apr. 10, 2012).
 20. *Statistics*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Apr. 10, 2012).
 21. See Weber & Monge, *supra* note 13, at 605.
 22. Doe v. MySpace Inc., 528 F.3d 413, 415 (5th Cir. 2008).
 23. *List of Social Networking Websites*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_social_networking_websites (last visited Apr. 10, 2012).
 24. The SNSs in our sample have diverse features and applications. The paradigmatic SNS enables users to construct profiles and interact with other users. Sites in the list were excluded from the sample if they began as an SNS but eliminated their social networking attributes or did not have a public terms of service agreement or a privacy policy that was accessible.
 25. *Comparison of Online Dating Websites*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_online_dating_websites (last visited Apr. 10, 2012).
 26. To paraphrase Professor Thomas Lambert Jr., “Interaction between members of a network is an essential predicate, much like a donut’s hole.” This was a phrase he used when teaching products liability. The defect in a products case is like the hole in a donut. This is the recollection of Michael Rustad, who was Tom Lambert’s student and successor to the Thomas F. Lambert Jr. endowed chair at Suffolk University Law School.
 27. We downloaded, read, discussed, and coded all available terms of service agreements and privacy policies to determine which social media providers included arbitration clauses or other alternative dispute resolution method. We created a comprehensive set of variables to describe both the physical characteristics of the arbitration clause (e.g., number of words, location in the larger document, and conspicuousness) and its substance (e.g., form of arbitration, costs, and reserved rights). Finally, we used intercoder reliability by independently coding the variables to ensure consistency in coding especially for variables that involved some subjectivity. See Matthew Lombard et al., *Intercoder Reliability: Practical Resources for Assessing and Reporting Intercoder Reliability in Content Analysis Research Projects*, <http://matthewlombard.com/reliability/#What%20is%20intercoder%20reliability> (last visited Apr. 10, 2012) (“Intercoder reliability is the widely used term for the extent to which independent coders evaluate a characteristic of a message or artifact and reach the same conclusion. . . . They write that while reliability could be based on correlational (or analysis of variance) indices that assess the degree to which ‘ratings of different judges are the same when expressed as deviations from their means,’ intercoder agreement is needed in

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content analysis because it measures only “the extent to which the different judges tend to assign exactly the same rating to each object.”). We designed the content analysis so that all variables were assessed for intercoder reliability among them. Individual coding was initially completed by two team members and then the entire group coded arbitral variables.

28. The research team coded each SNS by visiting the site and developing a typology of shared attributes.

29. One of the difficulties of content analysis is that some sites fit into more than one category. The decision rule was to determine the SNS’s “predominant purpose,” or thrust of the site, after reviewing the mission statement and primary features of each site. Intercoder reliability was used to determine variations in coding decisions.

30. Social networking sites often resemble moving streams versus frozen ponds in that their fundamental thrust changes over time because of events such as the sale of the site, new leadership, or failed business models.

31. See Weber & Monge, *supra* note 13, at 605.

32. Douglas McMillan, *Social Network Hi5 Gets Its Game On*, BLOOMBERG BUSINESSWEEK (Mar. 12, 2010), http://www.businessweek.com/technology/content/mar2010/tc20100312_481808.htm.

33. E.g., FOTKI, <http://www.fotki.com/us/en/> (last visited Apr. 10, 2012).

34. E.g., MUBI, <http://mubi.com> (last visited Apr. 10, 2012).

35. E.g., GAMERDNA, <http://www.gamerdna.com/> (last visited Apr. 10, 2012); PLAYFIRE, <https://www.playfire.com> (last visited Apr. 10, 2012); RAPTR, <http://raptr.com> (last visited Apr. 10, 2012).

36. E.g., LAFANGO, <http://lafango.com/> (last visited Apr. 10, 2012).

37. E.g., RAVELRY, <https://www.ravelry.com/account/login> (last visited Apr. 10, 2012).

38. E.g., FETLIFE, <https://fetlife.com/> (last visited Apr. 10, 2012).

39. E.g., GOODREADS, <http://www.goodreads.com/> (last visited Apr. 10, 2012); LIBRARYTHING, <http://www.librarything.com> (last visited Apr. 10, 2012).

40. FACEBOOK, <http://www.facebook.com/facebook?v=inf?> (last visited Apr. 10, 2012).

41. ACADEMIA, <http://www.academia.edu/about> (last visited Apr. 10, 2012).

42. LINKEDIN, <http://www.linkedin.com> (last visited Apr. 10, 2012).

43. Margaret M. DiBianca, *Ethical Risks Arising from Lawyers’ Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179, 181 (2011) (internal citation omitted).

44. BEBO, <http://www.bebo.com> (last visited Apr. 10, 2012).

45. E.g., HABBO, <http://www.habbo.com/> (last visited Apr. 10, 2012).

46. E.g., CAFEMOM, <http://www.cafemom.com/> (last visited Apr. 10, 2012).

47. E.g., BLACKPLANET, <http://www.blackplanet.com/> (last visited Apr. 10, 2012).

48. Our sample had two and a half times more arbitration clauses than the Internet retail sites studied by Mann and Siebeneicher, who found slightly less than ten percent of online retailers incorporated arbitration clauses. See Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 999 (2008).

49. In a study of California consumer transactions, thirty-five percent of businesses included mandatory arbitration clauses in their consumer contracts. Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004).

50. *Terms and Conditions*, FOCUS, <http://www.focus.com/about/tos/#> (last visited Apr. 10, 2012) (“Focus Research, Inc. may elect to resolve any controversy or claim arising out of

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or relating to these Terms or the Site by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association.”); *Terms of Use*, PUREVOLUME, http://www.purevolume.com/terms_of_use (last visited Apr. 10, 2012) (“Any controversy or claim arising out of or relating to these Terms and Conditions or any user’s use of the Products and Services shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association.”).

51. Under U.C.C. § 2-103(1)(b), a term is *conspicuous* if it is “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.”

52. “Whether a term is ‘conspicuous’ or not is a decision for the court and includes the following:

(i) for a person: (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language; and (ii) for a person or an electronic agent, a term that is so placed in a record or display that the person or electronic agent may not proceed without taking action with respect to the particular term.”

UCC § 2-103(1)(b) (2003).

53. Arbitral providers will sometimes permit general discovery but this requires an application to an arbitrator and is subject to the discretion of the arbitrator. *See* Paul Bennett Marrow, *When Discovery Seems Unavailable, It's Probably Available*, 80 N.Y. ST. B. ASS’N J. 44, 44–46 (October 2008), <http://www.marrowlaw.com/articles/pdf/Journal-oct08-marrow.pdf>. JAMS, for example, permits depositions and discovery at the arbitrator’s discretion, which is similar to the rule for the AAA. *Id.*

54. The social media provider has a “monopoly of knowledge” on all its contracting practices, privacy policy, and technical specifications. This is a serious omission because discovery will typically benefit the consumers in social media legal disputes.

55. *Sydnor v. Conesco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001).

56. *Griffin v. Burlington Volkswagen, Inc.*, 988 A.2d 101, 102 (N.J. Super. 2010).

57. Arbitration clauses did not typically address the distinction between class actions filed in federal and state courts and class action arbitrations. Class actions in court have radically different procedural and substantive rights than so-called class action arbitrations. For a discussion of the differences between court and arbitration class actions, see *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1757 (2011) (citing empirical research that revealed that class arbitrations did not result in final award on the merits).

58. As noted in Table Seven, ten clauses waived class actions entirely, while in one clause the user—but not the site—waives the right to pursue a class action. *Terms of Service*, TAGGED, http://www.tagged.com/terms_of_service.html (last visited Apr. 10, 2012) (original text all caps):

At any time and in its sole discretion tagged may direct the AAA to consolidate any and all pending individual arbitration claims that (i) arise in substantial part from the same and/or related transactions, events and/or occurrences, and (ii) involve a common question of law and/or fact which, if resolved in multiple individual and non-consolidated arbitration proceedings, may result in conflicting and/or inconsistent results. In said event, you hereby con-

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sent to consolidated arbitration, in lieu of individual arbitration, of any and all claims you may have against tagged and the AAA rules set forth herein shall govern all parties.

59. *Terms of Use*, GOODREADS, <http://www.goodreads.com/about/terms> (last visited Apr. 10, 2012).

60. This may not be true, however, under the laws of other countries. A French court of appeals recently ruled that a Facebook user is not bound by the provision that requires disputes to be brought exclusively in a state or federal court located in Santa Clara County. *Sébastien R. v. Société Facebook, Inc.*, Cour d'appel [CA][regional court of appeal] Pau, Mar. 23, 2012, (on file with authors). The court ruled that the provision violates Article 48 of the French Code of Civil Procedure, which requires that such a clause be highly visible. The court also found that such a restrictive clause is only valid between businesses.

61. The Joint Commission of the American Arbitration Association, the American Bar Association, and the American Medical Association identified four different types of health care arbitration: (1) predispute, final and binding arbitration; (2) predispute, nonbinding arbitration; (3) post-dispute final and binding arbitration; and (4) post-dispute, nonbinding arbitration. Am. Arbitration Ass'n, Am. Bar Ass'n, & Am. Med. Ass'n, COMMISSION ON HEALTH CARE DISPUTE RESOLUTION: FINAL REPORT 10 (Jul. 27, 1998), <http://www.ama-assn.org/ama1/pub/upload/mm/395/healthcare.pdf>.

66. Celeste M. Hammond, *A Real Estate Focus: The (Pre) Assumed 'Consent' of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 598–99 (2003) (“Most consumers and employees do not realize that they have waived these rights until they become necessary. Some of the rights most often waived in pre-employment or adhesion contracts are the aforementioned rights - trial, appeal, class action, and choice of the arbitrator.”). See F. PAUL BLAND JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS 6–12 (2007) (surveying the reasons why predispute mandatory arbitration diminishes rights of consumers).

63. Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 310, 318, 326–330 (1995) (arguing that consumer arbitration favors repeat players). See also, Edward A. Dauer, *Judicial Policing of Consumer Arbitration*, 1 PEPP. DISP. RESOL. L.J. 91 (2000); Zev J. Eigen, Nicholas F. Menillo and David Sherwyn, *Shifting the Paradigm of the Debate: A Proposal to Eliminate At-Will Employment and Implement a "Mandatory Arbitration Act"*, 87 IND. L.J. 271, 273 (2012) (arguing that those favoring and opposing mandatory arbitration are entrenched and polarized and noting that “detractors are making this erroneous presumption about mandatory arbitration.”).

64. *In re Knepp*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999).

65. Compulsory arbitration clauses in mass-market license agreements, computer contracts, or terms of service have been upheld by numerous United States courts. See, e.g., *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 706 (S.D. Ill. 2005) (ordering arbitration in case where predispute arbitration clause was added to the consumer’s contract for wireless services); *Lieschke v. RealNetworks, Inc.*, No. 99C7274, 2000 U.S. Dist. LEXIS 1683 (N.D. Ill. Feb. 10, 2000) (enforcing arbitration clauses in terms of service agreement); *Westendorff v. Gateway 2000, Inc.*, 2000 WL 307369 (Del. Ch. Mar. 16, 2000), *aff'd*, 763 A.2d 92 (Del. 2000); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530, 532–33 (N.J. 1999) (validating forum selection clause where subscribers to online software were required

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to review license terms in scrollable window and to click “I Agree” or “I Don’t Agree”); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (1998) (ordering enforcement of arbitration clause in Gateway’s standard computer contract); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203-04 (Tex. App. 2001) (upholding forum selection clause in online contract for registering internet domain names that required users to scroll through terms before accepting or rejecting them); *cf. Specht v. Netscape Commun. Corp.*, 306 F.3d 17 (2d Cir. 2002) (holding that user’s downloading software where the terms were submerged did not manifest assent to arbitration clause); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (declining to enforce arbitration clause on grounds that user did not agree to standard terms mailed inside computer box).

66. *Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes Advisory Committee*, AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 (last visited Apr. 10, 2012).

67. *Id.*

68. *Id.* (footnote omitted).

69. *Id.* (text bolded and italicized in original document).

70. *Id.* (quoting Principle 2, AAA, Consumer Due Process Protocol) (text bolded and italicized in original document).

71. “[C]onsumers rarely read or understand” predispute mandatory arbitration agreements. Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 ST. JOHN’S L. REV. 123, 160 (2007).

72. Our research team found it difficult to interpret the meaning of several of the clauses after a close examination. The typical clause was not drafted with educating the consumer in mind.

73. *Terms of Use*, FETLIFE, <https://fetlife.com/fetlife/tou> (last visited Apr. 12, 2012).

74. *Terms and Conditions*, FOCUS, <http://www.focus.com/about/tos/> (last visited Apr. 12, 2012).

75. Demaine & Hensler, *supra* note 49, at 73–74.

76. Christine Reilly, *Achieving Knowing and Voluntary Consent in Pre-dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1225 (2002) (reviewing empirical research on employment arbitration and concluding that employees “do not understand the remedial and procedural ramifications of consenting to arbitration”).

77. *Consumer Due Process Protocol* at Principle 11, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 (last visited Apr. 10, 2012).

78. These numbers are based on the standard of a 250-word page. HarperCollins Publisher, L.L.C. v. Arnell, No. 600507/08, 2009 WL 1119517, at *4 n.1 (N.Y. Sup. Ct. Apr. 15, 2009) (“It is undisputed that the standard in the book publishing industry is that a full text page contains 250 words.”).

79. “Testimony” may be broadly thought of as an oral declaration made by a witness or party under oath.

80. *See, e.g., Terms of Service*, TAGGED, http://www.tagged.com/terms_of_service.htm (last visited Apr. 10, 2012) (“[S]o long as the total amount of the relief you are seeking in the arbitration is \$10,000 or less, Tagged shall pay all other AAA administration fees and all arbitrator fees for the arbitration.”). In addition, the agreement to pay is negated “if the arbitrator in such action finds that either the substance of your dispute against Tagged or the

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relief you are seeking in the arbitration is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)).” *Id.* See also *User Agreement*, MYLIFE, <http://www.mylife.com/UserAgreement.pub> (last visited Apr. 10, 2012) (“If, however, the arbitrator finds that either the substance of your claim or the relief sought is improper or not warranted, as measured by the standards set forth in Federal Rule of Civil Procedure 11(b), then the payment of all such fees shall be governed by the AA [sic] Rules.”).

81. Match.com addresses arbitration fees in a separate Arbitration Procedures page, which is linked from the Terms of Use agreement. *Arbitration Procedures*, MATCH, <http://www.match.com/registration/arbitrationProcedures.aspx>. (last visited Apr. 10, 2012). For claims under \$1000, Match.com pays all fees. *Id.*

82. Further empirical evidence is necessary to determine whether arbitration is cheaper than a jury trial. From a consumer’s perspective, the ADR alternative may be more expensive. See Ellie Winninghoff, *In Arbitration, Pitfalls for Consumer*, N.Y. TIMES, Oct. 22, 1994, at L37 (quoting an experienced attorney stating it was a myth “that [arbitration is] cheaper—that’s definitely not true. If you go to trial, you get the judge for free.”).

83. *Consumer Arbitration Costs*, AMERICAN ARBITRATION ASSOCIATION (Fees Effective Jan. 1, 2010), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_014025 (last visited Apr. 10, 2012). When the claim or counterclaim is between \$10,000 and \$75,000, the consumer pays a maximum of \$375. *Id.*

84. *JAMS Policy on Consumer Arbitrations Pursuant to Predispute Clauses Minimum Standards of Procedural Fairness*, JAMSADR, <http://www.jamsadr.com/consumer-arbitration> (last visited Apr. 10, 2012).

85. *Small Claims FAQ*, NEW JERSEY COURTS, <http://www.judiciary.state.nj.us/civil/civ-02.htm#FileFeeSC> (last visited Apr. 10, 2012).

86. *Alaska Small Claims Handbook*, p. 3 (August 2011), available at <http://courts.alaska.gov/forms/sc-100.pdf>.

87. While the AAA’s Consumer-Related Disputes Supplementary Procedures state that “[c]onsumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business,” consumers should not have to rely on the discretion of an arbitration provider to retain this fundamental right. *Consumer Related Disputes Supplementary Procedures: Introduction*, AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/mdaw/mdax/~edisp/adrstg_004127.pdf (last visited July 15, 2012).

88. *Terms of Service*, CAFEMOM, <http://www.cafemom.com/about/tos.php> (last visited Dec. 10, 2011) (“The location of arbitration shall be New York, New York, USA.”).

89. *Terms and Conditions*, MYYEARBOOK, <http://www.myyearbook.com/terms.php> (last visited Apr. 10, 2012).

90. *Terms of Service*, MOUTHSHUT, <http://www.mouthshut.com/help/tos.php> (last visited Apr. 10, 2012) (“This Agreement is governed in all respects by the laws of Republic of India as such laws are applied to agreements entered into and to be performed entirely within India between Indian residents. Any controversy or claim arising out of or relating to this Agreement or the MouthShut.com site shall be settled by binding arbitration in accordance with the Indian Arbitration Act 1996. Any such controversy or claim shall be arbitrated on an individual basis, and shall not be consolidated in any arbitration with any claim or controversy of

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any other party. The arbitration shall be conducted in Mumbai, India and judgment on the arbitration award may be entered into any court having jurisdiction thereof.”)

91. *Terms and Conditions*, HABBO, <https://help.habbo.com/entries/278067-terms-and-conditions-us> (last visited Apr. 10, 2012).

92. *Terms of Use*, GENI, http://www.geni.com/company/terms_of_use (last visited Apr. 10, 2012) (“Nothing in this Section shall be deemed as preventing Geni from seeking injunctive or other equitable relief from the courts as necessary to protect Geni’s proprietary interests.”). CafeMom’s users “agree that, with the exception of injunctive relief sought by CafeMom for any violation of CafeMom’s proprietary or other rights,” all disputes will be resolved through arbitration. *Terms of Service*, CAFEMOM, <http://www.cafemom.com/about/tos.php> (last visited Apr. 10, 2012).

93. Hi5 and Lafango use nearly identical text: “Notwithstanding the foregoing, Hi5 may seek injunctive or other equitable relief to protect its intellectual property rights in any court of competent jurisdiction,” *Terms of Service*, Hi5, <http://hi5.com/friend/displayTOS.do> (last visited Apr. 10, 2012); “Notwithstanding the foregoing, Lafango may seek injunctive or other equitable relief to protect its intellectual property rights in any court of competent jurisdiction.” *Legal Information*, LAFANGO, <http://lafango.com/legal> (last visited Apr. 10, 2012).

94. *E.K.D. v. Facebook, Inc.*, No. 3:11-cv-461 (S.D. Ill, Mar. 8, 2012) (enforcing the forum-selection clause in Facebook’s Terms of Service); *Claridge v. RockYou Inc.*, 785 F. Supp. 2d 855 (N.D. Cal. 2011) (settling class action for failure of the site to secure user’s privacy and security); *Cohen v. Facebook, Inc.* 798 F. Supp. 2d 1090 (N.D. Cal. 2011) (holding that Facebook users did not consent to the SNS using their names and likenesses to promote service and ruling that the plaintiffs sufficiently stated a claim for appropriation of their names and likenesses for an advantage, but ruling that the plaintiffs were unable to prove damages); *In re Facebook Privacy Litigation*, 791 F. Supp. 2d 705 (N.D. Cal. 2011) (dismissing class action by Facebook users based upon the Electronic Communications Privacy Act as well as California state law); *Hubbard v. MySpace, Inc.*, 788 F. Supp. 2d 319 (S.D.N.Y. 2011) (filing class action against MySpace for alleged violation of the Stored Communications Act); *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (N.D. Cal. 2001) (approving \$8 million settlement in class action brought by Gmail users arising out of Google’s disclosure of personally identifiable information without authorization through the defunct site, Google Buzz).

95. Class actions “make it possible for plaintiffs with meritorious claims for small amounts of money, to bring th[o]se claims to court without spending more money on attorney’s fees and court expenses than the claims [a]re worth.” *City of S.F. v. Small Claims Court*, 190 Cal. Rptr. 340, 342 (Cal. Ct. App. 1983).

96. A consumer class action “produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.” *Vasquez v. Super. Ct. of San Joaquin Cnty.*, 484 P.2d 964, 968–69 (Cal. 1971).

97. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 336–37 (2007) (arguing that these clauses were included in consumer contracts to side-step class actions or aggregate dispute resolution).

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98. *Terms of Use*, MATCH, <http://www.match.com/registration/membagr.aspx> (last visited Apr. 10, 2012).
99. *Terms and Conditions*, MYYEARBOOK, <http://www.myyearbook.com/terms.php> (last visited Apr. 10, 2012).
100. These asymmetrical clauses violate the principle of mutual assent. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. d (“gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm . . . that the weaker party . . . did not in fact assent or appear to assent to the unfair terms.”).
101. *Terms of Service*, TAGGED, http://www.tagged.com/terms_of_service.html (last updated Apr. 10, 2012).
102. American Arbitration Association, *Consumer Due Process Protocol, Principle 5*, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 (last visited Apr. 10, 2012).
103. *See supra* Table Two.
104. *Id.*
105. *See Terms and Conditions*, AUDIMATED, <http://www.audimated.com/legal.php> (last visited Apr. 10, 2012); *Terms of Service*, SECONDLIFE, <http://secondlife.com/corporate/tos.php> (last visited Apr. 10, 2012); and *Terms of Service*, STUMBLEUPON, <http://www.stumbleupon.com/terms> (last visited Apr. 10, 2012).
106. *See Terms of Service Agreement*, FOTKI, <http://help.fotki.com/terms/> (last visited Apr. 10, 2012); *Terms of Service*, ITALKI, <http://www.italki.com/static/tos.htm> (last visited Apr. 10, 2012).
107. AMERICAN ARBITRATION ASSOCIATION, Q1 2012 data file, available at http://www.adr.org/cs/groups/governmentandconsumer/documents/document/mdaw/mda3/~e disp/adrstg_015403.xls (last visited Apr. 12, 2012). One claim filed by a consumer against a social networking site, MyPartner.com, was settled. *Id.* at Case ID 742009000485.
108. *See 2011 Release 03*, THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/data.php> (last visited Apr. 10, 2012).
109. *See infra* Appendix B for a list of the cases.
110. 9 U.S.C. §§ 1–16 (2006).
111. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1636 (2005).
112. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 76 (1997).
113. *Id.* at 78.
114. *See* Sternlight, *supra* note 111, at 1636 (internal quotation marks omitted).
115. Schwartz, *supra* note 112, at 78. *See also* Arbitration Fairness Act of 2009, H.R. 1020, § 2; S. 931, 111th Cong. sec. 2, 111th Cong. (2009).
116. *In re Knepp*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999).
117. Demaine & Hensler, *supra* note 49, at 55; *see also* Sternlight, *supra* note 111, at 1638.
118. Michael A. Satz, *Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform*, 44 IDAHO L. REV. 19, 26 (2007).
119. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).
120. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). Justice O’Connor dissented, believing not only that Congress did not intend for the FAA to preempt state law, but that

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“[o]ne rarely finds a legislative history as unambiguous as the FAA’s.” *Id.* at 25 (O’Connor, J., dissenting). Professor Ian Macneil blasted Chief Justice Burger’s opinion in *Southland* as reflecting a “painfully misleading history of the FAA.” IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 5.3.1, at 5:6 n.3 (Supp. 1999). Some legal scholars believe that the widespread use of arbitration clauses in consumer and employment contracts, often referred to as the consumerization of arbitration, “is due at least in part to *Southland*.” Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 102 (2002).

121. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)).

122. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

123. *See Sternlight*, *supra* note 111, at 1637–38.

124. *See Gilmer*, 500 U.S. at 33 (1991).

125. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

126. *Id.* at 273.

127. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

128. 131 S. Ct. 1740 (2011) (finding California’s rule as stated in *Discover Bank v. Super. Ct.*, 30 Cal. Rptr. 3d 76 (2005), was preempted by the FAA).

129. “Unconscionability has generally been recognized to include 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.” *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). Article 2 of the UCC adopted the concept of unconscionability permitting courts to police and strike down one-sided, oppressive and surprising terms. *See U.C.C.* § 2-302, cmt. 1.

130. *See Concepcion*, 131 S. Ct. at 1744 (citations omitted).

131. *Id.* at 1745.

132. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (reversing and remanding *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204 (9th Cir. 2010)).

133. *Id.* at 668.

134. *Id.* at 673.

135. *Id.* at 672.

136. *Id.* at 676 (Ginsberg, J., dissenting).

137. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

138. *Id.* at 1202.

139. *Brown v. Genesis Healthcare Corp.*, No. 35494 (W. Va., June 29, 2011), App. to Pet. for Cert. in No. 11-391, pp. 85a-86a.

140. *Marmet*, 132 S. Ct. at 1203-04.

141. *Id.*

142. *Id.*

143. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 14 n.3 (2002).

144. *Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643, 658 n.8 (Pa. 2002), *abrogated by Gaffer Ins. Co. Ltd. v. Discover Reinsurance Co.*, 936 A.2d 1109 (Pa. 2007) (emphasis in original).

145. Adam Borstein, *Arbitrary Enforcement: When Arbitration Agreements Contain Unlawful Provisions*, 39 LOY. L.A. L. REV. 1259, 1294 (2006). For an interesting empirical study of declining award finality in arbitration cases, see Michael H. LeRoy, *Misguided*

Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality, 83 NOTRE DAME L. REV. 551, 554 (2008). See also Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice*, 24 GEO. J. LEGAL ETHICS 225, 236–37 (2011).

146. Frank Blechschmidt, Comment, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 565 (2012).

147. See LeRoy, *supra* note 145, at 556.

148. Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011) (available at <http://www.govtrack.us/congress/billtext.xpd?bill=s112-987> (last visited Apr. 10, 2012)).

149. Press Release, Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts against Corporations (Apr. 27, 2011), available at http://franken.senate.gov/?p=press_release&id=1466.

150. See S. 987 § 2.

151. See S. 987 § 3.

152. See S. 987 § 3.

153. See *id.*

154. The bill's passage seems unlikely. It has not advanced since it was introduced in 2011 and is opposed by the U.S. Chamber of Commerce. See David Lazarus, *Lawmakers Should Ensure Consumers Have the Right to Sue*, L.A. TIMES, Jan. 13, 2012, at 1. For a proposal that seeks to improve arbitration programs while bypassing the legislature and courts, see Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985 (2012) (proposing a new rating system to increase awareness of and spur changes to consumer and employment arbitrations).

155. See *Arbitration: Is It Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, *supra* note 10 (statement of Victor E. Schwartz, Partner, Shook Hardy & Bacon, LLP, on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform).

156. NATIONAL CONSUMER LAW CENTER, <http://www.nclc.org/issues/arbitration-a-access-to-justice.html> (last visited Apr. 10, 2012).

161. B2C = Business to Consumer; Labor = Labor Collective Bargaining Agreement; E2E = Employer to Employee; B2B = Business to Business.