Bank Robbery in the Bizarro World[1]

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Code Section Affected
Code of Civil Procedure §1281.2 (amended).
SB 33 (Dodd); 2017 STAT. Ch. 480.

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1. *See* SUPERMAN: TALES OF THE BIZARRO WORLD (DC Comics 2000) (explaining the Bizarro World is a world where everything is its own opposite).

I. INTRODUCTION

Greed pushed Wells Fargo bank employees to open over two million bank accounts without customer knowledge or consent.[2] Employees, fearing humiliation and possibly termination for failing to meet aggressive and unrealistic sales goals, began forging customer signatures, creating fake PINs and email addresses, and sending bills from the phony accounts to their own addresses so the customers would never find out.[3] Employees would then pay for the unauthorized products by transferring money from the customers' other accounts, or would harm credit scores by simply letting late fees accrue.[4]

This practice continued for at least a decade[5] and was designed to boost sales figures and increase Wells Fargo's stock value.[6] After the fake accounts generated millions in fines for the customers[7] and hundreds of millions in gains for Wells Fargo,[8] the joy ride eventually ended.[9] The customers Wells Fargo

2. Consumer Fin. Protections Bureau, Consent Order on Wells Fargo Bank, N.A. at 5, 7 (Sept. 8, 2016) [hereinafter Consent Order] (stating the Consumer Financial Protection Bureau found that Wells Fargo employees opened 1,534,280 unauthorized deposit accounts and applied for 565,443 unauthorized credit-card accounts, a total of 2,099,723 unauthorized bank accounts); James Rufus Koren, *Wells Fargo May Have Created 3.5 Million Unauthorized Accounts—1.4 Million More Than Estimated, Attorneys Say*, L.A. TIMES (May 12, 2017, 4:05 PM), http://www.latimes.com/business/la-fi-unauthorized-accounts-20170512-story.html (on file with *The University of the Pacific Law Review*) (showing recent estimates put that number closer to 3.5 million, based on "public information, negotiations, and confirmatory discovery," however "[t]he filing cautions that the 3.5 million figure could be an overestimate, though a reasonable one.").

3. E. Scott Reckard, *Wells Fargo's Pressure-Cooker Sales Culture Comes at a Cost*, L.A. TIMES (Dec. 21, 2013, 12:00 PM), http://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html (on file with *The University of the Pacific Law Review*).

4. James F. Peltz, *Wells Fargo's Collateral Damage: Customers' Credit Scores*, L.A. TIMES (Sept. 23, 2016, 3:00 AM), http://www.latimes.com/business/la-fi-wells-fargo-credit-scores-20160923-snap-story.html (on file with *The University of the Pacific Law Review*); *see also* Editorial, *The Wells Fargo Spillover Effect*, N.Y. TIMES (Sept. 22, 2016), https://www.nytimes.com/2016/09/23/opinion/the-wells-fargo-spillover-effect.html (on file with *The University of the Pacific Law Review*) (stating that while the actual effect on credit scores is "difficult to measure," analysts from Goldman Sachs Group Inc. estimated that "if all the Wells Fargo customers with unwanted credit cards then applied for mortgages, they potentially faced $50 million in higher interest expenses overall.").

5. Stacy Cowley, *At Wells Fargo, Complaints About Fraudulent Accounts Since 2005*, N.Y. TIMES (Oct. 11, 2016), https://www.nytimes.com/2016/10/12/business/dealbook/at-wells-fargo-complaints-about-fraudulent-accounts-since-2005.html (on file with *The University of the Pacific Law Review*).

6. *See* Consent Order, *supra* note 2, at 4; *see also* Jena McGregor, *'You Should Resign': Elizabeth Warren Excoriates Wells Fargo CEO John Stumpf*, WASH. POST (Sept. 20, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/09/20/you-should-resign-elizabeth-warren-excoriates-wells-fargo-ceo-john-stumpf/?utm_term=.989d7964f8b4 (on file with *The University of the Pacific Law Review*) (questioning former Wells Fargo CEO John Strumpf at a Senate hearing, Senator Elizabeth Warren stated: "While this scam was going on, you personally held an average of 6.75 million shares of Wells Fargo stock …. The share price during this time went up by about $30, which comes out to more than $200 million in gains, all for you personally.").

7. Consent Order, *supra* note 2, at 5, 7 (finding that roughly 85,000 of the unauthorized deposit accounts incurred around $2 million in fees, while roughly 14,000 of the unauthorized credit-card accounts generated $403,145: Wells Fargo is in the process of refunding these fees).

8. McGregor, *supra* note 6.

defrauded, however, never got to face the bank giant in court.[10] By enforcing the arbitration clauses in the fine print of its contracts and sending all its customers' claims to private arbitration, Wells Fargo was able to ward off any public courtroom scrutiny.[11]

Chapter 480 is a direct response to this use of compelled arbitration to avoid answering to juries in a public court of law,[12] a tactic the senator who introduced Chapter 480 called "un-American."[13] Chapter 480 supporters—mainly consumer advocate groups[14]—hope the threat of public litigation will deter financial institutions from committing similar acts of fraud in the future,[15] and address the "growing breakdown of integrity in the culture of too many of our financial institutions."[16] The opposition—notably banks, insurance companies, and chambers of commerce[17]—have called Chapter 480 a "job killer,"[18] and believe the Federal Arbitration Act preempts it.[19]

II. LEGAL BACKGROUND

Arbitration clauses are frequently found in the fine print of consumer contracts—people who own cell phones, use credit cards, or have student loans[20] are exceedingly likely to be subject to one, often without even knowing it.[21]

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9. Michael Corkery, *Wells Fargo Fined $185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), https://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html (on file with *The University of the Pacific Law Review*).

10. Michael Hiltzik, *How Wells Fargo Exploited a Binding Arbitration Clause to Deflect Customers' Fraud Allegations*, L.A. TIMES (Sept. 26, 2016, 11:55 AM), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-wells-arbitration-20160926-snap-story.html (on file with *The University of the Pacific Law Review*).

11. James Rufus Koren, *Even in Fraud Cases, Wells Fargo Customers are Locked into Arbitration*, L.A. TIMES (Dec. 5, 2015), http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20151205-story.html (on file with *The University of the Pacific Law Review*).

12. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 33, at 1 (Apr. 24, 2017).

13. Treasurer Chiang, *Sen. Dodd Act to Stop Banks from Using Forced Arbitration to Settle Fraud Accusations*, California State Treasurer John Chiang (May 2, 2017), http://www.sto.ca.gov/news/releases/2017/20170502/23.pdf (on file with *The University of the Pacific Law Review*).

14. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 33, at 7 (Apr. 24, 2017).

15. *Id.* at 4–5.

16. Treasurer Chiang, *supra* note 12.

17. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 33, at 7–8 (Apr. 24, 2017).

18. Jennifer Barrera, *CalChamber-Opposed Job Killer Bill Discriminates Against Arbitration*, CALCHAMBER (Jan. 17, 2017), https://advocacy.calchamber.com/2017/01/17/calchamber-opposed-job-killer-bill-discriminates-against-arbitration/ (on file with *The University of the Pacific Law Review*).

19. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 33, at 6 (Apr. 24, 2017).

20. CFPB, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) at 7 (Mar. 2015) [hereinafter ARBITRATION STUDY] *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (on file with *The University of the Pacific Law Review*).

21. *Id.* § 1 at 11 ("Consumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally either do not know whether they

Parties subject to an arbitration clause may enforce it by asking a court to send both parties to arbitration if an issue arises between them.[22] An alternative to courtroom litigation, arbitration resolves disputes informally before arbitrators, instead of judges or juries.[23] Arbitration proceedings are private and may be kept confidential, and attorneys play a much more limited role.[24] Unlike the scope of judicial review that has a relatively low threshold for appealing a judgment, the scope of review for arbitration awards is "extraordinarily narrow."[25] For many, this informality makes arbitration preferable to the court system, which uses formalistic procedures and is notoriously slow.[26] Still, while arbitration may be significantly faster,[27] its informality and the risk of arbitrator bias causes many to oppose its grip over parties who would otherwise never agree to its terms.[28] Further, the rise of forced arbitration in disputes between corporations and consumers raises constitutional issues by depriving millions of Americans of their Seventh Amendment right to trial by jury.[29]

Part A explains the federal law that provides the legal basis for enforcing arbitration.[30] Part B discusses practical impacts of widespread arbitration use in

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can sue in court or wrongly believe that they can do so.").

22. Federal Arbitration Act (FAA) of 1925, 9 U.S.C. § 3 (West 2016).

23. Bernhardt v. Polygraphic Co. of America, Inc, 350 U.S. 198, 203 (1956).

24. A.B.A., BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES at 3, *available at* https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf (last visited July 3, 2017) [hereinafter A.B.A.] (on file with *The University of the Pacific Law Review*) ("Many hearing related matters which consume time and money in court are usually not part of arbitration such as extensive evidentiary issues, voir dire, jury charges, proposed findings of fact, endless authentication of documents, qualification of experts, and cumulative witnesses. Finally post hearing appeals and court proceedings are far more limited in arbitration than in court.").

25. Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990).

26. *See* A.B.A., *supra* note 24, at 3 (noting how, in 2011, the median amount of time it takes after filing a civil case in district court to reach disposition of appeal was 30.8 months, while the average time from starting arbitration proceedings to issuing a final award was around 7 months).

27. *Id.*

28. Thomas J. Stipanowich, *The Arbitration Fairness Index*, 60 U. KAN. L. REV. 985, 1026 (2012). *See* Omri Ben-Shara, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755, 1796 (2016) (citing as some of the more "frequently voiced concerns" over arbitration as being: "the lack of effective choice by consumers regarding binding arbitration, concerns about bias …, arbitration-related costs…, the opacity and difficulty of challenging arbitration awards, and the lack of information regarding the performance of arbitration systems."); *see also* Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability*, 56 S.M.U. L. REV. 819, 823 (2003) (explaining how the problem of power imbalances and lack of substantive judicial review in arbitration is "exacerbated by the fact that arbitrators, unlike judges, have economic incentives with respect to their case loads that can affect their judgment in individual cases.").

29. Norman W. Spaulding, *Due Process Without Judicial Process*, 85 FORDHAM L. REV. 2249, 2250 (2017) ("Some scholars view the disappearance of jury trials in civil cases as a Seventh Amendment crisis, the product of a gradual but systematic and unconstitutional redistribution of decision-making authority from juries to judges over the last 175 years.").

30. *See infra* Part II.A.

the financial industry, nonjudicial efforts to narrow the federal law, and California's arbitration law amended by Chapter 480.[31]

A. The Federal Arbitration Act

Subpart 1 examines the Supreme Court's broadening of the Federal Arbitration Act (FAA) over the past several decades.[32] Subpart 2 describes the FAA's recent developments and current status.[33] Subpart 3 explains the FAA's preemptive authority over conflicting state law.[34]

The FAA[35] makes arbitration clauses contained in maritime and commercial contracts "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[36] The Act was designed to place contracts with arbitration clauses "on the same footing as other contracts"[37] in response to how hostile courts were toward compelling arbitration.[38]

1. Supreme Court Broadens the FAA's Scope

After the FAA was enacted, courts treated the law as a matter of procedure for application in federal diversity cases.[39] Thus, based on the requirement that federal courts sitting in diversity apply state substantive law,[40] if a court decided

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31. *See infra* Part II.B.

32. *See infra* Part II.A.1.

33. *See infra* Part II.A.2.

34. *See infra* Part II.A.3.

35. Federal Arbitration Act (FAA) of 1925, 9 U.S.C. §§ 1–16 (West 2016).

36. 9 U.S.C. §§ 2–4 (establishing two means of enforcing arbitration upon the petition of a party: through a stay of any proceedings brought in court until all issues referable to arbitration are decided, or by ordering arbitration once "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.").

37. Dr.'s Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (quoting Scherk v. Alberto-Culver Co., 417 U. S. 506, 511 (1974)).

38. *See* Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 120–21 (1924) ("[F]ederal courts . . . both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance . . . or to stay proceedings on the original cause of action."); *see also* Danielsen v. Entre Rios R. Co., 22 F.2d 326, 327 (D. Md. 1927) ("Prior to the [FAA], the law was well settled that agreements for arbitration would not be allowed to oust the jurisdiction of the federal courts. Therefore no effect was given to them, even though they might be recognized as valid.").

39. *See* Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 278 (1932) (declaring the FAA constitutional, the Court classified the Act as procedural, stating: "[t]he general power of the Congress to provide remedies in matters falling within the admiralty jurisdiction of the federal courts, and to *regulate their procedure*, is indisputable.") (emphasis added); *see also* In re Woerner, 31 F.2d 283, 284 (2d Cir. 1929) (holding that the FAA, as law applicable in federal courts, did not govern the dispute because there was no diversity of citizenship or the sufficient amount in controversy).

40. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (putting forth the "Erie Doctrine" by holding that federal courts in diversity cases must apply state substantive law).

to apply the FAA, it would have to carefully ensure it did not infringe substantive state rights.[41] The Supreme Court decided 31 years later that the FAA was actually substantive, not procedural,[42] and as such seriously limited its use in federal diversity cases for the next several years.[43]

In 1967, the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* took a new stance towards arbitration.[44] Calling the FAA a legitimate exercise of congressional power over commerce, the Court held that it applied in federal diversity cases despite being substantive.[45] Additionally, it held that arbitration clauses were "separable" from their "container contracts."[46] This case concerned allegations that the bankrupt Flood & Conklin falsely represented itself as solvent to induce Prima Paint to enter into a consulting contract.[47] If true, Prima Paint may have voided the contract because it was induced by fraud.[48] Yet this consulting contract contained an arbitration clause, and based on what is now referred to as the "separability doctrine,"[49] the Court treated the arbitration clause as a separate contract, enforced it, and sent Prima Paint's fraudulent inducement

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41. *Id.* at 79; *see also* Wilko v. Swan, 346 U.S. 427, 435, 438 (1953) (choosing to invalidate an arbitration clause as applied to an issue arising under the Securities Act, the Court explained: "[e]ven though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings."); *see also* American Almond Prod. Co. v. Consol. Pecan Sales Co., 144 F.2d 448, 451 (1944) Learned Hand explained:

> Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.

Id.

42. Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 199–200 (1956) (applying state law after finding that compelling arbitration would make a radical difference in the ultimate result as compared to if the Court followed the Vermont state law that allowed for the revocation of arbitration agreements at any time prior to a judgment).

43. *See Federal Arbitration Act and Application of the "Separability Doctrine" in Federal Courts*, 1968 DUKE L.J. 588, 588 (1968) ("The classification of arbitration as "substantive" in *Bernhardt v. Polygraphic Company* jeopardized application of the federal Arbitration Act in diversity cases.").

44. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (expanding drastically the application of the FAA after having been declared substantive by the *Bernardt v. Polygraphic Co.* Court).

45. *Id.* at 405 (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)); S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) ("[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty.") (internal quotation marks omitted).

46. *Id.* at 410 (Black, J. dissenting) (using "container contract" to refer to the underlying contract that contains, for example, an arbitration clause).

47. *Id.* at 398.

48. *Id.* at 407 (Black, J., dissenting).

49. Stephen J. Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing, Inc. v. Cardegna, 8 NEV. L.J. 107, 109 (2007) ("This holding is known as the 'separability' doctrine because it treats the arbitration clause as if it is a separate contract from the contract containing the arbitration clause, that is, the *container contract*.") (internal quotation marks omitted) (emphasis added).

claim to arbitration.[50] In doing so, the Court interpreted the FAA's savings clause, which states: "save upon such grounds as exist at law or in equity for the revocation of any contract,"[51] as a means to challenge only the arbitration clause itself, rather than the contract as a whole. Revoking a contract on traditional grounds (such as fraud) could only be done if fraud was used to induce the arbitration clause specifically, rather than the entire contract.[52]

The Court doubled down on its new "liberal federal policy favoring arbitration"[53] in the 1980s, ruling that the FAA requires "rigorous" enforcement[54] in both state and federal courts.[55] This rigorous enforcement meant that any doubts as to whether a dispute should fall within the scope of an arbitration clause would need to be resolved "in favor of arbitration."[56] That is, a court could only refuse to send a claim to arbitration if there was "*positive assurance* that the arbitration clause is not susceptible [to] an interpretation that covers the asserted dispute."[57] As a result, a wide array of claims that can arise between parties to a contract, even torts,[58] usually fit well within the scope of arbitration clauses—particularly those worded broadly.[59] In fact, the only time disputes fall outside the scope of a broadly-worded arbitration clause is when the claim could be pursued "without referring to the contract or relationship at issue."[60]

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50. *Prima Paint Corp.*, 388 U.S. at 409 (Black, J., dissenting).

51. 9 U.S.C. § 2 (showing the FAA's "savings clause" follows immediately after the mandate that arbitration clauses be "valid, irrevocable, and enforceable") (emphasis added).

52. *Prima Paint Corp.*, 388 U.S. at 404 ("[A] federal court may consider only issues relating to the making and performance of the *agreement to arbitrate*") (emphasis added). *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 71, 130 S. Ct. 2772, 2778 (2010) (quoting *Prima Paint Corp.*, 388 U.S. at 403–04 ("In *Prima Paint* . . . if the claim had been fraud in the inducement of the arbitration clause itself, then the court would have considered it.") (internal quotation marks omitted).

53. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

54. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985).

55. Southland Corp. v. Keating, 465 U. S. 1, 16 (1984).

56. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

57. AT&T Techs. v. Comm. Workers of Am., 475 U.S. 643, 650 (1986) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960)) (emphasis added).

58. *See* Fazio v. Lehman Bros., Inc., 340 F.3d 386, 395 (6th Cir. 2003) ("Even real torts can be covered by arbitration clauses [i]f the allegations underlying the claims 'touch matters' covered by the [agreement].").

59. *AT&T Techs.*, 475 U.S. at 650 (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584–85 (1960)) ("Such a presumption [favoring coverage of the arbitration provision] is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder.") (internal quotation marks omitted).

60. Telecomms. Decision Makers, Inc. v. Access Integrated Networks, Inc., 654 F. App'x 218, 222 (6th Cir. 2016) (quoting Fazio v. Lehman Bros., Inc., 340 F.3d 386, 395 (6th Cir. 2003)).

2. Modern FAA

In 2007, the Court in *Buckeye Check Cashing, Inc. v. Cardegna* expanded the separability doctrine, declaring arbitration clauses separable from not only potentially *voidable* container contracts, but also from those that are *void* on inception.[61] Allegations of usurious interest rates would have made Buckeye Check Cashing's contracts illegal and unenforceable by either party.[62] The Court enforced the contracts' arbitration clauses anyway, because the FAA's use of the word "contract" "so obviously includes putative contracts."[63]

Four years later, the Court in *AT&T Mobility LLC v. Concepcion* held that California courts could not use the general contractual defense of unconscionability[64] to invalidate an arbitration clause's class action waiver.[65] In finding California's "*Discover Bank* rule" preempted by the FAA,[66] the majority explained: "[c]ontract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause,"[67] and California's refusal to enforce class action waivers as unconscionable "[stood] as an obstacle to the accomplishment of the FAA's objectives."[68]

3. Preemption

This apparent FAA conflict sent the *Discover Bank* rule into a fast-growing club of state laws preempted by the FAA.[69] Such preemptive authority[70] stems

61. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448 (2006).

62. *Id.* at 443.

63. *Id.* at 448.

64. Dean Witter Reynolds v. Super. Ct., 211 Cal. App. 3d 758, 795 (1989) (stating that the unconscionability doctrine allows the court to refuse to enforce a contract it deems "unconscionable," that is, one where a party lacks meaningful choice, the provision is "hidden in a prolix printed form" and is "overly harsh or one-sided.").

65. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–52 (2011); *see* Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 1101 (2002) ("[A class action waiver] provides the customer with no benefit whatsoever; to the contrary, it seriously jeopardizes customers' consumer rights by prohibiting any effective means of litigating Discover's business practices. This is not only substantively unconscionable, it violates public policy by granting Discover a "get out of jail free" card while compromising important consumer rights.").

66. *Concepcion*, 563 U.S. at 334, 351–52 (2011) (explaining the *Discover Bank* rule as being the holding that: "class waivers in consumer arbitration agreements are unconscionable if the agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud.").

67. *Id.* at 355–56.

68. *Id.* at 355.

69. *See* Perry v. Thomas, 482 U.S. 483, 484, 491 (1987) (preempting § 229 of the California Labor Code which allowed for wage collection actions to be brought in court despite being subject to an arbitration agreement); *see also* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (preempting "§ 31512 of the California Franchise Investment Law"); Adkins v. Labor Ready, Inc., 303 F.3d 496, 506 (4th Cir. 2002) (preempting a

from the U.S. Constitution's Supremacy Clause,[71] and because the FAA does not have express preemption language in its text,[72] the Supreme Court has inferred a preemptive effect.[73] States today cannot pass laws that "interfere with fundamental attributes of arbitration,"[74] or that "prohibit[] outright the arbitration of a particular type of claim."[75] State laws also cannot invalidate arbitration clauses unless the law is "generally applicable" to all contracts[76]—it cannot

West Virginia rule that prevented human rights claims from compelled arbitration); Abela v. Gen. Motors Corp., 669 N.W.2d 271, 278 (Mich. Ct. App. 2003) (preempting a Michigan law preventing lemon law claims from compelled arbitration).

70. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

> Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied preemption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. (internal quotation marks and citations omitted). *See* Kristen M. Blankley, *Impact Preemption*, 67 FLA. L. REV. 711, 711 (2015) (coining the term "impact preemption" for the FAA, explaining how the Supreme Court has made the scope of the FAA's preemption "broader than even field preemption.").

71. U.S. CONST. art. VI, cl. 2. *See* Altria Group, Inc. v. Good, 555 U.S. 70, 76 (2008) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)) ("[S]tate laws that conflict with federal law are without effect.") (internal quotation marks omitted).

72. Volt Info. Sci., Inc. v. Bd. of Tr. of LeLand Stan. Jr. Univ., 489 U.S. 468, 477 (1989).

73. *Southland*, 465 U.S. at 15–16 ("[S]ince the overwhelming proportion of civil litigation in this country is in the state courts, Congress could not have intended to limit the Arbitration Act to disputes subject only to *federal*-court jurisdiction. In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements"). This inference has been roundly criticized for contradicting the FAA's clear and unmistakable congressional intent. *See id.* at 23 (O'Connor, J., dissenting) ("The Court's decision . . . utterly fails to recognize the clear congressional intent underlying the FAA."); *see also id.* at 25 ("One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts"); *see also* Brief of Arbitration Scholar Imre S. Szalai As Amicus Curiae In Support Of Respondents, Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017) (No. 16–32) at 13 ("*Southland* is considered one of the most deeply flawed Supreme Court decisions ever issued regarding federalism, due to the broad, unconstitutional intrusion on state sovereignty arising from *Southland*."); Thomas Burch, *Necessity Never Made a Good Bargain*, 31 FLA ST. U. L. REV. 1005, 1014 (2004) ("*Southland* is perhaps the most controversial case in the Supreme Court's history of arbitration jurisprudence.").

74. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–45 (2011) (quoting Preston v. Ferrer, 552 U.S. 346, 357–58, 128 S. Ct. 978 (2008)) (explaining some "fundamental attributes of arbitration" are "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.").

75. *Id.* at 341.

76. Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions.").

"apply only to arbitration" or "derive [its] meaning from the fact that an agreement to arbitrate is at issue."[77]

This preemptive authority applies even if the state law is a matter of important public policy[78] or secures vindication of certain rights.[79] In fact, two years after *Concepcion*, the Court rejected the argument that prohibiting class actions precludes vindication of important rights because there is "no economic incentive to pursue [claims] individually in arbitration."[80] The *American Express Co. v. Italian Colors Restaurant* decision[81] dealt with the "effective vindication" exception set out by the Supreme Court in 1984, whereby arbitration agreements that acted as prospective waivers of statutory rights were recognized as against public policy.[82] Disregarding the economic realities of litigation, the *Italian Colors* majority stated: "[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."[83]

B. Practical Impacts and California's Arbitration Law

Through this fervent judicial sponsorship, arbitration agreements have increased in prominence,[84] limiting the ability of states to create or enforce laws addressing the potentially negative effects of reading the FAA so broadly.[85] Subpart 1 elaborates on how the current state of the law has allowed Wells Fargo to successfully enforce its arbitration clauses against its defrauded customers.[86] Subpart 2 describes efforts to curb unfairness incident to the rigorous enforcement of arbitration clauses.[87] Subpart 3 gives a brief overview of California's Arbitration Act.[88]

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77. Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017).

78. *Concepcion*, 563 U.S. at 355 ("Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.").

79. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311 (2013).

80. *Id.* at 2310.

81. *Id.* at 2310–12.

82. Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc., 473 U. S. 614, 637 n.19 (1984) (noting there would be "little hesitation in condemning [a clause that acted as a prospective waiver of the right to pursue statutory remedies for antitrust violations] as against public policy.").

83. *Italian Colors Rest.*, 133 S. Ct. at 2311.

84. Scott Atlas & Nancy Atlas, *Potential ADR Backlash*, 10 DISP. RESOL. MAG. 14, 15 (2004) (noting the American Arbitration Association reported a growth in arbitrations from less than 61,000 in 1990, to over than 230,000 in 2002).

85. *See* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 394 n.2 (2004) (providing a sampling of preempted state laws).

86. *See infra* Part II.B.1.

87. *See infra* Part II.B.2.

88. *See infra* Part II.B.3.

1. Wells Fargo Cashes in its Get-Out-of-Jail-Free Card[89]

Because arbitration clauses are rigorously enforced, Wells Fargo has managed to stay out of the courtroom and avoid facing the consequences of its multi-year scam.[90] When defrauded customers tried suing, the bank prevented their claims from reaching a courtroom by enforcing the arbitration clauses from the original contracts the customers signed,[91] each containing class action waivers and agreements to arbitrate all disputes.[92] In fact, "dispute" was defined as "any unresolved disagreement between you and the Bank," including "any disagreement relating in *any way* to services, accounts or matters . . . broken promises or contracts, *torts*, or other *wrongful actions* . . . statutory, common law, and equitable claims."[93] Such broad clauses meant that even if a judge had doubts as to whether identity theft and fraud ought to fall within their scope, those doubts were to be resolved "in favor of arbitration."[94]

2. Nonjudicial Attempts at Narrowing the FAA

Recognizing that the judiciary's infatuation with arbitration entailed unfairness in certain contexts, the other two branches of government have attempted to limit the FAA's broad reach.[95] In 2002, the Motor Vehicle Franchise Contract Arbitration Fairness Act required that pre-dispute arbitration clauses between motor vehicle dealers and manufacturers have both parties' consent before becoming enforceable.[96] Passage of the Dodd-Frank Act in 2010 barred the use of arbitration clauses in mortgage contracts[97] and enforcing such clauses against whistleblowers.[98] President Barack Obama's Fair Pay and Safe

89. Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 1101 (2002) (stating that class action waivers in particular have been called "get out of jail free cards," because they "[prohibit] any effective means of litigating [a corporation's] business practices.").

90. *See* Order Granting Defendant's Motions to Compel Arbitration, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC (N.D. Cal. 2015) No. 58, 59 at 3 (granting motion to compel arbitration over disputes concerning the illegal use of personal identifying information to open fake accounts).

91. *Id.*

92. Motion to Compel Arbitration of Plaintiff Kaylee Heffelfinger's Claims at 3, Jabbari v. Wells Fargo & Co. (N.D. Cal. 2015) (No. 15-cv-02159-VC).

93. *Id.* (emphasis added).

94. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

95. Motor Vehicle Franchise Contract Arbitration Fairness Act, Senate Bill 1140, 107th Cong. (2001); Motor Vehicle Franchise Contract Arbitration Fairness Act, Senate Bill 1140, 107th Cong. (2001); Dodd-Frank Act of 2010, H.R. 4173 § 922(b) (codified as 18 U.S.C. 1514A(e)) (West 2015); Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2016).

96. Motor Vehicle Franchise Contract Arbitration Fairness Act, Senate Bill 1140, 107th Cong. (2001) (providing "greater fairness in the arbitration process relating to motor vehicle franchise contracts").

97. Dodd-Frank Act of 2010, H.R. 4173 § 1414(e) (codified as 15 U.S.C. 1639c(e)) (West 2015).

98. Dodd-Frank Act of 2010, H.R. 4173 § 922(b) (codified as 18 U.S.C. 1514A(e)) (West 2015).

Workplaces Executive Order of 2014 barred employers from forcing arbitration of workers' sexual harassment, sexual assault, and workplace discrimination claims.[99] Recent attempts have been unsuccessful, however,[100] including the Justice for Victims of Fraud Act of 2016, which would have invalidated pre-dispute arbitration agreements related to unrequested credit cards.[101] Indeed, the trend of scaling back the FAA's expanse appears to have halted—a bill introduced in the Senate that would allow courts to invalidate arbitration clauses as unconscionable[102] has a 1% chance of enactment.[103] Furthermore, a rule by the Consumer Financial Protection Bureau (CFPB) banning pre-dispute class action waivers in arbitration clauses between financial providers and consumers[104] was instantly attacked by a swarm of banks,[105] and eventually repealed by Congress[106] with the Trump administration's blessing.[107]

3. California's Arbitration Act

Tracking closely to the FAA, Civil Code Section 1281.2 of the California Arbitration Act (CAA)[108] provided three exceptions to the court's obligation to

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99. Exec. Order No. 13673, 79 Fed. Reg. 45309 at 45314 (July 31, 2016).

100. The following bills did not end up passing: Fair Contracts for Growers Act of 2007, Senate Bill 221, 110th Cong. (2007) ("A bill . . . to provide for greater fairness in the arbitration process relating to livestock and poultry contracts."); Fairness in Nursing Home Arbitration Act, H.R. 6126, 110th Cong. (2008) (making pre-dispute arbitration clauses in long-term care facilities, such as nursing homes, unenforceable).

101. Justice for Victims of Fraud Act of 2016, Senate Bill 3491, 114th Cong. (2016) (amending "the Truth in Lending Act and the Electronic Fund Transfer Act to provide justice to victims of fraud.").

102. Restoring Statutory Rights and Interests of the States Act, S. 550, 115th Cong. (2017) (amending 9 U.S.C. § 2) (amending the FAA's savings clause—"save upon such grounds as exist at law or in equity for the revocation of any contract"—to include: "a Federal or State statute, or the finding of a Federal or State court, that prohibits the agreement to arbitrate on grounds that the agreement is unconscionable, invalid because there was no meeting of the minds, or otherwise unenforceable as a matter of contract law or public policy.").

103. *S. 550: Restoring Statutory Rights and Interests of the States Act of 2017*, GOVTRACK (last visited June 15, 2017), https://www.govtrack.us/congress/bills/115/s550 (on file with *The University of the Pacific Law Review*).

104. BUREAU OF CONSUMER FIN. PROTECTION, ARBITRATION AGREEMENTS, 12 C.F.R. PT. 1040(a)(1) (July 19, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-07-19/pdf/2017-14225.pdf (on file with *The University of the Pacific Law Review*).

105. AM. BANKERS ASS'N, TRADE LETTER ON ARBITRATION (2017), *available at* http_://www.aba.com/Advocacy/Grassroots/WINNDocs/TradeLetteronArbitrationCRA.pdf (on file with *The University of the Pacific Law Review*).

106. Goodwin, *CFPB's Arbitration Rule Dies at Hands of Senate and President*, JDSUPRA (Nov. 20, 2017), https://www.jdsupra.com/legalnews/cfpb-s-arbitration-rule-dies-at-hands-82054/ (on file with *The University of the Pacific Law Review*).

107. *H.J. Res. 111 – Disapproving the Rule, Submitted by the Consumer Financial Protection Bureau, Known as the Arbitration Agreements Rule*, THE WHITE HOUSE (July 24, 2017), https://www.whitehouse.gov/the-press-office/2017/07/24/hj-res-111-disapproving-rule-submitted-consumer-financial-protection (on file with *The University of the Pacific Law Review*) ("The Administration strongly supports House passage of H.J. Res. 111.").

108. California Arbitration Act (CAA), CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 2017).

enforce arbitration clauses.[109] A court would not grant a party's motion to compel arbitration if: (1) the right to compel has been waived; (2) the agreement is revocable; or (3) a party "is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact."[110]

III. CHAPTER 480

Chapter 480 amended Civil Code Section 1281.2 by adding a fourth exception to the court's obligation to enforce valid arbitration agreements.[111] This exception applies only where a financial institution petitions a court to compel arbitration against an unwilling party asserting claims of fraud and identity theft.[112] Specifically, it bars a "state or federally chartered depository institution" from enforcing any arbitration clause contained in its original banking contracts to accounts that were created "fraudulently without the respondent consumer's consent and by unlawfully using the respondent consumer's personal identifying information."[113]

IV. ANALYSIS

Chapter 480 is a direct response (and perhaps a knee-jerk reaction) to Wells Fargo's use of forced arbitration following its mass-defrauding scam.[114] While clearly necessary to address a real problem, the Supreme Court has interpreted the FAA so broadly that even the slightest whiff of "anti-arbitration" subjects state laws to preemption.[115] Part A discusses the virtue of Chapter 480, namely why its implementation is necessary to provide consumers better recourse against financial institutions than individual arbitration can.[116] Part B addresses its vice: preemption by the Federal Arbitration Act.[117]

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109. *Id.* at § 1281.2.

110. *Id.* This third exception was able to survive a Supreme Court preemption attack back in 1989 in *Volt Information Sciences, Inc. v. Board of Trustees of LeLand Stanford Junior University*, since the Court found the law would not "undermine the goals and policies of the FAA." Volt Info. Sci., Inc. v. Bd. of Tr. of LeLand Stan. Jr. Univ., 489 U.S. 468, 478 (1989).

111. CAL. CIV. PROC. CODE §1281.2(d) (amended by Chapter 480).

112. *Id.*

113. *Id.*

114. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 33, at 1 (Apr. 24, 2017).

115. *See* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017) (admonishing that state laws that "covertly accomplishes the same" as discriminating against the FAA are preempted).

116. *See infra* Part IV.A.

117. *See infra* Part IV.B.

A. The Problems with Forcing Arbitration

Subpart 1 explains why the prevalence of arbitration clauses in adhesive contracts, and banking contracts in particular, generally makes for a questionable deprivation of important rights.[118] Subpart 2 describes how certain features of arbitration are inherently pro-corporation.[119]

1. Mass Deprivation of Rights

The FAA was originally passed to streamline basic disputes between merchants of relatively equal bargaining power.[120] Today however, the FAA applies to adhesion contracts[121]—which, while constituting a bulk of contracts entered into today,[122] are in some cases not entirely voluntary. That is, although individuals do freely enter into these contracts and are responsible for knowing what they sign, the reality is that many still either do not read arbitration clauses at all, or do not understand what they are giving up by agreeing to one.[123] Further, even if a customer fully understood the effect of an arbitration clause, these clauses are in approximately three-quarters of all bank agreements,[124] leaving few options to walk away.[125] Hence, enabling compelled arbitration by

118. *See infra* Part IV.A.1.

119. *See infra* Part IV.A.2.

120. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 67th Cong., 4th Sess. 9-10 (1923) (responding to a senator inquiring whether the FAA would apply to take-it-or-leave-it contracts, the chairman of the Committee of Commerce Trade and Commercial Law of the American Bar Association answered: "I think that ought to be protested against, because it is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods.").

121. Heaberlin Farms, Inc. v. IGA Ins. Co., 641 N.W. 2d 816, 819 (Iowa 2002) ("The FAA does not exclude adhesion contracts.").

122. 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS, § 24.27A, at 193 (rev. ed. Supp. 2012) ("[T]he bulk of contracts signed in this country are adhesion contracts").

123. Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *Whimsy Little Contracts with Unexpected Consequences*, MD. L. REV. 1, 2 (2015) (indicating results from a study by St John's University School of Law, which found that out of an online survey of 668 consumers, less than 9% realized after reading an arbitration provision that it waived the right to proceed in court. "The survey results suggest a profound lack of understanding about the existence and effect of arbitration agreements among consumers."). *See* ARBITRATION STUDY, *supra* note 20, §1 at 11 (2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (on file with *The University of the Pacific Law Review*) ("[c]onsumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally either do not know whether they can sue in court or wrongly believe that they can do so.").

124. *Consumers Want the Right to Resolve Bank Disputes in Court: An Update to the Arbitration Findings in 2015 Checks and Balances*, at 1–3 PEW CHARITABLE TRUSTS (Aug. 17, 2016), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/consumers-want-the-right-to-resolve-bank-disputes-in-court (on file with *The University of the Pacific Law Review*).

125. DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 477 (2015) (Ginsberg, J., dissenting) ("The proliferation of take-it-or-leave-it agreements mandating arbitration and banning class procedures, and this

virtue of standard form, take-it-or-leave-it contracts diverges from the FAA's original purpose of streamlining disputes where bargaining power and voluntariness were not at issue.[126]

2. Arbitration Favors the Corporation

Arbitration can be an effective tool for resolving disputes quickly and informally; yet when seen in terms of actual outcomes, corporations appear to have a far greater chance at success than the average individual would.[127] In other words, the informality that is considered one of the great touchstones of arbitration[128] does not always benefit the weaker party.[129] For instance, class actions—even though they "*requir[e]* procedural formality"—allow individuals with small claims to vindicate their rights more cheaply than pursuing a claim individually.[130] Yet, because arbitration clauses that prohibit class actions are fully enforceable, individuals with small claims may be forced to face corporations individually in arbitration[131] for causing widespread damage to customers, albeit for individually small dollar amounts.

Corporations gain an even greater advantage in the arbitration process since they tend to be repeat players in the arbitration process, or with individual

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Court's readiness to enforce such one-sided agreements, have disabled consumers from shop[ping] to avoid arbitration mandates.") (internal quotation marks omitted).

126. *See id.* at 477–78 ("Congress in 1925 could not have anticipated that the Court would apply the FAA to render consumer adhesion contracts invulnerable to attack by parties who never meaningfully agreed to arbitration in the first place."); *see also* Cohen & Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926).

> [Arbitration] is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law-the questions of law which arise out of these daily relations between merchants.

Id.

127. *See* ARBITRATION STUDY, *supra* note 20, §5 at 13–14 (2015) (showing how consumers that file against companies in arbitration are awarded 12 cents for every dollar claimed, while companies are awarded 91 cents, and provided some type of relief 93% of the time).

128. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) (calling informality "the principal advantage of arbitration").

129. NAT'L ASS'N OF CONSUMER ADVOCATES, LEGIS. UNIT, CONSUMER ATTORNEYS REPORT: ARBITRATION CLAUSES ARE EVERYWHERE, CONSEQUENTLY CAUSING CONSUMER CLAIMS TO DISAPPEAR at 5 (2012) [hereinafter CONSUMER ATTORNEY REPORT], *available at* http://www.consumeradvocates.org/ sites/default/ files/NACA2012BMASurveyFinalRedacted.pdf (on file with *The University of the Pacific Law Review*) ("The overwhelming majority of consumer attorneys responded that arbitration was wholly disadvantageous to the consumer, with specific problems identified as: an uneven playing field, limited recourse for the consumer, questionable objectivity of the arbitrator and lack of transparency in the arbitration process.").

130. *Concepcion*, 563 U.S. at 349.

131. *Id.*

arbitrators themselves.[132] Since repeat players may be a consistent source of income for an arbitrator whose "compensation corresponds to the volume of arbitration they perform,"[133] there may be an incentive to rule in a corporation's favor in hopes of being selected to arbitrate that corporation's future disputes. This risk is particularly pronounced given the fact that the reasons for granting an arbitration award need not be disclosed.[134]

The privacy and confidentiality[135] of arbitration proceedings is yet another corporate advantage.[136] Corporations benefit from keeping duplicitous business practices out of the public eye, while individuals are eventually harmed by those practices continuing unchecked by public scrutiny.[137] To be sure, Wells Fargo's ability to continue its scam for so many years is attributed to the public being

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132. David Horton & Andrea Cann Chandrasekher, *After The Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 63 (2015) ("Our multivariate regression analyses demonstrate that these elite corporations outperform their one-shot counterparts on win rates and damage payments."); *see also* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 195 (1997) Explaining certain advantages for repeat players, such as:

> (1) experience leading to changes in how the repeat player structures the next similar transaction; (2) expertise, economies of scale, and access to specialist advocates; (3) informal continuing relationships with institutional incumbents; (4) bargaining reputation and credibility; (5) long-term strategies facilitating risk-taking in appropriate cases; (6) influencing rules through lobbying and other use of resources; (7) playing for precedent and favorable future rules; (8) (8) distinguishing between symbolic and actual defeats; and (9) investing resources in getting rules favorable to them implemented.

Id. See also Bingham, *supra* note 132, at 220 (1997) (describing the disadvantages for "one-shotters," on the other hand, as being that one-shotters: "(1) have more at stake in a given case; (2) are more risk averse; (3) are more interested in immediate over longterm gain; (4) are less interested in precedent and favorable rules; (5) are not able to form continuing relationships with courts or institutional representatives; (6) cannot use the experience to structure future similar transactions; and (7) have limited access to specialist advocates.").

133. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 416 (1967) (Black, J., dissenting) ("The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation.").

134. Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 199 (1956) ("Arbitrators . . . need not give their reasons for their results.").

135. A.B.A., *supra* note 24, at 5.

136. Ting v. AT&T, 319 F.3d 1126, 1151–52 (9th Cir. 2003), after stating that "confidentiality provisions usually favor companies over individuals," the Ninth Circuit explained:

> if the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player. This is particularly harmful here, because the contract at issue affects seven million Californians. Thus, AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract.

Id.

137. *Id.* (explaining further why it found a confidentiality provision unconscionable, the court noted that "the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T.").

none the wiser, since those willing to challenge the bank could only proceed in private arbitration.[138]

Simply put, it makes impeccable business sense for any corporation, including banks, to rely on arbitration agreements that the customer often overlooks.[139] Accordingly, Wells Fargo is not unique in taking advantage of such broad FAA interpretation to ruthlessly enforce arbitration clauses against its customers, even those victimized by deceptive and illegal business practices.[140] If objectively fewer claims are raised,[141] those that are raised are less likely to succeed, and the threat of public court proceedings is off the table, then the profits to be earned from cheating customers out of small sums of money winds up justifying the risk.

Efforts by members of Congress[142] and government agencies[143] demonstrate an acute awareness of and desire to fix this problem. In particular, the Consumer Financial Protection Bureau's final rule banning class action waivers in contracts between financial institutions and customers responded to the same problem triggering Chapter 480.[144] However, a republican Congress swiftly repealed this rule under the Congressional Review Act,[145] making state efforts like Chapter 480 all the more crucial.

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138. *See* Michael Corkery & Stacy Cowley, *Wells Fargo Killing Sham Account Suits by Using Arbitration,* N.Y. TIMES (Dec. 6, 2016), https://www.nytimes.com/2016/12/06/ business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html (on file with *The University of the Pacific Law Review*) ("Wells Fargo has been moving disputes about unauthorized accounts into arbitration for years, which lawyers say may have helped keep the problems from bursting into public view sooner.").

139. *See* ARBITRATION STUDY, *supra* note 20, §1 at 11 ("[c]onsumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally either do not know whether they can sue in court or wrongly believe that they can do so.").

140. *See* Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1205 (2006) (Pay day lender compelled arbitration of allegations it charged usurious interest rates in violation of various state consumer protection laws); *see also* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2308 (2013) (American Express compelled arbitration and enforced class action ban for claims it violated anti-trust laws to charge rates 30% higher than competitors); *and see* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011) (AT&T compelled arbitration and prevented the formation of a class action alleging AT&T committed fraud and engaged in false advertising).

141. CONSUMER ATTORNEY REPORT, *supra* note 129.

142. *See supra* note 95.

143. BUREAU OF CONSUMER FIN. PROTECTION, ARBITRATION AGREEMENTS, 12 C.F.R. PT. 1040 (July 19, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-07-19/pdf/2017-14225.pdf (on file with *The University of the Pacific Law Review*).

144. *Id.* (identifying the rule's purpose as the furtherance of "protection of consumers regarding the use of agreements for consumer financial products and services providing for arbitration of any future dispute.").

145. A JOINT RESOLUTION PROVIDING FOR CONGRESSIONAL DISAPPROVAL UNDER CHAPTER 8 OF TITLE 5, UNITED STATES, Senate J. Res. 47, 115th Congress (2017), https://www.congress.gov/115/bills/sjres47/ BILLS-115sjres47is.pdf (on file with *The University of the Pacific Law Review*); Goodwin, *CFPB's Arbitration Rule Dies at Hands of Senate and President*, JDSUPRA (Nov. 20, 2017), https://www.jdsupra.com/ legalnews/cfpb-s-arbitration-rule-dies-at-hands-82054/ (on file with *The University of the Pacific Law Review*).

B. Preemption

With so many unknowingly consenting to limiting their recourse against corporations, Chapter 480 is a noble attempt at re-balancing the scales of equity, at least when it comes to the relationships between banks and their customer.[146] Yet, good intentions and a worthy cause do little to address FAA preemption.[147] Judicial acrobatics has elevated the FAA to a place of broad preemptive authority,[148] despite all indications of original legislative intent envisioning quite the opposite.[149] Regardless, the FAA's expanse preempts those state laws that are anti-arbitration; i.e., those applicable to arbitration clauses in particular, and not contracts generally.[150] The FAA also preempts state laws that "invalidate arbitration agreements," or conflict with the FAA's objectives, such as "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[151]

Subpart 1 drives the first nail in the coffin of preemption by detailing the conflict between Chapter 480 and the FAA.[152] Subpart 2 explains how Chapter 480's narrowing of the scope of arbitrable disputes limits the validity of otherwise valid arbitration agreements.[153] Subpart 3 discusses whether such a narrow law could substantially defy the FAA's objectives.[154]

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146. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 33, at 1 (Apr. 24, 2017).

147. *See* Jennifer Barrera, *Senate Standing Committee on Judiciary Hearing of 05-02-2017*, DIGITAL DEMOCRACY (May 2, 2017), https://ca.digitaldemocracy.org/hearing/52532?startTime=957&vid=20fc71600cb56ec21205f4e404f836de (on file with *The University of the Pacific Law Review*) (expressing, in opposition to SB 33, that the bill "is going to be challenged under the Federal Arbitration Act, and would likely be preempted.").

148. E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1, 3 (2015) (explaining how FAA jurisprudence is "increasingly preemptive of state efforts to regulate arbitration.").

149. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 422 (1967) (citing Committee on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A. B. A. J. 153, 279) (explaining how arbitration under the FAA "is simply a new procedural remedy"); *see also id.* at 419 n. 23 (1967) (citing Committee on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A. B. A. J. 153, 155-56):

> Nor can it be said that the Congress of the United States, directing its own courts . . . , would infringe upon the provinces or prerogatives of the States . . . [T]he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced . . . There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.

Id.

150. Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions.").

151. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1743, 1748 (2011).

152. *See infra* Part IV.B.1.

153. *See infra* Part IV.B.2.

154. *See infra* Part IV.B.3.

1. Chapter 480 Does Not Apply to Contracts Generally

At first blush, the unavoidable conclusion is that Chapter 480 cannot avoid preemption; most glaringly, Chapter 480 does not apply to contracts generally, but instead "deriv[es] [its] meaning from the fact that an agreement to arbitrate is at issue."[155] Without an arbitration clause, Chapter 480 would simply have no purpose; it can *only* apply where a financial institution seeks "to apply a written agreement to arbitrate."[156]

Those in support of Chapter 480 do not consider this fatal, and instead argue that the law survives preemption since it is applicable to subsequent contractual relationships (fake bank accounts) fraudulently procured.[157] Specifically, Chapter 480's supporters assert that "a contract entered into fraudulently is void and any provision contained in it is void, including an arbitration provision."[158] While this understanding seems like common sense, it fails to take into account today's not-so-common sense separability doctrine.[159] Post-*Prima Paint*, arbitration clauses in potentially voidable contracts (e.g., those induced by fraud) were separate from the contract itself, meaning a contract's potential voidability did not affect the enforceability of an arbitration clause contained therein.[160] Further, post-*Buckeye*, arbitration clauses in potentially *void* contracts (e.g., illegal contracts) were also declared separable and enforceable.[161] So, defenses like fraud could only keep Wells Fargo customers from forced arbitration if the bank fraudulently induced the arbitration clauses in particular, but not the whole contract.[162] Because Chapter 480 does not require fraud or illegality to specifically pertain to an arbitration clause, it falls outside the purview of the FAA's savings clause,

155. Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1423 (2017).

156. CAL. CIV. PROC. CODE § 1281.2 (amended by Chapter 480).

157. Email from Les Spahn, Legislative Director, to Bill Dodd, Senator, Cal. State Senate (arguing that SB 33 is not preempted by Federal Law) (on file with *The University of the Pacific Law Review*).

158. *Id.*

159. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (declaring that arbitration agreements are separable from their container contracts).

160. *Id.*

161. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448 (2006).

162. *See Prima Paint Corp.*, 388 U.S. at 404 ("A federal court may consider only issues relating to the making and performance of the *agreement to arbitrate*."). To be sure, commentators have sharply criticized the separability doctrine. *See id.* at 423 (1967) (Black, J., dissenting).

> The separability rule which the Court applies to an arbitration clause does not result in equality between it and other clauses in the contract. I had always thought that a person who attacks a contract on the ground of fraud and seeks to rescind it has to seek rescission of the whole, not tidbits, and is not given the option of denying the existence of some clauses and affirming the existence of others.

Id. See also Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 131-32 (1996) (calling the separability doctrine "simply ludicrous" and a "legal fiction"); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability*, 56 S.M.U. L. REV. 819, 880 (2003) (calling separability "no longer necessary or appropriate").

which specifically includes only defenses challenging the validity of the arbitration clause.[163] Consequently, the fact that Chapter 480 is not generally applicable to all contracts[164] leaves it open to preemption, and the FAA's savings clause simply does not apply.

2. Chapter 480 Limits the Validity of Arbitration Clauses

Because fraud and illegality defenses can only affect enforceability if they aim directly at the arbitration clause, Chapter 480 would invalidate arbitration clauses that were otherwise valid under the FAA,[165] thereby conflicting with the FAA's mandate that arbitration clauses be "valid, irrevocable, and enforceable."[166]

Although it may be said that Chapter 480, by invalidating arbitration clauses for only specific claims, does not directly conflict with the FAA because the clauses would still be "valid, irrevocable, and enforceable," only narrower in scope.[167] Yet the scope of arbitrable issues is to be resolved in favor of arbitration, *especially* where the provision is broad.[168] And it cannot be said with "*positive assurance*"[169] that identity theft and fraud fall outside the scope of "any unresolved disagreement between [the customer] and the Bank," including "any disagreement relating in any way to services, accounts or matters . . . torts, or other wrongful actions . . . statutory, common law, and equitable claims."[170] Additionally, the sort of claim contemplated by Chapter 480 (unlawful use of personal identifying information to create fraudulent accounts) cannot be brought

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163. Federal Arbitration Act (FAA) of 1925, 9 U.S.C. § 2 (West 2016) ("save upon such grounds that exist at law or in equity for the revocation of any contract."); *see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (holding that the defenses referred to in the FAA's savings clause must be directed at the arbitration clause and not the contract in general).

164. CAL. CIV. PROC. CODE § 1281.2 (amended by Chapter 480).

165. *Id.*

166. Federal Arbitration Act (FAA) of 1925, 9 U.S.C. § 2 (West 2016).

167. *Id.*

168. AT&T Tech. v. Comm. Workers of Am., 475 U.S. 643, 650 (1986) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584–85 (1960)).

> Such a presumption [favoring coverage of the arbitration provision] is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . In such cases, [absent] any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.

Id. (internal quotation marks omitted).

169. *AT&T Techs.*, 475 U.S. at 650 (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960)) (emphasis added).

170. Motion to Compel Arbitration of Plaintiff Kaylee Heffelfinger's Claims at 3, Jabbari v. Wells Fargo & Co. (N.D. Cal. 2015) (No. 15-cv-02159-VC).

without referring to the original contract containing the valid arbitration clause.[171] Indeed, the personal identifying information could only be misused by virtue of the legitimate banking account with the consumer.[172] Thus, it would seem entirely consistent with FAA jurisprudence to determine that customers victimized by the Wells Fargo scam all have claims falling within the scope of their original contracts' broad arbitration clauses.[173]

This being the case, the argument also advanced by Chapter 480's supporters that, "if you don't have meeting of the minds, you can't have a contract," fails as well.[174] While a correct assertion by itself, the nonexistence of any additional contract being formed without customer consent is irrelevant to whether Chapter 480 conflicts with the FAA.[175] The problem Chapter 480 seeks to address is financial institutions applying arbitration clauses from contracts (that were validly entered into) in order to prevent customers from suing over subsequent fake accounts.[176] But if those arbitration clauses covered "any disagreement between you and the bank," then regardless of the illegality, fraudulence, or nonexistence of any subsequent contract, disputes over unconsented-to accounts fit within that scope.[177]

3. Chapter 480 May Go Against the FAA's Objectives

Chapter 480, in narrowing the scope of broad arbitration clauses like Wells Fargo's, would invalidate those clauses as to certain claims that otherwise would be and have been held to encompass the dispute.[178] Additionally, by turning "any unresolved disagreement between you and the bank"[179] into "any unresolved disagreement except for fraud and identity theft," Chapter 480 interferes with

171. CAL. CIV. PROC. CODE § 1281.2 (amended by Chapter 480).

172. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 33, at 6 (Apr. 24, 2017).

173. Order Granting Defendant's Motions to Compel Arbitration, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC (N.D. Cal. 2015) No. 58, 59 at 3.

174. Brian Cabateck, *Senate Standing Committee on Judiciary Hearing of 05-02-2017*, DIGITAL DEMOCRACY (May 2, 2017), *available at* https://ca.digitaldemocracy.org/hearing/52532?StartTime=957&vid=20fc71600cb56ec21205f4e404f836de (on file with *The University of the Pacific Law Review*).

175. Volt Info. Sci., Inc. v. Bd. of Tr. of LeLand Stan. Jr. Univ., 489 U.S. 468, 479 (1989) ("[a]rbitration under the [FAA] is a matter of consent.").

176. CAL. CIV. PROC. CODE § 1281.2 (amended by Chapter 480).

177. Motion to Compel Arbitration of Plaintiff Kaylee Heffelfinger's Claims at 3, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC (N.D. Cal. 2015) No. 50.

178. *See* Order Granting Defendant's Motions to Compel Arbitration, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC (N.D. Cal. 2015) No. 58, 59 at 3 (holding that illegally using consumers' personal identifying information to open fake accounts was within the scope of Wells Fargo's broad arbitration clauses).

179. Motion to Compel Arbitration of Plaintiff Kaylee Heffelfinger's Claims at 3, Jabbari v. Wells Fargo & Co. (N.D. Cal. 2015) (No. 15-cv-02159-VC).

arbitration's "principal purpose," which is enforcing arbitration clauses "according to their terms."[180]

Nevertheless, even if there is no room to maintain that Chapter 480 should survive preemption based on it being good policy,[181] the argument remains that such a narrow law simply cannot be said to *substantially* interfere with the FAA's objectives. While Chapter 480 would specifically undermine the enforceability of arbitration agreements, it would do so only in one narrowly defined instance.[182] Furthermore, Chapter 480 would not "make it trivially easy for States to undermine the Act;"[183] it has laser-like application and leaves no room for unwarranted expansion.[184] The court's determination is limited to deciding whether the petitioner qualifies as a "state or federally chartered depository institution,"[185] and whether it is seeking to apply a valid arbitration clause to a relationship that the financial institution created fraudulently, without customer consent, through unlawful use of the customer's identity.[186]

It could also be said that Chapter 480 contravenes FAA objectives by allowing some to simply allege fraud and identity theft solely to have a court deny arbitration, seeing as courts do not decide the merits of claims when determining the scope of arbitrable issues.[187] While this surely undermines the efficiency of arbitration, the burden is trivial.[188] A court could simply "remand" the claims to arbitration once it is determined the court no longer has jurisdiction.[189] Chapter 480 could therefore reasonably be regarded as a non-threat, occupying an insignificant area of the FAA's massive reach.[190]

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180. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (quoting Volt Info. Sci., Inc. v. Bd. of Tr. of LeLand Stan. Jr. Univ., 489 U.S. 468, 478 (1989)).

181. *Id.* at 355 ("Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.").

182. *See* CAL. CIV. PROC. CODE § 1281.2 (amended by Chapter 480) (applying only where the claim is for identity theft and fraud against a financial institution).

183. Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1428 (2017).

184. CAL. CIV. PROC. CODE § 1281.2(d) (amended by Chapter 480)

185. *Id.*

186. *Id.*

187. AT&T Techs. v. Comm. Workers of Am., 475 U.S. 643, 649 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.").

188. *Cf.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) (explaining how classwide arbitration goes against the "fundamental attributes of arbitration" by "sacrificing arbitration's informality and [making] the process slower, more costly, and more likely to generate procedural morass than final judgment.").

189. *Cf.* 28 U.S.C. §1447(c) (directing federal courts to remand claims to state court where there is no longer jurisdiction).

190. PUB. CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE at 1 (2009), *available at* https://www.citizen.org/sites/default/files/unfairandeverywhere.pdf (on file with *The University of the Pacific Law Review*) (reporting from a study of the major players in the credit card, banking, cell phone, computer manufacturing, internet, auto dealer, and brokerage industries that 75% used mandatory binding arbitration).

V. CONCLUSION

By allowing customers to hold banks accountable in court despite being contractually bound to arbitrate, Chapter 480 addresses a symptom of unchecked FAA expansion that was typified by Wells Fargo's decade-long practice of robbing its own customers.[191] Yet today's law makes Chapter 480's ultimate preemption almost inevitable.[192] Chapter 480 does not apply to contracts generally,[193] and ultimately makes arbitration provisions invalid as relating to the specific grievance of identity theft and fraud.[194] In doing so, Chapter 480 would go against the "principal purpose of arbitration"—enforcing arbitration clauses "according to their terms."[195]

Furthermore, the public policy arguments for Chapter 480 may be just as abundant as they are irrelevant.[196] A brief survey of the Supreme Court's ruthless application of the FAA suggests that Chapter 480 is all but dead on arrival.[197] Perhaps more troubling is that even though the 1925 Congress may not have wanted the FAA to effectively reduce corporate accountability,[198] both the 2017 Congress and President Trump appear to be all in favor of this result.[199] In any case, unless and until a preemption challenge successfully invalidates Chapter 480, this law will serve to safeguard consumers' rights[200] in the event that history repeats itself with another Wells Fargo-like fiasco.

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191. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 33, at 1 (Apr. 24, 2017).

192. Spitko, *supra* note 150, at 3 (calling FAA jurisprudence "increasingly preemptive of state efforts to regulate arbitration.").

193. Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("[S]tate laws applicable only to arbitration provisions" cannot invalidate arbitration clauses).

194. CAL. CIV. PROC. CODE § 1281.2(d) (amended by Chapter 480).

195. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (quoting Volt Info. Sci., Inc. v. Bd. of Tr. of LeLand Stan. Jr. Univ., 489 U.S. 468, 478 (1989)).

196. *Id.* at 1755 ("Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.").

197. DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 477-78 (2015) (Ginsberg, J., dissenting) (referring to the Supreme Court's recent decisions expanding the FAA, Justice Ginsberg stated: "These decisions have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws.").

198. *See id.* ("Congress passed the FAA in 1925 as a response to the reluctance of some judges to enforce commercial arbitration agreements between merchants with relatively equal bargaining power.").

199. *See H.J. Res. 111–Disapproving the Rule, Submitted by the Consumer Financial Protection Bureau, Known as the Arbitration Agreements Rule*, THE WHITE HOUSE (July 24, 2017), https://www.whitehouse.gov/the-press-office/2017/07/24/hj-res-111-disapproving-rule-submitted-consumer-financial-protection (on file with *The University of the Pacific Law Review*) (approving of H.J. Res. 111").

200. CAL. CIV. PROC. CODE § 1281.2(d) (amended by Chapter 480).