

April 2017

## A Motion to Compel Changes to Federal Arbitration Law: How to Remedy the Abuses Consumers Face When Arbitrating Disputes

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### Recommended Citation

Jeremy McManus, *A Motion to Compel Changes to Federal Arbitration Law: How to Remedy the Abuses Consumers Face When Arbitrating Disputes*, 37 B.C.J.L. & Soc. Just. 177 (2017), <https://lawdigitalcommons.bc.edu/jlsj/vol37/iss1/6>

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# A MOTION TO COMPEL CHANGES TO FEDERAL ARBITRATION LAW: HOW TO REMEDY THE ABUSES CONSUMERS FACE WHEN ARBITRATING DISPUTES

JEREMY MCMANUS\*

**Abstract:** Arbitration, as a form of alternative dispute resolution, is a favored method of settling legal disputes because it resolves disputes faster and more cost effectively than in-court litigation. Corporations often exploit the private nature of arbitration by including complex provisions in consumer contracts that require certain disputes to be resolved through arbitration. Consumers subject to these arbitration provisions often do not realize the existence of the provisions, and do not understand that because of undue corporate influence over arbitrators, arbitration tends to favor the corporations against which they arbitrate. Unfortunately, because the U.S. Supreme Court has declared that the Federal Arbitration Act (the “FAA”) preempts states’ ability to declare forced arbitration agreements unconscionable, consumers struggle to challenge unfavorable arbitration awards. To remedy the abuses consumers face in the arbitration arena, this Note argues that Congress should amend the FAA to allow states to declare forced arbitration agreements unconscionable.

## INTRODUCTION

In September 2016, three Utah residents who had previously done banking business with Wells Fargo & Co. (“Wells Fargo”) filed a lawsuit in the U.S. District Court for the District of Utah, alleging that Wells Fargo opened banking and credit card accounts in their names without their permission.<sup>1</sup> Accord-

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\* Executive Comment Editor, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE, 2016–2017.

<sup>1</sup> See Associated Press, *Wells Fargo Seeks Arbitration Order in Customer Lawsuit*, L.A. TIMES (Nov. 1, 2016), <http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20161127-story.html> [<https://perma.cc/RQ82-VUVR>]; 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> [<https://perma.cc/4RBD-3DQY>]; Jim Puzanghera, *Wells Fargo Customers Harmed by Fake Accounts Would Get to Sue Under Proposed Legislation*, L.A. TIMES (Dec. 1, 2009), <http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20161201-story.html> [<https://perma.cc/HQ46-3X6U>]. By using the personal information that Wells Fargo obtained when customers created legitimate accounts, Wells Fargo employees were able to sign customers up for fake accounts. See Corkery & Cowley, *supra*. This process involved Wells Fargo employees creating “fake email accounts to sign up customers for online banking services,” and “moving a small amount of money from the customer’s current account to open the new [account].” Michael Corkery, *Wells Fargo Fined \$185 Million for Fraudulently Opening Ac-*

ing to the three customers, who have since been joined by eighty other affected customers, Wells Fargo employees became motivated to open the accounts when faced with difficult-to-reach sales targets.<sup>2</sup> Once the employees opened the accounts, the affected customers were often charged fees associated with the unauthorized accounts; in some instances, debt collectors contacted the customers about those accounts.<sup>3</sup>

Wells Fargo's culpability for this conduct has been the subject of much investigation by financial regulators for the federal government, who have estimated that Wells Fargo employees have opened millions of unauthorized accounts for existing customers since 2011.<sup>4</sup> Based on the investigation, Wells Fargo agreed to pay the following amounts to avoid potential lawsuits: \$100 million to the federal Consumer Financial Protection Bureau; \$50 million to the City and County of Los Angeles; and \$35 million to the Office of the Comptroller of the Currency of the U.S. Department of the Treasury.<sup>5</sup>

Upon learning of the Utah lawsuit, which alleges causes of action including breach of contract and fraud stemming from the fake accounts, on November 23, 2016, Wells Fargo moved to dismiss the complaint and compel arbitration based on arbitration clauses found in the contracts that the customers had

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counts, 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> [<https://perma.cc/KUU7-B58W>]. The Wells Fargo employees usually closed the fake accounts almost immediately, most likely because their sales targets were only contingent upon the opening of the accounts, and not upon how long the accounts remained open. *See id.*

<sup>2</sup> *See* Corkery & Cowley, *supra* note 1; Stacy Cowley, *Voices from Wells Fargo: 'I Thought I Was Having a Heart Attack,'* N.Y. TIMES (Oct. 20, 2016), <https://www.nytimes.com/2016/10/21/business/dealbook/voices-from-wells-fargo-i-thought-i-was-having-a-heart-attack.html> [<https://perma.cc/3DFD-U9ZT>]. Wells Fargo employees reported being under intense pressure to meet difficult-to-reach sales goals, and feared Wells Fargo would fire them if they did not meet those goals. *See* Cowley, *supra*.

<sup>3</sup> *See* Corkery, *supra* note 1.

<sup>4</sup> *Id.* Wells Fargo hired an independent consultant to review millions of potentially unauthorized accounts that employees opened between 2011 and 2015. *Id.* Although Wells Fargo refunded money to customers if the bank had improperly charged them because of the unauthorized accounts, customers angered by the fraudulent conduct Wells Fargo employees had engaged in continued with their lawsuit against Wells Fargo. *Id.*

<sup>5</sup> *See id.* The Consumer Financial Protection Bureau is a federal agency that works to "protect consumers from unfair, deceptive, or abusive corporate practices and take action against companies that break the law" by educating consumers and corporations about consumer protection laws, and by filing lawsuits to enforce those laws. *The Bureau*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/about-us/the-bureau/> [<https://perma.cc/LNG5-TQSF>]. The Office of the Comptroller of the Currency "ensure[s] that national banks and federal savings associations operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations" by "[a]pprov[ing] or deny[ing] applications for new charters, branches, capital, or other changes in corporate or banking structure," and issuing rules and regulations. *About the OCC*, U.S. DEP'T TREASURY, <https://www.occ.treas.gov/about/what-we-do/mission/index-about.html> [<https://perma.cc/9PHH-HX2H>].

signed for their legitimate accounts.<sup>6</sup> Since at least 2012, Wells Fargo has required customers to consent to arbitration when they sign contracts to open accounts with the bank by including an arbitration provision in those contracts.<sup>7</sup> This type of arbitration is “forced arbitration” because the arbitration provision to which individuals are consenting is part of a larger contract, and is thus not the subject of independent bargaining behavior.<sup>8</sup> Forced arbitration agreements often include provisions that require that all future disputes be resolved by way of arbitration, that the consumer waives the ability to arbitrate as a class, and that the arbitration comply with the rules of the American Arbitration Association (AAA).<sup>9</sup> It is likely that the Utah plaintiffs signed a forced arbitration agreement including these terms when they initially opened their legitimate banking accounts with Wells Fargo in 2012.<sup>10</sup>

The plaintiffs in the current lawsuit were unaware that future contract disputes with Wells Fargo would settle through arbitration rather than through in-

<sup>6</sup> See Associated Press, *supra* note 1; Suzanne Barlyn, *Wells Fargo Asks U.S. Court to Dismiss Account Scandal Lawsuit*, REUTERS (Nov. 24, 2016), <http://www.reuters.com/article/us-wellsfargo-accounts-lawsuit-idUSKBN13J1WX> [<https://perma.cc/V6KF-MPGK>]. Arbitration is “[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.” *Arbitration*, BLACK’S LAW DICTIONARY (10th ed. 2014). In the Utah Wells Fargo case, the plaintiffs sought damages for invasion of privacy, fraud, negligence, breach of contract, conversion, and violation of the Utah Unfair Competition Act. Demand for Jury Trial at 1, *Mitchell v. Wells Fargo Bank*, No. 2:16-cv-00966 (D. Utah Sept. 15, 2016). The plaintiffs also sought punitive damages due to “Wells Fargo’s failure to implement tighter security and oversight of corporate activities, coupled with its activation of programs which not only encouraged the illegal activity, but also rewarded the activity . . .” *Id.* at 25.

<sup>7</sup> *Jabbari v. Wells Fargo & Co.*, No. 15-cv-02159 (N.D. Cal. Sept. 23, 2015) (granting defendants’ motion to compel arbitration); *Online Access Agreement*, WELLS FARGO (Sept. 15, 2016), <https://www.wellsfargo.com/online-banking/online-access-agreement> [<https://perma.cc/J45Z-BASR>].

<sup>8</sup> See KATHERINE V. W. STONE & ALEXANDER J. S. COLVIN, ECON. POLICY INST., *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 4–5 (2015), <http://www.epi.org/files/2015/arbitration-epidemic.pdf> [<https://perma.cc/3RNP-UZV2>]; Corkery & Cowley, *supra* note 1. An arbitration agreement is one “by which the parties consent to resolve one or more disputes by arbitration,” and “can consist of a clause in a contract or a stand-alone agreement and can be entered into either before a dispute has arisen between the parties (a predispute arbitration agreement) or after a dispute has arisen between the parties (a postdispute arbitration agreement or submission agreement).” *Arbitration Agreement*, BLACK’S LAW DICTIONARY (10th ed. 2014). A forced arbitration agreement is an arbitration agreement that a party signs without realizing its existence or understanding its significance. See STONE & COLVIN, *supra*, at 5.

<sup>9</sup> See, e.g., *Online Access Agreement*, *supra* note 7. The AAA is a non-profit organization that “provid[es] services to individuals and organizations who wish to resolve conflicts out of court” by “assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options . . .” *About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, AM. ARB. ASS’N (2016) [hereinafter *About the AAA & ICDR*], <https://www.adr.org/aaa/faces/home?> [<https://perma.cc/D85S-ZZL7>] (follow “About” hyperlink).

<sup>10</sup> See *Jabbari*, No. 15-cv-02159; *Online Access Agreement*, *supra* note 7. A 2015 order granting Wells Fargo’s motion to compel arbitration shows that these provisions existed that year, increasing the likelihood that the Utah plaintiffs signed arbitration agreements with these terms. *Jabbari*, No. 15-cv-02159.

court litigation.<sup>11</sup> Assuming the plaintiffs signed forced arbitration agreements including these terms, arbitration would not be an appealing option for the plaintiffs because the arbitration provision in Wells Fargo's legitimate banking contract would not permit them to arbitrate as a class, and because consumer arbitration is generally less fair to consumers than traditional in-court litigation.<sup>12</sup> According to Wells Fargo, however, arbitration is simply required in this case; all of the plaintiffs in the Utah lawsuit signed legitimate agreements to arbitrate future legal disputes, and the opening of unauthorized accounts qualifies as a legal dispute.<sup>13</sup>

The U.S. District Court for the District of Utah will have to decide whether the arbitration clauses found in agreements associated with the plaintiffs' legitimate accounts apply to disputes arising from the creation of unauthorized accounts.<sup>14</sup> Judges in other states, including a federal judge in California, have previously forced Wells Fargo customers to arbitrate these disputes, because of recent U.S. Supreme Court opinions that give great deference to the enforceability of arbitration agreements.<sup>15</sup> These court decisions paint an ominous picture for the future success of the Utah plaintiffs; should the U.S. District Court for the District of Utah rule in accordance with these previous decisions, the Utah plaintiffs will lose their ability to seek justice in the court system.<sup>16</sup> Instead, they will have to resolve their disputes with Wells Fargo in private arbitration, where corporations exert their unequal bargaining power to receive favorable arbitration awards.<sup>17</sup> This will likely also mean that the

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<sup>11</sup> See Corkery & Cowley, *supra* note 1.

<sup>12</sup> See *id.*; *Online Access Agreement*, *supra* note 7. A class is "[a] group of people, things, qualities, or activities that have common characteristics or attributes." *Class*, BLACK'S LAW DICTIONARY (10th ed. 2014). Class arbitration is "[a]n arbitration conducted on a representative basis similar to that of a class action in court, with a single person or small group of people representing the interests of a larger group." *Arbitration*, *supra* note 6. In consumer class arbitration, consumers who have the same complaint against a large corporation choose to arbitrate their disputes together, thus splitting the costs associated with the arbitration. Gary Born & Claudio Salas, *United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 21–22 (2012).

<sup>13</sup> See Corkery & Cowley, *supra* note 1.

<sup>14</sup> See *id.*

<sup>15</sup> See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); *Jabbari*, No. 15-cv-02159.

<sup>16</sup> See *Imburgia*, 136 S. Ct. at 471; *Am. Express*, 133 S. Ct. at 2312; *AT&T Mobility*, 563 U.S. at 352. This Note infers this conclusion because the Supreme Court has set precedent for courts to enforce arbitration agreements, including those forcing consumers to settle their legal disputes through arbitration rather than through court litigation. See *Imburgia*, 136 S. Ct. at 471; *Am. Express*, 133 S. Ct. at 2312; *AT&T Mobility*, 563 U.S. at 352.

<sup>17</sup> See Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System.'* N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?action=click&contentCollection=DealBook&module=RelatedCoverage&region=Marginalia&pgtype=article> [https://perma.cc/6H2A-FAF7]; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y.

plaintiffs will lose the ability to pursue dispute resolution as a class.<sup>18</sup> Unfortunately, losing the ability to arbitrate as a class will potentially cause many plaintiffs to abandon their claims, because the cost of individual arbitration tends to outweigh consumers' probable recoveries.<sup>19</sup> Wells Fargo will then, in this circumstance, escape legal responsibility for creating fake accounts in their consumers' names because it is simply too expensive for consumers to individually pursue dispute resolution.<sup>20</sup>

Consumers like those involved in the Wells Fargo dispute often lose the opportunity to resolve disputes arising from their consumer contracts in a fair manner when forced into arbitration.<sup>21</sup> In general, arbitration agreements provide that if designated parties cannot resolve their legal disputes on their own, then a private and neutral decision-maker outside of the court system, called an arbitrator, must resolve the disputes.<sup>22</sup> The use of arbitration can be appealing to parties to a legal contract—in the case of consumer contracts, typically large corporations and consumers—instead of traditional in-court litigation to resolve disputes arising under the contract, because arbitration can take less time and cost less money than traditional in-court litigation.<sup>23</sup> Arbitration is a faster process and is less costly than in-court litigation because the pool of arbitrators to choose from is larger than a pool of available judges; therefore, parties do not need to accommodate a particular judge's busy schedule.<sup>24</sup> Additionally, because arbitration exists largely outside of the judiciary, time-consuming discovery and evidentiary laws do not bind arbitrators.<sup>25</sup> To settle a legal dispute

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TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/DN2Z-SAT2>].

<sup>18</sup> See Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>22</sup> See *id.* As long as parties have contracted to arbitrate disputes, it does not matter whether an agreement to arbitrate is its own contract or part of a larger contract. See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See Matthew M. Hoffman, *The Advantages and Disadvantages of Arbitration vs. Court Litigation*, TUCKER ARNSBERG, P.C. (Feb. 13, 2015), <http://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-litigation/> [<https://perma.cc/R26C-AVT6>]; Andrew Pincus, *The Advantages of Arbitration*, N.Y. TIMES (May 24, 2012), <https://dealbook.nytimes.com/2012/05/24/the-advantages-of-arbitration/> [<https://perma.cc/GW9H-5YGE>]; Silver-Greenberg & Corkery, *supra* note 17. Arbitration is less costly than in-court litigation because it takes less time for a proceeding to occur, meaning that attorneys do not need to spend as much time appearing for preliminary hearings and motions, among other things. See *id.* Evidence can be obtained through discovery, and is “something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact.” *Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014). Discovery is “compulsory disclosure, at a party’s request, of information that relates to the litigation.” *Discovery*, BLACK’S LAW DICTIONARY (10th ed. 2014). Evidentiary laws are ones that operate to govern the presentation of these facts in a legal proceeding. See, e.g., FED. R. EVID. 702.

<sup>25</sup> See Silver-Greenberg & Corkery, *supra* note 17.

through arbitration, the arbitrator conducts a hearing in which both sides present evidence and make arguments to the arbitrator.<sup>26</sup> The arbitrator then renders a binding written decision that resolves the legal conflict.<sup>27</sup> Depending on the circumstances of the legal dispute, the arbitrator can also issue a monetary award to the prevailing party.<sup>28</sup> Arbitrators issue monetary awards when they determine that, as part of the dispute resolution, one party owes money to another party.<sup>29</sup>

Although it can be efficient, the arbitration process is not always fair to all involved parties.<sup>30</sup> Many consumers who have arbitrated disputes against large companies, such as Wells Fargo, already know that the opportunity for future business drives private arbitrators to be overwhelmingly partial towards corporations.<sup>31</sup> In 2015, the *New York Times* reported, “in interviews . . . more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.”<sup>32</sup> Arbitrator impartiality is not the only obstacle consumers face when forced into arbitration.<sup>33</sup> Because corporations bury arbitration agreements in larger contracts, consumers often do not know that they agreed to arbitration in the first place; as such, consumers are unprepared to navigate the differences between arbitration and in-court litigation, such as selecting an arbitrator and adapting to different procedural rules.<sup>34</sup> Furthermore, the private nature of arbitration means that rules of evidence largely do not apply; thus, arbitrators—many of whom are biased—are under no obligation to hear all of the evidence

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<sup>26</sup> See *Consumer Legal Information: Methods for Resolving Conflicts and Disputes*, OKLA. BAR ASS'N [hereinafter *Consumer Legal Information*], <http://www.okbar.org/public/brochures/methods/forresolvingconflictsanddisputes.aspx> [<https://perma.cc/JLZ5>] (last updated Aug. 2015). A panel of arbitrators may also resolve disputes. See AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES 18 (2014) [hereinafter CONSUMER ARBITRATION RULES], <https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTAGE2021425&revision=latestreleased> [<https://perma.cc/5S68-JBXM>]. The hearing lasts until the arbitrator feels that he has enough information to render a decision. See *Consumer Legal Information*, *supra*.

<sup>27</sup> See CONSUMER ARBITRATION RULES, *supra* note 26, at 7; *Consumer Legal Information*, *supra* note 26. Unlike with traditional litigation decisions, arbitration decisions are largely unappealable under federal law. See 9 U.S.C. § 10 (2012); Silver-Greenberg & Corkery, *supra* note 17.

<sup>28</sup> See CONSUMER ARBITRATION RULES, *supra* note 26, at 28; *Consumer Legal Information*, *supra* note 26.

<sup>29</sup> See CONSUMER ARBITRATION RULES, *supra* note 26, at 28; *Consumer Legal Information*, *supra* note 26.

<sup>30</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See Jean Murray, *Arbitration vs. Litigation—What Is the Difference?*, THE BALANCE (Nov. 6, 2016), <https://www.thebalance.com/arbitration-vs-litigation-what-is-the-difference-398747> [<https://perma.cc/7Y3K-VMUW>]; Silver-Greenberg & Corkery, *supra* note 17.

that consumers wish to present.<sup>35</sup> Arbitrators biased towards corporations may choose not to hear all of a consumer's evidence, which, if presented, would potentially result in a resolution favoring the consumer instead of the corporation.<sup>36</sup> Conversely, arbitrators may allow corporations to admit evidence that would otherwise not be admissible under the Federal Rules of Evidence; doing so would increase the chances that speculative or untrustworthy information influences the arbitrator's decision in the corporation's favor.<sup>37</sup> Moreover, consumers often lose the ability to arbitrate as a class when forced into arbitration, rendering the costs of arbitration greater than the potential recovery.<sup>38</sup> Because of the undue influence that corporations exert in the arbitration arena, consumers are ultimately at a disadvantage when arbitrating disputes against large corporations.<sup>39</sup>

In recent cases, the Supreme Court has upheld the ability of large corporations to force consumers like the Utah plaintiffs into arbitration, holding that the FAA sets forth a pro-arbitration policy that protects this ability.<sup>40</sup> The FAA provides narrow rules governing arbitration proceedings.<sup>41</sup> The Supreme Court has interpreted the FAA in a way that supports the enforcement of arbitration agreements that prohibit consumers from arbitrating as a class; as such, consumers are unable to arbitrate as a class, even when a class action is the only feasible way for the consumers to resolve their legal disputes.<sup>42</sup> As a result, arbitration often inhibits consumers from pursuing dispute resolution because the costs of arbitration, such as hiring an attorney and paying the arbitrator(s), significantly outweigh the potential monetary award.<sup>43</sup>

Because arbitration exists outside of the judiciary, courts are reluctant to overturn arbitration awards.<sup>44</sup> Although the FAA attempts to protect the fair-

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<sup>35</sup> See Murray, *supra* note 34; Silver-Greenberg & Corkery, *supra* note 17. Arbitrators only need to apply evidence rules to the extent that the parties agreed to their applicability ahead of time, and to the extent they are required for the arbitrator to avoid being "evidently partial." See 9 U.S.C. §§ 1–16 (2012); CONSUMER ARBITRATION RULES, *supra* note 26, at 25.

<sup>36</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>37</sup> See *id.* For example, an arbitrator could choose to let laypersons testify to opinions that experts provide in court proceedings under Federal Rule of Evidence 702. See FED. R. EVID. 702.

<sup>38</sup> See Silver-Greenberg & Corkery, *supra* note 17. Consumers who cannot afford to arbitrate individually are therefore discouraged from continuing with the arbitration. See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See 9 U.S.C. §§ 1–16; DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

<sup>41</sup> See 9 U.S.C. §§ 1–16.

<sup>42</sup> See *id.*; Imburgia, 136 S. Ct. at 471; Am. Express, 133 S. Ct. at 2312; AT&T Mobility, 563 U.S. at 352; Neil R. Bardack & Shannon M. Nessier, *The State of Arbitration Enforcement in California*, LAW360 (Apr. 18, 2014), <http://www.law360.com/articles/529015/the-state-of-arbitration-enforcement-in-calif> [https://perma.cc/7YMR-UNHC].

<sup>43</sup> See Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>44</sup> See Silver-Greenberg & Corkery, *supra* note 17.



ness of arbitration, courts prefer not to review the merits of arbitration awards because they view arbitration as a process that serves an invaluable role in ensuring speedy dispute resolution and the reduction of the court system's caseload.<sup>45</sup> Courts therefore do not liberally involve themselves in arbitration proceedings because such intervention would result in arbitration becoming a precursor to traditional litigation, which would ultimately burden the court system by increasing courts' caseloads.<sup>46</sup> Instead, courts become involved in arbitration only in extraordinary circumstances, such as when a party unwillingly or unknowingly submits to arbitration, rendering the arbitration agreement legally unconscionable.<sup>47</sup>

Unfortunately, even when courts do involve themselves in arbitration, they are often restricted in doing so because the FAA provides only very limited circumstances where such review is appropriate.<sup>48</sup> Such circumstances might include when an arbitrator is evidently partial towards one party to the arbitration, or when an arbitration proceeding did not conform to the procedural requirements of the arbitration agreement.<sup>49</sup> In contrast to an appellate review of trial-level judicial decisions, where appellate courts have the authority to overturn all decisions they find to be incorrectly decided as a matter of law, appellate courts reviewing arbitration awards are more constrained in their power to overturn arbitration awards.<sup>50</sup> Instead, appellate courts are typically evaluating only procedural aspects of the arbitration agreement itself, not the actual substance of the underlying dispute.<sup>51</sup> Consumers who receive unfair arbitration proceedings and awards therefore have little success using the court system to remedy the injustice they experienced in arbitration.<sup>52</sup>

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<sup>45</sup> See *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993). The FAA expressly states that a judge may vacate an arbitration award if, among other occurrences, there is "evident partiality" on the part of the arbitrator. See 9 U.S.C. § 10. The FAA does not define what evident partiality means, and courts have interpreted it differently. Compare *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 64 (2d Cir. 2012) ("[e]vident partiality may be found only where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration") (internal quotation marks omitted), and *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013) ("[a]n arbitrator is evidently partial only if a reasonable person would have to conclude that she was partial to one side"), with *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994) ("evident partiality is present when undisclosed facts show a reasonable impression of partiality") (internal quotation marks omitted).

<sup>46</sup> See *Folkways Music Publishers*, 989 F.2d at 111.

<sup>47</sup> See *Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2008 WL 5216255, at \*14 (S.D. Cal. Aug. 11, 2008).

<sup>48</sup> See 9 U.S.C. § 10; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

<sup>49</sup> See 9 U.S.C. § 10. These circumstances do not arise very often because it is hard to prove that an arbitrator was biased, and because corporations are careful to follow the procedures outlined in the contracts. *Supra* note 45 and accompanying text.

<sup>50</sup> See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility*, 563 U.S. at 352.

<sup>51</sup> See *Folkways Music Publishers*, 989 F.2d at 111.

<sup>52</sup> See *Silver-Greenberg & Corkery*, *supra* note 17.

Despite their limited review of arbitration awards, courts still contribute to the development of the legal landscape of arbitration.<sup>53</sup> In addition to the very limited instances where courts may overturn arbitration awards, courts are also responsible for determining whether parties actually agreed to arbitrate their specific legal disputes.<sup>54</sup> Arbitration agreements often state specific types of disputes that are subject to arbitration under the contract, and ones that are not.<sup>55</sup> Much like in the Wells Fargo case, courts frequently step in to resolve disagreements between consumers and corporations to determine whether the arbitration clause covers their specific dispute.<sup>56</sup> Additionally, courts resolve disagreements about how the arbitration proceeding should operate.<sup>57</sup> For consumers, however, the issue is often not that they interpreted the contract as one that does not subject them to arbitration for their specific dispute, but rather that they failed to read and comprehend the arbitration agreement altogether.<sup>58</sup>

When arbitration agreements are clear but buried in lengthy consumer contracts, courts are simply unable to intervene to save the consumer from arbitration because of existing Supreme Court precedent that limits the ability of states to overturn arbitration agreements on the legal theory of unconscionability.<sup>59</sup> According to the Supreme Court, the FAA sets forth a liberal federal policy favoring arbitration; state efforts to invalidate forced arbitration agreements on the legal theory of unconscionability undermine that policy.<sup>60</sup> The Supreme Court has therefore determined that the FAA preempts the ability of state courts to find forced arbitration agreements unenforceable on the legal theory of unconscionability.<sup>61</sup> Court involvement in arbitration ultimately does little to protect consumers from unfair arbitration proceedings and awards, but instead has the effect of educating corporations to write arbitration agreements

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<sup>53</sup> See *Am. Express*, 133 S. Ct. at 2312; *AT&T Mobility*, 563 U.S. at 352.

<sup>54</sup> See, e.g., *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 25 (Tex. 2014). Courts often use the phrase “threshold issue of arbitrability” to denote the determination of whether parties agreed to arbitrate specific legal disputes. See, e.g., *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 647 (1986).

<sup>55</sup> See, e.g., *Netflix Terms of Use*, NETFLIX (Sept. 15, 2014), <https://www.netflix.com/TermsOfUse> [<https://perma.cc/NEP8-U4YS>].

<sup>56</sup> See, e.g., *Americo Life*, 440 S.W.3d at 25.

<sup>57</sup> See *id.*

<sup>58</sup> See *Silver-Greenberg & Corkery*, *supra* note 17.

<sup>59</sup> See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); *Silver-Greenberg & Corkery*, *supra* note 17. Unconscionability is “extreme unfairness” and “is normally assessed by an objective standard: (1) one party’s lack of meaningful choice, and (2) contractual terms that unreasonably favor the other party.” *Unconscionability*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>60</sup> See *Imburgia*, 136 S. Ct. at 471; *Am. Express*, 133 S. Ct. at 2312; *AT&T Mobility*, 563 U.S. at 352.

<sup>61</sup> See *Imburgia*, 136 S. Ct. at 471; *Am. Express*, 133 S. Ct. at 2312; *AT&T Mobility*, 563 U.S. at 352.

that will not give rise to similar disputes in the future.<sup>62</sup> The inability of the states to intervene in arbitration fuels the imbalance of power corporations exert over consumers in the arbitration arena.<sup>63</sup>

Part I of this Note discusses the history and current state of arbitration law in the United States, and demonstrates how the federal landscape of arbitration has resulted in an imbalance of power between corporations and consumers in the arbitration arena. Part II explains the strategic corporate use of consumer arbitration provisions, and evaluates recent Supreme Court precedent that enforces forced arbitration for consumer disputes. Part II also analyzes the resulting harms of forced consumer arbitration, and the limited ability of state courts to protect consumers from unconscionable arbitration provisions. Part III argues that Congress should amend the FAA to provide states the right to declare forced arbitration agreements unconscionable, a change that would help level the playing field for consumers who seek to resolve disputes against large corporations.

## I. THE HISTORY OF ARBITRATION IN THE UNITED STATES

Arbitration is a long-recognized method of alternative dispute resolution that predates the creation of the United States.<sup>64</sup> At the time of colonization, the colonies of Massachusetts, Pennsylvania, and New York all legally recognized arbitration as a form of dispute resolution.<sup>65</sup> An early example of arbitration during colonial times was a provision in George Washington's last will and testament declaring that any disputes regarding his estate should be resolved through the decision of three arbitrators.<sup>66</sup> Since colonial times, arbitration in the United States has evolved into a prominent tool for the resolution of legal disputes; arbitration has only recently become a tool for the resolution of consumer disputes.<sup>67</sup> Arbitration has evolved into a favorable method of dispute resolution, in part because of initial steps taken by the federal government

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<sup>62</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>63</sup> See *id.*

<sup>64</sup> See Steven A. Certilman, *Throw Down the Muskets, Seek Out the Town Elders: This Is a Brief History of Arbitration in the United States*, 3 N.Y. DISP. RESOL. LAW. 10, 10 (2010). Native American tribes employed arbitration to resolve disputes before the creation of the United States. *Id.* Alternative dispute resolution is “[a]ny procedure for settling a dispute by means other than litigation, as by arbitration or mediation.” *Alternative Dispute Resolution*, BLACK’S LAW DICTIONARY (10th ed. 2014). Mediation is a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. *Mediation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>65</sup> See Certilman, *supra* note 64, at 10. These states either passed laws, or took other specific actions, recognizing and supporting the existence of arbitration. See *id.* For example, in 1768 the New York Chamber of Commerce created a tribunal tasked with conducting arbitrations over commercial disputes in the colony. See *id.*

<sup>66</sup> See *id.* at 11.

<sup>67</sup> See *id.* at 10; Silver-Greenberg & Corkery, *supra* note 17.

to provide alternative dispute resolution for labor disputes; this includes the eventual enactment of the Federal Arbitration Act (the “FAA”) in 1925, which officially gave federal authorization for parties to resolve disputes through arbitration.<sup>68</sup> The subsequent creation of organizations that work to conduct and oversee arbitration proceedings—such as the American Arbitration Association (AAA)—and certain Supreme Court decisions that have enforced the FAA’s liberal federal policy in favor of arbitration have since paved the way for arbitration to become a dominant method for resolving consumer disputes.<sup>69</sup>

### *A. Initial Steps by the Federal Government to Provide for Arbitration as a Source of Alternative Dispute Resolution*

The Arbitration Act of 1888 (the “Arbitration Act”) was the first federal law to allow for voluntary arbitration over labor disputes.<sup>70</sup> Congress and President Grover Cleveland intended the Arbitration Act to adjudicate labor disputes that had led to strikes on the railroad.<sup>71</sup> To address those disputes, the Arbitration Act established a board of arbitrators to oversee future labor disputes between the railroads and their employees.<sup>72</sup> Arbitration under the Arbitration Act was only voluntary and rarely invoked to resolve the railroad labor disputes, because both parties—the railroads and the laborers—preferred other methods of resolving legal disputes.<sup>73</sup>

In an effort to encourage alternative dispute resolution for future labor disputes, Congress enacted the Erdman Act (the “Erdman Act”) in 1898, which promoted both mediation and arbitration for the resolution of labor disputes.<sup>74</sup> The Erdman Act built upon the Arbitration Act in several ways, including by providing a more structured process for selecting a qualified, unbiased mediator or arbitrator to preside over dispute resolutions.<sup>75</sup> Although under the Erd-

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<sup>68</sup> See Certilman, *supra* note 64, at 11, 12.

<sup>69</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); *Silver-Greenberg & Corkery*, *supra* note 17.

<sup>70</sup> See Certilman, *supra* note 64, at 11.

<sup>71</sup> See Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 CATH. U. L. REV. 919, 924 n.25 (1998); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373, 382 (1983).

<sup>72</sup> See Nolan & Abrams, *supra* note 71, at 382. The arbitration board was to consist of three panelists, one chosen by each of the parties and a third picked by the first two panelists. See *id.* at 383.

<sup>73</sup> See *id.* at 383. Neither side of the railroad labor disputes wanted to submit to voluntary arbitration under the Arbitration Act of 1888 because “[r]ailroad unions increasingly relied on strikes and boycotts, while railroad companies preferred court orders.” See *id.*

<sup>74</sup> See Certilman, *supra* note 64, at 11. Whereas arbitration is “[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute,” mediation is “[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.” *Arbitration*, *supra* note 6; *Mediation*, *supra* note 64.

<sup>75</sup> See Certilman, *supra* note 64, at 11; Nolan & Abrams, *supra* note 71, at 383. When Congress created the Department of Labor in 1913, it included a provision granting the Secretary of Labor the

man Act arbitration became a popular method of resolving labor and other legal disputes, parties did not utilize arbitration to the extent Congress had intended.<sup>76</sup>

To champion the use of arbitration, Congress enacted the FAA in 1925 to set forth a liberal federal policy supporting the enforceability and use of arbitration to settle legal disputes.<sup>77</sup> Because courts viewed arbitration with “judicial hostility,” Congress implemented the FAA to prevent courts from finding all arbitration agreements legally unenforceable, a practice courts had adopted from English common law, based on the perception that arbitration undermined court power.<sup>78</sup> Therefore, to combat courts’ hostility towards arbitration, Congress enacted the FAA to place arbitration agreements “upon the same footing as other contracts, where [they] belong . . . .”<sup>79</sup> Additionally, public concerns of the costliness and delays of litigation motivated Congress to encourage the use of arbitration.<sup>80</sup> As such, Congress enacted the FAA to promote a national policy favoring arbitration that was applicable to state and federal courts, and to provide the public with a more efficient method of dispute resolution.<sup>81</sup>

To accomplish these goals, Congress included in the FAA a specific section establishing the “[v]alidity, irrevocability, and enforcement of agreements to arbitrate.”<sup>82</sup> Section 2 of the FAA states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable,

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“power to . . . appoint commissioners of conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done.” See John R. Steelman, *The Work of the United States Conciliation Service in Wartime Labor Disputes*, 9 LAW & CONTEMP. PROBS. 462, 462 (1942). As such, the U.S. Conciliation Service, an agency designed to provide mediation and arbitration services for labor disputes, was established. Certilman, *supra* note 64, at 11. In 1947, the Federal Mediation and Conciliation Service, an independent agency created in response to complaints that the Department of Labor should not oversee labor arbitrations, replaced the U.S. Conciliation Service. See *id.* at 12. The Federal Mediation and Conciliation Service still exists today. See *About Us*, FED. MEDIATION & CONCILIATION SERV, <https://www.fmcs.gov/aboutus/> [<https://perma.cc/49DY-2JDM>].

<sup>76</sup> See Nolan & Abrams, *supra* note 71, at 383.

<sup>77</sup> See 9 U.S.C. §§ 1–16 (2012); Certilman, *supra* note 64, at 12.

<sup>78</sup> See Daniel R. Strader, *Bridging the Gap: Amending the Federal Arbitration Act to Allow Discovery of Nonparties*, 41 STETSON L. REV. 909, 913–14 (2012); John D. Wood, *Opening the Door to Justice: Amending the Federal Arbitration Act to Remedy the Unjust Use of Pre-dispute Arbitration Agreements 2* (Selected Works, Working Paper, Feb. 2011). English courts “resented being ousted from their own jurisdiction by private contracts.” Strader, *supra*, at 914.

<sup>79</sup> Strader, *supra* note 78, at 914.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.* at 914–15.

<sup>82</sup> 9 U.S.C. § 2.

and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>83</sup>

This provision of the FAA permits the legal enforcement of arbitration agreements in consumer contracts.<sup>84</sup> Section 2 therefore legally enables corporations to require their consumers to agree to arbitrate future contractual disputes as a condition of receiving the corporation's services.<sup>85</sup> Consumers who are unable to negotiate with corporations to remove the arbitration agreements from their consumer contracts, and consumers who need the corporation's services because no alternatives exist, have no choice but to consent to arbitrate future legal disputes.<sup>86</sup> When corporations violate service contracts, "forced arbitration" prevents consumers from seeking justice in the traditional court system where their opportunity for success is much greater.<sup>87</sup>

Other sections of the FAA also accomplish Congress's arbitration objectives by providing basic rules aimed at ensuring fairness to the parties, including permitting courts to appoint arbitrators when the parties cannot agree on a method to do so, and allowing courts to overturn arbitration awards where the arbitrator was "evidently partial."<sup>88</sup> Because of vague language however, the FAA does not answer all questions regarding how to conduct arbitration proceedings.<sup>89</sup> For example, the FAA does not explicitly state that evidentiary laws are applicable to arbitration proceedings, nor does the FAA provide whether arbitration awards are appealable.<sup>90</sup> Similarly, the FAA does not mention any specific rules for consumer arbitrations.<sup>91</sup> As such, individual arbitrators have discretion over these specific aspects of arbitration proceedings.<sup>92</sup> Unfortunately, arbitrators often do not permit consumers to take advantage of

<sup>83</sup> *Id.*

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*; *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

<sup>86</sup> *See Silver-Greenberg & Corkery, supra* note 17. For example, there may be only one cellphone or cable television provider in an area, and that corporation may require consumers to sign an arbitration agreement. *See id.* Some corporations, such as Comcast, allow consumers to opt out of arbitration agreements by notifying the corporation of the intent to opt out of the agreement within thirty days. *See COMCAST, COMCAST AGREEMENT FOR RESIDENTIAL SERVICES 1*, 16, [https://cdn.comcast.com/~Media/Files/Legal/Subscriber%20Agreement/ResServices\\_HomeNetworkingUniLegal\\_STD\\_ENG.pdf?rev=1fec0de-b578-4e33-a0e4-f51176671aae](https://cdn.comcast.com/~Media/Files/Legal/Subscriber%20Agreement/ResServices_HomeNetworkingUniLegal_STD_ENG.pdf?rev=1fec0de-b578-4e33-a0e4-f51176671aae) [<https://perma.cc/JY9E-JA8D>].

<sup>87</sup> *See Silver-Greenberg & Corkery, supra* note 17.

<sup>88</sup> 9 U.S.C. §§ 5, 10 (2012); *supra* note 45 and accompanying text.

<sup>89</sup> *See Mignon A. Lunsford, Inside the Circuit Split over FAA Section 7*, LAW360 (Feb. 1, 2013), <https://www.law360.com/articles/411237/inside-the-circuit-split-over-faa-section-7> [<https://perma.cc/L5YG-RRDQ>]; Strader, *supra* note 78, at 915. For example, courts in 2013 were split over the meaning of vague language within FAA Section 7 as to whether it permits an arbitrator to compel prehearing discovery depositions and document production from nonparties. Lunsford, *supra*.

<sup>90</sup> *See* 9 U.S.C. §§ 1–16.

<sup>91</sup> *See id.*

<sup>92</sup> *See Silver-Greenberg & Corkery, supra* note 17.

all of the evidentiary rules that are available in traditional court litigation, which leaves consumers at a disadvantage in the arbitration arena.<sup>93</sup> Furthermore, arbitration is largely unappealable—courts rarely decide to, or have the opportunity to, appeal arbitration awards—leaving consumers harmed by unfavorable arbitration awards little to no avenue to obtain the fairness Congress intended them to receive through arbitration.<sup>94</sup>

Recognizing that the FAA did not completely address all aspects of arbitration, the AAA and other private organizations began providing services to improve arbitration in the United States.<sup>95</sup> The AAA, founded in 1926, is a non-profit organization whose primary objective is to appoint arbitrators and establish concrete rules of arbitration by which proceedings are to abide, including establishing rules of evidence for arbitration.<sup>96</sup> Instead of negotiating every procedural detail for how to conduct future arbitrations, parties have the opportunity to contract to arbitrate pursuant to specific AAA procedural rules.<sup>97</sup> Under the guidance of the AAA, arbitration is to proceed in a fair and efficient manner for all involved parties.<sup>98</sup>

Unfortunately, arbitration in the United States has not always proceeded in a fair manner for all parties, even when conducted pursuant to AAA rules.<sup>99</sup> Corporations often exploit the private nature of arbitration to influence con-

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<sup>93</sup> See *id.*

<sup>94</sup> See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

<sup>95</sup> See *AAA Mission and Principles*, AM. ARB. ASS'N (2016), <https://www.adr.org/aaa/faces/home?> [<https://perma.cc/7MBS-K63R>] (follow “About” hyperlink; then follow “Mission & Principles” hyperlink); Silver-Greenberg & Corkery, *supra* note 17. All of these organizations perform similar functions, but this Note will use the AAA as a representative example because many consumer arbitration contracts contain provisions mandating that the arbitrations comply with AAA rules—i.e., Netflix requires arbitration pursuant to the AAA consumer rules. *Netflix Terms of Use*, *supra* note 55.

<sup>96</sup> See *AAA Mission and Principles*, *supra* note 95.

<sup>97</sup> See *About the AAA & ICDR*, *supra* note 9. Application of AAA rules depends on the construction of each arbitration agreement. See *id.* Commercial agreements—agreements between corporations—that contain arbitration provisions are governed by the *AAA Commercial Arbitration Rules*, whereas consumer agreements—agreements between corporations and their consumers—that contain arbitration provisions are governed by the *AAA Consumer Arbitration Rules*. Compare CONSUMER ARBITRATION RULES, *supra* note 26, at 6 (stating that the *AAA Consumer Arbitration Rules* apply to disputes between a consumer and a corporation), with AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES 7 (2013) [hereinafter COMMERCIAL ARBITRATION RULES], <https://www.adr.org/aaa/faces/home?> [<https://perma.cc/WHL3-S5MT>] (follow “Rules and Forms” hyperlink; then follow “Rules” hyperlink; then follow “Commercial Arbitration Rules and Mediation Procedures” PDF hyperlink) (stating that the *AAA Commercial Arbitration Rules* apply to disputes between corporations). The distinguishing factor between the applicability of the *AAA Commercial Arbitration Rules* and the *AAA Consumer Arbitration Rules* is thus whether both parties are corporations; if both parties are corporations, the *AAA Commercial Arbitration Rules* will apply. See COMMERCIAL ARBITRATION RULES, *supra*, at 7. Consumers can choose to arbitrate pursuant to AAA rules, or they can choose not to arbitrate pursuant to AAA rules. See *About the AAA & ICDR*, *supra* note 9.

<sup>98</sup> See *About the AAA & ICDR*, *supra* note 9.

<sup>99</sup> See Silver-Greenberg & Corkery, *supra* note 17.

sumer arbitration proceedings.<sup>100</sup> As a result, arbitration has largely resulted in unfair awards for consumers.<sup>101</sup> Although the FAA and organizations like the AAA intend to promote fair and efficient dispute resolution, corporate domination over arbitration has resulted in just the opposite for consumers.<sup>102</sup>

### *B. How Corporations Utilize the FAA and AAA Rules to Dominate Arbitration*

At the turn of the twenty-first century, corporations began looking for ways to reduce the costs associated with defending frivolous consumer-driven lawsuits.<sup>103</sup> These corporations employed lawyers to determine more cost-effective methods of resolving contractual consumer disputes.<sup>104</sup> The corporate lawyers determined that forced arbitration agreements would help their corporate clients by legally requiring that consumers settle future disputes through arbitration rather than in-court litigation.<sup>105</sup> By using arbitration agreements, corporations could force consumers out of the court system entirely, thereby eliminating the opportunity for expensive class action consumer lawsuits.<sup>106</sup> Although historically only a few corporations—such as the credit card companies American Express and First USA—employed forced arbitration agreements in their consumer contracts, following the turn of the century the use of arbitration agreements in consumer contracts has become increasingly popular.<sup>107</sup> Today, hundreds of millions of consumer contracts contain arbitration provisions, including contracts with Amazon, Groupon, Netflix, Verizon and Wells Fargo.<sup>108</sup>

<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*; *Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization*, AM. ARB. ASS'N (2016), <https://www.adr.org/aaa/faces/home?> [<https://perma.cc/B8MK-NYKJ>] (follow “About” hyperlink; then follow “Mission & Principles” hyperlink; then follow “Statement of Ethical Principles” hyperlink).

<sup>103</sup> *See Silver-Greenberg & Gebeloff, supra* note 17.

<sup>104</sup> *See id.* The *New York Times* released an article portraying numerous corporate lawyers who, beginning in 1999, had conducted more than a dozen client meetings to discuss possible ways to save their corporate clients from having to defend frivolous consumer-driven lawsuits. *See id.*

<sup>105</sup> John R. Allison, *Five Ways to Keep Disputes Out of Court*, HARV. BUS. REV. (Jan.–Feb. 1990), <https://hbr.org/1990/01/five-ways-to-keep-disputes-out-of-court> [<https://perma.cc/M5QV-PGGY>]; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>106</sup> *See Silver-Greenberg & Gebeloff, supra* note 17.

<sup>107</sup> *See id.*

<sup>108</sup> *See, e.g., Mandy Walker, The Arbitration Clauses Hidden in Many Consumer Contracts*, CONSUMER REP., <http://www.consumerreports.org/cro/shopping/the-arbitration-clause-hidden-in-many-consumer-contracts> [<https://perma.cc/WA5X-3PRZ>]; *Amazon Conditions of Use*, AMAZON (June 21, 2016), <http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088> [<https://perma.cc/Y86J-U84Y>] (stating that “[t]he arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA’s Supplementary Procedures for Consumer-Related Disputes”). The National Association of Consumer Advocates explains that in today’s consumer-



As corporate use of forced arbitration agreements became increasingly popular, the potential detriments of arbitration—namely, that corporate domination in the arbitration arena results in unequal bargaining power for consumers to agree to arbitration—overshadowed many of the previous benefits parties to labor arbitrations enjoyed, including time- and cost-efficiency.<sup>109</sup> To ensure consumer complicity, corporations often bury arbitration agreements in larger consumer contracts where consumers are unlikely to see them, thereby forcing consumers to involuntarily contract to arbitration.<sup>110</sup> Additionally, corporations have a much better understanding of how arbitration works because they employ legal teams who repeatedly arbitrate consumer disputes.<sup>111</sup> Therefore, although intended to promote fair and efficient dispute resolution, since corporations have entered the arbitration arena, consumer arbitration has been anything but fair.<sup>112</sup> Furthermore, because the Supreme Court has repeatedly enforced the FAA's liberal policy favoring the enforceability of all arbitration agreements, despite the fairness of such agreements, consumers have little opportunity to challenge unfavorable and unconscionable arbitration awards.<sup>113</sup>

Corporations have successfully exerted power over consumer arbitration by mandating that consumers arbitrate future legal disputes pursuant to specific AAA rules, and the rules of similar organizations.<sup>114</sup> AAA rules are comprehensive and written with judicial review in mind, meaning that AAA rules structure arbitration proceedings in such a way that resulting arbitration awards will not be appealable to courts on procedural or substantive grounds.<sup>115</sup> Therefore, corporations often choose to arbitrate pursuant to those rules because they recognize that the consumers they are arbitrating against will most likely not have the opportunity for appeal should the corporation win the arbitration.<sup>116</sup>

Although the AAA strives to provide rules for, and oversee, consumer arbitration so that the arbitration proceedings conform to the policy of the FAA—namely, the promotion of fair and efficient dispute resolution—the

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driven market, many contracts for credit cards, checking accounts, insurance, investing accounts and student loans contain arbitration provisions. *See Walker, supra*.

<sup>109</sup> *See Silver-Greenberg & Gebeloff, supra* note 17.

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

<sup>111</sup> *See id.*

<sup>112</sup> *See Imre Stephen Szalai, Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 119 (2016); *Silver-Greenberg & Gebeloff, supra* note 17.

<sup>113</sup> *See Silver-Greenberg & Gebeloff, supra* note 17.

<sup>114</sup> *See, e.g., Amazon Conditions of Use, supra* note 108; *Netflix Terms of Use, supra* note 55.

<sup>115</sup> *See About the AAA & ICDR, supra* note 9. *See generally* Christopher D. Kratovil & Jared L. Hubbard, *Judicial Review of Arbitration Awards*, K&L GATES, <http://www.klgates.com/files/tempfiles/495162ee-0873-40a1-b6af-38ed4e4b39c3/utarbitrationpaper.pdf> [<https://perma.cc/45NA-5MGG>] (stating that “[e]ven if parties are subject to AAA procedural rules, they do not escape the dilemma of strict judicial review”).

<sup>116</sup> *See Silver-Greenberg & Corkery, supra* note 17.

AAA is not able to entirely eliminate corporate influence over arbitration.<sup>117</sup> Because of their experiences with arbitration and higher knowledge of AAA rules—namely, due to lawyer involvement—corporations are able to utilize the vague nature of AAA rules to create arbitration proceedings that favor their own interests over those of the consumer.<sup>118</sup> For example, in consumer arbitration, the method for selecting an arbitrator depends upon the terms of the specific contract; in many instances, either the AAA or the parties provide a list of names of potential arbitrators from which each party to the arbitration ranks its preferences.<sup>119</sup> In those scenarios, the rankings ultimately determine the arbitrator.<sup>120</sup> Alternatively, the *AAA Consumer Arbitration Rules* state that if the parties cannot agree upon an arbitrator or method to select an arbitrator, the AAA will appoint one.<sup>121</sup> In these scenarios, corporations are involved in determining who the arbitrator(s) will be, and can exert knowledge from their prior experiences with arbitration to ensure that they are able to appoint favorable arbitrators.<sup>122</sup> Consumers arbitrating disputes against corporations therefore find themselves at a marked disadvantage because the decision-maker in the arbitration proceeding is often not a neutral party.<sup>123</sup> As such, despite the AAA's intent to promote fair arbitration proceedings, the scale is often overwhelming tipped in favor of the corporation before the proceeding even begins.<sup>124</sup>

Congress enacted the FAA to promote fair and efficient dispute resolution, specifically through arbitration.<sup>125</sup> The purpose of organizations such as

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<sup>117</sup> See *id.*

<sup>118</sup> See *id.* AAA rules lack the exactness that would explicitly eliminate certain issues of arbitration that naturally favor corporations, such as arbitrator partiality and the absence of evidentiary and discovery rules. See CONSUMER ARBITRATION RULES, *supra* note 26, at 25; Silver-Greenberg & Corkery, *supra* note 17. As such, lawyers that corporations employ to handle legal matters such as arbitration and who have extensive knowledge regarding AAA rules—as evidenced by publications from law firms detailing how to best draft AAA-compliant arbitration provisions—are able to exploit the vague language of AAA rules to their clients' benefits. See GIBSON DUNN, DRAFTING ARBITRATION CLAUSES 2–30 (2015), <http://www.gibsondunn.com/publications/Documents/WebcastSlides-Drafting-Arbitration-Clauses-1.20.2015.pdf> [<https://perma.cc/FMA4-QRPM>]; LEA HABER KUCK & JULIE BÉDARD, PRACTICAL LAW, STANDARD ARBITRATION CLAUSES FOR THE AAA, ICDR AND ICC 50–54 (2010), [https://www.skadden.com/sites/default/files/publications/Publications2153\\_0.pdf](https://www.skadden.com/sites/default/files/publications/Publications2153_0.pdf) [<https://perma.cc/KU96-VFGB>]. Consumers on the other hand, who have little knowledge of arbitration by nature of their limited economic activities, cannot so easily exploit AAA rules to their advantage. See Silver-Greenberg & Corkery, *supra* note 17.

<sup>119</sup> See COMMERCIAL ARBITRATION RULES, *supra* note 97, at 34; AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES & MEDIATION PROCEDURES 20 (2009), [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004362](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362) [<https://perma.cc/8KHS-JBZN>].

<sup>120</sup> See COMMERCIAL ARBITRATION RULES, *supra* note 97, at 34.

<sup>121</sup> See CONSUMER ARBITRATION RULES, *supra* note 26, at 18.

<sup>122</sup> See *id.*

<sup>123</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>124</sup> See *id.*

<sup>125</sup> See 9 U.S.C. §§ 1–16 (2012); Szalai, *supra* note 112, at 119.

the AAA is to further that goal by dictating specific rules and procedures for arbitration proceedings, including consumer arbitrations.<sup>126</sup> Unfortunately, corporations have found strategic ways to exploit the FAA's liberal policy favoring arbitration, as well as specific AAA rules, to dominate the consumer arbitration arena.<sup>127</sup> Corporations rely on complex arbitration provisions buried in larger consumer contracts to force consumers to arbitrate future legal disputes arising under those contracts.<sup>128</sup> Once in arbitration, corporations exercise influence over "neutral" decision makers to ensure favorable arbitration awards.<sup>129</sup> Recognizing that arbitration awards are largely unappealable, corporations rest assured that consumers with whom they arbitrate are unable to challenge the resulting arbitration awards.<sup>130</sup> Consumers are therefore at a serious disadvantage when forced into arbitration, and are largely unable to remedy the abuses faced in the arbitration arena.<sup>131</sup>

## II. CORPORATE TAKEOVER OF THE ARBITRATION ARENA

Despite specific issues with consumer arbitration, arbitration continues to serve an invaluable role in the United States by relieving the court system of burdensome caseloads, allowing for swift dispute resolution, and providing cost-effective alternatives to litigation.<sup>132</sup> As arbitration has become a more prominent solution for legal disputes, however, concerns regarding the integrity and neutrality of arbitration proceedings have surfaced.<sup>133</sup> Most notably, there is a concern that the imbalance of power between corporations and consumers allows corporations to influence arbitration proceedings to serve the interests of the corporations.<sup>134</sup> For consumers, this often means unfairly and unjustly losing damages that they would have otherwise been able to recover had they been able to litigate their disputes in court.<sup>135</sup>

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<sup>126</sup> See *About the AAA & ICDR*, *supra* note 9.

<sup>127</sup> See *Silver-Greenberg & Corkery*, *supra* note 17.

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

<sup>130</sup> See *id.* Consumers more often have issues with arbitration awards that they desire to appeal—i.e., the arbitrator was partial or they were denied the opportunity to present evidence—but cannot because arbitration awards are largely unappealable. See *STONE & COLVIN*, *supra* note 8, at 3; *Silver-Greenberg & Corkery*, *supra* note 17. Because corporations have a significant advantage in arbitration, they presumably do not tend to seek appeal on arbitration awards. See *Silver-Greenberg & Corkery*, *supra* note 17. As such, the inability to appeal arbitration awards more negatively affects consumers. See *id.*

<sup>131</sup> See *Silver-Greenberg & Corkery*, *supra* note 17.

<sup>132</sup> See *id.* Arbitration can be more cost-effective and shorter than litigation because it is not fully subject to all rules of evidence. See *id.*

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

<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

### A. The Strategic Corporate Use of Consumer Arbitration Provisions

Because of the control they are able to exert over the dispute proceedings, corporations tend to favor arbitration over litigation.<sup>136</sup> As such, corporations strategically embed arbitration clauses into consumer contracts—recognizing that most consumers do not read contracts in their entirety—to force parties to resolve future disputes through arbitration.<sup>137</sup> The legal terminology of these arbitration clauses is also often beyond what the average consumer is able to understand.<sup>138</sup> Many consumers therefore agree to resolve disputes arising from their purchases without knowing or understanding that they are agreeing to do so; as a result, consumers who desire to bring lawsuits against corporations submit to unfavorable arbitration proceedings to settle their legal disputes.<sup>139</sup>

Corporations that utilize arbitration agreements typically have lawyers draft lengthy and complicated arbitration provisions that mandate how to settle consumer disputes.<sup>140</sup> Through legal jargon that the average consumer most likely does not understand, these agreements often dictate how to conduct an arbitration proceeding, who will be the “neutral” arbitrator, and where the arbitration will occur.<sup>141</sup> Because corporations dictate the terms of arbitration, all of these aspects of the proceeding tend to benefit the corporations.<sup>142</sup> For example, corporations can select arbitrators known to rule in their favor because of previous business that the company has provided to those arbitrators.<sup>143</sup> Corporations can also select venues for arbitration that are easily accessible to corporate counsel, but perhaps not feasible for some consumers to access.<sup>144</sup> Finally, corporate lawyers drafting these arbitration provisions understand the rules that the American Arbitration Association (AAA) dictates, and therefore know how to structure the provisions to not only comply with those rules, but to also exploit the benefits of the rules in favor of the corporation.<sup>145</sup>

Corporations also tend to bury arbitration agreements at the end of their service contracts, increasing the likelihood that consumers will not read the

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<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> *See id.* The Comcast Agreement for Residential Services states in Section 13, “[a]ny Dispute involving you and Comcast shall be resolved through individual arbitration.” *See* COMCAST, *supra* note 86, at 15.

<sup>139</sup> *See* Silver-Greenberg & Corkery, *supra* note 17.

<sup>140</sup> *See* Silver-Greenberg & Corkery, *supra* note 17.

<sup>141</sup> *See* CONSUMER ARBITRATION RULES, *supra* note 26, at 6; Silver-Greenberg & Corkery, *supra* note 17.

<sup>142</sup> *See* Silver-Greenberg & Corkery, *supra* note 17.

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

<sup>144</sup> *See* AM. ARBITRATION ASS’N, LOCALE DETERMINATIONS (2016), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_013007](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_013007) [<https://perma.cc/X2BZ-R7EM>].

<sup>145</sup> *See id.*

provisions.<sup>146</sup> For example, the contract that American Express cardholders are required to sign in order to activate their cards has been noted by the *New York Times* as particularly noteworthy because “[t]he section on arbitration can be found toward the end of the contract, which contains several thousand words of legal language.”<sup>147</sup> Particularly with quick-click terms and conditions, consumers often do not actually read through the conditions they are agreeing to when signing a contract.<sup>148</sup> Instead, consumers just tend to “agree” because they know that agreeing to the terms and conditions is the only way to purchase the services being offered.<sup>149</sup>

Even if a consumer reads every provision of the terms and conditions of a consumer contract, he or she most likely will not understand what arbitration is, or what agreeing to dispute resolution through arbitration entails.<sup>150</sup> Consumers often do not have the benefit of having a lawyer review the terms and conditions of a consumer agreement before they accept the agreement, and the language found in the terms and conditions can be confusing to a layperson.<sup>151</sup> Therefore, many consumers do not realize that agreeing to the terms and conditions of a consumer contract means that they are essentially signing away the ability to resolve disputes in a fair and neutral manner—i.e., through litigation.<sup>152</sup>

The terms and conditions of Netflix, a company that streams movies and television shows online, illustrate a prime example of the strategic corporate use of arbitration agreements.<sup>153</sup> All Netflix subscribers must agree to its terms and conditions—which include an arbitration provision—upon subscribing online.<sup>154</sup> Section 15 of the terms and conditions states:

[i]f you are a Netflix member in the United States (including its possessions and territories), you and Netflix agree that any dispute,

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<sup>146</sup> See Silver-Greenberg & Gebeloff, *supra* note 17. Although some corporations state the existence of an arbitration agreement at the beginning of their service contracts, they still bury the arbitration agreement at the end of the contract. See, e.g., *Netflix Terms of Use*, *supra* note 55. Although arbitration agreements could also be included in contracts for goods and products, this Note focuses primarily on service contracts because of relevant Supreme Court case law that addresses the use of arbitration agreements in service contracts. See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

<sup>147</sup> See Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>148</sup> See *STONE & COLVIN* *supra* note 8, at 4; Silver-Greenberg & Gebeloff, *supra* note 17. Many forced consumer arbitration agreements can be “signed” by clicking an agreement button online. See *STONE & COLVIN*, *supra* note 8, at 4.

<sup>149</sup> See *STONE & COLVIN*, *supra* note 8, at 4–5.

<sup>150</sup> See *id.* at 4.

<sup>151</sup> See *id.* at 4–5. Many arbitration agreements do not make use of explanatory phrases or other tools that might help consumers have a better understanding that they are contracting to arbitration. See *id.* at 4.

<sup>152</sup> See *STONE & COLVIN*, *supra* note 8, at 4–5; Silver-Greenberg & Corkery, *supra* note 17.

<sup>153</sup> See *Netflix Terms of Use*, *supra* note 55.

<sup>154</sup> See *id.*

claim or controversy arising out of or relating in any way to the Netflix service, these Terms of Use and this Arbitration Agreement, shall be determined by binding arbitration . . . .<sup>155</sup>

The arbitration provision explicitly dictates the requirement of an arbitrator and the evidence to be allowed in an arbitration proceeding.<sup>156</sup> When a Netflix consumer clicks the button agreeing to the terms and conditions of subscription, the arbitration agreement is binding upon the consumer, whether or not the consumer actually read and understood the agreement.<sup>157</sup> If a Netflix consumer were to have a legal dispute with Netflix, the arbitration provision would force him or her to settle that dispute in the strategically mandated arbitration process that strongly favors Netflix over the consumer.<sup>158</sup> The imbalance of power between corporations and consumers in arbitration proceedings, as evidenced by Netflix's arbitration provision, is the unfortunate result of inefficient rules and regulations governing arbitration in the United States.<sup>159</sup>

### *B. Tipping the Scale of Bargaining Power*

The use of arbitration provisions, as currently structured in the United States, creates an imbalance of bargaining power between consumers and corporations for a variety of reasons.<sup>160</sup> First, corporations that frequently arbitrate against consumers are more knowledgeable of the arbitration arena, and can offer repeat business to arbitrators in exchange for ruling in favor of the corporations.<sup>161</sup> Average consumers do not frequently arbitrate, and are therefore less knowledgeable about arbitration and are not similarly able to offer repeat business to potential arbitrators.<sup>162</sup> As such, corporations often benefit from the familiarity of arbitration and the partiality of arbitrators.<sup>163</sup> Second, an unequal-

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* The agreement also states that

[a]rbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award. You agree that, by agreeing to these Terms of Use, the U.S. Federal Arbitration Act governs the interpretation and enforcement of this provision, and that you and Netflix are each waiving the right to a trial by jury or to participate in a class action. This arbitration provision shall survive termination of this Agreement and the termination of your Netflix membership.

*Id.*

<sup>157</sup> See Silver-Greenberg & Corkery, *supra* note 17; Netflix Terms of Use, *supra* note 55.

<sup>158</sup> See Silver-Greenberg & Corkery, *supra* note 17; Netflix Terms of Use, *supra* note 55.

<sup>159</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>160</sup> See STONE & COLVIN, *supra* note 8, at 4–5; Silver-Greenberg & Corkery, *supra* note 17.

<sup>161</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>162</sup> See *id.*

<sup>163</sup> See *id.*

ity in bargaining power manifests itself in the fact that the average consumer cannot easily acquire services without first consenting to arbitration.<sup>164</sup> Thus, even to the extent that consumers know about the arbitration agreements contained in their consumer contracts, consumers are not always in a position to be able to seek other services or bargain with corporations for more favorable terms and conditions.<sup>165</sup> Therefore, many consumers sign arbitration agreements with corporations that contain a number of harms including arbitrator impartiality, limited evidentiary rules, and less opportunity for appeal.<sup>166</sup>

As previously discussed, one of the biggest problems facing consumers is the impartiality of the arbitrators selected to preside over their arbitration proceedings, which is exacerbated by the fact that courts are reluctant to declare arbitration provisions unconscionable.<sup>167</sup> In addition, the private nature of arbitration does not guarantee consumers the traditional rules of evidence that court litigation guarantees.<sup>168</sup> Depending on the arbitration agreement, the arbitrator presiding over the dispute resolution often has discretion over which discovery and evidentiary rules he or she will permit a consumer to employ.<sup>169</sup> Arbitrators unduly influenced by the prospect of future employment by corporations therefore have the discretion to limit the rules of evidence available to consumers.<sup>170</sup> The lack of baseline evidentiary rules in arbitration proceedings disparately affects individuals forced to arbitrate consumer disputes.<sup>171</sup> This is because consumers who cannot rely on baseline evidentiary rules may not be able to present all pieces of evidence that would be admissible in court, and might not be able to exclude all opposing pieces of evidence that would be in-

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<sup>164</sup> See STONE & COLVIN, *supra* note 8, at 4–5.

<sup>165</sup> See *id.*

<sup>166</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>167</sup> See DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011); Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>168</sup> See Silver-Greenberg & Corkery, *supra* note 17. Arbitration agreements can specify the degree to which evidentiary rules apply, or if arbitrating pursuant to AAA or other rules, then those rules will decide. See CONSUMER ARBITRATION RULES, *supra* note 26, at 25. The FAA is silent on evidentiary issues, so there is no statutory requirement that arbitration conform to a baseline level of evidentiary rules. See 9 U.S.C. §§ 1–16 (2012). For example, an arbitrator hypothetically could have the discretion to not permit consumers to object to hearsay evidence, which would be damaging to consumers because the arbitrator could rule in a corporation's favor based upon the statements of non-testifying third parties. See *id.*; Silver-Greenberg & Corkery, *supra* note 17.

<sup>169</sup> See generally *Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization*, *supra* note 102 (stating that “arbitrators decide cases” and “[w]here the AAA appoints an arbitrator, a party can make objections to that arbitrator”).

<sup>170</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>171</sup> See *id.*

admissible in court.<sup>172</sup> Thus, not being able to rely on evidence rules negatively impacts consumers who attempt to arbitrate disputes with large corporations.<sup>173</sup>

Moreover, arbitration awards are not appealable in the ways that court awards are appealable.<sup>174</sup> This is because arbitration is in theory an important tool for courts to keep their dockets in check; as a general policy, courts do not want to give away this benefit by liberally reviewing arbitration proceedings.<sup>175</sup> If courts liberally reviewed arbitration proceedings, then arbitration would merely become an intermediate step to conventional litigation, which would increase the length of an already time-consuming process.<sup>176</sup> For this reason, courts are inclined to limit overturning arbitration awards to extreme cases of arbitrator partiality, or to cases in which “corruption, fraud, or undue means” secured the arbitration award.<sup>177</sup> As a result, consumers often lose substantial damages, or face worse financial positions because they cannot appeal their arbitration awards.<sup>178</sup> The process of appeals is a vital part of the U.S. court system’s internal judicial review, because potentially three courts review each case to eliminate undue influence over the result.<sup>179</sup> Unfortunately, arbitration does not contain a similar internal review, allowing corporations to influence consumer arbitration awards without punishment.<sup>180</sup> The inability to appeal arbitration awards therefore puts consumers at a serious disadvantage in arbitration.<sup>181</sup>

### *C. State Involvement in Arbitration: How the Supreme Court Has Limited States’ Ability to Declare Arbitration Agreements Unconscionable*

To combat the unfairness of forced consumer arbitration agreements, states began nullifying them on the legal theory of unconscionability.<sup>182</sup> Under the doctrine of unconscionability, a contract is unenforceable if it is both procedurally and substantively unconscionable.<sup>183</sup> Although states may articulate different standards for what constitutes procedural and substantive uncon-

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<sup>172</sup> *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See id.*

<sup>175</sup> *See Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993).

<sup>176</sup> *See id.*

<sup>177</sup> *See* 9 U.S.C. § 10 (2012); *Folkways Music Publishers*, 989 F.2d at 111.

<sup>178</sup> *See Folkways Music Publishers*, 989 F.2d at 111; *Silver-Greenberg & Corkery*, *supra* note 17.

In one instance, a doctor who disputed the termination of her employment with a medical group pursuant to an arbitration proceeding struggled to pay the \$200,000 in legal fees that had resulted. *See Silver-Greenberg & Corkery*, *supra* note 17. She was unable to appeal her claim on grounds of the destruction of evidence and arbitrator partiality towards the medical group. *See id.*

<sup>179</sup> *See Silver-Greenberg & Corkery*, *supra* note 17.

<sup>180</sup> *See id.*

<sup>181</sup> *See id.*

<sup>182</sup> *See Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2008 WL 5216255, at \*14 (S.D. Cal. Aug. 11, 2008).

<sup>183</sup> *See id.* at \*7.



scionability, California's articulation is representative of the widely accepted view: "Procedural unconscionability focuses on 'oppression or surprise due to unequal bargaining power,' and substantive unconscionability focuses on 'overly harsh or one-sided results.'"<sup>184</sup> Using this framework for unconscionability, in *Laster v. T-Mobile USA, Inc.*, the California Supreme Court struck down a forced arbitration agreement as unconscionable because it waived class arbitration.<sup>185</sup> According to the California Supreme Court in that 2008 case, the forced arbitration agreement was substantively unconscionable because the class arbitration waiver allowed the corporation to avoid responsibility for wrongful behavior that the consumers would have addressed through class arbitration, but did not have an incentive to address through individual arbitration.<sup>186</sup> *Laster* is representative of how state courts applied the legal theory of unconscionability to nullify forced arbitration agreements in the early twenty-first century.<sup>187</sup>

In response to these state-led efforts to invalidate forced arbitration clauses on the legal theory of unconscionability, corporations began petitioning federal courts to end state interference in arbitration proceedings.<sup>188</sup> Specifically, corporations wanted the federal courts to rule that the authority of the Federal Arbitration Act (the "FAA") preempts the ability of states to determine that forced arbitration clauses are unconscionable.<sup>189</sup> Since 2011, corporations have overwhelmingly succeeded in limiting states' ability to interfere in arbitration proceedings for consumer disputes, which has resulted in a major shift in pow-

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<sup>184</sup> See *id.*; *Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901, 908 (N.M. 2009). For example, New Mexico courts instead articulate, "contract provisions that unreasonably benefit one party over another are substantively unconscionable," and "procedural unconscionability goes beyond the mere facial analysis of the contract and examines the particular factual circumstances surrounding the formation of the contract, including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other." *Cordova*, 208 P.3d at 908.

<sup>185</sup> See *Laster*, 2008 WL 5216255, at \*14 (holding that arbitration agreement was unconscionable under California state law because the agreement was forced upon the consumer by a corporation with greater bargaining power, the disputes between the parties predictably involved small amounts of damages, and the consumer alleged that the corporation deliberately intended to cheat large numbers of consumers out of the same small amount of damages).

<sup>186</sup> See *id.* at \*9, \*14.

<sup>187</sup> See *id.* at \*14; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>188</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); Silver-Greenberg & Gebeloff, *supra* note 17. For example, the U.S. District Court for the Southern District of California ruled in 2008 that a forced arbitration agreement that waived class action arbitration was unconscionable. *Laster*, 2008 WL 5216255, at \*14. The Supreme Court in *AT&T Mobility*, however, overturned that decision. 563 U.S. at 352. As such, subsequent courts that seek to declare forced arbitration agreements unconscionable, as the *Laster* court was able to do, are unable to overturn or repeal unfavorable arbitration awards. See *id.*

<sup>189</sup> See *Bardack & Nessler*, *supra* note 42; Silver-Greenberg & Gebeloff, *supra* note 17.

er in the consumer arbitration arena.<sup>190</sup> Two major cases decided by the Supreme Court in particular have granted great deference to AAA-governed forced arbitration clauses, ruling that such clauses are in fact enforceable against consumers.<sup>191</sup>

In 2011, in *AT&T Mobility LLC v. Concepcion*, the Supreme Court considered whether the FAA and its national policy favoring arbitration preempted a California common law, known as the “*Discover Bank*” rule, which declared most forced arbitration clauses unconscionable when they waived class arbitration.<sup>192</sup> More specifically, the California *Discover Bank* rule invalidated forced consumer arbitration agreements as unconscionable when the “disputes between the contracting parties predictably involve[d] small amounts of damages, and when it [wa]s alleged that the party with the superior bargaining power ha[d] carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . . .”<sup>193</sup> The *Discover Bank* rule invalidated forced consumer arbitration agreements when consumers sought dispute resolution over a “small amount of damages” that resulted from fraudulent corporate behavior.<sup>194</sup> According to the Supreme Court in *AT&T Mobility*, even though the *Discover Bank* rule contained these limitations, it still applied to “most collective-arbitration waivers in consumer contracts.”<sup>195</sup> Therefore, most consumers in California were able to invoke the *Discover Bank* rule to invalidate arbitration agreements that would have forced them out of the preferred in-court system.<sup>196</sup>

In *AT&T Mobility*, Vincent and Liza Concepcion sought to invalidate an arbitration agreement with AT&T so that they could join a class action lawsuit alleging that it was improper for AT&T to charge them \$30.22 in sales tax on a cellphone that AT&T advertised as free with the purchase of cellphone service.<sup>197</sup> The Concepcions argued that they could forgo arbitration and join the

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<sup>190</sup> See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility*, 563 U.S. at 352; Bardack & Nessler, *supra* note 42; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>191</sup> See *Am. Express*, 133 S. Ct. at 2312; *AT&T Mobility*, 563 U.S. at 352.

<sup>192</sup> See *AT&T Mobility*, 563 U.S. at 352. The rule was known as the *Discover Bank* rule because it resulted from *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *abrogated by AT&T Mobility*, 563 U.S. 333 (remanding to allow consumer the opportunity to demonstrate that forced arbitration agreement with a large corporation was unenforceable if consumer could demonstrate that the arbitration agreement was forced, the potential damages of the lawsuit were small, and the large corporation intended to cheat large numbers of consumers out of the same small amount of damages).

<sup>193</sup> 113 P.3d at 1110.

<sup>194</sup> See *id.* at 1110.

<sup>195</sup> See *AT&T Mobility*, 563 U.S. at 340–44.

<sup>196</sup> See 113 P.3d at 1110. The Supreme Court found that the *Discover Bank* rule was ultimately contrary to the goals of the FAA because, instead of promoting arbitration, the rule “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” See *AT&T Mobility*, 563 U.S. at 344.

<sup>197</sup> See 563 U.S. at 337–38.

class action lawsuit under the *Discover Bank* rule.<sup>198</sup> In deciding the case, the Supreme Court considered whether the *Discover Bank* rule interfered with the FAA's liberal policy favoring arbitration to such an extent that the FAA preempted that interference.<sup>199</sup> According to Justice Scalia, writing for the majority, "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."<sup>200</sup> Permitting classwide arbitration, said Justice Scalia, takes away "the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."<sup>201</sup> Under that reasoning, the Supreme Court ruled in favor of AT&T, and denied the Concepcions' petition to invalidate the forced arbitration agreement.<sup>202</sup>

At the outset, *AT&T Mobility* only applied to its facts—arbitration agreements that contained a class arbitration waiver.<sup>203</sup> In 2013, in *American Express Co. v. Italian Colors Restaurant*, however, the Supreme Court extended *AT&T Mobility* to apply to other situations involving class arbitration, deter-

<sup>198</sup> *See id.*

<sup>199</sup> *See id.* at 344. It is unclear whether AT&T moved to compel arbitration against the parties who were part of the existing class action lawsuit, or whether those parties even signed arbitration agreements. *See id.* at 337.

<sup>200</sup> *See id.* at 344. In making this assessment, Justice Scalia noted that similar rules, such as making all forced consumer arbitration agreements unconscionable if they denied the full availability of evidence or discovery laws, would unquestionably disfavor the use of arbitration to resolve certain types of disputes, and would thus be preempted by the FAA. *See id.* at 341–42. According to Justice Scalia:

A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to 'any' contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.

*Id.* at 342 (citation omitted). Thus, because state courts would be able to permit the invalidation of forced arbitration agreements on the basis that they did not require full discovery rules if the *Discover Bank* rule was allowed to stand, and because the FAA would preempt that extension because corporations would be less inclined to arbitrate disputes if arbitration proceedings were significantly slower due to the application of full discovery rules, the FAA preempts the *Discover Bank* rule. *See id.*

<sup>201</sup> *See id.* at 348.

<sup>202</sup> *See id.* at 352.

<sup>203</sup> *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013). The rule that courts applied in this situation is the effective vindication rule. *See id.* at 2310.

mining that the FAA preempts the ability of states to declare class action arbitration waivers unconscionable, even if doing so would effectively kill the legal claim.<sup>204</sup> In *American Express*, merchants brought a class action against American Express alleging that American Express's practice of charging credit card fees that were thirty percent higher than the average credit card fee violated U.S. antitrust laws.<sup>205</sup> American Express moved to settle the disputes through individual arbitration proceedings pursuant to the FAA.<sup>206</sup> One plaintiff, the owner of the Italian Colors Restaurant in Oakland, California, attempted to invalidate the forced arbitration agreement because pursuing the claim in individual arbitration would cost more than what he hoped to recover in the lawsuit, and would therefore dissuade him from seeking resolution entirely.<sup>207</sup> Justice Scalia, again writing for the majority of the Supreme Court, reiterated that state-led efforts to invalidate arbitration agreements make corporations less likely to use arbitration as a method of dispute resolution; the FAA therefore preempts those state-led efforts because they run counter to the FAA's liberal policy favoring arbitration.<sup>208</sup> Under that reasoning, the Supreme Court again denied the petition to invalidate the forced arbitration agreement.<sup>209</sup>

In 2015, the Supreme Court once again denied state efforts to declare forced arbitration agreements unconscionable.<sup>210</sup> In *DIRECTV, Inc. v. Imburgia*, the Supreme Court held that the FAA preempted the ability of a California court to find an arbitration clause unconscionable, even though the arbitration agreement specifically stated that it would be unenforceable if the "law of your state" made the agreement unenforceable for any reason.<sup>211</sup> In 2008, Amy Imburgia and Kathy Greiner sued DIRECTV, Inc. in California state court, alleging that DIRECTV, Inc. charged them early termination fees for their television services in violation of California law.<sup>212</sup> DIRECTV, Inc. moved to compel arbitration, citing an arbitration provision in the consumers'

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<sup>204</sup> See *id.* at 2312; Bardack & Nessler, *supra* note 42.

<sup>205</sup> See 133 S. Ct. at 2308.

<sup>206</sup> See *id.*

<sup>207</sup> See *id.*

<sup>208</sup> See *id.* at 2312. According to Justice Scalia:

[R]equir[ing]—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure.

*Id.*

<sup>209</sup> See *id.*

<sup>210</sup> See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015).

<sup>211</sup> See *id.*

<sup>212</sup> See *id.* at 466.

service contracts.<sup>213</sup> Ms. Imburgia and Ms. Greiner opposed the motion, pointing to language in the arbitration agreement that declared the entire arbitration agreement unenforceable if the “law of your state” found arbitration agreements that waived class arbitration to be unenforceable.<sup>214</sup> According to Ms. Imburgia and Ms. Greiner, the *Discover Bank* rule was in effect in California when they signed their arbitration agreements with DIRECTV, Inc., so the law of their state found the agreement unenforceable at the time they signed the agreement.<sup>215</sup>

Writing for the majority in *Imburgia*, Justice Breyer stated that *AT&T Mobility* invalidated the *Discover Bank* rule, and therefore that rule was invalid at the time that Ms. Imburgia and Ms. Greiner signed their arbitration agreements.<sup>216</sup> According to Justice Breyer, “California’s interpretation of the phrase ‘law of your state’ does not place arbitration contracts ‘on equal footing with all other contracts[.]’ For that reason, it does not give ‘due regard . . . to the federal policy favoring arbitration.’ Thus, the Court of Appeal’s interpretation is pre-empted by the Federal Arbitration Act.”<sup>217</sup> Justice Breyer, writing for the majority, noted that a court would not interpret any other type of contract in such a way as to apply an invalid law, so the attempt to do so in this case would only serve to limit the use of arbitration.<sup>218</sup> Because preventing the use of arbitration is inconsistent with the FAA’s liberal policy favoring arbitration, the FAA preempts the ability of California to apply invalid state law to an arbitration agreement.<sup>219</sup> Following *Imburgia*, consumers who signed arbitration agreements prior to *AT&T Mobility* and *American Express* could not retroactively void the agreements, even if the contract purported to apply state law that was in effect before those Supreme Court decisions.<sup>220</sup> *Imburgia* therefore left consumers with even fewer avenues to invalidate forced arbitration agreements.<sup>221</sup>

With every state-declared unconscionable arbitration clause that the Supreme Court overturns, consumers become less able to remove themselves from the effects of forced arbitration agreements.<sup>222</sup> This means that consumers are, more than ever, subject to biased dispute resolution with little to no chance of appeal.<sup>223</sup> Corporations are therefore increasingly able to escape liability for

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<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> *Id.* at 471 (citation omitted).

<sup>218</sup> *See id.* at 469.

<sup>219</sup> *See id.* at 471.

<sup>220</sup> *See id.*

<sup>221</sup> *See id.*

<sup>222</sup> *See Silver-Greenberg & Corkery, supra* note 17.

<sup>223</sup> *See id.*

their illegal consumer practices.<sup>224</sup> Because consumers often have no choice but to obtain certain services, consumers now live in a world where they must contractually limit their ability to pursue dispute resolution against corporations to obtain those services.<sup>225</sup>

Furthermore, following these Supreme Court decisions, the hurdles individuals face when forced into arbitration often make arbitrating consumer disputes not worth the headache.<sup>226</sup> Because arbitration clauses typically prevent consumers from arbitrating as a class, consumers experience a situation in which the cost of arbitrating their claims is greater than the amount of money in controversy.<sup>227</sup> Although there are no reliable statistics on how many people choose *not* to arbitrate meritorious claims, between 2010 and 2014, Verizon Wireless faced only sixty-five consumer arbitration proceedings among its 125 million subscribers, and Time Warner Cable faced only seven consumer arbitration proceedings among its fifteen million subscribers.<sup>228</sup> These numbers are shockingly low, and suggest that consumers would rather lose the amount of money they have in controversy with a corporation than risk losing more money by arbitrating their legal disputes, whether or not such disputes had merit.<sup>229</sup>

The reality that consumers are choosing not to resolve legitimate disputes with corporations because of the hurdles they experience during arbitration reinforces the argument that they are in an unfair position when it comes to all aspects of arbitration.<sup>230</sup> Many consumers need the services they contract for, and it is a fantasy to believe that they can choose to forego a service, or use a different service, because that service contract contains an arbitration agreement.<sup>231</sup> Because the Supreme Court has stated that the FAA preempts the ability of states to declare forced arbitration agreements in service contracts unconscionable, Congress should amend the FAA to state that the FAA does not preempt the states from having that ability.<sup>232</sup>

### III. COMBATING THE IMBALANCE OF POWER IN CONSUMER ARBITRATION

Consumer arbitration is problematic because it results from clauses buried in service contracts that consumers are unlikely to understand or even read,

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<sup>224</sup> *See id.*

<sup>225</sup> *See id.*

<sup>226</sup> *See Imburgia*, 136 S. Ct. at 471; *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); *Silver-Greenberg & Gebeloff*, *supra* note 17.

<sup>227</sup> *See Bardack & Nessier*, *supra* note 42.

<sup>228</sup> *See Silver-Greenberg & Gebeloff*, *supra* note 17.

<sup>229</sup> *See id.*

<sup>230</sup> *See id.*

<sup>231</sup> *See id.*

<sup>232</sup> *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Am. Express*, 133 S. Ct. at 2312; *AT&T Mobility*, 563 U.S. at 352; *Silver-Greenberg & Gebeloff*, *supra* note 17.

and because corporations wield an unequal bargaining power to secure biased arbitrators who resolve disputes in favor of those corporations.<sup>233</sup> Some consumers may be perceptive enough to spot arbitration clauses in their contracts and act on that information; many however, are not.<sup>234</sup> Although the Supreme Court has eliminated the ability of states to nullify such arbitration agreements on the grounds of unconscionability—something that states used to do with regularity—there are still steps that Congress can take to rectify this imbalance of power found in the consumer arbitration arena.<sup>235</sup>

### *A. Granting Statutory Authority to the States to Declare Forced Consumer Arbitration Clauses Unconscionable*

Scholars have recommended that Congress amend the Federal Arbitration Act (the “FAA”) to rectify the above-mentioned issues associated with the Supreme Court’s declaration that the FAA bars states from determining that an arbitration agreement is unenforceable.<sup>236</sup> To remedy these issues, scholars have proposed amending the FAA in several ways, including: (i) a separate framework for international arbitration—a recommendation prompted by the differences between domestic arbitration and international arbitration, and the need for the two systems of arbitration to develop separately from each other; (ii) a presumption that pre-dispute class arbitration waivers are unenforceable—a recommendation to provide consumers equal footing in the arbitration arena; and (iii) an overhaul of the rules regarding prehearing nonparty discovery—a recommendation aimed at curing inconsistencies in arbitration and promoting a policy whereby arbitrators consider all relevant evidence when determining an arbitration award.<sup>237</sup> Many of the scholars arguing for changes to the current operation of the FAA have noted that the FAA has resulted in

<sup>233</sup> See Silver-Greenberg & Corkery, *supra* note 17; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>234</sup> See Silver-Greenberg & Corkery, *supra* note 17; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>235</sup> See Mike J. Benza, *Amend the Federal Arbitration Act: A Call to Reform the Law on Mandatory Pre-Dispute Arbitration Agreements*, 13 MAYHEW-HITE REP. ON DISP. RESOL. & CTS. 2 (2015), <http://moritzlaw.osu.edu/epub/mayhew-hite/2015/03/amend-the-federal-arbitration-act/> [<https://perma.cc/478C-T6EP>]; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>236</sup> See STONE & COLVIN, *supra* note 8, at 25; William W. Park, *Report: Amending the Federal Arbitration Act*, 13 AM. REV. INT’L ARB. 75, 77–78 (2002); Benza, *supra* note 235. These issues include consumers signing up for arbitration without realizing they are doing so, corporations exploiting their unequal bargaining power to appoint biased arbitrators when arbitrating with consumers, less applicability of discovery and evidence rules, and a lack of a separate framework for international arbitration. See STONE & COLVIN, *supra* note 8, at 3; Park, *supra*, at 77–78; Benza, *supra* note 235. Scholars have noted that the FAA was unequipped to deal with all issues that could be involved with fair dispute resolution in the twenty-first century. See STONE & COLVIN, *supra* note 8, at 7; Park, *supra*, at 77–78; Benza, *supra* note 235. These issues include societal technological advances—ones that make discovery much more complicated and have changed how consumers contract for services—and the development of international arbitration. See STONE & COLVIN, *supra* note 8, at 4; Park, *supra*, at 77–78.

<sup>237</sup> Park, *supra* note 236, at 77–78; Strader, *supra* note 78, at 910.

serious financial consequences for consumers who fall party to consumer arbitration agreements that neutral state authorities cannot review.<sup>238</sup>

Although these scholars have proposed amendments to the FAA, none have focused their work exclusively on consumer arbitration.<sup>239</sup> Therefore, this Note offers yet another solution aimed at making arbitration fair for consumers: an amendment to the FAA expressly stating that nothing found within the FAA should prevent states from being able to declare forced consumer arbitration clauses unconscionable.<sup>240</sup> The amendment, best placed at the end of Section 2, would read, “States retain the right under this Act to invalidate all arbitration agreements that are unconscionable under their state’s law.”<sup>241</sup> To pass this proposed amendment, a member of the House of Representatives or the Senate would first be required to introduce the amendment while the House or the Senate is in session.<sup>242</sup> Both the House and the Senate would then vote on the amendment.<sup>243</sup> Upon a majority vote in both chambers of Congress, the President would then sign the amendment into law, effectively granting states the right to declare forced arbitration agreements unconscionable.<sup>244</sup>

This amendment to Section 2 of the FAA is reasonable because the FAA does not expressly state that all arbitration agreements should be enforceable.<sup>245</sup> Rather, the FAA simply grants parties the legal authority to contract to dispute resolution by arbitration.<sup>246</sup> The Supreme Court, relying on its assessment that the FAA establishes a “liberal federal policy favoring arbitration,” stated that the FAA preempts the ability of states to declare forced consumer arbitration agreements unconscionable.<sup>247</sup> Therefore, this proposed amendment to the FAA would eliminate the ability of courts to claim that this policy behind the FAA preempts the ability of states to declare forced arbitration agreements unconscionable.<sup>248</sup> Furthermore, because the Supreme Court’s conclusion stems from its assessment that the FAA broadly sets forth a policy favoring the enforceability of all arbitration agreements and not from any express

<sup>238</sup> See STONE & COLVIN, *supra* note 8, at 11–12; Benza, *supra* note 235.

<sup>239</sup> See STONE & COLVIN, *supra* note 8, at 27; Park, *supra* note 236, at 77–78; Strader, *supra* note 78, at 910; Benza, *supra* note 235.

<sup>240</sup> See Benza, *supra* note 235.

<sup>241</sup> See *id.*

<sup>242</sup> *The Legislative Process: Introduction & Referral*, U.S. HOUSE OF REPRESENTATIVES, [http://www.house.gov/content/learn/legislative\\_process/](http://www.house.gov/content/learn/legislative_process/) [<https://perma.cc/QJ38-GG9W>]. “Any member in the House of Representatives may introduce a bill at any time while the House is in session by simply placing it in the ‘hopper’ at the side of the Clerk’s desk in the House Chamber.” *Id.*

<sup>243</sup> See *id.*

<sup>244</sup> See *id.* If the President vetoed the amendment, larger majorities of the House and the Senate could vote to override the veto. *Id.*

<sup>245</sup> 9 U.S.C. §§ 1–16 (2012).

<sup>246</sup> See *id.* § 2.

<sup>247</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308–12 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337–51 (2011).

<sup>248</sup> See Benza, *supra* note 235; Silver-Greenberg & Corkery, *supra* note 17.



language from the FAA, it would not be inconsistent with the rest of the FAA to amend Section 2 in this manner.<sup>249</sup> Providing states with the ability to declare forced arbitration clauses unconscionable will not discourage arbitration when the parties actually want to arbitrate; therefore, amending the FAA in this manner will not harm the FAA's ultimate goal of encouraging fair and efficient arbitration.<sup>250</sup>

This proposed amendment to Section 2 of the FAA would allow states to invoke state contract law to declare forced arbitration agreements, including those that prohibit class arbitration, unconscionable and unenforceable.<sup>251</sup> For example, with this amendment to the FAA, California courts could invoke the *Discover Bank* rule to allow consumers to arbitrate as a class, especially when doing so is the only feasible option for dispute resolution.<sup>252</sup> With permissible state review of arbitration provisions, corporations could no longer force consumers into unfavorable or biased arbitration proceedings.<sup>253</sup> Corporate influence over neutral arbitrators would be obsolete if states could review all unconscionable arbitration contracts.<sup>254</sup> As such, this proposed amendment to the FAA would effectively even the playing field in the consumer arbitration arena, and would restore justice to the consumer dispute world—a world that is currently bleak for consumers.<sup>255</sup>

### *B. What State Courts Should Look for in Declaring Forced Consumer Arbitration Agreements Unconscionable*

Amending the FAA to grant authority to the states to have final review of the enforceability of consumer arbitration agreements and consumer arbitration procedures would better balance the power between consumers and corporations in consumer arbitration.<sup>256</sup> This authority would give state judiciaries wide latitude in determining the extent to which an arbitration agreement was fair to both parties to the disputed consumer contract—the consumer and corporation.<sup>257</sup> This solution also maintains the integrity and purpose of the FAA:

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<sup>249</sup> See 9 U.S.C. §§ 1–16; *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Am. Express*, 133 S. Ct. at 2312; *AT&T Mobility*, 563 U.S. at 352.

<sup>250</sup> See Szalai, *supra* note 112, at 119; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>251</sup> See Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>252</sup> See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by AT&T Mobility*, 563 U.S. 333; *Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2008 WL 5216255, at \*14 (S.D. Cal. Aug. 11, 2008).

<sup>253</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>254</sup> See *id.*

<sup>255</sup> See *id.*

<sup>256</sup> See *id.*

<sup>257</sup> See *id.*

to encourage the use of alternative dispute resolution and provide for the equitable resolution of consumer contract disputes.<sup>258</sup>

The single most important factor in determining whether a contract is unconscionable is the fairness of enforcement to a particular party to the contract.<sup>259</sup> Therefore, to determine the conscionability of an arbitration agreement, courts should first examine how likely it was that the consumer read the arbitration clause and understood what it entailed.<sup>260</sup> The average consumer is often unfamiliar with the concept of arbitration, and therefore does not know the advantages and disadvantages of contracting to arbitrate future disputes.<sup>261</sup> As such, courts should weigh the consumer's desire to agree to arbitration in assessing whether the arbitration agreement is unconscionable.<sup>262</sup> In assessing this willingness, courts should consider: (i) how prominently the corporation placed the arbitration clause in the contract, (ii) how accessible the language of the agreement is to an average layperson, and (iii) whether the consumer expressly agreed to the terms of the contract, or whether the contract was one of adhesion.<sup>263</sup> For example, an arbitration clause buried in pages of legal jargon comprising an online contract should be presumptively unconscionable, because it is very unlikely that the consumer signing the contract knew about the presence of the arbitration agreement and voluntarily consented to its terms.<sup>264</sup>

Courts should also evaluate the balance of power between the consumer and corporate party to an arbitration agreement.<sup>265</sup> Corporations often dictate the procedures of arbitration, including the selection of the arbitrator, in their consumer arbitration agreements.<sup>266</sup> Consequently, unduly-influenced arbitrators end up presiding over many consumer arbitrations.<sup>267</sup> Corporations are often repeat players in the consumer arbitration arena, and can thus offer repeat business to arbitrators who resolve contract disputes in the corporation's favor.<sup>268</sup> Therefore, it is important that courts examine the corporation's ability to appoint biased arbitrators under the arbitration contract.<sup>269</sup> Even if a court determines that a consumer understood the arbitration agreement, it is very un-

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<sup>258</sup> See Szalai, *supra* note 112, at 119; Silver-Greenberg & Corkery, *supra* note 17.

<sup>259</sup> See *Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2008 WL 5216255, at \*7 (S.D. Cal. Aug. 11, 2008).

<sup>260</sup> See Silver-Greenberg & Corkery, *supra* note 17; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>261</sup> See Silver-Greenberg & Corkery, *supra* note 17; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>262</sup> See Silver-Greenberg & Corkery, *supra* note 17; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>263</sup> See Silver-Greenberg & Corkery, *supra* note 17; Silver-Greenberg & Gebeloff, *supra* note 17.

If these issues are present, then it is more likely that the agreement is unfair enough to satisfy the definition of unconscionable. See *Laster*, 2008 WL 5216255, at \*7.

<sup>264</sup> See Silver-Greenberg & Corkery, *supra* note 17; Silver-Greenberg & Gebeloff, *supra* note 17.

<sup>265</sup> See Silver-Greenberg & Corkery, *supra* note 17.

<sup>266</sup> See *id.*

<sup>267</sup> See *id.*

<sup>268</sup> See *id.*

<sup>269</sup> See *id.*

likely that a consumer would proactively agree to an arbitrator appointment method that favors the corporation.<sup>270</sup> Courts should closely scrutinize arbitrator appointment procedures under the contract, and declare unconscionable those contracts that contain vehicles for the corporation to tilt the arbitration proceeding in its favor.<sup>271</sup>

Finally, courts should examine how the arbitration proceeding is to be conducted under the disputed contract, paying close attention to whether the lack of evidentiary or other discovery rules typically involved in traditional in-court litigation will lead to an unfair proceeding for the consumer.<sup>272</sup> For example, if a corporation included in its forced arbitration clause that arbitration proceedings would not be subject to any evidentiary rules whatsoever, then it is very unlikely that the resulting proceeding will be fair to the consumer.<sup>273</sup> If courts look to these specific issues when evaluating the enforceability of forced arbitration agreements, then such judicial review of arbitration will not intrude upon the FAA's policy of encouraging and enforcing arbitration agreements where the parties—consumers and corporations—intended to consent to arbitration, and understood the consequences of waiving dispute resolution in the court system.<sup>274</sup> Rather, arbitration subject to judicial review will promote fair dispute resolution for both consumers and corporations, which was Congress's ultimate intent in enacting the Federal Arbitration Act of 1925, but a goal that Congress has been unable to achieve thus far.<sup>275</sup>

## CONCLUSION

Alternative dispute resolution, particularly arbitration, is undoubtedly a favored method for resolving consumer disputes for corporations across the United States. Arbitration is beneficial on its face because it offers time- and cost-effective methods for resolving these types of disputes; but, because arbitration does not include many of the safeguards that traditional in-court litigation does, consumers might not always want to arbitrate their legal disputes. Oftentimes, however, consumers might not have a choice because corporations embed arbitration provisions in their consumer contracts to force consumers to arbitrate future legal disputes. Unfortunately, forced consumer arbitration clauses, as governed under current arbitration law, harm consumers who know little about arbitration, cannot comprehend the complex language included in arbitration agreements, do not understand the differences between arbitration and formal litigation, and fail to recognize how corporations exploit arbitration

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<sup>270</sup> *See id.*

<sup>271</sup> *See id.*

<sup>272</sup> *See id.*

<sup>273</sup> *See id.*

<sup>274</sup> *See id.*

<sup>275</sup> *See* STONE & COLVIN, *supra* note 8, at 27; Silver-Greenberg & Corkery, *supra* note 17.

to gain favorable awards. Corporations that arbitrate disputes with their consumers often receive favorable arbitration awards by offering arbitrators repeat business and by having increased knowledge of how courts interpret the enforceability of arbitration agreements. Exacerbating this problem, the U.S. Supreme Court has eliminated the ability of states to declare these forced arbitration agreements unconscionable, a previously powerful state tool to remedy the unequal bargaining power of parties subject to consumer arbitration. In several prominent cases, the Supreme Court reasoned that the Federal Arbitration Act's (the "FAA") policy of encouraging arbitration preempts the ability of states to invalidate arbitration agreements that would otherwise be unconscionable under state law.

To best protect consumers and ensure that they receive fair dispute resolution proceedings, Congress should amend the FAA to expressly grant states the right to declare forced arbitration agreements unconscionable. This amendment is appropriate because nothing in the current FAA leads to a conclusion that it was Congress's intention to encourage the enforceability of arbitration agreements that are unconscionable under state law. Furthermore, an amendment to the FAA to permit states to declare forced arbitration agreements unconscionable would promote fair and equitable dispute resolution, and would remedy the inherent imbalance of power in consumer arbitration. Because forced arbitration agreements in consumer contracts are presumably here to stay, Congress must provide states with a tool to protect their consumers and place them on a level playing field when agreeing to arbitration.