

Conscionable Judging: A Case Study of California Courts' Grapple with Challenges to Mandatory Arbitration Agreements

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This Note addresses a study of California state court decisions concerning the invalidation of contracts on the ground that the contract is unconscionable. Cases in this area have proliferated rapidly as a consequence of the frequent and highly successful use of the unconscionability defense as a weapon to attack petitions to compel mandatory arbitration of disputes. A review of four years of unconscionability-related decisions in the California courts of appeal leads to certain conclusions, which generally support a hypothesis that while judges form definite personal opinions as to the legality of typical mandatory arbitration agreements, those opinions are only weakly related to factors, such as political partisanship or workload, which might explain strategic behavior by judges. It concludes by discussing the future of unconscionability challenges in the arbitration arena in light of both recent U.S. Supreme Court cases that may substantially influence those challenges, and the current legislative environment.

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INTRODUCTION

In modern business life, most contracts that the average person executes are form contracts.¹ Most of these contracts are extraordinarily

1. Professor Slawson guessed that 99% of commercial contracts were form contracts—and that was in 1971. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971). What he did not add was that thanks to the proliferation of wrongful termination claims, the prevalence of standard form employment contracts has become almost as high. See generally Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term*,

long² and employ large quantities of legal terminology that is poorly understood by the general population.³ In an effort to cope with this situation, courts have, in the last forty years, revived the once-dormant equitable defense of unconscionability.⁴ Unconscionability exists where a contract is procedurally unconscionable—the contract was reached because one party was misled as to the real terms, or because that party was overmatched by the opposing party’s bargaining power—and substantively unconscionable—the contract contains terms that are patently unfair to the weaker party. Where both conditions are met, the contract may be denied enforcement by courts.⁵

In recent years, these arguments have been applied with particular force to agreements to arbitrate disputes.⁶ The reason for this trend is that other state regulations on arbitration have repeatedly run afoul of the Federal Arbitration Act (FAA).⁷ This statute, passed in 1925, states that arbitration agreements will be valid “save upon such grounds as exist . . . for the revocation of any contract.”⁸ While states may create general contract defenses that are equally applicable to both arbitration agreements and other contracts, they may not create special defenses for arbitration agreements.⁹ As a result, state laws that block the enforcement of arbitration agreements are, according to modern

Standard Form Employment Agreements, 49 ARIZ. L. REV. 637 (2007) (noting and analyzing the trend toward standard contracts in the employment context).

2. By way of example, the iTunes Terms and Conditions were 15,172 words long when checked by the Author in March 2011. *Terms and Conditions*, iTUNES STORE, <http://www.apple.com/legal/itunes/us/terms.html> (last visited Mar. 31, 2011). Most online consumer form contracts are of similar length.

3. Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 234 (2002).

4. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194–96 (2004).

5. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) (“[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, . . . may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.”). The California Supreme Court has stated the general rule succinctly in numerous cases. *See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

6. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 48 (2006). Post-dispute arbitration agreements (where each side agrees to take a particular dispute to an arbitrator rather than to court) provide fundamentally different incentives to litigants. John F. Griffiee, Note, *Against the Grain: The Arkansas Supreme Court Resists the Judicial Movement to Enforce Mandatory-Arbitration Provisions in Employment Contracts in Arkansas Diagnostic Center, P.A. v. Tahiri*, 62 ARK. L. REV. 381, 410 (2009).

7. *See, e.g., Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *see also* Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

8. 9 U.S.C. § 2.

9. *Doctor’s Assocs.*, 517 U.S. at 687; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987).

Supreme Court doctrine, preempted.¹⁰ Often the only defense available to defeat a signed arbitration agreement is to argue that the clause is unconscionable—it has become a doctrine of necessity. Many critics have noted that courts, especially California courts, seem to apply a particularly searching version of unconscionability analysis to arbitration clauses.¹¹ These critics say that such courts are less willing to assume that the parties were of equal bargaining power and more willing to scrutinize terms for whether they are fair or not fair, as opposed to whether they are *so* unfair that they “shock the conscience.”¹²

This study was commenced to answer three questions. First, what are lower courts in California doing with unconscionability claims? Second, can we isolate any differences between what different judges are doing? Finally, what, if anything, needs to be done about it?

Part I is an introduction to the history of the unconscionability doctrine, and its long and tortured interaction with arbitration agreements. Part II advances three models that could potentially explain lower court behavior. The first is the legal model, which argues that judges primarily decide cases based on the interaction between established legal doctrine and case facts. The second, the institutional model, argues that courts behave like bureaucracies, protecting their turf while trying to avoid crippling caseloads. The third, the policymaking model, suggests that courts behave in such a way as to strategically enhance the odds that they will advance their own policy preferences. Part III addresses a strategic-choice critique based on the Priest-Klein hypothesis which, if valid, would render the entire analytical approach meaningless.

The dataset collected is described in Part IV. Part V covers the implications of the dataset. Overall, in this area of the law, the data appear to support the legal model best. Judges on different courts uphold unconscionability defenses against arbitration agreements with different frequencies, but once we adjust for lower court outcomes, the difference appears to fall short of statistical significance. Individual judges appear to decide cases in favor of unconscionability claims at different rates, but those rates are not well correlated with political partisanship. I then discuss the relationship between my findings and scholarly criticism of the California courts’ approach. Part VI closes with a discussion of the future of the interaction between arbitration and unconscionability. A brief conclusion follows.

10. *Doctor’s Assocs.*, 517 U.S. at 688.

11. *See, e.g.*, Broome, *supra* note 6; Randall, *supra* note 4.

12. *See* Broome, *supra* note 6, at 40; Randall, *supra* note 4, at 214–16.

I. UNCONSCIONABILITY, ARBITRATION, LEGISLATION, AND HISTORY: THE ROOTS OF STRIFE

Understanding the origins of the unconscionability defense and its interaction with mandatory arbitration agreements requires a whirlwind trip through the history of American contract law. Important developments in that area of law have tended to make challenges to contracts on unconscionability grounds less successful over time. The recent success of unconscionability-based challenges to arbitration agreements represents a significant reversal of that trend.

A. UNCONSCIONABILITY

Prior to the early 1800s, the notion of “unconscionable” contracts as a special subset of contracts would not have made much sense.¹³ “[T]he community’s sense of fairness,” not that of the contracting parties, determined whether a defendant would be found liable.¹⁴ This framework changed dramatically during the period from 1810 to 1840, as courts stopped examining contracts for fairness and instead began simply to ask whether the parties agreed to bind themselves to a particular exchange.¹⁵ Instead of questioning whether the price paid for a transaction was “fair,” courts instead began to ask simply whether the apparently unfair price served as evidence of fraud or deceit.¹⁶

However, in a select minority of cases, courts continued to scrutinize the values exchanged in a given deal. That subset has been aptly characterized as cases involving “the old, the ignorant and the downright shameful.”¹⁷ When the contract was between an elderly individual and a younger, presumably more active one, courts closely scrutinized the deal to see whether the elderly person had been manipulated.¹⁸ When the contract involved a serious information disparity or a fiduciary relationship, as between a lawyer and his client or a doctor and his patient, courts were happy to step in and regulate the transaction because of the presumed ignorance of the client or patient.¹⁹ Finally, some contracts were so outrageously one-sided that judges simply could not bring themselves to enforce those deals.²⁰

13. My discussion of early American contract law is derived primarily from Morton Horwitz. *See generally* MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 140–210 (1977).

14. *Id.* at 166.

15. *Id.* at 180.

16. *Id.*

17. For numerous examples of such cases, see the eponymous article by Matthew S. Winings, *The Old, the Ignorant and the Downright Shameful* (Jan. 19, 2005) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=650822.

18. *Id.* at 3.

19. *Id.* at 14.

20. *Id.* at 20–21.

This hazy conception was first codified into something similar to the modern concept of unconscionability in the Uniform Commercial Code in 1952.²¹ The drafters had considerable difficulty arriving at a definition that could satisfy their goals.²² Indeed, ultimately the concept of substantive unconscionability was left completely undefined. This vague concept was then imported into the Restatement (Second) of Contracts.²³ Despite the efforts of scholars on both sides of the issue to produce a more workable test for unconscionability, it has continued to defy formal definition.²⁴ Nevertheless, we find that today, very few contracts are voided as unconscionable—*unless* they can be classified as “agreements to arbitrate which appear to be biased against the weaker party.”²⁵

B. ARBITRATION

Arbitration in the United States substantially predates independence. Merchants in eighteenth-century colonial America routinely used arbitration as a substitute for the costly, time-consuming, and unpredictable verdicts of courts.²⁶ Merchants saw courts as thoroughly hostile entities.²⁷ They stigmatized lawyers and judges as ignorant of commercial principles; indeed, some early American reformers wanted to abolish the legal system as such and replace it entirely with binding arbitration.²⁸

This did not happen—indeed, early nineteenth-century courts were able to gain substantial oversight powers over arbitration. “[T]raditional common law deference to the reports of arbitrators,” writes Horwitz,

21. See U.C.C. § 2-302(1) (1952 Official Draft) (“If the court finds the contract or any clause of the contract to be unconscionable it may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed.”); see also U.C.C. § 2-302(1) (2005) (“If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.”).

22. See Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 489–501 (1967).

23. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

24. See, e.g., Robert Dugan, *The Application of Substantive Unconscionability to Standardized Contracts—A Systematic Approach*, 18 NEW ENG. L. REV. 77, 84 (1982) (broad definition); Paul Bennett Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187, 188 (2005) (narrow definition). But see Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 117–18 (2006) (arguing in favor of continued subjectivity in the doctrine).

25. See *infra* Part IV.

26. HORWITZ, *supra* note 13, at 145.

27. *Id.*

28. See *id.* at 148–49 and references therein; see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 13–14 (3d ed. 2005) (describing colonial era efforts to replace lawsuits with arbitrations).

“had begun rapidly to dissipate.”²⁹ In 1833, a Pennsylvania lawyer could write that “the award of arbitrators weighs not a feather.”³⁰ As contract law became increasingly merchant-friendly, the forums that they had previously made use of withered, victims of a deadly combination of direct attack by the legal profession and a loss of their basic *raison d’être*—to allow merchants to evade the “premodern” tendencies of courts evaluating contracts on fairness grounds.³¹ With that theory seemingly dead, merchants no longer had reason to fight tooth and nail for an arbitration system, as they had in the eighteenth century.³²

C. LEGISLATION, CONFLICT, AND PRECEDENT

Enter the Federal Arbitration Act, passed in 1925 in an effort to reinvigorate arbitration law in America.³³ According to the Supreme Court’s authoritative construction of this Act—a construction that is intensely contested by some scholars³⁴—the Act “declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”³⁵ However—perhaps supporting the notion that the FAA was intended only to promote the kind of merchant-to-merchant arbitration that was commonplace in colonial times³⁶—issues of FAA interpretation took a surprisingly long time to materialize. The first fifty-nine years of the Act were for that reason fairly unremarkable, punctuated by the Supreme Court’s decision in *Wilko v. Swan*, which held that causes of action under public regulatory statutes could not be arbitrated.³⁷

Then, in 1983, the Supreme Court decided *Southland Corp. v. Keating*.³⁸ In this case, several 7-Eleven convenience store franchisees sued the parent company for violations of the California Franchise Investment Law (“CFIL”).³⁹ The contracts that they alleged violated the

29. HORWITZ, *supra* note 13, at 150.

30. *Id.* at 153.

31. *Id.* at 153–54.

32. *See id.* at 154.

33. United States Arbitration Act, Pub. L. No. 25-401, 43 Stat. 883 (1925). The Act was renamed the Federal Arbitration Act in 1947. Pub. L. No. 80-282, 61 Stat. 669 (1947) (codified at 9 U.S.C. §§ 1–16 (2006)).

34. *See, e.g.*, Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999); David S. Schwartz, *If You Love Arbitration, Set It Free: How “Mandatory” Undermines “Arbitration”* (Univ. of Wis. Legal Studies, Paper No. 1052, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1006826.

35. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

36. Stone, *supra* note 34, at 969–94.

37. 346 U.S. 427, 435 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

38. 465 U.S. 1.

39. *Id.* at 4; *see* California Franchise Investment Law, CAL. CORP. CODE §§ 31000–31516 (West

CFIL contained mandatory arbitration clauses, and the Supreme Court ruled that the FAA was not procedural but substantive federal law.⁴⁰ This endowed the FAA with the power to preempt state laws, like the CFIL, that required certain types of actions to be brought in court proceedings.⁴¹ Post-*Southland*, there is no state law recourse, other than generalized contract law defenses, when a valid contract specifies that some other type of legal proceeding is to be replaced with arbitration.⁴²

Southland marked the beginning of a vast expansion of the scope of the FAA. Within a few years, the Court had extended it to cover statutory claims,⁴³ to preempt state laws granting causes of action in court,⁴⁴ to preempt state laws requiring disclosure of arbitration agreements in prominent typeface,⁴⁵ to overrule *Wilko* and cover federal statutory claims where Congress had not expressly de-authorized arbitration,⁴⁶ to cover all forms of commerce including purely intrastate commerce,⁴⁷ and finally, in 2001, in perhaps the greatest leap forward of all, to construe the FAA definitively to cover nearly all employment contracts.⁴⁸

Why has the Supreme Court taken this route? The Court purports to be merely interpreting the FAA to create a “pro-arbitration policy,” but the legislative history of the provision lends little support to that assertion.⁴⁹ It could be that the Court genuinely believes that clearing dockets of federal courts, and referring aggrieved parties to a faster and more streamlined system will ultimately benefit litigants, even if they do not see it as a benefit.⁵⁰ A more cynical view is that the conservatively-inclined Court seeks simply to undercut and destroy civil rights law by allowing stronger parties to force weaker ones to bargain away their rights.⁵¹

1996).

40. 465 U.S. at 12–13.

41. *Id.* at 10.

42. *Id.* at 10–11.

43. *See, e.g.*, *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225–26 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624–25 (1985).

44. *See Perry v. Thomas*, 482 U.S. 483, 490–91 (1987).

45. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687–88 (1996).

46. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26–27 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480–84 (1989).

47. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–73 (1995).

48. *See Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 119 (2001).

49. *See Stone, supra* note 34, at 969–94.

50. Certainly, pro-arbitration scholars have argued as much. *See, e.g.*, RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 3–10 (1997); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254 (2006) (discussing cost savings to litigants).

51. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1050 (1996) (“The result is a bitter irony for the worker—she has more rights and less protection than ever.”).

D. MODERN UNCONSCIONABILITY AND ARBITRATION LAW

To recap, under current arbitration law, the FAA covers agreements to arbitrate both contractual and statutory claims. The Act's preemptive force reaches even the decisions of state courts in states whose own arbitration law would forbid the enforcement of predispute arbitration agreements—not on grounds of unconscionability, but simply as a matter of declared public policy.⁵² District courts have power to stay proceedings and compel arbitration in cases where one party alleges a preexisting agreement to arbitrate a dispute.⁵³ And, from a procedural standpoint, California courts have a nearly identical power (and duty) to compel arbitration where an agreement to arbitrate is alleged in state court.⁵⁴ In each case, assuming that the party demanding arbitration—usually the defendant⁵⁵—can show that the two sides agreed to a contract including an arbitration clause, the court will order arbitration unless the party opposing arbitration can show that the agreement is unlawful by means of a state contract law defense.⁵⁶ Such defenses include fraud, duress, economic duress, mistake, impossibility, and, crucially, unconscionability.⁵⁷

In most instances, when a prospective plaintiff has unwittingly agreed to arbitrate her disputes with the defendant, she will be unable to demonstrate most of the above defenses. For instance, one is not typically “duressed” into purchasing a personal computer or into agreeing to work as a paralegal for a law firm.⁵⁸ Unconscionability, however, is something of a cure-all. Almost any one-sided contract can be credibly alleged to be substantively unconscionable on grounds of unfairness, and almost any form contract can be alleged to be a contract of adhesion and thus procedurally suspect.

There is yet another phenomenon to be explained. The foregoing explains why many arbitration agreements are challenged on grounds of unconscionability; what it does not explain is why so high a *proportion* of unconscionability challenges relate to arbitration clauses.⁵⁹ Lawyers—

52. See, e.g., ALA. CODE § 8-1-41(3) (2002) (forbidding specific enforcement of arbitration agreements in Alabama state courts). This provision was struck down under the Supremacy Clause in *Allied-Bruce Terminix*, 513 U.S. at 272–73.

53. 9 U.S.C. § 3 (2006).

54. CAL. CIV. PROC. CODE § 1281.2 (West 2007).

55. Most orders to arbitrate disputes in my sample arose after a plaintiff sued the defendant for statutory or common-law injuries, and the defendant alleged that the plaintiff had previously agreed to arbitrate the dispute in question.

56. 9 U.S.C. § 2; CIV. PROC. CODE § 1281.

57. RESTATEMENT (SECOND) OF CONTRACTS § 151–199 (1981).

58. It should be noted, however, that these arguments do *occasionally* prevail. See, e.g., *Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903, 922 (Cal. 1997) (deciding an arbitration agreement was invalid where it was induced by fraudulent exaggeration of the speed with which claims could be resolved).

59. And they do. A substantial majority of unconscionability claims arise through arbitration agreements. Only 30 of 119 cases in the sample collected did not address an arbitration agreement. See

especially plaintiffs' lawyers who are working on a contingent fee basis and not subject to the inherent conflicts of interest created by billing for hours worked—tend to pursue claims that they feel they can win. And the simple fact is that unconscionability challenges to arbitration agreements succeed at a higher rate than unconscionability challenges to other agreements.⁶⁰ What, then, can explain this behavior on the part of lower courts?

II. THEORIES OF LOWER COURT ACTION

To answer the question just raised, we must develop some theories of lower court behavior that can account for the apparent discrepancy between U.S. Supreme Court precedent and lower court practice. This Part advances three models of action, which will be evaluated in Part V using data collected for this Note.

A. THE BEHAVIOR OF JUDGES

In an ideal world, it would perhaps be the case that judges were motivated entirely by considerations of the law, efficient social policy, and justice. We do not live in an ideal world, however. Substantial evidence developed over the past eighty years indicates that judges act in ways which are self-interested, both in the sense of advancing their preferred policies and in the sense of advancing their careers.⁶¹ This model is particularly associated with the school of legal behaviorism championed by Harold Spaeth.⁶² The most aggressive argument of behaviorists, that courts decide cases almost entirely on the basis of personal ideology, has been tempered to some degree by more recent findings that judges are less likely to vote to overrule precedents they disagree with than they are to vote for their preferred policy in matters of first impression.⁶³

The situation becomes doubly complex when dealing with judges at lower levels than that of the U.S. Supreme Court. Supreme Court Justices have no higher position to aspire to and answer to no genuinely binding precedent at all, since any Supreme Court decision can be

infra Part IV.

60. See *infra* Part IV; see also Broome, *supra* note 6, at 48.

61. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 33 (1993) (calling the “legal model” of decisionmaking according to predetermined rules a “mythology”).

62. See *id.*

63. Howard Gillman, *What's Law Got To Do with It? Judicial Behaviorists Test the “Legal Model” of Judicial Decision Making*, 26 *LAW & SOC. INQUIRY* 465, 480 (2001) (citing Jeffrey A. Segal & Robert M. Howard, *The Systematic Study of Stare Decisis* (2000) (unpublished paper presented at American Political Science Association Annual Meeting)). The point—that judges are human actors subject to human foibles—is well taken, however.

overruled by a later decision.⁶⁴ This is not to say that there are no checks on the discretion of the Court,⁶⁵ but the checks surely pale in comparison to those faced by lower court judges. Judges seeking to ascend within the justice system face some pressure to avoid reversals on appeal.⁶⁶ Moreover, while lower federal court judges have life tenure, state court judges routinely face elections.⁶⁷

Why, then, do critics observe the apparently scofflaw behavior⁶⁸ of lower courts in this area? One explanation for this failure is legal—that the Court’s opinions in this area are unusually unpersuasive. The justifications it has offered for its pro-arbitration stance include instances of quoting early decisions out of context,⁶⁹ overruling longstanding precedents on dubious grounds,⁷⁰ and assuming the truth of the conclusions it seeks to reach.⁷¹ The Court has arguably issued decisions undermining the very goals which it purports to seek.⁷² If judges are

64. This point is of particular relevance in the arbitration arena in light of the Court’s overruling the major case *Wilko v. Swan*, 346 U.S. 427 (1953), in 1989. See *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477 (1989).

65. The Supreme Court is always subject to override by Congress, either through constitutional amendment or through the much easier process of rewriting legislation. See generally JEB BARNES, *OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* (2004) (describing the process of legislative overrides as well as a framework for analyzing how those overrides come to be). Justices are also theoretically subject to the power of impeachment, although no Supreme Court Justice has ever been successfully impeached. Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 *RUTGERS L. REV.* 725, 788 (2010).

66. A pressure to which new Supreme Court Justice Sonia Sotomayor could no doubt relate. See, e.g., Tony Mauro, *Critics Pounce on Sotomayor’s Reversal Rate*, *NAT’L L.J.* (June 1, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431087253&slreturn=1&hbxlogin=1>.

67. This Note focuses on California. California trial judges face retention elections every six years; justices of the courts of appeals and the California Supreme Court face retention elections every twelve years. CAL. CONST. art. 6, § 16. These elections are rarely significant, although several Supreme Court justices were unseated in a retention election in 1986, largely over their opposition to the death penalty. Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 *S. CAL. L. REV.* 2007, 2007 (1988).

68. See Broome, *supra* note 6.

69. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

70. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989).

71. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (assuming, without evidence to the contrary, that arbitration forums are just as effective as judicial forums at vindicating statutory rights).

72. “[J]udges are trained in the law. They are not penologists, psychiatrists, public administrators, or educators.” GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 20 (1991) (citation omitted) (internal quotation marks omitted). Nor, for that matter, are they arbitrators. One scholar of arbitration has indeed taken the Supreme Court to task for “judicializing” arbitration and, in the process, destroying many of the virtues that supposedly make it attractive in the first place, like cost-effectiveness and quickness. Schwartz, *supra* note 34, at 3–4. In particular, the need to appear to avoid gutting the protections of federal civil rights statutes has posed a serious problem for advocates of arbitration, and the halfway “solutions” that have been innovated by lower federal and state courts—and ratified by the Supreme Court’s silence—have reintroduced many of the procedural aspects that arbitration was supposed to have obviated. See *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997); *Armendariz v. Found. Health Psychcare Servs., Inc.*,

primarily focused on apolitical legal analysis, these features might be particularly important.

Another explanation is institutional. The legal system is a large and ponderous bureaucracy.⁷³ Arguably, the Court lacks the time, temperament, and authority to shape the complicated, turgid bureaucracies of lower courts.⁷⁴ Critics of judicial action have observed that it lacks many of the features of highly effective bureaucratic structures, such as technical expertise.⁷⁵ Particularly problematic, in their eyes, is the problem of independent actors on the lower tiers: the upper levels of the hierarchy have difficulty enforcing a systematic approach to case law upon the judges at the lower levels.⁷⁶ Lower court judges by no means run the risk of automatic reversal when they write opinions challenging the reasoning of their superiors.⁷⁷

State supreme courts, in particular, face relatively few constraints on their authority. They have certain institutional advantages that the U.S. Supreme Court does not, including the ability to review all cases and all issues in those cases.⁷⁸ The Court, by contrast, cannot usually challenge state courts' interpretations of state law issues.⁷⁹ In this area, therefore, state courts are able largely to roam free of review, so long as they carefully structure their opinions.⁸⁰ The California Supreme Court's arbitration jurisprudence has, perhaps for these reasons, been quite effective at implementing clear and understandable arbitration-law norms throughout the state court system.⁸¹

6 P.3d 669, 682 (Cal. 2000).

73. As of 1985, there were over 27,000 judges in the American judicial system, including magistrates and administrative judges. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 37 (1996). The number today is undoubtedly higher. California's substantially smaller system fields 2,134 authorized judgeships (7 supreme court judgeships, 105 appeals court judgeships, and 2,022 superior court judgeships), though that number excludes Administrative Law Judges. JUDICIAL COUNCIL OF CAL., 2009 COURT STATISTICS REPORT 22, 45 (2009).

74. ROSENBERG, *supra* note 72, at 18–19.

75. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 138–39 (1994).

76. There are two fundamental problems here. One is independence: Judges' tenure and juries' impermanence make the lower rungs of the legal system nearly impervious to bureaucratic oversight. *Id.* at 141. The other is lack of expandability: There simply cannot be more than a certain number of justices on a supreme court without making the institution unmanageable, and the cap on numbers is an implied cap on workload. *Id.* at 144–45.

77. It helps if they do so in terms that are not flagrantly insubordinate. For an example of how *not* to do this, see Professor Randall's description of *Doctor's Assocs., Inc. v. Casarotto*. Randall, *supra* note 4, at 220–21.

78. CAL. CONST. art. 6, § 12(b) (“The Supreme Court may review the decision of a court of appeal in any cause.”).

79. See, e.g., *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 688 (1959).

80. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1482 (2008).

81. See, e.g., *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007) (followed twenty-one times);

A rational lower court judge, seeking to advance her career or policy preferences strategically, must thus take heed of several factors.⁸² Is it likely that the case in question will be overruled if decided contrary to existing precedent? If so, is there any way to write an opinion such that it will decrease those risks? Is writing such an opinion—which may have to be narrower or rely on certain difficult-to-review technical grounds—worth the potential missed opportunity to advance a favored cause? Is it possible to lose the battle and win the war—for instance, if the Supreme Court overrules the decision, might Congress intervene and override that ruling? If the judge works in a jurisdiction where she is subject to competitive elections, will writing an opinion benefit or decrease her reelection prospects?⁸³ Finally, will deciding a case in a certain way increase or decrease her workload?⁸⁴ Each of these factors might influence the manner in which a judge evaluates a claim of unconscionability in contract formation.

B. MODELS OF JUDICIAL BEHAVIOR

With that background laid, I will now introduce the models with which I plan to evaluate the performance of California judges in the arbitration-unconscionability arena. The first is what I will call the *legal* model. This model argues that judges are primarily focused on doing a good job in particular cases, and only secondarily concerned with the long-term implications of their decisions.⁸⁵ This model draws support from studies showing that judges tend to vote their policy preferences more often when they feel unconstrained by precedent.⁸⁶ The influence

Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) (followed fifty-two times); Armendariz v. Found. Health Psychcare Servs. Inc., 6 P.3d 669 (Cal. 2000) (followed 116 times).

82. An excellent analysis of the factors involved in strategic lower court judging, on which I rely implicitly throughout this Part, has recently been authored by Professor Bruhl. Bruhl, *supra* note 80.

83. For a profoundly disturbing look at the importance of this final factor to judging in the arbitration arena, see Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645 (1999). Professor Ware documents a split in the Alabama judiciary between judges whose campaigns are funded by trial lawyers and those whose campaigns are funded by corporations. *Id.* Virtually without fail, Alabama Supreme Court judges, during the time frame he studied, voted in favor of the interests of their campaign contributors. *Id.* at 684.

84. The intuitive hypothesis, that judges will try to achieve an “ideal” workload, and that cases in excess of that ideal will be more prone to efforts to remove them from the judge’s docket, has received some recent scholarly support. See, e.g., Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence* (Stanford Public Law, Working Paper No. 1024632, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024632.

85. See Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1407 n.2 (2000) (describing a conventional account of the legal decisionmaking process).

86. See Gillman, *supra* note 63, at 480; see also Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369, 381 (2008) (“In contrast to the pure forms of the attitudinal model, we find strong evidence that legal principles are influential.”).

of law is necessarily lessened when precedent in a given area is conflicting, unclear, or poorly justified.⁸⁷ If judges are *often* constrained by doctrine or facts into voting against their policy preferences, perhaps they can be excused for occasional teleological decisions in extreme cases. This model would explain the gap between the success rates of unconscionability challenges to arbitration agreements and challenges to other contracts as a consequence of specific features about arbitration agreements that make them more likely to *be* unconscionable than are other contracts.

The second is what I will call the *institutional* model. According to this theory, judges and lawyers may feel threatened by arbitration. Plaintiffs' lawyers fight it tooth and nail because they fear the loss of business, defense lawyers support it halfheartedly because they, too, fear their trial skills becoming obsolete, and judges act to maintain their authority by dominating as large a swath of jurisdiction as possible. It appears to be a theory to which the majority of the U.S. Supreme Court, at least as of 1985 and perhaps even today, subscribes.⁸⁸ This theory draws support from the studies demonstrating judges' docket-clearing tendencies.⁸⁹ Under this theory, lower court judges will favor arbitration in relatively busy districts and disfavor it in relatively quiet districts.

The final theory will be referred to as the *policymaking* theory. Under this theory, conservative judges generally act to increase the power of corporations and to promote a more classically "liberal" view of contract law, while judicial liberals do the opposite. Under this theory, judges will tend to favor or oppose arbitration based on their political leanings—conservative judges being pro-arbitration and anti-unconscionability, and liberal judges being pro-unconscionability and anti-arbitration. This theory draws its strongest support from qualitative findings on the influence of political leanings on arbitration case decisions.⁹⁰ Courts staffed by large numbers of judges who share political leanings can be expected to decide cases in accordance with those views. To be credible, this theory requires some sort of predictive model, even

87. For an argument that the U.S. Supreme Court's arbitration jurisprudence is all of the above, see Schwartz, *supra* note 34, at 32 ("As a law-clarifying institution, the Supreme Court has performed wretchedly since the mid-1980s on arbitration questions."). The precedents are clear enough, such as they are, but the Court has repeatedly refused to handle apparent interpretational conflicts by lower courts, thus opening the way to the deep splits in decisionmaking discussed earlier in this work. *Id.* In California, however, the leading case is unquestionably *Armendariz v. Found. Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000). It is, by far, the most cited single case in the sample that I collected. See *supra* note 81.

88. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985) ("[T]he [FAA] was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law.").

89. See Reeves, *supra* note 84, at 4.

90. See Ware, *supra* 83, at 684.

one as simple as judges' party affiliation. Otherwise the assertion that lower court judges are making policy is difficult to advance beyond the tautological argument that "the judge did X, therefore the judge must want to do X, and the way we know that is because he did X."⁹¹ For this study, I have used political partisanship as the underlying predictor.⁹²

Each of these models likely has a grain of truth to it, and it is very unlikely that one will predominate overwhelmingly. However, a look at decisional data will hopefully help indicate the relative importance of these factors and, thus, point the way to how the process might be reformed to make it more transparent and less capricious. If the legal model holds sway, then the status quo may be acceptable. If the root problem is institutional, the proper reform may be adding more judges or, since there are reasons to doubt the efficacy of expanding the judiciary,⁹³ redrawing district lines and reassigning judges. If the problem is that judges are acting as policymakers, however, then an overhaul of the process to remove it from the courts entirely may be warranted. If the decision whether to force a plaintiff to arbitrate is a political one, regardless, then perhaps it should be handled by the political branches.

III. METHODOLOGICAL CRITIQUE: ARE RESULTS DUE TO LITIGANTS' STRATEGY RATHER THAN TO IDEOLOGY?

George Priest and Benjamin Klein authored a seminal 1984 article on plaintiffs' win rates in civil litigation.⁹⁴ In this study, Priest and Klein used a theoretical-mathematics approach to demonstrate that actual win rates for plaintiffs in particular types of cases are not closely indicative of how well the law in those cases favors the plaintiffs.⁹⁵ Because the vast majority of lawsuits settle before reaching litigation, and particularly before reaching appeal, the subset of cases on which judges build the

91. This confronts a persistent and perhaps insoluble problem: "[P]olicy preferences may operate at a metalevel, where justices choose judicial values in a manner to advance broad policy goals." Bailey & Maltzman, *supra* note 86, at 382. In other words, a judge might become, say, a strong advocate of "judicial restraint" precisely because he believes that adopting such a philosophy will support decisions which promote his policy goals. However, a finding that judges are acting in accordance with a well-established political ideology should resolve most of these concerns, because judges cannot openly elect a "judicial philosophy" of favoring Democratic or Republican causes. See Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87, 95 (2008) (describing pressures on judges to mask decisionmaking by means of endorsing "widely held" judicial philosophies).

92. Other nontautological predictors could include judicial demographics (for example, is there a difference on this topic between male and female judges?) or personality traits (do extroverted judges tend to vote differently than introverted judges?). Fruitful further studies could be conducted in this area.

93. KOMESAR, *supra* note 75, at 144.

94. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

95. *Id.* at 4-5.

appellate record that lawyers are so familiar with is remarkably tiny and suffers from severe and pervasive selection bias.⁹⁶ As a consequence, litigated cases tend to be significantly more “even” than are the subset of cases as a whole, with plaintiffs’ win rates in appealed cases approaching 50%, even in unusually hostile or favorable areas of the law.⁹⁷ Even relatively high levels of uncertainty as to the likelihood of winning—a characteristic of impenetrable, case-specific doctrines like unconscionability—have relatively limited impacts on the percentage of wins for a given party in actually litigated cases, although they do tend to increase the theoretical percentage of cases that will reach litigation in the first place.⁹⁸

Subsequent writings have refined the hypothesis somewhat, however. Where parties’ estimates of the value of their cases are disproportionately higher or lower than the true value, trial win rates may be lower or higher than 50%, respectively.⁹⁹ Another empirical study has shown evidence that the type of judge before whom a case is to be argued influences the rates at which parties will settle.¹⁰⁰ Differences in quality of lawyering can impact success rates to an extent that penetrates the Priest-Klein effect.¹⁰¹ Finally, arbitration agreements can impact the types of cases which reach the attention of courts.¹⁰²

96. *Id.* at 2 (“It is very difficult to infer specific characteristics from observations of 0.2 percent or less of a population, especially where there is no evidence that the observations . . . were selected randomly.”).

97. *Id.* at 19.

98. *Id.* at 23.

99. Robert E. Thomas, *The Trial Selection Hypothesis Without the 50 Percent Rule: Some Experimental Evidence*, 24 J. LEGAL STUD. 209, 225–26 (1995). An empirical study has demonstrated this effect in the context of employment law. See Peter Siegelman & John J. Donohue III, *The Selection of Employment Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427, 450–51 (1995) (noting that plaintiffs’ win rates in employment discrimination cases drop during recessions, when the average case for discrimination is weaker, and that such cases settle at higher rates, although enough go to trial, due to misvaluation of the strength of the case, to pull down the overall win rate).

100. Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 336 (1999) (arguing that judicial background is statistically significant in determining whether cases settle or go to trial in a sample of recorded cases and settlements in Tax Court). It must be noted, however, that the same study found only a statistically insignificant effect on decisionmaking from the political party that appointed a given judge. *Id.* at 357.

101. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1582–83 (1989).

102. Christopher R. Drahozal, *Ex Ante Selection of Disputes for Litigation 2* (Feb. 27, 2004) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=510162. This effect does not typically come into play in the area of unconscionability challenges, because if an arbitration clause is unconscionable, that challenge can be heard by a court. However, it is extremely important in another area of arbitration law, namely arbitrability—the determination of whether a given dispute falls within the scope of an arbitration agreement—because the parties to a contract may agree, if they do so carefully, to send that issue to the arbitrator and allow her to determine her own jurisdiction. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Given this, what, exactly, do plaintiffs' win rates in appealed unconscionability cases tell us? Observed regression toward a roughly 50% mean could reflect litigation incentives of the parties more than the actual content of the law. However, there are some important differences between most arbitration clause appeals and other kinds of appeals. First, they are far less costly on average to produce than a typical appeal, because any denial of a motion to compel arbitration can be the subject of an interlocutory appeal under both state and federal law.¹⁰³ Parties favoring arbitration have more incentive to take long shot appeals when the appeals process is available at a fraction of the cost of appealing a trial verdict. Second, for defendants, a finding that an arbitration agreement is valid may effectively end the dispute process completely, as plaintiffs are unwilling to risk adding arbitration fees to their costs.¹⁰⁴ Parties favoring arbitration are allowed, by design, to take a risk in which a win is highly beneficial and a loss is of only minimal consequence. Moreover, a public trial has reputational consequences for defendants that an arbitration, which is presumptively private,¹⁰⁵ does not; thus, the defendant in a civil suit has an incentive to push cases to arbitration that is not counterbalanced by a similar incentive for the plaintiff. As a consequence, the stakes involved for the parties are not equal, violating one of the key assumptions required for the win rate to trend toward 50%.¹⁰⁶ Third, disputes over whether a case should go to arbitration or litigation are not quite as amenable to settlement as, for example, a damages action is, since the question of whether a case is to be arbitrated or litigated is an either/or question.¹⁰⁷ Of course, the parties could settle the *underlying claim*, but the low opportunity cost of not settling prior to the motion to compel arbitration means that settlement is not necessarily

103. In California, a petition to compel arbitration is heard as a summary motion and may be filed in lieu of answering a complaint. CAL. CIV. PROC. CODE § 1281.2 (West 2007) ("On petition . . . the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . ."). An average case consumes around seventy-two hours of attorney time. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 90 (1983). Taking a case through jury trial and appeal would undoubtedly raise that figure immensely.

104. Indeed, as a result of this incentive, the California Supreme Court has ordered courts to closely scrutinize arbitration agreements that, by their terms, deny the availability of class actions. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005).

105. See, e.g., AM. ARBITRATION ASS'N COMMERCIAL ARBITRATION R. 23 (2009) ("The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary."). The *result* of arbitration—but not the process—will often be revealed to the public if one party contests the validity of the arbitration award, because the other party will then have to file a motion to confirm the award, and such a motion is a matter of public record. See CAL. CIV. PROC. CODE § 1285 (2007) ("Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award."); *id.* § 1287.4 ("If an award is confirmed, judgment shall be entered in conformity therewith."). The federal provision is substantially similar. See 9 U.S.C. § 9 (2006).

106. See Siegelman & Donohue, *supra* note 99, at 430.

107. CIV. PROC. CODE § 1281.2.

as high a priority for the parties as it would be if failure to settle would lead to a jury trial.¹⁰⁸

In summary, the litigation incentives do not necessarily support the notion that arbitration cases ought to evidence a fifty-fifty win-loss rate for each party at the appellate level. Instead, the FAA and its California cognate encourage defendants to take advantage of favorable procedural rules to make long-shot appellate attacks on trial courts' denials of motions to compel arbitration. A plaintiffs' win rate of 50% is not necessarily inevitable, and thus differences in that win rate *can* give evidence for substantive arguments about judging.

IV. THE SAMPLE

The sample consists of 119 cases from the California courts of appeal.¹⁰⁹ This sample comprised cases decided in the First, Second, and Fourth Districts of the California Courts of Appeal between 2005 and 2008. I have elected, for reasons of simplicity, to treat cases that severed unconscionable terms from agreements and then compelled arbitration as victories for unconscionability claims, though the true degree to which such an outcome represents a "victory" to an individual is highly case-specific. I also excluded cases from the Third, Fifth, and Sixth Districts, because each district reported fewer than ten cases in which unconscionability determined the outcome.

This Part aims to address three issues. First, does this sample support the existing consensus that arbitration agreements are interpreted differently than other contracts for unconscionability purposes? Second, are there significant differences in the rate at which individual California courts find unconscionability? Third, are there significant differences in the rate at which individual *judges* find unconscionability? Part IV.A establishes whether arbitration agreements are unique at all in the landscape of California contract law. Part IV.B tests the institutional model to find out whether different districts handle cases differently. Part IV.C tests the policymaking model.

108. See *supra* note 96 and accompanying text. This point should not be exaggerated, as parties may settle on an arbitration in which the defendant pays most of the costs of the proceeding.

109. The sample was assembled primarily through a Lexis search, using the keyword "unconscionability." Many cases which contained the term were excluded, however, because the issue was briefly discussed or mentioned but did not determine the outcome of the case. Many arbitration agreements are invalidated for lack of offer and acceptance, rendering defenses to acceptance, such as unconscionability, redundant. In certain instances, this necessarily entailed a degree of authorial judgment. A full list of cases, judges, and case information used in this Note is on file with the Author and is available on the *Hastings Law Journal's* website. See *Thomas Data*, HASTINGS LAW JOURNAL, http://www.hastingslawjournal.org/wp-content/uploads/2011/04/Thomas_data_62-HLJ.pdf (last visited Mar. 31, 2011).

A. ARBITRATION AND NON-ARBITRATION CASES ARE NOT ON EQUAL FOOTING

With respect to how courts treat arbitration and non-arbitration cases, this sample largely replicates findings that have been made by other authors who have attempted to analyze the way California courts deal with the issue of unconscionability in different situations.¹¹⁰ The findings are summarized in Table 1 below. Each court found in favor of unconscionability at a noticeably higher rate in arbitration cases, as compared to other cases.¹¹¹

TABLE 1: DIFFERENTIAL SUCCESS RATES FOR UNCONSCIONABILITY CLAIMANTS IN ARBITRATION AND NON-ARBITRATION CASES, AND IN INDIVIDUAL CALIFORNIA APPELLATE DISTRICTS

Court of Decision	Arbitration Cases	Non-Arbitration Cases
California Courts of Appeal	45/89 (50.6%)	5/30 (16.7%)
First District	17/28 (60.7%)	1/8 (12.5%)
Second District	16/44 (36.3%)	2/9 (22.2%)
Fourth District	12/17 (70.6%)	2/13 (15.4%)

A caveat must be noted, however. For procedural reasons, the vast majority of California arbitration cases that are appealed come to the appellate court after the defendant's motions to dismiss and to compel arbitration have been denied by the trial court.¹¹² By contrast, appeals in non-unconscionability cases must come after a final decision. Parties who win at the trial level are much more successful at the appellate level,¹¹³ which biases the sample of arbitration cases slightly in favor of wins for the plaintiff, and the sample of non-arbitration cases in favor of wins for the defendant. The bias in favor of appeals from plaintiff wins at the trial court accounts for some of the disparity between arbitration and non-arbitration cases, but not all.¹¹⁴ It does appear that California courts are

110. Broome, *supra* note 6, at 48; Randall, *supra* note 4, at 194–96.

111. A chi-square calculation, testing against a null hypothesis (“the hypothesis that an observed difference (as between the means of two samples) is due to chance alone and not due to a systematic cause.” *Null Hypothesis*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/null%20hypothesis> (last visited Mar. 31, 2011)), reveals that the null hypothesis can be rejected with a less than 5% probability of error.

112. Under both the FAA and the California Arbitration Act, parties seeking arbitration are entitled to an immediate appeal when their motion to compel arbitration is denied by the trial court. 9 U.S.C. § 16(a)(1)(B) (2006); CAL. CIV. PROC. CODE § 1294.2 (West 2007).

113. Indeed, my sample did not include a single case in which a trial court was reversed on appeal in a non-arbitration case. When a party opposing an order compelling arbitration lost at the trial level, their appeals were successful or partially successful in just seven of twenty-one cases.

114. At the trial level, parties challenging a contract—usually plaintiffs in the lawsuit—won 5 of 30 non-arbitration unconscionability cases (17.5%) and 68 out of 89 arbitration unconscionability cases

using a more rigorous version of the unconscionability doctrine when it comes to arbitration agreements.

These findings confirm those of Professor Broome.¹¹⁵ Courts applying California law are most likely discriminating against arbitration agreements in a manner that is preempted by the interpretation of the FAA advanced by the Supreme Court.¹¹⁶ Having addressed the question of whether the California courts appear to disfavor arbitration agreements with a cautious affirmative, we can now move on to the question of *why* they find in the way that they do.

B. DIFFERENT DISTRICTS PRODUCE DIFFERENT OUTCOMES IN UNCONSCIONABILITY CASES, BUT WHY?

The First, Second, and Fourth Districts have not, in recent years, decided arbitration-unconscionability cases for contract-challengers at the same rates. As noted in Table 1, the Second District has been notably more hostile, and the Fourth District notably more receptive, to unconscionability claims than the baseline rate. This distinction is statistically significant.¹¹⁷ In other words, it is unlikely that the distribution is entirely random.

However, there are some confounding factors. In particular, as noted in Table 2, the Second District faced an unusual number of appeals in “writ cases”—cases where the defendant won in the trial court and the

(77.2%). In arbitration cases, the plaintiffs won 38 out of 68 cases at the appellate level after a trial court victory (55.9%) and 7 out of 21 cases after a trial court loss (33.3%). Calculating the expected win rate, given the odds of winning at trial looks like so: (hypothesized odds of winning at trial level)(total number of cases)(odds of winning on appeal given trial win) + (hypothesized odds of losing at trial)(total number of cases)(odds of winning on appeal given trial loss) = expected wins given hypothesized odds of winning at trial. If plaintiffs won at the trial level only 17.5% of the time, we would thus expect 33.2 plaintiffs’ wins (based on a calculation of $(.175)(89)(.559) + (.825)(89)(.333) = 33.2$), or a win rate of 37.3%, still comfortably in excess of the 17.5% win rate observed for non-arbitration unconscionability cases. *Both* trial and appellate courts, in other words, appear to be contributing substantially to the increased win rates of plaintiffs at the appellate level.

115. See generally Broome, *supra* note 6.

116. *Id.* at 65. Advocates of mandatory arbitration, however, may find this a hollow victory. The U.S. Supreme Court has looked askance at attempts to prove discrimination through statistics in the past. See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of . . . invidious . . . discrimination”); see also *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (“[D]iscriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.” (quoting *Pers. Adm’r v. Feeney*, 422 U.S. 256, 279 (1979) (internal quotation marks omitted))). In the equal protection context, discrimination must generally be proved through an analysis of the intent of the defendant. *Davis*, 426 U.S. at 249. While cross-applying legal doctrines from one area of law to another is hazardous, a similar requirement in the arbitration context would require a showing that a judge acted because of animus toward arbitration and not because of a good-faith belief that he was doing his job correctly—not an easy task.

117. A chi-square calculation indicates that the odds of the distribution arising due to random chance are less than 3%. Specifically, $\chi^2 = 7.45$ ($df = 2$) produces a *p*-value of 0.0241.

plaintiff sought a writ of mandate to block the entry of judgment on the defendant's petition.¹¹⁸ When those cases are excluded from the sample, there is almost no observed effect, with a greater than one-in-four chance that the minor effect that remains is due entirely to chance.¹¹⁹

TABLE 2: CHALLENGERS' WIN RATES IN NON-WRIT CASES COMPARED TO TOTAL WIN RATES

Court of Decision	Overall Challengers' Win Rate	Challengers' Win Rate in Non-Writ Cases
California Courts of Appeal	45/89 (50.6%)	38/68 (55.9%)
First District	17/28 (60.7%)	16/25 (64%)
Second District	16/44 (35.6%)	13/29 (44.8%)
Fourth District	12/17 (70.6%)	9/14 (64.3%)

The results are, therefore, inconclusive. The Second District faced an unusual number of writ cases but also decided them against unconscionability claimants in an unusual percentage of cases.¹²⁰ The truth probably lies somewhere in the middle of the two results presented. Unfortunately, that places these results right on the borderline of the 5% level of statistical significance. The hypothesis that California courts of appeal are deciding unconscionability cases at different baseline rates must be classified as unproven.

C. JUDGES DECIDE CASES AT DIFFERENT CHALLENGER WIN RATES

In addition to recording the results, I also recorded which judges voted for—and, in rare cases, against¹²¹—each of the decisions.¹²² This allows us to analyze the distribution of plaintiff win rates before individual judges. Conveniently, the nearly coin-flip odds that a given challenger will succeed means that if cases were to be decided entirely at

118. Writ cases comprised 15 of 44 Second District cases, but only 3 of 28 First District cases and 3 of 17 Fourth District cases. See *Thomas Data*, *supra* note 109.

119. A chi-square calculation ($\chi^2 = 2.49$, $df = 2$) produces a p -value of 0.288.

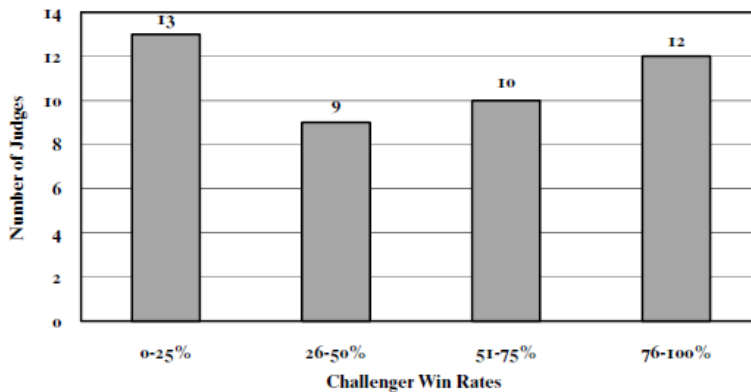
120. Perceptive readers will note that challengers' win rates in the Fourth District actually *dropped* when writ cases were excluded, as all three writ appellants in that District succeeded in at least partially invalidating the arbitration clauses they challenged.

121. Dissents are extremely rare in this sample of arbitration-unconscionability cases. Four cases had full dissents, and one had a partial concurrence, out of eighty-nine total cases. Dissenting judges were coded as voting for the opposite of the result reached.

122. The sample of cases contained, all told, votes by ninety-five different judges. However, many of these judges heard only one or two cases. I opted to exclude judges who heard fewer than three cases for two reasons: First, attempting to draw any conclusion from such a small sample would be rash; and, second, their inclusion would severely bias results toward the edges of the probability distribution, because each judge who heard only one case decided for or against the challenger in 100% of the cases he or she heard.

random, the distribution of judges would be a Gaussian bell-curve distribution, with most judges clustered closely around the 50% mark. The data, however, show a different result.

GRAPH 1: DISTRIBUTION OF JUDGES, BY CHALLENGER WIN RATES



As depicted in Graph 1, California judges, instead, appear to cluster in a somewhat bimodal distribution, with a large group of judges before whom challengers rarely win and a large group of judges who usually decide in favor of challengers. Indeed, the majority of judges either decide for challengers 25% of the time or less, or 75% of the time or more—60.9% of all votes cast in this sample were cast by judges at the ends of the ideological spectrum, just 39.1% by judges in the center.¹²³

D. RATES AT WHICH JUDGES DECIDE FOR UNCONSCIONABILITY CLAIMANTS ARE POORLY CORRELATED WITH POLITICAL AFFILIATION

The majority of California's appellate bench has been appointed to their current positions by Republican governors,¹²⁴ because Republicans have held the California governorship for thirty-one of the past forty years. Table 3 below shows the outcome of an effort to compare political affiliation with outcomes.

The only thing that can be said about these results is that there are none. Only in the second quartile are Republicans significantly underrepresented relative to their overall proportion within the judging population; they are most overrepresented, albeit minimally so, in the

123. See *infra* Table 3.

124. Appointment dates for members of the California courts can mostly be found at the California Courts website. *California Appellate Court Legacy Project*, CAL. COURTS, http://www.courtinfo.ca.gov/courts/courts_of_appeal/ (last visited Mar. 31, 2011); see also KENNETH JAMES ARNOLD, CALIFORNIA COURTS AND JUDGES HANDBOOK (2010–2011 ed. 2010).

first and fourth. One must, at least, question the notion that Republican-appointed judges are more likely than Democrat-appointed judges to vote against unconscionability claimants. Judicial votes are not a proxy for political allegiance but instead appear to represent something more individualized.

TABLE 3: MAGNITUDE AND PARTISAN AFFILIATION OF CHALLENGER WIN RATE QUARTILES

Quartile (Challenger Win Rates)	Votes in Quartile by Judges Appointed by Republican Governors (Percentage of Total Votes in Quartile)	Total Votes Cast by Judges in Quartile (Percentage of Total Votes)
1st (0–25%)	54 (68.4%)	79 (37.3%)
2nd (26–49%)	22 (53.7%)	41 (19.3%)
3rd (50–75%)	27 (64.3%)	42 (19.8%)
4th (76–100%)	34 (68%)	50 (23.6%)
Total	137 (64.6%)	212

V. ANALYSIS AND INFERENCES

From the foregoing, two tentative conclusions may be drawn. First, the legal model appears to best explain the observed results. Second, while some aspects of the criticism of California courts in this area are on point, particularly the observation that California courts do not treat arbitration agreements like any other contract, other criticisms find little support in the data.

A. THE LEGAL MODEL, THE POLICYMAKING MODEL, AND THE INSTITUTIONAL MODEL

The legal model appears to find the best support in the data collected, though the issue is by no means settled. Comparing it to the policymaking model, judges' rates of decision for or against unconscionability challenges differ significantly from a normal distribution.¹²⁵ However, this difference correlates poorly to a benchmark of "ideological" decisionmaking or political partisanship.¹²⁶ If California judges are in fact making policy through their courtrooms on this issue, it is at least a policy that lacks the obvious institutional sponsors and clear-cut intellectual alliances of partisan affiliation.

The legal model performs more equivocally when compared with the institutional model. There are real differences in win rates between districts in the California courts. The busiest California appellate

125. See *supra* Part IV.C.

126. See *supra* Part IV.D.

district—the Second—is the most pro-arbitration and anti-unconscionability of the three districts, with significant numbers of cases reported.¹²⁷ However, the least pro-arbitration and most pro-unconscionability district is the Fourth District, which is in between the First and Second in docket size.¹²⁸ Meanwhile, none of the three differ significantly in their treatment of non-arbitration unconscionability claims.¹²⁹ Those claims, unlike arbitration claims, typically are litigated through trial before reaching the appellate stage; unlike arbitration unconscionability provisions, a finding of unconscionability does not keep a pending case on the lower court's docket. However, the data are sufficiently inconclusive that those differences may be the product of a small sample size.¹³⁰ Further study is clearly warranted, but for the time being, I am unable to state with confidence that the size of an appellate district's docket—or for that matter, the demographic makeup of its underlying counties—plays any real role in the way it decides unconscionability claims.

B. THE LEGAL MODEL AND CRITICS OF THE CALIFORNIA COURTS

Critics of the lower courts' arbitration jurisprudence have no doubts about the notion that judges are behaving strategically. In their view, lower court judges are routinely forming opinions based on outdated prejudice against arbitration,¹³¹ intentionally opting for difficult-to-review legal theories in order to decrease the risk of reversals on appeal,¹³² and relying on legal theories that are preempted by existing Supreme Court precedent.¹³³ They are doing so to advance their own preferences about the role of the law,¹³⁴ and in some states, to win contentious reelection battles with well-funded pro-business candidates.¹³⁵ "California courts," in one account, treat arbitration agreements as a waiver of substantive rights, and thus "differently precisely because they are arbitration agreements, in direct contradiction of the Federal Arbitration Act."¹³⁶

127. JUDICIAL COUNCIL OF CAL., *supra* note 73, at 22.

128. *Id.*

129. *See supra* Table 1. The contrast with arbitration-unconscionability success rates is stark.

130. *See supra* Part IV.B. Even four years' worth of California cases has produced fewer than fifty non-arbitration unconscionability cases directly on point in each of the three most prolific districts, to say nothing of the other districts, which had so few cases as to render making an informed judgment about their tendencies impossible.

131. Randall, *supra* note 4, at 221.

132. Bruhl, *supra* note 80, at 1452.

133. Randall, *supra* note 4, at 209.

134. Broome, *supra* note 6, at 60 ("This approach appears to run counter to the U.S. Supreme Court's statement . . . that '[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are [not] enforceable.'" (first alteration in original) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991))).

135. Ware, *supra* note 83, at 684.

136. Randall, *supra* note 4, at 209.

One scholar has gone so far as to call California law in this sector “an unconscionable application of the unconscionability doctrine.”¹³⁷ These commentators have a fair point: According to the Supreme Court’s interpretation of the FAA, courts must treat arbitration agreements as they would any other form of contract.¹³⁸ Judicial opinions are not supposed to be exempt from the scope of the FAA’s preemption doctrine—otherwise, judges could accomplish through common law rules what legislatures cannot accomplish by statute.¹³⁹ This critique is difficult to contest on its face; indeed, the best counterargument for proponents of strong checks on arbitration agreements may be *tu quoque*, arguing that the array of Supreme Court cases dramatically expanding arbitration agreements¹⁴⁰ have been equally instrumentally motivated.¹⁴¹

In some ways, these results validate those criticisms. It is simple enough to notice the pattern of success rates,¹⁴² and that pattern is replicated in this dataset. The inconclusive analysis of different California appellate districts raises, but does not prove, the possibility that courts are using arbitration as a nonideological method of controlling their caseloads.¹⁴³ On the other hand, another possibility—that arbitration law is, as it were, politics by other means—finds little support in these data.¹⁴⁴ Overall, the statistical criticism appears valid, but in my view, the data tend to show that judges are voting based on a genuine—if perhaps misguided—belief that the arbitration clauses that they are reviewing are truly unconscionable and, thus, invalid contracts.

VI. THE FUTURE OF ARBITRATION-UNCONSCIONABILITY LAW

In recent months, the future of the application of unconscionability to arbitration agreements has become increasingly unclear. The Supreme Court’s decision in *Rent-A-Center West v. Jackson*¹⁴⁵ has thrown the law in this area into flux. Moreover, *AT&T Mobility v. Concepcion*,¹⁴⁶ a case heard in the October 2010 Term, has the potential to enact further significant change. Over and above their impact on the substantive law,

137. Broome, *supra* note 6, at 39.

138. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

139. *E.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 11–12 (1984) (preempting judicial construction of a California franchisee protection statute).

140. *See supra* Part I.C.

141. “The Court’s decision is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA.” *Southland*, 465 U.S. at 22–23 (O’Connor, J., dissenting).

142. *See supra* Part IV.A.

143. *See supra* Part IV.B.

144. *See supra* Part IV.C.

145. 130 S. Ct. 2772 (2010).

146. *See* *Laster v. AT&T Mobility*, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom.* *AT&T Mobility v. Concepcion*, 130 S. Ct. 3322 (2010).

these cases—and, arguably, the uncoincidental timing—arguably demonstrate that the Supreme Court is aware of both the potential power of unconscionability claims in this area and the shifting political winds.

In *Jackson*, decided in June 2010, the Court compelled arbitration by a plaintiff who had signed an arbitration agreement.¹⁴⁷ That agreement declared that the arbitrator, not a court, would exercise exclusive jurisdiction over all claims that parts of the agreement were void or voidable.¹⁴⁸ Such jurisdiction, the Court held, could legally encompass the claim that the arbitration clause as a whole was unconscionable.¹⁴⁹ In court, the plaintiff was allowed only to challenge the unconscionability of the particular sentence of the arbitration agreement that gave the arbitrator jurisdiction over challenges to enforcement of the agreement.¹⁵⁰ Justice Stevens, in dissent, analogized the majority's reasoning to playing with "Russian nesting dolls."¹⁵¹ While there is still an unconscionability doll inside the shell of the majority opinion, it appears to be a considerably smaller one.

Worse yet for advocates of unconscionability challenges, the Court accepted, and heard arguments in, *AT&T Mobility v. Concepcion*, which could further undermine unconscionability challenges. The case arose out of attempts to construct a "class arbitration" from what would otherwise have been numerous individual arbitration claims, most for trivial sums of money, against AT&T Mobility.¹⁵² A California court held that the agreement was invalid.¹⁵³ It appears likely that the Supreme Court will reverse that finding and declare California's *Discover Bank* doctrine,¹⁵⁴ which asserts the power of California courts to compel class arbitration in some situations, preempted by the FAA.¹⁵⁵

147. 130 S. Ct. at 2781.

148. *Id.* at 2775.

149. *Id.* at 2779. This opinion represents a substantial extension of the Court's earlier holding that a party wishing to challenge a petition to compel arbitration must allege that the arbitration clause, not merely some other term of a larger contract, is unconscionable. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395, 403–04 (1967).

150. *Jackson*, 130 S. Ct. at 2780. At first blush, this might seem irrelevant, but the Court made clear that it expected considerably fewer agreements to be invalidated as unconscionable, because plaintiffs would be compelled to demonstrate how various aspects of the arbitration agreement were unfair as applied solely to the arbitrator's ruling on jurisdiction. *Id.*

151. *Id.* at 2786 (Stevens, J., dissenting).

152. See *Laster v. AT&T Mobility*, 584 F.3d 849, 852–53 (9th Cir. 2009), *cert. granted sub nom.* *AT&T Mobility v. Concepcion*, 130 S. Ct. 3322 (2010).

153. *Id.* at 855.

154. So named for *Discover Bank v. Superior Court*, in which the California Supreme Court reversed a court of appeals panel—whose decision, as it happens, is included within the sample used in this Note—and held that arbitration clauses that prohibit class actions in adhesion contracts, inserted as part of a scheme to cheat customers out of small sums of money, are unconscionable. 113 P.3d 1100, 1109–10 (Cal. 2005).

155. This is, of course, only a prediction. But note that the other arbitration case which the Court

The Court does not operate in a vacuum. Professor Barnes discusses the Court, particularly in the statutory interpretation arena, as being contained within a policymaking framework in which congressional overrides of Court decisions have varying degrees of potential effectiveness.¹⁵⁶ Bills, such as the Arbitration Fairness Act, have repeatedly been introduced in Congress to roll back drastically the ability of employers, producers, and franchisors to force employees, consumers, and franchisees into binding arbitration.¹⁵⁷ At the moment, however, momentum in the area of legislative arbitration reform appears to have stalled. Congress appears happy to tack ad hoc arbitration bans, in specific areas of the law, onto new legislation, as it did successfully with the Franken Amendment¹⁵⁸ and the stimulus bill,¹⁵⁹ but the Arbitration Fairness Act appears to be dead for the foreseeable future.

A cynical view of the Court's recent jurisprudence, then, might suggest that the Court is more than willing to read its own pro-arbitration policy preferences into the law, but only during periods of time when Congress is unable or unwilling to act. Meanwhile, lower courts may find that periods when Congress threatens to override Supreme Court decisions grant them a certain degree of freedom to defy the Court.

It remains to be seen whether the Court's newest efforts to take control of the field of arbitration law will be more successful than in the past. For the reasons outlined, those efforts are misguided. This Note has shown that, at least in California, differences over the unconscionability, or lack thereof, of arbitration agreements seem to be honestly held and not the product of partisan pressures or a deliberate bias against arbitration.

Should the Supreme Court continue to severely limit the ad hoc efforts of lower courts to address "the downright shameful"¹⁶⁰ aspects of arbitration agreements, Congress should intervene. One possible reform at the federal level is, of course, the Arbitration Fairness Act, which would bar the enforcement of most unconscionable arbitration

heard in the October 2009 term, *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, compelled numerous individual arbitrations in another case in which a state court had instead ordered a class arbitration. 130 S. Ct. 1758, 1776–77 (2010). It seems overwhelmingly likely that the Court's purpose in taking *AT&T Mobility* is to apply one or both of *Stolt-Nielsen* and *Jackson* to strike down the *Discover Bank* doctrine.

156. BARNES, *supra* note 65, at 6–7 (describing the "pluralist," "hyperpluralist," and "capture" theories of the legislative override process). Whether one would predict arbitration law to be pluralist or hyperpluralist might depend on whether one sees the aggrieved consumer or employee as a "discrete, insular minorit[y]" or not. *Id.* at 192.

157. *See, e.g.*, Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

158. Department of Defense Appropriations Act, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409 (2009).

159. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(d), 123 Stat. 301.

160. *See* Winings, *supra* note 17.

agreements.¹⁶¹ However, it might also throw the baby out with the bathwater by barring many appropriate arbitration agreements.

Alternatively, Congress could take heed of Professor Korobkin's theory of bounded rationality and pass legislation which has the effect of limiting the duty of consumers and employees to read and negotiate nonsalient terms in form contracts.¹⁶² Finally, Congress could create a small, independent federal agency, modeled on the Securities and Exchange Commission, empowered to promulgate minimum rules for certain types of arbitration and to compel arbitration providers to register and provide information to the agency and to the public. The intended effect of all of these proposed solutions would be to modernize and clarify arbitration law and to minimize jurisdictional inequities, while returning unconscionability to its former function as a seldom-used contractual "safety valve" doctrine.

CONCLUSION

To summarize, under present law, arbitration agreements may be challenged successfully on grounds of unconscionability. The likelihood of success depends significantly on the individual judges involved, and the distribution of the rates at which particular judges find arbitration agreements unconscionable makes clear that judges take markedly different philosophical approaches to these claims. However, those approaches appear to have little relationship with their partisan affiliations or to their workload.

Significant changes in this area may already be occurring, thanks to recent Supreme Court jurisprudence that has seemingly made unconscionability challenges more difficult to prove. In order to mitigate the potentially harsh effects of these decisions, and to prevent additional inconsistencies in decisionmaking between lower courts of various jurisdictions and the Supreme Court, Congress should consider an overhaul of arbitration law to help clarify the proper standard by which courts should evaluate arbitration agreements.

161. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). The bill, in brief, would declare arbitration clauses unenforceable if they involve employment, consumer, or franchise agreements, or disputes under civil rights statutes. It also makes it slightly easier to challenge the validity of an arbitration agreement in court rather than before the arbitrator.

162. Professor Korobkin's theory is that salient terms—which is to say, terms that the average reader of a contract will be highly conscious of when deciding whether to sign—in adhesion agreements will be highly efficient, but that nonsalient terms will be, whether efficiently or not, simply the most pro-drafter and anti-adherent. Russell Kuroki, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1290–95 (2003). Though unfortunately somewhat tangential to this piece, his theory is a brilliant one and could be the basis for future legislation.