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# NOTES

## THE ENDLESS BATTLEGROUND: CALIFORNIA'S CONTINUED OPPOSITION TO THE SUPREME COURT'S FEDERAL ARBITRATION ACT JURISPRUDENCE

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### INTRODUCTION

Parties subject to arbitration agreements have contested the interpretation and reach of the Federal Arbitration Act (FAA) since its inception. As with many federal statutes, debate has played out through a series of Supreme Court cases and a forest of academic publications.<sup>1</sup> Over time, these cases have

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<sup>1</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011); Hall St.

slowly altered the interpretation of the FAA and expanded the reach of the statute, arguably far beyond the intention of the enacting Congress.<sup>2</sup> This has led to extensive and continuing debate, particularly in California courts over the past few decades.<sup>3</sup> In recent Supreme Court cases, the disputed interpretation of the FAA has focused on consumer class action cases involving arguments related to unconscionability; specifically, the extent to which courts can refuse to enforce contractual arbitration clauses they determine are unconscionable.<sup>4</sup> The Supreme Court has overturned several opinions from the Ninth Circuit and the California Supreme Court (CSC) resting on unconscionability arguments in arbitration agreements.<sup>5</sup>

Congress passed the FAA in 1925 in an effort to overcome judicial “hostility” towards arbitration.<sup>6</sup> California also passed a law mandating the enforcement of arbitration agreements in 1961,<sup>7</sup> and California courts have since shown a general willingness to enforce these agreements.<sup>8</sup> In the 1980s though, the Supreme Court’s interpretation of the FAA began to shift, and over the last several decades, the Court has made steady progress towards

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Assoc., L.L.C. v. Mattel, Inc. 552 U.S. 576, 592 (2008); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616 (1985); Southland Corp. v. Keating, 465 U.S. 1, 3 (1984); Wilko v. Swan, 346 U.S. 427, 430 (1953) (“The question is whether an agreement to arbitrate a future controversy is a ‘condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision’ of the Securities Act which § 14 declares ‘void.’” (footnote omitted)), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 729 (2012); Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 81 ST. JOHN’S L. REV. 99, 121 (2007); Richard C. Reuben, *FAA Law, Without the Activism: What If the Bellwether Cases Were Decided by a Truly Conservative Court?*, 60 U. KAN. L. REV. 883 (2012).

<sup>2</sup> If only because modern technology and electronics have vastly increased the number of contracts into which individuals enter on a daily basis, and recent years have seen the widespread use of arbitration agreements in those standard form electronic contracts. See Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 771 (2012) (arguing that *Concepcion* at least “improperly guts” the savings clause in § 2 of the FAA).

<sup>3</sup> Many hallmark Supreme Court cases on the FAA were appeals from Ninth Circuit and California court decisions. See, e.g., *Concepcion*, 131 S. Ct. 1740; *Preston v. Ferrer*, 552 U.S. 346 (2008); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

<sup>4</sup> See *Concepcion*, 131 S. Ct. 1740 (holding that the FAA preempted a state common law rule governing the determination of unconscionability for class arbitration waivers).

<sup>5</sup> See, e.g., *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011); *Concepcion*, 131 S. Ct. 1740; *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

<sup>6</sup> *Concepcion*, 131 S. Ct. at 1745 (citing *Hall St. Assocs., L.L.C.*, 552 U.S. at 581).

<sup>7</sup> CAL. CIV. PROC. CODE §§ 1280-1297.432 (West 2007).

<sup>8</sup> According to the California Supreme Court, California has a “strong public policy” in favor of arbitration as a dispute resolution mechanism. *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130, 153 (2011).

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expanding the reach and scope of the statute. California courts have resisted this shift, however, demonstrating a tendency to interpret each possible exception broadly and each power narrowly, pursuing every line of reasoning until cut off by contradictory Supreme Court jurisprudence.<sup>9</sup> This has led to decades of conflict between the opinions from the Supreme Court and California courts. This Note will focus on the CSC, and examine cases pending before the CSC today, concluding that, although the Supreme Court has reached a final cut-off point when it comes to the debate over consumer class actions and unconscionability, as long as California courts maintain their distrust of arbitration as a dispute resolution mechanism, the CSC will continue to try to find new ways around the FAA.

In Part I, this Note examines the origins of the FAA, discussing the reasoning behind the statute and initial interpretations, as well as the cases that marked the shift towards expansion of the FAA in the mid-1980s. Part II then turns towards some of the Supreme Court's more recent cases dealing with the FAA. This Part focuses on two main lines of interpretation in which the Supreme Court overrode California courts' efforts to expand statutory exemptions to the FAA. It also introduces a third line of cases, related to unconscionability arguments in consumer class action cases, which form the core of the most recent debate between California courts and the Supreme Court. Part III examines three arbitration cases – two facing the CSC today and one recently decided – including an analysis of the reasoning of the lower courts. Based on the arguments presented and recent Supreme Court guidance, this Section predicts an outcome for the two pending cases. Part IV discusses how these cases also show California's continued resistance to the Supreme Court's expansive interpretation of the FAA, and how the recently decided case may lead to further disagreement between the two courts. Based on the evidence of continuing interpretive disagreement, Part IV also argues that, due to lingering possessiveness among judges and paternalistic attitudes towards consumers, California courts remain "hostile" to arbitration in a way that justifies the Supreme Court's expansive interpretation on the FAA. Until or unless there is legislative change, this subtle but lingering hostility will keep the debate between the courts alive for decades to come.

#### I. HISTORY OF THE FAA

To discuss the disagreements between the CSC and the Supreme Court over interpretation of the FAA, it is important to understand how the application of the statute has changed over time. In the United States, cultures and communities have long practiced arbitration as a method of dispute resolution, with varying levels of formality.<sup>10</sup> Before the 1920s though, courts were often

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<sup>9</sup> See *infra* Part II.

<sup>10</sup> See Stephen E. Friedman, *Protecting Consumers from Arbitration Provisions in Cyberspace, the Federal Arbitration Act and E-Sign Notwithstanding*, 57 CATH. U. L. REV. 377, 381 (2008) (stating that if a dispute arose, "a party to a contract with an arbitration

reluctant to enforce arbitration agreements.<sup>11</sup> Judges justified this reluctance in a variety of ways. Some cited the need to protect weaker parties from being locked into arbitration involuntarily.<sup>12</sup> Others referred to the “ouster doctrine,”<sup>13</sup> a common law doctrine under which judges refused to enforce arbitration agreements because they perceived such agreements as efforts to “oust” the courts of their jurisdiction.<sup>14</sup> In some cases, the ouster doctrine might also have provided a screen for judges who perceived arbitrators as “minor league” judges and, as a result, viewed the process with general dislike.<sup>15</sup> Courts at the time also followed a practice of allowing parties to revoke arbitration agreements at any time before an award was entered.<sup>16</sup> This created a substantial loophole for any prospective losing party who decided at the last minute that they might have a better argument in court, or even just wanted a second chance to find a sympathetic audience. At a certain point, courts had so strongly established the common law practice of nonenforcement of arbitration agreements that some judges felt compelled to follow precedent

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agreement could sue in court even if the dispute was within the scope of the arbitration provision”); Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN’S L. REV. 77, 80 n.9 (2007) (noting that the Puritan, Quaker, Jewish, and Chinese communities, among others, have traditional means for resolving disputes that do not involve a formal, adversarial litigation process).

<sup>11</sup> See Friedman, *supra* note 10, at 381 n.14 (“[T]he real fundamental cause was that at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them[.]” (first alteration in original) (quoting *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 15 (1924) (statement of Julius Henry Cohen, Member, Am. Bar Ass’n Comm. on Commerce, Trade, & Commercial Law; General Counsel, N.Y. State Chamber of Commerce))).

<sup>12</sup> *Id.*

<sup>13</sup> Reuben, *supra* note 1, at 886.

<sup>14</sup> See, e.g., *Bozeman v. Gilbert*, 1 Ala. 90, 91 (1840); *Cal. Annual Conference of the Methodist Episcopal Church v. Seitz*, 15 P. 839, 841 (Cal. 1887); *Lewis v. Bhd. Accident Co.*, 79 N.E. 802, 803 (Mass. 1907); *Baltimore & O. R. Co. v. Stankard*, 46 N.E. 577, 578-79 (Ohio 1897); *Kinney v. Balt. & O. Emps.’ Relief Ass’n*, 14 S.E. 8, 8-9 (W. Va. 1891); see also Friedman, *supra* note 10, at 381-82 & n.15 (citing WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS 45 (1930)); Reuben, *supra* note 1, at 886.

<sup>15</sup> Kirgis, *supra* note 1, at 99; see also Friedman, *supra* note 10, at 383 (citing H.R. REP. NO. 68-96, at 1 (1924)) (discussing the passage of the FAA).

<sup>16</sup> See, e.g., *Seitz*, 15 P. at 841; *Donnell v. Lee*, 58 Mo. App. 288, 297 (1894); *Tyson v. Robinson*, 25 N.C. (3 Ired.) 333, 333 (1843); *Pepin v. Societe St. Jean Baptiste*, 49 A. 387, 388 (R.I. 1901); see also Friedman, *supra* note 10, at 381 (stating that the common law rules were sometimes referred to “collectively as the rule of revocability” (citing STURGES, *supra* note 14, at 45)).

even when they thought it would be better not to.<sup>17</sup> Growing dissatisfaction with the state of the law reached a peak in the 1920s when the increasing popularity of arbitration agreements in business led to formal legislative efforts to overrule this common law “hostility” towards arbitration.<sup>18</sup> As a result, starting with New York in 1920,<sup>19</sup> several states passed statutes commanding courts to enforce arbitration agreements, and Congress soon followed, passing the FAA in 1925.<sup>20</sup>

The FAA is codified at 9 U.S.C. §§ 1–16.<sup>21</sup> Sections 1, 2 and 10 draw much of the focus of this Note. Section 1 includes definitions of some of the basic terms, but also provides one of the textual exceptions on which the California Courts focused in one line of cases they followed before the Supreme Court reversed their interpretation.<sup>22</sup> Section 1 defines commerce, but specifies that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>23</sup> The next section, § 2, provides the primary operative provision of the FAA, stating that written provisions in any “contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be

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<sup>17</sup> See, e.g., *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915) (criticizing the law but finding precedent dictated the unenforceability of the arbitration agreement); *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 292 (N.Y. 1921).

<sup>18</sup> Friedman, *supra* note 10, at 381; Michael A. Landrum & Dean A. Trongard, *Judicial Morphallaxis: Mandatory Arbitration and Statutory Rights*, 24 WM. MITCHELL L. REV. 345, 355 (1998).

<sup>19</sup> New York Arbitration Act of 1920, N.Y. C.P.L.R. §§ 7501-7514 (McKinney 2013); see also Friedman, *supra* note 10, at 382; Landrum & Trongard, *supra* note 18, at 355.

<sup>20</sup> Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2012); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION – NATIONALIZATION – INTERNATIONALIZATION 42-47 (1992) (describing the passage of proarbitration statutes in New Jersey, Massachusetts, Oregon, and Washington, D.C.); Friedman, *supra* note 10, at 383.

In addition to the FAA, the United States has also signed onto the New York Convention, an international treaty that entered into force in 1959, and provides for the international enforcement of arbitration agreements. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208 (2012); Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 ST. JOHN’S L. REV. 123, 123 & n.2 (2007). There is also significant debate and disagreement over the terms and provisions of this convention, but this Note does not delve into those issues. For a further look at international arbitration issues, see, for example, Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN ST. L. REV. 1343, 1343-45 & nn.1-3 (2009); S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty, and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT’L L. 499, 499 (2013).

<sup>21</sup> 9 U.S.C. §§ 1-16.

<sup>22</sup> *Id.* § 1.

<sup>23</sup> *Id.*

valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>24</sup> Much of the more recent controversy regarding the extent of judicial powers arises from the interpretation of the savings clause at the end of § 2, allowing revocation “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>25</sup> Section 10, which includes a list of grounds upon which a court may vacate an arbitral award,<sup>26</sup> has also provided a source of contention in interpreting the FAA in recent years.<sup>27</sup>

A. *Early Interpretations*

Originally the FAA functioned as a procedural statute that was only applicable in federal courts.<sup>28</sup> Congress intended to use the FAA to make arbitration agreements enforceable – at least within the flow of interstate commerce – and to provide a procedure for the enforcement of those agreements in Federal court.<sup>29</sup> In a series of subsequent cases, the Supreme Court followed the text of the FAA but displayed continued wariness of arbitration.<sup>30</sup> Lower courts also used the exceptions in § 10 and the savings clause of § 2 to develop several common law exceptions to the FAA. These exceptions included cases in which courts overturned arbitrator decisions found to be “arbitrary and capricious,”<sup>31</sup> or where the outcome was either contrary to public policy or illegal.<sup>32</sup> Based on dicta from the Supreme Court

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<sup>24</sup> *Id.* § 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* § 10.

<sup>27</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578, 585 (2008) (declaring manifest disregard invalid and that the § 10 exceptions are an exclusive list).

<sup>28</sup> MACNEIL, *supra* note 20, at 83.

<sup>29</sup> Friedman, *supra* note 10, at 383-84 (quoting H.R. REP. NO. 68-96, at 2 (1924)). This interpretation of the FAA is occasionally considered today. In an article on arbitration, Mr. Roger B. Jacobs points out that Justice Clarence Thomas still asserts that the FAA does not apply to state court procedures, meaning Justice Thomas would prefer to interpret the FAA as a federal procedural rule, rather than as a substantive statutory requirement (accompanied by significant state preemption) as it is currently interpreted. *See* Roger B. Jacobs, *Fits and Starts for Mandatory Arbitration*, 29 HOFSTRA LAB. & EMP. L.J. 547, 552-53 (2012).

<sup>30</sup> *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 438 (1953).

<sup>31</sup> *See, e.g.*, *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 781 (11th Cir. 1993) (discussing Eleventh Circuit precedent recognizing courts’ power to vacate arbitration awards that are arbitrary and capricious), *abrogated by Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010).

<sup>32</sup> *E. Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 63 (2000); *see also Kirgis, supra* note 1, at 104 (discussing the narrowing of nonstatutory grounds for vacating awards from public policy to illegality); *Landrum & Trongard, supra* note 18, at 381-82 (describing cases where courts refused to enforce arbitrators’ awards because they were illegal or contrary to public policy).

case *Wilko v. Swan*,<sup>33</sup> many courts also adopted the theory of Manifest Disregard, pursuant to which courts could vacate arbitral awards if the arbitrator demonstrated a “manifest disregard” of the applicable law.<sup>34</sup> The time for applying these exceptions, however, appears to have drawn to a close. In recent decades the Supreme Court has made slow but steady progress toward eliminating these escape routes and strictly limiting the applicability of the textual exceptions in the statute.<sup>35</sup>

B. *The 1980s Shift Toward Expansive Interpretation and the Rise of California Versus Supreme Court Conflicts*

Early cases like *Wilko* followed the text of the FAA and rendered arbitration agreements enforceable, but preserved some areas in which courts could reserve some discretion in the enforcement of arbitration clauses.<sup>36</sup> The opinions in these earlier cases also reflected some continuation of negative attitudes towards arbitration. Beginning in 1984 with *Southland Corp. v. Keating*,<sup>37</sup> however, the Supreme Court began a major shift away from its earlier interpretations.<sup>38</sup> In *Southland*, the Court altered the procedural interpretation of the FAA and began to read in broad substantive provisions.<sup>39</sup> Over time the Court has expanded the reach of these substantive provisions,

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<sup>33</sup> *Wilko*, 346 U.S. 427.

<sup>34</sup> See Landrum & Trorgard, *supra* note 18, at 373-80 (discussing the development of Manifest Disregard through dicta in *Wilko*).

<sup>35</sup> See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011) (discussing the Supreme Court’s perception of the dangers of allowing state legislatures to curtail the power of the FAA); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584-85, 592 (2008) (declaring manifest disregard invalid).

<sup>36</sup> See Horton, *supra* note 1, at 731 (discussing courts’ refusals to enforce arbitration agreements under the Sherman Act, which unlike the Securities Act of 1933, did not contain any antiwaiver provision). In fact, for decades after this decision, the Court recognized an exemption for congressionally created rights from the FAA. *Id.* at 723 (citing *Wilko*, 346 U.S. at 435-38).

<sup>37</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>38</sup> See, e.g., Jacobs, *supra* note 29, at 552 (stating that in *Southland* the Supreme Court determined that the FAA created “substantive, not procedural, law that applied in both federal and state courts”); Reuben, *supra* note 1, at 889 (identifying the decision in *Southland* as the first time the Supreme Court held that the FAA directly preempted state law on arbitration).

<sup>39</sup> See Jacobs, *supra* note 29, at 552; Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 851 (2012); see also Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1353 (1985) (stating that the FAA “is now definitively established as a substantive federal law, preemptive and binding on the states, and articulating a federal policy extending to issues well beyond its literal terms”).

placing the FAA in a position to preempt a vast swath of state law on arbitration.<sup>40</sup>

The debates between the California Supreme Court (CSC) and the Supreme Court started as soon as the Supreme Court shifted towards the broader interpretation of the FAA. Other federal circuit and state courts have come into conflict with the Supreme Court on these issues too, of course, but none so often, nor with such persistence.<sup>41</sup> In *Southland*, the Supreme Court examined the case of a 7-11 franchise in which the franchisee contracts included arbitration agreements, but the franchisees nevertheless filed suit in California

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<sup>40</sup> Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 398-99 (1992); see also *Concepcion*, 131 S. Ct. at 1747 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008))); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688-89 (1996).

<sup>41</sup> Alabama, for example, long disfavored the enforcement of arbitration agreements outside the purview of the FAA, until the Supreme Court forced a reconsideration of state law in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). For a full discussion, see Henry C. Strickland, *Allied-Bruce Terminix, Inc. v. Dobson: Widespread Enforcement of Arbitration Agreements Arrives in Alabama*, 56 ALA. LAW. 238, 242 (1995). Since 1980 and the shift toward a substantive interpretation of the FAA, however, the highest concentration of landmark (or at least frequently cited) cases on arbitration and the FAA is in California. The origins of most complaints are scattered: Two cases from Alabama, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); *Dobson*, 513 U.S. 265, two cases from New York, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), and two from North Carolina, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), and one each from Florida, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2005), Montana, *Casarotto*, 517 U.S. 681, Nevada, *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010), and Puerto Rico, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616 (1985). The numbers do not add up much higher if the cases are grouped by circuit. The Eleventh Circuit covers Florida and the two Alabama cases, the Second Circuit covers the New York cases, the Fourth Circuit covers the North Carolina cases, and the First Circuit covers Puerto Rico. Looking to California, on the other hand, the Ninth Circuit area encompasses the source of eight major arbitration cases (whether on appeal from the Circuit or the state courts), six of which come from California (and thus stem from California state and common law). *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston*, 552 U.S. 346; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The Ninth Circuit also encompasses the Montana case, *Casarotto*, 517 U.S. 681, and the Nevada case, *Rent-A-Ctr., W., Inc.*, 130 S. Ct. 2772. Again, this list refers only to a selection of the most frequently cited arbitration cases, which constitute a fraction of the total cases that have challenged arbitration and the FAA in the thirty or so years since *Mitsubishi* and *Southland* and the Supreme Court's jurisprudential shift. Nevertheless, it gives an idea of why California courts and Ninth Circuit cases applying California law are of such interest in this examination of developments in federal arbitration law.



state court.<sup>42</sup> The case focused on the question of whether the FAA preempted the California Franchise Investment Law (FIL).<sup>43</sup> The CSC interpreted the state law to prohibit arbitration of disputes arising pursuant to violations of FIL.<sup>44</sup> The Supreme Court overturned the CSC ruling and held that the FAA was a substantive statute because § 2 referred to contracts “involving commerce.”<sup>45</sup> The Court said this language indicated congressional intent to expand the reach of the FAA to cover the maximum extent of Congress’ powers under the Constitution.<sup>46</sup> Thus, the Court ruled, the FAA applied not only to federal court procedure but also to the substantive law of state court cases.<sup>47</sup> As a result, the Court decided that states cannot create statutory requirements that contradict either federal law or the policy choices of Congress in passing the FAA.<sup>48</sup>

The year after *Southland*, the Supreme Court expanded the reach of the FAA again. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>49</sup> the Court began to reverse the line of cases that had followed from the opinion in *Wilko*, under which lower courts had expanded the exceptions of the FAA. In this case, well-known automobile manufacturers Mitsubishi and Chrysler disagreed over the terms of a contract for the sale of cars.<sup>50</sup> Chrysler brought claims against Mitsubishi under the Sherman Act, alleging that the latter had “conspired to divide markets in restraint of trade.”<sup>51</sup> Chrysler argued that an arbitration agreement could not cover claims arising out of statutes designed to protect a given class of plaintiffs, like the Sherman Act, unless the parties expressly agreed, and named the statute in the arbitration agreement.<sup>52</sup> The Court in *Mitsubishi Motors* disagreed, and held that arbitration agreements are valid even with respect to claims arising under the Sherman Act and similar

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<sup>42</sup> *Southland*, 465 U.S. at 1.

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.* at 5.

<sup>45</sup> *Southland*, 465 U.S. at 6, 14-15 (reversing the decision of the CSC (quoting 9 U.S.C. § 2 (2012)).

<sup>46</sup> *Id.* at 11-15 (stating the Court’s conclusion as well as discussing the potential ambiguities in the legislative history).

<sup>47</sup> *Id.* at 12 (“Although the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts.”).

<sup>48</sup> *Id.* at 16 (stating the majority opinion that Congress did not intend to allow “state legislative attempts to undercut the enforceability of arbitration agreements”). For a further discussion of the Court’s history in establishing that states cannot create their own limitations on the FAA, and for a discussion of an early precursor to *Southland*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), see Jacobs, *supra* note 29, at 552-53.

<sup>49</sup> 473 U.S. 614, 625 (1985).

<sup>50</sup> *Id.* at 617-20.

<sup>51</sup> Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2012); *Mitsubishi Motors*, 473 U.S. at 620.

<sup>52</sup> *Mitsubishi Motors*, 473 U.S. at 625.

protective statutes.<sup>53</sup> Furthermore, the Court stated that when in doubt as to the compatibility of federal law and the FAA, courts should construe statutes in favor of arbitration.<sup>54</sup> This ruling was a huge step in expanding the power of the FAA.

At the time the Supreme Court held, based on *Wilko*, that *Mitsubishi Motors* would not limit the effect of statutes where Congress had expressed intent to render arbitration agreements unenforceable.<sup>55</sup> This, however, preserved only the bare minimum of an exception. The Supreme Court stated that lower courts should recognize a general federal policy favoring arbitration.<sup>56</sup> The combination of a federal policy favoring arbitration and barring the enforcement of arbitration agreements only where Congress has expressed “intent” to make such agreements unenforceable suggests a “clear statement rule” – a high bar for parties seeking to bring charges in court. This case thus marked the Supreme Court’s shift toward an expansive interpretation of the scope and authority of the FAA.<sup>57</sup>

## II. CALIFORNIA’S CHALLENGES TO THE SUPREME COURT

In the years after *Southland* and *Mitsubishi Motors*, the Supreme Court published a series of opinions further expanding the reach of the FAA. The Court used broad interpretations of the statutory language regarding the scope of the statute and narrowed the exceptions.<sup>58</sup> The CSC, on the other hand,

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<sup>53</sup> *Id.* (“[W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.”).

<sup>54</sup> *Id.* at 626 (“Thus, as with any other contract, the parties’ intentions control, but those intentions are generously construed as to issues of arbitrability.”).

<sup>55</sup> *Id.* at 628 (“We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.” (citing *Wilko v. Swan*, 346 U.S. 427, 434-35 (1953))).

<sup>56</sup> *Id.* at 627 (citing *Wilko*, 346 U.S. at 434-35).

<sup>57</sup> “After *Mitsubishi* . . . the Court enforced arbitration agreements to arbitrate claims under the securities laws, the Racketeer Influenced and Corrupt Organizations Act (RICO), and the federal discrimination laws.” Kirgis, *supra* note 1, at 103 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (concerning arbitration and federal antidiscrimination law); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479, 486 (1989) (relating to arbitration and securities laws); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 222-23, 238, 242 (1987) (discussing arbitration in the context of securities law and RICO)). The Court completed its shift away from the nonarbitrability doctrine in 2009 with its ruling in *Pyett*. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260 (2009) (“[Respondents] argue . . . ‘arbitration under a collective bargaining agreement could not preclude an individual employee’s right to bring a lawsuit in court to vindicate a statutory discrimination claim.’ We disagree.” (citations omitted)).

<sup>58</sup> See *infra* Part II.A-B; see also Friedman, *supra* note 10, at 385 (“The Supreme Court has, over the past few decades, systematically read the language of the scope portion of section 2 (and relevant language in section 1) to expand the range of arbitration agreements

repeatedly found ambiguous language in the FAA and interpreted passages liberally to create exceptions to the statute.<sup>59</sup> Thus, after *Southland*, California courts provided a consistent source of opposing interpretations to the Supreme Court, resulting in the Court repeatedly overturning California rulings.<sup>60</sup>

A. *Sections 1 and 2: The Commerce Clause and Employment Contracts*

As mentioned in the discussion on the FAA's history,<sup>61</sup> one of the main debates between the CSC and the Supreme Court revolved around the language of § 1 of the Act. The statute exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>62</sup> The FAA also defines the term "commerce," but not "involving commerce."<sup>63</sup> In § 2, the FAA states that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable."<sup>64</sup> The statute also does not define what "evidenc[es] a transaction."<sup>65</sup> In the 1995 case *Allied-Bruce Terminix Cos. v. Dobson*, the Supreme Court decided on definitions of both "involving commerce" and "evidencing a transaction."<sup>66</sup> The Supreme Court held it was most consistent with the background and purpose of the FAA to interpret "involving commerce" to mean the same as "affecting commerce" and thus that the FAA's scope should extend as broadly as possible within the limits of Congress' enumerated powers under the U.S. Constitution.<sup>67</sup>

Given this broad interpretation of the words "involving commerce," the Ninth Circuit interpreted the exemption of "any other class of workers engaged in foreign or interstate commerce"<sup>68</sup> to have similar breadth, and thus decided

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falling within the scope of the FAA.").

<sup>59</sup> See *infra* Part II.A-B (discussing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001); and *McCarthy v. Citigroup Global Mkts. Inc.*, 463 F.3d 87, 91 (1st Cir. 2006), among others).

<sup>60</sup> Some cases involve the Ninth Circuit rather than the CSC directly, but under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Circuit Court applies California law and precedent when dealing with contract disputes.

<sup>61</sup> See *supra* Part I.

<sup>62</sup> 9 U.S.C. § 1 (2012).

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

<sup>64</sup> *Id.* § 2.

<sup>65</sup> See *id.* § 1.

<sup>66</sup> 513 U.S. 265, 277-78 (1995).

<sup>67</sup> *Id.* at 273-74 ("After examining the statute's language, background, and structure, we conclude that the word 'involving' is broad and is indeed the functional equivalent of 'affecting.'"). The debate over the growing reach of the FAA is such that some perceive this blanket grant of power as extending far beyond the range, either of what was intended, or at least what is wise. See generally Stempel, *supra* note 39 (criticizing the Supreme Court's broad interpretations of the FAA as unwise and inappropriate).

<sup>68</sup> 9 U.S.C. § 1.

that the FAA did not extend to arbitration agreements in employment contracts.<sup>69</sup> The Ninth Circuit was the only circuit court to reach this conclusion,<sup>70</sup> and in *Circuit City Stores, Inc. v. Adams*, the Supreme Court rejected it.<sup>71</sup> The Respondent argued in favor of a broad interpretation of the exemption for “workers,” contending that Congress intended to exempt all employment contracts when it passed the statute in 1925.<sup>72</sup> This did not sway the Supreme Court, which overturned the circuit court and held that such a broad exemption was inconsistent with the text of the FAA.<sup>73</sup> The Court decided that, “[u]nlike the ‘involving commerce’ language in § 2, the words ‘any other class of workers engaged in . . . commerce’ constitute a residual phrase, following, in the same sentence, explicit reference to ‘seamen’ and ‘railroad employees.’”<sup>74</sup> Based on the specific mentions of seamen and railroad workers, Justice Kennedy applied the interpretive canon of *ejusdem generis* and concluded that Congress intended to limit the § 1 exemption to transportation workers alone.<sup>75</sup>

B. *Section 10: Narrowing the Exceptions*

The Supreme Court’s strict interpretation of the terms of the FAA in § 1 turned California courts away from the employment exemption.<sup>76</sup> It did not, however, resolve the difference in perspectives between the two judicial bodies with respect to interpretation of the FAA.<sup>77</sup> The two courts soon clashed in a new arena: grounds for vacating arbitration awards. Section 10 of the FAA provides a list of grounds upon which courts may vacate an arbitration award.<sup>78</sup> In addition to the broad interpretation of the enabling text of § 2, the Supreme Court has limited the applicability of the grounds for courts to vacate awards

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<sup>69</sup> *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071-72 (9th Cir. 1999) (per curiam), *rev’d*, 532 U.S. 105 (2001).

<sup>70</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (“All but one of the Courts of Appeals which have addressed the issue interpret this provision as exempting contracts of employment of transportation workers, but not other employment contracts, from the FAA’s coverage.”).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 114.

<sup>73</sup> *Id.* at 119.

<sup>74</sup> *Id.* at 114.

<sup>75</sup> *Id.* at 114-15 (employing *ejusdem generis* to demonstrate that the general phrase “other class of workers” was limited by the specific use of “seamen” and “railroad employees”).

<sup>76</sup> *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 891 (9th Cir. 2002) (acknowledging the applicability of the FAA to employment contracts on remand from the Supreme Court).

<sup>77</sup> In fact, on remand, the Circuit Court accepted that employment contracts fell under the purview of the FAA, but still declined to enforce the arbitration based on an argument of unconscionability, which became one of the later sources of disagreement between California courts and the Supreme Court. *Id.* at 892.

<sup>78</sup> 9 U.S.C. § 10 (2012).

under § 10.<sup>79</sup> The textual exceptions include a power to vacate arbitral awards obtained by “fraud, corruption or undue means.”<sup>80</sup> Section 10 also creates exceptions for “partiality or corruption in the arbitrators”<sup>81</sup> or when there is other misconduct or misbehavior by the arbitrators that would prejudice the rights of the parties.<sup>82</sup> Finally, § 10 permits courts to vacate awards “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”<sup>83</sup> The statute’s wording does not provide any more precise definition of these exceptions, leaving arbitral awards open to judicial second guessing. As a result, courts developed a number of nontextual exemptions to the FAA including, as mentioned, the doctrine of Manifest Disregard.<sup>84</sup> This doctrine became the basis for one of the most common challenges to arbitration agreements.<sup>85</sup>

The use of Manifest Disregard continued until 2008, when the Supreme Court granted certiorari in the case *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>86</sup> In *Hall Street*, the Court focused on whether Manifest Disregard was a valid basis for vacating an arbitration award under the FAA.<sup>87</sup> The Supreme Court concluded it was not.<sup>88</sup> As mentioned previously,<sup>89</sup> the concept of Manifest Disregard developed from the Supreme Court’s language in *Wilko v Swan*.<sup>90</sup> In that case, the Court distinguished between an arbitrator interpreting law, on the one hand, and disregarding the law entirely, on the other.<sup>91</sup> The Court stated that “interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation.”<sup>92</sup> In subsequent cases, courts interpreted this

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<sup>79</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750-53 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584-89 (2008).

<sup>80</sup> 9 U.S.C. § 10(a)(1).

<sup>81</sup> *Id.* § 10(a)(2).

<sup>82</sup> *Id.* § 10(a)(3).

<sup>83</sup> *Id.* § 10(a)(4).

<sup>84</sup> See *supra* note 34 and accompanying text.

<sup>85</sup> See, e.g., Kevin Patrick Murphy, Note, *Alive but Not Well: Manifest Disregard After Hall Street*, 44 GA. L. REV. 285, 287 (2009) (citing Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements That Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861, 907 (2004)).

<sup>86</sup> 552 U.S. 576, 584-85 (2008).

<sup>87</sup> See *id.* at 585.

<sup>88</sup> *Id.* at 578.

<sup>89</sup> See *supra* notes 33-34 and accompanying text.

<sup>90</sup> 346 U.S. 427, 436 (1953) (stating that outlier hypotheticals seem to indicate that “the interpretations of the law by the arbitrators in contrast to manifest disregard of law are not subject, in the federal courts, to judicial review for error”).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 436-37.

statement to mean that arbitration awards were subject to judicial review for an arbitrator's manifest disregard of the law.<sup>93</sup> Justice Stevens even acknowledged Manifest Disregard in his *Mitsubishi Motors* dissent.<sup>94</sup> The Court in *Hall Street*, however, rejected Manifest Disregard as an additional basis for vacatur besides those listed in § 10.<sup>95</sup> The Supreme Court held that courts are strictly limited in their justifications for overturning arbitration awards.<sup>96</sup> The Court explicitly stated that exemptions to the FAA are limited to those included in the text of the statute.<sup>97</sup> This holding cut a sizeable hole in the umbrella of Manifest Disregard as an independent basis for vacating arbitration awards.<sup>98</sup> It also has ramifications elsewhere though, as it indicates the Court will no longer permit use of other common law exemptions that developed after *Wilko*, like those for "arbitrary and capricious" or outcomes contrary to public policy.<sup>99</sup>

C. *Section 2 Redux: The Savings Clause – Unconscionability from Casarotto to Concepcion*

Despite the limitations of *Hall Street*, the Supreme Court did not succeed in boxing California courts into their ideal interpretation of the FAA. The CSC quickly found another outlet. In *Doctor's Associates, Inc. v. Casarotto*,<sup>100</sup> the Court considered the savings clause in § 2 of the FAA and held that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without

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<sup>93</sup> The Supreme Court cited cases recognizing this development. See *Hall Street Assocs., L.L.C.*, 552 U.S. at 584-85 (citing *McCarthy v. Citigroup Global Mkts., Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoefl v. MVL Grp., Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395-96 (5th Cir. 2003); *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998)).

<sup>94</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law . . . ." (citing 9 U.S.C. §§ 10, 207 (2012))). Justice Stevens' citation, however, is ambiguous. It may imply that he considers § 10 to encompass the explicit exceptions as well as the common law developed additions. Alternatively, this quote could mean that he considers Manifest Disregard part of one of § 10's textual exceptions, such as the exception for cases where the arbitrator exceeds their powers. 9 U.S.C. § 10(a)(4).

<sup>95</sup> *Hall Street Assocs., L.L.C.*, 552 U.S. at 584.

<sup>96</sup> *Id.* at 588.

<sup>97</sup> *Id.* ("[T]he text compels a reading of the §§ 10 and 11 categories as exclusive.").

<sup>98</sup> Though, as suggested in the Stevens dissent in *Mitsubishi Motors*, see discussion *supra* note 94, courts may continue to use Manifest Disregard as an example of arbitrators overstepping their statutory authority. See *Manifest Disregard After Hall Street*, DISP. RESOL. J., May–July 2012, at 88.

<sup>99</sup> See *supra* Part I.A (mentioning common law workarounds that have developed in the wake of the FAA and *Wilko*); see also Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1106-07 (2009) (suggesting that only the public policy ground for vacatur should survive *Hall Street*).

<sup>100</sup> 517 U.S. 681 (1996).

contravening § 2.”<sup>101</sup> Once again, California courts interpreted this statement broadly, leading to a series of cases relying on unconscionability as grounds for vacating an arbitration award.<sup>102</sup>

As that line of cases developed, courts also began to raise questions about how much the now substantive FAA preempted state law.<sup>103</sup> The Supreme Court’s decisions on these cases expanded the FAA’s preemption of existing state law while decreasing the ability of state legislatures to pass new statutes limiting the FAA or even guiding its application. For example, one California case, *Preston v. Ferrer*,<sup>104</sup> involved a law that vested original jurisdiction for cases arising under the California Talent Agencies Act (CTAA) in the Labor Commissioner.<sup>105</sup> In *Preston*, a California attorney tried to compel arbitration pursuant to a contract with a judge and TV personality (Judge Alex).<sup>106</sup> Judge Alex argued the contract was void due to the attorney’s failure to get a license for talent agents required under the CTAA.<sup>107</sup> The California Court of Appeal decided that the Labor Commissioner had “exclusive original jurisdiction.”<sup>108</sup> The appellate court held the FAA thus did not preempt the California law because the state law did not discriminate against arbitration clauses, but rather relocated original jurisdiction for *all* disputes arising under the CTAA.<sup>109</sup> The Supreme Court disagreed. The Court held that the FAA preempted the law, and would also preempt any state laws seeking to establish primary jurisdiction in a

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<sup>101</sup> *Id.* at 687. The Court has since limited even those options. *See infra* notes 140-48 and accompanying text (discussing *Concepcion* and how the Supreme Court’s holding limits states’ ability to enforce contract law in cases where such laws come into conflict with the FAA).

<sup>102</sup> *See, e.g.*, *Discover Bank v. Superior Court*, 113 P.3d 1100, 1111 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 679 (Cal. 2000); *Iskarian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372, 377 (Ct. App. 2012), *review granted and opinion superseded*, 286 P.3d 147 (Cal. 2012). “[*Szetela*] first recognized that unconscionability was one reason to refuse to enforce a [class] arbitration waiver. It found procedural unconscionability in the adhesive nature of the contract.” *Discover Bank*, 113 P.3d at 1107 (citing *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 866 (Ct. App. 2002)).

<sup>103</sup> *See* *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (“The instant petition presents the following question: Does the FAA override not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency?”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006); *see also* *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (declining to reconsider the scope of preemption established in *Southland*).

<sup>104</sup> *Preston*, 552 U.S. 346.

<sup>105</sup> CAL. LAB. CODE § 1700.44(a) (West 2011).

<sup>106</sup> *Preston*, 552 U.S. at 351.

<sup>107</sup> *Id.* at 350.

<sup>108</sup> *Ferrer v. Preston*, 51 Cal. Rptr. 3d 628, 631 (Ct. App. 2006), *rev’d*, 552 U.S. 346 (2008).

<sup>109</sup> *Ferrer*, 51 Cal. Rptr. 3d at 634.

forum that would limit the applicability and enforceability of arbitration agreements.<sup>110</sup>

The Court decided several other cases based on similar reasoning. In another California case, *Perry v. Thomas*,<sup>111</sup> a state statute allowed parties to bring actions to collect wages in court without regard for private contractual agreements to arbitrate.<sup>112</sup> The Supreme Court held that the FAA preempted the law and stated that the statute constituted an impermissible state effort to avoid enforcing arbitration agreements.<sup>113</sup> Even *Casarotto*, in addition to the language on unconscionability, involved a preemption question. In that case, a Montana statute required that a contract include notice of any arbitration clause to the signatories, in the form of underlined, capital letters on the first page of the contract.<sup>114</sup> The Supreme Court struck down even that limitation, though, holding that the FAA preempted the statute “because the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.”<sup>115</sup>

This back and forth on the question of preemption continued, with the *Casarotto* language about unconscionability as a “generally applicable contract defense[]”<sup>116</sup> hovering in the background, until the FAA preemption question collided with the unconscionability argument in the case of *AT&T Mobility LLC v. Concepcion*.<sup>117</sup> This Note argues that the Supreme Court’s holding in

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<sup>110</sup> *Id.* at 359 (“When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.”).

The Court in *Preston* wrote out the question and, their response to this case as follows:

Does the FAA override not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency? We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.

*Id.* at 349-50. It is interesting to note this holding because, barely one year later, the CSC granted a petition for review (for the first time) of the case *Sonic-Calabasas A, Inc. v. Moreno*, in which the plaintiff offered an unconscionability argument based on the unavailability of a pretrial administrative procedure called a Berman hearing. See *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130 (2011), *vacated*, 132 S. Ct. 496 (2011); *infra* Part III.B.

<sup>111</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 482 U.S. 483 (1987).

<sup>112</sup> CAL. LAB. CODE § 229 (West 2011); see also *Perry v. Thomas*, 482 U.S. 483, 484 (1987) (discussing the California statute in presenting the issue of the case).

<sup>113</sup> *Perry*, 482 U.S. at 490-91 (holding that California’s law would “interfere with the federal regulatory scheme” and must therefore “give way” to the FAA under the Supremacy Clause).

<sup>114</sup> MONT. CODE ANN. § 27-5-114(4) (repealed 1997).

<sup>115</sup> *Casarotto*, 517 U.S. at 686-87.

<sup>116</sup> *Id.* at 687.

<sup>117</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).



*Concepcion* ultimately narrowed the use of unconscionability as an exception to the § 2 savings clause of the FAA to the point of ending any debate.<sup>118</sup>

The structure of the arguments in the *Concepcion* case is complex. Facing the lower courts as *Laster v. AT & T Mobility*,<sup>119</sup> the case involved a service agreement in which the *Concepcions* signed a two-year contract for cell phone service based on the company's advertised claim that the phones would be free with the contract, only to find the company charged them sales tax on the purchase.<sup>120</sup> The contract, however, contained an arbitration clause and a class action waiver, and when the couple filed suit, AT&T moved to enforce the contract.<sup>121</sup> In upholding the District Court's determination that the class action waiver was unconscionable and the arbitration agreement unenforceable, the appellate court relied on an earlier California case dealing with class arbitration waivers, *Discover Bank v. Superior Court*.

In *Discover Bank*, a credit card holder attempted to file a class action suit against the card issuer, while the issuer asked the court to enforce the class

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<sup>118</sup> See *infra* Part III.A.2 (discussing *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19 (Ct. App. 2011), and the probable outcome of that case on appeal to the CSC).

<sup>119</sup> *Laster v. AT & T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. Concepcion*, 131 S. Ct. 1740.

<sup>120</sup> *Id.* at 852-53.

<sup>121</sup> *Concepcion*, 131 S. Ct. at 1744 (quoting the contract language requiring parties to the contract to bring any action "in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding"); *Laster*, 584 F.3d at 853 ("AT & T filed a motion to compel the *Concepcion* plaintiffs to submit their claims to individual arbitration . . .").

Also note that, based on contract phrasing, some contracts include an arbitration provision, and a separate requirement for the parties to bring any actions in their "individual capacit[ies]." *Concepcion*, 131 S. Ct. at 1744. In other cases, an arbitration agreement will include a specific waiver of "class arbitration." See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005) (quoting the contract, which stated, "NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIM AS A REPRESENTATIVE OR MEMBER OF A CLASS . . ."), *abrogated by Concepcion*, 131 S. Ct. 1740. Courts have developed a procedure for class proceedings in arbitration. See *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *overruled on other grounds by Southland Corp. v. Keating*, 465 U.S. 1 (1984). These contracts speak to that procedure directly. In theory, these waivers are referred to in this Note as "class arbitration waivers" rather than "class action waivers," but courts may treat the terms interchangeably, or may refer to "arbitration class action waivers." *Discover Bank*, 113 P.3d at 1104. Cases also deal with severing these provisions, changing a class arbitration waiver into a separate class action waiver and arbitration clause, invalidating only the waiver, and leaving the parties to a potential class arbitration, which further confuses the terminology. See *Kinecta Alternative Fin. Solutions, Inc. v. Superior Court*, 140 Cal. Rptr. 3d 347 (Ct. App. 2012); *Discover Bank*, 113 P.3d at 1104-05; see also *infra* notes 175-77 and accompanying text (referring to "class arbitration" in discussing the *Iskanian* case).

arbitration waiver in the contract.<sup>122</sup> The lower courts spent some time wavering on the issue, debating back and forth based on precedent and reconsiderations, before the case finally reached the CSC.<sup>123</sup> The CSC determined that *Keating* (the lower court opinion in *Southland*) allowed for class arbitration when the arbitration agreement did not speak to the question.<sup>124</sup> According to the CSC, however, “[i]t did not answer directly the question whether a class action waiver may be unenforceable as contrary to public policy or unconscionable.”<sup>125</sup> The California high court determined that *some* class arbitration waivers are unconscionable and thus unenforceable, and developed a test for courts to use to determine when this is the case.<sup>126</sup> Under California law, the general test for unconscionability requires a showing of procedural and substantive unconscionability.<sup>127</sup> The court in *Discover Bank* created a more specific test, to provide some guidance on how to determine the enforceability of class arbitration waivers under an unconscionability analysis.<sup>128</sup> According to the test, class action waivers are unconscionable (and thus unenforceable), in situations involving: (1) consumer contracts of adhesion, (2) where the disputes predictably involved small damage claims, and (3) it is alleged that the party with greater “bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”<sup>129</sup>

Taking this test back to *Laster* and the cell phone service agreement, the court found that the contract in that case failed the *Discover Bank* test.<sup>130</sup> California Civil Code section 1670.5(a) permits courts to refuse to enforce a contract if it the court finds it was unconscionable when the contract was made and also allows courts to “limit the application of any unconscionable clause.”<sup>131</sup> And again, the Supreme Court in *Casarotto* stated, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may

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<sup>122</sup> *Discover Bank*, 113 P.3d at 1104, 1110 (holding that not all class action waivers are unconscionable, but that in circumstances such as those present in this case, class action waivers are unconscionable and unenforceable).

<sup>123</sup> *See id.* at 1104-05 for an overview of how the trial and appellate courts waffled back and forth in their decisions based on new precedent and repeated motions for reconsideration.

<sup>124</sup> *Id.* at 1106.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1104, 1108, 1110.

<sup>127</sup> Procedural unconscionability is indicated by “‘oppression’ or ‘surprise’ due to unequal bargaining power,” and substantive unconscionability is present when a party can demonstrate “‘overly harsh’ or ‘one-sided’ results.” *Id.* at 1108 (citations omitted).

<sup>128</sup> *Id.* at 1108-10.

<sup>129</sup> *Id.* at 1110.

<sup>130</sup> *Laster v. AT & T Mobility*, 584 F.3d 849, 854 (9th Cir. 2009).

<sup>131</sup> CAL. CIV. CODE § 1670.5(a) (West 2011).

be applied to invalidate arbitration agreements.”<sup>132</sup> Based on *Discover Bank* and *Casarotto* combined, California courts in a series of cases had invalidated arbitration agreements containing class arbitration waivers that failed the *Discover Bank* test.<sup>133</sup>

In *Laster*, the circuit court merely followed this precedent.<sup>134</sup> The court even took into account the Supreme Court’s limiting language in *Casarotto*.<sup>135</sup> The *Casarotto* decision stated that courts could invalidate arbitration agreements due to general contract defenses like unconscionability, “but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>136</sup> Interpreting the intersection of California law and *Casarotto*, the circuit court held that the *Discover Bank* test was valid because it declared class action waivers unconscionable generally.<sup>137</sup> It was merely, the court said, “a refinement of the unconscionability analysis applicable to contracts generally in California.”<sup>138</sup> Thus, the court decided the test did not single out arbitration for any negative treatment, and so the FAA did not preempt *Discover Bank*.<sup>139</sup>

In *Concepcion*, the Supreme Court rejected this interpretation, holding that the FAA preempted judicial use of the *Discover Bank* criteria.<sup>140</sup> The opinion thus overturned the entire line of California cases based on that test. The Supreme Court stated that the *Discover Bank* test constituted “an obstacle to the accomplishment and execution of the full purposes and objectives of

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<sup>132</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

<sup>133</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (citing *Cohen v. DirecTV, Inc.*, 48 Cal. Rptr. 3d 813, 819-21 (Ct. App. 2006); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 738-39 (Ct. App. 2005); *Aral v. EarthLink, Inc.*, 36 Cal. Rptr. 3d 229, 237-39 (Ct. App. 2005)); *see also Laster*, 584 F.3d at 854. As the Supreme Court pointed out when overruling the Ninth Circuit’s holding in *Concepcion*, due to the standardized and generally adhesive nature of most modern consumer contracts, this basically allowed California to strike out and hold unenforceable as unconscionable, under *Discover Bank*, the arbitration clauses of almost any of these contracts. *Concepcion*, 131 S. Ct. at 1750.

<sup>134</sup> *Laster*, 586 F.3d at 853 (“It is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable.” (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007)) (internal quotation marks omitted)).

<sup>135</sup> *Casarotto*, 517 U.S. 681. To be clear, the court does not cite to *Casarotto*, but rather took into account the concept that courts could apply unconscionability rationale to contracts involving arbitration agreements, which the Supreme Court had confirmed in *Casarotto*. The *Laster* court cites *Shroyer*, which, in turn, cites *Casarotto*.

<sup>136</sup> *Concepcion*, 131 S. Ct. at 1746 (citing *Casarotto*, 517 U.S. at 687).

<sup>137</sup> *See Laster*, 584 F.3d at 857; *see also Concepcion*, 131 S. Ct. at 1745.

<sup>138</sup> *Laster*, 584 F.3d at 857 (quoting *Shroyer*, 498 F.3d at 987).

<sup>139</sup> *Id.* at 856.

<sup>140</sup> *Concepcion*, 131 S. Ct. at 1753.

Congress.”<sup>141</sup> According to the Court, the *Discover Bank* rule might not technically require class-wide arbitration, but “the times in which consumer contracts were anything other than adhesive are long past.”<sup>142</sup> Thus the rule constitutes an effective ban on class arbitration waivers because, the Court asserted, such waivers interfere with the purpose of the FAA, which is to “ensur[e] that private arbitration agreements are enforced according to their terms.”<sup>143</sup> Critics of *Concepcion* have pointed out that the Court’s holding means parties could legally agree to terms in an arbitration agreement that would be invalid within a regular contract.<sup>144</sup> The Supreme Court, however, said that the interpretation in *Concepcion* is necessary to preserve the power of the FAA.<sup>145</sup> The Court asserts that the savings clause of the FAA “should not be construed to include a State’s mere preference for procedures that are incompatible with arbitration.”<sup>146</sup> This, the Court insists, would allow states to avoid arbitration agreements, and the FAA generally, by introducing facially neutral preferences that nonetheless preclude arbitration. According to the Supreme Court, any other course of interpretation would allow California courts to create a wide range of “devices and formulas”<sup>147</sup> holding arbitration agreements to contradict public policy, a practice that had led to the passage of the FAA in the first place.<sup>148</sup>

This history of cases interpreting the FAA demonstrates the Supreme Court’s continuous push towards a broader interpretation of the statute. It also shows the push and pull between the Supreme Court’s expansion of the FAA

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1750.

<sup>143</sup> *Id.* at 1748 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

<sup>144</sup> California law prohibits waivers of class litigation. *See Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 711-13 (2001). If inextricable from the contract as a whole, an unconscionable class action waiver would render the entire contract unenforceable, whereas in a contract with an arbitration agreement, the FAA preempts the same state laws and precedent. Thus, parties to a contract with an arbitration clause can be bound to terms of agreements that would be unenforceable in court. “The *Concepciones* argue that . . . even if we construe the *Discover Bank* rule as a prohibition on collective-action waivers rather than simply an application of unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well.” *Concepcion*, 131 S. Ct. at 1746 (citing *Am. Online Inc.*, 108 Cal. Rptr. 2d at 711-13).

<sup>145</sup> *Concepcion*, 131 S. Ct. at 1747-50 (“Although the [*Discover Bank*] rule does not require classwide arbitration, it allows any party to a consumer contract to demand it *ex post*. The rule is limited to adhesion contracts . . . but the times in which consumer contracts were anything other than adhesive are long past.” (citations omitted)).

<sup>146</sup> *Id.* at 1748 (quoting Brief for Respondents at 33, *Concepcion*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 511292).

<sup>147</sup> *Id.* at 1747 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

<sup>148</sup> *Id.* (explaining the Court’s reasoning in the context of the FAA’s purposes).

and California courts' efforts to preserve greater access to the judicial forum. It is interesting to observe that, especially in the recent debate, the California courts tend to focus on preserving court access for consumers. The Supreme Court maintains its stated intent to implement Congress' mandate in the FAA to the fullest extent allowed by law. Yet the CSC cases, including those discussed in the following Part, focus more and more on protecting consumers from the effects of standard form contracts drafted by much larger (and presumably much more legally sophisticated) companies. In conjunction with following discussion, this provides some insight into whether, or to what extent, the CSC remains "hostile" towards arbitration.

### III. THE CURRENT DEBATE: CASES PENDING BEFORE THE CALIFORNIA SUPREME COURT

One question that has arisen in the wake of *Concepcion* is whether the Supreme Court is correct in its suspicions about how states would behave if the Court took a more lenient approach to interpretation of the FAA. Are California courts still "hostile" to arbitration clauses? Many opinions in arbitration cases over the last decades, Supreme Court and otherwise, have referred to the FAA as designed to overcome the previous "hostility" of courts towards arbitration,<sup>149</sup> but the word may give a stronger impression than the intended effect. Before the 1920s courts may have refused to enforce arbitration agreements, but this was not always due to judicial dislike for the process.<sup>150</sup> Many courts today enforce arbitration agreements as a matter of course;<sup>151</sup> the "hostility" considered here is of a more subtle variety. The question is why courts in California come into conflict with the Supreme Court so often, and whether the repeated disagreements between the two courts are – as the Supreme Court seems to worry<sup>152</sup> – the result of a lingering bias against arbitration (even if only under certain circumstances). It is possible that courts have valid and neutral questions about the reach of the FAA, but it is also possible that courts have retained a self-preferential attitude toward judicial review, leading toward obstinacy in enforcement that is, in fact, the kind of "hostility" that led Congress to pass the FAA in the first place.

To determine whether courts have retained these biases, it is instructive to look at recent and pending California court opinions. Three cases related to arbitration have come before the CSC since *Concepcion* that may offer some

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<sup>149</sup> See, e.g., *id.*; *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 593 (2008) (Stevens, J., dissenting); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 106 (2001); *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984).

<sup>150</sup> See *supra* note 17 and accompanying text.

<sup>151</sup> See, e.g., Christopher K. Welsh, *The Illinois Supreme Court Recognizes Policy Favoring Arbitration over Interests of Third Parties*, 86 ILL. B.J. 514, 514-15 (1998) (discussing the Illinois Supreme Court's decision, over a decade ago, to endorse a policy strongly favoring the enforcement of arbitration agreements).

<sup>152</sup> See *supra* notes 147-50 and accompanying text.

insight into the mindset of that court. These decisions will provide evidence as to whether there is lingering bias or prejudice against aspects of the arbitration process within the court, and may also provide some clues as to remaining areas of disagreement between the two courts that may lead to further conflict in the future.

A. *Cases Reaching the CSC for the First Time*

In 2014, the CSC will hear two arbitration-related cases: *Iskanian v. CLS Transportation Los Angeles*<sup>153</sup> and *Sanchez v. Valencia Holding Co.*<sup>154</sup> As the CSC has not yet written an opinion on these cases, Subsections 1 and 2 of this Section focus on the questions presented in each case, the arguments on either side, and how the CSC may choose to respond in light of recent Supreme Court decisions. Subsection 3 addresses a third case, *Sonic-Calabasas A, Inc. v. Moreno*, which the CSC decided in early 2011 and which the Court has already vacated and remanded to the CSC for further consideration in light of *Concepcion*.<sup>155</sup> Through *Sonic*, Subsection 3 includes more direct analysis of the CSC's reasoning, as well as a discussion of the final outcome of that case.

1. *Iskanian v. CLS Transportation of Los Angeles*

The case of *Iskanian v. CLS* has a complicated procedural history that directly reflects the back and forth between the Supreme Court and the CSC on the subject of arbitration. The case involved an employee, Iskanian, who tried to bring a class action for wage and hour violations by his employer, CLS Transportation.<sup>156</sup> Iskanian had signed an arbitration agreement as part of the employment contract that applied to "any and all claims" and included a "class and representative action waiver" agreeing to submit any future claims to "individual" arbitration (emphasis added).<sup>157</sup>

At the trial level, the court granted the motion to compel arbitration and dismiss the class claims.<sup>158</sup> The appellate court, however, remanded the case to Superior Court to reconsider in light of a case the CSC had just decided, *Gentry v. Superior Court*.<sup>159</sup> *Gentry* involved a dispute over employee wages and overtime where the court found that "the statutory right to receive overtime pay embodied in section 1194 is unwaivable."<sup>160</sup> The CSC in that

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<sup>153</sup> *Iskanian v. CLS Transp. of L.A. LLC*, 286 P.3d 147 (Cal. 2012).

<sup>154</sup> *Sanchez v. Valencia Holding Co.*, 135 Cal. Rptr. 3d 19 (Ct. App. 2011), *review granted and opinion superseded*, 272 P.3d 976 (Cal. 2012).

<sup>155</sup> *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130 (2011), *cert. granted, judgment vacated*, 132 S. Ct. 496 (2011).

<sup>156</sup> *Iskanian*, 142 Cal. Rptr. 3d at 376.

<sup>157</sup> *Id.* at 375-76.

<sup>158</sup> *Iskanian v. CLS Transp. L.A. LLC*, No. B198999, 2008 WL 2171792 (Cal. Ct. App. May 27, 2008).

<sup>159</sup> *Gentry v. Superior Court*, 165 P.3d 556 (2007).

<sup>160</sup> *Id.* at 563.

case did not invalidate clauses mandating the arbitration of overtime disputes, but held that courts should not enforce *class* arbitration waivers if “class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration.”<sup>161</sup> The CSC opinion described minimum requirements for enforceable class arbitration waivers. The court stated:

(1) [T]he arbitration agreement may not limit the damages normally available under the statute; (2) there must be discovery “sufficient to adequately arbitrate their statutory claim”; (3) there must be a written arbitration decision and judicial review “sufficient to ensure the arbitrators comply with the requirements of the statute”; and (4) the employer must “pay all types of costs that are unique to arbitration.”<sup>162</sup>

Furthermore, the CSC held that in future cases, courts could allow class arbitrations regardless of written waivers in predispute contract wherever the waiver failed to meet those requirements.<sup>163</sup>

Upon the appellate court’s order to remand the case to Superior Court for reconsideration under *Gentry*, CLS withdrew the motion to compel arbitration, and Iskanian moved forward with his efforts to certify the claim as a class action.<sup>164</sup> While *Iskanian* was still pending though, the Supreme Court decided *Concepcion*, and CLS quickly renewed the motion to compel arbitration.<sup>165</sup> *Concepcion* overturned *Discover Bank*,<sup>166</sup> and the CSC’s opinion in *Gentry* placed significant emphasis on the holding in *Discover Bank*, including its discussion of unwaivable statutory rights.<sup>167</sup> CLS thus renewed the motion to compel arbitration on the theory that *Gentry* was no longer good law after *Concepcion*.<sup>168</sup> Accepting this argument, the superior court once again granted the motion to compel arbitration and dismissed the class claims.<sup>169</sup> Iskanian appealed.<sup>170</sup>

Although the Supreme Court expressly overruled *Discover Bank* and the rule that “class action waivers in consumer contracts of adhesion are unenforceable,”<sup>171</sup> the Court’s holding in *Concepcion* did not speak directly to

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<sup>161</sup> *Id.* at 559 (internal quotation marks omitted).

<sup>162</sup> *Id.* at 563 (citations omitted) (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 685 (Cal. 2000)).

<sup>163</sup> *Id.* at 561, 563-64.

<sup>164</sup> *Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372, 376 (Ct. App. 2012).

<sup>165</sup> *Id.*

<sup>166</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (“California’s *Discover Bank* rule is preempted by the FAA.”).

<sup>167</sup> *See Gentry*, 165 P.3d at 561-70 (discussing at length the validity of the *Discover Bank* rule).

<sup>168</sup> *Iskanian*, 142 Cal. Rptr. 3d at 376.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100, 1105 (2005).

*Gentry*.<sup>172</sup> Thus, on the second appeal Iskanian tried to argue that *Concepcion* only overturned the portion of *Gentry* directly based on *Discover Bank*. Iskanian argued that *Gentry* remained good law “to the extent that it prohibit[ed] arbitration agreements from ‘interfering with a party’s ability to vindicate statutory rights’ through class action waivers.”<sup>173</sup> The appellate court disagreed, stating, “the *Concepcion* decision conclusively invalidates the *Gentry* test.”<sup>174</sup> According to the appellate court, the Court in *Concepcion* rejected the idea of nonconsensual class arbitrations.<sup>175</sup> The lower court explained that *Concepcion* found nonconsensual class arbitration inconsistent with the FAA because that case “sacrifices the principal advantage of arbitration—informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>176</sup> Thus, the appellate court concluded, “[a] rule like the one in *Gentry*—requiring courts to determine whether to impose class arbitration on parties who contractually rejected it—cannot be considered consistent with the objective of enforcing arbitration agreements according to their terms.”<sup>177</sup>

The plaintiff in *Iskanian* presented other arguments to support his effort to avoid the arbitration agreement.<sup>178</sup> In one line of reasoning, Iskanian tried to argue that *Gentry* rested on public policy, unlike *Discover Bank* and *Concepcion*, which focused on unconscionability. The Court in *Concepcion*, though, used broad language, stating that § 2 of the FAA did not signal “an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>179</sup> Based on the breadth of the

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<sup>172</sup> See generally *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The parties in *Gentry* appealed the CSC decision but the Supreme Court denied the petition for certiorari. *Circuit City Stores, Inc. v. Gentry*, 552 U.S. 1296 (2008).

<sup>173</sup> *Iskanian*, 142 Cal. Rptr. 3d at 378.

<sup>174</sup> *Id.* at 379.

<sup>175</sup> *Id.* (citing *Concepcion*, 131 S. Ct. at 1750-51).

<sup>176</sup> *Id.* at 379-80 (citing *Concepcion*, 131 S. Ct. at 1751) (internal quotation marks omitted) (“[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” (citing *Concepcion*, 131 S. Ct. at 1751-52; *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 664 (2010))).

<sup>177</sup> *Id.* at 380.

<sup>178</sup> Iskanian tried to argue that the class action was necessary to vindicate statutory rights. *Id.* at 378. This may have tied to an effort to reconstruct the Vindication of Rights Doctrine that played a role in early FAA jurisprudence. Regardless, the Appellate Court held that this argument was “irrelevant” after *Concepcion*, and stated that “[t]he sound policy reasons identified in *Gentry* for invalidating certain class waivers are insufficient to trump the far-reaching effect of the FAA, as expressed in *Concepcion*.” *Id.* at 380; see also *supra* note 166 and accompanying text.

<sup>179</sup> *Concepcion*, 131 S. Ct. at 1748.



ruling, the appellate court found that the holding in *Concepcion* applied to public policy as well as unconscionability arguments.<sup>180</sup>

The CSC granted the petition for review of *Iskanian* in September 2012.<sup>181</sup> The court's choice between affirming or reversing the lower court and upholding *Gentry* will provide valuable insight into the future of the arbitration debate in California courts. The plaintiff in *Iskanian* first encourages the court to uphold *Gentry* only to the extent it prohibits arbitration agreements from interfering with a plaintiff's ability to vindicate statutory rights.<sup>182</sup> *Gentry* relies on *Discover Bank* for its holding, however, to an extent that makes separation of the two almost impossible.<sup>183</sup> Furthermore, the validity of the statutory rights argument was in question at the time the appellate court heard *Iskanian*,<sup>184</sup> and the Supreme Court recently reviewed a case on the subject that casts the argument into further doubt. In *American Express Co. v. Italian Colors Restaurant*, plaintiffs barred from class arbitration argued that the expense of arbitration outweighed any individual recovery, effectively

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<sup>180</sup> *Iskanian*, 42 Cal. Rptr. 3d at 380 (quoting *Concepcion*, 131 S. Ct. at 1748). Specifically, the court stated:

Iskanian argues that the *Gentry* rule rested primarily on a public policy rationale, and not on *Discover Bank*'s unconscionability rationale. While this point is basically correct, it does not mean that *Gentry* falls outside the reach of the *Concepcion* decision. . . . [*Concepcion*] found that nothing in section 2 of the FAA "suggests an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA's objectives," which are "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." A rule like the one in *Gentry*—requiring courts to determine whether to impose class arbitration on parties who contractually rejected it—cannot be considered consistent with the objective of enforcing arbitration agreements according to their terms.

*Id.* (quoting *Concepcion*, 131 S. Ct. at 1748).

<sup>181</sup> *Iskanian v. CLS Transp. of L.A. LLC*, 286 P.3d 147 (Cal. 2012).

<sup>182</sup> See *supra* note 156 and accompanying text.

<sup>183</sup> Although the court engages in separate discussion for the vindication of rights argument and the direct analysis of *Discover Bank*, the case is cited throughout the opinion, and much of the reasoning in *Gentry* is similar to or the same as that used by the court in reaching its conclusion in *Discover Bank*. For example, as the *Gentry* court explained:

Nor do we accept Circuit City's argument that a rule invalidating class arbitration waivers discriminates against arbitration clauses in violation of the Federal Arbitration Act. We considered at great length and rejected a similar argument in *Discover Bank*. The principle that in the case of certain unwaivable statutory rights, class action waivers are forbidden when class actions would be the most effective practical means of vindicating those rights is an arbitration-neutral rule: it applies to class waivers in arbitration and nonarbitration provisions alike.

*Gentry v. Superior Court*, 165 P.3d 556, 569 (Cal. 2007) (citations omitted).

<sup>184</sup> The Court cites to *Concepcion*, 131 S. Ct. at 1748, as well as *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 166-68 (1974), as examples of prior restrictions on the Vindication of Rights theory. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013); see also Horton, *supra* note 1, at 730.

preventing them from vindicating their rights under federal law.<sup>185</sup> There is a simple parallel between this and *Iskanian*. The Court rejected the “effective vindication” argument in *Italian Colors*, stressing that “the exception finds its origin in the desire to prevent ‘prospective waiver of a party’s *right to pursue* statutory remedies,’ . . . . The class-action waiver merely limits arbitration to the two contracting parties.”<sup>186</sup>

*American Express* thus provides clear guidance for the CSC in considering *Iskanian*, and the language of *Concepcion* only adds to the weight of the employers’ argument. The Court stated that, “class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.”<sup>187</sup> Though the words reference *Discover Bank*, the statement strongly suggests that any case law rule imposing nonconsensual class arbitration is invalid. Thus, the CSC is unlikely to uphold any part of *Gentry* on the basis of this argument.<sup>188</sup> The CSC’s choice to do so would be a direct challenge, once again, to the Supreme Court, indicating a high level of continued hostility towards the FAA and arbitration generally.

## 2. *Sanchez v. Valencia Holding Company*

The *Iskanian* case addresses one aspect of arbitration law after the Supreme Court’s ruling in *Concepcion*, but questions about arbitration law remain regardless of the outcome in that case. The next case offers some clues as to how the CSC will react to the continued narrowing of exceptions to the FAA and the future of the debate between the Supreme Court and the CSC.

In *Sanchez v. Valencia*, the plaintiff bought a car, only to discover the dealer had lied about the condition of the car and several costs that the dealer had incorporated into the purchase price.<sup>189</sup> Upon discovering the damage to the vehicle, the buyer filed suit against the dealer alleging violations of several state and federal laws, including the Consumer Legal Remedies Act (“CLRA”).<sup>190</sup> The parties’ contract of sale, however, included an arbitration

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<sup>185</sup> *Italian Colors*, 133 S. Ct. at 2308.

<sup>186</sup> *Id.* at 2310-11.

<sup>187</sup> *Concepcion*, 131 S. Ct. at 1751.

<sup>188</sup> See *supra* note 121 (discussing *Kinecta Alternative Fin. Solutions, Inc. v. Superior Court*, 205 Cal. App. 4th 506, 511 (Ct. App. 2012), *reh’g denied*, Ct. App. May 21, 2012, and *rev. denied*, Cal. July 11, 2012, a case dealing with similar questions about nonconsensual class arbitration, in which the appellate court ordered enforcement of a class action waiver in addition to an arbitration clause). Notice that the appellate court denied a rehearing and the CSC declined to review the result in this case. Though the focus of the legal argument in *Kinecta* is different, the court’s refusal to review lends support to this Note’s argument that the CSC will not uphold *Gentry*.

<sup>189</sup> *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19, 23-24 (Ct. App. 2011).

<sup>190</sup> *Id.* at 24. The plaintiff also made claims under the Automobile Sales Finance Act, unfair competition law, the Song-Beverly Consumer Warranty Act, and the California Tire Recycling Act. *Id.*

agreement and class action waiver.<sup>191</sup> Nonetheless, the Superior Court denied the dealer's motion to compel arbitration, stating that the buyer was "statutorily entitled to maintain a CLRA suit as a class action."<sup>192</sup>

The dealer appealed and the Court of Appeals affirmed on the grounds of unconscionability, avoiding the class action issue.<sup>193</sup> The Court of Appeals upheld the refusal to enforce the arbitration agreement, finding that the arbitration clause was unconscionable, and that the court could not sever the unconscionable portions of the arbitration agreement.<sup>194</sup> *Sanchez* came to the Court of Appeals several months after the Supreme Court published its holding in *Concepcion*.<sup>195</sup> The lower court distinguished *Concepcion* in refusing to enforce the arbitration agreement, but granted a motion for reconsideration from the dealer.<sup>196</sup> The second appellate court opinion expands upon the original distinction between *Concepcion* and *Sanchez*, making the definitive statement that "*Concepcion* . . . does not preclude the application of the unconscionability doctrine to determine whether an arbitration provision is unenforceable."<sup>197</sup>

According to the Court of Appeals, in *Concepcion* the Supreme Court rejected *Discover Bank's* treatment of class action waivers. The lower court, though, said that *Concepcion* only dealt with FAA preemption as related to *Discover Bank's* rule about unconscionability determinations in consumer cases with class action waivers.<sup>198</sup> Specifically, the Supreme Court "concluded that '[r]equiring the availability of *classwide arbitration* interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."<sup>199</sup> Thus, the appellate court stated that as long as a case is not dealing with the enforceability of a class action waiver or a judicial procedure designed to be inconsistent with arbitration provisions, *Concepcion* does not apply.<sup>200</sup> The court stated: "The unconscionability principles on which we rely govern all contracts, are not unique to arbitration agreements, and do not

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<sup>191</sup> *Id.* at 24-25.

<sup>192</sup> *Id.* at 22.

<sup>193</sup> *Id.* at 28 ("We do not address whether the class action waiver is unenforceable. Rather, we conclude the arbitration provision as a whole is unconscionable . . .").

<sup>194</sup> *Id.* at 28, 33.

<sup>195</sup> The Supreme Court published its holding in *Concepcion* on April 27, 2011. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The Court of Appeals ruled on *Sanchez* once on October 24, 2011 and later on November 23, 2011. *Sanchez v. Valencia Holding Co., LLC*, 132 Cal. Rptr. 3d 517 (Ct. App. 2011), *vacated by Sanchez*, 135 Cal. Rptr. 3d 19 (Ct. App. 2011).

<sup>196</sup> *Sanchez*, 135 Cal. Rptr. 3d at 29.

<sup>197</sup> *Id.* at 28 (citations omitted).

<sup>198</sup> *Id.* at 29 (citing *Concepcion*, 131 S. Ct. at 1748-53).

<sup>199</sup> *Id.* (alteration in original) (quoting *Concepcion*, 131 S. Ct. at 1748).

<sup>200</sup> *Id.*

disfavor arbitration.”<sup>201</sup> The California court also looked at the principles behind the FAA, finding that this conclusion would not undermine the FAA’s purpose “to ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings.*”<sup>202</sup>

The Court of Appeals cited the same section of the California Civil Code as *Concepcion*, section 1670.5,<sup>203</sup> which allows a court to refuse to enforce an unconscionable provision in a contract if the court finds the clause was unconscionable at the time it was made.<sup>204</sup> Based on this section, a court may enforce the rest of the contract without the unconscionable clause, or limit the application of the unconscionable section of the contract as necessary to avoid an unconscionable result.<sup>205</sup> The *Sanchez* court also referred to section 1281 of the California Code of Civil Procedure<sup>206</sup> to support the use of section 1670.5 in rendering an arbitration agreement unenforceable.<sup>207</sup> Section 1281 states that arbitration agreements are “valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.”<sup>208</sup> This echoes the language of § 2 of the FAA<sup>209</sup> and thus ties into the Supreme Court’s holding in *Casarotto*, allowing courts to invalidate arbitration agreements under § 2 of the FAA based on “[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability.”<sup>210</sup> In *Sanchez*, the appellate court stated that since unconscionability constitutes grounds for courts to refuse to enforce contracts generally, unconscionability may also constitute grounds for courts to refuse to enforce an arbitration agreement.<sup>211</sup>

The CSC granted the petition for review of the *Sanchez* case in early 2012 and the case is still pending.<sup>212</sup> In light of the back and forth between the CSC and the Supreme Court, *Sanchez* stands at a tipping point. The plaintiff in *Sanchez* first argued that the class action waiver was unenforceable under the

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 29-30 (quoting *Concepcion*, 131 S. Ct. at 1748) (internal quotation marks omitted).

<sup>203</sup> CAL. CIV. CODE § 1670.5(a) (West 1985).

<sup>204</sup> *Sanchez*, 135 Cal. Rptr. 3d at 28 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (2000)).

<sup>205</sup> *Id.*

<sup>206</sup> CAL. CIV. PROC. CODE § 1281 (West 2007).

<sup>207</sup> *Sanchez*, 135 Cal. Rptr. 3d at 28 (citing *Armendariz*, 6 P.3d at 689-90).

<sup>208</sup> CAL. CIV. PROC. CODE § 1281 (West 2007); *see Sanchez*, 135 Cal. Rptr. 3d at 28.

<sup>209</sup> “[A]n agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2012).

<sup>210</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)).

<sup>211</sup> *Sanchez v. Valencia Holding Co. LLC*, 132 Cal. Rptr. 3d 517, 526 (Ct. App. 2011).

<sup>212</sup> *Sanchez v. Valencia Holding Co. LLC*, 272 P.3d 976 (Cal. 2012) (granting petition for review).

CLRA.<sup>213</sup> Although that provided the grounds for the Superior Court decision, the Court of Appeals explicitly stated, “[W]e do not address whether the class action waiver is unenforceable,”<sup>214</sup> and instead based its decision on the language of general unconscionability.<sup>215</sup> This allows *Sanchez* to avoid the problems of *Iskanian* with respect to *Gentry* and the rules of class action waivers in arbitration. It does raise questions under § 2 of the FAA though. On the one hand, this case mirrors *Concepcion* in that it relies on state law regarding unconscionability as a reason to invalidate an arbitration agreement. On the other hand, the state law and civil procedure sections cited are almost direct quotes from the Supreme Court’s jurisprudence on the § 2 savings clause.<sup>216</sup> In theory, the Supreme Court’s decision in *Concepcion* does not overturn *Casarotto*’s allowance for unconscionability claims under the § 2 savings clause of the FAA. The question is how and when courts can apply unconscionability to invalidate a contract containing an arbitration agreement.

The use of unconscionability in *Sanchez* is not tied into a judicially created test specific to contracts including class arbitration waivers, as it was in *Concepcion*, but is rather a direct test for all contracts to determine whether the contract was unconscionable at the time it was created (and is thus unenforceable).<sup>217</sup> The appellate court’s ruling in *Sanchez*, therefore, may not implicate the concern with California courts inventing “‘devices and formulas’”<sup>218</sup> to avoid arbitration clauses, as the Supreme Court found so troubling in *Concepcion*. This means that *Sanchez* offers the CSC one more chance to skate the edge of § 2 and to force the Supreme Court to make a choice regarding whether to amend its own holding from *Casarotto*, or to allow some unconscionability analyses to survive *Concepcion* and the FAA.

#### B. *Sonic-Calabasas A, Incorporated v. Moreno*

The cases of *Iskanian* and *Sanchez* provide insight into the state of the unconscionability debate facing the CSC today. Plaintiffs in the lower courts continue to push back against the Supreme Court’s expansive interpretation of

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<sup>213</sup> *Sanchez*, 132 Cal. Rptr. 3d at 525.

<sup>214</sup> *Sanchez*, 135 Cal. Rptr. 3d at 28.

<sup>215</sup> *Sanchez*, 132 Cal. Rptr. 3d at 521.

<sup>216</sup> 9 U.S.C. § 2 (2012); *see also supra* notes 208-10.

<sup>217</sup> *Sanchez*, 135 Cal. Rptr. 3d at 40 (“The trial court has discretion under this statute to refuse to enforce an entire agreement if the agreement is ‘permeated’ by unconscionability. . . . An arbitration agreement can be considered permeated by unconscionability if it ‘contains more than one unlawful provision . . . .’” (quoting *Lhotka v. Geographic Expeditions, Inc.*, 104 Cal. Rptr. 3d 844, 853 (Ct. App. 2010)) (internal quotation marks omitted)).

<sup>218</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (“[T]he judicial hostility towards arbitration that prompted the FAA had manifested itself in ‘a great variety’ of ‘devices and formulas’ declaring arbitration against public policy.” (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959))).

the FAA, but after *Concepcion* it is possible to predict the outcome of each case discussed. *Sonic-Calabasas A, Inc. v. Moreno*, however, is the only one of these three recent arbitration cases for which the CSC has already published an opinion.<sup>219</sup> In *Sonic-Calabasas*, the CSC held an arbitration clause unenforceable because it involved the waiver of an Administrative process known as a Berman hearing, which the court found unconscionable and, to add an element of *Iskanian*, contrary to public policy.<sup>220</sup> The CSC published its opinion just before the Supreme Court published its decision in *Concepcion* in 2011; the Supreme Court has already granted certiorari on *Sonic-Calabasas*, reversed the CSC holding, and remanded the case for reconsideration in light of *Concepcion*.<sup>221</sup> The reasoning of the CSC in its initial ruling on the case, however, provides insight into the CSC's attitude toward arbitration that may also be valuable in attempting to determine the most likely direction of California's arbitration jurisprudence in the future.

*Sonic-Calabasas* involved an arbitration agreement in an employment contract.<sup>222</sup> Under the California Labor Code, an employee claiming unpaid wages has the right to request a Berman hearing, which is an informal hearing before the Labor Commissioner.<sup>223</sup> If the Commissioner grants the employee an award at the hearing, the employer can request de novo review in superior court.<sup>224</sup> The plaintiff in *Sonic-Calabasas* argued it was against public policy and unconscionable for an employer to have an arbitration clause that included a waiver of the Berman hearing in a mandatory, predispute employment contract.<sup>225</sup> The CSC agreed with the plaintiff and held that employers could only enforce arbitration agreements *after* the Berman hearing stage, directing any appeals to an arbitrator rather than the superior court.<sup>226</sup> Furthermore, the CSC directly considered whether the FAA would preempt the state law requiring the Berman hearing and concluded that it did not.<sup>227</sup>

In the original opinion, the CSC split its analysis into two parts. First, the court looked at whether a Berman hearing was compatible with arbitration. A Berman hearing is an administrative procedure an employee can elect to use to seek relief before resorting to judicial action.<sup>228</sup> Much like arbitration, the hearing is "designed to provide a speedy, informal, and affordable method of

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<sup>219</sup> *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130 (Cal. 2011), *vacated and remanded*, 132 S. Ct. 496 (2011).

<sup>220</sup> *Id.* at 133-34.

<sup>221</sup> *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011).

<sup>222</sup> *Sonic-Calabasas A, Inc.*, 247 P.3d at 134.

<sup>223</sup> *Id.* at 133; *see also* CAL. LAB. CODE § 98 (West 2007).

<sup>224</sup> CAL. LAB. CODE § 98.2.

<sup>225</sup> *Sonic-Calabasas A, Inc.*, 247 P.3d at 134.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*; *see also* CAL. LAB. CODE § 98.2.

resolving wage claims.”<sup>229</sup> The administrative scheme mandates a rapid resolution of the case, limits the pleadings, and does not follow formal rules of evidence, but at the same time provides assistance and protection for employees in addition to those offered in the courtroom.<sup>230</sup> For example, the Commissioner must represent employees unable to afford counsel in court if the employer appeals the Commissioner’s decision.<sup>231</sup> There is also a “one-way attorney fee provision” that requires the employer to pay the employee’s attorney’s fees if the employer’s appeal is not successful.<sup>232</sup> A Berman hearing always precedes judicial action, so once the Commissioner makes a decision, “[e]ither party may then pursue judicial action unless the parties had agreed to binding arbitration. In that event, [arbitration law] would apply, and the dispute would go to binding arbitration.”<sup>233</sup> The appellate court thus reasoned that preserving the hearing would never subject to a court proceeding any party that had contracted for arbitration, and found the hearing compatible with arbitration.<sup>234</sup> Only after the court determined both procedures could coexist did it switch to an analysis of public policy and unconscionability.<sup>235</sup> In a previous case, the court determined that mandatory employment arbitration agreements are enforceable as long as they do not “contain features that [are] contrary to public policy or unconscionable.”<sup>236</sup>

The arguments related to public policy and unconscionability touch on the same discussions that appear in *Iskanian* and *Sanchez* – the vindication of statutory rights and the common law tests of unconscionability. The CSC decided that the Berman hearing constituted an unwaivable statutory right.<sup>237</sup> The court also distinguished *Gentry* as a judicially devised procedure, rather than an administrative procedure established by statute as a prelitigation step.<sup>238</sup> The CSC went on to determine that this particular arbitration

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<sup>229</sup> *Sonic-Calabasas A, Inc.*, 247 P.3d at 136 (quoting *Cuadra v. Millan*, 952 P.2d 704, 706 (1998)) (internal quotation marks omitted).

<sup>230</sup> CAL. LAB. CODE § 98.2; *Sonic-Calabasas A, Inc.*, 247 P.3d at 136 (explaining that the Labor Commissioner has fifteen days after the hearing to decide the case, and that if parties do not appeal that decision within ten days, the decision is “final immediately, and enforceable as a judgment in a civil action”).

<sup>231</sup> CAL. LAB. CODE § 98.2; *see also Sonic-Calabasas A, Inc.*, 247 P.3d at 137.

<sup>232</sup> CAL. LAB. CODE § 98.2; *see also Sonic-Calabasas A, Inc.*, 247 P.3d at 136.

<sup>233</sup> *Sonic-Calabasas A, Inc.*, 247 P.3d at 138.

<sup>234</sup> *Id.* at 138-39.

<sup>235</sup> *Id.* at 139.

<sup>236</sup> *Id.* (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 679-81 (Cal. Ct. App. 2000)).

<sup>237</sup> *Id.* at 140.

<sup>238</sup> *Id.* at 143.

agreement was against public policy,<sup>239</sup> and that it failed the test for unconscionability (and was thus doubly unenforceable).<sup>240</sup>

Based on the Supreme Court's remand to reconsider in light of *Concepcion*, there is a clear outcome here, one which also has implications for *Iskanian* and *Sanchez* because this case echoes their arguments – namely unwaivable statutory rights, public policy versus unconscionability, and the validity of unconscionability generally. Upon remand from the Supreme Court, the CSC decided that the FAA does, under *Concepcion*, preempt any state law rule that mandates a Berman hearing prior to arbitration.<sup>241</sup> The court stated that, in light of *Concepcion*, the mandatory Berman Hearing constituted an impermissible delay in the commencement of arbitration proceedings.<sup>242</sup> In the words of the CSC, “*Concepcion* preempts *Sonic P's* rule categorically prohibiting waiver of a Berman hearing in arbitration agreements.”<sup>243</sup>

The CSC did not, however, alter the existing state law governing invalidation of a contract on the basis of unconscionability (as discussed in *Sanchez*). In *Concepcion*, the Supreme Court emphasized that lower courts could not use unconscionability in a way that disadvantages arbitration.<sup>244</sup> According to the CSC, this “made [it] clear that courts cannot impose unconscionability rules that interfere with arbitral efficiency, including rules forbidding waiver of administrative procedures that delay arbitration.”<sup>245</sup> The CSC also observed, however, that unconscionability survives *Concepcion* as “a valid defense to a petition to compel arbitration.”<sup>246</sup>

The CSC held that “state courts may continue to enforce unconscionability rules that do not ‘interfere[] with fundamental attributes of arbitration.’”<sup>247</sup> The court decided that even though courts cannot create or use a categorical rule mandating a Berman hearing, the unconscionability analysis does not end there.<sup>248</sup> According to the CSC's opinion, the unconscionability analysis focuses on “whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and

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<sup>239</sup> *Id.* at 144.

<sup>240</sup> *Id.* at 146.

<sup>241</sup> *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 188 (Cal. 2013).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 198.

<sup>244</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747-48 (2011).

<sup>245</sup> *Sonic-Calabasas A, Inc.*, 311 P.3d at 199 (citing *Concepcion*, 131 S. Ct. at 1749). “It is well-established that such rules must not facially discriminate against arbitration and must be enforced evenhandedly. *Concepcion* goes further to make clear that such rules, even when facially nondiscriminatory, must not disfavor arbitration as applied by imposing procedural requirements that ‘interfere[] with fundamental attributes of arbitration’ . . .” *Id.* at 201 (emphasis omitted) (quoting *Concepcion*, 131 S. Ct. at 1751).

<sup>246</sup> *Id.* at 201.

<sup>247</sup> *Id.* at 188 (quoting *Concepcion*, 131 S. Ct. at 1748).

<sup>248</sup> *Id.* at 203.



unaffordable, and thereby ‘effectively blocks every forum for the redress of disputes, including arbitration itself.’”<sup>249</sup> Waiver of the Berman hearing may constitute a factor in the analysis and indicate potential unconscionability because the employer is asking the employee to waive a preliminary, affordable, and accessible dispute resolution option,<sup>250</sup> but the waiver is not itself sufficient to support a finding of unconscionability.<sup>251</sup> The lower courts had not developed this analysis in previous hearings, so the CSC remanded the case for the trial court to decide whether the clause is unconscionable on the facts of the case.<sup>252</sup>

#### IV. THE CALIFORNIA/SUPREME COURT DIVIDE CONTINUES

Recent and upcoming cases show that California is at a tipping point in its arbitration jurisprudence. The Supreme Court has narrowed the debate on class action waivers and unconscionability to the point of exhaustion. Based on the Court’s guidance and attitude towards arbitration thus far, it is possible to predict the outcomes of both *Iskanian* and *Sanchez*. Two questions, then, remain. First, there is the question of whether there are any areas of law or interpretation remaining where the CSC and the Supreme Court differ on the subject of arbitration law and the FAA. The second question is why these differences continue and whether they stem from a lingering hostility towards arbitration within the lower courts.<sup>253</sup>

##### A. Remaining Room for Disagreement

The three cases together make it clear that there are still many possible areas for dispute between the Supreme Court and the CSC. After *Concepcion* overturned *Discover Bank*, plaintiffs in California immediately issued challenges arguing that *Concepcion* also overturned *Gentry*, either in whole or in part.<sup>254</sup> The appellate court in *Iskanian* also based its opinion in part on a theory of vindication of statutory rights, which the Supreme Court almost immediately rejected in *Italian Colors*.<sup>255</sup> Upon remand from the Supreme

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<sup>249</sup> *Id.* at 204 (quoting *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 277 (2003)).

<sup>250</sup> *Id.* at 203-04.

<sup>251</sup> *Id.* at 204.

<sup>252</sup> *Id.* at 188.

<sup>253</sup> The Supreme Court often refers to judicial “hostility” towards arbitration in its description of the history of the FAA. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745, 1747 (2011); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984).

<sup>254</sup> *Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372, 378 (Ct. App. 2012).

<sup>255</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (describing the history of the exception but “declin[ing] to apply it to invalidate the arbitration agreement at issue,” and observing that the origins of the exception are from dicta).

Court, the CSC decided in *Sonic* that the lower court could still consider waiver of the Berman hearing as a factor when determining the unconscionability of a contract.<sup>256</sup> This decision indicates that the CSC still considers unconscionability a valid argument, which is fairly determinative of the outcome in *Sanchez*.<sup>257</sup> The CSC's recognition of unconscionability also raises a question in conjunction with the holding in *Italian Colors*. On remand, the court in *Sonic* cited the "costs and risks" of arbitration for a wage claimant that may make "resolution of the wage dispute inaccessible and unaffordable" to support its conclusion that courts may consider a waiver of statutory rights (in this case, a Berman hearing) as a factor in their unconscionability determinations.<sup>258</sup> The Supreme Court's decision in *Italian Colors* rejected the argument that a court could refuse to enforce an arbitration agreement if the cost of arbitration would exceed the potential recovery.<sup>259</sup>

Read together, the language in these two cases presents a new question of interpretation: Can courts consider the waiver of statutory rights within an arbitration agreement as a factor in an unconscionability determination? According to one possible interpretation, at least, courts' ability to consider waiver as a factor implies there is some additional potential for viable unconscionability arguments in contract disputes *because of* the presence of an arbitration agreement (which allows for the waiver of what would otherwise be a statutory right). In *Concepcion*, the Supreme Court insisted that courts "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms."<sup>260</sup> Recognizing the waiver of statutory rights as a potential factor of unconscionability unique to arbitration is inconsistent with that mandate. The CSC's holding came on remand, though, so unless the plaintiff loses again and appeals the case all the way back to the Supreme Court, the higher court is unlikely to take any further action on this particular case. Thus, despite the Court's decision in *Concepcion*, and the subsequent limitations imposed by *Italian Colors*, there are still immediate interpretive differences between the CSC and the Supreme Court.

#### B. *Lingering Judicial Hostility*

The final question, then, is why these differences persist. After so many years under the FAA, why do California state courts and the Supreme Court

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<sup>256</sup> *Sonic-Calabasas A, Inc.*, 311 P.3d at 203.

<sup>257</sup> The CSC should affirm the appellate court's refusal to enforce the arbitration clause on unconscionability grounds. *See supra* Part III.A.2.

<sup>258</sup> *Sonic-Calabasas A, Inc.*, 311 P.3d at 204.

<sup>259</sup> *Italian Colors*, 133 S. Ct. at 2311. The Supreme Court did specify some exceptions to this, stating that the FAA would not permit "a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310-11.

<sup>260</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citation omitted).

continue to clash over interpretation? *Iskanian*, *Sanchez*, and *Sonic* show that courts in California have adopted a more arbitration-friendly stance in recent decades. The courts in *Iskanian* demonstrate almost perfect neutrality towards arbitration and the FAA. The lower court twice gave an order to enforce the arbitration agreement at issue in the case, and the appellate court switched easily from nonenforcement to enforcement with the change in the governing case law.<sup>261</sup> In *Sanchez*, however, both the trial and appellate courts refused to enforce the class arbitration waiver on two separate legal theories.<sup>262</sup> The appellate court even reconsidered *Sanchez* after *Concepcion*, only to reaffirm its initial holding.<sup>263</sup> And then, in *Sonic*, even after that case reached the Supreme Court on the question of the Berman hearing, the CSC allowed the plaintiff to avoid the arbitration clause by permitting the plaintiff to move forward with the case under the plaintiff's unconscionability argument based on the § 2 savings clause.<sup>264</sup> The predictability (or so this Note asserts) of the outcomes of these cases indicates a lack of hostility because it hints the court will take direction. As shown in *Sanchez* and *Sonic* though, California courts may force the Supreme Court to speak several times before they will bar an unconscionability or other argument, and even then there would be no guarantee the state courts would enforce a given arbitration agreement, as they may simply look to new arguments entirely.<sup>265</sup>

Thus, these cases provide conflicting evidence about California courts' future approach to arbitration agreements. The courts will order parties to arbitrate disputes, but, particularly in disputes between consumers and large

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<sup>261</sup> See *Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372, 375-76 (Ct. App. 2012), *reh'g denied, review granted and opinion superseded sub nom. Iskanian v. CLS Transp. of L.A. LLC*, 286 P.3d 147 (Cal. 2012).

<sup>262</sup> See *Sanchez v. Valencia Holding Co., LLC*, 132 Cal. Rptr. 3d 517, 520-21 (Ct. App. 2011). It is interesting to note that other courts in the Ninth Circuit have also done this. The *Casarotto* opinion cited in this Note is the second time that case reached the Supreme Court. The first time, the Supreme Court vacated the Montana Supreme Court decision and remanded for further consideration in light of *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685-86 (1996). On remand, the Montana high court allowed neither further briefing nor argument, and affirmed their original refusal to enforce the arbitration agreement. *Id.* The Supreme Court again accepted the petition for certiorari, and reversed. *Id.* at 686.

<sup>263</sup> *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19, 29 (Ct. App. 2011).

<sup>264</sup> See *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 188 (Cal. 2013) (explaining that the court could still consider unconscionability and weigh the waiver as a factor in the unconscionability determination); *Sonic-Calabasas A, Inc. v. Moreno*, No. B204902, 2013 WL 6683951, at \*2 (Cal. Ct. App. Dec. 19, 2013) (remanding the case to the trial court to consider whether the arbitration agreement between the parties is unconscionable).

<sup>265</sup> It seems that preserving "in the alternative" arguments, may be a key element of success for plaintiffs seeking to avoid arbitration. Again, see *Sonic-Calabasas A, Inc.*, 311 P.3d at 188, where the CSC, on remand from the Supreme Court, followed a second line of reasoning to justify not enforcing the arbitration clause.

corporations, continue to use workarounds and make efforts to preserve judicial exceptions as much as possible. Each case discussed in Part III acknowledges the state of the law, as well as California's legislative acceptance of arbitration as a dispute resolution mechanism. *Iskanian* and *Sonic* even cite to the California Arbitration Act, drawing parallels between state and federal arbitration law.<sup>266</sup> The appellate court opinion in *Iskanian* quoted the Supreme Court's own language from *Concepcion* articulating the "liberal federal policy favoring arbitration."<sup>267</sup> The court explained, "California law similarly favors enforcement of arbitration agreements, save upon grounds that exist at law or in equity for the revocation of any contract, such as unconscionability."<sup>268</sup> This decision shows state-level legislative concurrence with the federal law and policy, yet the appellate court in *Iskanian* and the CSC in *Sonic* both refused, at least once, to order enforcement of the arbitration clause in question.

The appellate court in *Sanchez* also cited Supreme Court FAA jurisprudence. The court recognized the purpose of the FAA, as stated by the Court, "to ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings*."<sup>269</sup> Yet the appellate court found the arbitration agreement unconscionable, objecting to, among other elements, the placement of the arbitration clause.<sup>270</sup> According to the court, "the arbitration provision itself sacrifices efficient and speedy resolution through the adoption of harsh, one-sided terms in an effort to ensure that the car dealer will be the prevailing party."<sup>271</sup> Based on the circumstances surrounding the contract's creation, the appellate court concluded that the agreement was unconscionable when made, and also failed to further the purposes of the FAA.<sup>272</sup> So even though in each case the deciding court, at some point, cited to state policy favoring arbitration to match the federal policy stated by the Supreme Court, the outcomes of the cases fail to mirror the Court's commitment to enforcement of arbitration agreements on their terms.

Why is this? The federal government does not hold a monopoly on concerns of cost and court overcrowding. California prisons have been ordered to

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<sup>266</sup> See *id.* at 223; *Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372, 377 (Ct. App. 2012).

<sup>267</sup> *Iskanian*, 142 Cal. Rptr. 3d at 377 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742, 1745 (2011)).

<sup>268</sup> *Id.*; see also CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 2007).

<sup>269</sup> *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19, 29-30 (Ct. App. 2011), review granted and opinion superseded, 272 P.3d 976 (Cal. 2012) (quoting *Concepcion*, 131 S. Ct. at 1748).

<sup>270</sup> The language related to arbitration was on the bottom of the back page of the contract, while the last signature required from the buyer was at the bottom of the front page. *Id.* at 26.

<sup>271</sup> *Id.* at 30.

<sup>272</sup> See *id.* at 29, 41.

release inmates due to problems with Eighth Amendment violations, and the civil dockets are no less overcrowded and understaffed.<sup>273</sup> Courts seeking to order the enforcement of arbitration agreements now have the advantage of almost one hundred years of favorable precedent, and strong support from the current Supreme Court.<sup>274</sup> The courts' reasoning in *Iskanian*, *Sanchez*, and *Sonic*, follow clear, well-articulated logic, and consistently acknowledge both the FAA and the California Arbitration Act, with its matching judicial preference for arbitration. Yet California courts still resist application of the FAA. From the early debates over the Commerce Clause and § 10 exceptions<sup>275</sup> to unconscionability, courts continue to try to review more cases and keep more disputes within the judicial system than Congress has authorized.<sup>276</sup> The courts consistently reach results that the Supreme Court takes the time to overturn.

Based on the evidence at hand, it appears that this is in fact due to continued judicial "hostility" towards arbitration. As discussed previously, in this context the word is not applied to indicate an emotional response, nor is it meant to suggest an aggressive or antagonistic reaction to arbitration that somehow interferes with the judgment of Californian courts. The evidence from the CSC's cases indicates, rather, that there is still "hostility" in the sense of courts' continued possessiveness of their jurisdiction over certain arbitration cases. It is not the same hostility that existed in courtrooms before 1920. As mentioned, there is now helpful federal precedent, a cooperative Supreme Court, and a number of state laws and policies favoring enforcement.<sup>277</sup> Judges

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<sup>273</sup> See *Brown v. Plata*, 131 S. Ct. 1910, 1917-18 (2011); Press Release, Pub. Info. Office, U.S. Courts for the Ninth Circuit, Eastern District of California Needs New Judgeships to Stem Docket Overload (Mar. 10, 2010), archived at <http://perma.cc/99TC-XAFD>; see also Adam Liptak, *Justices, 5-4, Tell California to Cut Prison Crowding*, N.Y. TIMES, May 24, 2011, at A1.

<sup>274</sup> This Note discusses how interpretation has shifted over that time, especially since the 1980s, but the point is that judges have not had to deal with truly arbitration-negative federal law since the promulgation of the FAA in 1925. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). States have continued to develop laws, but in terms of legislation, states now generally favor arbitration. New York started the trend with the first arbitration law in 1921, and it has continued through the twentieth century to Georgia's arbitration law, promulgated in 1988. GA. CODE ANN. §§ 9-9-1 to 9-9-3 (Cum. Supp. 1992). Furthermore, the FAA is now interpreted to preempt most state law, so even states that passed arbitration statutes relatively recently have a supplement (or replacement) in the form of a century of federal precedent mandating proarbitration treatment. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (applying the FAA broadly to preempt Georgia's state arbitration law); Strickland, *supra* note 40.

<sup>275</sup> See *supra* Part II.

<sup>276</sup> According to the Supreme Court's interpretation of the FAA, at least.

<sup>277</sup> See *supra* note 272 and accompanying text.

do not rely on the “ouster doctrine” or make references to “minor-league” judging. In fact, many arbitrators are retired judges.<sup>278</sup> Courts are also focusing on consumer contracts – none of the class arbitration problems related to unconscionability and bargaining power are likely to apply to large corporate business contracts. So in some respects, courts are now “friendly” to arbitration agreements, and content to enforce those agreements according to their terms. What triggers the lingering possessiveness, and combines with it to generate this “hostility,” is a new element of paternalism. Courts now feel they need to protect individual consumers whose background likely has not prepared them to understand the potential consequences of an arbitration agreement, especially when combined with a class action waiver. Consequently, courts are wary of the fairness of arbitration to uncomprehending laypeople and try to preserve their jurisdiction. Courts try even harder to retain jurisdiction because one of the claimed benefits of arbitration is that it avoids multiple levels of review and therefore leaves little room for correction of arbitral mistakes.<sup>279</sup> Thus, in this arena, judicial hostility towards arbitration agreements lives on.

State legislative actions further support this conclusion. The fact that states have passed arbitration laws indicates that if Congress revoked the FAA or passed legislation limiting the application of the FAA, states likely would not return to earlier pre-1920s precedent restricting the enforcement of arbitration agreements. The difference is that states generally – and California in particular – prefer more protective measures than the FAA provides. Some state ideas for protection are quite mild, like the Montana statute invalidated in *Casarotto* that instituted some basic type and font requirements for arbitration agreements.<sup>280</sup> And, based on the CSC’s placement objections in *Sonic*,<sup>281</sup> the

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<sup>278</sup> See *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 189 (Cal. 2013) (raising an argument related to the contractual requirement that the arbitrator be a retired California judge); Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator*, DISP. RESOL. J., Aug. 2005, 24, 26-28 (2005) (discussing retired judges as one possible category of arbitrators from which to choose when selecting an arbitration panel).

<sup>279</sup> Or even, after *Hall Street*, correction of an arbitrator’s manifest disregard of the applicable law. See *supra* notes 35, 94-95, and accompanying text.

<sup>280</sup> MONT. CODE ANN. § 27-5-114(4) (repealed 1997) (providing font and placement requirements for arbitration clauses in order to ensure a greater measure of notice). The Montana law created font and placement requirements that were struck down, yet in *Concepcion*, the Court noted that “[s]tates remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 n.6 (2011). In *Casarotto*, though, the court said Montana’s requirements were invalid “because the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The Court has arguably contradicted itself. Though the Court might decide that laws related to class waivers in arbitration clauses are different than notice requirements for arbitration clauses generally, this could well lead to yet another Supreme Court case making the

California courts or legislature might choose to institute a similar rule. Other consumer or employee protections, however, like the *Discover Bank* test, would just make it harder for companies to enforce arbitration agreements and class arbitration waivers. Critics of the post-*Southland* interpretation of the FAA argue that consumers need such protection in the modern world of mass production and online “click-to-agree” contracts.<sup>282</sup> They argue protections would benefit the parties involved while preventing companies from getting away with unlawful business practices.<sup>283</sup> The Supreme Court rejects these arguments out of hand, expressing much more confidence in the value of arbitration for dispute resolution.<sup>284</sup> Lower courts might also recognize the value of arbitration and the value of limiting appeals and less formal procedure to resolve disputes quickly and cheaply.<sup>285</sup> This approach does not allay the lingering doubts of Californian courts. As a result, these courts continue their attempts to preserve as much freedom as possible to step in and change the course of a dispute – just in case. The judges in these courts might not think of it as “hostility,” but it has the same effect and drives courts to behave just as the Supreme Court fears.<sup>286</sup> As long as this is true, California courts and the CSC will continue to debate the interpretation and application of the FAA.

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decision.

<sup>281</sup> See *supra* note 271 and accompanying text.

<sup>282</sup> See, e.g., Llewellyn Joseph Gibbons, *Creating A Market for Justice; A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT’L L. & BUS. 1, 3-7 (2002) (discussing potential due process concerns involved in online, standard-form contracts between businesses and consumers).

<sup>283</sup> See Stempel, *supra* note 39, at 851, 858; Weston, *supra* note 2, at 771 (arguing *Concepcion* “improperly guts” the savings clause in § 2 of the FAA).

<sup>284</sup> See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311-12 (2013) (“[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.”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671-72 (2010) (“[I]t is not enough . . . to show that the [arbitrators] committed an error—or even a serious error. ‘It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be unenforceable.’” (citations omitted) (quoting *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam))).

<sup>285</sup> *Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372, 387 (Ct. App. 2012) (recognizing the “efficient nature” of arbitration and affirming the motion to compel arbitration).

<sup>286</sup> As long as courts doubt the justice of arbitration panels, they will seek to avoid enforcing agreements under circumstances they consider somehow unfair, leading lower courts to develop the “devices and formulas” the Supreme Court refers to as invalid means of avoiding federal law. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

## CONCLUSION

Though the CSC bows, as it must, to the views and holdings of the Supreme Court, the policy goals and interpretive differences between the Court and the CSC continue to drive them to conflicting conclusions. If *Iskanian* and *Sanchez* turn out as this Note predicts, it will bring the debate over unconscionability in consumer class actions to an end. It will not, however, solve the fundamental incongruity that remains between the perspectives of the Supreme Court and the CSC on arbitration and the appropriate interpretation of the FAA. Left to their own devices, lower courts would develop their own rules that balance protection and efficiency, more lenient than those the Supreme Court's interpretation allows. The Supreme Court, on the other hand, has demonstrated a willingness to accept arbitration as an equal and independent form of dispute resolution, with judicial review strictly limited to that allowed in the text of the statute.<sup>287</sup> Until California courts accept the same principle, or legislative reform alters the Supreme Court's course of interpretation, the debate between the courts will continue.

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<sup>287</sup> See, e.g., *Concepcion*, 131 S. Ct. at 1745 (citing the "liberal federal policy favoring arbitration"); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) ("Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'"); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001) ("[T]here are real benefits to the enforcement of arbitration provisions. . . . Arbitration agreements allow parties to avoid the costs of litigation . . ."); Teressa L. Elliott, *Responsibility of the Courts in Motions to Compel Arbitration*, 32 OHIO N.U. L. REV. 89, 126 (2006) (finding it best to encourage arbitration of disputes between employees and employers).