
NOTES

ARBITRATION OF “PUBLIC INJUNCTIONS”: CLASH BETWEEN STATE STATUTORY REMEDIES AND THE FEDERAL ARBITRATION ACT

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“9 U.S.C. § 2. The language sweeps broadly and brooks little reservation. We must, therefore, be chary of a narrowing construction, lest such an interpretive modality clog the channel Congress has opened.”

*Justice Selya*¹

I. INTRODUCTION

In 1924, proponents of the Federal Arbitration Act (“FAA”) believed arbitration was an amicable way to resolve disputes between business professionals: Arbitration “preserves business friendships. . . . It raises business standards. It maintains business honor.”² This indeed may be true, but judicial opinions interpreting the FAA have transcended the realm of legal reasoning, becoming hostile and antagonistic not toward a party’s

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1. *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1118 (1st Cir. 1989) (holding that Massachusetts securities regulations were preempted by the Federal Arbitration Act).

2. *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. 7 (1924) [hereinafter *Joint Hearings*] (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, N.Y. Chamber of Commerce).

improper action, but toward judges. Justice Selya's remarks have caused Justice Trieweler of the Montana Supreme Court to state:

I am particularly offended by the attitude of federal judges, typified by the remarks of Judge Selya

. . . .

This type of arrogance not only reflects an intellectual detachment from reality, but a self-serving disregard for the purposes for which courts exist.

. . . .

It seems to me that judges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens.³

Judicial animosities aside, preferring arbitration to adjudication may seem to be a new trend among the courts. Justice Selya's comments are consistent with the U.S. Supreme Court's view of arbitration—that it should be a highly favored means of resolving disputes.⁴ Consider that one of the main reasons proponents sought passage of the FAA was to reverse the trend of judicial hostility toward arbitration.⁵ But in 1817, the *Underhill v. Van Cortlandt*⁶ court stated that arbitration “is a popular, cheap, convenient, and domestic mode of trial, which the courts have *always* regarded with liberal indulgence.”⁷ According to Ian Macneil, an established historian and scholar in the field of arbitration, “contrary to modern folklore . . . the premodern statutory law of arbitration was largely supportive of that institution, as was the common law.”⁸ Thus historically,

3. *Casarotto v. Lombardi*, 886 P.2d 931, 940–41 (Mont. 1994) (holding that a predispute arbitration clause was not enforceable because it did not comply with Montana's notice requirement under the Montana Uniform Arbitration Act, which was not preempted by the FAA), *overruled by* *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688–89 (1996) (reversing *Casarotto* because the notice requirement places arbitration clauses in a different class than contracts, which in turn violates “the goals and policies of the FAA”).

4. *See* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113–14 (2001) (holding that employment contracts are applicable to the FAA); *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (holding that the FAA “embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause”); *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984) (holding that the FAA preempts California's Franchise Investment Law).

5. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987).

6. 2 Johns. Ch. 339 (N.Y. Ch. 1817).

7. *Id.* at 361 (emphasis added).

8. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 19 (1992).

arbitration has been a preferred means of resolving disputes in the United States.⁹

The U.S. Supreme Court has handed down numerous pro-arbitration decisions in the past two decades, which correspondingly has led to a widespread proliferation of predispute arbitration clauses in consumer contracts.¹⁰ American Express, First USA, Discover Card, Saks Fifth Avenue, Greentree Financial Company, and many more have included these provisions in their customers' contracts.¹¹ This dramatic increase has also raised interesting legal issues, such as the use of arbitration provisions in the employment context,¹² arbitration costs and fees,¹³ the permissibility of an arbitrator's awarding punitive damages,¹⁴ and whether class actions can be arbitrated.¹⁵ Yet another compelling issue remains: Do individuals whose disputes are subject to arbitration have to arbitrate their claims for injunctive relief that is granted to them through public interest state statutes?

Recently, the California Supreme Court dealt with this issue and held in *Broughton v. Cigna Healthplans*¹⁶ that a plaintiff pursuing injunctive relief under the California Consumer Legal Remedies Act ("CLRA") did

9. See *id.* See also Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 212-18 (1995) (arguing that many contemporary scholars have agreed with Macneil's perspective on how state courts have "looked favorably on agreements to arbitrate"). Resnik uses Macneil's premise to argue that instead of the historical private and public Alternative Dispute Resolution ("ADR") system, today's systems are merging together, creating fewer ADR options. See *id.*

One may question why federal law on arbitration is needed when states and courts support arbitration. But as shown in Part III, there are many reasons for the FAA passage. This point is emphasized particularly to counter the unsupported claims of Julius Henry Cohen, the principal drafter of the FAA, who believed that arbitration clauses were disfavored by the courts. MACNEIL, *supra* note 8, at 186 n.54.

10. See *Overview of Contractual Mandatory Binding Arbitration: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. 46-48 (2000) (prepared statement of Patricia Sturdevant, Executive Director and General Counsel, National Association of Consumer Advocates).

11. *Id.*

12. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (holding that arbitration clauses in employment contracts are applicable to the FAA and are valid).

13. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 80 (2000) (finding that an arbitration agreement without a fee and cost schedule is enforceable).

14. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-64 (1995) (reversing motion to vacate award of punitive damages by arbitrator because punitive damages were within the scope of the contract).

15. See *Johnson v. W. Suburban Bank*, 225 F.3d 366, 377-78 (3d Cir. 2000) (allowing arbitration of Truth In Lending Act claims even though it would prevent the plaintiffs from pursuing their claim on a class action basis).

16. 988 P.2d 67 (Cal. 1999).

not have to arbitrate because arbitration was not a suitable forum in which to carry out the public interest aim of the statute.¹⁷ Specifically, an “inherent conflict” existed between a “public injunction”¹⁸ and arbitration since a CLRA injunction benefits the public, not just the parties to the suit, and the courts have “significant institutional advantages over arbitration in administering a public injunctive remedy.”¹⁹ The court used this “inherent conflict” argument to escape the application of the FAA, which under the current pro-arbitration U.S. Supreme Court jurisprudence most likely would have compelled arbitration.²⁰

Broughton has been followed by numerous California courts for the proposition that “public injunctive relief [is] inarbitrable.”²¹ *Broughton* has not been followed, however, by a recent Federal district court. In *Arriaga v. Cross Country Bank*,²² the court found that only Congress can carve-out

17. *See id.* at 76.

18. An injunction is a “court order commanding or preventing an action.” BLACK’S LAW DICTIONARY 788 (7th ed. 1999). “An injunction has also been defined as a writ . . . commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience.” *Id.* (quoting 1 HOWARD C. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS § 1, at 2–3 (2d ed. 1909)). The *Broughton* majority has created a new term in referring to injunctions: “public injunction.” The court does not provide a definition for the phrase “public injunction,” but I assume that the court would define it as an act commanding or preventing action that pursues the greater public justice or good over the good for an individual plaintiff. For example, under the CLRA, a public injunction would prevent a deceptive business “method, act or practice” that primarily injures the general public and that incidentally harms the plaintiff bringing suit. *See Broughton*, 988 P.2d at 74, 77. The majority has used the phrase “public injunction” to persuade others that a CLRA remedy is immeasurably different from an injunction. The court has attempted through word choice to highlight that a CLRA injunction involves the public, whereas a non-CLRA injunction does not. It should be noted that in his dissent, Justice Chin only refers to the phrase “public injunction” or “public injunctive” four times and does so only when referring to the majority’s analysis. Likewise, throughout this Note when I refer either to a “public injunction” or to “public injunctive” relief, I am assuming an injunction is derived from a state statute similar to the CLRA. However, as will be shown in Part V, I do not agree that a CLRA injunction or “public injunction” pursues the greater public good over individual relief.

19. *Broughton*, 988 P.2d at 78.

20. *See id.* at 78–79; Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: The Millennium Edition*, 56 BUS. LAW. 1219, 1228–29 (2001) (arguing that *Broughton* is troubling precedent and that its logic does “not justify the conclusion that a state statute can ‘trump’ the FAA”); Mark A. Chavez & Kim E. Card, *California’s Unfair Competition Law: The Structure and the Use of Business and Professions Code § 17200*, in CONSUMER FINANCIAL SERVICES LITIGATION 2001, at 405, 439 (PLI Corp. Law & Practice Course, Handbook Series No. B0-00ZV, 2001) (arguing that *Broughton*’s analysis is not complete and that “[t]his is an issue about which there is likely to be further litigation in the near future”); discussion *infra* Part IV.

21. *Cruz v. PacifiCare Health Sys., Inc.*, 111 Cal. Rptr. 2d 395, 398 (Ct. App. 2001), *reh’g granted, depublished*, 34 P.3d 288 (Cal. 2001). *See also* Warren-Guthrie v. Health Net, 101 Cal. Rptr. 2d 260, 270 (Ct. App. 2000); *Coast Plaza Doctors Hosp. v. Blue Cross*, 99 Cal. Rptr. 2d 809, 820 (Ct. App. 2000).

22. 163 F. Supp. 2d 1189 (S.D. Cal. 2001).

exceptions to the FAA.²³ Even though the plaintiff in that case sought "public injunctive" relief similar to that sought by the plaintiff in *Broughton*, the court held that the dispute must be resolved in an arbitration proceeding because of the strong FAA mandate.²⁴

The *Arriaga* court found that the U.S. Supreme Court has been clear on the issue of preemption and that "state legislatures may not attempt to limit the enforceability of arbitration agreements governed by the FAA."²⁵ Otherwise, the states would "be allowed to undercut the FAA in an area in which Congress is supreme (i.e., interstate commerce)."²⁶ Thus, arbitration agreements are enforced "unless *Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."²⁷

Therefore, among the courts a debate exists with respect to whether a person whose dispute is subject to arbitration can seek "public injunctive" relief under a state statute. This Note argues that the FAA preempts state statutory claims and that even if these claims were not preempted, "public injunctive" relief can be pursued through arbitration.

Part II discusses relevant U.S. Supreme Court decisions on arbitration and the enforcement of statutory rights. Part III contrasts the FAA's original intent with Supreme Court decisions in this area, concluding that the Court has been particularly activist and that lower courts should interpret the Court's decisions broadly. Part IV discusses in detail *Broughton*, *Arriaga*, and the corresponding preemption debate. It also applies the relevant Supreme Court decisions and argues that *Broughton* is unsound because the FAA preempts state statutes that prevent the enforcement of predispute arbitration clauses. Part V suggests and describes how a "public injunction" is feasible and compatible with arbitration. Part VI concludes that arbitration has evolved to encompass "public injunctive" relief claims.

II. U.S. SUPREME COURT JURISPRUDENCE

The U.S. Supreme Court has consistently outlined a pro-arbitration policy. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,²⁸ Prima Paint, asserting diversity jurisdiction, sued Flood & Conklin on the

23. *See id.* at 1198, 1200.

24. *See id.* at 1200.

25. *Id.* at 1198.

26. *Id.* at 1199.

27. *Id.* at 1198.

28. 388 U.S. 395 (1967).

grounds that the consulting agreement between the parties had been induced by fraud.²⁹ Per the predispute arbitration clause, Flood & Conklin moved to stay any court action until arbitration was completed.³⁰ The Court, in determining whether the FAA applied, wrestled with two questions: first, whether the contract was one “involving commerce,”³¹ and second, whether under diversity jurisdiction “a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators.”³²

The Court found that the use of Flood & Conklin, a New Jersey business that had numerous clients in multiple states, by a Maryland Corporation, Prima Paint, was sufficient to “evidenc[e] a transaction in interstate commerce.”³³ The majority’s opinion took an expansive view of the interstate commerce requirement,³⁴ which allowed the Court in later decisions to outline an expansive reach for the FAA.³⁵

29. *Id.* at 397–98.

30. *Id.* at 399.

31. *Id.* at 400. It is important to note § 2 of the FAA, which states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2000) (emphasis added).

32. *Prima Paint*, 388 U.S. at 402.

33. *Id.* at 401.

34. In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Court found that the FAA did not apply because the interstate commerce requirement had not been met. *See id.* at 200–01. In that case, an employee had signed an employment agreement in New York that contained an arbitration clause, but when the employee, as anticipated by the contract, went to Vermont to carry out duties associated with his job, he was fired. *Id.* at 199. Instead of holding that the employee’s contract was not covered under the FAA, the Court held that the employee had not shown that while he was performing his duties he “was working ‘in’ commerce, was producing goods for commerce, or was engaging in activity that affected commerce.” *Id.* at 200–01. Under this interpretation, one could argue that in *Prima Paint*, the employee’s work did provide for an interstate transfer of business. Therefore, as commentators have noted, the *Prima Paint* decision represents an “abandonment of *Bernhardt*’s narrow view of commerce as used in [the] FAA.” IAN R. MACNEIL, RICHARDE. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW* § 14.2.1 (1999). *See also* Henry C. Strickland, *The Federal Arbitration Act’s Interstate Commerce Requirement: What’s Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 414–15 (1992) (discussing how the *Bernhardt* Court “was not ready to give the commerce issue the same broad interpretation and perfunctory treatment it receives in other contexts”); Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 169–70 (1989) (arguing that judicial interpretations of the FAA as it relates to commerce have “obliterated” the limited purpose of the FAA).

35. In a footnote, Justice Black discusses numerous statutes that differentiate between “involving” commerce and “affecting” commerce and how “[t]he Arbitration Act is an example of carefully limited language.” *Prima Paint*, 388 U.S. at 410 n.3. He also mentions how the FAA lacks

In answering the second question, the Court held that a general fraud claim applicable to the entire contract must be arbitrated,³⁶ whereas a claim of fraud in the inducement of the arbitration clause itself goes to the making of the agreement to arbitrate and so must be adjudicated.³⁷ This interpretation of the FAA rested not on state-law grounds, which would have adjudicated any allegation of fraud, but on federal.³⁸ This distinction between state and federal law, coupled with diversity jurisdiction, created an *Erie Railroad Co. v. Tompkins*³⁹ question.⁴⁰

Under an *Erie Railroad Co.* analysis, the Court affirmed *Bernhardt v. Polygraphic Co. of America*,⁴¹ which had held that the FAA was a substantive rule.⁴² In determining whether the FAA was based on Congress' power to regulate the federal courts or on the broader power to regulate commerce,⁴³ the Court stated that "Congress plainly has power to legislate" because that power "is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and
⁴⁴ Therefore, in diversity cases under *Prima Paint*, federal courts must apply the applicable provisions of the FAA as long as the interstate commerce requirement has been met.⁴⁵ But the importance of *Prima Paint* does not lie in its application of the FAA in diversity cases; it lies in *Prima Paint's* broader implication for state courts and arbitration laws: "[T]he conclusion that the FAA was substantive law based on the

"any declaration of some national interest to be served . . . and this absence suggests that Congress did not intend to exert its full power over commerce." *Id.*

36. *See id.* at 404, 406–07.

37. *Id.* at 403–04. This distinction has become known as the separability rule.

38. The New York Arbitration Act, which did not follow the separability rule, stated that "general allegations of fraud in the inducement would, as a matter of state law, put in issue the making

Id. at 421 (Black, J., dissenting).

39. 304 U.S. 64 (1938). *Erie Railroad Co.* states:

[The] purpose of . . . section [34 of the Federal Judiciary Act of 1789] was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written.

. . . Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

Id. at 72–73, 78.

40. *See Prima Paint*, 388 U.S. at 404–05.

41. 350 U.S. 198 (1956).

42. *Id.* at 202–03.

43. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 651 (1996).

44. *Prima Paint*, 388 U.S. at 405 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

45. *Id.* at 406.

Commerce Clause would predictably require application of the FAA in state court[s] under the Supremacy Clause.”⁴⁶

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,⁴⁷ the Court reaffirmed *Prima Paint* and outlined a broader pro-arbitration policy under the FAA.⁴⁸ The Court stated that § 2 of the FAA declares a liberal federal policy favoring arbitration, despite any contrary state substantive or procedural policies.⁴⁹ Expounding upon a pro-arbitration policy, the Court stated:

[Q]uestions of arbitrability must be addressed with a *healthy regard for the federal policy* favoring arbitration. . . . The [FAA] establishes that, as a matter of federal law, *any doubts* concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.⁵⁰

The Supreme Court did not rely on the FAA’s legislative history for such a strong federal pro-arbitration policy. Instead, it relied on *Prima Paint*, which only implicitly had supported a strong arbitration policy.⁵¹ It also referenced some federal appellate cases that provided support for the advantages of arbitration—such as easing court congestion—but these cases merely cited a pro-arbitration policy and lacked any in-depth discussion on the statutory grounds for such a policy.⁵² As in *Prima Paint*,

46. Sternlight, *supra* note 43, at 657. See also THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 110 (1989) (“Challenges to the validity of arbitration agreements on the basis of state law provisions, therefore, were seen essentially as a dilatory tactic, meant to defeat the manifest purpose of the federal legislation.”).

47. 460 U.S. 1 (1983).

48. See *id.* at 24.

49. See *id.*

50. *Id.* at 24–25 (emphasis added).

51. See Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 455 (1998).

52. See, e.g., *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 643 (7th Cir. 1981) (citing other cases that support the policy that arbitration should be favored, but not providing any independent reasoning); *Wick v. Atl. Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979) (citing other cases that purportedly support a pro-arbitration policy); *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 43–45 (3d Cir. 1978) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and federal appellate cases, but not providing any independent reasons to support a pro-arbitration policy); *Hanes Corp. v. Millard*, 531 F.2d 585, 598 (D.C. Cir. 1976) (citing other cases that support a pro-arbitration policy and arguing that this policy eases court congestion, “permit[s] effectuation of the intent of the parties,” and prevents delays in dispute resolution that would occur if judicial consideration were required prior to arbitration); *Maldonado v. PPG Indus., Inc.*, 514 F.2d 614, 616–17 (1st Cir. 1975) (holding that “Puerto Rico like Congress encourages arbitration of disputes” and thus that a third party claim cannot undermine a decision to arbitrate); *Germany v. River Terminal Ry. Co.*, 477 F.2d 546, 547 (6th Cir. 1973) (arguing

the Court "displaced state contract rules regarding intent concerning the scope of a contract term, even though those rules did not discriminate against arbitration."⁵³

In *Southland Corp. v. Keating*,⁵⁴ the Court not only curtailed a state's ability to prevent arbitration of statutory rights, but also endorsed the strong federal pro-arbitration policy. On behalf of 800 California 7-Eleven franchisees, Keating brought, inter alia, a California Franchise Investment Law ("CFIL") violation against Southland Corporation.⁵⁵ According to the predispute arbitration clause, Southland was granted a motion to compel arbitration regarding all of the claims except for the CFIL claim.⁵⁶ The California Supreme Court affirmed, holding that a CFIL claim deserved judicial consideration and that this did not challenge the FAA.⁵⁷

In deciding whether the CFIL was preempted by the FAA, the U.S. Supreme Court first stated that "[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."⁵⁸ After reiterating this strong pro-arbitration policy, the Court held that under the FAA there are only two limitations on the enforceability of arbitration clauses.⁵⁹ First, "they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce,'" and second, these clauses "may be revoked upon 'grounds as exist at law or in equity for the
⁶⁰ Thus, no state laws can limit the enforceability of the FAA.⁶¹

that arbitration eases court congestion); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211–12 (2d Cir. 1972) (stating that "federal policy [is] to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration," but providing no basis for this policy); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1360–61 (10th Cir. 1971) (stating that "in view of the overriding federal policy favoring arbitration, waiver is not lightly inferred"). See also *Sternlight*, *supra* note 43, at 660–61 & n.129 ("Most of the lower court cases [that *Moses H. Cone Memorial Hospital*] cited as favoring arbitration also provided no rationale for this favoritism.").

53. *Harding*, *supra* note 51, at 457. See also 2 MACNEIL ET AL., *supra* note 34, § 20.1.3 (using *Moses H. Cone Memorial Hospital* as the foundation for an in-depth discussion on the scope of intent regarding arbitration clauses covered under the FAA).

54. 465 U.S. 1 (1984).

55. *Id.* at 3–4.

56. *Id.* at 4.

57. See *id.* at 5–6.

58. *Id.* at 10.

59. See *id.* at 10–11.

60. *Id.* at 11.

61. See *id.*

To support this broad claim, the Court cited *Prima Paint* and *Moses H. Cone Memorial Hospital*, and argued that according to the legislative history of the Act, Congress had intended “something more than making arbitration agreements enforceable only in the federal courts.”⁶² The Court went on to state that the FAA largely had been passed to allow the enforceability of arbitration agreements in the face of jealous courts and because state arbitration statutes had failed to mandate enforcement of arbitration agreements.⁶³

Justice Burger, writing for the majority, dismissed Justice O’Connor’s dissenting argument that the FAA is a procedural statute only to be applied in federal court.⁶⁴ Burger suggested that if the FAA were only procedural, then there would be no need to limit it to transactions involving commerce.⁶⁵ Burger’s analysis continued:

[W]e cannot believe Congress intended to limit the Arbitration Act to disputes subject only to federal court jurisdiction. Such an interpretation would frustrate congressional intent to place “[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs.”

....

In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. We hold that § 31512 of the [CFIL] violates the Supremacy Clause.⁶⁶

Southland explicitly states what *Prima Paint* implicitly held: The FAA applies not only in diversity cases, but also in state court proceedings.⁶⁷

62. *Id.* at 11–12. To support its view of the FAA’s legislative history, the Court stated that a “broader purpose can also be inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce.” *Id.* at 13.

63. *See id.* at 13–14.

64. *See id.* at 14. O’Connor, dissenting, stated that the “history [of the FAA] establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.” *Id.* at 25.

65. *See id.* at 14–15.

66. *Id.* at 15–16 (citations omitted). The California Supreme Court reasoned that because *Wilko v. Swan*, 346 U.S. 427 (1953), had found that Federal Securities Act of 1933 claims could not be subject to arbitration, CFIL claims could not be subject to arbitration. *Southland*, 465 U.S. at 16 n.11. But the U.S. Supreme Court dismissed this, stating that “[t]he analogy is unpersuasive. The question in *Wilko* was not whether a state legislature could create an exception to § 2 of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception.” *Id.*

67. Harding, *supra* note 51, at 457.

Southland's reasoning has been applied numerous times to invalidate state laws that have been preempted by the FAA.⁶⁸ Furthermore, *Southland* represents the Court's movement to federalize American law on arbitration⁶⁹—a movement that may be logical, but that also "suppl[ies] additional content to the federal legislation and embellish[es] its original policy imperative."⁷⁰

Only a year-and-a-half after *Southland*, the Court ruled in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁷¹ that antitrust claims under the Sherman Act are arbitrable in the international context.⁷² Before reversing the First Circuit, the Supreme Court reiterated its strong pro-arbitration policy and noted that the competence of arbitration tribunals is well-accepted by the courts.⁷³ According to the Court, in order to determine what statutory claims are arbitrable, courts should look to the congressional intention manifested in the specific statute at issue.⁷⁴ Further, Justice Blackmun found that if Congress had wanted to prevent a party from vindicating its statutory right in court, this intention would be "deducible from text or legislative history."⁷⁵

68. *Id.* at 468–69 & n.465, 470 n.466. The author provides numerous examples, such as *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 711 (7th Cir. 1994), holding that the FAA preempted an Illinois rule that prohibited arbitrators from awarding punitive damages; *Prudential Securities Inc. v. Banales*, 860 S.W.2d 594, 597 (Tex. Ct. App. 1993), holding that the FAA preempted the Texas Deceptive Trade Practices Act's nonwaiver provision as applied to the enforcement of arbitration agreements; and *Osteen v. T.E. Cuttino Construction Co.*, 434 S.E.2d 281, 284 (S.C. 1993), holding that the FAA preempted formal notice requirement by South Carolina. Harding, *supra* note 51, at 469 n.465, 470 n.466.

69. See CARBONNEAU, *supra* note 46, at 112–13.

70. *Id.* at 114. The author continues, "In order to have a cohesive and coherent national policy regarding arbitration, it may well be necessary to minimize state legislative authority in local commercial matters and to compel compliance by both state and federal courts with the FAA's express language." *Id.* However, this argument could always be advanced by those who favor federal control over state control because having a "coherent national policy" is dependent on having a federal policy. Conversely, state control over certain policies will most likely cause this policy to be decentralized. Thus, Carbonneau avoids the larger argument of whether it is *better* to have a coherent, federalized policy over a decentralized state policy.

71. 473 U.S. 614 (1985).

72. *Id.* at 640.

73. See *id.* at 626–27.

74. See *id.* The Court specifically stated:

Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Id. at 627.

75. *Id.* at 628.

Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. In the meantime, nothing prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.⁷⁶

In the interests of international comity and predictability, the Court held that that the antitrust claims were arbitrable.⁷⁷ Justice Blackmun stated that even though a party may agree to arbitrate a statutory claim, that party has not relinquished any substantive rights provided by the statute. Instead, the forum merely has changed.⁷⁸

Additionally, *Mitsubishi Motors* addresses policy questions regarding arbitration's ability to handle antitrust issues. According to the Court, the potential for complex problems arising during and throughout arbitration is not a problem for arbitrators because "adaptability and access to expertise⁷⁹ Moreover, although antitrust laws are enforced through private causes of action—creating a "private attorney-general who protects the public's interest"—the Sherman Act allows individuals to claim treble damages, which deters potential violators.⁸⁰ No individual is forced into bringing an antitrust suit, and a private plaintiff may settle at any time; thus, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute . . . continue[s] to serve both its remedial and deterrent function."⁸¹

In addition to the federal Antitrust Act claim, Soler, the plaintiff, also claimed a violation of the Puerto Rico competition statute and the Puerto Rico Dealers' Contracts Act.⁸² Under the former statute, Soler argued that the claim could not be arbitrated, but the appellate court held that this was

76. *Id.*

77. *See id.* at 629. The Court hinted that this result may be different in a domestic context: "even assuming that a contrary result would be forthcoming in a domestic context." *Id.*

78. *Id.* at 628.

79. *Id.* at 633.

80. *Id.* at 635–36 (quoting *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968)).

81. *Id.* at 635–37. Justice Stevens, dissenting, stated:

The interest in wide and effective enforcement has thus, for almost a century, been vindicated by enlisting the assistance of "private Attorneys General"; we have always attached special importance to their role because "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress."

Id. at 653–54 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972)). *See also* CARBONNEAU, *supra* note 46, at 125 (arguing that arbitrators lack the necessary credibility to address regulatory issues that impact the public).

82. *Mitsubishi Motors*, 473 U.S. at 620.

preempted by § 2 of the FAA.⁸³ Soler did not challenge this ruling on appeal, but the Supreme Court noted that *Southland* would control.⁸⁴ Soler did argue, however, that the antitrust claims under Puerto Rico law were inarbitrable, but the Court, in dicta, stated, "In any event, any contention that the local antitrust claims are nonarbitrable would be foreclosed by this Court's decision in *Southland Corp. v. Keating*."⁸⁵ Although the facts in *Mitsubishi Motors* limited its applicability to international transactions, the Court later applied the opinion's propositions to solely domestic transactions.⁸⁶

In *Shearson/American Express Inc. v. McMahon*,⁸⁷ the Court applied its *Mitsubishi Motors* reasoning (that Congress must have intended for the statutory claims to be inarbitrable) and found that Exchange Act claims are arbitrable.⁸⁸ The Court also held that Racketeer Influenced and Corrupt Organizations Act ("RICO") claims are arbitrable, relying on the policy considerations outlined in *Mitsubishi Motors*:⁸⁹ "Because RICO's text and legislative history fail to reveal any intent to override the provisions of the Arbitration Act, the McMahons must argue that there is an irreconcilable conflict between arbitration and RICO's underlying purposes."⁹⁰ The Court stressed the findings in *Mitsubishi Motors* that arbitrators are apt to deal with complexity, and argued that even though RICO may create incentives for private attorney generals, this is overridden by the statute's primary focus on allowing private parties to claim treble damages.⁹¹ Further, the Court stressed that the public interest claim is weaker in RICO actions than in antitrust actions because "[t]he special incentives necessary to encourage civil enforcement actions against organized crime do not support nonarbitrability of run-of-the-mill civil RICO claims brought

83. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 158 (1st Cir. 1983), *aff'd in part and rev'd in part by*, remanded by 473 U.S. 614 (1985).

84. See *Mitsubishi Motors*, 473 U.S. at 621 n.8.

85. *Id.* at 623 n.10.

86. See CARBONNEAU, *supra* note 46, at 135; Speidel, *supra* note 34, at 188 (arguing that in *McMahon*, the Court heavily relied upon the reasoning in *Mitsubishi Motors*, "even though that decision was predicated upon the fact that an international transaction was involved"). See also Michael A. Landrum & Dean A. Trongard, *Judicial Morphallaxis: Mandatory Arbitration and Statutory Rights*, 24 WM. MITCHELL L. REV. 345, 362 (1998) (arguing that the *Mitsubishi Motors* reasoning on the arbitrability of statutory claims created "a rut in the mud of legal reasoning which the Court has continued to track in other, totally different 'statutory claim' cases").

87. 482 U.S. 220 (1987).

88. See *id.* at 238.

89. See *id.* at 242.

90. *Id.* at 239.

91. See *id.* at 239-42.

against legitimate enterprises.”⁹² Therefore, the RICO claims were arbitrable because there was no justifiable policy reason to exclude them from an arbitration forum in which substantive statutory rights would be vindicated.⁹³

In *Gilmer v. Interstate/Johnson Lane Corp.*,⁹⁴ the Court again found that statutory rights were arbitrable using the reasoning outlined in *Mitsubishi Motors*.⁹⁵ Petitioner Gilmer argued that the public policy underlying the Age Discrimination in Employment Act (“ADEA”) is inconsistent with arbitration.⁹⁶ The Court rejected this argument and stated that “[t]he Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but . . . claims under those statutes are appropriate for arbitration.”⁹⁷ The Court listed numerous reasons why the ADEA public policy is not undermined through arbitration: individuals can still file charges with the EEOC; Congress recently amended the ADEA but did not prevent a waiver of the right to a judicial forum; the New York Stock Exchange (“NYSE”)⁹⁸ has numerous rules that safeguard against a biased arbitrator; the NYSE requires a written opinion summarizing the award and requires that this award be available to the public; and an arbitrator has the power to award equitable relief.⁹⁹

Many hoped that the Court would overrule *Southland* in *Allied-Bruce Terminix Cos. v. Dobson*,¹⁰⁰ but the Court extended its earlier reasoning and adopted a broader view of the FAA.¹⁰¹ “Nothing significant has changed in the 10 years subsequent to *Southland*; no later cases have eroded *Southland*’s authority; and no unforeseen practical problems have arisen.”¹⁰² Instead, “private parties have likely written contracts relying

92. *Id.* at 242.

93. *Id.*

94. 500 U.S. 20 (1991).

95. *See id.* at 26–27.

96. *Id.*

97. *Id.* at 28. The Court stated that Securities Act claims were arbitrable, *id.*, which was also the holding in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483–84 (1989).

98. Gilmer’s registration application with the NYSE, as required by Interstate/Johnson Lane Corporation, contained a predispute arbitration clause, which stated that Gilmer “‘agreed to arbitrate between him and Interstate ‘that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which [Gilmer] register[s].’” *Gilmer*, 500 U.S. at 23.

99. *Id.* at 28–33.

100. 513 U.S. 265 (1995).

101. *See id.* at 270, 272.

102. *Id.* at 272.

upon *Southland* as authority.”¹⁰³ Furthermore, Congress has expanded, not retracted, arbitration.¹⁰⁴

With *Southland* firmly in place, the Court discussed the scope of the words “involving commerce” as stated in § 2 of the FAA.¹⁰⁵ The Court noted that the word “involving” is “broad” and is the functional equivalent effecting.”¹⁰⁶ Therefore, the FAA reaches the full constitutional power granted to Congress and has a broad application.¹⁰⁷ The Court concluded its opinion by reminding states that they

may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of *any* contract.” What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause . . . for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act’s language and Congress’ intent.¹⁰⁸

The Montana Supreme Court failed to heed the U.S. Supreme Court’s message that arbitration agreements must not be isolated, and its decision was reversed in *Doctor’s Associates, Inc. v. Casarotto*.¹⁰⁹ The Montana Supreme Court believed that the Montana requirement that all arbitration clauses must be “typed in underlined capital letters on the first page of the contract” did not “undermine the goals and policies of the FAA” and that it therefore was a valid exercise of state power.¹¹⁰ But in a brief opinion, Justice Ginsburg concisely stated that “Montana’s law places arbitration agreements in a class apart from ‘any contract,’ and singularly limits their validity. The State’s prescription is thus inconsonant with, and is therefore

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103. *Id.*

104. *Id.*

105. *Id.* at 273.

106. *Id.* at 273–74.

107. *Id.* at 277. *But see* Speidel, *supra* note 34, at 211 (stating that “[t]he contention that Congress, in enacting the FAA, intended to exploit its full power under the Commerce Clause is dubious”). Almost all states enforce arbitration clauses, so the need to protect arbitration from jealous courts has been minimized. *Id.* Section 2 of the FAA does not need to “equal the full power of Congress to regulate commerce.” *Id.*

108. *Allied-Bruce Terminix*, 513 U.S. at 281 (citation omitted) (quoting 9 U.S.C. § 2 (2000)).

109. 517 U.S. 681, 688–89 (1996).

110. *Id.* at 683, 685.

111. *Id.* at 688. *See also* Harding, *supra* note 51, at 476 (arguing that the FAA clearly assigns state general contract law to govern these transactions and that if state contract law fails to protect consumers, then state contract law should change).

In later opinions, the U.S. Supreme Court held that statutory rights are arbitrable. In *Green Tree Financial Corp. v. Randolph*,¹¹² the Court held that a Truth in Lending Act (“TILA”) claim was arbitrable even though Randolph had claimed that she would not be able to vindicate her statutory rights under TILA because of prohibitive costs.¹¹³ Also, the Court provided a succinct test recapitulating the principles that had been laid down in *Mitsubishi Motors*: “In determining whether statutory claims may be arbitrated, we first ask whether the parties agreed to submit their claims to arbitration, and then ask whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”¹¹⁴ The Court did not foreclose the option of invalidating arbitration agreements on the basis of costs, but instead held that Randolph had not sufficiently met the “burden of showing the likelihood of incurring such”¹¹⁵ In answering the plaintiff’s claim that adjudication of the TILA claim would hurt important social policies, the Court stated, “[E]ven claims arising under a statute designed to further important social policies may be arbitrated because ‘so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum,’ the

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In *Circuit City Stores, Inc. v. Adams*,¹¹⁷ the Court again expanded the reach of the FAA, holding that the FAA applies to all employment contracts except those involving transportation workers.¹¹⁸ The Court also reaffirmed its dedication to *Southland* even though “the attorneys general of 22 States . . . object that the reading of the § 1 exclusion provision adopted today intrudes upon the policies of the separate States.”¹¹⁹

The U.S. Supreme Court’s decisions interpreting the FAA have enunciated an overt acceptance of arbitration in the dispute-resolution landscape. Key decisions, most notably *Southland*, have largely displaced state laws that have attempted to regulate arbitration clauses. As will be seen in Part III, the FAA is modeled after a New York law and was created

112. 531 U.S. 79 (2000).

113. *See id.* at 89–91.

114. *Id.* at 90.

115. *Id.* at 92. The Court did not provide any guidance on “how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence.” *Id.*

116. *Id.* at 90 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

117. 532 U.S. 105 (2001).

118. *See id.* at 119.

119. *Id.* at 121–22.

by its drafters, principally Julius Cohen, to bring arbitration into the mainstream of resolving disputes. The importance of providing a glimpse of the legislative history of the FAA cannot be overstated because it is from that history that the debate over arbitration began.

III. LEGISLATIVE HISTORY OF THE FEDERAL ARBITRATION ACT

"The scope of the [FAA] and its potential usefulness are too little known. . . . It must be read in the light of the situation which it was devised to correct and of the history of arbitration and of similar statutes in the recent past."¹²⁰

The goal here is not to provide a history lesson in arbitration, but to provide a historical perspective and some legislative background in order to describe where arbitration came from and where it is today.

A. THE CONTEXT

Arbitration may at first appear to be a new way to resolve disputes because it is carried out in such a different way than judicial adjudication. But consider that arbitration was used as early as 600 B.C. in Athens to resolve an international dispute and that it was commonly used among the Romans to end litigation.¹²¹ Later on, arbitration was used by the many merchant guilds in England because litigation was too contentious and the merchant was "far more interested in continuing business relations than in preserving his legal rights."¹²²

120. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926).

121. See FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 4 (1948); Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 242 (1928); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U.P.A. L. REV. 132, 132 (1934). It is interesting to note Cicero's view on the differences between arbitration and litigation and how his statement could easily be applied in today's society:

A trial is one thing, the decision of an arbiter another. A trial concerns a definite sum, an arbitrator's opinion an indefinite. We come to the trial with this idea, that we will either win the whole suit or lose it; an arbitration we approach in this spirit (that neither we will gain nothing nor will gain as much as we demanded) that we may gain something but not all we want. Of this fact, the very words of the contract are a proof. What is trial like? Exact, clear cut, frank. . . . What is arbitration like? Gentle, fair

Jones, *supra*, at 243 (quoting Cicero's oration for Quintus Rescius). Many scholars in this field, such as Sternlight or Carbonneau, may indeed disagree with the point that today's arbitration is "gentle and fair" when arbitration handles issues of public concern.

122. Wolaver, *supra* note 121, at 133, 144-45.

Notwithstanding this history, many North American colonies passed arbitration regulations that usually limited arbitration's applicability to certain causes of action.¹²³ From this experience, many states passed arbitration statutes including irrevocability clauses, although many lacked teeth and required postdispute consent to arbitrate.¹²⁴ During this time, complications arose regarding the enforceability of an arbitrator's award, and if members of two different organizations arbitrated their dispute, questions arose as to which organization's rules would govern.¹²⁵ Springing forth from these complications was a reform movement, and its first success "captured the greatest commercial and financial state of the Union," New York.¹²⁶

Under the 1920 New York Act, "a written contract to settle a controversy thereafter arising was valid, enforceable, and irrevocable, save upon such grounds as exist at law or equity for the revocation of any contract."¹²⁷ Courts were given the authority to stay proceedings until arbitration had been completed, and they were allowed to uphold arbitration awards.¹²⁸

With this victory in hand, the reform movement went to Washington D.C. to pass federal legislation on arbitration. Proponents of the FAA postulated numerous reasons for the Act. First, the courts were clogged

123. Jones, *supra* note 121, at 246–47. For example, the General Laws of the Massachusetts Colony allowed arbitration for trespass. *Id.* See also Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1048–49 (1998) (discussing William Penn's vision of "a truly peaceful place" and how arbitration played a part in achieving this vision).

New Jersey on September 20, 1682 was the first colony to enact a law requiring arbitration. FRANCES ALICE KELLOR, *ARBITRATION AND THE LEGAL PROFESSION* 11–12 (1952). The law stated:

And for the preventing of needless and frivolous Suits . . . all Accounts of Debt . . . and Accounts whatsoever not exceeding Twenty Shillings, between Neighbours, Arbitration of two indifferent Persons of the Neighbourhood, shall be tendered by some one Justice of the Peace who shall have Power to summon the Parties before him, before it be brought to Court.

Id. at 12. It is interesting to discover that "frivolous" suits and the desire to decrease case loads have existed for hundreds of years.

124. Jones, *supra* note 121, at 247–48.

125. *Id.* at 248.

126. MACNEIL, *supra* note 8, at 36–37. This is also a great source for the details surrounding the New York reform movement the history of the FAA.

127. *Id.* at 35. This language is almost identical to the language used in the later FAA. The importance of the 1920 New York Act cannot be overstated:

[It] made possible the extension of arbitration beyond the trade associations which were its main breeding ground and led to its wholesale employment in standardized agreements of all kinds. This, in turn, raised a whole host of new questions regarding public policy limitations and one-sidedness which were not a problem when arbitration was about two textile merchants arguing over the quality of the merchandize [sic].

Id. at 36–37 (citing an anonymous reviewer of an early draft of Macneil's book).

128. *Id.* at 35–36.

and many thought that the FAA would decrease the heavy caseload.¹²⁹ Second, the expense of litigation was an issue, including the cost to the consumer who must pay a higher price for a product because of potential costly litigation.¹³⁰ Third and most important, the FAA was seen as a way to overcome the rule of equity that arbitration agreements were not enforceable.¹³¹

B. THE ACT

The FAA's legislative history is lacking in volume: Only two congressional hearings were held, and the bill received no substantive objections once it was up for a vote.¹³² Nevertheless, between the hearings and the committee reports, a few conclusions are abundantly clear.

The Supreme Court's interpretation aside,¹³³ the FAA was supposed to pronounce new procedural rights, not substantive ones.¹³⁴ The first committee hearing on the FAA restated the principles laid down in *Berkovitz v. Arbib & Houlberg, Inc.*,¹³⁵ which was one of the first cases interpreting the 1920 New York Act.¹³⁶ The court stated that "[a]rbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow."¹³⁷ This interpretation of the New York Act is useful because the FAA was modeled and drafted according to it. Julius Cohen, a principal drafter of the FAA, also stated that "[t]he statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements. . . . That the enforcement of arbitration contracts is within the law of procedure as

129. See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 2, 5 (1923) [hereinafter *Hearings*] (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, N.Y. Chamber of Commerce); Jones, *supra* note 121, at 257-58; *Joint Hearings* *supra* note 2, at 34-35 (prepared statement of Julius Henry Cohen).

130. *Joint Hearings* *supra* note 2, at 35 (prepared statement of Julius Henry Cohen); *Hearings* *supra* note 129, at 7 (testimony of Charles L. Bernheimer).

131. See *Joint Hearings* *supra* note 2, at 14 (testimony of Julius Henry Cohen); *Hearings* *supra* note 129, at 6-7 (testimony of Charles L. Bernheimer).

132. See *Joint Hearings* *supra* note 2; *Hearings* *supra* note 129; H.R. REP. NO. 68-96, at 1 (1924) (noting that even in committee there was no opposition to the bill); 65 CONG. REC. 1931 (1924) (arguing over whether H.R. 646 should be brought up on a vote on the Consent Calendar); 65 CONG. REC. 11080, 11081-82 (1924) (passing H.R. 646 without any objection).

133. See *supra* note 42 and accompanying text.

134. See MACNEIL, *supra* note 8, at 106-07; *supra* note 64 and accompanying text.

135. 130 N.E. 288 (N.Y. 1921).

136. *Hearings* *supra* note 129, at 2.

137. *Berkovitz*, 130 N.E. at 290.

distinguished from substantive law is well settled.”¹³⁸ Not only did the courts and the principal drafter of the FAA believe it was procedural, but the Judiciary Committee also agreed with this interpretation: “Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made.”¹³⁹ Accordingly, the FAA was originally intended to be only a procedural rule.¹⁴⁰

Section 2 of the FAA uses the phrase “interstate commerce,” which has created a contested issue that the Supreme Court has resolved by allowing the phrase to have the broadest interpretation allowed under the Commerce Clause.¹⁴¹ The Court has also stated in *Southland* that the FAA created a national arbitration policy and withdrew power from the states.¹⁴² These arguments operate together, and both are contrary to the history of the FAA.

The FAA was proposed as part of a larger arbitration policy. Proponents first wanted to get state statutes passed, then federal, and then international.¹⁴³ This scheme made sense because even if states passed statutes enforcing arbitration agreements, those agreements would not be enforceable in federal courts—they were not bound by state statutes.¹⁴⁴ Therefore, in order for arbitration agreements to be enforced in federal court, a federal law was needed, which supports the reasoning that the FAA was not supposed to replace state laws, but to supplement them.¹⁴⁵ This conclusion is bolstered by the fact that the FAA confers no independent subject matter jurisdiction.¹⁴⁶ Further, the FAA was supposed to apply only to diverse parties. One of Julius Cohen’s rationales for the FAA was that a New York Merchant’s arbitration provision could be defeated by the
¹⁴⁷ Federal law is not necessary because a merchant “can not get jurisdiction in a foreign State, and if he does get jurisdiction, the law of that foreign State may be different from the law [in

138. *Joint Hearings*, *supra* note 2, at 37.

139. H.R. REP. NO. 68-96, at 1 (1924).

140. *See* MACNEIL, *supra* note 8, at 111, 117; *supra* note 64 and accompanying text.

141. *See* discussion *supra* Part II.

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

143. *Joint Hearings*, *supra* note 2, at 16.

144. *See id.*

145. *See* H.R. REP. NO. 68-96, at 1 (1924) (“Before such contracts could be enforced in the Federal courts, therefore, [the FAA] is essential.”).

146. *See* *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 291 (1995) (Thomas, J., dissenting).

147. *Joint Hearings*, *supra* note 2, at 27–28.

New York] and may not be recognized as we have it [in New York]."¹⁴⁸ The notion that the FAA was originally supposed to operate only in diversity suits in federal courts supports the conclusion that it was not supposed to crowd-out state statutes.

Although in *Southland* Justice Burger argued that the interstate commerce requirement implied that the Act had a substantive effect and broad applicability throughout state courts,¹⁴⁹ this claim was refuted over seventy-five years ago: "It has been suggested that the proposed law depends for its validity upon the exercise of the interstate commerce and admiralty powers of Congress. This is not the fact. . . . It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."¹⁵⁰

In other words, although the interstate commerce language was included in the Act, the Act neither depends nor solely relies on the powers associated with the Commerce Clause. This quote demonstrates the importance of recognizing that the FAA was passed as a procedural, not substantive, rule. It also says something about the FAA's relation to states' rights. An act passed solely because of Congress' power to regulate interstate commerce crowds-out states, but an act passed primarily because of Congress' power to control the Federal courts does not affect the states at all. For example, even though Congress approves the Federal Rules of Civil Procedure, this does not prevent a state from creating its own rules of civil procedure. This is how the drafters and committees saw the FAA.¹⁵¹ The FAA "provides a procedure in the Federal courts for their enforcement. The procedure is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties."¹⁵²

Further, the drafters saw the FAA not as a broad proposition replacing state statutes, but as a model that states *could* follow. After discussing that some states were working on arbitration legislation and that others were confused about its benefits, Mr. Alexander Rose stated, "I have no doubt all of the States *would* pattern after [the FAA]."¹⁵³ However, if the Supreme

148. *Id.* at 27.

149. *See Southland Corp. v. Keating*, 465 U.S. 1, 14–15 (1984).

150. *Joint Hearings supra* note 2, at 37.

151. *But see* MACNEIL, *supra* note 8, at 145–47 (arguing that the reformers included the interstate commerce language for political reasons and did not primarily rely on Congress' power to control the federal courts).

152. H.R. REP. NO. 68-96, at 2 (1924).

153. *Joint Hearings supra* note 2, at 28 (emphasis added). Rose represented the Arbitration Society of America, New York City. *Id.* at 25.

Court was correct in *Allied-Bruce Terminix*, then there would be no reason for states to model the FAA because the FAA would already control. Originally, the FAA was not supposed to crowd-out states in the creation of their own arbitration law. Julius Cohen, a principal drafter of the FAA, agreed:

There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. The statute can not have that effect. . . . [W]ithout this action no remedial action by the States ever can be effected. . . . If one of [the parties to an arbitration agreement] is bound to arbitrate because he lives in a State enforcing arbitration agreements, the other should equally be bound.¹⁵⁴

Although the FAA's history is not clear on all points, one can presume that the Supreme Court cases interpreting the original intent of the FAA are mistaken. The history suggests that after the FAA had been passed, states had the right to declare or not declare that arbitration agreements were enforceable. But the Court has taken this power away.

C. THE INTERPRETIVE CONUNDRUM

A crossroads exists. One of these roads is paved with the FAA's legislative history, which aimed through procedure to provide a federal forum to enforce predispute arbitration agreements and reserve power to the states to regulate the enforceability of arbitration agreements in their respective forums.¹⁵⁵ The other road is paved by the U.S. Supreme Court, which interpreted the FAA as creating substantive arbitration law that preempts state laws from restricting the enforceability of arbitration agreements. Some scholars argue that the Supreme Court should "abandon its unjustified preference for arbitration" and should replace it with an approach compatible with the FAA's original legislative purpose.¹⁵⁶ Alternatively, they argue that Congress should amend the FAA to restore the states' power to limit the enforceability of predispute arbitration agreements.¹⁵⁷

154. *Joint Hearings*, *supra* note 2, at 40. Cohen again restated this general principle: "So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does *not encroach upon the province of the individual States.*" Cohen & Dayton, *supra* note 120, at 277 (emphasis added).

155. MACNEIL, *supra* note 8, at 106-07.

156. See Sternlight, *supra* note 43, at 711-12.

157. See Rita M. Cain, *Preemption of State Arbitration Statutes: The Exaggerated Federal Policy Favoring Arbitration*, 19 J. CONTEMP. L. 1, 18-19 (1993); Speidel, *supra* note 34, at 211-12; Sternlight, *supra* note 43, at 712.

However, these suggestions to follow the road paved by the FAA's legislative history fail to have practical significance. The U.S. Supreme Court in *Circuit City Stores* recently has reaffirmed *Southland* and again has expanded the FAA, this time holding that it includes employment contracts.¹⁵⁸ The Supreme Court rarely overturns precedent, and with *Circuit City Stores* one can safely assume that the pro-arbitration cases listed in Part II will remain valid for many years to come.

Numerous bills limiting the use of predispute arbitration agreements are pending in Congress. Senator Feingold has introduced the Consumer Credit Fair Dispute Resolution Act ("CCFDRA"), which would invalidate pre-dispute arbitration agreements in consumer contracts by amending the FAA.¹⁵⁹ Congressman Gutierrez has introduced the Consumer Fairness Act of 2002 ("CFA"), which prohibits predispute arbitration clauses in consumer contracts because they are a deceptive trade practice.¹⁶⁰ But these bills lack the political support to get passed. Senator Feingold's bill only has one cosponsor, and no action has been taken since its introduction. CCFDRA's legislative forecast is bleak, posting a 4% chance of getting through the Senate committee and a 2% chance of being passed in the Senate.¹⁶¹ The approval numbers are even lower for the House.¹⁶² Similarly, Congressman Gutierrez' bill is merely a copy of a bill he introduced on June 17, 1999, which never found its way out of the Subcommittee on Financial Institutions and Consumer Credit.¹⁶³ The current version of the CFA is likely to suffer the same fate, as it also has been referred to the Subcommittee on Financial Institutions and Consumer Credit and lacks bipartisan support.¹⁶⁴

Instead of advocating that the Court and Congress limit the FAA's scope to its original purpose, one should consider arbitration relative to the political reality in which it exists. The Supreme Court has abandoned the FAA's legislative history, judicially expanding the FAA's reach, and Congress likely is not going to amend the FAA to change this. However,

158. See *supra* notes 118-119 and accompanying text.

159. See Consumer Credit Fair Dispute Resolution Act of 2001, S.192, 107th Cong. § 2 (2001).

160. See Consumer Fairness Act of 2002, H.R. 5162, 107th Cong. (2002).

161. See Billcast, available at <http://www.lexis.com> (last visited Nov. 10, 2002).

162. See *id.*

163. See Bill Summary and Status for the 106th Congress: H.R. 2258, available at <http://thomas.loc.gov/bss/d106/d106bill.html> (last visited Nov. 10, 2002).

164. See Bill Summary and Status for the 107th Congress: H.R. 5162, available at <http://thomas.loc.gov/bss/d107/d107bill.html> (last visited Nov. 10, 2002). The 1999 version of the CFA, H.R. 2258, only garnered twenty-two cosponsors, twenty-one of whom were Democrats. 1999 Bill Tracking H.R. 2258 (June 17, 1999).

this does not render the FAA's legislative history meaningless. The contrast between the Supreme Court's decisions and the FAA's history reveals the implicit arbitration signal commanded by the Supreme Court. State courts should not dissect or scrutinize the language or circumstances of the Supreme Court's decisions. Instead, state courts should embrace the Court's activist arbitration stance and construe its decisions broadly.

The Court has stated that arbitration issues should be "addressed with a healthy regard for the federal policy favoring arbitration,"¹⁶⁵ and with this broad framework in mind, *Broughton* and the corresponding decisions are next analyzed.

IV. *BROUGHTON* AND PREEMPTION

A. CASES

Minor Adrian Broughton and his mother Keya Johnson, the plaintiffs, brought numerous causes of action against Cigna Healthplans of California, the defendant, because of injuries the plaintiffs had suffered during Adrian's birth.¹⁶⁶ One of these causes was a Consumers Legal Remedies Act ("CLRA") violation alleging that Cigna had "deceptively and misleadingly advertised the quality of medical services which would be provided under its health care plan."¹⁶⁷ Cigna sought an order to compel arbitration under the predispute arbitration provision located in the healthcare policy.¹⁶⁸ The plaintiffs objected to arbitrating the CLRA claim because the Act prohibits consumers from waiving any of its provisions, and the plaintiffs claimed that arbitration is tantamount to a waiver.¹⁶⁹ The California trial court agreed and stayed arbitration relating to this cause, and the Court of Appeal affirmed on grounds that arbitration was not an adequate forum because the CLRA authorizes permanent injunctions, which an arbitrator cannot issue.¹⁷⁰

After providing a brief summary of relevant U.S. Supreme Court decisions such as *Southland*,¹⁷¹ the California Supreme Court stated, "The unsuitability of a statutory claim for arbitration turns on congressional

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

166. *Broughton v. Cigna Healthplans*, 988 P.2d 67, 71 (Cal. 1999).

167. *Id.*

168. *Id.*

169. *Id.* According to the CLRA, "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." CAL. CIV. CODE § 1751 (West 1998).

170. *See Broughton*, 988 P.2d at 71-72.

171. *See supra* Part II for a discussion of these cases.

intent, which can be discovered in the text of the statute in question, its legislative history or in an 'inherent conflict' between arbitration and the [statute's] underlying purposes."¹⁷² In this case, the first reason for the inherent conflict was that "the evident purpose of the injunctive relief provision of the CLRA is not to resolve a private dispute but to remedy a public wrong." The second reason was that "the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy."¹⁷³

In analyzing the first reason for the inherent conflict, the court, using *Mitsubishi Motors* and *McMahon*, found that arbitration was a suitable forum because the RICO and Sherman Acts focus primarily on a private remedy—treble damages—and not on the broader public interest.¹⁷⁴ Thus, if a statute's primary function is to prevent harm to the general public, then arbitration may be incompatible.¹⁷⁵ To support the claim that the CLRA was incompatible, the court cited the CLRA, which states that its purpose is to "protect consumers against unfair and deceptive business practices"¹⁷⁶ and that the benefits of CLRA injunctive relief primarily accrue to the general public and incidentally accrue to the individual plaintiff.¹⁷⁷

In analyzing the second reason, the court found that in dealing with "public injunctions," continuous supervision could become quite complex. According to the court, such supervision is relatively easier for courts to handle because any modification of arbitrators' injunctions requires cumbersome, new proceedings.¹⁷⁸ "Public injunctions" require judges to take on a "quasi-executive function," which necessitates a continual involvement, which is too much to ask from newly assigned arbitrators with limited jurisdiction.¹⁷⁹ In addition, arbitrators' injunctions would not have collateral estoppel effect, and someone challenging the injunctions' enforcement would have to relitigate the same deceptive practices because only the particular parties involved in the injunctions would be able to enforce them.¹⁸⁰ Private arbitrators also lack public accountability because they lack disciplinary procedures, they do not take a constitutional oath,

172. *Broughton*, 988 P.2d at 73 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). See *supra* notes 94–99 and accompanying text for a discussion of *Gilmer*.

173. *Broughton*, 988 P.2d at 76, 78.

174. *See id.* at 74.

175. *Id.*

176. *Id.*

177. *Id.* at 76–77.

178. *Id.* at 77.

179. *Id.*

180. *Id.*

and all of their proceedings take place in private.¹⁸¹ Conversely, judges are subject to public discipline, they must take constitutional oaths, and most of their proceedings take place in public. This makes judges better suited to resolve issues directly concerning the public.¹⁸²

Consistent with its ruling, the California Supreme Court found that this interpretation is not preempted by the FAA because even though the U.S. Supreme Court had held that only Congress and not state legislatures can prevent statutory rights from being arbitrated, it had not ruled on whether “a legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests.”¹⁸³ Furthermore, even though federal law strongly favors enforcing arbitration agreements with the FAA, “it would be perverse to extend the policy so far as to preclude states from passing legislation the purposes of which make it incompatible with arbitration, or to compel states to permit the vitiation through arbitration of the substantive rights afforded by such legislation.”¹⁸⁴ In addition, arbitration is not an adequate forum in which to resolve private attorney general disputes, and this conclusion does not depend on whether these rights are derived from a federal or state statute.¹⁸⁵ Likewise, it is highly unlikely that the Congress that passed the FAA intended for it to apply in the situation of the “public

¹⁸⁶

Broughton was followed by numerous California cases. In *Coast Plaza Doctors Hospital v. Blue Cross*,¹⁸⁷ the plaintiff, Coast Plaza, sought injunctive relief, which would have prohibited the defendant, Blue Cross, from providing unreasonable and anticompetitive reimbursement rates.¹⁸⁸ The Court of Appeal found that the unfair trade practices¹⁸⁹ and the unfair competition¹⁹⁰ statutory claims were not arbitrable because of the largely

181. *Id.* at 78.

182. *Id.*

183. *Id.*

184. *Id.* at 79.

185. *Id.*

186. *Id.*

187. 99 Cal. Rptr. 2d 809 (Ct. App. 2000).

188. *Id.* at 820.

189. The relevant statutory provision states: “Any person or trade association may bring an action to enjoin and restrain any violation of this chapter and, in addition thereto, for the recovery of damages.” CAL. BUS. & PROF. CODE § 17070 (West 1997).

190. The relevant statutory provision states:

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in

public nature of the relief.¹⁹¹ In *Groom v. Health Net*,¹⁹² the court found that the plaintiff's statutory unfair competition claim was not arbitrable because the plaintiff, by pursuing injunctive relief, was serving the role of the private attorney general.¹⁹³ Similarly, in *Warren-Guthrie v. Health Net*,¹⁹⁴ a plaintiff again pursued injunctive relief based on a statutory unfair competition claim, and the court again found the claim inarbitrable because such relief was beyond the arbitrator's power.¹⁹⁵ Finally, in *Cruz v. PacificCare Health Systems, Inc.*,¹⁹⁶ the court found a plaintiff's CLRA, statutory unfair competition, and statutory false advertising claims inarbitrable.¹⁹⁷ Instead of simply citing *Broughton* and finding the claims inarbitrable, the court wrestled with the recent U.S. Supreme Court decision in *Green Tree Financial Corp. v. Randolph* and its recapitulation of the statutory rights test.¹⁹⁸ However, the lower court found that the test as laid down in *Randolph* did not present any new issues that *Broughton* had failed to analyze, and thus the trial court properly stayed arbitration to the statutory claims.¹⁹⁹

While the California state courts followed the *Broughton* decision without any hesitation, the California district courts split on the issue.

this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Id. § 17203.

191. *Coast Plaza Doctors Hosp.*, 99 Cal. Rptr. 2d at 820.

192. 98 Cal. Rptr. 2d 836 (Ct. App. 2000).

193. *See id.* at 843-44.

194. 101 Cal. Rptr. 2d 260 (Ct. App. 2000).

195. *See id.* at 269-70.

196. 111 Cal. Rptr. 2d 395 (Ct. App. 2001), *reh'g granted, depublished*, 34 P.3d 288 (Cal. 2001).

197. *Id.* at 397-99. Most likely, the Supreme Court will not overturn its earlier ruling in *Broughton*, but will reverse the ruling that claims for equitable monetary relief are also inarbitrable because they are intimately tied to a "public injunction." *See id.* at 401-02.

The statutory provision at issue in *Cruz* states:

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

CAL. BUS. & PROF. CODE § 17535 (West 1997).

198. *Cruz*, 111 Cal. Rptr. 2d at 397-99. *See also supra* note 114 and accompanying text.

199. *Cruz*, 111 Cal. Rptr. 2d at 398-99.

*Gray v. Conseco, Inc.*²⁰⁰ involved plaintiffs who had filed suit against Conseco, claiming that the defendant had misled them into believing that they would receive the most competitive interest rates on their mortgages.²⁰¹ The central district court began the relevant discussion by stating, “When considering whether a state statutory claim is arbitrable, a court should look to the intent of the state legislature, just as it looks to the intent of Congress when determining if a federal statutory claim is arbitrable.”²⁰² This court found that the federal TILA class action claim was arbitrable, but followed *Coast Plaza Doctors Hospital and Groom* and held that the statutory unfair competition claim was not arbitrable under the *Broughton* rationale.²⁰³ However, this reasoning was flatly rejected in *Arriaga v. Cross Country Bank*, where the plaintiff, Arriaga, had claimed that the defendant’s predispute arbitration clause was not applicable to her statutory unfair competition claim because, as in *Broughton*, “forcing her to arbitrate would result in an ‘inherent conflict’ between arbitration and the underlying purposes of the statute.”²⁰⁴

First, the court analyzed the California legislature’s intent in enacting California Business and Professions Code section 17200 and found that the legislature had intended to prevent “public injunctive” relief claims from being arbitrated.²⁰⁵ However, this discussion was extremely limited, and without delay the court discussed preemption.²⁰⁶ In finding that the California legislature was preempted, the court stated, “[T]he Supreme Court’s message has been clear, unequivocal and consistent . . . state legislatures may not attempt to limit the enforceability of arbitration agreements governed by the FAA.”²⁰⁷ Only three exceptions exist preventing the enforcement of arbitration clauses under the FAA: the contract does not involve interstate commerce or is not a maritime contract,²⁰⁸ the arbitration clause fails as a matter of law or in equity,²⁰⁹ and “Congress itself” intended that the statutory rights at issue be vindicated in

200. No. SA CV 00-322DOC(EEX), 2000 WL 1480273 (C.D. Cal. Sept. 29, 2000).

201. *Id.* at *1–*2.

202. *Id.* at *7.

203. *See id.*

204. *Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1190–91, 1196 (2001).

205. *Id.* at 1197.

206. *See id.* The discussion on the legislature’s intent in enacting section 17200 was extremely brief, providing no reasoning whatsoever.

207. *Id.* at 1198.

208. *Id.* (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10–11 (1984)).

209. *Id.*

a court of law.²¹⁰ Thus, only Congress and not state legislatures can dictate whether statutory rights can be excluded from arbitration.

State legislatures cannot be allowed to do implicitly what the Supreme Court and the FAA do not allow them to do explicitly. If it were enough for a state legislature to declare, through the nature of the remedies it offers in a statute, that it did not wish to have certain claims subjected to arbitration, states would essentially be allowed to undercut the FAA in an area in which Congress is supreme (i.e., interstate commerce).²¹¹

According to the *Arriaga* court, the California legislature created a statutory remedy, “public injunctive” relief, which was incompatible with arbitration and which prevented the enforcement of an otherwise valid arbitration clause.²¹² The court analogized this to the U.S. Supreme Court’s decision in *Doctor’s Associates, Inc. v. Casarotto*, which had prohibited “singl[ing] out arbitration provisions for suspect status.”²¹³ Thus, in *Gray*, the federal court followed the *Broughton* reasoning, but in *Arriaga* the federal court completely rejected *Broughton*, holding that the FAA and subsequent Supreme Court decisions preempt the California state legislature.

B. FAA PREEMPTION AND STATE STATUTORY RIGHTS

In *Broughton*, the California Supreme Court first discussed *Southland*, *Mitsubishi Motors*, and *McMahon* for the proposition that arbitration agreements should be favored. But in a way reminiscent of Dr. Jekyll and Mr. Hyde, the court then focused on the intent of the California legislature in enacting the CLRA and on the pros and cons of arbitrating a CLRA injunction, and *then* discussed preemption.²¹⁴ This was telling. Unlike what the court in *Broughton* thought, federal preemption—the most important issue to resolve—should be discussed first.

Broughton states that it would be “perverse” to extend *Southland*’s reasoning to prevent a state legislature from “passing legislation the purposes of which make it incompatible with arbitration”²¹⁵—but such an act by a legislature places arbitration on unequal footing relative to other terms of the contract and discounts the emphatic Supreme Court policy

210. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

211. *Id.* at 1199.

212. *Id.*

213. *Id.*

214. *See Broughton v. Cigna Healthplans*, 988 P.2d 67, 72–79 (Cal. 1999).

215. *Id.* at 79.

favoring arbitration. For example, *Prima Paint's* affirmation that the FAA is a substantive, not procedural, rule is counter to the FAA's legislative history and, as with most of the Supreme Court's cases in this area, represents an act of judicial invention primarily focused on decreasing court dockets²¹⁶ instead of on the specific law at hand. This case and others signal to the lower courts a steadfast support of arbitration strong enough to overcome any contrary FAA legislative history. *Moses H. Cone Memorial Hospital* best summarizes this Supreme Court policy by stating that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."²¹⁷ Granted, whether to arbitrate issues of public concern is not a matter to be taken lightly, but the Court has found that RICO, Sherman Act, Securities Act, ADEA, and TILA claims all should be arbitrated. Arbitrating those "public" statutory disputes should have provided *Broughton* with enough guidance to find that even with potential public policy concerns, arbitration is a highly favored means of resolving disputes.

For instance, the South Carolina Supreme Court in *Munoz v. Green Tree Financial Corp.*²¹⁸ followed this guidance.²¹⁹ Petitioners, the Munozes, claimed that Green Tree Financial had violated the South Carolina Consumer Protection Code.²²⁰ After the Munozes had filed their claim in state court, Green Tree requested that the court compel arbitration pursuant to the predispute arbitration clause.²²¹ The South Carolina Supreme Court affirmed the Court of Appeal and found that the state statute did not invalidate the arbitration agreement.²²² After quoting extensively from the U.S. Supreme Court decision in *Green Tree Financial Corp.*, the court stated, "Although the Supreme Court's decision involved a federal statutory claim and is not directly applicable here, we are guided by the same liberal policy favoring arbitration."²²³ It is this liberal policy that also should have guided the *Broughton* court.

216. This argument should not be perceived as "critical" of the Supreme Court's concern with unclogging dockets. Shifting the heavy case-load burden out of the courts was one of the main reasons for passing the FAA, and one could argue that the Supreme Court's emphatic pro-arbitration policy coincides with the spirit behind the enactment of the FAA. See *supra* note 129 and accompanying text. The central problem with the Supreme Court's case law is that it espouses strict adherence to the FAA's legislative history while supporting rulings that run counter to the legislative history.

217. 460 U.S. 1, 24–25 (1983).

218. 542 S.E.2d 360 (S.C. 2001).

219. See *id.* at 362.

220. *Id.*

221. *Id.*

222. See *id.* at 363.

223. *Id.* at 364.

The *Broughton* majority is correct that the U.S. Supreme Court has never specifically addressed whether a state legislature may restrict the right to arbitrate when public interests are at stake, yet it has overlooked the U.S. Supreme Court's strong policy toward the federalization of arbitration.²²⁴ *Mitsubishi Motors, McMahon*, and other cases primarily deal with federal statutes and their congressional intent, but if that reasoning is coupled with the reasoning in *Southland*, the answer becomes evident: State legislatures cannot legislate around arbitration clauses by claiming that a strong public policy exists. This analysis is not derived from stretching or distorting judicial analysis. Interestingly, from *Mitsubishi* to one of the U.S. Supreme Court's more recent decisions in *Doctor's Associates*, one would be hard pressed to find any language that significantly limits a prior Supreme Court decision on the federalization of arbitration.

The divergence between *Broughton* and *Arriaga* concerning the federalization of arbitration centers on the U.S. Supreme Court's statement that "Congress has evinced an intention to preclude a waiver"²²⁵ and on whether that statement means that *only* Congress can create a statutory waiver of the FAA. Perhaps the word "Congress" does not specifically exclude state legislatures, which means that they, too, can create statutory exceptions to the FAA when public interests conflict with arbitration. This latter interpretation has been succinctly stated in *Gray v. Conseco, Inc.*: "When considering whether a state statutory claim is arbitrable, a court should look to the intent of the state legislature, just as it looks to the intent of Congress when determining if a federal statutory claim is arbitrable."²²⁶ This view has found support in both California and some federal courts.²²⁷

For example, in *Republic of the Philippines v. Westinghouse Electric Corp.*,²²⁸ the Philippine government filed suit against Westinghouse and other American corporations over a nuclear power plant contract that had gone bad.²²⁹ The defendants sought to compel arbitration on all claims,

224. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *Broughton v. Cigna Healthplans*, 988 P.2d 67, 83–84 (Cal. 1999) (Chin, J., dissenting in part and concurring in part).

225. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

226. *Gray v. Conseco, Inc.*, No. SA CV 00-322DOC(EEX), 2000 WL 1480273, at *7 (C.D. Cal. Sept. 29, 2000).

227. See *supra* notes 187–198 and accompanying text. *Gray* found *Broughton* persuasive and adopted the *Broughton* reasoning without much discussion. See *Gray*, 2000 WL 1480273, at *1–*2.

228. 714 F. Supp. 1362 (D.N.J. 1989).

229. *Id.* at 1364–67.

including a New Jersey Consumer Fraud Act (“NJCFCA”) statutory claim.²³⁰ The court applied the logic of *Mitsubishi Motors* and found that “[t]here is no evidence that the legislature intended to foreclose the resolution of claims brought under [the NJCFCA] through arbitration and this count is also arbitrable.”²³¹ The court did not discuss public policy implications, and unlike *Broughton* it found the claim to be arbitrable. The interesting point in the court’s analysis was how it had arrived at this conclusion. It resolved the issue of intent by focusing on the state legislature, and hypothetically if the court had found that considerations such as public policy had made the statutory claim incompatible with arbitration, it would have denied arbitration.

However, this interpretation of the Supreme Court’s language by *Broughton*, *Gray*, and *Westinghouse Electric* lacks any true rationale for why this view should be supported, absent that it would be “perverse” not to allow states to create such an exception. Accordingly, the majority of case law goes against such an interpretation.

For example, in *Securities Industry Ass’n v. Connolly*,²³² the plaintiffs, the Securities Industry Association and ten corresponding brokerage firms, filed suit against the Massachusetts Secretary of State and the Securities Division director because various Massachusetts regulations, inter alia, had prevented firms from requiring a predispute arbitration agreement as a condition to opening an account.²³³ The First Circuit Appellate Court held that Congress had not intended any securities exceptions under the FAA, and thus that the Massachusetts regulations were preempted.²³⁴ In response to the appellants’ argument that the Commodities Futures Trading Commission (“CFTC”) and the Securities Exchange Commission (“SEC”) had implicitly approved of such securities regulations, the court stated, “Both CFTC’s rulemaking and the SEC’s acquiescence are products of federal, not state, authority. That is a critical distinction. Congress has not structured a similar arbitration exception for securities in general and certainly not for state regulation of securities in particular.”²³⁵ The importance of this decision’s rationale is that it did not focus on the state legislature’s intent, but solely on whether Congress created an exception, which corresponds accurately with *Mitsubishi*. In pressing the importance

230. *Id.* at 1373–74.

231. *Id.*

232. 883 F.2d 1114 (1st Cir. 1989).

233. *Id.* at 1118.

234. *See id.* at 1121–22, 1124.

235. *Id.* at 1122.

of the distinction between Congress and state legislatures, *Connolly* states that “only Congress, not the states, may create exceptions to [the FAA].”²³⁶

Some may argue that *Connolly* lacked the necessary state public interest because securities are largely controlled at the federal level and the decision provides a poor example. But *Connolly*’s preemption reasoning was also used by *In re Conseco Finance Servicing Corp.*²³⁷ Conseco brought a mandamus proceeding requesting that the Texas appellate court grant Conseco’s motion to compel arbitration, which had been denied earlier on grounds that it violated the provisions of the Texas Debt Collections Act (“TDCA”).²³⁸ The court held that arbitration should have been granted because a state cannot avoid the FAA’s application by its own acts, and “[t]hus . . . although a federal statutory claim may escape an arbitration clause that is subject to the FAA, depending upon Congress’ intent, a state statutory cause of action, such as [the plaintiff’s] claim for violations of the [TDCA], may not.”²³⁹ Unlike *Broughton*, this case did not involve a “public injunction,” but the Texas court’s language was so broad that it feasibly could have included such a claim. Furthermore, the reasoning was based upon the rationale that only Congress’ intent matters and that state legislatures cannot legislate around the FAA.

Although those cases may lack authoritative force, the U.S. Supreme Court has provided guidance on the issue. As stated above, the *Broughton* majority is correct that the U.S. Supreme Court has never held that a state statute that prevents arbitration because of a “public injunction” is inconsistent with the FAA—but it has come close. Consider *Mitsubishi Motors*, where the Court, in dicta, found the plaintiff’s Puerto Rico antitrust claims arbitrable and reasoned that this was controlled by *Southland*.²⁴⁰ This analysis is noteworthy in two respects. First, the Court’s rationale sheds light on the divergence between the reasoning of *Broughton* and *Arriaga*. The Court did not hold that the claims were precluded by *Mitsubishi Motors*, where the Court had stated the controversial

236. *Id.* at 1124.

237. *See* 19 S.W.3d 562, 571 (Tex. App. 2000).

238. *Id.* at 565.

239. *Id.* at 570. *See also* Coonly v. Rotan Mosle, Inc., 630 F. Supp. 404, 406 (W.D. Tex. 1985) (holding that the Texas Deceptive Trade Practices Act and the Texas Securities Act claims must be arbitrated because the FAA is controlling and not arbitrating the claims would “produce a result inconsistent with the objective of the federal state”); Value Car Sales, Inc. v. Bouton, 608 So. 2d 860, 861 (Fla. Dist. Ct. App. 1992) (finding that Florida Deceptive and Unfair Trade Practices Act claims are subject to arbitration if the contract contains a predispute arbitration clause).

240. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 620, 623 n.10 (1985).

“Congressional intent” language, but referenced *Southland*, which had found that state legislatures cannot preempt the FAA. Second, the Court never discussed the statute’s public interest importance, which may imply that the “public interest” argument is not that critical, despite the fact that this state statute, as in *Broughton*, allowed for “public injunctive” relief.²⁴¹ Thus, indirectly the Supreme Court has held that a statute’s “public injunctive” relief requirement must be arbitrated.²⁴²

Within its preemption discussion *Broughton* also found that arbitrating a CLRA claim would vitiate the statutory rights because the judicial forum was far superior to arbitration.²⁴³ Weighing the benefits of one forum over another was explicitly prohibited by the U.S. Supreme Court in *Southland*, where the FAA was interpreted as federal legislation that withdrew power from the states to require a judicial forum for the resolution of claims.²⁴⁴ Furthermore, in *Green Tree Financial Corp.*, the Court found that an arbitration forum was acceptable even though social policies were at stake.²⁴⁵ Fundamentally, the California Supreme Court believes that statutory rights cannot be properly vindicated through arbitration, but the U.S. Supreme Court has been consistent in holding that the forum in which statutory rights are vindicated does not change the substantive rights.²⁴⁶

The last preemption argument that the California Supreme Court advanced in *Broughton* was that the FAA’s legislative intent lacked any suggestion that Congress had “contemplated ‘public injunction’ arbitration to be within the universe of arbitration agreements it was attempting to

241. The specific Puerto Rico statute states:

Every person shall have the right to institute proceedings for injunctions before the Court of First Instance to prevent losses or damages to his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by this chapter.

§§ 259 and 261 and subsection (f) of § 263 of this title are hereby excluded from the provisions of this section.

This order for “injunction” shall be issued in accordance with Rule 57 of the Rules of Civil Procedure of 1958, which governs these procedures.

10 P.R. LAWS ANN. § 269a (1999). Except for substituting the phrase “Court of First Instance” for “Superior Court,” the statute has not undergone any significant revisions since the *Mitsubishi Motors* Court reviewed it in 1985.

242. The plaintiff most likely never raised the public interest issue, but the Court stated “any contention that the local antitrust claims are nonarbitrable would be foreclosed by this Court’s decision in *Southland Corp. v. Keating*.” *Mitsubishi Motors*, 473 U.S. at 623 n.10. The phrase “any contention” is so broad that it would encompass any possible argument that the plaintiff could make. Therefore, my interpretation appears to be valid.

243. See *Broughton v. Cigna Healthplans*, 988 P.2d 67, 79 (Cal. 1999).

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

245. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

246. See *supra* Part II for a discussion of relevant Supreme Court cases.

Broughton majority may one day find its preemption ruling reversed.²⁴⁹

247. *Broughton*, 988 P.2d at 79.

248. Cohen & Dayton, *supra* note 120, at 281. The court did cite Cohen and Dayton, but it mistakenly only cited to page 285, which accordingly stated that arbitration should be used in trade disputes and approached with caution. It is odd that the Court would not quote, let alone cite, from page 281 because it not only states that arbitration should only be deployed for common and trade disputes, but also that it should not be used for policy considerations. See *Broughton*, 988 P.2d at 79. A possible reason that the Court did not use this language or even cite to it may lie in the fact that the language goes against arbitrating any statutory right and therefore is broader than the principle that the Court wanted to uphold, namely, that “public injunctions” should not be arbitrated.

249. See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996), where the Court first remanded the case to the Montana Supreme Court to consider its ruling that typeface and construction requirements for arbitration provisions were valid in light of the *Allied-Bruce Terminix* decision. However, the “cavalier” Montana Supreme Court, on remand, did not allow any further briefing or oral

V. BROUGHTON AND “PUBLIC INJUNCTIONS”

An arbitrator has the broad authority to fashion appropriate remedies. The American Arbitration Association recognizes such a broad remedial power.²⁵⁰ “[T]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties.”²⁵¹ Within this broad power also exists the ability to award equitable relief.²⁵²

The convergence of arbitration and “public injunctions” creates two interesting questions of law. First, is it functionally feasible for an arbitrator to consider and award a “public injunction”? Second, are “public injunctions” fundamentally compatible with arbitration? These two issues are discussed below.

A. FEASIBILITY

Even though an arbitrator has been conferred broad remedial and equitable powers, courts have found that arbitrators may sometimes lack

argument, and it merely upheld its prior decision. *Id.* The U.S. Supreme Court again granted certiorari and reversed. *Id.*

250. It is important to recognize that an arbitrator’s power is determined from the language used in the predispute arbitration clause. Thus, a court may be limited in allowing an arbitrator to award various remedies if those remedies have been precluded by the agreement. However, this is unlikely. Most arbitration clauses fashioned today aim to be as broad as possible, therefore foreclosing any adjudication.

For a good discussion on drafting arbitration clauses from the viewpoint of a consumer lender, see Alan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should Be Considered by a Consumer Lender*, SF81 A.L.I.-A.B.A. 215 (2001). For the purposes of this section, I assume that in *Broughton*, the Court examined an arbitration clause that incorporated Rule 43 of the American Arbitration Association. This premise is fair because the California Supreme Court never discussed the language of the arbitration agreement, so in order to present the best analysis of “feasibility,” one should assume the broadest arbitration clause. Justice Kennard dissented in *Broughton* because of this very concern: “Because defendant failed to prove the existence of an arbitration agreement, it is impossible to know the scope of the alleged arbitration agreement and whether it was intended to include plaintiffs’ CLRA claim.” *Broughton*, 988 P.2d at 92.

251. *John A. Cookson Co. v. N.H. Ball Bearings, Inc.*, 787 A.2d 858, 866–67 (N.H. 2001). The California Supreme Court has also recognized this legal principle.

Arbitrators, unless specifically restricted by the agreement to following legal rules, may base their decision upon broad principles of justice and equity. As early as 1852, this court recognized that, “[t]he arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [that is, according to what is just and good].”

See *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1001 (Cal. 1994).

252. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (noting that “arbitrators do have the power to fashion equitable relief”). *See also* *Sperry Int’l Trade, Inc. v. Gov’t of Isr.*, 532 F. Supp. 901, 905 (S.D.N.Y. 1982) (noting that “[a]n arbitration panel may grant equitable relief that a

specific injunctive powers. For example, the *Broughton v. Cigna Healthplans*²⁵³ Court of Appeal has held that an arbitrator seeking CLRA injunctive relief is "not in a position to award injunctive relief or to perform the critical function of monitoring any violations of the injunction by the defendant," and therefore that a CLRA injunctive relief claim must be brought before a court.²⁵⁴ Although the ability of an arbitrator to issue a permanent injunction was not addressed by the California Supreme Court in *Broughton*,²⁵⁵ this issue undoubtedly arises if courts hold that CLRA injunction claims are preempted by the FAA and therefore must be arbitrated according to a predispute arbitration agreement.²⁵⁶

The *Broughton* Court of Appeal first relied upon *Marsch v. Williams*,²⁵⁷ which held that an arbitrator's injunctive power was limited because the arbitrator had lacked the power to appoint receivers.²⁵⁸ Marsch alleged, *inter alia*, that his business partner, Williams, had breached his fiduciary duty and had committed fraud.²⁵⁹ The dispute was arbitrated according to a predispute arbitration clause in the partnership agreement and the arbitration panel found that Williams' violations amounted to nearly \$48.5 million in damages.²⁶⁰ The panel also appointed one of its own as a receiver²⁶¹ to supervise the dissolution of the partnership and its property.²⁶² The court found that arbitrators must have statutory authorization to appoint receivers even if the parties had already agreed to appoint one in the original contract:

There is no power vested in the courts more jealously guarded or safeguarded than this very power to appoint a receiver to take, for the court, the possession and control of the property of others . . . [because]

253. 76 Cal. Rptr. 2d 431 (Ct. App. 1998).

254. *Id.* at 442.

255. *Broughton*, 988 P.2d at 76. The court stated, "We need not decide the broad question framed by the Court of Appeal and by plaintiffs as to whether an arbitrator may ever issue a permanent injunction." *Id.* The court decided the case on narrower grounds, *see id.*, to be discussed *infra* Part V.B.

256. For example, in *Arriaga*, the court allowed the CLRA claim to be arbitrated, so questions about the associated powers of the arbitrator in forming an injunction are highly likely. *See Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1198, 1200 (S.D. Cal. 2001).

257. 28 Cal. Rptr. 2d 402 (Ct. App. 1994).

258. *Id.* at 407.

259. *Id.* at 404.

260. *Id.*

261. The sole purpose of a receivership is to "prevent injury to the thing in controversy and to preserve it, *pendente lite* or after judgment, for the security of all parties in interest, to be finally disposed of as the court may direct." 65 AM. JUR. 2D *Receivers* § 6 (2d ed. 2001).

262. *Marsch*, 28 Cal. Rptr. 2d at 404.

the exercise of the power may mean the [sic] divesting the owner of his lawful right to remain in possession of his property.²⁶³

Marsch only states that arbitrators should not appoint receivers, not that they functionally cannot appoint them. Consider that in *Marsch*, the arbitration panel appointed a receiver who was also on the panel, which according to the court was a conflict of interest. But this hurdle can be overcome. Just as courts have lists of people who can be receivers,²⁶⁴ arbitration associations could also have lists of people who could be receivers. Setting up such a list would not be difficult for the arbitration associations because they could follow the same procedure currently used in selecting arbitrators. Most states require statutory authorization for courts to appoint receivers,²⁶⁵ which is true in California.²⁶⁶ Therefore, the *Marsch* decision is correct in not allowing the appointment of a receiver because the plaintiff lacked statutory authorization. However, all claims for “public injunctive” relief derive from statutes, and many authorize receiverships. Consider *Groom v. Health Net*, where the plaintiff asserted an unfair competition claim under California Business and Professions Code section 17200.²⁶⁷ This statute grants authorization for courts to appoint a receiver, and this power should flow to the arbitrator when the individual has agreed to arbitrate such claims. The claim that the court’s power of appointing a receiver is “jealously guarded” and not within the power of an arbitrator represents the same judicial hostility toward arbitration that has been rejected in *Moses H. Cone Memorial Hospital, Southland, Mitsubishi Motors, Gilmer*, and *Allied-Bruce Terminix*. In the end, *Marsch*’s applicability to a “public injunction” lacks persuasive appeal.

The *Broughton* Court of Appeal also relied on *Luster v. Collins*,²⁶⁸ where the court had held that an arbitrator lacked the necessary power to award damages for violating an injunction.²⁶⁹ *Luster* sued *Collins* because *Collins* had placed a fence, trees, and irrigation equipment on the easement between their respective properties.²⁷⁰ This dispute was settled with a written settlement agreement that contained an arbitration clause for future

263. *Id.* at 407–09.

264. ROBERT I. WEIL & IRA A. BROWN, JR., CIVIL PROCEDURE BEFORE TRIAL §§ 9:768–69 (2001).

265. 65 AM. JUR. 2D *Receivers* § 3.

266. See CAL. CIV. PROC. CODE § 564 (West 1979 & Supp. 2002).

267. 98 Cal. Rptr. 2d 836, 838 (Ct. App. 2000).

268. 19 Cal. Rptr. 2d 215 (Ct. App. 1993).

269. See *id.* at 221–22.

270. *Id.* at 216.

conflict.²⁷¹ Conflicts arose as to the meaning of the written agreement, and after the second arbitration hearing, the arbitrator ordered Collins to remove the trees and signs and assessed a daily \$50 penalty for each tree and sign that was not removed.²⁷² The court held that even though a confirmed arbitration award has the same force and effect as a civil judgment under California Civil Code sections 1285 and 1287.4,²⁷³ the arbitrator lacked power to order a penalty because there was no statutory authorization for an arbitrator to enforce awards.²⁷⁴ Thus, the confirmation of the arbitration award imposing a \$50 per diem penalty was outside the statutory authority of the arbitrator.²⁷⁵

As with *Marsch*, *Luster* lacks the necessary facts to make the legal rules sufficiently applicable to "public injunctions." *Luster* involves a common land dispute over an easement between two parties, whereas disputes under state statutes like the CLRA statutorily authorize "public relief. If the CLRA authorizes injunctive relief and if the arbitration agreement allows injunctive relief, then the arbitrator's associated powers to order enforcement should be presumed. Under California's Code of Civil Procedure section 1283.05,²⁷⁶ arbitrators are recognized as having the same discovery powers as courts, including sanctioning a party for violating a discovery order. If an arbitrator can find statutory authority through the CLRA to impose injunctive relief, then the arbitrator should also have the power to sanction violation of that relief. At

271. *Id.* at 217.

272. *Id.* at 218. The court later determined that the \$50 per diem amount was not compensatory and thus was a sanction or penalty. *See id.* at 221.

273. *See id.* at 222. Section 1285 of the California Code of Civil Procedure states:

Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award.

CAL. CIV. PROC. CODE § 1285 (West 1982). Section 1287.4 of the California Code of Civil Procedure states:

If an award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification.

CAL. CIV. PROC. CODE § 1287.4 (West Supp. 2002).

274. *Luster*, 19 Cal. Rptr. 2d at 221.

275. *Id.* at 222.

276. *Id.* at 221. Section 1283.05 states:

The arbitrator or arbitrators themselves shall have power, in addition to the power of determining the merits of the arbitration, to enforce the rights, remedies, procedures, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in like circumstances in a civil action by a superior court of this state under the provisions of this code, except the power to order the arrest or imprisonment of a person.

CAL. CIV. PROC. CODE § 1283.05(b) (West 1982 & Supp. 2002).

a minimum, section 1283.05 proves that an arbitrator *can* functionally award penalties for violating injunctive relief. But even conceding that an arbitrator does not have the ability to impose monetary penalties on potential violators of an order does not leave the arbitrator powerless. As noted above, the procedural rules surrounding an arbitrator's award, once confirmed, give the award the same effect as if it had been ordered by a court. Thus, a violation of the injunction could allow for contempt proceedings because the injunction would have the same force as law.²⁷⁷ *Luster* may have been a limitation on the powers of an arbitrator, but this does not limit the ability of an arbitrator to award a "public injunction."

The *Broughton* Court of Appeal also relied on *Badgley v. Van Upp*,²⁷⁸ which involved a protracted litigation concerning tenants-in-common property between Badgley and Van Upp.²⁷⁹ After over twenty years of litigation, the defendant argued that the dispute should have been arbitrated, but the court found this argument unpersuasive because one cannot request arbitration through an affirmative defense by way of demurrer if the complaint raises issues susceptible to arbitration.²⁸⁰ In this case, the plaintiff requested an appointment of receiver to protect the property and a preliminary injunction, both of which, according to the court, were beyond the power of the arbitrator to grant.²⁸¹ This case represented a limitation on an arbitrator's power to award equitable relief, and the *Broughton* Court of Appeal used it accordingly.²⁸²

Although *Badgley* may have jurisdictional force, it does not provide proof that arbitrators cannot issue injunctions. Other jurisdictions have found that arbitrators can order preliminary injunctions. For example, in the Southern District of New York, a federal court has denied requests for preliminary injunctions when the injunctions encroach upon the "province of the arbitrator and undermine the arbitration process" because an arbitrator "has the power to grant injunctive relief."²⁸³ But this analysis

277. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 232–33 (2d ed. 1994).

278. 24 Cal. Rptr. 2d 406 (Cal. Ct. App. 1993).

279. *Id.* at 407.

280. *See id.* at 406–08.

281. *See id.*

282. *Broughton v. Cigna Healthplans*, 76 Cal. Rptr. 2d 431, 442 (Ct. App. 1998).

283. *Klein Sleep Prods., Inc. v. Hillside Bedding Co.*, 563 F. Supp. 904, 906–07 (S.D.N.Y. 1982). *See also* *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001) (holding that an arbitrator has broad equitable powers and the ability to award injunctive relief); *In re Hydro-Action, Inc.*, 266 B.R. 638, 650 (Bankr. E.D. Tex. 2001) (denying debtor's argument that injunctive relief could not be pursued through arbitration because arbitration affords the same remedial rights as a court).

can be taken further. Consider *Marsh v. First USA Bank*,²⁸⁴ where the court found that even though the plaintiff had requested injunctive relief under the TILA, the claim was still arbitrable.²⁸⁵ The court held that the statutory rights at issue would be adequately preserved through arbitration.²⁸⁶ In addition, as noted above, courts have recognized an arbitrator's broad power to create remedies: "In general arbitrators enjoy *greater* flexibility than juries and courts in fashioning remedies, and relief that could legally have been ordered by a trial court or jury is also within the normal authority of a contractual arbitrator."²⁸⁷ This "flexibility" allows an arbitrator, according to the American Arbitration Association, to order appropriate relief in the form of monetary damages, specific performance, and an injunction.²⁸⁸ Thus, the specific examples of courts' allowing the arbitration of statutory rights, coupled with arbitrators' broad flexibility to fashion remedies, creates a strong inference that arbitrators can also fashion "public injunctions."

Furthermore, the *Broughton* Court of Appeal used *Sontag Chain Stores Co. v. Superior Court*²⁸⁹ to argue that the court has a special role to play with permanent injunctions because of their fluid nature.²⁹⁰ In discussing injunctive relief, the court in *Sontag Chain Stores* stated, "[A]lthough purporting on its face to be permanent, [injunctions are] in essence of an executory or continuing nature, creating no right but merely assuming to protect a right from unlawful and injurious interference. . . . [Injunctions are] always subject, upon a proper showing, to modification or dissolution."²⁹¹ The *Broughton* Court of Appeal also held that it would not be "efficient or economical" for an arbitrator to award injunctions because a new arbitration proceeding would have to be brought every time a modification was sought.²⁹² California Code of Civil Procedure section 1286.06 allows an arbitrator to modify an award "not later than 30 days after service," and this time restriction, coupled with the frequency of modification, would create a procedural morass that wastes time and money.²⁹³

284. 103 F. Supp. 2d 909 (N.D. Tex. 2000).

285. *See id.* at 924.

286. *See id.*

287. *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1007–08 (Cal. 1994) (emphasis added).

288. *Id.* at 1011–12 (discussing Rule 43 of the American Arbitration Association).

289. 113 P.2d 689 (Cal. 1941).

290. *Broughton v. Cigna Healthplans*, 76 Cal. Rptr. 2d 431, 441 (Ct. App. 1998).

291. *Sontag Chain Stores*, 113 P.2d at 690.

292. *Broughton*, 76 Cal. Rptr. 2d at 441.

293. *See id.*

As the California Supreme Court noted in *Sontag Chain Stores*, injunctions are not truly permanent because the need for modification or dissolution often arises. This does not sound the death knell, however, for arbitrating injunctions. The appropriateness of modifying an injunction through arbitration was the specific question of law in *Swan Magnetics, Inc. v. Superior Court*,²⁹⁴ where the court held that an arbitrator has the authority to modify or dissolve an injunction because of the “inherent modifiability of injunctions and the agreement of the parties to arbitrate their disputes rather than litigate them in court.”²⁹⁵ Allowing the court to intervene on such modification issues would require the court to determine the merits of the dispute, which would “contravene the parties’ expectation that their differences be resolved solely through the arbitration process and would bypass the policy favoring this alternative method of dispute resolution.”²⁹⁶ In addition, arbitrators can extend their jurisdiction to include modifying an injunction. For example, consider *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*,²⁹⁷ where the court upheld an arbitration award that required the arbitrator’s approval for any future price adjustments because of the flexible remedial powers granted to an arbitrator.²⁹⁸ Similarly, arbitrators should be allowed to extend their jurisdiction over injunctive relief for future modifications.

Allowing arbitrators to modify and dissolve injunctions also solves the potential “efficiency and economic” problems raised in *Sontag Chain Stores*. First, only allowing courts to modify injunctive relief awards creates more inefficiency. There would be a greater probability that the losing party would seek modification more frequently in a new forum because the new forum may come out differently on the merits of the case and correspondingly change the order. Thus, allowing courts to modify an arbitrator’s injunction creates a de facto appeal. Second, this defeats the contract expectations of finality because allowing courts to modify injunctions would have the effect of creating more instability.²⁹⁹ Third, the instability and frequent appeals to the court for modifications destroys the central purpose behind arbitration—speedy resolution of disputes.

294. 66 Cal. Rptr. 2d 541 (Ct. App. 1997).

295. *Id.* at 547.

296. *Id.*

297. 918 F.2d 1215 (5th Cir. 1990).

298. *See id.* at 1220.

299. *See* *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1000 (Cal. 1994) (holding that a deferential standard of review for an arbitrator’s award should exist because of the expectations of finality).

When awarding a "public injunction," the arbitrator has the same power that the court has to appoint receiverships or award the necessary penalties. None of the decisions against arbitration present a reason why an arbitrator could not feasibly award "public injunctive" relief. Courts have repeatedly held that arbitrators have broad equitable powers including the ability to issue injunctive relief in a public setting. This award is enforceable and can be modified. An arbitrator's proceedings may be different from those of a court, but this does not foreclose the option of injunctive relief.

B. COMPATIBILITY

In *Broughton*, the California Supreme Court held that an "inherent conflict" existed between arbitration and a CLRA injunctive remedy because the CLRA provision aimed to resolve a public, not private, wrong and the judicial forum had significant advantages over arbitration.³⁰⁰ However, the court overstated its claim and ignored the potential benefits of arbitrating injunctive relief. An arbitration scholar recently noted that "[all t]oo often arbitration is simply compared to litigation and when such comparison is made, arbitration invariably comes out looking like a second-rate method to resolve disputes and achieve justice, particularly because of the cultural bias in favor of a formal legal system."³⁰¹

This Section aims to provide the other side of the debate on awarding "public injunctive" relief through arbitration.

The first "inherent conflict" between the CLRA and arbitration was premised on a public-versus-private distinction. *Broughton* stated that the purpose of the CLRA was to resolve a public wrong over that of an individual harm because the benefit of an injunction primarily accrues to the general public, not to the individual.³⁰² The CLRA allows for individual damages, but these damages are merely incidental to the larger public benefit derived from injunctive relief.³⁰³ The *Broughton* majority supported its public-versus-private distinction with *Mitsubishi Motors*, which had upheld the arbitration of Sherman Act antitrust claims because the Sherman Act awarded treble damages. *Broughton* reasoned that

300. *Broughton v. Cigna Healthplans*, 988 P.2d 67, 78–79 (Cal. 1999).

301. Harding, *supra* note 51, at 480.

302. *See Broughton*, 988 P.2d at 76.

303. *Id.* at 76–77.

arbitration was precluded because, unlike in *Mitsubishi Motors*, treble damages are not allowed under the CLRA.³⁰⁴

However, the CLRA damages provision is substantial, allowing for compensatory, punitive, and restitutionary damages, in addition to attorney's fees and costs.³⁰⁵ Although the CLRA does not allow treble damages, it does allow punitive damages, which are similar to treble damages in that both are considered punitive remedies "designed to punish" ³⁰⁶ "The advantage of statutory penalties over punitive damages is that they replace a jury's largely unguided discretion with a" ³⁰⁷ "But since both damages achieve high levels of deterrence and punishment, these remedies have more similarities than differences."³⁰⁸ In addition, *Broughton* holds that a "public injunction" primarily benefits the public—but the end achieved through punitive damages also benefits the public by deterring future harm. Admittedly, the means used to achieve these ends are different. Punitive damages require individuals to file claims, whereas injunctive relief relies on the individual harmed and on third parties for enforcement. This is a minor distinction because it is the threat of these remedies that protects the general public. Moreover, with both punitive damages and "public injunctive" relief, the central focus is on the individual.

Although treble damages are not allowed under the CLRA, California courts have extended the *Broughton* reasoning to statutes that include a treble damages provision. In *Coast Plaza Doctors Hospital*, the court held that because of the *Broughton* reasoning, injunctive claims under California Business and Professions Code 17020 et seq., are inarbitrable despite the

304. *See id.*

305. The relevant statutory provision states:

(a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following:

- (1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars (\$1,000).
- (2) An order enjoining the methods, acts, or practices.
- (3) Restitution of property.
- (4) Punitive damages.
- (5) Any other relief that the court deems proper.

CAL. CIV. CODE § 1780(a) (West 1998 & Supp. 2002). Additionally, "[t]he court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith." *Id.* § 1780(d).

306. LAYCOCK, *supra* note 277, at 4–5.

307. *Id.* at 704.

308. Arbitrators can award punitive damages. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995).

fact that section 17082 of that same chapter allows for "three times the amount of the actual damages"—treble damages.³⁰⁹ Thus, the majority's argument that the CLRA lacks treble damages loses persuasive force if lower courts apply the *Broughton* reasoning, regardless of the individual damages available under a particular statutory cause of action.

Furthermore, as dissenting Justice Chin discusses, the CLRA confers full control of the litigation on the individual.³¹⁰ An individual can raise a CLRA claim arguing for an injunction and damages and can settle, which subsequently defeats the public purpose of the statute. It seems highly unlikely that a state legislature would give such power to an individual if the statute's main purpose is to provide for public, not individual, relief. The court has narrowly interpreted *Mitsubishi Motors* as solely relying on the Sherman Act's treble damages provision, yet *Mitsubishi Motors* also states that "the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit . . . and the private antitrust plaintiff needs no executive or judicial approval before settling one."³¹¹ This is true under the Sherman Act and is also true under the CLRA, demonstrating the CLRA's individual remedial purpose. In addition, bifurcating the injunctive claim from damages may provide the individual plaintiff with an additional bargaining chip to induce settlement, which would not exist if all of the claims were arbitrated. *Broughton* may have actually decreased social change through litigation.

Although *Broughton* argued against arbitrators resolving matters of public policy, arbitrators repeatedly decide statutory claim issues that have public policy implications. For example, the TILA provides consumers with credit protection by mandating various disclosures of credit terms and by prohibiting unfair credit billing.³¹² The TILA provides individual

309. Section 17082 states:

In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, *any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages*, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter.

In any action under this chapter in which judgment is entered against the defendant the plaintiff shall be awarded a reasonable attorney's fee together with the costs of suit.

CAL. BUS. & PROF. CODE § 17082 (West 1997) (emphasis added).

310. *Broughton v. Cigna Healthplans*, 988 P.2d 67, 88 (Cal. 1999) (Chin, J., dissenting in part and concurring in part).

311. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

312. See *Rossman v. Fleet Bank (R.I. Nat'l Ass'n)*, 280 F.3d 384, 389 (3d Cir. 2002).

damages and, similar to the CLRA, aims to deter future violations.³¹³ However, TILA claims are arbitrable.³¹⁴ Similarly, the Sherman Act promotes a competitive economy, and a plaintiff asserting a claim becomes a private attorney general protecting the public interest.³¹⁵ Yet, Sherman Act claims are arbitrable.³¹⁶ The Age Discrimination Employment Act (“ADEA”) allows individuals to file claims against employers to pursue the important social policy of stamping out age discrimination, but these claims are also arbitrable.³¹⁷ One may argue that the Federal Trade Commission can enforce antitrust claims or that ADEA claims can be enforced by the Equal Employment Opportunity Commission, but the CLRA also has a government-based enforcement scheme, namely, the Attorney General. Disproving the claim, with the CLRA, the California legislature was solely looking to individuals for public enforcement. The main role of the Attorney General is not to receive damages, but to advance the important policy interests of the CLRA. It seems more likely that the legislature wanted to create individual damage claims primarily for compensation with the secondary benefit of advancing policy goals through their litigation.

Broughton states that the CLRA’s purpose is to protect consumers against deceptive business practices.³¹⁸ Although this policy aim of the California legislature cannot be doubted, the court’s statement is incomplete. Section 1760 of the CLRA, which is cited by the court, also states that another goal is to provide efficient and economical procedures to achieve this consumer protection.³¹⁹ Arbitration meets both of these requirements. It is efficient because of arbitrators’ streamlined procedures, coupled with their ability to resolve claims quickly. It is also economical because it saves time and eliminates the costs associated with litigation. Arbitration associations such as the American Arbitration Association (“AAA”) are making arbitration cost-efficient for consumers by capping their arbitration expenses at \$125 for claims under \$10,000 and \$375 for

313. *Williams v. Pub. Fin. Corp.*, 598 F.2d 349, 355 (5th Cir. 1979).

314. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89–91 (2000).

315. *Mitsubishi Motors*, 473 U.S. at 635.

316. *See id.* at 635–39.

317. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

318. *See Broughton v. Cigna Healthplans*, 988 P.2d 67, 74 (Cal. 1999).

319. Specifically, the statute states: “This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.” CAL. CIV. PROC. CODE § 1760 (West 1998).

claims over that amount.³²⁰ The AAA has also instituted a pro bono program and allows waivers for financial hardships.³²¹ Therefore, arbitrating a CLRA injunction follows the statute's original purpose.

The second "inherent conflict" reasoned by *Broughton* is premised on the institutional shortcomings of arbitration compared to adjudication when "public injunctive" relief is claimed.³²² The court believes that modifying injunctions is too cumbersome and that many times courts must reassess the award because of changing circumstances.³²³ "In some cases, the continuing supervision of an injunction is a matter of considerable complexity."³²⁴ This complexity requires a necessary consistency that arbitration lacks.³²⁵ Furthermore, judges are publicly accountable in ways arbitrators are not because judges are subject to discipline, are locally elected, are subject to appellate review, and take constitutional oaths.³²⁶ Therefore, a court is the appropriate forum to provide a "public injunction."

First, the claim that a judicial forum is better than arbitration relies on the same judicial hostility that has been continually rejected by the U.S. Supreme Court. It views arbitration not as a substitute or waiver of substantive rights, but merely as a different forum to resolve the claims.³²⁷ Second, in contrast to the California Supreme Court's view of arbitration, arbitrators routinely handle complex matters. The U.S. Supreme Court has held that arbitrators can handle complex antitrust, RICO, TILA, ADEA, and Securities Act claims. *Broughton*'s specific attack against arbitrators relates to the complexity of supervising an injunction. *Broughton* assumes that just because supervising injunctive relief is difficult for the courts, then it must be equally, if not more, difficult for an arbitrator. The hallmark of arbitration is that it can streamline the process and allow for a more efficient resolution of the conflict. Just as arbitrators can streamline discovery, they can also streamline the supervision of injunctions because they can be more flexible than courts and they have access to a wealth of expertise.³²⁸ Unlike courts, arbitrators may be able to fashion injunctions

320. See Press Release, American Arbitration Association, American Arbitration Association Continues Implementation of Changes Aimed at Fairness for Consumers in Arbitration (Feb. 11, 2002), available at <http://www.adr.org>.

321. See *id.*

322. *Broughton*, 988 P.2d at 77.

323. See *id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

328. See *id.* at 633.

that better meet the needs of the parties and their expectations, which could possibly foreclose repeated pleas for modification.

Furthermore, even if the court is correct that an arbitrator may not be able to supervise an injunction as efficiently as a court, the fact remains that the parties have already agreed beforehand that an arbitrator would handle the dispute. The court's decision inevitably frustrates the contract expectations that a dispute would be resolved through arbitration. Just as a party may decide to settle a CLRA claim or refuse to ask for injunctive relief, a party may choose to forego adjudication of injunctive relief and opt for a streamlined, but possibly inefficient, arbitration. After all, California would enforce a choice-of-law provision contained in an adhesion contract even if enforcement of this provision creates inefficiencies, in order to give effect to the agreed bargain. Thus, the courts should also enforce arbitration agreements.³²⁹ Consider that in *Broughton*, the court's decision bifurcated the issues, leading to the lower court's resolving the injunctive relief claim and to the arbitration of all the other claims. But having the injunctive relief claim resolved in court may create additional obstacles and may substantially hinder the arbitrator's ability to meet the expectations of the parties.

Third, *Broughton* argues that arbitrators are not publicly accountable. However, the parties are able to choose the arbitrators, which contrasts sharply with the assignment of a judge. At least some form of choice is involved. Also, arbitrators do not have free reign to act in an unscrupulous manner. American Arbitration Association Rules 12 and 19 mandate that arbitrators disclose any circumstances that could affect impartiality or create bias.³³⁰ Arbitrators do not have to take an oath, but under the AAA's appointment form, arbitrators swear that they will "faithfully and fairly hear and examine the matters in controversy between the . . . Parties, in accordance with their Arbitration Agreement, and will make a just Award according to the best of [their] understanding."³³¹ Likewise, the ethical code developed by the AAA and American Bar Association dictates that arbitrators "owe a responsibility of fairness and integrity 'to the public, to the parties whose rights will be decided, and to all other participants in the proceeding.'"³³² Even though arbitrators are not elected, they are still publicly accountable because they owe a duty of fairness and responsibility to the public. In addition, *Broughton*'s specific argument rests on a

329. See *Wash. Mut. Bank, FA v. Superior Court*, 15 P.3d 1071, 1079–80 (Cal. 2001).

330. 3 MACNEIL ET AL., *supra* note 34, § 28.2.6.

331. *Id.* § 27.4.2.

332. *Id.* § 27.2.4.

cognizable public interest, which as previously shown, does not exist in regard to a CLRA remedy because it focuses on the individual.

Broughton also argues that judges are better because the level of appellate review for arbitration is minimal compared to that of a court's decision. However, in every case in which a party contractually decides to arbitrate a dispute the resulting award is subject to minimal review. The court provides no rationale as to why higher appellate standards of review are needed for court-ordered injunctions. *Broughton* uses the differences of appellate review to demonstrate lack of accountability, but the finding only demonstrates the judicial hostility of the majority toward arbitration.

In sum, an "inherent conflict" does not exist between arbitration and a CLRA injunction. They are compatible. Although a public policy interest does exist, this is not the primary interest because of the overarching emphasis the CLRA places on the individual. The individual can bring, drop, and settle any dispute under the CLRA at any time. According to the U.S. Supreme Court, claims brought under public policy statutes can be arbitrated. These arbitrators are experienced, efficient, accountable, and flexible in many ways that the courts are not. Allowing arbitrators to award a CLRA injunction does not hinder a state policy interest, but adheres to the individual's contractual choice under the FAA to arbitrate.

VI. CONCLUSION

A state legislature cannot prevent a valid arbitration clause from being enforced, even if this results in the arbitration of a "public injunction." The U.S. Supreme Court has held that only Congress and not state legislatures can prevent the enforcement of arbitration clauses. Those decisions may differ from the original purpose of the FAA, but this contradiction between the Supreme Court and the FAA's history implies an explicit Supreme Court preference for arbitration, which should be respected by lower courts like *Broughton*. Furthermore, considering the political reality, this strong preference is likely to exist for years to come. Thus, through the U.S. Supreme Court and the tacit acceptance by Congress, arbitration has evolved.

Arbitrators have been given the necessary power and credibility to deal with issues of public policy. Even though the courts may be reluctant to give up their jealously guarded powers, arbitrators can effectively award and modify injunctive relief. The arbitration process may be different from the court process throughout these various stages, but arbitration is inherently different from litigation. It should be expected that just as an

arbitrator may handle questions of evidence differently than a court, an arbitrator may handle injunctive relief differently than a court. These differences should not be a reason to foreclose an arbitrator from awarding relief that the parties have previously agreed to through contract.

Predispute arbitration clauses may be unconscionable if they are unfairly oppressive or if the consumer lacked the necessary bargaining power, but if this is true, then these clauses should be voided on those grounds.³³³ Courts like *Broughton* should not pursue these same goals by stating that an arbitrator cannot issue an injunction. Even though the American Arbitration Association recently has announced that it will no longer enforce predispute arbitration agreements between Health Maintenance Organizations and patients,³³⁴ this does not necessarily imply that arbitration associations will refuse to enforce all predispute commercial agreements. Increasingly, it will be difficult for courts to maintain that arbitrators cannot issue “public injunctive” relief, especially if arbitration associations create even more favorable procedural rules. For example, the Securities and Exchange Commission recently has adopted amendments from the National Association of Securities Dealers Arbitration Code that allow an arbitration panel to award permanent injunctions.³³⁵

Citibank recently sent out a change-in-terms notice to its credit card customers in California.³³⁶ Citibank added a mandatory arbitration clause that “provides that any dispute may be resolved by binding arbitration” and that “[a]ll Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive, or declaratory relief) they seek . . . includ[ing] Claims based on contract, tort, . . . statutory or regulatory provisions.”³³⁷ Including the injunctive relief language was most likely a response to *Broughton*. Whether or not a California court will allow “public injunctive” relief to be resolved through arbitration in the

333. See generally Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996) (arguing that *Doctor's Associates* prevents courts from stringently applying unconscionability to arbitration agreements over regular commercial contracts).

334. Charles Ornstein, *Health Care Disputes at Issue*, L.A. TIMES, Mar. 11, 2002, at B1.

335. Justin Kelly, *SEC Approves NASD Arbitration Rule on Injunctive Relief*, ADRWorld.com, at <http://www.adrworld.com/opendocument.asp> (Jan. 22, 2002).

336. Citibank acquired Associates National Bank, and this notice was sent out to Associates' credit card holders.

337. Notice of Change in Terms to Your Citibank Card Agreement, Citibank (Mar. 2002) (on file with author).

face of such language is an open question, but a court certainly *should* allow it.