A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements

Michael Schneidereit

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol55/iss4/5

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements

MICHAEL SCHNEIDEREIT*

[The law is] like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling, and somebody is always going to nigh catch pneumonia. . . . The law is always too short and too tight for growing humankind. The best you can do is do something and then make up some law to fit and by the time that law gets on the books you would have done something different.†

INTRODUCTION

This Note uses a California Court of Appeals case, Mercuro v. Superior Court,1 as a launching point for an examination of mandatory arbitration clauses in employment contracts. After summarizing Mercuro, it considers the history of arbitration in the United States since 1925, taking note of several landmark United States Supreme Court cases that altered the jurisdictional relationship between the courts and arbitration. Next, it examines the arguments that have been marshaled in opposition to the current state of arbitration jurisprudence, including those professing support from empirical research. This section outlines the basic problems with mandatory employment arbitration. Third, it searches down several avenues, particularly those of the United States Supreme Court and the legislature, for a potential solution to the alleged problem. Finally, it examines and assesses the viability of the solution crafted by the California Supreme Court.

* J.D. Candidate, University of California, Hastings College of the Law, 2004; B.A., University of California, Santa Cruz, 2000. This Note originated from Professor Charles L. Knapp’s “Case Studies in Contracts” seminar. I would like to thank Professor Knapp for his guidance both in that class and in first-year Contracts. Thanks also to Celeste Evans and Peter Schneidereit for their kind support.

[987]
I. A Case Study: Mercuro v. Superior Court

In the spring of 1997, Countrywide Securities Corporation presented certain employees with an arbitration agreement. The agreement required signatories to "knowingly and voluntarily" waive their right to a jury trial and submit certain employment-related disputes to arbitration. Countrywide offered twenty-five shares of its stock or one extra day of vacation in exchange for signing the agreement. Fred Mercuro, a securities broker for Countrywide, chose not to sign, claiming that the consideration was inadequate.

Unfortunately for Mercuro, subsequent events demonstrated that Countrywide did not intend for him to have a choice. Mercuro was first told by his superiors that he "did not have the option of not signing the agreement" and that he "would find it difficult to make a living at Countrywide" if he did not sign. Countrywide further suggested that his refusal to sign might be explained by the fact that he "was not generationally compatible with the other salesmen." He was told that Countrywide's corporate attorney was "livid about [his] refusal to sign the arbitration agreement" and that Countrywide's Chief Executive Officer regretted hiring "this S.O.B" who "had caused him considerable grief." Mercuro was threatened with removal of his accounts, nonapproval of his road trips, and "whatever action was necessary to drive [him] out." Countrywide's Chief Operating Officer confirmed to Mercuro that the CEO and corporate attorney were planning to "drive [him] out, making it all but impossible [for him] to make a living" and leaving him "in California with no income and litigating a court case which would take years to resolve." No doubt this was a bitter pill for Mercuro, who was fifty-two years old at the time and had moved from Florida to California only one year earlier.

Mercuro eventually yielded and signed the agreement. He later asserted that he had signed the agreement under duress and coercion, explaining that it was "clear that I had to sign [the agreement] in order to

2. Id. at 674.
3. Id.
4. Id.
5. Id.
6. Id. at 674-75.
7. Id. at 675.
8. Id.
9. Id. at 676.
10. Id. at 675.
save my job at Countrywide... I felt so desperate that I finally signed the agreement.”

After leaving Countrywide in March 2000, Mercuro filed an action charging Countrywide with “numerous employment-related torts including age and disability discrimination, fraud, and wrongful termination in violation of public policy.” In response, Countrywide filed a motion to compel arbitration pursuant to the agreement Mercuro had signed. The Superior Court granted the motion to compel, and Mercuro appealed the decision.

The Court of Appeal found the arbitration agreement unconscionable and therefore unenforceable. Under California law, two elements must be proven to establish a defense of unconscionability: procedural unconscionability and substantive unconscionability. The court first found the agreement procedurally unconscionable. Citing from Armentariz v. Foundation Health Psychcare Services, Inc., a California Supreme Court decision, the court defined procedural unconscionability as “adhesiveness—a set of circumstances in which the weaker or ‘adhering’ party is presented a contract drafted by the stronger party on a take it or leave it basis.” The court found a high degree of procedural unconscionability because of Countrywide’s “highly oppressive conduct” in securing Mercuro’s signature. Evidence of Countrywide’s threats and the fact that Mercuro was fifty-two years old and had only recently moved to California strongly support the court’s finding.

11. Id.
12. Id. at 673.
13. As an aside, it is interesting to contemplate why Mercuro was so firmly set against signing the arbitration agreement. His unwillingness to do so certainly evinces a level of sophistication and understanding not common to the average employee. See, e.g., Sarah Rudolph Cole, Uniform Arbitration: “One Size Fits All” Does Not Fit, 16 OHIO ST. J. ON DISP. RESOL. 759, 769 (2001) (“[E]mployees typically learn about crucial issues such as dispute resolution mechanisms... a substantial amount of time after beginning employment.”) (citing David Charny, Nonlegal Sanctions in Commercial Relationships, 104 HARV. L. REV. 375 (1990)). Then again, the fact that his recalcitrance so raised the hackles of Countrywide’s highest ranking officers indicates that he probably was more valuable and possibly more sophisticated than the average employee. Given the evident bad blood between Mercuro and those officers, one can speculate that Mercuro may have already decided to sue Countrywide at the time he was presented with the arbitration agreement. He may have waited until March of 2000 to sue because he had a fixed-term employment contract. If so, he could not have quit earlier without being in breach. This might also explain why Countrywide, rather than simply firing Mercuro, was forced instead to threaten his benefits within the company.
14. Mercuro, 116 Cal. Rptr. 2d at 675.
15. 6 P.3d 669, 689 (Cal. 2000).
16. Mercuro, 116 Cal. Rptr. 2d at 676.
17. Id.
The court noted that the presence of a high degree of procedural unconscionability meant that Mercuro would have to make only a "minimal showing" of substantive unconscionability to avoid enforcement. Under *Armendariz*, substantive unconscionability can be established by "overly harsh" or "one-sided" terms in an agreement. Mercuro made two arguments in attempting to establish substantive unconscionability. First, he contended that the agreement was unfairly one-sided because it excluded from arbitration claims for injunctive or equitable relief for intellectual property violations, unfair competition, and unauthorized disclosure of trade secrets or confidential information. These were all claims that Countrywide was likely to bring. Yet the agreement required arbitration of almost all of Mercuro's potential claims. For example, Mercuro would have to arbitrate any disputes relating to breach of express or implied contracts or covenants, tort claims, claims of discrimination based on race, sex, age or disability, or claims for violations of any federal, state or other governmental constitution, statute, ordinance, regulation or public policy. Agreeing with Mercuro, the court noted that, under *Armendariz*, substantive unconscionability could be established if the stronger party to an arbitration agreement was given a choice of forum while the weaker party was forced to arbitrate all claims. The court rejected Countrywide's arguments that the agreement was not one-sided because Mercuro was exempted from arbitrating worker's compensation and unemployment benefits claim. The court explained that "neither [worker's compensation nor unemployment benefits claims are] a proper subject for arbitration."

---

18. *Id.* This rule is indeed very useful to a court wishing to invalidate a mandatory agreement to arbitrate employment claims because such agreements will almost always have an element of adhesiveness, and hence procedural unconscionability. In *Stirlen v. Supercuts*, 60 Cal. Rptr. 2d 138, 147 (Cal. Ct. App. 1997), for example, the California Supreme Court found that a high-ranking executive who had been courted by Supercuts was nevertheless the victim of procedural unconscionability. Such a broad approach is not necessarily unjust, since the proliferation of form agreements can result in a diminution of choice even for relatively powerful employees. As one prominent scholar has noted, "[s]hopping [for more favorable contracts] can protect shoppers only when it is a widespread activity." Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1229 (1983). In other words, even an employee with significant bargaining power will find it difficult to wriggle out of a form agreement if no other employee has been able to do so. 19. *Armendariz*, 6 P.3d at 690. 20. *Mercuro*, 116 Cal. Rptr. 2d at 677. 21. *Id.* at 676. 22. *Id.* at 677. 23. *Id.* 24. *Id.* 25. *Id.*
The court also rejected Countrywide's argument that it had a reasonable business justification for the exemption. Under *Stirlen* and *Armendariz*, it is not unconscionable for a party with superior bargaining strength to insert contractual terms that provide it with "extra protection" not afforded to the opposing party so long as there is a legitimate need for those terms. Countrywide claimed that it had a legitimate commercial need to get effective relief for intellectual property violations, but could not do so through arbitration since arbitral tribunals are unable to grant equitable or injunctive relief. However, the *Mercuro* court noted that, under the Code of Civil Procedure, a court may grant provisional injunctive relief to a party involved in arbitration. The court concluded that because Countrywide could get provisional injunctive relief from a court, it had not shown that it had a legitimate commercial need for the exemption.

*Mercuro* is a useful case from which to start assessing the enforcement of mandatory employment arbitration contracts because it has an emotional impact. A classic power relationship is at its core: the large, callous corporation on one side, versus the relatively powerless, isolated employee on the other. The decision feels just. Yet had *Mercuro* been decided in a different jurisdiction, the outcome may well have been different. The California court's finding of procedural unconscionability in Mercuro would likely be sustained in any jurisdiction, but the finding of substantive unconscionability, premised as it was on mutuality of remedy, is a finding peculiar to California courts. Had Mercuro brought his case in another jurisdiction, the arbitration clause would likely have been enforced. The reasons for this are explored in more detail below. For now, it will suffice to keep Mercuro in mind as a moral keel with which to navigate the cold doctrine that is mandatory employment arbitration jurisprudence.

II. FROM DAVID TO GOLIATH: THE HISTORY OF ARBITRATION IN THE UNITED STATES

It is essential to understand the history of arbitration in America to appreciate the quandary that the California state courts presently face. Modern American arbitration jurisprudence traces its history to 1925, when Congress passed the Federal Arbitration Act ("FAA"). Prior to

---

27. 6 P.3d 669, 691 (Cal. 2000).
28. Id.
30. Id. at 678.
31. Id.
that time, common law courts in both England and America would not enforce agreements to arbitrate, believing that they "ousted" jurisdiction from the courts at a time when dockets still thirsted for cases. However, the burgeoning mercantile interests of the early 20th century outweighed the predilections of the judiciary, and the FAA was passed, declaring arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Since 1925, the United States Supreme Court has issued a line of cases interpreting the FAA. A landmark among these cases is Prima Paint Corp. v. Flood & Conklin Mfg. Co., which signaled the advent of the Court's pro-arbitration stance. In Prima Paint, the Court propounded the legal fiction that an arbitration agreement could be "separa[ted]" from the remainder of a contract. This allowed an arbitrator to decide the question of whether a contract was induced by fraud because the arbitration agreement was not itself part of the contract.

---


The need for the law arises from... the jealousy of the English courts for their own jurisdiction... This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment.


36. For a time, the Supreme Court remained skeptical of arbitration, and in fact crafted a public policy defense to mandatory agreements to arbitrate claims under section 12(2) of the Securities Act of 1933. This defense incorporated arguments against arbitration that remain in vogue. See Wilko v. Swan. 346 U.S. 427 (1953). Wilko was eventually overruled by Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477 (1989).


38. See id. at 402.

39. A noteworthy consequence the separability doctrine espoused by Prima Paint is that it favors plaintiffs seeking court review of an unconscionability defense as opposed to a fraud defense. This is because an unconscionability defense will more likely be directed at the arbitral process itself, and thereby inherently attach to the arbitration clause, whereas a fraud defense will more likely be directed against the contract as a whole. Of course, occasions where a fraud defense is directed exclusively at the arbitration clause in a contract are not inconceivable (for example, if fraud is used to induce an employee's assent to a separate arbitration clause after the initial contract has been signed), but it is on the whole less likely.
Following *Prima Paint*, the Court issued a series of decisions further establishing its new pro-arbitration bent. By 1983, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court concluded that the FAA evinces "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." The decision enshrined the FAA as federal substantive law, meaning that it could be applied in state courts under the framework associated with *Erie Railroad v. Tompkins*. The Court buttressed its position in *Southland Corp. v. Keating*, holding that enactment of the FAA was an exercise of Congress' Commerce Clause power and that it therefore superceded any conflicting state laws by virtue of the Supremacy Clause.

In 1991, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, the milestone case establishing the validity of mandatory arbitration clauses in employment agreements. *Gilmer* held specifically that claims under the Age Discrimination in Employment Act of 1967 ("ADEA") could be subjected to mandatory arbitration. Gilmer, the petitioner, was required by his employer, the respondent, to register with the New York Stock Exchange (NYSE). The registration application contained an agreement to arbitrate employment claims. When Gilmer was fired, he brought an age discrimination suit in federal court, and his employer moved to compel arbitration.

The *Gilmer* Court voiced in no uncertain terms its sympathy towards arbitration. The Court relied on its legacy of pro-arbitration decisions to establish that statutory claims are presumptively arbitrable and that the burden is on the party seeking to avoid enforcement to show that Congress "intended to preclude a waiver of a judicial forum." The Court

---


41. 460 U.S. 1, 24 (1983).

42. 304 U.S. 64 (1938). *See Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir. 2001).


44. *Id.; see also* *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that a Montana law requiring arbitration clauses to be underlined was preempted by the FAA). The Court stated that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Id.* at 687; *Perry v. Thomas* 482 U.S. 483 (1987); *Lagatree v. Luce, Forward, Hamilton & Scripps*, 88 Cal. Rptr. 2d 664 (Cal. Ct. App. 1999).


46. *Id.* at 23.

47. *Id.*

48. *Id.* at 23-24.

49. *Id.* at 26.
concluded that Congress had not intended to preclude arbitration of ADEA claims.

The Court flatly rejected Gilmer's objections to mandatory arbitration. First, confronted with Gilmer's contention that arbitration panels may be biased, the Court retorted: "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." In the Court's opinion, the NYSE rules governing arbitration would be sufficient to eliminate any potential bias. The Court also took the opportunity to restrict the overturn of arbitration decisions to cases "where there was evident partiality or corruption in the arbitrators."

Second, the Court refused to credit Gilmer's complaint that the limits on discovery in arbitration would deprive him of a fair opportunity to present his claims. The Court found that the NYSE's limits on discovery were not unfair, and observed that limits on discovery are indeed one of the advantages of arbitration. Second, the Court rejected Gilmer's complaint that the lack of written decisions in arbitration is unfair because it stifles development of the law. The Court explained that the NYSE did provide for written decisions, and that there will always be some claims that go to court to provide fodder for developing the law. Third, the Court found, contrary to Gilmer's assertions, that equitable relief was available under the NYSE's arbitration rules.

Finally, the Court rejected Gilmer's argument that he was a victim of unequal bargaining power. Observing that "[m]ere inequality in bargaining power...is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context," the Court explained that allegations of unequal bargaining power should be examined on a case by case basis. In a nod toward the doctrines of unconscionability and duress, the Court added that such allegations will support revocation of a contract if they represent "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" Finding Gilmer to be "an experienced businessman," the Court concluded that he had not been the victim of any such inequality

50. Id. at 30.
51. Id. at 30–31.
52. Id. at 30.
53. Id. at 31.
54. Id. at 31–32.
55. Id. at 32.
56. Id. at 33.
57. Id.
58. Id.
in bargaining power. Thus, *Gilmer* ushered in the age of mandatory employment arbitration.

Most Circuits and State courts have obediently toed the line drawn by *Gilmer*. However, there have been some notable developments and divergences. In *Cole v. Burns Intl. Security Services*, the District of Columbia Circuit wrought from *Gilmer*'s negation of defenses to arbitration a set of positive factors that must be present for an employment-related arbitration agreement to be enforceable against a Title VII claim. These factors mandate that the agreement provide neutral arbitrators, more than minimal discovery, a written award, and all types of relief otherwise available in court. The court further held that such agreements must not "require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum."

The Ninth Circuit, at least at first, interpreted *Gilmer* more broadly. In a trio of cases, it attempted to salvage what it could from *Gilmer*'s assault upon an employee's right to a jury trial. In *Craft v. Campbell Soup Co.*, the court seized upon the distinction that *Gilmer* dealt not with an employment agreement but a registration application to hold that employment agreements were exempted from the FAA. The court reaffirmed this holding in *Circuit City Stores v. Adams*. During its 2000 term, the U.S. Supreme Court granted certiorari in *Circuit City* in order to resolve the conflict between the Ninth Circuit and all other circuits. The Court reversed the Ninth Circuit, concluding that employment agreements are not exempt from the FAA.

This left but one rogue decision unsettled. In *Duffield v. Robertson Stephens & Co.*, the Ninth Circuit had held that mandatory agreements to arbitrate Title VII and California Fair Employment and Housing Act

59. 105 F.3d 1465 (D.C. Cir. 1997).
60. Id. at 1482 (emphasis omitted).
61. 177 F.3d 1083 (9th Cir. 1999).
62. To reach this conclusion, the court interpreted the FAA in a historical manner. 9 U.S.C. § 2 states that the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce." Looking back to 1925, when the FAA was drafted, the court observed that the commerce power was relatively narrow. Congress would not have expected it to cover employment contracts outside of interstate commerce. So by exempting interstate workers from the FAA, Congress believed that it was exempting all employment contracts under its authority from the FAA. All other employment contracts would have been assumed exempt from the FAA as a matter of course because they were not within the commerce power.
63. 194 F.3d 1070 (9th Cir. 1999).
65. 144 F.3d 1182 (9th Cir. 1998).
("FEHA") claims could not be imposed as a condition of employment. However, in EEOC v. Luce, Forward, Hamilton & Scripps, the Ninth Circuit felt compelled to abandon the Duffield outpost, recognizing the patent conflict with the Supreme Court's opinion in Circuit City.

With the abandonment of Duffield, the last vestige of a defense to mandatory arbitration of employment contracts in California lies with state contract law. The FAA states that arbitration agreements may be revoked "upon such grounds as exist at law or in equity for the revocation of any contract." This leaves open the defenses of duress and, perhaps more significantly, unconscionability. Indeed, on remand, the Ninth Circuit in Circuit City was able to retreat to state principles of unconscionability to rescind the arbitration agreement at issue.

III. DEFINING THE PROBLEM

Before evaluating possible solutions to the problem of mandatory employment arbitration, the basic problems associated with such agreements must be acknowledged. Fortunately for this purpose at least, there is no dearth of criticism leveled at mandatory employment arbitration. What follows is only a brief survey of some of the more prominent complaints.

First, it has been argued that the majority of mandatory employment arbitration agreements are contracts of adhesion. Prospective employees have no real choice but to sign such agreements, because the alternative would likely be loss of the offer of employment. Most employees first encounter a mandatory arbitration clause at the moment they are being hired. It comes nestled somewhere within the boilerplate type of the employment contract, the fruit of their job search. They are told that

66. In a creative opinion, the court reasoned that language in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081 (1991), stating that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title" evidenced a Congressional intent to prohibit mandatory arbitration. The court reasoned that mandatory arbitration would in fact limit the choice of forum, thereby contradicting the stated intent of encouraging alternative fora for dispute resolution. See Duffield, 144 F.3d at 1189-1200, overruled by E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 745 (9th Cir. 2003).

67. 345 F.3d 742, 749 (9th Cir 2003) (en banc).


69. Unconscionability is a more likely defense to mandatory arbitration because, as discussed in more detail below, it is a more open and inclusive standard. To meet a claim of duress, a plaintiff must show (1) a wrongful or improper threat, (2) a lack of reasonable alternative, and (3) actual inducement of the contract by the threat. Restatement (Second) of Contracts § 175 (1981).

70. Circuit City Stores v. Adams, 279 F.3d 889, 892 (9th Cir. 2002).

they must sign the agreement in order to get the job. Perhaps they read the agreement before signing, perhaps not. Even if they do, they are unlikely to understand its implications. And if they are familiar with the implications, they still are unlikely to challenge the inclusion of an arbitration clause, for they are at the honeymoon stage of their relationship with their employer and do not wish to chill any feet. Furthermore, the employer would be unlikely to succumb to such a challenge even were it made, unless the employee were in a position of uncommon bargaining power.

Yet the fact that a mandatory arbitration agreement is a contract of adhesion does not, by itself, render the agreement unenforceable. Nevertheless, a finding that a mandatory arbitration agreement is a contract of adhesion provides valuable ammunition for a defense of procedural unconscionability.

A second criticism, directed at the arbitration process itself, is that plaintiff-employees may suffer from a bias in arbitration towards "repeat players." Because employers are inevitably engaged in arbitration more often than employees, they acquire a degree of experience and familiarity in dealing with the arbitration procedure. Employers thereby gain added familiarity with arbitrators, advantages due to economies of scale, and a greater interest in the large-scale picture of how arbitration is conducted. This greater interest in turn motivates employers to lobby and pursue other avenues of political influence in ensuring that the interest is protected.

Another asserted failure of arbitration is that it neither creates nor adheres to precedent, and often requires no written judgments. There is therefore no public record by which to examine trends in decisions, nor is

72. See Christine M. Reilly, Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment, 90 CAL. L. REV. 1203, 1231 (discussing how employees rely on inaccurate heuristics to evaluate agreements to arbitrate).

73. Id. at 1235.

74. Lagatree v. Luce, Forward, Hamilton & Scripps, 88 Cal. Rptr. 2d 664, 680 (Cal. Ct. App. 1999) (holding that a mandatory arbitration agreement is "not rendered unenforceable just because it is required as a condition of employment or offered on a 'take it or leave it' basis").

75. Since a finding of procedural unconscionability requires that the assenting party had no real choice but to assent, a contract of adhesion will almost certainly satisfy that requirement. See, e.g., Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000).


77. Bingham, supra note 76, at 241.

there a means of monitoring the decisions. This is a particularly salient criticism with respect to arbitration of civil rights claims, where public knowledge of violations and penalties is crucial to ensure deterrence and supervision. A further rights-based complaint is that mandatory arbitration denies the plaintiff the fundamental right to a jury trial. The rebuttal here is simply that the plaintiff has assented to the agreement, thereby voluntarily relinquishing the right to a jury. Nonetheless, not all assents are voluntary, and adhesive contracts still pose a problem in this regard. Limits on discovery commonly imposed in arbitration have also come under fire. However they are also a mainstay of pro-arbitration arguments because they speed the arbitral process.

One might hope that sheer empirical data could cut through the arguments and perhaps point the way towards a solution. Unfortunately, as seems to be the case with many of the knottiest legal problems, such data is spotty and inconclusive, tending to support both sides of the debate. Data can be apparently assembled either to show that arbitration is clearly unfair, or the exact opposite, depending on how it is spun.

79. See, e.g., Kinney v. United Healthcare Servs., Inc., 83 Cal. Rptr. 2d 348, 354 (Cal. Ct. App. 1999) ("Faced with the issue of whether a unilateral obligation to arbitrate is unconscionable, we conclude that it is. The party who is required to submit his or her claims to arbitration foregoes the right, otherwise guaranteed by the federal and state Constitutions, to have those claims tried before a jury.").

80. See, e.g., Fitzgibbon, supra note 78, at 1410.

81. See, e.g., Paul L. Edenfield, No More the Independent and Virtuous Judiciary?: Triaging Anti-discrimination Policy in a Post-Gilmer World, 54 STAN. L. REV. 1321, 1330 (2002) (claiming that an early 1990s study "showed employees won sixty-eight percent of the time in court, and only twenty-eight percent in arbitration"); Bingham, supra note 76, at 234 (presenting statistics showing that "[employees . . . have significantly lower outcomes in cases involving repeat player employers"); Katherine Eddy, To Every Remedy A Wrong: The Confounding of Civil Liberties Through Mandatory Arbitration Clauses in Employment Contracts, 52 HASTINGS L.J. 771, 777 (2001) (stating that plaintiff-employees are "estimated to win nearly 70% of the 25,000 wrongful discharge and discrimination cases filed in state and federal courts nationwide, with the average jury award at approximately $700,000").

82. See, e.g., Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 COLUM. HUM. RTS. L. REV. 29, 47 (1998) (presenting data that employee-plaintiffs only won forty-four percent of jury verdicts in 1994, and that, of all employment discrimination cases brought in 1994, sixty percent were disposed of by pre-trial motion, won by employers ninety-eight percent of the time). Maltby also cites to an early 1990s study showing that plaintiff-employees won sixty-eight percent of cases in arbitration as opposed to twenty-eight percent in trial. Id. at 49; U.S. GEN. ACCT. OFF., ALTERNATIVE DISP. RESOL.: EMPLOYERS' EXPERIENCE WITH ADR IN THE WORKPLACE 19 (1997) (presenting evidence that at least one company reported that the overall cost of ADR was less than half of the cost of litigating employment disputes); Michael Z. Green, Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims, 31 RUTGERS L.J. 399, 450 (2000) (arguing that criticism of arbitration "loses its sting" in light of statistics showing a severe backlog of employment cases filed with the Equal Employment Opportunity Commission); Matthew Struble, Are All Contracts of Employment Exempt from the Provisions of the Federal Arbitration Act?: The Supreme Court Settles the Matter, 67 Mo. L. REV. 651, 682 (2002).

Of the employment discrimination cases in federal district court in 1994, employees won an abysmal 14.9% of the time. On the other hand, the mean damages awarded to those em-
IV. POTENTIAL SOLUTIONS

A. THE UNITED STATES SUPREME COURT AS THE SOURCE OF A SOLUTION

If one’s reading were confined to Supreme Court opinions of the past quarter-century, it may seem that criticism of mandatory arbitration is the province of malcontents. That to complain about arbitration being inferior to the courts is like complaining about the telephone being inferior to letter-writing—an atavism. It is as if the Court remains reluctant to tweeze out the shortcomings of employment arbitration lest it causes the entire fabric of arbitration to unravel. Perhaps such exaggerated regard for arbitration could once have been justified as offsetting the bias against underprivileged arbitration. But in an age where corporations send sixty-two percent of their employment disputes to arbitration, such a justification is disingenuous. Neither does the Court’s devout invocation of the FAA’s stated purpose of placing arbitration agreements “on the same footing as other contracts” ring altogether true. Legislative history reveals that the FAA was intended to apply only to agreements between commercial entities and not in the employment context. Add to this the Court’s summary dismissal of criticisms of employment arbitration, and its position borders on denial.

In *Gilmer*, for example, the Court refused to “indulge” Gilmer’s argument concerning the “repeat player effect.” In so refusing, the Court paid no heed to the significant research and literature establishing the repeat player effect as a genuine handicap for first-time plaintiffs suing their employees. Instead, the Court relied upon an apparent intuition that arbitrators will abide by rules of fair-play set out for them. Of employees was in excess of $500,000. Mean damages awarded to successful employee claimants in arbitration cases decided by the American Arbitration Association from 1993 to 1995 was a mere $49,030; however, employees won in sixty-three percent of arbitrations. Thus, while awards were typically smaller than in litigation, employees who arbitrated were far more likely to obtain relief.

---

83. This notion is apparent in the *Gilmer* Court’s refusal to “indulge” skepticism about the fairness of arbitration proceedings. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991).


86. See *Gilmer*, 500 U.S. at 20, in which the Court rejected four of the most prominent arguments against employment arbitration in three scant pages. The arguments claimed that employment arbitration was flawed because of (1) the repeat player effect, (2) the limits on discovery, (3) the lack of written awards, and (4) the inequality in bargaining power. *Id.* at 30–33.

87. *Id.* at 30.

88. See Bingham, *supra* note 76, at 238.
course, such faith in arbitrators ignores the possibility that an arbitrator could be influenced by an unconscious bias.

The Court’s dismissal of Gilmer’s claim that he was the victim of unequal bargaining power was equally perfunctory. The Court justified its reasoning by noting that Gilmer was “an experienced businessman,” thereby placing the burden on Gilmer to demonstrate the presence of unequal bargaining power. A more realistic assessment might have placed the burden on Gilmer’s employer to show that Gilmer had a real choice in the matter. In all, the Supreme Court is not the place to look for acknowledgement of the problem. Having built its castle in the sky, it is unlikely that the Supreme Court will reverse its position on employment arbitration in the near future.

B. The Legislature as the Source of a Solution

Neither may it be prudent to hold out for a legislative fix. In February of 2002, California Senate Bill 1538 was introduced, proposing to “invalidate predispute arbitration agreements between employers and employees” that related to FEHA, and to prohibit employers from requiring employees to sign mandatory arbitration agreements as a condition of employment. On September 10, 2002, Governor Gray Davis vetoed the bill, explaining that “in these difficult economic times I am not prepared to place additional burdens on employers by preventing them from requiring alternative dispute resolution of employment claims.” Governor Davis was given another opportunity to invalidate pre-dispute agreements to arbitrate FEHA claims in October 2003, during his lame-duck period, when AB 1715 was introduced. However, he once again refused to do so, saying that he was “concerned about adversely affecting

89. Gilmer, 500 U.S. at 33.
90. See, e.g., Stirlen v. Supercuts, 60 Cal. Rptr. 2d 138, 146 (Cal. Ct. App. 1997) (holding that appellant, a high-level executive nonetheless had no real choice when signing an employment agreement requiring arbitration); Rakoff, supra note 18, at 1176 (arguing that form terms in contracts of adhesion should be presumptively unenforceable).
91. See, e.g., Fitzgibbon, supra note 78, at 1410 (“[A legislative intention to restrict resolution of employment claims to courts] does not appear to be a priority on the congressional agenda.”); David Sherwyn et al., In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process, 2 U. PA. J. LAB. & EMP. L. 73, 125 (“[L]egislation [that would] ban mandatory arbitration agreements . . . [has] never come close to being enacted.”).
93. Id.
94. Id.
the ability of California business to cost efficiently resolve disputes.97 These instances underscore the highly-charged political and economic nature of the mandatory arbitration issue.98

C. CALIFORNIA STATE UNCONSCIONABILITY DOCTRINE AS A SOLUTION

*Armendariz v. Foundation Health Psychcare Services, Inc.*,99 the case upon which *Mercuro* relies, established the California state court approach to invalidating mandatory employment arbitration agreements through unconscionability. In *Armendariz*, two plaintiffs sued their employer, claiming violations under FEHA and other causes of action.100 The employer moved to compel arbitration pursuant to a mandatory arbitration clause in the employees' employment contract.101 The court began by assessing the arbitrability of FEHA claims under the D.C. Circuit's *Cole* factors. The court then considered the presence of substantive unconscionability in the agreement.

I. Application of the Cole Factors in Armendariz and After

In the first part of its opinion, the California Supreme Court borrowed the *Cole* factors102 developed by the D.C. Circuit to decide whether or not to compel arbitration of the FEHA claims.103 The court found that by limiting the available remedies to back pay, and requiring the employees to share the costs of arbitration,104 the agreement violated two of the five *Cole* factors. Accordingly, the court declined to compel

---

97. Id.
98. At bottom, the arbitration issue is a political one. A truly satisfying fix can come only from the United States Supreme Court or the Legislature. See, e.g., Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 FORDHAM L. REV. 761, 798 (2002). Professor Knapp further points out that the Supreme Court's stance on mandatory arbitration is essentially a political one.
99. 6 P.3d 669 (Cal. 2000).
100. Id. at 675.
101. Id. The *Cole* factors state that an agreement to arbitrate is lawful so long as it: (1) provides for neutral arbitrators; (2) provides for more than minimal discovery; (3) requires a written award; (4) provides for all of the types of relief that would otherwise be available in court; and (5) does not require employees to pay either unreasonable costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum. Id. at 102 (citing Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997)).
102. *Cole*, 105 F.3d at 1482.
103. *Armendariz*, 6 P.3d at 682.
104. An interesting point regarding cost-sharing in arbitration was made by an employment attorney whom I interviewed. She noted that prior to the inclusion of cost-sharing provisions in employment arbitration agreements, employers routinely paid the entire cost of arbitration. This policy was only changed due to a sentiment among those opposed to the agreements that such one-sided payment further biased the arbitrators against employees, because the employers were paying the arbitrators' full salary. Thus, the current line of criticism against cost-sharing provisions in such agreements leaves employers in a "damned if you do, damned if you don't" type situation. Telephone Interview with Anonymous Attorney (Dec. 2, 2002).
arbitration of the FEHA claims. Enshrinement of the Cole factors into California state law is a welcome development for safeguarding employees’ rights with respect to FEHA and Title VII claims. It is also a fairly uncontroversial tactic when applied to statutory rights, since Cole derived its criteria from Gilmer.105

2. Unconscionability as a Defense Against Mandatory Arbitration

In the second part of its analysis in Armendariz, the court honed California unconscionability law into a weapon that could be used against mandatory arbitration agreements. The court first made a summary finding that the contract was a contract of adhesion and thereby supported a finding of procedural unconscionability.106

Moving on to substantive unconscionability, the court began by summarizing typical disadvantages of arbitration for an employee, citing the lack of discovery, waiver of the right to a jury trial, limited judicial review, and the repeat player syndrome.107 While the court did not explicitly declare that these features of arbitration alone give rise to substantive unconscionability, it implied that they go a long way toward establishing such a defense, especially if there is any other indication of unfairness in an agreement. The court noted: “[g]iven the lack of choice and the potential disadvantages that even a fair arbitration system can

105. Cole, 105 F.3d at 1482. In a 2003 case, Little v. Auto Stiegler, Inc., 63 P.3d 979 (Cal. 2003), the California Supreme Court took the more controversial step of extending the application of the Cole/Armendariz factors to non-statutory claims. In Auto Stiegler, the plaintiff brought a common-law claim for wrongful termination contrary to public policy, known in California as a “Tameny” claim. See Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980). The defendant sought to compel arbitration pursuant to a mandatory arbitration clause in the employment agreement. The court held that even though the Tameny claim is judicially created, it is “almost by definition unwaivable” and that the rationale of Cole extends “generally to unwaivable rights conferred for a public benefit.” Auto Stiegler, Inc., 63 P.3d at 987–88. The court then drew upon the fifth Cole/Armendariz factor, the imposition of arbitration costs on the employee, to exempt the Tameny claim from arbitration.

In dissent, Justice Brown argued that this was an unwarranted extension of the Cole/Armendariz factors, and in contravention of the FAA. Id. at 997–98 (Brown, J., dissenting). Justice Brown explained that the rationale behind the Cole factors was to fulfill Congress’s intent in creating certain statutory rights that could not be waived by agreement or weakened by diverting them to arbitration. Id. The Cole factors provide a procedural safeguard for the enforcement of these rights. However, this means that Cole applied only to statutory rights, not to common law causes of action such as a Tameny claim. Indeed, the FAA almost certainly precludes application of the Cole factors unless there is an ascertainable Congressional intent to apply them, due to the FAA’s “liberal federal policy favoring arbitration.” Id. at 998. Moreover, the D.C. Circuit, which created the Cole factors, itself limited their application to statutory rights in Brown v. Wheat First Securities, Inc., 257 F.3d 821 (D.C. Cir. 2001). The effect of Auto Stiegler is therefore to impose requirements upon arbitration agreements that were not only unintended by Congress, but, through the FAA, actively preempted. 63 P.3d at 997 (Brown, J., dissenting). Auto Stiegler provides a good indication of the California Supreme Court’s willingness to take an activist approach in striking down mandatory arbitration agreements.

106. Armendariz, 6 P.3d at 690.
107. Id.
harbor for employees, we must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement.\footnote{108}{Id.}

It is troubling that the court relied on typical features of arbitration to support a finding of substantive unconscionability. Regardless of the actual legitimacy of these arguments, all were dismissed \textit{per se} grounds for establishing substantive unconscionability by the U.S. Supreme Court in \textit{Gilmer}.\footnote{109}{The \textit{Gilmer} Court held that, under the FAA, arbitration should be considered presumptively fair unless the plaintiff can show otherwise. \textit{Gilmer v. Interstate/Johnson Lane Corp.}, 500 U.S. 20, 30–33 (1991). Therefore, a court ought not find typical characteristics of arbitration to be suggestive of substantive unconscionability. Rather, the court may only look at the characteristics of the particular arbitration proceedings being challenged.} For the \textit{Armendariz} court to rely on them in finding the agreement to be unfair is therefore inconsistent with the high court’s doctrine.\footnote{110}{Of course, the California Supreme Court is not bound by United States Supreme Court precedent when it is dealing exclusively with issues of state contract law. This is most likely why the California Supreme Court has used unconscionability as a weapon against mandatory arbitration.} Granted, the \textit{Gilmer} court did not give an unconditional blessing to all forms of arbitration.\footnote{111}{Indeed, the \textit{Cole} requirements were derived from the minimum standards applicable to arbitration implicit in \textit{Gilmer}. \textit{Cole}, 105 F.3d at 1467.} But nowhere did it sanction a finding that arbitration is typically unfair to plaintiff-employees.

Next, the \textit{Armendariz} court addressed the fact that the agreement at issue required the employees to arbitrate their wrongful termination claims against the employer, but did not require the employer to arbitrate claims against the employees.\footnote{112}{\textit{Armendariz}, 6 P.3d at 691.} The court found that these two factors in combination gave rise to substantive unconscionability because the one-sidedness of the agreement put the employees at a disadvantage.\footnote{113}{Id. at 692.}

Citing two prior California cases, \textit{Kinney v. United HealthCare Services, Inc.}\footnote{114}{83 Cal. Rptr. 2d 348 (Cal. Ct. App. 1999).} and \textit{Stirlen v. Supercuts}, the court endorsed a rule that a mandatory arbitration agreement must feature a “modicum of bilaterality”\footnote{115}{\textit{Armendariz}, 6 P.3d at 691.} to avoid being substantively unconscionable. This rule forbids the employer from imposing an obligation upon the employee to arbitrate when it does not itself share the obligation, unless there is a reasonable business justification for the disparity.\footnote{116}{Id. at 692.} The court noted that while “such lack of mutuality does not render the contract illusory, i.e., lacking in mu-
tual consideration . . . in the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable."

At once the most creative and troubling aspect of the opinion is the court's attempt to defend this mutuality requirement in the face of a contrary Alabama Supreme Court case, *Ex parte McNaughton*, and, more importantly, the U.S. Supreme Court's holdings in *Perry v. Thomas* and *Doctor's Associates v. Casarotto*. In *Perry*, the Court held that:

A court may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Similarly, the Court held in *Doctor's Associates* that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." This point was also made by the Alabama Supreme Court in *Ex parte McNaughton*. The *McNaughton* court, faced with facts similar to those in *Armendariz*, declined to apply either the Alabama doctrine of mutuality of remedy or the doctrine of unconscionability because it found that both approaches would rely on "the uniqueness of the concept of arbitration [and would assign] a suspect status to arbitration agreements . . . [thereby flying] in the face of *Doctor's Associates*.

The *Armendariz* court rejected the reasoning of *McNaughton* and attempted to reconcile its holding with *Doctor's Associates* and *Perry* by maintaining that it was not finding arbitration itself, but rather the disparity in the contract at issue, to be unconscionable. The court noted that, "[i]t does not disfavor arbitration to hold that an employer may not

---

117. *Id.*
118. 728 So. 2d 592 (Ala. 1998).
121. *Perry*, 482 U.S. at 492 n.9.
122. 517 U.S. at 687.
123. 728 So. 2d at 598.
124. This equitable doctrine is used to reform or invalidate a contract that limits the form of remedy receivable by one party while allowing the other party the full range of remedies. This occurs, for example, when one party is restricted to seeking specific performance but the other party is free to seek money damages or specific performance in the case of breach. The Alabama Supreme Court refused to apply this doctrine, stating that arbitration is not a remedy but a forum. *McNaughton*, 728 So. 2d at 598.
125. *Id.*
impose a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee's expense."

This argument, however sympathetic to the plight of plaintiff-employees, seems like a logical sleight of hand. The U.S. Supreme Court's has mandated that the "uniqueness of arbitration agreements" cannot provide a basis for a finding of unconscionability. It is not logically possible to abstain from considering the uniqueness of arbitration as a basis for unconscionability, as required by Perry, while simultaneously finding that factors unique to arbitration support a finding of unconscionability, as in Armendariz. Neither is the Armendariz court's argument that it is not the factors themselves, but rather the disparity in application of the factors to the parties, satisfying. To avoid singling out arbitration for disfavor, it must be considered the equal of the judicial system. Requiring each party to submit to two different yet equal systems of dispute resolution cannot be considered disparate.127 For example, in Mercuro, Countrywide's attempt to send claims for injunctive relief to the courts while sending other claims to arbitration cannot be found unconscionable under the U.S. Supreme Court's jurisprudence, since both systems are to be considered equal. There can be no "one-sidedness" resulting from the differing forums.

Gripping about a problem is far easier than finding a solution. It is therefore difficult to fault the California Supreme Court for concocting such a resourceful antidote to the problem of mandatory arbitration. Mandatory employment arbitration, as cases such as Mercuro demonstrate, is a problem which requires a more satisfactory solution than the U.S. Supreme Court or the legislature appear willing to provide. Faced with the pre-emptive FAA and a mightily pro-arbitration U.S. Supreme Court, it is understandable that the California Supreme Court retreated to the only province in which it is sovereign—state law—in order to find a solution. The difficult question is whether this solution is apposite.

The most apparent problem with the California approach is that it likely contravenes the FAA as interpreted by the U.S. Supreme Court in Perry, Doctor's Associates and Gilmer. Although the Armendariz decision may be insulated from U.S. Supreme Court review by virtue of its

127. If this argument resonates with the historical jurisprudence of equal protection, it is perhaps because the underlying reasoning is not so dissimilar. In both instances, the United States Supreme Court has refused to acknowledge the empirical differences between two systems, relying instead on a theoretical window-dressing.
reliance on state unconscionability doctrine,\textsuperscript{128} \textit{Auto Steigler} is not so insulated and appears to be an unveiled assault upon the FAA's pro-arbitration policy. In both cases, it is unsettling for a state supreme court to contravene the U.S. Supreme Court and Congress. Not only does this tactic undermine the authority of the judicial hierarchy, but also the credibility of the California court. It may also encourage forum-shopping among employers.

Furthermore, reliance upon unconscionability doctrine as a means of overturning a mandatory arbitration agreement leaves much to judicial discretion. Judges will be free to uphold or invalidate mandatory arbitration agreements on the basis of personal conceptions of fairness. The \textit{Armendariz} court gives little guidance as to how one-sided an agreement to arbitrate must be to be substantively unconscionable. And, although it is not likely to be a big problem, some employers may be deterred from hiring in California due to the unpredictability of employment disputes.\textsuperscript{129}

\textbf{CONCLUSION}

This Note has recognized two problems. The first is the larger problem of whether mandatory arbitration clauses in employment contracts are fair and equitable to employees. As noted above, the answer to this problem is not clearly discoverable through statistics or through anecdotal cases such as \textit{Mercuro}. While the evidence discussed above may suggest that such clauses are at least potentially inequitable, the decision about what to do about them is ultimately a political one properly made by the legislature. Consequently, unless Congress elects to amend the FAA, the U.S. Supreme Court's interpretation of that statute as permitting the use of pre-dispute mandatory agreements to arbitrate in employment contracts must stand.

\textsuperscript{128} It is somewhat unclear whether the \textit{Armendariz} decision was appealable under \textit{Cox Broadcasting Corp. v. Cohn}, 420 U.S. 469 (1975). \textit{Cox} held that judgments of state courts that finally decide a federal issue are immediately appealable when the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action. \textit{Id.} at 482–83. The tricky question is whether the issue presented by the \textit{Armendariz} decision is a federal or state one. If characterized as a decision pertaining to the FAA, it is federal and appealable, but if characterized as an interpretation of state unconscionability doctrine, review ends at the state high court level.

\textsuperscript{129} California is an exceptional state in terms of resources and business advantages. It is therefore unlikely that an employer wishing to hire in California would be significantly deterred by the \textit{Armendariz} rule. Quite possibly this truth informed the \textit{Armendariz} court's judgment. However, other states wishing to use the decision as a model may be more warranted in taking this factor into consideration.
The second problem is the conflict between the California Supreme Court's decision in *Armendariz* and the U.S. Supreme Court's holding in *Doctor's Associates*. This incongruity can only be solved through an appeal to the U.S. Supreme Court, but it is initially unclear whether the *Armendariz* decision could have been appealed under *Cox Broadcasting Corp. v. Cohn*.

*Cox* held that judgments of state courts that finally decide a federal issue are immediately appealable when "the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . ." The tricky question is whether the issue presented by the *Armendariz* decision is a federal or state one. If characterized as a decision pertaining to the FAA, it is federal and appealable, but if characterized as an interpretation of state unconscionability doctrine, review ends at the state high court level.

This Note suggests that it is a federal issue, since the U.S. Supreme Court explicitly stated in *Doctor's Associates* that the differences between the courts and arbitration cannot be used as a basis for finding a contract unconscionable. The rule in *Doctor's Associates* was an interpretation of the FAA itself, and is therefore pre-emptive federal law.

Ultimately, mandatory employment arbitration law in California is like Robert Penn Warren's single-bed blanket, shared by three folks: Congress, the United States Supreme Court, and the California Supreme Court. It has been pulled and hauled at by each, leaving some out in the cold. Cases like *Mercuro* attest to the need for a solution, but the California Supreme Court's attempt to stretch the blanket may tear too much at the fabric that holds the law together.

---

131. *Id.* at 482-83.
132. A full discussion of the federalism issue, while fascinating, is unfortunately beyond the scope of this Note.