

## A PRO-CONGRESS APPROACH TO ARBITRATION AND UNCONSCIONABILITY

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### INTRODUCTION

This Essay endeavors to resolve a current controversy involving the application of the unconscionability doctrine to arbitration agreements. The pro-arbitration policies of the Federal Arbitration Act (FAA) and the anti-arbitration instincts of the unconscionability doctrine are difficult to reconcile. Instead of clarity in this area of law, we have a series of hints and clues, often contradictory, from the Supreme Court. Although Professor David Horton and I share a desire to clarify this area of the law, we have nearly opposite views about how this should be accomplished. This Essay sets forth my position and also responds to *Unconscionability Wars*,<sup>1</sup> Professor Horton's latest thoughtful effort on the subject.

Courts and commentators have struggled with the question of how courts should apply unconscionability to arbitration provisions in a manner consistent with the FAA. The better and more fundamental question is whether courts should apply the doctrine to arbitration provisions at all. In a recent article, I argued that courts should not apply the doctrine to these provisions.<sup>2</sup> Professor Horton disagrees with my position and he offers a vigorous critique of my article in *Unconscionability Wars*.

Section 2 of the FAA provides that only some state-law grounds can be used to refuse enforcement of an arbitration provision.<sup>3</sup> Until recently, it seemed settled that unconscionability was such a ground. The Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion*,<sup>4</sup> decided shortly after my article appeared, has largely upended assumptions about the relationship between unconscionability and arbitration and created a much more favorable environment for the position I advocate. While *Concepcion* sanctions the continued *theoretical* applicability of unconscionability to

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<sup>1</sup> David Horton, *Unconscionability Wars*, 106 NW. U.L. REV. COLLOQUY 13 (2011) (link).

<sup>2</sup> Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035 (2011) (arguing that the FAA removed the judicial power to use unconscionability to deny the enforcement of arbitration agreements) (link).

<sup>3</sup> 9 U.S.C. § 2 (2006) (permitting application only of "such grounds as exist at law or in equity for the revocation of any contract") (link).

<sup>4</sup> 131 S. Ct. 1740 (2011) (link).

arbitration provisions, it leaves very little room for the *actual* application of the doctrine. In my view, the case puts back into play the crucial question of whether unconscionability is permitted under § 2 at all. I argue in this Essay that it is not.<sup>5</sup> I say this because Congress addressed fairness and other related concerns directly in the FAA (as opposed to permitting courts to do so through the unconscionability doctrine) and eliminated, in the context of arbitration provisions, the type of discretion inherent in unconscionability.

This Essay presents a refined and expanded version of my argument that incorporates *Concepcion* and responds to some of Professor Horton's objections to my position. Professor Horton characterizes my initial argument as "anti-court" because I argued that courts lacked the power to use the unconscionability doctrine in the context of arbitration provisions. My argument is not anti-court, but rather pro-Congress. I prefer this term because my argument simply recognizes that, rightly or wrongly, it was Congress's intent to take the leading role when it comes to the fairness of arbitration provisions and to limit the role of the courts.

Part I of this Essay briefly describes the uneasy relationship between arbitration and unconscionability and how *Concepcion* altered that relationship. It also describes how *Concepcion* supports this Essay's argument that unconscionability is not a permitted ground for non-enforcement under § 2 of the FAA. Part II argues that Congress designed the FAA to play the role that Professor Horton envisions unconscionability playing. Part III argues that the discretion inherent in unconscionability is inconsistent with Congress's intent in passing the FAA and addresses Professor Horton's arguments to the contrary. Part IV addresses whether the enforcement mechanism of § 4 of the FAA has any place for unconscionability.

#### I. ARBITRATION AND UNCONSCIONABILITY, B.C. AND A.C. (BEFORE *CONCEPCION* AND AFTER *CONCEPCION*)

Section 2 of the FAA draws a line between state laws that courts may consider in determining the enforceability of arbitration provisions in contracts and state laws that courts may not consider when making such determinations. Section 2 permits courts to consider only "such grounds as exist at law or in equity for the revocation of any contract."<sup>6</sup>

Unconscionability, as Professor Horton explains, generally includes both a substantive component, which addresses the fairness and one-sidedness of contract terms, and a procedural component, which hinges on

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<sup>5</sup> In my prior article, I suggested that unconscionability might be a permitted state-law ground for non-enforcement but that only arbitrators, not courts, could apply the doctrine. Friedman, *supra* note 2, at 2062–64. This Essay goes further, arguing that unconscionability is simply not a ground for non-enforcement under § 2.

<sup>6</sup> 9 U.S.C. § 2.

the circumstances surrounding the contract's formation, such as whether terms are buried in fine print.<sup>7</sup> Courts routinely apply unconscionability to refuse enforcement of arbitration provisions.<sup>8</sup> Courts doing so are assuming that unconscionability is a permitted state law doctrine under § 2. That assumption is less certain after *Concepcion*.

Before *Concepcion*, unconscionability was firmly but uncomfortably on the side of permitted state laws. On two previous occasions, the Supreme Court described unconscionability as a generally applicable state law that courts can apply to arbitration provisions in contracts.<sup>9</sup> However, the Court also said that courts cannot “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable,”<sup>10</sup> and that if a court determines that a contract is fair enough to enforce all its basic terms, such as price, then the arbitration provision must also be enforced.<sup>11</sup> Thus, even before *Concepcion*, it was unclear how unconscionability could be applied to arbitration provisions in a manner consistent with the FAA.

*Concepcion* is a crucial opinion that places at least some applications of unconscionability on the side of non-permitted state laws. *Concepcion* involved California precedent that rendered most waivers of class-action arbitration in consumer transactions unenforceable. The Supreme Court labeled this application of unconscionability the “Discover Bank Rule” after a key California case.<sup>12</sup>

The Court began its analysis by stating that unconscionability, like fraud and duress, was a “generally applicable contract defense[],”<sup>13</sup> and that courts could refuse to enforce arbitration agreements based on unconscionability. The Supreme Court observed that the Discover Bank Rule raised the “complex” issue of what to do “when a doctrine normally thought to be generally applicable, such as . . . unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.”<sup>14</sup> The Court held that the FAA preempted the Discover Bank Rule because the rule stood as an obstacle to the accomplishment of the FAA’s objectives, one of which is the promotion of arbitration.<sup>15</sup> Engrafting a class-action procedure onto arbitration would, in the Court’s view, interfere with the efficient

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<sup>7</sup> Horton, *supra* note 1, at 18.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) (link); Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (link).

<sup>10</sup> Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987) (link).

<sup>11</sup> Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) (link).

<sup>12</sup> AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (citing Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) (link)) (link).

<sup>13</sup> *Id.* (quoting Casarotto, 517 U.S. at 687) (internal quotation mark omitted).

<sup>14</sup> *Id.* at 1747.

<sup>15</sup> *Id.* at 1748.

resolution of claims.<sup>16</sup> Because the efficient resolution of claims is a key feature of arbitration, the rule undercut arbitration and was preempted.<sup>17</sup>

Justice Thomas went further in his concurring opinion. For him, courts are required to enforce arbitration provisions unless “a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress.”<sup>18</sup> The unconscionability at issue in *Concepcion* did not go to formation, according to Justice Thomas, but rather to public policy. Thus, the FAA barred courts from considering it.<sup>19</sup>

Some applications of unconscionability, such as the Discover Bank Rule, are now clearly on the side of non-permitted state laws. What is less clear is exactly where *Concepcion* draws the line, or which applications of unconscionability are still on the side of permitted state laws. It is difficult to envision applications of unconscionability that do not obstruct the objective of promoting arbitration—after all, non-enforcement of an arbitration provision necessarily inhibits arbitration, at least in the particular case. However, given the Court’s description of unconscionability as a generally applicable ground upon which courts can refuse to enforce arbitration agreements, some applications of unconscionability may still belong among the permitted state laws. The line has been moved in a way that restricts the application of the unconscionability doctrine. How significant that restriction is remains to be seen.

The Court’s 2010 decision in *Rent-A-Center, West, Inc. v. Jackson*<sup>20</sup> foreshadowed the result in *Concepcion*. *Jackson* reflected a more subtle hostility towards the judicial application of unconscionability to arbitration provisions. There, the Court made clear that parties can delegate to arbitrators the question of whether an arbitration agreement is unconscionable.<sup>21</sup> *Jackson* thus empowered parties to shift almost all unconscionability determinations from the courts to the arbitrators.

Taken in combination, *Jackson* and *Concepcion*, while not eliminating unconscionability as a judicial tool for policing arbitration provisions, marginalized it. In my view, the Court is moving in the right direction.

*Concepcion*, in particular, makes possible a more direct assault on unconscionability than the one I originally offered. My prior article, which appeared before *Concepcion*, demonstrated a bit of ambivalence. Faced with the fact that on two occasions the Supreme Court had, in dicta, placed unconscionability in the category of permitted state laws,<sup>22</sup> I was reluctant to make a full-scale attack on unconscionability’s status as a defense

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<sup>16</sup> *Id.* at 1752.

<sup>17</sup> *Id.* at 1749, 1753.

<sup>18</sup> *Id.* at 1753 (Thomas, J., concurring) (citing 9 U.S.C. §§ 2, 4 (2006)).

<sup>19</sup> *Id.* at 1756.

<sup>20</sup> 130 S. Ct. 2772 (2010) (link).

<sup>21</sup> *Id.* at 2777–78.

<sup>22</sup> See *supra* note 9 and accompanying text.

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permitted under § 2. Thus, I conceded the possibility that unconscionability may be within § 2, but that only arbitrators, and not courts, could apply the doctrine to arbitration provisions.<sup>23</sup> This position had the advantage of taking out of the hands of the courts a highly discretionary doctrine, removing the temptation to return to the judicial hostility that the FAA was designed to undo without running afoul of dicta that the Court had consistently articulated.

Professor Horton was not about to let me get away with this tactic. He argues that permitting arbitrators (but not courts) to make determinations of unconscionability would result in an “anomaly” in which courts would enforce arbitration provisions that might not satisfy § 2. We would thus have “arbitration without a valid arbitration clause.”<sup>24</sup>

In fact, “arbitration without a valid arbitration clause” is consistent with current FAA jurisprudence. The Supreme Court has long permitted courts to enforce an arbitration provision without first establishing its ultimate validity. In cases like *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>25</sup> and *Buckeye Check Cashing, Inc. v. Cardegna*,<sup>26</sup> the Court held that a challenge to a contract as a whole (e.g., a challenge that the contract is void for fraud in the inducement, as was the case in *Prima Paint*, or void for illegality, as in *Buckeye*) is decided by the arbitrator, not the court. There is no need for a valid arbitration provision for a court to order arbitration. An arbitration provision in a contract that is adjudged by the arbitrator to be illegal is not ultimately valid even though the court enforced it. The Court recognized this anomaly in *Buckeye*, acknowledging that the rule “permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void.”<sup>27</sup>

I do, however, concede a real force to Professor Horton’s argument. Fortunately, *Concepcion* makes a more direct approach possible. By significantly limiting the range of the unconscionability doctrine, *Concepcion* invites us to ask whether unconscionability really is within § 2 at all. That is, rather than put unconscionability into a tiny cage in which it can barely move, why not put it out of its misery altogether in the context of arbitration provisions? I argue in the next Parts of the Essay that we should do exactly that.

### II. ONLY ROOM FOR ONE SHERIFF

The key question is whether Congress intended unconscionability to be among the “grounds at law or in equity” that can be used to revoke an arbitration provision. I cannot imagine that it did. The FAA provides its

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<sup>23</sup> Friedman, *supra* note 2, at 2064.

<sup>24</sup> Horton, *supra* note 1, at 19.

<sup>25</sup> 388 U.S. 395, 402–04 (1967) (link).

<sup>26</sup> 546 U.S. 440, 443–49 (2006) (link).

<sup>27</sup> *Id.* at 448.

own protections, supplanting the role that unconscionability typically plays. This is true with respect to both the substantive and procedural components of unconscionability.

#### A. *The FAA Addresses Substance*

I begin by noting that Congress specifically and explicitly granted courts a role in policing the fairness of arbitration. However, courts do not play this role until after the arbitration hearing occurs, and when they do, their role is carefully cabined. That role is set forth clearly in §§ 10 and 11. For instance, § 10 provides that a court may vacate an award if the award was procured by “corruption, fraud or undue means,” if there was “evident partiality or corruption” in any of the arbitrators, or if the arbitrators were guilty of various types of misconduct or exceeded or imperfectly executed their powers.<sup>28</sup> Section 11 sets forth limited grounds on which a court can modify an award, such as for miscalculations or if the arbitrators ruled on a matter that had not been submitted to them.<sup>29</sup>

The FAA is thus quite specific in the powers granted to courts for assessing arbitration procedures. Judicial review occurs not before the arbitration proceeds (i.e., “this procedure might not be fair”), but rather afterwards (i.e., “as it turns out, this procedure was not fair”). Proponents of unconscionability must therefore argue that Congress delineated a clear set of criteria that courts could use only after the arbitration award was entered, while Congress simultaneously intended that courts would have roving unlimited authority to assess the fairness of arbitration provisions before the award stage.

Further, Professor Horton identifies the possibility of arbitration in a distant forum as a grave danger and one that unconscionability is designed to police.<sup>30</sup> But the FAA has built-in protections against this danger. These protections have not worked out as Congress anticipated, but this does not mean that they do not exist. Section 4 restricts where a party can file a petition to enforce an arbitration provision. A party can only make such petitions to “any United States district court which, save for such [arbitration] agreement, would have jurisdiction under title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties.”<sup>31</sup> Section 4 then includes what was almost certainly intended as a very important protective provision: “The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.”<sup>32</sup> Thus, the

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<sup>28</sup> 9 U.S.C. § 10(a)(1)–(4) (2006) (link).

<sup>29</sup> *Id.* § 11 (link).

<sup>30</sup> Horton, *supra* note 1, at 21.

<sup>31</sup> 9 U.S.C. § 4 (link). The Act as originally adopted referred to “the judicial code” as opposed to Title 28. Pub. L. No. 68-401, § 4, 43 Stat. 883, 883 (1925) (link).

<sup>32</sup> *Id.*

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arbitration hearing can only take place in the district in which the petition was filed.

In 1925, this requirement would have served as a powerful one-two punch for protecting against forced arbitration in a distant forum. When Congress passed the FAA, personal jurisdiction was narrowly defined. This point is made clear in an exchange at the joint hearings of the congressional subcommittees considering the FAA. When asked where a party could bring a petition, Julius Henry Cohen, a principal drafter of the FAA, responded:

Where the defendant lives. That would mean practically that you have to go to the jurisdiction where the defendant is, or wait until he comes into your jurisdiction so that process may be served upon him. The process is exactly the same as in civil procedure in the Federal courts.<sup>33</sup>

Because courts could only order arbitration proceedings in the district in which the party filed the petition, the FAA provided parties with significant protection. Senator Caraway, during the Senate debate on the bill, confirmed that this protective language, which had not been in the original version of the bill,<sup>34</sup> was in the final version to ensure that it was “not possible to drag a man across the country to arbitrate.”<sup>35</sup> Congress likely assumed that the language of § 4 ensured parties were not required to arbitrate in a distant forum.

Of course, subsequent developments have greatly weakened the protection. First, the concept of personal jurisdiction has been dramatically expanded.<sup>36</sup> Second, and perhaps more important, is the proliferation of readily enforced choice-of-forum provisions.<sup>37</sup>

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<sup>33</sup> *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 18 (1924) [hereinafter *Joint Hearings*] (statement of Julius Henry Cohen). The question that Cohen was asked by Congressman Hickey was a bit of a non-sequitur, as it inquired as to where arbitration would be held “[w]ithout a written agreement.” *Id.* Of course, without a written agreement the FAA would not apply at all. 9 U.S.C. § 2 (requiring a written arbitration agreement). Congressman Hickey also showed some confusion about jurisdiction, asking whether the application for arbitration would be made “to the court where the party asking for arbitration resides.” *Joint Hearings*, at 18. Cohen’s answer corrected Congressman Hickey’s apparent misunderstandings, explaining that the usual rules of federal civil procedure would apply. *Id.*

<sup>34</sup> See *E.C. Ernst, Inc. v. Potlatch Corp.*, 462 F. Supp. 694, 698 n.8 (S.D.N.Y. 1978) (noting that the FAA, as originally introduced, did not include this language) (link).

<sup>35</sup> 66 Cong. Rec. 2761 (1925) (statement of Sen. Caraway).

<sup>36</sup> See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that physical presence is not necessary for personal jurisdiction but that litigation-related “minimum contacts” may suffice) (link).

<sup>37</sup> See *J.P. Morgan Secs. Inc. v. La. Citizens Prop. Ins. Corp.*, 712 F. Supp. 2d 70, 83 (S.D.N.Y. 2010) (noting a failure by drafters of the FAA to anticipate widespread use of forum-selection clauses) (link).

Although it is beyond me to quibble with the last few decades of personal jurisdiction jurisprudence, the decision by courts to enforce choice-of-forum provisions in arbitration agreements seems quite simply wrong. Section 4 provides that jurisdiction can be established in any court that would have jurisdiction of the underlying controversy “save for such agreement.”<sup>38</sup> The intent of this language is probably to remove any possible argument that an arbitration agreement deprived a court of its jurisdiction. However, the phrase “save for such agreement” does more than merely prevent the arbitration agreement from removing jurisdiction—it also should logically prevent the arbitration agreement (including its choice-of-forum provision) from creating jurisdiction. Thus, jurisdiction should be addressed, according to the statute, as though there were no arbitration agreement. In my opinion, the FAA was ahead of its time, barring the use of choice-of-forum provisions (at least in the context of enforcing arbitration agreements) long before such provisions became ubiquitous.

### B. The FAA Addresses Procedure

The FAA speaks for the procedural aspects of unconscionability’s job as well. Consider the FAA’s writing requirement: Section 2 places within the FAA’s scope only arbitration provisions that are written.<sup>39</sup> I have argued in the past that this requirement serves a very specific purpose—ensuring that the parties to an arbitration agreement take their obligation seriously.<sup>40</sup> This requirement is exactly the type of danger that unconscionability is intended to police.

Courts cannot demand, under the rubric of procedural unconscionability, that parties exceed the statute’s form requirement to secure enforcement. Section 2 requires a writing—presumably a “normal” writing—and nothing more. A court cannot require extra-large print, even though such a requirement might make assent more meaningful. Nor can it require a signature or initials, even though these are commonly used signifiers of meaningful understanding and assent.<sup>41</sup>

That courts cannot exceed the FAA in matters that it addresses may provide a better justification for the Court’s decision in *Doctor’s Associates, Inc. v. Casarotto*<sup>42</sup> than the one articulated by the Court. In *Casarotto*, the Court held that the FAA preempted a state law requiring

<sup>38</sup> 9 U.S.C. § 4 (2006).

<sup>39</sup> *Id.* § 2.

<sup>40</sup> Stephen E. Friedman, *Protecting Consumers from Arbitration Provisions in Cyberspace, the Federal Arbitration Act and E-SIGN Notwithstanding*, 57 CATH. U. L. REV. 377, 406–08 (2008).

<sup>41</sup> *Cf. In re Exeter Mfg. Co.*, 5 N.Y.S.2d 438, 439–40 (App. Div. 1938) (holding that a party was not able to defeat a motion to compel arbitration under the New York Arbitration Law based on the Statute of Frauds because all that is necessary under the law is that agreement be written, not that it be signed).

<sup>42</sup> 517 U.S. 681 (1996) (link).

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arbitration provisions to be printed in bold and on the front page of an agreement because it singled out arbitration provisions for special suspect status and imposed on arbitration provisions a requirement that it did not impose on other contracts.<sup>43</sup> The Court could just as easily have held that § 2 only requires the arbitration provision to be written—not that it be written in conspicuous text—and that courts cannot add an additional form requirement to the FAA.

At any rate, the FAA’s written requirement in § 2 provides a built-in protection when it comes to form, and the FAA preempts state laws that demand that parties exceed it under the rubric of procedural unconscionability.

Thus, Congress included three protective screens. It provided a postponed and cabined role for judicial review, provided protections against arbitration in distant fora, and set forth a formal requirement to assure the arbitration provision was taken seriously. These screens may or may not be up to the task of providing meaningful protections. They do, however, demonstrate that Congress intended to deal with the issue of fairness directly, and not to let courts do so through the doctrine of unconscionability.

### III. DISCRETION AND UNCONSCIONABILITY

#### A. *There’s Discretion, and Then There’s “Discretion”*

I previously argued that the type of discretion inherent in unconscionability is exactly the type of discretion Congress sought to eliminate with the FAA. The purpose of the FAA was to reverse the judicial hostility towards arbitration<sup>44</sup>—a hostility that was manifested in a variety of judicial rules and devices declaring arbitration provisions contrary to public policy.<sup>45</sup> Hence, Congress likely did not intend the FAA to re-empower courts to introduce the same hostility through unconscionability, which is very similar to the discretionary tools Congress sought to eliminate.<sup>46</sup>

Professor Horton’s essay claims that this argument “sweeps too broadly” in that there are plenty of highly discretionary and pliable doctrines, such as duress and good faith, that indisputably apply to

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<sup>43</sup> *Id.* at 687.

<sup>44</sup> See S. REP. NO. 68-536, at 2–3 (1924) (describing the judicial hostility that the United States Arbitration Act was intended to correct); H.R. REP. NO. 68-96, at 1–2 (1924) (noting that the “need for the law arises from an anachronism of our American law,” reflecting a judicial hostility towards arbitration agreements).

<sup>45</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

<sup>46</sup> Friedman, *supra* note 2, at 2050–55.

arbitration provisions.<sup>47</sup> Thus, the argument goes, a meaningful line cannot be drawn between unconscionability and other discretionary doctrines.<sup>48</sup>

I have a number of responses. First is the matter of degree. While many contract defenses involve judicial discretion, unconscionability may in fact be the “champ” in this regard—not only do courts have great difficulty defining it,<sup>49</sup> but courts note its very lack of a definition as among the doctrine’s key features.<sup>50</sup>

Second, the discretion inherent in unconscionability is different in kind from other types of discretion. It is far more self-contained and hence more likely to give rise to pockets of anti-arbitration hostility. For instance, Professor Horton notes that duress hinges on “easily-manipulated factors such as whether a threat is ‘improper.’”<sup>51</sup> But there are important constraints on a court’s practical ability to manipulate this factor. Cases determining the impropriety of a threat in other contexts, such as sales contracts or non-competition agreements, surely provide guidance and precedent as to what constitutes an improper threat in cases dealing with arbitration provisions. Cases involving arbitration provisions must comport with cases in other contexts. But unconscionability, and particularly substantive unconscionability (which goes to the one-sidedness and propriety of the terms), is different. A court could determine that an arbitration provision is “not fair” simply out of hostility towards arbitration. Jurisprudence from other types of cases, whether sales contracts or non-competition agreements, would really have very little relevance to a case involving an arbitration provision because each type of contract term is so different. Thus, pockets of hostility could easily develop.

Third, unconscionability is a matter of discretion exclusively for judges. The FAA was designed to control judicial hostility towards arbitration provisions,<sup>52</sup> not out of concern with the ways juries were exercising their discretion. Although judges will sometimes be called on to decide the other types of discretionary matters Professor Horton mentions, unlike unconscionability these matters are not questions of law whose development is entirely dependent on judges. Duress is typically a question for the jury.<sup>53</sup> The same is true of good faith.<sup>54</sup> Thus, the jury, not the court,

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<sup>47</sup> Horton, *supra* note 1, at 22.

<sup>48</sup> *Id.* at 22–23.

<sup>49</sup> See, e.g., *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969) (noting that it is easier to decide an unconscionability case than to explain the doctrine) (link).

<sup>50</sup> See, e.g., *Nu Dimensions Figure Salons v. Becerra*, 340 N.Y.S.2d 268, 272 (Sup. Ct. 1973) (“If a definition were given, it would only limit the application of the concept.”) (link).

<sup>51</sup> Horton, *supra* note 1, at 23 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981)).

<sup>52</sup> See *supra* note 44.

<sup>53</sup> See, e.g., *Pierce v. Haverlah’s Estate*, 428 S.W.2d 422, 455 (Tex. Civ. App. 1968) (noting that the modern approach is to treat a question of duress as a question of fact) (link).

<sup>54</sup> See, e.g., *Onal v. BP Amoco Corp.*, 275 F. Supp. 2d 650, 658–60 (E.D. Pa. 2003) (noting that good faith performance is a question for the jury) (link).

typically exercises discretion in these areas, and so the danger of a resurgence of the type of judicial hostility the FAA eliminated is reduced.

Fourth, the proof of all this may be in the pudding. I argue that the discretion inherent in unconscionability can readily lead to hostility towards arbitration. In fact, there is some reason to believe it is already doing just that. In *Concepcion*, the Court noted studies indicating that California courts actually have been more likely to find arbitration provisions unconscionable than other types of contracts.<sup>55</sup> And Professor Steven Burton has observed that the application of unconscionability to arbitration provisions has resulted in a new judicial hostility towards arbitration.<sup>56</sup> I am not aware of claims that courts are using other doctrines, such as fraud or good faith, to express hostility towards arbitration provisions.

That the FAA removed *some* judicial discretion is beyond argument. Otherwise, the FAA would not have achieved its purpose of removing judicial hostility towards arbitration. Professor Horton concedes this point (to a degree). He notes, for example, that the FAA preempts one version of unconscionability, which he refers to as “equitable unconscionability.”<sup>57</sup> Equitable unconscionability, according to Professor Horton, focuses on whether a contract is “too one-sided to specifically enforce.”<sup>58</sup> He acknowledges that the FAA “eclipses any rule, including equitable unconscionability, that entitles judges to deny specific performance.”<sup>59</sup> Professor Horton characterizes this form of unconscionability as a crude precursor to modern unconscionability, to which it is “only tenuously related”<sup>60</sup>—a sort of Neanderthal to modern unconscionability’s *Homo sapiens*.

However, far from being “tenuously related” to modern unconscionability, what Professor Horton describes as equitable unconscionability is actually at the heart of the modern doctrine. The power of a judge to refuse specific enforcement because of contractual unfairness is central to unconscionability. An official comment to the section of the *Restatement (Second) of Contracts* that articulates the current unconscionability rule begins as follows: “Perhaps the simplest application of the policy against unconscionable agreements is the denial of specific performance where the contract as a whole was unconscionable when made.”<sup>61</sup> The first illustration of unconscionability<sup>62</sup> is based on *Campbell Soup Co. v. Wentz*, a case in which the court denied equitable relief because

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<sup>55</sup> AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1747 (2011) (link).

<sup>56</sup> See Steven J. Burton, *The New Judicial Hostility To Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469 (2006) (link).

<sup>57</sup> Horton, *supra* note 1, at 15.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 27.

<sup>60</sup> *Id.* at 27–28.

<sup>61</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. g (1981).

<sup>62</sup> *Id.* § 208 cmt. c, illus. 1.

a contract was too one-sided.<sup>63</sup> This same case is the first one cited in the official comments to the section of the Uniform Commercial Code on unconscionability in sales contracts.<sup>64</sup> Not only is “equitable unconscionability” at the heart of modern unconscionability—it is the form of unconscionability that is most relevant in a challenge to an arbitration provision because the party invoking the defense is invariably asking that an arbitration provision not be specifically enforced.

Judicial discretion exercised under the rubric of unconscionability also empowers courts in another inappropriate way. Such discretion enables courts to define the term “arbitration” in a federal statute (the FAA) by reference to state law. For example, when California courts hold that procedures for consumer arbitrations must permit class action proceedings, those courts are effectively using state law to establish the parameters of an “arbitration” that is worthy of enforcement under the FAA. But it is a basic principle of federal statutory interpretation that “federal statutory terms are presumptively governed by federal law absent clear congressional intent for state law to govern.”<sup>65</sup> The Supreme Court has noted in a different context that the presumption that Congress does not intend to make the application of federal legislation “dependent on state law” is appropriate both because of the interest in nationwide uniformity and the danger that state law might impair the effectiveness of a federal statute.<sup>66</sup>

As a number of courts have made clear, despite the incorporation of some state law in § 2 of the FAA, these same considerations are equally applicable to determining the meaning of arbitration under the FAA. For example, in *Fit Tech, Inc. v. Bally Total Fitness Holdings Corp.*, the United States Court of Appeals for the First Circuit addressed the question of whether a particular alternative dispute resolution procedure was arbitration.<sup>67</sup> The court observed that the definition of arbitration is a matter of federal law:

That a uniform federal definition is required is obvious to us. True, the *substance* of the purchase agreement—who promised to do what—is governed by state law . . . but whether what has been agreed to amounts to “arbitration” under the Federal Arbitration Act depends on what Congress meant by the term in the federal statute.

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<sup>63</sup> 172 F.2d 80, 83–84 (3d Cir. 1948) (link).

<sup>64</sup> U.C.C. § 2-302 cmt. 1 (2011).

<sup>65</sup> Dianne Rosky, *Respondeat Inferior: Determining the United States’ Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. DAVIS L. REV. 895, 929 (2003) (link).

<sup>66</sup> *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43–44 (1989) (rejecting the argument that the meaning of “domicile” under the Indian Child Welfare Act should be determined by state law) (link).

<sup>67</sup> 374 F.3d 1, 5–6 (1st Cir. 2004) (link).

Assuredly Congress intended a “national” definition for a national policy.<sup>68</sup>

Similarly, the United States Court of Appeals for the Tenth Circuit also made clear that the definition of arbitration is a federal, not a state, question. In *Salt Lake Tribune Publishing Co. v. Management Planning, Inc.*, the court observed that the definition of arbitration was crucial since the word “arbitration” “establishes the scope and force of the FAA.”<sup>69</sup> The court held that neither the language nor the legislative history of the FAA demonstrated a congressional intent that state law should supply the meaning of this crucial word, and noted, “Were we to hold that state law guides our determination, we would empower states to define arbitration as they choose, thus limiting the FAA’s utility. This we decline to do.”<sup>70</sup> The court then proceeded to make the following highly relevant point: “Congress passed the FAA to ensure that state law would not undermine arbitration agreements. In passing the FAA to curb state attempts to eliminate arbitration provisions, Congress likely did not delegate to the states the power to define arbitration in a way that would circumscribe its availability.”<sup>71</sup>

### B. *The Silence of the Legislative History*

Professor Horton and I disagree over the significance of the lack of any mention in the legislative history of a role for the courts. In my initial article, I noted various points at which take-it-or-leave-it contracting and the imposition of contracts on weaker parties was discussed. I noted that judicial policing of such contracts was never mentioned.<sup>72</sup> To me, this supports the conclusion that Congress anticipated no such role for the courts.

Professor Horton argues that I am reading too much into this silence. He points out that the concept of contracts of adhesion had entered legal thought in a significant way only a few years earlier and that in 1925 “[p]olicymakers had not started thinking about standard forms as part of a systemic problem.”<sup>73</sup> That is probably correct, but the concept of courts protecting weaker parties was hardly novel in 1925. I have argued elsewhere that unconscionability was well established by 1925.<sup>74</sup> For instance, the Supreme Court observed in 1870 that “[i]f a contract be

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<sup>68</sup> *Id.* at 6.

<sup>69</sup> 390 F.3d 684, 688 (10th Cir. 2004) (link).

<sup>70</sup> *Id.* at 689.

<sup>71</sup> *Id.* (citation omitted).

<sup>72</sup> Friedman, *supra* note 2, at 2050–52.

<sup>73</sup> Horton, *supra* note 1, at 23.

<sup>74</sup> Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney’s Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 339–40 (2010).

unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to.”<sup>75</sup> Had concerns about take-it-or-leave-it contracts or the imposition of contracts on weaker parties not come up in the legislative history, then I would probably agree that the absence of any discussion of a judicial role would be of little import. But those issues did come up. In my view, the silence about any judicial policing role is relevant.

Professor Horton also points out that the FAA only applies when subject matter jurisdiction is established. Professor Horton argues that diversity jurisdiction’s amount-in-controversy requirement (\$3,000 at the time) would have screened out “most consumer, employment, and insurance agreements.”<sup>76</sup> Thus, Congress would have never faced the choice between rigorous enforcement on the one hand and a robust judicial role in protecting the little guy on the other.

As ultimately adopted, the FAA applied only to cases in which the requirements for diversity jurisdiction (including the amount in controversy) were satisfied. But the version of the FAA that Congress debated was very different. It included a provision that dispensed with the \$3,000 amount-in-controversy requirement.<sup>77</sup> That Julius Henry Cohen had this version in mind during his testimony is quite clear. For example, in the statement he submitted to Congress in support of adoption of the FAA, he noted: “Federal courts are given jurisdiction to enforce [arbitration] agreements whenever under the Judicial Code they would normally have jurisdiction of a controversy between the parties. (Although, if the basis of jurisdiction is diversity of citizenship, the usual limitation of \$3,000 is removed).”<sup>78</sup> Thus, the version Congress debated and about which Cohen testified surely contemplated small cases (involving consumers, insurance agreements and employment).

While I do not think that congressional silence in this regard is dispositive or of monumental importance, I do think that it bolsters the argument that Congress intended for there to be no role for the judicial policing of arbitration agreements and that it expected courts to rigorously enforce arbitration agreements.

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<sup>75</sup> *Scott v. United States*, 79 U.S. (1 Wall.) 443, 445 (1870) (link).

<sup>76</sup> Horton, *supra* note 1, at 24.

<sup>77</sup> H.R. 646, 68th Cong. § 8 (1924) (as passed by the House of Representatives and referred to the Senate Commerce Committee, June 7, 1924); *see* 65 CONG. REC. 11,118 (1924) (reporting a message from the House on the passing of H.R. 646, “An act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations”).

<sup>78</sup> *Joint Hearings*, *supra* note 33, at 34 (brief submitted by Julius Henry Cohen).

IV. WHAT TO “MAKE” OF SECTION 4

Professor Horton and I disagree about whether unconscionability belongs in § 2. We also disagree about whether it belongs in § 4 of the FAA. Section 4 provides in relevant part that:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . . If the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof.<sup>79</sup>

Section 4 cannot accommodate unconscionability determinations. Section 4 calls for trial by jury on disputed issues. In contrast, unconscionability is a matter for the judge. Additionally, § 4 presents a stark binary choice between enforcement and non-enforcement. In contrast, unconscionability gives discretion for limited or partial enforcement.<sup>80</sup> The square peg of unconscionability does not fit into the round hole of § 4.

Professor Horton responds that § 4 does not vest in juries the exclusive right to determine matters under § 4. He notes that under some circumstances (i.e., when a jury trial is not demanded) § 4 permits determinations by the court.<sup>81</sup> However, a party can always forgo its right to a jury trial. Section 4 merely tells us that in such a case the court determines the matter.<sup>82</sup> This language in § 4 is entirely unremarkable and does not undermine the conclusion that § 4 precludes unconscionability determinations.

Professor Horton also argues against my position that § 4’s preoccupation with jury trials is about safeguarding litigants’ rights under the Seventh Amendment.<sup>83</sup> Professor Horton suggests that the references in § 4 to jury trials are a “holdover” from the New York Arbitration Law that referred to jury trials to reflect a quirk in New York law that provided for equitable defenses to be heard by a jury in some cases.<sup>84</sup> There is plenty of reason to think that § 4 is really about the constitutional right to a jury trial. For instance, the Senate Report’s description of § 4 concludes by stating: “The constitutional right to a jury trial is adequately safeguarded.”<sup>85</sup> I am somewhat dubious that Congress was concerned about preserving language

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<sup>79</sup> 9 U.S.C. § 4 (2006).

<sup>80</sup> Friedman, *supra* note 2, at 2062–63.

<sup>81</sup> Horton, *supra* note 1, at 31.

<sup>82</sup> 9 U.S.C. § 4.

<sup>83</sup> Friedman, *supra* note 2, at 2058.

<sup>84</sup> Horton, *supra* note 1, at 31–32.

<sup>85</sup> S. REP. No. 68-536, at 3 (1924).

relating to New York procedure in a section of the FAA that applies only in federal courts. The lack of any support for this position in the legislative history bolsters my conclusion.

Professor Horton also argues that my definition of “making” for purposes of § 4 is far too narrow and that “making” should actually be read to refer to any defense having anything to do with the arbitration agreement.<sup>86</sup> I cannot say that I know with absolute certainty what “making” means, but it must mean something. Professor Horton virtually reads it out of § 4. But even if we were to read § 4 as broadly as Professor Horton argues, unconscionability would still not fit into § 4 for the reasons already discussed—unconscionability is for a judge and permits limited or partial enforcement while § 4 directs issues to the jury and provides no option for limited or partial enforcement.

Given my argument in this Essay that unconscionability is not permitted under § 2, whether unconscionability fits into § 4 becomes less important.<sup>87</sup> But the fact that it does not may lend some support to the argument that Congress intended for unconscionability to not be among the grounds permitted by § 2.

#### CONCLUSION

*Unconscionability Wars* is an outstanding effort to resolve the relationship between unconscionability and arbitration. It did indeed cause me to recalibrate my own position, though it ultimately pushed me towards a conclusion, supported by *Concepcion*, that unconscionability is not within § 2 of the FAA.

Congress may or may not have been right in determining that it could safely remove the tool of unconscionability from the courts. But it did, in my view, make this determination. Sometimes the simplest answer to a vexing question is the correct answer: because Congress says so, courts should not apply unconscionability to arbitration provisions.

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<sup>86</sup> Horton, *supra* note 1, at 30–31.

<sup>87</sup> And of course, it may be that courts can decide even matters that do not fit within § 4 of the FAA, a point that will have to wait for another day.