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UNCONSCIONABILITY WARS[†]

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ABSTRACT—For decades, courts have invoked the contract defense of unconscionability to invalidate one-sided arbitration clauses. Recently, however, a growing cadre of judges, scholars, and litigants has asserted that this practice is incompatible with the Federal Arbitration Act (FAA). Some claim that the FAA only permits arbitrators—not courts—to find arbitration clauses to be unconscionable. Others, such as Justice Thomas—who provided the decisive vote in the Court's recent decision in *AT&T Mobility LLC v. Concepcion*—contend that the statute's plain language immunizes arbitration clauses from unconscionability in all circumstances. This Essay responds to these arguments. In particular, it challenges the cornerstone of both anti-unconscionability theories: that the FAA's text only allows courts to strike down arbitration clauses for reasons that relate to the "making" of the agreement to arbitrate.

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INTRODUCTION

It would be hard to exaggerate the importance of the unconscionability doctrine to federal arbitration law. In the last three decades, as the Supreme Court has expanded the scope of the Federal Arbitration Act (FAA),[1] arbitration clauses have become a routine part of consumer, franchise, and employment contracts. Some companies have sought not just to funnel cases away from courts, but to tilt the scales of justice in their favor: stripping remedies, slashing discovery, selecting biased arbitrators, eliminating the right to bring a class action, and saddling adherents with prohibitive costs and fees.[2] The unconscionability doctrine has emerged as the primary check on drafter overreaching. The Court has repeatedly acknowledged that lower courts can invoke unconscionability to invalidate one-sided arbitration provisions,[3] and dozens (perhaps hundreds) of judges have done exactly that.[4]

Recently, however, a rising chorus of voices has argued that the FAA allows arbitrators, but not judges, to strike down arbitration clauses as unconscionable.[5] These critics make three main points. First, they argue that the FAA, which limits judicial discretion, is incompatible with unconscionability, which is one of the most subjective and amorphous rules

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[1] Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2006)).

[2] For specific examples, see David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 460 (2011).

[3] *See, e.g.*, Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996).

[4] *See, e.g.*, David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 658 (2010).

[5] *See, e.g.*, Petitioner's Reply Brief at 12–16, Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010) (No. 09-497); Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2067 (2011).

in all of law.[6] Second, they assert that Congress recognized that the statute might allow powerful drafters to exploit weaker parties, but nevertheless concluded that its benefits outweighed this risk.[7] Third, they seize upon a seeming discrepancy at the heart of the statute. Section 2's savings clause permits courts to invalidate arbitration clauses under "such grounds as exist at law or in equity for the revocation of any contract"[8]—a phrase that arguably encompasses all contract defenses, including unconscionability. Yet § 4 only allows judges to hear challenges to the "making of the agreement for arbitration."[9] Unconscionability revolves, in part, around substantive fairness, not the "making" of the arbitration clause. Thus, the claim proceeds, because unconscionability does not fall within § 4, judges cannot employ the rule.[10] I will call this group of arguments the "anti-court" theory.

The anti-court theory took on a new dimension in April 2011, when the U.S. Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the FAA preempts a California Supreme Court rule that had rendered most class arbitration waivers in consumer contracts unconscionable.[11] The logic in Justice Scalia's majority opinion—that the California law is inconsistent with the "purposes and objectives" of the FAA—earned the support of only three other Justices. Although Justice Thomas "reluctantly" joined the majority opinion, he wrote separately to explain that he believes § 4 restricts § 2's savings clause to defenses that relate to the "making" of the arbitration provision.[12] In other words, Justice Thomas adopted one of the anti-court theory's premises, but arrived at a different, more drastic conclusion: whereas the anti-court theory posits that *judges* cannot apply unconscionability to arbitration clauses, Justice Thomas implied that *nobody* can apply unconscionability to arbitration clauses.[13] I will call this the "anti-unconscionability" theory. Because Justice Thomas provided the swing vote in *Concepcion* and invited parties to address the link between §§ 2 and 4 in the future,[14] he ensured that unconscionability's viability will become a flashpoint in the arbitration wars.

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[6] *See, e.g.*, Friedman, *supra* note 5, at 2050 ("[T]he whole point of the FAA is to take arbitration provisions out of the doghouse by removing judicial discretion when it comes to their enforcement.").

[7] *See, e.g.*, *id.* at 2051.

[8] 9 U.S.C. § 2 (2006).

[9] *Id.* § 4.

[10] Petitioner's Reply Brief, *supra* note 5, at 13 ("Treating unconscionability as relevant to whether an arbitration agreement has been 'made' is . . . inconsistent with the text of Section 4 . . . .").

[11] 131 S. Ct. 1740, 1753 (2011).

[12] *See id.* at 1753–55 (Thomas, J., concurring).

[13] *See infra* Part III.C (explaining why I read Justice Thomas's opinion to suggest that the modern unconscionability doctrine is not a proper defense to an arbitration clause).

[14] *See Concepcion*, 131 S. Ct. at 1754 (Thomas, J., concurring) (noting that this issue "could benefit from briefing and argument in an appropriate case"). In fact, pro-business litigants and amici had already been pushing this theory hard. *See, e.g.*, Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner at 31 n.7, *Concepcion*, 131 S. Ct. 1740 (No. 09-893); Petition for Writ of Certiorari at 14–15, Cellco P'ship v. Litman, 131 S. Ct. 2872 (2010) (No. 10-398), 2010 WL 3700269, at *15.

This Essay challenges the anti-court and anti-unconscionability theories. First, it argues that the anti-court theory is impossible to square with the FAA. The statute's core provision, § 2, only validates arbitration clauses if they do not violate "grounds . . . for the revocation of any contract."[15] As the Court has acknowledged, unconscionability is one such ground.[16] Section 2 thus predicates arbitration on the existence of an arbitration clause that is not unconscionable. The anti-court theory does not comply with this sensible mandate because it requires judges to compel arbitration even when faced with a flagrantly unconscionable (and thus unenforceable) arbitration clause.

Second, this Essay debunks the idea, common to both the anti-court and anti-unconscionability theories, that § 4 restricts § 2's defenses to those that relate to the "making" of the arbitration clause. Focusing exclusively on the statute's text, as Justice Thomas purported to do, actually demonstrates that § 2 preserves all contract doctrines that can be grounds for the rescission of an agreement. Although § 2 excludes one variation of unconscionability, a rule I call "equitable" unconscionability, it embraces the modern unconscionability doctrine that courts actually apply to arbitration clauses. Thus, the statute neither strips judges of the power to apply unconscionability nor excludes unconscionability completely.

I. UNCONSCIONABILITY AND THE FEDERAL ARBITRATION ACT

Today, most courts and scholars think of unconscionability as a single monolithic doctrine. In this Part, I show that in the eighteenth and nineteenth centuries, unconscionability actually consisted of several discrete principles. Then, I describe how the passage of the FAA made the precise contours of unconscionability one of the most important and contentious issues in federal arbitration law.

A. Pre-FAA Unconscionability

Before the twentieth century, most judges described contracts as unconscionable if they were too one-sided to specifically enforce. As the Michigan Supreme Court succinctly put it: "Specific performance is a remedy of grace, rather than right, and will be refused where it is inequitable to grant it."[17] Even a modest degree of unfairness could trigger this manifestation of the rule. For example, one court denied specific performance of a deal to sell a tract of land for $14,000 because its fair market value was $15,000.[18] I will call this equitable unconscionability.

Judges also used another variation of unconscionability to limit the damages available in an action at law. This version of the rule required a

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[15] 9 U.S.C. § 2 (2006).

[16] *See, e.g.*, Doctor's Assocs. v. Casarotto, 517 U.S. 681, 686–87 (1996).

[17] Rathbone v. Groh, 100 N.W. 588, 591 (Mich. 1904) (citations omitted).

[18] *See* Wilson v. White, 119 P. 895, 900 (Cal. 1911).

stronger showing of injustice than equitable unconscionability. For example, in *Hume v. United States*, the federal government argued that a contract calling for it to purchase shucks for thirty-five times their market price was unconscionable.[19] The Supreme Court agreed, and awarded the seller nothing more than the reasonable value of the shucks.[20] As the Court explained, the agreement was "fraudulent" because it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[21] Because judges in these cases held that the consideration was so imbalanced that fraud was intrinsic to the exchange, I will refer to it as the "intrinsic fraud" rule.

Finally, courts employed a third version of unconscionability to nullify entire contracts. These cases featured two elements. First, because of a flaw in the contracting process—"imbecility," intoxication, old age, or a language barrier—one party could not fully understand the bargain.[22] This component distinguished the rule from intrinsic fraud, which was available even to sophisticated parties with bargaining power.[23] Second, this manifestation of unconscionability required the terms of the agreement to be harsh or "improvident."[24] Although the opinions are inconsistent, the degree of unfairness sufficient to rescind a contract generally was greater than that required for equitable unconscionability, but was less than that necessary for intrinsic fraud.[25] As with intrinsic fraud, though, the basis of the rule was that one party had not given her authentic, autonomous assent to the transaction.[26] I will describe this doctrine as "rescission" unconscionability.

Before the twentieth century, courts did not apply the unconscionability doctrine in any of its incarnations to arbitration clauses. But as I describe next, two major developments—the enactment of the FAA and the rise of standard form contracts—would pit arbitration and unconscionability against each other.

B. The FAA

In 1925, Congress passed the FAA.[27] The statute sought to override the deep-seated suspicion of arbitration that American courts had inherited

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[19] 132 U.S. 406, 414 (1889).

[20] *Id.* at 415.

[21] *Id.* (internal quotation marks omitted).

[22] *See, e.g.*, Harris v. Wamsley, 41 Iowa 671, 673 (1875); Miller v. Howard, 184 P. 773, 775 (Okla. 1919).

[23] For example, as noted above, *Hume* applied the intrinsic fraud rule even though the party invoking the rule was the federal government, which enjoys ample bargaining muscle. *See Hume*, 132 U.S. at 414–15.

[24] *Harris*, 41 Iowa at 673.

[25] *See, e.g.*, Bride v. Reeves, 40 App. D.C. 473, 478–79 (1913).

[26] *See, e.g.*, Barnes v. Waterman, 104 N.Y.S. 685, 687 (Sup. Ct. 1907) (annuity contracts were unconscionable because one party did not "fully and clearly understand the[ir] terms").

[27] 9 U.S.C. §§ 1–16 (2006).

along with the common law.[28] In the seventeenth and eighteenth centuries, English courts had invented unique rules to prevent litigants from settling disputes outside of the judicial system. Under the ouster doctrine, they invalidated arbitration clauses as improper attempts to override their jurisdiction.[29] And under the rule of revocability, courts allowed parties to retract their consent to arbitrate until the very moment that the arbitrator rendered an award.[30] The FAA abolished these anti-arbitration measures. Section 2, the statute's "centerpiece,"[31] instructs courts that they can only use traditional contract principles—not the ouster or revocability doctrines—to nullify a contract to arbitrate: "A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[32]

Yet the FAA did not cut judges out of the loop completely. If a dispute arises about the "making of the agreement for arbitration," § 4 tasks courts (or juries) with resolving it.[33] For reasons that will become apparent, I will quote § 4 in detail later.

C. Modern Unconscionability

Decades after the FAA's enactment, courts and scholars struggled to assimilate the standard form (or "adhesion contract") into contract law. These nonnegotiated, unilaterally drafted documents reduced transaction costs.[34] At the same time, though, they threatened to undermine the very definition of a contract. Although binding agreements supposedly arose from words or conduct that each party could reasonably construe as assent to the exchange, drafters knew that few (if any) adherents would read the boilerplate. As a result, standard forms—particularly self-serving provisions in standard forms—did not seem to meet the minimum standards for contract formation.[35]

Courts and policymakers responded, in part, by revamping the unconscionability doctrine. In the mid-1960s, building on the foundation laid by "rescission" unconscionability, they created an unconscionability

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[28] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (explaining that the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts").

[29] *See, e.g.*, Kill v. Hollister, (1746) 95 Eng. Rep. 532 (K.B.) ("[T]he agreement of the parties cannot oust this Court . . . .").

[30] *See, e.g.*, Vynior's Case, (1609) 77 Eng. Rep. 597 (K.B.); 80 Co. Rep. 81 b (holding that parties could withdraw their consent to arbitrate at any time before the arbitrator ruled).

[31] Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 593 (2008) (Stevens, J., dissenting).

[32] 9 U.S.C. § 2 (2006).

[33] *Id.* § 4.

[34] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.8, at 115 (6th ed. 2003).

[35] *See, e.g.*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370–71 (1960).

rule tailored to standard forms. This doctrine, which I will call "modern" unconscionability, consists of the two-pronged test that prevails in most jurisdictions today.[36] Procedural unconscionability hinges on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print.[37] Substantive unconscionability arises when a term is "overly-harsh" or "one-sided."[38] By allowing courts to invalidate terms that suffer from these defects, modern unconscionability penalizes drafters for overreaching and maintains judicial integrity.[39] But more importantly, it isolates terms to which adherents do not assent in any meaningful way. As the D.C. Circuit explained in the watershed case *Williams v. Walker–Thomas Furniture Co.*: "[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."[40] Indeed, modern unconscionability empowers courts to strike down provisions that "fall outside the 'circle of assent' which constitutes the actual agreement."[41]

When the Court expanded the scope of the FAA in the mid-1980s, it transformed modern unconscionability into the most important—and controversial—doctrine in federal arbitration law. Responding to the Court's pro-arbitration jurisprudence, companies of all sizes placed arbitration clauses in their standard form contracts.[42] Often these provisions not only required the parties to bypass the judicial system, they also created an alternative procedural regime that favored the drafter.[43] Courts annulled so many of these clauses that modern unconscionability became defined largely by its role in the arbitration context.[44] In turn, this entanglement with arbitration created a new problem. On the one hand, the overwhelming consensus among judges and commentators—reinforced by dicta in several

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[36] *See, e.g.*, U.C.C. § 2-302 (2011) (recognizing modern unconscionability); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 541 (1967) (tracing the drafting history of the U.C.C.'s unconscionability provision and criticizing the rule for its "definitional void").

[37] *See, e.g.*, David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1694–95 (2009) (collecting cases).

[38] A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 122 (Ct. App. 1982) (internal quotation marks omitted).

[39] *See* Friedman, *supra* note 5, at 2043.

[40] 350 F.2d 445, 449 (D.C. Cir. 1965).

[41] *A & M Produce*, 186 Cal. Rptr. at 122 (footnote omitted).

[42] *See, e.g.*, Ellie Winninghoff, *In Arbitration, Pitfalls for Consumers*, N.Y. TIMES, Oct. 22, 1994, at L37 (noting the pervasiveness of arbitration clauses).

[43] *See, e.g.*, Horton, *supra* note 2, at 460.

[44] *See, e.g.*, Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622 (2009) (noting the sharp rise in unconscionability challenges to arbitration clauses in the last decade); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 804–08 (2004) (collecting cases that illuminate the "renewed unconscionability-based scrutiny of arbitration clauses").

Court opinions—was that unconscionability was a "ground[] . . . for the revocation of any contract" and thus could serve as a defense to an arbitration clause under § 2.[45] On the other hand, unconscionability was so tied to arbitration that it seemed less like a traditional contract defense and more like a specialized anti-arbitration measure. Scholars began to protest that courts were manifesting a "new judicial hostility to arbitration" by applying a stricter version of unconscionability to arbitration clauses.[46] In fact, *Concepcion* was the culmination of a long struggle by corporate defendants to get the Court to review a lower court's unconscionability ruling that allegedly discriminated against arbitration.[47]

The anti-court and anti-unconscionability theories are the latest embodiment of this pushback. I critique both in the next two Parts.

II. THE ANTI-COURT THEORY: ARBITRATION WITHOUT A VALID ARBITRATION CLAUSE

Under the anti-court theory, arbitrators can apply unconscionability but judges cannot. Before I address this thesis on its own terms, I will highlight a reason why it cannot be correct: it would force courts to compel arbitration before determining that a valid arbitration clause exists.

The Court often declares that arbitration is "a matter of contract."[48] Section 2 enshrines this principle by making a binding arbitration clause—one that is not susceptible to "grounds . . . for the revocation of any contract"[49]—the price of admission to arbitration. However, the anti-court theory would send disputes to arbitration without insisting that the drafter lay this foundation. For instance, Stephen Friedman, who endorses the anti-court theory in a brilliant article, argues that even judges faced with a flagrantly unconscionable arbitration clause "must grit their teeth" and compel arbitration.[50] But that would allow arbitration to conjure itself out of thin air. If an arbitration clause is blatantly unconscionable, it is unenforceable under § 2 and there is no basis for arbitration.

There are two seeming exceptions to this principle, but neither goes as far as the anti-court theory. First, the FAA requires courts to honor "invalid" arbitration clauses because it preempts traditional contract law. For instance, the Court has interpreted the statute to eradicate certain

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[45] *E.g.*, Doctor's Assocs. v. Casarotto, 517 U.S. 681, 688 (1996) (quoting 9 U.S.C. § 2 (2006)) (internal quotation mark omitted); Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (emphasis omitted) (quoting § 2) (internal quotation mark omitted).

[46] Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 470–71, 486.

[47] *Cf.* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1466–68 (2008) (anticipating *Concepcion* by noting the rise in petitions for certiorari that asked the Court to rule that a lower "court is using unconscionability against arbitration clauses in ways it is not used in other contexts").

[48] Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010).

[49] § 2.

[50] Friedman, *supra* note 5, at 2067.

strands of the longstanding contract defense of violation of public policy.[51] As a result, a court cannot strike down an arbitration clause just because a state has a strong interest in guaranteeing a judicial forum for certain claims. This may or may not be normatively desirable, but it flows naturally from the fact that the FAA preempts any state law that obstructs its goals. Critically, however, neither judges nor arbitrators can apply the public policy defense in this manner—it is not a viable defense to an arbitration clause. Conversely, the anti-court theory candidly acknowledges that unconscionability *is* a permissible defense to an arbitration clause. Indeed, even under the anti-court theory, unconscionability is a non-preempted "ground[] . . . for the revocation of any contract" under § 2.[52] Thus, when a court enforces an unconscionable arbitration clause, it does not merely uphold a term that would be invalid under quotidian contract law—it upholds a term that is invalid *under the FAA itself*. The anti-court theory cannot be squared with the statute it seeks to interpret.

Second, although the FAA allows arbitrators to decide gateway issues about the arbitration itself, it does not permit a judge to enforce an arbitration clause that triggers a non-preempted ground for revocation of any contract. For instance, arbitrators can determine whether a particular dispute falls within the scope of the clause. However, that is not the same as determining whether the arbitration clause is valid under § 2. Similarly, under the separability doctrine, courts must treat any contract that contains an arbitration clause as two contracts: (1) the overarching agreement that includes the arbitration clause (the "container contract") and (2) the contract to arbitrate.[53] The separability doctrine permits arbitrators to resolve allegations that the container contract is unenforceable.[54] But when a party specifically challenges the *arbitration clause*, a court decides the issue.[55] Thus, even under the separability doctrine, arbitration cannot proceed unless a judge has determined that the arbitration clause satisfies § 2.

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[51] *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 18–20 (1984) (Stevens, J., concurring in part and dissenting in part) (noting that by holding that the FAA preempts the right of states to deem certain contracts void for violation of public policy, the Court has eradicated a "ground[] . . . for the revocation of any contract" (quoting § 2) (internal quotation marks omitted)).

[52] *See supra* note 45 and accompanying text.

[53] *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 402 (1967) (compelling the arbitration of a claim that one company fraudulently induced another company to enter into a consulting agreement that included an arbitration clause); *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.").

[54] *Prima Paint*, 388 U.S. at 402.

[55] *See, e.g.*, *Buckeye*, 546 U.S. at 448–49. Admittedly, the contours of the separability doctrine are hotly contested. *Compare* Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 14 (2003) (arguing courts are, in fact, able to decide some claims that seek to invalidate the container contract), *with* Stephen J. Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing, Inc. v. Cardegna, 8 NEV. L.J. 107, 121–23 (2007) (claiming that the separability rule is too broad and should be repealed). I am referring to the doctrine as the Court seems to understand it in cases like *Buckeye*.

Likewise, the Court's recent decision in *Rent-A-Center, West, Inc. v. Jackson*[56] conditions arbitration on the existence of an arbitration clause that a judge has vetted for the full range of non-preempted grounds for revocation of any contract. In *Rent-A-Center*, the Court extended the separability rule to so-called "delegation clauses," which expressly authorize the arbitrator to decide the very issue of whether the arbitration clause is enforceable.[57] The Court held that if a contract contains a delegation clause, judges cannot decide whether the arbitration clause is valid unless a party first overturns the delegation clause.[58] But the Court reached this conclusion by conceptualizing delegation clauses as stand-alone, mini-arbitration clauses within arbitration clauses within container contracts: "an agreement to arbitrate threshold issues concerning the arbitration agreement."[59] In other words, even if a contract contains a delegation clause, a case does not proceed directly to arbitration. Rather, a court must decide whether the delegation clause is valid under § 2.[60] Again, under no circumstances can drafters do what the anti-court theory would permit them to do: completely end-run the judiciary by creating self-enforcing agreements to arbitrate.

Finally, the anti-court theory would have perverse results. It would give arbitrators the exclusive right to decide whether an arbitration clause is unconscionable even when the unfair features of the clause make it harder to prove that the arbitration clause is unconscionable. Suppose the drafter reserves the right to select the arbitrator. As the Fourth Circuit declared, such an arrangement "ensure[s] a biased decisionmaker."[61] However, without a prophylactic layer of court involvement, the biased decisionmaker would preside over the claim in which she is biased. Of course, the law tolerates self-interested adjudication when a judge must decide whether to recuse herself, but judges are never unilaterally appointed by one party. And unlike arbitrators, their rulings (both on recusal motions and the merits) are subject to the full panoply of appellate review. Thus, by allowing arbitrators complete dominion over their own neutrality, the anti-court theory encourages abuse. Similarly, if drafters impose exorbitant arbitral costs or choose an inconvenient forum, the only way for consumers, franchisees, or employees to obtain a ruling that these provisions are unconscionable would be to endure the exact injustices—paying excessive fees or travelling far away—that made the provisions unconscionable.

For these reasons, Congress did not exempt arbitration clauses from unconscionability challenges in court. In the next Part, I examine the anti-court and anti-unconscionability theories in greater detail.

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[56] 130 S. Ct. 2772 (2010).
[57] *Id.* at 2777.
[58] *Id.* at 2780–81.
[59] *Id.* at 2777.
[60] *See id.* at 2777–78.
[61] Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999).

III. THE FLAWED FOUNDATION OF THE ANTI-COURT AND ANTI-UNCONSCIONABILITY THEORIES

As I mentioned at the outset of this Essay, anti-court proponents make three main arguments. They contend that courts cannot apply unconscionability to arbitration clauses because (1) unconscionability gives judges too much discretion, (2) Congress passed the FAA even though it recognized that stronger parties might foist arbitration on others, and (3) unconscionability does not relate to the "making of the agreement to arbitrate" under § 4.[62]

Although the anti-unconscionability theory is less developed, it maps onto these assertions perfectly. Each argument drives a wedge between the FAA and unconscionability, suggesting that unconscionability cannot be a defense to an arbitration clause. Moreover, Justice Thomas's concurrence in *Concepcion* held that certain strands of unconscionability do not relate to the "making" of the arbitration clause.

A. Judicial Discretion

According to the anti-court camp, there is tension between the FAA, which eliminates judicial discretion in several areas, and unconscionability, which gives judges wide leeway to do what they wish. Indeed, the FAA severely limits the grounds on which courts can vacate, modify, or overrule an arbitrator's award.[63] It also requires courts to stay litigation and compel arbitration "in accordance with the terms of the agreement" if a dispute falls within the scope of a valid arbitration clause.[64] Unconscionability, on the other hand, revolves around "fairness"—an utterly subjective norm—and allows courts to annul some aspects of the arbitration clause while upholding others. Moreover, the theory continues, Congress passed the FAA to abolish the ancient judicial hostility to arbitration.[65] Thus, it could not have wanted courts to apply a doctrine that could easily camouflage the same antagonism toward extrajudicial dispute resolution.

Yet this argument sweeps too broadly. Unconscionability is not the only fact-sensitive, pliable rule that courts use to strike down arbitration clauses (or portions of arbitration clauses). Consider the implied covenant of good faith and fair dealing. Judges have relied on the implied covenant to nullify one-sided arbitral procedures[66] and drafters' attempts to unilaterally add arbitration clauses to existing contracts.[67] However, good faith—a "chameleon" which lacks "a settled meaning"—is just as nebulous as

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[62] 9 U.S.C. § 4 (2006).
[63] *Id.* §§ 9–11.
[64] *Id.* §§ 3, 4.
[65] *See* Friedman, *supra* note 5, at 2051.
[66] *See, e.g.*, *Hooters*, 173 F.3d at 940.
[67] *See, e.g.*, Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 284 (Ct. App. 1998).

unconscionability,[68] and no court, scholar, or litigant of whom I am aware has argued that it is off limits to judges in the arbitration arena. Similarly, courts routinely decide that a party has waived its right to arbitrate, even though this issue involves a flexible, multi-factored balancing test.[69] Even the duress defense, which indisputably falls under § 2, is "amorphous"[70] and hinges on easily manipulated factors such as whether a threat is "improper."[71]

Thus, many rules aggrandize courts and yet remain capable of voiding arbitration clauses. Unless Congress meant to create a nasty recurring line-drawing problem, the mere fact that a doctrine confers broad discretion on judges does not mean that it is unavailable to them.

B. Contractual Overreaching

Anti-court theorists also claim that Congress was aware that the FAA might allow stronger parties to impose arbitration on others, but ultimately decided that its virtues trumped these shortcomings. These theorists focus on two exchanges in the legislative history. First, Julius Henry Cohen, the author of the FAA, testified that the revocability doctrine reflected the fact that "the stronger men would take advantage of the weaker, and the courts had to come in and protect them."[72] As anti-court proponents argue, because Congress passed the FAA after Cohen flagged these concerns, it must have determined "that simplicity and the desirability of enforcing arbitration provisions outweighed . . . protect[ing] vulnerable parties."[73] Second, Senator Sterling, the Subcommittee Chairman, quizzed Cohen about railroad contracts offered on a "take it or leave it" basis.[74] Cohen replied by citing the governmental regulation of bills of lading and insurance contracts as evidence that "people are protected to-day as never before."[75] However, the anti-court theorists state that "[n]owhere in his answer does Cohen indicate any role for courts in policing against overreaching contracts."[76]

Yet it is not surprising that Cohen never mentioned that judges might protect adherents. In 1925, they lacked the means to do so. Policymakers

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[68] Empire Gas Corp. v. Am. Bakeries Co., 840 F.2d 1333, 1339 (7th Cir. 1988).

[69] *See, e.g.*, Davis v. KB Home of S.C., Inc., 713 S.E.2d 799, 807 (S.C. Ct. App. 2011) ("There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." (quoting Liberty Builders, Inc. v. Horton, 521 S.E.2d 749, 753 (S.C. Ct. App. 1999)) (internal quotation marks omitted)).

[70] Andreini v. Hultgren, 860 P.2d 916, 920 n.4 (Utah 1993).

[71] RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

[72] Friedman, *supra* note 5, at 2050–51 (quoting *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 15 (1924) [hereinafter *Joint Hearings*] (statement of Julius Henry Cohen)) (internal quotation mark omitted).

[73] *Id.* at 2051.

[74] *See id.* at 2051–52 (quoting *Joint Hearings*, *supra* note 72 (statement of Julius Henry Cohen)).

[75] *Id.* at 2052 (quoting *Joint Hearings*, *supra* note 72 (statement of Julius Henry Cohen)).

[76] *Id.*

had not started thinking about standard forms as part of a systemic problem. Indeed, it had been just six years since Edwin Patterson had introduced the phrase "contract of adhesion" to American legal commentary.[77] As I have argued above, the unconscionability doctrine was largely a way for courts sitting in equity to refuse specific performance of one-sided contracts. Modern unconscionability, which would have applied to the standard form contracts that Cohen and Senator Sterling were discussing, did not emerge until the mid-1960s.

Moreover, Congress never had to consider whether judges should protect weaker parties because the FAA as enacted was much narrower than it is today. Congress arguably passed the statute under its Commerce Clause power.[78] In 1925, however, Congress could not regulate intrastate transactions.[79] Thus, the FAA would have applied only to the rare adhesion contract that was negotiated across state lines. Alternatively, some judges and scholars believe that the FAA actually flowed from Congress's Article III authority to regulate federal courts.[80] As a result, the statute would have only governed in diversity cases, where the parties were citizens of different states and the amount in controversy exceeded $3000[81]—criteria that would have excluded most consumer, employment, and insurance agreements. Accordingly, Congress never faced the stark choice between arbitration hegemony and protecting the rights of adherents that the anti-court camp attributes to it.

Thus, the most plausible explanation for any silence in the record about the role of courts is not that Congress intended to strip them of their ability to act as a bulwark against powerful drafters. Rather, it is that Congress assumed that the FAA applied largely to merchant-to-merchant transactions and thus did not create a serious risk of exploitation.

C. The "Making" of the Arbitration Clause

Finally, both the anti-court and anti-unconscionability theories claim that unconscionability does not fall within § 4. When a party moves to compel arbitration, § 4 states 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. If no jury trial be

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[77] *See* Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

[78] *See, e.g.*, Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 106 (2002).

[79] *See id.* at 127–28.

[80] *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 28 (1984) (O'Connor, J., dissenting).

[81] *See* Drahozal, *supra* note 78, at 157 (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 267 (1926)).

> demanded by the party alleged to be in default, . . . the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may . . . demand a jury trial of such issue . . . . If the jury find that no agreement in writing for arbitration was made . . . , the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing . . . , the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.[82]

Thus, on its face, § 4 seems only to permit courts to resolve disputes about the "making of the agreement for arbitration."

This passage is key to the anti-court theory. For instance, Professor Friedman argues that unconscionability does not relate to the "making" of the arbitration clause. Instead, as he sees it, "the contract has been made and we need to decide what to do with it."[83] Accordingly, he concludes that § 4 does not permit courts to entertain unconscionability challenges to arbitration clauses. Rather, courts must order cases to arbitration and permit the arbitrator to decide what to do with the potentially unconscionable provision.[84]

Likewise, the phrase "making of the agreement for arbitration" is central to the anti-unconscionability theory as set out in Justice Thomas's concurrence in *Concepcion*. The seeds of *Concepcion* were sown in 2005, when the California Supreme Court held in *Discover Bank v. Superior Court* that class arbitration waivers in consumer contracts could be unconscionable when applied to numerous low-value claims.[85] The state high court reasoned that because plaintiffs will not prosecute such claims on an individual basis, class arbitration waivers amount to "'get out of jail free' card[s]" for corporate liability.[86] However, *Concepcion* held that the FAA preempts *Discover Bank*.[87] The four-Justice majority reasoned that class arbitration is slower and more formal than bilateral arbitration.[88] Thus, the majority held that California's attempt to guarantee such procedures for low-value claimants through the unconscionability doctrine "stand[s] as an obstacle to the accomplishment of the FAA's objectives."[89]

Nevertheless, Justice Thomas, a staunch textualist, has foresworn the freewheeling "purposes and objectives" preemption that the majority deployed.[90] As a result, he "reluctantly" concurred and wrote separately to explain how he reached the same result by applying the statute's plain

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[82] 9 U.S.C. § 4 (2006).

[83] Friedman, *supra* note 5, at 2060.

[84] *Id.*

[85] 113 P.3d 1100, 1108–10 (Cal. 2005).

[86] *Id.* at 1108.

[87] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

[88] *Id.* at 1751.

[89] *Id.* at 1748.

[90] Wyeth v. Levine, 555 U.S. 555, 602 (2009) (Thomas, J., concurring in the judgment) (internal quotation marks omitted).

meaning.[91] First, he noted that § 2 makes arbitration clauses "valid, irrevocable, and enforceable," but only makes them vulnerable to "grounds . . . for the *revocation* of any contract."[92] This asymmetry led him to conclude that § 2 does not apply to "all defenses applicable to any contract but rather some subset of those defenses."[93] To determine which defenses fit the bill, he looked to § 4:

> When a party seeks to enforce an arbitration agreement in federal court, § 4 requires that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," the court must order arbitration "in accordance with the terms of the agreement."
>
> Reading §§ 2 and 4 harmoniously, the "grounds . . . for the revocation" preserved in § 2 would mean grounds related to the making of the agreement.[94]

Although *Discover Bank* claimed to apply the unconscionability doctrine, Justice Thomas reasoned that it actually furthered California's interest in using the class action to deter corporate wrongdoing.[95] Because it centered on these extrinsic policy considerations rather than the "making" of the arbitration provision, it was preempted.

More broadly, Justice Thomas's concurrence implied that he does not think that modern unconscionability is a defense to an arbitration clause. For instance, he explained that §§ 2 and 4 require courts to enforce an arbitration clause "unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake."[96] Unconscionability is conspicuously absent from that list. Then, in a footnote, he cited *Hume v. United States* for the proposition that unconscionability "*historically* concern[s] the making of an agreement."[97] As noted, *Hume* involved the intrinsic fraud rule, a precursor to modern unconscionability. The fact that Justice Thomas interprets the FAA to allow courts to utilize the intrinsic fraud rule does not necessarily mean that he would extend that logic to modern unconscionability, which did not exist when Congress passed the statute.

As I explain in the next subparts, I disagree with the anti-court and anti-unconscionability theories' view of these issues for three reasons. First, I am not convinced by Justice Thomas's conclusion that § 2 is ambiguous. As a result, there is no reason to try to shoehorn § 4's reference to the "making" of the arbitration clause into § 2. Second, I do not believe that Congress intended the word "making" to mean "formation." As I explain, this narrow reading would have undesirable consequences in other contexts,

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[91] *Concepcion*, 131 S. Ct. at 1754 (Thomas, J., concurring).
[92] *Id.* (emphasis added) (quoting 9 U.S.C. § 2 (2006)).
[93] *Id.*
[94] *Id.* at 1754–55 (omission in original) (quoting § 4).
[95] *Id.* at 1756.
[96] *Id.* at 1755.
[97] *Id.* at 1755 n.* (emphasis added).

such as the separability doctrine. Third, even if §§ 2 or 4 do, in fact, only encompass defenses that relate to contract formation, modern unconscionability satisfies this standard. Even the species of unconscionability that Justice Thomas found preempted in *Concepcion* preserves the role of mutual assent in adhesion contracts and thus falls squarely within §§ 2 and 4.

1. The False Link Between §§ 2 and 4.—Unlike the anti-court theory, which takes no position about the meaning of § 2, the anti-unconscionability theory's central premise is that § 2 is ambiguous. Indeed, as Justice Thomas observed, § 2 is lopsided: it makes arbitration clauses "valid, irrevocable, and enforceable" subject only to grounds for "the *revocation* of any contract."[98] Thus, Justice Thomas looked to § 4 "[t]o clarify the meaning of § 2."[99]

However, with one caveat, I believe that § 2 is clear on its face. The phrases on which Justice Thomas focused do two things. First, they abolish the ouster and revocability rules. They do this by making arbitration clauses "valid" (overruling the ouster doctrine) and "irrevocable" (eliminating the revocability principle). Second, by making arbitration clauses "enforceable," they prohibit courts from denying specific performance. Indeed, one of the FAA's major purposes was to require courts to automatically grant specific performance as the remedy for breach of an arbitration clause.[100] This need to make specific performance mandatory explains half of the "ambiguity" that Justice Thomas identified: the omission of the word "non-enforcement." Section 2 could not have stated that arbitration clauses are "valid, irrevocable, and enforceable" subject to the grounds for the "revocation *and non-enforcement* of any contract." Doing so would have created a loophole that would have permitted courts to continue to decline to specifically enforce arbitration clauses.

At this point, I want to acknowledge a corollary of my interpretation: the FAA does not allow courts to apply the doctrine of equitable unconscionability. By immunizing arbitration clauses from traditional contract rules that are grounds for non-enforcement, the statute eclipses any rule, including equitable unconscionability, that entitles judges to deny specific performance. Thus, when Justice Thomas reasoned that § 2 "does not include all defenses applicable to any contract but rather some subset of those defenses,"[101] he was exactly right. However, because equitable unconscionability is only tenuously related to modern unconscionability, this conclusion makes little practical difference. More importantly, once the

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[98] *Id.* at 1754 (emphasis added) (quoting § 2) (internal quotation mark omitted).

[99] *Id.*

[100] *See, e.g.*, Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 593 (2008) (Stevens, J., dissenting) (reasoning that the FAA "abrogate[d] the general common-law rule against specific enforcement of arbitration agreements" (quoting Southland Corp. v. Keating, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part))).

[101] *Concepcion*, 131 S. Ct. at 1754 (Thomas, J., concurring in the judgment).

"non-enforcement" puzzle is solved, § 2 contains only one true ambiguity: it does not state that arbitration clauses are susceptible to grounds for contractual "invalidity."

There are several plausible explanations for the absence of "invalidity." The most likely contender is that, as Justice Thomas acknowledged, "invalidity" and "revocation" mean the same thing.[102] "Invalid" means "being without legal force."[103] "Revoke" means "to void."[104] Because there is no difference between a contract that lacks legal force and one that is void, a contract cannot be "invalid" unless it is "revocable," and vice versa. In fact, in the years leading up to the FAA's passage, courts often emphasized that an agreement was binding by calling it "valid and irrevocable."[105] Congress could easily have determined that "revocation" made "invalidity" superfluous.

Another possibility stems from the FAA's drafting history. The first glimmer of what would become § 2 can be found in a 1917 Illinois law that provided that "[a] submission to arbitration shall . . . be irrevocable."[106] Although the statute only governed the arbitration of existing controversies and not future disputes, it influenced Julius Henry Cohen, who reproduced it verbatim in the appendix of his 1918 polemic *Commercial Arbitration and the Law*.[107] Cohen then borrowed the basic structure of the Illinois legislation when he drafted New York's landmark 1920 Arbitration Act, which made arbitration clauses "valid, enforcible [sic] and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any

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[102] *Id.* In fact, Justice Thomas lumps "enforceability" into the same class as "validity" and "irrevocability." *Id.* As noted above, I believe that grounds for "non-enforcement" are narrower than grounds for "invalidity" and "revocability." A contract can be "valid" and "irrevocable" but not "enforceable" if a court refuses to specifically enforce it. Similarly, doctrines such as frustration or impracticability, which excuse performance, are neither grounds for "revocation" nor "invalidity."

[103] Butts v. Bysiewicz, 5 A.3d 932, 941 (Conn. 2010) (defining "invalid" as "[n]ot legally binding" (quoting BLACK'S LAW DICTIONARY 900 (9th ed. 2009)) (alteration in original) (internal quotation mark omitted)); Gonzales-Blanco v. Clayton, 458 N.E.2d 1156, 1158 (Ill. App. Ct. 1983) (defining "invalid" as "being without legal force or effect" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1188 (1976)) (internal quotation marks omitted)); Sims v. Beckett, 15 Ohio Dec. 734, 740 (Ohio Ct. Com. Pl. 1905) ("Webster's International Dictionary defines the term 'invalid,' as used in law, as of no force or effect or efficacy; void; null.").

[104] *In re* Nantz, 627 S.E.2d 665, 670 (N.C. Ct. App. 2006) ("The American Heritage Dictionary defines 'revoke' as 'to void or annul by recalling, withdrawing, or reversing.'" (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000))); *see also* BLACK'S LAW DICTIONARY 1435 (9th ed. 2009) (defining "revocation" as "[a]n annulment, cancellation, or reversal").

[105] *See, e.g.*, Harper v. Tipple, 184 P. 1005, 1007 (Ariz. 1919); English v. Bd. of Supervisors, 19 Cal. 172, 185 (1861); Bobzin v. Gould Balance Valve Co., 118 N.W. 40, 42 (Iowa 1908); Worthington v. Rich, 26 A. 403, 404 (Md. 1893); Sch. Dist. of City of Kan. City v. Stocking, 40 S.W. 656, 659 (Mo. 1897); Knickerbocker Inv. Co. v. Voorhees, 91 N.Y.S. 816, 819 (App. Div. 1905); Schnuerle v. Gilbert, 180 N.W. 953, 954 (S.D. 1921); Waggoner Bank & Trust Co. v. Warren, 234 S.W. 387, 389 (Tex. 1921); Brundage v. Burke, 40 P. 343, 343 (Wash. 1895); Raesser v. Nat'l Exch. Bank, 88 N.W. 618, 620 (Wis. 1902).

[106] 1917 Ill. Laws 202.

[107] JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW app. at 294–98 (1918).

contract."[108] Not only did ending the provision with "revocation" mirror the Illinois law, but it made sense because the revocability doctrine was so firmly established in New York that the legislature had seen fit to carve out a limited exception to it in New York's Code of Civil Procedure.[109] It was thus important to stress that the new Arbitration Act totally superseded the revocability principle. Cohen copied the New York statute's language in § 2 of the FAA. Accordingly, the FAA's fixation on "grounds for revocation" may simply be a historical accident.

However, Justice Thomas's solution to the omission of "invalidity" in § 2—to import the phrase "the making of the agreement for arbitration" from § 4—is not persuasive. To be sure, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."[110] Yet there is no need to look outside the four corners of a statutory provision unless it is actually *ambiguous*—susceptible to multiple reasonable interpretations that would produce different outcomes when applied to the same facts.[111] The fact that Congress did not use the word "invalidity" in § 2 is not a real ambiguity. As noted above, "revocation" and "invalidity" are synonyms. Because § 2 already uses the term "revocation," it would generate the same results in cases with or without the word "invalidity." Thus, Justice Thomas's justification for grafting language from § 4 into § 2 is dubious.

Moreover, even if § 2 is ambiguous, Justice Thomas's "clarification" of it is a jarring non sequitur. There is no analytical relationship between the symptom (the omission of the word "invalidity") and the cure (limiting § 2 to defenses that relate to contract formation). Because the statute uses the term "revocation," and to "revoke" is "to void," § 2 includes all defenses that can void a contract. This is true whether the defenses relate to contract formation (like fraud) or not (like public policy). The absence of "invalidity" does not suggest that Congress meant something narrower than "revocation" when it used the word "revocation." By limiting the plain meaning of "revocation" in § 2 by inserting language from § 4, Justice Thomas did not "clarify" the statute. Rather, he contradicted it.

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[108] 1920 N.Y. Laws 803, 804 (current version at N.Y. C.P.L.R. 7501 (McKinney 1998 & Supp. 2011)).

[109] 3 The New York Code of Civil Procedure as it Is January 1, 1913 § 2383 (George A. Clement ed., Baker, Voorhis & Co. 6th ed. 1912) (providing that parties could no longer revoke their consent to arbitrate after the arbitration had progressed past a certain point), *repealed by* 1920 N.Y. Laws 803, 806 ("Sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five of chapter seventeen, title eight, of the code of civil procedure are hereby repealed.").

[110] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1754 (2011) (Thomas, J., concurring in the judgment) (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (internal quotation mark omitted)).

[111] *See, e.g.*, United States *ex rel.* Sikkenga v. Regence BlueCross BlueShield of Utah, 472 F.3d 702, 710 (10th Cir. 2006) ("A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses." (internal quotation mark omitted)).

In fact, the FAA's legislative history elucidates that Congress believed that § 2 applied to all defenses—not just those that center on formation. For instance, Senator Walsh expressed his understanding that "[t]he court has got to hear and determine whether there is an agreement of arbitration . . . and it is open to all defenses, equitable and legal."[112] Similarly, in a law review article about the New York statute, Cohen wrote that it "recognizes that the infirmities, common to all contracts, which furnish ground for revocation at law or in equity, may still exist in cases of arbitration agreements."[113] To be sure, Cohen used the word "revocation," but, as noted above, grounds for "revocation" include both formation and non-formation-related defenses. And at the very least, if § 2 did, in fact, only govern contract formation, there would have been some discussion of this point in the congressional record. But there is none.

Accordingly, § 4 sheds no light on § 2. Of course, the fact that "grounds for revocation" includes all contract defenses (other than those that would be "grounds for non-enforcement") does not mean that judges can freely apply these rules. For instance, no court could invalidate an arbitration clause because it believes that waiving the right to a jury trial violates public policy. But contrary to Justice Thomas's view, that result does not stem from the language of § 2. Instead, it arises from the doctrine of "purposes and objectives" preemption and the muscular proarbitration policy that the Court created out of whole cloth. To be serious about textualism is to acknowledge that the statute only preempts a sliver of traditional contract doctrine.

2. "Making."—Both the anti-court and anti-unconscionability theories also claim that Congress used the phrase "the making of the agreement for arbitration" in § 4 to mean the "formation" of the arbitration clause. For instance, Professor Friedman argues that "[u]nconscionability does not really go to the issue of whether a contract was made."[114] And as noted above, Justice Thomas concluded that "[c]ontract defenses unrelated to the making of the agreement . . . could not be the basis for declining to enforce an arbitration clause."[115]

However, these approaches rely too heavily on words that Congress did not utilize with precision. For instance, § 4 requires a court to order arbitration if "an agreement for arbitration was made in writing" but not if "no agreement in writing for arbitration was made."[116] Similarly, a report prepared by the House Committee on the Judiciary describes § 4 as offering

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[112] *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 5 (1923) (statement of Charles L. Bernheimer).

[113] Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 149 (1921).

[114] Friedman, *supra* note 5, at 2060.

[115] *Concepcion*, 131 S. Ct. at 1755 (Thomas, J., concurring in the judgment).

[116] 9 U.S.C. § 4 (2006).

"a method for the summary trial of any claim that no arbitration agreement ever was made."[117] Read literally, these excerpts seem to require courts to order arbitration if there is a piece of paper that purports to be an arbitration clause. Indeed, an arbitration clause induced by egregious fraud has been "made." However, no one subscribes to this view. Thus, the fact that Congress used "made" loosely militates against a hyper-literal reading of "making."

Moreover, if "making" meant only "formation," it would have bizarre consequences outside the narrow context of unconscionability. Section 4 also provides the textual root of the separability doctrine. As the Court has explained, judges cannot hear challenges to the container contract because § 4 only permits them to resolve "issue[s] which go[] to the 'making' of the agreement to arbitrate."[118] But if "making" is "formation," then courts lack jurisdiction to entertain challenges to the arbitration clause that do not relate to the contracting process. Paradoxically, these would be the very claims—that the arbitration provision is illegal or violates some non-preempted strand of the public policy defense—that Congress was least likely to entrust to arbitrators.

Finally, Professor Friedman buttresses his argument by noting that § 4 "is directed largely at safeguarding the right to trial by jury."[119] Indeed, that provision repeatedly mentions the role of the jury in deciding whether to compel arbitration. Because juries do not hear unconscionability challenges, Professor Friedman concludes that § 4 does not permit courts to invoke the rule.[120]

Nevertheless, § 4 does not vest in juries the exclusive right to determine whether an arbitration clause was "made." To the contrary, it entrusts the court with "hear[ing] and determin[ing]" that issue "[i]f no jury trial be demanded by the party alleged to be in default."[121] Moreover, there is a simple explanation for § 4's preoccupation with jury trials. As noted, Cohen modeled the FAA on New York's arbitration law. Section 3 of the New York statute, which served as the blueprint for § 4 of the FAA, declared that if a party demanded a jury trial about the "making" of the arbitration clause, the judge should submit the matter "to a jury in the manner provided by law for referring to a jury issues in an equity action."[122] By doing so, it preserved an important feature of New York's Code of Civil Procedure: the ability of parties to request a jury trial for equitable

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[117] H.R. REP. NO. 68-96, at 2 (1924).

[118] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967).

[119] Friedman, *supra* note 5, at 2059.

[120] *Id.* at 2059–60.

[121] 9 U.S.C. § 4 (2006); *see also* 1920 N.Y. Laws 803, 804 ("If no jury trial be demanded by *either party* . . . ." (emphasis added)).

[122] 1920 N.Y. Laws 803, 805.

defenses.[123] Eliminating this entitlement would have raised a serious constitutional problem.[124] So, the New York statute (in a paragraph the FAA copied wholesale) took pains to give juries an active role in challenges to the "making" of the arbitration clause. Thus, the fact that § 4 refers repeatedly to jury trials is a holdover from the New York statute, not evidence of Congress's intent to foreclose courts from entertaining equitable defenses such as unconscionability.

3. Modern Unconscionability and Formation.—Finally, suppose that the anti-court and anti-unconscionability theories are correct that only defenses that hinge on the "making" of the arbitration clause fall within § 4 (or § 2). As I have argued above, modern unconscionability does, in fact, revolve around contract formation. Indeed, modern unconscionability reflects the fact that "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm . . . that the weaker party . . . did not in fact assent or appear to assent to the unfair terms."[125] Under their own logic, then, the anti-court and anti-unconscionability theories do not remove unconscionability from the judicial arsenal.

This conclusion is true even for the very application of the unconscionability doctrine that Justice Thomas found to be preempted in *Concepcion*. Citing a passage in *Discover Bank* in which the California Supreme Court explained that class arbitration waivers can reduce the drafter's liability, Justice Thomas reasoned that "[e]xculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy."[126] He thus concluded that the state high court's holding does not revolve around the "making" of the arbitration clause. But there is a second, well-established reason that courts strike down exculpatory clauses in adhesion contracts: because they are "wanting in the element of voluntary assent."[127] Indeed, in *Tunkl v. Regents of University of California*, a case that served as the springboard for *Discover Bank*, the California Supreme Court noted that when a liability waiver appears in an adhesion contract, "the releasing party does not really acquiesce voluntarily in the

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[123] *See, e.g.*, Bernard E. Gegan, *Is There a Constitutional Right to Jury Trial of Equitable Defenses in New York?*, 74 ST. JOHN'S L. REV. 1, 21–28 (2000) (noting that New York courts allowed defendants to try equitable defenses to juries if the plaintiff sought relief at law).

[124] *See id.* at 1–3.

[125] RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981); *see also id.* § 211 cmt. c (noting that because customers only "assent[] to a few terms," standard forms are subject to "the power of the court to refuse to enforce an unconscionable contract or term"). Justice Thomas may not disagree with this general sentiment. *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 249 (1995) (plurality opinion) (O'Connor, J., joined by Thomas, J., concurring in part and dissenting in part) ("[A] determination that a contract is 'unconscionable' may in fact be a determination that one party did not intend to agree to the terms of the contract.").

[126] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1756 (2011) (Thomas, J., concurring in the judgment).

[127] The Kensington, 183 U.S. 263, 268 (1902).

contractual shifting of the risk."[128] Thus, if *Discover Bank* had simply pointed out that consumers are unlikely to notice, understand, or agree to class arbitration waivers, Justice Thomas could not have found it to be preempted. At most, then, the anti-court and anti-unconscionability theories will change the rhetoric that judges employ, rather than the results they reach.

CONCLUSION

The anti-court and anti-unconscionability theories are not convincing interpretations of the FAA. The anti-court theory would make unconscionable arbitration clauses self-enforcing—a result that is both illogical and undesirable. The anti-unconscionability theory takes an unduly narrow view of § 2. Courts should reject these attempts to eliminate their role as a vital check on unfairness in arbitration.

[128] Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 446 (Cal. 1963).