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ARTICLES

ARBITRATION PROVISIONS: LITTLE DARLINGS AND LITTLE MONSTERS

*Stephen Friedman**

This Article takes a new approach to resolving the growing tension between the Federal Arbitration Act (FAA) and the unconscionability doctrine. While arbitration provisions are favored under the FAA, they are viewed far more skeptically by courts applying unconscionability to refuse enforcement of one-sided arbitration provisions. This tension, which has increased dramatically in recent years, represents a major fault line in contract law. Jurisprudence and commentary on this issue have assumed that courts have the authority to apply the unconscionability doctrine to arbitration provisions. This Article refutes that assumption, taking the position that Congress, in passing the FAA, removed from the courts the power to use unconscionability to deny enforcement of arbitration provisions. This argument is based on the language and structure of the FAA, the FAA's legislative history, commentary contemporaneous with the passage of the FAA, and the nature of unconscionability. To the extent it is necessary to protect vulnerable parties from one-sided arbitration provisions, judicial application of the unconscionability doctrine cannot be the solution. This Article suggests that the arbitration system itself may be capable of addressing any such overreaching.

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INTRODUCTION

In the eyes of the Federal Arbitration Act (FAA),¹ arbitration provisions are “little darlings”—favored contract terms presumptively entitled to full enforcement. To courts applying the unconscionability doctrine, however, such provisions are often viewed as “little monsters.” Three developments have brought the FAA’s pro-arbitration policy into conflict with unconscionability’s more skeptical outlook. First, the United States Supreme Court has steadily expanded the scope of the FAA.² Second, arbitration provisions have become increasingly common in employment and consumer contracts.³ And, third, parties with stronger bargaining power have become more brazen about drafting arbitration provisions to favor their own interests.⁴ The Supreme Court recently had an opportunity to resolve the conflict,⁵ but left things only slightly less confused than before.⁶

Jurisprudence and commentary to date have assumed that courts have the authority to use the unconscionability doctrine to refuse to enforce one-sided arbitration provisions. This Article challenges that assumption and takes the position that Congress, in passing the FAA, intended to strip courts of that power. This Article puts forward a number of arguments to support the position that courts should not use unconscionability as a tool to assess arbitration provisions. First, in passing the FAA, Congress made a meta-determination that arbitration agreements, as a class, are beyond judicial skepticism. They are, at least as far as the courts should be concerned, “pre-approved.” Thus, even a badly one-sided arbitration provision should not, to use a typical formulation of unconscionability, “shock the conscience”⁷ of a court (or if it does, the court must not be so

1. 9 U.S.C. §§ 1–16 (2006).

2. *See infra* notes 30–34 and accompanying text.

3. *See infra* notes 62–63 and accompanying text.

4. *See infra* note 64 and accompanying text.

5. *See Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

6. *See discussion infra* Part I.C.2.

7. *See infra* note 51 and accompanying text.

darn sensitive). The legislative history and commentary contemporaneous with the passage of the legislation establish this point.

Second, the structure of the FAA demonstrates that Congress intended to remove discretionary doctrines, such as unconscionability, from the tools available to courts to police arbitration provisions. The FAA simply does not contemplate an unconscionability analysis; to the contrary, the structure of the FAA excludes it, replacing it with only a limited review after the arbitrators' award.

Third, while the Supreme Court has indicated that the triumvirate of fraud, duress, and unconscionability are state law doctrines of general applicability that can be applied to arbitration provisions without running afoul of the FAA,⁸ this Article takes the position that because unconscionability is, in key relevant ways, different from fraud and duress, courts should not apply unconscionability to arbitration provisions. For instance, while fraud and duress go to the "making of the arbitration agreement"⁹ (and hence are within the scope of matters to be addressed by a court), unconscionability goes to "what the arbitration agreement is made of," a question that is properly addressed by the arbitrator.

Concluding that courts should not apply unconscionability to arbitration provisions does not constitute a dismissal of the importance of the unconscionability doctrine in general. While the FAA may suspend the ability of courts to apply unconscionability in this context, the doctrine still remains the law and there is no impediment to arbitrators applying the doctrine. This leads to one final question: can we trust the arbitrators with this job? The most accurate answer is probably "we'll see," but there are at least some hopeful signs.

The Article proceeds as follows: Part I provides an overview of the FAA, the unconscionability doctrine, and, most importantly, the interaction between them. Part II puts forward several arguments that support the proposition that unconscionability should not be used by courts to assess arbitration provisions. Finally, Part III addresses the question of whether, if we put courts out of the unconscionability business, arbitrators are up to the task of policing arbitration provisions.

I. BRIEF BACKGROUND ON THE FAA AND THE UNCONSCIONABILITY DOCTRINE

A. *The FAA*

The Supreme Court often seems torn when it comes to how courts should treat arbitration provisions compared to how they treat other types of contract provisions. Consider the following statement: "[s]ection 2 [of the FAA] embodies the national policy favoring arbitration and places

8. *Jackson*, 130 S. Ct. at 2776; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996).

9. 9 U.S.C. § 4 (2006).

arbitration agreements on equal footing with all other contracts.”¹⁰ On the one hand, the Court seems to be saying that arbitration provisions are to be treated just like other contract provisions (that is, no better and no worse). But if that is the case, how is there a federal policy “favoring” arbitration, since “to favor” implies giving one thing preferential treatment over another? There cannot be both equality and favoritism. The current status of arbitration provisions is probably akin to that of the pigs in George Orwell’s *Animal Farm*—all contract provisions are equal, but some (like arbitration provisions) are more equal than others.¹¹ A quick review of the FAA shows how we got to this point.

In 1925 Congress passed the United States Arbitration Act,¹² as the FAA was originally titled, to overcome prior judicial hostility towards pre-dispute arbitration agreements.¹³ That judicial hostility was reflected in common law rules that rendered pre-dispute arbitration provisions of little use. Under those common law rules, courts permitted either party to a pre-dispute arbitration agreement to revoke the agreement at any time before the entry of an award.¹⁴ Further, although arbitration agreements were deemed technically valid, courts typically refrained from enforcing them in equity, refusing to stay litigation or order the parties to proceed to arbitration.¹⁵

Dissatisfaction with these common law rules (often referred to collectively as the “rule of revocability”¹⁶), mostly in commercial circles, led to a strong movement to undo such rules legislatively. Efforts, initially led by the New York State Chamber of Commerce, resulted in the passage of the New York Arbitration Law in 1920.¹⁷ The New York Arbitration Law reversed the judicial hostility towards arbitration provisions, mandating that a “provision in a written contract to settle by arbitration a controversy thereafter arising between the parties . . . shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in

10. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

11. GEORGE ORWELL, *ANIMAL FARM* 149 (Harcourt Brace & Co. 1995) (1945) (“All animals are equal but some animals are more equal than others.”).

12. ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16).

13. See 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); S. REP. NO. 68-536, at 2–3 (1924) (describing the judicial hostility that the United States Arbitration Act was intended to correct).

14. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 32 (1984) (O’Connor, J., dissenting).

15. See S. REP. NO. 68-536, at 2 (“[I]t is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action.”).

16. WESLEY A. STURGES, *A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS* 45 (1930).

17. Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 *YALE L.J.* 147, 147–48 (1921) (describing efforts leading up to passage of the New York Arbitration Law).

equity for the revocation of any contract.”¹⁸ The New York Arbitration Law thus “abrogate[d] an ancient rule”¹⁹—the rule of revocability.

Federal legislation modeled on the New York Arbitration Law followed within a few years. The FAA, like the New York Arbitration Law, was passed to reverse legislatively the judicial rule of revocability²⁰ and to “replace judicial indisposition to arbitration with a ‘national policy favoring [it].’”²¹ Accordingly, the FAA “declares simply that . . . agreements for arbitration shall be enforced, and provides a procedure . . . for their enforcement.”²²

Section 2 of the FAA (section 2), the FAA’s “centerpiece provision,”²³ states that a “written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁴ The FAA also provides a mechanism for the specific enforcement by courts of arbitration provisions. Section 3 of the FAA (section 3) empowers (actually, it requires) a court to stay litigation when a lawsuit has been brought over an issue covered by a valid arbitration agreement.²⁵ And section 4 of the FAA (section 4) requires a court, once satisfied that an arbitration agreement has been made and that one of the parties has refused to arbitrate, to order the parties to proceed to arbitration in accordance with the terms of the agreement.²⁶ The FAA provides limited grounds for vacating²⁷ or modifying²⁸ the award of the arbitrators.²⁹

The FAA’s importance has been magnified by the fact that the Supreme Court has greatly expanded the scope of the FAA. For instance, the Court has held that Congress intended the FAA to extend to the full limit of Congress’s authority under the Commerce Clause.³⁰ The Court has also held that the FAA applies in state as well as federal courts,³¹ that the FAA

18. Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803, *reprinted in part in* STURGES, *supra* note 16, at 92 (current version codified as amended at N.Y. C.P.L.R. §§ 7501–14 (MCKINNEY 2011)).

19. *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 289 (N.Y. 1921).

20. *See supra* note 16 and accompanying text.

21. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

22. H.R. REP. NO. 68–96, at 2 (1924).

23. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274 (2009) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)) (internal quotation marks omitted).

24. 9 U.S.C. § 2 (2006).

25. *Id.* § 3.

26. *Id.* § 4.

27. *Id.* § 10.

28. *Id.* § 11.

29. I discuss this point more fully later in the Article. *See infra* notes 175–87 and accompanying text.

30. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–74 (1995); *see also* *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 55 (2003) (rejecting requirement that activity must have a “substantial effect on interstate commerce” to be covered by the FAA).

31. *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984).

applies to employment contracts³² (despite some ambiguous language in the statute³³), and that, with some possible exceptions, the FAA applies to agreements to arbitrate statutory claims.³⁴

The Court has also reduced the applicability of state law to arbitration provisions, and the scope of this reduction is crucial to understanding the role of unconscionability in the policing of arbitration provisions. Section 2 does carve out a role for state law, providing for the enforceability of written arbitration provisions “save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁵ The Court has made clear that state law may be applied “if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”³⁶ The Court has even gone so far as to twice identify unconscionability as one of the grounds referred to in section 2.³⁷

On the other hand, the Court has also stated:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act’s language and Congress’ intent.³⁸

This language seems to say that while a contract containing an arbitration clause can be unenforceable, the arbitration provision itself cannot be considered as part of that judicial determination.

These seemingly conflicting statements from the Court have left the status and role of unconscionability unsettled. I return to this point below when I discuss the encounter between unconscionability and the FAA over the proper regulation of arbitration provisions.³⁹ But first I provide an overview of the doctrine of unconscionability.

B. Unconscionability

The Supreme Court had an opportunity to clarify the relationship between unconscionability, arbitration provisions, and the FAA in the recent case *Rent-A-Center, West, Inc. v. Jackson*,⁴⁰ an opinion I will address in more detail shortly. During oral argument Justice Breyer asked one of the attorneys the following crucial questions: “What is the underlying rationale in contract law of setting aside contracts as unconscionable? Why

32. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

33. The statute excludes from its coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce.” 9 U.S.C. § 1.

34. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”).

35. 9 U.S.C. § 2.

36. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

37. *See infra* notes 79–91 and accompanying text.

38. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

39. *See discussion infra* Part I.C.2.

40. 130 S. Ct. 2772 (2010).

do courts do it? What's the theory? I would like to know that."⁴¹ In this section of the Article I attempt to provide a very brief response to the questions posed by Justice Breyer.

Most law-trained readers are quite familiar with modern unconscionability as articulated in the Uniform Commercial Code (U.C.C.) and the *Restatement (Second) of Contracts (Restatement)*. Section 2-302 of the U.C.C. provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.⁴²

The common law formulation, as articulated in *Restatement* section 208, is based on⁴³ and nearly identical to section 2-302(1) of the U.C.C., providing that:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.⁴⁴

Neither the U.C.C. nor the *Restatement* defines unconscionability, but most courts continue to require a showing of both procedural unconscionability (which goes to the manner in which the bargain was formed) and substantive unconscionability (which goes to the one-sidedness of the contract terms involved).⁴⁵ However, many courts take other approaches, such as requiring only substantive unconscionability.⁴⁶ Even among courts that do adhere to the procedural/substantive unconscionability

41. Transcript of Oral Argument at 49, *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (No. 09-497), 2010 WL 1654083 at *48.

42. U.C.C. § 2-302 (2002).

43. See *RESTATEMENT (SECOND) OF CONTRACTS* § 208, reporter's note (1981) (noting that the description of unconscionability follows U.C.C. § 2-302).

44. *Id.* § 208.

45. See *JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS* § 96(B)(2)(b) (4th ed. 2001).

46. See, e.g., *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59–60 (Ariz. 1995) (indicating substantive unconscionability alone may be sufficient for a finding of unconscionability); *Ahern v. Knecht*, 563 N.E.2d 787, 792 (Ill. App. Ct. 1990) (gross excessiveness of price alone is sufficient for unconscionability); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574–75 (App. Div. 1998) (indicating substantive unconscionability alone may be sufficient for a finding of unconscionability); cf. *March v. Tysinger Motor Co.*, No. 3:07-CV-508, 2007 WL 4358339, at *4 n.5 (E.D. Va. Dec. 12, 2007) (noting that Virginia law on unconscionability does not include the procedural/substantive dichotomy).

requirement, there is a difference of opinion as to whether the mere use of a contract of adhesion gives rise, by itself, to procedural unconscionability.⁴⁷

Beyond the basic framework, things become even more unsettled. Because unconscionability is not defined, it has been described as “amorphous”⁴⁸ and “chameleon-like.”⁴⁹ A few formulations seem to recur. For instance, courts frequently describe unconscionability as existing in the case of contracts that “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.”⁵⁰ Other courts have described unconscionable contracts or terms as being those that “shock the conscience.”⁵¹ Another standard provides that unconscionability involves a finding of “an absence of meaningful choice” coupled with contract terms that are “unreasonably favorable” to the stronger party.⁵²

Of course, U.C.C. section 2-302 was drafted after the passage of the FAA. But the doctrine of unconscionability was well established by the

47. *Compare* Clerk v. First Bank of Del., No. 09-5121, 2010 WL 1253578, at *9 (E.D. Pa. Mar. 22, 2010) (“Procedural unconscionability is generally found where the agreement is a contract of adhesion.”), *and* Flores v. Transamerica HomeFirst, Inc., 113 Cal. Rptr. 2d 376, 382 (Ct. App. 2001) (stating that “[a] finding of a contract of adhesion is essentially a finding of procedural unconscionability”), *with* Bhim v. Rent-A-Center, Inc., 655 F. Supp. 2d 1307, 1313 n.3 (S.D. Fla. 2009) (indicating mere fact that a contract is an “adhesion contract” is not by itself sufficient to establish procedural unconscionability under Florida law).

48. *See, e.g.*, Farmers Auto. Ins. Ass’n v. Union Pac. Ry. Co., 2008 WI App 116, ¶ 32, 313 Wis. 2d 93, 756 N.W.2d 461.

49. Steinhardt v. Rudolph, 422 So. 2d 884, 890 (Fla. Dist. Ct. App. 1982).

50. This is the formulation used in a leading mid-eighteenth century English case on unconscionability, *Earl of Chesterfield v. Janssen*, (1750) 28 Eng. Rep. 82, 100(Ch.); 2 Ves. Sen. 125, 155. This formulation, or variations on it, is still quite common. *See, e.g.*, Am. Botling Co. v. Crescent/Mach I Partners, L.P., No. 09C-02-134 WCC, 2009 WL 3290729, at *4 (Del. Super. Ct. Sept. 30, 2009) (noting that in Delaware the traditional test for unconscionability is whether a contract is “such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other” (quoting Tulowitzki v. Atl. Richfield Co., 396 A.2d 956, 960 (Del. 1978))); *Stream v. Grow*, No. 09-1011, 2010 WL 1578233, at *5 (Iowa Ct. App. Apr. 21, 2010) (an agreement is unconscionable if it is “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” (quoting *Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979))); *Cioffi-Petrakis v. Petrakis*, 898 N.Y.S.2d 861, 861 (App. Div. 2010) (“An unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience”) (quoting *Morad v. Morad*, 812 N.Y.S.2d 126, 127 (App. Div. 2006))).

51. *See, e.g.*, *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 125 (2d Cir. 2010) (substantive unconscionability exists only if the agreement “shocks the court’s conscience”); *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1107 (9th Cir. 2003) (noting that substantive unconscionability requires that an agreement’s terms are “so one-sided as to shock the conscience”); *Oesterle v. Atria Mgmt. Co.*, No. 09-4010-JAR, 2009 WL 2043492, at *3 (D. Kan. July 14, 2009) (unconscionability requires that a court find the contract provision at issue so outrageous and unfair as to “shock[] the conscience”).

52. This standard was articulated in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965), and has been described by a leading treatise as a “durable” standard. E. ALLEN FARNSWORTH, *CONTRACTS* § 4.28, at 301 (4th ed. 2004).

time of the passage of the FAA⁵³ and Congress would surely have been aware of this doctrine at the time.

So, what is the response to Justice Breyer's inquiry as to the "underlying rationale" of unconscionability and why courts refuse to fully enforce unconscionable contracts? In my view, there are two fundamental rationales: (1) the protection of parties with weak bargaining power from contractual overreaching by those with stronger bargaining power, and (2) the preservation of judicial integrity. With respect to this latter point, I mean that courts do not want to serve as tools of injustice and will not lend their active assistance, by way of full enforcement, to those who seek to take advantage of others through the imposition of overreaching contracts.

The first rationale—protection of weaker parties—is fairly evident. Modern unconscionability is designed to protect contracting parties from "oppression and unfair surprise."⁵⁴ This solicitude is at its greatest when it comes to parties with weak bargaining power: "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice"⁵⁵

Important though this rationale is, unconscionability has also long been a doctrine of preserving judicial integrity and ensuring that courts not participate in perpetrating injustice. As one court observed in a leading case on unconscionability:

[A] party who has offered and succeeded in getting an agreement as tough as [the one before the court] is, should not come to a chancellor and ask court help in the enforcement of its terms. That equity does not enforce unconscionable bargains is too well established to require elaborate citation.⁵⁶

The court noted that although the contract before it was not illegal and could be enforced, specific enforcement would not be granted because "the sum total of [the contract's] provisions drives too hard a bargain for a court of conscience to assist."⁵⁷ Similarly, Justice Frankfurter, in a dissent to a 1942 Supreme Court opinion, described the "basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice" as firmly embedded in the law.⁵⁸

53. See, e.g., *Scott v. United States*, 79 U.S. (12 Wall.) 443, 445 (1870) (noting that "[i]f a contract be 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"). I have previously argued that unconscionability had become well established in the United States by the end of the nineteenth century. See Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 339–40 (2010).

54. U.C.C. § 2-302 cmt. 1 (2002).

55. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

56. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948).

57. *Id.* at 84.

58. *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting).

While unconscionability largely developed as an equitable doctrine, it also has deep roots in law⁵⁹ and there, too, unconscionability was largely about judicial discretion and integrity. Unconscionability manifested itself in law as a doctrine that permitted a court to adjust the extent to which it would enforce a contract. As the Supreme Court noted in 1870, “If a contract be unreasonable and unconscionable . . . 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.”⁶⁰ Similarly, in an 1872 opinion, a New York state court refused to fully enforce a contract to write an autobiography because the award sought struck the court as “so monstrous and extravagant that it would be a reproach to the administration of justice to countenance or uphold it.”⁶¹

Having established a preliminary answer to Justice Breyer’s questions by saying that two rationales—the protection of vulnerable parties and the protection of the courts—underlie unconscionability, we can turn more specifically to the relationship between unconscionability and the FAA when it comes to arbitration provisions.

C. *The FAA and Unconscionability: The Twain Meet*

1. Initial Encounters

Since the 1980s we have seen the “expansion of arbitration into the realm of standardized consumer and employment contracts.”⁶² As arbitration provisions moved from their traditional role in commercial transactions and labor-management transactions into other types of transactions, such as consumer transactions,⁶³ arbitration provisions began playing more and more on unconscionability’s turf.

Additionally, parties began drafting arbitration agreements in ways that struck some courts as overreaching. Instead of “plain vanilla” arbitration provisions that might simply refer all disputes to arbitration under the rules of a provider of arbitration services (such as the American Arbitration

59. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.38, at 382 (5th ed. 2003).

60. *Scott v. United States*, 79 U.S. (12 Wall.) 443, 445 (1870).

61. *Greer v. Tweed*, 13 Abb. Pr. (n.s.) 427, 429 (N.Y. Ct. Com. Pl. 1872).

62. Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 37; see also *Wylie Indep. Sch. Dist. v. TMC Found., Inc.*, 770 S.W.2d 19, 23–24 (Tex. App. 1989) (Howell, J., dissenting) (noting a continuing trend towards the use of arbitration provisions in various types of agreements, including employment agreements, insurance agreements, and contracts for the sale of consumers goods, and predicting an acceleration of this proliferation).

63. See generally Linda J. Demaine & Deborah R. Hensler, “Volunteering” To Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer’s Experience*, 67 LAW & CONTEMP. PROBS. 55, 55–56 (2004) (noting that over the past few decades there has been a shift from arbitration provisions being used primarily in commercial transactions and labor-management transactions to arbitration provisions being used in consumer transactions, as well); Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 6–8 (1997) (discussing widespread use of arbitration in consumer and employment contracts following series of expansive Supreme Court decisions in the 1980s).

Association), carefully tailored arbitration provisions began appearing. Arbitration provisions were drafted that limited the type or amount of damages an arbitrator could award (including limits on the award of punitive damages), prohibited class-wide arbitration, required employees or consumers to arbitrate their claims but permitted the drafting party to sue in court, failed to assure a neutral arbitrator, imposed cost allocations that might discourage the bringing of claims, and called for arbitration in a forum inconvenient for the consumer or employee.⁶⁴

Unconscionability was brought to bear on these aspects of arbitration provisions as part of a large upswing in the use of unconscionability to police arbitration agreements beginning in the 1990s.⁶⁵ Professor Charles Knapp surveyed reported case law on unconscionability from 1990 through 2008. He observed a dramatic increase in the number of annual claims of unconscionability as a defense to enforcement of an arbitration provision—“from 1 or 2 at most through 1996, up to an average of 38 from the years 2003 through 2007, and to 115 in 2008.”⁶⁶

The results of this increased use of unconscionability are not always clear, and arbitration provisions may be treated very differently depending on what court is assessing them. As one article noted in comparing Georgia and California law, “[m]any jurisdictions, including Georgia, [are] . . . reluctant to invalidate arbitration agreements on unconscionability grounds” while in California “a parallel body of unconscionability jurisprudence” has resulted in “hundreds of California cases [that] expand and justify the use of unconscionability to strike down arbitration provisions.”⁶⁷ Class action waivers in arbitration provisions provide one useful illustration of the mess that is current unconscionability doctrine. Some courts have found limitations on a consumer’s right to proceed as part of a class to be substantively unconscionable,⁶⁸ while others have found it to be not substantively unconscionable.⁶⁹ California courts, for their part, have

64. See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1437–39 (2008) (describing various aspects of arbitration provisions that courts have focused on as potentially problematic).

65. *Id.* at 1439–41 (quantifying increased use of unconscionability defenses directed towards arbitration provisions); see also Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements To Arbitrate*, 2006 J. DISP. RESOL. 469, 492–500 (collecting cases applying unconscionability doctrine to various aspects of arbitration provisions); 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, 799–812 (2004) (discussing the increased use of unconscionability to police arbitration agreements).

66. Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622 (2009).

67. Ryan M. Turley, *Only the Rich Can Afford a Remedy: The Unconscionable Enforcement of Arbitration Provisions Against the Indigent*, 2007 J. DISP. RESOL. 611, 614–15.

68. See, e.g., *Cottonwood Fin., Ltd. v. Estes*, 2010 WI App 75, ¶ 1, 325 Wis. 2d 749, 784 N.W.2d 726.

69. See, e.g., *La Torre v. BFS Retail & Commercial Operations, LLC*, No. 08-22046-CIV, 2008 WL 5156301, at *5 (S.D. Fla. Dec. 8, 2008).

developed a three-part test for determining when a waiver by a consumer of the right to proceed in a class is unconscionable.⁷⁰ Arbitration law has thus become something of a patchwork—hardly a desirable result in a federal statute that articulates a national policy.⁷¹

Some commentators have cheered the increasing use of unconscionability to assess arbitration provisions,⁷² while others have criticized it as a return to the judicial hostility that the FAA was designed to eliminate.⁷³ This Article seeks to add to that debate by questioning the very premise that courts have the authority to assess the unconscionability of arbitration provisions.

2. The Supreme Court on Arbitration and Unconscionability

The Supreme Court has sent mixed signals when it comes to arbitration provisions and unconscionability. The Court noted in *Allied-Bruce Terminix Cos. v. Dobson*⁷⁴ that “[s]tates may regulate contracts, including arbitration clauses, under general contract law principles.”⁷⁵ But the Court went on to note:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the [FAA’s] language and Congress’ intent.⁷⁶

The above language, while not directly referring to unconscionability, provides guidance in understanding the role that unconscionability can (and cannot) play in the policing of arbitration provisions. Taken literally, the language in *Allied-Bruce* would seem to say that while a contract containing an arbitration provision can be deemed unenforceable, the arbitration provision itself cannot be a factor in making that determination.

The relationship between unconscionability and arbitration was mentioned, though in dicta, in *Perry v. Thomas*.⁷⁷ In that case the Court declined to consider a claim that an arbitration provision was unconscionable but noted that the lower court was free to consider the matter on remand. The Court gave some guidance to the lower court:

70. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

71. See, e.g., *Fit Tech Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004) (noting it is obvious that a uniform federal definition of the word “arbitration” is required).

72. See, e.g., Stempel, *supra* note 65, at 808 (arguing that the “advent of renewed unconscionability-based scrutiny of arbitration clauses is on the whole a positive trend”).

73. See *infra* notes 128–36 and accompanying text.

74. 513 U.S. 265 (1995).

75. *Id.* at 281.

76. *Id.*

77. 482 U.S. 483, 492 n.9 (1987) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)).

[Under section 2], state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of [section] 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.⁷⁸

Perry left for the lower court the determination of whether unconscionability as directed against an arbitration provision is a law that governs contracts generally. Further, while the Court indicated that the “uniqueness of an agreement to arbitrate” cannot be the basis of a determination of unconscionability, it left open what is included within the scope of that uniqueness. At the very least, *Perry* would seem to put some aspects of arbitration beyond the range of unconscionability.

The Court discussed, albeit briefly and in dicta, the relationship between unconscionability and the FAA in *Doctor’s Associates, Inc. v. Casarotto*.⁷⁹ The Court in *Casarotto* held that a Montana statute that required arbitration provisions to be in underlined capital letters on the first page of a contract was preempted by the FAA because the Montana statute impermissibly singled out arbitration provisions for suspect status.⁸⁰ Although a Montana statute (and not unconscionability) was at issue in *Casarotto*, the Court indicated in dicta that unconscionability is applicable to arbitration provisions covered by the FAA. The Court gave three examples of generally applicable contract defenses—“fraud, duress, or unconscionability”—each of which the Court said “may be applied to invalidate arbitration agreements without contravening [section] 2.”⁸¹

The recent opinion of *Rent-A-Center, West, Inc. v. Jackson*⁸² provides the Court’s most significant discussion of the relationship between unconscionability and the FAA. The key issue before the Court in *Jackson* was whether the court or the arbitrators should decide the unconscionability of an arbitration provision. The arbitration agreement at issue in *Jackson* provided in relevant part that the “Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.”⁸³

78. *Id.*

79. 517 U.S. 681 (1996).

80. *Id.* at 683, 686–87.

81. *Id.* at 687.

82. 130 S. Ct. 2772 (2010).

83. *Id.* at 2775.

An earlier opinion had established two key guiding principles (though not with respect to unconscionability in particular) that the *Jackson* Court applied. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁸⁴ the Court had held that a claim for fraud in the inducement of an entire contract (as opposed to a claim directed against the arbitration provision in particular) was generally for the arbitrator, not the court, to decide.⁸⁵ In reaching that decision the Court held that, as a matter of federal substantive law, an arbitration provision is separable from the contract in which it is embedded.⁸⁶ Further, the Court in *Prima Paint* held that a challenge to the contract as a whole is to be addressed by the arbitrator. Only if a challenge is to the arbitration provision itself is the court to consider the matter.⁸⁷ The reason for the rule of severability, the Court explained in *Jackson*, is that section 2 makes written provisions “valid, irrevocable, and enforceable” without any mention that the contract in which it is included must also be valid.⁸⁸

The Court in *Jackson* made clear that the fact that an arbitration provision is severable does not make it “unassailable”⁸⁹ and that one of the bases on which an arbitration provision could be assailed is unconscionability. The Court noted, as it had in *Casarotto*, that “[l]ike other contracts . . . [arbitration provisions] may be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’”⁹⁰ The Court noted as well that the “validity of a written agreement to arbitrate (. . . including, of course whether it was void for unconscionability) is governed by [section] 2’s provision that it shall be valid ‘save upon such grounds as exist at law or equity for the revocation of any contract.’”⁹¹

The Court in *Jackson* held that the challenge at issue was to the validity of the contract as a whole (even though the “whole” contract was an arbitration agreement without any other provisions) and thus was properly directed to the arbitrator and not the court. Only a challenge to the specific aspect of the arbitration agreement at issue—the granting of authority to the arbitrator to decide questions of validity—would have been for the court.⁹²

The Court thus pushed the concept of severability quite hard. The dissent observed that the severability rule established by *Prima Paint* permits a court “to pluck from a potentially invalid *contract* a potentially valid *arbitration agreement*.”⁹³ The dissent then criticized the majority for extending that rule to an extreme: “Today the Court adds a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid *arbitration agreement*

84. 388 U.S. 395 (1967).

85. *Id.* at 404.

86. *Id.* at 402–04.

87. *Id.* at 403–04.

88. 130 S. Ct. at 2776 (quoting 9 U.S.C. § 2 (2006)).

89. *Id.* at 2778.

90. *Id.* at 2776 (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

91. *Id.* at 2777 n.1 (quoting 9 U.S.C. § 2).

92. *Id.* at 2778.

93. *Id.* at 2786 (Stevens, J., dissenting).

even narrower provisions that refer particular arbitrability disputes to an arbitrator.”⁹⁴

Because the Court held that the challenge was to the agreement as a whole and hence for the arbitrator, the Court did not fully resolve the question of how an unconscionability analysis would fit into the judicial procedures of the statute. The Court seemed to assume that such a challenge would be decided under the procedures for a stay of litigation and an order to compel arbitration set forth in sections 3 and 4, respectively. The Court noted, for instance, that sections 3 and 4 are designed to implement section 2’s substantive rule.⁹⁵ In somewhat ambiguous language, the Court stated that if a party challenges the validity of an arbitration agreement under section 2, “the federal court must consider the challenge before ordering compliance with that agreement under [section] 4.”⁹⁶ It is difficult to know whether this dicta indicates that the consideration of the challenge is carried out under the rubric of section 4 or whether the consideration is somehow separate from section 4 (i.e., must come “before” the analysis under section 4 in some procedure not explicitly set out in the FAA).

The Court did characterize unconscionability as a “gateway” issue, and this characterization gives some indication of how unconscionability is to be treated. Gateway issues, “such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy,”⁹⁷ are the types of issues that parties would likely have expected a court to decide. By placing unconscionability alongside issues of contract formation, which are to be determined under section 4, the Court indicated that unconscionability should be decided by a like procedure.⁹⁸

It was with this last point that the Court, in my view, went somewhat astray. The bottom line result of *Jackson* will be the removal from the courts of many determinations of the unconscionability of arbitration provisions. Assuming a sufficiently broad grant of arbitral authority in the agreement it appears that, as a practical matter, the only issue of unconscionability that a court will address is a challenge to the very grant of authority to the arbitrator. It seems unlikely that such a grant will be deemed unconscionable with any frequency. This result is perfectly consistent with the FAA and perfectly consistent with this Article’s key argument—courts should largely be put out of the unconscionability business when it comes to arbitration provisions.

However, the Court in *Jackson* should, in my view, have taken the next logical step. Instead of leaving a fairly small scrap of unconscionability determinations to the courts, it should have simply removed the

94. *Id.*

95. *Id.* at 2776.

96. *Id.* at 2778.

97. *Id.* at 2777.

98. *Cf.* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (noting that fraud in the inducement directed at the arbitration provision at issue would be determined under section 4).

unconscionability doctrine completely from the judicial realm when it comes to arbitration provisions. In the next part of the Article, I discuss why such a result is called for by the FAA.

II. UNCONSCIONABILITY IS NOT AN APPROPRIATE TOOL FOR JUDICIAL POLICING OF ARBITRATION PROVISIONS

This part of the Article puts forward several reasons why courts should not use unconscionability to police arbitration provisions. First, the whole point of the FAA is to take arbitration provisions out of the doghouse by removing judicial discretion when it comes to their enforcement. While the FAA was not intended to insulate arbitration provisions from all challenges, it was intended to insulate them from the type of judicial discretion inherent in unconscionability. This intent is made clear through the legislative history as well as commentary contemporaneous with the passage of the FAA. Second, that intent is made clear through the structure of the FAA, which leaves neither a procedure nor an opportunity for judicial discretion (except to a very limited degree after the arbitrators reach their decision). Third, unconscionability is, in highly relevant ways, different from duress and fraud. While duress and fraud are certainly permissible defenses to the enforcement of an arbitration provision and likely should be addressed under section 4, unconscionability is significantly different and should be treated differently for purposes of the FAA.

A. Limiting Judicial Discretion

The two main rationales for unconscionability are, as discussed above, the protection of weaker parties and the preservation of judicial integrity (effectuated by giving courts the discretion to refuse full enforcement of overreaching contract terms).⁹⁹ The FAA has addressed both these issues on the legislative level and removed them from the judicial realm when it comes to arbitration provisions. The drafters of the FAA understood that they were making a trade-off: simplicity and rigorous enforcement of arbitration provisions took the place of judicial protection and discretion.

The rule of revocability which the FAA eliminated was itself a judicial tool for the protection of vulnerable parties. In his testimony to the joint congressional committee considering the legislation, Julius Henry Cohen, general counsel for the New York State Chamber of Commerce¹⁰⁰ and one of the primary drafters of both the New York Arbitration Law and the FAA,¹⁰¹ noted that “the real fundamental cause [for the rule of revocability] was that at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage

99. See *supra* notes 54–61 and accompanying text.

100. *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. 13 (1924) [hereinafter *Joint Hearings*] (statement of Julius Henry Cohen).

101. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 n.7 (2008) (describing Cohen and looking to his testimony before Congress to understand meaning of the FAA); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274, 279 (1995) (same).

of the weaker, and the courts had to come in and protect them.”¹⁰² Cohen further noted that courts applying the rule of revocability “said, ‘If you let the people sign away their rights, the powerful people will come in and take away the rights of the weaker ones.’”¹⁰³ He continued, “And that still is true to a certain extent.”¹⁰⁴

Thus, Cohen and Congress understood that there was contractual overreaching directed against weaker parties and that courts were concerned about this overreaching. Yet Congress still passed the FAA, presumably determining that simplicity and the desirability of enforcing arbitration provisions outweighed these judicial concerns. The main purpose of the FAA was to take away from courts the judicial tool of the rule of revocability (and presumably other similar tools) that protected vulnerable parties. Perhaps Congress believed such tools were not necessary or that other values outweighed judicial skittishness. Perhaps Congress was wrong, but that is a different matter.

Congress apparently saw fit to rely on non-judicial sources to protect weaker parties. The passage of the FAA, as well as similar statutes, assumes a great deal of faith in the ability of the arbitrators themselves to provide justice. The rule of revocability was premised in part on a belief on the part of nineteenth century courts that arbitration provided “second-rate justice at best.”¹⁰⁵ But the FAA was designed to reverse that judicial hostility and ensure that arbitrators be given the power to adjudicate disputes.¹⁰⁶ The FAA is designed to permit the arbitration to proceed “without interference by the court”¹⁰⁷ and the FAA facilitates a “full and fair consideration of the controversy” by the arbitrators.¹⁰⁸ The limited bases available for a court to vacate, modify, or correct an arbitrator’s award¹⁰⁹ also demonstrate a faith in the ability of the arbitrators to do justice.

The legislative history indicates that the FAA is premised on the belief that to the extent arbitrators were not fully up to the task of doing justice or protecting parties, legislation would provide sufficient additional protection. Senator Thomas Sterling, who was chairing the joint hearings, pressed Cohen on the issue of contractual overreaching. Senator Sterling noted, “There are certain contracts to-day between the railroads and the shippers in which there is an agreement to arbitrate, and the representation is made to

102. *Joint Hearings, supra* note 100, at 15 (statement of Julius Henry Cohen).

103. *Id.*

104. *Id.*

105. *See* *Wold Architects & Eng’rs v. Strat*, 713 N.W.2d 750, 761–62 (Mich. 2006) (Corrigan, J., concurring) (discussing judicial hostility to arbitration in the nineteenth century).

106. *See* discussion *supra* Part I.A.

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

108. *Joint Hearings, supra* note 100, at 36 (containing the brief on the proposed federal arbitration statute).

109. *See infra* notes 175–87 and accompanying text.

the shipper, "You can take it or leave it, just as you please; but unless you sign you can not ship."¹¹⁰

While Senator Sterling was focused on transactions between commercial entities, Cohen's answer also addressed the imposition of arbitration provisions on individuals:

There is nothing to that contention, Mr. Chairman, for this reason: In the first place, we have the bills of lading act, and the bills of lading act contains the terms of the bill of lading. And that is a protection to the shipper.

And then we have the regulation of the Federal Government, through its regularly constituted bodies, and they protect everybody. Railroad contracts and express contracts and insurance contracts are provided for. You can not get a provision into an insurance contract to-day unless it is approved by the insurance department. In other words, people are protected to-day as never before.¹¹¹

Cohen thus had in mind that arbitration agreements would be imposed on "regular" people, not just commercial entities. Nowhere in his answer does Cohen indicate any role for courts in policing against overreaching contracts, and Senator Sterling's question seems to assume that any such judicial protection is being removed by the FAA.

In addition to the arbitrators and the legislatures, the only other source that Cohen mentions for the protection against improper use of arbitration agreements is the good judgment of lawyers. In a law review article, he and his co-author noted that "what is designed for use is subject to abuse" and that "the arbitration clause requires skill and intelligent understanding of its place in the scheme of contracts and of its limitations and of the safeguards against its misuse."¹¹² But nowhere is there a hint that the courts would provide any protection.

As the Supreme Court has noted, the "preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate."¹¹³ Thus, rigorous enforcement and simplicity were given a higher value than protection of weaker parties by the courts. The FAA represents a legislative determination that courts should, regardless of what their "consciences" tell them, enforce arbitration provisions. Arbitration provisions are, in essence, "pre-approved" and do not have to pass the usual judicial tests for specific enforcement (including, presumably, that the arbitration agreement being enforced is not unconscionable).

Early commentators on arbitration legislation recognized and assumed that the FAA and similar state arbitration statutes stripped courts of their discretion and these commentators often criticized this aspect of the

110. *Joint Hearings*, *supra* note 100, at 15 (statement of Julius Henry Cohen).

111. *Id.*

112. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926).

113. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

legislation. A 1933 law review article by Professor Philip Phillips¹¹⁴ focused on the adoption of state statutes based on the American Arbitration Association's Model Arbitration Act (MAA),¹¹⁵ a draft act "in complete accord" with the FAA and designed to do for arbitration provisions in intrastate transactions what the FAA did for arbitration provisions in interstate transactions.¹¹⁶ The MAA is, in relevant respects, virtually identical to the FAA.¹¹⁷ Phillips observed that "one concrete result" of the adoption of statutes based on the MAA "has been the frequent insertion of arbitration clauses in 'take or leave it' contracts containing provisions no court would enforce but which arbitrators invariably do."¹¹⁸ Phillips plainly had in mind take it or leave it contracts imposed on individuals:

Standardized order blanks used in business dealings with small buyers or housewives frequently contain arbitration clauses, and the unsuspecting small buyer or housewife signs the contract and is taken advantage of as a result. The courts generally hold that the making of the contract is not in issue and order arbitration to proceed¹¹⁹

Phillips criticized the arbitration laws for their stripping away of judicial discretion in the enforcement of arbitration provisions. He observed that the language of the MAA "leaves no ground for misunderstanding. The court is given no discretion to deny a motion to compel arbitration, and if the trial judge is satisfied that 'the making of the contract . . . or the failure to comply therewith is not in issue,' arbitration is ordered to proceed."¹²⁰ Phillips was highly critical of this stripping away of discretion: "Is equity history to be taken so lightly and equitable principles to be so disregarded that specific performance, always a remedy in the discretion of the chancellor, is now to be granted wholesale, without thought?"¹²¹ Unconscionability, it bears repeating, is itself a doctrine that had previously been used to withhold specific performance from otherwise enforceable agreements.¹²² It, too, is presumably taken off the table by the FAA, along with other similar doctrines.

Similarly, Professor Sidney Simpson, in a law review article published in 1934, compared American arbitration statutes (the FAA and comparable state statutes) with the English Arbitration Act.¹²³ Simpson noted that "[m]odern American arbitration statutes have been regarded as imposing

114. Philip G. Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258 (1933).

115. The Model Arbitration Act (MAA) is reprinted in *Model Arbitration Statute Offered*, 10 J. AM. JUDICATURE SOC'Y. 122, 124-26 (1926-1927).

116. *Id.* at 126 (containing the MAA Summary).

117. A comparison of 9 U.S.C. §§ 2, 3, 4, 9, 10, and 11, with, respectively, MAA §§ 1, 2, 3, 9, 10, and 11, shows that the text of the two acts is nearly identical.

118. Phillips, *supra* note 114, at 1274.

119. *Id.* at 1274-75.

120. *Id.* at 1265.

121. *Id.* at 1266.

122. See discussion *supra* Part I.B.

123. Sidney P. Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. PA. L. REV. 160 (1934).

upon the courts a mandatory ‘duty to enforce’ arbitration agreements.”¹²⁴ In contrast, the English Arbitration Act existing at the time gave “the court discretion as to whether or not to stay an action brought in violation of an arbitration clause.”¹²⁵ Simpson strongly favored the English approach in his article, noting that the American system of compelling arbitration in every instance even when it is “unjust in the particular case” may bring the whole system of arbitration into “disrepute.”¹²⁶ Simpson noted that “there can be no doubt that such cases of injustice can and do arise” as in the inclusion in contracts of adhesion of “onerous arbitration clauses.”¹²⁷ The American arbitration statutes, such as the FAA, were, according to Simpson, simply not equipped to deal with such injustices since they had effectively given pre-approval to arbitration provisions.

While early commentators assumed that the FAA was meant to remove judicial discretion and make arbitration provisions automatically enforceable, modern commentators have demonstrated that Congress was right to be suspicious of courts wielding discretionary and equitable tools when it comes to arbitration provisions. Various analyses in the past decade of efforts by courts to apply unconscionability to arbitration provisions suggest that a fear that judicial discretion will result in judicial hostility is well founded. For instance, Professor Steven Burton has observed that in many instances unconscionability is being used as part of a new judicial hostility towards arbitration strongly reminiscent of the state of affairs that the FAA was designed to correct.¹²⁸ Thus, Professor Burton’s analysis of unconscionability cases led him to conclude that: “There is a new judicial hostility to arbitration in noncommercial cases. Many courts, when asked to enforce an arbitration agreement, seize upon the unconscionability doctrine as a pretext to refuse enforcement.”¹²⁹

Similarly, Professor Susan Randall compared the way in which courts apply unconscionability to similar issues in the arbitration context and in the non-arbitration context.¹³⁰ For example, she found that while courts generally enforce forum-selection clauses in cases that do not involve arbitration agreements, courts routinely find forum-selection clauses in arbitration agreements unconscionable.¹³¹ More broadly, Professor Randall’s study of unconscionability cases for the period of 2002 through 2003 shows that courts were almost twice as likely to find arbitration provisions unconscionable compared to other types of contracts.¹³²

124. *Id.* at 173–74 (quoting *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 291 (N.Y. 1921)).

125. *Id.* at 174.

126. *Id.*

127. *Id.*

128. Burton, *supra* note 65, at 469–71.

129. *Id.* at 500.

130. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004).

131. *Id.* at 214–18.

132. *Id.* at 194–96.

Stephen A. Broome concluded that judicial hostility towards arbitration agreements is evident in California.¹³³ His survey of cases from the California intermediate courts of appeals showed that unconscionability challenges are more than five times more likely to succeed when directed against an arbitration provision as compared to other types of contract provisions.¹³⁴ Further, California courts have imposed, under the guise of unconscionability, requirements on arbitration provisions that are not imposed on other types of contracts. For instance, under California law an arbitration provision that is not binding on both parties is likely to be found unconscionable.¹³⁵ Because “[o]utside of the arbitration context, California law does not require mutuality of obligation,”¹³⁶ the requirement of mutuality in the arbitration context represents and reflects a judicial hostility towards arbitration.

In sum, Congress intended to remove discretionary tools from the courts¹³⁷ (presumably leaving the fairness of arbitration provisions to arbitrators) and, insofar as courts have wielded their discretion against arbitration, was right to do so. This intent is also demonstrated by the structure of the FAA, a point I turn to now.

B. *The Structure of the FAA*

Not only the FAA’s legislative history and contemporaneous commentary, but also its structure, supports the proposition that the FAA leaves no place for the type of judicial discretion that is the lifeblood of unconscionability. Sections 3 and 4 implement the substantive rule of section 2.¹³⁸ Through these sections the FAA provides “two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration [provided for in section 3] and an affirmative order to engage in arbitration [provided for in section 4].”¹³⁹ The Court has indicated that section 3 is binding on state courts as well as federal courts.¹⁴⁰ Whether state courts or only federal courts are bound by section 4 is, according to the Court, “less clear.”¹⁴¹ Regardless of whether state courts are technically bound by both sections 3 and 4, the structure of the FAA demonstrates what Congress had in mind for the role of the courts in enforcing arbitration agreements.

133. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 65 (2006).

134. *Id.* at 44–48.

135. See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 691–93 (Cal. 2000) (requiring a “modicum of bilaterality” in arbitration agreements, and asserting that such a requirement does not run afoul of the FAA).

136. Broome, *supra* note 133, at 52.

137. Except for a very limited discretion in deciding whether to confirm an arbitration judgment. See *infra* notes 175–87 and accompanying text.

138. See *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).

139. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

140. See *id.* at 26 n.34.

141. *Id.* at 26. The Court noted that, unlike section 3, section 4 refers to a petition being made in a United States district court. *Id.* at 26 n.35.

As noted earlier, section 3 requires a court to stay litigation of “any issue referable to arbitration under an agreement in writing for such arbitration.”¹⁴² Section 3 contemplates a judicial determination of whether a disputed issue is within the scope of an arbitration agreement—the court must be “satisfied” that it is before staying litigation.¹⁴³ Additionally, a court must also be satisfied that an arbitration agreement was actually made, as provided for in section 4.¹⁴⁴ But section 3 contains nothing that even hints at judicial discretion. If the court finds the issue referable under an arbitration agreement it “shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.”¹⁴⁵

Several courts have noted that section 3 permits no judicial discretion. For instance, in *Gutierrez v. Academy Corp.*,¹⁴⁶ the court addressed a claim that an arbitration provision was unconscionable. The court noted that section 3 “is mandatory; if the issues in a case are within the reach of the agreement, the district court has no discretion to deny the stay.”¹⁴⁷ In *Seguros Banvenez, S.A. v. S/S Oliver Drescher*,¹⁴⁸ the court rejected the lower court’s relatively expansive view of the discretion granted to a court under section 3, holding that “in passing upon a [section] 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.”¹⁴⁹

Similarly, section 4 provides no place for judicial discretion. While section 3 provides for a stay of litigation, section 4 authorizes (actually, it requires) a court to order the parties to proceed with arbitration on the exact terms agreed upon. Thus, under section 4 (upon a proper petition), the court “shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith 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.”¹⁵⁰ Section 4 directs a court how to proceed if the “making of the arbitration agreement or the failure, neglect, or refusal to perform the same” is at issue. Unless jury trial on these issues is waived, the court is to hold a summary jury trial on those issues and “[i]f the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall

142. 9 U.S.C. § 3 (2006).

143. *Id.*

144. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (holding that “in passing upon a [section] 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate,” thus indicating that the section 4 analysis is relevant to a stay brought under section 3).

145. 9 U.S.C. § 3.

146. 967 F. Supp. 945 (S.D. Tex. 1997).

147. *Id.* at 947.

148. 761 F.2d 855 (2d Cir. 1985).

149. *Id.* at 862 (quoting *Prima Paint*, 388 U.S. at 404); *see also Schulman Inv. Co. v. Olin Corp.*, 458 F. Supp. 186, 188 (S.D.N.Y. 1978) (holding that section 3 forecloses the exercise of judicial discretion to consider “judicial economy and avoiding confusion and inconsistent results” in deciding whether to grant a stay).

150. 9 U.S.C. § 4 (emphasis added).

make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.”¹⁵¹ Thus, the court not merely may, but “shall” (and the Supreme Court has added the even more emphatic “must”¹⁵²) make an order and the order must be for the parties to proceed with the arbitration in accordance with the terms of the arbitration provision.

The requirement for an order to proceed with arbitration “in accordance with the terms thereof” is telling. Unconscionability is notable in that it is a flexible doctrine that permits a court a wide latitude in selectively enforcing or modifying a contract.¹⁵³ That the statute requires enforcement only in accordance with the terms of the agreement, without any possibility for modification, indicates that unconscionability has no place in the statutory scheme.¹⁵⁴ In fact, section 5 of the FAA also reflects that the terms of the arbitration agreement are to be followed precisely and without judicial interference: “If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed.”¹⁵⁵

One might respond at this point that section 4 is the exact right place for a determination of unconscionability. Section 4 requires that the court be satisfied that the “making” of the arbitration agreement is not at issue; perhaps unconscionability puts the making of the arbitration agreement at issue and should simply be addressed under section 4. Although the Court in *Jackson* did not directly reach the issue (because the unconscionability of the arbitration agreement was deemed a question for the arbitrator and not the court), dicta in that opinion seem to indicate that a court would assess unconscionability under sections 3 and 4.¹⁵⁶

There appears to be little case law that unequivocally addresses the question. A federal district court in California recently held that an unconscionability challenge “assumes the existence and making of the arbitration agreement” and thus does not put the making of the arbitration agreement at issue for purposes of section 4.¹⁵⁷ In contrast, a federal district court in Kentucky recently held that the making of the arbitration agreement had been put at issue for purposes of section 4 by allegations of

151. *Id.* (emphasis added).

152. *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 n.27 (1983).

153. *See* U.C.C. § 2-302(1) (2002) (providing that a “court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result”); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (similar).

154. *Cf.* Phillips, *supra* note 114, at 1268 (“Generally, at least, equity can enforce its remedies as it sees fit. But not here [i.e., under the arbitration statutes], for in ordering arbitration it is directed to do so, ‘in accordance with the terms of the contract.’”).

155. 9 U.S.C. § 5.

156. *See* discussion *supra* Part I.C.2.

157. *Madrigal v. New Cingular Wireless Servs., Inc.*, No. 09-CV-00033-OWW-SMS, 2009 WL 2513478, at *7 (E.D. Cal. Aug. 17, 2009).

unconscionability and fraudulent inducement, but it is not clear if the unconscionability claim alone would have done so.¹⁵⁸

Professor David Horton has argued that unconscionability challenges should be addressed under section 4.¹⁵⁹ His position is that “the making of the agreement to arbitrate” should be read relatively broadly and that in order “to contest ‘the making of the agreement to arbitrate’—and thus fall within section 4’s ambit—a party need only invoke a contract defense,” including a claim that the arbitration provision is unconscionable.¹⁶⁰ For Professor Horton, it only makes sense to view section 4 as providing a judicial forum for claims that might be made under section 2 (i.e., challenges based on state laws that are not preempted by the FAA)—“[o]therwise, Congress went out of its way to create a judicial forum for the exceedingly rare assertion that no arbitration clause exists and yet neglected to specify where the parties must bring the vast majority of challenges to the validity of an arbitration clause.”¹⁶¹

Despite Professor Horton’s excellent analysis, there are many reasons to think that an unconscionability challenge directed against an arbitration provision does not put the “making” of the arbitration agreement at issue for purposes of section 4. First, the fact that Congress did not specify a judicial forum for assessing unconscionability has a simple explanation: Congress intended for arbitrators, not courts, to make such assessments.

Second, the legislative history indicates that section 4 is designed for a comparatively narrow range of issues. Section 4 is described in the House Report as providing a “method for the summary trial of any claim that no arbitration agreement ever was made.”¹⁶² An exchange between Julius Henry Cohen and Senator Sterling sheds some additional light on section 4. Cohen observed that the legislation addresses concerns over the constitutional right to trial by jury through the procedure established in section 4.¹⁶³ Cohen then testified:

But you can waive [the right to trial by jury]. And you can do that in advance. Ah, but the question whether you waive it or not depends on whether that is your signature to the paper, or whether you authorized that signature, or whether the paper is a valid paper or not, whether it was delivered properly. So there is a question there which you have not waived the right of trial by jury on.¹⁶⁴

Senator Sterling followed up by stating, “The issue there is whether there is an agreement to arbitrate or not.”¹⁶⁵ Cohen responded, “Exactly.”¹⁶⁶

158. *Baquie v. E. Energy Corp.*, No. 1:09-CV-00121-TBR, 2010 WL 1416557, at *6 (W.D. Ky. Apr. 2, 2010).

159. David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 VA. L. REV. IN BRIEF 1, 3 (2010), <http://www.virginialawreview.org/inbrief/2010/04/02/horton.pdf>.

160. *Id.* at 8.

161. *Id.* at 7.

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

163. *Joint Hearings*, *supra* note 100, at 17 (statement of Julius Henry Cohen).

164. *Id.*

165. *Id.*

A number of things are clear from this exchange. First, section 4 is about a fairly narrow range of issues—whether an arbitration agreement really was signed, for example. Professor Horton, however, takes a contrary view. He points to the reference to “valid paper” as indicating that section 4 empowers courts to decide a wide range of issues beyond whether there is an arbitration agreement.¹⁶⁷ It is not entirely clear what Cohen meant by “valid paper.” One law dictionary roughly contemporaneous with the passage of the FAA defined “valid” as being “[o]f binding force. A deed, will, or other instrument, which has received all the formalities required by law, is said to be valid.”¹⁶⁸ This definition seems to point to a very narrow meaning of the term “valid paper.” Another dictionary defined “valid” more broadly as “[h]aving force, of binding force; legally sufficient or efficacious; authorized by law.”¹⁶⁹ And a West Virginia court in 1914 also gave a fairly broad meaning to the term “valid paper,” describing it as “such as the law permits the parties to make and allows the courts to enforce.”¹⁷⁰

Given the doubt about what is meant by “valid paper,” one can only fall back on the context, and that context supports a narrow reading. The reference to valid paper is squeezed between a statement that courts should decide whether an agreement was signed and another statement that a court should decide whether an agreement was properly delivered. It seems unlikely that between these two statements, each dealing with the formal requisites of a contract, would be a statement that courts should engage in a broad ranging analysis of the contract. Further, Senator Sterling’s description of the issue dealt with by section 4 as being “whether there is an agreement to arbitrate or not” and Cohen’s affirmative response also lead to a conclusion that the fact of agreement, and not the enforceability of the agreement, is the focus of section 4.

In addition to the legislative history and language of the statute, there is an additional reason why unconscionability is not to be assessed under section 4: section 4 is directed largely at safeguarding the right to trial by jury.¹⁷¹ Section 4 provides that where the issue of the “making of the arbitration agreement or the failure, neglect, or refusal to perform” is “in issue, the court shall proceed summarily to the trial thereof” and that trial is to be a jury trial unless “no jury trial be demanded.”¹⁷²

Thus, section 4 is directed at issues that are for a jury to decide; however, unconscionability is not such an issue. Unconscionability is “addressed to the court, and the decision is to be made by it” and evidence regarding

166. *Id.*

167. Horton, *supra* note 159, at 7.

168. HENRY CAMPBELL BLACK, A LAW DICTIONARY CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN 1196 (2d ed. 1910).

169. 2 JOHN BOUVIER, BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 3387 (Francis Rawle ed., 8th ed. 1914).

170. Raleigh Cnty. Bank v. Poteet, 82 S.E. 332, 336 (W. Va. 1914).

171. *See* S. REP. NO. 68-536, at 8 (1924) (noting that the right to a jury trial is adequately safeguarded by section 4).

172. 9 U.S.C. § 4 (2006).

commercial practices is “for the court’s consideration, not the jury’s.”¹⁷³ Section 4 may be broad enough to include claims of fraud and duress, since these are traditionally jury issues,¹⁷⁴ but section 4 leaves no place for unconscionability or other exercises of judicial discretion.

Unconscionability does not really go to the issue of whether a contract was made. As noted earlier, in many jurisdictions the circumstances surrounding the making of the contract are not even relevant. Further, the key rationales of unconscionability are the protection of vulnerable parties and the protection of judicial integrity. While these are both important values, neither has to do with the “making” of the contract—the contract has been made and we need to decide what to do with it.

The FAA’s structure does not completely remove all opportunity for judicial supervision or discretion when it comes to the enforcement of arbitration agreements. It simply postpones and cabins it by providing for very limited judicial review after the arbitration award is entered. Section 9 of the FAA provides that after an arbitration is complete, a party to the arbitration may apply to the appropriate court for an order confirming the award and that the court “must” grant such an order unless there are grounds for vacating, modifying, or correcting the award under sections 10 or 11 of the FAA.¹⁷⁵ Those grounds are quite narrow and provide some, although very limited, space for an exercise of judicial discretion. As Julius Henry Cohen observed in a brief he submitted in support of the passage of the FAA: “The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced.”¹⁷⁶ He continued, noting that the FAA provides “no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.”¹⁷⁷ Congress knew how to grant courts some limited authority. It simply granted that limited authority through sections 10 and 11 and determined that this authority is to be exercised after the arbitrators enter their award.

Section 10 provides that an arbitration award can be vacated in the following circumstances:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear

173. U.C.C. § 2-302 cmt. 3 (2002); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. f (1981) (noting that “determination that a contract or term is unconscionable is made by the court”).

174. *See infra* notes 189–90 and accompanying text.

175. 9 U.S.C. § 9.

176. *Joint Hearings, supra* note 100, at 36.

177. *Id.*

evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.¹⁷⁸

The broad discretion of unconscionability is thus replaced with a much narrower opportunity for judicial discretion.

Grounds for modification of an award are “equally limited.”¹⁷⁹ Section 11 permits a modification in three situations only. Two of these grounds involve cases of ministerial mistakes, as with an evident material mistake (either in the calculation of figures or in the “description of any person, thing, or property referred to in the award”¹⁸⁰) or cases where the “award is imperfect in matter of form not affecting the merits of the controversy.”¹⁸¹ The remaining ground permits a modification in cases in which the arbitrators “awarded upon a matter not submitted to them.”¹⁸² The broad “justice” afforded by unconscionability is thus replaced with a much narrower, post-arbitration opportunity for a court to modify an arbitrator’s award “so as to effect the intent thereof and promote justice between the parties.”¹⁸³

The Supreme Court has made clear that sections 10 and 11 represent the sum total of judicial discretion and cannot be expanded, even by agreement of the parties. For instance, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,¹⁸⁴ the Court addressed an arbitration agreement that called for the court to vacate, modify, or correct an arbitration award where either the findings of fact were not supported by substantial evidence or the conclusions of law were erroneous.¹⁸⁵ The Court held that permitting parties to expand the “detailed categories would rub too much against the grain of the [section] 9 language, where provision for judicial confirmation carries no hint of flexibility.”¹⁸⁶

In sum, the structure and wording of the FAA make clear that judicial application of the unconscionability doctrine has no place in the FAA and that judicial discretion is limited to the narrow post-award review provided for by sections 10 and 11. It is that narrow review that provides, albeit it in

178. 9 U.S.C. § 10.

179. Cohen & Dayton, *supra* note 112, at 273.

180. 9 U.S.C. § 11(a).

181. *Id.* § 11(c).

182. *Id.* § 11(b).

183. *Id.* § 11.

184. 128 S. Ct. 1396 (2008).

185. *Id.* at 1405.

186. *Id.* The Court expressed doubt as to whether the “manifest disregard of the law” (language the Court had used in an earlier opinion) could serve as a ground for vacating an award. The Court suggested it was possible that the language had simply been intended to refer to some or all of the section 10 grounds collectively. *Id.* at 1404. The Court recently passed on an opportunity to definitively state whether the “manifest disregard” standard survived *Hall Street* as an independent ground for review or as a judicial gloss on the grounds set forth in section 10. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1768 n.3 (2010).

a more limited way, the judicial “safety valve” function that the unconscionability doctrine is said to provide.¹⁸⁷

None of this is to say that arbitrators may not assess the fairness or unconscionability of arbitration provisions. The mandatory language of the FAA is not directed towards arbitrators but rather to courts. And judicial hostility is the evil to be corrected by the FAA. Thus, while unconscionability remains “the law,” that law is to be applied by arbitrators and not the courts.

C. Fraud, Duress, and Unconscionability: The “Making of the Contract” Versus “What the Contract Is Made Of”

As previously noted, the Court has twice grouped unconscionability with fraud and duress as “generally applicable contract defenses” that are permitted under section 2.¹⁸⁸ The Court may well be correct, but it does not follow that all three defenses are to be addressed by courts under section 4. While fraud and duress do fit, albeit uncomfortably, within section 4 (and hence may be addressed by courts), unconscionability does not.

Unconscionability differs from fraud and duress in important and relevant ways. First, the contract defense of fraud is a question of fact,¹⁸⁹ as is the contract defense of duress.¹⁹⁰ Accordingly, they are appropriately decided by the summary jury trial called for in section 4. Conversely, unconscionability is a question of law for a court¹⁹¹ and therefore is by definition outside the scope of such jury trial.

Second, fraud and duress are “all or nothing defenses,” while unconscionability is anything but. The result of a successful claim of duress is either that no contract was formed (in the case of physical duress)¹⁹² or that the contract is voidable in its entirety (in the case of economic duress).¹⁹³ Similarly, the result of a successful claim of fraud is either that no contract was formed (in the case of fraud in the execution)¹⁹⁴ or that the contract is voidable in its entirety (in the case of other types of

187. *See, e.g.*, Steinhardt v. Rudolph, 422 So. 2d 884, 890 (Fla. Dist. Ct. App. 1982) (noting that unconscionability serves as a “safety valve” to enable courts to administer justice). *See generally* Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73 (2006) (arguing that unconscionability’s function as a safety valve to prevent contractual overreaching should be protected against trend towards formalism in the law).

188. *See* discussion *supra* Part I.C.2.

189. *See, e.g.*, Chamberlain Livestock Auction, Inc. v. Penner, 462 N.W.2d 479, 481 (S.D. 1990) (noting that the existence of fraud as a contract defense is a question of fact).

190. *See, e.g.*, Premier Farm Credit, PCA v. W-Cattle, LLC, 155 P.3d 504, 521 (Colo. App. 2006) (noting that duress is generally a question of fact); Alexander v. Standard Oil Co., 368 N.E.2d 1010, 1016 (Ill. App. Ct. 1977) (same); Gainey v. Gainey, 675 S.E.2d 792, 799 (S.C. Ct. App. 2009) (same). *But see* Comcast of Oregon II, Inc. v. City of Eugene, 155 P.3d 99, 106 (Or. Ct. App. 2007) (noting that the underlying facts of a defense of fraud, including whether the party claiming duress acted reasonably, is for the jury, but question of whether particular facts amount to duress is a question of law).

191. *See supra* notes 45–47, 68–70 and accompanying text.

192. RESTATEMENT (SECOND) OF CONTRACTS § 174 (1982).

193. *Id.* § 175.

194. *Id.* § 163.

fraud and misrepresentation).¹⁹⁵ As a result, these defenses fit nicely into the FAA's enforcement scheme—if the defense of fraud or duress fails then the arbitration agreement is enforced “according to the terms” of the agreement, and if the defense succeeds, then the agreement is not enforced at all.

Unconscionability, however, is quite different. It is not an “all or nothing” defense. Instead, the court is given a great deal of discretion in deciding how to proceed and has choices other than non-enforcement or full enforcement. Under the U.C.C., for example, a court is specifically given discretion to refuse to enforce a contract, but may also “strike any single clause or group of clauses . . . or it may simply limit unconscionable clauses so as to avoid unconscionable results.”¹⁹⁶ The common law provides this same discretion,¹⁹⁷ and, indeed, even the earliest unconscionability cases were premised on the idea that a court could partially enforce a contract if necessary for justice.¹⁹⁸ Since the FAA is premised on courts applying all or nothing defenses only—enforcement on the terms of the agreement or not at all—there is a place in sections 3 and 4 for fraud and duress. There is no such place for unconscionability.

Third, fraud and duress both put at issue the making of the contract in a way that a claim of unconscionability does not. As noted above, certain forms of fraud and duress go directly to the making of the contract. Fraud in the execution and physical duress result in there being no contract at all, and thus plainly put the making of the contract at issue. Other types of fraud and duress do not so directly put the making of the contract at issue, but they do result in a contract that is voidable at the election of the victim and in that sense go to whether the parties “really” made a mutually binding contract.¹⁹⁹ While unconscionability, at least in most jurisdictions, requires some analysis of the bargaining process, in all jurisdictions the substance of the terms is relevant.²⁰⁰ Unlike unconscionability, duress and fraud do not generally depend on the substance of the contract or contract terms at issue. To establish a claim of fraud in the inducement requires showing that a “party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is

195. *Id.* § 164.

196. U.C.C. § 2-302 cmt.2 (2002).

197. RESTATEMENT (SECOND) OF CONTRACTS § 208 (noting that court has the ability to refuse enforcement of the contract, enforce the contract without the unconscionable clause, or limit the application of any unconscionable clause).

198. In what is considered one of the earliest cases on unconscionability, *James v. Morgan*, (1663) 83 Eng. Rep. 323 (K.B.), the court addressed the enforcement of a contract, the full enforcement of which would have resulted in the payment of an exorbitant price for a horse. The court opted for limited enforcement, restricting the jury to an award of only a purchase price equal to the value of the horse. *Id.*

199. *Cf. Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (stating in dicta that a claim of fraud in the inducement directed against an arbitration provision goes to the making of the agreement to arbitrate and should be decided under section 4).

200. *See* discussion *supra* Part I.B.

justified in relying, the contract is voidable by the recipient.”²⁰¹ The contents and substance of the contract itself are irrelevant; only the process by which the contract was made is relevant. Similarly, a claim of non-physical duress is made out and a contract is deemed voidable “[i]f a party’s manifestation of assent is induced by an improper threat . . . that leaves the victim no reasonable alternative.”²⁰² The threat and the reasonableness of alternatives are relevant, but the substance of the contract is not. This means, in theory, that a finder of fact could assess these defenses without knowing the substance of the contract and only the circumstances of the making of the contract. This makes for reasonably good fit under section 4 and reduces the danger of judicial “discrimination” against arbitration provisions since the substance of the contract is not legally relevant. This is not at all true of unconscionability, in which the substance of the contract is a key and required consideration. Thus, while fraud and duress go to the making of the contract (and hence belong in section 4), unconscionability goes to the very different question of what the contract is made of.

Finally, unconscionability is a rule of judicial discretion. If a contract is unconscionable a court “may” refuse to enforce it, in whole or in part.²⁰³ But fraud and duress are not discretionary. If the elements of physical duress or fraud in the execution are established then the result is automatic—there is no contract.²⁰⁴ Similarly, non-physical duress and fraud in the inducement also leave nothing to judicial discretion—if the elements are satisfied then the contract becomes voidable.²⁰⁵ Unlike unconscionability, duress and fraud are (relatively) cabined and constrained doctrines and not doctrines of judicial discretion. They are thus far less susceptible to being used as proxies for judicial hostility towards arbitration provisions.

In sum, fraud and duress may be an uncomfortable fit with the FAA’s judicial enforcement scheme, but they do fit. Unconscionability is quite different from those two doctrines—it is not a jury question, it is not an all or nothing defense, it does not go to the making of the contract, and it is largely a discretionary doctrine. Unconscionability may fit within section 2, but it does not fit within sections 3 and 4. Therefore, the unconscionability of arbitration provisions should not be a question for the courts.

III. ARBITRATORS AS ARBITERS OF GOOD ARBITRATION?

In light of the conclusions set forth above, we are left with one final question: in a world in which courts cannot use unconscionability to assess arbitration provisions, are the arbitrators themselves up to the task of policing arbitration agreements? There is at least some reason to think the answer to this question is “yes.”

201. RESTATEMENT (SECOND) OF CONTRACTS § 164(1).

202. *Id.* § 175(1).

203. U.C.C. § 2-302 (2002); RESTATEMENT (SECOND) OF CONTRACTS § 208.

204. *See* RESTATEMENT (SECOND) OF CONTRACTS § 174 (duress); *id.* § 163 (fraud).

205. *See id.* § 175(1) (duress); *id.* § 164(1) (fraud).

First, we should remember that we are all pretty new to this. The widespread proliferation of arbitration provisions into consumer and employment contracts is a relatively recent phenomenon, as is the practice of drafting one-sided arbitration provisions.²⁰⁶

Under the current system, we leave it to arbitrators to assess unconscionability challenges to both the entire contract (including the arbitration provision) and each of the terms of a contract other than the arbitration provision itself (such as purchase price). Only if a challenge is to the arbitration provision itself can the court assess the claim.²⁰⁷ There is some irony in trusting arbitrators to assess the fairness of all provisions in a contract except for the one type of provision they see most frequently and address on a regular basis.

The Supreme Court in *Jackson* determined that arbitrators are capable of making determinations about the unconscionability of an arbitration agreement. The Court made clear that parties can allocate the question of unconscionability of the arbitration agreement itself to the arbitrators. The only issue that appears not subject to allocation is the very question of whether the allocation itself is unconscionable.²⁰⁸

Individual arbitrators have found arbitration provisions unconscionable,²⁰⁹ so at least we know the phenomenon is not merely an urban myth. On a macro level, some of the large providers of arbitration have indeed responded to certain perceived abuses in the arbitration system. For instance, JAMS, a large provider of private arbitration services,²¹⁰ has had a “Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses” in effect since July 2009 that articulates “Minimum Standards on Procedural Fairness.”²¹¹ According to this policy, JAMS will administer a consumer arbitration only if the clause itself and the rules of arbitration called for by the clause meet certain minimum requirements. These minimum standards include requirements that the arbitration agreement be binding on both parties,²¹² that all remedies that would be available to a consumer in litigation be available in arbitration,²¹³ that the arbitrators be neutral (and that the consumer have some reasonable opportunity to participate in the selection process),²¹⁴ that the consumer have a right to an

206. See *supra* notes 62–64 and accompanying text.

207. See discussion *supra* Part I.C.2.

208. See discussion *supra* Part I.C.2.

209. See, e.g., *Labor Ready Nw., Inc. v. Crawford*, No. 07-1060-HA, 2008 WL 1840749, at *2–4 (D. Or. Apr. 21, 2008) (noting that arbitrator had struck down arbitration provision that prohibited class actions); *Smith v. Gateway, Inc.*, No. 03-01-00589-CV, 2002 WL 1728615, at *1–2 (Tex. Ct. App. July 26, 2002) (noting that arbitrator had found unconscionable an arbitration provision prohibiting consequential, indirect, or punitive damages).

210. See *infra* note 225.

211. *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness*, JAMS: THE RESOLUTION EXPERTS, <http://www.jamsadr.com/consumer-arbitration> (last visited Mar. 23, 2011).

212. *Id.* ¶ 1.

213. *Id.* ¶ 3.

214. *Id.* ¶ 4.

arbitration in the consumer's "hometown area,"²¹⁵ that costs be limited to \$250,²¹⁶ that discovery be allowed,²¹⁷ and that the arbitrators' award states finding and conclusions in writing.²¹⁸ The JAMS policy responds well to many objections directed towards arbitration provisions.

Similarly, the American Arbitration Association (AAA) established a National Consumer Disputes Advisory Committee designed to develop "standards and procedures for the equitable resolution of consumer disputes."²¹⁹ The committee articulated fifteen principles in the form of a Consumer Due Process Protocol. The first principle in the protocol is that "[a]ll parties are entitled to a fundamentally-fair ADR process."²²⁰ Accordingly, other principles call for "a Neutral who is independent and impartial,"²²¹ to an arbitration "of reasonable cost to [c]onsumers,"²²² and to an arbitration at a "location which is reasonably convenient to both parties."²²³ Although the Consumer Due Process Protocol does not itself set any rules, the recommendations are "likely to have a direct impact on the development of rules, procedures and policies for the resolution of consumer disputes under the auspices of the AAA."²²⁴

Of course, the promulgation of guidelines by arbitration associations is not a complete cure. First, even the noblest aspirations are not always fully realized. Second, it is difficult to monitor whether an organization is in fact consistently applying its own standards. Third, there is probably little recourse if such an organization ignores its standards. And, of course, not every provider of alternative dispute resolutions has adopted standards like those of JAMS and the AAA (though these organizations are arguably the most significant providers of such services).²²⁵ But the fact that two leading providers of arbitration services have taken it on themselves to articulate minimum standards of fairness is encouraging.

Although it may seem odd to provide an arbitrator with a power that a court is lacking, it is not at all inconsistent with the FAA. First, the FAA is designed to correct the hostility that *courts* directed towards arbitration provisions. The FAA, as previously discussed, was designed to undo rules by which courts refused to specifically enforce arbitration provisions and by

215. *Id.* ¶ 5.

216. *Id.* ¶ 7.

217. *Id.* ¶ 9.

218. *Id.* ¶ 10.

219. *Consumer Due Process Protocol*, AM. ARBITRATION ASS'N, <http://www.adr.org/sp.asp?id=22019> (last visited Mar. 1, 2011) (Introduction: Genesis of the Advisory Committee).

220. *Id.* (Principle 1).

221. *Id.* (Principle 3).

222. *Id.* (Principle 6).

223. *Id.* (Principle 7).

224. *Id.* (Introduction: Genesis of the Advisory Committee).

225. JAMS describes itself as "the largest private alternative dispute resolution . . . provider in the world." *About JAMS*, JAMS: THE RESOLUTION EXPERTS, http://www.jamsadr.com/aboutus_overview/ (last visited Mar. 1, 2011). The American Arbitration Association describes itself as the "nation's largest full-service alternative dispute resolution . . . provider." *Dispute Resolution Services*, AM. ARBITRATION ASS'N, <http://www.adr.org/drs> (last visited Mar. 1, 2011).

which courts permitted one party to back out of an arbitration agreement.²²⁶ That is, it was designed “to reverse the longstanding *judicial* hostility to arbitration agreements that had existed at the English common law and had been adopted by American courts.”²²⁷ The FAA has nothing to do with the power of an arbitrator to make an assessment of the grant of its own authority or whether the rules provided for in an arbitration agreement satisfy the arbitrator’s own standards.²²⁸ Second, the “mandatory” aspects of the FAA are not directed against arbitrators. Thus, a court, upon determining that there is no issue regarding the making of the arbitration agreement or its scope, “shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.”²²⁹ It is the “court” that must issue the order and the court’s order is directed to the parties. Nowhere is the behavior of the arbitrator subject to control, nor could it be.

I am not suggesting that the problem of overreaching arbitration provisions has been completely solved by the arbitrators. But I am suggesting that they may be moving in the right direction and should be given an opportunity to address the problem.

CONCLUSION

This Article has argued that courts applying the unconscionability doctrine to arbitration provisions are not acting in a manner consistent with the FAA. Congress took the judicial exercise of unconscionability off the table with the passage of the FAA and did so with good reason. Accordingly, even courts that consider arbitration provisions to be misbehaving “little monsters” must grit their teeth and treat such provisions like the “little darlings” Congress says they are. The arbitral system should be given a chance to demonstrate that it can deal with the problem of overreaching arbitration provisions in a manner that is both effective and consistent with the FAA.

226. See discussion *supra* Part I.A.

227. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (emphasis added).

228. *Cf. Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) (noting that senior vice president of the AAA had testified that system of “arbitration” established by an employer “so deviated from minimum due process standards that the [AAA] would refuse to arbitrate under those rules”).

229. 9 U.S.C. § 4 (2006).