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## **Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism**

JEFFREY W. STEMPEL\*

### I. INTRODUCTION

The legal Zeitgeist of the past 20 years—with the United States Supreme Court providing most of the tail wind—has strongly favored enforcement of arbitration agreements,<sup>1</sup> largely without regard to the quality of consent attending those agreements<sup>2</sup> and arguably in direct contravention of statutory

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\* William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Special thanks to Jennifer Brown, Ian Ayres, and participants at the Yale-Quinnipiac Dispute Resolution Workshop discussing this Article. Thanks also to Jean Braucher, Ann McGinley, Jean Sternlight, Elizabeth Thornburg, Dean Richard Morgan, and especially to Russell Korobkin, who provided many helpful comments although we continue to disagree about the market's production (or nonproduction) of beneficial arbitration terms and the proper extent of the judicial role in regulating arbitration clauses. Preparation of this Article was supported by a grant from the James E. Rogers Research Fund.

<sup>1</sup> See CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS*, Chs. 2 & 3 (2002); Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 263–66 (1988) (describing historical development and growth of arbitration); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) (criticizing the Court's enthusiasm for compelling arbitration and arguing that the Court has overlooked serious Seventh Amendment and due process concerns); see also Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 334–54 (1990) [hereinafter Stempel, *Public Policy*] (criticizing perceived zeal of some courts in striking down arbitration agreements on grounds of public policy); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1412–28 (1996) [hereinafter Stempel, *Consent*] (arguing that the Court has uncritically embraced arbitration as an unalloyed social benefit).

<sup>2</sup> See Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1339–45 (1996); Stempel, *Consent*, *supra* note 1, at

language that seemingly removes employment agreements from the reach of the Federal Arbitration Act (FAA).<sup>3</sup> This sometimes uncritical embrace of arbitration by Justices quite removed from the actual operation of arbitration has attracted considerable academic criticism as well as protests from those who see themselves as forced into mandatory arbitration.<sup>4</sup> In addition, many

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1389–1412; Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1032–34 (1996).

<sup>3</sup> See Federal Arbitration Act of 1925, 9 U.S.C. § 1 (2000); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1363–72 (1997) (criticizing the Court for supporting the enforcement of mandatory arbitration agreements required of workers in view of the language of 9 U.S.C. § 1, which states that the Act's power of specific enforcement of predispute arbitration agreement does not extend to a "contract of employment"); Matthew W. Finkin, "Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. OF EMP. & LAB. L. 282 (1996) (same); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 263–79 (same); Jeremy Kennedy, Comment, *The Supreme Court Swallows a Legal Fly: Consequences for Employees as the Scope of the Federal Arbitration Act Expands*, 33 TEX. TECH L. REV. 1137, 1153–64 (2002) (same); see also Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1019–46 (2000); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 607–12 (1997) (contending that courts should not enforce arbitration provisions in a manner inconsistent with statutory rights).

<sup>4</sup> See Sen. Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 283–84 (2002) (criticizing Court's preference for arbitration); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 811–20 (2002) (same); Linda Alle-Murphy, Comment, *Are Compulsory Arbitration Clauses in Consumer Contracts Enforceable? A Contractual Analysis*, 75 TEMP. L. REV. 125, 129–37 (2002) (same); Cameron L. Sabin, Note, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1341–46 (2002) (same); see also Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 357 (2003) (observing the disadvantages of arbitration as a method of dispute resolution: "the legal system should reconsider the highly favorable stance that it takes toward mandatory, binding arbitration in general, so as to take account of the negative effects of arbitration lawlessness. A neutral legal and judicial stance toward binding arbitration would be more appropriate."); Michelle Andrews, *For Patients, Unpleasant Surprises in Arbitration*, N.Y. TIMES, Mar. 16, 2003, § 3, at B8 (describing the increasing use of arbitration agreements in medical services agreements, suggesting that the manner of contracting leaves prospective patients little choice so that the significance of the arbitration provision frequently is not appreciated by the patient); Scott Atlas, *Have You Ever Tried to Make Up Your Mind—About Arbitration?*, 29 LITIG., Fall 2002, at 1, 1 (describing the change in the opinion of the Chair of the ABA Litigation Section, initially an enthusiast for arbitration as means of

have come to question the fulcrum on which much of modern arbitration leverage rests—the Supreme Court’s view that the FAA creates substantive federal law that ousts any contrary state law that targets arbitration.<sup>5</sup> Only general state contract law applies to construction and enforcement of arbitration agreements. As long as the requisite nexus exists with interstate commerce, state legislation aimed specifically at perceived problems of arbitration is preempted by the FAA.<sup>6</sup>

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alternative dispute resolution, who now expresses mixed feelings about the efficacy of arbitration); Mary P. Gallagher, *AAA’s Impartiality Challenged by Lawyer Seeking Alternate Forum*, N.J. L.J., Oct. 22, 2002, at 1; Joanne Gordon, *Here Come Da Judge: Usually It’s Plaintiffs’ Attorneys Whining About Mandatory Arbitration. Now It’s the Corporate Lawyers*, FORBES, Dec. 9, 2002, at 60 (noting increasing business dissatisfaction with arbitration, finding it slower, less decisive, and less substantively favorable than anticipated); Jackson Williams, *Mandatory Arbitration: Ganging up on Little Guys*, NAT’L L.J., Jul. 22, 2002, at A24.

The Supreme Court’s strong support of arbitration has been met with both praise and scorn. Compare Bruce M. Selya, *Arbitration Unbound?: The Legacy of McMahon*, 62 BROOK. L. REV. 1433, 1454–57 (1996) (approving of arbitration generally and expressing concern over the tendency to require arbitration to mimic the judicial process once arbitration has become widespread) and Marc I. Steinberg, *Securities Arbitration: Better for Investors than the Courts?*, 62 BROOK. L. REV. 1503, 1505–06 (1996) (approving of arbitration in general and finding its outcomes more pro-consumer than many court decisions) with Paul D. Carrington, *Self-Deregulation, the “National Policy” of the Supreme Court*, 3 NEV. L.J. 259, 284–86 (2002/2003) (comparing the Court’s rush toward arbitration as jurisprudential equivalent of tulip bulb craze of 17th century Holland) and Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 7–14 (1997).

<sup>5</sup> See Carrington, *supra* note 4 at 264–65 (arguing that FAA was intended as a procedural rule for federal courts rather than as statute creating substantive law). But see Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105–08 (2002) (defending the correctness of Court decisions characterizing the FAA as creating substantive law overriding contrary state law).

<sup>6</sup> The Federal Arbitration Act provides that a written agreement to arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2000). This section has been interpreted to forbid application of any state contract law that singles out arbitration clauses for any special treatment. However, the validity of an arbitration term may be examined according to a state’s general contract law regarding formation, enforcement, breach, and rescission. See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996).

Section 1 of the Act broadly defines key terms and contains the limitation that arbitration agreements contained in a contract of employment are not enforceable—a limitation courts have applied only to contracts involving workers directly involved in interstate transportation of items (e.g., postal service workers, longshoreman, and truckers). See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (holding that

As a result of the new arbitrability regime, formally announced in 1984 with the *Southland v. Keating*<sup>7</sup> decision but with roots dating back to the Court's 1960s jurisprudence, there has been a dramatic expansion of the use of arbitration clauses, with a corresponding increase in litigation over arbitrability.<sup>8</sup> For the most part, those seeking to enforce arbitration clauses have won the fact specific battles of arbitration as well as the war of jurisprudential theory.<sup>9</sup> This was particularly true in the first decade after *Southland*, when arbitration was required even under circumstances many would regard as coercive—and in the face of contrary state law or policy.<sup>10</sup>

There remained some pockets of resistance in the 1990s as some courts attempted to resurrect the pre-*Southland* doctrine that certain statutory claims were protected from the reach of an arbitration agreement,<sup>11</sup> an approach that

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the arbitration clause in a retail sales worker's contract was not exempt from enforcement under section 1); Stempel, *supra* note 3, at 262–72. The Act also sets forth certain procedures governing arbitration, including a provision for staying litigation pending arbitration (9 U.S.C. § 3) and one authorizing federal courts to compel arbitration (9 U.S.C. § 4), as well as providing for a streamlined process for entering judgment upon an arbitration award (9 U.S.C. § 9). Arbitration awards are deferentially reviewed by courts, which under the Act may modify or vacate an award on only limited grounds such as corruption, fraud, evident partiality, arbitrator misconduct, or arbitration that exceeds the scope of the contract provision providing for arbitration. 9 U.S.C. § 10; *see also* Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co., 529 U.S. 193, 198–204 (2000) (reviewing the Act's provisions generally and holding that arbitration awards may be confirmed in any judicial district with requisite jurisdiction; no requirement that judgment be entered only in the district where the award was rendered).

<sup>7</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>8</sup> *See* Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1380–83 (1991) (reviewing the history of arbitration and the Federal Arbitration Act as well as interpretative case law).

<sup>9</sup> *See* DRAHOZAL, *supra* note 1, at 37–50; IAN R. MCNEIL ET AL., *ARBITRATION LAW AND PRACTICE* § 3 (1995); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 653–74 (1996).

<sup>10</sup> *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 55–66; Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1015–24 (1999).

<sup>11</sup> *See* *Duffield v. Robertson, Stephens & Co.*, 144 F.3d 1182, 1187–1200, 1202–03 (9th Cir. 1998) (finding a Title VII claim not arbitrable because the 1991 Civil Rights Act evinced congressional intent to preclude waiver of judicial remedies); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 759–63 (9th Cir. 1997) (holding that an agreement to arbitrate employment disputes must be sufficiently consensual); *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1304–05 (9th Cir. 1994) (determining that enforcement of a provision to arbitrate Title VII claims requires “knowing” consent, implicitly a greater showing than constructive consent to a standard form).

is probably impermissible and foreclosed by the Court's modern arbitration precedents.<sup>12</sup>

Beginning in the 1990s, however, lower courts, particularly state courts, began to take a harder look at arbitration agreements and their enforcement. Several courts began invoking concepts related to unconscionability in order to refuse enforcement of arbitration clauses. The phenomenon accelerated in

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The Ninth Circuit panel decision in *Duffield* gained considerably notoriety and became something of a rallying point for those opposing mandatory arbitration of such claims. However, the U.S. Supreme Court's holding in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), which enforced such an agreement, effectively overruled *Duffield*'s "Title VII is beyond the reach of the FAA due to the 1991 Civil Rights Act" approach, although *Duffield* did not go gently into the good night. In federal district court, the EEOC obtained an injunction preventing the Luce, Forward, Hamilton & Scripps law firm from insisting that employees sign an arbitration agreement as a condition of employment—something the firm had required of Donald Lagatree, a secretary. A panel of the Ninth Circuit reversed the trial court, dissolved the injunction, and effectively overruled *Duffield* on the basis of intervening U.S. Supreme Court precedent such as *Circuit City*. See *EEOC v. Luce, Forward, Hamilton & Scripps LLP*, 303 F.3d 994, 1080 (9th Cir. 2002). Rehearing en banc was granted, 319 F.3d 1091 (9th Cir. 2003), and oral argument was held on March 27, 2003. An en banc decision was rendered. *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003); see also Jason Hoppin, *Circuit Grapples with "Duffield,"* THE RECORDER, Mar. 28, 2003, at 1 (describing lively oral argument).

The en banc Ninth Circuit overruled *Duffield*, holding that arbitration agreements as a condition of employment were not prohibited by Title VII or the 1991 Act. *Luce, Forward*, 345 F.3d at 744. However, the case was remanded to the trial court to address the EEOC's argument that discharging an employee for refusing to sign an agreement at a time when *Duffield* was still good law in the circuit could constitute impermissible employer retaliation against a worker insisting on his federal statutory rights and general right of access to the courts. *Id.* at 752–53; Hoppin, *supra*, at 1 (revisiting en banc oral argument); see also *Luce, Forward*, 345 F.3d at 754 (Pregerson, J., Reinhardt, J., and Schroeder, C.J., concurring and dissenting) (concurring as to remand of the retaliation claim and dissenting as to the continued vitality of *Duffield*); *Al-Safin v. Circuit City Stores, Inc.*, No. 00-35241, 2002 U.S. App. LEXIS 19153, at \*2 (9th Cir. Sept. 9, 2002) (agreeing with the *Luce, Forward* panel as to the infirmity of *Duffield* after *Circuit City*; appearing to view *Prudential v. Lai* as continued good law, but remanding to the trial court for consideration of unconscionability defenses potentially available under California state law).

<sup>12</sup> See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227–38 (1987) (rejecting the argument that claims arising under the Securities Exchange Act of 1934 are exempt from arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628–40 (1985) (rejecting the argument for exempting antitrust claims from international arbitration and suggesting no basis for any antitrust exception for domestic arbitration).

the late 1990s. The California Supreme Court's *Armendariz* decision<sup>13</sup> is probably the most prominent example of this emerging body of law. During the past five years, courts—particularly state courts—appear far more willing to strike down an arbitration agreement or limit its enforcement on the ground that the arbitration agreement is unfair as a matter of the applicable state's general contract law.<sup>14</sup>

Refusing to enforce the literal language of a contract is, of course, generally considered to be part of the judiciary's "policing" of contract terms.<sup>15</sup> Although courts and commentators differ over the question of how frequently and aggressively such policing should occur, everyone agrees that there are at least some occasions when courts should not enforce the literal language of a contract.<sup>16</sup> Sometimes the literal language may not be what was meant. Sometimes literal application of the contract provision would produce an "absurd" result.<sup>17</sup> On other occasions, literal enforcement of a contract or instrument may violate a well-defined public policy.<sup>18</sup>

Even these fairly rare and restrained means of policing contracts are subject to some controversy. For example, courts and commentators differ over the degree to which a court may consult extra-textual sources of information in determining what was meant by the language, whether an outcome would be absurd, and what boundaries of public policy exist.<sup>19</sup> More controversial is the propriety of courts policing a contract on the basis

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<sup>13</sup> See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 688–94 (Cal. 2000) (holding that the arbitration provision requiring the employer but not the employee to arbitrate was unconscionable due to lack of mutuality). See generally Michael H. LeRoy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249 (2003) (observing court decisions, particularly of appellate courts, reining in the breadth of the Supreme Court's pro-arbitration doctrine through the use of countervailing contract law concepts).

<sup>14</sup> See *infra* note 94 and accompanying text.

<sup>15</sup> I borrow the term from E. ALLAN FARNSWORTH, *CONTRACTS* 223 (3d ed. 1999) (chapter entitled "Policing the Agreement"). Professor Farnsworth uses the term to describe the activity of courts in reviewing contract agreements to prevent "unfairness by placing limits on their enforceability." *Id.* at 223–24.

<sup>16</sup> See *id.* §§ 4.1–29 (reviewing the variety of means by which courts supervise contractual enforcement and indicating that the consensus of courts and commentators is that such activity is necessary, although members of the legal profession may divide over the amount of judicial policing required and the most apt means for effecting this public policy).

<sup>17</sup> *Id.*

<sup>18</sup> See *id.* § 5.1; JEFFREY W. STEMPEL, *LAW OF INSURANCE CONTRACT DISPUTES* § 4.10[b] (2d ed. 1999 & Supp. 2003) (describing the operation of this contract construction norm for insurance policies).

<sup>19</sup> See FARNSWORTH, *supra* note 15, §§ 6.1–12, 7.1–17.

of unconscionability. Although all jurisdictions appear to recognize the concept, which is in theory universal, judges differ a great deal in their willingness to invoke the unconscionability concept to modify, strike down, or refuse enforcement of a contract term.<sup>20</sup> Arbitration clauses, like other contract terms, are subject to the divergent landscape of unconscionability, perhaps more so in that arbitration agreements may be viewed as more “procedural” than “substantive” and hence, less likely to be the source of the type of social ill that justifies judicial interference with contract through the unconscionability doctrine. In addition, the unconscionability concept has been in some disrepute and retreat during the same time that arbitration has been in ascendancy. Beginning with Arthur Leff’s critique-cum-diatribes against the unconscionability provision of Article 2 of the Uniform Commercial Code (UCC),<sup>21</sup> many scholars have suggested that unconscionability is simply too plastic a concept that permits too much post-hoc judicial meddling with contracts.<sup>22</sup> The legal and political revolt against the “judicial activism” of the Warren Court on matters of constitutional and criminal law<sup>23</sup> also made it unfashionable for judges to do anything that

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<sup>20</sup> See *id.* § 4.28.

<sup>21</sup> See Arthur A. Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).

<sup>22</sup> See FARNSWORTH, *supra* note 15, § 4.28; Leff, *supra* note 21, at 515, stating

[I]f one decides to police contracts on a clause-by-clause basis, he finds that he has merely substituted the highly abstract word “unconscionable” for the possibility of more concrete and particularized thinking about particular problems of social policy. Should warranty disclaimers be permitted? If so, should they be with respect to consumer goods?

*Id.* See generally Arthur A. Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970) (arguing that the unconscionability concept should not be an ad hoc judicial remedy but may be effective as a regulatory concept imposed by legislature or administrative agencies). *But see* M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969) (defending unconscionability); John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969) (same). *see also* Robert Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337, 337 (1970) (stating the opinion of the author and Reporter of the ALI Restatement (Second) Contracts, who admits to seeing unconscionability as an “unruly horse” of too much indeterminacy and discretion, but moderates his criticism in finding that a workable concept of unconscionability may be possible for courts to operationalize).

<sup>23</sup> See *infra* note 164 and accompanying text. *See also* Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 189–204 (1998) (suggesting that the general backlash against judicial activism was responsible in part for the surge and decline of reasonable expectations analysis during 1970 to 1985 in cases construing insurance policies). *See generally* JOHN DENTON CARTER, *THE WARREN*



looked like case-specific legislating, even for the seemingly far more mundane matters of contract law and arbitration. Law and economics criticisms of the doctrine focused on the potential inefficiencies of ad hoc judicial interference with contract terms, particularly the standardized form terms found in most contracts.<sup>24</sup> Although the law-and-cognition movement of the past fifteen years has provided support for some greater paternalism in policing contracts, even this literature has been far more comfortable with macrocosmic policing of contract by legislation or administrative agency rule than with microcosmic supervision of contract terms by courts.<sup>25</sup>

These two strands of jurisprudential development—unconscionability's fall from grace and arbitration's ascendance—combined to produce a law of arbitrability that was both substantively supportive of arbitration and reluctant to reign in arguable excesses of arbitration. As a result, much of modern arbitration law has possessed a formalist, wooden, result-oriented quality that has made it the subject of considerable criticism. Although lower courts have always had—at least in theory—the power to police arbitration agreements on the basis of ordinary contract law—this power was rarely used until recently. Even the limited unconscionability-based regulation of arbitration agreements seen during the past five years has arguably been halting and truncated. Although courts appear to be more willing to supervise arbitrability than they once were, courts continue to appear to be reluctant to invoke the unconscionability concept or to apply it as a general norm. Instead, courts have looked for particular attributes of an arbitration clause

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COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM (1973); ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968); LOUIS LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* (1975); BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS 1-25* (1979); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan & Bush*, 57 ALB. L. REV. 1111 (1994) (examining Reagan's and Bush's attempts to appoint Supreme Court Justices who would reverse the liberal policy decisions of the Warren Court).

<sup>24</sup> See *infra* notes 213-21 and accompanying text.

<sup>25</sup> See *id.* See, e.g., Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for the Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 417-23 (2003) (finding a role for unconscionability analysis in policing standard form contract terms but advocating establishment of legal rules and limits rather than ad hoc judicial supervision based upon unconscionability norm); Russell Korobkin, *Bounded Rationality: Standard Form Contracts and Unconscionability*, 70 U. CHI. L. REV. 1203, 1290-95 (2003) (advocating judicial use of unconscionability analysis to police contracts but only where term is "inefficient"); Carol B. Swanson, *Unconscionable Quandry: UCC Article 2 and the Unconscionability Doctrine*, 31 N. MEX. L. REV. 359, 386-98 (2001) (arguing that standard form contracts promote efficiency and that contract policing doctrines other than unconscionability, such as fraud, misrepresentation, duress, and mistake, are more efficient avenues of redress).

that are classified as unreasonable as a prerequisite to refusing enforcement. If such attributes are not present, the judicial tendency continues to be one of arbitration clause enforcement, with few courts appearing to take an overall view of the fairness of the arbitration provision as a whole in light of the context of the contract.<sup>26</sup> Many courts continue to give unconscionability concerns the judicial equivalent of the cold shoulder and are unmoved by arguments that an arbitration clause lacks minimal fairness.<sup>27</sup>

However incomplete, unaggressive, or sub-optimal, unconscionability analysis of arbitration agreements has made something of a comeback in the late twentieth century and early twenty-first century. Just as nature abhors a vacuum, water seeks to be level, and ecosystems work to retain environmental stability, the legal system has witnessed an incremental effort by lower courts to soften the rough edges of the Supreme Court's pro-arbitration jurisprudence through rediscovery of what might be called the

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<sup>26</sup> See *infra* Part III.C.

<sup>27</sup> See, e.g., *Boomer v. AT&T Corp.*, 309 F.3d 404, 417–24 (7th Cir. 2002) (determining that an arbitration clause was not unconscionable for barring punitive damages and class wide treatment of disputes); *Potts v. Baptist Health Sys., Inc.*, 853 So.2d 194, 204–07. (Ala. 2002) (finding an arbitration term in an employment contract enforceable; court finds nothing oppressive about a group meeting and pep talk for new employees where a signature to the form was required); *Green Tree Fin. Corp. v. Lewis*, 813 So. 2d 820, 824–25 (Ala. 2001) (finding arbitration clause enforceable where borrower did not demonstrate inability to obtain financing from lender without arbitration clause); *Mandel v. Household Bank (Nev.)*, 129 Cal. Rptr. 2d 380, 385–86 (Cal. Ct. App. 2003); *Locke v. Raymer*, No. 6029074, 2002 WL 31025863, at \*3–5 (Cal. Ct. App. Sept. 11, 2002) (holding that a one-year time limit for bringing action in any dispute arising out of the contract is not unconscionable); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Cal. Ct. App. 2002) (finding that it is not procedurally unconscionable to impose an arbitration term on a credit card user through mailing standard form language along with monthly billing coupled with consumer's continued use of care); *Joseph v. M.B.N.A. America Bank, N.A.*, 775 N.E.2d 550, 553 (Ohio Ct. App. 2002); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 362–63 (Tenn. Ct. App. 2001) (finding arbitration term not unconscionable for requiring buyer to share costs unless buyer could demonstrate that the total cost exceeded the amount likely to be incurred in litigation).

Although *Potts* and *Green Tree* are both Alabama Supreme Court cases finding no unconscionability problem with certain arbitration terms, Alabama has also rendered several prominent decisions refusing to enforce arbitration agreements. The mixture of Alabama cases appears in large part to be the result of change in the composition of the Supreme Court more than change in, or erratic application of, judicial philosophy, with the current Alabama Supreme Court arguably more receptive to arbitration than were predecessor compositions of the Court. See Stephen J. Ware, *The Alabama Story: The State's Experience with Arbitration Shows the Connection of Law to Politics and Culture*, 24 DISP. RESOL. MAG., Summer 2001, at 24; Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 627–29 (2002).

“unconscionability norm”—a collective judicial view as to what aspects of an arbitration arrangement are too unfair to merit judicial enforcement. In rediscovering and reinvigorating the unconscionability norm for arbitration law, the lower courts have begun to achieve an equilibrium of arbitrability.

How completely this equilibrium develops and how firmly it becomes established remain open questions that are subject to solidification or retrenchment based on the Supreme Court’s future arbitration pronouncements.<sup>28</sup> At this juncture, however, the seeming rediscovery of the unconscionability norm, however incomplete, in modern arbitration law reflects several significant points worth considering.

First, when the Supreme Court announces and imposes arguably erroneous or unfair legal doctrine, lower courts<sup>29</sup> appear to respond by utilizing what other legal doctrines (unforeclosed by Supreme Court precedent) may be available for correction or mitigation of perceived excesses by the Court or private actors capitalizing on advantages conferred by the High Court. Lower courts and other socio-legal forces work to produce an equilibrium of moderation and compromise rather than enforcing the Court’s doctrinal pronouncements to their fullest extent. Regarding enforcement of arbitration agreements, it is as if many lower courts have in recent years been “tapping the brakes” on arbitration rather than allowing contractual proponents of arbitration clauses to accelerate to the degree that might have been initially suggested by the Court’s cheerleading for arbitration. This equilibrating tendency appears to be activated in part by the excesses of opportunistic legal actors attempting to capitalize on problematic legal doctrine. For example, the late 1980s and 1990s saw businesses attempting to mandate arbitration before favorable tribunals in situations where arbitration had not been used.<sup>30</sup>

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<sup>28</sup> See *infra* notes 101–18 and accompanying text.

<sup>29</sup> I use the term “lower courts” as a matter of convenient shorthand for describing judicial tribunals other than the Supreme Court. I realize that purists may dislike the term in that the United States judicial system is a federal one in which state court systems are separate from the federal system and not “inferior” to it. Nonetheless, as a practical matter, U.S. Supreme Court decisions ordinarily are final and dispositive, irrespective of whether the High Court reviews a decision of a lower federal court or a state supreme court.

<sup>30</sup> See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood*, 11 OHIO ST. J. ON DISP. RESOL. 297, 334–40 (noting the differences between “old” ADR traditionally used for commercial contracts and “new” ADR affecting consumer and employment contracts). See, e.g., Jane Spencer, *Signing Away Your Right to Sue: In Significant Legal Shift, Doctors, Gyms, Cable Services Start to Require Arbitration*, WALL ST. J., Oct. 1, 2003, at D1.

Second, the role played—and yet to be played—by the unconscionability concept demonstrates the continued vitality and importance of the concept, including judicial power to apply unconscionability doctrine where necessary on an ex post and ad hoc, situation-specific basis despite concerns that this may be inefficient judicial aggrandizement of power or may produce inconsistencies in application.

Third, the judiciary's slow and continuingly reluctant application of what I call the "unconscionability norm," even in cases where it would clearly be helpful, suggests both that the judiciary has been unduly cowed by the critics of unconscionability, and that the critics of unconscionability—even the justly revered Professor Arthur Leff—have been too strident in criticizing the concept. Developments in the arbitration field taking place in the years since Leff wrote underscore the continued necessary role of unconscionability analysis in the judicial policing and enforcement of arbitration clauses, and perhaps all contract terms.

Part II of this Article reviews the development of the Supreme Court's arbitration jurisprudence. Part III examines the application of arbitration clause enforcement in the lower courts and the emergent judicial use of unconscionability and related analyses to police arbitration agreements. Part IV reviews the unconscionability doctrine as well as criticism and defense of the concept. Part V argues that unconscionability became unfashionable at essentially the same time the Supreme Court became infatuated with arbitration, resulting in judicial reluctance to restrain arbitration through unconscionability analysis until lower courts were forced to resort to the concept in view of the Court's foreclosure of other avenues for restraining arbitration abuses. Part VI focuses on potential future development and argues that a reasonably vigorous unconscionability doctrine remains an appropriate and important means for courts to prevent arbitration abuses. Although the unconscionability norm presents drawbacks, it remains an essential tool for policing arbitration terms in contracts. Arbitration clauses, more than most contract terms, are a type of contract provision meriting substantial judicial scrutiny as to fairness because of the inability of most laypersons to effectively assess ex ante the value they will ultimately place on judicial access or at least leverage as to the shape of any alternative forum.

## II. THE SUPREME COURT'S MODERN ERA OF ARBITRATION CLAUSE ENFORCEMENT

### A. *Historical Judicial Attitudes Toward Arbitration and the Federal Arbitration Act*

Arbitration has a venerable history<sup>31</sup> predating modern controversy over arbitration. It has long been a dispute resolution forum of choice among merchants in a particular industry.<sup>32</sup> Stock exchanges and mercantile markets frequently require arbitration among members with particular rules.<sup>33</sup> Written, bilateral arbitration agreements existed at least as far back as medieval Venice and the Italian city-states active in trade.<sup>34</sup> However, courts in the United States were historically reluctant to enforce pre-dispute arbitration agreements.<sup>35</sup> The reluctance even rose to the level of recalcitrant

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<sup>31</sup> See Randy Linda Sturman, *House of Judgment: Alternative Dispute Resolution in the Orthodox Jewish Community*, 36 CAL. W. L. REV. 417, 419–23 (2000) (describing Bet Din, a form of ADR similar to arbitration and in use for centuries in Judaism); see also DRAHOZAL, *supra* note 1, § 1.05; IAN R. MACNEIL, ET AL., *FEDERAL ARBITRATION LAW* § 4 (1995); WESLEY STURGES, *A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS* § 60 (1930). See generally Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984) (describing arbitration in colonial times);

<sup>32</sup> See Sarah R. Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DIS. RESOL. 759, 760–67 (2001) (noting variety of arbitral mechanisms historically and currently). See generally Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597–98 (1928) (noting arbitration among Roman merchants).

<sup>33</sup> See DRAHOZAL, *supra* note 1, at 158–65; LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* Ch. 11D (4th ed. 2001 & Supp. 2003).

<sup>34</sup> See Stempel, *Public Policy*, *supra* note 1, at 270 n.31 (noting records of arbitration agreements in Renaissance Italy).

<sup>35</sup> See *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406–07 (2d Cir. 1959) (noting historical judicial resistance to any contract provision that would tend to remove the court from its jurisdiction); D.G.R., Note, *Effect of the United States Arbitration Act*, 25 GEO. L.J. 443, 445 (1937) (observing that the primary purpose of the FAA was to legislatively overrule the anti-arbitration cases of the common law); see also Paul D. Carrington & Paul Y. Castle, *Contract Provisions Controlling Resolution of Future Disputes: The Tradition of Revocability*, LAW & CONTEMP. PROBS. (forthcoming 2003) (noting resistance to arbitration agreements but viewing judicial attitude more charitably as part of an overarching doctrine permitting revocability of contracts in certain situations). See generally *Scott v. Avery*, 10 Eng. Rep. 1121 (1856); *Kill v. Hollister*, 95 Eng. Rep. 332 (1746); Julius Henry Cohen & Kenneth Dayton, *The New*

prejudice among some courts, which declared such pre-dispute arbitration agreements unenforceable because they effectively “ousted” the court from what would otherwise be its clear jurisdiction.<sup>36</sup> Courts on occasion also thwarted arbitration through an extremely narrow reading of the scope of an arbitration clause.<sup>37</sup>

In response to this judicial resistance to arbitration, the business community and the commercial bar, particularly the New York bar, successfully lobbied for passage of a national law making arbitration agreements specifically enforceable.<sup>38</sup> The Federal Arbitration Act was passed in 1925 and took effect on January 1, 1926.<sup>39</sup> The Act provides for enforcement of predispute agreements to arbitrate so long as the arbitration clause is in writing and the contract in which the arbitration agreement is contained evidences a transaction involving interstate commerce.<sup>40</sup> Of course, in 1925, notions of interstate commerce were considerably less expansive than they came to be and remain today.<sup>41</sup>

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*Federal Arbitration Law*, 12 VA. L. REV. 265 (1926) (noting the historical attitude of courts as a major impetus for passage of the FAA).

Recent scholarship has made a strong case that this conventional wisdom of judicial hostility toward arbitration is overstated and even a “fallacy.” See LeRoy & Feuille, *supra* note 13, at 272–77 (contending that most courts were not directly hostile to arbitration but that certain prominent cases in that vein have been overemphasized in the traditional rendering of arbitration history). Even if the LeRoy and Feuille thesis is correct, there is no question that the perception of the proponents of the Federal Arbitration Act and, more importantly, the Congress that enacted it, was one of judicial hostility toward specific enforcement of predispute arbitration clauses.

<sup>36</sup> See Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 139 (1934).

<sup>37</sup> See, e.g., *Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 232 F. 403, 405 (S.D.N.Y. 1916), *aff’d*, 250 F. 935 (2d Cir. 1918), *aff’d* 252 U.S. 313, 315 (1920) (taking an extreme, arguably absurdly narrow, reading of a broadly worded arbitration clause and thus finding grounds to refuse to enforce an arbitration provision against a party refusing to arbitrate).

<sup>38</sup> See THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON COMMERCIAL ARBITRATION* 1–22 (1997); DRAHOZAL, *supra* note 1, § 4.01; STEPHEN B. GOLDBERG, ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 209–83 (4th ed. 2003).

<sup>39</sup> See United States Arbitration Act, 68 Pub. L. 401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2003)).

<sup>40</sup> See 9 U.S.C. § 2 (2003).

<sup>41</sup> See GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 141–227 (13th ed. 1997); GEOFFREY STONE, ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 258–313 (1986). Compare *Hammer v. Dagenhart*, 247 U.S. 251, 269–77 (1918) (finding that federal child labor law was an invalid exercise of Congress’s commerce power, as the manufacturing of goods is not “commerce” unless

Unfortunately, the Supreme Court has not paid much attention to this development in making the sweeping pro-arbitration pronouncements discussed in Part II.B, below, but that is the subject of another critique, one that has left the Court largely unmoved.<sup>42</sup> The Act also specifically states that an arbitration clause in a “contract of employment” is not enforceable, a seemingly clear limitation on the Act’s endorsement of arbitration that has also been effectively gutted by the Supreme Court despite the Court’s frequent rhetoric purporting to favor applying the plain meaning of statutory text.<sup>43</sup>

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it involves a direct link to transportation across state lines) *with* *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (determining that federal agricultural regulations were a valid exercise of commerce power, because a significant amount of wheat that was the subject of regulation would eventually cross state lines, either as raw goods or as ingredients in other food products).

The 1990s saw something of a rebirth of a more limited notion of interstate commerce in some Rehnquist Court decisions. *See, e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73–78 (2000) (limiting application of the ADEA on sovereign immunity grounds and limiting *EEOC v. Wyoming*, 460 U.S. 226 (1983)); *United States v. Morrison*, 529 U.S. 598, 607–19 (2000) (striking down the civil enforcement provision of the federal Violence Against Women Act as exceeding the Commerce Clause power of Congress); *Printz v. United States*, 521 U.S. 898, 923–25 (1997) (striking down a portion of the Brady Act on gun control, which required state cooperation with the federal law enforcement scheme); *Seminole Tribe v. Florida*, 517 U.S. 44, 59–73 (1996) (invalidating a provision of the Indian Gaming Regulatory Act and overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991) (noting concern for and giving deference to state prerogatives and federalism as a canon of construction for statutes and the Constitution). *But see* *Nevada v. Hibbs*, 123 S.Ct. 1972, 1976–77 (2003) (holding that the Eleventh Amendment does not bar application of the Family and Medical Leave Act to states and that state employees are entitled to exercise rights under the Act). On the whole, however, the New Deal Era’s judicial expansion of the reach of the Commerce Clause and the broad notion of what constitutes interstate commerce remains intact enough to say with certainty that today’s notions of interstate commerce are broader than those prevailing at the time the FAA was passed.

<sup>42</sup> *See* Stempel, *supra* note 3, at 266–80 (arguing that it is incorrect for the Supreme Court to seize upon expanding the notion of interstate commerce to expand the reach of the FAA generally without also applying this concept to give section 1 of the FAA, which makes arbitration agreements inapplicable for employment contracts, similar expanded construction; instead, courts continue to give workers section 1 protection from arbitration clauses only if they are directly engaged in interstate movement of goods).

<sup>43</sup> 9 U.S.C. § 1 (2000). *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that an arbitration clause contained in a worker’s retail employment contract is not exempt from the FAA); *Gilmer v. Interstate/Jonson Lane Corp.*, 500 U.S. 20, 25 (1991) (holding that an arbitration agreement required of workers at a securities firm was not an arbitration provision in a “contract of employment”); Stempel, *supra* note 3, at 266–80.

Viewed as a whole and in light of its limited but clear legislative history and political background, it is clear that the Act was designed largely to ensure that written arbitration clauses contained in commercial contracts between merchants were enforced. The business community strongly desired pro-arbitration federal legislation because of a view that arbitration provided a lower cost alternative to traditional litigation that also had the benefits of expert fact finders from business and industry rather than the use of judges or juries less familiar with the subject matter at issue.<sup>44</sup> Support for arbitration also appears to have stemmed from the view that arbitrators would be relatively free to decide matters according to the informal norms of an industry or the more specialized contractual understandings of business, a type of “Law Merchant” basis for decision.<sup>45</sup> Comparatively few businesspeople appear to have considered whether they would be better off under a more formal legal regime should they become embroiled in a purely legal contract dispute unmoored from any norms or fact questions specific to the industry—or they considered it and concluded that the greater informality and flexibility of the law in arbitration was likely to be better for them should they be in breach or claiming damage from breach. The reduced prospect of punitive damages awards or other damages in arbitration appears not to have been a conscious consideration during the discussion of the Act.

Interestingly, the business community favored arbitration even before the expansion of discovery in civil litigation occasioned by the enactment of the Federal Rules of Civil Procedure in 1938. As might be expected, the business community has become more convinced of the relative cost savings of arbitration as the perception has grown that modern civil litigation is particularly expensive, intrusive, and cumbersome because of the availability of broad (albeit narrowing in recent years) discovery.<sup>46</sup> Comparatively few

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<sup>44</sup> See IAN MACNEIL, ET AL., *supra* note 31, at ch.1; Cohen & Dayton, *supra* note 35, at 269–74.

<sup>45</sup> See Cohen & Dayton, *supra* note 35, at 270–75; Wolaver, *supra* note 36, at 135–38.

<sup>46</sup> See Carrington & Castle, *supra* note 35, 266–67 n.59. The FAA was focused on business, not

consumers, tenants, patients, or employees. It did not occur to anyone in 1925 that the Act would be used as an instrument of “tort reform,” to disable consumers and employees from enforcing their statutory rights. In part, this was because there was so little law protecting such persons. Labor law was a creature of collective bargaining, and there was little consumer protection law that was privately enforced.

*Id.*; see John Lande, *Failing Faith in Litigation: A Survey of Business Lawyers’ & Executives’ Opinions*, 3 HARV. NEGOT. L. REV. 1, 56–58 (1998); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. J. NEGOT. 137, 184–86 (2000); Stempel, *supra* note 30, at 334–40 (noting that arbitration as



businesspeople appear to have considered the possibility that they might be involved in a dispute in which they would prefer the greater discovery provided in the courts—or they considered it and implicitly decided that on balance they were likely to be better off with less discovery, reduced disputing costs, or both.

Passage of the Act of course did bring a change in the law of arbitrability. No longer could a court simply refuse to enforce an arbitration clause as a matter of turf protection. Notwithstanding the Act, however, there remained areas of difficulty which resulted in non-enforcement of arbitration clauses in some circumstances. In *Bernhardt v. Polygraphic Company*,<sup>47</sup> the Supreme Court held that the Act applied only to cases in federal court and did not constrain state courts from refusing to compel arbitration, even if the refusal was based on state-specific grounds at odds with federal law or the majority rule in the states. In *Wilko v. Swan*,<sup>48</sup> the Court ruled that a claim brought pursuant to the Securities Act of 1933 was not subject to arbitration on the ground that the statutory language and intent was inconsistent with enforcement of arbitration clauses. *Wilko* was often interpreted to mean that arbitration of statutory claims—or at least certain statutory claims—was precluded.<sup>49</sup> On this basis, some courts refused to require arbitration of

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originally contemplated by Congress and the drafters of the FAA was confined to the subset of industry, involved systemic relationships, addressed commercial matters and actors, and focused on contract rather than tort or statute). See generally Carrington, *supra* note 4. But see Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights*, LAW & CONTEMP. PROBS. (forthcoming 2003) (arguing that by language and design, the FAA is not limited to commercial matters or disputes between relatively sophisticated parties).

<sup>47</sup> *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 202–03 (1956).

<sup>48</sup> *Wilko v. Swan* 346 U.S. 427, 437–38 (1953).

<sup>49</sup> See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (holding that an arbitration clause was not enforceable with respect to civil rights claims made pursuant to 42 U.S.C. § 1983); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745–46 (1981) (holding that Fair Labor Standards Act claims are not required to be arbitrated pursuant to arbitration provisions of collective bargaining agreement); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974) (holding that Title VII claims are not arbitrable); *Criswell v. Western Airlines, Inc.*, 709 F. 2d 544, 547–48 (9th Cir. 1983) (refusing to compel arbitration of ADEA claims); *Hanes Corp. v. Millard*, 531 F.2d 585, 593–94 (D.C. Cir. 1976) (holding that patent claims are not subject to arbitration); *Foster Wheeler Corp. v. Babcock & Wilcox Co.*, 440 F. Supp. 897, 901 (S.D.N.Y. 1977) (holding that patent claims are not arbitrable); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271, 277–78 (E.D. Pa. 1977) (holding that ERISA claims not arbitrable).

antitrust claims.<sup>50</sup> If the antitrust claim was “intertwined” with otherwise arbitrable contract claims, some courts refused arbitration altogether.<sup>51</sup>

### B. *The 1960s and 1970s: Gradual Change*

The legal landscape of arbitration in the 1926–1960 period was one of only partial judicial support for arbitration. Significant pockets of exception to arbitrability remained. The 1960s began a gradual move toward greater solicitude for arbitration with the *Steelworkers’ Trilogy*.<sup>52</sup> In these three cases, the Court expressed a preference for resolving any uncertainties of language in an arbitration clause in favor of arbitration and extolled the general social benefits of arbitration—at least in the context of labor disputes.<sup>53</sup> In addition, the Court articulated an extremely deferential standard of review for labor arbitration awards: courts should affirm so long as the arbitrator’s decision “draws its essence” from the agreement, seemingly irrespective of whether the arbitrator’s decision was in accord with the legal regime.<sup>54</sup>

Although the *Steelworkers’ Trilogy*, by definition, addressed labor arbitration, which differs from commercial arbitration and consumer arbitration, the holdings and rhetoric of the *Trilogy* were clearly a boost for broad construction and enforcement of arbitration clauses. In *Prima Paint v. Flood & Conklin Manufacturing Company*,<sup>55</sup> the Court gave a similar boost to commercial arbitration agreements by holding that a defense of fraud in the inducement to the contract containing the arbitration clause was a defense that related to the contract as a whole (and hence was arbitrable) rather than

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<sup>50</sup> See, e.g., *Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d 116, 117–19 (7th Cir. 1978); *Helfenbein v. Int’l Indus.*, 438 F.2d 1068, 1070–71 (8th Cir. 1971); *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827–28 (2d Cir. 1968).

<sup>51</sup> See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 216–17 (1985).

<sup>52</sup> See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>53</sup> Technically and (to a large extent) practically, labor arbitration and non-labor arbitration are two separate worlds. The former is governed by the common law powers of courts pursuant to section 301 of the Labor Management Relations Act while the latter is governed by the Federal Arbitration Act. Thus, there are some differences in labor arbitration law and non-labor arbitration law. To a large extent, however, the jurisprudence of the two types of arbitration moves in tandem. Consequently, the emerging pro-arbitration labor law decisions such as those of the *Steelworkers’ Trilogy* served to exert hydraulic pressure in favor of a more pro-arbitration jurisprudence in matters of commercial law, and ultimately, noncommercial, non-labor arbitration as well.

<sup>54</sup> See *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

<sup>55</sup> *Prima Paint Co. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

to the making of the arbitration agreement alone (which was and continues to be a matter for judicial decision in first instance). *Prima Paint* had the effect of moving more contract disputes into the arbitration forum at the outset and making it less likely that a party resisting arbitration could engage in a war of attrition through pre-award judicial challenges to arbitration.<sup>56</sup> There were a few setbacks for arbitration during the 1960s. For example, in one case the Court refused to enforce an arbitration clause that required one party to incur significant inconvenience by disputing the matter in a distant forum.<sup>57</sup> Occasionally lower courts applied similar reasoning to refuse enforcement of arbitration clauses.<sup>58</sup> In addition, although a defense of fraud in the inducement to a contract was first presented to the arbitrator, defenses based on fraud in the factum, duress, and coercion were used by courts to negate arbitration clauses.<sup>59</sup>

In the 1970s, the Court continued to show incremental growth in its support of arbitration agreements but also continued to show reluctance to require arbitration of certain sorts of claims grounded in statutory law. The

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<sup>56</sup> See DRAHOZAL, *supra* note 1, at 55, noting that

Under the separability doctrine as adopted by the Supreme Court in *Prima Paint*, an arbitration clause is separable from the main contract entered into by the parties. In other words, the agreement to arbitrate is treated as a separate contract from the underlying contract, so that the arbitration agreement is untainted by any fraudulent inducement as to the underlying contract. . . . [Separability] allocates decision making authority between courts and arbitrators" . . . in a manner effectively shifting more power to arbitrators than would be the case without separability.

*Id.*; see also *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002) (affirming the continued viability of *Prima Paint* and the separability doctrine and requiring arbitration of client service agreements); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 838–83 (2003) (criticizing breadth of *Prima Paint* separability doctrine and arguing that the Court could have used the *Howsam* case as a vehicle for reducing *Prima Paint*'s delegation of power from courts to arbitrators).

<sup>57</sup> See *Moseley v. Elecs. & Missile Facilities, Inc.*, 374 U.S. 167, 170–72 (1963).

<sup>58</sup> See, e.g., *AAACon Auto Transport, Inc. v. State Farm Mutual Auto. Ins. Co.*, 537 F.2d 648 (2d Cir. 1976) (finding the arbitration clause in a car transit agreement not enforceable against a consumer where it provides for an extremely inconvenient forum for the consumer); *Miller v. AAACon Auto Transport, Inc.*, 434 F. Supp. 40, 42–43 (S.D. Fla. 1977), *aff'd mem.*, 614 F.2d 292 (5th Cir. 1980).

<sup>59</sup> See, e.g., *Hellenic Lines v. Louis Dreyfus Corp.*, 372 F.2d 753, 756–58 (2d Cir. 1967) (finding that proof of duress or coercion in connection with an arbitration clause would make the clause unenforceable but finding insufficient proof of duress in the instant case); *Dougherty v. Mieczkowski*, 661 F. Supp. 267, 273–76 (D. Del. 1987) (finding that a claim of forged signatures to an arbitration clause alleges defense of fraud in the factum and, if proven in court, negates the arbitration clause).

Court ordered enforcement of an arbitration or forum selection provision in two cases involving international transactions.<sup>60</sup> On the other hand, the Court refused to order arbitration of job discrimination claims<sup>61</sup> and certain labor law claims.<sup>62</sup>

The 1970s also saw extra-judicial developments favoring greater court receptiveness to arbitration. A burgeoning alternative dispute resolution (ADR) movement was developing. Chief Justice Burger frequently extolled the benefits of ADR generally and arbitration in particular.<sup>63</sup> The 1976 Pound Conference, organized and supported by the Chief Justice, both endorsed ADR and engaged in what many found to be litigation-bashing.<sup>64</sup> Several federal courts introduced court-annexed, non-binding arbitration of relatively small contract and tort disputes and found the results positive.<sup>65</sup>

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<sup>60</sup> See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519–20 (1974) (holding that an arbitration clause is enforceable in a claim related to an international securities dispute); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8–20 (1972) (enforcing a forum selection clause in a high seas towing agreement despite great leverage enjoyed by the towing company when the ship was disabled).

<sup>61</sup> See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56–60 (1974) (holding that Title VII claims not arbitrable).

<sup>62</sup> See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 734–46 (1981) (holding that National Labor Relations Act claims are not arbitrable).

<sup>63</sup> See generally Warren A. Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274 (1982) (arguing for greater use of ADR to make for faster resolution of disputes and to ease court dockets).

<sup>64</sup> See Laura Nader, *A Reply to Professor King*, 10 OHIO ST. J. ON DISP. RESOL. 99, 100–01 (1994) (“ADR was publically [sic] declared in 1976 at the Roscoe Pound Conference [and represented] a turning point on a public debate that began . . . in the 1960s when opposing groups of people voiced dissatisfaction with the American legal system.”); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 11 OHIO ST. J. ON DISP. RESOL. 211, 216–18 (1995); Stempel, *supra* note 30, at 310–12; Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156–58 (1993) (“[T]here was an unmistakable tone at the Conference that the . . . alleged litigation explosion would have to be controlled”).

The formal title of the Pound Conference was the “National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice,” popularly known as the Pound Conference because of Harvard Law Dean Roscoe Pound’s 1906 speech of the same name, which was delivered in St. Paul, Minnesota, Chief Justice Burger’s hometown and the location for the 1976 Conference. The most frequently cited article emerging from the papers presented at the 1976 Conference is Frank E.A. Sander’s *Varieties of Dispute Processing*, 70 F.R.D. 79, 111–14 (1976), in which Professor Sander introduced the concept of the “multi-door courthouse.”

<sup>65</sup> See generally Raymond J. Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A.J. 64 (1983) (commenting favorably on a court-annexed arbitration program in his judicial district).

### C. The 1980s: Sea Change

Although some Supreme Court decisions of the early 1980s continued to limit the reach and enforceability of arbitration agreements,<sup>66</sup> such rulings were the exception in what by the mid-1980s became a series of cases that both changed the “meaning” of the FAA and the ground rules for its application and expressed the Court’s substantive policy preference for arbitration and other forms of ADR as part of an arguable judicial backlash against the perceived excesses of civil litigation.

In 1983, the Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Company*,<sup>67</sup> required arbitration of a construction dispute, finding that defenses to arbitration such as laches and estoppel should be interpreted narrowly. Of perhaps greater jurisprudential importance, the Court in *Moses H. Cone* also found a strong federal policy favoring arbitration over litigation when there were questions as to the scope of a written arbitration agreement.<sup>68</sup>

In 1984, the Court rendered perhaps its most significant arbitration decision. In *Southland Corporation v. Keating*,<sup>69</sup> the Court required arbitration of a dispute between franchiser and franchisee notwithstanding a state law invalidating such agreements. In doing so, the *Southland* Court declared that the FAA was not merely a procedural statute governing the treatment of arbitration clauses in federal courts. Rather, the FAA created a substantive federal law regarding arbitration as part of a “national policy” favoring arbitration.<sup>70</sup> *Southland* effectively overruled the 1956 *Bernhardt v. Polygraphic Company*<sup>71</sup> decision. Oddly, the *Southland* majority opinion did not even cite *Bernhardt*, much less acknowledge its inconvenient existence. Only Justice O’Connor’s dissent noted *Bernhardt*, arguing that it was rightly decided and entitled to more deference through stare decisis than it was

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<sup>66</sup> See *supra* note 49, discussing cases limiting arbitration of civil rights and other statutory claims. See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (holding that 42 U.S.C. § 1983 claims are not arbitrable); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745–46 (1981) (holding that certain FLSA claims not arbitrable).

<sup>67</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr.*, 460 U.S. 1, 19–29 (1983).

<sup>68</sup> See *Moses H. Cone*, 460 U.S. at 24–25 (“Section 2 [of the Act] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . .”); see also Sternlight, *supra* note 4, at 17–18 (viewing *Moses H. Cone* as perhaps the key case launching the Court’s era of modern arbitration law and criticizing the decision for essentially inventing purported national policy favoring arbitration out of whole cloth).

<sup>69</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 16–17 (1984).

<sup>70</sup> See *id.* at 10–11.

<sup>71</sup> *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).

accorded by the *Southland* majority in its fervor for the national policy favoring arbitration.<sup>72</sup>

In 1985, the Court effectively ended the “intertwinement” doctrine that barred arbitrability when arbitrable and non-arbitrable claims were enmeshed. In *Dean Witter Reynolds, Inc., v. Byrd*,<sup>73</sup> the Court compelled arbitration of arbitrable issues, ruling that there was no reason to delay the arbitration of these claims merely because related claims between the parties were not within the scope of the arbitration agreement. The Court again expressed support for arbitration as a policy concept and rendered a legal holding requiring arbitrability, again in a franchiser-franchisee context but in an international setting. The Court rejected contentions that either the logistical inconvenience of the arbitral forum or the substantive identity of the arbitrator constituted a basis for refusing to enforce the arbitration clause. In particular, the Court interred the intertwining exception to arbitrability that refused to require arbitration where the dispute presented a mix of contract and statutory claims.<sup>74</sup> In 1987, the Court reaffirmed its view (first stated expressly in *Southland*) that the FAA created substantive federal law—and that it pre-empted any state legislation that attempted to treat arbitration clauses less favorably than other types of contractual agreements.<sup>75</sup>

Many viewed these decisions as signaling reduced support for the Court’s then 30-year-old *Wilko v. Swan* decision restricting arbitration of securities disputes because of the language and purpose of the Securities Act of 1933.<sup>76</sup> Certainly, the securities industry saw an opportunity as it increased the use of arbitration clauses in its brokerage agreements and sought to enforce them in individual litigation and industry public relations efforts. The court seemingly validated this assessment in the 1987 *Shearson/American Express, Inc. v. McMahon* decision,<sup>77</sup> which required enforcement of an arbitration clause in a brokerage agreement despite customer claims of violations of the Securities Exchange Act of 1934. *Wilko* was formally overruled in *Rodriguez de Quijas v. Shearson/American*

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<sup>72</sup> See *Southland*, 465 U.S. at 23.

<sup>73</sup> *Dean Whitter Reynolds v. Byrd*, 470 U.S. 213, 216–27 (1985).

<sup>74</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628–40 (1985).

<sup>75</sup> See *Perry v. Thomas*, 482 U.S. 483, 490–92 (1987) (finding that the FAA preempts a California statute making wage disputes nonarbitrable).

<sup>76</sup> See *Wilko v. Swan*, 346 U.S. 427, 437–38 (1953).

<sup>77</sup> *Shearson/American Express v. McMahon*, 482 U.S. 220, 237–38 (1987).

*Express, Inc.*,<sup>78</sup> which held that claims made pursuant to the Securities Act of 1933 were in fact arbitrable.

As during the earlier decades, proponents of arbitration in the 1980s occasionally lost a round in the ongoing struggle between arbitration enthusiasts and critics. For example, in a labor dispute, the same Court that created a national arbitration policy in *Southland* and resolved doubts in favor of arbitrability in *Moses H. Cone* found the arbitration provisions of the collective bargaining agreement in a subsequent case to be insufficiently broad to encompass the dispute, and refused to compel arbitration.<sup>79</sup> For the most part, however, any neutral observer would have to conclude that the 1980s was a breakthrough decade for arbitration. What had once been a procedural statute controlling only the federal courts was now a body of national substantive law. Where there had previously been a regime of neutrality to contract provisions regarding arbitration, there was now a “national policy” in favor of arbitration. Where in the past even broadly worded arbitration clauses had been forced to yield to certain statutes, it now appeared that both statutory and contract-based claims were subject to the same new pro-arbitration regime.

What is to some degree extraordinary about the 1980s is that this arbitration revolution took place with essentially no serious discussion by the Court as to the contract doctrine and methodology that would govern construction and enforcement of arbitration clauses. Instead, it was largely assumed by the Court that the text of the arbitration was the only yardstick to assess arbitrability. Essentially no attention was paid to questions of the linguistic or hermeneutic certainty of the words on the face of the arbitration clause, or to the surrounding circumstances of the contract, the specific intent of the parties, or the overall purpose of the agreement. Nothing was said about course of performance, course of dealing, usage in trade, or the objectively reasonable expectations of the parties.

In short, the focus was on arbitrability in the abstract rather than on any questions or how courts might apply the general contract law that they were directed to utilize in making arbitrability decisions pursuant to Section 2 of the FAA, which mandated that arbitration agreements be enforced on the same basis as any other contract term. Although this is to some degree understandable in that the Court’s primary role is to provide constitutional, statutory, and doctrinal guidance on matters of national import (rather than to act as a nine-person version of *Farnsworth on Contracts*), the absence of

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<sup>78</sup> *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484–86 (1989).

<sup>79</sup> *See AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650–52 (1986).

serious contract construction discussion by the Court is both odd and disappointing. As noted above, the Court in the 1980s effected a revolution in arbitration law. One might have reasonably expected that it would at least sketch for the lower courts the governing body of arbitrability law it anticipated would replace the deposed older order. Instead, the Court made reference only generally to broad contract principles without articulating and examining them, giving little guidance to lower courts. When more guidance came from the Court during the 1990s, it left many thinking that the Court would have been better off remaining silent.

*D. The Supreme Court in the 1990s and the Twenty-First Century:  
Conviction of the Convert, an Embrace of Textual Formalism, and  
Occasional Doubt*

As noted above, the new arbitration jurisprudence of the 1980s said very little about contract law methodology for construing arbitration clauses. Implicitly, however, the Court appeared to be endorsing a textualist and formalist preference regarding construction of arbitration agreements. By textualist, I mean that the Court not only favored the normal contract canon of applying the words of the contract as written, but also that the Court appeared to believe that there was not much more to the inquiry regarding the meaning of the arbitration clause than to examine the face of the document containing the clause.<sup>80</sup> There is little in the Court's arbitration opinions to suggest that nontextual indicia of meaning were to be considered unless the arbitration clause was ambiguous on its face. By formalist, I mean that the Court suggested that if the words of the arbitration clause appeared to encompass the dispute at issue, arbitration would be compelled without much, if any, consideration of other factors courts may consider as part of the process of contract construction, application, and enforcement. The less

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<sup>80</sup> See WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 817–48 (3d ed. 2001) (describing the textualist school of thought in statutory interpretation); FARNSWORTH, *supra* note 15, §§ 7.7–.13 (describing textualism and approaches to interpreting contract language). See generally James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995 (1992) (describing the divide over formal and functional approaches as one of “text of contract” versus “context of contract environment” and also suggesting that in non-insurance contracts, textualism is the rule). My own view is that Professor Fischer may be correct in arguing that nontextual factors have greater influence for insurance disputes, but I believe he is incorrect to the extent that he suggests that the formal “rules” of construction differ for insurance and non-insurance contracts. See STEMPEL, *supra* note 18, §§ 4.04, 4.08, 4.09.



formal approach to construing contracts is often described as “functional” or “instrumental.”<sup>81</sup>

Certainly, the Court’s other cases of the period concerning contract interpretation, and its cousin, statutory interpretation, were viewed by many as adopting a textualist and formalist approach.<sup>82</sup> Thus, it was perhaps hardly surprising that this proved to be the Court’s approach to arbitration clauses as well. For example, the Court did not give any particular consideration in *Southland* to the possibility that the arbitration provision insisted on by a franchiser might be procedurally or substantively unfair to a franchisee. Neither did the Court worry much that the arbitration clauses in the brokerage contracts at issue in *McMahon* or *Rodriguez* might be substantively unfair, unfairly surprising, or simply not really agreed to by the customers raising securities claims. The Court rejected the notion that the mere status of the agreements as contracts of adhesion might invalidate them, a position completely consistent with the textualist/formalist approach.

Once the Court addressed what might be regarded as “second-generation post-*Southland*” arbitration, its preference for textualism and formalism became clear. Perhaps the best example is *Gilmer v. Interstate/Johnson Lane Corp.*<sup>83</sup> In *Gilmer*, the Court faced the question, one raised late in the litigation, of whether section 1 of the FAA applied to bar enforcement of the arbitration clause at issue. Plaintiff Gilmer was in the securities industry, but as a broker and employee rather than as a customer. When he was discharged, he sued, alleging age discrimination by his employer, who sought to compel arbitration pursuant to a securities industry-wide agreement Gilmer had signed as a condition of beginning his employment. Section 1 of the Arbitration Act states that “nothing herein contained shall apply to

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<sup>81</sup> See BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JUDICIAL PRIMER 145 (1994) (using the term “instrumentalism” and also legal realism); Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1058–73 (1991) (using the formalist-functionalist dichotomy to explain different results reached by different courts construing the same standardized insurance policy language); see also Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543, 634–36 (1996) (arguing that both textual and nontextual considerations can be accommodated in construing contracts).

<sup>82</sup> See Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 58–60 (1995); Catherine L. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 221–25 (1995); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 434 (1993). The judicial trend toward textual focus and formalism was not confined to the Supreme Court. See Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 425–27 (1986).

<sup>83</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>84</sup>

Incredibly, the Supreme Court avoided a direct confrontation with section 1 by ruling that the arbitration agreement signed by Gilmer was neither a “contract of employment” nor part of a contract of employment,<sup>85</sup> thereby making section 1 inapposite by judicial fiat (save for the dissenting voice of sanity from Justice Stevens, who correctly characterized the majority’s maneuver as transparently evasive).<sup>86</sup>

A decade later, the Court was forced to reach the section 1 issue of arbitration clauses in employment agreements in *Circuit City Stores, Inc. v. Adams*.<sup>87</sup> St. Clair Adams, a former sales associate (i.e., what most of us would less euphemistically call an employee, a worker, or a salesperson) at a branch store of the electronics retailing giant, alleged race discrimination in connection with his discharge, invoking Title VII of the Civil Rights Act. Circuit City moved to compel arbitration, winning in the trial court but losing before the Ninth Circuit. The Supreme Court took the case and supported Circuit City’s position. Faced squarely with the section 1 issue that it avoided in *Gilmer*, the *Circuit City v. Adams* Court held that despite the seemingly clear “plain meaning” of section 1, this portion of the Act did not bar enforcement of the arbitration clause. Drawing on lower court precedent and what many regard as a strained view of the legislative history of the Act, the Court found that section 1, although written in language at least as broad as the typical arbitration clauses (usually enforced by the Court) worked only to prevent forced arbitration based on clauses found in the employment contracts of workers directly engaged in interstate commerce activity.

To state the obvious, I view *Circuit City v. Adams* (and the precedent on which it drew) as wrongly decided.<sup>88</sup> But whoever is correct about the “real” meaning of section 1 of the Act, the *Gilmer* and *Adams* decisions both qualify as very formalist decisions even if they are arguably anti-textual. In other arbitration cases of the 1990s, the Court was more consistently both

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<sup>84</sup> See 9 U.S.C. § 1 (2000).

<sup>85</sup> See *Gilmer*, 500 U.S. at 25 n.2.

<sup>86</sup> See *id.* at 36 (Stevens, J., dissenting) (noting that the Court majority “skirts the antecedent question whether the coverage of the Act even extends to arbitration clauses contained in employment contracts”).

<sup>87</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 116–24 (2001).

<sup>88</sup> See Stempel, *supra* note 3, at 304–05. In addition, I was a signatory of an amicus brief submitted on behalf of Adams arguing that arbitration clauses in such employment contracts are specifically placed outside the FAA. See also Finkin, *supra* note 3, at 289–97 (arguing in particular that courts have incorrectly understood congressional intent underlying the employment contract exception); Schwartz, *supra* note 10, at 36 (criticizing the Court’s view of the section 1 employment exception to arbitration).

textual and formalist. Most of all, however, *Circuit City v. Adams* was pro-arbitration and largely dismissive of any potential contract-based arguments against arbitration enforceability as well as any state contract law that appeared even modestly directed against arbitration agreements.

Other court decisions took a similar view favoring a broad reach of the FAA as a matter of federal law. For example, in *Perry v. Thomas*,<sup>89</sup> the Court held that the FAA preempted state legislation making wage claims nonarbitrable. In *Doctor's Associates, Inc. v. Casarotto*,<sup>90</sup> the Court reiterated the view that any state statute or judicial doctrine providing for increased regulation of arbitration provisions, but not other contract terms, was in violation of the FAA. However, the *Casarotto* Court, like the *Perry* Court, kept the door open for more generic judicial policing of arbitration agreements even as it was barring the door to state attempts to regulate perceived abuses specific to arbitration, stating:

Repeating our observation in *Perry*, the text of § 2 [of the Act] declares that state law may be applied “if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.” Thus, generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements without contravening § 2.

Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed “upon the same footing as other contracts.” [The Montana law regulating disclosure of arbitration clauses in franchise agreements that is the subject of the Court’s review] directly conflicts with § 2 of the FAA because the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act.<sup>91</sup>

In its other arbitration decisions of the 1990s, the Court continued its generally supportive stance, finding little that might invalidate arbitration provisions. The Court continued to take a broad view of what constitutes interstate commerce for purposes of the FAA and to view the FAA as substantive federal law.<sup>92</sup> The Court also reaffirmed its view that

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<sup>89</sup> *Perry v. Thomas*, 482 U.S. 483, 490–92 (1987).

<sup>90</sup> *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–88 (1996).

<sup>91</sup> *Id.* at 686–87 (second emphasis added) (citations omitted).

<sup>92</sup> *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–76 (1995).

characterizing the FAA as federal substantive law required that any contrary state law specific to arbitration be struck down,<sup>93</sup> although selection of state law in the same contract containing an arbitration clause required that any applicable state law restrictions on arbitration be observed.<sup>94</sup> Although several Justices frequently praised federalism and state prerogatives, the Court rendered its pro-arbitration holdings despite strong opposition from many state attorneys general.<sup>95</sup> In *EEOC v. Waffle House*,<sup>96</sup> however, the Court ruled that the EEOC is not precluded from seeking judicial relief for a worker, including back pay, reinstatement, and damages, due to the worker's arbitration agreement with the employer. On a matter arguably related to unconscionability concerns, the Court in *Green Tree Financial Corp. v. Randolph*,<sup>97</sup> held that an arbitration agreement that was silent as to fees was not rendered unenforceable.

Although rejecting the arbitral challenge before it in *Green Tree*, the Court also gave some aid and comfort to the unconscionability norm, suggesting that arbitration clause provisions or procedures that imposed excessive burdens through fee shifting might be unenforceable:

It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. . . . The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. . .

[W]e believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden.<sup>98</sup>

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<sup>93</sup> See *Casarotto*, 517 U.S. at 687–88.

<sup>94</sup> See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995) (holding that the selection of New York law in the choice of law provisions of a contract containing an arbitration clause does not also incorporate New York law barring arbitrators from ordering punitive damages); see also *Volt Info. Scs., Inc. v. Bd of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 490–92 (1989) (holding that a contract with an arbitration clause and a choice of law provision must honor both and apply the chosen law to issues of contract formation and enforcement).

<sup>95</sup> See *Sternlight*, *supra* note 4, at 20.

<sup>96</sup> *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295–96 (2002).

<sup>97</sup> *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91–92 (2000).

<sup>98</sup> *Id.* at 90–92. The Court continued:

In a more recent arbitration decision, *Howsam v. Dean Witter Reynolds, Inc.*,<sup>99</sup> the Court reaffirmed its commitment to the 1967 *Prima Paint* decision and its approach to the question of which tribunal is accorded initial and primary jurisdiction over the issue of arbitrability, ruling that a dispute over the applicability of the NASD six-year limit for bringing securities claims was not a dispute as to arbitrability and therefore should first be presented to the arbitrator. There is still arguable inconsistency and confusion in this area as both *Howsam* and *Prima Paint* can be read as inconsistent with *First Options of Chicago, Inc. v. Kaplan*,<sup>100</sup> which ruled that the Kaplan claim regarding the scope of the arbitration clause should be heard initially by the Court.

During 2003, the Court decided two arbitration cases on narrow grounds. The thrust of both decisions suggests that the Court continues to adhere to its pro-arbitration stance.

The Court in 2003 reviewed the Eleventh Circuit's decision *In re Humana Inc. Managed Care Litigation*,<sup>101</sup> which held that an arbitration agreement may not preclude arbitrators from considering a possible award of treble damages in conjunction with a physicians' RICO (Racketeer Influenced and Corrupt Organization Act) claim against an HMO, reasoning that a provision barring punitive damages in the arbitration clauses at issue intruded too greatly on the treble damages remedy provided by RICO.<sup>102</sup> The Eleventh Circuit decision was obviously in tension with the Supreme Court's modern arbitration law in that the appellate court appeared to have based its decision on the distinctive statutory right to treble damages, which it viewed as quite distinct from the contractual relations of the disputants.<sup>103</sup> In

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How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point. The Court of Appeals therefore erred in deciding that the arbitration agreement's silence with respect to costs and fees rendered it unenforceable.

*Id.* at 92. The Court also declined to rule on Randolph's argument that the arbitration clause impermissibly precluded her from bringing Truth in Lending Act (TILA) claims as a class action. *Id.* at 92, n.7.

<sup>99</sup> *Howsam v. Dean Ritter Reynolds, Inc.*, 573 U.S. 79, 85–86 (2002).

<sup>100</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–47 (1995).

<sup>101</sup> *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002), *rev'd sub nom.*, *Pacificare Health Sys., Inc. v. Book*, 123 S. Ct. 1531 (2003).

<sup>102</sup> *See Humana*, 285 F.3d at 973, 976; *see also Paladino v. Avnet Computer Techns., Inc.*, 134 F.3d 1054, 1061–62 (11th Cir. 1998).

<sup>103</sup> *See Humana*, 285 F.3d at 976, stating

contrast, the Supreme Court during the past twenty years has specifically overruled or implicitly backed away from cases suggesting that statutory rights are not arbitrable.<sup>104</sup>

The physician claims against Humana/Pacificare are distinguishable, however, in that the issue in the case was not the arbitrability of the RICO claim or statutory claims generally, but whether the arbitration clause can permissibly restrict remedies that would be available pursuant to statute. However, there is a Catch-22 quality about the distinction the Eleventh Circuit sought to draw between remedy and forum while at the same time asserting an intertwinement of the punitive and treble damages. According to the Eleventh Circuit, an arbitration agreement barring punitive damages is generally permissible, but this remedy limitation becomes improper in a statutory claim for treble damages because of the similarity between treble damages and punitive damages.<sup>105</sup> Although treble damages share a purpose of deterrence and punishment with punitive damages, the Eleventh Circuit argument seemed strained from the outset. Not surprisingly, the Supreme Court reversed.<sup>106</sup>

In the past, the Supreme Court has evidenced general hostility toward any state statute that restricts arbitrability or treats arbitration clauses differently than other contracts.<sup>107</sup> The *Humana/Pacificare* case did not require the Court to address the unconscionability analysis under the FAA, but presented an opportunity. The lower court opinions in the cases appear to accept that arbitration agreements may restrict punitive damages so long as the punitive damages concept is not commingled with statutory remedies. However, one can certainly argue that a restriction on punitive damages, treble damages, or any other remedy, violates the unconscionability norm by being unreasonably favorable to the drafter. The briefs of the parties and

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Here, the doctors' suit does not rely upon or presume the existence of an underlying contract; the RICO claims in this case are based on a statutory remedy Congress has provided to any person injured as a result of the illegal racketeering activities. This remedy stands apart from any available remedies for breach of contract, and clearly is not "intimately founded in and intertwined with the underlying contract obligations."

*Id.*

<sup>104</sup> See *supra* notes 89–93 and accompanying text (discussing the demise of statutory exceptions to arbitrability).

<sup>105</sup> See *Humana*, 285 F.3d at 973–74.

<sup>106</sup> See *Pacificare Health Sys, Inc. v. Book*, 123 S. Ct. 1531 (2003).

<sup>107</sup> See *supra* note 5 and accompanying text (discussing the Court's view that the FAA creates substantive federal law that displaces any contrary state law).

amici raised this issue, which also arose during oral argument,<sup>108</sup> but the issue was not addressed by the Court.

It is perhaps not surprising that the Supreme Court reversed the Eleventh Circuit, making its decision in relatively short time after the oral argument.<sup>109</sup> Perhaps equally unsurprisingly, the Court did not use the *Humana/Pacificare* decision as an opportunity to make broad pronouncements about federal arbitration law or to address the unconscionability question. Instead, the Court decided the case on the narrower ground that the Eleventh Circuit simply read too much into the provision limiting arbitral remedies, and that when properly read, the arbitration clause could not be interpreted as a matter of law as impermissibly restricting statutory remedies of treble damages in a civil RICO claim.<sup>110</sup> Consequently, it was premature for a court to interfere with the arbitration.<sup>111</sup> The case was remanded for further proceedings. If the Court had been inclined, it could have used *Humana/Pacificare* as the vehicle for both deciding whether limitations on remedies makes an arbitration term unconscionable, and outlining a general approach to arbitrability under the FAA. Although the general law of contract used to determine arbitrability has traditionally been state law, as suggested by the language of section 2 and the legislative history of the FAA, this would not preclude the Court from reading a general unconscionability norm into the FAA, particularly since *Southland* made the FAA substantive federal law.

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<sup>108</sup> See Brief of Respondents at \*9–11, *Pacificare Health Sys. Inc. v. Book*, 123 S.Ct. 1531 (2003) (No. 02–215) (arguing that waivers of statutory rights in arbitration agreements are unenforceable); Brief of Public Citizen as Amicus Curiae in Support of Respondents, at \*3–5, *Pacificare* (No. 02–215); Brief of National Association of Consumer Advocates as Amicus Curiae in Support of Respondents, at \*4–6, *Pacificare* (No. 02–215) (arguing that the bias of certain arbitration organizations makes arbitration clauses selecting these organizations unconscionable); Reni Gertner, *Is Arbitration Agreement Barring Punitives Enforceable?*, LAW. WEEKLY USA, Mar. 17, 2003, at 1 (reporting on an oral argument in the case). The Petitioners implicitly disputed the doctors' unconscionability argument but the Petitioners' brief and reply brief are explicitly directed toward the issue of arbitrability on the basis of contract and statutory text. See generally Petitioners' Brief, *Pacificare* (No. 02–215); Petitioners Reply Brief, *Pacificare*, (No. 02–215); see also Brief of U.S. Chamber of Commerce as Amicus Curiae in Support of Petitioners, at \*8, *Pacificare*, (No. 02–215) (making argument that contract containing damage or remedy limitations is not inherently unconscionable).

<sup>109</sup> See *Pacificare*, 123 S. Ct. 1531. The *Pacificare* oral argument was held on February 24, 2003. The decision was issued April 7, 2003.

<sup>110</sup> See *id.* at 1535–36.

<sup>111</sup> See *id.*

The Supreme Court also reviewed the South Carolina Supreme Court decision in *Bazzle v. Green Tree Financial Corp.*<sup>112</sup> In *Bazzle*, the South Carolina Supreme Court held that the arbitration agreement employed by Green Tree, a consumer lender, did not preclude class wide treatment of the consumer claims against Green Tree.<sup>113</sup> Specifically, the Bazzles and others alleged that Green Tree had violated the South Carolina Consumer Protection Code.<sup>114</sup> The South Carolina Supreme Court decided: (a) the Green Tree arbitration clause was effectively silent as to class wide consideration of claims and therefore should not be construed to prohibit such claims; and (b) that section 4 of the FAA, the portion of the Act empowering courts to compel arbitration, applied only to federal courts and did not govern state court proceedings.<sup>115</sup> The arbitration clause in question stated:

ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . *shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.* This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1 . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN) . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These

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<sup>112</sup> *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2002), *cert. granted*, 123 S. Ct. 817 (2003), *vacated*, 123 S. Ct. 2402 (2003).

<sup>113</sup> *See Bazzle*, 569 S.E.2d at 360–61.

<sup>114</sup> *See id.* at 351–52; *see also* S.C. CODE ANN. §§ 37-10-102, 37-10-105 (Supp. 1997). Specifically, the *Bazzle* claim was that Green Tree's solicitation and lending documents in connection with home improvement financing failed to comply with the attorney and insurance agent preference notice requirements of the statute.

<sup>115</sup> *See Bazzle*, 569 S.E.2d at 360–61. Section 4 of the Act (court power to compel arbitration by a recalcitrant party) can be technically distinguished from section 2 of the Act, which merely states that arbitration agreements are specifically enforceable and says nothing about the procedure for enforcement. However, this appears to be the classic case of a distinction without a difference. If section 2 of the Act makes arbitration agreements specifically enforceable, this implies that a court with proper subject matter and personal jurisdiction may act to enforce an arbitration agreement. Section 4 merely confirms this truth about this judicial power and provides some guidance as to the procedure for enforcing arbitration agreements. This appeared to be the view of the Supreme Court in vacating and remanding *Bazzle* on the question of arbitrator authority to determine the availability of class action treatment. The Court did not even address the South Carolina Supreme Court's section 4 argument. *See id.*



powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.<sup>116</sup>

*Bazzle* presented a more significant opportunity for the Court to modify its arbitration jurisprudence than did the *Humana/Pacificare* case. For example, at least one amicus brief argued that the case presented an opportunity to overrule *Southland*, or at least restrict its reach circumstantially.<sup>117</sup> The Court implicitly spurned this invitation to reconsider *Southland* and did not address the issue, save for the lone dissent of Justice Thomas, which reiterated his longstanding disagreement with *Southland*.<sup>118</sup>

Neither did the Court simply affirm the South Carolina Court's seemingly correct contract interpretation decision finding that the language of the Green Tree arbitration clause does not preclude class treatment of the consumer protection claims in arbitration.<sup>119</sup> The arbitration clause certainly

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<sup>116</sup> See *id.* at 2405.

<sup>117</sup> See Brief of Law Professors as Amicus Curiae in Support of Respondents, at \*2-\*6, *Bazzle* (No. 02-634) ("This Court should overrule *Southland* and hold that the FAA does not apply in state court or preempt state law."). In the interest of full disclosure, I note that I was one of the law professors signing the brief, which was largely written by University of Wisconsin Professor David Schwartz and University of Houston Law Professor Richard Alderman, both prominent critics of the Court's modern arbitration jurisprudence. See, e.g., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Schwartz, *supra* note 10.

I am not as critical of *Southland* as are many in the academy. See, e.g., Carrington, *supra* note 4, at 265. However, the Schwartz and Carrington criticisms have persuaded me that *Southland* should be reversed in order to avoid problems in application and also because of the problems noted in this Article; the Court consistently provides an uncritical embrace of arbitration but is unwilling to engage in a serious, functional contract analysis in order to police arbitration agreements so that arbitration clauses do not become instruments of abuse. See *supra* text and accompanying notes 82-83 (discussing Court's textualist, formalist view of contract law). In theory, *Southland's* holding of the FAA as substantive law can co-exist with a contract construction methodology sufficiently protective of consumers. In the absence of this type of an approach to contracts by the Court, it would be better if the reach of *Southland* and the FAA were curtailed and state legislatures were permitted to specifically regulate arbitrability.

<sup>118</sup> See *Bazzle*, 123 S. Ct. at 2411.

<sup>119</sup> Here, the South Carolina Supreme Court opinion appears indisputably correct as a matter of contract interpretation. The arbitration clause at issue was silent on the matter of class action treatment, despite Green Tree's strained argument that the clause, by referring to "this agreement," meant to preclude class treatment. As the South Carolina Court concluded, the language at issue is at least ambiguous and must therefore be construed against Green Tree as the drafter and in favor of the consumer that accepted the

does not contain any prohibition on class wide treatment of arbitral claims. The most natural reading of the clause is that class action arbitrations are permitted because “the arbitrator shall have all powers provided by law.”<sup>120</sup> Instead of merely affirming the South Carolina decision, the Court engaged in a bit of deferral. Justice Breyer, writing for the majority (and joined by Justices Souter, Ginsburg, and Scalia) held that the type of interpretative question at issue (the availability of class wide treatment of the claim of lending disclosure violations) was one to be decided in the first instance by the arbitrator rather than by a court.<sup>121</sup> Consequently, because the record suggested that the trial court had ordered the arbitration to proceed on a class basis (giving the arbitrator no say on that issue), the matter was vacated and remanded for the purpose of having the arbitrator make a de novo determination of the class treatment question.<sup>122</sup> Even though the arbitrator had awarded more than \$19 million to the plaintiffs, it was Justice Breyer’s view that it remained unclear as to whether the arbitrator would have proceeded with class action arbitration in the absence of the orders of the South Carolina Court.

Justice Stevens concurred and dissented, agreeing to join the Breyer group in order to ensure that there would be a “controlling judgment of the Court,” but would have preferred to simply affirm the South Carolina Supreme Court.

The parties agreed that South Carolina law would govern their arbitration agreement. The Supreme Court of South Carolina has held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue. There is nothing in the Federal Arbitration Act that precludes either of these determinations by the Supreme Court of South

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standard form provision (unless there was other persuasive extrinsic evidence of party intent or contract meaning). *See id.* at 359–60. Notwithstanding what to me seems the unassailable strength of this analysis of the arbitration clause as a matter of contract law, case law exists treating the silence of arbitration terms as meaning that the arbitrator lacks authority to consolidate claims made by different customers. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 67–71, 83 (2000) (noting cases and criticizing this analysis). Perhaps more important, three members of the U.S. Supreme Court (Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy) found the Green Tree clause so clear as to preclude class wide arbitration as a matter of law a textual construction that seems simply bizarre in light of the open language of the clause quoted above in text. *See Bazzle*, 123 S.Ct. at 2408.

<sup>120</sup> *See id.* at 2405.

<sup>121</sup> *See id.* at 2407–08.

<sup>122</sup> *Id.*

Carolina. Arguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court. Because the decision to conduct a class-action arbitration was correct as a matter of law, and because petitioner has merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker, there is no need to remand the case to correct the possible error.<sup>123</sup>

Although the *Bazzle* decision implicitly achieves an acceptable result (class treatment of claims is permitted if this is the arbitrator's determination and such treatment is not clearly foreclosed by the text of the arbitration clause), the decision is something of a dodge in that only Justice Stevens was willing to simply affirm the South Carolina court and give precedential force to what seems to be a clearly correct reading of an open-ended arbitration clause (such open clauses do not implicitly forbid class wide arbitration). Ominously, Justices Rehnquist, O'Connor, and Kennedy were so eager to prevent arbitration claimants from enjoying the procedural benefits of class action case processing that they adopted a very strained interpretation of Green Tree's arbitration clause, declaring that the clause "clearly" barred class wide arbitration because it used the word "you" to refer to the consumer signing the arbitration agreement and speaks of disputes arising under "this" contract.<sup>124</sup>

Elements of the Court and perhaps the Court as a whole continue to exhibit strong sentiments in favor of businesses drafting arbitration clauses of adhesion, even to the point of issuing dissenting opinions with embarrassingly bad contract analysis.<sup>125</sup> The inevitable conclusion seems to

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<sup>123</sup> *Id.* at 2408 (citations omitted).

<sup>124</sup> *See id.* at 2409–10.

<sup>125</sup> I realize it is a bit undiplomatic to be so critical of the work product of three Supreme Court Justices. But bad is bad. The Rehnquist dissent in *Bazzle* flunks Contracts 101 in its textual analysis. First, terms like "you" and "this contract" are the type of generic boilerplate that should not be accorded more substantive meaning than it can logically bear. Second, the clause clearly does not specifically address class actions by name, much less specifically forbid them. Third, the clause does state that the arbitrator "shall have all powers provided by law" when acting as a private judge. *Bazzle*, 123 S. Ct. at 1205. A real judge of course clearly has power to order class wide treatment of claims provided that the criteria of Federal Rule of Civil Procedure 23 are met. Thus, the arbitrator presumably enjoys similar power under the plain language of the clause. Fourth, to the extent that there is uncertainty of contract meaning that cannot be resolved through compelling extrinsic evidence, the hornbook rule of contract law is that ambiguities are construed against the drafter. Green Tree authored the clause in question and thus should lose on the interpretative point absent language much clearer than the language actually before the Court. Fifth, public policy analysis is an appropriate part of contract law. Public policy factors favor the availability of class wide treatment of small

be that these three Justices are more interested in ensuring that arbitration limits claimant rights and protects businesses than they are in fairly applying conventional contract doctrine.

Notwithstanding that the Court in *Bazzle* spurned the invitation to reconsider the *Southland* holding that the FAA created substantive federal law, it is interesting to note that five members of the current Court have at times expressed disagreement with *Southland*<sup>126</sup> and the view that the FAA creates substantive federal law. The potential for the Court as a whole to revisit and alter the *Southland* holding seems ever-present, particularly in light of the sustained academic criticism of *Southland*.<sup>127</sup> But *Southland* probably will survive through a combination of stare decisis (in that, although problematic, it has been controlling law for nearly twenty years and is supported by current preferences, at least among political elites, for ADR and arbitration) and voting theory (in that the Justices with misgivings about *Southland* tend to have different reasons for their disagreement and are

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claims such as those in *Bazzle*. Without class treatment, the grievant has reduced incentive to vindicate the law and the matter may be adjudicated inefficiently in piecemeal fashion. See generally FARNSWORTH, *supra* note 15, regarding general rules of contract construction.

<sup>126</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 36 (1984) (O'Connor, J., dissenting) (stating that the majority decision in *Southland* is "unfaithful to congressional intent, unnecessary, and inexplicable"); *Perry v. Thomas*, 482 U.S. 483, 493 (Stevens, J., dissenting) (stating "the Court has effectively rewritten the [Federal Arbitration Act] to give it a pre-emptive scope that Congress certainly did not intend"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting) (stating "I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time"); *id.* at 285 (Thomas, J., dissenting) (stating "In my view, the Federal Arbitration Act does not apply in state courts"). Justice Thomas continued to adhere to this view in *Bazzle* and thus dissented from the Court's majority opinion remanding the matter to South Carolina for a decision of the arbitrator interpreting whether the clause permitted class wide treatment. See *Bazzle*, 123 S. Ct. at 2411.

<sup>127</sup> See *supra* note 5 and accompanying text. But see Drahozal, *supra* note 5, 105–08 (arguing that *Southland* was correctly decided and that congressional intent underlying the FAA was to create substantive as well as procedural law). Professor Drahozal's defense of *Southland* is most well-timed and may influence the Court even if it is never cited. He provides a reasonable argument in favor of the FAA as substantive law that will be persuasive to many. At the very least, his thesis may give one or two of the Justices who have previously disparaged *Southland* reason for determining that *Southland* is sufficiently incorrect to merit overruling in light of the Court's general policy of stare decisis.

unlikely to coalesce around a single opinion to overrule or significantly alter the *Southland* holding).<sup>128</sup>

Thus, as *Southland* approaches its twentieth anniversary and Supreme Court solicitude for arbitration moves toward a golden anniversary, it is likely that the Court's support of a substantive pro-arbitration regime will remain intact. Similarly, the current Court's textualist and formalist approach to contract matters is unlikely to change in the near future. These traits of arbitration law will continue to frame and govern the work of lower courts. Against this backdrop, it is perhaps unsurprising that lower courts have to a degree rediscovered unconscionability analysis as one of the relatively few grounds remaining available for the policing of arbitration agreements.

### III. LOWER COURT REACTION TO THE NEW ERA OF FEDERAL ARBITRATION ACT JURISPRUDENCE: THE HALTING REDISCOVERY OF UNCONSCIONABILITY

#### A. *Past Unconscionability Precedents Regarding Arbitration Clauses and Form Contracts*

To borrow a phrase from Judge Posner, unconscionability is not some "newfangled" doctrine of contract law.<sup>129</sup> The concept has been around for centuries<sup>130</sup> and is perfectly consistent with the governing norms of contract and policy reasons underlying freedom of contract: consent, bargain, free will, free exchange, and wealth maximization.<sup>131</sup> Although an aggressive or reckless use of the doctrine holds the potential to interfere with contract law and policy, this has historically been considered a matter of the doctrine's

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<sup>128</sup> See ESKRIDGE, ET AL., *supra* note 80, at 80 (describing the possibility of voting paradoxes in which the preference held by most members of a group does not become the official position of the group due to a variety of presentations of a question and the order in which the issue is presented to the deliberative body). In addition, in any collegial body such as a court, the strength of preferences of the members may play a role. For example, even if five Justices are weakly in favor of modifying *Southland*, one or more of these Justices may prefer not to engage in protracted struggle with one or more Justices strongly holding to the view that *Southland* was correctly decided.

<sup>129</sup> See *Mkt. St. Assoc. v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991) (discussing the duty of good faith performance in contract law).

<sup>130</sup> See, e.g., *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (1750) (holding that a contract provision is unenforceable if it embodies an arrangement "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").

<sup>131</sup> See FARNSWORTH, *supra* note 15, §§ 4.27–.28 (3d ed. 1999); STEMPEL, *supra* note 18, § 4.10[b].

proper use rather than its legitimacy. All major contract treatises recognize unconscionability as a legitimate element of contract law even if they vary in their enthusiasm for the concept.<sup>132</sup> The UCC, adopted in every state, contains a provision expressly adopting unconscionability as a means of policing sales contracts, although it leaves the term undefined.<sup>133</sup>

But what exactly is unconscionability? The most famous unconscionability law does not define the term<sup>134</sup> and neither do judicial

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<sup>132</sup> See JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* §§ 56, 70 (1970) (recognizing the doctrine); FARNSWORTH, *supra* note 15, § 4.27–28 (summarizing the doctrine); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* §§ 4.1–.2 (4th ed. 1995) [hereinafter WHITE & SUMMERS]; JAMES J. WHITE & ROBERT S. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* §§ 4-1, 4-2 (1972) [hereinafter WHITE & SUMMERS, FIRST EDITION]; see also DAVID G. EPSTEIN, ET AL., *MAKING AND DOING DEALS: CONTRACTS IN CONTEXT* 329–44, 330 (2002) (recognizing the doctrine and observing that “[s]cholars trace the concept of unconscionability back to Roman law and find traces of an unconscionability doctrine in basic equity maxims such as ‘clean hands’”).

<sup>133</sup> See U.C.C. § 2-302 (1998); see also EPSTEIN, ET AL., *supra* note 132, at 330 (finding that “modern American law of unconscionability has its roots in section 2-302” and in the case of *Williams v. Walker-Thomas Furniture Co.*, 350 F. 2d 445 (D.C. Cir. 1965), an influential decision striking down certain debt acceleration and creditors’ remedies provisions of a form consumer contract for purchasing furniture).

<sup>134</sup> Section 2-302 of the UCC, which has been adopted in every state but Louisiana (which has codified the concept in slightly different language in the Louisiana Civil Code) states:

(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.

U.C.C. § 2-302 (1998).

Comment 1 to this section attempts to flesh out the black letter pronouncement, by stating that a criterion for determining unconscionability is:

whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.

U.C.C. § 2-302, cmt. n.1 (1998).

opinions, at least not with great precision.<sup>135</sup> Although courts have been reluctant to articulate a specific definition of unconscionability, there is considerable case law articulating a rough definition that is largely accepted by courts and commentators (and probably by counsel advising clients drafting agreements as well).<sup>136</sup> Historically, a contract term was viewed as unconscionable if it was unreasonably favorable to one of the parties.<sup>137</sup>

In his well-known article discussed in more detail in Part IV.A below, Professor Leff articulated two different types of unconscionability—procedural and substantive.<sup>138</sup> Procedural unconscionability or “bargaining naughtiness” (Leff’s term) involves unfair contracting practices. Substantive unconscionability involved terms that—no matter how openly set forth or voluntarily accepted—are simply too unfair to merit judicial enforcement.<sup>139</sup> The common law unconscionability definition of an “unreasonably favorable” term is in essence a definition of substantive unconscionability despite its generic phrasing.

Although the emergence of a specific unconscionability provision in the UCC has led many to view unconscionability as a doctrine that “took off” during the 1960s, the development of unconscionability is more complicated. As noted above, the notion of unconscionability has roots in ancient times. In addition, Anglo-American courts acting well before the UCC have invoked both types of unconscionability—procedural and substantive—in invalidating or modifying contracts on occasion.<sup>140</sup> Put another way, Karl Llewellyn and the other drafters of the UCC did not create the

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<sup>135</sup> See WHITE & SUMMERS, *supra* note 132, at 213 (“It is not possible to *define* unconscionability. It is *not a concept, but a determination* to be made in light of a variety of factors not unifiable into a formula.”) (citing *Mieske v. Bartell Drug Co.*, 593 P.2d 1308, 1313 (Wash. 1979) (stating that an unconscionability determination made by considering many factors with no one factor determinative)).

<sup>136</sup> See, e.g., *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 266 (E.D. Mich. 1976) (acknowledging unreasonable advantage for one party); *Schroeder v. Fageol Motors, Inc.*, 544 P.2d 20, 23–24 (Wash. 1975) (citing inconspicuous terms and language inconsistent with party understanding or lack of negotiation); *W.L. May Co. v. Philco-Ford Corp.*, 543 P.2d 283, 287 (Or. 1975) (acknowledging oppressive terms and an unreasonable advantage for one party in light of the risks assumed).

<sup>137</sup> See STEMPEL, *supra* note 18, § 4.10[b] at 4-162–163.

<sup>138</sup> See Leff, *supra* note 21.

<sup>139</sup> *Id.* at 509–40.

<sup>140</sup> See *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948) (holding a restriction on the sale of a fungible commodity to others is unconscionable); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 85–86 (N.J. 1960) (finding that a disclaimer of implied warranty of merchantability is unenforceable). The court suggests that the provision is so uniformly used by automakers and so unreasonably unfavorable to buyer as to be unconscionable. *Id.*

unconscionability concept out of whole cloth; they imported it into the UCC from the common law predating the UCC.

Clearly, the concept of unconscionability has been around for some time and has been deployed with some frequency. What is less clear is the interrelation between procedural and substantive unconscionability. In particular, there is the question of whether a term that is not procedurally unconscionable may be invalidated or modified because of its arguably substantive unconscionability. A related issue is whether the doctrine has applicability outside the realm of contracts of adhesion.

Although considerable precedent suggests that procedural unconscionability is a prerequisite to any unconscionability-based interference with contract text,<sup>141</sup> this does not follow inevitably from either the nature or logic of the unconscionability concept. Many cases, however, appear to require the presence of both forms of unconscionability in order to invalidate or make unenforceable a given contract term. But many other cases utilize the unconscionability concept in either procedural or substantive form alone.<sup>142</sup> More important, the concepts are analytically distinct and should not be needlessly co-mingled.

For example, an arbitration provision may provide for a perfectly reasonable and even-handed arbitration scheme in the event of disputes but be the product of the type of bargaining naughtiness Leff noted. The clause may be in typeface too small to be read without a microscope. It may be in written in complex legalese or other jargon incomprehensible even to the lay

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<sup>141</sup> See, e.g., Korobkin, *supra* note 25, at 1251–78 (concluding that most courts have required both imperfections in the bargaining process, or “procedural unconscionability,” and an unfairly one-sided term, “substantive unconscionability,” to exist before refusing to enforce an unambiguous contract term).

<sup>142</sup> See, e.g., *Kinney v. United Healthcare Servs., Inc.*, 83 Cal. Rptr. 2d 348, 352 (Cal. Ct. App. 1999) (discussing a “sliding scale” examination where sufficient presence of factors related to either substantive unconscionability or procedural unconscionability make an offending provision unenforceable); *Carboni v. Arrospide*, 2 Cal. Rptr. 2d 845, 849 (Cal. Ct. App. 1991) (discussing a sliding scale); W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH CENTURY REFORMATION OF CONTRACT LAW* 142 (1996) (recognizing that most courts use a sliding scale approach); Swanson, *supra* note 25, at 367. *But see* *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (finding that Pennsylvania law requires both procedural and substantive unconscionability to abrogate or modify a contract term); *Iwen v. U.S. West Direct, Inc.*, 977 P.2d 989, 995 (Mont. 1999) (finding the same for Montana law); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17 (1993) (describing most courts and commentators as defining unconscionability to require both procedural and substantive unconscionability).

For example, the cases discussed in Part V of this Article finding certain arbitration provisions to be unconscionable often based the finding and the court’s action on the presence of procedural or substantive infirmities standing alone.



reader armed with a microscope. It may be stapled to the contract as an “endorsement” after execution and never seen by the party that signed the overall contract. The execution of the “container contract” (the contract containing the arbitration term) may have been attended by an environment designed to distract the adhering party or to pressure him or her into reviewing and signing quickly (e.g., “Ms. Unsophisticated, Deferential Consumer, there are twenty-eight people in line behind you. Do you want the Miracle Widget or don’t you? If you do, please just sign the contract so that I can wait on the other customers.”).

In any of these scenarios, even if the substantive content of an arbitration clause is beyond reproach, most courts would have difficulty enforcing the provision in light of the procedural unconscionability described above. Even if the arbitration clause provided for full discovery followed by hearing before a panel consisting of Jimmy Carter, Albert Schweitzer, and Mother Theresa, the fact remains that the arbitration clause was arguably forced upon the misled consumer or, in the case of the post-signature endorsement, the product of outright fraud. One at least hopes that most courts would not take a “no harm, no foul” approach to such procedural abuses. After all, if the consumer really thought there was no harm, the economics of disputing would also work to discourage the metaphorical unsophisticated customer from challenging the arbitration clause in the text of the container contract.

Logic would appear to support a role for procedural unconscionability standing alone. As a practical matter, however, there may be few occasions for its invocation unless the court is quite sensitive to arguable procedural abuses. Few businesses would attempt to add a post-execution change in the contract without notice to the consumer, both because the provision would likely be unenforceable and because it would drive potential customers away if discovered. Similarly, businesses will ordinarily refrain from an overtly coercive contracting environment that may make not only the arbitration clause but also other aspects of the contract subject to challenge (although commercial actors may not be above providing a contracting context that tends to put more subtle pressure on the consumer and to reduce haggling). Rational businesses can be expected to at least make arbitration clauses clear and conspicuous since that would make enforcement more likely and imposes relatively little additional cost on the business.

But what about the converse situation? Can an arbitration provision that has no procedural defects be so substantively unconscionable as to be unenforceable? Again, the correct answer would appear to be affirmative. Assume that an arbitration clause is clearly written and not capable of being overlooked in connection with the container contract or other aspects of the transaction. The clause is carefully explained to the signing party, who is asked to sign the arbitration clauses separately in addition to the executing

the full contract. The signer is also given several days to reflect on whether to enter the agreement and is even encouraged to consult an attorney.

Can any arbitration clause resulting from such a process be substantively unconscionable? My answer is “of course”; this is the nature of the distinction between substantive and procedural unconscionability. Some contract terms may simply be too one-sided to be enforceable, at least in some circumstances. For example, an arbitration clause providing that disputes would be resolved by the drafting party with no right of judicial review would probably not survive in many courts, even where the adhering party is reasonably sophisticated and entered the agreement without significant economic or other duress (although some courts might find such a provision acceptable as applied to a sophisticated and well-heeled but foolish or foolishly desperate commercial entity).

For business-consumer or employer-employee arbitration, the case for substantive unconscionability, and the likelihood that courts will find it, is stronger. If a job applicant is seeking work during a recession, he or she is likely to agree to fairly oppressive arbitration clauses in the interests of procuring employment. If a loan applicant is seeking financing for a home, he or she may similarly accept some rather severe arbitration mechanisms no matter how fulsomely these are disclosed and explained during the contracting process.

Determining whether substantive unconscionability alone will avoid a contract term can be difficult as well because the doctrine may be conflated or co-mingled with notions of public policy. What if, for example, the procedurally circumspect contract drafting party provides for an arbitration mechanism in which disputes are resolved by the arbitrator torturing both disputants, with the disputant who endures longest obtaining an arbitration award in his favor (sort of a Marquis de Sade-style arbitration)? Although such a provision is probably outright illegal in most jurisdictions and certainly at odds with most people’s concept of public policy, it is not at all clear that the provision is unreasonably favorable to the drafting party (although one would expect the rational drafting party to have a pretty high pain threshold before coming up with this sort of dispute resolution mechanism).

Throwing aside hypothetical detours, it appears that, at least in theory, there can be substantive unconscionability without procedural unconscionability. Substantive unconscionability results in practice, not because contract drafters set out to design obscenely bizarre contract terms or arbitration clauses, but because adhering parties are not fully rational—only boundedly rational. Because most adhering parties—at least most consumers and small businesses—are not realistically able to investigate the arbitration provisions that are produced by even the most procedurally fair contracting,

the realistic possibility remains that a nontrivial number of arbitration clauses might be substantively unconscionable.<sup>143</sup> This phenomenon suggests a legitimate, continued role for judicial policing of arbitration agreements on the basis of substantive unconscionability as well as procedural unconscionability. Although the UCC commentary about unconscionability suggests that deals should not be modified simply because they result from disparate bargaining power, this admonition for a code among merchants should not prevent courts from appreciating the degree to which asymmetric bargaining power—and sophistication, understanding, and impaired rationality—might result in entry into unconscionable arbitration arrangements by employees, consumers, tenants, medical patients, and others.

In the wake of the Supreme Court's modern pro-arbitration jurisprudence, however, lower courts generally did not attempt to invoke either procedural or substantive unconscionability analysis to police arbitration agreements.<sup>144</sup> For the most part, courts simply enforced the arbitration agreements without much assessment of anything other than the text of the clause and the basic formalities of contract formation. To the extent that there were disputes over the making of the contract itself, these were to be first sent to the arbitrator under *Prima Paint* (a procedure that continues under *Howsam* and *Bazzele*).<sup>145</sup> Where the objecting party's challenge was to the making of the arbitration agreement or its scope, this was a decision for the court, but one made by most courts in the formalist manner found in Supreme Court opinions without particular concern for nontextual factors relevant to interpretation of the arbitration agreement, including unconscionability analysis.<sup>146</sup>

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<sup>143</sup> See Korobkin, *supra* note 25, at 1234.

[A] non-salient term will not automatically become salient just because its content is communicated to the buyer. A form term calling for arbitration of disputes in an inconvenient state, for example, is likely to be non-salient to the vast majority of buyers unless the type of contract in question commonly results in disputes. . . . "Notice" is a prerequisite of salience, but notice is not a sufficient condition of salience.

*Id.*

<sup>144</sup> See Drahozal, *supra* note 5, at 107–14.

<sup>145</sup> See *supra* note 56 and accompanying text.

<sup>146</sup> See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (suggesting no unfairness problem with the requirement that a Montana franchisee arbitrate a dispute in Connecticut, the franchiser's home state), *remanded* *Casarotto v. Lombardi*, 901 P.2d 596, 598 (Mont. 1995) (modifying arbitration clause due to unconscionability); *Wood v. Saturn Distrib. Corp.*, 78 F.3d 424, 427–29 (9th Cir. 1996) (holding that a panel of two Saturn dealers and two Saturn employees was not

In response to *Southland* and its progeny, some states adopted laws requiring greater indicia of disclosure or consent for the enforcement of a predispute arbitration agreement. Courts have consistently refused to apply these provisions, finding them pre-empted by the Federal Arbitration Act on the ground that they were state laws discriminating against arbitration in particular (rather than general state contract laws designed to further the provision of information or to ensure the reliability of form contracts).<sup>147</sup>

The emerging post-*Southland* jurisprudence of arbitrability in the lower courts became one in which any specific restrictions on arbitration contract formation or enforcement were likely to be struck down. The door remained open for using general unconscionability doctrine as a policing mechanism for arbitration agreements. For the most part, however, Courts during the 1980s and most of the 1990s appeared to be reluctant to invoke this mechanism for adjudicating arbitrability disputes.

## B. An Upsurge in the Unconscionability Approach in Reaction to Oppressive Arbitration Agreements

Beginning in the late 1990s, courts appeared to become more receptive to the application of general contract law of unconscionability as a means of determining the force of arbitration clauses. *Armendariz v. Foundation Health Psychcare Services, Inc.*<sup>148</sup> is perhaps the best known of this new

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unconscionable or insufficiently neutral to arbitrate dealer's dispute with Saturn); *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1077 (5th Cir. 2002) (enforcing a boilerplate arbitration clause in a mobile home sales form against an owner's claims of toxic tort damages); *Coon v. Nicola*, 21 Cal. Rptr. 2d 846, 853-54 (Cal. Ct. App. 1993) (enforcing an arbitration clause in a medical service agreement); *Burton v. Mt. Helix Gen'l Hosp.*, Civ. No. 14210, 1976 Cal. App. LEXIS 1280, \*17 (Cal. Ct. App. 1976) (enforcing a form arbitration clause in a hospital's intake forms filled out by a patient as part of the routine checking in for surgery); *KFC Nat'l Mgm't Co. v. Beauregard*, 739 So.2d 630, 631 (Fla. Dist. Ct. App. 1999) (enforcing retroactively an arbitration clause added after a food service worker began the job); Carol A. Crocca, Annotation, *Arbitration of Medical Malpractice Claims*, 24 A.L.R. 5TH 1 (1994) (noting similar cases enforcing such clauses in medical service forms).

<sup>147</sup> See, e.g., *KKW Enters, Inc. v. Gloria Jean's Gourmet Coffees Franchising Group*, 184 F.3d 42, 50-52 (1st Cir. 1999) (holding that the FAA preempts Rhode Island statutes invalidating clauses in franchise agreements if a forum outside the state is selected); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (holding that the FAA preempts a similar New Jersey statute); *Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc.*, 840 F. Supp. 708, 710 (D. Ariz. 1993) (holding that the FAA preempts a similar Michigan statute); *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 722 (4th Cir. 1990) (holding that the FAA preempts Virginia law prohibiting "nonnegotiable arbitration provisions").

<sup>148</sup> *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000).

generation of cases refusing to enforce arbitration terms on grounds of unconscionability. The *Armendariz* Court ruled that an arbitration provision that required employees—but not the employer—to arbitrate was unconscionable.<sup>149</sup>

Although lack of mutuality was the crux of the *Armendariz* holding, the California Supreme Court articulated a number of other factors for judicial scrutiny of arbitration terms based on the unconscionability norm: limitation of remedies; inadequate discovery; imposition of unreasonable fees and costs; and degree of mutuality as to each party's choice of arbitration or litigation.<sup>150</sup>

*Armendariz* applied a sliding scale test for determining unconscionability, examining the challenged arbitration provision for both procedural and substantive unconscionability.<sup>151</sup> However, under California law as set forth by *Armendariz*, the challenged term must be contained in a contract of adhesion to trigger further unconscionability analysis.<sup>152</sup>

Because *Armendariz* was a decision of the highest court of the largest state, it has attracted considerable attention<sup>153</sup> and something of a following in that it appears to have ushered in a series of cases refusing to enforce arbitration clauses where the drafter and the non-drafter did not have mutual options in the event of a dispute.<sup>154</sup> This view has met significant opposition, however, from other courts<sup>155</sup> and commentators.<sup>156</sup>

The unconscionability norm was stirred from slumber by *Armendariz*, perhaps because it was one of the few remaining avenues for judicial

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<sup>149</sup> *Id.* at 689–99.

<sup>150</sup> *Id.* at 691–98.

<sup>151</sup> *Id.* at 689–90.

<sup>152</sup> *Id.* at 689.

<sup>153</sup> As of August 6, 2003, *Armendariz* has been cited in approximately 150 judicial decisions and 70 law reviews or other legal periodicals such as A.L.R. annotations, rather extraordinary figures for a case only three years old. *See also* Leroy & Feuille, *supra* note 13, at 287 (describing *Armendariz* as a “key decision” in a lower court “revolt” against the excesses of Supreme Court’s arbitration jurisprudence).

<sup>154</sup> *See infra* text and notes 157–66, discussing decisions invalidating non-arbitration provisions.

<sup>155</sup> *See, e.g.*, *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 183–84 (3d Cir. 1999) (deciding that an arbitration clause giving a consumer lender the unilateral option to litigate or arbitrate is not unconscionable).

<sup>156</sup> *See, e.g.*, Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 IOWA J. CORP. L. 537, 541 (2002) (arguing that a mutuality requirement in arbitration clauses “may result in arbitration proceedings that are less fair, rather than more fair, to consumers” and that a mutuality requirement is inconsistent with general contract law). Professor Drahozal also concludes that the *Armendariz* approach, despite its growth, remains the minority view. *Id.* at 540.

policing of arbitration agreements. However, there were unconscionability-based decisions refusing to enforce arbitration agreements prior to *Armendariz*. For example, in *Broemmer v. Abortion Services of Phoenix, Ltd.*,<sup>157</sup> the Arizona Supreme Court refused to enforce an arbitration agreement entered into by a medical service provider on grounds of unconscionability coupled with the arguably coercive setting in which the agreement was obtained.<sup>158</sup> The court stated, “Contracts of adhesion will not be enforced unless they are conscionable and within the reasonable expectations of the parties. This is a well-established principle of contract law; today we merely apply it to the undisputed facts of the case before use.”<sup>159</sup>

During the 1990s and the early twenty-first century, courts have tended to develop a typology of unenforceable arbitration agreements, although these decisions vary in the degree to which they specifically invoke the unconscionability norm.<sup>160</sup> In addition, many courts continue to reject unconscionability-based defenses to arbitration clauses.<sup>161</sup> As discussed above, the Supreme Court’s arbitration law of the *Southland* era produced a major shift in doctrine and power in favor of entities desiring to impose arbitration and against those who seek to avoid compelled arbitration.

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<sup>157</sup> *Broemmer v. Abortion Servs. of Phoenix, LTD*, 840 P.2d 1013 (Ariz. 1992) (en banc).

<sup>158</sup> *Broemmer* was 21 years old, poor, and 16 weeks pregnant. *Id.* at 1014. She sought an abortion under pressure from the father of the fetus, completing several forms as part of patient intake, including a form containing a broad arbitration clause. *Id.* at 1014–15. During the course of the abortion procedure, she “suffered a punctured uterus that required medical treatment,” leading to a subsequent malpractice claim against Abortion Services. *Id.* at 1050. Under the circumstances, the Arizona court concluded that a valid agreement had not been formed. *Id.* at 1017. Although the Court’s discussion stresses the plaintiff’s relative lack of information and choice, the opinion is founded on notions of procedural unconscionability as well. *Id.* *Accord* *Obstetrics & Gynecologists v. Pepper*, 693 P.2d 1259, 1261 (Nev. 1985) (per curiam) (refusing to enforce an arbitration agreement in similar circumstances, holding that the lack of sufficient consent precluded formation of agreement).

<sup>159</sup> *See Broemmer*, 840 P.2d at 1018. In dissent, Justice Martone argued that the language of the arbitration clause was sufficiently clear as to make for constructive consent by the patient. *See id.* at 1018–21 (Martone, J., dissenting). The Arizona Supreme Court in *Broemmer* thus encapsulates the basic divide in the courts between formalist and functionalist, textual and contextual approaches to arbitration clauses and contracts generally.

<sup>160</sup> *See infra* notes 165–76 and accompanying text (reviewing cases refusing arbitration).

<sup>161</sup> *See supra* notes 141–42 and accompanying text; *infra* notes 160–71 (reviewing cases rejecting unconscionability defenses to arbitration).

The judicial treatment of arbitration clauses reflected in the unconscionability-based arbitration decisions of the past decade represents a re-calibration of arbitration law toward a better balanced legal regime.<sup>162</sup> Whether consciously or not, these cases suggest that many lower courts—forced into the slanted pro-arbitration doctrinal straightjacket fashioned by the Supreme Court—have begun to find a means of at least loosening the straps even though early efforts in this regard were unsuccessful and seemingly foreclosed. Because specific regulation of arbitration alone has been struck down, lower courts appear to be increasingly willing to turn toward general contract law and its attendant unconscionability norm in order to regulate arbitrability to the degree seen necessary by these courts.<sup>163</sup> The

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<sup>162</sup> A similar phenomenon appears to have taken place regarding judicial construction and application of the 1983 Amendment to Federal Rule Civil Procedure 11. When Rule 11 was initially strengthened in 1983, courts for several years thereafter applied it in a manner many found to be overly wooden and undermining of creative legal representation, especially for civil rights plaintiffs. Decisions of the late 1980s and early 1990s adopted a more restrained and nuanced view of Rule 11. *See generally* Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105 (1992) (comparing the current version to the 1983 version of the Rule and noting that sanctions are discretionary rather than mandatory and attorneys and parties have a “safe harbor” of time to withdraw contentions before a motion for sanctions may be filed with the court; additional provisions also make Rule 11 less intimidating for those asserting claims for relief). Despite this recalibration, criticisms of Rule 11 prompted further revision of the text of the Rule in 1993. *See* FED. R. CIV. P. 11.

<sup>163</sup> There still remain some battles on this front. In addition to reviving unconscionability analysis, the California Supreme Court has held, despite the U.S. Supreme Court precedents described above, that claims seeking injunctive relief sought pursuant to certain state statutes are not arbitrable. *See, e.g., Broughton v. Cigna Healthplans of California*, 988 P.2d 67, 79 (Cal. 1999) (holding that claims for injunctive relief under the California Consumer Legal Remedies Act that are designed to protect the public from deceptive business practices are not subject to arbitration). The California high court, in a Spring 2003 decision, reaffirmed its commitment to *Broughton*’s approach and rejected a claim that the U.S. Supreme Court decisions in *Green Tree* and *Circuit City* required abandonment of this “public interest equitable action” exception to FAA-driven enforcement of arbitration clauses. *See Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1164–68 (Cal. 2003) (holding that claims to enjoin misleading advertising and unfair competition under Cal. Bus. & Prof. Code §§ 17200 and 17500 are inarbitrable but that claims for restitution and disgorgement of profits, being similar to actions for money damages, may be arbitrated pursuant to contract term). Two justices dissented. *Id.* at 1168 (arguing that *Broughton* and *Cruz* were inconsistent with U.S. Supreme Court holdings, including *Southland*, which began as this type of public interest statutory enforcement action). Plaintiff Cruz also argued that the arbitration clause was unconscionable, an argument the court declined to address in view of its holding abrogating the provision on the basis of statutory interpretation and public policy. *Id.* at 1168.

trend to increased policing of arbitration terms is sufficiently robust that according to the authors of one study:

Critics of mandatory arbitration will also be unsettled . . . [by many of the actual case outcomes]. Relying on textual passages from leading Supreme Court cases, they worry that federal courts are in lock-step agreement with the pro-arbitration Justices who authored these decisions. Some believe that a legislative remedy is needed to undo damage from the Supreme Court. The reality is, however, that lower courts sidestep these precedents more often than is realized. . . . [T]he judiciary is currently developing a set of due process guidelines consistent with common law traditions dating to the early nineteenth century. . . . [C]ourts behave more consistently over extended periods than either arbitration advocates or critics realize.<sup>164</sup>

*C. Continued Judicial Wariness Regarding Broad-Based Policing of Arbitration Agreements Through Unconscionability Analysis*

The recent “unconscionability evolution” concerning arbitration has been something less than total and something less than coherent and fully developed. First, as noted above, the revolution, or perhaps evolution, is hardly complete. Lower courts remain divided as to what constitutes unconscionability and under what circumstances the presence of unconscionability invalidates an arbitration term. Nonetheless, there seems to be a clear emergence of increased judicial use of unconscionability analysis for arbitrability disputes. Although these cases are clearly doing so in part on the basis of what might be termed the “unconscionability norm,” they often stop short of a full-fledged embrace of unconscionability as a general tool for regulating contracts and usually do not attempt to articulate a general theory of unconscionability.

Instead, these courts have focused on particular provisions in contracts that are viewed as unduly problematic or unfair. Where such a provision is found, as outlined in the rough typology of the preceding subsection, the court labels this a fatal flaw and strikes down the arbitration provision (or, more specifically, refuses to give it judicial enforcement). As a consequence of this resurgence in policing arbitration agreements, drafters of arbitration clauses and those who must (or are willing to) adhere to them have an informal check to consult for attempting to predict the efficacy of such arbitration arrangements. The case law policing arbitration agreements under an unconscionability norm has established a number of specific traits that may brand an arbitration clause as unconscionable:

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<sup>164</sup> See LeRoy & Feuille, *supra* note 13, at 256.



- *Lack of mutuality regarding remedial options.*<sup>165</sup>
- *Lack of mutuality of obligation.*<sup>166</sup>
- *Limitations on damages or other elements of remedy.*<sup>167</sup>

<sup>165</sup> See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689–99 (Cal. 2000) (holding that it is unconscionable to permit an employer to select either litigation or arbitration in the event of a dispute while an employee’s only option was arbitration); *Pindeo v. Premium Tobacco Stores, Inc.*, 102 Cal. Rptr. 2d 435, 439–40 (Cal. Ct. App. 2000); *Samek v. Liberty Mut. Fire Ins. Co.*, 793 N.E. 2d 62, 64–66 (Ill. Ct. App. 2003) (determining that a one-way arbitration clause permitting an insurer to seek trial de novo, given an award in excess of \$20,000, violates public policy and effectively becomes substantively unconscionable); *Iwen v. U.S. West Direct, Inc.*, 977 P.2d 989, 996 (Mont. 1999); *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 859–62 (W. Va. 1998); see also *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894–96 (9th Cir. 2002) (applying California law and following *Armendariz* and also holding that an arbitration clause was unconscionable because it limited the remedies available to the employee); *Drahozal*, *supra* note 156, at 551, n.104 (citing seven unpublished California Court of Appeals opinions following *Armendariz*). But see *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 183–84 (3d Cir. 1999) (finding an arbitration clause not unconscionable for giving a drafting lender unilateral control of whether a dispute is arbitrated or litigated). For a recent summary of California law regarding arbitration and unconscionability, see *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1173, 1180 (9th Cir. 2003) (rejecting an arbitration term similar to the clause at issue in *Circuit City* on the grounds of unconscionability).

<sup>166</sup> See, e.g., *E-Z Cash Advance, Inc. v. Harris*, 60 S.W.3d 436, 442 (Ark. 2001); *Showmethemoney Check Cashers, Inc. v. Williams*, 27 S.W.3d 361, 365–67 (Ark. 2000); *Labor Ready Cent. III, L.P. v. Gonzalez*, 64 S.W.3d 519, 524 (Tex. App. 2001). Although cases such as *Armendariz* appear to be on the rise, “[p]rior to 1990, a number of courts (although certainly not all) refused to enforce nonmutual arbitration clauses, relying on the doctrine of mutuality of obligation—that both parties to an agreement must be bound or neither is bound.” *Drahozal*, *supra* note 156, at 542–43 (footnotes omitted) (citing cases). See, e.g., *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985). See also *MACNEIL, ET AL.*, *supra* note 31, § 17.4.2 (viewing *Hull v. Norcom* as wrongly decided because it rested on the New York law view that arbitration clauses need their own consideration and are not supported by a contract’s overall consideration, a result inconsistent with the *Southland* admonition that the FAA preempts inconsistent state law); *Jarmillo v. JH Real Estate Partners, Inc.*, 3 Cal. Rptr. 3d 525, 534–35 (Cal. Ct. App. 2003) (suggesting substantive unconscionability due to de facto nonmutuality of obligation and noting that a requirement in a lease of arbitrating all personal injury claims would, as practical matter, only affect tenants, who are far more likely to be hurt on premises than landlord). The case could be characterized as one turning on nonmutuality of remedy and classified with *Armendariz*.

<sup>167</sup> See, e.g., *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 (5th Cir. 2002) (stating that a restriction on punitive damages in a RICO action is unenforceable); *Larry’s United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001) (holding that a punitive damages exclusion is unenforceable); *Paladino v. Avnet*

- *Imposition of excessive fees or fee-shifting.*<sup>168</sup>
- *Selection of a seriously inconvenient forum.*<sup>169</sup>
- *Unduly tight deadlines for filing claims.*<sup>170</sup>

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Computer Technologies, Inc., 134 F.3d 1054, 1060, 1062 (11th Cir. 1998) (examining a limitation on remedies); *Graham Oil Co. v. Arco Products Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994) (reviewing a restriction on exemplary damages and recovery of fees otherwise available to prevailing plaintiff in statutory cause of action); *Mandel v. Household Bank (Nev.) Nat'l Ass'n*, 129 Cal. Rptr. 2d 380, 385–86 (Cal. 2003), *rev. granted*, 65 P.3d 1284, 1284 (Cal. 2003) (finding an arbitration clause prohibiting class actions is substantively unconscionable); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 150–52 (Cal. Ct. App. 1997) (finding an arbitration clause unconscionable for limiting a worker to only “actual damages for breach of contract” in event of wrongful discharge); *Kyocera Corp. v. Prudential-Bache T Servs., Inc.*, 341 F.3d 987, 1003 (9th Cir. 2003) (deciding that parties are not free to contract for a customized standard of judicial review of an arbitration award and that default rules set forth in the FAA are binding on federal courts and may not be altered by private parties). *But see* *Farrell v. Convergent Communications, Inc.*, No. C98-2613 MJJ, 1998 U.S. Dist. LEXIS 17314, at \*14 (N.D. Cal. Oct. 29, 1998) (holding that “limitations on the amount of damages alone does not render an agreement to arbitrate *per se* unconscionable, as parties are generally free to contract as they see fit”).

<sup>168</sup> *See, e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (holding that an arbitration clause’s imposition of the English Rule, which required the loser to pay the opponent’s counsel fees, is substantively unconscionable); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 559 (4th Cir. 2001) (holding that the high expense of arbitration imposed on the adhering party made the clause unenforceable); *Shankle v. B-G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234–35 (10th Cir. 1999) (holding that the shifting of arbitration fees and costs to the losing party made the agreement unenforceable); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998) (refusing to enforce an International Chamber of Commerce arbitration provision due to the high financial burden it would impose on the nondrafting party). *But see* *Doctor’s Assocs., Inc. v. Stuart*, 85 F.3d 975, 980–81 (2d Cir. 1996) (holding that an arbitration term in a franchise agreement was not unconscionable on the basis of costs likely to be incurred in arbitration); *see also* *LeRoy & Feuille*, *supra* note 13, at 316–18 (describing the division of the courts on this point).

<sup>169</sup> *See, e.g.*, *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566–68 (Cal. Ct. App. 1993) (holding that the requirement that California consumers arbitrate in Minnesota made the arbitration clause unconscionable); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 866 (Ohio 1998) (refusing to enforce an arbitration agreement in connection with a consumer loan due to its inconvenient forum and other unconscionable provisions). *But see* *Doctor’s Assocs.*, 85 F.3d at 980 (rejecting the argument that requiring arbitration outside of the state where the franchise is located made the arbitration clause unconscionable).

<sup>170</sup> *See, e.g.*, *Alexander*, 341 F.3d at 266–67 (holding that the imposition of a 30-day time limit for bringing an arbitration claim made the clause substantively unconscionable); *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 726–27 (9th Cir. 2000)

- *Pressure tactics to induce obtain signatures.*<sup>171</sup>
- *Insufficient neutrality in the arbitration mechanism.*<sup>172</sup>
- *Fraudulent aspects of the arbitration term or its implementation.*<sup>173</sup>
- *Inadequate assent to the arbitration term.*<sup>174</sup>

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(holding that a 60-day deadline for challenging a health plan coverage determination through arbitration was too short).

<sup>171</sup> See, e.g., *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 383–84 (S.D.N.Y. 2002) (discussing an employer that gave workers a maximum of 15 minutes to review and sign a 16-page document); *Sun Trust Bank v. Sun Int'l Hotels, Ltd.*, 184 F. Supp. 2d 1246, 1256, 1261–62 (S.D. Fla. 2001) (holding that an arbitration agreement presented to a guest at a Bahamas resort upon arrival from the continental United States was unenforceable because it offered the guest no realistic opportunity to reject the clause; the only alternative to adhering to terms was abrupt and inconvenient change of travel and lodging plans); *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 940 (S.D. Tex. 2001) (holding that arbitration agreements were procedurally unconscionable because Spanish-speaking workers were forced to sign contracts with arbitration terms that were written in English).

<sup>172</sup> See, e.g., *McMullen v. Meijer, Inc.*, 337 F.3d 697, 704–06 (6th Cir. 2003) (holding that an arbitration clause that gave employers excessive control over the process and selection of arbitrators was unconscionable); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999) (holding that an arbitration term was unconscionable because it provided an unfair advantage to the employer in selecting arbitrators); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 944–49 (N.D. Ind. 2000) (voiding an arbitration term that resulted in a three-person panel with two arbitrators having ties to the provider organization and the employer); *Burch v. Second Judicial Dist. Court of State ex rel.*, 49 P.3d 647, 650–51 (Nev. 2002) (holding that an arbitration term in a home sale agreement that gave the builder's warranty insurer an "unilateral and exclusive right to decide the rules that govern the arbitration and to select the arbitrators" was "oppressive" and substantively unconscionable); see also *Floss v. Ryan's Family Steakhouses, Inc.*, 211 F.3d 306, 315 (6th Cir. 2000) (acknowledging concerns over competence and possible bias of arbitral arrangement but refusing to enforce agreement on other grounds).

<sup>173</sup> See, e.g., *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 916–22 (1997) (finding an arbitration term misleading as to speed and other aspects).

<sup>174</sup> See, e.g., *Alexander*, 341 F.3d at 266 (holding that an arbitration term imposed in an employment contract as a condition of employment when new employees arrived for an orientation meeting constituted procedural unconscionability); *Jaramillo v. JH Real Estate Partners, Inc.*, 3 Cal. Rptr. 3d 525, 534 (Cal. Ct. App. 2003) (holding that a clause in a lease that required arbitration of personal injury claims was unenforceable because the tenant had no realistic opportunity to consider and decline the provision); *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 290–91 (Cal. Ct. App. 1998) (holding that the placement of a preprinted insert into a credit card bill was insufficient to appraise the cardholder of an arbitration provision and its implications); *DirectTV, Inc. v. Mattingly*, 829 A.2d 626, 633–39 (Md. 2003) (holding that an arbitration provision that was

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- *Retaliating against workers who refuse to sign arbitration clauses.*<sup>175</sup>
- *Any combination of these deficiencies.*<sup>176</sup>

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embedded in a customer agreement, which was sent with the billings, provided inadequate notice and was unenforceable); *Burch v. District Court*, 49 P.3d 642, at 650 (Nov. 2002) (holding that an arbitration term buried in a lengthy and complex home warranty agreement gave insufficient notice and was procedurally unconscionable). *But see* *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148, 1151 (7th Cir. 1997) (holding that the placement of a preprinted insert with an arbitration clause inside the computer packaging created an enforceable arbitration agreement when the customer opened the box and removed the product for use).

<sup>175</sup> *See, e.g., Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1310–11 (11th Cir. 2002) (reversing the District Court on this point).

<sup>176</sup> *See, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172–73 (9th Cir. 2003):

Several substantive terms of Circuit City's arbitration agreement are one-sided. The provisions concerning coverage of claims, the statute of limitations, the prohibition of class actions, the filing fee, cost-splitting, remedies, and Circuit City's unilateral power to modify or terminate the arbitration agreement all operate to benefit the employer inordinately at the employee's expense. Because these one-sided provisions grossly favor Circuit City, we conclude that, under California law, these terms are substantively unconscionable . . . .

*Id.*

The *Ingle* Court also found the agreement procedurally unconscionable in that the worker had no meaningful choice as to the term and further found that the unconscionable aspects of the provision so infused the arbitration clause that they could not be severed. *See id.* at 1172, 1179–80.

In addition, courts may refuse to enforce arbitration agreements on the basis of other statutory directives deemed to override the FAA. *See, e.g., Allen v. Pacheco*, 71 P.3d 375, 384 (Colo. 2003) (holding that the regulation of arbitration provisions in health insurance plans overrode the FAA pursuant to the McCarran-Ferguson Act, which makes the business of insurance subject to state regulation). This sort of restriction on arbitration, however, is not grounded on the unconscionability norm.

Cases that restrict enforcement of an arbitration term against one who did not sign the contract in question are closer to the unconscionability norm, but are more properly classed as based on agency principles. *See, e.g., Allen*, 71 P.3d at 378–81 (Colo. 2003) (holding that a wife was not bound by the deceased husband's signature to a HMO health services contract containing an arbitration term); *Shea v. Global Travel Mktg, Inc.*, No. 4002-910, 2003 Fla. App. LEXIS 5755, at \*13 (Fla. Dist. Ct. App. Apr. 23, 2003) (holding that an arbitration clause that was signed by a mother was not binding on the father who sued for the wrongful death of an 11-year-old child killed by hyenas while on an African safari with the child's mother); *see also* *Korobkin*, *supra* note 25, at 1255–78 (providing similar categorization of the types of unconscionable conduct or provisions of arbitration terms).

### D. Evaluating the "New Unconscionability" of Arbitration Agreements

The advent of renewed unconscionability-based scrutiny of arbitration clauses is on the whole a positive trend. It interjects considerations of fairness and contracting context that have been largely absent in the Supreme Court's arbitration jurisprudence<sup>177</sup> and thus serves the equilibrating function posited for lower courts in this Article. In the absence of sufficient judicial use of the unconscionability norm, arbitration case law may be more indeterminate and inconsistent than when unconscionability analysis is performed by courts policing contracts. As one commentator summarized after reviewing decisions seeming to alternate between enforcement and nonenforcement of arbitration decisions:

How and why are the courts arriving at such drastically different conclusions? While slight differences in facts may explain some discrepancies, a bigger factor seems to be judicial attitude. Some of these courts are untroubled by the claims that the arbitration clauses were surprise packages in contracts of adhesion, while some courts were very troubled indeed. The differences appear on the surface to be inconsistent applications of state and federal law. Perhaps courts simply fail to understand the difficult doctrines of unconscionability, contracts of adhesion, and the reach of the commerce clause.

There is a different way to explain the messiness of the case law. Courts with reservations about arbitration of personal injury claims are not allowed a direct attack. Precluded by the FAA from basing decisions on concerns about consumer arbitration generally, those courts use the tools available. They rule on issues that are supposed to be heard by the arbitrator. They ignore the FAA, or hold the contracts to be intrastate and apply more protective state law. They construe the clauses narrowly. They use state law contract defenses broadly to find clauses to be unconscionable, or grasp at the plaintiff's illiteracy to find lack of consent. Failing that, they protect spouses and children who have not actually signed the contract containing the arbitration clause. In doing so, they often render opinions that are technically incorrect. Small wonder that this area is full of

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<sup>177</sup> See Elizabeth G. Thornburg, *Contracting With Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, LAW & CONTEMP. PROBS. (forthcoming 2003):

The Supreme Court's arbitration jurisprudence, with its emphasis on formal agreement to contract terms, underplays the fairness of contract law. When the parties to a contract have disparate bargaining power, disparate knowledge, and disparate interest, both the moral and economic bases of contracting demand more than the mere outward trappings of contract.

inconsistent cases. The law applied in these cases often serves as a proxy for the courts' more basic concerns.<sup>178</sup>

On the whole, I agree with Professor Thornburg's comment. Many of the arbitrability decisions of the post-*Southland* era, particularly where a court is refusing enforcement and failing to follow the Supreme Court's formalist template, give the impression the courts are attempting to shoehorn the situation into a category that will prevent enforcement. However, I would disagree with Professor Thornburg to the extent that she sees the unconscionability norm as part of the problem. I see it as part of the solution, provided the unconscionability norm is applied candidly, straightforwardly, and with relative consistency as well as some caution and reluctance to render decisions adverse to contract text or any demonstrable efficiencies delivered by the arbitration system of which the challenged clause is a part. Unconscionability can be more effectively deployed, however, if deployed generally, with the court freed from the need to find a particular type of offense in order to trigger the unconscionability analysis. Put another way, the unconscionability norm should not reflect the type of indirection or obfuscation found in other, covertly anti-arbitration precedents.

The new, situation-specific unconscionability of arbitration thus seems a mixed blessing. On the positive side, as noted above, it at least gets courts back into the business of policing arbitration clauses, something the Supreme Court has largely been unwilling to do except in rare instances. If anything, the Court has been more interested in policing any effort to restrict the reach of an arbitration clause. Certainly, the Court has not been interested in providing a clear template for the use of lower courts in policing arbitration agreements.<sup>179</sup> In addition, the mild invocation of unconscionability seen

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<sup>178</sup> See Thornburg, *supra* note 177 (footnotes omitted).

<sup>179</sup> Of course, the Justices might respond to such a criticism by asserting that it is not their job to provide a road map of contractual unconscionability and that this is a task for the tribunals applying respective state contract law. At this juncture, it appears that the contract law of arbitration agreements (as opposed to the specific performance questions addressed in the text of the FAA) is governed by general state contract law, which will not be disturbed unless the state law specifically targets arbitration terms for disparate treatment. However, if the Supreme Court continues to adhere to the *Southland* view that the FAA creates substantive federal law of arbitrability, it would not be inconsistent to treat all general contract issues surrounding an arbitration agreement as a matter of federal common law in order achieve consistency in arbitrability decisions irrespective of different general state contract law. Although since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938) it is accepted that there is no “general federal common law,” federal common law is applied in order to vindicate important federal interests. See e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (describing the rationale for, and instances of, federal common law). This doctrine has been used to justify use of federal common law

thus far poses little risk of “runaway judicial activism” or similar judicial meddling that might interfere with markets. Because the cases to date restricting arbitration tend to fall relatively neatly into the categories set forth above in Part III.C., this emerging body of unconscionable arbitration provisions gives drafters of arbitration clauses quite a bit of specific guidance. If a business wishes to draft an arbitration clause that will be enforced, the case law to date provides a rather readable road map. By contrast, a body of more open-ended unconscionability law could be so indefinite that commercial actors (and consumer advocates, for that matter) would have essentially no guidance in determining what to draft, what to insist upon, and what to dispute. But, there is a negative side to the emerging specificity of unconscionability. It may tend to pigeonhole unconscionability into particular categories in derogation of the bigger picture and an appropriate resolution of each given case before the Court.

As a result, courts policing arbitration agreements according to the delineated criteria set forth in the “new unconscionability” cases to date may be hunting for proverbial trees while missing the metaphorical forest (perhaps becoming bogged down with clichés as well). For example, a court may review an arbitration agreement and find none of the things (lack of mutuality; high fees; inconvenient venue; non-neutral decision maker, etc.) listed above that have barred arbitrability in the past. However, a court that then so abruptly ends its “shift” as a contract policeman may permit some extremely unfair or oppressive arbitration provisions to control the dispute. Although it may be unfashionable to urge greater investment of judicial resources in case-specific contract policing according to a general unconscionability norm rather than a short list of unconscionability indicators, this may be necessary to effectively regulate the imposition of arbitration clauses in form contracts. In addition, application of the unconscionability norm through a “paint by numbers” method that consults a checklist of disfavored practices may be under-inclusive or over-inclusive. To state the more intuitive problem first: If judicial contract policing is based too rigidly on scrutiny of a few disfavored practices, courts may simply miss a substantial number of unconscionable contract provisions because the unfair term is not on the court’s “watch list” of disfavored practices. The problem really is not all that different than that faced by law enforcement and security agencies when attempting to apprehend criminals or terrorists (or at least prevent their presence in certain locations such as airplanes or the White House). If the security agent examines only prospective entrants in

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of contract. *See* *Young v. Washington Gas Light Co.*, 206 F.3d 1200, 1204 (D.C. Cir. 2000); *STEMPEL*, *supra* note 18, § 20.03 (noting that insurance coverage disputes involving benefit plans subject to ERISA are governed by federal common law).

juxtaposition with the watch list, the agent is likely to prevent anyone on the list from getting through (at least getting through unscathed). But if this is all the security agent seeks, he could be completely oblivious to very suspicious characters who simply have the good fortune not to be on the list. In similar fashion, courts that limit their contract policing activity to a few traits of arbitration arrangements such as mutuality of remedy or physical inconvenience of the arbitral location, may be missing both the much bigger picture and much more unfair aspects of an arbitration clause.

The over-inclusiveness problem is perhaps counter-intuitive but nonetheless a real danger as well. Under what appears to be the emerging norm of arbitration clause scrutiny, if an arbitration term violates a value on the court's metaphorical checklist the arbitration clause is deemed unenforceable—period—without much further consideration of whether the arbitration clause as a whole or in context represents a basically fair (and therefore not unconscionable) means of dispute resolution. For example, a “good” or “decent” arbitration clause might very well provide some advantages to the drafter while providing a different set of advantages to the adhering party. The drafter may very much want (and therefore insist upon) an asymmetric set of disputing options and may even be willing to give the signer a dramatic reduction in price or other incentives for agreeing to the asymmetry. The signer may be perfectly content, for example, with this “ban” on punitive damages if in return it is permitted broad discovery or greater latitude in selecting the arbitrator. Such an arrangement would appear not to violate the common law concept of unconscionability—but it might well be struck down by one of the “new” unconscionability precedents such as *Armendariz*.<sup>180</sup>

Furthermore, as compared to a generalized unconscionability norm, identifying specific types of arbitration clause infirmities that invalidate the clause has a false air of objectivity and precision about it. But to have an air of objectivity is not the same as to actually be objective and predictable. When the unconscionability norm is expressed not as a concept but as a list of disfavored traits, it is true that affected parties no longer need to speculate very much about what traits in an arbitration term may invalidate the provision. Instead, they must ask questions that are equivalently indeterminate despite their veneer of certainty and specificity: “What is sufficient mutuality? Of obligation? Of remedy? Must there be complete symmetry or equality of options for the parties? What is a sufficiently

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<sup>180</sup> See Drahozal, *supra* note 156, at 541, 555–65 (making a similar but more sophisticated argument suggesting that rational businesses, subject to *Armendariz*, may well tend to react by offering mutual, but less fair, arbitration provisions in consumer contracts).



inconvenient forum or venue to vitiate an arbitration agreement? Just how much access to information must be provided through the arbitration to keep it from being deemed defective and quasi-unconscionable?" When it comes time to actually decide cases and determine whether to enforce an arbitration clause, the specific components of unconscionability, or what might be termed "proxies" for, or indicators of, unconscionability may not be any more definite or measurable than the unconscionability norm itself or the notions of fairness on which it is based.

Although the newer genre of "unconscionability-lite" decisions has restored some equilibrium to arbitration law, lower courts might be able to accomplish more arbitral justice by utilizing the more general and less trait-specific notion of unconscionability that long predates the Supreme Court's modern and post-*Southland* eras of arbitration law. Why have these courts, which so clearly seem to be seeking and achieving a recalibrating equilibrium, shirked from fully embracing the unconscionability norm? The answer lies mingled in political and intellectual trends of the last third of the twentieth century.

#### IV. EXPLAINING THE HISTORICAL AND CONTINUING HESITANCE ABOUT UNCONSCIONABILITY

Reviewing the history of arbitrability and unconscionability in the courts, one cannot help but ask how it came that courts appear willing to police arbitration clauses only through a truncated unconscionability approach rather than a wide-ranging unconscionability-based review. The cases discussed in Part III.B that refuse enforcement of problematic arbitration provisions certainly draw upon concepts of unconscionability. These courts however, have neither enunciated a broad-based notion of unconscionability nor posited that courts are vested with such wide-ranging powers to police problematic contract terms. In other words, courts remain relatively slow to apply the unconscionability norm to arbitration clauses and restrained in their use of the concept. My question is: "Why?"

This is a different question than asking why the courts seem to have rediscovered the applicability of the unconscionability norm during the 1990s. The answer is simply that lower courts were forced into it by Supreme Court decisions that foreclosed other alternatives. In the early aftermath of *Southland* and the new reign of the substantive, pre-emptive FAA, lower courts and state legislatures—at least the lower courts and legislatures that were less uncritically enamored of arbitration than the Supreme Court—tried to police arbitration by other means. For essentially the first decade of the Court's modern arbitration law however, the Court rebuffed these efforts, finally setting forth a pattern of precedent that showed these lower courts that

unconscionability would be one of the few available means of regulating arguably oppressive arbitration clauses. By the 1990s, the Court's "lesson" had been "learned" by the lower courts. If they were to supervise arbitration clauses in any significant manner, it would be through the use of unconscionability concepts.

Answering this question—why did courts come to this new brand of unconscionability analysis—illustrates to some degree the type of equilibrating tendencies I posit. In a system (judicial, legal, social) populated by people of different opinions, there will be a tendency for some actors in the system to counter the initiatives of other actors in the system if those actions appear excessive or extreme. The new trend in arbitral unconscionability reflects this counterbalancing tendency of the legal system as applied to arbitration and also reflects a counterbalance to much of the late twentieth century conventional wisdom that unconscionability was not a helpful judicial tool.

The later recalibration has been something less than a total revolution in favor of unconscionability analysis. This part of the Article asks why, as a jurisprudential matter, has there not been a swifter, stronger embrace of unconscionability doctrine. As noted in the introduction to this Article, my contention is that the current situation-specific "unconscionability lite" (rather than judicial embrace of a robust general doctrine of unconscionability) results from an unfortunate combination of intellectual and political trends.

Five intellectual and social developments worked to place the unconscionability norm out of judicial favor. First is the academic assault on unconscionability led by Professor Arthur Leff. Second is the reascendancy of a textualist, formalist version of classical contract interpretation. Third is the rise of the law and economics movement. Fourth is the upsurge in political and social opposition to any perceived increase in judicial power and discretion. Fifth is a general turn against legal regulation and perceived excessive litigation in favor of a more laissez-faire approach to commercial activity. These developments combined to diminish the standing of the unconscionability norm in the courts as well as provide additional energy to the embrace of ADR that helped fuel modern pro-arbitration jurisprudence. Although there were countervailing intellectual trends, these were either substantially less powerful or too late in their development to impact the key Supreme Court shift toward arbitration in the 1983–89 time period.

### *A. The Academic Assault on Unconscionability*

Professor Arthur Leff launched a frontal assault on the unconscionability norm in his oft-cited, well-known, and influential law review article. In *The*

*Emperor's New Clause*,<sup>181</sup> Leff argued that UCC section 2-302 was open-ended, amorphous, and unwisely permitted courts to interfere with contract terms without benefit of sufficient formal structure.<sup>182</sup> Although Leff did not quite parody Justice Potter Stewart's famous bon mot (or faux paus) regarding pornography,<sup>183</sup> Leff was essentially arguing that the unconscionability norm, at least as contained in the UCC's undefined unconscionability term, was something of an "I know it when I see it" standard that was too indeterminate to be consistently and fairly used either for resolving litigation or permitting judicial interference with the markets.

Leff's article, published in 1967, triggered something of an academic cottage industry debating unconscionability. Some scholars took considerable umbrage with Leff's criticism and defended both section 2-302 and the unconscionability norm.<sup>184</sup> Others were more sympathetic to Leff's view.<sup>185</sup> But, without doubt, unconscionability received renewed scholarly attention. Over time, it appears that the Leff critique gained sway, although the intellectual victory was not complete. I reach this conclusion even though much of the most noted scholarly commentary of the era defended the unconscionability norm and sought to rebut the Leff criticism.<sup>186</sup>

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<sup>181</sup> See generally Leff, *supra* note 21.

<sup>182</sup> See *id.* at 485.

<sup>183</sup> Justice Stewart attracted some criticism when he observed that it was difficult to articulate a definition of pornography but that the case before the Court could be adjudicated because "I know it when I see it." See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>184</sup> See, e.g., Ellinghaus, *supra* note 22, at 12; Murray, *supra* note 22, at 50.

<sup>185</sup> See, e.g., Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294-95 (1975) (addressing the unconscionability concept in terms arguably harsher than Leff's); Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461, 485-90 (1974) (adopting the view that judicial intervention in contract disputes via the unconscionability norm is misguided but suggesting legislative or administrative intervention through statutes or rule-making); Arnold L. Rotkin, *Standard Forms: Legal Documents in Search of an Appropriate Body of Law*, 1977 ARIZ. ST. L.J. 599, 613-15 (1977). It is perhaps reflective of Leff's long-term influence that the more recent articles on the topic appreciate or embrace his view of unconscionability, perhaps more than did articles immediately following *The Emperor's New Clause*—a time when much scholarship in the field was intended as a rejoinder to Leff or partial defense of the unconscionability norm. See, e.g., Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 16-17 (1998) (referring to unconscionability as "[p]erhaps the most notorious paternalistic device" and citing Leff to explain unconscionability).

<sup>186</sup> See, e.g., Ellinghaus, *supra* note 22, at 12; Murray, *supra* note 22, at 50; see also Robert Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337, 338 (1970) (expressing modest support for the unconscionability norm while praising Leff's analytical framework); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*,

Prior to the publication of Leff's article, the unconscionability norm and the judiciary's power to invoke this principle were relatively unquestioned. The roots of the unconscionability norm arguably extended for at least decades, if not centuries.<sup>187</sup> The doctrine itself, enunciated as a requirement that contract provisions not be excessively unfair, was supported by English case law at least as far back as the eighteenth century<sup>188</sup> and American law from at least the nineteenth century forward.<sup>189</sup> The UCC was the product of a "brain trust" of drafters from the American legal establishment.<sup>190</sup> The principal drafter of Article 2 was Columbia Professor Karl Llewellyn, an icon of the law (albeit perhaps a controversial one).<sup>191</sup> The United States

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117 U. PA. L. REV. 931, 968–69 (1969); Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359, 374–75 (1970) (supporting unconscionability and removing the element of assent). In addition to having support from others, *see supra* note 185, Leff was also perhaps his own best defender. *See, e.g.*, Arthur Allen Leff, *Contract As Thing*, 19 AM. U. L. REV. 131, 155–56 (1970) (suggesting that form contracts have attributes of products as much as they are written expressions of bargains and should therefore be regulated in the manner that governments regulate goods or services, giving deference to permit markets to regulate with minimal government involvement); Leff, *supra* note 22, at 352–54 (recognizing the need to police unfairness in consumer contracts but advocating that this be done through specific laws rather than ad hoc judicial supervision).

<sup>187</sup> *See* EPSTEIN ET AL., *supra* note 132, at 330.

<sup>188</sup> *See, e.g.*, *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (1750) (refusing to enforce a penalty provision on the basis of what we now call substantive unconscionability); *Emanuel College v. Evans*, 21 Eng. Rep. 494, 495 (1625) (refusing enforcement of a mortgage agreement on the grounds of what we now label procedural unconscionability).

<sup>189</sup> *See, e.g.*, *Scott v. United States*, 79 U.S. (12 Wall.) 443, 445 (1870); *Woolums v. Horseley*, 0 S.W. 781, 781 (Ken 1892). At least one commentator sees *Scott* as a break from a prior regime of strict enforcement of contract terms on the basis of the popularity of a laissez-faire approach to contract law. *See* Eben Colby, Note, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625, 628–29 (2002) (finding also that "the doctrine of unconscionability appeared to have little effect on the day-to-day operations of the Walker-Thomas Furniture Company"). "Soon after its adoption, it was eclipsed by more specific consumer legislation that garnered more attention from businesses selling to the poor." *Id.* at 660. The author also suggests that there is relatively little help for poor customers through the unconscionability norm because comparatively few of them avail themselves of legal remedies in disputes with merchants. *Id.*

<sup>190</sup> *See* WHITE & SUMMERS, *supra* note 132, § 1, at 3; Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940–1949*, 51 SMU L. REV. 275, 276–77 (1998).

<sup>191</sup> *See* KUKLIN & STEMPEL, *supra* note 81, at 154–56 (1994) (noting Llewellyn's key role in the Legal Realism movement and legal academia generally); WHITE & SUMMERS, *supra* note 132, § 1, at 4 (noting Llewellyn's key role in the UCC); Mitchell

Court of Appeals for the District of Columbia Circuit had embraced the unconscionability norm in *Williams v. Walker-Thomas Furniture Co.*,<sup>192</sup> a decision authored by Judge J. Skelly Wright, another icon of American law.<sup>193</sup> In short, as 1967 began, unconscionability was on something of a roll, if that can ever be said about something as non-kinetic as legal concepts.

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Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 330 (1951) (referring to the UCC as “lex Llewellyn”); Leff, *supra* note 21, at 488 n.11 (“From time to time [in the article] I shall use the singular form ‘draftsman’ to refer to the late Karl Llewellyn who, at least at the earliest drafting stages, did the major share of the actual drafting, especially of the Sales article.”); Eugene F. Mooney, *Old Kontract Principles and Karl’s New Code: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 223 (1966) (describing Llewellyn’s influence on the drafting of the UCC). *But see* Leff, *supra* note 21, at 488 n.11:

It became an article of faith for the defenders of the Code to assert that no single man or group had a monopoly of the drafting of the Code, especially (during the height of the adoption push) not law professors. There are a goodly number of articles on who really drafted the Code, taking somewhat divergent views.

*Id.*; Karl Llewellyn, *Why A Commercial Code?*, 22 TENN. L. REV. 779, 784 (1953) (lamenting that “there [were] so many beautiful ideas I tried to get in . . . but I was voted down”).

<sup>192</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965). Judge Wright was joined in the panel’s majority opinion by Chief Justice David Bazelon, another noted jurist but also one, like Wright, who became a target of criticism over his perceived liberalism or judicial activism. *See* WOODWARD & ARMSTRONG, *supra* note 23, at 14, 23–25 (noting Bazelon’s role as a “feeder” judge of law clerks to Supreme Court Justice William Brennan and legal staff to Sen. Edward M. Kennedy (D-Massachusetts), and the resentment of future Supreme Court Chief Justice Warren Burger toward this liberal trio). As discussed below, the late twentieth century unfashionability of both unconscionability and liberal jurists is related to some degree. Justice Burger, author of *Southland*, was also a strong proponent of arbitration. But on that issue, Burger and Brennan were close in position. Justice Brennan authored *Moses H. Cone*, which announced the Supreme Court’s new “national policy” favoring arbitration and is viewed by some as the more pivotal case ushering in the modern era of arbitration law. These two threads of legal and social attitude reflect the alignment of factors favoring a move toward a more aggressive body of law concerning arbitrability.

<sup>193</sup> *See* JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT’S BROWN DECISION INTO A REVOLUTION FOR EQUALITY 112–35 (1981) (noting Wright’s role in important desegregation decisions while serving as a federal district judge in Louisiana prior to his appointment to the D.C. Circuit); EPSTEIN ET AL., *supra* note 132, at 336–37 (quoting Justice Brennan’s comments describing Wright as “one of the outstanding jurists of the nation’s history”); William J. Brennan, Jr., *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 361 (1988); *see also* Dean v. Thomas, 93 F. Supp. 129, 130 (E.D. La. 1950) (demonstrating that Wright, serving as district judge, enjoined the registrar of the Louisiana university system to cease racial discrimination in elector registration).

Then came Leff's article. A portion of *The Emperor's New Clause* was devoted to a frontal attack on the *Walker-Thomas* decision, including use of what became something of a Leff trademark—the theatrical pseudo-conversation or narrative parable.<sup>194</sup> Like most of Leff's writing, it was interesting and amusing and carried considerable bite. Although I have never found his attack on *Walker-Thomas* particularly persuasive (despite being a self-confessed fan of Leff's who benefited as a student in three of his courses), the criticism no doubt had significant impact. If nothing else, it provided strong academic support to attorneys defending contract drafters who wished to discourage courts from overturning or modifying the drafter-favorable terms they had fought so hard to achieve.

Just as important was the impact of *The Emperor's New Clause* on the momentum previously garnered by the unconscionability norm. Before Leff's article, vesting courts with a license to apply unconscionability seemed unquestioned. After Leff's article however, the concept of unconscionability itself, the standards (or purported lack of standards) governing its use, as well as the role of the courts in utilizing the doctrine became more controversial.<sup>195</sup>

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<sup>194</sup> See Leff, *supra* note 21, at 544–45 (featuring the hypothetically ironic and humorous pseudo-testimony of merchant “Max Greed” and defense counsel resisting payment on Greed's contract and a similar spoof of hypothetical testimony in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960)). Leff frequently used the pseudo-conversation or ironic essay format to enliven his articles and drive home a point, sometimes pointedly and on the edge of ridicule. See, e.g., Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 451–52 (1974) [hereinafter Leff, *Realism About Nominalism*] (comparing the first edition of Richard Posner's *Economic Analysis of Law* to Cervantes's *Don Quixote* because of the manner in which “Economic Analysis” is presented by Posner as a protagonist seeking to explain law and rid it of inefficiency); Arthur Allen Leff, *Law And*, 87 YALE L.J. 989, 989–90 (1978) [hereinafter Leff, *Law And*] (creating mythical “Maize Jondo” and “Fish Jondo” tribes to provide illustrative foil for his assessment of Law and Economics and other interdisciplinary legal movements); Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1229 [hereinafter Leff, *Unspeakable Ethics*] (placing the narrator in the position of making a plaintive cry to the heavens in response to a revealed conundrum).

<sup>195</sup> See WHITE & SUMMERS, *supra* note 132, § 4-3, at 155; Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2207 (1991) (“The influence of academic writings is, of course, difficult to assess exactly, apart from obvious examples such as Arthur Leff's largely successful effort to limit the sweep of unconscionability in UCC section 2-302.”); Robert A. Hillman, “Instinct with an Obligation” and the “Normative Ambiguity of Rhetorical Power,” 56 OHIO ST. L.J. 775, 804 n.164 (1995) (referring to *Emperor's New Clause* as the “leading article” about unconscionability); Mark Klock, *Unconscionability and Price Discrimination*, 69 TENN. L. REV. 317, 337 (2002) (referring to Leff's article as “classic” and stating that it labels the UCC provision about

In short, after Leff's article, unconscionability lost much of its once largely unchallenged strength as a legal concept. Although Leff did not eradicate the unconscionability norm, he clearly cut it down to size, both in the academy and, I posit, the courts (although this is admittedly a difficult phenomenon to gauge). After the article, counsel for companies wishing to defend against charges of unconscionability now had a weapon and courts wanting to rein in unconscionability had a tool. Even if *The Emperor's New Clause* was not formally cited in briefs or opinions, its reasoning likely informed legal argument and judicial decisions.<sup>196</sup> If nothing else, an ensuing generation of lawyers and judicial law clerks were introduced to the Leff critique of unconscionability during law school, where *The Emperor's New Clause* received considerable attention.<sup>197</sup> To be sure, the article was often juxtaposed with *Walker-Thomas*, which gave readers a choice of positions on

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unconscionability to be "so vague as to be totally unhelpful"); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 463 (1995) (referring to Leff as "the first principal critic" of UCC section 2-302); see, e.g., *Wilson v. World Omni Leasing, Inc.*, 540 So. 2d 713, 717 (Ala. 1989) ("Rescission of a contract for unconscionability is an extraordinary remedy usually reserved for the protection of the unsophisticated and the uneducated.").

Professor Frier appeared to accept the success of the Leff attack with a mixture of admiration and disgruntlement. See Frier, *supra*, at 2207 n.44 ("Contrast with Leff the far more thoughtful article of Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969), which has had little influence.").

<sup>196</sup> Regardless of whether one agreed or disagreed with the Leff attack on section 2-302, everyone started to use Leff's vocabulary after publication of *The Emperor's New Clause*. The concepts of "procedural" and "substantive" unconscionability framed by Leff with terms coined by Leff has become standard fare for academic or judicial discussions of the subject. See WHITE & SUMMERS, *supra* note 132, §§ 4-3, 4-4 (titling the sections of the treatise according to Leff dichotomy); Ware, *supra* note 2, at 1016 n.103 (crediting Leff with distinguishing two types of unconscionability); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 456 (2002) (noting the general use of the dichotomy and crediting it to Leff); Michael Hunter Schwartz, *Power Outage: Amplifying the Analysis of Power in Legal Relations (With Special Application to Unconscionability and Arbitration)*, 33 WILLAMETTE L. REV. 67, 106 (1997) (noting the influence of Leff's view that a contract term should be unenforceable only if a court finds both procedural and substantive unconscionability).

<sup>197</sup> See, e.g., A CONTRACTS ANTHOLOGY 495-509 (Peter Linzer ed., 2d ed. 1995) (reprinting or discussing prominently *The Emperor's New Clause*); STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW (2d ed. 2001) (same); JOHN D. CALAMARI ET AL., CASES AND PROBLEMS ON CONTRACTS (3d ed. 2000) (same); FARNSWORTH, *supra* note 15, § 4.28 (same); LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW 78 (7th ed. 2001); ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE AND PRACTICE 572 (4th ed. 2001).

the issue of unconscionability.<sup>198</sup> After publication of the article, however, there could never be a one-sided debate or an uncritical embrace of either the *Walker-Thomas* decision or the unconscionability doctrine.

Nearly 250 law review articles have cited *The Emperor's New Clause*.<sup>199</sup> Perhaps more importantly, it has been cited in nearly fifty judicial decisions.<sup>200</sup> My reading of these cases appears to confirm the influence of the article, or at least its close match with judicial attitudes. Of the forty-eight cases examined, thirty-one reached what I categorize as results consistent with the Leff view and found nothing sufficiently unconscionable about the contract or term at issue; the remaining cases found unconscionability despite citing *The Emperor's New Clause*. Breaking down the group of cases further showed that fourteen cases reflected an express or strongly implied approval of Leff's position, with only one opinion appearing critical of the Leff analysis. Another eighteen cases cited *The Emperor's New Clause* and noted its influence or importance. Fourteen decisions cited the article simply as a neutral background secondary source. These numbers suggest that the Leff commentary has impacted the courts as well as the academy. Thus, Leff's work in the area casts a long shadow, even where *The Emperor's New Clause* is not cited. For example, as previously noted, Leff popularized and coined the distinction between procedural and substantive unconscionability. Hundreds of cases now routinely use this terminology without citing to Leff

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<sup>198</sup> See, e.g., FARNSWORTH, *supra* note 15, § 4.28, at 311–12; FULLER & EISENBERG, *supra* note 197, at 62; SUMMERS & HILLMAN, *supra* note 197, at 572. By stressing the influence of the Leff critique and the prominence of *The Emperor's New Clause*, I am not attempting to slight the impact of *Walker-Thomas*. As of August 6, 2003, the case had been cited in nearly 350 judicial decisions and nearly 350 law review articles. But, quantity of citation of course does not directly correspond to influence. As noted above, the California Supreme Court's *Armendariz* decision backing unconscionability review of arbitration clauses is well on its way to perhaps passing *Walker-Thomas*. See *supra* notes 148–64 and accompanying text. But it appears that the Leff perspective has dominated in both the academy and the courts. Whether it will continue to hold sway in coming years depends, of course, on the degree to which decisions like *Armendariz* and commentary favoring judicial contract policing via the unconscionability norm is viewed as more persuasive than the anti-unconscionability views of Leff and others.

<sup>199</sup> As of my Lexis database search of July 7, 2003, the “exact” count was 237.

<sup>200</sup> More “precisely,” there were forty-eight as of July 7, 2003. I place the “scare quotes” around exact and precisely because database searches can always miss a few citations or have false positives depending on how well the search strategy captures the “real” world of court opinions or law review articles. As of this writing, I have not examined all 237 articles citing *The Emperor's New Clause*, although I have reviewed the bulk of them. However, there always remains the chance that I have missed a case or two.



or *The Emperor's New Clause*, suggesting that his analysis of unconscionability rests near the core of judicial thinking on the topic.<sup>201</sup>

During what might be termed the late high season of debate over Leff's view of unconscionability and contract law generally, another soon-to-be famous contract article was published. W. David Slawson's *Standard Form Contracts and the Democratic Control of Lawmaking Power* began with the unsubstantiated, but normally accepted, empirical claim that more than ninety-nine percent of all contracts were standard form contracts.<sup>202</sup> The vast presence of so many standard form contracts provided both social benefit and social detriment.

On the benefit side of the ledger, such contracts were useful in lowering transaction costs by reducing the need for case-specific negotiation and drafting. They also allowed for ready comparability of contractual options. For example, if all commercial liability insurance policies are essentially the same, the prospective policyholder can shop according to price alone rather than attempting to compare differences in contract text. Excess insurers and reinsurers can instantly know what they are committing to when issuing their policies based upon the standard primary policies in the field.<sup>203</sup>

On the detriment side, standardization led to more contracts of adhesion being offered on a "take it or leave it" basis, with little or no room for modifying the contract for a specific context or for permitting any softening of the rough edges of the standard form. In addition, standardization led to more dense, complex preprinted form contracts, with the preprinted form often presenting a struggle to read and understand its contents in even the best of circumstances. Standard printing also led commercial actors to attempt to turn otherwise innocuous documents into contracts. This begat the "contracts" one finds on the back of a purchase receipt, a transportation voucher, or a ticket stub.<sup>204</sup> This also led drafters of these pseudo-contracts to engage in overreaching, attempting to add unreasonably favorable "contract" language to these documents in the hope that courts would give the verbiage

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<sup>201</sup> See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.37, at 381 (5th ed. 2003) ("Professor Leff labeled the two kinds of unconscionability as 'substantive' and 'procedural,' distinguishing the content of the contract (substantive oppression) and the process by which the allegedly offensive terms found their way into the agreement (procedural surprise). Many authorities have adopted this terminology."); see also *supra* note 196.

<sup>202</sup> W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

<sup>203</sup> See STEMPEL, *supra* note 18, § 4.06[c] (reviewing the benefits and detriments of contract standardization).

<sup>204</sup> See *id.*

legal impact, or that the strong pro-drafter language would at least give the drafter psychological leverage should a dispute arise.<sup>205</sup>

Although more receptive to judicial intervention than Leff, Slawson shared Leff's aversion to unguided judicial interference with contract text. Both Leff and Slawson supported legislative regulation of contracts to prevent imposition of harsh terms, but neither was very comfortable with courts generating the operational unconscionability norms except in particularly egregious circumstances.<sup>206</sup> This view persists today among mainstream contracts scholars. While concerned with contract fairness, they are equally or more concerned about activist judicial interjection of unconscionability concerns in contract disputes.<sup>207</sup>

In the more than thirty years since Leff and Slawson addressed these issues, the unconscionability norm has been in retreat. Because the unconscionability approach was bloodied to a degree during the very period when arbitration was on the ascendancy, the unconscionability norm provided only a modest bulwark for resisting the excesses of arbitration imposed by standard form contracts. As a result, it tended to be overlooked by the judiciary, particularly when Supreme Court discussion of arbitration appeared to be unconcerned with unconscionability principles.

### B. *The Re-Emergence of Textualism, Formalism, and Classical Contract Theory*

During the same final third of the twentieth century, there was a resurgence of classical contract law, textualism, and formalism—all doctrines inhospitable to unconscionability. The timing of this trend, appearing in tandem with the attack on unconscionability, is seemingly coordinated in almost an eerie way. While Leff was attacking the unconscionability principle, the American Law Institute was working apace on the *Restatement (Second) of Contracts* [hereinafter "*Restatement (Second)*"], first with Robert Braucher of Harvard and then Allan Farnsworth of Columbia serving as its Reporters. The *Restatement (Second)* was widely available in tentative draft form during the 1970's and was officially

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<sup>205</sup> See Bailey H. Kuklin, *On The Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 899 (1988).

<sup>206</sup> See Slawson, *supra* note 202, at 550.

<sup>207</sup> See, e.g., EPSTEIN ET AL., *supra* note 132, at 338 (stating that the success of unconscionability doctrine in courts is mixed and highly fact-specific); FARNSWORTH, *supra* note 15, § 4.28 (introducing the unconscionability concept, but noting restrained use by courts).

published in 1981.<sup>208</sup> It embraced a functional approach to contract law more closely linked to the Corbin tradition<sup>209</sup> than the formalism of Williston.<sup>210</sup> But, because of other trends favoring formalism and textualism, the *Restatement (Second)* has been undermined to a degree. This was even true as of the date of its publication. In the reported cases, textualism and formalism appear to be on the rise.<sup>211</sup> In its statutory interpretation and contract construction jurisprudence, the Supreme Court expressed greater solicitude for these concepts and greater suspicion of functionalist approaches out of an express or implicit fear that this would lead to judges substituting their own preferences for the written agreement of the parties. The confirmation of Antonin Scalia—an unapologetic, even extreme textualist, formalist, and traditionalist<sup>212</sup>—as a Justice of the Supreme Court in 1986 (with nary a dissenting vote) illustrates that this Willistonian re-emergence had arrived in force. Conveniently, this accompanied the Supreme Court's new era of arbitration jurisprudence.

### C. The Rise of Law and Economics Analysis

Within this same time frame came the rise of “Law and Economics” (L&E) scholarship.<sup>213</sup> In addition to generally helping to create a more business-friendly climate, L&E writings and theory were hostile toward the unconscionability norm on the theory that market interaction would produce

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<sup>208</sup> RESTATEMENT (SECOND) OF CONTRACTS (1981).

<sup>209</sup> See MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.4 (Joseph M. Perillo ed., rev. ed. 1998) (expressing a preference for functional and contextual contract analysis over formal and textualist contract interpretation).

<sup>210</sup> See WALTER H. E. JAEGER, WILLISTON ON CONTRACTS § 618 (3d ed. 1961) (expressing preference for textualism and formalism over functionalism and contextualism).

<sup>211</sup> See Braucher, *supra* note 82, at 53–56 (describing the ascendancy of textualism and formalism in contract law during the 1980s and 1990s); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 660 (1990) (describing the rise in textualist thinking regarding statutory interpretation).

<sup>212</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (describing his own embrace of formalism as the correct view of law).

<sup>213</sup> See KUKLIN & STEMPEL, *supra* note 81, at 35 (describing the rise of the L&E movement during the latter third of the twentieth century, pegging the beginning of the movement with the publication of Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) and Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961)). The L&E movement was clearly a force of note from the time of Richard Posner's treatise was initially published in 1972. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972). The Posner treatise has enjoyed a “good run” in academia and is now in its fifth edition.

optimally efficient contract terms.<sup>214</sup> In a nutshell, the standard L&E analysis of form contract terms posits that market forces will produce efficient form contract terms that on the whole benefit not only contract drafters (i.e., sellers) but also adhering parties (i.e., buyers or consumers). The impact of the L&E assessment has been significant. This construct for evaluating contract terms is a trump card of sorts against those protesting the imposition of standard form contract terms. If persuaded by the L&E analysis, courts no longer need to worry about things like bargaining power, consent, understanding, or fairness in the individual contract disputes. The forces of the market economy will produce standard form contract terms that are generally efficient. Therefore, strict enforcement of these terms became the “right” thing for courts to do, irrespective of any analysis of the particular context of the dispute before the court or potential consequences to the disputants.<sup>215</sup>

I realize that I am taking some liberty in advancing my five-prong thesis as to the factors deflating the strength of the unconscionability norm during the 1967–97 period. Many will undoubtedly disagree with my thesis in whole or at least as to discrete parts. On the whole, however, I am probably more confident as to the influence of L&E on the atrophy of unconscionability than perhaps any other prong. The clear thrust of basic L&E texts such as the Posner,<sup>216</sup> Polinsky,<sup>217</sup> or Cooter & Ulen<sup>218</sup> treatises is to embrace the market as a default rule that for the most part creates optimally efficient contract terms. As an inevitable corollary, most regulation of any sort is viewed with

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<sup>214</sup> See, e.g., George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1347 (1981); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1398–99 (1983).

<sup>215</sup> See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89 (1989) (stating that “[t]he law-and-economics movement has fought long and hard to convince courts to restrict the use of immutable rules” that would trump contract language); Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 113 (1995) (stating that “the entire field [of contract law], under [L&E] influence, took a massive wrong turn,” which led scholars and courts to focus too greatly on the economic efficiency of contract rather than other concerns attending contract disputes).

<sup>216</sup> POSNER, *supra* note 213, at 41–64.

<sup>217</sup> See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 7–14, 105–13 (2d ed. 1989).

<sup>218</sup> See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 16–39 (4th ed. 2004). As one commentator has noted, the sound bite or slogan for the L&E movement might be that the “law is efficient.” See KUKLIN & STEMPEL, *supra* note 81, at 27–46; see also Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 605–09 (1989).

suspicion because it alters the normally sanguine market outcomes. Although some L&E scholars such as Judge Posner seem to express a de facto preference that regulation come via common law adjudication,<sup>219</sup> any tendencies toward L&E empowerment of judicial regulation as less sweeping and politicized than legislative decisionmaking appears to be swamped by the more dominant notion held by the public and many political theorists: that regulation should generally be done by legislatures or agencies because of their greater expertise, responsiveness, and purported democratic legitimacy.<sup>220</sup> In addition, many moderates addressing contract policing from a moderate economic perspective do in fact appear to embrace the view that specific legislative prescriptions are better than ad hoc judicial development of the unconscionability norm.<sup>221</sup>

Because L&E was the dominant intellectual and jurisprudential subdiscipline of law from at least the late 1970s into the 1990s (and arguably continues to enjoy this stature today), L&E thinking and belief systems probably contributed a good deal toward judicial reluctance to invoke unconscionability. L&E, more than other legal subgroups, appeared to have

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<sup>219</sup> See POSNER, *supra* note 213, at 7–8. Coincidentally, this is also the reading given to Posner’s treatise by Leff, whose review is arguably the most entertaining book review ever published in a legal periodical. See Leff, *Realism About Nominalism*, *supra* note 194, at 451–52 (concluding as have others that Posner’s view is that the hydraulic pressure of common law judicial decisions is toward efficient legal rules and outcomes, but providing entertainment as well by analogizing *Economic Analysis of Law* to *Don Quixote*, in which the “hero,” “Economic Analysis,” conquers all by relentless imposition of its own vision on the world).

<sup>220</sup> But see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164–65 (1982) (contending that courts possess advantages of institutional competence in this regard as compared to legislatures or executive branch agencies).

<sup>221</sup> See, e.g., Korobkin, *supra* note 25, at 1285–95; Braucher, *supra* note 25, at 421–22. On this point, Professor Korobkin and I are perhaps fated never to agree. In providing gracious and helpful commentary on a draft of this Article, he very properly took issue with the causality arguments I am making in my five-prong thesis on the relative desuetude of unconscionability during the 1967–97 period. Pointedly, he asks “did L&E scholarship really cause courts to be hesitant to use unconscionability?” and states that he is “not sure there is much proof of this . . . even circumstantial proof.” See E-mail from Russell Korobkin to the author (Sept. 17, 2003) (on file with author). For the reasons set forth in the text above, I see at least correlation and circumstantial proof.

Professor Korobkin and I also remain in some disagreement as to the appropriate bounds of judicial enforcement of the unconscionability norm. We do both agree, however, that courts have a role to play in policing contracts. Professor Korobkin favors more emphasis on tangible rules while I am advocating more free-form standards. Indeed, one of the most pointed criticisms Professor Korobkin levels at my view is that it is so dependent on unarticulated discretion as to be near-standardless. See E-mail from Korobkin, *supra*. I address this point later in this Article.

considerable practical influence outside the academy and in the judiciary. Judges expressly embracing L&E analysis (e.g., Richard Posner, Frank Easterbrook, and Alex Kozinski) were appointed to the federal bench. Many judicial law clerks were exposed to the L&E approach during law school and a significant number expressly embraced the L&E subdiscipline.

#### *D. Political and Social Misgivings About Judicial Power*

In addition, political trends of the final third of the twentieth century worked against widespread judicial use of any doctrine or principle that appeared to be permitting courts to “rewrite” contracts, just as courts were not to “rewrite” statutes or the Constitution. Earl Warren, who presided as Chief Justice of the Supreme Court from 1954–69, and the Warren Court became a lightning rod for criticism as that Court was frequently accused of ignoring textual directives of positive law (i.e., the written words of the Constitution or a statute) in order to render what the Court viewed as a best result in a case or to update the constitutional provision in question.<sup>222</sup> Notable examples included the Warren Court’s “reading into” the Constitution:

- A Sixth Amendment right to counsel for indigent criminal defendants.<sup>223</sup>
- An expansion of the Fifth Amendment right against self incrimination that required police to advise arrested criminals of their rights, including a right to counsel and that what they said could and would be held against them.<sup>224</sup>

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<sup>222</sup> See, e.g., ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 45–100 (1978); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 69–100 (1990); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 267–99 (1995); JOHN HART ELY, *DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–75 (1980); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 37–92 (1996); BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* (1983); G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 169–72, 351–55 (1982); Laura Kalman, *The Wonder of the Warren Court*, 70 N.Y.U. L. REV. 780 (1995) (addressing the issue of why there are so few good biographies of Warren Court Justices).

<sup>223</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963).

<sup>224</sup> See *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

- An incorporation of certain provisions in the Bill of Rights into the Fourteenth Amendment, making them applicable to the states.<sup>225</sup>
- A requirement under the Equal Protection Clause of the Fourteenth Amendment that each voter's ballot have rough equality, a decision that essentially outlawed the historical practice of dividing election districts according to geography more than demographics.<sup>226</sup>

Even the Warren Court decision that everyone agrees with (at least ostensibly and in public), *Brown v. Board of Education*,<sup>227</sup> has been the subject of continued hand-wringing over its alleged activism and criticism of its methodology.<sup>228</sup>

The backlash against the Warren Court probably reached its zenith when it became an issue in the 1968 presidential campaign. Republican candidate Richard Nixon made criticism of the Court a significant part of his campaign, including the promise to appoint only strict constructionists to the Court rather than judicial activists.<sup>229</sup> The seriousness of Nixon's commitment was sufficiently palpable that Warren Burger, who ultimately did succeed Earl

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<sup>225</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding that the Fourth Amendment was applicable to the states through incorporation via the Due Process Clause of the Fourteenth Amendment).

<sup>226</sup> See *Baker v. Carr*, 369 U.S. 186, 226–31 (1962).

<sup>227</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>228</sup> See ESKRIDGE, JR. ET AL., *supra* note 80, at 1–23 (using *Brown v. Board* as the centerpiece of the book and presenting the reconciliation of *Brown*'s purported activism and traditional constitutional structure and restraint as the central dilemma in modern constitutional law); Barry Friedman, *The Birth of An Academic Obsession: The History of the Countermajoritarian Difficulty Part Five*, 112 YALE L.J. 153, 191 (2002) (suggesting that legal scholars have been unduly worried about the legitimacy of the judge-generated *Brown* opinion).

<sup>229</sup> See JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 1–28 (2001) (describing the politics of Supreme Court selections during this era); MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 112 (1998) (noting the backlash against the Warren Court); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 592 (Kermit L. Hall et al. eds., 1992) (same); JACK HARRISON POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 289 (1979) (noting that Warren Court decisions engendered large-scale “fulminations” against Warren and the Court); WOODWARD & ARMSTRONG, *supra* note 23, at 5–25 (discussing how Republican candidate Richard Nixon used the Warren Court as a political issue during the 1968 presidential campaign and sought to reverse Warren Court decisions with his nominations to Court); Charles J. Ogletree, Jr., *Judicial Activism or Judicial Necessity: The D.C. District Court's Criminal Justice Legacy*, 90 GEO. L.J. 685, 693–94 (2002) (noting that during his 1968 presidential campaign, Nixon argued that the Warren Court had rendered decisions that “weaken[ed] the peace forces” of society in favor of the “criminal forces of this country”).

Warren as Chief Justice, was seen as “running” for the post through his public speeches, agreeing with the implicit criticism of the Warren Court and suggesting that Burger, as a strict constructionist, would be the perfect person for the Court.<sup>230</sup>

### E. *The “Turn Against Law”*

Beyond the political attack on the perceived excesses of the Warren Court and activist judging generally, this era was also marked by a general “turn against law,” which was both a political and intellectual movement.<sup>231</sup> Although this trend was not as noticeable until the 1970s, it took solid root and remains the dominant perspective, at least in politics and public opinion, with intellectual opinion more divided. I used the term “turn against law” in the same sense as Marc Galanter, who coined the term, as well as other commentators making similar points. In reaction to a perceived excessive increase in the growth of litigation and liability, interest groups, certain political and intellectual elites, and much of the public at large came to view excessive litigation as a social cost, expending resources too freely rather than a benefit achieving recompense, resolution, or social justice and harmony.<sup>232</sup> Perhaps not coincidentally, the 1976 Pound Conference championed by Chief Justice Burger is often seen as part of this trend.<sup>233</sup> Other examples of this shift in social attitude include:

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<sup>230</sup> See LIVA BAKER, *MIRANDA: CRIME, LAW & POLITICS* 245–49 (1983) (noting that the public outcry against *Miranda* and other Warren Court decisions, which were viewed as excessively favorable for criminal defendants, fueled appointments designed to change the approach of the Court); WOODWARD & ARMSTRONG, *supra* note 23, at 11–25; Peter G. Fish, *Spite Nominations to the United States Supreme Court: Herbert C. Hoover, Owen J. Roberts, and the Politics of Presidential Vengeance in Retrospect*, 77 KY. L.J. 545, 545–46 (1989) (discussing how the selection of Burger, an outspoken opponent of Warren Court decisions, was a direct signal that Nixon sought change in the Court’s direction).

<sup>231</sup> See Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 285 (2002).

<sup>232</sup> See *id.* at 291; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 494–95 (1986) (describing phenomenon on smaller scale of emerging dissatisfaction with civil litigation procedure); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659 (1993).

<sup>233</sup> See *supra* note 64 and accompanying text (describing the 1976 Pound Conference and Chief Justice Burger’s activism in favor of contracting litigation and private ADR).



- The medical malpractice tort reforms of the mid-1970s (often referred to as the “first” tort reform or med mal “crisis”);<sup>234</sup>
- The product and public liability tort reforms of the mid-1980s (the second tort reform crisis);<sup>235</sup>
- Incremental amendments to federal and state rules of civil procedure that generally reduced the availability of discovery and made prosecution of damage claims or institutional reform litigation more difficult;<sup>236</sup>
- Case law restricting discovery and litigation claims, especially law reform litigation;<sup>237</sup>
- The rise of the ADR movement, including greater solicitude for arbitration;<sup>238</sup> and

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<sup>234</sup> See generally Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 5 (describing the perceived medical malpractice crisis of 1970s and tort reform initiatives directed at the problem).

<sup>235</sup> See e.g., Jay Angoff, *Insurance Against Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property-Casualty Insurance Industry*, 5 YALE J. ON REG. 397 (1988) (discussing the effect of tort reform on the insurance industry). The problem of the mid-1980s was centered on product liability and other relatively new risks such as municipal liability and child care liability. Like the 1970s medical malpractice problem, it was also very much insurance-driven, as many policyholders found themselves facing large premium increases or even cancellation. See George J. Church, *America: Your Policy is Cancelled*, TIME, Mar. 24, 1986, at 16.

<sup>236</sup> See e.g., Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 753–84 (1998); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684–86 (1998); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform,”* 64 LAW. & CONTEMP. PROBS., Spring/Summer 2001, 197, 207–11.

<sup>237</sup> See e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 968–95 (1998) (concluding that access to courts became more difficult in 1970–95 time period, with negative results); Stempel, *supra* note 232, at 688–90 (observing the trend toward discouraging full discovery and litigation of disputes).

<sup>238</sup> See Stempel, *supra* note 8, at 1380–82 (reviewing the history of arbitration, including the modern pro-arbitration movement); Stempel, *Public Policy*, *supra* note 1, at 269–83 (same); Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 271–85 (reviewing the history and rise of mediation).

- Efforts to make both lawyers and lawsuits targets of political rhetoric.<sup>239</sup>

Although describing the “turn against law” phenomenon briefly enough for this Article risks reducing it to a cartoon, there appears to be no question that there was a sea change of sorts in attitudes toward law and litigation during the past quarter or third of the twentieth century. The new, anti-litigation (or, more charitably, “law in its proper place and scope”) movement was clearly dominant by the 1980s. Not coincidentally, this is when the Supreme Court rendered its most significant, sweeping, and arguably overly enthusiastic, pronouncements about arbitration and arbitration law.

Applied to arbitration, the “turn against law” logically favored less litigation and more ADR, including arbitration, because ADR mechanisms were both less legalistic and thought to be less prone to the perceived pathologies of litigation, such as excessive jury awards, undue delay, increased expense, and substantial pretrial efforts and expenditures. Court dockets were thought to be too crowded and growing too fast, a perception naturally hospitable to developing a refined body of arbitration law more likely to move more disputes from the courts to arbitration.

Like almost any other social or intellectual movement, however, the “turn against law” has another side that can be mustered in support of a less expansive, textual, and formal approach to arbitrability. One premise of the move away from litigation is that ADR works better because it is voluntary, less formal, and less technical than litigation. Arbitration outcomes are thought to be based more on rough justice or equity and less on the letter of the law. A judicial sentiment to move more disputes into arbitration is of course perfectly consistent with litigation’s fall from grace during the same time that the Court was remaking American arbitration law. Ironically, however, the Court changed arbitration law and practice by utilizing the traditional “legalistic” tools that had also fallen into disfavor: literalist reading of contracts, disregard for the practicalities and equities of the context giving rise to the arbitration clause, formalism in arbitration enforcement, and a limited role for common sense review or policing of the arbitral process and the privatization of dispute resolution.

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<sup>239</sup> See Stempel, *supra* note 232, at 687 (describing attacks on lawyers by various interest groups and attacks even from the President and Vice-President of the United States).

*F. The Privatization Movement*

In addition to these trends, but perfectly consistent with them, arose a privatization movement during the last quarter of the twentieth century. The privatization norm argued that many functions previously performed by governments should be reallocated to the private sector in order to achieve greater efficiencies. Privatization, downsizing of government, and re-inventing became the conventional wisdom of the day.<sup>240</sup> Every President during the this time period, Republican or Democrat, appears to have embraced the concept.<sup>241</sup> In addition, these and other government actors took concrete action designed to “down-size” government functions and have more historically governmental functions performed by the private sector. Examples include privately managed prisons, schools, and social welfare systems.<sup>242</sup> The American resistance to government-provided health care presents another example of the relative triumph of privatization.<sup>243</sup> Even

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<sup>240</sup> See, e.g., AL GORE, *CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW*, 62–64 (1993) (advocating for the privatization of many government functions and the use of market-based incentives for government programs). See generally, DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT* (1992) (same).

<sup>241</sup> See, e.g., MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* 29–33 (Brookings Institution, 1985) (illustrating Ronald Reagan’s advocacy of deregulation); Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521, 524–27 (1990) (discussing Jimmy Carter and zero-based budgeting). Bill Clinton, particularly in his first presidential campaign, ran on a prominent reinventing government program, which was credited with making Clinton more popular and electable than many potential Democratic candidates. See generally DONALD F. KETTL, *THE GLOBAL PUBLIC MANAGEMENT REVOLUTION: A REPORT ON THE TRANSFORMATION OF GOVERNANCE* (2000); Nand C. Bardouille, *The Transformation of Governance Paradigms and Modalities: Insights into the Marketization of the Public Service in Response to Globalization*, 6 GEO. PUB. POL’Y REV. 155 (2001) (discussing deregulation as a response to globalization); *The Ghost of Bill Clinton*, *ECONOMIST*, Aug. 2, 2003, at 34 (arguing that the anti-government or limited government ethos is so strong in current U.S. politics and thought as to require that even the more liberal major political party fun limited government candidate if it is to win the presidency).

<sup>242</sup> See Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 536 (1989) (noting that governments frequently hire private contractors to run prisons); Note, *The Hazards of Making Public Schooling a Private Business*, 112 HARV. L. REV. 695, 701 (1999) (highlighting the Edison Project, in which a private company was selected to run certain troubled public schools).

<sup>243</sup> See W. John Thomas, *The Clinton Health Care Reform Plan: A Failed Dramatic Presentation*, 7 STAN. L. & POL’Y REV. 83, 83–84 (1996) (describing the unpopularity of

when the body politic has strong incentives to seek a governmental initiative, there has, in the recent modern era, been strong resistance to anything viewed as additional government activity as well as a zeal for turning government functions over to private entities. One need only recall the debate concerning a Transportation Safety Agency with federal employees to screen air travel passengers in the wake of the September 11 tragedy. Although this piece of legislation was ultimately enacted, there was considerable resistance and it almost failed despite the macabre energy it possessed because of the September 11 airplane hijackings.<sup>244</sup>

The privatization movement joined well with the above-mentioned trends to encourage enforcement of arbitration clauses with relatively little examination of the particular arbitration provision or reflection about the type of arbitration being compelled. Judges, like society as a whole, appear to have accepted as a general norm the idea that the government should delegate more social functions to the private sector. Enforcing pre-dispute arbitration clauses as written was quite consistent with this notion.

#### *G. A Confluence of Factors Favoring Arbitration and Disfavoring Unconscionability Intervention*

As is probably true with all social trends, the ones discussed in this section did not proceed in isolation from one another. For example, the L&E writings that defended form contract terms also criticized both the tort system and excessively broad discovery rules while championing more use of determinable “rules” (logically to be set forth in the text of statutes or contracts) in lieu of the more relaxed “standards” that might permit judges to intrude too greatly into the contractual “bargains” made by the parties. Even legislation was reconceptualized, not as some public deliberation of great social problems, but as “deals” worked out by interest groups and their allied representatives.<sup>245</sup> Corporations were described, not as a separate entity, but

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the 1993 Clinton Administration health care initiative, which sought considerably less government control of health care than the single payer system long in use in Canadian provinces).

<sup>244</sup> See Richard A. Oppel, Jr., *Stalemate in Congress Irks Security Experts*, N.Y. TIMES, Nov. 3, 2001, at 7 (reporting that Congress was quite divided as to whether additional federal workers should be hired for airport safety screening as opposed to continued use of private contractors).

<sup>245</sup> See, e.g., Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 192–91 (1986).

as a “nexus of contracts.”<sup>246</sup> These views dovetailed significantly with those in the legal elite who advocated formalism and textualism.<sup>247</sup>

#### H. *The Ineffectiveness of Countervailing Intellectual Trends*

United States society, however sheep-like it may appear on occasion, is still relatively pluralist, of course. The trends described above were not unopposed or unanswered. Intellectually, the L&E and legal formalism movements were answered by the Critical Legal Studies (hereinafter “CLS”) movement that clearly has roots in the Legal Realist movement as well as a revival of functionalist legal process thinking clearly descended from the Hart and Sacks Harvard Legal Process school. Cognitive theory and behavioral science learning entered the legal arena as a “law and” subject. In addition, many judges defended functionalism and even judicial activism as a necessary part of the judicial role. Contract theorists and consumer advocates challenged the efficiency and operation of standard form terms. ADR writings, once largely promotional efforts for ADR devices, have become more searching, more serious, and more critical.

On the whole, however, the activities described in the preceding paragraph have not enjoyed the same success—at least in the political and judicial arena—as have the more pro-arbitration, anti-unconscionability movements described in this Article. Clearly, ADR remains in ascendancy and litigation in disrepute. Tort reform remains the order of the day in many state legislatures, particularly in light of recent upheavals over medical malpractice insurance premiums and the increasing militancy of physicians demanding some revision of the tort system. Criticism of excessive litigation and excessive legalism is popular both in society generally and among the elite. The success of Philip Howard’s books and their provocative titles (*The Death of Common Sense*<sup>248</sup> and *The Collapse of the Common Good*)<sup>249</sup> provide a particularly good example of this social trend.

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<sup>246</sup> See, e.g., William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 407–11 (1989); Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U. L. REV. 99, 100–03 (1989).

<sup>247</sup> See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 774 (2002); see, e.g., Scalia, *supra* note 212.

<sup>248</sup> See generally PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994) (arguing that excessively formal legalism and bureaucracy has resulted in waste, mismanagement, and the thwarting of useful activity, giving many anecdotes from news stories: for example, New York City’s failure to provide regulatory clearance for a much-needed low-income housing project).

### 1. *Critical Legal Studies*

The counter-revolution of sorts described above can be described as too little, too late. Too little—and paradoxically too much—describes the CLS counter-attack. CLS can be described as a school of jurisprudential thought, rising during the 1970s, positing that much of the perceived coherence, consistency, and rigor of the American legal system was a facade that could not hold up under closer examination. As one scholar put it, if the slogan of the L&E movement was “law is efficiency,” the CLS slogan was “law is politics.”<sup>250</sup> The CLS critique suggested the following more specific shortcomings of the existing legal system:

[I]ndeterminacy of legal doctrine; undue mystification of the law to exclude outsiders and enhance the power of lawyers; doctrine and procedure structured to obscure the political aspects of law; protection of the interests of the dominant under the guise of neutrality. . . . Unlike the Realists, however, CLS adherents often not only recognize the inevitably political aspects of law but also argue for a more self-consciously political approach to law, one which assesses legal outcomes not by application of formal rules or processes so much as by the distributional consequences of legal activity.<sup>251</sup>

Although the overall thrust of the CLS movement was not as radical as contended by its critics, CLS arguments did, on occasion, go to extremes that

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<sup>250</sup> See Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 621 (1989).

<sup>251</sup> See KUKLIN & STEMPEL, *supra* note 81, at 175.

made them easy targets of criticism.<sup>252</sup> The movement, whatever its successes,<sup>253</sup> rubbed many in the legal profession the wrong way.<sup>254</sup>

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<sup>252</sup> For example, some CLS scholars took the “law is politics” aspect of CLS so seriously as to suggest that legal outcomes were *always* driven by social, economic, and political power rather than substantive rationality or fidelity to first principles, a position seen by most as too extreme. Some CLS writings argued that legal rules are limitlessly malleable and therefore have no constraining effect on decisionmakers—legal realism on steroids if you will. *See, e.g.*, Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518, 519–26 (1986). As a result, CLS writings sometimes argued what many regarded as extreme views, such as the proposition that there is no intellectual content to the distinction between public and private. Although most reflective persons would readily admit that the dividing line between the two spheres is murky and even meandering, most in the legal mainstream would never agree that the concept had no heuristic or practical value. *See* Symposium, *The History of the Public/Private Distinction*, 130 U. PENN. L. REV. 1423 (1982) (criticizing the historical, formal rigidity of the public-private concept as unrealistic but most contributors refusing to find the distinction devoid of intellectual support).

<sup>253</sup> CLS scholars would, to a significant degree, state that CLS has been given something of a “bum rap” by mainstream law and legal education in that CLS is not a doctrine of anarchy and destruction, but more a school of post-modern social construction that looks behind the formalism of law to suggest reform of the socially constructed hierarchies pervading society. *See, e.g.*, Peter W. Martin, “Of Law and the River,” *and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 1–10 (1985); Minda, *supra* note 250, at 614–22. Certainly, concepts and analyses consistent with the CLS view, and arguably influenced by it, can be found in the writings of mainstream legal scholars. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56–122 (1992) (utilizing rules-standards distinction for assessing Supreme Court opinions). The rules-standards distinction, although arguably implicitly existing since the dawn of society, is frequently associated with an important CLS article considered to be one of the foundations of the CLS movement. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1713 (1976).

In this Article, my objective is not to determine the relative strength of the pro and anti-CLS positions. Rather, my contention, as set forth in more detail in the text, is that the CLS movement was never openly accepted by the legal establishment and arguably spurred a significant backlash against liberal or functional analyses due to a retrenchment of formal, conventional legal thought in the face of what many saw as an onslaught by a hoard of intellectual barbarians at the gates of the law. *See generally* BRYAN BURROUGHS & JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* (1990) (using the Visigoths and Roman Empire analogy to describe the reaction of many established economic interests to the less genteel operating style of the establishment).

<sup>254</sup> *See, e.g.*, Daniel C.K. Chow, *Trashing Nihilism*, 65 TUL. L. REV. 221, 223–57 (1990); Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 1–2, 14–15 (1986).

Ironically, one of the harshest critics of the CLS movement was Paul Carrington,<sup>255</sup> who later became one of the harshest critics of the Supreme Court's modern arbitration jurisprudence.<sup>256</sup> Carrington's standing astride these two worlds summarizes my point about the relative inefficacy of CLS in holding back the formalist, textualist, efficiency-enamored tide in favor of aggressive compulsion of arbitration. Even those with grave misgivings about the new world of arbitration law did not deploy CLS concepts against it.

Other potentially powerful jurisprudential movements against the rise of the Court's modern arbitration law tended to be too late on the scene. By the time they arrived, the Court had already set out on the path of arbitration as national policy, enforced by textualist, formalist application of arbitration clauses. Cases such as *Moses H. Cone, Southland, McMahon*, and *Rodriguez*<sup>257</sup> were precedent and would receive judicial deference even if their approach was undermined by subsequent scholarly writings.

## 2. *The New Legal Process*

One example of these jurisprudential movements is evidenced in the renewed interest in legal process analysis. During the 1950s, Harvard Law professors Albert Sacks and Henry Hart developed what came to be known as the Harvard Legal Process school of jurisprudential thought. It was characterized by a functional analysis of legal problems emphasizing institutional competence, decisionmaking authority, and the nature and context of legal problems. Documentary text was respected by Hart and Sacks but not sanctified. Further, they were not textualists in the manner of Justice Scalia or other devotees of a "plain meaning" approach to interpretative problems.

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<sup>255</sup> See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 222–26 (1984) (arguing that CLS scholars were nihilists who should not be part of law school faculties). At the time of the *Of Law and the River* article, Carrington was Dean at Duke Law School, a position that added to the attention his assessment received and helped to underscore the degree to which CLS was something of an "outsider" movement. Carrington was not arguing that CLS adherents had no rights of expression or no place in academia, but instead was arguing that the status of law as both an academic discipline and a means of social governance made CLS thinking inappropriate for law.

<sup>256</sup> See, e.g., Carrington, *supra* note 4, at 260; Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 333–36.

<sup>257</sup> See *supra* notes 67–78 and accompanying text (describing these cases and evolution of Supreme Court's view of arbitration law during 1980–90 period).



Unfortunately, the manifesto of the Legal Process School was an unpublished draft of the Hart and Sacks teaching materials.<sup>258</sup> To be sure, it was influential and has been referred to (probably correctly) as the most famous unpublished work in law.<sup>259</sup> But it remained unpublished during the 1960s, 1970s, and 1980s. More important, and not unrelated, the Hart and Sacks approach had faded from the frontal lobes of lawyers, scholars, and judges. Not only was the movement's sacred text unpublished, but the law reviews of the day were far more likely to be filled with L&E, CLS, or straight doctrinal scholarship. Of course, there was advocacy and policy scholarship on the pages of law reviews during this era. But much of it was scholarship attacking litigation and promoting ADR generally and arbitration in particular. Against this backdrop, the teachings of Hart and Sacks—which in my view cautioned against the uncritical embrace of arbitration, rigid textualism, or formalist enforcement of arbitration clauses—were not consulted. During this time period, the Supreme Court began its infatuation with arbitration and its embrace of the new, aggressively enforced approach to enforcing arbitration clauses.

The Hart and Sacks manuscript was eventually published in book form, with an updated introduction by its editors, prominent legal scholars William Eskridge and Philip Frickey—but not until 1994.<sup>260</sup> By then, the modern era of arbitrability was sufficiently entrenched as to be relatively immune from this sort of intellectual influence. Although to some extent the influence of Hart and Sacks “never left” the law, and there were elements of revival through the “new” Legal Process school associated with Eskridge, Frickey,<sup>261</sup> and others,<sup>262</sup> their revival of legal process thinking simply was

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<sup>258</sup> See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958) (tentative draft), in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 165–67 (1994) (William N. Eskridge, Jr. & Philip P. Frickey eds.).

<sup>259</sup> See KUKLIN & STEMPEL, *supra* note 81, at 159.

<sup>260</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also *id.* at ii (discussing of the role of the text at the Harvard Law School).

<sup>261</sup> See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987).

<sup>262</sup> See, e.g., Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919 (1989) (reviewing ESKRIDGE, JR. ET AL., *supra* note 80); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983) (reviewing CALABRESI, *supra* note 220).

I suppose that I am implicitly not giving Robert Weisberg's contribution its due by suggesting that the “new” Legal Process did not take root until the later 1980s and that there was not really a full-fledged rediscovery of the Hart and Sacks approach until

not strong or timely enough to have a large impact on judicial construction of arbitration agreements, particularly during the key years 1976–87, when litigation was subject to criticism and ADR and arbitration were in ascendancy.

In addition, much of the new legal process project was directed toward statutory interpretation. Although the Supreme Court's arbitration decisions, particularly *Southland*, were statutory interpretation decisions, they received comparatively little attention from this group of scholars. For example,

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formal publication of their manuscript. Of course, I do not mean any of this all that literally. Attempting to site intellectual trends on the historical landscape always involves approximation. For example, I am focusing on the date of formal publication of *The Legal Process* (1994) as a matter of convenience and ready reference, what one might call a "Casey Stengel" approach to establishing the historical timeline (so named because of the famous baseball manager's frequent defense of even his most outrageous statements with "you can look it up," something fairly readily done with a book catalogued by the Library of Congress). In fact, the intellectual currents that spurred formal publication were stirring for some time prior to the Eskridge and Frickey project in order to create the sentiment for the project and the publisher's receptiveness. A good deal of it also was personal serendipity. See HART & SACKS, *supra* note 260, at xxv-xcvi (describing the personal contacts and relationships leading to formal publication).

In fact, Eskridge & Frickey's own introduction suggests that the legal process revival was a 1980s phenomenon rather than a late-1980s and early 1990s phenomenon as I am positing. See HART & SACKS, *supra* note 260, at cxxv. Perhaps they are correct, at least in regard to legal scholarship. But even conceding this, I would still argue that my assessment is correct regarding the visibility of legal process thinking for the United States Supreme Court that launched the modern arbitration era. In addition, even if legal process was "back" by the 1980s, it nonetheless continued to be snowed under by L&E, formalism, textualism, and even CLS.

More to the point regarding my arguable failure to give Weisberg his due is this—Weisberg is critical of Calabresi's book as constituting too much of a brief for legal activism. See generally Weisberg, *supra*. The "new" Legal Process as conceptualized by Weisberg is more receptive to Calabresi's approach (that courts treat legislation only as the equivalent of precedent rather than as binding positive law that cannot be changed by courts) than the old legal process would have been. *Id.* at 237–49. But it is still critical and suggests that Calabresi was promoting something of a CLS-like radical methodology when one might have just as easily regarded the Calabresi approach as an accepted member in the new legal process club. *Id.* What Calabresi suggested is not much different than the approach to statutes championed by "new" Legal Process school founder William N. Eskridge. See generally WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994); William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). In my view, the Weisberg treatment of Calabresi's book suggests that new legal process thinking in the early 1980s had not become the more functionalist new legal process thinking of later in the decade. And, of course, Weisberg was among Calabresi's friendlier critics. Others accused him of disrespect for the legal order. See, e.g., Allan C. Hutchinson & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752 (1982).

Professor Eskridge spent only a few lines of hundreds of pages of his statutory scholarship of the time in addressing the Court's arbitration decisions. When he did, he was critical, but offhandedly critical without sustained examination of the matter.<sup>263</sup> His critique, like that of most who weighed in against the new law of arbitration, was focused on statutory analysis and jurisprudential concerns other than contract doctrine.

### 3. Cognitive Theory and Behavioral Science

The insights of cognitive theory/behavioral science also came a bit too late in the play to have a significant effect on the plot or outcome of the arbitration drama, even though the application of cognitive theory to law has become one of the most dominant "law ands" of the past decade. By cognitive theory and behavioral science, I mean the body of learning that addresses the manner in which people make decisions—often noting the irrationality or imperfections of the judgment process owing to the heuristic errors and biases held by humans. Work in this area is founded upon the pioneering psychological experiments and writings of Amos Tversky, Daniel Kahneman, and fellow travelers in this field.<sup>264</sup> Its first significant appearance in legal scholarship appeared during the late 1980s and early 1990s, increasing significantly in the mid-1990s.<sup>265</sup> Today, cognitive theory analysis is no longer a "hot, new area" so much as it is a well-established area in which a substantial amount of serious and prominent scholarship continues to be done.<sup>266</sup>

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<sup>263</sup> See, e.g., William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1083–86, 1099–1100 (1989).

<sup>264</sup> See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, et al. eds. 1982); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE, Sept. 27, 1974, at 1124.

<sup>265</sup> See Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1506 (1998); see, e.g., Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1418 n.35 (1985); Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521, 525 (1985); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 261 (1987). The LexisNexis database of American and Canadian law reviews reflects no law review articles prior to 1980 that cite to leading behavioral science scholars Amos Tversky and Daniel Kahneman. My research revealed fewer than 20 such articles published prior to 1990. Thus, I am fairly confident that the Supreme Court did not consider this literature during its important arbitration decisions of the mid-1980s.

<sup>266</sup> See, e.g., BEHAVIORAL LAW AND ECONOMICS (Cass Sunstein ed. 2000); Korobkin, *supra* note 25, at 1202–08 (employing cognitive theory to assess the problems posed by form contract terms and the most efficient means for controlling potential

Scholarly work in this area has been impressive and promising.<sup>267</sup> To a large degree, cognitive analysis is an antidote to the errors and excesses sometimes found in the L&E analyses. L&E thinking posits perfectly rational actors. Cognitive theory demonstrates that most humans are at best vested with only “bounded rationality” that limits the thoroughness and effectiveness of their investigation and analysis of legal arrangements.<sup>268</sup> Consequently, the preferences of people will not always serve their best interests, an insight that has obvious implications for government and legal decisions as to when market deference or market regulation should be the order of the day. Some conclusions of cognitive theorists fit comfortably with L&E assessments,<sup>269</sup> but many findings of cognitive theory also support the previously instinctive resistance to some L&E assertions. Importantly, the scientific base of cognitive analysis makes it a counterweight to L&E that has significantly more academic credibility than many of the traditional objections to L&E, which are based on seemingly more subjective or indeterminate concepts such as justice or fairness.

Without a doubt, bringing cognitive theory into the analysis makes it more difficult for courts to take a strictly textualist or formalist approach to arbitration enforceability. As to timing, however, it is quite clear that cognitive theory insights simply did not arrive on the legal intellectual scene soon enough to have a significant influence on the development of modern arbitration law. It was largely absent from the legal literature during the 1980s when the bulk of the arbitration revolution took place. Like renewed

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abuses); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 743 (2000). *But see* Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1911 (2002); Gregory Mitchell, *Why Law & Economics Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67, 73 (2002).

<sup>267</sup> See, e.g., BEHAVIORAL LAW AND ECONOMICS, *supra* note 266; Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 782 (2001); Christine Jolls et al., *A Behavioral Approach to Law & Economics*, 50 STAN. L. REV. 1471, 1479 (1998); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1811–28 (2000); Russell Korobkin & Chris Guthrie, *Psychology, Economics, & Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 84–86 (1997); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1051–60 (2000).

<sup>268</sup> “Bounded rationality” is limited rationality rather than fully rational analysis. See Korobkin, *supra* note 25, at 1222. People exhibit bounded rationality in many of their decisionmaking behaviors because they lack the cognitive ability, as well as the time, resources, or expertise to engage in the sort of investigation, analysis, and understanding required for full rationality. See *id.* at 1224–28.

<sup>269</sup> See, e.g., *id.* at 1224–31.

legal process thought, it was established during the 1990s when the Supreme Court was continuing to sort out arbitration law. Thus it had not been practically available as a basis for resistance when the Court transformed the FAA from a procedural rule of the federal courts into a national policy of substantive federal law backed by a textualist, formalist view of contract. Although the emergence of cognitive theory in the law may well support or even eventually propel changes in arbitration jurisprudence, eventually it could not, and did not, hinder the emergence of current arbitration law that rode the other intellectual, social, and political waves described in this Article.

#### V. THE FUTURE OF UNCONSCIONABILITY AND ARBITRATION: PROSPECTS FOR CONTINUING EQUILIBRIUM AND IMPROVED CONTRACT SUPERVISION THROUGH UNCONSCIONABILITY ANALYSIS

The unconscionability norm has unfortunately become a disfavored stepchild of contract law. Although it remains acknowledged by courts and commentators, none embrace it too closely or urge its growth and greater use.<sup>270</sup> Much of the most recent scholarship of contract theorists that addresses unconscionability fits comfortably within the dominant post-Leff construct in which judicial creation and application of the unconscionability norm is disfavored.<sup>271</sup> Instead, the prevailing norm even for those favoring some role for the concept is that unconscionability standards, since they interfere with contract terms produced by the market, are better set by legislatures or executive agencies and not developed by courts.<sup>272</sup> In

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<sup>270</sup> See, e.g., Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 302 (1975); Robert Flannigan, *Commercial Fiduciary Obligations*, 36 ALBERTA L. REV. 905, 920–21 (1998); Allan Schwartz, *A Re-assessment of Non-Substantive Unconscionability*, 63 VA. L. REV. 1053, 1054–55 (1977).

<sup>271</sup> See FARNSWORTH, *supra* note 15, § 4.28; JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS, §§ 9.37–.41 (5th ed. 2000); Braucher, *supra* note 25, at 421–23.

<sup>272</sup> See, e.g., Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTING L.J. 459, 466, 553–54 (1995); Symposium, *Unconscionability Around the World: Seven Perspectives on the Contractual Doctrine*, 14 LOYOLA L.A. INT'L & COMP. L.J. 435 (1992); William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1020–21 (noting that consumers and others with relatively small stakes at issue in particular cases are unlikely to invest in developing contextual facts to show unconscionability); Robert Wisner, 51 U. TORONTO FAC. L. REV. 396, 409 (1993) (arguing for Kantian constraints on the unconscionability doctrine); see also Russell Korobkin, *The Efficiency of Managed Care "Patient Protection" Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1, 62 (1999) (making an argument for legislative and administrative standard-setting regarding the

addition, judicially-generated unconscionability standards can be criticized as being too slow in development.<sup>273</sup> In general, the prevailing norm posits that the judicial role in policing contracts should be circumscribed, and that only in the most extreme cases of procedural or substantive unconscionability, courts should generate and apply common law unconscionability norms.<sup>274</sup> Many, and perhaps most courts, require that the unconscionability must be both procedural and substantive in order to merit judicial intervention.<sup>275</sup>

In contravention of the post-Leff conventional wisdom, I am arguing for a significant, continued role for unconscionability analysis in the policing contracts by the courts—as a matter of judicially-created common law—and that the unconscionability norm be applied flexibly and as something of a gestalt, without highly confined reference to any specific traits that are on the “list” of unconscionable provisions. The judicial approach I am advocating has, as discussed above, taken root to a large extent as the courts have begun to increasingly apply the unconscionability norm to arbitration clauses. However, I remain concerned that courts using an unconscionability analysis may become too focused on particular traits while failing to evaluate whether the arbitration provisions of a contract are, as a whole, unfairly obtained or

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fairness of health insurance contract provisions). *But see* Korobkin, *supra* note 25, at 1277–84 (appearing to accept the utility of a greater judicial role in policing contracts under an unconscionability analysis).

Professor Leff, of course, remains the strongest proponent of the view that legislatures or agencies (rather than courts) should define unconscionability and should define it with specificity rather than depending on general notions of fairness. *See* Leff, *supra* note 21, at 488–89; Leff, *supra* note 186, at 149 (1970); Leff, *supra* note 22, at 357–58.

<sup>273</sup> *See* Braucher, *supra* note 25, at 421:

[S]low accretion of cases does not work to make particular harsh terms unenforceable when procedural unconscionability must be shown, because each factual variation in formation potentially makes any given case distinguishable. Pure substantive unconscionability has better potential to “accumulate,” as Llewellyn put it, into a body of prohibited terms – but this is an expensive, long-term project. Unconscionability is fire as a residual type of policing for overreaching that has not yet appeared, but where particular substantive abuses are already identified, they can and should be specifically targeted in a statute or regulation.

*Id.*

<sup>274</sup> *See supra* note 272; Braucher, *supra* note 25, at 421–23. Professor Korobkin appears to support a greater judicial role but one more constrained than advocated in this article. *See* Korobkin, *supra* note 25, at 1274–84.

<sup>275</sup> *See supra* notes 194–96 and accompanying text; *see also* PERILLO, *supra* note 197, § 9.37, at 381 (distinguishing Leff’s characterization of oppression and surprise in terms of both substantive content of contracts and procedural processes by which offensive terms find their way into contracts).

unreasonably favorable in its substance. In particular, I am advocating that either procedural or substantive unconscionability, standing alone, should be sufficient to permit judicial intervention or judicial refusal to enforce arbitration clauses.<sup>276</sup>

Although legislative or administrative guidance is of course helpful and welcome, courts should not be restrained in their contract policing powers merely because of the absence of statute, agency rule, or executive order. Rather, courts should rediscover and continue to exercise their historical power of policing contract formation, construction of contract language, and enforcement of contract terms in order to prevent unfairness in arbitration and to promote full disclosure, better understanding, and more meaningful consent in this aspect of contracting.

As discussed in Part IV of this Article, lower courts have to a large degree attempted to achieve this result in the aftermath of the Supreme Court's arbitral infatuation of the modern era.<sup>277</sup> Through what I have characterized as a cautious embrace of the unconscionability principle, lower courts have refused to enforce problematic arbitration clauses.<sup>278</sup> However, these courts have not only been relatively unaggressive in their use of unconscionability analysis but have also tended to take a trait-specific approach to unconscionability. Rather than starting from the premise that a court may act upon a finding of any type of unconscionability in an arbitration term, courts have looked for a particular type of problem in the arbitration arrangement as a prerequisite for refusing to enforce the text of the written clause.<sup>279</sup> As a result, these cases have spoken of an arbitration clause being infirm because of lack of mutuality, excessive fees, or a distant forum rather than finding the arbitration clause defective because it is unconscionable in a general sense.

This greater judicial vigilance in reviewing arbitration agreements is on the whole a welcome development. It represents a helpful reining in of the arguably rampaging pro-arbitration body of Supreme Court law of arbitration. As discussed in Part IV, the lower courts, whether consciously or not, have worked toward an equilibrium of more consumer-protective arbitration law by rediscovering unconscionability and related doctrines as a

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<sup>276</sup> See also PERILLO, *supra* note 271, § 9.37, at 381 (stating that "there is no basis" in the UCC unconscionability provision for requiring showing of both procedural and substantive unconscionability to render a contract provision unconscionable as a matter of law). In my view, the argument for requiring both procedural and substantive unconscionability as matter of common law is even weaker since the common law notion of unconscionability is at least as broad as that set forth in UCC section 2-302.

<sup>277</sup> See *supra* notes 165–76 and accompanying text.

<sup>278</sup> See *id.*

<sup>279</sup> *Id.*

means of doing what they can to police arbitration contracts within the area of discretion permitted them by the Court's arbitration precedents.

Although the new unconscionability and new equilibrium in arbitration is a welcome development, it remains an incomplete and excessively mild counter-revolution. Arbitration clauses that are unfair may yet escape judicial scrutiny because they do not fall directly into one of the categories (such as mutuality) that trigger judicial disapproval. The limited, situation-specific policing of arbitration by lower courts to date also holds substantial unintended consequences. For example, faced with a ban on mutuality, arbitration clause draftspersons may instead impose a mutual, but unfair or oppressive arbitration provision in a contract.<sup>280</sup> Rather than continue this pattern of seeking an equilibrium through proxies for policing by unconscionability, courts should instead expressly regulate arbitration terms by self-conscious reference to the unconscionability norm.

Although the notion of judicial policing of contracts with something as malleable as unconscionability has been viewed as too standardless,<sup>281</sup> the common law history of unconscionability suggests that it is not a rogue doctrine, but instead a relatively constrained judicial tool for policing contracts that can be consistently and fairly applied in a manner that does not unduly disturb the expectations or reliance interests of contracting parties.<sup>282</sup> As noted above, in many cases, courts will not invalidate an agreement or restrain the reach of its text unless there is both procedural and substantive unconscionability.<sup>283</sup> Even in such instances, a court may not decide to invalidate the entire contract but may merely sever the unconscionable provision from the contract as a whole.<sup>284</sup> Whether a court is

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<sup>280</sup> See Drahozal, *supra* note 156, at 561–65.

<sup>281</sup> See *supra* notes 181–212 and accompanying text (noting both the academic and judicial criticism of the unconscionability concept).

<sup>282</sup> See, e.g., Ellinghaus, *supra* note 22, at 759–60 (noting that the use of unconscionability by the courts has not been wild or standardless); Murray, *supra* note 22, at 3–4 (same); Joel A. Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 936–52 (1969) (discussing the concepts and definitions behind the unconscionability doctrine).

<sup>283</sup> See *supra* note 142 and accompanying text.

<sup>284</sup> See, e.g., *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682 (8th Cir. 2001) (refusing to invalidate entire an arbitration agreement due to a defective term that can be severed); *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1033 (S.D. Miss. 2000), *aff'd*, 265 F.3d 1059 (5th Cir. 2001) (same); *Jones v. Fujitsu Network Communications, Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (same); see also *Quiller v. Barclays Am./Credit, Inc.*, 764 F.2d 1400, 1402 (11th Cir. 1985), *cert. denied*, 976 U.S. 1124 (1986) (finding severability the general rule so long as severance does not make a contract meaningless); *Vineberg v. Brunswick Corp.*, 391 F.2d 184, 186 (5th Cir.



required to sever an unconscionable portion of an arbitration term where possible in order to save arbitrability has not been fully articulated by the courts. The Supreme Court had an opportunity to address this issue in the *Humana/Pacificare* case, where the parties and amici briefed the issue,<sup>285</sup> but the Court nevertheless declined. To the extent that the Court—or a critical mass of lower courts—support severability, the use of the unconscionability norm can add flexibility to the judicial policing of arbitration clauses. Instead of striking down such clauses on an all-or-nothing basis, courts may trim away unconscionable or problematic attributes of the clause without preventing an arbitration that was in the main agreed upon by the contracting parties.

Judicial use of the unconscionability norm is thus subject to substantial legal and practical constraint. A party who wishes to successfully challenge clear contractual text on the basis of the unconscionability norm must be able to articulate and support an argument that either the contracting process was procedurally unconscionable or that the contract term is substantively unconscionable, or perhaps both. The trial judge must accept the argument, or at least be willing to submit it to a jury that accepts the argument. Then, the appellate court must affirm the trial court's ruling. In other words, three out of four judges reviewing the matter must find an arbitration term to violate the unconscionability norm before the judicial system will interfere with the contract. As a practical matter, this is unlikely to lead to wholesale judicial rewriting of contractual text.

Judicial use of a general unconscionability norm in policing arbitration terms, and all contract terms for that matter, also has the advantage of permitting the evolution of judicial thought that is arguably the essence of common law.<sup>286</sup> Operating pursuant to a general unconscionability norm, a given jurisdiction can organically develop a body of unconscionability law that evolves over time and in response to the economic and social situations

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1968) (same); Korobkin, *supra* note 25, at 1288–89 (discussing the severability of unconscionable arbitration terms).

<sup>285</sup> *Pacificare Health Sys., Inc. v. Book*, 123 S. Ct. 1531 (2003). See Petitioner's Brief, *supra* note 108, at \*8–10 (arguing that severability is permitted and even required by the national policy in favor of arbitration embodied in the FAA); Respondent's Brief, *supra* note 108, at \*15–17 (arguing that severability impermissibly rewrites the arbitration provision to impose a contract that was never agreed to by either party); Brief of Amicus Curiae Chamber of Commerce, *supra* note 108, at \*3 at \*3 (arguing for severability); Brief of Amicus National Association of Consumer Advocates, *supra* note 108, at \*3 (arguing against severability).

<sup>286</sup> See generally Wes Parsons, Note, *The Inefficient Common Law*, 92 YALE L.J. 862, 867 (1983) (discussing the concept of common law adjudication and its Anglo-American history).

that confront contracting parties and the courts. Under a general common law unconscionability norm, courts can both treat like cases alike and make prudent distinctions. For example, an arbitration agreement providing for a foreign location may be unconscionable in a low-stakes dispute involving a consumer but be perfectly reasonable as between two medium size businesses. Similarly, such a clause may be more or less reasonable depending on whether the record reflects that the designation of a particular forum or location resulted in a lower price, a better warranty, or some other trade-off for the party agreeing to the provision. By contrast, a more specific checklist of what makes for unconscionability may not only limit courts from the outset, but also retard the evolution of the law of arbitration clause unconscionability.

In short, my own view is that much of the criticism of unconscionability, particularly its relatively frequent use to police arbitration clauses, is not persuasive. Although I prefer a more generalized unconscionability norm to item-specific unconscionability review by courts, the issues are largely the same for both varieties of unconscionability as are the relative pros and cons of judicial use of unconscionability in overseeing arbitration clauses.

Critics of unconscionability will undoubtedly respond that judicial interjection of this concept makes for interference with efficient terms. How do we know that a seemingly oppressive arbitration clause is efficient? According to the standard L&E analysis, the answer is that the “market says so.”<sup>287</sup> In this Article, I am not attempting to address in detail the economic arguments surrounding unconscionability. However, the economic argument against judicial enforcement of the unconscionability norm appears problematic in at least two ways.

First, the consumers interacting with vendors in the market for arbitration clauses are not fully rational, but only “boundedly” rational while the vendors are much closer to being fully rational, or at least in a more advantageous position to correct their mistakes in evaluating consumer preferences. Vendors can read market signals and respond.<sup>288</sup> They also have the financial incentive to devote more time to changing contract terms even where this results in minor benefits per contract or interaction. By contrast, consumers are closer to being “one-shot players” for many transactions, while vendors are the classic repeat players. When using arbitration clauses, vendors generally will have determined what arbitration clauses are in their best interests and will seek to impose them through standard form contracts.

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<sup>287</sup> See *supra* notes 213–21 and accompanying text (discussing the economic theory supporting enforcement of standard form contracts).

<sup>288</sup> See Korobkin, *supra* note 25, at 1220–46 (describing the contracting behavior of vendors and buyers).

They may know full well that a given arbitration organization is virtually guaranteed to bring them victory should a dispute arise with the consumer.<sup>289</sup> By contrast, the consumer is effectively precluded from engaging in the type of cost-benefit analysis necessary to determine whether to accept or reject the arbitration term or the contract containing the arbitration term. As a result, the market will not always produce efficient contract terms, particularly regarding arbitration, which governs the meta-issue of how contract rights are to be vindicated in the event of a dispute, rather than any specific aspect of the substance of the exchange provided for in the contract.

Second (and clearly beyond a full discussion in this Article), the economist's usual measure of efficiency—the Kaldor-Hicks criteria of wealth maximization—may be inapt for assessing the social utility of arbitration clauses. Most economists tend to measure efficiency and social value according to a Kaldor-Hicks or utilitarian criteria: if the use of the standard form term creates more savings or benefits for society as a whole than it causes detriment to an aggrieved person or pool of aggrieved persons, then the term is “efficient” within the meaning of this economic analysis.<sup>290</sup> Although this “greatest good for the greatest number,” utilitarian-

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<sup>289</sup> For example, the California Research Bureau of the California State Library has conducted a study suggesting that HMOs are likely to avoid consent to an arbitrator that rules against them and highly likely to seek to re-use those that find for them. See MARCUS NIETO & MARGARET HOSEL, CALIFORNIA RESEARCH BUREAU NO. 00-09, ARBITRATION IN CALIFORNIA MANAGED HEALTH CARE SYSTEMS 18–23 (Dec. 2000), available at <http://www.library.ca.gov/crb/00/09/00-009.pdf> (body of report); *id.*, available at [http://www.library.ca.gov/crb/00/09/Appendix\\_009.pdf](http://www.library.ca.gov/crb/00/09/Appendix_009.pdf) (appendix to report). Perhaps more troubling is the contention made by the National Association of Consumer Advocates' brief in *Humana/Pacificare*, which referred to a report on discovery produced in *Bowens v. First USA Bank, N.A.*, Civil Action No. 99-2479-PR (Cir. Ct. Montgomery Cty., Ala.), stating:

In an interrogatory response in that case, First USA stated that it had prevailed in 19,618 cases before [private arbitration services provider] the National Arbitration Forum [the arbitration provider designated in the bank's arbitration clause in its credit card agreements] while its card members had prevailed in only 87 cases. . . . First USA's success rate of 99.6% is astounding and strongly suggests that the National Arbitration Forum is unable to provide a fair and unbiased mechanism for resolution of disputes involving First USA.

Brief of Amicus Curiae National Association of Consumer Advocates, *supra* note 108, at \*6 (citing Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, WASH. POST, March 1, 2000, at E1).

<sup>290</sup> See POSNER, *supra* note 213, at 4.

style<sup>291</sup> argument may be apt for much social decisionmaking, it is arguably inapt when addressing the means by which disputes are resolved.

The very nature of adjudication is an inquiry into the relative factual and legal strengths of the positions of the disputants. Permitting adjudication rather than having all differences subject to a default rule minimizing fact-finding suggests that the social system has already moved away from a purely utilitarian approach and is more concerned with individual justice. Otherwise, disputes could be resolved by routinely splitting the difference or use of somewhat more tailored, situation-specific rules rigidly applied. These approaches might be far more efficient in the Kaldor-Hicks sense than either arbitration or litigation so long as the behavior of one of the disputants is not unduly bizarre. Under such non-adjudicative regimes, parties to a contract would still have an incentive to perform. Even if the judicial mechanism for dispute resolution was the flip of a coin, rational contracting parties will not want to risk the fifty percent chance of loss. In the case of the mandatory compromise, they will use this default rule to shape their behavior toward efficiency.

Of course, I am not proposing that judicial review of arbitration terms on grounds of unconscionability be so free-form as to be standardless. Rather, I am arguing that reviewing courts should not be tightly bound by the emerging “checklist” of unconscionable traits of arbitration clauses, even though that list has become quite extensive. Courts should remain free to find unconscionability irrespective of the form of that unconscionability in cases where the court is left with the overall impression that an arbitration term was unfairly achieved (procedural unconscionability) or is unfair in substance (substantive unconscionability). If the former occurs, the arbitration clause is inconsistently volitional and should not be enforced

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<sup>291</sup> Although wealth maximization and utility maximization are not technically the same thing, the concepts are similar in that both involve treating an aggregate gain as “good” even if in the course of achieving this aggregate gain, some individuals suffer losses or “bad” results. Similarly, a utilitarian philosophical approach, often called a teleological approach, is one in which the a policy, program, or social arrangement is considered “good” to the extent it produces greater aggregate happiness whatever the distribution of the happiness or even if some persons are miserable while the majority is happy. This is in contrast to the deontological approach associated with philosophers like Immanuel Kant, which argues that there are certain absolutes and that violation of these absolutes cannot be “good” even if more benefit from the violation than lose from the violation. *See KUKLIN & STEMPEL, supra* note 81, at 6 (“Teleological ethics declares that goodness dominates justice, that the just act is that which is required to increase the Good. Deontological ethics declares that justice dominates goodness, that the just act, one’s duty, is to be done even if it decreases the Good.”). Since either ethical school in pure form can lead to extreme or bizarre results, most societies practice a hybrid form of ethics that attempts to accommodate the greater good with adequate individual justice.

because of the consent norm in contract law. If the latter type of unconscionability exists, the manner in which the arbitration term was imposed is immaterial: unfairness is unfairness, however achieved.

As to the standards for applying the proposed standard-based, comprehensive concept of unconscionability, the accumulation of case precedent should provide substantial “notice” to contracting parties to guide their behavior in drafting, adhering to, performing, and disputing arbitration provisions. There is no need to move to a system of more formal checklists of “acceptable” traits and unconscionable traits as an official constraint on adjudication of arbitration terms. Case synthesis has already generated such a list as a guidepost and will continue to do so as courts apply the unconscionability norms in the future, thereby providing sufficient prediction of the law to guide actors in the marketplace.

Although many will undoubtedly view my proposal as insufficiently detailed, I offer as a workable standard for unconscionability the following: a term or condition is unconscionable, as a matter of either procedure or substance, when the party achieving arbitration in this manner would be unwilling to accept the arbitration provision if the roles were reversed. In other words, to be enforceable, an arbitration term should be one that was achieved in a manner the vendor would agree was procedurally fair if it were a consumer or employee. In addition, the substantive provisions of an arbitration term (e.g., cost-shifting, forum traits, control over forum, available remedies) should be the sort that the vendor would accept if it were substituted for the consumer or employee in the transaction. Where this test of symmetry cannot be met, the arbitration term is unconscionable and should not be enforced. Alternatively, where the vendor can demonstrate that the consumer/employee received some significant benefit in return for agreeing to the arbitration provision, courts need not insist on precise symmetry. For example, an arbitration provision that seems too advantageous to the vendor when standing alone may not be unconscionable as a whole if the consumer received a significant price reduction or the employee received a higher wage in return for agreeing to the arbitration clause.

To the extent additional specific guidance is required, contract law authorities Joseph Perillo and John D. Calamari have suggested that courts, and consequently contracting parties seeking to avoid having contract terms declared unconscionable, could look not only to the traits already viewed as suspect by some courts, but in addition may consider the “six illustrative circumstances which a court should consider in an unconscionability determination” set forth in the Uniform Consumer Sales Practices Act, which was released in 1970 (but not widely adopted by the states).<sup>292</sup> Under this

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<sup>292</sup> See PERILLO, *supra* note 271, § 9.40, at 391.

## ARBITRATION UNCONSCIONABILITY

Act, problematic contract provisions raising unconscionability concerns arise when the supplier has reason to know:

(1) that he took advantage of the inability of the consumer to reasonably to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors;

....

(3) that when the consumer transaction was entered into the consumer was unable to receive a substantial benefit from the subject of the transaction;

....

(5) that the transaction he induced the consumer to enter was excessively one-sided in favor of the supplier; or

(6) that he made a misleading statement of opinion on which the consumer was likely to rely to his detriment.<sup>293</sup>

Other traits for courts to use as guideposts for assessing unconscionability could include the illustrations of procedural unconscionability I have previously suggested for use:

- “Blameless Ignorance” as to the existence or effect of arbitration provisions,<sup>294</sup> a consideration likely to apply in many cases since arbitration terms are not salient to most consumers;<sup>295</sup>
- Inability to escape from adhesive terms because of their widespread, close-to-uniform use by vendors;<sup>296</sup>
- “Defective Agency,” in which an arbitration provision is negotiated by or adhered to without authorization.<sup>297</sup>

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<sup>293</sup> *Id.* (quoting UNIF. CONSUMER SALES PRACTICES ACT § 4). Omitted are criteria numbers (2) and (4), which involved aspects of a transaction designed to apply to terms other than arbitration clauses.

<sup>294</sup> Stempel, *supra* note 8, at 1435–37.

<sup>295</sup> See Korobkin, *supra* note 25, at 31.

<sup>296</sup> See Stempel, *supra* note 8, at 1438–42 (labeling this as an arbitrability defense of “inescapable adhesion”).

<sup>297</sup> *Id.* at 1443–44. The defective agency concept may have little actual application outside the context of labor organizations agreeing to arbitrate under a collective bargaining agreement where individual members wish to bring civil rights claims. Because the collective bargaining agreement generally relates only to terms and conditions of the union’s employment contract, my view is that these arbitration clauses should not foreclose civil rights litigation for members. *Id.* at 1443–47. In addition, the *Better Approach* article advocates strong contract policing if there is “dirty dealing” (procedural unconscionability) or substantive unconscionability in the form of highly one-sided arbitration provisions. *Id.* at 1437–38, 1442–43.

Other yardsticks for measuring any alleged unconscionable component of an arbitration term could also include:

- “[T]he degree to which terms of the transaction require consumers to waive legal rights”;<sup>298</sup>
- The competence of the adhering party and the presence of legal advice;<sup>299</sup>
- The value of consideration received in return for adhering to the contract term at issue.<sup>300</sup>

The social and legal system has always made situation-specific, dispute resolution on the merits available to disputants. This is the default rule society has implicitly embraced over the centuries. Even if parties “contract out of” this default rule in a manner that satisfies the Kaldor-Hicks test of efficiency, this may not be to the ultimate good of the socio-legal system, which is attempting to provide forms of dispute resolution that achieve rational, fair, merit-based results that are at least procedurally satisfactory to all disputants. Apart from whatever good derives from correct results for individual cases, the socio-legal system derives the aggregate benefits of social stability and public satisfaction.

The use of standard form contracts to escape this default norm of adjudication may be unacceptable even if it increases net social wealth. Such a situation would accomplish its efficiency by allowing a relatively small concentration of vendors to capture the net gain in wealth while many of the consumers would be relatively impoverished. Calling this a good result simply because the overall net wealth is greater seems inappropriate when the purported gains are so skewed in their distribution.

Examined another way, one can argue that the imposition of standard form arbitration with no judicial policing for unconscionability fails the standard Kaldor-Hicks criteria for efficiency. In counting costs and benefits, those defending the efficiency of form terms set by the market tend to look only at the effect on the vendors and consumers engaged in contracting. There is no real effort to value the gain or loss to the socio-legal system as a whole. But if my hypothesis is correct—that a significant perception of unfairness or inadequacy of dispute resolution is a substantial cost to

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<sup>298</sup> N.Y. CITY ADMIN. CODE § 2203d-2.0(b) (McKinney’s 2001); PERILLO, *supra* note 271, at 391 n.22 (citing § 2203d-2.0(b) with approval).

<sup>299</sup> See UNIF. CONSUMER CREDIT CODE § 1.107(4), 7 U.L.A. 112 (2002); PERILLO, *supra* note 271, at 391 n.23 (citing § 1.107(4) with approval).

<sup>300</sup> See UNIF. CONSUMER CREDIT CODE § 6.111(3); PERILLO, *supra* note 271, at 391 n.24 (citing § 6.111(3) with approval).

society—this cost should be counted in calculating the overall efficiency of contract terms. In other words, one cannot bless an arbitration clause as efficient unless one knows whether the total net gain to vendors, or the gain to vendors combined with savings to consumers, exceeds the social costs when inflexibly-imposed arbitration creates the impression of judicial coercion applied in the service of unfair forums and where many disputants are dissatisfied not only with the outcome of the dispute, but the procedure by which the dispute was processed.

There is also the problem of the absence of any serious empirical support for the economic rationale for judicial non-interference with form arbitration terms. One might accept that the market, in theory, will produce optimally efficient terms. For example, the average consumer may prefer a lower product price and an arbitration clause (even one providing for arbitration in a biased forum) in lieu of a higher product price and no arbitration clause.<sup>301</sup> But there is nothing to suggest that vendors imposing arbitration clauses actually lower their prices in conjunction with using arbitration clauses in their contracts. Similarly, there is no solid support for the theoretical idea that by using arbitration clauses, vendors are able to refrain from price increases that would otherwise occur.<sup>302</sup> The imposition of arbitration without judicial policing may merely result in a windfall to vendors rather than a benefit shared among vendors and consumers. The situation may still be one that is efficient in the broadest Kaldor-Hicks sense of the word, but it is not the efficiency that has historically been used to “sell” arbitration as a benefit to consumers as well as vendors.

Of course, litigation imposes social costs as well as generates the positive externalities I posit. In addition, it can be argued that where markets are competitive and barriers to entry are low, it will be difficult for vendors imposing arbitration clauses to retain all economic surplus from any actual savings of disputing costs. The idea is that at least some vendors will attempt to compete for business by passing on some of the disputing efficiencies obtained through imposing arbitration rather than litigating disputes with customers or employees. Although this argument is theoretically attractive, I remain skeptical largely because it is so hard to find any real evidence of: (1) such savings from substituting arbitration as the default for litigation; and (2) vendors sharing with consumers the purported savings from widely-imposed arbitration clauses. If such information were available, one would certainly

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<sup>301</sup> See Priest, *supra* note 214, at 1307–13.

<sup>302</sup> At least it has no empirical support of which I am aware. The scholarly writings positing the efficiency of standard form contract terms set by the market all make their case on the basis of assumption and theory rather than through empirical study. See *supra* notes 213–21 and accompanying text.



expect the proponents of mandatory arbitration, who have litigated the issue for more than twenty years, to produce such empirical support. They have not, but instead continue to argue their case for social gains solely on the basis of theory. Concern for contract fairness and consent should prompt courts to require more evidence before determining that arbitration agreements satisfy the unconscionability norm.

In addition, those favoring increased limitations on judicial intervention to enforce the unconscionability norm can also argue that courts have a serious institutional competence problem in that the court's knowledge is generally confined to the litigants, rather than to the overall markets, businesses, or behaviors implicated by the case. Although this is a valuable point to consider, I see it as a relatively weak argument against policing contracts according to unconscionability. First, courts can acquire a good deal of broad knowledge in an area implicated by a case. The parties and the fact witnesses implicitly do this in most cases. Second, judges and juries use their collective experience to fill in some of the blanks regarding behavior and conduct, making justifiable inferences as necessary. Third, expert witnesses can be brought to bear by either the litigants or the court so that the tribunal is better informed about information that transcends the parties for purposes of evaluating the fairness of arbitration clauses. Although this would be overkill if used in every case, it can be justified in select cases. After that, the common law development of unconscionability precedent serves to place this accumulated knowledge in the public and legal domain for future use by courts assessing unconscionability and arbitration.

Perhaps most important, a contract term affecting the means of dispute resolution in the event of contract discord is quite different than a contract term that merely affects a discrete part of the contract. A contract clause establishing arbitration or another means of dispute resolution is a "meta-term" that can affect the operationalization of all other aspects of the contract. It substitutes the designated arbitration forum for the default rule of the courts. This is quite different from a contract term that requires complaints to be filed within a reasonable time, or even one that limits consequential damages to a liquidated amount. With respect to contract terms other than arbitration, consumers and vendors may alternately "win some and lose some." But with arbitration clauses, a vendor's "win" on this point may effectively skew the parties' respective rights across the contract for a variety of disputes. In this sense, an arbitration clause is quite different than other contract terms and quite different from the example of consumer warranties or payment clauses that were the focus of not only the Leff critique, but also more recent commentary expressing wariness about undue interference with

form contract terms via the unconscionability norm.<sup>303</sup> Bounded rationality analysis strongly supports this view, concluding that for most contracting parties, an arbitration clause may not be a salient term even though it can have significant impact (and significantly disadvantage the adhering party) in the event of a dispute.<sup>304</sup>

In light of these shortcomings in the economic analysis as well as the emerging insights of cognitive theory, recent commentary has suggested that there is at least some role to be played by courts in policing arbitration agreements.<sup>305</sup> However, many courts and commentators, following the Leff tradition, want unconscionability to be circumscribed and specific rather than general. They would also prefer that the specific standards for unconscionability be determined by legislatures or administrative agencies rather than courts. Unfortunately, this view fails to fully appreciate the problems of depending on a legislative or administrative solution to the problem of policing unconscionable contract terms.

In this vein, it is important to remember that Leff largely wrote his analysis of contract and unconscionability before intervening developments regarding the analysis of administrative and legislative institutions. *The Emperor's New Clause* was published in 1967 at a time when confidence in political institutions remained high. It was the time of the New Frontier and the Great Society, of an optimism about the role of government and the rationality of the political process.<sup>306</sup> The general view was that legislatures

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<sup>303</sup> See, e.g., Braucher, *supra* note 25, at 421–23; Korobkin, *supra* note 25, at 1290–95. In addition, arbitration clauses are the type of contract term that laypersons are far less likely to understand without investing significant resources toward the task of evaluation. According to cognitive theory, they are unlikely to make such an investment due to the bounded rationality of law consumers in this position. See *id.* at 12–15.

<sup>304</sup> See Korobkin, *supra* note 25, at 31.

<sup>305</sup> See *id.* at 70–80.

<sup>306</sup> The “New Frontier,” President John F. Kennedy’s (1961–63) campaign slogan, was designed to connote that he was younger and more vibrant than the President he was replacing (Dwight D. Eisenhower) and that his administration would be active in “getting the country moving again.” See ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY* 250–95 (2003) (describing Kennedy’s political platform in the 1960 presidential campaign). The “Great Society” was the popular name for the set of liberal social programs championed by President Lyndon B. Johnson (1963–69), including efforts broadly known as the “War on Poverty.” See BARRY R. FURROW ET AL., *HEALTH LAW* 539–51 (2d ed. 1991) (describing the Johnson administration’s successful push for Medicare and Medicaid); JONATHAN RAUCH, *GOVERNMENT’S END: WHY WASHINGTON STOPPED WORKING* (1999) (describing the rise and fall of large government social programs, including Johnson’s Great Society).

Even prior to the liberal Democratic administrations of Presidents Kennedy and Johnson, the nation and society had been in something of an “era of good feeling” about

were composed of reasonably intelligent, well-informed members, who were collectively trying to make effective public policy in response to perceived social needs.<sup>307</sup> Similarly, administrative agencies, although technically an arm of the executive branch, were thought of as repositories of expertise that could be deployed to solve the societal problems confronting the agency.<sup>308</sup>

Contrast the situation when Leff wrote with today's received intellectual view regarding political institutions. Legislatures are thought to be the captives of interest groups with their ability to respond restricted both by interest group politics and the limitations of agenda-setting and voting behavior, which may prevent the true preferences of the body from being enacted into law.<sup>309</sup> Administrative agencies are thought to frequently be

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government institutions, despite the looming presence of the Cold War with the former Soviet Union and its allies. President Eisenhower (1953–61) was a hero of the Second World War, which the United States had prosecuted successfully under the liberal Democratic administrations of Presidents Franklin D. Roosevelt and Harry S. Truman: a time during which domestic policy and public opinion had been bullish on the role of government and its institutions. This included the advent of the New Deal and its many government initiatives and regulatory agencies, which were not curtailed by Eisenhower (a moderate Republican who also was forced to deal with a U.S. Senate controlled by powerful Democratic Majority Leader and pro-government liberal Lyndon Johnson). *See* ESKRIDGE ET AL., *supra* note 80, at 1100–08 (describing governmental and agency growth during New Deal era). In short, the 1960s was probably both the apogee and last gasp of unbridled optimism about government activism by the legislature and administrative agencies. But even then, the seeds of future criticism were sown and could have been familiar to Leff at the time of the 1967 article. *See e.g.*, MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 79–97 (1955); ANTHONY DOWNS, *INSIDE BUREAUCRACY* 84–97 (1967);

<sup>307</sup> The period from the 1950s through the early 1960s was also a time of relatively little division in America over public policy and was even referred to as a time of the "end of ideology." *See e.g.*, DANIEL BELL, *THE END OF IDEOLOGY* 17 (2000); ROBERT DAHL, *PLURALISM* 1–32 (1957); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92–126 (2d ed. 1979) (describing the earlier era as something of a golden age, later replaced by legislatures unwilling to make hard political choices and delegating authority to administrative agencies to avoid legislative decisionmaking).

<sup>308</sup> *See* JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 222–54 (1990) (noting both the promise and failure of the National Traffic and Motor Vehicle Safety Act of 1966); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671–76 (1975).

<sup>309</sup> *See* DANIEL A. FARBER & PHILIP B. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 13–17 (1991); MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION* 114–25 (1965); MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 31–34 (1982). Of course, recognizing the impact of interest groups and deciding what might be an apt judicial response are two

captured by the entities they are supposed to regulate, a process fueled by familiarity, political pressure on the administrative experts, and the revolving door process by which agency positions are filled.<sup>310</sup>

None of this is news today. Although perhaps excessively pessimistic,<sup>311</sup> there is no doubt that today's intellectual view of the political branches posits that legislatures and administrative agencies are limited in their ability to intervene at all on behalf of contractually oppressed parties, much less to intervene effectively and positively on their behalf.<sup>312</sup> As a result, it now seems unrealistic (at least to me) to take the position that contract policing on the basis of unconscionability should be the near-exclusive province of the legislature or executive agencies.

However, a preference for legislative or administrative contract policing was far more defensible at the time of *The Emperor's New Clause*. The UCC had been drafted by a seemingly responsible private legislature seemingly untainted by interest group pressure.<sup>313</sup> Contrast this to the most recent

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different things. Compare Einer R. Elhauge, *Does Interest Group Intrusive Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 48-101(1991) (arguing that public choice and interest group theory do not justify a more active judicial review) and Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1289-90 (1994) (same), with Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227-34 (1986) (suggesting that the implications of interest group theory justifies a more searching judicial review and a greater effort to construe statutes in a public-regarding manner) and Edward Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 4-64 (1991) (same, but with more support for judicial intervention and emphasis on purpose-based statutory construction).

<sup>310</sup> See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 503-11 (1989); Richard Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 484-89 (1990).

<sup>311</sup> For a view contrary to the gloom-and-doom attitude toward the political process reflected in much public choice scholarship, see STEVEN KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* 227-31 (James Q. Wilson ed., 1987); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 82 (1984).

<sup>312</sup> See ESKRIDGE ET AL., *supra* note 80, at 50-60; ROBERT A. DAHL, *DILEMMAS OF A PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 1-7 (1982); WILLIAM H. RIKER & PETER C. ORDESHOOK, *AN INTRODUCTION TO POSITIVE POLITICAL THEORY* 1-7 (1973); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528-63 (1992).

<sup>313</sup> See WHITE & SUMMERS, *supra* note 132, §§ 4.1, 4.2; Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 371-97 (1995); Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-54*, 49 BUFF. L. REV. 359, 415-24

statutory efforts of the National Conference on Uniform State Laws, where model statutes on banking and computer contracts have been accused of serving the industry with little regard for the public.<sup>314</sup> Public legislatures, such as Congress, have been accused of becoming either gridlocked or even captured by interest groups.<sup>315</sup> Seldom in recent years has Congress been regarded as producing purely public-regarding legislation. Many of the scholarly works symptomatic of this new view were not published until well after Leff's article recommending that courts stay out of the unconscionability business.<sup>316</sup>

Administrative agencies have perhaps been even more tarred by academic and political commentary in the years since Leff wrote. Richard Stewart's seminal *The Reformation of American Administrative Law*, which forcefully posited the case for agency capture by interest groups<sup>317</sup> was not published until eight years after *The Emperor's New Clause*. The ensuing fifteen years saw an avalanche of commentary in this vein.<sup>318</sup> As with legislatures, evaluating the product of administrative regulation is complex. Agencies, like legislatures, have capable defenders who argue that the processes are still public-regarding rather than private-regarding on the whole.<sup>319</sup>

However, it seems beyond doubt that both the intellectual community and the broader political community have become far more pessimistic about the performance of the legislative and executive branches than was the case when Leff launched his attack on judicial use of the unconscionability norm, unguided by neither specific administrative nor legislative guidance. The

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(2001); Allen R. Kamp, *Uptown Act: A History of the UCC: 1940-49*, 51 SMU L. REV. 275, 306-13 (1998).

<sup>314</sup> See Scott J. Burnham, *Perspectives on the Uniform Laws Revision Process*, 52 HASTINGS L.J. 603, 603-05 (2001); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1711-15 (1999); Richard E. Speidel, *Revising UCC Article 2: A View From the Trenches*, 52 HASTING L.J. 607, 617-18 (2001).

<sup>315</sup> See *supra* note 309.

<sup>316</sup> See *id.*

<sup>317</sup> See Stewart, *supra* note 308, at 1671.

<sup>318</sup> See, e.g., Abner J. Mikva, *Symposium on the Theory of Public Choice Foreword*, 74 VA. L. REV. 167, 167-76 (1988).

<sup>319</sup> See, e.g., STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 28-30 (1979); Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1054-60 (discussing the modern trend toward judicial deference to administrative agency interpretations even prior to the Supreme Court's opinion in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), in significant part because of expertise and competence of agencies).

intellectual development of public choice research and theory strengthens the case for giving the judiciary a more robust role in policing contracts, particularly arbitration clauses, according to the unconscionability norm.

Of course, as noted above, the judiciary has not escaped unscathed from criticism during the years since publication of *The Emperor's New Clause*. But in the main, the judiciary was removed from its pedestal much earlier as a result of the legal realist critique.<sup>320</sup> Since 1967, despite the popular political attacks on "activist" judging, there has been relatively little serious academic criticism of judicial performance.<sup>321</sup> To be sure, individual judges may err, but this is not the type of problem on which I focus.<sup>322</sup> Adjudication may be expensive. Lay jurors may pose competence issues or valuation problems. But few serious observers have attempted to make a case that courts fail to correctly decide legal issues most of the time. In addition, many prominent scholars have forcefully argued that as a matter of institutional competence, courts are the best situated of the three branches for making decisions consistent with contemporary values.<sup>323</sup>

Although the issue is, of course, not open-and-shut, I read the literature of institutional competence as suggesting that courts are indeed likely to be superior to legislatures or administrative agencies in developing the contours of a general unconscionability norm through the traditional common law means as applied to particular cases.<sup>324</sup> As a matter of positive political theory, a statute can direct judicial activity in this regard.<sup>325</sup> An administrative rule or interpretation is normally granted substantial deference by the courts.<sup>326</sup> If legislatures and agencies wish to address the problem of arbitration clause unconscionability, they can and will, one hopes, do so in a public-regarding manner and not as agents of vendors attempting to insulate them from liability. But in the absence of such legislative or administrative

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<sup>320</sup> See KUKLIN & STEMPEL, *supra* note 81, at 150–58.

<sup>321</sup> But see Guthrie et al., *supra* note 267, at 777–89 (assessing survey data on judicial decisionmaking, implicitly suggesting some shortcomings but also suggesting that judicial performance is good on the whole).

<sup>322</sup> For that reason, I do not include scholarly commentary that criticizes a particular case or single judge as being an indictment of the "judicial system" per se.

<sup>323</sup> See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 16–30 (1982); Eskridge & Frickey, *supra* note 261, at 691–95.

<sup>324</sup> The argument of judicial advantages in this regard is particularly well made in CALABRESI, *supra* note 323, at 16–30.

<sup>325</sup> See Hart, Jr. & Sacks, *supra* note 258, at 165–67 (noting how legislation binds courts absent unconstitutionality).

<sup>326</sup> See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

guidance, there is nothing wrong or imprudent about judicial use of the unconscionability norm to police arbitration agreements.

Further, to perhaps state the obvious, arbitration appeared not to be considered by Leff at all in discussing unconscionability. In addition, when Leff wrote, he could not have anticipated the aggressive pursuit of mass privatization of dispute resolution that developed as the Supreme Court ushered in the new era of more modern, pro-arbitration jurisprudence.<sup>327</sup> As a result, the legal landscape of arbitration today is far different than it was thirty-five years ago when the Leff criticisms of judicial use of the general unconscionability norm were planted and took the root that today has grown into an intellectual suspicion of unbridled unconscionability analysis.

In 1967, labor arbitration pursuant to a collective bargaining agreement and commercial arbitration among merchants were the only types of arbitration receiving significant judicial attention. They were practically the only types of arbitration, save for perhaps construction industry arbitration and statutorily required arbitration of insurance claims. Today, this “old” type of arbitration continues to exist and there is also a “new” type of arbitration that has received the most legal scrutiny from arbitration critics. New arbitration involves employees and consumers, including buyers of all stripes and credit card users. Franchise agreements that require arbitration are a mix of old and new arbitration in that the franchisee is not as “boundedly” rational or unsophisticated as a typical consumer, but nonetheless has little effective leverage against franchisers in most instances.<sup>328</sup>

In total, the late twentieth and early twenty-first centuries present a picture of arbitration and a more aggressive use of arbitration than could have been imagined by Professor Leff and the others who debated the merits of the unconscionability norm during the late 1960s. Leff may have won that debate then. He at least inflicted significant wounds upon the unconscionability concept.<sup>329</sup> But that was then and this is now. The anti-unconscionability arguments of the 1960s, even if persuasive at the time, are not persuasive today.<sup>330</sup>

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<sup>327</sup> See *supra* notes 231–39 and accompanying text.

<sup>328</sup> See Stempel, *supra* note 30, at 334–40 (coining and discussing the terms “old” and “new” varieties of arbitration).

<sup>329</sup> See *supra* notes 21–22 and accompanying text (describing the unconscionability debate in the wake of *The Emperor’s New Clause*).

<sup>330</sup> Sadly, Professor Leff died of cancer in 1981 at age 46. See Marcia Chambers, *Arthur A. Leff is Dead at 46: Professor at Yale Law School*, N.Y. TIMES, Nov. 4, 1981, at A26. Although he continued to be an active and prominent scholar until the time of his death, his scholarly interests had largely moved away from unconscionability and toward general legal theory and legal ethics. See, e.g., ARTHUR ALLEN. LEFF, SWINDLING AND SELLING (1976); Leff, *Law And*, *supra* note 194, at 1008–11; Leff, *Unspeakable Ethics*,

## VI. CONCLUSION

This Article has traced the development of the Supreme Court's arbitrability doctrine and the rise of unconscionability as a counterweight to the arguable excesses of that doctrine. In the wake of the Court's expansive endorsement of a new regime of more common mandatory arbitration controlled by federal law, lower courts were slow in applying unconscionability analysis to arbitration provisions. Academic, doctrinal, theoretical, political, and social forces were all combining to discourage judicial use of the unconscionability norm at the same time that infatuation with ADR and arbitration was driving the Court toward an extremely pro-arbitration body of law. Only as the Court's zeal for arbitration wore thin did unconscionability experience a resurgence, partly because the Court left little other recourse for regulating arbitration terms and partly because courts were confronted by a growing number of overreaching and unfair arbitration provisions.

After nearly twenty years of aggressive pro-arbitration jurisprudence from the Supreme Court, it appears that lower courts have gradually reacted in a manner designed to achieve greater equilibrium between drafters and nondrafters of arbitration terms. The vehicle for pursuing this equilibrium has

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*supra* note 194. He was also working on a legal dictionary as well. See Chambers, *supra* at A26. *The Emperor's New Clause*, however, remained identified in the minds of most as Leff's most prominent and influential work. Grant Gilmore, a retired member of the faculty, recalled Leff's the article, "It was both an extraordinary work of scholarship and a remarkably profound analysis of the deep current in the law of contracts. He had extraordinary originality." *Id.*

The one exception to Leff's drift away from contract law and unconscionability was a four-page comment, Arthur Allen Leff, *Thomist Unconscionability*, 4 CAN. BUS. L.J. 424, 424-27 (1980), an article described as "short but insightful." John-Paul F. Bogden, *On the "Agreement Most Foul": A Reconsideration of the Doctrine of Unconscionability*, 25 MANITOBA. L.J. 187, 187 (1998). *Thomist Unconscionability* appears consistent with other post-*Emperor* writings of Leff on the subject. See Leff, *supra* note 186, at 140-47; Leff, *supra* note 22. In *Thomist Unconscionability*, Professor Leff appears not to have been moved by the intervening thirteen years of public choice and administrative law writings. Perhaps the coming behavioral science and new legal process writings would have made him more tolerant of judicially imposed unconscionability policing. Perhaps the advent of new arbitration entities, which appear to strive for kangaroo-court status, would have made him more charitable toward both the unconscionability norm and a strong judicial role in its enforcement. Perhaps not. Regardless, one can certainly argue that developments since 1967, particularly the Supreme Court's vigorous preference for arbitration, coupled with the large, seemingly opportunistic drive by business interests toward mandated arbitration for society's "little guys," ought to prompt some modification or contraction of the Leff critique. See Sternlight, *supra* note 9, at 637-39 (framing mandatory arbitration as evolving toward a big-vs.-small conflict).



been unconscionability analysis, albeit in restrained fashion, giving specific focus on particularly problematic traits of some arbitration agreements rather than emphasizing any general judicial power to police contract terms. Unfortunately, unconscionability was given such a bad rap during the late 1960s, 1970s, and 1980s that even today, commentators remain reluctant to endorse broad judicial policing based on unconscionability grounds.<sup>331</sup>

However, the answer of many courts to the new twenty-first century problem of arbitrability has been the rediscovery and reinvigoration of a venerable doctrine<sup>332</sup> that deserves greater respect and more frequent use across the board. Continued use of the unconscionability norm would serve contract law well generally and arbitration law in particular. The rediscovery of unconscionability has softened the rougher edges of the Supreme Court's arbitration formalism and made both the judicial and arbitration systems more effective. The arbitration-unconscionability experience suggests that a relatively less constrained version of the unconscionability norm should continue to play a role in contract construction, both for arbitration terms and other contract provisions.

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<sup>331</sup> See *supra* notes 140–42 and accompanying text.

<sup>332</sup> See Knapp, *supra* note 247, at 797 n.120 (“If nothing else, the arbitration wars have brought unconscionability back to center stage.”); Korobkin, *supra* note 25 (“[A]rbitration clause jurisprudence is a good source of insight into the unconscionability doctrine.”).