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COMMENT

Contract After *Concepcion*: Some Lessons from the State Courts

In *AT&T Mobility LLC v. Concepcion*, the United States Supreme Court held that the Federal Arbitration Act (FAA) preempts the use of unconscionability doctrine to invalidate arbitration clauses that foreclose classwide remedies.[1] The Court found that requiring the availability of classwide arbitration raises costs and prolongs disputes, thereby interfering with the "fundamental attributes of arbitration" at the core of the FAA.[2] The majority construed the FAA to allow for the invalidation of arbitration clauses "by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[3]

The five-to-four decision in *Concepcion* was quickly lambasted as brazenly conservative[4] and anti-consumer.[5] More recently, some scholars have raised a different concern: that *Concepcion* signals the federal colonization of state contract law.[6] Casting aside Justice Brandeis's observation that "a single courageous state" must sometimes be permitted to "serve as a laboratory,"[7] the Supreme Court has instead insisted that the presence of an arbitration clause

1. 131 S. Ct. 1740, 1748 (2011).

2. *Id.*

3. *Id.* at 1746 (quoting Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996)).

4. *See, e.g.*, Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 317 (2012).

5. *See, e.g.*, Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 724 (2012).

6. *See, e.g.*, Christopher R. Drahozal, *FAA Preemption After* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 153, 155 & n.8 (2014). Drahozal's incisive piece on *Concepcion*, which touches on many of the same themes explored here, went to press while this Comment was being edited.

7. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

prevents state-court judges from applying contract defenses on which they had previously relied for decades.[8]

How much of state contract law remains after *Concepcion*? During the past several years, state courts have been engaged in a tug-of-war with the Supreme Court over the answer to this question. In 2012 and 2013, several state courts developed theories under which *Concepcion* could be cabined or read narrowly. The Supreme Court then invalidated the most promising of those theories in *American Express Co. v. Italian Colors Restaurant*. In that case, the Court held that class-arbitration waivers cannot be invalidated as unconscionable even when the cost of individually arbitrating a statutory claim vastly exceeds the potential recovery.[9] After *Italian Colors*, state judges tugged back yet again, deploying new readings of *Concepcion* that left room for state courts to refuse to enforce at least some forced-arbitration clauses.[10]

This Comment explores the vitality of state contract law after *Concepcion*. In the three years since the case was decided, state courts have developed a number of innovative, narrow readings of *Concepcion*. These readings, taken together with other opinions that have sought to limit the scope of FAA preemption, show that state-court judges are eager to protect their traditional role as the final arbiter of contracts.

Part I catalogues recent state-court approaches to forced-arbitration clauses, focusing in particular on four arguments: (1) *Concepcion* forecloses the use of unconscionability doctrine only when the application of that doctrine would interfere with the "fundamental attributes of arbitration"; (2) *Concepcion* applies to categorical but not case-by-case unconscionability analysis; (3) *Concepcion* does not prevent state courts from interrogating the conscionability of the formation of the entire contract; and (4) "arbitration" might be defined narrowly so as to limit the scope of FAA preemption. Building on these theories, Part II suggests a more ambitious avenue for innovation within the space left open by *Concepcion*. By applying duress doctrine to certain contracts containing forced-arbitration clauses, state courts

8. *Concepcion*, 131 S. Ct. at 1746-48 (limiting the use of unconscionability analysis).

9. 133 S. Ct. 2304, 2306 (2013). Although *Italian Colors* involved a claim under a federal antitrust statute, courts have concluded that the reasoning of *Italian Colors* travels to causes of action based in state law. *See, e.g.*, Machado v. System4 LLC, 993 N.E.2d 332, 333 (Mass. 2013). The U.S. Supreme Court itself recently signaled that the applicability of *Italian Colors* should not vary based on whether the underlying claim sounds in state or federal law. *See* CarMax Auto Superstores California, LLC v. Fowler, 134 S. Ct. 1277 (2014) (vacating a decision that had applied "effective-vindication" theory in a case involving a state-law cause of action).

10. *See, e.g.*, Sonic-Calabasas A, Inc. v. Moreno (*Sonic II*), 311 P.3d 184 (Cal. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).

and arbitrators[11] may be able to protect lay claimants while still remaining faithful to Supreme Court precedent.

I. NARROW READINGS OF *CONCEPCION*

Many state courts have read *Concepcion* broadly, concluding that it requires judges to enforce nearly all arbitration agreements.[12] Others have applied *Concepcion*, but have done so while casting doubts on its wisdom.[13] Still other courts—particularly those of California, Massachusetts, Missouri, and Washington—have read *Concepcion* narrowly. These readings of *Concepcion* can be grouped into four broad categories.

A. Unconscionability Analysis Survives Concepcion

In 2005, the California Supreme Court held in *Discover Bank v. Superior Court* that it was categorically unconscionable to enforce a class-arbitration waiver in a case involving a forced-arbitration clause in a consumer contract and a predictably small amount of damages.[14] In *Concepcion*, the Supreme Court indicated that the *Discover Bank* rule was preempted because it "interfere[d] with the fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA."[15] As examples of rules interfering with the fundamental attributes of arbitration, the Court listed contract defenses that conditioned the enforcement of an arbitration clause on the use of a jury, the use of the Federal Rules of Evidence, or the use of court-monitored discovery.[16]

These three examples do little to resolve the question of which attributes of arbitration are "fundamental." Some commentators have adopted a broad

11. For a discussion of where the duress theory could be argued, see *infra* notes 45-51 and accompanying text.

12. *See, e.g.*, McKenzie Check Advance of Florida, LLC v. Betts, 112 So. 3d 1176, 1183 (Fla. 2013); Qualls v. Alpine Direct Servs., LLC, 2012 WL 2375272 (Ill. App. Ct. 2012); York v. Dodgeland of Columbia, Inc., 749 S.E.2d 139, 153 (Ohio Ct. App. 2013); Aldridge v. Thrift Fin. Mktg., LLC, 376 S.W.3d 877, 882 (Tex. Ct. App. 2012); Cottonwood Fin., Ltd. v. Estes, 810 N.W.2d 852, 858 (Wis. Ct. App. 2012).

13. *See, e.g.*, LegalZoom.com, Inc. v. McIllwain, 429 S.W.3d 261, 265 (Ark. 2013); Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 569 (Ky. 2012); *see also* Kelker v. Geneva-Roth Ventures, Inc., 303 P.3d 777, 787 (Mont. 2013) (Baker, J., dissenting).

14. 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751-52 (2011).

15. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011).

16. *Id.* at 1747.

definition of "fundamental attributes of arbitration," concluding that the FAA preempts the imposition of any contract defense that makes arbitration "more formal, costlier, or less efficient."[17] Others have concluded that the "fundamental attributes of arbitration" may be narrower, and that only contract defenses that are closely analogous to the Court's examples should be struck down.[18] The California Supreme Court recently weighed in on this question in *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic II*). Justice Goodwin Liu's opinion for the majority persuasively argued that the *Concepcion* Court intended the "fundamental attributes of arbitration" to include low costs, efficiency, speed of dispute resolution, and expert adjudicators.[19]

Significantly, *Concepcion* does not entirely foreclose the use of unconscionability doctrine to invalidate forced-arbitration clauses.[20] On the contrary, state-court judges can use unconscionability rules to police arbitration clauses so long as such rules do not interfere with the "fundamental attributes of arbitration."[21] For example, California courts have found that

17. Arpan A. Sura & Robert A. DeRise, *Conceptualizing* Concepcion*: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 449 (2013).

18. Drahozal, *supra* note 6, at 165 & n.67.

19. Sonic-Calabasas A, Inc. v. Moreno (*Sonic II*), 311 P.3d 184, 290 (Cal. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).

20. *See* Michael A. Helfand, *Purpose, Precedent, and Politics: Why* Concepcion *Covers Less Than You Think*, 4 Y.B. ON ARB. & MEDIATION 126, 128 (2012).

21. *Concepcion* did not address the question of whether the forum is itself a fundamental attribute of arbitration. This leaves open an interesting possibility: states could create arbitration agencies to hear claims arising under state statutes. States could also provide for various procedural protections within these arbitrations, such as the availability of counsel and translators. As long as these new arbitration agencies safeguarded the fundamental attributes of arbitration by providing speedy and informal dispute resolution, they would not be preempted by the FAA. Although it would be difficult to ensure that arbitration agencies provided quick remedies, it would not be impossible. *See* Judith S. McIlwee, Comment, Circuit City *Meets the California Labor Commissioner: Does the FAA Preempt Administrative Claims?*, 40 CAL. W. L. REV. 383, 396-97 & n.124 (2004) (discussing California's administrative procedure for handling employment disputes, which has speedily resolved nearly two million cases). Once the agencies existed, consumers could apply market pressure to force companies to designate the agencies as arbitrators. *See Cheerios Backtracks: It's OK to "Like" Without Losing Your Rights*, NBC NEWS (Apr. 21, 2014, 12:12 PM), http://www.nbcnews.com/business/consumer/cheerios-backtracks-its-ok-without-losing-your-rights-n85831 [http://perma.cc/4GQD-H6W6] (discussing Cheerios's decision to alter its arbitration clause in response to consumer pressure). State-court judges might also be able to compel arbitration before the state agencies by holding that it would be unconscionable to send parties to the arbitration provider specified in the contract. *See Sonic II*, 311 P.3d at 289-300 (finding arbitration clause unconscionable because it forced employees to waive their statutory right to an administrative hearing and instead arbitrate under procedures that were more formal and less friendly to the claimant).

arbitration clauses are unconscionable if they include an unreasonable limitation on damages,[22] if they impose a "threshold" amount in controversy before claimants can arbitrate,[23] or if they allow a prevailing employer to recoup attorneys' fees without making the same provision for a prevailing claimant.[24] These decisions concerned contract terms that had nothing to do with the cost, speed, or efficiency of the arbitration proceeding. Therefore, the courts concluded that there was no basis for the FAA to preempt the state's determination that these provisions were unconscionable.

B. The FAA Preempts Only Categorical Unconscionability Rules

Other courts have concluded that the FAA has preemptive force only when states have adopted *across-the-board* rules requiring some feature of an arbitration agreement to be held *categorically* unconscionable. On this view, the problem with the *Discover Bank* rule was its breadth; it required the invalidation of class-arbitration waivers even when they existed within decidedly pro-consumer contracts "that might . . . otherwise [have been] conscionable under [state] law."[25] In the wake of *Concepcion*, some courts have concluded that as long as judges determine unconscionability through a context-based, *case-by-case* approach,[26] the FAA will not necessarily preempt a judicial determination of unconscionability.

The Washington Supreme Court pioneered this approach. In *Gandee v. LDL Freedom Enterprises, Inc.*, that court considered three terms contained within the arbitration clause of a debt-adjustment contract: a "loser pays" provision, a venue provision, and a provision requiring arbitration within thirty days of the emergence of the dispute.[27] The court also considered the validity of the contract's severability clause.[28] After separately considering each of the four clauses "*based on the specific facts at issue in the current case*,"[29] the *Gandee* court concluded that the three provisions of the arbitration clause were substantively unconscionable and that the arbitration clause could not be

22. Harper v. Ultimo, 7 Cal. Rptr. 3d 418 (Ct. App. 2003).

23. Little v. Auto Stiegler, Inc., 63 P.3d 979 (Cal. 2003).

24. Ajamian v. CantorCO2e, L.P., 137 Cal. Rptr. 3d 773 (Ct. App. 2012).

25. Gandee v. LDL Freedom Enters., Inc., 293 P.3d 1197, 1203 (Wash. 2013).

26. *Id.* at 1202-03; *see also* Saleemi v. Doctor's Assocs., Inc., 292 P.3d 108, 113 (Wash. 2013) (discussing *Gandee*'s case-by-case approach).

27. *Gandee*, 293 P.3d at 1200-01.

28. *Id.* at 1201.

29. *Id.* at 1203 (emphasis added).

severed from the contract. To date, the Supreme Court of Missouri[30] and the lower courts in California[31] have embraced the *Gandee* approach.

C. *The FAA Permits Courts to Interrogate the Conscionability of the Formation of the Entire Contract*

In his seminal article *Contract as Thing*, Arthur Leff argued that contracts of adhesion are not actually contracts at all; rather, they are "unilaterally manufactured commodities" and "products of non-bargaining."[32] In Leff's view, the agreement at issue in *Concepcion* would best be described not as a contract but as a *product*—a "thing" that could be bought and sold, but whose terms could not be negotiated.[33] On this theory, applying unconscionability analysis to arbitration clauses misstates the problem by committing a classification error. The significant issue is not whether the arbitration clause is unconscionable, but rather whether the "contracty thing[]"[34] containing the arbitration clause can even be classified as a contract.

Some states, while stopping short of classifying contracts as products, have used similar arguments as a kind of background principle that counsels for aggressive interrogation of a contract's formation. For example, the Missouri Supreme Court held in *Brewer v. Missouri Title Loans* (*Brewer II*) that the conscionability of a class-arbitration waiver should be determined by applying contract law to determine whether the formation of the *agreement as a whole* was conscionable.[35] In that case, the court held that a gross imbalance in bargaining power rendered a consumer arbitration clause unconscionable. The evidence in that case "demonstrated that no consumer ever successfully had renegotiated the terms of the title company's arbitration contract."[36] Eager to

30. Brewer v. Missouri Title Loans (*Brewer II*), 364 S.W.3d 486, 490-91 (Mo. 2012) (en banc), *cert. denied*, 133 S. Ct. 191 (2012).

31. *See, e.g.*, Vargas v. Sai Monrovia B, Inc., 157 Cal. Rptr. 3d 742, 753 (Ct. App. 2013).

32. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 147 (1970).

33. Significantly, products can be regulated by the state. For example, a state could decide that if an agreement to provide cell-phone service cannot be negotiated by the consumer, then that agreement is actually a *product* rather than a *contract*. Such a decision would make this agreement a non-contract for the purposes of state law, thereby removing the agreement from under the aegis of the FAA and enabling its direct regulation as a product. Leff notes that, "*when seen as products*, ["things"] have been regulated as to quality for quite a long time. Life insurance contracts, for instance, have been in effect written by deputy insurance commissioners for years." *Id.* at 149-50.

34. *Id.* at 155.

35. *Brewer II*, 364 S.W.3d at 490-91.

36. *Id.* at 493.

regain some authority over state contracts, judges in New Jersey and Hawaii have already begun to embrace certain tenets of the *Brewer II* approach.[37]

Although the *Brewer II* court framed its approach in the language of procedural unconscionability, the argument here is similar to Leff's: negotiation and bargaining are an essential part of contract. If state courts find that some agreement seems too unfair—for example, if the agreement cannot be negotiated or altered in any way—then the court could hold that no valid contract was ever formed.[38] No federal statute can stop a state-court judge from ruling that a boilerplate agreement containing an arbitration clause is simply not a contract under state law. Over time, state-court judges concerned with formation will find that some contracts were validly formed and others were not. The result will be a body of case law that channels Leff's arguments by regulating the way in which merchants and employers write their arbitration clauses.

D. Defining "Arbitration" Narrowly

The FAA applies only to arbitrations.[39] Therefore, as Christopher Drahozal has noted,[40] any mode of dispute resolution that does not constitute an arbitration is not protected by the statute.

The courts of appeals currently are divided over the question of whether to define "arbitration" under the FAA by reference to state law or by reference to federal law.[41] If "arbitration" can be defined by state law, then a state legislature would be free to decide that arbitrations must include certain procedural protections, such as the assistance of counsel or even the availability of classwide remedies. If an arbitration agreement executed in that state did not provide such protections, then state judges could hold that the procedure

37. *See, e.g.*, Siopes v. Kaiser Found. Health Plan, Inc., 312 P.3d 869, 871 (Haw. 2013), *as corrected* (Sept. 26, 2013); *id.* at 896 n.13 (Acoba, J., concurring); NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 24 A.3d 777, 792 (N.J. Super. Ct. App. Div. 2011).

38. The *Brewer II* court did not cite or discuss *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 (1967). Some have interpreted *Prima Paint* to require that arbitrators, rather than courts, resolve questions relating to the formation of an entire contract that happens to contain an arbitration clause. For a fuller discussion of *Prima Paint*, see *infra* notes 45-51 and accompanying text.

39. Federal Arbitration Act, 9 U.S.C. § 2 (2012); *see* Drahozal, *supra* note 6, at 172 & nn.106-107.

40. Drahozal, *supra* note 6, at 172-73.

41. Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135, 707 F.3d 140, 143 (2d Cir. 2013) (noting that four circuits—the First, Second, Sixth, and Tenth—define "arbitration" by reference to federal common law, while two others—the Fifth and Ninth—apply state law).

contemplated by the agreement was not an arbitration and therefore was not protected by the FAA. After making such a finding, the state court would be free to strike down the "agreement" on any grounds it desired.

Some state courts have already taken steps in this direction. For example, California courts have concluded that, under California law, "arbitration" requires a neutral decision maker; when decision-making processes have called for biased arbitrators, the California courts have held that the process was not an "arbitration" and was therefore not governed by the FAA.[42]

II. APPLYING DURESS DOCTRINE TO FORCED-ARBITRATION CLAUSES

Nothing in the FAA prevents courts from invalidating forced-arbitration clauses on the basis of "generally applicable contract defenses, such as fraud, duress, or unconscionability."[43] Thus, claimants challenging such an arbitration clause may be able to avoid federal preemption if they frame their defense in the language of formation rather than in the language of unconscionability. As of 2014, however, many litigants (and judges) are making the right arguments with the wrong words. In *Brewer II*, for example, the Missouri Supreme Court found an arbitration agreement unconscionable since it was non-negotiable and one-sided.[44] That opinion could have framed this power imbalance as a formation issue (duress) rather than as a public-policy issue (unconscionability).

The threshold question of who should adjudicate these contract defenses—the court or the arbitrator—is a difficult one. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the U.S. Supreme Court held that "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate."[45] Under *Prima Paint*'s "separability doctrine," questions relating to the making of the *entire contract* cannot be heard by a court and must instead be resolved by the arbitrator.[46] Although authorities are

42. Cheng-Canindin v. Renaissance Hotel Assoc., 57 Cal. Rptr. 2d 867, 875 (Ct. App. 1996).

43. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (internal quotation marks omitted); *see id.* at 1753 (Thomas, J., concurring).

44. Brewer v. Missouri Title Loans (*Brewer II*), 364 S.W.3d 486, 493-94 (Mo. 2012), *cert. denied*, 133 S. Ct. 191 (2012).

45. 388 U.S. 395, 404 (1967).

46. *Id.* at 403-04; *see* 9 U.S.C. § 4 (2012) (providing that a court must order arbitration once "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue"); *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) (discussing this doctrine).

divided on the question,[47] there are good reasons to believe that courts *can* hear contract-defense claims that apply to both the arbitration clause and the contract generally.[48] A full dissection of this "much-litigated"[49] and "hotly contested"[50] question is beyond the scope of this Comment. But even if parties are not able to litigate the duress argument outlined below, they can make still the same argument to their arbitrator.[51]

Notwithstanding *Prima Paint*, a number of state courts have recently refused to uphold arbitration agreements on the grounds that the contract containing them was not validly formed.[52] That trend must now be expanded.

47. *Compare* Nagrampa v. MailCoups Inc., 469 F.3d 1257, 1263-64 (9th Cir. 2006) (en banc) (holding that the court could reach the merits of a claim that an arbitration clause was entered under duress even though the same argument could have applied to the contract generally), *with In re* RLS Legal Solutions, LLC, 221 S.W.3d 629, 632 (Tex. 2007) (per curiam) ("Unless the arbitration provision alone was singled out from the other provisions, the claim of duress goes to the agreement generally and must be decided in arbitration."), Brown v. Pac. Life Ins. Co., 462 F.3d 384, 397 (5th Cir. 2006) (similar), *and* Green Tree Fin. Corp. of Alabama v. Wampler, 749 So. 2d 409, 414 (Ala. 1999) (similar).

48. *See* Alan Scott Rau, *"Separability" in the United States Supreme Court*, 2006 STOCKHOLM INT'L ARB. REV. 1, 14 ("[I]t should be obvious that a challenge can be 'to the arbitration clause itself' without being '*specifically* to the arbitration provision'" (quoting *Buckeye*, 546 U.S. at 445, 449)); Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 17-18 (2003) [hereinafter Rau, *Everything You Really Need to Know*] (suggesting that the *Prima Paint* decision "*preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question*"); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 130 (1996); *see also* Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 FORDHAM URB. L.J. 167, 196-97 (1999) ("Rarely will predatory conduct, such as duress or overreaching, focus specifically on an arbitration provision."); 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, 841 n.131 (2003) (collecting authorities critical of *Prima Paint*).

49. Rau, *Everything You Really Need to Know*, *supra* note 48, at 2.

50. David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 408 n.55 (2012).

51. *But see* 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, 24 (1997) ("[A]rbitrators are even less likely to void purported arbitration agreements than are courts."); *see id.* at 24 & n.89 (noting that arbitrators have a financial incentive to dismiss formation defenses). Some claimants have gone so far as to raise duress arguments in court proceedings seeking to confirm an arbitrator's award. *See, e.g.*, ITT Commercial Fin. Corp. v. Tyler, No. 917660, 1994 WL 879497, at *6-7 (Mass. Super. Ct. Aug. 10, 1994) (declining to confirm an arbitrator's award on the grounds that the defendants had entered the contract containing the arbitration clause under economic duress).

52. *See, e.g.*, Samaniego v. Empire Today LLC, 140 Cal. Rptr. 3d 492, 502 (Ct. App. 2012) (unconscionable formation of contract); Siopes v. Kaiser Found. Health Plan, Inc., 312 P.3d 869, 884 (Haw. 2013), *as corrected* (Sept. 26, 2013) (lack of mutual assent); NAACP of

Courts should employ the theory of "economic duress" to hold that no valid contract can be formed when an offeror proposes a take-it-or-leave-it deal requiring the offeree to either (1) consent to a nonnegotiable contract clause requiring arbitration of all disputes or else (2) forego something that a reasonable person would deem necessary for modern life.[53] Such a deal is a Hobson's choice, not a contract.

Traditionally, the doctrine of duress applied only when the contract was signed under physical coercion or threat. Over the course of the last several decades, however, courts and scholars have expanded the concept of duress. In modern courts, claims of "economic duress" are commonplace.[54] Although the "vagueness of the concept of economic duress"[55] has been widely bemoaned, courts evaluating economic-duress claims usually consider the terms of the challenged contract in order to determine whether "a party with superior bargaining power coerce[d] the other party into agreeing to a contract out of severe economic necessity."[56] In many state and federal courts, economic-duress claims are evaluated under a "no reasonable alternative" test.[57] Under this framework, courts will interrogate the terms offered to the party alleged to have violated the contract. If the court finds that this party had no reasonable

Camden Cnty. E. v. Foulke Mgmt. Corp., 24 A.3d 777, 794 (N.J. Super. Ct. App. Div. 2011) (same); Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC, 306 P.3d 480, 491 (N.M. Ct. App. 2012) (unconscionable formation of contract); *see also* York v. Dodgeland of Columbia, Inc., 749 S.E.2d 139, 145 (S.C. Ct. App. 2013) (recognizing that, under the FAA, state courts can refuse to enforce an arbitration clause if no "meeting of the minds to arbitrate existed").

53. Justice Breyer hinted at a duress theory in his *Concepcion* dissent, but this option has not yet been fully explored in the literature. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1760 (2011) (Breyer, J., dissenting) ("If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?").

54. *See, e.g.*, Gen. Motors Corp. v. Paramount Metal Prods. Co., 90 F. Supp. 2d 861 (E.D. Mich. 2000); Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533 (N.Y. 1971); Capps v. Ga. Pac. Corp., 453 P.2d 935, 938 (Or. 1969). Some jurists have recognized the similar formation defense of "moral duress." The Illinois courts, for example, have long held that parties should be able to claim "moral duress" to void contracts that allowed the superior party to "[take] undue advantage of the business or financial stress or extreme necessities or weakness of another." Rees v. Schmits, 164 Ill. App. 250, 258 (1911); *see also* Chicago & A.R. Co. v. Chicago, V. & W. Coal Co., 79 Ill. 121, 130 (1875) (early use of moral-duress theory).

55. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 629 (1983).

56. Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 26-27 (2008).

57. Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 448 (2005); *see also id.* at 474-75 & nn.184-189 (collecting cases applying this test).

choice other than to consent to the terms offered, then the court will hold that no valid contract was ever formed.

The precise elements of an economic-duress claim vary from jurisdiction to jurisdiction. Many courts require a showing that the party with superior bargaining power committed a wrongful act, threatened the party with inferior bargaining power, or otherwise engaged in oppressive or coercive behavior.[58] Forced arbitration satisfies this requirement. In the context of employment arbitration, the wrongful act may be refusing to grant or continue employment unless the employee agrees to waive her right to litigate employment disputes before a court or an administrative agency.[59] In the context of consumer arbitration, the wrongful act may be the merchant's refusal to make an essential service available unless consumers agree to arbitrate all disputes arising under some nonnegotiable contract. Given that economic duress is a court-made concept, courts could also loosen or even suspend the wrongful-act requirement in the forced-arbitration context, where the equities so strongly favor the claimant.

Although the economic-duress defenses outlined above are colorable under existing law, these defenses would be nearly foolproof under the broader theories of duress that have been advanced by some feminist scholars. These theories suggest that duress claims should focus not just on economic conditions, but also on the power imbalance between the parties. Deborah Waire Post has argued that, "[w]hen we discuss only *economic* duress," we understate "the role law plays in creating and maintaining structures of subordination" and prevent the emergence of "a law of contracts that grapples with inequalities that exist—not just between individuals, but between groups or classes of people."[60] Elsewhere, Catharine MacKinnon has noted that contract law has long been "criticized for abstracting from gender by assuming an arm's length atomism in transactions, and for presupposing behaviors and

58. *See, e.g.*, Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 57 (1st Cir. 1986); Fees v. Mut. Fire & Auto. Ins. Co., 490 N.W.2d 55, 58 (Iowa 1992).

59. *See, e.g.*, Standard Coffee Serv. Co. v. Babin, 472 So. 2d 124, 125 (La. Ct. App. 1985) (holding that an arbitration clause was obtained through duress when an employer threatened dismissal if employee refused to sign); *In re* RLS Legal Solutions, L.L.C., 156 S.W.3d 160, 165 (Tex. Ct. App. 2005) (holding that an arbitration clause was obtained through duress when an employer withheld wages until an employee agreed to arbitrate), *rev'd*, 221 S.W.3d 629 (Tex. 2007); *supra* note 21 (discussing *Sonic II*'s suggestion that forcing employees to waive their right to an administrative hearing on an employment dispute is unconscionable).

60. Deborah Waire Post, *Outsider Jurisprudence and the "Unthinkable" Tale: Spousal Abuse and the Doctrine of Duress*, 26 U. HAW. L. REV. 469, 483 (2004).

forms of power that imagine and favor men over women."[61] Building on these observations, Orit Gan has argued for "the development of a broader, more complex duress doctrine that is sensitive to social inequality and context and that includes aggrieved parties' experiences and perspectives."[62] This theory would allow judges to deploy duress doctrine to void all sorts of contracts—ranging from spousal agreements to mortgages to forced-arbitration clauses.[63]

State courts have already begun to explore the application of duress doctrine to forced-arbitration clauses. Although the majority of these courts have dismissed the economic-duress argument,[64] a few have been receptive.[65] Those hostile to the duress argument often insist that, despite the adhesive nature of forced-arbitration clauses, consumers simply are not "deprived . . . of their free will" when they agree to arbitrate.[66] The Supreme Court itself has repeatedly insisted that arbitration "is a matter of consent, not coercion."[67] But the Supreme Court's "hypnotic"[68] obsession with consent is impossible to square with the facts on the ground. Given the near ubiquity of forced-arbitration clauses, it has now become routine to offer consumers an all-or-nothing option to either accept a forced-arbitration clause or else forego some commodity that is necessary "to live in the twenty-first century."[69] In such

61. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1295 (1991); *see also* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1024-36 (1985).

62. Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 171 (2013).

63. *Id.* at 207-08.

64. *See, e.g.*, Bama's Best Housing, Inc. v. Hodges, 847 So. 2d 300, 304 (Ala. 2002); Richards v. Allianz Life Ins. Co. of N. Am., 62 P.3d 320, 326-30 (N.M. Ct. App. 2002); Vickery Transp., Inc. v. HEPACO, Inc., No. W2003-01512-COA-R3CV, 2004 WL 2280421, at *3 (Tenn. Ct. App. Oct. 4, 2004).

65. *See, e.g.*, *In re* RLS Legal Solutions, L.L.C., 156 S.W.3d 160, 165 (Tex. Ct. App. 2005). This opinion was later reversed by the Texas Supreme Court, which held that the arbitrator should have decided the duress question. 221 S.W.3d at 631. *See also Ex parte* Early, 806 So. 2d 1198, 1202 (Ala. 2001) (vacating an order compelling arbitration and remanding for further proceedings on an economic-duress claim); ITT Commercial Fin. Corp. v. Tyler, No. 917660, 1994 WL 879497, at *6-7 (Mass. Super. Ct. Aug. 10, 1994).

66. Acquaire v. Canada Dry Bottling, 906 F. Supp. 819, 827 (E.D.N.Y. 1995).

67. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (internal quotation marks omitted)).

68. Rau, *Everything You Really Need to Know*, *supra* note 48, at 5.

69. Allan B. Diamond, Remarks at the 2014 American Constitution Society National Convention: Your Day in Court? The Undermining of Access to Justice, at 14:21-15:22, YOUTUBE (July 23, 2014), https://www.youtube.com/watch?v=5gE9HR4dD74 [http://perma.cc/T7MQ-SF56].

cases, the duress doctrine should be viewed as a valid defense to the forced-arbitration clause.

Consider, for example, regional monopolies. Many areas are serviced by one Internet service provider,[70] one public utility, one hospital, or one airline. The contracts used by these monopolies often contain a forced-arbitration clause to which consumers must agree before receiving an essential service. For instance, many Americans live in areas where the only provider of cellular service is either Sprint or AT&T—both of which require the consumer to "consent" to arbitration.[71] When asked to enforce these arbitration clauses, a judge should apply the "no reasonable alternative" test to hold that the consumer entered the contract for the essential good under duress and therefore no contract was ever actually formed. Such a holding would be a logical extension of previous cases holding that a company's status as the sole supplier of a particular product may subject the company to economic-duress claims in certain circumstances.[72]

But the problem is not limited to regional monopolies. Consumers often find that they have a choice of suppliers but no choice whether to arbitrate. Suppose, for example, that a consumer wants cable television but is not happy with the mandatory arbitration clause in her contract with Comcast.[73] This consumer likely has no alternative options. *All* of America's leading cable

70. *See* Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 566 (Ky. 2012) (discussing arbitration clause in contracts with "the only local broadband cable Internet provider" in Jefferson County, Kentucky).

71. *Wireless Customer Agreement*, AT&T § 2.2, http://www.att.com/shop/legalterms.html?toskey=wirelessCustomerAgreement&#disputeResolutionByBindingArb [http://perma.cc/Y93Z-AQKP]; *Terms and Conditions*, SPRINT SOLUTIONS INC., http://www.citizen.org/documents/Sprint-Forced-Arb-Contract.pdf [http://perma.cc/8ZVK-H53H]. In some areas, such as northwest Connecticut, Verizon is the only cell-service provider. Shako Liu, *Verizon 4G Network to Enter Northwest Corner's Dead Zone*, LITCHFIELD CNTY. TIMES, Feb. 3, 2014, http://www.countytimes.com/articles/2014/02/03/news/doc52f012b19356e696173898.txt [http://perma.cc/FC7L-59CE]. That company requires its customers either to arbitrate disputes or to bring individual actions in small-claims court. *Customer Agreement*, VERIZON, http://www.verizonwireless.com/b2c/support/customer-agreement [http://perma.cc/EW8W-SEZS].

72. *See, e.g.*, Thomas Constr. Co. of Mo. v. Kelso Marine, Inc., 639 F.2d 216, 220 & n.4 (5th Cir. Mar. 1981) (successful economic-duress claim involving general contractor's dealings with the only bulk concrete supplier in the area); Gen. Motors Corp. v. Paramount Metal Products Co., 90 F. Supp. 2d 861, 875 (E.D. Mich. 2000) (economic-duress claim involving GMC's sole supplier of seat frames); Hous., Inc. v. Weaver, 246 S.E.2d 219, 226 (N.C. Ct. App. 1978), *aff'd*, 251 S.E.2d 457 (N.C. 1979) (successful economic-duress claim involving defendant's "status as sole supplier of stone" in the area).

73. *Comcast Agreement for Residential Services*, COMCAST § 13(f)(2), http://www.comcast.com/Corporate/Customers/Policies/SubscriberAgreement.html [http://perma.cc/PF54-6RHS].

providers—Comcast, TimeWarner,[74] Charter Communications,[75] and AT&T[76]—require individual arbitration of disputes, although some of these providers allow customers to opt out of arbitration by notifying the company within thirty days of beginning service.[77] And although the problem is particularly pronounced in the area of cable and telecommunications,

> forced arbitration is becoming so widespread that in *many* industries . . . it is not possible to shop around for a product or service that doesn't require forced arbitration. Today it is increasingly difficult to find insurance, a credit card, cell phone, a brokerage for a retirement account, or a nursing home, for example, where forced arbitration isn't required.[78]

Thus, despite the Supreme Court's attempt to pull the wool over the nation's eyes, it is clear that Americans are not binding themselves to arbitrations by choice. They "consent" to these arbitration clauses because they don't know what else to do.

CONCLUSION

Writing near the end of the recent financial crisis, John Lanchester observed that "[m]odern banks are creations of the state, made by our choices, and we can shape them any way we want. It's time to make our banks do the

74. *Residential Services Subscriber Agreement*, TIMEWARNER § 15(b), http://help.twcable.com/RSSA_English.pdf [http://perma.cc/3TD-RFJH].

75. *Charter Communications Terms and Conditions of Residential Service*, CHARTER COMMUNICATIONS, https://www.charter.com/browse/content/residential-video [http://perma.cc/6N4F-B6NT].

76. *AT&T U-verse Voice and TV Terms of Service*, AT&T § 11(a), http://www.att.com/u-verse/att-terms-of-service.jsp [http://perma.cc/PR53-7ZB4].

77. *See Comcast Terms*, *supra* note 73, § 13(c); *Charter Terms*, *supra* note 75; *TimeWarner Terms*, *supra* note 74, § 15(e). Cox Communications, another leading company, does not make its user agreement for cable available online. DirectTV, a leading provider of satellite television, requires arbitration and does not allow its customers to opt out. *Customer Agreement*, DIRECTTV § 9(c), http://www.directv.com/learn/pdf/042411_customer_agreement_for_web.pdf [http://perma.cc/S4NS-2VMF].

78. *Forced Arbitration*, NAT'L ASS'N OF CONSUMER ADVOCATES, http://www.naca.net/issues/forced-arbitration [http://perma.cc/5GVR-KA7E] (emphasis added). For a list of companies requiring arbitration in each of these industries, see *Forced Arbitration Rouges Gallery*, PUBLIC CITIZEN, http://www.citizen.org/forced-arbitration-rogues-gallery [http://perma.cc/T275-GWG5].

things we need."[79] The same can be said for contracts. Many have argued that the proliferation of forced-arbitration clauses has stripped lay claimants of basic procedural protections and given big business the ability to abuse consumers without fear of class-action liability. Some state-court judges, sympathetic to this position, have illuminated a path forward by explaining how to limit the federal colonization of contract law. Their innovations should now be embraced and expanded.

This Comment has explored the ways in which state-court judges, locked in a tug-of-war with the Supreme Court, have reacted to *Concepcion*. These judges have held that FAA preemption does not apply when state courts regulate arbitration without disturbing its fundamental attributes; when state courts use a contextual approach to unconscionability; when state courts interrogate the formation of the contract as a whole; or when state courts find that the procedure specified in some agreement does not actually constitute an arbitration. This Comment has also suggested that courts and arbitrators should apply the doctrine of duress to hold that certain "contracts" containing forced-arbitration clauses were never validly formed and therefore cannot be enforced.

Even if state courts do not embrace the particular theories outlined above, they should continue to explore the legal space left open by *Concepcion*. Indeed, despite recent judicial innovations, there remains much cause for pessimism. For so long as the current majority remains on the Supreme Court, Americans must live with a troubling reality: that nearly that every action they take — right down to eating a bowl of Cheerios[80] — could constitute a waiver of their right to enter a court.

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79. John Lanchester, *Let's Consider Kate*, LONDON REVIEW OF BOOKS, July 18, 2013, at 8, http://www.lrb.co.uk/v35/n14/john-lanchester/lets-consider-kate [http://perma.cc/UXM7-6JJ8].

80. Stephanie Strom, *When 'Liking' a Brand Online Voids the Right to Sue*, N.Y. TIMES, Apr. 16, 2014, http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html [http://perma.cc/R2G6-6WBA]. This policy was later amended. *See Cheerios Backtracks: It's OK to "Like" Without Losing Your Rights*, *supra* note 21.

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