



ARTICLE

Arbitration About Arbitration

David Horton*

Abstract. The U.S. Supreme Court's interpretation of the Federal Arbitration Act (FAA) has nearly eliminated consumer and employment class actions, sparking vigorous debate. But another important development in federal arbitration law has flown largely under the radar. Traditionally, judges granted motions to compel arbitration only after confirming that the parties had formed a valid agreement to arbitrate that applied to the underlying lawsuit. But now, through the use of "delegation clauses," businesses are giving arbitrators the exclusive power to decide these issues. Increasingly, critical questions about the arbitration—including whether the process is fair—are being resolved in the arbitration itself.

This Article gives this trend the attention it deserves. It demonstrates that courts once regarded agreements to arbitrate about arbitration with greater skepticism than agreements to arbitrate the merits of a case. However, in 2010, the Supreme Court seemed to cast doubt on this distinction in *Rent-A-Center West, Inc. v. Jackson* by opining that delegation clauses are their own freestanding arbitration clauses: (1) agreements to arbitrate disputes (2) over the broader agreement to arbitrate the underlying complaint. Seen this way, delegation clauses are entitled to the same extraordinary deference enjoyed by conventional arbitration provisions.

This Article challenges that account of delegation clauses. Drawing on the FAA's text and history and reading *Rent-A-Center* carefully, it argues that agreements to arbitrate the scope or enforceability of an arbitration clause should not enjoy the same exalted status as agreements to arbitrate substantive claims. Instead, delegation clauses should be understood as watered-down arbitration clauses that are more amenable to regulation than industrial-strength agreements to arbitrate a cause of action. Finally, this Article explains how its thesis would help resolve many of the questions about arbitral power that are currently dividing courts.

* Professor of Law and Chancellor's Fellow, University of California, Davis, School of Law. Thanks to Courtney Joslin, David Noll, Alan Rau, Stephen Ware, and Sam Pokross and the editors of the *Stanford Law Review* for helpful comments.

Table of Contents

Introduction..... 365

I. The Rise of Arbitration About Arbitration..... 377

 A. The Early Years..... 377

 B. The Arbitration War..... 386

 C. *Rent-A-Center*..... 394

II. Rethinking Arbitration About Arbitration..... 399

 A. Delegation Versus Arbitration..... 399

 B. Reading *Rent-A-Center* Narrowly..... 406

III. Doctrinal Implications..... 414

 A. Clear and Unmistakable..... 414

 B. Assent to the Container Contract..... 422

 C. Wholly Groundless..... 424

 D. Unconscionability..... 429

 E. Limits on the FAA..... 435

Conclusion..... 440

Introduction

Uber drivers recently filed a wave of class actions challenging the popular ridesharing service's labor practices.¹ Uber's first line of defense was fine print. The company argued that the plaintiffs assented to its software license and online services agreement by accessing its smartphone application—which they needed to do in order to pick up passengers—and clicking “Yes, I agree.”² This contract stated that drivers needed to resolve any lawsuit against Uber in arbitration rather than in the judicial system.³ It waived the drivers' right to bring a class action and required them to pay part of the arbitrator's fees.⁴ But it did not stop there. In a seeming paradox, it also mandated that disputes over the “validity of the arbitration provision . . .” be decided by the arbitrator.⁵ Citing this language, Uber asserted that an arbitrator, not a court, must decide whether the agreement to arbitrate the drivers' labor claims was enforceable.⁶

* * *

In 2002, Shirley Douglas opened an account with Union Planters Bank.⁷ She agreed to arbitrate any future dispute arising out of her contract with the company, including those involving the “scope of th[e] arbitration provision.”⁸ Eight months later, Douglas closed her account.⁹ In 2005, Union merged with Regions Bank.¹⁰

In 2007, Douglas was injured in a car accident.¹¹ She received a \$500,000 settlement from the other driver.¹² One of Douglas's lawyers deposited these

-
1. See, e.g., Class Action Complaint ¶¶ 1, 28, *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185 (N.D. Cal. 2015) (No. 3:14-cv-05200), 2014 WL 6657544; Second Amended Class Action Complaint and Jury Demand ¶¶ 1-2, *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. 3:13-cv-03826-EMC), 2014 WL 7912596.
 2. See *Mohamed*, 109 F. Supp. 3d at 1190-91, 1197, *aff'd in part and rev'd in part*, 836 F.3d 1102 (9th Cir.), *amended in other part by* 848 F.3d 1201 (9th Cir. 2016).
 3. See *id.* at 1193.
 4. See *id.* at 1193, 1207.
 5. See *id.* at 1193 (capitalization altered); see also *id.* at 1198.
 6. See *id.* at 1202-03.
 7. See Plaintiff's Memorandum of Authorities Supporting Response to Motion to Compel Arbitration and to Stay Proceedings at 2, *Douglas v. Trustmark Nat'l Bank*, No. 3:12CV523-LG-FKB, 2012 WL 5400040 (S.D. Miss. Nov. 5, 2012), 2012 WL 7188726.
 8. *Id.* (capitalization altered).
 9. See Regions Bank's Motion to Compel Arbitration and to Stay Proceedings at 3, *Douglas*, 2012 WL 5400040 (No. 3:12-cv-00523-LG-FKB), 2012 WL 7317647.
 10. See *Douglas v. Regions Bank*, 757 F.3d 460, 461 (5th Cir. 2014).
 11. *Id.*
 12. See *id.*

funds into his client trust account—which happened to be at Regions—and then embezzled money from the account.¹³

In 2012, Douglas sued Regions in state court for failing to prevent her attorney’s wrongdoing.¹⁴ Regions responded by removing to federal court¹⁵ and invoking the arbitration provision that governed Douglas’s 2002 account with Union Planters.¹⁶ Douglas protested that her current claims against Regions had nothing to do with her long-defunct contract with Union Planters.¹⁷ As Douglas put it, her “allegations [did] not relate in any way to the Union Planters account or any banking relationship between [her] and Regions.”¹⁸ But Regions countered that this was an issue about the “scope” of the arbitration clause in the 2002 Union Planters agreement, which the arbitrator needed to resolve.¹⁹

* * *

Former students filed a class action against the Daymar Institute, a for-profit college in Tennessee, alleging that it had misrepresented its educational offerings and its graduates’ job prospects.²⁰ However, the students’ enrollment agreements contained an arbitration clause declaring that its “enforceability . . . shall be determined by the arbitrator, and not by a court.”²¹ At the district court, the students protested that enforcing the arbitration agreement would require them “to pay arbitration fees and costs they [could not] possibly afford—buried as they [were] in . . . tens of thousands of dollars of [student] debt.”²² In response, Daymar asked the court to honor the contract and require

13. *See id.*

14. *See id.*; Complaint ¶¶ 1, 3, *Douglas v. Trustmark Nat’l Bank*, No. 25H2-481CIV (Miss. Cir. Ct. June 14, 2012).

15. *See* Joint Notice of Removal at 1, *Douglas v. Trustmark Nat’l Bank*, No. 3:12CV523-LG-FKB, 2012 WL 5400040 (S.D. Miss. July 23, 2012), 2012 WL 3099498.

16. *See Douglas*, 757 F.3d at 461.

17. *See* Brief of Appellee at 5, *Douglas*, 757 F.3d 460 (No. 12-60877), 2013 WL 526328 (arguing that “there is no connection between the current dispute and the agreement containing the arbitration clause” (capitalization altered)).

18. *Id.*

19. *See* Brief of Appellant Regions Bank at 12, *Douglas*, 757 F.3d 460 (No. 12-60877), 2012 WL 6812070.

20. *See* Complaint at ¶¶ 1-9, 78-82, *Dean v. Draughons Junior Coll., Inc.*, 917 F. Supp. 2d 751 (M.D. Tenn. 2013) (No. 3:12-cv-00157), 2012 WL 6838805.

21. *See* Memorandum in Support of Defendants’ Motion to Compel Arbitration and Dismiss or Stay at 4, *Dean*, 917 F. Supp. 2d 751 (No. 3:12-cv-00157), 2012 WL 6838792 (quoting the agreement).

22. *See* Plaintiffs’ Response in Opposition to Defendants’ Motion to Compel Arbitration and Dismiss or Stay at 2, *Dean*, 917 F. Supp. 2d 751 (No. 3:12-cv-00157), 2012 WL 6838795.

the students to arbitrate the issue whether they could afford to arbitrate their lawsuit.²³

* * *

These are scenes from a quiet coup in the U.S. civil justice system. As is well known, consumer and employment arbitration has long been controversial.²⁴ In 1925, Congress passed the Federal Arbitration Act (FAA)²⁵ to make arbitration clauses specifically enforceable in federal court and to encourage merchants to resolve conflict outside the court system.²⁶ Half a century later, the U.S. Supreme Court began to interpret the statute broadly, holding that it applies in state courts,²⁷ preempts state law,²⁸ and embodies a “liberal federal policy favoring arbitration.”²⁹ Then, starting in 2011, the Justices decided *AT&T Mobility LLC v. Concepcion*,³⁰ *American Express Co. v. Italian Colors Restaurant*,³¹ and *DIRECTV, Inc. v. Imburgia*,³² cases that effectively allowed businesses to use arbitration clauses as a shield against class action liability. Scores of articles in prominent law journals have criticized these opinions.³³

23. See Memorandum in Support of Defendants’ Motion to Compel Arbitration and Dismiss or Stay, *supra* note 21, at 3.

24. For the seminal critiques of mandatory arbitration, see Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (analyzing the U.S. Supreme Court’s Federal Arbitration Act (FAA) cases from the mid-1990s); 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 (accusing the Court of misinterpreting the FAA); and Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996) (same).

25. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2016)).

26. See, e.g., *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 1-2 (1923) [hereinafter *1923 Hearing*] (statement of Charles L. Bernheimer, Chairman, Arbitration Committee, New York Chamber of Commerce); H.R. REP. NO. 68-96, at 2 (1924).

27. See *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

28. See *id.* at 11.

29. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

30. 563 U.S. 333, 340, 352 (2011) (holding that the FAA preempted a California common law rule that deemed most class arbitration waivers in consumer contracts to be unconscionable).

31. 133 S. Ct. 2304, 2312 (2013) (enforcing a class arbitration waiver despite evidence that it would be cost prohibitive for plaintiffs to arbitrate their federal antitrust claims on an individual basis).

32. 136 S. Ct. 463, 466, 471 (2015) (concluding that the FAA preempted a California appellate court’s interpretation of an arbitration provision and a class arbitration waiver).

33. See, e.g., Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1956-59 (2014); Andrew D. Bradt, *Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act*, 92 WASH. U. L. REV. 603, 644-51 (2015); Brian T. *footnote continued on next page*

The *New York Times* ran a series of front-page stories on the Court's FAA jurisprudence in which a federal judge—an appointee of President Reagan, no less—called it one of the “most profound shifts in our legal history.”³⁴

After decades of sitting on the sidelines, federal lawmakers and bureaucrats have leapt into the fray. In 2010, Congress passed the Franken Amendment, which prohibited the Department of Defense from entering into contracts for more than \$1 million in goods or services with entities that mandate arbitration of certain employment-related claims.³⁵ In 2014, President Obama signed Executive Order 13,673 (EO 13,673), “Fair Pay and Safe Workplaces,” which extended a similar ban to all federal agencies.³⁶ Likewise, the U.S.

Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 172-73 (2015); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1553-56 (2016); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3066-68 (2015); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1241-44 (2013); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 278-81 (2015); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 322-25 (2013); David L. Noll, *Rethinking Anti-aggregation Doctrine*, 88 NOTRE DAME L. REV. 649, 678-81 (2012); Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion*, Wal-Mart v. Dukes, and Turner v. Rogers, 125 HARV. L. REV. 78, 126-33 (2011); Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103, 115-16 (2015); Aaron Blumenthal, Comment, *Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699, 708 (2015).

34. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), <https://perma.cc/9XJ7-GL9C> (quoting Judge William G. Young of the United States District Court for the District of Massachusetts); see *Young, William G.*, U.S. DISTRICT CT.: DISTRICT MASS., <https://perma.cc/XT3P-DDVP> (archived Nov. 10, 2017); see also Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a “Privatization of the Justice System,”* N.Y. TIMES: DEALBOOK (Nov. 1, 2015), <https://perma.cc/M5N7-RN2H> (discussing the ramifications of the Court's recent expansion of the FAA in greater detail).
35. See Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, div. A, tit. VIII, § 8116, 123 Stat. 3409, 3454-55; see also Cynthia Dizikes, *Senate Passes Franken Amendment Aimed at Defense Contractors*, MINNPOST (Oct. 6, 2009), <https://perma.cc/9A2J-HSDC>. Also in 2010, Congress banned arbitration clauses in certain mortgages. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1414(a), 124 Stat. 1376, 2151 (2010) (codified at 15 U.S.C. § 1639c(e) (2016)); see also 12 C.F.R. § 1026.36(h) (2017).
36. See Exec. Order No. 13,673, § 6(a), 3 C.F.R. 283, 289-90 (2015), reprinted as amended in 41 U.S.C. § 3101 app. at 68, 70-71 (2016). EO 13,673 has since been revoked. See Exec. Order No. 13,782, § 1, 82 Fed. Reg. 15,607, 15,607 (Mar. 30, 2017). For a description of the original executive order, see Emily Bazelon, *Obama Is on a Pro-labor Roll*, SLATE (Aug. 7, 2014, 6:05 PM), <https://perma.cc/62WH-ZNKJ>.

Department of Education (DoE) and the U.S. Department of Health and Human Services (HHS) have floated proposals to protect student borrowers³⁷ and nursing home patients,³⁸ respectively. This flurry of regulation may be the next battleground in the “arbitration war.”³⁹

However, another sea change in federal arbitration law has received less attention. The FAA gives trial courts the responsibility for determining whether a dispute is “arbitrable”: that is, subject to arbitration.⁴⁰ For decades, this gatekeeping function has been a vital check on the integrity of private dispute resolution. If a company tried to gain an advantage by mandating

-
37. See, e.g., Press Release, U.S. Dep’t of Educ., Education Department Proposes New Regulations to Protect Students and Taxpayers from Predatory Institutions (June 13, 2016), <https://perma.cc/9MCY-M7TZ>. The DoE ultimately adopted a regulation banning mandatory arbitration for certain claims against schools that receive Title IV assistance under the Higher Education Act. See 34 C.F.R. § 685.300(e)-(f) (2017); Student Assistance General Provisions, 81 Fed. Reg. 75,926, 76,087-89 (Nov. 1, 2016); see also Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. ch. 28 (2016)). The Trump Administration has proposed delaying this rule. See Student Assistance General Provisions, 82 Fed. Reg. 49,155, 49,156 (proposed Oct. 24, 2017); Danielle Douglas-Gabriel, *DeVos Calls for Another Delay of Rule to Protect Students from Predatory Colleges*, WASH. POST: GRADE POINT (Oct. 24, 2017), <https://perma.cc/U3ZN-EF2F>.
38. See, e.g., Jessica Silver-Greenberg & Michael Corkery, *U.S. Just Made It a Lot Less Difficult to Sue Nursing Homes*, N.Y. TIMES: DEALBOOK (Sept. 28, 2016), <https://perma.cc/PA2C-ZG7T>. Also, in May 2016, the Consumer Financial Protection Bureau (CFPB) issued a highly anticipated proposed rule banning class action waivers in arbitration clauses in the financial services sector. See Arbitration Agreements, 81 Fed. Reg. 32,830 (proposed May 24, 2016). The CFPB issued its final rule in 2017, see Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017), but Congress overturned it, see Act of Nov. 1, 2017, Pub. L. No. 115-74, 131 Stat. 1243, 1243; see also 82 Fed. Reg. 55,500 (Nov. 22, 2017) (removing the rule from the *Code of Federal Regulations*); Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), <https://perma.cc/Z5FP-NG4M>. Likewise, the National Labor Relations Board has determined that class arbitration waivers violate the National Labor Relations Act, an issue that is currently pending at the Supreme Court. See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017). The Court heard oral argument in *Lewis* and two other cases with which *Lewis* was consolidated in October 2017. See Transcript of Oral Argument, *Epic Sys. Corp. v. Lewis*, Nos. 16-285, 16-300 & 16-307 (U.S. Oct. 2, 2017). At the time this Article went to print, the Court had yet to issue a decision.
39. See Editorial, *The Arbitration War*, N.Y. TIMES (Nov. 26, 2010), <https://perma.cc/3UCC-TZEW> (discussing “the latest in the arbitration war—a battle over whether the United States will increasingly have a privatized system of justice that bars people from enforcing rights in court and, if so, what will be considered fair in that system”). For more on the recent outpouring of agency regulation of arbitration, see Daniel T. Deacon, Essay, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 1014-22 (2017); and David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1038-44 (2017).
40. See 9 U.S.C. §§ 3-4 (2016) (dictating that courts must find that the parties agreed to arbitrate a particular dispute); *Arbitrability*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “arbitrability” as “[t]he status, under applicable law, of a dispute’s being or not being resolvable by arbitrators because of the subject matter”).

confidentiality, shortening the statute of limitations, selecting a biased arbitrator, waiving a plaintiff's right to recover certain damages, or imposing hefty costs or fees, a judge would strike down all or part of the agreement to arbitrate.⁴¹ Similarly, if a firm contended that the parties had agreed to arbitrate a matter that fell outside the scope of the arbitration provision, or to which the FAA did not apply, a court would refuse to order arbitration.⁴² Nevertheless, as the vignettes at the beginning of this Article illustrate, corporations have begun drafting around this prophylactic layer of judicial review. Through the use of what are known as "delegation clauses,"⁴³ they are giving the arbitrator the exclusive right to decide whether arbitration should proceed.⁴⁴

This mind-bending issue—arbitration about arbitration—has become one of the most important and unsettled areas on the docket. In 2016 alone, there were more than two hundred decisions dealing with delegation clauses.⁴⁵ Unfortunately, these cases are a tangled mess. The mist descends at the first step in the analysis, where courts disagree about how to tell whether a contract assigns gateway matters about the arbitration to the arbitrator.⁴⁶ For instance, a federal district court in California held that Uber's software license and online services agreement was not clear enough to deputize the arbitrator with deciding whether the agreement to arbitrate the merits of the drivers' labor claims was enforceable.⁴⁷ But the Ninth Circuit and federal judges in Arizona, Florida, Illinois, Maryland, and Texas have reached the opposite conclusion.⁴⁸

41. See *infra* text accompanying notes 186-93.

42. See, e.g., *Fazio v. Lehman Bros.*, 340 F.3d 386, 395 (6th Cir. 2003) ("District courts have the authority to decide, as a threshold matter, whether an issue is within the scope of an arbitration agreement.").

43. See *infra* note 222.

44. See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) ("The *delegation provision* is an agreement to arbitrate threshold issues concerning the arbitration agreement." (emphasis added)).

45. I generated this figure by searching Westlaw for "adv: delegat! /10 arbitrator" and narrowing the results to cases decided in 2016. This search produced 218 results.

46. See *infra* Part III.A.

47. See *O'Connor v. Uber Techs., Inc.*, 150 F. Supp. 3d 1095, 1101-02 (N.D. Cal. 2015); see also *supra* text accompanying notes 1-6 (discussing the skirmishes over Uber's arbitration clause).

48. See *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1110 (9th Cir.), *amended in other part by* 848 F.3d 1201 (9th Cir. 2016); *Micheletti v. Uber Techs., Inc.*, 213 F. Supp. 3d 839, 845-46 (W.D. Tex. 2016); *Lee v. Uber Techs., Inc.*, 208 F. Supp. 3d 886, 891-92 (N.D. Ill. 2016); *Suarez v. Uber Techs., Inc.*, No. 8:16-cv-166-T-30MAP, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016), *aff'd on other grounds per curiam*, 688 F. App'x 777 (11th Cir. 2017); *Varon v. Uber Techs., Inc.*, No. MJG-15-3650, 2016 WL 1752835, at *6 (D. Md. May 3, 2016); *Sena v. Uber Techs. Inc.*, No. CV-15-02418-PHX-DLR, 2016 WL 1376445, at *3-4 (D. Ariz. Apr. 7, 2016).

Moreover, courts are struggling with cases like Shirley Douglas's, in which a delegation clause purports to give the arbitrator the right to decide whether a lawsuit falls within the ambit of an arbitration clause.⁴⁹ Two members of a Fifth Circuit panel thought it self-evident that Douglas's former arbitration agreement with Union Planters Bank did not apply to her current dispute with Regions Bank.⁵⁰ As the majority saw it, "[T]he events leading to Douglas's claim—a car accident, a settlement, and embezzlement of the funds through an account that a third party held with the bank—have nothing to do with her checking account opened years earlier for only a brief time."⁵¹ Thus, the majority held that Regions Bank's attempt to force arbitration over the reach of the Union Planters Bank arbitration clause was "wholly groundless."⁵² But not everyone was persuaded. Dissenting, Judge Dennis chastised his colleagues for creating an exception to the FAA out of whole cloth and observed that although Douglas might be correct "that her claim against Regions falls outside the scope of the arbitration agreement, that dispute must be submitted in the first instance to the arbitrator."⁵³ Even more starkly, in January 2017, the Tenth Circuit refused to adopt the rule that delegation clauses do not apply to wholly groundless claims of arbitrability, creating a jurisdictional split.⁵⁴

Likewise, it is unclear how courts can invalidate delegation clauses. Judges use the unconscionability doctrine to nullify harsh components of agreements to arbitrate the merits of a dispute.⁵⁵ But unconscionability does not translate neatly into the context of delegation clauses.⁵⁶ Terms that seem unjust when applied to the plaintiff's *substantive* claims—such as limitations on remedies or discovery—do not necessarily make it more onerous to arbitrate about *arbitration*. In fact, some courts have gone so far as to hold that delegation

49. See *supra* text accompanying notes 7-19.

50. See *Douglas v. Regions Bank*, 757 F.3d 460, 462-64 (5th Cir. 2014) ("The mere existence of a delegation provision in the checking account's arbitration agreement . . . cannot possibly bind Douglas to arbitrate gateway questions of arbitrability in *all* future disputes with the other party, no matter their origin.").

51. *Id.* at 464.

52. *Id.*; see also *Agere Sys., Inc. v. Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009) (setting forth a test for arbitrability that asks in part whether "the assertion of arbitrability [is] 'wholly groundless'" (quoting *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006))).

53. See *Douglas*, 757 F.3d at 466 (Dennis, J., dissenting); see also *id.* at 467-68 (criticizing the "wholly groundless" test as contrary to Supreme Court precedent).

54. See *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1286-87 (10th Cir. 2017). As this Article was in the final stages of editing, the Eleventh Circuit also "join[ed] the Tenth Circuit in declining to adopt what has come to be known as the wholly groundless exception." *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1269 (11th Cir. 2017).

55. See *infra* text accompanying notes 186-93.

56. See *infra* Part III.D.

clauses are immune from unconscionability challenges that relate both to arbitrating the merits and to arbitrating about arbitrating the merits, such as challenges to provisions calling for excessive arbitrator's fees.⁵⁷ For example, in the class action filed by the former students against the Daymar Institute,⁵⁸ the district court reluctantly held that the debt-saddled students needed to arbitrate whether they could afford to arbitrate their fraud complaints:

While required by the FAA, this result strikes the court as manifestly unjust and, perhaps, deserving of legislative attention. This court harbors no hostility towards arbitration, which can provide a streamlined and efficient means of resolving disputes and which presumptively reflects a bargained-for agreement to avoid the judicial forum. However, in cases such as the one presented here, requiring impoverished individuals to arbitrate could effectively prevent them from exercising their rights⁵⁹

Finally, delegation clauses could be headed for a showdown with federal efforts to restrict arbitration.⁶⁰ Admittedly, this issue is less pressing after the inauguration of President Trump, who quickly signed an executive order scrapping President Obama's anti-arbitration EO 13,673.⁶¹ Yet the Franken Amendment⁶² and the DoE's and HHS's regulations⁶³ remain on the books, raising novel problems about how to allocate power between courts and arbitrators. According to some courts, delegation provisions empower arbitrators to rule not only on the scope or validity of an agreement to arbitrate but also on whether the FAA even applies to a case.⁶⁴ Thus, delegation clauses could allow arbitrators to decide whether the President, Congress, or an agency has precluded the arbitration of a particular grievance.

To be sure, to some members of the dispute resolution community, the prospect of arbitrators deciding these kinds of threshold issues is not alarming.⁶⁵ Indeed, arbitral authority has swollen over time. In 1967, the Court

57. *See, e.g., Dean v. Draughons Junior Coll., Inc.*, 917 F. Supp. 2d 751, 758-63 (M.D. Tenn. 2013).

58. *See supra* text accompanying notes 20-23.

59. *Dean*, 917 F. Supp. 2d at 765.

60. *See supra* notes 35-38 and accompanying text.

61. *See* Exec. Order No. 13,782, § 1, 82 Fed. Reg. 15,607, 15,607 (Mar. 30, 2017).

62. *See supra* text accompanying note 35.

63. *See supra* notes 37-38 and accompanying text.

64. *See, e.g., Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) (holding that an arbitrator should decide whether a lawsuit falls under section 1 of the FAA); *see also* 9 U.S.C. § 1 (2016) (exempting "contracts of employment of . . . any . . . class of workers engaged in foreign or interstate commerce").

65. For instance, Alan Rau, the leading authority on the separability doctrine and arbitrating arbitrability, has published a string of brilliant articles that (for the most part) defend the rise of arbitral power. *See generally* Alan Scott Rau, "The Arbitrability Question Itself," 10 AM. REV. INT'L ARB. 287, 303 (1999) [hereinafter Rau, *Arbitrability* footnote continued on next page

adopted the separability doctrine, which allows arbitrators to entertain most challenges to the validity of the contract that contains the arbitration clause (the “container contract”).⁶⁶ Although the parameters of this controversial rule have never been clear, separability is generally understood as (1) treating an arbitration clause as a discrete contract within a broader container contract and (2) allowing courts to resolve only claims that target the arbitration clause itself.⁶⁷ Likewise, many European countries follow the principle of *kompetenz-kompetenz*,⁶⁸ under which arbitrators determine whether they have jurisdiction over a case.⁶⁹ And in the United States, arbitrators have long resolved matters of “procedural arbitrability” such as whether a claim is stale or whether a party has either waived its right to arbitrate or failed to satisfy a condition precedent to arbitration.⁷⁰ Arguably, allowing drafters to task arbitrators with “substantive arbitrability”—questions about the scope or validity of the arbitration provision⁷¹—simply accelerates this ebb of power from public judges to their private counterparts.

Nevertheless, this Article argues that there is a fundamental flaw in the way delegation clauses are currently conceptualized. The spread of arbitration about arbitration can largely be traced to a single analytical gambit in the

Question]; Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1, 32-35 (2003) [hereinafter Rau, *Separability*]; Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT’L ARB. 435, 488-523 (2011) [hereinafter Rau, *Trilogy*]; Alan Scott Rau, *Arbitrating “Arbitrability,”* 7 WORLD ARB. & MEDIATION REV. 487, 526-27 (2013) [hereinafter Rau, *Arbitrating “Arbitrability”*]. For more skeptical views, see Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. 1, 61 (2011); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 262-65 (2012); and Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 343-70 (2011).

66. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967).

67. See *infra* text accompanying notes 116-28.

68. Cf. *Competence-Competence Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The principle that arbitrators may decide challenges to their own jurisdiction.”).

69. See, e.g., John J. Barceló III, *Who Decides the Arbitrators’ Jurisdiction?: Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT’L L. 1115, 1124-31 (2003); William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 676 n.101 (1989).

70. See, e.g., *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (“Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, ‘procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.”); Alan Schwartz, Note, *Procedural Arbitrability Under Section 301 of the LMRA*, 73 YALE L.J. 1459, 1460 (1964).

71. Confusingly, courts sometimes refer to “substantive arbitrability” merely as “arbitrability.” See *infra* notes 217-18 and accompanying text.

Court's 2010 opinion in *Rent-A-Center, West, Inc. v. Jackson*.⁷² In that 5-4 decision, Justice Scalia, writing for the majority, declared that delegation clauses are "agreement[s] to arbitrate threshold issues concerning the arbitration agreement."⁷³ In other words, Justice Scalia cast delegation provisions as independent arbitration clauses that apply to any dispute about the agreement to arbitrate the underlying lawsuit.⁷⁴ Viewing delegation clauses this way infuses them with the full force of the FAA and gives them the same lofty status as agreements to arbitrate the plaintiff's complaint.⁷⁵

This Article claims that *Rent-A-Center's* approach is historically inaccurate and normatively undesirable. For starters, the law has long distinguished between agreements to arbitrate a complaint and agreements to arbitrate the enforceability or scope of an arbitration provision.⁷⁶ When it comes to agreements to arbitrate the merits, there is a hallowed presumption that "any doubts . . . should be resolved in favor of arbitration."⁷⁷ But for agreements to arbitrate substantive arbitrability, the premise flips: "Courts should *not* assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."⁷⁸ Thus, by conflating arbitration clauses and delegation provisions, *Rent-A-Center* fuses two concepts courts have traditionally treated differently.

The doctrinal divergence between agreements to arbitrate a lawsuit and agreements to arbitrate whether the parties have agreed to arbitrate a lawsuit was not random; to the contrary, it stemmed from a clear-eyed assessment that delegation clauses are more troubling than arbitration provisions. Sections 3 and 4 of the FAA require judges to decide whether the parties have formed a valid agreement to arbitrate encompassing the plaintiff's causes of action.⁷⁹ When parties try to draft around these commands, they cut against the grain of the statute. Likewise, equating arbitration and delegation provisions ignores the fact that arbitration about arbitration is an exotic issue that parties are

72. 561 U.S. 63 (2010).

73. *Id.* at 68.

74. *See id.* at 68-69.

75. *See id.* at 70 ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.").

76. *See infra* Part I.A.

77. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

78. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (alterations in original) (emphasis added) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

79. *See* 9 U.S.C. §§ 3-4 (2016).

unlikely to notice or comprehend.⁸⁰ Many plaintiffs would be surprised to find that they have entrusted an arbitrator—who, unlike a judge, bills by the hour—to decide the very question whether a dispute should be arbitrated.⁸¹

Likewise, *Rent-A-Center's* unusual facts undermine its attempt to announce an across-the-board rule that delegation clauses are miniature arbitration clauses. That case involved an employee who signed a brief “Mutual Agreement to Arbitrate Claims” that contained a distinct provision requiring the parties to arbitrate substantive arbitrability.⁸² As a result, the delegation provision under Justice Scalia’s microscope actually *was* a discrete arbitration agreement within an arbitration agreement.⁸³ But that does not mean that all delegation provisions necessarily fit that paradigm. In fact, many delegation clauses are logically and grammatically entwined with the agreement to arbitrate the merits.⁸⁴ They thus do not seem like autonomous arbitration provisions.

Finally, *Rent-A-Center* spawns perverse results. Deeming delegation provisions to be full-blooded arbitration clauses means that they are insulated by the separability doctrine. When extended to delegation provisions, separability creates a regime of “Russian nesting dolls”⁸⁵: contracts within contracts within contracts. This artificial construct sows confusion about whether rules that regulate arbitration clauses in particular transactions (for example, employment or insurance agreements) also govern delegation clauses in those agreements.⁸⁶ Moreover, it limits courts’ jurisdiction to the laser-thin band of defenses that “challenge[] the delegation provision specifically” rather than those that challenge the broader arbitration clause or the container contract.⁸⁷

A better approach would acknowledge that delegation provisions are unique. To be sure, delegation clauses are analogous to arbitration clauses. The FAA validates “written provision[s] . . . to settle by arbitration a controversy . . . arising out of [a] contract,”⁸⁸ and delegation clauses commit certain controversies—those that relate to arbitration—to a private judge. Thus, delegation provisions should be both presumptively valid and shielded from regulation by the same basic principles as agreements to arbitrate the merits.⁸⁹

80. See *First Options*, 514 U.S. at 945.

81. See *id.*

82. See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 65-66 (2010).

83. See *id.* at 70.

84. See *infra* notes 312-13 and accompanying text.

85. See *Rent-A-Ctr.*, 561 U.S. at 85 (Stevens, J., dissenting).

86. See *infra* text accompanying notes 314-16, 480-83.

87. See *Rent-A-Ctr.*, 561 U.S. at 72 (majority opinion).

88. 9 U.S.C. § 2 (2016).

89. See *infra* text accompanying notes 162-66.

Yet because delegation clauses are more problematic than arbitration clauses, these doctrines should not apply with the same force to delegation clauses. Instead, courts should be able to create exceptions to the FAA's enforcement mandate to accommodate the challenges of arbitration about arbitration.

Debunking the idea that delegation provisions are arbitration clauses would allow judges to continue to preserve the legitimacy of alternative dispute resolution. First, it would allow courts to consider the fact that delegation clauses are more esoteric than arbitration clauses when they decide whether consumers and employees have assented to them.⁹⁰ Second, it would permit judges to regulate delegation provisions through unique rules like the “wholly groundless” exception, which do not apply to agreements to arbitrate underlying claims.⁹¹ Third, it would relax the shackles of the separability doctrine, which forces plaintiffs to arbitrate even if there is grave doubt about whether the arbitration clause is enforceable.⁹² Fourth, it would permit judges, not arbitrators, to implement federal regulations limiting arbitration in the consumer, employment, education, and financial services sectors.⁹³

This Article contains three Parts. Part I traces the history of arbitration about arbitration. It demonstrates that before *Rent-A-Center*, agreements to arbitrate about arbitration never enjoyed the same favored standing as agreements to arbitrate the merits. Part II argues that *Rent-A-Center* glosses over glaring differences between arbitrating substantive arbitrability and

90. See *infra* Part III.B.

91. See *infra* Part III.C.

92. See *infra* Part III.D.

93. See *infra* Part III.E. Due to space constraints, I will not address yet another issue that has begun to divide courts: the relationship between arbitration clauses, delegation clauses, and class arbitration. When an arbitration provision does not expressly mention class actions, it is unclear who decides whether such proceedings are permissible. See *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) (“[T]his Court has not yet decided whether the availability of class arbitration is a question of arbitrability.”). The majority view is that “whether an arbitration agreement permits class arbitration is a question of [substantive] arbitrability for the court.” *Del Webb Cmty., Inc. v. Carlson*, 817 F.3d 867, 876 (4th Cir.), *cert. denied*, 137 S. Ct. 567 (2016); *accord* *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 332 (3d Cir. 2014); *Huffman v. Hilltop Cos.*, 747 F.3d 391, 398 (6th Cir. 2014); see also *Anwar v. Fairfield Greenwich Ltd.*, 950 F. Supp. 2d 633, 636 (S.D.N.Y. 2013). *But see* *Robinson v. J&K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193, 196 (5th Cir.) (“[W]hen an [arbitration] agreement includes broad coverage language, . . . then the availability of class or collective arbitration is an issue arising out of the agreement that should be determined by the arbitrator.”), *cert. denied*, 137 S. Ct. 373 (2016). Even in jurisdictions that presumptively allocate the propriety of class arbitration to courts, a broad delegation clause might override this default and assign the issue to arbitrators. See, e.g., *Fed. Nat'l Mortg. Ass'n v. Prowant*, 209 F. Supp. 3d 1295, 1310-11 (N.D. Ga. 2016) (holding that delegation provisions were “sufficient to give the question of class availability to the arbitrator, no matter whether class availability is a procedural issue or a (substantive) question of arbitrability”); see also *infra* note 352.

arbitrating a lawsuit. It also proposes an alternative understanding of delegation provisions that would better facilitate Congress's intent, the expectations of the parties, and public policy. Part III catalogs the doctrinal chaos that has plagued courts since *Rent-A-Center*. It then explains how differentiating delegation clauses from arbitration clauses can resolve this conflict.

I. The Rise of Arbitration About Arbitration

This Part describes the emergence of arbitration about arbitration. It explains why the division of power between judges and arbitrators has long been a source of confusion. In addition, it demonstrates that *Rent-A-Center's* insistence that delegation clauses deserve the same respect as arbitration provisions contradicts decades of accumulated wisdom. Indeed, unlike an agreement to arbitrate a complaint, which is a kind of “super contract,”⁹⁴ agreements to arbitrate whether a dispute falls within the scope of a valid arbitration clause have traditionally been disfavored.

A. The Early Years

Congress passed the FAA⁹⁵ in 1925 to abolish judicial hostility to arbitration.⁹⁶ In the seventeenth and eighteenth centuries, courts had invented special rules called the ouster and revocability doctrines, which prevented parties from obtaining specific performance of a contract to arbitrate.⁹⁷ The FAA overrides these anti-arbitration measures through its centerpiece, section 2, which makes arbitration provisions “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any

94. See *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 791 S.E.2d 128, 137-38 (S.C. 2016) (Toal, J., dissenting).

95. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2016)).

96. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (discussing the FAA's “basic purpose . . . to overcome courts' refusals to enforce agreements to arbitrate”).

97. See, e.g., *Kill v. Hollister* (1746) 95 Eng. Rep. 532, 532; 1 Wils. K.B. 129, 129 (refusing to dismiss a case concerning an insurance policy that contained an arbitration provision because “the agreement of the parties cannot oust this [c]ourt” of jurisdiction); *Vynior's Case* (1609) 77 Eng. Rep. 597, 599-600; 8 Co. Rep. 81b-82b (voiding an arbitration award made after one party tried to revoke the arbitration agreement); see also *Allied-Bruce*, 513 U.S. at 270 (explaining that early English and U.S. courts were once hostile to arbitration); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 983 (2d Cir. 1942) (“[I]t became fashionable in the middle of the 18th century to say that such agreements were against public policy because they ‘oust the jurisdiction’ of the courts.”).

contract.”⁹⁸ Thus, the statute seeks to place arbitration clauses “upon the same footing as other contracts.”⁹⁹

Although the FAA abrogated hundreds of years of common law, its ambitions were actually somewhat modest. For example, the statute contains two important exclusions. First, section 2 validates arbitration clauses only in agreements that involve interstate commerce.¹⁰⁰ Before the New Deal, under Congress’s then-anemic Commerce Clause authority,¹⁰¹ the statute might have applied to some deals brokered across state lines, but not to most transactions involving small businesses or consumers.¹⁰² Second, the FAA was not supposed to cover employment agreements. Although most such contracts lacked a nexus to “interstate commerce” as that concept was understood in 1925—and thus would not have fallen within section 2—there was one exception: employment relationships in the shipping or transportation industries.¹⁰³ To clarify that even these arrangements did not fall within the statute, section 1 of the FAA exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹⁰⁴ Then-Secretary of Commerce Herbert Hoover suggested this language to assuage powerful labor unions, which had “object[ed] . . . to the inclusion of workers’ contracts in the law’s scheme.”¹⁰⁵

Although the FAA privatizes dispute resolution, it does not cut courts out of the loop completely. Section 3 authorizes courts to stay litigation pending the outcome of arbitration only if they are “satisfied” that the matter “is

98. 9 U.S.C. § 2.

99. H.R. REP. NO. 68-96, at 1 (1924).

100. See 9 U.S.C. §§ 1-2.

101. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 268, 276-77 (1918) (striking down an attempt to regulate child labor as beyond Congress’s regulatory authority under the Commerce Clause), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); see also U.S. CONST. art. I, § 8, cl. 3.

102. See, e.g., *In re Cold Metal Process Co.*, 9 F. Supp. 992, 992-94 (W.D. Pa. 1935) (holding that a patent licensing agreement between an Ohio company and a Pennsylvania corporation did not fall under the FAA); see also Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 129 n.190 (2002) (“At the time the FAA was enacted, most consumer contracts would not have had a sufficient nexus to interstate commerce for the Act to apply.”).

103. See, e.g., *Phila. & Reading Ry. Co. v. Hancock*, 253 U.S. 284, 285-86 (1920) (holding that a railroad employee was engaged in interstate commerce).

104. 9 U.S.C. § 1.

105. See 1923 *Hearing*, *supra* note 26, at 14 (statement of Herbert Hoover, Secretary of Commerce); see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 126-27 (2001) (Stevens, J., dissenting) (providing more detail about labor’s opposition to the original bill and the Hoover amendment, which excluded shipping and transportation workers from the FAA’s scope).

referable to arbitration.”¹⁰⁶ Likewise, section 4 tasks judges with entertaining allegations that a party did not agree to arbitration, stating that if there is an “issue” about “the making of the arbitration agreement[,] . . . the court shall proceed summarily to the trial thereof.”¹⁰⁷

On the flip side, the active role judges play before the inception of arbitration vanishes after the arbitrator has ruled. To be sure, section 10 of the FAA permits a party to return to court and overturn an award.¹⁰⁸ But in keeping with Congress’s intent to make private dispute resolution fast and final,¹⁰⁹ the statute severely restricts the grounds on which judges can second-guess arbitrators to concrete proof of “corruption,” “fraud,” “partiality,” or excess of powers.¹¹⁰ These demanding standards make judicial scrutiny of arbitration awards “little better than a rubber stamp.”¹¹¹

However, in the decades after the FAA’s enactment, cases refused to stay inside the tidy lines Congress had tried to draw between courts and arbitrators. Contracts often contained extremely broad arbitration clauses—for example, requiring “any controversy or claim arising out of or relating to this agreement [to] be settled by arbitration.”¹¹² This language created two persistent problems.

The first occurred when a party tried to escape its obligations by arguing that its agreement with the other party was tainted by mistake, fraud, or duress.¹¹³ Should a court or an arbitrator entertain that assertion? On the one hand, arbitration seemed to be the proper venue. After all, the allegation that

106. 9 U.S.C. § 3.

107. *Id.* § 4.

108. *See id.* § 10(a) (providing for vacatur upon the application of either party).

109. *See, e.g.*, H.R. REP. NO. 68-96, at 2 (1924) (noting that Congress designed the FAA as an antidote to “the costliness and delays of litigation”).

110. *See* 9 U.S.C. § 10(a)(1)-(4).

111. *See Consolidation Coal Co. v. United Mine Workers of Am., Local Union 1545*, 213 F.3d 404, 406 (7th Cir. 2000). There are also two nonstatutory grounds for vacating an arbitrator’s decision. The first is the “manifest disregard” doctrine, which applies when “the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). Second, some judges refuse to enforce arbitral awards that violate public policy. *See, e.g., Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 861 F.2d 665, 671 (11th Cir. 1988). Because neither appears in the text of the FAA, they have long been controversial. *Cf. Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008) (noting doubts about the viability of the manifest disregard doctrine); *Allstyle Coil Co. v. Carreon*, 295 S.W.3d 42, 44 (Tex. App. 2009) (noting that “the nonstatutory grounds of manifest disregard of the law and violation of public policy . . . are no longer legally recognized grounds for vacating an arbitration award”).

112. *E.g., Lummus Co. v. Commonwealth Oil Ref. Co.*, 280 F.2d 915, 918 (1st Cir. 1960) (capitalization altered).

113. *Cf.* 9 U.S.C. § 10(a)(1) (providing for vacatur of an “award . . . procured by corruption, fraud, or undue means”).

the contract was unenforceable was a “controversy or claim” within the meaning of the arbitration clause.¹¹⁴ But on the other hand, mandating arbitration would be perverse. What if the arbitrator held that the contract was *not*, in fact, valid? Because arbitration is binding only if the parties have agreed to it, the arbitrator’s ruling would undercut the very source of her own authority.¹¹⁵

In 1967, the Court confronted this conundrum in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*¹¹⁶ Flood & Conklin (F&C) and Prima Paint entered into a consulting agreement and agreed to arbitrate “[a]ny controversy or claim arising out of or relating to [it].”¹¹⁷ Prima Paint then learned that F&C was about to declare bankruptcy.¹¹⁸ Prima Paint sued in federal court, arguing that the consulting contract had been induced by fraud.¹¹⁹ F&C responded by filing a motion to compel arbitration.¹²⁰ The Court granted certiorari to consider whether a federal judge or an arbitrator should resolve Prima Paint’s “fraud in the inducement” claim.¹²¹

Speaking through Justice Fortas, the Court held that the matter was for the arbitrator.¹²² Justice Fortas reached this result by announcing that “except where the parties otherwise intend, . . . arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded.”¹²³ That is, every agreement that includes an arbitration clause is, in fact, two agreements:

114. See, e.g., Richard K. Parsell, *Arbitration of Fraud in the Inducement of a Contract*, 12 CORNELL L.Q. 351, 358 (1927) (recognizing the argument that “it was the intention of the parties to have all controversies which might arise on account of reliance on the contract . . . adjusted by arbitration whether the principal contract was valid or not”).

115. See, e.g., *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 986 (2d Cir. 1942) (noting that such a ruling “would destroy the arbitrators’ authority to decide anything and thus make their decision a nullity”); *In re Wrap-Vertiser Corp.*, 155 N.Y.S.2d 806, 808 (App. Div. 1956) (“Obviously, parties cannot agree, in an invalid contract, to arbitrate the validity of the contract.”), *rev’d sub nom.* *Wrap-Vertiser Corp. v. Plotnick*, 143 N.E.2d 366 (N.Y. 1957), *overruled by* *Weinrott v. Carp*, 298 N.E.2d 42 (N.Y. 1973); *In re Cheney Bros.*, 219 N.Y.S. 96, 96 (App. Div. 1926) (*per curiam*) (“If the contract was voided by fraud the arbitration provision therein falls.”), *rev’d on other grounds per curiam sub nom.* *Cheney Bros. v. Joroco Dresses, Inc.*, 157 N.E. 272 (N.Y. 1927); see also Philip G. Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258, 1271 (1933) (noting that if arbitrators decided that a contract was invalid, they would have “by their very finding destroyed the only basis of their jurisdiction”).

116. 388 U.S. 395 (1967).

117. *Id.* at 398.

118. *Id.*

119. *Id.*

120. See *id.* at 399.

121. *Id.* at 396-97.

122. See *id.* at 406-07.

123. *Id.* at 402 (emphasis omitted).

(1) the agreement to arbitrate and (2) the overarching container contract.¹²⁴ This legal fiction—the separability doctrine—allows arbitrators to strike down the container contract without simultaneously foreclosing their own ability to make such a ruling.¹²⁵ Indeed, because arbitration clauses stand alone, they remain on the books even if the container contract falls away.¹²⁶ In addition, Justice Fortas interpreted section 4 of the FAA to permit courts to entertain challenges to the arbitration clause but not to the container contract:

[T]he federal court is instructed to order arbitration to proceed once it is satisfied that “the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.” Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the “making” of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.¹²⁷

Because Prima Paint’s fraud claim did not target the arbitration clause specifically, the Court sent it to the arbitrator.¹²⁸

The second recurring dilemma caused by broad arbitration clauses was arbitrating arbitrability: allowing the arbitrator, rather than a court, to decide whether a lawsuit should be arbitrated. Unlike separability, which was triggered by an assertion that all or part of the container contract was invalid, arbitrability came in several different shapes and sizes. The propriety of arbitrating the merits of a case might depend on anything from whether a nonsignatory was bound to an arbitration provision,¹²⁹ to whether a demand

124. *See id.*

125. *See, e.g.,* Rau, *Arbitrability Question*, *supra* note 65, at 341 (calling the separability doctrine “a fiction by which we can overcome the conceptual horror of an arbitral decision of contract invalidity that ‘calls into question the validity of the arbitration clause from which [the arbitrators] derive their power’” (alteration in original) (quoting William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 19, 53 (1998))).

126. *See* Stephen J. Ware, *Arbitration Law’s Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 109-10 (2007) (“[T]he separability doctrine is a legal fiction that, in addition to the container contract, the parties also formed a second contract consisting of just the arbitration clause. . . . Courts applying the separability doctrine enforce the fictional second contract when they send to arbitration disputes over whether the container contract was induced by fraud.”).

127. *Prima Paint*, 388 U.S. at 403-04 (second alteration in original) (footnotes omitted) (quoting 9 U.S.C. § 4).

128. *See id.* at 406-07.

129. *See, e.g.,* *Koreska v. Perry-Sherwood Corp.*, 253 F. Supp. 830, 831-32 (S.D.N.Y. 1965) (noting that a party submitted to an arbitrator the issue whether it was bound by an arbitration clause despite not being a signatory), *aff’d mem.*, 360 F.2d 212 (2d Cir. 1966).

for arbitration was timely,¹³⁰ to whether a complaint fell within the scope of an arbitration clause.¹³¹

Although allowing the arbitrator to hear these matters might seem to put the proverbial cart before the horse, it was the norm in Europe. Countries including England, France, and Switzerland had embraced the principle of *kompetenz-kompetenz*: the idea that arbitrators, like courts, enjoy jurisdiction to determine their own jurisdiction.¹³² These countries gave arbitrators the first crack at deciding whether a case must be arbitrated but then subjected this determination to searching post-award judicial review.¹³³ This straight-to-arbitration pipeline prevented parties from exploiting their right to a judicial forum to thwart the streamlined private dispute resolution process.¹³⁴

In the United States, arbitrating arbitrability gained a foothold in the field of labor arbitration in the mid-twentieth century. The touchstone here was not the FAA, but rather section 301 of the Labor Management Relations Act of 1947, also known as the Taft-Hartley Act, which gives federal courts jurisdiction to enforce collective bargaining agreements.¹³⁵ In this sphere, there were powerful arguments in favor of allowing arbitrators to decide at least one issue of arbitrability: whether a dispute fell within the scope of an

130. See, e.g., *In re Reconstruction Fin. Corp.*, 106 F. Supp. 358, 362 (S.D.N.Y. 1952) (“[T]he issue of whether or not the statute of limitations is a bar to the proceeding[] is . . . within the competence of the arbitrators.”), *aff’d sub nom.* *Reconstruction Fin. Corp. v. Harrison & Crosfield, Ltd.*, 204 F.2d 366 (2d Cir. 1953).

131. See, e.g., *McCarroll v. L.A. Cty. Dist. Council of Carpenters*, 315 P.2d 322, 333-35 (Cal. 1957) (discussing the possibility that an arbitrator might decide whether a dispute falls within the scope of an arbitration clause).

132. See, e.g., 4 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 44.15.1, at 44:9-:10 (Supp. 1996) (“The prevailing international view is that arbitrators have the right to rule on their own jurisdiction.”); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT’L ARB. 133, 140 (1997); see also *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe* [1954] 1 QB 8 at 12-13 (Eng.) (“It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally.”); Park, *supra* note 69, at 676 n.101 (noting that *kompetenz-kompetenz* has been recognized in France and Switzerland); Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045, 1053 (1986) (describing the genesis of *kompetenz-kompetenz* in France).

133. See, e.g., Note, *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816, 1818 n.12 (1988).

134. George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. INT’L L. 1, 14 (2012).

135. See Pub. L. No. 80-101, § 301, 61 Stat. 136, 156-57 (codified at 29 U.S.C. § 185 (2016)); *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 451-52 (1957).

arbitration clause.¹³⁶ In labor cases, the merits and the arbitrability of the merits tended to overlap. Often, a union alleged that an employer's personnel decisions were not authorized by a collective bargaining agreement.¹³⁷ Yet because this contract invariably contained an arbitration clause, the question whether it spoke to the employer's conduct determined *both* the outcome of the dispute *and* whether the dispute should be arbitrated.¹³⁸ This militated toward consolidating both proceedings in one forum.¹³⁹ Also, because labor arbitrators are steeped in the norms of a particular industry, they are better situated than generalist judges to discern the parties' intent.¹⁴⁰ Thus, it sometimes made sense to allow the parties to "economize time and effort" by asking the arbitrators to say whether an arbitration clause covered a particular grievance.¹⁴¹

But not every collective bargaining agreement assigned the task of interpreting the arbitration clause to the arbitrator. Because arbitrators can act with near impunity, permitting them to define their own jurisdiction raised the specter that they "would then have the power to impose obligations outside the contract limited only by [their] understanding and conscience."¹⁴² Thus, courts required employers and unions to showcase their intent to arbitrate arbitrability with a particularized statement.¹⁴³

Exactly what sufficed was unclear. Some collective bargaining agreements boasted nearly boundless arbitration provisions that covered conflict "of any

136. See *Local No. 149 of the Am. Fed'n of Tech. Eng'rs v. Gen. Elec. Co.*, 250 F.2d 922, 926 (1st Cir. 1957) (recognizing that argument).

137. See, e.g., *Am. Stores Co. v. Johnston*, 171 F. Supp. 275, 277 (S.D.N.Y. 1959) (considering whether a dispute regarding the company retirement plan was an arbitrable dispute under the collective bargaining agreement).

138. See, e.g., *id.* (noting the connection between the issue whether the employer's retirement policy was "a discharge or layoff within the meaning of the contract" and whether it "could give rise to an arbitrable dispute").

139. Cf. Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1509 (1959).

140. See, e.g., *Local No. 149*, 250 F.2d at 926 (reasoning that collective bargaining agreements often contain gaps that labor arbitrators can fill based on their experience with the industry and the parties and that this provides arbitrators with "certain advantages over a court").

141. See Cox, *supra* note 139, at 1509. For an example of a labor dispute in which the court sent the issue of arbitrability to an arbitrator, see *Metal Prods. Workers Union, Local 1645 v. Torrington Co.*, 358 F.2d 103, 105 (2d Cir. 1966). See also Eugene F. Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds*, 17 U. CHI. L. REV. 616, 623 (1950) ("[T]here appears no reason why the parties may not submit the issue of arbitrability to arbitration.").

142. See Cox, *supra* note 139, at 1509.

143. See, e.g., *Metal Prods. Workers Union*, 358 F.2d at 105.

nature or character”¹⁴⁴—termed “all disputes” provisions. Others mandated arbitration only for controversies “concerning the interpretation or application of any provision of this agreement”¹⁴⁵—“interpretation” provisions. As a matter of brute grammar, both the “all disputes” and the “interpretation” language seemed to govern the issue whether a grievance fell within the scope of an arbitration clause. Yet there was widespread consensus that an “interpretation” provision was not sufficient to mandate arbitration about arbitration.¹⁴⁶ Indeed, drafters who wanted the arbitrator to define the ambit of the arbitration clause needed to do more than just “specif[y] that any controversy relating to the meaning or interpretation or application of the contract is arbitrable.”¹⁴⁷ How much more? Courts did not speak with a single voice. The majority approach demanded “an express provision allowing the arbitrators to decide arbitrability.”¹⁴⁸ But several outlier judges found that an “all disputes” clause, standing alone, was sufficient to allow the arbitrator to interpret the arbitration agreement.¹⁴⁹

144. See, e.g., *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 571 (1960) (Brennan, J., concurring).

145. See *Standard Motor Freight, Inc. v. Local Union No. 560, Int’l Bhd. of Teamsters*, 228 A.2d 329, 332 n.2 (N.J. 1967).

146. *Lodge No. 12, Int’l Ass’n of Machinists v. Cameron Iron Works, Inc.*, 257 F.2d 467, 470 (5th Cir. 1958) (noting that courts, “with practical uniformity,” had held that arbitrability was a question for the courts “even where the contract specific[d] that *any* controversy relating to the meaning or interpretation or application of the contract [was] arbitrable”); *id.* at 470 n.6 (collecting cases); see also, e.g., *Int’l Union, United Auto. Aircraft v. Benton Harbor Malleable Indus.*, 242 F.2d 536, 538-40 (6th Cir. 1957); cf. Cox, *supra* note 139, at 1509-10 (“We can give effect to [an arbitration clause’s] underlying purpose only by . . . giving the court the duty to determine whether the claim which one side wishes to arbitrate gives rise to a dispute concerning the ‘interpretation and application’ of the collective-bargaining agreement.”).

147. *Lodge No. 12*, 257 F.2d at 470 (emphasis omitted).

148. See, e.g., *Refinery Emps. Union v. Cont’l Oil Co.*, 268 F.2d 447, 452-53 (5th Cir. 1959), *abrogated in other part* by *Bhd. of R.R. Trainmen v. Cent. of Ga. Ry. Co.*, 415 F.2d 403 (5th Cir. 1969); see also *Strauss v. Silvercup Bakers, Inc.*, 353 F.2d 555, 557 (2d Cir. 1965) (requiring that a “contract clearly manifest[] an intention that arbitrability should be decided by the arbitrator” before sending a dispute over arbitrability to an arbitrator); *United Optical Workers Union Local 408 v. Sterling Optical Co.*, No. 73 C 1444, 1973 WL 1008, at *2 (E.D.N.Y. Dec. 10, 1973) (collecting authority for the proposition that “[w]hether an issue is arbitrable is to be determined by the court in the absence of an express, or at least clear, intention that the issue be decided by the arbitration”), *aff’d*, 500 F.2d 220 (2d Cir. 1974).

149. See, e.g., *City of Bridgeport v. Bridgeport Police Local 1159*, 438 A.2d 1171, 1173 (Conn. 1981) (holding that a provision requiring arbitration of “any matter or condition arising out of the employee-employer relationship” was sufficient to find “that the parties intended the question of arbitrability to be determined by the arbitrators” (emphasis omitted)).

The Supreme Court never resolved this conflict, although it did throw its weight behind the proposition that arbitrating arbitrability was extraordinary. In 1960, the Justices announced that a party seeking to compel arbitration must “clear[ly] demonstrat[e]” that a collective bargaining agreement “excluded from court determination . . . the question of [the dispute’s] arbitrability.”¹⁵⁰ Two decades later, the Court reiterated that arbitrability is “undeniably an issue for judicial determination,” “[u]nless the parties clearly and unmistakably provide otherwise.”¹⁵¹

In addition, even when the “clear and unmistakable” test was satisfied, judges held a trump card. Several federal and state courts opined that they could ignore a contract’s plain language and refuse to compel arbitration about arbitration when “the claim of arbitrability is wholly groundless.”¹⁵² As one federal district judge explained, “When it appears that a claim of arbitrability is frivolous or patently baseless it would be an abuse of the arbitration process and would defeat the contractual intent of the parties to compel arbitration.”¹⁵³

Finally, outside the labor milieu, arbitration about arbitration stood on shakier footing. Most of the arbitrating arbitrability jurisprudence dealt with section 301 of the Taft-Hartley Act, which is silent on the roles of judges and arbitrators.¹⁵⁴ By comparison, sections 3 and 4 of the FAA task courts with deciding gateway matters about arbitration.¹⁵⁵ Thus, in commercial cases, allowing arbitrators to rule on their own jurisdiction was hard to square with congressional design.¹⁵⁶ For this reason, well into the second half of the twentieth century, courts interpreting the FAA virtually never allowed arbitrators to decide matters of substantive arbitrability. Even when it was “difficult to imagine broader general language than that contained in the . . .

150. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960).

151. *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986).

152. *McCarroll v. L.A. Cty. Dist. Council of Carpenters*, 315 P.2d 322, 333 (Cal. 1957); *accord Local 205, United Elec., Radio, & Mach. Workers of Am. v. Gen. Elec. Co.*, 233 F.2d 85, 101 (1st Cir. 1956) (requiring that “the applicant’s claim of arbitrability [not be] frivolous or patently baseless” before sending the issue of arbitrability to an arbitrator), *aff’d on other grounds*, 353 U.S. 547 (1957); *Food Handlers Local 425, Amalgamated Meat Cutters & Butcher Workmen v. Pluss Poultry, Inc.*, 158 F. Supp. 650, 657 (W.D. Ark.) (citing *Local 205*, 233 F.2d at 101), *aff’d on other grounds*, 260 F.2d 835 (8th Cir. 1958).

153. *Am. Stores Co. v. Johnston*, 171 F. Supp. 275, 277 (S.D.N.Y. 1959).

154. *See supra* notes 135-41 and accompanying text.

155. *See* 9 U.S.C. §§ 3-4 (2016); *supra* text accompanying notes 106-07.

156. *See, e.g., Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693, 696-97 (2d Cir. 1965) (relying on section 4 of the FAA to reserve the question of arbitrability for the court); *Office Emps. Int’l Union, Local 153 v. Ward-Garcia Corp.*, 190 F. Supp. 448, 449 (S.D.N.Y. 1961) (same).

arbitration clause,”¹⁵⁷ the rule was sharp and clear: “[T]he question of arbitrability [was] for the courts.”¹⁵⁸

As this history demonstrates, Congress installed courts as sentries at the gates of private dispute resolution. Although the widespread use of broad arbitration clauses, the birth of labor arbitration under the Taft-Hartley Act, and the separability doctrine all aggrandized arbitrators, the FAA gave judges the power to decide whether parties had formed a valid arbitration clause that applied to a complaint.

B. The Arbitration War

During the Reagan era, businesses complained that the United States was experiencing a “litigation explosion.”¹⁵⁹ These concerns resonated with the Court, which began to see arbitration as a way to alleviate the pressure on the judicial system.¹⁶⁰ In a flurry of cases, the Court liberated the FAA from the constraints Congress had placed on it, transforming the statute into what Justice O’Connor eventually described as “an edifice of [the Court’s] own creation.”¹⁶¹ The Court held that the FAA stretches to the maximum reach of

157. *Caribbean S.S. Co. v. Sonmez Denizcilik ve Ticaret A.S.*, 598 F.2d 1264, 1266 (2d Cir. 1979) (noting that courts, not arbitrators, must decide whether a claim is arbitrable absent express, clear language to the contrary).

158. *Necchi*, 348 F.2d at 696; *see also* *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 511, 514 n.6 (7th Cir. 1992) (rejecting the argument that securities arbitrators had the jurisdiction to decide whether a claim was timely); *Robbins v. Chipman Trucking, Inc.*, 866 F.2d 899, 901-02 (7th Cir. 1988) (holding that the district court must determine whether a request for arbitration was timely under federal pension law); *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986) (“[T]he enforceability of an arbitration clause is a question for the court when one party denies the existence of a contract with the other.”); *Interocean Shipping Co. v. Nat’l Shipping & Trading Corp.*, 462 F.2d 673, 678 (2d Cir. 1972) (holding that the appellants were entitled to a trial, pursuant to FAA section 4, to determine whether the appellee was bound to an arbitration clause in a maritime transaction); *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 829 (2d Cir. 1968) (holding that whether an arbitration clause could be assigned “is an issue to be decided in the courts”), *overruled in other part by* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). *But see* *Seaboard Coast Line R.R. Co. v. Nat’l Rail Passenger Corp.*, 554 F.2d 657, 660 (5th Cir. 1977) (per curiam) (holding that the arbitrator should construe disputes over the “intent, meaning, or effect” of the arbitration provision (quoting *Lundell v. Massey-Ferguson Servs. N.V.*, 277 F. Supp. 940, 942 (N.D. Iowa 1967))).

159. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 6-11 (1983) (discussing the emergence of the “litigation explosion” claim (quoting Warren E. Burger, *Isn’t There a Better Way?*, 68 A.B.A. J. 274, 275 (1982))).

160. *See, e.g.*, Burger, *supra* note 159, at 276 (advocating for wider use of methods of alternative dispute resolution, “especially arbitration”).

161. *See* *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

the commerce power¹⁶² and governs employment contracts.¹⁶³ In addition, the Court ignored compelling evidence that Congress intended the FAA to be a mere procedural rule for federal courts¹⁶⁴ and held, in *Southland Corp. v. Keating*, that the statute applies in state courts, too.¹⁶⁵ Finally, the Court held that the FAA is a kind of equal protection clause for arbitration provisions and thus preempts any state rule that echoes the ouster and revocability doctrines by exhibiting distrust of arbitrators or the arbitral process.¹⁶⁶

Companies saw the Court's jurisprudence as an invitation to engage in "do-it-yourself tort reform."¹⁶⁷ As they added arbitration clauses to their contracts, "alternative" dispute resolution became commonplace.¹⁶⁸ Soon, engaging in commerce—ordering a product; joining a gym; opening a checking, savings, or credit card account; renting a car; downloading software; subscribing to phone, cable, or internet service; or starting a job—meant surrendering one's right to access the courts.¹⁶⁹ But firms did not stop there. Instead, many began using arbitration to create a parallel procedural universe that was skewed in their favor. Among other things, they crafted rules in order to select biased

162. See *id.* at 277 (majority opinion).

163. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

164. See David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 5, 18 ("The idea that the FAA would apply in state courts or preempt state law was beyond the contemplation of Congress; it simply did not arise in the legislative history of the Act."); *id.* at 19-27 (reviewing the evidence of congressional intent).

165. 465 U.S. 1, 12 (1984).

166. See, e.g., *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("By enacting § 2 [of the FAA], . . . Congress precluded States from singling out arbitration provisions for suspect status . . .").

167. See *Ragan v. AT&T Corp.*, 824 N.E.2d 1183, 1193 n.1 (Ill. App. Ct. 2005) (quoting Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75, 103).

168. For studies of the prevalence of arbitration clauses in consumer and employment contracts in the financial services and telecommunications sectors, see Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 880-83 (2008); and Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 143-50 (2010).

169. Cf. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1429 (2008) (describing arbitration's expansion from "a tool for resolving commercial disputes" into "a phenomenon that pervade[s] virtually every corner of the daily economy").

arbitrators,¹⁷⁰ limit their liability,¹⁷¹ and saddle prospective plaintiffs with paying some of the arbitrator's fees.¹⁷²

This trend raised fresh questions about the domains of courts and arbitrators. The Court's separability doctrine established a stark dichotomy between defenses to the arbitration clause (which are for judges) and defense to the container contract (which are for arbitrators).¹⁷³ Separability began to have real bite as increasing numbers of consumers and employees tried to escape the black box of the arbitral forum. Because few people are even aware that arbitration clauses exist, it was hard to argue with a straight face that such a clause was the product of trickery or coercion.¹⁷⁴ Instead, any meritorious mistake, fraud, or duress claim would likely pertain to the container contract,¹⁷⁵ which would funnel the claim to an arbitrator, not a court.¹⁷⁶

In addition, the finer points of the separability doctrine were confusing. The formalistic distinction between attacks on the arbitration clause and attacks on the container contract was defensible in cases like *Prima Paint*, which involved allegations that the container contract had been fraudulently induced.¹⁷⁷ In that scenario, separability could be seen as a default rule.¹⁷⁸ It sprang into action when both parties manifested assent to the container contract. It used this external badge of assent—a handshake or signature—in conjunction with a broad arbitration clause to presume that the parties wished to arbitrate any dispute, including whether their apparent consent to the container contract was authentic.¹⁷⁹ But other fact patterns were more complex. What if a party asserted that her handwriting on the container contract was forged, had been obtained at gunpoint, or was illegitimate due to

170. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999).

171. See, e.g., *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 143 (Ct. App. 1997).

172. See, e.g., *Faber v. Menard, Inc.*, 367 F.3d 1048, 1051 (8th Cir. 2004).

173. See *supra* text accompanying notes 123-28.

174. Cf. 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, 851 (2003) ("Rare is the case in which a party seeking to avoid arbitration will be able to point to a deformity of contract formation that is directed exclusively at the arbitration clause and not at all to the larger container contract.").

175. See, e.g., 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 & n.87 (1997).

176. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967).

177. See *id.* at 402.

178. See, e.g., Rau, *Separability*, *supra* note 65, at 29 (terming *Prima Paint* "one more default rule with respect to the likely boundaries of contractual consent").

179. See *id.* (arguing that the separability default rule presumes that "the parties did indeed wish the matter of contractual validity to be entrusted to arbitrators").

her age or mental incapacity?¹⁸⁰ Although technically these were challenges to the container contract, they also undercut the notion that the party had “agreed” in a meaningful sense “to *anything*.”¹⁸¹

Another boundary-straddling rule quickly emerged as a flashpoint: the unconscionability doctrine. This notoriously amorphous defense applies when a term is both procedurally unconscionable (offered on a take-it-or-leave-it basis by a powerful drafter or hidden in fine print) and substantively unconscionable (grossly unfair).¹⁸² Some judges held that because unconscionability hinges, in part, on the formation of the container contract, it is for the arbitrator under *Prima Paint*.¹⁸³ But gradually, courts began to reserve the doctrine for themselves.¹⁸⁴ These judges reasoned that a narrowly tailored

-
180. Courts have disagreed over how to classify these issues under the separability rubric. Compare, e.g., *Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003) (holding that a party’s mental incapacitation defense “goes to *both* the entire contract and the specific agreement to arbitrate” and thus should be resolved by the court), with, e.g., *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) (holding that a party’s mental incapacity defense was “a defense to his entire agreement . . . and not a specific challenge to the arbitration clause” and thus should be resolved by the arbitrator). For other cases on the *Spahr* side of the line, see, for example, *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992) (“The [*Prima Paint*] calculus changes when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration. . . . Under these circumstances, there is no presumptively valid general contract which would trigger the district court’s duty to compel arbitration pursuant to the Act.”), abrogated in other part by *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995), as recognized in *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325 (11th Cir. 2016); and *Jolley v. Welch*, 904 F.2d 988, 993-94 (5th Cir. 1990) (affirming the district court’s refusal to compel arbitration where a party alleged that her signature on the container contract was forged).
181. See Rau, *Separability*, *supra* note 65, at 14-15 (quoting Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT’L ARB. 213, 253 n.173 (1996) [hereinafter Rau, *The New York Convention*]). But see Ware, *supra* note 126, at 124-26 (attacking the separability doctrine by questioning whether there is a meaningful difference between a signature obtained at gunpoint and less extravagant facts that give rise to mine-run fraud or duress claims).
182. See generally Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967) (dividing the doctrine into procedural (“bargaining naughtiness”) and substantive (“evils in the resulting contract”) unconscionability).
183. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398 (5th Cir. Unit B Feb. 1981); cf. *Benoay v. Prudential-Bache Sec., Inc.*, 805 F.2d 1437, 1441 (11th Cir. 1986) (per curiam) (directing the district court to determine whether the party’s unconscionability claim concerned just the arbitration clause itself or the contract as a whole before deciding whether *Prima Paint* required the claim to be resolved in arbitration).
184. See, e.g., *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1270-71 (9th Cir. 2006) (en banc); *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 264 (3d Cir. 2003); see also *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 159 (Wis. 2006) (holding that an unconscionability challenge to the arbitration agreement should be decided by the courts where neither party argued that the dispute must be decided in arbitration).

unconscionability claim “goes specifically, and only, to the arbitration clause,” rather than the container contract.¹⁸⁵ They struck down as unconscionable provisions that mandated confidentiality,¹⁸⁶ prohibited the award of particular remedies,¹⁸⁷ shortened statutes of limitations,¹⁸⁸ selected distant fora,¹⁸⁹ restricted discovery,¹⁹⁰ imposed hefty costs,¹⁹¹ prohibited declaratory and injunctive relief,¹⁹² or eliminated the right to bring a class action.¹⁹³ Separability thus made unconscionability the only reliable avenue for regulating lopsided arbitration clauses.

Meanwhile, in 1995, with *First Options of Chicago, Inc. v. Kaplan*, the Court addressed arbitrating arbitrability under the FAA for the first time (albeit in the context of sophisticated parties).¹⁹⁴ Manuel Kaplan owned a company called MKI Investments, Inc. (MKI).¹⁹⁵ Manuel, his wife, and MKI entered into four separate contracts with First Options of Chicago, Inc. (First Options).¹⁹⁶ Only one of these agreements contained an arbitration clause, and it had been signed by MKI but not the Kaplans personally.¹⁹⁷ A dispute arose, and First Options filed an arbitration against MKI as well as the Kaplans as individuals.¹⁹⁸ MKI agreed to arbitrate, but the Kaplans resisted, arguing to the arbitrators that they had never agreed to arbitrate their dispute with First Options.¹⁹⁹ The arbitrators first rejected the Kaplans’ objections and then found for First Options on the merits.²⁰⁰

The Supreme Court took the case to clarify the standard courts should apply when reviewing an arbitrator’s decision that a dispute is subject to arbitration.²⁰¹ In a short but dense opinion written by Justice Breyer, the Court

185. *E.g.*, *Nagrampa*, 469 F.3d at 1270.

186. *E.g.*, *Sprague v. Household Int’l*, 473 F. Supp. 2d 966, 974 (W.D. Mo. 2005).

187. *E.g.*, *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 671 (S.C. 2007).

188. *E.g.*, *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 152 (Ct. App. 1997).

189. *E.g.*, *Nagrampa*, 469 F.3d at 1285.

190. *E.g.*, *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 786-87 (9th Cir. 2002).

191. *E.g.*, *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 277 (Ct. App. 2004).

192. *E.g.*, *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000).

193. *E.g.*, *id.*

194. 514 U.S. 938, 940 (1995).

195. *Id.*

196. *Id.*

197. *Id.* at 941.

198. *See id.* at 940-41.

199. *See id.* at 941.

200. *Id.*

201. *See id.*

held that the answer to this question hinges on the parties' intent.²⁰² If "the parties agree[d] to submit the arbitrability question itself to arbitration," then a judge should give the arbitrators' resolution of that issue the same broad deference they give to arbitral awards on the merits.²⁰³ Conversely, if "the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."²⁰⁴

Justice Breyer then addressed how courts should decide whether the parties intended to arbitrate the question whether they have agreed to arbitrate.²⁰⁵ Citing the Court's previous opinions on labor arbitration under section 301 of the Taft-Hartley Act,²⁰⁶ Justice Breyer held that although arbitration is generally a matter of contract, judges "should *not* assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."²⁰⁷ He reasoned that this thumb on the scale against finding an intent to arbitrate arbitrability stemmed from the fact that the issue "is rather arcane."²⁰⁸ Indeed, he continued, "A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers."²⁰⁹

Finally, Justice Breyer applied the "clear and unmistakable" rule to the case. He held that First Options had failed to prove that the Kaplans had unequivocally consented to arbitrate the issue whether they had agreed to arbitrate the merits of their dispute.²¹⁰ After all, only MKI—not the Kaplans—had even signed a contract that contained an arbitration clause.²¹¹ Moreover, although the Kaplans had appeared in the arbitration, they did so for one purpose only: to vociferously protest the arbitrators' assertion of jurisdiction over them.²¹²

First Options's legacy was not its analysis of the facts of that case, but rather its strong suggestion that the FAA did not bar contractual partners from

202. *See id.* at 940, 943.

203. *See id.* at 943.

204. *Id.*

205. *See id.* at 944.

206. *See supra* text accompanying notes 135-41.

207. *First Options*, 514 U.S. at 944 (alterations in original) (emphasis added) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

208. *See id.* at 945.

209. *Id.*

210. *Id.* at 946.

211. *See id.* at 941.

212. *See id.* at 946.

unambiguously “agree[ing] to submit the arbitrability question itself to arbitration.”²¹³ As scholars noted, this invitation to arbitrate arbitrability in the commercial setting broke with tradition.²¹⁴ Although Justice Breyer did not explain how *First Options* was consistent with sections 3 and 4 of the FAA, the opinion became synonymous with the idea that parties *could* arbitrate the scope or validity of the arbitration clause if they were abundantly clear that they wished to do so.²¹⁵

The Court revisited the borderland between arbitral and judicial power in the decade after *First Options*. Although it did not address the “clear and unmistakable” test again, it did refine the definition of “arbitrability.” In *Howsam v. Dean Witter Reynolds, Inc.*, the Justices considered whether courts or arbitrators should apply a National Association of Securities Dealers (NASD) rule requiring claims to be brought within six years of the alleged wrongdoing.²¹⁶ The Court reasoned that some matters (substantive arbitrability) are presumptively for judges, including “whether the parties are bound by a given arbitration clause” or “whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.”²¹⁷ However, the Court

213. *Id.* at 943.

214. *See, e.g.*, Natasha Wyss, *First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351, 357-58 (1997).

215. *See, e.g.*, *Carson v. Giant Food, Inc.*, 175 F.3d 325, 329-31 (4th Cir. 1999) (instructing drafters who desired to arbitrate arbitrability that they “need only state that ‘all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,’ or words to that clear effect”); *cf.* *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998) (“We find no ‘clear and unmistakable evidence’ within the four corners of the Manufacturing Agreement that the parties intended to submit the question of whether an agreement to arbitrate exists to an arbitrator.”); *Gen. Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 249 (5th Cir. 1998) (“The arbitration clause in the lease contract does not clearly and unmistakably grant [the arbitrator] the authority to decide the scope of his own powers.”); *McLaughlin Gormley King Co. v. Terminix Int’l Co.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (“[N]either the arbitration clause nor any other provision . . . clearly and unmistakably evidenced the parties’ intent to give the arbitrator power to determine arbitrability.”). *But see* *Abram Landau Real Estate v. Benova*, 123 F.3d 69, 73 (2d Cir. 1997) (holding that the “clear and unmistakable” requirement from *First Options* applies only to “a dispute regarding whether parties ever entered into a valid arbitration agreement at all”); *Rau, Arbitrability Question*, *supra* note 65, at 302 (discerning from *First Options* only that a party cannot agree to arbitrate whether it had agreed to arbitrate the merits merely by appearing at the hearing to contest the arbitral panel’s jurisdiction).

216. 537 U.S. 79, 81 (2002).

217. *See id.* at 84. Other judges and commentators usually call these questions matters of “substantive arbitrability.” *See, e.g.*, *Boys Club of San Fernando Valley, Inc. v. Fid. & Deposit Co. of Md.*, 8 Cal. Rptr. 2d 587, 589 (Ct. App. 1992) (quoting *Unimart v. Superior Court*, 82 Cal. Rptr. 249, 253 (Ct. App. 1969)); *Reuben*, *supra* note 174, at 835. However, the Supreme Court has merely called them matters of “arbitrability.” *See, e.g.*, *Howsam*, 537 U.S. at 83.

also explained that other matters (procedural arbitrability) are presumed to be for arbitrators.²¹⁸ This group—which includes “prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate”—consists of topics that emerge *during* the dispute resolution process, meaning that parties would expect an arbitrator to resolve them.²¹⁹ The Court held that the NASD rule fell within the latter camp.²²⁰ In addition, the Court buttressed this conclusion by reasoning that “the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it.”²²¹

Corporate lawyers were watching the Court’s jurisprudence closely. Frustrated with what they perceived as the hair-trigger use of the unconscionability doctrine to nullify arbitration clauses, they began to try to capitalize on *First Options* through “delegation clauses”²²²: provisions that expressly allow the arbitrator to decide any issue relating to the agreement to arbitrate the merits.

At first, these provisions received a mixed verdict. Courts had few qualms about agreements to arbitrate arbitrability in business-to-business transactions or contracts involving savvy individuals like Manuel Kaplan.²²³ But judges

218. *Howsam*, 537 U.S. at 84-85. In the Court’s vernacular, matters of procedural arbitrability are not matters of “arbitrability.” *See id.* at 84.

219. *See id.* at 84-85 (emphasis omitted) (quoting UNIF. ARBITRATION ACT § 6 cmt. 2, 7 U.L.A. 13 (Supp. 2002)).

220. *Id.* at 85.

221. *Id.* This “institutional competence” rationale loomed large in a subsequent case, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). In *Bazzle*, a plurality of the Court held that arbitrators, not courts, should decide whether an arbitration clause barred class actions when it was silent on the issue. *Id.* at 452-53 (plurality opinion). The plurality reasoned that “[a]rbitrators are well situated” to decide “what kind of arbitration proceeding the parties agreed to” because that question “concerns contract interpretation and arbitration procedures.” *Id.* (emphasis omitted).

222. The term “delegation clause” first appeared in the early 2000s, *see, e.g.*, Appellants’ Reply Brief at 3, *Luna v. Household Fin. Corp.*, III, No. 02-36076 (9th Cir. May 13, 2003), 2003 WL 22593601, and was eventually popularized by the Court, *cf. Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (adopting the parties’ use of the term “delegation provision”).

223. *See, e.g.*, *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 207-08, 211 (2d Cir. 2005) (compelling arbitration of an issue of arbitrability where a contract between two companies incorporated the American Arbitration Association (AAA) rules, including a provision granting arbitrators power to determine their own jurisdiction); *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 203 F.R.D. 677, 678, 685 (S.D. Fla. 2001) (applying the same analysis to a contract between an orthopedic center and a management firm), *aff’d in other part, appeal dismissed in part per curiam*, 312 F.3d 1349 (11th Cir. 2002), *abrogated in other part*, *Ray Haluch Gravel Co. v. Cent. Pension Fund*, 134 S. Ct. 773 (2014); *Polaris Sales, Inc. v. Heritage Imps., Inc.*, 879 So. 2d 1129, 1131, 1133-34 (Ala. 2003) (enforcing a delegation clause in a contract between a vehicle distributor and a dealer).

were more skeptical when these clauses appeared in adhesion contracts.²²⁴ For instance, in *Luna v. Household Finance Corp. III*, a mortgage company's boilerplate declared that "the validity or enforceability of this arbitration clause . . . shall be resolved . . . by binding arbitration."²²⁵ The Western District of Washington refused to follow this directive, reasoning that it was incompatible with both section 4 of the FAA and "fundamental notions of fairness and basic principles of contract formation."²²⁶ Likewise, a California appellate panel cited the arbitrator's "self-interest in deciding that a dispute is arbitrable" and invalidated a delegation clause in an employment contract.²²⁷ As the court explained, "[A]n arbitrator who finds an arbitration agreement unconscionable would not only have nothing further to arbitrate, but could also reasonably expect to obtain less business in the future."²²⁸

Thus, even as late as the dawn of the new millennium, courts refused to allow arbitrators to resolve matters of substantive arbitrability in the consumer and employment setting. Nevertheless, the Court would soon abolish this exception.

C. *Rent-A-Center*

In 2010, the Court decided *Rent-A-Center, West, Inc. v. Jackson*,²²⁹ which transformed arbitration about arbitration. Rent-A-Center, a nationwide rent-

224. See, e.g., *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 9, 13 (1st Cir. 2009) (refusing to send an unconscionability claim to arbitration—despite incorporation of the AAA rules permitting an arbitrator to determine arbitrability—until a judge had conducted a preliminary examination of whether the drafter's dispute resolution scheme gave the plaintiffs meaningful access to an arbitral forum). Admittedly, other courts did not treat adhesion contracts differently for the purposes of arbitrating substantive arbitrability. See *Citifinancial, Inc. v. Newton*, 359 F. Supp. 2d 545, 546, 552 (S.D. Miss. 2005) (compelling arbitration about the arbitrability of a consumer fraud claim based on the parties' agreement "to be bound by the procedural rules of the AAA"); *Ford Motor Credit Co. v. Cornfield*, 918 N.E.2d 1140, 1144, 1155 (Ill. App. Ct. 2009) (allowing an arbitrator to decide whether a retail installment sales contract survived the parties' settlement).

225. 236 F. Supp. 2d 1166, 1171 (W.D. Wash. 2002).

226. See *id.* at 1173-74.

227. See *Ontiveros v. DHL Express (USA), Inc.*, 79 Cal. Rptr. 3d 471, 480-82 (Ct. App. 2008), *abrogated by Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010), *as recognized in Tiri v. Lucky Chances, Inc.*, 171 Cal. Rptr. 3d 621 (Ct. App. 2014).

228. *Id.* at 482. In the context of employment agreements, courts also declined to allow the arbitrator to decide whether the party had waived the right to arbitration by actively litigating the dispute in court or before an administrative agency, even when the contracts mandated arbitration for "arbitrability" issues. See *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 222 (3d Cir. 2007); *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 14-15 (1st Cir. 2005).

229. 561 U.S. 63 (2010).

to-own company,²³⁰ required its at-will workers to sign a freestanding “Mutual Agreement to Arbitrate Claims.”²³¹ In the middle of a paragraph entitled “Arbitration Procedures” was a clause that gave the arbitrator the “exclusive authority to resolve . . . any claim that all or any part of this agreement is void or voidable.”²³² Antonio Jackson, a former employee, sued the company for racial discrimination and retaliation.²³³ When Rent-A-Center moved to compel arbitration,²³⁴ Jackson countered by arguing that “the arbitration agreement as a whole” was unconscionable because it forced him to pay a portion of the arbitrator’s fees and restricted discovery.²³⁵ The Ninth Circuit held that Jackson could pursue his unconscionability theory in federal district court, rather than arbitration, because any arbitration clause that might be unconscionable cannot pass the “clear and unmistakable” test.²³⁶ According to the appellate panel, this was because an allegation of unconscionability translates into a claim that a party “could not meaningfully assent to the agreement.”²³⁷

The Supreme Court offered a fundamentally different take. Justice Scalia, writing for the Court, began by refuting the Ninth Circuit’s bright-line rule that drafters cannot task the arbitrator with deciding whether the agreement to arbitrate the merits is unconscionable.²³⁸ According to Justice Scalia, the *First Options* “clear and unmistakable” rule “pertains to the parties’ *manifestation of intent*”—not their *actual* assent—and is thus satisfied by mere written words on a page.²³⁹ Thus, he concluded that the Mutual Agreement to Arbitrate Claims contained a presumptively valid delegation clause.²⁴⁰

230. See *Learn About the History of Rent-to-Own and Rent-A-Center*, RENT-A-CTR., <https://perma.cc/M3SH-5JSD> (archived Nov. 23, 2017).

231. See *Jackson v. Rent-A-Ctr. W., Inc.*, 581 F.3d 912, 914 & n.1 (9th Cir. 2009), *rev’d*, 561 U.S. 63 (2010); see also Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS., no. 1, 2012, at 129, 140 (interpreting the fact that the only contract between the parties in *Rent-A-Center* was an arbitration agreement to mean that the plaintiff was an at-will employee).

232. *Jackson*, 581 F.3d at 914 (capitalization altered).

233. *Id.* at 912, 914.

234. See *Rent-A-Ctr.*, 561 U.S. at 65.

235. *Id.* at 73-74 (emphasis omitted) (quoting Opposition to Motion to Compel Arbitration and for Attorney Fees at 5, *Jackson v. Rent-A-Ctr.-W. Inc.*, No. 03:07-CV-0050-LRH (RAM), 2007 WL 7030394 (D. Nev. June 7, 2007), 2007 WL 7031087); *id.* at 66 (discussing Jackson’s argument that the fee-splitting provision was substantively unconscionable).

236. *Jackson*, 581 F.3d at 917.

237. *Id.*

238. See *Rent-A-Ctr.*, 561 U.S. at 69 n.1.

239. See *id.*

240. See *id.* (“[FAA] § 2 applies to all written agreements to arbitrate.”).

Justice Scalia then addressed Jackson's unconscionability challenge by fusing the Court's separability and arbitrating arbitrability case law. Section 2 of the FAA states in part that "[a] written provision . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable."²⁴¹ Justice Scalia opined that a delegation clause is its own "written [arbitration] provision" within the meaning of the statute:

The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. . . . An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.²⁴²

In turn, by deeming delegation clauses to be self-contained arbitration clauses, Justice Scalia brought the separability doctrine into play. *Prima Paint* decreed that a challenge to the container contract (but not the arbitration provision) is a matter to be resolved in arbitration.²⁴³ In *Rent-A-Center*, Justice Scalia extended this principle and held that if an arbitration agreement includes a delegation clause, a challenge to the validity of the arbitration agreement (but not the delegation clause specifically) is also for the arbitrator.²⁴⁴ As a result, a plaintiff cannot ask a judge to review the fairness of the agreement to arbitrate the merits of the dispute unless she first proves that the delegation clause is invalid.

To see why this is a formidable hurdle for plaintiffs, consider how Justice Scalia disposed of Jackson's efforts to avoid arbitration. At the district court, Jackson had argued that the Mutual Agreement to Arbitrate Claims was unconscionable because it limited discovery in his fact-sensitive civil rights lawsuit and called for him to pay a portion of the arbitrator's fees.²⁴⁵ But he had not offered any reason that *the delegation clause itself* was invalid. Thus, the Court concluded that Jackson had conceded the relevant issue and held that he must arbitrate the question whether the arbitration clause was unconscionable.²⁴⁶ Moreover, Justice Scalia took pains to point out that even if Jackson had contested the enforceability of the delegation clause, he likely would have

241. 9 U.S.C. § 2 (2016).

242. *Rent-A-Ctr.*, 561 U.S. at 68-70.

243. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); *supra* text accompanying notes 127-28.

244. See 561 U.S. at 70-72 ("[U]nless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, . . . leaving any challenge to the validity of the [a]greement as a whole for the arbitrator.").

245. See *Opposition to Motion to Compel Arbitration and for Attorney Fees*, *supra* note 235, at 4-5.

246. See *Rent-A-Ctr.*, 561 U.S. at 74-75.

lost.²⁴⁷ As Justice Scalia noted, the aspects of the arbitration clause that Jackson claimed made it unfair for him to arbitrate his substantive claim—the fee-sharing provision and discovery limitations—had little bearing on whether it would be unfair for him to arbitrate the discrete question whether the arbitration clause was unconscionable.²⁴⁸

Lower courts interpreted *Rent-A-Center* broadly. For one, they understood the opinion to establish a kind of “super-separability” rubric in which every contract that contains a delegation clause breaks down into “three agreements[,] each nested inside the other”: (1) a delegation clause, (2) an arbitration clause, and (3) the container contract.²⁴⁹ In addition, they took to extremes the idea that plaintiffs needed to argue that the delegation provision *itself* is unconscionable.²⁵⁰ If a plaintiff failed to mention the magic words “delegation clause” in her pleadings, she—like Jackson in *Rent-A-Center*—would be forced to challenging the fairness of the arbitral process in arbitration itself.²⁵¹

247. See *id.* at 74 (hypothesizing arguments against the delegation provision and labeling them “difficult . . . to sustain”).

248. See *id.* Justice Stevens’s dissent criticized the majority opinion on two grounds. First, echoing the Ninth Circuit below, Justice Stevens noted that the essence of an unconscionability challenge is that an adherent “did not in fact assent or appear to assent to the unfair terms.” *Id.* at 81 (Stevens, J., dissenting) (quoting 2 RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (AM. LAW INST. 1981)); see *Jackson v. Rent-A-Ctr. W., Inc.*, 581 F.3d 912, 917 (9th Cir. 2009), *rev’d*, 561 U.S. 63 (2010). Accordingly, Justice Stevens questioned how language in an arbitration clause could “clearly and unmistakably” demonstrate that an adherent had agreed to arbitrate the very question whether he had agreed to arbitrate. See *Rent-A-Ctr.*, 561 U.S. at 80-82 (Stevens, J., dissenting).

Second, Justice Stevens accused the majority of extending *Prima Paint* beyond its normative underpinnings. He noted that one of the separability doctrine’s purposes is to prevent courts from seizing power from arbitrators by resolving claims that relate both to arbitrability and the substantive dispute. See *id.* at 87. For instance, he elaborated, if a court had decided the fraud claim in *Prima Paint*, that would have been “the entire ball game”: There would have been nothing left for the arbitrator to do. *Id.* Conversely, in *Rent-A-Center*, “resolution of the unconscionability question [would] have no bearing on the merits of the underlying employment dispute”; instead, it would “only, as a preliminary matter, resolve who should decide the merits of that dispute.” *Id.*

249. See *Brennan v. Opus Bank*, 796 F.3d 1125, 1133 (9th Cir. 2015); see also *Law Offices of Daniel C. Flint, P.C. v. Bank of Am., N.A.*, No. 15-13006, 2016 WL 1444505, at *5 (E.D. Mich. Apr. 13, 2016) (explaining that *Rent-A-Center* “extended the separability rule advanced in *Prima Paint* to delegation provisions within arbitration agreements”).

250. See, e.g., *Rai v. Ernst & Young, LLP*, No. 09-13194, 2010 WL 3518056, at *4-5 (E.D. Mich. Sept. 8, 2010) (faulting the plaintiff for merely contending “that fee splitting makes it too expensive to litigate his entire discrimination claim, not the limited question of whether the Arbitration Agreement is valid and enforceable”).

251. See *Parks v. Career Educ. Corp.*, No. 4:11 CV 999 CDP, 2011 WL 5975936, at *2 (E.D. Mo. Nov. 30, 2011) (rejecting the plaintiff’s challenge to the delegation clause because “[n]one of the challenged provisions affect [her] ability to arbitrate whether the arbitration agreement is valid and enforceable” and concluding that “the arbitrator

footnote continued on next page

Then, on the heels of *Rent-A-Center*, the Supreme Court decided a rash of cases about the FAA and class actions that had the collateral consequence of further insulating delegation clauses. For example, in *AT&T Mobility LLC v. Concepcion*, the Court held that the statute preempts a California common law doctrine that deemed most class arbitration waivers in adhesion contracts to be unconscionable.²⁵² Although *Concepcion*'s holding remains contested, some courts read the opinion as signaling that “[a]ny general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA.”²⁵³

Delegation clauses rode the wake of these decisions. Recall that some judges refused to compel arbitration of unconscionability challenges on the

must decide the enforceability of the arbitration agreement”); *Staples v. Regions Bank*, 825 F. Supp. 2d 754, 760 (N.D. Miss. 2011) (“Plaintiffs have filed a lengthy opposition to the motion to compel arbitration, but it seems clear to this court that all of the arguments therein relate either to the enforceability of the [container contract] as a whole or to the enforceability of the arbitration agreement as a whole.”); *Madgrigal v. AT&T Wireless Servs., Inc.*, No. 1:09-cv-0033-OWW-MJS, 2010 WL 5343299, at *7 (E.D. Cal. Dec. 20, 2010) (rejecting the plaintiff’s contention that the arbitration clause was invalid due to costs “of conducting the *entire arbitration*” that could exceed \$60,000 because she “provide[d] no evidence that the cost of submitting threshold questions of arbitrability to the arbitrator is so high as to impede[] [her] ability to challenge the arbitration agreement”).

252. 563 U.S. 333, 340, 352 (2011). The Court in *Concepcion* opined that class arbitration lacks the speed and informality of two-party arbitration. *See id.* at 348-49. Accordingly, by effectively mandating that class procedures be available for certain claims, the state rule violated the FAA’s overarching purpose of “allow[ing] for efficient, streamlined procedures.” *Id.* at 344-45. Four years later, the Court also held that the FAA barred a California court from finding that a California choice-of-law clause manifested the parties’ intent to select California law (instead of the FAA) to govern the issue whether a class arbitration waiver in a consumer contract was unconscionable. *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469-71 (2015) (holding that such an interpretation fails to “place arbitration contracts ‘on equal footing with all other contracts’” (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006))).
253. *See, e.g., Mortensen v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1153, 1159-62 (9th Cir. 2013) (holding that the FAA precluded a court from striking down an arbitration clause under Montana’s “reasonable expectations” doctrine); *see also Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 930, 934 (9th Cir. 2013) (determining that the FAA preempted a California rule that exempted “public injunctive relief” claims from arbitration). However, other courts (including other Ninth Circuit panels) have construed *Concepcion* as signaling only that the FAA overrides state rules that thwart “fundamental attributes of arbitration” such as the “parties’ freedom to select informal arbitration procedures.” *See, e.g., Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 427, 429, 435 (9th Cir. 2015) (quoting *Concepcion*, 563 U.S. at 344) (holding that the FAA did not preempt a state law doctrine that exempts from arbitration claims under California’s Private Attorneys General Act of 2004); *see also Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013) (“[S]tate-law rules that do not ‘interfere[] with fundamental attributes of arbitration’ do not implicate *Concepcion*’s limits on state unconscionability rules.” (second alteration in original) (citation omitted) (quoting *Concepcion*, 563 U.S. at 344))).

ground that as “a repeat player, the arbitrator has a unique self-interest in deciding that a dispute is arbitrable.”²⁵⁴ Nevertheless, after *Concepcion*, the same courts were constrained to find that this theory is preempted by the FAA because it “discriminates against arbitration, putting agreements to arbitrate on a lesser footing than agreements to select any judicial forum for dispute resolution.”²⁵⁵ Thus, they uniformly “reject[ed] the argument, however practical it may be, that an arbitrator will be unable to determine the question of arbitrability because he or she may potentially be driven by an ulterior interest in keeping the case in arbitration to generate fees.”²⁵⁶

* * *

For decades, courts applied closer scrutiny to agreements to arbitrate substantive arbitrability than they did to agreements to arbitrate the merits. Yet *Rent-A-Center* seemed to obliterate that distinction by declaring that delegation clauses qualify for the same protections under federal law as arbitration provisions.²⁵⁷ As this Article explains next, that view is flawed.

II. Rethinking Arbitration About Arbitration

This Part proposes an alternative understanding of delegation provisions. First, from a normative perspective, it argues that any satisfying account of delegation clauses must consider the FAA’s division of power between courts and arbitrators and the clandestine nature of arbitration about arbitration. Because these characteristics are specific to delegation clauses, it would be unwise to treat delegation and arbitration provisions precisely the same way. Second, from a descriptive standpoint, this Part explains why *Rent-A-Center* does not foreclose this more nuanced account of delegation clauses.

A. Delegation Versus Arbitration

To frame this discussion, it is helpful to step back and situate *Rent-A-Center* within a larger theory of the divide between arbitral and judicial power. The point of departure is the axiom that arbitration draws its legitimacy from the

254. See, e.g., *Ontiveros v. DHL Express (USA), Inc.*, 79 Cal. Rptr. 3d 471, 481 (Ct. App. 2008), abrogated by *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010), as recognized in *Tiri v. Lucky Chances, Inc.*, 171 Cal. Rptr. 3d 621 (Ct. App. 2014); see also *supra* text accompanying notes 227-28.

255. *Malone v. Superior Court*, 173 Cal. Rptr. 3d 241, 255 (Ct. App. 2014).

256. See, e.g., *Phillips v. Bestway Rental, Inc.*, No. 4:12CV48, 2013 WL 832306, at *3 (N.D. Miss. Mar. 6, 2013), *aff’d per curiam*, 542 F. App’x 410 (5th Cir. 2013); see also *Tiri*, 171 Cal. Rptr. 3d at 635.

257. See *supra* text accompanying notes 241-44.

parties' mutual consent.²⁵⁸ As the Court has repeatedly intoned, the arbitral process "is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."²⁵⁹ Thus, even staunch advocates of arbitral power believe that judges must make a preliminary determination that the parties have consented to arbitrate *something*.²⁶⁰

What counts as this kind of prima facie agreement to arbitrate is hotly contested. At this threshold step, courts seem not to ask whether a party's apparent consent to the transaction is voluntary, informed, or free from fraud or duress.²⁶¹ Instead, they merely confirm that the parties are competent and have manifested assent to the container contract.²⁶² The judicial inquiry is so restrained because an agreement to arbitrate is an agreement unlike any other. The mere existence of an arbitration clause raises the possibility that contractual partners wanted an arbitrator to resolve *every* possible future dispute between them. As Alan Rau has explained, once a judge has verified that the parties have agreed to arbitrate *some* issues, a second question pops up: How *far* does the parties' agreement extend?

A party may well have "consented" to the arbitration of disputes relating to a contractual shipment of pork bellies—but he has not necessarily "consented" thereby to arbitrate disputes arising out of an arguably distinct contract for the shipment of pig iron

258. See, e.g., *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so").

259. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (emphasis omitted) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

260. Cf. Rau, *Arbitrability Question*, *supra* note 65, at 303 n.42 (arguing that an arbitration clause cannot be "entirely self-validating"); Rau, *Separability*, *supra* note 65, at 5 ("Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract' and thus of arbitration." (quoting *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002))).

261. See *supra* notes 177-81 and accompanying text.

262. See, e.g., *Vector Elec. & Controls, Inc. v. ABM Indus. Inc.*, No. 3:15-00252-JWD-RLB, 2016 WL 126752, at *5 (M.D. La. Jan. 11, 2016) ("[S]o long as (1) a valid agreement to arbitrate is tendered, (2) the relevant dispute falls within that agreement's ambit, and (3) none of the general contract defenses subsumed into the Savings Clause have been presented, arbitration must follow, and a federal case either stayed or dismissed."); see also *supra* note 180. Things get pretty hairy at the fringes of this issue. For instance, does a party "agree" to arbitrate an allegation that she signed the container contract at gunpoint? Compare Rau, *Separability*, *supra* note 65, at 14 (asserting that the separability doctrine would not compel arbitration in such a case because "[t]here [was] simply no agreement to anything" (quoting Rau, *The New York Convention*, *supra* note 181, at 253 n.173)), with Ware, *supra* note 126, at 121-26 (criticizing Rau's hypothetical and arguing that the separability doctrine is flawed because it would compel arbitration of such a claim).

... Suppose that the parties have undoubtedly “consented” to arbitrate the merits of a contractual dispute: It need not follow, however, that they have “consented” to arbitrate any claim where, say, the validity of the underlying contract itself has been vitiated by fraud. Nor does it follow that they have necessarily “consented” to arbitrate any claim where the underlying contract is no longer in force, but may have expired or been terminated.²⁶³

Further complicating matters, this second question leads to a third. It is entirely possible that the parties wanted an arbitrator—not a court—to delineate the boundaries of their consent to arbitrate.²⁶⁴ So once we have confirmed that the parties are capable of contracting and seem to have assented to a document that includes an arbitration clause, who decides whether the parties have agreed to arbitrate a particular dispute?

The Court’s separability and arbitrating arbitrability jurisprudence can be seen as a phalanx of presumptions that answers this last question. Collectively, *Prima Paint*, *First Options*, and *Howsam* establish that as long as the parties employed a broad arbitration clause, arbitrators resolve claims that the container contract is unenforceable under a defense like fraud or duress,²⁶⁵ that a party has failed to comply with a condition precedent to arbitration,²⁶⁶ or that the statute of limitations has run.²⁶⁷ Conversely, matters related to the validity or scope of the arbitration clause are presumptively for judges.²⁶⁸ This is where delegation clauses come in. They are attempts to override this default allocation of jurisdiction by shunting *all* these topics to the arbitrator.

Critically, though, this ploy cuts sharply against the grain of the FAA. Sections 3 and 4 of the FAA require courts to examine whether the parties have entered into an enforceable arbitration clause that covers the underlying complaint.²⁶⁹ Congress probably intended these to be mandatory rules. Section 9 provides a good point of comparison. That provision states that the court “must grant” a motion to confirm an arbitral award “unless the award is vacated, modified, or corrected.”²⁷⁰ In *Hall Street Associates v. Mattel, Inc.*, the Court held that parties cannot draft around section 9, noting: “There is nothing malleable about ‘must grant,’ which unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies.”²⁷¹ Sections 3 and 4 share section 9’s imperative tenor. Indeed, section 3

263. Rau, *Arbitrability Question*, *supra* note 65, at 309 (footnote omitted).

264. *See id.* at 311.

265. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967).

266. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-46 (1995).

267. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002).

268. *See supra* text accompanying note 217.

269. 9 U.S.C. §§ 3-4 (2016); *see supra* text accompanying notes 106-07.

270. 9 U.S.C. § 9.

271. 552 U.S. 576, 587-89 (2008).

entitles the party seeking enforcement of the arbitration agreement to a stay of litigation only if the judge is “satisfied that the issue involved . . . is referable to arbitration.”²⁷² Even more forcefully, section 4 declares that “[t]he court *shall* hear the parties . . . [i]f the making of the arbitration agreement . . . [is] in issue.”²⁷³ Like section 9, neither section 3 nor section 4 “sound[s] remotely like a provision meant to tell a court what to do just in case the parties say nothing else.”²⁷⁴

The FAA’s context and history reinforce this conclusion. Even in the early 1920s, long before the advent of rampant adhesion contracting,²⁷⁵ members of Congress expressed concern about arbitration being imposed on unwilling parties. For instance, as Senator Walsh of Montana put it:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily [sic] things at all. . . . A man says[,] “These are our terms. All right, take it or leave it.” Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.²⁷⁶

To ameliorate this criticism, pro-arbitration lobbyists, including the FAA’s draftsman, Julius Henry Cohen,²⁷⁷ emphasized sections 3 and 4. For instance, in a law review article about a New York statute that served as a precursor to the FAA, Cohen reassured readers that “if there be any dispute regarding the making of the contract . . . , a trial of that issue by the court . . . is preserved.”²⁷⁸ In 1924, when testifying before congressional subcommittees, Cohen again mentioned this safeguard:

At the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim.²⁷⁹

272. 9 U.S.C. § 3.

273. *Id.* § 4 (emphasis added).

274. *Cf. Hall St.*, 552 U.S. at 587.

275. Indeed, the expression “contract of adhesion” had just been introduced when Congress debated the FAA. *See Stordahl v. Gov’t Emps. Ins. Co.*, 564 P.2d 63, 66 n.4 (Alaska 1977) (citing Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919)).

276. 1923 *Hearing*, *supra* note 26, at 9 (statement of Sen. Walsh).

277. *See Aragaki*, *supra* note 33, at 1947 (calling Cohen “the chief draftsman of the FAA”).

278. Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 149 (1921); *see* Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803 (codified as amended at N.Y. C.P.L.R. 7501-7514 (McKinney 2017)).

279. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 33-35 (1924) (statement of Julius Henry Cohen).

In addition, Senator Walsh expressed his understanding that “[t]he court has got to hear and determine whether there is an agreement of arbitration . . . and it is open to all defenses, equitable and legal.”²⁸⁰ Thus, there is a plausible argument that parties should not be able to dispense with judicial review of arbitration clauses under sections 3 and 4, just as they cannot contract for expanded judicial review of arbitration awards under section 9.²⁸¹

At the same time, though, there are reasons not to treat sections 3 and 4 as ironclad and unyielding. For one, courts have insisted for decades that parties *can* arbitrate arbitrability (as long as they unambiguously communicate their wish to do so).²⁸² It would be jarring to reconsider an issue that has acquired the patina of settled law. Moreover, barring arbitration about arbitration would violate the FAA’s goal of promoting party autonomy.²⁸³ Justice Kennedy captured this point during the *Rent-A-Center* oral argument by asking the plaintiff’s counsel: “[A]fter this suit was filed and both parties are going up the steps to the court, could the attorneys and the parties stop and say, let’s arbitrate this issue of unconscionability, and pick an arbitrator?”²⁸⁴ As the question implies, an indiscriminate ban on arbitrating substantive arbitrability would be extreme. Therefore, sections 3 and 4 exist halfway between inexorable commands and pure background principles. They should be seen as “sticky defaults”—rules that are hard to draft around—that bow only to “clear and unmistakable” evidence that the parties wanted to arbitrate substantive arbitrability.²⁸⁵

280. 1923 Hearing, *supra* note 26, at 5 (statement of Sen. Walsh).

281. See Thomas E. Carbonneau & Andrew W. Sheldrick, *Tax Liability and Inarbitrability in International Commercial Arbitration*, 1 J. TRANSNAT’L L. & POLY 23, 25 n.12 (1992) (arguing that “[u]nder section three of the [FAA], a court must decide whether a valid agreement to arbitrate exists”); Wyss, *supra* note 214, at 356 (noting that the traditional view is that “section 3 of the Act empowers the courts to decide all arbitrability issues”).

282. See *supra* notes 144-51, 213-15 and accompanying text.

283. See Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote “Autonomy”?*, 91 IND. L.J. 1143, 1145-46 (2016) (describing but then challenging the widespread belief that party autonomy is the most important value of arbitration and therefore that courts should enforce arbitration agreements).

284. Transcript of Oral Argument at 36, *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010) (No. 09-497), 2010 WL 1654083; see also Rau, *Arbitrability Question*, *supra* note 65, at 295 (providing a similar example of a voluntary postdispute submission of substantive arbitrability to arbitration).

285. For more on sticky defaults, see Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2045 (2012). In a short online essay published before the Court decided *Rent-A-Center*, I argued that section 4 was mandatory. See David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 VA. L. REV. IN BRIEF 1, 3 (2010). Although I still believe that this is what Congress intended, I now appreciate why a sticky default rule makes more sense than a mandatory rule.

There is a strong argument that—as the Ninth Circuit held in *Rent-A-Center*²⁸⁶—adhesive delegation clauses never satisfy the “clear and unmistakable” criterion. In contracts of adhesion, people “agree” to arbitrate in the most attenuated sense. Studies have demonstrated that consumers and employees do not read (and in any event, could not understand) fine-print dispute resolution provisions. For example, Jeff Govern et al. asked 668 respondents to answer a series of questions after reading a credit card contract that included an arbitration clause.²⁸⁷ They found that only 59 individuals—under 9% of all respondents—realized that the document waived their right to file a lawsuit in court.²⁸⁸ Likewise, Zev Eigen discovered that only 3 out of 37, or roughly 8%, of sales associates at an electronics store knew they had signed an arbitration agreement when they were hired.²⁸⁹

Of course, the law defines contractual consent objectively.²⁹⁰ To determine whether an individual assented to an exchange, we ask whether she signed on the dotted line or clicked a button on her computer screen, not whether she experienced some kind of “transcendent insight or internal transformation.”²⁹¹ Yet even the objective theory of contracts does not take acquiescence to fine print at face value. Instead, boilerplate clauses occupy a twilight zone between consensual and nonconsensual. As Karl Llewellyn famously argued, “agreement” to adhesive provisions is two-tiered:

Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific

286. See *Jackson v. Rent-A-Ctr. W., Inc.*, 581 F.3d 912, 918-19 (9th Cir. 2009), *rev'd*, 561 U.S. 63 (2010).

287. Jeff Govern et al., “Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 26-31 (2015).

288. See *id.* at 47.

289. Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 401, 409 (2008); cf. Yannis Bakos et al., *Does Anyone Read the Fine Print?: Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (observing the behavior of 48,154 visitors to 90 software company webpages and finding that “only one or two in 1,000 shoppers access a product’s [end-user license agreement] for at least 1 second”).

290. See, e.g., *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 221-22 (3d Cir. 2008) (“According to the objective theory of contract formation, what is essential is not assent, but rather what the person to whom a manifestation is made is justified as regarding as assent.” (quoting 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 4:19, at 586 (4th ed. 2008))); O.W. HOLMES, JR., THE COMMON LAW 309 (Boston, Little, Brown & Co. 1881) (“The law has nothing to do with the actual state of the parties’ minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct.”).

291. See Rau, *Separability*, *supra* note 65, at 8-10.

assent) to any not unreasonable or indecent terms the seller may have on his form . . .²⁹²

Indeed, only after a court has determined that a boilerplate provision is not unconscionable can it truly be said to fall within the “circle of assent.”²⁹³ Thus, the key to the entire kingdom—a consumer or employee’s consent to arbitrate *anything*—is shrouded in doubt.

Allowing an adhesive delegation clause to expand this putative agreement to include matters of substantive arbitrability is even more fraught. The Court has admitted that “the ‘who (primarily) should decide arbitrability’ question . . . is rather arcane”²⁹⁴ and that even well-represented entities and savvy businesspeople, such as the plaintiffs in *First Options*, might not grasp “the significance of having arbitrators decide the scope of their own powers.”²⁹⁵ For consumers and employees, this lack of comprehension is no mere risk; rather, it is a virtual certainty. Accordingly, any thoughtful approach to delegation clauses in adhesion contracts must accommodate Congress’s blueprint and the fact that adherents give only the shell of consent to arbitrating arbitrability.

The best way to balance these concerns would be to treat delegation clauses as “lite” arbitration clauses. In a nod to the Court’s endorsement of arbitration about arbitration, agreements to arbitrate substantive arbitrability should share the essential qualities of agreements to arbitrate the merits. First, they should be presumptively valid.²⁹⁶ Second, any state rule that severely discriminates against delegation clauses should be preempted.²⁹⁷ For example, the Court has declared that “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”²⁹⁸ It would be easy to introduce this credo into the realm of arbitration about arbitration. Recall that in the 2000s, some courts refused to enforce any delegation clauses in consumer and employment

292. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

293. See *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Ct. App. 1982) (quoting JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS: A REVISION OF GRISMORE ON CONTRACTS* § 352, at 743 (2d rev. ed. 1974)); see also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.”).

294. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

295. See *id.*

296. See *supra* text accompanying notes 98-99.

297. See *supra* note 166 and accompanying text.

298. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

contracts.²⁹⁹ These holdings operate from the premise that arbitrators cannot be trusted to decide substantive arbitrability and should thus be preempted.

Nevertheless, because delegation clauses are harder to square with the FAA’s text and history, the Act should not apply to them with the same ferocious force. Especially in the context of fine print, where the gulf between arbitration and assent is the widest,³⁰⁰ courts ought to be able to continue to apply rules acknowledging that delegation provisions are unique. These doctrines—including the “clear and unmistakable” test, the “wholly groundless” rule, and the idea that defenses such as unconscionability should have a particularly sharp bite when applied to arbitration about arbitration—do not express unwarranted suspicion of arbitral power. Rather, they merely recognize that delegation clauses stand on shakier footing under sections 3 and 4 and are further divorced from mutual consent than are agreements to arbitrate the merits. Thus, the relationship between delegation and arbitration provisions should be understood as a rough analogy, not an airtight syllogism.

B. Reading *Rent-A-Center* Narrowly

One might object that *Rent-A-Center* forecloses this proposal by treating delegation provisions as de facto arbitration clauses. But Justice Scalia’s opinion also lends itself to a reading consistent with the view that delegation clauses are only *like* arbitration provisions. Moreover, this milder interpretation is superior from a policy perspective.

Upon close inspection, *Rent-A-Center* does not support sweeping claims about the equivalence of arbitration and delegation clauses. For one, it applies the “clear and unmistakable” test: In a footnote, Justice Scalia concedes that “[c]ourts should *not* assume that the parties agreed to arbitrate [substantive] arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.”³⁰¹ The opinion’s casual invocation of a “heightened standard” that applies *only* to delegation clauses³⁰² debunks the notion that delegation clauses are indistinguishable from arbitration provisions. Although Justice Scalia calls the “clear and unmistakable” rule a “caveat” to the master tenet that “the FAA operates on [a delegation clause] just as it does on any other [arbitration clause],”³⁰³ the existence of the rule proves that courts *can* use special principles when faced with a purported agreement to arbitrate substantive arbitrability.

299. See *supra* notes 224–28 and accompanying text.

300. See *supra* notes 287–89 and accompanying text.

301. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010) (first, third, and fourth alterations in original) (emphasis added) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

302. See *id.*

303. See *id.* at 69 n.1, 70.

In addition, *Rent-A-Center's* facts are atypical, problematizing any attempt to read it as establishing that delegation provisions are always independent arbitration clauses. For one, the only formal contract between Antonio Jackson and Rent-A-Center was the Mutual Agreement to Arbitrate Claims.³⁰⁴ Unlike the typical consumer or employment agreement, where the arbitration clause is hidden within a maze of text,³⁰⁵ Jackson knew that he had agreed to arbitrate *something*.³⁰⁶ Thus, his signature on the short document provides a hook for arbitration that most adhesive arbitration provisions lack. In addition, because the Mutual Agreement to Arbitrate Claims was the sole binding arrangement between the parties, it could have been described as the container contract under the rubric established by *Prima Paint* half a century ago.³⁰⁷ In turn, longstanding separability principles would have dictated the same outcome Justice Scalia ultimately reached: Jackson's argument that "the Agreement as a whole is unconscionable" targeted the overarching transaction and needed to be heard by the arbitrator.³⁰⁸ In this way, *Rent-A-Center* can be seen as applying settled law rather than breaking new ground. The case's aggressive version of separability can be cabined to situations in which drafters take pains to secure an adherent's assent by breaking out the arbitration clause into a standalone contract.

Similarly, the Mutual Agreement to Arbitrate Claims features unusual language. In the agreement's fourth paragraph, Rent-A-Center and Jackson "mutually consent[ed] to the resolution by arbitration of all claims or controversies."³⁰⁹ The sixteenth paragraph then contains a discrete provision assigning substantive arbitrability to the arbitrator:

The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.³¹⁰

This bifurcated structure is not a conventional delegation clause. As Justice Scalia observed, *Rent-A-Center's* contract "contains *multiple* 'written

304. *See id.* at 65-66.

305. *See, e.g.,* *Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 747 (Cal. 2015) (describing an arbitration clause in a dense car sales contract that the consumer allegedly did not see).

306. *See Rent-A-Ctr.*, 561 U.S. at 65-66 (stating that Jackson signed the agreement "as a condition of his employment" with Rent-A-Center).

307. *See supra* text accompanying notes 123-27.

308. *See Rent-A-Ctr.*, 561 U.S. at 75 (emphasis omitted).

309. *See* Motion to Dismiss Proceedings and Compel Arbitration exhibit 1 at 1, *Jackson v. Rent-A-Ctr.-W. Inc.*, No. 03:07-CV-0050-LRH (RAM), 2007 WL 7030394 (D. Nev. June 7, 2007), 2007 WL 7140327 (reproducing the Mutual Agreement to Arbitrate Claims).

310. *Id.* at 2-3.

provision[s]’ to ‘settle by arbitration a controversy.’³¹¹ Yet the fact that the Mutual Agreement to Arbitrate Claims boasts two separate agreements to arbitrate does not mean that *all* contracts with delegation provisions do, too. In fact, most people would not understand delegation clauses in adhesion contracts this way. Companies often condense all language related to arbitration into a single sentence, such as “[a]ny claim or dispute, whether in contract, tort, statute or otherwise (including interpretation and scope of this clause, and the arbitrability of the claim or dispute) . . . shall . . . be resolved by neutral, binding arbitration and not by a court action.”³¹² Others mandate arbitration for “dispute[s],” which they define as “any controversy or claim,” “including any issue concerning the validity, enforceability, or scope of . . . the [a]rbitration agreement.”³¹³ In these common formulations, the delegation clause is entwined with the core agreement to arbitrate.

This connection between the arbitration and delegation clauses is not just grammatical. Instead, it runs deeper, because one overarching set of rules applies to the entire arbitral process. Whether the issue being arbitrated is the plaintiff’s complaint or the arbitrability of the plaintiff’s complaint, the hearing is conducted by the same decisionmaker under the same procedural and evidentiary standards. Thus, many delegation provisions do not seem like independent arbitration clauses.

Confining *Rent-A-Center* to its idiosyncratic facts would also be good policy. First, Justice Scalia’s labels-driven rubric spawns absurd results. For example, in the oft-cited case *Cole v. Burns International Security Services*, the D.C. Circuit held that employers cannot force employees with certain causes of action to bear any expense unique to arbitration.³¹⁴ This employer-pays

311. *Rent-A-Ctr.*, 561 U.S. at 68 (alteration in original) (emphasis added) (quoting 9 U.S.C. § 2).

312. See, e.g., *Stubblefield v. Best Cars KC, Inc.*, 506 S.W.3d 377, 380 (Mo. Ct. App. 2016); see also *Dulaw Mgmt. Ltd. v. PHL Variable Ins. Co.*, No. 08-61167-CIV, 2008 WL 4525008, at *1 (S.D. Fla. Oct. 6, 2008).

313. See, e.g., *Parnell v. CashCall, Inc.*, 181 F. Supp. 3d 1025, 1032-33 (N.D. Ga.), *aff’d per curiam sub nom. Parnell v. W. Sky Fin., LLC*, 664 F. App’x 841 (11th Cir. 2016); see also *Kemph v. Reddam*, No. 13 CV 6785, 2015 WL 1510797, at *4 (N.D. Ill. Mar. 27, 2015); cf. *Johnson v. Keybank Nat’l Ass’n (In re Checking Account Overdraft Litig.)*, 754 F.3d 1290, 1292 (11th Cir. 2014) (discussing an arbitration clause mandating arbitration of “any claim, dispute, or controversy between you and us arising from or relating to this Agreement or your Account(s), including, without limitation, the validity, enforceability, or scope of this Arbitration Provision or this Deposit Account Agreement”).

314. 105 F.3d 1465, 1483-85 (D.C. Cir. 1997) (stating that “[t]here is no reason to think that the Court would have approved arbitration” if “employees [were] required to pay for the arbitrator assigned to hear their statutory claims”); accord *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674, 687 (Cal. 2000) (“This rule will ensure that employees bringing [state statutory] claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer.”), *abrogated in other part by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

principle applies to plaintiffs with statutory claims but not to those who sue for breach of contract or other violations of private law.³¹⁵ Under an expansive understanding of *Rent-A-Center*, even if a plaintiff were to bring a statutory age, race, or sex discrimination claim, courts could not cite the doctrine to invalidate a delegation clause that required the plaintiff to shoulder a portion of the arbitrator's fees. Quarantined from the original complaint, the plaintiff's challenge to the delegation clause would be a pedestrian matter of contract enforcement.³¹⁶ It would not qualify as a public law case that would trigger the employer-pays rule.

Likewise, in several states, arbitration clauses are either substantively unconscionable or flatly invalid if they are nonmutual.³¹⁷ A lack of mutuality occurs when a provision requires arbitration for causes of action that consumers or employees are likely to assert (such as statutory claims) but exempts those the drafter is likely to bring (such as those revolving around noncompetition or confidentiality clauses).³¹⁸ The logic here is that “[i]f the arbitration system established by the [drafter] is indeed fair, then [the drafter] as well as [the other party] should be willing to submit claims to arbitration.”³¹⁹

315. See, e.g., *Brown v. Wheat First Sec., Inc.*, 257 F.3d 821, 824-25 (D.C. Cir. 2001) (rejecting the argument that *Cole's* employer-pays rule “extend[s] to state common law claims that are rooted in ‘public policy’”).

316. See *Andresen v. IntePros Fed., Inc.*, 240 F. Supp. 3d 143, 153 (D.D.C. 2017) (declining to apply *Cole* “in the context of a challenge to a delegation provision specifically[,] as opposed to in the context of a challenge to a primary arbitration clause”).

317. See, e.g., *Noohi v. Toll Bros.*, 708 F.3d 599, 602, 610-11 (4th Cir. 2013) (holding that an arbitration provision that bound only the buyer was “unenforceable for lack of mutual consideration under Maryland law”); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 169 (5th Cir. 2004) (reasoning that “[t]he one-sidedness of the duty to arbitrate raises a serious question as to the clause’s validity” under Louisiana law); *Armendariz*, 6 P.3d at 692 (“[I]t is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee”); *Figueroa v. THI of N.M. at Casa Arena Blanca LLC*, 306 P.3d 480, 491 (N.M. Ct. App. 2012) (“[W]e refuse to enforce an agreement where the drafter unreasonably reserved the vast majority of his claims for the courts, while subjecting the weaker party to arbitration on essentially all of the claims that party is likely to bring.”); see also *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372-73 (N.C. 2008) (noting that the apparent “one-sidedness” of exceptions from the arbitration provision “contribute[d] to [the] overall conclusion that [the arbitration clause] is unconscionable”). Some courts have concluded that the Supreme Court’s decision in *Concepcion* undermines the validity of these cases. See, e.g., *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1169-70 (10th Cir. 2014); *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802, 809-12 (N.C. Ct. App. 2014).

318. See, e.g., *Figueroa*, 306 P.3d at 491; see also *Farrar v. Direct Commerce, Inc.*, 215 Cal. Rptr. 3d 785, 796-98 (Ct. App. 2017) (finding the drafter’s exclusion from arbitration of claims related to a confidentiality agreement to be nonmutual).

319. *Armendariz*, 6 P.3d at 692.

Yet if delegation provisions truly are disassociated from the rest of the agreement, they would rarely pass the mutuality test. Even if they seem bilateral on paper, in practice they are “entirely one-sided because [a] defendant cannot be expected to claim that it drafted an unconscionable agreement.”³²⁰ Thus, if *Rent-A-Center* is serious that delegation clauses are arbitration provisions, it is unclear why they should ever be enforceable in states that follow the nonmutuality doctrine.

Finally, the strongest rationales for expanding arbitral power do not apply to *Rent-A-Center*'s super-separability regime. For one, although separability can be defended as a majoritarian default rule, Justice Scalia's approach cannot. As mentioned, *Prima Paint* is best understood as a presumption that the use of a broad arbitration clause showcases the parties' intent to submit questions about the validity of the container contract to the arbitrator.³²¹ In contracts between relative equals, this regime probably embodies both parties' preferences at the time of contracting.³²² Separability spares them the hassle of litigating the validity of the container contract and then arbitrating any remaining issues.

But in the adhesion contract setting, treating delegation clauses as separate arbitration agreements does not reflect the wishes of *both* parties.³²³ Most consumers and employees are one-shot plaintiffs who face repeat-player defendants.³²⁴ They have every incentive *not* to entrust the arbitrator with

320. See *Murphy v. Check 'N Go of Cal., Inc.*, 67 Cal. Rptr. 3d 120, 125 (Ct. App. 2007). *But see* *Tiri v. Lucky Chances, Inc.*, 171 Cal. Rptr. 3d 621, 634 (Ct. App. 2014) (finding a delegation clause to be mutual because it applied evenhandedly to “any and all differences and/or legal disputes”). *Murphy*, too, is subject to dispute after *Concepcion*. See *Malone v. Superior Court*, 173 Cal. Rptr. 3d 241, 244 (Ct. App. 2014); see also *supra* note 317.

321. See *supra* text accompanying notes 178-79.

322. See *Rau, Separability*, *supra* note 65, at 34.

323. One might argue that because delegation clauses *expressly* assign substantive arbitrability to the arbitrator, there is no need to fall back on default rules. But the same issue arises with the separability doctrine. Broad arbitration clauses empower the arbitrator to hear “any controversy or claim arising out of or relating to [the] agreement.” See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (capitalization altered). Read literally, this language covers challenges to the container contract, obviating the need for a default rule. Separability's status as a default rule thus acknowledges that even the most expansive arbitration clause may not *actually* embody the parties' intent to send disputes over the container contract's enforceability to the arbitrator. Delegation clauses are no different. Some are vast indeed, governing “any challenges or objections with respect to the existence, applicability, scope, enforceability, construction, validity and interpretation of . . . any agreement to arbitrate.” See, e.g., *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 204 (5th Cir. 2016). But even if this language does not seem equivocal, it may not reflect the parties' wishes, forcing us to rely on background principles.

324. See, e.g., David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 63, 104 (2015) [hereinafter Horton & Chandrasekher, *Consumer Arbitration*] (surveying 4839 arbitrations filed by consumers
footnote continued on next page)

deciding whether a dispute falls within the scope of a valid arbitration clause. After all, private arbitrators, unlike their traditional counterparts, are paid by the hour and handpicked by the parties.³²⁵ They thus have a double-barreled incentive to conclude that claims are arbitrable. Doing so will not only allow them to bill for the merits but also curry favor with repeat-player companies that may select them or veto their appointment in the future.³²⁶

Another justification for the separability doctrine is pragmatic. Sophisticated parties often sue either for breach or rescission of the container contract.³²⁷ This means that the merits of the underlying lawsuit are inseparable from the container contract's enforceability. In turn, prohibiting

with the AAA between July 2009 and December 2013 and finding that defendants in 71% of the arbitrations were repeat players); David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 465, 484 (2016) [hereinafter Horton & Chandrasekher, *Employment Arbitration*] (analyzing 5883 employee-initiated arbitrations filed with the AAA over the same time period and finding that employer defendants in 72% of the arbitrations were repeat players).

325. See, e.g., AM. ARBITRATION ASS'N, *EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES* r. 13, at 21, r. 44, at 30 (2016), <https://perma.cc/6JPE-XBAC> [hereinafter AAA *EMPLOYMENT ARBITRATION RULES*] (discussing the selection and compensation of arbitrators); Deborah Rothman, *Trends in Arbitrator Compensation*, DISP. RESOL. MAG., Spring 2017, at 8, 8-10 (surveying billing practices at various arbitration providers).
326. Admittedly, empirical studies are inconclusive about whether arbitrators go out of their way to rule in favor of repeat-player companies in the hopes of obtaining future business. Compare Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 238 & tbl.3 (1998) (finding that companies did better in a repeat pairing, that is, when they appeared before the same arbitrator more than once), and Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 18-20, 19 tbl.7 (2011) (discovering a similar "[r]epeat-employer-arbitrator pairing" effect using a larger sample size and a regression analysis), with Horton & Chandrasekher, *Consumer Arbitration*, *supra* note 324, at 121 (attributing the "repeat-pairing" advantage to the fact that "businesses do better when they encounter the same arbitrator more than once" and noting that Bingham and Colvin "did not control for different levels of company sophistication"), and Horton & Chandrasekher, *Employment Arbitration*, *supra* note 324, at 491 (same). Nevertheless, because the issue is whether *Rent-A-Center's* separability-within-separability rubric reflects the parties' preferences, the question is whether plaintiffs and their lawyers believe that arbitrators favor big businesses. On that score, the answer is yes. Cf. Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 103, 112 (2014) (surveying about seven hundred employment attorneys and concluding that, for plaintiffs, "outcomes in arbitration are starkly inferior to outcomes reported in litigation"); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1329 (2009) ("[T]he majority of plaintiffs' lawyers prefer litigation [over arbitration] because they believe arbitration to be unfair, relatively speaking.").
327. See, e.g., *Prima Paint*, 388 U.S. at 398 (involving a request for rescission); see also Stephen J. Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, 68 FLA. L. REV. 1227, 1257 n.140 (2016) (noting that arbitrators in the labor and commercial contexts "hear almost nothing but breach-of-contract claims").

arbitrators from deciding these issues would gut the institution of arbitration. By the time the judge had ruled, “there would be virtually nothing left for the arbitrator to decide.”³²⁸ For instance, if the district court had ruled on Prima Paint’s fraud claim,³²⁹ it would either have upheld or invalidated the container contract, mooting the very dispute the parties had ostensibly agreed to arbitrate.³³⁰

However, this danger does not exist for delegation clauses in adhesive agreements. In this milieu, plaintiffs frequently seek redress for violations of consumer protection or labor legislation.³³¹ These causes of action virtually never implicate the scope or validity of the arbitration clause itself. In recent class actions against Uber, for instance, the plaintiffs contended that the company violated state unfair competition and employment statutes by discouraging passengers from tipping and by misclassifying its drivers as independent contractors.³³² A court can interpret the arbitration clause or decide whether it is unconscionable without adjudicating a single issue related to the allegations in the complaint. As a result, arbitrability issues are safely insulated from merits issues.

And although one might try to normalize *Rent-A-Center* by citing the fact that European countries follow the doctrine of *kompetenz-kompetenz*, that would not be a fair comparison. For one, many of these nations have banned predispute arbitration clauses in standard form contracts.³³³ In addition, in the vast majority of these countries, courts can review an arbitrator’s ruling on

328. *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.*, 673 P.2d 251, 258 (Cal. 1983); *see Rau, Separability*, *supra* note 65, at 33.

329. *See supra* text accompanying notes 117-19.

330. *Cf. Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 87 (2010) (Stevens, J., dissenting) (explaining that separability prevents courts from ruling on claims for rescission that would “decide the merits of the entire dispute”).

331. *See, e.g., CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS* 47 fig.5 (2015), <https://perma.cc/L5CF-C8RZ> (finding hundreds of federal and state statutory claims filed by consumers in arbitration against financial services companies with the AAA in 2010 and 2011).

332. Second Amended Class Action Complaint and Jury Demand, *supra* note 1, ¶¶ 1-3.

333. *See, e.g., Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, arts. 3(3), 6(1), annex (1)(q), 1993 O.J. (L 95) 29, 31, 33; *see also Cross, supra* note 65, at 35-38 (“In contrast to U.S. law, the laws of many developed nations prohibit arbitration of consumer and employment disputes.”); Jean R. Sternlight, *Is the U.S. Out on a Limb?: Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 847-48 (2002) (“[G]iven this strong European Union position, specific European countries have adopted their own laws explicitly prohibiting the use of mandatory pre-dispute arbitration in the consumer context.”).

arbitrability without deference.³³⁴ In sharp contrast, the FAA’s grounds for vacating an arbitrator’s award are vanishingly narrow.³³⁵ Indeed, judges must uphold an arbitrator’s decision that a dispute falls within the ambit of an arbitration clause “[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of [her] authority.”³³⁶ Likewise, courts must affirm an arbitrator’s ruling that an arbitration clause is not unconscionable even if there is only “a ‘barely colorable justification’ for the outcome.”³³⁷ Thus, in giving arbitrators carte blanche to decide whether a dispute falls within the scope of a valid arbitration clause, the United States stands alone.

* * *

In the context of adhesion contracts, courts should not view delegation clauses as independent “written provision[s] to ‘settle by arbitration a controversy’” under section 2.³³⁸ Instead, judges should view these provisions as less potent arbitration clauses. This change would honor the wishes of Congress, facilitate the parties’ intent, and realign the law with its normative underpinnings. Moreover, as this Article explains next, it would also give courts and policymakers more freedom to regulate arbitration about arbitration.

334. See, e.g., Bermann, *supra* note 134, at 18-19 (noting that French law requires courts to address challenges to an arbitrator’s decision on arbitrability “without any deference to jurisdictional findings the arbitral tribunal may have previously made”).

335. See 9 U.S.C. § 10 (2016); *supra* text accompanying notes 108-11.

336. *Contech Constr. Prods., Inc. v. Heierli*, 764 F. Supp. 2d 96, 114 (D.D.C. 2011) (alterations in original) (quoting *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1180 (D.C. Cir. 1991)); accord *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 650 (6th Cir. 2005) (noting that the arbitrator’s reading of an arbitration agreement must be upheld “[i]f a dispute is even arguably within the scope of an arbitration clause”).

337. See *Washington v. William Morris Endeavor Entm’t, LLC*, No. 10-cv-9647 PKC, 2014 WL 4401291, at *9 (S.D.N.Y. Sept. 5, 2014) (quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010)); see also *S. Commc’ns Servs., Inc. v. Thomas*, 829 F. Supp. 2d 1324, 1341 (N.D. Ga. 2011) (opining in dicta that “even if the arbitrator had performed an erroneous unconscionability analysis, this Court would have no authority to vacate his award because . . . ‘the FAA does not empower [this Court] to review these allegations of legal error’” (second alteration in original) (quoting *White Springs Agric. Chems., Inc. v. Glawson Invs. Corp.*, 660 F.3d 1277, 1281 (11th Cir. 2011))), *aff’d on other grounds*, 720 F.3d 1352 (11th Cir. 2013); *Parallel Networks, LLC v. Jenner & Block LLP*, No. 05-13-00748-CV, 2015 WL 5904685, at *6 (Tex. App. Oct. 9, 2015) (reasoning that reversing an arbitrator’s determination on unconscionability would be impermissibly “substituting our judgment merely because we would have reached a different decision”).

338. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (alteration in original) (quoting 9 U.S.C. § 2).

III. Doctrinal Implications

As arbitration about arbitration has gone mainstream, *Rent-A-Center* has quietly become a contested decision. Some courts are firmly committed to treating delegation clauses as “separate arbitration provisions.”³³⁹ But others refuse to take this command literally, instead continuing to apply doctrines that pertain only to arbitration about arbitration. This Part defends judges in the latter camp. It argues that they correctly recognize that delegation clauses are not identical to arbitration provisions and thus can be policed through sui generis measures. Finally, this Part contends that this insight can generate better results in five challenging areas: (1) how courts should decide whether an agreement contains a delegation clause, (2) who entertains allegations that a party did not manifest assent to the container contract, (3) the status of the “wholly groundless” exception, (4) how plaintiffs can challenge delegation provisions as unconscionable, and (5) whether drafters can empower arbitrators to resolve either whether an exception to the FAA applies or whether federal law precludes arbitration.

A. Clear and Unmistakable

There has never been a shared understanding of what it means to have a “clear and unmistakable” delegation clause.³⁴⁰ This Subpart reveals that *Rent-A-Center* has exacerbated this problem. It then explains how the distinctive nature of arbitration about arbitration tips the scales toward requiring adhesive delegation provisions to be “clear and unmistakable” in the sense that they are both (1) express and (2) unequivocal.

After *First Options* extended the “clear and unmistakable” rule to the FAA,³⁴¹ courts began to enforce delegation clauses that did not actually appear on the face of a contract. Drafters often specify that any arbitration must be conducted by a specific dispute resolution service, such as the American Arbitration Association (AAA), the International Chamber of Commerce (ICC), or JAMS.³⁴² These institutions have promulgated their own procedural codes, which include rules that empower arbitrators to decide matters related to the

339. *Law Offices of Daniel C. Flint, P.C. v. Bank of Am., N.A.*, No. 15-13006, 2016 WL 1444505, at *5 (E.D. Mich. Apr. 13, 2016). For example, “federal courts have routinely refused to disregard delegation provisions when the party opposing arbitration raises a defense to the provision that is no different than her defense to the contract as a whole, or to the arbitration clause in general.” *Atkinson v. Harpeth Fin. Servs., LLC*, No. 3:17-cv-504, 2017 WL 2223837, at *6 (M.D. Tenn. May 22, 2017) (collecting cases).

340. See *supra* text accompanying notes 143-51.

341. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-46 (1995); *supra* text accompanying notes 194-212.

342. See, e.g., sources cited *infra* note 344.

arbitration itself.³⁴³ In commercial transactions involving sophisticated parties, the Second, Fifth, Eighth, Eleventh, and Federal Circuits have held that this gesture—simply requiring arbitration to be conducted under the auspices of the AAA, ICC, or JAMS—functions as a delegation clause.³⁴⁴

Yet after *Rent-A-Center*, judges have disagreed about whether to treat adhesion contracts differently. Some have found delegation clauses implied by a mere reference to an arbitration institution's rules in installment loans,³⁴⁵ vocational school enrollments,³⁴⁶ employment terms and conditions,³⁴⁷ timeshare arrangements,³⁴⁸ or video game subscriptions.³⁴⁹ Conversely, a vocal minority of courts have reached the opposite conclusion, reasoning that mentioning an arbitration provider in fine print does not clear the high hurdle imposed by *First Options*.³⁵⁰ As a federal district court in Pennsylvania

-
343. See, e.g., AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES r. 14(a), at 17 (2016), <https://perma.cc/89H8-STGC> (permitting an arbitrator to resolve “any objections with respect to the existence, scope, or validity of the arbitration agreement”); AAA EMPLOYMENT ARBITRATION RULES, *supra* note 325, r. 6(a), at 17 (same); INT'L CHAMBER OF COMM., ARBITRATION RULES r. 6(4), at 15 (2017), <https://perma.cc/27QQ-PW79> (noting that “[t]he arbitration shall proceed” even if the arbitral panel is only “*prima facie* satisfied that an arbitration agreement . . . may exist”); JAMS, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES r. 11(b), at 14 (2014), <https://perma.cc/F8Q4-S63W> (“The [a]rbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.”).
344. See *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); cf. *Oracle Am., Inc. v. Myriad Grp.*, 724 F.3d 1069, 1073-75 (9th Cir. 2013) (holding that the parties agreed to arbitrate arbitrability by incorporating the United Nations Commission on International Trade Law arbitration rules, which give arbitrators the power to determine their own jurisdiction).
345. See, e.g., *Bernal v. Sw. & Pac. Specialty Fin., Inc.*, No. C 12-05797 SBA, 2014 WL 1868787, at *1, *4 (N.D. Cal. May 7, 2014) (involving an agreement that incorporated the AAA rules).
346. See, e.g., *Kimble v. Rhodes Coll., Inc.*, No. C-10-5786 EMC, 2011 WL 2175249, at *1-4 (N.D. Cal. June 2, 2011) (AAA rules).
347. See, e.g., *Mercadante v. XE Servs., LLC*, 78 F. Supp. 3d 131, 134, 139 (D.D.C. 2015) (AAA rules); *Yahoo! Inc. v. Iversen*, 836 F. Supp. 2d 1007, 1008, 1012 (N.D. Cal. 2011) (AAA rules); *Howard v. Rent-A-Ctr., Inc.*, No. 1:10-CV-103, 2010 WL 3009515, at *3-4 (E.D. Tenn. July 28, 2010) (AAA, JAMS, and National Arbitration Forum rules).
348. See, e.g., *Marriott Ownership Resorts, Inc. v. Flynn*, No. 14-00372 JMS-RLP, 2014 WL 7076827, at *8 (D. Haw. Dec. 11, 2014) (AAA rules); *Crook v. Wyndham Vacation Ownership, Inc.*, No. 13-cv-03669-WHO, 2013 WL 11275036, at *2, *5 (N.D. Cal. Nov. 8, 2013) (AAA rules).
349. See, e.g., *Mendoza v. Microsoft Inc.*, No. 2:14-cv-00316-MJP, 2014 WL 4540225, at *4 (W.D. Wash. Sept. 11, 2014) (AAA rules).
350. See, e.g., *Meadows v. Dickey's Barbecue Rests. Inc.*, 144 F. Supp. 3d 1069, 1079 (N.D. Cal. 2015) (refusing to treat a franchise contract's incorporation of the AAA rules as a clear
- footnote continued on next page*

reasoned, “[I]ncorporating forty pages of arbitration rules into an arbitration clause is tantamount to inserting boilerplate inside of boilerplate, and to conclude that a single provision contained in those rules amounts to clear and unmistakable evidence of an unsophisticated party’s intent would be to take ‘a good joke too far.’”³⁵¹ Accordingly, whether delegation clauses can be imported in this manner remains an open question.³⁵²

Likewise, some courts have held that delegation clauses are not “clear and unmistakable” when they seem to conflict with the contract’s other terms. Even when an arbitration provision gives an arbitrator the authority to rule on arbitrability, other clauses can muddy the waters by suggesting that courts might also make that decision. For example, drafters often insert severability provisions that declare that the rest of the contract stands if any part of the “arbitration agreement shall be determined by the arbitrator or *by any court* to be unenforceable.”³⁵³ Several courts have held that this or similar language undercuts the delegation provision because it insinuates that a judge might decide whether an arbitration clause is valid.³⁵⁴ Other courts have disagreed,

and unmistakable delegation clause sufficient to satisfy *First Options*); *Tompkins v. 23andMe, Inc.*, Nos. 5:13-CV-05682-LHK et al., 2014 WL 2903752, at *11 (N.D. Cal. June 25, 2014) (holding that “a bare reference to the AAA rules” in an online contract for the sale of a DNA testing kit “does not show that the parties clearly and unmistakably intended to delegate arbitrability”), *aff’d on other grounds*, 840 F.3d 1016 (9th Cir. 2016); *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 369 (Mont. 2016) (reaching the same result for an agreement “between a debt relief organization and a debt-ridden consumer” and distinguishing the agreement from one “between sophisticated parties in commercial settings”).

351. *Allstate Ins. Co. v. Toll Bros.*, 171 F. Supp. 3d 417, 429 (E.D. Pa. 2016) (footnote omitted) (quoting *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948)).

352. Likewise, arbitration institutions’ generous grants of power to arbitrators can affect the issue of who decides whether an arbitration clause that is silent about class actions permits them. As I mentioned in note 93 above, most courts have held that the availability of class proceedings is a matter of substantive arbitrability for courts to decide. Yet some courts have also held that the choice to arbitrate under the auspices of the AAA or JAMS functions as a delegation clause by allowing arbitrators to rule on their own jurisdiction, thereby reversing this default. *See, e.g.*, *Fed. Nat’l Mortg. Ass’n v. Prowant*, 209 F. Supp. 3d 1295, 1310 (N.D. Ga. 2016); *Hedrick v. BNC Nat’l Bank*, 186 F. Supp. 3d 1189, 1196 (D. Kan. 2016). *But see, e.g.*, *Shakoor v. VXI Glob. Sols., Inc.*, 35 N.E.3d 539, 550 (Ohio Ct. App. 2015) (“Although the AAA rules are referenced[,] in general that is not sufficient to conclude that the parties agreed the arbitrator was authorized to determine if the agreement permits class arbitration.”).

353. *E.g.*, *Baker v. Osborne Dev. Corp.*, 71 Cal. Rptr. 3d 854, 859 (Ct. App. 2008).

354. *See Vargas v. Delivery Outsourcing, LLC*, No. 15-cv-03408-JST, 2016 WL 946112, at *7 (N.D. Cal. Mar. 14, 2016) (“[D]espite clear language delegating arbitrability to the arbitrator, the issue of delegation is made ambiguous by the language of the arbitration provision that permits modification of the . . . [a]greement should ‘a court of law or equity’ hold any provision of the [a]greement unenforceable. The [a]greement cannot be read as providing a ‘clear and unmistakable’ delegation to [the] arbitrator.”); *Cobarruviaz v. Maplebear, Inc.*, 143 F. Supp. 3d 930, 940 (N.D. Cal. 2015) (holding that

footnote continued on next page

reasoning that a severability clause cannot “negate[] the plain manifestation of intent expressed in the delegation provision.”³⁵⁵

Similarly, employers often exempt claims for equitable relief from arbitration.³⁵⁶ They do so because they want to preserve their right to obtain a preliminary injunction in court against an employee, for instance one who is

the purported delegation clause “is inconsistent with the severability clause . . . , which states that ‘any arbitrator *or court*’ could declare or determine that a provision of the [a]greement is invalid or unenforceable”); *Commercial Credit Corp. v. Leggett*, 744 So. 2d 890, 893 (Ala. 1999) (“[T]he severability clause expressly acknowledged that such a claim could be rejected by a *court*. In other words, the severability clause creates an ambiguity as to how [an arbitrability issue] is to be resolved.”); *Peleg v. Neiman Marcus Grp.*, 140 Cal. Rptr. 3d 38, 51 (Ct. App. 2012) (“[T]he inconsistency between the [a]greement’s delegation and severability provisions indicates the parties did not clearly and unmistakably delegate enforceability questions to the arbitrator.”); *Hartley v. Superior Court*, 127 Cal. Rptr. 3d 174, 181 (Ct. App. 2011) (“The severability clause here uses the term ‘trier of fact of competent jurisdiction,’ rather than the term ‘arbitrator,’ indicating the court has authority to decide whether an arbitration provision is unenforceable.”); *Parada v. Superior Court*, 98 Cal. Rptr. 3d 743, 753 (Ct. App. 2009) (“Use of the term ‘trier of fact of competent jurisdiction’ instead of ‘arbitration panel’ . . . suggests the trial court also may find a provision, including the arbitration provision, unenforceable.”); *Baker*, 71 Cal. Rptr. 3d at 859, 862 (“[W]e agree with the trial court that although one provision of the arbitration agreement stated that issues of enforceability or voidability were to be decided by the arbitrator, another provision indicated that the court might find a provision unenforceable. Thus, we conclude the arbitration agreement did not ‘clearly and unmistakably’ reserve to the arbitrator the issue of whether the arbitration agreement was enforceable.”).

355. *HPD, LLC v. TETRA Techs., Inc.*, 424 S.W.3d 304, 311 (Ark. 2012); *accord Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (holding that a severability clause providing that “a court of competent jurisdiction’ [might] invalidate[] a provision . . . is too thin a basis for concluding that [an agreement’s] language ‘evinces an intent to allow questions of arbitrability to be decided by a court’” (quoting the district court’s opinion)); *Gozzi v. W. Culinary Inst., Ltd.*, 366 P.3d 743, 751-52 (Or. Ct. App.), *modified in other part per curiam*, 371 P.3d 222 (Or. Ct. App. 2016). In addition, a similar argument—that there is tension between the delegation clause and a venue selection provision that mentions courts in a specific district—has generally failed. *See, e.g., Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1109-10 (9th Cir.) (“It is apparent that the venue provision here was intended . . . to identify the venue for any other claims that were not covered by the arbitration agreement. That does not conflict with or undermine the agreement’s unambiguous statement identifying arbitrable claims and arguments.”), *amended in other part by* 848 F.3d 1201 (9th Cir. 2016); *cf. Fallo v. High-Tech Inst.*, 559 F.3d 874, 879 (8th Cir. 2009) (“[T]he students argue that the reference to ‘court costs’ conflicts with a clear and unmistakable intent to arbitrate. However, after participating in arbitration, a party may seek to have the arbitrator’s order confirmed, modified or vacated in a court, thereby incurring court costs. Thus, the governing law provision’s reference to ‘court costs’ is not inconsistent with a clear and unmistakable intent to arbitrate” (citation omitted)).

356. *See, e.g., Christopher R. Drahozal & Erin O’Hara O’Connor, Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1966-67 (2014).

threatening to disclose trade secrets or breach a noncompetition agreement.³⁵⁷ However, unconscionability—the most common ground for challenging the validity of an arbitration clause—is also an equitable defense.³⁵⁸ Thus, several courts have concluded that the fact that an arbitration agreement excludes claims for equitable relief means that its purported delegation clause does not “clearly and unmistakably” compel arbitration of unconscionability challenges.³⁵⁹ Again, though, not every judge has agreed. For example, in *Brennan v. Opus Bank*, the Ninth Circuit rejected this logic, opining that there is a difference between “a claim for equitable relief” and “a defendant’s reliance on an arbitration clause to avoid litigation,” which “is an equitable defense.”³⁶⁰ As these cases illustrate, the contours of the “clear and unmistakable” standard are hazy.

Limiting *Rent-A-Center* can resolve these conflicts over the “clear and unmistakable” rule by allowing courts to acknowledge that the rule has always been—and should be—context-specific. For example, as Part I.A above demonstrated, judges historically treated potential delegation clauses in commercial contracts differently than they did similar clauses in collective bargaining agreements.³⁶¹ Indeed, the FAA differs from the Taft-Hartley Act in one crucial respect: It entrusts courts, not arbitrators, with policing the gateway to the arbitral forum.³⁶² For this reason, courts outside the labor context traditionally held that even extremely broad arbitration clauses covering “[a]ll matters, disputes or disagreements” between the parties were *not* sufficient to pass the torch to the arbitrator to decide substantive arbitrability.³⁶³ Even when the issue was merely whether a claim fell within the scope of an arbitration clause, courts were “reluctan[t] . . . to find that the parties . . . agreed to submit to arbitrators the question of *what* they agreed to arbitrate.”³⁶⁴

357. See, e.g., Erin O’Hara O’Connor et al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 167 (2012).

358. See, e.g., *Skibbe v. Residential Credit Sols., Inc.*, No. 2:08-cv-01393, 2014 WL 2573322, at *3 (S.D. W. Va. June 9, 2014) (“In West Virginia, . . . unconscionability was traditionally an equitable defense to enforcement of a contract . . .”).

359. See, e.g., *Hartley*, 127 Cal. Rptr. 3d at 180-81 (“A claim that a contract is unenforceable on the ground of unconscionability is an equitable matter. . . . [O]ne paragraph of the arbitration clause here authorizes the court to decide all equitable issues, notwithstanding another paragraph that authorizes the arbitrator to decide all disputes.”).

360. 796 F.3d 1125, 1131 (9th Cir. 2015). As I discuss below, this view is flawed. See *infra* text accompanying notes 377-78.

361. See *supra* text accompanying notes 154-58.

362. See *supra* text accompanying notes 154-55.

363. See, e.g., *Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693, 695-96 (2d Cir. 1965).

364. See *B. Fernandez & Hnos. v. Rickert Rice Mills, Inc.*, 119 F.2d 809, 815 (1st Cir. 1941) (emphasis added); see also *Lehigh Coal & Navigation Co. v. Cent. R.R. of N.J.*, 33 F. Supp. *footnote continued on next page*

Thus, the FAA has long required parties to jump through additional hoops to showcase their desire to arbitrate substantive arbitrability.

Moreover, the Court's modern jurisprudence suggests that the "clear and unmistakable" principle should apply with special force to adhesion contracts. As Justice Breyer explained in *First Options*, the doctrine prevents courts from forcing "unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."³⁶⁵ Like all sticky default rules,³⁶⁶ it tries to "mak[e] contracting more informed."³⁶⁷ Even in transactions between relative equals, arbitrating arbitrability is so "arcane" that it inverts the time-honored presumption that all doubts about whether to compel arbitration should be resolved in the affirmative.³⁶⁸ Accordingly, in cases involving consumers and employees, it would be especially unwise to "interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power."³⁶⁹

362, 365 (E.D. Pa. 1940) (construing the scope of an arbitration clause rather than allowing arbitrators to do so). As noted above, judges were more lenient about permitting arbitrators to decide questions of procedural arbitrability. See, e.g., *In re Reconstruction Fin. Corp.*, 106 F. Supp. 358, 361-62 (S.D.N.Y. 1952) ("[T]he issue of whether or not the statute of limitations is a bar to the proceeding, is, nevertheless, within the competence of the arbitrators."), *aff'd sub nom.* *Reconstruction Fin. Corp. v. Harrison & Crosfield, Ltd.*, 204 F.2d 366 (2d Cir. 1953); *supra* text accompanying notes 218-19.

365. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

366. See *supra* note 285 and accompanying text.

367. See Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1567 (2016).

368. See *First Options*, 514 U.S. at 944-45.

369. See *id.* at 945. Alan Rau is skeptical that there should be any "clear and unmistakable" requirement at all. See, e.g., Rau, *Arbitrability Question*, *supra* note 65, at 344; Rau, *Arbitrating "Arbitrability"*, *supra* note 65, at 528-41; Rau, *Trilogy*, *supra* note 65, at 510. First, he argues that Justice Breyer's statement in *First Options* must be understood in context. Because the Kaplans did not believe that the arbitrators had power over them, they faced two unpleasant options: either sitting on the sidelines and defaulting or objecting to the panel's jurisdiction and thereby risking being seen as consenting to arbitration through their participation. See Rau, *Arbitrating "Arbitrability"*, *supra* note 65, at 531. They chose the latter path and, according to Rau, Justice Breyer used the "clear and unmistakable" language merely to drive home the fact that they did not impliedly agree to arbitrate through that conduct. See *id.* at 532 ("[C]lear and unmistakable[] . . . is . . . a rum way of saying that merely to show up and complain is probative of precisely nothing."). However, this is a highly idiosyncratic reading of the relevant passage in *First Options*, which has the authoritative tone of a black-letter rule. See 514 U.S. at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." (alterations in original) (quoting *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986))). Moreover, Rau does not address the fact that the "clear and unmistakable" rule has deep roots in both labor and commercial arbitration and has never been confined to the narrow proposition that courts should not assume that parties have implicitly

footnote continued on next page

For these reasons, courts should hold that adhesion contracts must contain explicit delegation clauses—for example, those that allow the arbitrator to decide “the validity, enforceability, or scope of th[e] [a]rbitration provision”³⁷⁰—rather than imply delegation by merely selecting the AAA, ICC, or JAMS rules. Of course, under orthodox contract law, “[a] contract may include a separate writing or portions thereof, if properly incorporated by reference.”³⁷¹ At the same time, though, this technique requires it to be “clear that the parties to the agreement had knowledge of and assented to the incorporated terms.”³⁷² An oblique reference to an arbitration institution’s procedures in a standard form contract falls far short of this standard. As one California appellate court observed, to realize that she had agreed to arbitrate substantive arbitrability, an individual would need to “read[] the arbitration provision in the proposed agreement, note[] that disputes will be resolved by arbitration according to [an institution’s] rules, . . . track down those rules,

agreed to arbitrate arbitrability. *See, e.g., United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960).

Second, Rau observes that a neglected Supreme Court case, *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), appears to be inconsistent with any “clear and unmistakable” mandate. *See* Rau, *Arbitrating “Arbitrability,” supra* note 65, at 538. In *PacifiCare*, doctors sued managed health care organizations under the Racketeer Influenced and Corrupt Organizations Act (RICO), among other statutes. 538 U.S. at 402; *see also* Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-1968 (2016)). The doctors had signed arbitration provisions that did not include delegation clauses. *See* Brief of Respondents at 1, *PacifiCare*, 538 U.S. 401 (No. 02-215), 2003 WL 144669. They argued that the arbitration clauses were unenforceable because RICO entitled them to treble damages but the contract barred the arbitrator from awarding “punitive or exemplary” damages. *See id.* at 20-26. The Court held that the arbitration clauses’ remedial limitations were ambiguous and that the arbitrator should interpret them. *See PacifiCare*, 538 U.S. at 406-07. As a result, Rau notes, the Court effectively permitted the arbitrator to decide substantive arbitrability—whether the parties had agreed to arbitrate RICO claims for treble damages—in the absence of an express delegation of power. *See* Rau, *Arbitrating “Arbitrability,” supra* note 65, at 538. This is a very astute point. But it is so astute that it seems to have escaped even the Court. *Rent-A-Center*, which was decided seven years after *PacifiCare*, cites the “clear and unmistakable” test with approval. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010).

370. *See, e.g., Douglas v. Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014).

371. *See, e.g., Walker v. BuildDirect.com Techs., Inc.*, 349 P.3d 549, 553 (Okla. 2015); *see also* 1 RESTATEMENT (FIRST) OF CONTRACTS § 208 (AM. LAW INST. 1932) (“The memorandum may consist of several writings . . . if each writing is signed by the party to be charged and the writings indicate that they relate to the same transaction . . .”).

372. *Vernon v. Qwest Commc’ns Int’l, Inc.*, 857 F. Supp. 2d 1135, 1150 (D. Colo. 2012) (quoting *Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus Grp.*, 251 P.3d 1091, 1095 (Colo. App. 2010)), *recommendation adopted by* 925 F. Supp. 2d 1185 (D. Colo. 2013); *accord* *Gilbert St. Developers, LLC v. La Quinta Homes, LLC*, 94 Cal. Rptr. 3d 918, 924 (Ct. App. 2009); *Walker*, 349 P.3d at 553; *State ex rel. U-Haul Co. of W. Va. v. Zakaib*, 752 S.E.2d 586, 598 (W. Va. 2013).

examine them, and focus on the particular rule.”³⁷³ There is no meaningful difference between trying to delegate power to the arbitrator through this roundabout mechanism and saying nothing about the topic.

Likewise, delegation clauses should be void if they are ambiguous. This would include contracts with severability clauses that mention the possibility of a judge or a court excising tainted portions of an agreement to arbitrate and enforcing the rest of the agreement.³⁷⁴ The implication of these severability provisions is that a court rather than an arbitrator *may* rule on substantive arbitrability, which contradicts the delegation clause.³⁷⁵ Additionally, employers should not be able to exempt claims for equitable relief from arbitration and force employees to arbitrate unconscionability challenges to the arbitration clause.³⁷⁶ Although the Ninth Circuit in *Brennan v. Opus Bank* held that there was no tension between an equitable relief carve-out and an *employer’s motion to compel arbitration*,³⁷⁷ it missed the point: It is the *employee’s unconscionability allegations* that fall within the exception. Indeed, “[j]urisdictions throughout the country agree that . . . unconscionability is an equitable cause of action.”³⁷⁸ Thus, a contract that contains both an exclusion for equitable relief and a delegation clause points in two directions at once.

Admittedly, some courts have taken the “clear and unmistakable” jurisprudence too far. For instance, in *Schumacher Homes of Circleville, Inc. v. Spencer*, an agreement between a construction company and homeowners declared: “The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute.”³⁷⁹ The Supreme Court of Appeals of West Virginia held that this was not a “clear and unmistakable” delegation because the word “arbitrability” was “nebulous” and “can encompass multiple distinct concepts.”³⁸⁰ Similarly, the

373. *Ajajian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 789 (Ct. App. 2012).

374. *See supra* text accompanying notes 353-54.

375. *See supra* text accompanying notes 353-54.

376. *Cf. supra* text accompanying notes 356-59.

377. 796 F.3d 1125, 1131 (9th Cir. 2015) (“[A]lthough courts have held that a defendant’s reliance on an arbitration clause to avoid litigation is an equitable *defense*, it is not a *claim* for equitable relief.” (citation omitted)).

378. *Wells Fargo Bank, NA v. Smith*, Nos. 2012-UP-690 & 2009-125666, 2012 WL 10987189, at *4 (S.C. Ct. App. June 13, 2012).

379. 774 S.E.2d 1, 6 (W. Va. 2015), *vacated mem.*, 136 S. Ct. 1157 (2016).

380. *Id.* at 12-13 (quoting *Bruni v. Didion*, 73 Cal. Rptr. 3d 395, 407 (Ct. App. 2008), *abrogated in other part by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), *as recognized in* *Malone v. Superior Court*, 173 Cal. Rptr. 3d 241 (Ct. App. 2014)). In addition, the *Schumacher Homes* court took an unsubtle swipe at *Rent-A-Center* and its progeny:

In recent years, the United States Supreme Court has doled out several complicated decisions construing the Federal Arbitration Act. Read together, these decisions create an eye-glazing conceptual framework for interpreting contracts with arbitration clauses that is politely described as “a tad oversubtle for sensible application.” The Supreme Court sees its arbitration decisions as a series of “clear instruction[s].” But experience suggests that the rules derived

footnote continued on next page

Supreme Court of Montana held that a purported delegation clause flunked the “clear and unmistakable” test because it contained a typo,³⁸¹ and the Supreme Court of New Jersey faulted a drafter for failing to “*explain* that an arbitrator will decide whether the parties agreed to arbitrate legal claims” and “that arbitration is a substitute for bringing a claim before a court or jury.”³⁸² These holdings do not seem like evenhanded attempts to accommodate ways in which delegation provisions are unique; rather, they seem like disingenuous attempts to manufacture ambiguity. Even under this Article’s narrow reading of *Rent-A-Center*, they should be preempted by the FAA.

In sum, the meaning of “clear and unmistakable” should vary with the type of contract. Because a consumer or employee’s assent to arbitrate *anything* is so attenuated, adhesive delegation provisions should only meet this “heightened standard”³⁸³ if they physically appear within the agreement itself and are consistent with the rest of its terms.

B. Assent to the Container Contract

Rent-A-Center has also sown confusion about the queen of all threshold issues: Can an arbitrator decide whether the parties manifested assent to the container contract? This Subpart explains why such decisions are for courts.

Judges may soon be inundated with motions to compel arbitration of plaintiffs’ claims that they never agreed to the container contract. With the explosive growth of e-commerce and smartphones, “clickwrap,” “browsewrap,”

from these decisions are difficult for lawyers and judges—and nearly impossible for people of ordinary knowledge—to comprehend.

Id. at 5 (alteration in original) (footnote omitted) (citations omitted) (first quoting *Rau, Trilogy*, *supra* note 65, at 519; then quoting *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam)). In February 2016, the Court granted certiorari and vacated and remanded the state high court’s decision in light of *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). *See* *Schumacher Homes of Circleville, Inc. v. Spencer*, 136 S. Ct. 1157 (2016) (mem.).

381. *See* *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 368 & n.4 (Mont. 2016). In that case, a company’s customer agreement mandated arbitration for all claims, including those related to the “termination of the scope or applicability of this agreement to arbitrate.” *Id.* at 365. The company explained that “termination” was a drafting error and should have been “determination.” *Id.* at 368 & n.4. Nevertheless, the state supreme court refused to allow the arbitrator to decide whether the arbitration clause was valid, reasoning that the alleged delegation clause “makes no sense” and “therefore falls far short of the required *clear and unmistakable* standard.” *See id.* at 368.

382. *See* *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1175, 1178-79 (N.J. 2016) (emphasis added) (rejecting the argument that a technical college’s enrollment agreement contained a delegation clause even though it allowed the arbitrator to decide “[a]ny objection to arbitrability or the existence, scope, validity, construction, or enforceability of this Arbitration Agreement”).

383. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010).

“scrollwrap,” and “sign-in wrap” contracts are part of the fabric of everyday life.³⁸⁴ Cases involving these putative contracts often hinge on whether an individual had “actual or constructive notice” of the drafter’s terms of service.³⁸⁵ But what happens when the terms of service give the arbitrator the right to determine whether this test has been met?

There is some authority for the proposition that “even disputes over contract formation could be committed to arbitration.”³⁸⁶ This would be the logical consequence of *Rent-A-Center’s* declaration that judges can only entertain allegations “specific to the delegation provision.”³⁸⁷ Perhaps a plaintiff who argues that she neither knew nor reasonably should have known she was consummating a contract commits the same sin as Antonio Jackson, the plaintiff in *Rent-A-Center*: She merely “challenge[s] . . . the validity of the [a]greement as a whole,” which is a matter “for the arbitrator.”³⁸⁸

384. See *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 394-401 (E.D.N.Y. 2015) (describing each species of online contract), *appeal dismissed as withdrawn*, No. 15-1407 (2d Cir. May 16, 2016); NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* 1-3 (2013) (noting the ubiquity of “wrap” contracts).

385. See, e.g., *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016) (differentiating between clickwrap and browserwrap agreements based on whether users must “expressly and unambiguously manifest either assent or rejection prior to being given access to the product” (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004))).

386. See, e.g., *Allstate Ins. Co. v. Toll Bros.*, 171 F. Supp. 3d 417, 423 (E.D. Pa. 2016) (calling this proposition “consistent with . . . the Court’s arbitration jurisprudence”); see also *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 738 (7th Cir. 2010) (“[T]he existence of a contract is an issue that the courts must decide prior to staying an action and ordering arbitration, unless the parties have committed even that gateway issue to the arbitrators.” (emphasis added)); George A. Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 AM. REV. INT’L ARB. 551, 557-58 (2011) (“[E]ven a party that steadfastly insists that it is a stranger to an agreement may, by virtue of clear and unmistakable language in the contract, find itself having given a tribunal primary authority to answer that very question.”); cf. *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) (“[W]here the dispute at issue concerns contract formation, the dispute is generally for courts to decide.” (emphasis added)).

387. 561 U.S. at 73.

388. See *id.* at 72. Yet even the Court does not seem to give this simplistic container contract/arbitration clause dichotomy its full-throated endorsement. Twice in recent cases it has dropped a footnote suggesting that certain challenges to the container contract might also uproot the agreement to arbitrate. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) (“The issue of the contract’s validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue . . . [whether] it is for courts to decide whether the alleged obligor ever signed the contract”); *Rent-A-Ctr.*, 561 U.S. at 70 n.2 (making the same distinction and citing the *Buckeye Check Cashing* footnote).

But this is a spectacular exercise in bootstrapping. Arbitration draws its normative force from the parties' agreement.³⁸⁹ As a result, a complete failure of consent would drain the lifeblood from the entire transaction between the parties, including any arbitration and delegation terms within it.³⁹⁰ When one has not manifested assent to the container contract, one cannot be bound by a single stitch of its text.³⁹¹ Accordingly, no matter what *Rent-A-Center* implies about courts only hearing challenges to the delegation clause, "[w]here the very existence of any agreement is disputed, it is for the courts to decide at the outset whether an agreement was reached."³⁹²

C. Wholly Groundless

Although delegation clauses often give the arbitrator the unfettered right to decide whether a dispute falls within the metes and bounds of an arbitration clause, some judges refuse to honor these terms when a claim of arbitrability is

389. See *United Gov't Sec. Officers of Am. v. Exelon Nuclear Sec., LLC*, 24 F. Supp. 3d 460, 465 (E.D. Pa. 2014) ("[P]arties cannot be bound to arbitrate any particular dispute that they did not agree to arbitrate." (citation omitted)).

390. Cf. *In re Glob. Tel*Link Corp. ICS Litig.*, No. 5:14-CV-5275, 2017 WL 831101, at *2 (W.D. Ark. Mar. 2, 2017) ("When the parties dispute whether an arbitration agreement was ever concluded in the first place, then the Court cannot rely on the disputed arbitration agreement itself to compel arbitration of the issue of its own formation . . ."), *appeal docketed sub nom. Stuart v. Glob. Tel*Link Corp.*, No. 17-1720 (8th Cir. Apr. 4, 2017).

391. Cf. *Rau, Separability*, *supra* note 65, at 17 ("Despite casual assumptions to the contrary, *Prima Paint* . . . preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question." (emphasis omitted)).

392. *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 218 (5th Cir. 2003); *accord Meyer v. Kalanick*, 200 F. Supp. 3d 408, 412 (S.D.N.Y. 2016) ("The question of whether an arbitration agreement existed is for the Court and not an arbitrator to decide . . ."), *vacated on other grounds sub nom. Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017); *Nat'l Fed'n of the Blind v. Container Store, Inc.*, No. 15-12984-NMG, 2016 WL 4027711, at *8 (D. Mass. July 27, 2016) ("[Q]uestions regarding the formation or existence of a contract that contains an agreement to arbitrate [are] gateway question[s] for the court, not the arbitrator."), *appeal docketed*, No. 16-2112 (1st Cir. Sept. 2, 2016); *Celltrace Commc'ns Ltd. v. Acacia Research Corp.*, No. 15-CV-4746 (AJN), 2016 WL 3407848, at *2 (S.D.N.Y. June 16, 2016) ("[W]here one party argues that there is no valid arbitration agreement, courts have decided the question of arbitrability."), *aff'd in part, vacated in other part, and remanded per curiam*, 689 F. App'x 6 (2d Cir. 2017); *Vallejo v. Garda CL Sw., Inc.*, 948 F. Supp. 2d 720, 726-28 (S.D. Tex. 2013) ("Challenges to contract formation . . . are different from the challenges to contract validity addressed in *Buckeye* and *Rent-A-Center*. . . . [T]he intervenors' arguments that they never signed the agreement containing the arbitration provision or otherwise assented to it at all raise threshold issues of arbitrability that this court must first decide."), *aff'd mem.*, 559 F. App'x 417 (5th Cir. 2014); *see also Rau, Trilogy*, *supra* note 65, at 515 n.265 ("[A] lack of assent [to the arbitration clause] in such circumstances may be demonstrated simply by an attack on the entire agreement.").

“wholly groundless.”³⁹³ This Subpart argues that *Rent-A-Center* should not be the death knell for this entrenched practice.

The “wholly groundless” rule is supposed to give courts a safety valve for far-fetched assertions that an arbitration agreement applies to a particular claim. Suppose *A* and *B* enter into a contract for the sale of widgets that includes an arbitration clause allowing the arbitrator to resolve any dispute about its scope. Years later, *A* crashes her car into *B*, who sues *A* for personal injuries. If the delegation clause in the widget sales contract is taken at face value, the arbitrator would need to decide whether *B* needs to arbitrate her unrelated tort claim against *A*.³⁹⁴ Because entering the arbitral forum only to be inevitably bounced out seems like a colossal waste of time and resources, the First, Fifth, Sixth, and Federal Circuits, among other courts, have observed that judges can ignore delegation clauses when the merits are not “at least arguably covered by the agreement.”³⁹⁵

In January 2017, however, the Tenth Circuit broke ranks and declined to adopt the “wholly groundless” rule in *Belnap v. Iasis Healthcare*.³⁹⁶ In 2009, LeGrand Belnap, a surgeon, joined the Salt Lake Regional Medical Center (the Medical Center).³⁹⁷ The Medical Center’s bylaws, which did not contain an arbitration clause, governed the parties’ relationship.³⁹⁸ In 2012, Belnap and the Medical Center signed a separate contract in which Belnap agreed to provide management and consulting services to help the Medical Center create a surgical center.³⁹⁹ The 2012 agreement contained both an arbitration clause and a delegation provision (by incorporating the JAMS rules).⁴⁰⁰ In 2013, the

393. See, e.g., *McCarroll v. L.A. Cty. Dist. Council of Carpenters*, 315 P.2d 322, 333 (Cal. 1957); see also *supra* text accompanying notes 152-53.

394. See, e.g., *Douglas v. Regions Bank*, 757 F.3d 460, 462 (5th Cir. 2014) (providing a similar hypothetical example).

395. *Turi v. Main St. Adoption Servs., LLP*, 633 F.3d 496, 511 (6th Cir. 2011) (emphasis omitted); accord *Douglas*, 757 F.3d at 464 (concluding that the plaintiff “meant only to bind herself to arbitrate gateway questions of arbitrability if the argument that the dispute falls within the scope of the agreement is not wholly groundless”); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 & n.5, 1374 (Fed. Cir. 2006) (employing the “wholly groundless” inquiry); *Local 205, United Elec., Radio, & Mach. Workers of Am. v. Gen. Elec. Co.*, 233 F.2d 85, 101 (1st Cir. 1956) (requiring that “the applicant’s claim of arbitrability [not be] frivolous or patently baseless”), *aff’d on other grounds*, 353 U.S. 547 (1957); *Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400, 424-25 (E.D.N.Y. 2014); *McCarroll*, 315 P.2d at 333; *Dream Theater, Inc. v. Dream Theater*, 21 Cal. Rptr. 3d 322, 326 (Ct. App. 2004); *McLaughlin v. McCann*, 942 A.2d 616, 626-27 (Del. Ch. 2008).

396. 844 F.3d 1272, 1286 (10th Cir. 2017).

397. *Id.* at 1274.

398. *Id.*

399. *Id.*

400. See *id.* at 1275-76.

Medical Center disciplined Belnap for alleged sexual harassment of a Medical Center employee.⁴⁰¹ Nevertheless, a subsequent investigation concluded that the Medical Center's actions were unfounded.⁴⁰² Belnap sued for, among other things, breach of the bylaws.⁴⁰³

What followed was a veritable ping-pong match of theories about arbitrability. The Medical Center claimed that Belnap's complaint triggered the arbitration clause in the 2012 consulting agreement.⁴⁰⁴ Belnap responded that his allegations arose from the bylaws, not the consulting agreement.⁴⁰⁵ The Medical Center countered that the delegation clause in the consulting agreement gave the arbitrator, not the court, the right to resolve this issue.⁴⁰⁶ Belnap replied that even if this were true, the Medical Center's assertion that his lawsuit fell within the scope of the consulting agreement's arbitration clause was wholly groundless.⁴⁰⁷ And the Medical Center countered that even if the court could ask whether a party's arbitrability argument was wholly groundless, "here, the arbitrability of Belnap's claims is self-evident."⁴⁰⁸

The Tenth Circuit acknowledged that several courts had adopted the "wholly groundless" rule but chose not to add its voice to that chorus.⁴⁰⁹ The panel explained that the "wholly groundless" rule was "in tension with language of the Supreme Court's arbitration decisions."⁴¹⁰ For instance, in the labor setting, the Court has admonished lower courts to refrain from passing judgment on the underlying case:

[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. . . . [E]ven if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determin-

401. *Id.* at 1276.

402. *Id.*

403. *See id.* at 1276-77.

404. *See id.* at 1277-78; *see also* Appellants' Brief at 15-33, *Belnap*, 844 F.3d 1272 (No. 15-4010), 2015 WL 2165504 (arguing that all of Belnap's claims should have been held to fall within the 2012 arbitration clause).

405. *See* Appellee's Opening Brief at 16, *Belnap*, 844 F.3d 1272 (No. 15-4010), 2015 WL 3613754.

406. *See Belnap*, 844 F.3d at 1277-78; *see also* Appellants' Reply Brief at 3-8, *Belnap*, 844 F.3d 1272 (No. 15-4010), 2015 WL 3989047.

407. *See* Appellee's Opening Brief, *supra* note 405, at 13-15.

408. *See* Appellants' Reply Brief, *supra* note 406, at 9-13.

409. *See Belnap*, 844 F.3d at 1285-86.

410. *Id.* at 1286.

ing whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.”⁴¹¹

Reading this language in conjunction with *Rent-A-Center*, the Tenth Circuit held that the mere existence of a delegation clause requires “the district court . . . to eschew consideration of the arbitrability of the claims and to grant the motion to compel arbitration as to *all* of the claims against [the Medical Center].”⁴¹² Thus, there is a nascent circuit split about the “wholly groundless” rule.

The Tenth Circuit’s skepticism is understandable. For starters, there is no “frivolous claims” carve-out for garden-variety motions to compel arbitration. Indeed, even if the plaintiff’s allegations seem flimsy, courts simply inquire “(1) whether a valid agreement to arbitrate exists and (2) whether the particular dispute falls within the scope of that agreement.”⁴¹³ Because *Rent-A-Center* opines that delegation clauses *are* arbitration clauses, heightened judicial scrutiny for arbitration about arbitration seems anomalous.

Moreover, the “wholly groundless” rule is an exception to the least controversial form of arbitrating substantive arbitrability. Arbitrators tend to be familiar with the customs of a particular industry and thus act at the apex of their authority when they interpret a contract involving that industry.⁴¹⁴ Conflict over what is sometimes called “scope arbitrability” also differs from disputes over the validity or formation of an arbitration clause⁴¹⁵: A party who argues that the arbitration clause does not apply to her complaint *concedes* that she agreed to arbitrate but merely asserts, “I didn’t agree to arbitrate *that*.”⁴¹⁶ She thus has more reason to expect that she might be forced to plead her arbitrability objection to the arbitrator.

Nevertheless, none of these concerns justify abandoning the “wholly groundless” rule. First, the Tenth Circuit’s reliance on the Court’s labor

411. *Id.* at 1286-87 (quoting *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649-50 (1986)).

412. *Id.* at 1287, 1292-93. For other skeptical views of the “wholly groundless” rule, see *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1269 (11th Cir. 2017); and *Private Jet Servs. Grp. v. Marquette Univ.*, No. 14-cv-436-PB, 2015 WL 2228041, at *2 (D.N.H. May 12, 2015) (“[I]t remains unclear whether the Supreme Court would approve the ‘wholly groundless’ rule in light of its previous cases addressing the enforceability of delegation provisions.”).

413. *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005).

414. See, e.g., Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140-42 (1977).

415. See *Consol. Rail Corp. v. Metro. Transp. Auth.*, No. 95 Civ. 2142 (LAP), 1996 WL 137587, at *8 (S.D.N.Y. Mar. 22, 1996).

416. George Bermann & Alan Scott Rau, *Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau*, 43 PEPP. L. REV. 469, 474-75 (2016).

arbitrability opinions⁴¹⁷ is misplaced. The Taft-Hartley Act does not boast a provision like section 3 of the FAA, which requires a court to “be[] satisfied” that a dispute falls within the scope of an arbitration clause.⁴¹⁸ Because the “wholly groundless” rule emanates from the FAA’s text, it has a unique pedigree in cases decided under the Act.⁴¹⁹ Likewise, the policy considerations animating the Court’s bright-line rule against judges taking it upon themselves to construe arbitration clauses in collective bargaining agreements do not translate into the setting of consumer and employment arbitration.⁴²⁰ Labor arbitrators may be fluent in “shop talk,”⁴²¹ but that skill is less useful in the domain of adhesion contracts, where one party is ignorant of trade usage. Thus, dicta from the Court’s labor precedents should not throw a shadow on the “wholly groundless” rule.⁴²²

Second, *Rent-A-Center* does not foreclose reliance on the “wholly groundless” rule. It is true that there is no “wholly groundless” rule for agreements to arbitrate the merits.⁴²³ But this is only a problem if we accept the proposition that delegation provisions must be treated precisely like arbitration clauses. As I argued above, that is not (and should not be) the law.⁴²⁴ Once we abandon that misconception, the singular nature of the “wholly groundless” rule is no longer an obstacle.

Third, the “wholly groundless” rule effectuates the parties’ likely intent. Even when a delegation provision “clearly and unambiguously” permits the

417. See *supra* text accompanying notes 411-12.

418. See 9 U.S.C. § 3 (2016).

419. See, e.g., *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1370-71 (Fed. Cir. 2006) (describing the “wholly groundless” rule as an attempt to “reconcile an agreement to delegate arbitrability decisions to an arbitrator in accordance with the language of section 3 of the FAA”).

420. See, e.g., *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (“The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.”).

421. Cf. *supra* text accompanying note 414.

422. The degree to which labor and commercial arbitration cases should inform each other has never been clear. Compare *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (“[A]rbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement . . .”), *Samaan v. Gen. Dynamics Land Sys., Inc.*, 835 F.3d 593, 599 (6th Cir. 2016) (“Although labor arbitrations and commercial arbitrations share certain legal concepts, these areas of law are not interchangeable.”), and *Local 1351 Int’l Longshoremens Ass’n v. Sea-Land Serv. Inc.*, 214 F.3d 566, 571 (5th Cir. 2000) (“[L]abor arbitration should not be treated in the same manner as arbitration of general commercial disputes.”), with, e.g., *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 291-92, 300-01 (2010) (relying on FAA opinions in a labor arbitration dispute).

423. Cf., e.g., *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1286-87 (10th Cir. 2017).

424. See *supra* Part II.A.

arbitrator to hear assertions that a claim is arbitrable, it does not follow that the parties want to arbitrate *all* such assertions. Again, the dispositive question is how far the parties' consent to arbitration extends. Did they agree to arbitrate doomed arguments that the arbitration clause encompasses the plaintiff's complaint? The answer should be no. When a case can only be found nonarbitrable, the parties could not have wanted to squander time and energy "at an unnecessary and needlessly expensive gateway arbitration."⁴²⁵ Accordingly, a drafter's attempt to assign "scope arbitrability" to the arbitrator should yield to serious doubts that a lawsuit falls within the ambit of the agreement to arbitrate the merits.

D. Unconscionability

After decades of litigation, jurisdictions have a mature body of case law on the factors that make an arbitration clause unconscionable.⁴²⁶ Nevertheless, it has been difficult to import these teachings into the realm of arbitration about arbitration. This Subpart claims that reading *Rent-A-Center* narrowly would help courts make that transition.

Rent-A-Center has complicated the intersection of arbitration and unconscionability in several ways. For one, the opinion's super-separability regime⁴²⁷ elevates form above substance. A consumer or employee who fails to attack the delegation clause itself goes straight to arbitration.⁴²⁸ Even seasoned lawyers have overlooked this nuance and forfeited compelling arguments by arguing that the arbitration clause "*as a whole* is unconscionable."⁴²⁹ As one frustrated

425. See *Douglas v. Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014).

426. See David Horton, *Unconscionability Wars*, 106 NW. U.L. REV. 387, 392-94 (2012).

427. See *supra* text accompanying notes 249-51.

428. See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010); see also *Mercadante v. XE Servs., LLC*, 78 F. Supp. 3d 131, 140 (D.D.C. 2015) ("The challenge . . . must be directed specifically at the delegation agreement and not at 'another provision of the contract, or to the contract as a whole.'" (quoting *Rent-A-Ctr.*, 561 U.S. at 70)).

429. See *Brennan v. Opus Bank*, 796 F.3d 1125, 1133 (9th Cir. 2015) (quoting *Rent-A-Ctr.*, 561 U.S. at 75); see also *Law Offices of Daniel C. Flint, P.C. v. Bank of Am., N.A.*, No. 15-13006, 2016 WL 1444505, at *6 (E.D. Mich. Apr. 13, 2016) ("Plaintiff's opposition to [the defendant's] motion to compel makes no reference [to] or mention of the delegation provision that [the defendant] seeks to enforce."); *Meadows v. Dickey's Barbecue Rests. Inc.*, 144 F. Supp. 3d 1069, 1079-80 (N.D. Cal. 2015) ("Plaintiffs challenge the entire arbitration clause as unconscionable, but do not challenge the specific delegation clauses as unconscionable."); *W.L. Doggett LLC v. Paychex, Inc.*, 92 F. Supp. 3d 593, 598 (S.D. Tex. 2015) (reasoning that the plaintiff did not "challenge[] . . . the delegation provision specifically"); *Barker v. Fox Den Acres, Inc.* (*In re Barker*), 510 B.R. 771, 780 (Bankr. W.D.N.C. 2014) ("Debtor has not made a specific and separate challenge to the delegation clause."); *Regions Bank v. Rice*, 209 So. 3d 1108, 1111 (Ala. 2016) ("Although Rice challenged the validity of the arbitration provision as a whole, she has not specifically challenged the delegation provision."); *Allied Prof'ls Ins. Co. v. Fitzpatrick*,

footnote continued on next page

litigant complained, Justice Scalia's finicky rule requires "a challenge to a certain clause, followed by challenges to single sentences, followed by challenges to words tacked on to conjunctions at the end of a sentence."⁴³⁰

In addition, even when a plaintiff assails the delegation clause itself, she encounters another roadblock: Many common reasons for invalidating agreements to arbitrate the merits do not apply to delegation clauses. For example, courts routinely hold that arbitration provisions are substantively unconscionable when they limit the remedies arbitrators can award.⁴³¹ But the fact that a drafter has prohibited punitive or consequential damages is not relevant for the extraordinarily narrow (and migraine-inducing) issue whether it is unconscionable to arbitrate the issue whether it is unconscionable to arbitrate the case. Likewise, shortened statutes of limitations and abbreviated discovery can make agreements to arbitrate the lawsuit seem overly harsh⁴³² but are unlikely to make it unfair to arbitrate whether it is unfair to arbitrate the lawsuit.⁴³³ In fact, even the most intuitive grounds for challenging a delegation clause—excessive arbitrator's fees—do not always succeed. Arguably, a plaintiff who cannot afford to arbitrate her complaint also cannot afford to arbitrate whether she must arbitrate her complaint. But then again, perhaps arbitrating about arbitration takes less time and is therefore less expensive

169 So. 3d 138, 141 (Fla. Dist. Ct. App. 2015) ("Although the plaintiffs challenged the arbitration provision as a whole, the plaintiffs did not challenge this delegation provision specifically."); *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 608 (Mo. Ct. App. 2015) ("Dotson waived any specific challenges he may have had to the enforceability of the delegation provision . . ."); *Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 47 N.E.3d 463, 474 (N.Y. 2016) (holding that the plaintiffs "did not specifically direct any challenge to the delegation clauses empowering the arbitrators to determine gateway questions of arbitrability"); *Schumacher Homes of Circleville, Inc. v. Spencer*, 787 S.E.2d 650, 663 (W. Va. 2016) ("The plaintiffs' arguments addressed the validity of the arbitration agreement as a whole, but failed to even mention the delegation language . . .").

430. See Response Brief of Appellee Joshua Parnell at 15, *Parnell v. CashCall, Inc.*, 804 F.3d 1142 (11th Cir. 2015) (No. 14-12082), 2014 WL 5793755.

431. See, e.g., *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 766-67 (Wash. 2004) (holding that a purported waiver of "all rights to recover punitive or exemplary damages in connection with any common law claims" was substantively unconscionable). *But see* *Rau, Separability*, *supra* note 65, at 66-67 (arguing that arbitrators are better positioned than courts to decide the context-sensitive matter whether remedial limitations are valid).

432. See, e.g., *Hulett v. Capitol Auto Grp.*, No. 07-6151-AA, 2007 WL 3232283, at *4-5 (D. Or. Oct. 29, 2007); *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 547 (E.D. Pa. 2006).

433. See, e.g., *Rent-A-Ctr.*, 561 U.S. at 74.

than arbitrating the merits.⁴³⁴ Accordingly, some judges have rejected cost-based attacks on delegation provisions as “speculative.”⁴³⁵

Finally, FAA preemption and *Rent-A-Center* are a powerful one-two punch. In a footnote in *Perry v. Thomas*, the Court prohibited judges from factoring “the uniqueness of an agreement to arbitrate” into their unconscionability calculus.⁴³⁶ Although this passage is notoriously opaque,⁴³⁷ it seems to prohibit courts from finding that a term possesses a greater degree of procedural or substantive unconscionability simply because it *mandates arbitration*.⁴³⁸ Yet that is precisely what makes delegation clauses so abstruse. Indeed, they are counterintuitive because they risk requiring “unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.”⁴³⁹ Arguably, this means that *Rent-A-Center* doubles down on *Perry* because it precludes judges from considering the rank obscurity of delegation clauses when they apply the unconscionability doctrine.

Distinguishing between arbitration and delegation clauses would help on all these fronts. For one, consider *Rent-A-Center*’s directive that plaintiffs must challenge the delegation clause specifically.⁴⁴⁰ This is not just formalism; it is

434. *See id.* (“[T]he unfairness of the [arbitrator] fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination.”).

435. *See, e.g.,* *Micheletti v. Uber Techs., Inc.*, 213 F. Supp. 3d 839, 848 (W.D. Tex. 2016) (“Here, plaintiffs’ claims are entirely speculative; they *might* be subjected to paying significant forum fees.”); *Halliday v. Beneficial Fin. I, Inc.*, No. 2:12-cv-708, 2013 WL 693022, at *4 (S.D. Ohio Feb. 26, 2013) (“The speculative possibility that threshold issues may require more than one day of arbitration, and that plaintiffs may be forced to spend some uncertain amount of money to continue arbitration[,] does not render the delegation clause unconscionable.”); *see also* *Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 964 (N.D. Cal. 2015) (holding that the plaintiffs had failed to prove that paying arbitral filing fees to arbitrate about arbitration would be overly burdensome), *appeal dismissed*, No. 15-16878 (9th Cir. Jan. 27, 2016); *cf. Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1112 (9th Cir.) (suggesting that arbitration costs of roughly \$7000 a day might be problematic but that the drafter had agreed to pay all such expenses), *amended in other part* by 848 F.3d 1201 (9th Cir. 2016); *Dean v. Draughons Junior Coll., Inc.*, 917 F. Supp. 2d 751, 762-63 (M.D. Tenn. 2013) (holding that the FAA preempts any argument that arbitration about arbitration is cost prohibitive).

436. *See* 482 U.S. 483, 493 n.9 (1987).

437. *See, e.g.,* Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1289 (2011) (arguing that the passage from *Perry* “makes no sense”).

438. *Cf. Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1425-27 (2017) (citing *Perry* and striking down a Kentucky rule requiring a power of attorney to expressly grant the agent the authority to enter into arbitration agreements because it was “tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers”).

439. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

440. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010).

empty formalism. There is no good reason to require arbitration of viable challenges to the delegation clause simply because the plaintiff has not targeted that clause in her briefs. Doing so not only resurrects the kind of procedural rigidity that supposedly died in the mid-nineteenth century⁴⁴¹ but also causes courts to abdicate their duties under sections 3 and 4 of the FAA to ensure that the parties have actually agreed to arbitrate a particular dispute.⁴⁴² Thus, appreciating that the separability doctrine does not apply with the same strength to delegation provisions would allow judges to hear plaintiffs' legitimate objections to them. And if a plaintiff has failed to challenge the delegation clause in her pleadings or motion papers or at oral argument, courts should liberally grant leave to amend.⁴⁴³

In addition, recognizing that delegation clauses do not command the same deference as arbitration provisions would help courts calibrate the unconscionability defense in the post-*Rent-A-Center* landscape. Although *Perry* may bar a judge from deeming an arbitration clause to be procedurally unconscionable simply because it requires plaintiffs to pursue claims outside the court system, there is no reason to treat delegation clauses precisely the same way. Courts should be free to conclude that delegation clauses in adhesion contracts are inherently more procedurally defective than agreements to arbitrate the merits.⁴⁴⁴ Indeed, although procedural unconscionability doctrine varies widely, in many states it can be triggered by "complex legalistic language"⁴⁴⁵ that is "so difficult to . . . understand that the plaintiff cannot fairly

441. *Cf., e.g.,* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459 (1943) (describing the rigid "issue-pleading" requirements of the common law).

442. *See* 9 U.S.C. §§ 3-4 (2016).

443. For an example of a court doing exactly this, see *Parnell v. CashCall, Inc.*, 804 F.3d 1142 (11th Cir. 2015), which held that the plaintiff "may still seek leave from the district court to amend his complaint to reflect a proper challenge to the delegation provision," *id.* at 1149. *See also* FED. R. CIV. P. 15(a)(2) ("[A] party may amend its pleading . . . with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.").

444. Some courts perceive no difference between the procedural unconscionability of a delegation clause and the procedural unconscionability of an agreement to arbitrate the merits. For instance, the Ninth Circuit recently held that if a drafter gives a consumer or employee a short period of time to opt out of arbitration, a delegation clause cannot be procedurally unconscionable. *See* *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1111 (9th Cir.), *amended in other part by* 848 F.3d 1201 (9th Cir. 2016); *see also* *Bruster v. Uber Techs. Inc.*, 188 F. Supp. 3d 658, 664 (N.D. Ohio 2016) (holding that an opt-out provision was fatal to the plaintiffs' procedural unconscionability argument).

445. *See, e.g.,* *Wash. Mut. Fin. Grp. v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004) (quoting *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 725 (Miss. 2002)); *Lovey v. Regence BlueShield of Idaho*, 72 P.3d 877, 882 (Idaho 2003); *see also* *Sitogum Holdings v. Ropes*, 800 A.2d 915, 921 (N.J. Super. Ct. Ch. Div. 2002) (noting that procedural unconscionability "can include . . . unduly complex contract terms").

be said to have been aware he was agreeing to it.”⁴⁴⁶ This description fits delegation provisions like a glove.⁴⁴⁷ In fact, sophisticated corporate *drafters* such as KeyBank and Lyft have sometimes failed to recognize that *their own contracts* empower the arbitrator to decide threshold issues about the arbitration clause.⁴⁴⁸

In turn, because unconscionability exists on a sliding scale in that a strong showing on one element can compensate for weakness on another,⁴⁴⁹ courts ought not to be so gun-shy about invalidating delegation clauses. It is true that an unfair term often works less of a hardship when it comes to arbitrating the laser-focused issue of arbitrability than it does with respect to arbitrating the merits.⁴⁵⁰ But this should not be the sum total of the analysis. Instead, the greater degree of procedural infirmity in the delegation clause should make up for any lesser degree of substantive unfairness.

A 2015 California appellate case, *Pinela v. Neiman Marcus Group*,⁴⁵¹ provides a snapshot of this approach in action. Former employees filed a class action against Neiman Marcus for violating the California Labor Code.⁴⁵² Neiman Marcus’s employment contract included a Texas choice-of-law provision and a

446. See, e.g., *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 622 (Ill. 2006); see also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (explaining that procedural unconscionability hinges, in part, on whether an adherent “ha[d] a reasonable opportunity to understand the terms of the contract”); *Ark. Nat’l Life Ins. Co. v. Durbin*, 623 S.W.2d 548, 551 (Ark. Ct. App. 1981) (linking the unconscionability doctrine to factors including “whether the aggrieved party was made aware of and comprehended the provision in question”).

447. See, e.g., *Tiri v. Lucky Chances, Inc.*, 171 Cal. Rptr. 3d 621, 633 (Ct. App. 2014) (“[D]elegating arbitrability questions to an arbitrator is a ‘rather arcane’ issue upon which parties likely do not focus.” (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995))).

448. Cf., e.g., *Johnson v. KeyBank Nat’l Ass’n (In re Checking Account Overdraft Litig.)*, 754 F.3d 1290, 1295 (11th Cir. 2014) (“When arguing its original . . . motion to compel arbitration, KeyBank made no mention of the delegation clause.”); *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 293 n.3 (D. Mass. 2016) (“Lyft did not address the delegation clause in its briefing and expressly waived that argument during the hearing.”), *appeal docketed*, No. 16-2109 (1st Cir. Aug. 30, 2016).

449. See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (“[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000), *abrogated in other part by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011))).

450. See, e.g., *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 74 (2010); see also, e.g., *supra* notes 434-35 and accompanying text (noting that some judges have rejected cost-based unconscionability challenges to delegation provisions).

451. 190 Cal. Rptr. 3d 159 (Ct. App. 2015).

452. *Id.* at 164.

delegation provision.⁴⁵³ The court first held that the delegation clause was procedurally unconscionable:

While this is not a case involving fraud or sharp practices, we conclude there is more than the minimum degree of procedural unconscionability that is always present with an adhesive contract. Grasping the import and meaning of this particular delegation clause would have been beyond the ken of most anyone Although the delegation clause was not hidden from [the plaintiff], it might as well have been.⁴⁵⁴

Against this backdrop, the court then held that the delegation clause was substantively unconscionable because the choice of Texas law prevented the arbitrator from applying California's plaintiff-friendly unconscionability doctrine to the agreement to arbitrate the merits.⁴⁵⁵

Likewise, courts should scrutinize other provisions that make it harder for plaintiffs to arbitrate challenges to the validity of the arbitration clause. In addition to fee-splitting and choice-of-law clauses, this litany of suspect terms includes those that select an inconvenient forum. It makes no sense to force a plaintiff to travel hundreds or even thousands of miles just to argue that she should not be forced to travel to arbitrate her complaint.⁴⁵⁶ And in the same

453. *See id.* at 169, 173.

454. *Id.* at 173-74.

455. *See id.* at 175-77. Not all courts agree that a choice-of-law clause can make a delegation provision unconscionable. *See, e.g.,* *Doctor's Assocs. v. Tripathi*, No. 3:16CV00562 (JCH), 2016 WL 7634464, at *18-19 (D. Conn. Nov. 3, 2016) (rejecting the argument that a delegation clause was substantively unconscionable because it selected Connecticut rather than California law), *recommendation adopted by* 2016 WL 7406725 (D. Conn. Dec. 2, 2016), *appeal dismissed as withdrawn*, No. 16-4329 (2d Cir. July 12, 2017). Likewise, a handful of judges have held that choice-of-law clauses appearing outside the delegation clause are irrelevant because the delegation clause is its own separate contract. *See, e.g.,* *Micheletti v. Uber Techs., Inc.*, 213 F. Supp. 3d 839, 846-47 (W.D. Tex. 2016) (concluding that "the choice-of-law provisions have no effect on this Court's determination of the enforceability of the delegation provision" because the delegation provision "is antecedent to the arbitration agreement" and "includes no choice-of-law provision"). *But cf. Morocho v. Carnival Corp.*, No. 10-21715-CIV, 2011 WL 147750, at *1 (S.D. Fla. Jan. 18, 2011) ("Here, Plaintiff challenged the arbitration delegation clause itself and its propriety in light of the choice of forum clause contained within the same provision and the choice of law clause contained within the next provision. [Thus, t]his case is different from *Rent-A-Center* . . ."). This takes *Rent-A-Center's* super-separability approach to the extreme.

456. *See, e.g.,* *Vargas v. Delivery Outsourcing, LLC*, No. 15-cv-03408-JST, 2016 WL 946112, at *11 (N.D. Cal. Mar. 14, 2016) ("Forcing Plaintiff, a luggage delivery driver, to challenge the arbitration agreement thousands of miles from where he worked places a substantial barrier to Plaintiff bringing his claims."); *Galen v. Redfin Corp.*, Nos. 14-cv-05229-TEH & 14-cv-05234-TEH, 2015 WL 7734137, at *10 (N.D. Cal. Dec. 1, 2015) ("The Agreement's selection of Seattle as the forum for arbitration is similarly unconscionable, because it would make it significantly harder for the California resident Plaintiffs to litigate their claims."); *Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 421 (N.D. Cal. 2015)

footnote continued on next page

vein, courts should be wary of clauses that permit a prevailing party to recoup its litigation expenses or attorneys' fees. As one court has held, these loser-pays provisions are substantively unconscionable in the delegation context because they extract a stiff penalty from plaintiffs who lose, "even as to the limited issue of arbitrability."⁴⁵⁷

E. Limits on the FAA

Federal law limits arbitration in several ways, including exceptions within the FAA,⁴⁵⁸ the McCarren-Ferguson Act (MFA),⁴⁵⁹ and recent efforts by the executive branch to trim arbitration's sails.⁴⁶⁰ This Subpart addresses whether delegation clauses should allow arbitrators to decide whether these rules apply.

The chicken-and-egg dilemma of whether arbitrators can decide whether the FAA applies to disputes has already arisen in the employment context. As mentioned, section 1 of the FAA excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."⁴⁶¹ The Court has interpreted this language to "exempt[] contracts of employment of transportation workers, but not other employment contracts."⁴⁶² In turn, judges decide whether an employee is a "transportation worker[]" by weighing factors such as whether the employee operates a vehicle or handles goods that are shipped across state lines.⁴⁶³ Yet when an arbitration clause includes a delegation provision, should arbitrators apply this test to determine whether an employee is a transportation worker?

The two federal courts of appeals to consider this matter have reached irreconcilable conclusions. In *Green v. SuperShuttle International, Inc.*, airport shuttle drivers filed a class action against SuperShuttle under the Minnesota Fair Labor Standards Act.⁴⁶⁴ The plaintiffs had signed a contract that contained an arbitration provision with a delegation clause.⁴⁶⁵ When the company tried

(striking down a delegation clause in part because the plaintiff lived over a thousand miles away from the chosen forum).

457. *Saravia*, 310 F.R.D. at 421.

458. See 9 U.S.C. §§ 1-2 (2016); see also *supra* text accompanying notes 100-05.

459. See 15 U.S.C. § 1012(b) (2016) (providing that state law can sometimes override federal law in the context of insurance); see also McCarren-Ferguson Act, ch. 20, Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015).

460. See *supra* notes 35-39 and accompanying text.

461. 9 U.S.C. § 1.

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

463. See, e.g., *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005) (articulating an eight-factor test for whether an employee is a transportation worker).

464. 653 F.3d 766, 767 (8th Cir. 2011).

465. See *id.* at 767-68.

to compel arbitration, the plaintiffs argued that they qualified for the carve-out under section 1 of the FAA.⁴⁶⁶ The Eighth Circuit held that the delegation clause applied and that the application of the “transportation worker” exception “is a threshold question of arbitrability” for the arbitrator to decide.⁴⁶⁷ Conversely, in *In re Van Dusen*, the Ninth Circuit rejected that very argument, reasoning that “private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold.”⁴⁶⁸

Likewise, courts have begun to address whether they must honor delegation provisions when a party alleges that the MFA reverse-preempts the FAA. The MFA permits state insurance regulation to supersede federal law.⁴⁶⁹ However, the Third Circuit has enforced a delegation clause to allow an arbitrator to decide whether a document was an “insurance” agreement that qualified for a state statutory exemption from arbitration.⁴⁷⁰ Conversely, the Court of Appeals of New York simply ignored a delegation clause and resolved the reverse preemption issue on its own.⁴⁷¹

The recent spate of federal anti-arbitration regulation raises similar problems. For instance, the Franken Amendment bars the Department of Defense from entering into contracts for more than \$1 million in goods or

466. See *id.* at 768; see also Appellants’ Brief and Addendum at 11-15, *Green*, 653 F.3d 766 (No. 10-3310), 2010 WL 5306837 (“[B]ecause of the transportation worker exclusion, Defendants cannot compel arbitration under the FAA.”).

467. See *Green*, 653 F.3d at 769.

468. *Van Dusen v. U.S. Dist. Court (In re Van Dusen)*, 654 F.3d 838, 843-44 (9th Cir. 2011). Courts have generally agreed with *Van Dusen*. See, e.g., *Atwood v. Rent-A-Ctr. E., Inc.*, No. 15-cv-1023-MJR-SCW, 2016 WL 2766656, at *1 (S.D. Ill. May 13, 2016) (“Just as a federal court lacks the power to stay a case pending arbitration under the [FAA] when Section 1’s commerce requirement isn’t satisfied, so too does a court lack the power to compel arbitration under the Act when an agreement is exempt from it under Section 1.” (citations omitted)); *Oliveira v. New Prime, Inc.*, 141 F. Supp. 3d 125, 133-35 (D. Mass. 2015) (“[T]he question of whether the § 1 exemption applies is for the Court, and not the arbitrator, to decide.”), *aff’d*, 857 F.3d 7 (1st Cir. 2017), *petition for cert. filed*, No. 17-340 (U.S. Sept. 6, 2017); cf. *Morning Star Assocs. v. Unishippers Glob. Logistics, LLC*, No. CV 115-033, 2015 WL 2408477, at *2, *8 (S.D. Ga. May 20, 2015) (deciding for itself that the transportation worker exemption did not apply even where the arbitration agreement contained a delegation clause), *appeal dismissed for lack of jurisdiction per curiam sub nom. Herrman v. Unishippers Glob. Logistics, LLC*, No. 15-12680 (11th Cir. Feb. 21, 2017).

469. See 15 U.S.C. § 1012(b) (2016) (“No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . .”).

470. See *S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138, 142, 146 (3d Cir. 2016).

471. See *Monarch Consulting, Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 47 N.E.3d 463, 469-73 (N.Y. 2016).

services with entities that compel arbitration of claims brought by their employees under Title VII or for “any tort related to or arising out of sexual assault or harassment.”⁴⁷² Likewise, HHS has declared that nursing homes participating in Medicare or Medicaid “must not enter into a pre-dispute agreement for binding arbitration with any resident or resident’s representative.”⁴⁷³ Finally, the DoE has followed suit by outlawing mandatory arbitration for certain claims against schools that receive Title IV assistance under the Higher Education Act.⁴⁷⁴

Although these rules do not expressly invalidate arbitration clauses, they achieve the same result through the back door. Under the defense of illegality, “a contract entered in violation of federal statutory or regulatory law is unenforceable.”⁴⁷⁵ At the same time, though, each of these federal anti-arbitration directives requires preliminary factual findings about topics such as the value of the contract, the nature of the plaintiff’s claims, or the defendant’s business practices.⁴⁷⁶ Someone needs to make these determinations.

Thus, there is a live issue about who entertains an allegation that federal policymakers have outlawed a particular arbitration clause. There is no authority directly on point. To be sure, *Prima Paint* usually allows arbitrators to hear allegations that the container contract violates public policy. For instance, in *Buckeye Check Cashing, Inc. v. Cardegna*, the Court invoked the

472. See Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, div. A, tit. VIII, § 8116, 123 Stat. 3409, 3454-55.

473. Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688, 68,867 (Oct. 4, 2016) (to be codified at 42 C.F.R. § 483.70(n)). This rule was recently enjoined, see *Am. Health Care Ass’n v. Burwell*, 217 F. Supp. 3d 921, 925 (N.D. Miss. 2016), and the Fifth Circuit dismissed the appeal upon the government’s unopposed motion, see *Am. Health Care Ass’n v. Price*, No. 17-60005 (5th Cir. June 2, 2017); Unopposed Motion to Dismiss Appeal at 2, *Am. Health Care Ass’n*, No. 17-60005 (5th Cir. June 2, 2017).

474. See *supra* note 37 and accompanying text. In addition, in 2016 the CFPB proposed abolishing class arbitration waivers in financial services contracts, but Congress overturned that rule in 2017 before it could go into effect. See *supra* note 38.

475. *Resolution Tr. Corp. v. Home Sav. of Am.*, 946 F.2d 93, 96 (8th Cir. 1991); *accord Comdisco, Inc. v. United States*, 756 F.2d 569, 576 (7th Cir. 1985); *Quinn v. Gulf & W. Corp.*, 644 F.2d 89, 94 (2d Cir. 1981) (refusing to enforce a contract that was “illegal for the parties to make”); *cf. United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 563 (1961) (“Were we to decree the enforcement of . . . a contract [forbidden by the federal conflict-of-interest statute], we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred.”).

476. For example, the Franken Amendment does not apply unless a contract is worth more than \$1 million. Department of Defense Appropriations Act § 8116(a), 123 Stat. at 3454-55. In addition, the illegality defense does not always kill off an entire contract; to the contrary, it typically gives the decisionmaker leeway to fashion an appropriate remedy. See, e.g., *Rau, Separability*, *supra* note 65, at 48-51.

separability doctrine to compel arbitration of a consumer's allegation that a loan contract was invalid under Florida's lending and consumer protection laws.⁴⁷⁷ Likewise, a federal district court in Arizona held that the arbitrator must decide whether an agreement between an employer and its independent contractors "is void as being in violation of federal regulations."⁴⁷⁸ Nevertheless, the problem with an agreement that fails to conform to federal regulations is not that its interest rate is too high or that one of the parties did not obtain a necessary license or permit. Instead, it is the very fact that the contract contains an illicit arbitration clause. This places "the making of the agreement for arbitration . . . in issue" under section 4 of the FAA and is presumptively a matter for courts to entertain.⁴⁷⁹ Therefore, the key question is whether a company can override this default by asking the arbitrator to decide whether an arbitration clause defies one of these rules.

Rent-A-Center suggests that if a contract contains a delegation clause, arbitrators should make the call. If we follow Justice Scalia's view that delegation provisions are miniature "agreement[s] to arbitrate threshold issues concerning the arbitration agreement," "severable from the remainder of the contract,"⁴⁸⁰ then they exist in a contextless vacuum, sequestered from the other terms. Technically, they are neither contracts to employ "workers engaged in foreign or interstate commerce" under section 1 of the FAA,⁴⁸¹ nor "insurance" contracts that trigger the MFA,⁴⁸² nor agreements to arbitrate that run afoul of federal regulations.⁴⁸³ Instead, they are hermetically sealed agreements to arbitrate disputes about the scope or validity of the arbitration clause. It would make no difference if Congress or the executive branch has exempted the entire transaction or the underlying causes of action from the FAA.

Instead of this blunderbuss approach, it would be better to sort federal checks on arbitration into two categories: those that merely limit the FAA and those that prohibit arbitration altogether. The first group—limits on the FAA—consists of rules that poke holes in the FAA's coverage. Suppose an employment agreement between an airline and a pilot might qualify for section 1's transportation worker exception,⁴⁸⁴ a parochial land sale contract

477. 546 U.S. 440, 443, 446 (2006).

478. *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co. (AZ)*, 288 F. Supp. 2d 1033, 1034, 1037 (D. Ariz. 2003).

479. *See* 9 U.S.C. § 4 (2016).

480. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68, 71 (2010) (quoting *Buckeye Check Cashing*, 546 U.S. at 445).

481. *See* 9 U.S.C. § 1.

482. *See* 15 U.S.C. § 1012(b) (2016).

483. *See supra* text accompanying notes 473-74.

484. *See supra* text accompanying notes 461-62.

might not “involve commerce” under section 2,⁴⁸⁵ or an insurance policy might qualify for reverse preemption under the MFA.⁴⁸⁶ Relying on *Rent-A-Center* to permit arbitrators to decide whether the FAA applies to these deals is exactly backward. Because no one has established that the FAA controls—indeed, that is the very question the arbitrator must answer—invoking the Court’s FAA cases is as circular as circular gets.

In this context, it would make more sense to consider state arbitration law to resolve the question whether courts or arbitrators should decide whether a contract is exempt from the FAA. When the FAA does not apply, the result is not that arbitration is precluded; instead, the result is that the validity of the arbitration clause is governed by state arbitration principles.⁴⁸⁷ Some jurisdictions have adopted the Court’s industrial-strength version of the separability doctrine and therefore might allow the arbitrator to decide whether a dispute falls within the FAA’s ambit.⁴⁸⁸ Conversely, other states adhere to common law ouster or revocability principles.⁴⁸⁹ In these states, courts should decide whether a dispute is excluded. Any other approach would presume that the FAA governs the question whether the FAA governs.

But there is also a second, more muscular set of federal anti-arbitration rules. Sometimes federal officials seek to ban arbitration in particular milieus.⁴⁹⁰ Despite what *Rent-A-Center* implies, courts should entertain allegations that an arbitration clause violates one of these mandates. These rules exist because policymakers have concluded that arbitration can have pernicious effects. Critically, many of these harms arise out of the arbitration process itself and thus flow from arbitration about the merits *and* arbitration about arbitration. For example, President Obama’s now-defunct EO 13,673, which forbade government contracts with entities that insist on the arbitration of certain employment claims, stemmed in part from a desire to

485. See 9 U.S.C. § 2; *supra* text accompanying note 100.

486. See *supra* note 469 and accompanying text.

487. See, e.g., *Diaz v. Mich. Logistics Inc.*, 167 F. Supp. 3d 375, 381 (E.D.N.Y. 2016) (“[A]ssuming that the FAA does not apply, state arbitration law governs.”), *appeal dismissed*, No. 16-1006 (2d Cir. July 11, 2016); *Shanks v. Swift Transp. Co.*, No. L-07-55, 2008 WL 2513056, at *4 (S.D. Tex. June 19, 2008) (“The weight of authority shows that even if the FAA is inapplicable, state arbitration law governs.”).

488. See, e.g., *U.S. Insulation, Inc. v. Hilro Constr. Co.*, 705 P.2d 490, 494 (Ariz. Ct. App. 1985); *Quirk v. Data Terminal Sys., Inc.*, 400 N.E.2d 858, 861 (Mass. 1980); *Jackson Mills, Inc. v. BT Capital Corp.*, 440 S.E.2d 877, 879 (S.C. 1994).

489. See, e.g., ALA. CODE. § 8-1-41 (2017) (“The following obligations cannot be specifically enforced: . . . [a]n agreement to submit a controversy to arbitration”); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 239 S.E.2d 647, 649 (S.C. 1977) (“It is well established in South Carolina that general arbitration agreements which oust the South Carolina circuit court from jurisdiction are unenforceable as against public policy.”).

490. See, e.g., *supra* text accompanying notes 472-74.

“increase employee perceptions of fairness in workplace dispute mechanisms, thereby improving employee morale and productivity.”⁴⁹¹ Because arbitrating arbitrability is so jarring—so likely to be seen by laypeople as a loophole within a loophole—letting arbitrators enforce this rule would amplify the seeming injustice of arbitration, compounding the very problem the rule tries to solve. Likewise, the HHS regulation reflects the fact that many Medicaid and Medicare “beneficiaries lack the resources to litigate a malpractice claim, much less an initial claim seeking to invalidate an arbitration clause.”⁴⁹² And in the same vein, the DoE sought to light the path for student debtors to obtain relief from abusive for-profit colleges.⁴⁹³ Nothing could be further from these goals than requiring plaintiffs to pay arbitrator’s fees just to obtain a ruling that the federal government has prohibited arbitration. And although drafters could subsidize these costs,⁴⁹⁴ compelling arbitration would still defeat HHS’s and the DoE’s efforts to streamline cases by abolishing preliminary skirmishes over arbitrability. For these reasons, it would be perverse to funnel these anti-arbitration efforts into arbitration.

Conclusion

When Congress passed the FAA, it established a price of admission into the arbitral forum: convincing a court that the parties had entered into a valid agreement to arbitrate that encompassed the plaintiff’s allegations. But in rising numbers, companies are attempting to privatize this gatekeeping function. The Supreme Court has encouraged this movement by insisting that delegation clauses are independent arbitration provisions.

But arbitration about arbitration has never been fungible with arbitration about the merits. As a result, delegation clauses should not be seen as fully functional arbitration clauses entitled to all the privileges of the FAA. Instead, they ought to be treated like the weaker cousins of agreements to arbitrate the merits: terms that are presumptively valid but also laden with commonsense

491. See Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 81 Fed. Reg. 58,562, 58,574 (Aug. 25, 2016) (discussing the rationale for the Department of Defense, General Services Administration, and National Aeronautics and Space Administration’s rule implementing EO 13,673). *But see supra* note 36 (noting the Trump Administration’s revocation of the order).

492. See Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688, 68,792 (Oct. 4, 2016).

493. See Student Assistance General Provisions, 81 Fed. Reg. 75,926, 76,022 (Nov. 1, 2016) (finding that “the extensive use of class action waivers . . . effectively removed any deterrent effect that the risk of . . . lawsuits” might have had on educational institutions’ “abusive conduct”). *But see supra* note 37.

494. See, e.g., *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1112 (9th Cir.), *amended in other part by* 848 F.3d 1201 (9th Cir. 2016).

Arbitration About Arbitration
70 STAN. L. REV. 363 (2018)

exceptions. In turn, this shift would allow judges to maintain the legitimacy of alternative dispute resolution.