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Throwing Out the Threshold: Analyzing the Severability Conundrum Under Rent-A-Center, West, Inc. v. Jackson

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COMMENTS

THROWING OUT THE THRESHOLD: ANALYZING THE SEVERABILITY CONUNDRUM UNDER *RENT-A-CENTER, WEST, INC. V. JACKSON*

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INTRODUCTION

Captivated by a sordid tale involving graphic sexual assault charges in the workplace, public attention recently focused on the Supreme Court's policy of construing the Federal Arbitration Act (FAA) to compel arbitration of employees' statutory claims—even in the most gruesome of circumstances.[1] The Jamie Leigh Jones saga began in 2005 when Jones, a Halliburton/KBR employee working in Iraq, was allegedly gang-raped and badly beaten by multiple co-workers.[2] In an alleged attempt to cover up the brutal incident, Halliburton put Jones in a locked trailer for hours and threatened her job security if she left to seek medical treatment.[3] Jones filed suit against Halliburton in federal court,[4] but the United States District Court for the Southern District of Texas enforced an arbitration clause in Jones's employment contract, compelling the case into arbitration[5] and

1. *See, e.g.*, James Risen, *Limbo for U.S. Women Reporting Iraq Assaults*, N.Y. TIMES, Feb. 13, 2008, at A1 (describing Jones's story as highly publicized and asserting that her testimony before Congress may help spark a movement to reevaluate arbitration for claims of violence); *see also* Amanda Terkel, *Halliburton/KBR Goes After Rape Survivor Jamie Leigh Jones' Personal Integrity in Its Supreme Court Petition*, THINK PROGRESS (Jan. 26, 2010, 12:34 PM), http://thinkprogress.org/2010/01/26/kbr-jones-appeal/ (tracking the progress of the Jones legal drama with distaste).

2. *See* Jones v. Halliburton Co., 625 F. Supp. 2d 339, 343 (S.D. Tex. 2008) (describing Jones' allegations that she was drugged and raped, resulting in serious bodily injury, including torn pectoral muscles); *see also* Brian Ross, Maddy Sauer, & Justin Rood, *Victim: Gang-Rape Cover-Up by U.S., Halliburton/KBR*, ABC NEWS (Dec. 10, 2007), http://abcnews.go.com/Blotter/story?id=3977702&page=2 (quoting Jamie Leigh Jones recounting her story that, following the rape incident, Halliburton put her under guard and threatened her job position if she left Iraq).

3. *Jones*, 625 F. Supp. 2d at 343.

4. *See id.* at 344 (listing Jones' claims of sexual harassment and hostile work environment under Title VII, negligence, negligent undertaking, retaliation, false imprisonment, breach of contract, fraud in the inducement to enter the employment contract, assault, battery, and fraud in the inducement to enter the arbitration agreement).

5. *See id.* at 355 (compelling arbitration of Jones's claims that fell within the scope of the arbitration agreement in her employment contract, including claims of sexual harassment

igniting an uproar in both Congress and the media.[6]

In response to the public outcry over the decision compelling arbitration in *Jones v. Halliburton Co.*,[7] Congress, at Senator Al Franken's urging, amended the Defense Department's 2010 appropriations bill ("the Franken Amendment") to deny government defense contracts to companies, like Halliburton, that require employees to sign away their rights to sue for sexual assault.[8] Citing due process concerns in precluding victims of sexual assault from having their day in court, Senator Franken admonished the fine print arbitration clauses that now permeate most employment contracts.[9] The *Jones* episode dramatically illustrated the extent to which employees can be precluded from litigating statutory violations in court due to the growing body of jurisprudence limiting their ability to do so.[10]

Despite the public outcry[11] and congressional action[12] that the *Jones* case

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and hostile work environment under Title VII).

6. *See, e.g.*, Lynn Harris, *Can't Work for Them, Can't Sue Them*, SALON (Feb. 13, 2008, 11:23 AM), http://www.salon.com/life/broadsheet/2008/02/13/kbr_arbitration (lamenting that arbitration clause enforcement tends to put female employees like Jones in "legal limbo"); Justin Rood, *Congress to Probe Iraq Rape Allegations*, ABC NEWS (Dec. 13, 2007), http://abcnews.go.com/Blotter/story?id=3992370&page=1 (noting that the House Judiciary Committee decided to hold a hearing after receiving "numerous letters from lawmakers demanding answers in the case").

7. 625 F. Supp. 2d 339 (S.D. Tex. 2008).

8. *See* Dep't of Defense Appropriations Act, 2010, H.R. 3326 § 8116 (2010).

9. *See* 155 CONG. REC. S10,148–49 (daily ed. Oct. 6, 2009) (statement of Sen. Al Franken). In support of the amendment, Senator Franken remarked:

> Today, defense contractors are using fine print in their contracts to deny women such as Jamie Leigh Jones their day in court. But it is not just Jamie Leigh Jones. This isn't about one instance . . . . This is about many . . . who have been hired by contractors and who have been forced to arbitrate by contractors . . . . [W]omen are not given their day in court. Instead, they are forcing them behind the closed doors of arbitration where the Federal Rules of Evidence don't apply, where decisions are binding and secret, and where decisions are issued by a private arbitrator often paid by the company itself.

Id. at S10,148. The Franken Amendment gained some bipartisan support and passed through the Senate. *See* Stephen Clark, *For Franken, No More Mr. Funny Guy*, FOX NEWS (Dec. 18, 2009), http://www.foxnews.com/politics/2009/12/18/franken-mr-funny-guy/ (reporting that only thirty Republican Senators voted against the Franken Amendment).

10. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109–10 (2001) (compelling arbitration where the employee signed a standard form employment application that included a binding arbitration provision); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (deciding that an employee's Age Discrimination in Employment Act (ADEA) claim was subject to arbitration, absent a showing that Congress intended to preclude an arbitration forum); *see also* Bautista v. Star Cruises, 396 F.3d 1289, 1292 (11th Cir. 2005) (requiring crewmember employees to arbitrate their negligence claims arising from employer's steam boiler exploding, killing six plaintiffs and injuring four); Farac v. Permanente Med. Grp., 186 F. Supp. 2d 1042, 1043 (N.D. Cal. 2002) (enforcing an arbitration agreement in an employment contract to compel arbitration of sexual harassment claims). *See generally* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (articulating a liberal federal policy that favors arbitration).

11. Jon Stewart, for example, highlighted the Jones incident and showed support for the subsequent Franken Amendment. Showing a CNN news clip characterizing the amendment debate as Congress deciding not to "hire contractors that make their employees agree in advance not to sue if they're raped by co-workers," Stewart rhetorically mused, "*how* is that

sparked, the Court's arbitration jurisprudence continues, and the Court has, yet again, enforced a pre-dispute arbitration clause in an employment contract.[13] In *Rent-A-Center, West, Inc. v. Jackson*,[14] the Court considered whether a district court may decide a claim that an arbitration agreement is unconscionable where the parties' agreement contains a provision that explicitly delegates that decision to an arbitrator (frequently termed a "delegation provision").[15] In a 5–4 decision, the Supreme Court held that where an agreement to arbitrate includes a provision establishing that the arbitrator will determine the enforceability of the agreement, a district court may only hear challenges that specifically target that delegation provision.[16] If, on the other hand, the party challenges the enforceability of the agreement as a whole, that challenge may only be heard by an arbitrator.[17] To reach this conclusion, the Court largely applied the contract doctrine of severability, which holds that arbitration agreements can be severed from broader substantive contracts and enforced, even if terms in the principal contract are unenforceable.[18] Under the severability analysis,

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a loophole that needs closing?" *The Daily Show with Jon Stewart* (Comedy Central television broadcast Oct. 14, 2009), *available at* http://www.thedailyshow.com/watch/wed-october-14-2009/rape-nuts.

12. The Franken Amendment went into effect on February 17, 2010, broadly prohibiting contractors from receiving government funds if they require employees to arbitrate certain Title VII claims. *See* FRANKEN AMENDMENT: CLIENT ALERT (Feb. 23, 2010), http://www.proskauer.com/publications/client-alerts/franken-amendment/ (advising defense contractors with arbitration agreements to reconsider trying to enforce such agreements in light of the Franken Amendment).

13. *See* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2780 (2010) (compelling an employee to arbitrate his racial discrimination claims against his employer). The Court's pro-arbitration jurisprudence is not limited to employment contexts. Recently, the Court has shown its staunch pro-arbitration zeal in the context of class action arbitration as well. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court held that parties cannot be compelled to submit to class arbitration unless they expressly contracted to do so. 130 S. Ct. 1758, 1765 (2010). Where the arbitration clause is silent as to class actions, class arbitration is foreclosed. *Id.* at 1776. The Court extended the pro-arbitration trend when it decided another class action case in 2011, and held that the FAA preempted California state law which declared class arbitration waivers unconscionable and unenforceable. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (precluding consumer plaintiffs from aggregating their false advertising claims in class arbitration, even when each individual damages claim only amounted to about thirty dollars).

14. 130 S. Ct. 2772 (2010).

15. *Id.* at 2775. The term "delegation provision" refers to an agreement to arbitrate threshold issues relating to the arbitration agreement, such as whether the parties have agreed to arbitration in the first place. *Id.* at 2777.

16. *Id.* at 2779.

17. *Id.*

18. The seminal case applying severability to arbitration provisions is *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). *Prima Paint* resolved a circuit split by establishing that arbitration clauses, as a matter of substantive federal arbitration law, are severable from the contracts in which they are embedded. *Id.* at 402; *see also* Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1001–02 (9th Cir. 2010) (permitting a claim to proceed before a court where plaintiff argued that, as a threshold matter, the arbitration clause, standing alone, was unenforceable).

the Court compelled the plaintiff's claim into arbitration because it targeted the contract generally and not the delegation clause specifically.[19]

Although the *Jones* case highlighted the possibility of legislative action correcting arbitration problems, the judicial standards by which arbitration clauses are evaluated, as seen in *Rent-A-Center*, continue to typify the central *Jones* problem: the contractual rigidity of arbitration jurisprudence.[20] This Comment analyzes the Supreme Court's stringent application of a severability analysis to delegation provisions in employment arbitration agreements and argues that severability is not the appropriate legal framework for deciding delegation provision challenges. Rather than relying on legislative action, this Comment contends that there is a judicially-manageable standard that would preserve employees' statutory rights without undermining past precedent or subrogating a national policy that favors arbitration. Specifically, this Comment suggests that the Court could preserve both the integrity of employee statutory rights and a pro-arbitration policy by adopting and applying a "knowing and voluntary" standard to delegation provisions in employment arbitration agreements. Adopting a knowing and voluntary standard would maintain the importance of mutual assent in employment arbitration agreements and allow courts to ensure that statutory rights claims are being resolved in the appropriate forum.

Part I of this Comment begins with a brief discussion of the procedural and substantive rights that are at stake when threshold questions of arbitrability proceed before an arbitrator rather than a court. Part I then continues with an overview of how the FAA has been applied to arbitration agreements and how severability principles have been used in arbitration agreements. Part II next explains that a severability analysis is an inappropriate lens through which to view threshold questions of arbitrability in employment arbitration agreements. Part III argues that the Supreme Court should apply a knowing and voluntary standard to determine whether a delegation provision is enforceable in an employment arbitration agreement. Finally, this Comment concludes by reconsidering the consequences of maintaining a hard-line severability approach to delegation provisions.

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19. *See Rent-A-Center*, 130 S. Ct. at 2780 ("Jackson's appeal to the Ninth Circuit confirms that he did not contest the validity of the delegation provision in particular.").

20. *See generally Mandatory Binding Arbitration: Is It Fair and Voluntary?: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) (statement of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary) (accusing the Court of adopting a sweeping pro-arbitration stance that exceeds the FAA's original intent).

I. BACKGROUND

A. Arbitration Versus Litigation: What is at Stake?

When a court considers threshold questions of arbitrability, the main issue is whether a court or an arbitrator should decide whether the claim should be litigated or arbitrated.[21] The procedural and substantive differences between litigation and arbitration are highlighted when deciding questions of arbitrability because, depending on the outcome, the arbitrator may be empowered to determine the validity of the contract that gives rise to his own arbitral authority.[22] Employers tend to favor arbitration because of its lower costs, relative speed, and customized procedural rules.[23] Rather than having generalist courts decide technical, industry-specific claims, employers seek arbitrators to provide expertise in the decision-making process.[24] The Supreme Court has repeatedly endorsed arbitration, explaining that it merely "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[25] Viewing arbitration through this lens, the Court has interpreted the FAA as propounding a national policy that favors arbitration.[26] As a result of the Court's arbitration endorsement, pre-dispute mandatory arbitration clauses are now ubiquitous in employment contracts, forcing employees to arbitrate, rather than litigate, their statutory

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21. A "threshold question of arbitrability" refers to issues that contracting parties would likely have expected a court to decide. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–84 (2002). Thus, the answer to a threshold question of arbitrability will determine whether the underlying controversy will proceed before an arbitrator or a court. *Id.*

22. *See, e.g.*, AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 651–52 (1986) (recognizing the arbitrability conundrum and subsequently requiring courts to decide whether the parties agreed to arbitrate grievances at issue).

23. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010) (evaluating the pros and cons of arbitration as applied to class-action arbitration); Randall Thomas et al., *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 VAND. L. REV. 959, 970–71 (2010) (explaining that if arbitration does not proceed quickly and efficiently, the parties may threaten to fire the arbitrator).

24. *See* Thomas et al., *supra* note 23, at 970 (suggesting that employers may prioritize business expertise over legal expertise).

25. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). *But see* Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 261–62 (2008) (alleging that arbitration deprives parties of rights they would have in court, but realizing that correcting this problem would mean sacrificing arbitration's procedural efficiency).

26. *See, e.g.*, *Mitsubishi Motors*, 473 U.S. at 628–29 (enforcing pre-dispute arbitration agreements against small businesses asserting Sherman Act claims); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (declaring that the FAA is a canon of federal arbitration law that requires arbitration questions to be resolved in favor of arbitration).

claims before disputes even arise.[27] Yet, despite the Court's frequent pro-arbitration gloss on the differences between arbitration and adjudication,[28] several important characteristics make the two forums quite different.[29]

Generally, arbitration is designed to abbreviate judicial proceedings and reduce costs.[30] Commentators have suggested that arbitration agreements often limit discovery, provide for an accelerated resolution time schedule, alter the burden of proof,[31] and restrict the availability of appeals.[32] Such agreements can even stipulate that the parties will not use counsel.[33] While these sorts of provisions may seem neutral on their face, they often tend to

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27. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2 (2009) (finding that a "large and rapidly growing number" of employers are requiring employees to submit their claims to binding arbitration). Congress has not turned a blind eye to the growing use of mandatory arbitration clauses in employment and consumer contexts, where employees and consumers typically have little or no bargaining power. The Arbitration Fairness Act of 2011 (AFA), a pending bill reintroducing the 2009 Act, would amend the FAA to make certain pre-dispute arbitration clauses unenforceable. H.R. 1873, 112th Cong. § 402 (2011).

28. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (citing reduced costs of arbitration as a contributing factor in the pro-arbitration calculus); *Gilmer*, 500 U.S. at 26 (concluding that statutory claims, in light of the national pro-arbitration policy, can be subjected to arbitration); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (construing section 2 of the FAA as a declaration of federal policy favoring arbitration, as a matter of substantive federal law).

29. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 532 (1974) (Douglas, J., dissenting) ("The loss of the proper judicial forum carries with it the loss of substantial rights."); *see also* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (noting that the decision as to which forum has the authority to decide whether a party consented to arbitration "can make a critical difference" in the outcome of the case); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1340–41 (2009) (concluding that there is no proof that mandatory arbitration is fair); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1673 (2005) (concluding that mandatory arbitration is unjust not only because it usurps substantive and procedural rights, but also because it excludes the public service component of the justice system). *But see* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 796 (2008) (arguing that arbitration actually benefits employees by providing greater access to a forum for dispute resolution than litigation).

30. *See* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1563–64 (2005) (contending that arbitration provides a quicker resolution than litigation by reducing the cost and time involved with resolving the dispute). *But see* Julia A. Scarpino, Comment, *Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers*, 10 AM. U. J. GENDER SOC. POL'Y & L. 679, 681 (2002) (asserting that plaintiffs often encounter prohibitively expensive arbitration costs).

31. *See* Sherwyn et al., *supra* note 30, at 1563–64 (delineating common critiques of mandatory arbitration).

32. *See* Schwartz, *supra* note 29, at 1282–83 (positing that the availability of appellate access is favorable for employees because it may have a moderating influence on a decision-maker). *But see* Stephen Willis Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 895 (2010) (citing studies that indicate some employers actually favor litigation over arbitration due to the availability of appellate review).

33. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 33 (1998) (explaining that arbitration agreements can stipulate that neither party will have legal representation).

disadvantage plaintiff-employees.[34] For example, limited discovery provisions may prevent employees from accessing the incriminating documents needed to meet the applicable burden of proof.[35] Similarly, arbitration provisions that prevent both parties from using counsel may also favor employers since employers have access to other trained professionals on staff who are familiar with arbitration proceedings.[36]

Employees can be further disadvantaged by mandatory arbitration because of the "repeat player" problem.[37] Many employment arbitration agreements allow the employer to be involved in choosing the arbitrator.[38] Consequently, an employer's ability to influence the selection of an arbitrator often gives rise to symbiotic relationships between employers and arbitrators.[39] Employers then become repeat players compared to the one-timer employee, benefitting from their extensive experience with arbitration.[40] Indeed, an empirical study of the repeat player problem examined the results of employment arbitrations where employers were repeat players and concluded that employees fared quite poorly in such situations.[41] The discrepancy between employer and employee success rates in repeat player cases as compared with other employment arbitration cases suggests that employees suffer from unequal bargaining power.[42] Because arbitrators may have a financial interest in continued work from repeat player employers,[43] there is little incentive "to satisfy the employee,

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34. *Id.*; *see* Schwartz, *supra* note 29, at 1283 (summarizing evidence that suggests mandatory arbitration is unfair).

35. *See* Beth A. Rowe, Comment, *Binding Arbitration of Employment Disputes: Opposing Pre-Dispute Agreements*, 27 U. TOL. L. REV. 921, 936–37 (1996) (explaining that, without the ability to compel discovery, employees may be precluded from obtaining necessary evidence from the more detailed records of employers).

36. *See* Maltby, *supra* note 33, at 33. *But see* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–64 (2001) (arguing that employee claims generally do not attract the interest of private lawyers because they are too small and that arbitration is a preferable alternative for pro se plaintiffs).

37. A repeat player is an employer who frequently engages in arbitrations and thus has experience advantages in the arbitral forum. *See generally* Darren P. Lindamood, Comment, *Redressing the Arbitration Process: An Alternative to the Arbitration Fairness Act of 2009*, 45 WAKE FOREST L. REV. 291, 303 (2010) (articulating the inherent bias problems that arise when companies that frequently engage in arbitral proceedings develop experiential advantages).

38. *See* Maltby, *supra* note 33, at 33 (explaining that arbitration agreements may permit employers to manipulate arbitrator selection by submitting a list of potential candidates).

39. *See id.*

40. *See generally* Sternlight, *supra* note 29, at 1654 (questioning whether an inexperienced employee could successfully represent herself pro se in arbitration).

41. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 213 (1997) (examining empirical data and finding that employees only won sixteen percent of cases against repeat players).

42. *See id.* (arguing that unequal bargaining power, often a product of divergent economic status, is a likely explanation for the low employee success rate).

43. *See* Nancy A. Welsh, *What is "(Im)partial Enough" in a World of Embedded*

who is highly unlikely to have another opportunity to choose an arbitrator."[44]

Another distinction between arbitration and litigation is that arbitration may not allow for adequate development of the law.[45] Arbitration opinions are typically unpublished and are not made available to the public.[46] Generally, arbitrators are not obligated to issue written opinions, but even if they were so obligated, their opinions would not have the same precedential value as court-issued opinions.[47] Furthermore, although a party may petition a court to review an arbitrator's decision, courts will usually only set aside arbitration decisions in exceptional circumstances.[48] And, as Justice Douglas stated, "[a]n arbitral award can be made without explication of reasons and without development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable, even when the arbitrator seeks to apply [public] law."[49] In addition to reviewability problems, arbitrators often remain immune from malpractice suits,[50] and unlike judges, arbitrators' decisions are not available to the public. The lack of judicial review, combined with arbitrators' malpractice immunity, may deprive arbitration claimants of protection from the mistakes of arbitrators.[51]

Neutrals?, 52 ARIZ. L. REV. 395, 401 (2010) (noting that as arbitration has grown increasingly more prominent, it has spawned a lucrative private business, with some judges retiring from the bench in order to earn substantial sums as private arbitrators).

44. Maltby, *supra* note 33, at 33.

45. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2 (2009) ("Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. . . . Arbitrators enjoy near complete freedom to ignore the law and even their own rules."); *see also* Carbonneau, *supra* note 25, at 266 (explaining that decisional law suffers under prevalent arbitration because legal standards are not generated for the public record or *stare decisis*).

46. *See* Kathyrn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 807 (2009) (analogizing arbitration decisions to "secret law," known only to repeat players).

47. *See generally* Sherwyn et al., *supra* note 30, at 1563 (noting that private arbitration does not entail public accountability as public litigation does).

48. *See* Federal Arbitration Act, 9 U.S.C. § 10 (2006) (permitting overturning only where award was procured by corruption, fraud, or undue means or where the arbitrator exceeded his powers); Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (per curiam) (explaining that an arbitrator's "improvident, even silly, factfinding" will not warrant overturning the award on review); Brentwood Med. Assocs. v. United Mine Workers, 396 F.3d 237, 239 (3d Cir. 2005) (refusing to vacate an arbitration award unless there is manifest disregard for the contract at issue).

49. Scherk v. Alberto-Culver Co., 417 U.S. 506, 532 (1974) (Douglas, J., dissenting).

50. *See* Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 963 (2002) (explaining that arbitrators enjoy "quasi-judicial immunity").

51. *See generally* Carbonneau, *supra* note 25, at 266 ("The decisional sovereignty of the arbitrator is sometimes close to a divine right."); Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1214 (2003) (highlighting the danger that arbitrators, without any liability constraint,

Nevertheless, the Court has continued to adhere to a national policy favoring arbitration.[52]

B. From Prima Paint *to* Rent-A-Center*: Disjointed and Far-Reaching Severability Standards*

The Court initiated a long-lasting pro-arbitration stance in 1967 when it decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[53] In *Prima Paint*, the Court addressed the issue of whether a claim of fraud in the inducement of the entire contract should be resolved by a federal court or referred to arbitration.[54] Three weeks after Prima Paint contracted to purchase Flood & Conklin's paint business, the parties entered into a consulting agreement whereby Flood & Conklin would provide consulting services to Prima Paint.[55] The consulting agreement contained a broad arbitration clause that assigned any claims relating to the agreement to arbitration.[56] After discovering that Flood & Conklin was insolvent, Prima Paint filed suit in federal court, seeking rescission of the consulting agreement.[57] In response, Flood & Conklin moved to compel arbitration of the dispute.[58]

Construing section 4 of the FAA, the Court determined that the FAA intended to effectuate a doctrine of severability, whereby an arbitration provision may be separated from the remainder of a contract and enforced.[59] Subsequently, the Court held that a challenge to the validity of the contract at issue did not necessarily impair the separate agreement to arbitrate within the same contract.[60] Instead, the Court held that the merits of the contractual dispute were for the arbitrator to decide, so long as the claim of fraud in inducement did not go toward the validity of the arbitration clause itself.[61] In sum, the Court established that a court may only entertain the suit if the plaintiff challenged the arbitration agreement

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may serve more like dictators than neutral fact-finders).

52. *E.g.*, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91 (2000) (expressing a "liberal federal policy favoring arbitration agreements" (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1982))).

53. 388 U.S. 395 (1967).

54. *Id.* at 396–97.

55. *See id.* at 397 (describing the exchange of a covenant not to compete and consulting advice for a series of payments).

56. *See id.* at 398 ("Any controversy or claim arising out of or relating to this agreement, or breach thereof, shall be settled by arbitration . . . .").

57. *See id.* (alleging that Flood & Conklin fraudulently represented that the company was solvent).

58. *Id.*

59. *See id.* at 399–400 (agreeing with the lower court's analysis that a claim of fraud in inducement of the contract generally is for the arbitrators and not the courts as a matter of national substantive arbitration law).

60. *Id.* at 403–04.

61. *Id.*

in its own right,[62] while challenges to the whole contract must be compelled to arbitration.[63]

Severability therefore allows a court to separate the arbitration clause from the rest of the contract and analyze the clause's independent validity.[64] Under a severability analysis, it does not matter that the contract as a whole is invalid.[65] Provided that nothing is illegal about the independently viewed arbitration clause, courts must compel arbitration.[66] Although *Prima Paint* was considered an overwhelmingly pro-arbitration opinion, the Court was still careful to note that the decision was intended to make arbitration agreements as enforceable as regular contracts, but not more so.[67]

Following *Prima Paint*, courts have applied this analysis to sever and enforce arbitration clauses contained in broader contracts.[68] For instance, in *Buckeye Check Cashing, Inc. v. Cardegna*,[69] the Court applied severability to sever and enforce an arbitration provision contained in the

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62. *Id.*

63. *See id.* at 404 (construing the language of the FAA as precluding federal courts from considering claims of fraud in the inducement of the contract generally).

64. *See id.* (rejecting plaintiff's claim and compelling arbitration since the fraudulent inducement claim failed to address the arbitration provision directly).

65. *See* Haynsworth v. Corp., 121 F.3d 956, 964–65 (5th Cir. 1997) (holding that generalized misrepresentation allegations are insufficient to overcome a severable arbitration clause). *But see* Rainbow Invs., Inc. v. Super 8 Motels, Inc., 973 F. Supp. 1387, 1391 (M.D. Ala. 1997) (citing Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 855 (11th Cir. 1992)) (pointing out that severability does not mandate compelling arbitration when there is substantial evidence that the underlying contract never existed).

66. Lawrence Cunningham, *A Murder Contract's Arbitration Clause*, CONCURRING OPINIONS (Sept. 24, 2010, 4:35 PM), http://www.concurringopinions.com/archives/2010/09/a-murder-contracts-arbitration-clause.html#more-34377. *Compare* Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1002 (9th Cir. 2010) (affirming the district court's decision that arbitration was inappropriate where the plaintiff showed that lack of mutuality and unconscionability permeated the arbitration clause itself), *with* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877 (11th Cir. 2005) (observing that the plaintiff's claims of adhesion and unconscionability pertained to the contract as a whole and therefore must be arbitrated), *and* Wolff v. Westwood Mgmt., LLC, 503 F. Supp. 2d 274, 283–84 (D.D.C. 2007) (rejecting plaintiff's argument that defendant's unclean hands implicated the arbitration provision, and accordingly compelling arbitration), *aff'd*, 558 F.3d 517 (D.C. Cir. 2009).

67. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (cautioning that courts cannot immunize an arbitration clause from judicial challenge).

68. *See, e.g.*, Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 54–56 (1st Cir. 2002) (compelling arbitration where a mortgage agreement contained an arbitration provision and plaintiffs asserted that the contract had been rescinded); Burden v. Check Into Cash of Ky., LLC, 267 F.3d 483, 491 (6th Cir. 2001) (declining to allow a claim for fraud in the inducement to proceed in court unless the complaint contains a well-founded claim of fraud in the inducement of the arbitration clause itself); Garten v. Kurth, 265 F.3d 136, 144 (2d Cir. 2001) (rejecting plaintiff's contentions that (1) defendants are more comfortable in arbitration and (2) arbitration will be less expensive for defendants than for plaintiffs, as insufficient to render an isolated arbitration provision suspect within a construction contract).

69. 546 U.S. 440 (2006).

Deferred Deposit and Disclosure Agreement ("Disclosure Agreement").[70] Concluding that the plaintiffs challenged the Disclosure Agreement but not the arbitration provisions specifically,[71] the Court held that the arbitration provisions were enforceable apart from the remainder of the contract.[72] In so holding, the Court acknowledged that the *Prima Paint* severability standard permits a court to enforce arbitration provisions within broader substantive contracts even if the principal contract is later deemed unenforceable.[73] The Court in *Buckeye* thus adhered to *Prima Paint*'s basic talisman—challenges to the validity of contracts as a whole must be compelled to arbitration.[74]

In 2010, the Supreme Court expanded the applicability of the severability doctrine to include delegation provisions contained in stand-alone arbitration agreements.[75] In *Rent-A-Center*, the Court considered whether a district court may decide a claim that an arbitration agreement is unconscionable where the agreement explicitly delegates that decision to the arbitrator.[76] The plaintiff-employee, Jackson, pressed statutory claims, alleging racial discrimination and retaliation.[77] In response, defendant Rent-A-Center moved to compel arbitration.[78] Rent-A-Center argued that the plaintiff signed an arbitration agreement that included a delegation provision,[79] delegating exclusive authority to resolve any disputes about the enforceability of the arbitration agreement to an arbitrator.[80] In light of this provision, Rent-A-Center asserted that the threshold question of whether

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70. *Id.* at 449.

71. *See id.* at 444 (asserting that the plaintiff's main contention was that the contract as a whole should be invalidated by a usurious finance charge).

72. *Id.* at 446.

73. *See id.* at 448–49 (rationalizing the odd outcome as part and parcel of the national policy favoring arbitration).

74. *Id.* at 444–45 (discussing the import of *Prima Paint* in creating federal substantive arbitration law).

75. *See* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2779 (2010) (severing and enforcing a delegation provision within a stand-alone arbitration agreement).

76. *Id.*

77. *See* Jackson v. Rent-A-Center, W., Inc., 581 F.3d 912, 914 (9th Cir. 2009) (explaining that Jackson filed an employment discrimination claim under 42 U.S.C. § 1981 in Nevada District Court), *rev'd*, 130 S. Ct. 2772 (2010).

78. *Id.* Rent-A-Center had, since about July 2000, required all new employees to sign a free-standing arbitration agreement requiring arbitration of "all past, present, and future disputes." *Id.*

79. *Id.* The Supreme Court further delineated that a "delegation provision" can be defined as "an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center*, 130 S. Ct. at 2777.

80. *Jackson*, 581 F.3d at 914 n.1. The delegation provision provided that:

> [t]he 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.

Id. at 914 (emphasis added). This provision is termed the "delegation provision" because it delegates questions of arbitrability to an arbitrator. *Rent-A-Center*, 130 S. Ct. at 2777.

the arbitration agreement was valid was reserved only for an arbitrator, not a court.[81] Jackson countered that the threshold issue should be litigated because the arbitration agreement was unconscionable.[82]

In its analysis, the United States Court of Appeals for the Ninth Circuit focused on the idea that courts should determine unconscionability challenges to arbitration agreements before compelling arbitration.[83] The court noted the FAA provides that arbitration agreements in writing "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[84] Accordingly, "generally applicable contract defenses such as fraud, duress or unconscionability may be applied to invalidate arbitration agreements."[85] In light of Jackson's unconscionability contract defense, the Ninth Circuit held that the threshold unconscionability challenge to the delegation provision was properly before the court rather than the arbitrator.[86] The Ninth Circuit recognized that, in delegation provision cases, the presumption that courts determine whether parties agreed to arbitrate "can only be overcome with 'clear and unmistakable evidence' of such intent."[87]

On review, the Supreme Court reversed the Ninth Circuit's decision, concluding that because Jackson had challenged the arbitration agreement as a whole rather than specifically targeting the delegation provision, his unconscionability claim was reserved for the arbitrator and could not be heard by a court.[88] In arriving at this conclusion, the Court relied heavily on the contract severability principles delineated in *Prima Paint*.[89] Applying severability to the arbitration agreement in *Rent-A-Center*, the Court stated that only challenges that specifically target the validity of the delegation provision are relevant to a court's determination of whether the delegation provision at issue is enforceable.[90] Therefore, a challenge to

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81. *Jackson*, 581 F.3d at 914.

82. *Id.* (describing Jackson's assertions of unconscionability due to provisions specifying limited discovery and requiring arbitrator fee sharing).

83. *See id.* at 915 (reading section 2 of the FAA as requiring courts to determine arbitration agreement enforceability as a threshold question).

84. *Id.* (quoting Federal Arbitration Act, 9 U.S.C. § 2 (2006)).

85. Pendergast v. Sprint Nextel Corp., 592 F.3d 1119, 1133 n.13 (11th Cir. 2010) (quoting Dale v. Comcast Corp., 498 F.3d 1216, 1219 (11th Cir. 2007)).

86. *See Jackson*, 581 F.3d at 917 (acknowledging that unconscionability claims are preserved for the courts since unconscionability is a common contract defense and may implicate the existence of mutual assent).

87. *Id.* (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995)) (suggesting that Jackson's unconscionability claim undermines the theory that he meaningfully assented to the arbitration agreement's terms).

88. Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2779 (2010).

89. *Id.* at 2778 (referencing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)).

90. *See id.* at 2777–78 (extending severability to include delegation provisions since "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement .

another provision in the arbitration agreement, or to the arbitration agreement as a whole, does not prevent a court from enforcing the delegation provision.[91] Unless Jackson challenged the delegation provision in particular, the Court held, the provision must be enforced, "leaving any challenge to the validity of the [a]greement as a whole for the arbitrator."[92] Under *Rent-A-Center*, the Court thus established that the severability doctrine may be used to separate delegation provisions from arbitration agreements and to independently enforce delegation provisions, notwithstanding the validity of the overarching arbitration agreement.[93]

C. The FAA and Employment Contracts: A Tenuous Beginning

Although the Court mechanically applied a severability analysis to enforce the delegation provision in *Rent-A-Center*, employment contracts have not always been treated equally by courts applying the FAA.[94] In fact, despite the Court's long-standing preference for arbitration, the FAA has not always been held to cover employment contracts[95] or statutory claims arising in an employment context.[96] The FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in

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. . and the FAA operates on this additional arbitration agreement just as it does on any other").

91. *Id.* at 2778 (noting that agreements to arbitrate are severable from the contract).

92. *Id.* at 2779.

93. *See id.* at 2779–81 (describing how Jackson's unconscionability claim lodged a general challenge against the contract as a whole).

94. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 130–31 (2001) (Stevens, J., dissenting) (condemning the majority's application of the FAA to employment contracts as a substantial departure from the Court's prior implications). *See generally* Sternlight, *supra* note 29, at 1637–38 (documenting that employers and employees alike used to think public policy would prevent courts from compelling arbitration of employment discrimination claims).

95. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (holding that an employee has a right to proceed with a Title VII claim in court regardless of an arbitrator's prior decision). Indeed, most scholars seem to agree that the legislative history of the FAA suggests that the Act was intended to cover commercial contracts, but not employment contracts. *See* 65 CONG. REC. 1931 (1924) (emphasizing that the bill would provide enforcement for commercial contracts and admiralty contracts). Even *Prima Paint*, a famous pro-arbitration opinion, implied that employment contracts may well be beyond the scope of the FAA. As the Court stated, "[w]e note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 n.9 (1967).

96. *See* McDonald v. City of W. Branch, 466 U.S. 284 (1984) (indicating that arbitration was not well-suited to protect statutory rights Congress conferred on individuals); Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) ("[Fair Labor Standards Act] rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate."); *see also Circuit City*, 532 U.S. at 140 (Souter, J., dissenting) ("[W]hat [Congress] wrote was a general exclusion for employment contracts within Congress's power to regulate.").

foreign or interstate commerce."[97] Initially, courts adopted a plain-meaning interpretation of this section and maintained that the FAA simply did not reach employment contracts.[98]

For example, in *Alexander v. Gardner-Denver Co.*,[99] the Court considered whether an employee's right to trial de novo under Title VII of the Civil Rights Act of 1964[100] may be foreclosed by prior submission of his claim to arbitration.[101] The Court flatly rejected the employer's claim that the employee was barred from filing suit in federal court because an arbitrator had decided a parallel claim.[102] Rather, the Court emphasized that the arbitral forum was "comparatively inappropriate" for resolving Title VII claims.[103] The *Alexander* Court unanimously rejected the notion "that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues."[104] Because *Alexander* permitted an employee to bring a discrimination claim in court, even if the claim had already failed in arbitration, the decision was initially viewed as prohibiting courts from forcing employees into binding arbitration.[105]

The Court expanded *Alexander* in *Barrentine v. Arkansas-Best Freight System, Inc.*[106] by recognizing that employees' statutory rights were not waivable.[107] In *Barrentine*, the Court announced that "not all disputes between an employee and his employer are suited for binding resolution" and that "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum

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97. Federal Arbitration Act, 9 U.S.C. § 1 (2006).

98. *Compare* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (requiring an employee to arbitrate his Age Discrimination in Employment Act claim against his employer), *with Alexander*, 415 U.S. at 47 (holding that a prior arbitral decision does not preclude a plaintiff from filing a Title VII claim in federal court).

99. 415 U.S. 36 (1974).

100. 42 U.S.C. § 2000 (2006).

101. *See Alexander*, 415 U.S. at 38–42 (noting that the arbitration clause was broad and it provided that the outcome of arbitration would be binding on both parties).

102. *See id.* at 59–60 (requiring the trial court to hear the employee's claim de novo, independent of the arbitral decision).

103. *See id.* at 56–57 (faulting arbitration because arbitrators are bound by the contractual intentions of the parties rather than by the requirements of statutory enactments).

104. *Id.* at 56–58 (highlighting several procedural inadequacies of the arbitration forum in vindicating statutory rights, including: arbitration fact-finding is not equivalent to judicial fact-finding; arbitrators have no obligation to give their reasons for an award; and arbitration is not bound by the normal evidentiary rules that govern the courts).

105. *See id.* at 59–60 (establishing that an employee could pursue both arbitration and a federal court cause of action); Sternlight, *supra* note 29, at 1638 n.31 (describing the initial interpretation of *Alexander* as standing for the principle that employment discrimination claims would not be compelled to arbitration).

106. 450 U.S. 728 (1981).

107. *See id.* at 740–41 (asserting that allowing waiver of an employee's Fair Labor Standards Act rights would "nullify the purposes" of having the statutory rights in the first place).

substantive guarantees to individual workers."[108] The Court called into question whether arbitrators were well suited to decide questions of public law, given that statutory questions "must be resolved in light of volumes of legislative history and . . . decades of legal interpretation and administrative rulings."[109] Accordingly, the Court concluded that Congress intended to give individual employees the right to bring statutory Fair Labor Standards Act (FLSA) claims in court.[110]

The presumption that the FAA did not apply to employment contracts or statutory claims eroded following the Court's 1991 opinion in *Gilmer v. Interstate/Johnson Lane Corp.*[111] In *Gilmer*, the Court resolved the issue of whether an employee's statutory Age Discrimination in Employment Act (ADEA) claim could be subject to mandatory arbitration.[112] Since Congress had not expressed an intention to preclude waiver of judicial remedies for the statutory rights at issue, the Court determined that Gilmer's statutory claim *could* be subject to arbitration.[113] The *Gilmer* Court, while not overruling *Alexander*,[114] shifted the burden to Congress to explicitly exempt a particular statutory claim from being subject to arbitration.[115] The Court also abrogated *Alexander* and *Barrentine*'s precedent by tempering the notion that arbitration is structurally ill-suited to protect and enforce statutory rights.[116] Although *Gilmer* made clear that statutory claims could be subjected to mandatory arbitration, the Court did not definitively resolve the simple issue of whether the FAA's scope included employment contracts.[117]

Ten years later, the Court decided that the FAA applied to employment contracts in *Circuit City Stores, Inc. v. Adams*.[118] In *Circuit City*, the Court

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108. *Id.* at 737.
109. *Id.* at 743.
110. *See id.* at 745 (predicating non-waivability of FLSA statutory rights on the arbitral forum's inability to adequately protect congressionally granted rights).
111. 500 U.S. 20 (1991).
112. *Id.* at 23.
113. *Id.* at 26.
114. *Id.* at 33–34 (distinguishing the case from *Alexander*).
115. *See id.* at 26 ("'[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))); Sabbeth & Vladeck, *supra* note 46, at 817 (noting a shift in burden of showing that statutory rights could not be arbitrated).
116. *Compare Gilmer*, 500 U.S. at 28 (describing both arbitration and litigation as being capable of furthering "broad[] social purposes"), *with* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 744 (1980) (lamenting arbitration's failure to account for public laws because arbitrators who are bound by the parties' contract may issue rulings that are antithetical to the employee's statutory rights), *and* Alexander v. Gardner-Denver, Co. 415 U.S. 36, 58 (1974) (criticizing the informal nature of arbitration as an inappropriate forum for vindicating statutory rights).
117. *Gilmer*, 500 U.S. at 27–28.
118. 532 U.S. 105, 123–24 (2001) (enforcing arbitration of an employee's Title VII

considered the scope of the FAA's exemption of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[119] Applying the statutory canon of *ejusdem generis*,[120] the Court rejected the notion that section 1 precluded the FAA's applicability to employment contracts of non-transportation workers.[121] The proper scope of the FAA's exemption, the Court concluded, only exempts the employment contracts of transportation workers.[122] Thus, *Circuit City* clarified that, despite potentially contrary legislative intent,[123] the FAA's scope generally reached employment contracts.[124]

Following *Circuit City*, scholars have noted that courts routinely enforce boilerplate arbitration provisions in employment contracts, even when there is evidence of unequal bargaining power.[125] Despite the *Circuit City* Court's proclamation that the FAA applies to employment contracts, some courts continue to accord special treatment to arbitration provisions in employment contracts.[126] In particular, some courts have adopted a knowing and voluntary standard to dilute the enforceability of arbitration provisions under the FAA.[127]

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claim when his employment contract contained a broad arbitration clause).

119. *Id.* at 109 (quoting 9 U.S.C. § 1 (2000)) (framing the issue in the case as whether the FAA's reach, under section 1, extended to all employment contracts).

120. *Ejusdem generis* is a canon of statutory construction that interprets general words followed by a list of specifics to include only items of the same nature as those enumerated in the preceding specific words. *See* WILLIAM ESKERIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 261–62 (2d ed. 2006) (explaining how courts employ *ejusdem generis*). For example, in a list that names "chocolate, caramel, peppermints, and other treats," the phrase "other treats" will not be construed to mean "sports car" or "champagne," but may include other types of sweets. *See id.* at 262 (providing examples of how *ejusdem generis* works).

121. *See Circuit City*, 532 U.S. at 118–19 (endeavoring to construe "engaged in . . . commerce" consistently with the FAA's purpose of overcoming broad judicial hostility toward arbitration).

122. *Id.* at 119.

123. *See id.* at 136 (Souter, J., dissenting) (arguing that the majority's construction of the exemption is clearly erroneous because when Congress passed the FAA, Congress's commerce power was only thought to reach employment relationships where workers were actually engaged in interstate commerce); *id.* at 132 (Stevens, J., dissenting) ("There is little doubt that the Court's interpretation of the Act has given it a scope far beyond the expectations of the Congress that enacted it."); *see also id.* at 119 (majority opinion) (acknowledging that the legislative history arguments about Congress's intent with respect to the exemption are "not insubstantial").

124. *Id.*

125. *See, e.g.*, Sabbeth & Vladeck, *supra* note 46, at 819 (recognizing *Circuit City* as sparking a movement toward arbitration provisions appearing in most employment contracts).

126. *See, e.g.*, Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 383 (6th Cir. 2005) (applying a heightened standard of mutual assent to arbitration agreements in employment contracts).

127. *See* Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 658 (2007)

D. Toward a Knowing and Voluntary Standard

Recognizing that employees often have little choice in signing pre-dispute arbitration agreements, some courts have imposed a heightened standard of mutual assent to arbitration provisions by analyzing whether employees knowingly and voluntarily agreed to arbitrate their statutory claims.[128] The United States Court of Appeals for the Sixth Circuit adopted such a standard in response to overreaching arbitration terms in an employment contract in *Walker v. Ryan's Family Steak Houses, Inc.*[129] In that case, a group of employees filed a complaint for violations of the FLSA against their employer, defendant Ryan's Family Steak Houses, Inc. ("Ryan's").[130] Ryan's moved to compel arbitration, relying on arbitration agreements that each employee executed prior to the start of his or her employment.[131] The arbitration agreements were a mandatory precondition to employment: failure to execute an arbitration agreement resulted in Ryan's terminating a job applicant's application.[132] Unlike a typical arbitration agreement between an employee and an employer, the arbitration agreements in *Walker* were between the employee and Employment Dispute Services, Inc. ("EDSI").[133] Ryan's employees executed an agreement with EDSI agreeing to bring any employment claims against Ryan's to arbitration.[134] In turn, Ryan's would enter a

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("Notwithstanding the judicial trend in favor of arbitration, a species of the knowing and voluntary test for enforceability survives in a few jurisdictions, and courts remain willing to condemn employer behavior that is sufficiently misleading to undermine assent.").

128. *E.g.*, *Walker*, 400 F.3d at 381–82 (analyzing whether plaintiff-employees knowingly and voluntarily waived their rights to trial by signing an arbitration agreement in rushed conditions); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 668 (6th Cir. 2003) (en banc) (submitting employee's waiver of right to bring claims in federal court to knowing and voluntary analysis to ensure employer did not undermine statutory rights afforded by Title VII due to superior bargaining power); Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1304 (9th Cir. 1994) (construing employee Title VII claims as requiring scrutiny under a knowing and voluntary standard before arbitration can be compelled). *But see* Morales v. Sun Constructors, Inc., 541 F.3d 218, 223 (3d Cir. 2008) (rejecting a knowing and voluntary standard as applied to arbitration agreements, finding that it may be inconsistent with the FAA).

129. 400 F.3d 370, 381 (6th Cir. 2005). The arbitration agreements at issue in *Walker* caused a flurry of litigation in different courts around the country. While the Sixth Circuit was unique in applying a knowing and voluntary standard to the agreements, other circuits have taken different approaches to invalidating the arbitration agreements. *Compare* Goins v. Ryan's Family Steakhouses, Inc., 181 F. App'x 435, 438 (5th Cir. 2006) (per curiam) (setting aside the arbitration agreement due to lack of adequate consideration), *with* Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753, 759 (7th Cir. 2001) (invalidating the arbitration agreement because it represented an illusory promise).

130. *See Walker*, 400 F.3d at 373 (alleging that Ryan's failed to make overtime payments to the plaintiffs, as required by the FLSA).

131. *Id.*

132. *Id.*

133. *See id.* at 375 (establishing that EDSI is a separate, for-profit corporation that administers an employment dispute resolution program).

134. *See id.* (noting that under the arbitration agreement, the plaintiffs agreed to submit

separate agreement with EDSI agreeing to "arbitrate and resolve any and all employment-related disputes between the Company's employees (and job applicants) and the Company."[135]

The court in *Walker* declined to compel arbitration, holding that the arbitration agreements were unsupported by consideration[136] and that the employees did not knowingly or voluntarily waive their right to jury trial.[137] The court reasoned that Ryan's failed to meet its burden of showing that (1) the arbitration agreement was bargained for,[138] (2) the parties contemplated arbitrating a statutory rights issue,[139] and (3) the employees signed the arbitration agreement "knowingly" and "voluntarily."[140] In particular, the court focused its analysis on the lack of mutual assent evidenced in the arbitration agreements.[141] Recognizing the importance of ensuring that arbitration agreements are actually *agreed* to,[142] the court invalidated the arbitration agreement because Ryan's failed to meet its burden of showing that the plaintiffs had actually bargained over the agreement or that the terms were within the reasonable expectation of an ordinary person in the employment setting.[143]

As part of its mutual assent analysis, the Sixth Circuit held that the plaintiffs should not be compelled to arbitrate their claims because they did not "knowingly and voluntarily waive their constitutional right to a jury trial."[144] Here, the court weighed five different factors as evidence that the waiver was knowing and voluntary: (1) the plaintiff's experience, education, and background; (2) the amount of time the plaintiff had to consider whether to sign the agreement; (3) the clarity of the agreement; (4)

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all claims to EDSI for arbitration and to be bound by the EDSI administrator's final decision).

135. *Id.*

136. *See id.* at 381 (holding the arbitration agreements were unsupported by consideration because the employer's promise to consider job application was illusory and inadequate). The *Walker* court made two independent holdings: first, that the agreement was unenforceable because it failed to meet the knowing and voluntary standard, and second, that the agreement was invalid because it lacked consideration. *Id.*

137. *Id.* at 383.

138. *Id.* at 384.

139. *See id.* (concluding that arbitration of this sort of claim was not shown to be within reasonable expectation of an ordinary person under the signing circumstances).

140. *Id.* at 383.

141. *See id.* ("Although the question of mutual assent involves largely an objective analysis, the parties' intent remains relevant, in particular the circumstances surrounding the formation of the contract.").

142. *See id.* (noting that contracts, including arbitration agreements, "must result from a meeting of the minds"); *see also* McNally Pittsburg, Inc. v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 812 F.2d 615, 621 (10th Cir. 1987) (permitting an exception to the general rule that a party's signature is binding where the plaintiff did not knowingly sign a document with an embedded arbitration clause).

143. *See Walker*, 400 F.3d at 384 (emphasizing that the agreements were presented in a hurried, take-it-or-leave-it manner and that the plaintiffs were not highly educated).

144. *Id.* at 381.

the consideration supporting the agreement; and (5) the totality of the circumstances.[145] The court observed that the facts in *Walker* militated in favor of concluding that the plaintiff-employees did not knowingly and voluntarily relinquish their trial rights by executing arbitration agreements.[146]

First, the court noted that most of the plaintiffs did not complete high school and were in dire financial straits.[147] Second, the plaintiffs were typically hired on the spot and given the arbitration agreement in a hurried manner, without an opportunity to take the agreement home or to consult an attorney.[148] Third, when Ryan's managers described the agreement, they sometimes provided misleading information, undermining the clarity of the agreement.[149] Fourth, as the court had already concluded, the agreement was not supported by consideration.[150] Given the totality of the circumstances, the court reasoned, the plaintiffs did not knowingly and voluntarily waive their right to court adjudication.[151]

Similarly, the Ninth Circuit has adopted a knowing and voluntary standard to determine whether individuals have waived their rights to statutory remedies by agreeing to arbitration.[152] In *Prudential Insurance Co. of America v. Lai*,[153] the Ninth Circuit invalidated an arbitration agreement where the employees did not knowingly contract to forego their statutory remedies by submitting to arbitration.[154] The court expressly declined to apply *Prima Paint*'s severability doctrine, distinguishing *Prudential* as addressing the separate question of when an individual may be deemed to have waived his or her statutory remedies.[155] Unlike the Sixth Circuit, which was primarily concerned with mutual assent, the Ninth Circuit adopted a knowing and voluntary standard out of concern for

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145. *Id.* (citing Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 668 (6th Cir. 2003) (en banc)).
146. *Id.* at 383.
147. *See id.* at 381 (suggesting the need for minimum wage employment indicated a lack of real free will in the bargaining process).
148. *See id.* at 381–82 (noting that the plaintiffs would not be considered for employment if they did not sign the agreements immediately).
149. *See id.* at 382 (stating that one manager represented the arbitration agreement as ensuring that if problems arose, they would be handled by higher management within the company).
150. *Id.* at 381 (finding that in return for their agreement to arbitrate, the plaintiffs only received an illusory promise from the defendant).
151. *Id.*
152. *See* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (suggesting that arbitration is intended to supplement, not supplant, statutory remedies); *cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973) (applying a "knowing and intelligent" waiver standard in criminal cases to protect defendants' trial rights).
153. 42 F.3d 1299 (9th Cir. 1994).
154. *Id.* at 1305.
155. *Id.* at 1303.

congressional intent.[156] After reviewing Title VII's legislative history, the court concluded that Congress intended to ensure that an employee's waiver of Title VII statutory rights through an arbitration agreement is, at a minimum, knowingly executed.[157] Although the court did not delineate the kinds of factors a court might consider in assessing whether an arbitration agreement had been knowingly entered into, the *Prudential* court did assess: (1) the employee's understanding of the agreement; (2) the language of the agreement; and (3) the employee's relative awareness of the agreement.[158] Because the employment contract failed to describe the disputes that the parties agreed to arbitrate, the court held that the employee did not knowingly agree to arbitrate his Title VII claims.[159]

Thus, despite the Supreme Court's candid preference for arbitration, some courts continue to recognize the unique character of employment contracts and apply a knowing and voluntary standard for determining whether the employee intended to waive his or her constitutional right to a jury trial.[160] Scholars have endorsed the knowing and voluntary standard as a means of invalidating mandatory employment arbitration agreements with unfair arbitration terms.[161] Indeed, as this Comment explores, utilizing a knowing and voluntary standard to determine the validity of delegation provisions appropriately casts mutual assent as the key inquiry.[162]

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156. *See id.* at 1304 (studying Title VII's text and legislative history and concluding that, taken together, they mandated adoption of a knowing and voluntary standard).

157. *See id.* at 1305 (citing 137 CONG. REC. S15,472 (daily ed. Oct. 30, 1991) (statement of Sen. Robert Dole)) (pointing to a statement made by Senator Dole that the arbitration provision of Title VII allows arbitration only where parties knowingly and voluntarily agree to it).

158. *See id.* (examining what the text of the form conveyed, what the employees could have reasonably understood the form to mean, and whether the employees were aware of the form's nature).

159. *Id.*

160. *See, e.g.*, Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234–35 (10th Cir. 1999) (ruling that an arbitration agreement was unenforceable because it functioned as a condition of employment and failed to provide the weaker party with any recourse from the costs of arbitration).

161. *See* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 57–58 (1997) (suggesting that a major problem concerning arbitration agreements is that those signing and binding themselves to the agreement fail to do so voluntarily). *See generally* Christina Semmer, Note, *The "Knowing and Voluntary" Standard: Is the Sixth Circuit's Test Enough to Level the Playing Field in Mandatory Employment Arbitration?*, 2008 J. DISP. RESOL. 607, 607 (2008) (arguing that the knowing and voluntary standard should apply to employment arbitration agreements since agreeing to arbitrate entails waiving one's right to a jury trial).

162. *See* Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 383 (6th Cir. 2005) (requiring a meeting of the minds as a precondition to a valid contract).

II. *PRIMA PAINT* SHOULD NOT GOVERN DELEGATION PROVISION ENFORCEABILITY ISSUES

Prima Paint provides an inappropriate analytical framework for determining the enforceability of delegation provisions within employment arbitration agreements. As an initial matter, severability does not apply equally to stand-alone arbitration agreements and contracts with other substantive terms.[163] Using a severability analysis to sever delegation provisions from contracts also fails to account for the substantive differences between delegation and arbitration provisions.[164] Additionally, a severability analysis is inappropriate where the contract only contains arbitration terms because such an analysis effectively deprives courts of their authority to ensure that the parties intended to arbitrate all disputes, violating the "equal footing" doctrine.[165] Furthermore, applying *Prima Paint* to delegation provisions in employment contexts ignores the Court's general acknowledgment that statutory rights claims may deserve special treatment.[166] This Comment will explore each of these concerns in turn.

A. Prima Paint*'s Concept of Severability Does Not Necessarily Apply Equally to Stand-Alone Arbitration Agreements*

Applying severability principles to separate the delegation provision from the rest of the arbitration agreement in *Rent-A-Center* is inconsistent with, and more severe than, the Court's more moderate holding in *Prima Paint*.[167] In *Prima Paint*, the Court applied severability only to arbitration clauses within broader contracts.[168] *Prima Paint* contemplated a contract containing substantive provisions unrelated to arbitration, in addition to an arbitration provision.[169] Unlike the consulting agreement in *Prima Paint*, the arbitration agreement at issue in *Rent-A-Center* only contained provisions related to arbitration.[170] In other words, the entirety of the

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163. *See* Jackson v. Rent-A-Center, W., Inc., 581 F.3d 912, 916 n.2 (9th Cir. 2009) (dismissing the applicability of a severability analysis to the case at bar because Jackson challenged a stand-alone arbitration agreement), *rev'd*, 130 S. Ct. 2772 (2010).

164. *See supra* Part I.B (delineating the differences between the two types of provisions).

165. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) ("[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for the court to decide." (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 946 (1995))).

166. *See supra* Part I.C (recounting the ways in which courts have granted special status to employees' statutory rights claims).

167. *See generally* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967) (adopting severability principles to sever arbitration provisions from broader, substantive contracts).

168. *Id.*

169. *See id.* at 397–98 (describing the substantive provisions of the consulting agreement, which also included a broad arbitration clause).

170. *Compare id.* (examining the substantive terms of the consulting agreement, which

agreement in *Rent-A-Center* was a stand-alone agreement to arbitrate.[171] Because the agreement to arbitrate at issue in *Rent-A-Center* only contained provisions relating to arbitration procedures, the relevancy of a severability analysis is not immediately apparent.[172]

The charge from the Court in *Prima Paint* that challengers must specifically target the arbitration provisions of broader substantive contracts does not necessarily apply equally to contracts that solely relate to arbitration.[173] Challenging the consulting terms in a broader consulting contract as unconscionable, for example, does not necessarily mean that the embedded arbitration provision is also invalid.[174] An unconscionability claim directed at a broad substantive contract might not directly implicate an arbitration agreement contained therein because the promises to arbitrate may be independent.[175] The parties may have agreed to arbitrate disputes arising from the contract, irrespective of whether both parties performed their ends of the bargain.[176] On the other hand, the plaintiff's assertion in *Rent-A-Center* that the arbitration agreement was unenforceable because the agreement was unconscionable targeted provisions of the same singular promise to arbitrate.[177]

As applied to the stand-alone arbitration agreement, Jackson's claim necessarily encompassed a challenge to both the arbitration agreement and

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had nothing to do with the arbitration provision), *with* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2775 (2010) (stating that Jackson signed a mutual agreement to arbitrate claims as a condition of his employment).

171. *Rent-A-Center*, 130 S. Ct. at 2775.

172. *See id.* at 2786–87 (Stevens, J., dissenting) (noting that the Court in *Rent-A-Center* only dealt with an "independently executed arbitration agreement" rather than an arbitration provision buried within a broader substantive contract); *see also* Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1006 (9th Cir. 2010) (acknowledging that severability need not be applied when "sever[ing] the offending provisions [leaves] almost nothing to the arbitration clause"); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 674 (6th Cir. 2003) (en banc) ("[S]everability of a contract is a question of law and depends on the intent of the parties." (quoting Toledo Police Patrolmen's Ass'n v. City of Toledo, 641 N.E.2d 799, 803 (Ohio Ct. App. 1994))).

173. *See Prima Paint*, 388 U.S. at 423–24 (Black, J., dissenting) (asserting that the severing of individual contract provisions is only appropriate when the parties agreed that the contract would be severable).

174. *See* Jeske v. Brooks, 875 F.2d 71, 75 (4th Cir. 1989) (differentiating between arbitration provision challenges and challenges to general provisions of the shareholder agreement).

175. *See id.* (holding that an unconscionability claim challenges the shareholder agreement generally and does not necessarily implicate the arbitration provision).

176. *See generally* K & G Constr. Co. v. Harris, 164 A.2d 451, 454 (Md. 1960) (explaining that failure to perform an independent promise does not discharge liability for the adversary's subsequent failure to perform).

177. *See* Jackson v. Rent-A-Center, W., Inc., 581 F.3d 912, 914 (9th Cir. 2009) (describing Jackson's allegations that the arbitration agreement's discovery limits, arbitrator fees, and one-sided coverage provisions rendered agreement substantively unconscionable), *rev'd*, 130 S. Ct. 2772 (2010).

the delegation provision.[178] Unlike *Prima Paint*, where the plaintiff's fraud claim pertained to arbitration and non-arbitration terms alike, Jackson's unconscionability claim only related to arbitration terms—indeed, there were no other terms in the contract.[179] As Justice Stevens rightly noted in his dissent, "a general revocation challenge to a stand-alone arbitration agreement is, invariably, a challenge to the 'making' of the [arbitration] agreement itself."[180]

But rather than applying *Prima Paint* to allow this kind of claim to proceed in court, the majority expanded *Prima Paint* to hold that where the specific delegation provision is not challenged, arbitration must be compelled.[181] *Rent-A-Center*'s holding thus undermines many courts' understanding of *Prima Paint* as distinguishing between the entire contractual bargain of the parties and the arbitration clause.[182] The *Rent-A-Center* Court, in essence, delineated a new pleading standard that requires complainants to mention the specific sentences of the delegation provision to maintain an action in court.[183]

In a straightforward severability analysis, there should be no provisions to sever from a stand-alone arbitration agreement, as the entirety of the agreement pertains to the parties' promise to arbitrate.[184] Jackson's unconscionability claim arguably complied with *Prima Paint*'s mandate that the claim challenge the "making of the agreement to arbitrate"[185] because his complaint implicated the stand-alone agreement to arbitrate.[186] *Rent-A-Center* extends the reach of the doctrine of severability by requiring challenges not to "the making of the agreement to arbitrate,"[187] but to the

178. *See id.* at 917 (determining that plaintiff's unconscionability claim required the court to decide whether the delegation provision was valid in the first place).

179. *See id.* at 914 (describing the contract between plaintiff and employer as simply a "Mutual Agreement to Arbitrate Claims").

180. Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2786 (2010) (Stevens, J., dissenting) (quoting Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 (1967)).

181. *See id.* at 2778 (majority opinion) (explaining that severability also applies to delegation provisions, despite substantive differences between arbitration provisions and delegation provisions).

182. *See, e.g.*, Hamilton Life Ins. Co. of N.Y. v. Republic Nat'l Life Ins. Co., 408 F.2d 606, 610 (2d Cir. 1969) (ordering arbitration where the plaintiff failed to allege the arbitration provision itself was induced by illegality or fraud, based on the notion that the agreement to arbitrate was independent of the principal contract).

183. *See Rent-A-Center*, 130 S. Ct. at 2779–80 (faulting the plaintiff for failing to mention the delegation provision specifically).

184. *See generally* David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 VA. L. REV. IN BRIEF 1, 4 (2010) (suggesting that an unconscionability challenge to stand-alone arbitration agreement necessarily puts the agreement to arbitrate in issue).

185. *See Prima Paint*, 388 U.S. at 403–04.

186. *See Rent-A-Center*, 130 S. Ct. at 2775 (describing the terms of the mutual agreement to arbitrate claims).

187. *Prima Paint*, 388 U.S. at 403–04.

making of the delegation provision itself.[188] By demanding the pleading specificity delineated in *Rent-A-Center*, the Court extended the concept of severability beyond *Prima Paint*'s logical confines because the *Prima Paint* analysis only contemplated contracts with other substantial terms.[189]

B. Rent-A-Center *Is an Unwarranted Extension of* Prima Paint *that Undervalues the Special Character of Delegation Provisions*

The *Prima Paint* severability standard also does not properly apply to delegation provisions because a delegation provision is substantially different from a simple arbitration clause. A delegation provision assigns certain threshold questions of arbitrability to an arbitrator rather than a court.[190] The phrase "questions of arbitrability" also has been given a rather narrow definitional scope by the Supreme Court.[191] The phrase is applicable to the narrow circumstance:

> where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[192]

When there is a dispute about whether the parties should be subject to an arbitration clause at all, for example, such a challenge would constitute a question of arbitrability.[193] In contrast, an arbitration provision simply expresses the parties' agreement to arbitrate disputes arising from a contractual relationship.[194]

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188. *See Rent-A-Center*, 130 S. Ct. at 2779 (indicating that plaintiff had to challenge the actual language of the delegation provision).

189. *See supra* notes 169–170 and accompanying text (discussing the differences in the contracts contemplated by *Prima Paint* and *Rent-A-Center*, respectively); *see also* Jackson v. Rent-A-Center, W., Inc., 581 F.3d 912, 916 n.9 (9th Cir. 2009) (dismissing the applicability of the principles of severability to a claim that challenges an agreement to arbitrate), *rev'd*, 130 S. Ct. 2772 (2010).

190. *See Jackson*, 581 F.3d at 914 (describing the language of the delegation provision).

191. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–85 (2002) (declining to allow a procedural time-limit rule question to be considered a question of arbitrability).

192. *Id.* at 83–84.

193. *See id.* at 84 (rejecting the notion that parties should be forced to arbitrate a matter they did not intend to arbitrate).

194. Arbitration provisions can come in many different forms, but all have the basic feature of agreeing to submit certain contemplated disputes to arbitration. A standard-form arbitration clause, for example, may provide that:

> Any dispute arising out of this Agreement or relating to the Services and Equipment must be settled by arbitration administered by the American Arbitration Association. Each party will bear the cost of preparing and prosecuting its case . . . . All claims must be arbitrated individually, and there will be no consolidation or class treatment of any claims. This provision is subject to the United States Arbitration Act.

Arbitration provisions are substantially different than delegation provisions because courts are tasked with ensuring that arbitration clauses are separately enforceable by making a threshold inquiry about whether all of the necessary elements of an arbitration agreement exist.[195] Historically, arbitration provisions contained within a broader substantive contract have been treated as severable because of a judicial recognition that the agreement to arbitrate disputes may exist as a promise that is independent of the broader contract.[196] Thus, pursuant to a severability analysis, an alleged breach of contract will not preclude enforcement of an arbitration clause because the decision to arbitrate is independent of the broader contract.[197]

In contrast, delegation provisions, having never been severed from contracts, are not expected to have the same "mini"-contract qualities that characterize arbitration clauses.[198] Delegation provisions, embedded within stand-alone arbitration agreements, represent only the parties' stipulation that threshold questions of arbitrability should proceed before an arbitrator.[199] In this sense, delegation provisions are more like discovery limits, arbitrator selection rules, or other terms that parties may add to shape the procedural rules of arbitration.[200] Unlike arbitration provisions, delegation provisions are not necessarily promises independent of the principal agreement to arbitrate: the contracting parties may not have agreed to arbitration if some procedural devices, like the delegation provision, were struck out.[201] Under the *Rent-A-Center* rule, stand-alone arbitration agreements are subject to severability, even if the parties would not have agreed to the arbitration agreement, if some of the terms were

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Alltel Corp. v. Sumner, 203 S.W.3d 77, 78–79 (Ark. 2005).

195. *See id.* at 79–80 (delineating five essential elements of arbitration agreements: "(1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual assent, and (5) mutual obligation").

196. *See* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959) (observing that the FAA requires enforcement of arbitration provisions as independent promises so that the parties can still benefit from arbitration efficiency).

197. *E.g.*, Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 989–90 (2d Cir. 1942) (reading the FAA as requiring arbitration of a breach of contract suit because an arbitration provision is not considered a dependent promise).

198. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (characterizing typical delegation provision issues as questions of "who has primary authority to decide arbitrability," not whether the provision can stand as an independent agreement).

199. *See* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2777–78 (2010) (explaining the reach of delegation provisions).

200. *See* Baravati v. Josephthal, Lyon, & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) (specifying that once the parties have entered into a valid arbitration agreement, they may stipulate to whatever procedures they would like to govern, short of authorizing trial by a "panel of three monkeys").

201. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 424 (1967) (Black, J., dissenting) (dismissing the notion that a court can re-write an agreement by striking some provisions while keeping others).

missing.[202] By severing and enforcing delegation provisions, *Rent-A-Center* impermissibly allows "the judicial effort . . . to look more like rewriting the contract than fulfilling the intent of the parties."[203]

C. Applying Severability to Delegation Provisions May Violate the Equal Footing Doctrine and Circumvent Courts' Gate-Keeper Function in Arbitration

Extending the severability analysis framework to encompass delegation provisions may contravene the Court's general policy of putting arbitration agreements on equal footing with other contracts[204] by elevating arbitration agreements with boilerplate delegation provisions to a superior position of enforceability. The *Prima Paint* Court rejected the notion that an arbitration agreement could be more enforceable than other forms of contract.[205] While recognizing a pro-arbitration policy, the *Prima Paint* Court also realized that arbitration agreements should not be put on a higher playing field than ordinary contracts.[206] The Court's holding in *Rent-A-Center* elevates the enforceability of stand-alone arbitration agreements with boilerplate delegation provisions because, under *Rent-A-Center*, such agreements become virtually impenetrable.[207] The *Rent-A-Center* Court conceded as much by noting that under the new severability analysis, "the claimed basis of invalidity for the contract as a whole will be much easier to establish than the same basis as applied only to the severable agreement to arbitrate."[208] If a party challenges the enforceability of an arbitration agreement as a whole, then the challenge must be heard by

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202. *See id.* at 423–24 (lamenting severability for failing to account for the fact that parties assent to agreements as a single whole); *see also* Great Earth Co. v. Simons, 288 F.3d 878, 890 (6th Cir. 2002) ("Whether the agreement to arbitrate is entire or severable turns on the parties' intent at the time the agreement was executed . . . ." (quoting Nat'l Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 333 (5th Cir. 1987))).

203. Booker v. Robert Half Int'l Inc., 413 F.3d 77, 85 (D.C. Cir. 2005) (permitting severance of a provision barring unenforceable punitive damages based on a finding that severance would not unravel interlocking provisions).

204. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) (interpreting section 2 of the FAA as giving arbitration agreements equal contractual status).

205. *See Prima Paint*, 388 U.S. at 404 n.12 (emphasizing that "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so"); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581–82 (2008) (reviewing section 2 of the FAA and remarking that its purpose is to equate arbitration agreements with other contracts).

206. *See Hall Street Assocs., LLC*, 552 U.S. at 581–82 (reviewing section 2 of the FAA and remarking that its purpose is to equate arbitration agreements with other contracts).

207. *See Cunningham*, *supra* note 66 (suggesting that, following *Rent-A-Center*, the only way to get a court to determine the enforceability of an arbitration clause is to allege that no agreement ever existed).

208. Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010).

an arbitrator.[209] For example, prior to the *Rent-A-Center* pleading standard, a claimant could allege that limitations on discovery rendered his arbitration agreement unenforceable on an unconscionability theory and have a court determine whether the claim was arbitrable in the first place.[210] But, applying the new pleading standard, a claimant with an unconscionability challenge must target the delegation provision as it stands alone—separated from the rest of the arbitration agreement.[211] Consequently, an unconscionability challenge would necessarily have to show that the delegation provision, notwithstanding other arbitration terms, is unconscionable in and of itself to maintain the action in a court.[212] The difficulty of making such a showing may thus have the effect of elevating arbitration agreements to a superior position of enforceability compared to other contracts, ignoring *Prima Paint*'s cautionary note that arbitration agreements and ordinary contracts should be on equal ground.[213]

Imposing a severability analysis elevates arbitration agreements above ordinary contracts because plaintiffs must now tailor their claims to address the particular sentences of the delegation provision to maintain an action in court.[214] In contrast, in ordinary contract rescission cases, plaintiffs must seek rescission of the whole contract, not isolated provisions.[215] In those ordinary contract actions, plaintiffs are not permitted to deny "the existence

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209. *Id.*

210. *See generally* Ragone v. Atl. Video at Manhattan Ctr., 595 F.3d 115, 120–21 (2d Cir. 2010) (entertaining an unconscionability claim by conducting an independent review of whether the parties agreed to arbitrate arbitrability).

211. *Rent-A-Center*, 130 S. Ct. at 2778.

212. *Id.*; *see also Cunningham*, *supra* note 66 (conducting a thought experiment regarding a contract to commit murder to emphasize the potentially absurd results of a severability standard).

213. *See supra* note 67 and accompanying text (discussing the equal footing doctrine noted in *Prima Paint*); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 412–13 (1967) (Black, J., dissenting) (acknowledging that arbitration agreements should not be more enforceable than any other kind of contract); Nancy R. Kornegay, Comment, Prima Paint *to* First Options*: The Supreme Court's Procrustean Approach to the Federal Arbitration Act and Fraud*, 38 HOUS. L. REV. 335, 359 (2001) (suggesting that *Prima Paint*'s progeny, as a general matter, have created an elevated class of arbitration agreements).

214. *See Rent-A-Center*, 130 S. Ct. at 2787 (Stevens, J., dissenting) (specifying that the majority rule requires claims to be directed at the particular sentences of delegation provisions). Such specificity might not be plausible in some circumstances. *See, e.g.*, Spahr v. Secco, 330 F.3d 1266, 1271–73 (10th Cir. 2003) (allowing court to hear general claim that a contract is void due to mental incapacity, because, even though a mental incapacity claim challenges the entire agreement, the challenge cannot be applied with precision to a specific provision).

215. *See* United States v. Bethlehem Steel Corp., 315 U.S. 289, 298 (1942) (stating that whether promises constitute a single non-severable contract or many severable provisions must be determined by asking "'whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out'" (quoting SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 863 (2d ed. 1936))).

of some clauses and affirm[] the existence of others."[216] Conversely, the pleading standard enunciated in *Rent-A-Center* enhances the enforceability of arbitration agreements with delegation provisions because a delegation provision is still enforceable, even if the rest of the underlying agreement is not.[217]

In addition to raising certain arbitration agreements' level of enforceability, severance of delegation provisions also conflicts directly with the plain meaning of section 3 of the FAA, which provides that "upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement," the court must "stay the trial of the action until such arbitration has been had."[218] Thus, *Rent-A-Center*'s severance of the delegation provision deprives courts of their critical gate-keeping function of ensuring that arbitration clauses are enforceable and valid.[219] Instead, *Rent-A-Center* assigns that task to an arbitrator.[220] Applying severability principles to questions of delegation provision enforceability nullifies the court's authority to first ensure that there is a valid arbitration agreement.[221] The FAA specifically mandates that "[t]he court shall hear the parties, and *upon being satisfied* that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration."[222] But in *Rent-A-Center*, the Court applied severability to compel arbitration on the threshold question of whether the arbitration agreement, in its entirety, was unconscionable because the agreement had a standard delegation provision.[223] The Court, as Justice Stevens noted in his dissent, had to resolve the unconscionability claim "to decide whether the

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216. *Prima Paint*, 388 U.S. at 423–24 (Black, J., dissenting) (ridiculing the idea that a court could hold Prima Paint's agreement to provide consulting services in exchange for Flood & Conklin not to compete as severable, because, without both components, no agreement would have been made).

217. *See Rent-A-Center*, 130 S. Ct. at 2780 (describing challenges that will be heard by courts as compared to challenges that must be heard by an arbitrator).

218. Federal Arbitration Act, 9 U.S.C. § 3 (2006).

219. *E.g.*, Moseley v. Elec. & Missile Facilities, Inc., 374 U.S. 167, 171 (1963) (allowing a claim of fraud in procurement of an arbitration agreement to proceed in district court so court could ensure that a valid arbitration agreement existed); *see also* Mark Weidemaier, Rent-A-Center *Roundtable Continues*, CONTRACTS PROFESSOR'S BLOG (Apr. 21, 2010), http://lawprofessors.typepad.com/contractsprof_blog/2010/04/rentacenter-roundtable-continues-mark-weidemaier.html (arguing courts, rather than arbitrators, should determine threshold challenges to clauses that provide for high initial filing fees, arbitration in remote locations, or arbitration before a biased arbitrator).

220. *See Rent-A-Center*, 130 S. Ct. at 2778 (requiring gateway question of whether a claim must be arbitrated to be decided by an arbitrator if the arbitration agreement contains a delegation provision).

221. *See generally id.* at 2782 (Stevens, J., dissenting) (suggesting that section 2 of the FAA requires judicial review of whether the parties have a valid arbitration agreement).

222. 9 U.S.C. § 4 (2006) (emphasis added).

223. *Rent-A-Center*, 130 S. Ct. at 2774.

parties have a valid arbitration agreement under § 2" before the case can be compelled to go to arbitration.[224] Instead, the Court in *Rent-A-Center* circumvented the FAA's prescription of judicial responsibility by using severability to mechanically carve up arbitration agreements without regard to a preliminary determination that the "making of the agreement" is not at issue.[225]

In practical effect, the *Rent-A-Center* Court permits the arbitrator to determine the very validity of the arbitration agreement that allegedly gives rise to his arbitral authority.[226] In other words, *Rent-A-Center* permits arbitrators to police their own authority by giving them the power to decide whether claims should be submitted to arbitration.[227] This application of severability in *Rent-A-Center* is problematic because, in essence, it allows courts to shirk their FAA-mandated duty to consider whether arbitration provisions are valid and enforceable under state-law contract principles.[228] Where an arbitration agreement is executed as a precondition to employment, it is critical that a court first determine that the making of the contract is not at issue, because employees are often unaware of the implications of such terms.[229] Permitting severance of delegation provisions from arbitration agreements that are otherwise unenforceable is a problematic extension of *Prima Paint* because, in the employment context, employees often would expect a court to decide certain gateway matters about arbitration.[230] Allowing courts to sever and enforce

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224. *Id.* at 2785 (Stevens, J., dissenting).

225. *See id.*; *see also* 9 U.S.C. § 2 (directing courts to ensure that the making of an agreement to arbitrate is not at issue before allowing the dispute to proceed before an arbitrator).

226. *See Rent-A-Center*, 130 S. Ct. at 2779 (delegating all challenges to the validity of the agreement as a whole to the arbitrator).

227. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 416 (1967) (Black, J., dissenting) ("The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform.").

228. *See* 9 U.S.C. § 2 ("[A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *see also Prima Paint*, 388 U.S. at 425 (Black, J., dissenting) ("Congress also plainly said that whether a contract containing an arbitration clause can be rescinded on the ground of fraud is to be decided by the courts and not by the arbitrators.").

229. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (realizing that the significance of having arbitrators decide the scope of their own powers is often lost on the parties); *see also* Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 12 (1st Cir. 2009) (determining that arbitration challengers were entitled to a court ruling regarding the threshold matter of whether an arbitration remedy is illusory).

230. *See* Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 374 (6th Cir. 2005) (citing conflicting evidence regarding whether the plaintiffs knew what they were agreeing to); *see also* Sabbeth & Vladeck, *supra* note 46, at 807 (suggesting that employees often unknowingly bargain away their rights to trial); Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1225–26 (2002) (reviewing an

delegation provisions therefore conflicts with the Court's long-standing policy of ensuring that parties are only compelled to arbitrate claims that they reasonably contemplated and agreed to arbitrate.[231] Thus, rather than simply applying *Prima Paint* to the *Rent-A-Center* problem, the Court added a new layer of severability doctrine to the federal substantive law associated with the FAA: now, arbitrators, rather than courts, may determine threshold questions of arbitrability.[232] In this sense, the FAA's reservation of revocation issues for courts is rendered meaningless.[233]

D. Prima Paint *Cannot Apply to Statutory Rights Cases Without Undermining the Court's Past Precedent*

Applying severability to delegation provisions where statutory rights are at issue ignores both the Court's past jurisprudence[234] and congressional intent.[235] Specifically, applying *Prima Paint* to enforce delegation provisions in arbitration agreements fails to account for prior jurisprudence and legislative history suggesting that statutory claims deserve special treatment.[236] Courts have sometimes recognized that the waivability of an

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empirical study that showed employees are often uninformed about their legal rights and remedies in the workplace).

231. *See* Howsam v. Dean Witter Reynolds Inc., 537 U.S. 79, 83 (2002) (providing that, despite the Court's preference for arbitration agreements, "the 'question of arbitrability' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise'" (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986))).

232. *Compare* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2779 (2010) (delegating all challenges to the validity of the agreement as a whole to the arbitrator), *with AT&T Techs., Inc.*, 475 U.S. at 651 (holding that a court, not an arbitrator, must first decide whether an agreement conveyed an intention to arbitrate layoff grievances). *But cf. Prima Paint*, 388 U.S. at 416 (Black, J., dissenting) ("[Arbitrators'] compensation corresponds to the volume of arbitration they perform. . . . If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation.").

233. *But cf.* Cooper Indus., Inc. v. Aviall Servs., Inc., 534 U.S. 157, 158 (2004) (asserting that courts must give effect to every term in a statute).

234. *E.g.*, Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 743 (1981) (emphasizing non-waivability of individual rights conferred by the FLSA); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (declining to compel arbitration of an employee's Title VII claim and articulating a cautionary belief that the arbitral forum may not adequately protect statutory rights).

235. *See* Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 2 (2011) (asserting that the FAA was originally intended to apply to disputes between commercial parties of a similar sophistication); 155 CONG. REC. S10,069 (daily ed. Oct. 1, 2009) (statement of Sen. Al Franken) (introducing an amendment seeking to remedy the unfairness of mandatory arbitration by withholding federal funds from government contractors who require employees to sign mandatory arbitration agreements over certain statutory claims); *see also* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (asserting that remedies and procedures available to plaintiff-employees in arbitration may substantially differ from the protections and remedies contemplated by the legislature in enacting the statute).

236. *See Barrentine*, 450 U.S. at 743 (questioning whether arbitrators possess adequate knowledge of public law considerations to make determinations with respect to the FLSA);

employee's statutory rights entails more complex considerations than non-statutory claims cases.[237] Statutory rights as diverse as those contained in Title VII, the FLSA, and the ADEA are all analogous when considered in the context of arbitration because the rights they confer upon employees are public rights that were carefully preserved by Congress.[238] The existence of a legislatively-created private right of action in such statutory claims cases presumes judicial enforcement.[239]

While *Prima Paint* only required the Court to construe the FAA,[240] employee statutory claims typically require an analysis of both the FAA and the statute conferring the rights at issue.[241] For example, to resolve the plaintiff's Title VII claim in *Alexander*, the Court, examining the arbitrability of the Title VII claim, had to analyze both the substantive provisions of Title VII and the FAA.[242] Similarly, Jackson's racial discrimination claim would implicate both the FAA and 42 U.S.C. § 1981, and, as the *Alexander* Court determined, while arbitrators may have specialized knowledge of the "law of the shop," they often do not have equivalent knowledge of the "law of the land."[243] Submitting employees' statutory rights to arbitration without a court first determining that the parties intended to arbitrate unnecessarily contravenes *Alexander*'s basic principle that public rights should not be decided in private arbitration.[244] Strictly applying *Prima Paint* to delegation provisions where enforcement

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Alexander, 415 U.S. at 57 (describing how disputes over statutory and constitutional rights require reference to public law concepts and therefore fall under the court's jurisdiction). *But see* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 630 (1985) (announcing that an arbitration clause is no different from a forum-selection clause).

237. *See generally Prudential*, 42 F.3d at 1305 (concluding that some of the procedural protections of arbitration may not be adequate with respect to Title VII sexual harassment claims).

238. *See* Sabbeth & Vladeck, *supra* note 46, at 803–04, 807 (equating various statutory rights and suggesting their commonality in being federally created remedies). *See generally* 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, 37 (1997) (insisting that permitting enforcement of adhesive arbitration clauses in statutory claims cases effectively permits employers to deregulate themselves).

239. *See* Schwartz, *supra* note 238, at 87 (arguing that the FAA was not intended to prevent state courts from enforcing statutory rights).

240. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 399–400 (1967) (presenting the underlying issue not as a matter of substantive statutory rights, but as a claim of fraud in the inducement of a contract).

241. *E.g.*, Jackson v. Rent-A-Center, W., Inc., 581 F.3d 912, 914 (9th Cir. 2009) (interpreting both the FAA and 42 U.S.C. § 1981 (2006)), *rev'd*, 130 S. Ct. 2772 (2010); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc., 170 F.3d 1, 11 (1st Cir. 1999) (analyzing Title VII and the ADEA in the context of the FAA).

242. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51–52 (1974) (interpreting Title VII in the context of the FAA's preference for arbitration).

243. *See id.* at 57 (suggesting that arbitration is not the proper forum for adjudicating statutory rights, which involve extensive knowledge of public laws).

244. *See id.* at 58 ("[Efficiency] makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.").

compels arbitration improperly subordinates these waivability concerns in favor of a bright-line rule.[245] Moreover, applying a severability analysis obscures the rights Congress conferred on employees in enacting statutes like the FLSA, the ADEA, and Title VII.[246] Compelling arbitration of threshold matters of arbitrability diminishes these public statutory rights because employees are compelled to arbitrate them in a private setting.[247]

Furthermore, a severability analysis is inappropriate in employment contracts because *Prima Paint* only contemplated a contract between two sophisticated business actors.[248] In contrast, the agreement in *Rent-A-Center* was between one sophisticated business actor and an employee.[249] In employment situations, mandatory arbitration is sometimes considered suspect because arbitration agreements are often the product of contracts of adhesion and unequal bargaining power.[250]

Precluding threshold questions of arbitrability from adjudication in court is problematic in an employment context where employees, like Jackson, are often forced to sign arbitration agreements as an antecedent to employment.[251] Courts have recognized that employees may be in financial need, making arbitration terms impossible to negotiate.[252] Additionally, employees may not even know that they are agreeing to arbitrate all statutory claims, which creates mutual assent concerns.[253] Further,

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245. *See* Sabbeth & Vladeck, *supra* note 46, at 805–06 (equating the Court's pro-arbitration stance with "Lochnerism" and arguing that the private justice trend impermissibly excludes the legislature).

246. *See id.* at 834 (discussing the harmful societal impact of allowing private arbitration to trump public law statutory remedies, including the loss of case law precedent and development).

247. *See Alexander*, 415 U.S. at 57 (positing that statutory claims are best reserved for the courts since constitutional and public law issues are at stake); Carbonneau, *supra* note 25, at 261–62 (contending that arbitration is more than a mere forum and arguing that arbitration fails to guarantee parties the rights they would have in court).

248. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 (1967) (detailing the complex commercial transactions made by Flood & Conklin and Prima Paint Corp. in interstate commerce).

249. *See* Jackson v. Rent-A-Center, W., Inc., 581 F.3d 912, 914 (9th Cir. 2009) (describing the arbitration agreement between Jackson, an employee, and Rent-A-Center, the employer, as a precondition of employment), *rev'd*, 130 S. Ct. 2772 (2010).

250. *See* Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1004 (9th Cir. 2010) (treating terms over which a party has reduced bargaining power to negotiate as procedurally unconscionable); *see also* Farac v. Permanente Med. Grp., 186 F. Supp. 2d 1042, 1047 (N.D. Cal. 2002) (requiring a "modicum of bilaterality" before permitting arbitration of an employee's Title VII claim).

251. *See, e.g.*, *Jackson*, 581 F.3d at 914 (noting that Jackson signed the arbitration agreement as a condition of his employment).

252. *See, e.g.*, Melena v. Anheuser-Busch, Inc., 847 N.E.2d 99, 116 (Ill. 2006) (Kilbride, J., dissenting) (characterizing pre-dispute mandatory arbitration provisions in employment contexts as a product of economic coercion).

253. *See id.* (suggesting that employees typically do not know if they have waived certain statutory remedies because their primary concern is obtaining employment); Reilly, *supra* note 230, at 1225 (citing data from a study showing that less than ten percent of employees tested correctly answered questions about their legal rights in the workplace).

mandatory arbitration can be unfair for employees because it can be expensive, limit damages, limit discovery, alter the burden of proof, allow for untrained arbitrators, and be biased by the "repeat player" problem.[254] One way that courts have combated some of the perceived unfairness of arbitration terms in employment contexts is by using their gate-keeper role to hear unconscionability challenges to arbitration provisions.[255] But *Rent-A-Center* forecloses courts' gate-keeping role, threatening to compound long-standing concerns about protecting statutory rights in the arbitration forum[256] and greatly reducing the ability of employees to challenge pre-dispute arbitration agreements.[257]

The Court's strict application of a severability analysis may lead employees to unknowingly waive their rights to fully vindicate statutory claims.[258] The *Rent-A-Center* Court does not offer procedures for employees to challenge whether they intended to waive their constitutional right to a trial, thereby undervaluing the importance of mutual assent in creating a valid arbitration agreement.[259] Under *Rent-A-Center*, employees may be stripped of the important rights created and protected by federal legislation.[260] Applying a severability analysis to delegation provisions renders these provisions virtually impenetrable, causing employees to potentially waive their rights to a trial without even knowing it.[261]

See generally Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 241 (1995) (finding that standard form contracts are often too technical and inaccessible for laypersons to understand); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 478–79 (1999) (documenting misperceptions of the law governing the workforce among even highly educated working professionals).

254. *See* Sherwyn et al., *supra* note 30, at 1563–64 (delineating criticism frequently levied against employment mandatory arbitration).

255. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1420 (2008) (arguing that as the Supreme Court's jurisprudence shut off most means of resisting arbitration, state courts began to employ the doctrine of unconscionability to strike down arbitration agreements).

256. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 532 (1974) (Douglas, J., dissenting) (observing that compelling arbitration can impact the choice of laws to be applied in resolving the dispute, resulting in a loss of substantial rights); *see also* Carbonneau, *supra* note 25, at 268 (contending that arbitration decisions involving statutory rights should be reviewed by courts).

257. *See* Bruhl, *supra* note 255, at 1436 (explaining that under a severability analysis, courts cannot invalidate an arbitration provision contained within a broader contract if the unconscionability claim implicates the entire contract).

258. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 673 (6th Cir. 2003) (en banc) (finding that the arbitration provision at issue undermined Title VII's purposes and remedial efforts).

259. *See* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2784–85 (2010) (Stevens, J., dissenting) (contending that the majority should be concerned with whether the parties intended to arbitrate arbitrability).

260. *See Morrison*, 317 F.3d at 653 (recognizing that the goals of pre-dispute mandatory arbitration may be "irreconcilable" with the goals of protecting statutory rights).

261. *See* Melena v. Anheuser-Busch, Inc., 847 N.E.2d 99, 116 (Ill. 2006) (Kilbride, J.,

III. COURTS SHOULD APPLY A KNOWING AND VOLUNTARY STANDARD TO DETERMINE WHETHER DELEGATION PROVISIONS ARE ENFORCEABLE IN EMPLOYMENT CONTRACTS

Rather than extending and applying *Prima Paint* to delegation provisions, courts should apply a knowing and voluntary standard to delegation provisions to assess their enforceability with special scrutiny.[262] Specifically, federal courts should be allowed to evaluate whether employees knowingly and voluntarily agreed to arbitrate their statutory claims against employers by assessing: "(1) the plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver . . . ; (3) the clarity of the waiver; (4) consideration for the waiver; [and] (5) the totality of the circumstances."[263] Such a standard would serve two main functions. First, a knowing and voluntary standard would appropriately place central importance on the parties' mutual assent to arbitrate the issue. Second, the standard would ensure that disputes over statutory rights are resolved in the appropriate forum.

A. A Knowing and Voluntary Standard Properly Recasts Mutual Assent as the Preeminent Consideration in Delegation Provision Enforceability

Unlike a severability analysis, which rigidly carves up the terms of a contract without regard to the meaning of the agreement as a whole,[264] a knowing and voluntary standard places central importance on mutual assent.[265] Adopting such a standard would realign the Court's jurisprudence with the long-accepted principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit."[266] Employing a knowing

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dissenting) (suggesting that most employees lack sufficient knowledge to make informed decisions about mandatory arbitration agreements).

262. *E.g.*, Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 381 (6th Cir. 2005). While imposing a knowing and voluntary standard of scrutiny on delegation provisions may be criticized as simply permitting all unconscionability claims into court, in the context of federal statutory rights such a result may be preferable and more consistent with the original intent of the FAA. *See generally* Schwartz, *supra* note 238, at 76–77 (suggesting that the legislative history of the FAA makes clear that it was not intended to cover either adhesive contracts generally or employment contracts in particular).

263. *Walker*, 400 F.3d at 381.

264. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 423–24 (1967) (Black, J., dissenting) (lamenting severability for splicing a contract into tidbits without concern for the possibility that "'there would have been no bargain whatever, if any promise or set of promises were struck out'" (quoting United States v. Bethlehem Steel Corp., 315 U.S. 289, 298 (1942))).

265. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) (expressing concern about forcing unwilling parties to arbitrate issues that they reasonably thought a judge would decide).

266. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 82 (2002) (quoting United

and voluntary standard would also comport with the Supreme Court's precedent establishing that questions of arbitrability are "undeniably . . . issue[s] for judicial determination unless the parties clearly and unmistakably provide otherwise."[267] In particular, applying a knowing and voluntary standard would ensure that parties clearly and unmistakably[268] demonstrate that they contemplated arbitrating these issues by accounting for the employee's experience, background, education, and the amount of time given to contemplate the agreement.[269] Employees are often presented with arbitration agreements as a precondition of employment.[270] In such situations, even objective manifestations of assent may not ensure that an actual "meeting of the minds" took place because inequality of bargaining power, together with unreasonable terms, may show that the weaker party (in these cases, the employee) had no practical choice.[271] Using a knowing and voluntary standard to carefully scrutinize delegation provisions would ensure that the parties are required to arbitrate only those issues that they agreed to arbitrate.[272]

While courts generally apply an objective analysis in determining questions of mutual assent, some courts have noted that the parties' subjective intent and the circumstances surrounding the execution of an arbitration agreement remain relevant.[273] Adopting a knowing and voluntary standard would properly recast mutual assent as a key factor in determining whether a delegation provision is enforceable.[274] Although an

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Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)); *see also First Options*, 514 U.S. at 943 (stating that arbitration is a way to resolve only those disputes that the parties have agreed to submit to arbitration).

267. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986) (commanding the district court to first interpret the arbitration agreement to determine whether the parties intended to arbitrate layoff grievances).

268. *See First Options*, 514 U.S. at 942 (assuring that parties who did not agree to arbitrate arbitrability would have the right to court adjudication).

269. *See* Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 381–82 (6th Cir. 2005) (applying knowing and voluntary factors to plaintiff-employees and suggesting that the hurried conditions under which the arbitration agreements were presented to them undermined the argument that the agreements were supported by true mutual assent).

270. *E.g.*, *id.* (terminating application unless agreement is signed); *see also* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2772–73 (2010) (explaining that the company required all employees to sign the agreement).

271. *See* Melena v. Anheuser-Busch, Inc., 847 N.E.2d 99, 116 (Ill. 2006) (Kilbride, J., dissenting) ("By being economically coerced into signing a take-it-or-leave-it employer-mandated arbitration agreement just to maintain employment, the employee is often unwittingly stripped of the future ability to treat issues on a case-by-case basis.").

272. *See id.* at 115–16 (insinuating that failure to consider the voluntariness of the agreement undermines public policy).

273. *See, e.g.*, N.Y. Trust Co. v. Island Oil & Transp. Corp., 34 F.2d 655, 656 (2d Cir. 1929) ("[I]n ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable."); Higgins v. Oil, Chem. & Atomic Workers Int'l, 811 S.W.2d 875, 879 (Tenn. 1991) (finding it necessary to look beyond words themselves to determine the parties' true intent).

274. *See Walker*, 400 F.3d at 383 (emphasizing the circumstances surrounding

objective analysis of mutual assent maintains importance in assuring contract reliability,[275] in cases where an employee has no opportunity to negotiate arbitration terms and may not understand the implications of waiving the judicial forum,[276] verifying that a true meeting of the minds occurred is warranted.[277] The best way for courts to assess mutual assent is by applying a knowing and voluntary standard.[278] Specifically, considering the employee's education,[279] the clarity of the delegation provision, and whether the employee had time to consider the agreement would allow the court to verify that the employee did intend to waive their right to bring certain claims in court.[280]

Adopting a knowing and voluntary standard would have the additional benefit of restoring the courts to their original gate-keeping role.[281] Rather than applying severability to automatically refer claims to an arbitrator to decide whether they are subject to arbitration,[282] a knowing and voluntary standard would allow a court to first be satisfied that a valid arbitration agreement exists.[283] A court would determine, as a threshold matter, that the parties knowingly and voluntarily agreed to arbitrate even threshold

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arbitration agreement formation as relevant to evaluating mutual assent).

275. *See* Rood v. Gen. Dynamics Corp., 507 N.W.2d 591, 598 (Mich. 1993) (requiring the focus of mutual assent questions to be how a reasonable person in the position of the promisee would have interpreted the promisor's statements or conduct). *See generally* E. ALLEN FARNSWORTH, CONTRACTS § 3.1 (3d ed. 1999) ("Since it is difficult for a workable system of contract law to take account of assent unless there has been an overt expression of it, courts have required that assent to the formation of a contract be manifested in some way, by words or other conduct . . . .").

276. *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997) (concluding, based on empirical studies, that workers overestimate their legal protections and that employees often erroneously equate unfairness and unlawfulness).

277. *See generally* Reilly, *supra* note 230, at 1261 (acknowledging that informed consent and meaningful choice are necessary to overcome barriers to consent in an employment setting).

278. *See generally id.* at 1260–61 (advocating a knowing and voluntary consent model as a means of giving job applicants a greater understanding of what rights are at stake).

279. Courts have acknowledged the distinction between laypersons without substantial knowledge of the law and sophisticated business parties. *See, e.g.*, Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1044 (6th Cir. 1986) (enforcing a release waiver of the plaintiff's ADEA claims where the plaintiff was a highly educated, highly paid, and highly experienced labor attorney and not a "lay person[] . . . with little knowledge of their legal rights").

280. *See, e.g.*, Seawright v. Am. Gen. Fin. Servs., Inc., 507 F.3d 967, 974 (6th Cir. 2007) (holding that a waiver was knowing and intelligent where the plaintiff was a managerial employee and had two months to consider signing the agreement).

281. *See* Federal Arbitration Act, 9 U.S.C. § 4 (2006) (requiring courts to first ensure that there is a valid arbitration agreement before compelling arbitration).

282. *See* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010) (construing section 4 of the FAA as requiring courts to hear challenges only where the severed delegation provision has been specifically challenged).

283. *See id.* at 2782 (Stevens, J., dissenting) (arguing that "gateway matters" of arbitrability should be preserved for judicial review, especially when the parties are not likely to have contemplated the issue going to arbitration).

matters of arbitrability, thus ensuring that the "making of the agreement for arbitration . . . is not in issue."[284] By permitting courts to make this initial inquiry, a knowing and voluntary standard ensures that courts retain their gate-keeping function.[285] And, instead of allowing arbitrators to decide their own arbitral authority,[286] the knowing and voluntary approach would enable courts to first affirm that the parties *actually* agreed to such a set-up.[287] The knowing and voluntary approach is particularly appropriate in an employment context where employees may not have negotiating power to contest agreeing to let an arbitrator decide whether the claim will be arbitrated.[288] Thus, utilizing a knowing and voluntary standard to determine whether questions of arbitrability should proceed before a court or an arbitrator returns the court's role to its proscribed FAA function: ensuring that arbitration contracts are valid in the first instance.[289]

Applying a knowing and voluntary standard to delegation provisions has the additional benefit of preserving a role for unconscionability challenges to one-sided contracts.[290] The FAA specifically mandates that arbitration clauses are only "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract."[291] Unconscionability challenges are precisely the kinds of claims that the courts should be hearing as a preliminary matter, because unconscionability is a challenge that exists at law for revoking a contract.[292] The *Rent-A-*

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284. 9 U.S.C. § 4.

285. *See generally* Schwartz, *supra* note 238, at 82–83 (arguing that severability improperly assumes that the court should not retain its gate-keeping function when a contract is challenged generally).

286. *See Rent-A-Center*, 130 S. Ct. at 2782 (Stevens, J., dissenting) (recognizing that a "bizarre" effect of the majority's opinion will be that arbitrators will decide questions about the existence of a valid arbitration agreement).

287. *See* Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 383 (6th Cir. 2005) (insisting that there must be some evidence that the employees "knew what they were signing at the time they executed the agreements"); *see also* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1304 (9th Cir. 1994) (agreeing that Congress intended there to be at least a "knowing" component to an employee's agreement to arbitrate Title VII statutory claims).

288. *See* Schwartz, *supra* note 238, at 58 ("But if an arbitration clause has been inserted in a contract of adhesion on a 'take-it-or-leave-it' basis, [as in an employment setting] it is difficult to characterize it as the product of 'consent,' 'agreement,' or 'bargaining.'").

289. *See, e.g.*, Berger v. Cantor Fitzgerald Sec., 942 F. Supp. 963, 965 (S.D.N.Y. 1996) (articulating that the court must first determine the enforceability of the arbitration agreement before compelling arbitration); Allstar Homes, Inc. v. Waters, 711 So. 2d 924, 937–38 (Ala. 1997) (prohibiting arbitration of contract formation issues); Frizzell Constr. Co. v. Gatlinburg, L.L.C., 9 S.W.3d 79, 81 (Tenn. 1999) (holding the same).

290. A knowing and voluntary standard also comports with the Court's holding in *First Options* that courts should not assume the parties agreed to arbitrate arbitrability questions unless the evidence that they did so is clear and unmistakable. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (explaining why courts are hesitant to give arbitrators the power to decide who should decide arbitrability).

291. 9 U.S.C. § 2 (2006).

292. *See generally* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170 (9th Cir. 2003) (stating that unconscionability is a generally applicable defense to contracts within the

Center arbitrability issue should have been allowed to proceed before a court because successful unconscionability claims undermine evidence of mutual assent.[293] An unconscionability claim casts doubt on whether the parties actually did knowingly and voluntarily delegate all threshold issues of arbitrability to an arbitrator.[294] For example, in *Rent-A-Center*, the plaintiff disputed that he could have meaningfully agreed to the arbitration agreement because the terms contained therein were substantively and procedurally unconscionable.[295] A court should be entertaining these kinds of unconscionability claims as a threshold matter because the gravamen of the challenge is that the parties did not meaningfully agree to the arbitration agreement's terms.[296] The special scrutiny of the knowing and voluntary standard would permit courts to make such preliminary inquiries before compelling the case to arbitration by requiring courts to assess the parties' true intent.[297]

B. The Knowing and Voluntary Standard Ensures Employees' Statutory Rights Claims Are Resolved in the Appropriate Forum

The knowing and voluntary standard should be applied in analyzing threshold questions of arbitrability in employment contexts to ensure that the parties fairly contemplated such issues being resolved by an arbitrator.[298] The knowing and voluntary standard, as detailed in *Walker*,[299] allows courts to evaluate whether the plaintiff knowingly and voluntarily agreed to waive his or her constitutional right to a jury trial by assessing factors that include the plaintiff's experience, background, and education.[300] While it is settled law that the FAA applies to employment

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meaning of section 2 of the FAA). *But see* AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (holding that the FAA preempts state law that deems certain class arbitration waivers unconscionable because requiring class-wide arbitration "interferes" with arbitration's fundamental attributes).

293. *See generally* Bruhl, *supra* note 255, at 1437–38 (explaining that courts' analyses of unconscionability under the FAA often include a finding that the arbitration clause was "non-mutual").

294. *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 249 (1995) (O'Connor, J., dissenting) (equating unconscionability with lack of mutual assent).

295. Jackson v. Rent-A-Center, W., Inc., 581 F.3d 912, 917 (9th Cir. 2009), *rev'd*, 130 S. Ct. 2772 (2010).

296. *See* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2784–85 (2010) (Stevens, J., dissenting) (suggesting that section 2 of the FAA requires courts to hear unconscionability challenges to ensure that a valid arbitration agreement with mutual assent exists).

297. *See* Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 381 (6th Cir. 2005) (announcing a five-factor test that underscores mutual assent of the parties).

298. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943–44 (1995) (emphasizing the importance of parties actually agreeing to arbitrate arbitrability).

299. *See Walker*, 400 F.3d at 381 (delineating a five-factor knowing and voluntary test).

300. *See id.* (applying the knowing and voluntary standard to assess plaintiff-employees' financial situation and level of comprehension with respect to waiving trial rights).

contracts,[301] promulgating a standard that allows courts to give special consideration to threshold questions of arbitrability in employment contracts may align the Court's jurisprudence with the true legislative intent of the FAA.[302]

By restoring a gate-keeping role for the courts in questions of arbitrability, a knowing and voluntary standard would afford statutory rights the heightened protection that Congress intended.[303] Specifically, a knowing and voluntary standard would safeguard employees who signed arbitration agreements of adhesion from "[t]he loss of the proper judicial forum [which] carries with it the loss of substantial rights."[304] Adopting the knowing and voluntary standard is preferable to a severability framework because it allows courts to account for the unique character of employment contracts.[305] In particular, the *Walker* standard allows courts to consider the educational, economic, and financial background of employees who sign arbitration agreements when determining whether an employee knowingly and voluntarily agreed to arbitrate threshold questions of arbitrability.[306] The heightened scrutiny of the knowing and voluntary standard would militate against the harshly pro-arbitration stance seen in cases like *Jones* since the court would be obligated to consider the plaintiff's unconscionability claim before compelling arbitration.[307] Certain statutory causes of action under the ADEA, the FLSA, Title VII, and other statutes would receive the protection they deserve under a knowing and voluntary standard because courts would at least be required to ensure that employees were not unwittingly forced into waiving their

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301. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (determining that the scope of the FAA reaches and applies to employment contracts generally).

302. *See id.* at 126–27 (Stevens, J., dissenting) (contending that the legislative history of the FAA plainly reveals that the Act was only intended to cover commercial contracts and commercial disputes). Commentators have also endorsed the view that the FAA was intended only to cover simple contract disputes between commercial entities of equal bargaining power. *See, e.g.*, Kornegay, *supra* note 213, at 345 (suggesting that legislators only intended the FAA to include day-to-day contract performance issues that were straightforward and factually-based).

303. *See* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (claiming that statutory remedies, like Title VII, can only be waived knowingly since procedural safeguards that may be lacking in arbitration differ substantially from what the legislature envisioned in resolving statutory claims).

304. Scherk v. Alberto-Culver Co., 417 U.S. 506, 532 (1974) (Douglas, J., dissenting).

305. *See also* Sternlight, *supra* note 161, at 57–58 (advocating for a four-pronged test to determine whether statutory rights have been waived, including (1) the visibility and clarity of the agreement, (2) the relative knowledge and economic power of the parties, (3) the degree of voluntariness of the agreement, and (4) the substantive fairness of the agreement).

306. Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 381 (6th Cir. 2005).

307. *See generally* Jones v. Halliburton Co., 625 F. Supp. 2d 339, 347–48 (S.D. Tex. 2008) (dismissing the plaintiff's unconscionability claims but acknowledging the concern about arbitration in the employment context).

right to trial.[308]

CONCLUSION

Applying *Prima Paint*'s severability analysis to determine whether questions of arbitrability should be preserved for a court or an arbitrator creates an inappropriate framework for delegation provision analysis for several reasons. *Prima Paint* provides an improper calculus for delegation provision challenges because the concept of severability in *Prima Paint* only contemplated arbitration agreements embedded in broader contracts. The effect of *Prima Paint* should be confined to commercial contracts that contain substantive terms as well as an arbitration clause. Moreover, by applying severability in *Rent-A-Center*, the Court erroneously equated delegation provisions with arbitration provisions when the two clauses are actually substantively distinct. Further, applying severability to delegation provisions undermines a fundamental principle of the FAA—that the court should first ensure that the arbitration agreement is enforceable before compelling arbitration. Additionally, severability may even make arbitration agreements with delegation provisions more enforceable than ordinary contracts. Finally, employing a severability analysis for delegation provisions eschews the Court's past jurisprudence, which recognized the importance of resolving statutory claims in the appropriate forum.

As an alternative, the Court should adopt a knowing and voluntary standard for employment contracts. Instead of rendering most adhesive arbitration agreements impenetrable, a knowing and voluntary standard would ensure that employees actually intended to waive their rights to a jury trial. Employing a knowing and voluntary analysis would allow the courts to maintain the importance of mutual assent in arbitration contracts by verifying that the parties actually agreed to arbitrate the issue of arbitrability. In the process, courts would regain their FAA-mandated duty to serve as the gate-keepers of the arbitral forum. Additionally, a knowing and voluntary standard would help reconcile the schism between recognizing the unique circumstances of an employment contract on the one hand and applying overly rigid contract principles that erode employee's statutory rights on the other.

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308. *See* Sabbeth & Vladeck, *supra* note 46, at 837 (alleging that arbitration has become an effective tool in voiding statutory rights).