Fixing a Power Struggle in America's Civil Justice System

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ABSTRACT

The Federal Arbitration Act, the 1925 statute governing arbitration in the United States, sets forth and carefully defines a relationship between courts and arbitration tribunals whereby the courts play a role in supervising arbitration. However, as the Supreme Court has expanded its interpretations of arbitration law, this relationship between courts and arbitration tribunals has shifted, with greater adjudicatory power transferred to private arbitration tribunals. Unfortunately, with this shift of power, the relationship between courts and arbitration tribunals is no longer well defined and is subject to several conflicting legal standards.

This Article explores this shift of power and in particular, the confusing and conflicting legal standards regarding the relationship between courts and arbitration tribunals. The Article proposes a simple solution to resolve this multi-layered conflict: a clear, uniform legal standard for courts to apply, alongside some specific drafting advice for parties. This proposed solution eliminates the existing confusion regarding the correct legal standard; limits the shift of power from courts to arbitrators; and helps restore the original balance of power recognized in the FAA, under which courts are supposed to have greater supervisory authority over arbitration to ensure its fairness and legitimacy.

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TABLE OF CONTENTS

Introduction

Over the last forty years, the Supreme Court of the United States has greatly expanded the legal framework supporting arbitration, and arbitration clauses have exploded to cover virtually every type of transaction and dispute in American society. Millions of aggrieved parties, such as consumers,[2] workers,[3] and small businesses,[4] can no longer freely access the traditional court system because of arbitration clauses buried in their written contracts or online transactions. Instead, parties must bring any disputes to private arbitration, where there are limited procedural protections compared to litigating in court[5] and the arbitrator's decision is final and binding, even if the arbitrator applied the law incorrectly and issued a deeply flawed decision.[6] The explosive growth of arbitration has transformed the civil justice system in America.

The Federal Arbitration Act ("FAA"), the 1925 statute governing arbitration in the United States, sets forth and carefully defines a relationship between courts and arbitration tribunals whereby the courts are supposed to facilitate, supervise, and help ensure the fairness of arbitration proceedings.[7] However, as the Supreme Court has expanded its interpretations of arbitration law, this relationship between courts and arbitration tribunals has shifted over time, with

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2. *Cf. Walmart.com Terms of Use*, Walmart, https://www.walmart.com/help/article/walmart-com-terms-of-use/f25b207926d84d79b57e6ae2327bbf12 [perma.cc/J9XD-9CB6].

3. *Cf. Dawson v. Uber Techs. Inc.*, No. 3:20-cv-06736-WHO, 2021 WL 2273981, at *1 (N.D. Cal. May 7, 2021); *Gilbert v. Indeed, Inc.*, 513 F. Supp. 3d 374, 385 (S.D.N.Y. 2021); *Bouskos v. J.P. Morgan Chase Bank, N.A.*, No. 1:19-cv-01431-DAD-SAB, 2020 WL 8483909, at *1 (E.D. Cal. Dec. 21, 2020).

4. *See, e.g.*, *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 231 (2013) (holding that local restaurant must arbitrate claims with American Express); *Doctor's Assocs., L.L.C. v. Tripathi*, 794 F. App'x 91, 92, 94 (2d Cir. 2019) (subway franchisee covered by arbitration clause with franchisor); *Doctor's Assocs., LLC v. Tripathi*, 794 F. App'x 91, 94 (2d Cir. 2019) (Subway franchisee covered by arbitration clause with franchisor).

5. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[By agreeing to arbitrate, a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.") (alteration to the original).

6. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572 (2013) (explaining that "an arbitrator's error—even his grave error—is not enough" to vacate an arbitrator's award); *Adell v. Cellco P'ship*, No. 1:18CV623, 2021 WL 2075475, at *2 (N.D. Ohio May 24, 2021) (stating that judicial review of an arbitrator's award "is one of the narrowest standards of judicial review in all of American jurisprudence" (quoting *Uhl v. Komatsu Forklift Co.*, 512 F. 3d 294, 305 (6th Cir 2008)).

7. 9 U.S.C. §§ 1–16 (2018).

greater adjudicatory power transferred to private arbitration tribunals. This shift of power and the redefining of the relationship between courts and arbitration have caused problems.

Although the Supreme Court has granted more power to arbitrators, confusion still exists regarding the precise contours of this power, and there is uncertainty among judges, arbitrators, lawyers, and parties regarding the legal framework supporting arbitration. The relationship between courts and arbitration tribunals is not well defined. Moreover, courts have issued multiple, conflicting decisions attempting to define this relationship and the correct legal standard. For example, several critical threshold issues can arise in connection with arbitration, such as whether an arbitration agreement covers a particular dispute, whether a third party who may have some connection to a transaction—but who did not sign the arbitration agreement—is nevertheless still bound to arbitrate, or whether a valid arbitration agreement was formed. As explained in more detail below, there is much uncertainty and inconsistent rulings as to whether courts or arbitrators should decide important threshold issues like these. Such confusion is unfortunate and undermines the potential value of arbitration as an efficient method of dispute resolution. Parties with legitimate, underlying claims can spend years tied up in litigation in crowded courts trying to sort out the confusion over the correct legal framework supporting arbitration and the correct balance of power between courts and arbitration tribunals. This prolonged litigation impacts whether the underlying claims on the merits will ultimately be heard and resolved in court or in private arbitration.

To illustrate the tension in the law, it is important to understand that arbitration agreements today commonly cite to or incorporate the arbitration rules of an arbitration organization like the American Arbitration Association ("AAA") or Judicial Arbitration and Mediation Services, Inc. ("JAMS"), and much of the debate focuses on this particular circumstance involving an agreement's incorporation of outside rules. For example, millions of people who use social media are bound by arbitration clauses. If you are an Instagram user, Instagram's Terms contain an arbitration clause that states "[t]he American Arbitration Association will administer all arbitrations under its Consumer Arbitration Rules."[8] There are conflicting court

8. *Terms of Use*, INSTAGRAM, (Jan 4, 2022), https://help.instagram.com/581066165581870 [https://perma.cc/LT4X-CJLF].

decisions and much confusion as to how a court would interpret Instagram's arbitration agreement and its incorporation of rules from an outside arbitration organization.[9] Some courts, when they see such an incorporation of particular rules from an arbitration organization, will say that all threshold issues about arbitrability, such as whether a valid arbitration agreement exists or whether the arbitration clause covers a particular claim, will be resolved by an arbitrator.[10] But other courts hold to the contrary, finding that the mere incorporation of outside rules will not displace the role of courts as the correct decision maker for such threshold issues.[11] In addition, courts have further splintered these two basic views and created other layers of uncertainty by holding that the mere incorporation of outside rules may or may not displace the role of courts as decision makers for threshold issues, depending on whether the dispute involves an unsophisticated party, a non-signatory to the arbitration agreement, or collective proceedings.[12]

This Article explores the shift of power from courts to private arbitration tribunals, and in particular, the confusing legal standards regarding this relationship between courts and arbitration tribunals. Section I of this Article provides some background regarding arbitration law and the shifting of power that has occurred because of the Supreme Court's expansion of arbitration law. Section II then discusses the clashing views that have emerged regarding the power of an arbitrator and the relationship between courts and arbitration. Section III concludes the Article with a simple solution to clarify the confusion: a clear, uniform legal standard for courts to apply and some specific drafting advice for parties. This proposed solution eliminates the existing confusion regarding the correct legal standard; limits the shift of power from courts to arbitrators; and helps restore the original balance of power recognized in the FAA, under which courts are supposed to have greater supervisory authority over arbitration to ensure its fairness and legitimacy. Such fairness and legitimacy are critical in an environment where millions of American consumers and workers are purportedly bound to arbitrate virtually

9. *See infra* Section II.B.

10. Federal courts tend to take this view. *See, e.g.*, *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) ("By incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid.").

11. This contrary view has taken root primarily in state courts. *See, e.g.*, *Global Client Solutions, L.L.C. v. Ossello*, 367 P.3d 361, 369 (Mont. 2016).

12. *See infra* Section II.B.

all types of disputes. These issues regarding the power of the arbitrator also raise fundamental questions about the meaning of the FAA and the proper role of arbitration in America's civil justice system.

I. The FAA and The Supreme Court's Shifting of Power from Courts to Arbitrators

A. *Overview of the FAA*

Arbitration is a private, binding method of dispute resolution, and the foundation of arbitration is consent.[13] In arbitration, parties agree to submit their dispute to a private, neutral decision maker, and the parties agree to abide by the arbitrator's decision resolving their dispute. Arbitration has existed since ancient times,[14] and parties can go through the arbitration process on their own, without government involvement or any government regulation. For example, two parties with a dispute may voluntarily agree to arbitrate, and the parties may then voluntarily go through the arbitration process where an arbitrator gives each side an opportunity to present their case. The arbitrator, after hearing both parties, then issues an award, and the parties may voluntarily comply with the arbitrator's award. This entire process may occur from start to finish without the formal backing of law, without any court involvement, and without any government support at all.

During the 1920s, Congress and state legislatures enacted arbitration statutes by which the government, through the courts, could facilitate the arbitration process,[15] and there are several ways in which a court can become involved. Courts can generally become involved at the beginning of the process, with enforcing an agreement to arbitrate; during a pending arbitration proceeding to assist with discovery or the appointment of an arbitrator; or in limited circumstances after an arbitration award is issued.[16]

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13. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.").

14. *See generally* Derek Roebuck & Bruno de Loynes de Fumichon, Roman Arbitration (2004).

15. *See generally* Imre S. Szalai, Outsourcing Justice: The Rise of Modern Arbitration Laws in America 9–12, 97–187 (2013) (outlining the history of arbitration, including efforts to advocate and lobby for arbitration laws at the federal level and in states like New York).

16. *See, e.g.*, 9 U.S.C. § 4 (2018) (providing for a court to enter an order compelling arbitration); *id.* § 7 (arbitral subpoena powers for witnesses and documents); *id.*

The FAA and similar state statutes declared that arbitration agreements are fully binding, and courts can review arbitration agreements to ensure their terms are not oppressive or unfair.[17] Prior to the enactment of these laws in the 1920s, a party could generally revoke an agreement to arbitrate, and courts would not compel a party to honor an arbitration agreement.[18] However, after the enactment of modern arbitration statutes like the FAA, courts were empowered to facilitate the arbitration process and enforce arbitration agreements if there was a breakdown in the process. If one party refuses to honor an arbitration agreement, section 4 of the FAA allows the other party to petition a court for an order enforcing the arbitration agreement and directing the recalcitrant party to submit to arbitration.[19] If there is a dispute about the making of the arbitration agreement, section 4 also provides for a jury trial on this narrow issue of whether an obligation to arbitrate exists.[20] For example, if one party refuses to arbitrate because the party claims that a valid contract to arbitrate was never formed, the other party can ask the court to compel arbitration, and there can be a jury trial on whether a proper agreement was formed.[21] If the agreement has flaws or unconscionable, one-sided, harsh terms, the court can also invalidate the arbitration agreement.[22] Through section 4's procedures for compelling arbitration, courts help ensure that parties honor their promises to arbitrate, and courts also monitor the fairness of the arbitration process by invalidating arbitration agreements with unconscionable, one-sided terms.

The FAA also provides for judicial assistance during the arbitral process itself. For example, if the parties try to arbitrate, but there has been a breakdown in the process of selecting an arbitrator, section 5 allows a party to petition the court to appoint an arbitrator.[23] Also, section 7 of the FAA grants subpoena powers to arbitrators so

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§ 5 (appointment of arbitrator); *id.* § 9 (judicial confirmation of arbitral awards); *id.* § 10 (limited grounds for judicial vacatur of arbitral awards).

17. *See, e.g.*, 9 U.S.C. § 2 (2018). For an example of a state arbitration law, see Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803.

18. Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization 19-20 (1992).

19. 9 U.S.C. § 4 (2018).

20. *Id.*

21. *Id.*

22. *See, e.g.*, *Fisher v. MoneyGram Int'l, Inc.*, 281 Cal. Reptr. 3d 771, 791 (Cal. App. Dep't Super. Ct. June 29, 2021).

23. 9 U.S.C. § 5 (2018); *see, e.g.*, *Evangelical Lutheran Good Samaritan Soc'y v. Moreno by Hatton*, No. CIV 16-1355 JB/KS, 2019 WL 999736, at *5 (D.N.M. Feb. 28, 2019).

that they can summon witnesses to testify or have witnesses bring material evidence, and courts can assist with enforcing the subpoena.[24]

After an arbitrator issues an award, the FAA provides that a court may confirm the award, and a judgment of the court can be entered on the award.[25] In effect, the arbitrator's award becomes equivalent to a binding, enforceable court judgment. Also, in very limited circumstances, a court may vacate an arbitrator's award, primarily for major procedural flaws, such as an award procured by corruption or an arbitrator's misconduct in refusing to hear material evidence.[26] However, a court cannot vacate an arbitrator's award for errors, even serious errors, on the merits; there is generally a strong presumption of finality connected with arbitral awards.[27]

Thus, through the FAA, there are several ways in which a court may become involved to facilitate the arbitration process. Although the FAA carefully limits these circumstances to help respect party autonomy, the FAA allows for judicial intervention as a safeguard to deal with abuses of arbitration or breakdowns in the arbitration system. Through carefully drafted provisions, the FAA defines the relationship between courts and arbitration tribunals and strikes a careful balance.[28] However, as explained below, the Supreme Court has altered this balance in the statute over the years and expanded the FAA beyond its original text and purpose.

B. *Types of Arbitration Agreements*

It is helpful to realize there can be different types of arbitration agreements, and these agreements can be loosely organized across a spectrum. At one end of the spectrum, there is a simple, single sentence agreement to arbitrate. At the other end of the spectrum, one can place an extremely detailed agreement to arbitrate, and this type of arbitration agreement comprehensively covers almost every conceivable aspect of an arbitration. In the middle are agreements to arbitrate of varying complexity, where parties incorporate, to different

24. 9 U.S.C. § 7 (2018); *see, e.g.*, *Maine Cmty. Health Options v. Walgreen Co.*, 18-mc-0009, 2018 WL 6696042, at *2 (W.D. Wis. Dec. 20, 2018).

25. 9 U.S.C. § 9 (2018).

26. *Id.* § 10.

27. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572–73 (2013) (explaining that "an arbitrator's error—even his grave error—is not enough" to vacate an arbitrator's award).

28. For example, while an arbitration proceeding is ongoing, the FAA permits courts to enforce arbitral subpoenas for witness testimony, 9 U.S.C. § 7 (2018), and judicial review of the arbitration proceeding is narrowly circumscribed. *Id.* §§ 10, 11.

degrees, arbitration rules of different arbitration organizations. These three scenarios, which fall on a spectrum and do not represent absolute categories, are explored below.

1. *Simple, One-Sentence Agreement to Arbitrate, With No Selected Rules or Administering Organization*

It is possible for parties to enter into a simple, bare-bones, one-sentence arbitration clause. As an example, a contract can state something to the effect that "the parties agree that all disputes arising out of this agreement will be subject to binding arbitration." This one sentence agreement to arbitrate does not refer to any outside rules developed by arbitration organizations, or to any outside arbitration organization that would administer the arbitration proceeding. Although such a simple promise to arbitrate can be fully binding and produce a final, enforceable arbitral award, there are many details the parties will have to work through if a dispute eventually arises. For example, how will an arbitrator be selected? How many arbitrators will hear the dispute, one or three? Is there a limit on discovery? Where will arbitral hearings take place? Can the parties engage in motion practice in connection with the arbitration proceeding? How will an arbitration be commenced? Who pays for the arbitration?

However, an arbitration clause does not need to contain such precise details to be enforceable. For example, in *Vegter v. Forecast Fin. Corp.*, the arbitration clause was a single sentence: "Any and all disputes between the parties shall be resolved by way of binding arbitration in Okaloosa County, Florida."[29] The court rejected arguments that this simple arbitration clause was not enforceable because it did not address details such as "the method for selecting an arbitrator, the rules or procedures for the arbitration, how the costs of the arbitration will be allocated, and how a consumer can institute arbitration proceedings."[30] A single-sentence arbitration agreement can still bind the parties to arbitrate, even though such an agreement leaves many gaps as to the details of the process.[31]

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29. No. 1:07-CV-279, 2007 WL 4178947, at *1 (W.D. Mich. Nov. 20, 2007).

30. *Id.* at *2-*4.

31. *See also Lawit v. Maney & Gordon, P.A.*, No. 13-CV-0835 SMV/LFG, 2014 WL 11512612, at *1 (D.N.M. Jan. 17, 2014) (enforcing single-sentence arbitration clause, which stated "[i]n the event of dispute, the parties agree to resolve all issues by way of binding arbitration."); *Marzano v. Proficio Mortg. Ventures, LLC*, 942 F. Supp.2d 781, 792–94 (N.D. Ill. 2013) (upholding single-sentence arbitration agreement and rejecting arguments that the agreement is vague and unenforceable since the agreement "lacks procedural and substantive rules, time limitations, cost information, and

With only a single sentence agreement to arbitrate, there are a variety of different ways to fill in these procedural gaps. After a dispute arises, the parties can negotiate and agree to some or all of these issues, or perhaps the parties can agree, post-dispute, on a particular arbitration organization which would administer the arbitration proceeding pursuant to established, detailed, already-developed rules from the organization. State or federal law may also fill in the gaps as a default in case the parties cannot agree.[32] Or after a dispute arises, the parties may mutually select an arbitrator, and once the arbitrator is appointed, the arbitrator will have broad discretion to determine details concerning how the arbitration should proceed.[33]

2. *Complex, Comprehensive Agreement to Arbitrate*

Parties may also have a very detailed, comprehensive arbitration agreement that specifies virtually every possible aspect of the dispute resolution process.[34] Such aspects include how one can commence an arbitration proceeding; the process for selecting an arbitrator; the scope of the arbitrator's powers, such as whether the arbitrator can grant preliminary relief; and details about the hearing, such as its location, limitations on witnesses or evidence, or whether written motions or briefs can be filed. When parties draft such comprehensive arbitration clauses, there is no need to refer to outside rules developed by an arbitration provider.

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venue provisions"); *Schulze and Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715-16 (7th Cir. 1987). *But see Brody v. CultureSource*, No. 20-11663, 2020 WL 6562089, at *3 (E.D. Mich. Nov. 9, 2020) (denying motion to compel arbitration because, among other things, the arbitration agreement "does not indicate that Plaintiff is waiving legal rights and lacks clarity regarding the process to which Plaintiff is agreeing").

32. *Lawit*, 2014 WL 11512612, at *7 (in connection with a single-sentence arbitration clause, directing the parties to select an arbitrator, and if they cannot agree, court will appoint an arbitrator pursuant to 9 U.S.C. § 5).

33. *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 84 (2002) (procedural questions are generally for an arbitrator to resolve); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012) ("[A]rbitrators have broad discretion to set applicable procedure . . ."); *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 215 (Cal. 2013) ("[A]rbitrators have discretion to decide on features of arbitration that are not specified in the agreement . . .").

34. *See, e.g.*, Arbitration Procedures of The Savannah College of Art and Design, Inc., Ex. A to Second Declaration of Jonathan Goldstein, *Payne v. The Savannah College of Art and Design, Inc.*, No. 1:20-cv-05000, 2021 WL 307545, at *34 (N.D. Ga.).

3. *An Arbitration Agreement Incorporating Outside Rules Developed by an Arbitration Organization*

Another type of agreement may involve a promise to arbitrate certain disputes pursuant to outside rules developed by an arbitration provider. These types of arrangements will generally involve two components. First, the parties will agree to arbitrate certain substantive disputes, such as disputes related to one's employment or the purchase of a good or service. Second, the agreement also requires arbitration to be administered pursuant to a particular set of rules developed by an outside arbitration organization. Arbitration organizations like the AAA, JAMS, International Institute for Conflict Prevention & Resolution, Inc. ("CPR"), and others have developed rules to govern arbitration, and parties may generally choose rules they find suitable for their disputes and incorporate such rules within their arbitration agreements. For example, if a consumer purchases items through Walmart's website, the arbitration agreement in Walmart's Terms of Use provides that "[t]he arbitration will be administered by Judicial Arbitration Mediation Services, Inc. ('JAMS') pursuant to the JAMS Streamlined Arbitration Rules & Procedures effective July 1, 2014 (the 'JAMS Rules') and as modified by this agreement to arbitrate."[35] Similarly, Instagram's arbitration agreement provides that "[t]he American Arbitration Association will administer all arbitrations under its Consumer Arbitration Rules."[36]

C. *The Supreme Court's Shifting of Power from Courts to Arbitrators*

Since the 1980s, the Supreme Court has expanded the FAA and transformed its purpose and application. The FAA, as originally enacted, only applied to disputes that "aris[e] out of" a contract.[37] Merchants involved in interstate and international commerce heavily lobbied for the statute, and the statute was originally intended to cover contractual, commercial disputes, such as disputes about shipping delays or whether delivered products satisfy the parties' contractual promises.[38] However, since the 1980s, the Supreme Court has

35. *Walmart.com Terms of Use,* WALMART (May 28, 2021), https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0 [https://perma.cc/J9XD-9CB6].

36. *Terms of Use,* INSTAGRAM (Jan. 4, 2022), https://help.instagram.com/581066165581870 [https://perma.cc/Q89P-C27Q].

37. 9 U.S.C. § 2 (2018) (FAA's coverage is limited to written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract").

38. *See generally* SZALAI, *supra* note 15.

ignored the contractual limitation in the FAA's text and expanded the statute beyond contractual disputes to cover virtually every type of claim. For instance, now, the FAA is interpreted to cover statutory claims or tort claims.[39] Additionally, the statute originally excluded employment disputes,[40] but the Court has interpreted this exclusion very narrowly so that almost all types of employment disputes are now covered.[41] The FAA was also designed solely for application in federal court,[42] but the Court has interpreted the statute to govern state courts as well.[43]

With the Court's expansion of the statute, arbitration agreements have exploded in use throughout the United States.[44] One can find arbitration agreements in connection with all types of daily transactions and the purchase of goods and services, such as going to see a doctor,[45] ordering a product online,[46] hailing an Uber driver,[47] going to the gym,[48] or using a cell phone.[49] Applying for a credit card,[50] buying a car,[51] leasing an apartment,[52] obtaining a loan,[53] or enrolling in school[54] can all involve an arbitration clause. Employers also aggressively use arbitration agreements.[55] There are very few circumstances where an arbitration agreement cannot be found, and

39. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S.Ct. 1421, 1428–29 (2017).

40. *See* SZALAI, *supra* note 15, at 191–92.

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

42. *See generally* MACNEIL, *supra* note 18.

43. *Southland Corp. v. Keating*, 465 U.S. 1, 3 (1984).

44. Imre Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019) (noting that more than 826 million consumer arbitration agreements in force in the United States in 2018).

45. *Lerner v. Masterson*, B297323, 2021 WL 3162837, at *1 (Cal. Ct. App. July 27, 2021) (unpublished).

46. *Nicholas v. Wayfair Inc.*, 410 F. Supp. 3d 448, 451–52 (E.D.N.Y. 2019).

47. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 71–72 (2d Cir. 2017).

48. *Williams v. Planet Fitness, Inc.*, No. 20CV3335, 2021 WL 1165101, at *2 (N.D. Ill. Mar. 26, 2021).

49. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011).

50. *Fremeau v. Credit One Bank, N.A.*, No. 2:19cv254, 2020 WL 201046, at *1 (E.D. Va. Jan. 10, 2020).

51. *Raebel v. Tesla, Inc.*, 451 F. Supp. 3d 1183, 1186–87 (D. Nev. 2020).

52. *Turnipseed v. APMT, LLC*, No. 18-5187, 2018 WL 5977889, at *1 (E.D. La. Nov. 14, 2018).

53. *Swiger v. Rosette*, 989 F.3d 501, 503 (6th Cir. 2021).

54. *Kourembanas v. InterCoast Colleges*, 373 F. Supp. 3d 303, 307 (D. Me. 2019).

55. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE, at 2 (2018) (more than 60 million American workers are bound by arbitration agreements).

with this proliferation of arbitration in the United States, most people have lost access to the traditional courts for resolving disputes.

There are three landmark Supreme Court decisions that have helped define the relationship between courts and arbitration tribunals. In these cases, the Court interpreted the FAA in such a manner as to expand the power of arbitrators at the expense of judicial power. First, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Supreme Court treated an arbitration clause as distinct from the rest of a contract, so that potential defenses applicable to the broader contract must be heard by an arbitrator.[56] Second, in *First Options of Chicago, Inc. v. Kaplan*, the Supreme Court allowed arbitrators to decide, under certain circumstances, whether the parties agreed to arbitrate.[57] Finally, in *Rent-A-Center, West, Inc. v. Jackson*, the Supreme Court enforced a party's agreement to arbitrate whether the arbitration agreement itself was enforceable.[58] Through these three cases, the Supreme Court has granted greater powers to arbitrators, and this expansion of arbitrator power is contrary to the FAA's text and purpose.

1. *Prima Paint* and the Separability Doctrine

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Supreme Court addressed whether a court or arbitrator was the correct decision maker to resolve a claim of fraud in connection with the sale of a paint business from one company to another.[59] For this sale, the two companies entered into a consulting agreement containing an arbitration clause.[60] The purchasing company alleged that the selling company had fraudulently represented that it was solvent and able to perform consulting obligations in connection with the sale.[61]

A dispute arose over who would resolve this issue of fraud in the inducement of the consulting agreement—a court or arbitrator. One could argue that the fraud infected the entire consulting agreement, including all the provisions of the consulting agreement and the arbitration clause contained therein. Under this view, there is arguably no obligation to arbitrate; the same fraud that would negate the broader contractual obligations would also negate the obligation to arbitrate.

56. 388 U.S. 395, 403–04 (1967).
57. 514 U.S. 938, 944 (1995).
58. 561 U.S. 63, 72–76 (2010).
59. 388 U.S. 395, 396–97 (1967).
60. *Id.* at 397.
61. *Id.* at 398.

However, the Supreme Court found that there was still an obligation to arbitrate in this case, despite the allegation of fraud, and arbitrators could resolve these claims of fraudulent inducement related to the broader contract.[62] In *Prima Paint*, the Supreme Court relied on section 4 of the FAA, pursuant to which a court must order arbitration once the court is satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue."[63] The Court reasoned that under section 4, a court would not be authorized to resolve disputes about the making of the broader contract; instead, under the terms of section 4, courts could only adjudicate a claim of fraudulent inducement narrowly directed to the making of the arbitration clause itself.[64] In addition to this textual argument based on section 4 of the FAA, the Court also cited with approval appellate decisions that treated an arbitration clause as separable from the broader contract in which the clause is embedded.[65]

The *Prima Paint* Court created a legal fiction: an arbitration clause generally stands alone and is conceptually separate from the broader contract in which the arbitration clause may be embedded. Based on this legal fiction, the Supreme Court was able to define a particular relationship between courts and arbitration tribunals. Under *Prima Paint*, arbitrators, not courts, generally resolve challenges to a broader contract, and defects related to the broader contract generally do not undermine the power of the arbitrators to resolve disputes involving those defects.[66] Courts, under section 4 of the FAA, would only focus on attacks specifically directed to the arbitration clause, but not attacks directed to the broader contract.[67]

Justice Black, joined by Justices Douglas and Stewart, issued a dissenting opinion.[68] The dissent criticized the majority's textual argument regarding section 4, pointing out that section 4's language

62. *Id.* at 402–04.

63. *Id.* at 403–04 (citing 9 U.S.C. § 4). Section 4 of the FAA sets forth several procedures for judicial enforcement of an arbitration agreement. Generally, if one party is aggrieved by the failure of another party to honor an arbitration agreement, the aggrieved party may petition a federal court for an order compelling arbitration. In this situation, "[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 in accordance with the terms of the agreement." 9 U.S.C. § 4 (2018).

64. *Id.*

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

66. *Id.* at 403–04.

67. *Id.*

68. *Id.* at 407–25.

does not clearly dictate or require the separability of an arbitration clause from the rest of the contract.[69] For example, suppose a manufacturing contract contains several key terms, such as a provision about price, delivery date, specifications for the manufacture of a product, a most favored purchaser clause, and an arbitration clause. Why would a fraudulent inducement argument, whereby the buyer argues that the manufacturer's false representations induced the buyer to sign the broader agreement, invalidate every provision in the agreement *except for* the arbitration provision? In other words, section 4 of the FAA dictates that a court resolves issues regarding the making of the arbitration agreement, and one can argue that the fraudulent inducement argument applicable to the entire transaction puts the making of the arbitration clause, and every other clause in the agreement, at issue. Thus, under section 4, courts must resolve arguments regarding fraudulent inducement of the broader contract because such arguments impact the arbitration clause. Practically speaking, this would mean that such defenses or attacks on the broader contract would not be resolved in arbitration and instead be resolved in court, and more disputes would be sent to court instead of arbitration. But if there is no showing that the broader contract is invalid, parties can still arbitrate other issues, such as whether the contract terms regarding a delivery date or the quality of a manufactured product or other contractual specifications have been satisfied. Although the majority in *Prima Paint* tilted the balance of power in favor of arbitrators, the dissent believed the text of the FAA did not require such a result.[70]

2. *First Options* and the Clear and Unmistakable Standard

Another landmark opinion defining the relationship between courts and arbitration tribunals under the FAA is *First Options of Chicago, Inc. v. Kaplan*.[71] *First Options* involved a securities-related dispute arising out of the October 1987 stock market crash.[72] An investment company and a stock-clearing company were parties to an agreement containing an arbitration clause.[73] However, neither the

69. *Id.* at 410 ("That language [in section 4], considered alone, far from providing an 'explicit answer,' merely poses the further question of what kind of allegations put the making of the arbitration agreement in issue.").

70. *Id.* at 407–25.

71. 514 U.S. 938 (1995).

72. *Id.* at 940.

73. *Id.* at 941.

owner of the investment company, Mr. Kaplan, nor his wife were signatories to this agreement.[74] When a dispute arose regarding the liability of the investment company and the personal liability of Mr. and Mrs. Kaplan, the stock-clearing company commenced an arbitration.[75] However, Mr. and Mrs. Kaplan contested the arbitrators' jurisdiction since they were not parties to the contract containing the arbitration clause.[76]

The Supreme Court explained that this case involved three levels of disputes. First, a dispute existed regarding the merits, whether the Kaplans were personally liable to the stock-clearing company.[77] Second, an arbitrability dispute existed whether the Kaplans were obligated to arbitrate the merits dispute.[78] Third, a dispute existed whether a court or arbitrator would decide the second dispute, whether the Kaplans are bound to arbitrate.[79]

For this third level of dispute, regarding who is the correct decision maker on the issue of whether or not to arbitrate, the Supreme Court raised several concerns. First, the Court explained that the answer to this question depended on the agreement of the parties.[80] The Court reasoned that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."[81] Next, the Court also examined the standard to determine whether parties have agreed to submit arbitrability questions to an arbitrator or court. Labelling this "who should decide arbitrability" issue as "arcane," the Court observed that parties may not focus on this particular issue or understand the significance of arbitrators ruling on their own jurisdiction.[82] Thus, in light of this lack of awareness, the Court also explained that silence or ambiguity about who decides arbitrability matters should not be interpreted as giving the power to an arbitrator. Giving such a power to an arbitrator when the contract is ambiguous would in effect force unconsenting parties to arbitrate a matter they would have reasonably expected a judge to resolve.[83]

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74. *Id.*
75. *Id.* at 940–41.
76. *Id.* at 941.
77. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).
78. *Id.*
79. *Id.*
80. *Id.* at 943.
81. *Id.*
82. *Id.* at 945.
83. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

Given these concerns, the Court in *First Options* developed the following standard: "Courts should not assume that the parties agreed to arbitrate [the issue of] arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[84] Applying this standard to the facts of the case, the Court reasoned that Mr. and Mrs. Kaplan had not "clearly and unmistakably" agreed to have the arbitrators decide the question of arbitrability. After all, the Kaplans forcefully objected to the arbitrators' jurisdiction over them.[85] Thus, a court would determine the issue of whether they were bound to arbitrate.[86]

The Court in *First Options* seemed to be searching for a post-dispute agreement to submit the arbitrability question to an arbitrator.[87] For instance, after the securities dispute had arisen, the Kaplans could have entered into a post-dispute agreement to submit the question of arbitrability to an arbitrator. In such a post-dispute situation, they would be fully aware, with eyes wide open, of the implications of this "arcane" issue of having an arbitrator resolve arbitrability questions—they would have clearly and unmistakably assented to arbitration. But such post-dispute agreement did not exist in *First Options.*

First Options is a critical Supreme Court case for understanding the allocation of decision-making authority between courts and arbitration tribunals. However, the clear and unmistakable standard is not recognized in the text of the FAA, and under section 4 of the FAA, it appears that courts would have the exclusive authority to rule on

84. *Id.* at 944 (citations omitted). The concept that arbitrators have jurisdiction to rule on their own jurisdiction is sometimes known as competence-competence. A few courts have said that state law should govern whether this clear and unmistakable standard is satisfied. *See, e.g.*, *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1246 (10th Cir. 2018) (applying Colorado state law to help determine whether there is a clear and unmistakable delegation); *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 399 (2d Cir. 2018) ("State law defines how explicit the clause's language must be to satisfy that [clear and unmistakable] standard."). However, the clear and unmistakable standard is part of the FAA's framework, and this heightened standard is carefully calibrated to address the expectations of parties; concerns about impartiality, conflicts of interest, and fairness in the arbitration proceeding; and constitutional concerns. State law should not be used to undermine this heightened standard. Moreover, when discussing the clear and unmistakable standard, the Court in *First Options* appeared to present this standard as distinct from or as modifying state law. In *First Options*, the Court recognized that state law should generally control whether parties have agreed to arbitrate, but a special, additional standard of clear and unmistakable evidence should be used when determining whether parties have agreed to arbitrate arbitrability. 514 U.S. at 944.

85. *Id.* at 946.

86. *Id.* at 947.

87. *Id.* at 946.

disputes about the making of the agreement.[88] Even though *First Options* allows an arbitrator to rule on arbitrability matters, the text of section 4 does not recognize such power.[89]

As discussed in more detail in this Article, the clear and unmistakable standard manufactured by the Court in *First Options* has given rise to uncertainty. There is much confusion regarding what situations satisfy this standard, and this Article proposes a solution.

3. *Rent-A-Center* and Delegation Clauses

The separability doctrine from *Prima Paint,* as well as the *First Options* standard for assessing who determines arbitrability, set the stage and combined to produce the Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*.[90] In *Rent-A-Center*, an employer and employee entered into the following arbitration agreement:

> The Company and I mutually consent to the resolution by arbitration of all claims or controversies ('claims'), past, present, or future . . . that the Company may have against me or that I have against . . . the Company. The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement . . .[91]

The employee sued the employer in court for employment discrimination and challenged the enforcement of the arbitration agreement. Specifically, the employee argued that the agreement was unconscionable due to the high costs of arbitration, as well as the agreement's one-sided coverage and discovery provisions.[92]

Applying both *Prima Paint* and *First Options*, and in light of the arbitration agreement's terms providing an arbitrator with "exclusive authority" to resolve any dispute about the agreement's enforceability, the Supreme Court held that an arbitrator must resolve the unconscionability challenge.[93] The Court cited cases recognizing that, although gateway arbitrability matters are generally for a court to decide, parties can delegate such matters to the arbitrator.[94] Then, relying on *Prima Paint*'s separability doctrine, the Court found that

88. 9 U.S.C. § 4 (2018).
89. *Id.*
90. 561 U.S. 63 (2010).
91. *Jackson v. Rent-A-Center-West, Inc.*, No. 03:07–CV–0050–LRH (RAM), 2007 WL 7030394, at *1 (D. Nev. June 7, 2007).
92. *Rent-A-Center*, 561 U.S. at 65; *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912, 914 (9th Cir. 2009).
93. *Rent-A-Center*, 561 U.S. at 69–72.
94. *Id.* at 68–70.

the provision delegating arbitrability matters to the arbitrator (the "delegation clause") was an agreement to arbitrate, separate from the broader arbitration clause by which the parties agreed to arbitrate employment disputes.[95] As a result, challenges to the validity of the broader arbitration clause, as opposed to a challenge specific to the narrow delegation clause, would be delegated to and heard by the arbitrator.[96] Similar to the situation in *Prima Paint*, a party would have to raise a specific challenge to the narrow delegation clause in order for a court to rule on this challenge concerning the making of that particular, narrow agreement.[97]

As interpreted through *Prima Paint*, *First Options*, and *Rent-A-Center*, the FAA establishes a particular partnership or relationship between courts and arbitrators, with certain determinations to be made by courts and others to be made by arbitrators. Generally, courts determine whether the parties are bound to arbitrate or whether a particular dispute falls within the scope of an arbitration clause. However, upon a heightened showing, the parties may clearly and unmistakably agree or delegate such arbitrability determinations to an arbitrator.

II. Conflicting Decisions about the Supreme Court's "Clear and Unmistakable" Standard

The FAA facilitates arbitration through a legal framework where certain decisions are made by courts and other decisions are made by arbitrators. For this system to function smoothly, this partnership between courts and arbitration tribunals should be well-defined. Under the framework established by the Supreme Court, courts generally determine threshold arbitrability issues, such as whether the parties are bound to arbitrate or whether the scope of an arbitration

95. *Id.* at 71–72.

96. *Jackson v. Rent-A-Center West, Inc.*, 561 U.S. 63, 72 (2010).

97. *Id.* To help illustrate how challenges to arbitration should be handled, suppose the following sentence appears buried under multiple hyperlinks on a consumer website: "The company and I agree to arbitrate all disputes arising out of this contract before an arbitrator located in Los Angeles, California." Suppose the consumer, who is located in New York, sues the company for products liability in connection with a sale, and the consumer files the lawsuit in a court in New York. Because there is no clear and unmistakable evidence that the parties agreed to delegate to an arbitrator the issue concerning the enforceability of the arbitration clause, a court would decide whether the clause is unconscionable. However, if the arbitration clause also contained the following phrase, "arbitrators shall determine any issues regarding the formation, enforceability, validity, or scope of this arbitration clause," then an arbitrator would generally be responsible for determining whether the arbitration clause is enforceable.

clause covers a particular claim, unless the parties clearly and unmistakably agreed to delegate such arbitrability issues to an arbitrator.

Unfortunately, there is much confusion in the law regarding this heightened clear and unmistakable standard. As a result, some arbitrability issues are stuck in a legal limbo where parties fight for years in court concerning the narrow issue of whether a court or arbitrator should make a threshold arbitrability determination. Borrowing the tripartite analysis from *First Options*, such parties are stuck litigating the third level dispute (whether a court or arbitrator will resolve particular arbitrability issues)[98] because of uncertainty either in the law or how the clear and unmistakable standard should be interpreted. With years of litigation regarding the third level of dispute, the parties cannot reach the second level of dispute (whether there is a binding obligation to arbitrate),[99] or the deeper, more significant first level of dispute (the underlying substantive merits).[100] This tension in arbitration law is counterproductive and undermines the value of arbitration as a potentially efficient method of dispute resolution.

This Section summarizes the conflicting court opinions and views that have emerged regarding the clear and unmistakable standard, which directly impacts the allocation of decision-making authority between a court and arbitrator.

A. *Arbitrability Determinations*

One potential benefit of arbitration is that parties can develop or design special rules to govern the resolution of their dispute, and the different categories of arbitration agreements discussed above reflect different degrees of party involvement in designing specialized arbitration rules. For example, with the single, simple sentence agreement to arbitrate, parties have committed to arbitrate, but they are exerting very little control over the process. Instead, with a single arbitration sentence, the arbitrator, once appointed, will likely have much control over the process, and the arbitrator will likely fill in the gaps regarding the details of the arbitration process to be followed. At the opposite extreme of the spectrum, where parties have drafted

98. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).
99. *Id.*
100. *Id.*

their own, specialized, tailored arbitration clause in detail, the parties have tried to define for themselves almost every conceivable major procedure or stage for an arbitration. Within the broad middle range, parties generally rely on outside arbitration rules to govern the arbitration process.[101] There is uncertainty in arbitration law with respect to this middle range of agreements.

If one has an arbitration agreement falling in the first category of arbitration agreements described above, where there is a simple, one-sentence promise to arbitrate,[102] the parties generally should not be treated as having satisfied the heightened clear and unmistakable standard from *First Options*.[103] In this situation, the parties have agreed to arbitrate the merits of a substantive dispute, but there is no express agreement at all to arbitrate arbitrability, much less a clear and unmistakable one.[104] Under the framework established by *First Options*, the default rule should apply whereby courts will determine any threshold arbitrability issues that may arise.[105]

When the parties have a comprehensive, detailed arbitration clause, whether the parties have satisfied the heightened clear and unmistakable standard from *First Options* will depend on the specific language drafted by the parties. If the parties' agreement contains a specific, detailed delegation clause, then the *First Options* standard would be satisfied. For example, if the parties' arbitration agreement states that an arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, validity, or formation of this arbitration agreement,[106] then the parties

101. Agreements within this middle range may involve arrangements with two or three components: (1) a promise to arbitrate; (2) a reference to outside rules developed by an arbitration provider which will govern the proceeding; and (3) possibly some special rules in the agreement that override or supplement some of the outside rules developed by the arbitration provider.

102. *Supra* Section I.B.

103. *First Options*, 514 U.S. at 944.

104. When a party has a broad arbitration clause, such as a clause covering all disputes arising out of or relating to an agreement, such a broad clause does not satisfy the clear and unmistakable standard. *Simply Wireless, Inc v. T-Mobile US, Inc*, 877 F.3d 522, 526–27 (4th Cir. 2017), *abrogated on other grounds by Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). *But see NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1031 (2d Cir. 2014) ("We have found the 'clear and unmistakable' provision satisfied where a broad arbitration clause expressly commits all disputes to arbitration, concluding that all disputes necessarily includes disputes as to arbitrability."). It is the position of this Article that a broad arbitration clause should not satisfy the heightened clear and unmistakable standard, and instead, courts should adopt a bright-line rule that parties must include an explicit delegation provision in their agreement in order to satisfy the heightened standard.

105. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

106. *See, e.g.*, *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 65–66 (2010).

have opted out of the default rule and satisfied the clear and unmistakable standard from *First Options*. In this situation, an arbitrator will have the power to adjudicate threshold arbitrability matters instead of a court. But if the parties' detailed agreement fails to include an explicit delegation, an arbitrator would not have such adjudicatory power.

However, with the middle range of arbitration clauses, where an arbitration clause incorporates by reference the arbitration rules of an outside arbitration provider, there are clashing, diverging court opinions as to whether the clear and unmistakable standard from *First Options* has been satisfied.

B. *Conflicting Views Regarding Arbitrability Determinations When A Contract Incorporates by Reference the Rules of An Arbitration Provider*

Courts have developed conflicting views about who determines arbitrability issues where an arbitration clause incorporates by reference the arbitration rules of an outside arbitration provider. For example, if the parties' agreement says that they will arbitrate all disputes arising out of the agreement pursuant to the Consumer Arbitration Rules of the AAA, there is uncertainty whether the agreement's incorporation of such rules satisfies the clear and unmistakable standard.

One view, the "Mere Incorporation View," is that an arbitration agreement's mere reference or incorporation of the rules of an outside arbitration provider satisfies the clear and unmistakable standard, so long as the outside rules recognize the power of an arbitrator to rule on his or her own jurisdiction. Most federal appellate courts to have considered this situation have reached this conclusion, but with minimal or no analysis.[107] When a court provides some analysis regarding this view, it tends to be that the parties' agreement refers to

107. *See, e.g.*, *Petrofac, Inc. v. DynMcDermott Petrol. Ops. Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (adoption of the AAA Rules is clear and unmistakable evidence); *Fallo v. High–Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (same); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (same); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) ("By incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir.1989); *see also HealthplanCRM, LLC v. AvMed, Inc.*, 458 F. Supp. 3d 308, 322 (W.D. Pa. 2020) ("What's troubling to the Court, however, is that many of these decisions simply state, without much analysis, that incorporation of AAA rules is a sufficiently "clear" delegation because that is the majority view.").

the rules of an outside arbitration organization, and such rules in turn recognize that an arbitrator can rule on arbitrability issues.[108]

The competing view adopted by other courts, primarily state courts, is the "Anti-Incorporation View," that mere reference to or incorporation of the rules of an outside arbitration provider fails to satisfy the heavy standard of *First Options*. For example, in *Doe v. Natt*, a Florida appellate court found that the AAA's jurisdictional rule is "two steps" removed from the parties' agreement itself, "hidden" within a larger body of procedural rules, and merely grants non-exclusive authority to an arbitrator without necessarily excluding the power of a court to rule on threshold arbitrability matters.[109] As a result, the appellate court ruled there was no clear and unmistakable agreement based on the mere reference to the AAA's rules in the parties' agreement.[110] Also, in *Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Const., Inc.*, the Supreme Court of South Dakota rejected "a per se finding of intent to arbitrate arbitrability based solely upon the incorporation of [outside arbitration rules] in the agreement."[111] Instead, the court explained that the focus should be on the language found in the parties' agreement.[112] Similarly, in *Ajamian v. CantorCO2e, L.P.*, a California appellate court seriously questioned how the mere incorporation of AAA rules would satisfy the clear and unmistakable standard.[113] The court reasoned that "[t]here are many reasons for stating that the arbitration will proceed by particular rules, and doing so does not indicate that the parties' motivation was to announce who would decide threshold issues of enforceability."[114]

To make matters worse, there has been a further splintering of authority, beyond the two competing views set forth above. Some-

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108. *See, e.g.*, *Innospec Ltd. v. Ethyl Corp.*, No. 3:14–cv–158–JAG, 2014 WL 5460413, at *4 (E.D. Va. Oct. 27, 2014) (explaining that because outside arbitration rules allow for arbitrator to rule on jurisdiction, and because the parties agreed to arbitrate pursuant to such rules, the parties have satisfied the clear and unmistakable standard).

109. *Doe v. Natt*, 299 So. 3d 599, 609 (Fla. Dist. Ct. App. 2020), *rev'd sub nom. Airbnb, Inc. v. Doe*, No. SC20-1167, 2022 WL 969184, at *5 (Fla. Mar. 31, 2022) (reasoning that the heightened standard is satisfied because the parties' agreement incorporates the AAA's rules, which in turn provide for an arbitrator to resolve arbitrability issues).

110. *Id.*

111. 701 N.W.2d 430, 437 (S.D. 2005).

112. *Id.*

113. 137 Cal. Rptr. 3d 773, 788–89 (Cal. Ct. App. 2012).

114. *Id.*; *see also Global Client Solutions, LLC v. Ossello*, 367 P.3d 361, 369 (Mont. 2016) (mere incorporation of outside arbitral rules is not clear and unmistakable evidence).

times these splinters even occur within the same jurisdiction, between judges in the same courthouse. For instance, probably in an attempt to limit the Mere Incorporation View, some judges have held that mere incorporation does not satisfy the *First Options* standard where unsophisticated parties, such as consumers or employees, are involved.[115] However, other judges have held that the Mere Incorporation View prevails, regardless of the identity of the parties.[116]

Another splintering regarding the Mere Incorporation View involves the problem of non-signatories. Sometimes, there may be disagreement whether an obligation to arbitrate exists between a signatory to an arbitration clause and a third party, who is not a signatory to an arbitration clause.[117] Some courts have broadly applied the Mere Incorporation View in this setting so that if the arbitration clause incorporates outside provider rules recognizing the power of an arbitrator to rule on arbitrability, then an arbitrator will decide whether there is an obligation to arbitrate with respect to non-signatories.[118] However, other courts find that the Mere Incorporation View should not apply in situations involving non-signatories, and courts must determine whether there is an obligation to arbitrate with respect to non-signatories.[119]

A further splintering that has developed involves the problem of class or collective proceedings. Normally, whether an arbitration agreement provides for class proceedings is an issue for a court to resolve, but parties may delegate this issue to an arbitrator.[120] Courts are divided on whether the Mere Incorporation View controls in this setting of class or collective proceedings.[121]

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115. *See, e.g.*, *Ingalls v. Spotify USA, Inc.*, No. C 16-03533 WHA, 2016 WL 6679561, at *3 (N.D. Cal. Nov. 14, 2016) (incorporation of the AAA rules is insufficient to establish delegation in consumer contracts involving at least one unsophisticated party).

116. *See, e.g.*, *McLellan v. Fitbit, Inc.*, No. 3:16-cv-00036-JD, 2017 WL 4551484, at *2–*3 (N.D. Cal. Oct. 11, 2017) (Mere Incorporation View applies, even if unsophisticated parties involved).

117. This type of disagreement existed in the *First Options* case, where Mr. and Mrs. Kaplan were non-signatories to the governing arbitration agreement. *First Options*, 514 U.S. at 941.

118. *See, e.g.*, *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 714–15 (5th Cir. 2017).

119. *See, e.g.*, *Altenhofen v. S. Star Cent. Gas Pipeline, Inc.*, NO. 4:20CV-00030-JHM, 2020 WL 6877575, at *4 (W.D. Ky. Nov. 23, 2020).

120. *See, e.g.*, *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 335–36 (3d Cir. 2014).

121. *Compare Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763–64 (3d Cir. 2016) (rejecting application of the Mere Incorporation View in connection with class arbitrability issues), *with Dish Network L.L.C. v. Ray*, 900 F.3d

Looking at all of these different views, the federal appellate courts generally appear to favor the Mere Incorporation View: mere incorporation of outside rules satisfies the heightened consent standard, especially outside of the special context involving class action arbitrability matters. However, as explained below, this Article argues that courts should adopt the Anti-Incorporation View. An arbitration clause's mere reference to or incorporation of outside arbitration rules cannot satisfy the heightened standard of clear and unmistakable evidence.

III. Courts Should Adopt the Anti-Incorporation View

This Article proposes a simple rule, based on the Supreme Court's *Rent-A-Center* decision, whereby courts should require express delegation language in the parties' agreement itself, not in outside, incorporated arbitration rules. If the power to rule on jurisdiction is solely recognized in outside arbitration rules, and not in the parties' agreement, the heightened clear and unmistakable standard from *First Options* should not be satisfied. This Anti-Incorporation View is justified for several reasons.

A. *Concerns About Impartiality and Conflicts of Interest*[122]

"No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."

James Madison, Federalist No. 10.

1240, 1247–58 (10th Cir. 2018) (Mere Incorporation View applies in connection with class arbitrability issues).

122. These arguments regarding impartiality and conflicts of interest were previously developed by Richard D. Faulkner and Philip J. Loree, Jr., who joined the author of this Article in the *amicus curiae* briefs filed in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 656 (2021), and *Airbnb, Inc. v. Doe*, No. SC20-1167, 2022 WL 969184 (Fla. Mar. 31, 2022). Brief of Arbitrators, Arbitration Practitioners, and Arbitration Scholars as *Amici Curiae* Supporting Respondent, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963, 2020 WL 6273641 (U.S. Oct. 20, 2020); *Amici Curiae* Brief of Henry Allen Blair, Angela Downes, Richard D. Faulkner, Clerk Freshman, Jill I. Gross, Philip J. Loree, Jr., and Imre Stephen Szalai in Support of the Position of the Respondents, *Airbnb, Inc. v. Doe*, No. SC20-1167, 2022 WL 969184 (Fla. Mar. 31, 2022); *see* Richard D. Faulkner & Philip J. Loree, Jr., Schein's *Remand Decision: Should Scotus Review the Provider Rule Incorporation-by-Reference Issue?*, 38 Int'l Inst. for Conflict Prevention & Resol., Alts. to High Cost of Litig. 70 (May 2020).

The Mere Incorporation View is problematic because of concerns with impartiality and conflicts of interest. As set forth in *First Options*, the governing framework requires heightened consent to reverse the normal presumption (or default rule) that courts generally resolve threshold arbitrability issues.[123] The Court in *First Options* suggests that party expectations may help justify this heavy standard because a "party often might not focus upon that [arcane] question or upon the significance of having arbitrators decide the scope of their own powers," and there is a risk that without the heavy standard, courts may "force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[124]

The heightened standard of consent recognized in *First Options* helps promote fairness in the arbitration process by alleviating serious concerns about conflicts of interest and impartiality.[125] When an arbitrator is tasked with deciding a gateway question of arbitrability, the arbitrator may bear a fundamental conflict of interest because the arbitrator may have a direct economic interest in the outcome of

123. *First Options*, 514 U.S. at 944.

124. *Id.* at 945.

125. Both ethics rules and the FAA require arbitrators to be impartial. An ethics code developed by the American Arbitration Association and American Bar Association provides that persons who are requested to serve as arbitrators should disclose, before accepting an appointment, whether they have any "direct or indirect financial or personal interest in the outcome of the arbitration." *The Code of Ethics for Arbitrators in Commercial* Disputes, AM. ARB. ASS'N 4 (Mar. 1, 2004), https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf [https://perma.cc/MQZ7-4RBY]. JAMS has also issued ethics guidelines that provide "[a]n Arbitrator should promptly disclose, or cause to be disclosed all matters required by applicable law and any actual or potential conflict of interest or relationship or other information, of which the Arbitrator is aware, that reasonably could lead a Party to question the Arbitrator's impartiality." *Arbitrators Ethics Guidelines,* JAMS §V(A) https://www.jamsadr.com/arbitrators-ethics/ [https://perma.cc/5CS3-2G5Y]. There is some tension in arbitration law regarding the requirement of impartiality under the FAA. One view is that arbitrators should not be held to the same high standards of decorum as judges "because [arbitrators] are men of affairs, not apart from but of the marketplace, [which makes them] effective in their adjudicary function." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring, joined by Marshall, J.). An arbitrator's past experiences or personal interests or connections to a certain industry may enhance the arbitrator's ability to render a quick, fair resolution in a matter. Having an expert as an arbitrator may justify a more relaxed standard of impartiality for arbitrators compared to judges. However, another view is that arbitrators should be held to a higher standard of impartiality than judges because arbitrators, when compared to judges, "have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id.* at 149. *See also Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 282–83 (5th Cir. 2007) (noting the tension in the plurality and concurring opinions in *Commonwealth Coatings*).

this arbitrability determination. Arbitrators are typically paid by the hour or per day of hearings,[126] and thus, an arbitrator would likely lose fees if she or he rules against arbitrability and determines that an underlying claim is not arbitrable.[127] When an arbitrator is considering and ruling on the underlying merits of a dispute, for example, whether an employer discriminated against an employee, the arbitrator generally would not have a financial interest one way or the other in this particular dispute. However, when ruling on arbitrability matters, such as whether the employee and employer are bound to arbitrate or whether this discrimination claim falls within the scope of an arbitration clause, the arbitrator has a direct financial interest in such an arbitrability decision and ruling in favor of arbitration. If the arbitrator rules against arbitrability, for example, by concluding that the dispute falls outside the scope of the arbitration clause or by concluding that the arbitration agreement is not valid, the arbitrator will not hear the underlying merits. But if the arbitrator rules in favor of arbitrability, the arbitrator in effect extends his or her role and moves on to considering the underlying merits. And, when an arbitrator is paid by the day or by the hour, the decision in favor of arbitrability in effect increases the arbitrator's income.[128] When a court instead rules on arbitrability matters, the judge does not have such a direct financial interest in the outcome of this arbitrability decision.[129]

This personal financial interest of the arbitrator in ruling in favor of arbitrability is highly problematic because "[i]t is an elementary principle of justice that no one should serve as the judge in their

126. *See, e.g.*, *Costs of Arbitration*, Am. Arb. Ass'n 2, https://www.adr.org/sites/default/files/document_repository/AAA228_Costs_of_Arbitration.pdf (recognizing that an arbitrator's compensation "might be per hour, per day, or per hearing") (last visited Aug. 3, 2021) [https://perma.cc/9P7R-BNEL]; *Aquino v. BT's on the River, LLC*, No. 20-20090-CIV, 2021 WL 99545, at *1 (S.D. Fla. Jan. 12, 2021) (recognizing $500 hourly fee of arbitrator); *Swain v. LaserAway Med. Grp., Inc.*, 270 Cal. Rptr. 3d 787, 800 (Ct. App. 2020) (hourly rates of arbitrators "ranged from $375 to $1,000," with "daily rates of up to $10,000").

127. One notable exception, however, would involve an arbitrator who is paid a flat fee, regardless of the length of a hearing.

128. One potential solution to avoid this financial conflict of interest is to have one arbitrator rule on arbitrability, and if a claim is arbitrable, a different arbitrator or arbitration tribunal would hear the underlying merits. By having two separate arbitrators or separate tribunals, the "arbitrability" arbitrator would not stand to gain additional compensation for ruling in favor of arbitrability.

129. A judge in court may have an interest in clearing his or her docket by sending a case to arbitration, but a judge's direct monetary compensation should not change on the basis of the arbitrability determination.

own cause. *Nemo iudex in causa sua*."[130] In several prior cases, the Supreme Court has upheld the disqualification of a judge if the judge has a conflict of interest based on financial motives comparable to the motives of an arbitrator ruling on arbitrability. For example, in *Tumey v. Ohio*, a local "liquor court" was established during Prohibition to enforce a state's Prohibition laws, and the village's mayor served as a judge for this local court.[131] However, the mayor-judge's compensation was troubling. For his services, the mayor-judge's compensation came from fines he levied upon convicted defendants.[132] In receiving $12 for convicting the defendant in the case (and about $100 per month for such convictions), he had a direct financial interest in convicting people for unlawful possession of liquor, and he would not receive such funds if he acquitted a defendant.[133] The fines imposed in *Tumey* also funded the village's general treasury.[134] The Supreme Court required disqualification of the mayor-judge under these circumstances "both because of [the mayor-judge's] direct pecuniary interest in the outcome, and because of his official motive to convict . . . to help the financial needs of the village."[135] Just like the mayor-judge in *Tumey* who pocketed fees for every decision to convict, an arbitrator stands to receive significant fees for finding that the parties are obligated to arbitrate. Having an adjudicator with a direct economic interest in reaching a particular outcome (such as a finding of conviction in *Tumey* or an arbitrator's ruling in favor of arbitrability) violates fundamental fairness.

Tumey involved an adjudicator with a direct financial interest in the outcome, but the Supreme Court has also disqualified adjudicators with indirect financial interests. For example, in the case of *Ward v. Monroeville*, a mayor who was in charge of the financial affairs of a village also served as a judge in traffic court.[136] A significant part of the village's funding came from the fines imposed by the mayor-judge through this traffic court.[137] While the mayor-judge in *Tumey* had a direct financial interest in a decision to convict, the mayor-judge in *Ward* had an indirect financial interest. Although the $50 fines in *Ward* went to the village's general treasury, not the

130. *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *17 (D. Vt. May 18, 2016).
131. 273 U.S. 510, 514–15 (1927).
132. *Id.* at 520.
133. *Id.* at 520, 523, 532.
134. *Id.* at 523–24.
135. *Id.* at 535.
136. 409 U.S. 57, 57–58 (1972).
137. *Id.* at 58–59.

mayor's personal pocket as in *Tumey*, the Court still found that the mayor-judge in *Ward* could not be impartial and had to be disqualified.[138] The mayor-judge faced a "possible temptation" arising from his "executive responsibilities for village finances."[139]

The Supreme Court has been vigilant in safeguarding the fairness of adjudicatory processes by promoting the neutrality and impartiality of various tribunals. In *Gibson v. Berryhill*, the Court affirmed the disqualification of a board of optometrists from presiding over a hearing which could revoke the licenses of competing optometrists.[140] Such an adjudicatory hearing could not be fair and impartial because the optometrists serving in a judicial capacity had a financial interest in the outcome of the case involving competing optometrists.[141] Revoking the licenses of competing optometrists could provide more business to those serving on the adjudicatory board, all of whom were in private practice.[142] As recognized by the Court, "[i]t is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."[143] In *Tumey*, *Ward*, and *Gibson*, the Court found that an adjudicator's financial interest, both direct and indirect, in the outcome of his or her decision-making stains the process by preventing the adjudicator from being fair and impartial and provides an immediate basis for disqualification.[144]

Citing *Tumey*, the dissenting Justices in *Prima Paint* explained that "it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation."[145] In the

138. *Id.* at 57, 61–62.
139. *Id.* at 60 (citation omitted).
140. 411 U.S. 564, 578 (1973).
141. *Id.* at 579.
142. *Id.* at 578.
143. *Id.* at 579 (citing *Tumey* and *Ward*).
144. *See also Connally v. Georgia*, 429 U.S. 245, 250 (1977) (system whereby a justice of the peace received $5.00 for each search warrant issued, but no such compensation if a warrant is denied, was unconstitutional because the decision-maker had a "direct, personal, substantial, pecuniary" interest in reaching a particular outcome.)
145. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 416 (1967) (Black, J., dissenting, joined by Douglas and Stewart, JJ.). The dissenting Justices in *Prima Paint* described the problem of biased arbitrators as involving questions of due process. Supreme Court cases like *Tumey*, *Ward*, and *Gibson* involve a constitutional framework of due process since these judicial tribunals involve state action. Some courts have held that arbitration does not involve state action or constitutional due process rights, and so cases involving constitutional due process rights may not directly control. *See, e.g.*, *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) ("state action element of a due process claim is absent in private arbitration cases" (citations omitted)). However, just like in *Prima Paint*, there have been times

Prima Paint fact pattern, the arbitrator is tasked with ruling on a fraudulent inducement challenge to the broader contract, and if an arbitrator "determine[s] that a contract is void because of fraud, there is nothing further for them to arbitrate."[146] Although *Prima Paint* involves claims of fraudulent inducement and attacks on the broader arbitration clause, a similar concern about financial conflicts of interest would apply in connection with an arbitrator ruling on arbitrability matters. Just like the disqualifying financial interests of the adjudicators in *Tumey*, *Ward*, and *Gibson*, there is an indisputable and clear conflict of interest and personal, direct, financial stake for arbitrators to rule in favor of arbitration when resolving a threshold arbitrability matter. *Ward* involved a $50 indirect financial incentive in 1972 (which would be about $335 in 2022, adjusted for inflation),[147] while *Tumey*, a 1927 case, involved a $12 direct financial incentive (about $196 in 2022, adjusted for inflation).[148] These amounts, which are not hourly rates but instead rates per case, are significantly lower than the hourly rates arbitrators can earn for ruling in favor of arbitrability and continuing to hear the merits of an

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when the Supreme Court applies due process concepts in connection with arbitration. For example, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Court discussed class arbitration using a due process framework. *Id.* at 349–350. When analyzing concerns about class arbitration, the Court in *Concepcion* relied on its landmark decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), which defined due process rights in the context of judicial class actions. *Concepcion,* 563 U.S. at 349. *See also Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 598 (6th Cir. 2013) (observing "due-process concerns" with complex procedures used in arbitration); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 954–55 (2000) (arbitration can involve state action and trigger constitutional due process protections). Even if arbitration technically does not trigger an application of constitutional due process rights, arbitration still involves due process-like norms of fundamental fairness, and the statutory justifications for judicial vacatur of an arbitral award arguably incorporate such principles. 9 U.S.C. § 10 (2018). If an arbitrator has a personal financial stake in an arbitration, one can argue there is "evident partiality," a grounds for vacatur of an arbitral award under 9 U.S.C. § 10 (2018), because the arbitrator is not a neutral decision-maker. *Hernandez v. Smart & Final, Inc.*, No. 09-CV-2266 BEN NLS, 2010 WL 2505683, at *7 (S.D. Cal. June 17, 2010) (citation omitted) ("situations involving 'evidence partiality' for purposes of 9 U.S.C. § 10(a) include an arbitrator's financial interest in the outcome of the arbitration."). Thus, even if *Tumey*, *Ward*, and *Gibson* are not directly applicable to arbitration, the concerns raised in these due process cases are instructive for analyzing the fairness of arbitration proceedings.

146. 388 U.S. at 416.

147. *Ward*, 409 U.S. at 57; *CPI Inflation Calculator,* Bureau Lab. Stats, https://www.bls.gov/data/inflation_calculator.htm (last visited Apr. 9, 2022) [https://perma.cc/8MUF-9DFW].

148. *Tumey*, 273 U.S. at 531; *CPI Inflation Calculator*, Bureau Lab. Stats, https://www.bls.gov/data/inflation_calculator.htm (last visited Apr. 9, 2022) [https://perma.cc/8MUF-9DFW].

underlying dispute. There is evidence that arbitrators can earn between $300 and $1,000 per hour,[149] and an arbitrator who rules against arbitrability would lose these significant fees.[150]

These concerns about an arbitrator's personal, direct, financial conflict of interest in ruling on arbitrability help justify both the default rule and reasonable expectation, recognized in the FAA, that a judge or jury generally resolves arbitrability matters instead of an arbitrator,[151] as well as the heightened standard of consent required for reversing this default rule.[152]

B. *Concerns About the Constitutional Right to a Jury Trial*

The Seventh Amendment to the United States Constitution provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . "[153] One can generally waive this right to a jury through consent, and such a waiver can occur by agreeing to arbitrate.[154] However, what happens if there is uncertainty or disagreement whether this waiver has occurred, namely, whether there is a valid agreement to arbitrate covering a particular dispute?

When the bills that would become the FAA were being debated in Congress, the FAA's principal drafter, Julius Cohen, discussed how the proposed statute would operate. He explained "there is one constitutional provision which we considered," the right to a trial by

149. One commentator has observed that as a general rule of thumb, "the most in-demand arbitrators' rates tend to mirror the rates of the most skilled litigators in their respective jurisdictions." Deborah Rothman, *Trends in Arbitrator Compensation*, 23 DISP. RESOL. MAG. 8, 9 (Spring 2017); *id.* at 8–11 (AAA arbitrators may earn from $300 per hour to more than $1,000 per hour). *See also Kinsella v. JAMS, Inc.*, No. D073159, 2019 WL 2511410, 2019 WL 2511410, at *5 n.3 (Cal. Ct. App. June 18, 2019) ("The hourly cost for JAMS neutrals range between $300 to $1000. [The former judge's] hourly rate of $550 is average."); *Weiler v. Marcus & Millichap Real Estate Inv. Servs., Inc.*, 232 Cal. Rptr. 3d 155, 159 (2018) (three-person panel of AAA arbitrators charged $1,450 per hour); *Monfared v. St. Luke's Univ. Health Network*, No. 5:15-CV-04017, 2016 WL 6525411, at *1 (E.D. Pa. Nov. 2, 2016) (list of AAA arbitrators set forth rates ranging from $250 and $550 per hour); *Penilla v. Westmont Corp.,* 207 Cal. Rptr. 3d 473, 479 (Cal. Ct. App. 2016) ("fees for a single [JAMS] arbitrator ranged from $500 to $800 per hour").

150. The financial interest of an arbitrator would appear to be even more significant in a case where the arbitrability issue involves class proceedings. *See supra* notes 119–20 and accompanying text.

151. 9 U.S.C. § 4 (2018).

152. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

153. U.S. CONST. AMEND. VII.

154. *Berkovitz v. Arbib & Houlberg*, 130 N.E. 288, 291 (N.Y. 1921).

jury, and he explained that such a right can be waived in advance. [155] However, he recognized that there can be doubts about this waiver, such as "whether that is your signature to the paper, or whether you authorized that signature, or whether the paper is a valid paper or not, whether it was delivered properly."[156] Cohen explained that these are arbitrability questions "which you have not waived the right of trial by jury on."[157] This discussion from Cohen helps explain why a right to a jury trial was recognized in section 4 of the FAA. As further discussed in a Senate report about the proposed FAA, this "constitutional right to a jury trial is adequately safeguarded" through section 4 of the FAA, which provides for a jury trial if the making of the arbitration agreement is at issue.[158]

Although the *First Options* case suggested that party expectations may help justify the heightened clear and unmistakable standard,[159] the Seventh Amendment also supports this heavy standard. When the FAA was being drafted, concerns were raised about potential Seventh Amendment violations arising from a court's order wrongfully forcing non-consenting parties to arbitrate; to help ensure that no one is stripped of their Seventh Amendment rights, section 4 of the FAA guarantees a jury trial for arbitrability issues.[160] Rigorous enforcement of the heightened clear and unmistakable standard will help ensure that the waiver of constitutional rights is knowing, informed, and intentional.[161]

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155. *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 17 (1924) (statement of Julius Cohen).

156. *Id.*

157. *Id.* at 17, 34 (discussing FAA's provision regarding a jury trial); *Turner v. PillPack, Inc.*, No. 5:18-CV-66-TBR, 2019 WL 2314673, at *6 (W.D. Ky. May 30, 2019) (ordering jury trial to determine whether the plaintiff had entered into an arbitration agreement).

158. S. REP. NO. 536, at 3 (1924).

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

160. 9 U.S.C. § 4 (2018) ("Where such an issue [regarding the making of the arbitration agreement] is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.").

161. *Cf. Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 685 (2015) (waiver of the right to Article III adjudication must be "knowing and voluntary").

Section 4 of the FAA avoids these constitutional concerns as well as the separate concerns about improper conflicts of interest by providing, without exception, that a judge and jury determine arbitrability matters—not an arbitrator with a financial self-interest in ruling in favor of arbitrability. It should be emphasized that, despite the holding in *First Options*, the text of the FAA does not allow or recognize any exception for an arbitrator to make arbitrability determinations. Instead, the FAA only recognizes the ability of a court to resolve arbitrability disputes.[162] In response to this textual argument that only courts can resolve arbitrability disputes, the Supreme Court has implicitly recognized and dismissed this textual argument by tersely stating "that ship has sailed."[163] Perhaps the Court today, with some Justices who may value textual arguments, [164] would address the situation in *First Options* differently and hold that the court must always determine arbitrability matters. However, in light of the constitutional concerns and conflicts of interest mentioned above, courts should very narrowly interpret the exception recognized in *First Options* and rigorously enforce the heightened clear and unmistakable standard.

C. *Concerns About a Party's Awareness of Delegation*

The Supreme Court in *First Options* described the problem of who decides arbitrability matters as an "arcane" issue.[165] Other courts have described the Supreme Court's interpretations of the FAA as "an eye-glazing conceptual framework" because of its complexity.[166] Sophisticated parties or repeat users of arbitration may possibly understand this hypertechnical issue of arbitration law, or they may have access to specialized counsel who could explain this complex issue. However, these rules about arbitrating whether one has agreed to arbitrate, or delegating to an arbitrator the decision of

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162. 9 U.S.C. § 4 (2018).

163. *Henry Schein, Inc. v. Archer & White Sales, Inc*., 139 S. Ct. 524, 530 (2019) ("Archer and White interprets [section 4 of the FAA] to mean, in essence, that a court must always resolve questions of arbitrability and that an arbitrator never may do so. But that ship has sailed.").

164. *See generally* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020) (describing Justice Neil Gorsuch as a "self-proclaimed textualist"). Justice Elena Kagan has stated "We're all textualists now." Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg%20 [https://perma.cc/2DA8-65NQ].

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

166. *Schumacher Homes of Circleville, Inc. v. Spencer*, 774 S.E.2d 1, 5 (W. Va. 2015), *cert. granted, judgment vacated*, 577 U.S. 1129 (2016).

whether one has agreed to arbitrate, "are nearly impossible for people of ordinary knowledge to comprehend."[167]

Treating the heightened clear and unmistakable evidence standard as satisfied merely because of a contract's incorporation by reference of outside arbitration rules is problematic. There is evidence that an average person may not even be aware of or understand the significance of arbitration clauses in his or her contracts. In a report to Congress, the Consumer Financial Protection Bureau found that "[c]onsumers are generally unaware of whether their credit card contracts include arbitration clauses[,]" and ninety-three percent of consumers with such clauses in their agreements generally either do not know whether they can sue in court or wrongly believe that they can do so.[168]

If an average person is unlikely to understand the significance of a basic arbitration provision, it is even less likely that such a person would understand an antecedent delegation agreement to arbitrate buried in a separate set of complex arbitration rules. In other words, the purported delegation promise is at least one or two steps removed from the original arbitration agreement, which itself is likely not understood.

For example, suppose a consumer created an account with Walmart.com in January 2021. It is possible for the consumer to set up a new account on Walmart.com's page by simply entering a name, email, and password, without reviewing Walmart's Terms of Use, which is hyperlinked at the bottom of the screen for creating an account.[169] In July 2021, imagine the consumer orders a product online at Walmart.com, but the product is defective or fraudulently represented in some manner. Or, in a different hypothetical, suppose a consumer opens a bank account in January 2021, and a few months later in July 2021, when the consumer uses a payment service from the bank, something goes wrong with the payment service, or an improper charge appears.

In these examples, the transaction giving rise to a claim occurs six months after the original terms of service or contract was purportedly entered into. It is possible that the original contract was signed at a local branch office of the bank, where a bank employee rushed

167. *Id.* (internal formatting modified)

168. Consumer Financial Protection Bureau, *Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a)*, at 11, 19 (2015).

169. *Create your Walmart Account*, WALMART, https://www.walmart.com/account/signup (last visited Apr. 9, 2022) [https://perma.cc/S8U6-JSDZ].

the consumer through several screens of disclosures to sign, directing the consumer to quickly sign or initial each screen without really having a chance to read it. Or a customer created the Walmart account on the small screen of a smartphone, where the popup, on-screen keyboard covers up a significant part of Walmart's website. To see the arbitration clause, a customer would have to scroll through several detailed paragraphs of Walmart's Terms of Use, which in turn reference the arbitration rules of JAMS.[170] A consumer would then have to go to the website of JAMS to read through its rules. The JAMS Streamlined Arbitration Rules & Procedures, which are referenced in Walmart's Terms of Use, contain the following in Rule 8, which is titled "Interpretation of Rules and Jurisdictional Challenges":

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.[171]

If an average consumer goes through multiple steps and happens to see this particular rule, Rule 8 out of 28 rules, how would the consumer interpret the language about "jurisdictional and arbitrability disputes?" And what does it mean that the arbitrator has authority to resolve these particular issues "as a preliminary matter"? Will someone else rule on these issues as a final matter, as opposed to a preliminary matter? This purported delegation clause is separated in time, and by several steps, from the transaction giving rise to a claim several months later.[172]

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170. *Warlmart.com Terms of Use*, WALMART § 20 (May 28, 2021), https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0 [https://perma.cc/J9XD-9CB6].

171. *JAMS Streamlined Arbitration Rules and Procedures*, JAMS, Rule 8(b) (June 1, 2021), https://www.jamsadr.com/rules-streamlined-arbitration [https://perma.cc/3RWD-RPVM].

172. A counter-argument could be that everyone has a duty to read every line of every contract they sign. There is a line of authority recognizing such a duty. *See, e.g., Ross v. Citifinancial, Inc*., 344 F.3d 458, 464 (5th Cir. 2003) ("[A] party is under an obligation to read a contract before signing it.") (citations omitted). However, other cases, probably recognizing the reality that not everyone will read every term in a contract, appear to require a heightened form of consent, particularly for online transactions. *See, e.g.*, *Specht v. Netscape Comm'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (Sotomayor, J.) (explaining that there should be "reasonably conspicuous notice" of online contract terms).

If ninety-three percent of consumers with arbitration clauses in their contracts generally either do not know whether they can sue in court or wrongly believe that they can do so, one would have to suspend belief to conclude that an unsophisticated consumer or employee clearly and unmistakably agreed to arbitrate the issue of whether they agreed to arbitrate through a contract's mere incorporation by reference of an arbitration provider's rules found outside of the contract. As recognized by one court, to conclude that an agreement's incorporation by reference of outside rules is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability would be tantamount to "tak[ing] a good joke too far."[173]

There are millions of arbitration agreements in the United States purporting to bind consumers and workers.[174] If the courthouse door is easily shut for millions of Americans in such a manner, through a fantastical assumption that a consumer or worker agreed to arbitrate threshold arbitrability matters because arbitral rules found outside of a contract say so, such a ruling could have an adverse impact on the administration of justice. Unsophisticated parties who never consented to arbitrate may be forced to arbitrate whether they agreed to arbitrate. Such a Kafkaesque ruling built on a foundation of arcane legal fictions weakens public trust in the courts and in the arbitration process itself.

D. *The Changing Nature of Most Arbitral Rules Prevents a Clear and Unmistakable Delegation Through Incorporation*

The mere incorporation of outside arbitration rules should never satisfy the heightened clear and unmistakable standard. An additional reason why incorporation should not suffice is that the rules of many well-established arbitration organizations are fluid and can be

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173. *Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 429 (E.D. Pa. 2016) ("[I]ncorporating forty pages of arbitration rules into an arbitration clause is tantamount to inserting boilerplate inside of boilerplate, and to conclude that a single provision contained in those rules amounts to clear and unmistakable evidence of an unsophisticated party's intent would be to take 'a good joke too far.'") (citation omitted).

174. Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019) (81% of America's largest companies have used arbitration agreements for consumer transactions, and by conservative estimates, there are more than 826 million consumer arbitration agreements in America); Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, THE EMP. RTS. ADVOC. INST., at 3 (Mar. 2018) (80% of America's largest companies have used arbitration agreements for employment disputes); Colvin, *supra*, note 54, at 2 (more than 60 million American workers are bound by arbitration agreements).

amended or substituted at any time. Additionally, some rules of such organizations may be vague or ambiguous as to the arbitrator's power.

For example, the AAA's Consumer Arbitration Rules contain the following provision about the arbitrator's power:

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.[175]

Notice that this provision does not state that the arbitrator has exclusive power or jurisdiction to rule on arbitrability matters, and arguably this provision is not intended to displace the concurrent power of a court to rule on arbitrability.[176] As explained by one court, such a provision does not clearly involve a "delegation" of authority and instead indicates at best a shared authority between courts and arbitrators to rule on arbitrability matters.[177] One could argue that under this particular rule, there is no clear and unmistakable delegation to an arbitrator to the exclusion of a court. Furthermore, according to Rule R-1(e) of the AAA's Consumer Arbitration Rules, "[t]he AAA has the initial authority to apply or not to apply the Consumer Arbitration Rules." It is possible that the AAA may choose to apply a different set of AAA rules, and not every set of AAA rules recognizes the power of an arbitrator to rule on arbitrability matters.[178]

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175. *Consumer Arbitration Rules*, AM. ARB. ASS'N 17 (Sep. 1, 2014) https://www.adr.org/sites/default/files/Consumer%20Rules.pdf [https://perma.cc/CD5R-H3RQ].

176. *Taylor v. Samsung Elecs. Am., Inc*., No. 19 C 4526, 2020 WL 1248655, at *4 (N.D. Ill. Mar. 16, 2020) ("Generally speaking, a court decides 'gateway' issues relating to arbitration, including whether there is a valid arbitration agreement and whether it applies to the particular controversy.") (citations omitted).

177. *Id.*

178. The AAA has more than 200 sets of active and archived rules on its website. *See Active Rules*, AM. ARB. ASS'N, https://www.adr.org/active-rules (last visited Apr. 9, 2022) [https://perma.cc/Z46B-HKB2]; *Archived Rules*, AM. ARB. ASS'N, https://www.adr.org/ArchiveRules (last visited Apr. 9, 2022) [https://perma.cc/3AP2-LC83]. As one example, the AAA has developed Wireless Industry Arbitration Rules for billing or other disputes involving customers of cellular and wireless services. *Wireless Industry Arbitration Rules*, AM. ARB. ASS'N, (June 1, 2009) https://www.adr.org/sites/default/files/AAA_Wireless_Rules%20%283%29.pdf [https://perma.cc/6VXX-F3ZH]. These Wireless Industry Arbitration Rules do not recognize the ability of an arbitrator to rule on jurisdictional or arbitrability matters. *Id.* Suppose a customer with a dispute with a cellphone provider has an arbitration agreement referencing the AAA's Consumer Arbitration Rules. Because Rule 1-(e) of the Consumer Arbitration Rules recognizes the unilateral ability of the AAA to not apply the Consumer Arbitration Rules, the AAA could in theory substitute the Wireless Industry Arbitration Rules in connection with this consumer dispute with a cellphone provider. Because of a lack of

Moreover, the AAA periodically and unilaterally amends its rules. For example, Rule R-1(a)(2) of the AAA's current version of the Consumer Arbitration Rules acknowledges that the AAA unilaterally amends its rules from time to time.[179] This rule recognizes that the current version of the AAA's Consumer Arbitration Rules applies to and governs a proceeding, even if a party incorporated a prior version of the consumer rules.[180] Also, the large set of archived rules on the AAA's website confirms that the AAA periodically and unilaterally amends its own rules. For example, it appears that the AAA has at least five versions, and possibly more, of its Commercial Rules, dated 2003, 2005, 2007, 2009, and 2013.[181] On the AAA's page for archived rules, one can see several other examples of AAA rules that have been amended over time. It appears that the AAA applies the most recent version of rules in existence at the time a dispute arises in the future, instead of the version of the rules in force when a contract is originally made.[182] Similarly, other arbitration organizations unilaterally amend their rules and apply the rules in effect when arbitration commences at some unknown date in the future.[183]

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certainty regarding which AAA rules will govern, and because not all of the AAA's sets of rules recognize the power of an arbitrator to rule on arbitrability, one can argue there is no clear and unmistakable delegation if an agreement merely references AAA rules.

179. *Consumer Arbitration Rules*, AM. ARB. ASS'N 9 (Sep. 1, 2014) https://www.adr.org/sites/default/files/Consumer-Rules-Web.pdf [https://perma.cc/3ZBG-N5E9].

180. Under Rule 1(a)(2) of the AAA's Consumer Arbitration Rules, the rules govern if the parties have specified in a prior agreement that "the Supplementary Procedures for Consumer-Related Disputes shall apply, which have been amended and renamed the Consumer Arbitration Rules." *Id.*

181. At least four older versions appear on the AAA's webpage for its archived rules, *AAA Archived Rules*, AM. ARB. ASS'N https://www.adr.org/ArchiveRules (last visited Apr. 9, 2022) [https://perma.cc/3AP2-LC83], while a fifth and current version appears on the AAA's webpage for active rules, *AAA Active Rules*, AM. ARB. ASS'N, https://www.adr.org/active-rules [https://perma.cc/Z46B-HKB2]. The webpage for archived rules also contains three other sets of rules, titled "Commercial Dispute Resolution Procedures," dated 2000, 2002, and 2003. It appears these rules may be precursors to the Commercial Rules. Thus, the AAA's Commercial Rules may have gone through multiple different revisions or versions since 2000.

182. *See, e.g.*, Am. Arb. Ass'n, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 7 (Oct. 1, 2013) ("These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA."), https://adr.org/sites/default/files/CommercialRules_Web-Final.pdf [https://perma.cc/8GQP-Q3CT].

183. JAMS Comprehensive Arbitration Rules & Procedures provides that "JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration . . . shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules." *Comprehensive Arbitration Rules and*

A clear and unmistakable delegation cannot exist if the outside, purportedly incorporated rules can be unilaterally changed at any time. Even if a set of rules currently allows for an arbitrator to resolve threshold arbitrability issues, organizations like the AAA, JAMS, or CPR may unilaterally amend these terms in the future and no longer provide for such a delegation. A contract that incorporates by reference a shifting, ever-changing set of arbitration rules cannot demonstrate by clear and unmistakable evidence that the parties intended to delegate arbitrability issues to an arbitrator. A current arbitral rule allowing for delegation may not even be in existence years later when a dispute eventually arises. Because of the changing, fluid nature of the rules of some prominent arbitration organizations in the United States, there is even more reason to require the parties, in their own agreement to arbitrate, to explicitly provide for a delegation. Then, despite possible unilateral changes made by an arbitration organization of its own rules, the parties' intent will be clear. But even if arbitration rules were frozen in time and never changeable, an arbitration agreement's mere incorporation of outside arbitration rules should not satisfy the heightened clear and unmistakable standard.

E. *Courts Should Reject the Mere Incorporation View Because This View Erodes the Role of Courts in Supervising and Monitoring Arbitration Agreements for Fairness*

Under the Mere Incorporation View, challenges to arbitrability, such as arguments that an arbitration clause has overly harsh terms, are sent to an arbitrator for resolution if the arbitration clause simply incorporates the rules of most arbitration organizations, like the AAA or JAMS. As noted, the arbitrator would have a financial incentive to rule in favor of arbitrability.[184] If the arbitrability problem involves a harsh term in the arbitration clause, like an abbreviated statute of limitations or a limitation on damages, an arbitrator may perhaps merely sever the harsh term in the arbitration clause, enforce the

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Procedures, JAMS, Rule 3 (June 1, 2021), https://www.jamsadr.com/rules-comprehensive-arbitration/ [https://perma.cc/5JMC-3GW9]. Likewise, the International Institute for Conflict Prevention & Resolution provides in its domestic administered rules that "[u]nless the parties otherwise agree, these Administered Rules, and any amendment thereof adopted by CPR, shall apply in the form in effect at the time the arbitration is commenced." *2019 Administered Arbitration Rules*, INT'L INST. FOR CONFLICT PREVENTION & RESOL., Rule 1 (Mar. 1, 2019), https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules-2019 [https://perma.cc/V8J6-H5YR].

184. *See supra* Section III.A.

remainder of the arbitration clause, and continue with the arbitration proceeding.

If threshold arbitrability decisions are routinely and easily sent to arbitrators through the Mere Incorporation View, the role of courts in supervising arbitration for fairness would be diminished. Section 4 of the FAA originally established a framework whereby courts and juries would monitor the enforcement of arbitration agreements if a party raised a challenge to the arbitration agreement. For example, as a result of this procedure, there is a body of published judicial decisions exploring what counts as an oppressive, unfair term in an arbitration clause.[185] However, this critical role of courts in monitoring the fairness of arbitration clauses has been vanishing with the spread of the Mere Incorporation View. If arbitrators, instead of courts, are now the primary gatekeepers regarding the enforceability of arbitration agreements, the number of published judicial decisions analyzing arbitration agreements for fairness would diminish, leaving drafters of arbitration clauses in the dark.

With the Mere Incorporation View, there is less supervision from courts regarding the fairness of the arbitration system. Courts in effect just rubberstamp orders compelling arbitration,[186] even if there

185. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (finding fee splitting and confidentiality provisions unconscionable); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999) ("The Hooters rules [such as requiring arbitrators to be selected from a list created exclusively by Hooters] . . . are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding."); *Bencharsky v. Cottman Transmission Sys., LLC*, 625 F. Supp. 2d 872, 881–82 (N.D. Cal. 2008) (finding an arbitration agreement's provisions allowing company, but not consumer, to seek equitable relief in court; barring the recovery of punitive and exemplary damages; and imposing one-year statute of limitations to be substantively unconscionable terms).

186. *See, e.g.*, *Tice v. Amazon.com*, 845 Fed. Appx. 535, 537 (9th Cir. 2021) (finding that because of mere incorporation of arbitral rules, arbitrator must decide whether plaintiff, a non-signatory, was obligated to arbitrate her claim that Amazon's Alexa surreptitiously recorded her communications); *Brumley v. Austin Centers for Exceptional Students Inc.*, No. CV-18-00662-PHX-DLR, 2019 WL 1077683, at *3 (D. Ariz. Mar. 7, 2019) (finding that because of mere incorporation of arbitral rules, arguments about the arbitration clause's validity and scope are for arbitrator to decide); *In re StockX Customer Data Sec. Breach Litig.*, No. 19-12441, 2020 WL 7645597, at *5 (E.D. Mich. Dec. 23, 2020) (finding that because of mere incorporation of arbitral rules, arbitrator will decide whether arbitration clause is unconscionable and whether minor plaintiffs are obligated to arbitrate). As mentioned previously, one potential solution is to have an arbitrability arbitrator who rules solely on whether there is an obligation to arbitrate, and this arbitrability arbitrator would be different from a second arbitrator who would then hear the merits of the underlying dispute.

are legitimate arguments that there is no obligation to arbitrate,[187] and even if the arbitrator has a financial self-interest to rule in favor of arbitrability. Vulnerable consumers or workers who have suffered wrongdoing may lose trust in a court system that quickly refuses to hear their valid substantive claims, as well as their legitimate claims that they are not bound to arbitrate.[188] Such parties may also feel unjustly stuck in an arbitration system which they never agreed to and where there is virtually no right of appeal. Parties with legitimate arguments that they are not bound to arbitrate may feel frustration with judicial orders forcing them to arbitrate this issue of whether they have to arbitrate. They will be stuck with an arbitrator who is financially-motivated to continue with the arbitration, and who will perhaps sever any unconscionable terms of the arbitration agreement instead of invalidating the entire obligation to arbitrate. The Mere Incorporation View may contribute to the erosion of the legitimacy and public trust of our civil justice system and arbitration.

Conclusion

This Article recommends that courts adopt the Anti-Incorporation View. To satisfy the heightened consent standard from *First Options* and reverse the default rule that courts determine arbitrability, courts should adopt a bright-line rule to be certain of the parties' intent: as a matter of federal law under the FAA, the parties' contract must itself contain a clear and unmistakable delegation explicitly recognizing that the arbitrator has the exclusive power to rule on arbitrability matters. Such contract language would be similar to the arbitration agreement at issue in the Supreme Court's *Rent-A-Center* decision.[189] An arbitration agreement's mere incorporation of outside arbitration rules should not satisfy the onerous standard to displace the power of courts to rule on arbitrability. Adopting such a bright-line rule would simplify application of the *First Options* standard and

187. *See Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S. Ct. 524, 529 (2019) (stating that even "wholly groundless" arbitrability issues must be delegated to an arbitrator if there is a clear and unmistakable delegation).

188. *See, e.g.*, *Spok, Inc. v. Goel*, No. CV 19-2096, 2019 WL 5446425, at *2 (D. Minn. Oct. 24, 2019) (finding that, even though arbitration agreement did not cover claims involving violation of a non-compete clause, arbitrator will decide whether such claims must be arbitrated).

189. The provision at issue in *Rent-A-Center* reads: "The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement . . ." *Jackson v. Rent-A-Center-West, Inc.*, No. 0307CV0050LRHRAM, 2007 WL 7030394, at *1 (D. Nev. June 7, 2007).

avoid years of litigation regarding the multiple conflicting views that have emerged involving unsophisticated parties,[190] class procedures,[191] and non-signatories.[192]

The debate about the Mere Incorporation View raises deeper questions about the meaning of the FAA and the proper relationship between courts and arbitration tribunals. The text of the FAA does not allow for a delegation and instead states that a judge and jury resolves arbitrability matters,[193] but *First Options* allows parties to bypass these statutory protections and delegate arbitrability disputes to an arbitrator. Are there mandatory provisions of the FAA that can never be waived, or are the provisions of the FAA default provisions that parties can contract around? For example, there are conflicting views whether parties can waive the statutory rights to vacatur of arbitrator awards under 9 U.S.C. § 10.[194]

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190. *See supra* notes 115–116 and accompanying text.

191. *See supra* notes 120–121 and accompanying text.

192. *See supra* notes 117–119 and accompanying text. The Mere Incorporation Rule should be rejected outright, for all circumstances. However, the Supreme Court's *First Options* case provides an additional reason why the Mere Incorporation Rule should not apply in the context of non-signatories. The Kaplans were not parties to the arbitration agreement in *First Options*, 514 U.S. at 946 (1995). Because the Kaplans had no pre-existing arbitration agreement at all with First Options, there was only one method for the Kaplans to engage in a clear and unmistakable delegation of arbitrability issues to the arbitrator: through a post-dispute submission of the narrow issue of arbitrability. However, there was no post-dispute submission in *First Options*, and the Kaplans strongly objected to the arbitrators' authority. *Id.* at 946. If there is a non-signatory, they have, by definition, never entered into any arbitration agreement with a party, much less an agreement that clearly and unmistakably delegates arbitrability issues to an arbitrator. Without any binding agreement in place, a non-signatory could not have agreed to arbitrate anything at all, including questions of arbitrability. In order to satisfy the heightened clear and unmistakable standard in a situation where there is no pre-dispute agreement, there would have to be an unreserved, post-dispute submission of the arbitrability issue to arbitration. In *First Options*, the Kaplans and First Options were never parties to an arbitration agreement with each other, and the Kaplans did not unreservedly submit the arbitrability issue to the arbitrators. *Id.* Under the circumstances of *First Options*, there was no clear and unmistakable delegation. *Id.* at 941, 946. Similarly, in connection with a non-signatory, it is impossible for there to be a clear and unmistakable delegation of arbitrability matters based simply on a pre-dispute arbitration agreement.

193. 9 U.S.C. § 4 (2018).

194. *Compare Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001) ("parties to an arbitration agreement may eliminate judicial review by contract" (citations omitted)), *with In re Wal-Mart Wage & Hour Emp. Pracs. Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) ("Permitting parties to contractually eliminate all judicial review of arbitration awards would not only run counter to the text of the FAA, but would also frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration.").

What is the proper role of courts in connection with arbitration? Do we as a society want to recognize party autonomy to the highest degree, allow parties to control the resolution of their disputes as they see fit, and eliminate judicial supervision and monitoring of arbitration? Or are there certain unwaivable rights, whereby parties can always access the courts to address problems with the arbitration process, where courts can always step in to correct overreaching by stronger parties who draft arbitration clauses with harsh terms? Other countries with more advanced, modern arbitration statutes have clarified which provisions of arbitration law are mandatory and which are discretionary.[195]

No other country in the world allows for the expansive use of arbitration that exists in America.[196] To help protect the millions of vulnerable parties covered by arbitration clauses, certain provisions of the FAA should be mandatory and unwaivable so that courts can play a stronger role with arbitration, and it should be clear which provisions are mandatory. In recent years, the role of the judiciary has been diminishing with respect to supervising and monitoring the fairness of arbitration as a result of Supreme Court cases like *Rent-A-Center* and arbitration doctrines like the Mere Incorporation View. It is hoped that Congress will undertake a closer examination at how our current arbitration system operates because the FAA of 1925 is long overdue for serious reform.

195. *See, e.g.*, English Arbitration Act (1996) § 4.

196. Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 391 n.51 (2018) ("Mandatory pre-dispute arbitration in consumer and employment contexts is a uniquely American phenomenon, distinguishing U.S. arbitration from domestic arbitration in other countries." (citation omitted)).