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First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions

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FIRST OPTIONS, CONSENT TO ARBITRATION, AND THE DEMISE OF SEPARABILITY: RESTORING ACCESS TO JUSTICE FOR CONTRACTS WITH ARBITRATION PROVISIONS

*Richard C. Reuben**

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I. INTRODUCTION

DESPITE the law's promise of a remedy for every right,[1] the ability of aggrieved parties to access the courts, and the law, has long been constrained as a practical matter.[2] In recent years, the pace of contraction has accelerated as Congress and the courts have used a wide variety of techniques[3] to limit judicial access across a broad terrain of contexts.[4] Similar developments may be seen in the

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

2. *See* Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 967 (1998); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 631-41 (1997).

3. These techniques include:

- Increasing the "amount in controversy" required for diversity jurisdiction. *See, e.g.*, The Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205(a), 110 Stat. 3847, 3850 (1997) (increasing the amount from $50,000 to $75,000, effective Jan. 17, 1997).
- Narrowing the definition of "standing" to bring legal actions. *See, e.g.*, Lujan v. Defenders of Wildlife, 505 U.S. 555, 560 (1992) (contracting "injury in fact" requirement for environmental standing); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (adopting scienter requirement under Section 10(b) of the federal securities law).
- Narrowing the ripeness necessary to bring legal actions. *See, e.g.*, Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998) (holding that environmentalists' challenge to deforestation plan not ripe for review because of possibility that plan may be changed).
- Expanding sovereign immunity. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999) (reversing prior law in holding that Congress may not subject state to suit in state court without state's consent, even on a federal claim).

For criticisms, see Press Release, Ronald Weich, American Civil Liberties Union, Upsetting Checks and Balances: Congressional Hostility To Courts in Times of Crisis (Nov. 1, 2001), *available at* http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9810&c=111; Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 618-31 (1986).

4. Access to justice for the poor has been limited by severe reductions in funding for legal services. *See, e.g.*, DOUGLAS J. BESHAROV, *Introduction* to LEGAL SERVICES FOR THE POOR: TIME FOR REFORM xxiii (Douglas J. Besharov ed., 1990) (stating that the Legal Services Corporation budget was cut by a quarter during the Reagan Administration); Anonymous, *Legal Services Survives, Barely*, N.Y. TIMES, May 6, 1996, at A14 (noting that in 1996 Congress succeeded in cutting LSC funding by 30% and placing restrictions on the type of work legal aid lawyers could conduct).

Congress and the courts have also limited legal rights in death penalty cases. *See* The Anti-Terrorism and Effective Death Penalty Act § 104 (1996), 28 U.S.C. § 2254 (1994 & Supp. 2003) (limiting, *inter alia*, the availability of successive appeals, stays of execution, and the scope of federal appeals); McCleskey v. Zant, 499 U.S. 467 (1989) (broadly apply-

states.[5]

Ironically perhaps, the rise of the Alternative Dispute Resolution (ADR) movement in the last quarter of a century has also contributed to this alienation from law and the courts. Mediation programs are common conditions of proceeding to trial in both state and federal courthouses,[6] and an abundance of contractual programs employing a wide variety of dispute resolution processes are steadily becoming fixtures in American life.[7]

While the research tends to suggest that many such initiatives have a salutary effect,[8] resulting in better outcomes through more satisfying processes,[9] not all is well.[10] When unilaterally imposed in consumer and employment contracts of adhesion, arbitration has been quite controversial, in large part because of its capacity to reduce, if not altogether eliminate, access to the courts and to the law.[11] After all, arbitration is an informal process in which the rules of substantive and procedural law are not necessarily applied[12] by arbitrators who may or may not have a legal

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ing the "abuse of the writ" doctrine to bar successive habeas petitions); Teague v. Lane, 489 U.S. 288 (1989) (limiting habeas review to new issues of law).

5. *See generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

6. *See* ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS 9-10 (1996).

7. *See, e.g.*, Jeffrey R. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. 79 (detailing expansion of ADR in the federal government); Christine M. Carlson, *ADR in the States: Great Progress Has Been Made, But There is Still Much to Do*, 7 DISP. RESOL. MAG. 4 (Summer 2001) (providing an overview of state court and administrative ADR programs); Catherine Cronin-Harris, *Mainstreaming: Systemizing Corporate Use of ADR*, 59 ALB. L. REV. 847 (1996).

8. *See generally* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002) (assessing an Ohio court-connected mediation program and comparing it with other empirical findings documenting positive effects of mediation); Jennifer Shack, *Efficiency: Mediation Can Bring Gains, but under What Conditions?*, 9 DISP. RESOL. MAG. 11 (Winter 2003) (summarizing empirical research).

9. *See, e.g.*, SUSAN KEILITZ ET AL., NAT'L CTR. FOR STATE COURTS, A MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL COURT PROCESSING (1992) (finding that mediation participants were more likely to find the process to be fair and to be satisfied with their agreement than those in adjudication).

10. *See, e.g.*, Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81.

11. The commentary on mandatory arbitration is vast, especially on the issue of predispute agreements to arbitrate statutory employment and consumer rights. *Compare, e.g.*, Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997) (supporting mandatory arbitration in the employment rights context), *with* Jean R. Sternlight, *Compelling Arbitration of Claims under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273 (1999) (opposing same). For a critique of mandatory arbitration of consumer rights, see David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33.

12. *See* GABRIEL M. WILNER, 1 DOMKE ON COMMERCIAL ARBITRATION § 1.01 (rev. ed. 1997) (hereinafter 1 DOMKE). For discussions of the trend toward formalization of arbitration, and ADR in general, see Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002) and Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991).

background.[13] Moreover, the arbitrator's decisions are final in that they are not subject to substantive review by courts beyond procedural defects such as arbitral bias or misconduct.[14]

This informality is a two-edged sword. Because arbitration permits parties to resolve their disputes without the constraints of law, it has the potential to be faster and less expensive than traditional litigation.[15] It also offers the possibility of better decision making, as arbitration awards are generally made by persons whom the parties agree upon, often because of the arbitrator's sophistication in the subject matter of the dispute. Moreover, unfettered by rules of evidence or procedure, arbitral decisions can be based on whatever evidence the parties wish to put before the arbitrator, including industry customs and practices and other applicable but non-legal norms.

However, the absence of legal standards can translate into gross substantive and procedural injustices, particularly when there are severe power imbalances between the parties,[16] and the absence of substantive judicial review worsens the situation by making capricious awards essentially uncorrectable. This problem is exacerbated by the fact that arbitrators, unlike judges, have economic incentives with respect to their case loads that can affect their judgment in individual cases, making them perhaps more favorably disposed toward "repeat players" than "one-shotters."[17]

Arbitration, in short, is a trade-off in which the parties agree to exchange the benefits and risks of dispute resolution under the formal law for the benefits and risks of dispute resolution in a less formal setting. For this reason, whether the parties have actually agreed to this trade-off—the "arbitrability" of the dispute—is a question that is profoundly important to the more fundamental question of whether the parties will have access to the courts and to the law for purposes of resolving the merits of their legal dispute. This question of agreements to arbitrate has proliferated an extraordinarily complex and nuanced patchwork of doctrine that sometimes seems far removed from reality—the Serbonian bog of arbi-

13. 1 DOMKE, *supra* note 12, § 1.01-1.02; *see also* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 743 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 n.18 (1974).

14. 1 DOMKE, *supra* note 12, § 35:01-35:04; *see also* 9 U.S.C. § 10 (1999 & Supp. 2003) (stating grounds for vacatur under the Federal Arbitration Act); REVISED UNIF. ARBITRATION ACT § 23 (2000) (stating grounds for vacatur under the Revised Uniform Arbitration Act).

15. For a thoughtful discussion of pros and cons of arbitration, see generally Thomas J. Stipanowich, *Rethinking American Arbitration Law*, 63 IND. L.J. 425 (1988).

16. *See, e.g.*, Richard C. Reuben, *The Dark Side of ADR*, 14 CAL. LAW. 53 (1994); Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (rejecting as unconscionable an arbitration provision that limited remedies, depositions, and bound only the employee, among other abuses).

17. *See* Garth, *supra* note 12, at 932-33. For judicial concern about the repeat player problem, see *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (Ginsburg, J., dissenting on behalf of Justices Stevens, Souter, and Breyer) and *Morrison v. Circuit City Stores*, Inc., 317 F.3d 646 (6th Cir. 2003). For more on repeat players, see sources cited *infra* note 315.

tration law.[18]

Moreover, just who makes the arbitrability decision is among the more subtle and important issues lurking in the mist.[19] In this deeper region of the bog, the terrain is particularly treacherous, for American law sets up something of a shell game. On one hand, the relevant statute, the Federal Arbitration Act, requires courts of law to determine if parties have agreed to arbitrate a dispute under normal principles of contract law: a bargained-for exchange and the absence of defenses to enforcement, such as fraud and duress.[20] On the other hand, however, if the arbitration provision is included in a larger contract and the dispute is about the validity of that larger contract—which is to say, most of the time—the U.S. Supreme Court held in 1967 that parties are *presumed* to have agreed to arbitrate merely by entering into the larger contract, regardless of that larger contract's enforceability. Under the so-called "separability doctrine" of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[21] the arbitration provision is deemed at law to be a "separate" contract, under what may be understood as a theory of implied consent to arbitration. As

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18. This phrase has a rich pedigree. Greek historian Herodotus described a Lake Serbonis as a large marshy tract of land in the northern part of ancient Egypt in which whole armies were said to have been swallowed up. *See* Encarta'95 Multimedia Encyclopedia, *Serbonian*, (Microsoft CD-ROM 1994). Later, Milton compared the Serbonian bog to a location in hell "[w]here armies whole have sunk." JOHN MILTON, 2 PARADISE LOST 592-94 (2d ed. 1674).

The phrase was used by Justice Cardozo in his dissent in *Landress v. Phoenix Mutual Life Insurance, Co.* to warn the majority of the effect of forcing courts to distinguish between accidental death and accidental means. Landress v. Phoenix Mut. Life Ins., Co., 291 U.S 491, 499 (1934) (Cardozo, J., dissenting) ("The attempted distinction between accidental death and accidental means will plunge this branch of law into a Serbonian Bog."). Since then, courts and legal scholars have used the phrase to describe other murky areas of the law where courts and lawyers can easily lose themselves in hazy distinctions and definitions. *See, e.g.*, Texas v. Cobb, 532 U.S. 162 (2001) (Breyer, J., dissenting) (describing a test adopted by the Supreme Court majority as "the criminal law equivalent of Milton's 'Serbonian Bog'"); Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 IOWA L. REV. 173 (2000) (accidental death law); Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 132 (2001) ("this three-pronged definition [of disability in the ADA] has become a Serbonian Bog"); Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539 (1998) (civil procedure). I thank Jeffrey Stempel for suggesting the metaphor.

19. For an empirical study establishing a relationship between judicial preferences and judicial behavior, see Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998). For a summary of related research, see *id.* at 1642-55 and sources cited therein.

20. My use of the term "valid" here and throughout this article draws on the language of section 2 of the FAA and generally refers to contracts or contractual provisions that satisfy contractual formation requirements that may be enforced because they are not subject to a defense to enforcement. It thus includes contracts in which there is a defect of formation, and therefore are void at law, as well as contracts that are induced by fraud, duress, etc., and therefore are voidable at law. For a discussion on the distinction between void and voidable, see 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 1.6-1.7 (Joseph M. Perillo ed., rev. ed. 1993) and *infra* notes 200-01.

21. 388 U.S. 395 (1967).

a result, fraud and other such challenges to the main contract will be decided by an arbitrator and not a court of law.

For example, under the separability doctrine, a real property buyer's action to void the transaction on fraud grounds would generally be decided by an arbitrator rather than a court, if the sale agreement includes a standard broad arbitration provision covering "all disputes arising out of this agreement."[22] A court's power is limited by separability in such cases to consideration of whether the arbitration clause itself was fraudulently induced, separate and apart from any fraud involved in the larger transaction.[23]

For a society steeped in the belief in the right to one's "day in court,"[24] the separability doctrine is counter-intuitive, and as a result has been difficult for many lower courts to implement,[25] and has simply been rejected by others as bad policy.[26] This has led to massive doctrinal complexity, confusion, and uncertainty;[27] it is one of the thickest areas in the bog.

Against this background, the U.S. Supreme Court in 1995 issued an unusual opinion, unanimously agreeing in *First Options of Chicago, Inc. v. Kaplan*[28] that courts, not arbitrators, are to decide whether the parties have agreed to arbitration unless the parties "clearly and unmistakably" assign that function to the arbitrator. In reaching this conclusion, the Court emphasized its reluctance to "force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[29] The underlying theory of the case appears to be that assent to arbitration must be actual rather than implied. When applied in the context of container contracts, *First Options* would suggest that courts, not arbitrators, would decide the validity of contracts that include arbitration provisions.[30] After all, an arbitration provision is just another term in a contract, which, like any other, can only be enforced if the contract itself is enforceable.[31]

Although the opinion was unanimous, scholars and courts have been unsure about what to make of *First Options*, particularly its implications for separability. Some distinguished scholars, such as Alan Scott Rau,

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22. For more extended consideration of this hypothetical, see *infra* notes 115-17 and accompanying text.

23. *See infra* notes 122-30 and accompanying text.

24. *See infra* notes 160-67 and accompanying text.

25. *See infra* notes 191-207 and accompanying text.

26. *See infra* note 206 and accompanying text.

27. *See* IAN R. MACNEIL ET AL., 2 FEDERAL ARBITRATION LAW § 15.3 (1994) [hereinafter MACNEIL ET AL.]; STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION § 2.24 (2001).

28. 514 U.S. 938 (1995).

29. *Id.* at 945 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960)).

30. Significantly, the Court did not cite *Prima Paint* in *First Options*, nor did its decision acknowledge separability as an independent basis for allocating the "who decides" question to arbitrators.

31. Voidable contracts, of course, can be ratified by the complaining party. *See* CORBIN, *supra* note 20; *infra* notes 200-01.

have contended that *First Options* merely restates current law.[32] Others, such as the authors of a prominent arbitration treatise, have suggested *First Options* has "the air of a pullback from the unmitigatedly pro-arbitration decisions of the Supreme Court over the past dozen or so years."[33] The Court's most recent pronouncement on the issue—the 2002 Term decision in *Howsam v. Dean Witter Reynolds*[34] and, to a lesser degree, *PacifiCare Health Systems v. Book*[35]—provides further evidence that a more fundamental shift may be underway within the Court on arbitrability law—away from a patchwork of difficult, amorphous doctrines and toward a more principled and functional approach that seeks to further the reasonable expectations of the parties.

While two cases do not a revolution make, the continuation of this momentum would raise serious questions about the continued vitality of *Prima Paint*'s doctrine of separability,[36] and its foundational principle of implied consent. As Federal Circuit Judge Frank Easterbrook has adroitly noted, *Prima Paint* "sits uneasily alongside" of *First Options*,[37] and lower courts are just beginning to grasp the technical and jurisprudential tensions between these cases.[38] How these tensions are resolved has crucial significance for judicial access, for whether *First Options*'s apparent requirement of actual consent to arbitration in fact comes to supercede *Prima Paint*'s doctrine of separability will determine whether many disputes arising from contracts that include an arbitration provision will be heard and decided under law.

This Article describes the context and current state of the law in this area under the Federal Arbitration Act (FAA),[39] urges the Court to con-

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32. *See generally* Alan Scott Rau, *"The Arbitrability Question Itself,"* 10 AM. REV. INT'L ARB. 287 (1999).

33. 2 MACNEIL ET AL., *supra* note 27, §17.3.1.

34. Howsam v. Dean Witter Reynolds, Inc., 123 S. Ct. 588 (2002).

35. 123 S. Ct. 409 (2002). *PacifiCare* is a complex case about the about the validity of a mandatory arbitration provision barring punitive damages in the context of a RICO claim for which plaintiffs would be entitled to treble damages if successful. One of the issues the case presents is whether a court or an arbitrator should make the decision about the enforceability of the arbitration provision in this context. *See* Petitioner's Brief Pac. Health Sys., Inc. v. Book, 2002 WL 31789394 (Dec. 6, 2002) (No. 02-215) (arguing in favor of arbitral resolution); Brief of Respondents at 5-16, Pac. Health Sys., Inc. v. Book, 2003 WL 144669 (Jan. 13, 2003) (No. 02-215) (arguing in favor of judicial resolution). The Court did not reach this issue, however, ruling it premature because it was unclear that the arbitrator would be precluded under the contract from awarding treble damages if they were found to be remedial rather than punitive. *Id.* at 4-6.

36. The tension between actual and implied theories of consent to arbitration also raises implications for other areas of arbitrability, as well as mandatory arbitration and the manner of assent to arbitration more generally. These important issues are left for another day, as they are beyond the scope of this article's narrow focus on separability and the tension between *First Options* and *Prima Paint*.

37. Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 590 (7th Cir. 2002) (Easterbrook, J.) (decided on other grounds). This decision came down long before the Supreme Court granted review in *Howsam*.

38. *See infra* notes 319-33 and accompanying text.

39. Arbitrations that are conducted pursuant to other authority, such as collective bargaining agreements or international law, raise other issues, and are excluded from the scope of this Article. William W. Park, *The Case for Reform: Amending the FAA to Sepa-*

tinue its path toward actual consent to arbitration,[40] and suggests an approach for finally reconciling the tension between *Prima Paint* and *First Options*. Part II describes the nature and historical context of the arbitrability problem. In so doing, it describes the fundamental tension between collective "rule of law" values and individual freedom-of-contract values that permeates arbitration jurisprudence, and which has contributed to significant generational change in judicial attitudes toward agreements to arbitrate. It further places the more specific question of "who decides" whether there is an agreement to arbitrate in the context of that development, states the general rule that such arbitrability issues are to be decided by courts, and lays out the four key exceptions to that general rule.

Part III focuses specifically on the doctrine of separability, which is the most critical (and most complex) of these exceptions. In particular, it discusses and critiques the *Prima Paint* case that initiated the separability doctrine and its rule of arbitral autonomy, the line of subsequent cases that embrace *Prima Paint*'s unstated principle of implied consent to arbitration, the contraction of judicial access that results from separability, and the confusion and uncertainty that separability has created in the lower federal and state courts.

Part IV discusses the impact on separability of recent U.S. Supreme Court case law, especially the 1995 decision in *First Options* that arbitrability issues are to be decided by the courts unless the parties "clearly and unmistakably" agree to allocate that function to arbitrators. It also discusses the 2002 *Howsam* decision that applied *First Options* in holding that compliance with timing requirements for submissions of securities arbitrations is a procedural issue for arbitrators to determine.[41] This section further demonstrates how *First Options* and *Howsam* are among the latest in a line of cases appearing to require actual manifestation of consent to arbitration that is related to, but unconnected with, the implied consent line of cases initiated by *Prima Paint*. Finally, it explores several questions left open by the Court's analysis in *First Options* and *Howsam*.

Part V returns to separability and focuses on one of those questions: the tension between *First Options* and *Prima Paint*. It examines how the lower courts have begun to grapple with this tension, and argues that the separability doctrine should be repudiated as archaic, unworkable, and broader than necessary to accomplish its legitimate policy goals. Finally, Part V contends that a more contemporary and normatively desirable understanding of *Prima Paint* would be to establish a rule of arbitrator com-

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rate Domestic and International Arbitration, 36 VAND. J. TRANSNAT'L L. (forthcoming 2003).

40. By "actual consent" in this article, I am referring to actual manifestations of assent, supported by consideration, that are consistent with the objective theory of contract, not actual consent in the sense of a "meeting of the minds" under the subjective theory of contract. For more on this distinction, see CORBIN, *supra* note 20, § 4.12.

41. The *PacifiCare* decision is not discussed in detail, *see supra* note 35, because the Court did not address the arbitrability issue in a substantial way. *See* 123 S. Ct. at n.2.

petence to determine their jurisdiction. Such an understanding would permit *Prima Paint* to shed its controversial and overbroad husk of separability while leaving its core principle of arbitral authority intact. Moreover, recognition of this *competence-competence* of arbitrators would be consistent with party expectations, the Court's apparent current trajectory of actual consent, and international legal standards.

II. NAVIGATING THE SERBONIAN BOG OF ARBITRABILITY

A. THE FUNDAMENTAL TENSION AND GENERATIONAL CHANGE IN ARBITRATION JURISPRUDENCE

Arbitrability generally deals with the question of whether parties have agreed to arbitrate a dispute, the scope of that agreement, and the more "arcane" question of who decides those two issues.[42]

These questions implicate the underlying struggle that Anglo-American courts have had for centuries with the enforcement of agreements to arbitrate,[43] as they raise a fundamental tension between two often competing values:[44] freedom of contract versus the rule of law[45] that is necessary in a society that depends on "the concept of ordered liberty."[46]

Questions of arbitrability implicate this tension because they require courts to choose between these two competing norms.[47] Judges who tend to favor freedom of contract values often tend to interpret arbitration issues in a way that promotes arbitration. Judges who tend to favor rule-of-law values often tend to interpret arbitration issues in a way that is more concerned with preserving judicial access rights.

This judicial choice is further influenced by a variety of other incentives, including the institutional interests that courts have in the efficient

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42. *First Options*, 514 U.S. at 945. For a general discussion, see 2 MACNEIL ET AL., *supra* note 27, § 15.1.

43. For a concise general discussion of history of the enforcement of agreements to arbitrate, see Reuben, *supra* note 2, at 598-601 and sources cited therein.

44. This is a familiar source of tension in the law, one that, for example, led the U.S. Supreme Court to one of its darker periods through a temporary embrace of contractual rights over individual liberties. For a general discussion of the so-called "Lochner-era," see GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 460-73 (13th ed. 1997).

45. "Rule of law" values include such principles as: parties should be treated equally before the law; the law should be fundamentally fair as a substantive matter; the law should be predictable, stable, and transparent; and judges should be neutral and independent. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (discussing the advantages of establishing general rules of law); William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 678 (1999); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886-87 (1981).

46. Palko v. Connecticut, 302 U.S. 319, 325 (1937). Carrington and Haagen suggest that the Court's recently renewed embrace of contract rights is one explanation for its strong support of contractual arbitration. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 334.

47. For a similar analysis, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 660-63 (1996).

processing of legalized disputes (i.e., docket reduction), the types of arbitration clauses presented to courts by parties seeking to maximize personal gain, as well as the ideological preferences of individual judges.[48] As a result, the fundamental tension does not easily permit sustainable resolution, and indeed is in part responsible for a difficult case law that is heavily nuanced, constantly shifting, and often inconsistent and confusing.[49]

Historically, much of the action on the fundamental tension has focused on questions of arbitrability, and prevailing judicial attitudes have swung like a pendulum.[50] On one end, courts dating back to medieval England struck the balance on the fundamental tension in favor of public norms and rule-of-law values, refusing under the "ouster doctrine" to enforce agreements to arbitrate as a matter of policy because those agreements improperly denied the courts of their jurisdiction to decide legal disputes according to the rule of law.[51] Despite a major initiative to reverse this policy legislatively, culminating in the U.S. Arbitration Act of 1925,[52] this judicial hostility held sway until the 1980s,[53] when the U.S. Supreme Court set forth a series of opinions recalibrating the balance on the fundamental tension in favor of broad support for arbitration.[54]

As Professor Stempel suggests, this new-found judicial deference to arbitration may have been spurred by perceptions of the halcyon nature of labor arbitration as a successful alternative to workplace strikes, back when arbitration was the primary form of "old" ADR, roughly before 1976.[55] These arbitrations tended to involve insular groups (such as col-

48. For a discussion of these and other incentives affecting judicial decision making, see Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 13-15 (1993).

49. Others have been harsher in their descriptions. *See, e.g.*, 2 MACNEIL ET AL., *supra* note 27, § 17.3.1 ("chaotic state of the law"); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1412-17 (1996) (discussing "the Supreme Court's schizophrenia and result-driven interpretation of the Federal Arbitration Act").

50. *See* Richard C. Reuben, *The Pendulum Swings Again:* Badie, Wright *Decisions Underscore Importance of Actual Assent to Arbitration*, 6 DISP. RESOL. MAG. 18 (Fall 1999).

51. For a concise discussion, see Reuben, *supra* note 2, at 599-605 and sources cited therein.

52. Act of Feb. 12, 1925, ch. 13, § 1, 43 Stat. 883 (codified at 9 U.S.C. §§ 1-14 (1994)).

53. *See infra* note 59 and accompanying text.

54. *Id.*; *see also* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 363-79 (1996). Interestingly, when *Prima Paint* was decided, arbitration constituted much of ADR universe, which might help explain the unseemingly strong support of Justice Abe Fortas, *see Prima Paint*, 388 U.S. 395, 397-407 (1967), and Justice William Brennan, *see* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 4-29 (1983).

55. 1976 is often used as a rough point of demarcation because that was the year of the so-called Pound Conference, at which Frank E.A. Sander's legendary "multi-door courthouse" speech is generally credited with kicking off the modern ADR movement. *See, e.g.*, Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fair Accompli, Failed Overture, or Fledging Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309 (1996). For the speech itself, see Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 337 (A. Leo Levine & Russell R. Wheeler eds., 1976).

lective bargaining units), to be industry specific (such as the diamond industry),[56] and to involve commercial matters focusing on issues of contractual interpretation or performance.[57] However, as arbitration has evolved in the "new" era of ADR, deference to arbitration is less appropriate because it has come to be more likely to affect large classes of persons or entities, more likely to affect personal rather than commercial matters, more likely to pit one-time litigants against "repeat players," and more likely to involve statutory and other rights rather than matters of industry custom or contractual interpretation and performance.[58] This may be one reason why, after a burst of judicial exuberance,[59] the Court now appears to be settling on a less permissive, more centrist, traditional contract theory,[60] seeking to compel a party into arbitration "only [for] those issues it specifically has agreed to submit to arbitration."[61]

These broad contextual themes are helpful, if not essential, in understanding the difficult state of arbitration law in general. Moreover, as we shall see, one manifestation of this generational change in the arbitrability context is the seemingly schizophrenic emergence of two related but unconnected lines of cases on the manner of consent necessary to forge an enforceable agreement to arbitrate: one indicating that implied consent to arbitrate is sufficient,[62] the other suggesting that actual consent is required.[63]

B. THE FAA: A LEGISLATIVE COMPROMISE ON THE FUNDAMENTAL TENSION

The requirement of some kind of consent to arbitration arises from the Federal Arbitration Act, which legislatively sought to reverse the ouster doctrine through a unique legislative compromise between the commercial and legal communities:[64] agreements to arbitrate, previously unen-

56. The diamond industry provides a paradigmatic example of such an idealized view of the old arbitration. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

57. *See* Stempel, *supra* note 55, at 335-36 (comparing characteristics of "old" ADR and "new" ADR).

58. *See id.* at 334-38.

59. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (compelling arbitration of federal age discrimination claim); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (compelling securities fraud claims under the 1934 Act); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (compelling arbitration of securities fraud claims under the 1933 Act and RICO).

60. *See* Reuben, *supra* note 50; Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195 (1998); *see also infra* notes 228-46 and accompanying text.

61. *First Options*, 514 U.S. at 945 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960)); *see also Howsam*, 123 S. Ct. at 592; *PacifiCare*, 2003 WL 1791225, at *4 n.2.

62. *See infra* notes 172-82 and accompanying text.

63. *See infra* notes 248-59 and accompanying text.

64. The two key leaders of this movement were Julius Henry Cohen, an attorney with connections to state bar and national bar associations, and Charles L. Bernheimer, a cotton products company president with ties to local, state, and national chambers of commerce. For a discussion of their respective roles in the drafting of the New York Arbitration Law

forceable as a matter of public policy, would be enforced just like any other agreement, as long as the agreement is enforceable as a matter of contract law.[65] Thus the heart of the FAA is found in section 2, which provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*[66]

The FAA's repeal of the ouster doctrine promoted commercial interests in the legitimacy, certainty, and finality of agreements to arbitrate.[67] It satisfied legal concerns by delineating a set of procedural safeguards, the cornerstone of which was the requirement of a contractually enforceable agreement to arbitrate.[68] The assurance of the validity of the agreement to arbitrate was accomplished through a fairly intricate mechanism that looked to the institutional competence of courts to serve as gatekeepers of contractual arbitration by calling upon them to determine if there was consent to arbitrate a given dispute or range of disputes as a matter of state contract law. In particular, section 4 permits a court to compel an unwilling party into arbitration if it is satisfied that there is an enforceable agreement to arbitrate; if not, then section 4 leaves the dispute to the court.[69] Section 3 further requires a court to stay legal proceedings to permit the enforcement of an agreement to arbitrate that is found enforceable.[70]

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of 1920, the Federal Arbitration Act, and the 1924 draft act submitted to the National Conference of Commissioners on Uniform State Laws, see *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 8 (1923) (testimony of W.H.H. Piatt). For a greater discussion of the legislative history, see *infra* note 143.

65. For a definitive legislative history on the FAA, see IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION (1992).

66. 9 U.S.C. § 2 (1999) (emphasis added); *see also* UNIF. ARBITRATION ACT § 1, 7 U.L.A. 1 (1997).

67. For a classic statement with regard to the importance of arbitration in promoting private ordering in the labor context, see David E. Feller, *Arbitration: The Days of Its Glory are Numbered*, 2 INDUS. REL. L.J. 97, 101 (1977).

68. Other elements of the legislative compromise included what would become other major pillars of arbitration's legitimacy as a process: the impartiality of the neutral and the requirement that the arbitrator stay within the scope of his or her authority. Both of these issues were spelled out in the FAA as reasons for the vacatur of an arbitration award. 9 U.S.C. § 10 (1999).

69. "The 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 (1999).

70. The "court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had" 9 U.S.C. § 3 (1999).

The legislative compromise on the fundamental tension was thus built upon the foundation of traditional contractual consent, providing for the repeal of the ouster doctrine, and the specific enforcement of agreements to arbitrate, as long as any questions about whether such an agreement in fact existed were decided in a court of law according to traditional rules of state contract law. This approach reflected the drafters' vision of actual consent to arbitration as a predicate to the legitimacy of using the state's coercive power to compel an unwilling party into arbitration when a dispute actually arises, and was especially important considering the Act's severe limitations on post-hoc substantive review.[71]

While the compromise gave the FAA its unique structure,[72] it did little to resolve the fundamental tension in arbitration between public rule-of-law norms and private contractual rights. Instead, it merely shifted that struggle away from the categorical refusal of courts to enforce agreements to arbitrate under the ouster doctrine to the more individualized determination of whether parties in a particular case agreed to arbitrate a particular matter—that is, to the battlefield of arbitrability.

C. MAPPING THE BOG: THE CONFUSED MEANING OF "ARBITRABILITY"

In considering arbitrability, it is essential to distinguish between two different levels of analysis. The first level is the substantive issue of *whether* the parties agreed to arbitrate a dispute, and the scope of that agreement. The second level is the more "arcane" procedural level of *who decides* the existence and scope of an arbitration agreement: the "who decides" question.[73]

Unfortunately, the term "arbitrability" has come to embrace—and confuse—a series of similar but analytically distinct issues relating to agreements to arbitrate. The analytical abyss that has inevitably followed does not permit easy synthesis;[74] even simple discussion is often inhibited by the frailty of language in allowing for nuance.[75] As a result, one lead-

71. 9 U.S.C. § 10 (1999) (vacatur).

72. For an argument that this structure is sufficient to establish state action for purposes of requiring minimal but meaningful due process protections in arbitrations conducted under the FAA, see generally Reuben, *supra* note 2.

73. *First Options*, 514 U.S. at 945.

74. *See* Conrad K. Harper, *The Options in* First Options*: International Arbitration and Arbitral Competence*, 579 PLI/LIT 127, 136-43 (1998) and cases cited therein.

75. The varying meanings of the word "arbitrability" underscore the inadequacy of our current vocabulary in accommodating substantive nuance and the perceptions of varying listeners. The phrase "arbitration agreement" is similarly ambiguous, potentially referring to a stand-alone agreement to arbitrate, or to an arbitration provision in larger contract—the issues raised by separability. These slippery slopes lead to a greater appreciation for the Yupik Eskimos of Alaska, who developed a wide variety of words to describe snow with a precision that reflected the central significance of snow to their lives. *See* Joel Sherzer, *A Richness of Voices*, *in* AMERICA IN 1492: THE WORLD OF THE INDIAN PEOPLES BEFORE THE ARRIVAL OF COLUMBUS 251, 255 (Alvin M. Josephy, Jr., ed., 1993); BENJAMIN LEE WHORF, LANGUAGE, THOUGHT AND REALITY 213 (John B. Carroll ed., 1956). Analysis of arbitrability issues would do well with similar precision, as context is not always helpful in clarifying intended meaning.

ing arbitration scholar has mused wistfully that "'arbitrability' is a word that might well be banned from our vocabulary entirely—or at least restricted, as in other legal systems, to the notion of what society will permit arbitrators to do."[76]

It is therefore helpful to identify the major related but clearly distinct questions that are commonly and crudely clumped together under the general heading of "arbitrability," and to recognize that they operate at both the substantive level and the "who decides" level. These questions principally include:[77]

1. Whether the parties entered into an agreement to arbitrate (and who decides);[78]
2. Whether a specific issue or dispute is included within the scope of the arbitration agreement (and who decides);
3. Whether any conditions that might be necessary to trigger the contractual duty to arbitrate have been satisfied (and who decides).[79]

A related and important concept that is also sometimes included within the rubric of "arbitrability" is the question of whether an arbitrator may decide his or her own jurisdiction, a concept known in international and comparative commercial arbitration as *competence-competence*, or *kompetenz-kompetenz*.[80] While this doctrine does not settle easily into the architecture of American law, the concept is extraordinarily important to arbitration and arguably constitutes the legitimate core of *Prima Paint* separability, as discussed below.[81]

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76. *See* Rau, *supra* note 32, at 308. Judicial confusion has been acknowledged at all levels, including the U.S. Supreme Court. Consider this passage from the oral arguments in *First Options*:

> "QUESTION: Then how would you describe a question of whether a particular subject is subject to the arbitration agreement, which the parties concededly agreed to?
>
> ANSWER: Well, in other words, there is an arbitration contract, and there's a dispute. Is that—that's also called arbitrability.
>
> QUESTION: Yes, that's what confuses me. It seems to me it's two distinct things, and people call them the same thing." Transcript of Oral Argument, First Options of Chi., Inc. v. Kaplan, 1995 WL 242250 at *29-30 (March 22, 1995) No. 94-560.

77. While it is less relevant to the issues raised in this article, one may also add to this list of "arbitrability" issues the degree to which public policy may prohibit the parties' wishes regarding the arbitration submission. *See* William W. Park, *The Arbitrability Dicta in* First Options v. Kaplan*: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L J. 137, 143-45 (1996).

78. This is the question that is at the heart of section 4 of the FAA, and includes issues relating to the capacity of an arbitration agreement to bind third parties. The third-party problem has not received a great deal of scholarly attention, but for a discussion in the employment context, see Recent Case, Penn v. Ryan's Family Steak Houses, Inc, *269 F.3d 753 (7th Cir. 2001)*, 115 HARV. L. REV. 2066 (2002).

79. This question has come to be known as "procedural arbitrability." *See infra* notes 92-102 and accompanying text.

80. *See infra* notes 103-13 and accompanying text.

81. *See infra* Part III.

D. THE "WHO DECIDES" QUESTION

The judicial access problem is chiefly implicated by the "who decides" aspect of arbitrability, because the structure of the legislative compromise predicates the enforcement of an arbitration provision on its contractual enforceability at law. Put another way, to the extent one gets one's "day in court" in arbitration under the FAA, that day comes if and when there is a question about whether a party may be compelled into arbitration.[82]

As a general matter, the FAA is fairly explicit in stating the general rule that courts decide arbitrability.[83] However, at least four major doctrinal strands have emerged to provide exceptions that significantly erode that general rule: the doctrine of default rules,[84] the doctrine of procedural arbitrability, the doctrine of *competence-competence*, and the doctrine of separability. These doctrines generally correlate with the basic arbitrability questions previously identified.

1. The Doctrine of Default Rules: Parties Submit Arbitrability Issue to the Arbitrator

The doctrine of default rules roughly correlates with the questions of who decides whether the parties have agreed to arbitrate, and who decides whether a specific issue is within the scope of that submission to arbitration.[85]

This doctrine recognizes that many sections of the Federal Arbitration Act are "default rules," or rules that will govern agreements to arbitrate unless the parties decide otherwise and incorporate their preferred rules into their arbitration agreement.[86] Default rules stand in contrast to mandatory rules, which parties are not free to waive or revise.[87] Most of the FAA provisions relating to the manner in which the arbitration is conducted would likely be considered default rules that the parties could vary by contractual agreement, such as section 7's rules regarding witness testimony.[88] By contrast, the provisions that are directed at the courts likely would be considered mandatory rules that the parties could not change by contractual agreement, such as section 16's rules regarding ap-

82. The so-called "procedural justice" literature on the significance of one's "day in court" is vast. *See, e.g.*, E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 985 (1990) (parties who have their day in court are more likely to feel as though they were treated fairly by the justice system and to be satisfied with the process and outcome).

83. 9 U.S.C. §§ 3, 4. *See generally* 2 MACNEIL ET AL., *supra* note 27, § 15.4.1.

84. While the notion of default rules is hardly new, my construct of it as a "doctrine" is original, for better or for worse. For an important discussion of default rules in the arbitration context, see Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999). For a more general discussion, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

85. *See supra* notes 78-79 and accompanying text.

86. *See, e.g.*, Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468 (1989) (party selection of choice of law rules is not preempted by FAA).

87. *See* Ware, *supra* note 84, at 706-07.

88. 9 U.S.C. § 7 (1999).

peals of arbitral awards.[89]

Under the doctrine of default rules, the general rule that courts decide arbitrability issues is a default rule that the parties may change by express contractual agreement.[90] As the U.S. Supreme Court stated in *First Options*, "the question 'who has the primary power to decide arbitrability' turns on what the parties agreed about the matter. Did the parties agree to submit the arbitrability question itself to arbitration?"[91]

2. *The Doctrine of Procedural Arbitrability*

A second vehicle that courts have used in answering the "who decides" question is to divide the concept of arbitrability into two familiar categories—substantive arbitrability and procedural arbitrability[92]—both of which must be present before a dispute can be arbitrated.[93]

Under this doctrine, substantive arbitrability is understood to focus on the question of whether a dispute is encompassed by an agreement to arbitrate. The focus here is on the substantive merits of the particular dispute, and whether the parties agreed to include it within the submission to arbitration. Procedural arbitrability, on the other hand, focuses on a different question: whether any conditions that might trigger a duty to arbitrate under an enforceable arbitration provision have been fulfilled.[94] This includes such procedural issues as time limits, notice, waiver, estoppel, and other conditions precedent to the obligation to arbitrate. Under the doctrine of procedural arbitrability, these issues are decided by the arbitrator, not the court, on the theory that they are included within the scope of the arbitration provision.[95] Moreover, all procedural requirements must be satisfied before the duty to arbitrate is triggered.[96]

The rationale for the doctrine of procedural arbitrability is to further the contracting intent of the parties when there is no dispute that there is, in fact, an actual agreement to arbitrate, as well as to promote the judicial system's interest in efficiency. Procedural arbitrability honors the parties'

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89. 9 U.S.C. § 16 (1999). For a discussion of problems relating to judicial review of arbitral awards, see Sarah Rudolph Cole, *Managerial Litigants: The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. J. 1199 (2000).

90. For a more thorough discussion, see 2 MACNEIL ET AL., *supra* note 27, § 15.1.4.1.

91. *First Options*, 514 U.S. at 943.

92. For an application of the substantive-procedural distinction in civil procedure, see *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). For an application in the administrative law context, see *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994). For a critique of this and other such distinctions seen in fundamental law, see Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*,130 U. PA. L. REV. 1349, 1350-57 (1982).

93. 2 MACNEIL ET AL., *supra* note 27, § 15.1.4.2.

94. Procedural arbitrability correlates with the third fundamental arbitrability question. *See supra* note 79 and accompanying text.

95. *See, e.g.*, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). For a criticism, see Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability*: David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 58 BROOK. L. REV. 279 (1992). For a general discussion, see KATHERINE VAN WEZEL STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 498-516 (2000).

96. *See supra* note 93.

perceived interest in efficiency by preventing the delay and higher costs in dispute resolution that can arise from having courts decide technical questions of whether the conditions giving rise to the specific duty to arbitrate had been satisfied.[97] Similarly, it respects judicial economy by relieving courts of the difficult tasks of separating substantive and procedural issues, and of deciding matters that parties were willing to submit to an arbitrator. At a more theoretical level, procedural arbitrability represents a policy choice based on the institutional competence of arbitrators to decide matters arising under the contract.[98] For these reasons, even close calls on "mixed cases" will tend to be decided by the arbitrator rather than the courts.[99]

Still, the case law is hardly consistent in categorizing an issue as substantive or procedural.[100] A common example is the question of whether the moving party has made a timely demand for arbitration, which was generally at issue in *Howsam*. Some courts have ruled that courts should decide this issue,[101] while others, including the U.S. Supreme Court in *Howsam*, have left it for the arbitrators.[102]

3. *The Doctrine of Competence-Competence*

The doctrine of *competence-competence*, or *kompetenz-kompetenz*,[103] is most familiar in the international or comparative commercial arbitration context, and refers generally to the independent authority of the arbitrator to decide the limits of his or her own jurisdiction.[104]

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97. The doctrine of procedural arbitrability is particularly significant in the commercial construction industry, where large projects like office buildings and bridges require the coordinated activity of many different players, including architects, general contractors, and subcontractors. Problems at any point in the chain can create legal disputes elsewhere in the chain, potentially delaying or derailing the project's completion. As a result, the pragmatic need for certainty, speed, expertise, and finality in dispute resolution—arguably arbitration's central virtues—make a particularly compelling argument for the resolution of arbitrability disputes by arbitrators rather than courts. Thomas J. Stipanowich, *Of "Procedural Arbitrability": The Effect of Noncompliance with Contract Claims Procedures*, 40 S.C. L. REV. 847 (1989).

98. *See Howsam*, 123 S. Ct. at 593.

99. *John Wiley & Sons*, 376 U.S. at 559.

100. Given the difficulty that courts have had with the substance/procedure distinction in other contexts, this should not be surprising. *See supra* note 92 and sources cited therein.

101. *See, e.g.*, Frederick Contractors, Inc. v. Bel Pre Med. Ctr., Inc., 334 A.2d 526 (1975).

102. The Court's decision in *Howsam* was limited to the interpretation of the unique six-year rule for determining eligibility for arbitration in the securities industry. For an example of a court ruling that arbitrators decide arbitrability in another context, see *Contracting Northwest, Inc. v. City of Fredericksburg*, 713 F.2d 382, 385 (8th Cir. 1983), in which a party alleged several procedural defects that should have precluded arbitration, including failure to make a timely demand, failure to document extra work, and failure to comply with contract requirements for "equitable adjustment" of the contract price.

103. While American scholars often use *competence-competence* and *kompetenz-kompetenz* interchangeably, internationalists tend to equate *kompetenz-kompetenz* with the stricter form of the doctrine adopted in Germany. *See infra* note 104 and accompanying text. Telephone Interview with William W. Park, Professor of Law, Boston University School of Law (Aug. 19, 2002).

104. W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 515-16 (3rd ed. 2000); *see also* William W. Park, *Bridging the Gap in Forum Selec-*

The most critical issue raised by *competence-competence* is whether the arbitrator has the power to invalidate the contract granting his or her authority to decide the dispute.[105] Theoretically, if the arbitrator does not have this power, the arbitration proceedings would have to be halted pending judicial decision whenever a question arose that would implicate the authority of the arbitrator to rule on a particular issue, such as the validity of the contract as a whole. The doctrine of *competence-competence* sensibly addresses this problem by assuming that the parties chose arbitration precisely to avoid these types of delays in the resolution of their dispute, and by further assuming that the parties intended for the arbitrator to decide this question.[106]

The doctrine is widely recognized internationally although there are many different strands, which vary primarily on the timing of judicial intervention.[107] Under the English model, arbitrators may decide their jurisdiction, but a court can review that decision at any time.[108] By contrast, the French model does not permit judicial review until after the award has been rendered.[109] The Swiss model splits the difference, permitting arbitrators to decide jurisdictional questions, but permitting parties to bring an interlocutory appeal at any time.[110] Finally, the German approach to what it terms *kompetenz-kompetenz* is a particularly strong one, not only reserving jurisdiction in the arbitrator to decide jurisdiction, but ultimately precluding later judicial review of that decision.[111]

Significantly, the United States has never formally adopted the doctrine of *competence-competence*, although some have argued that the U.S. Supreme Court has effectively adopted it by implication, either in *First Options*[112] or in the concept of *Prima Paint* separability—the fourth exception to the FAA's general rule of allocating judicial decisions to courts.[113]

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tion: Harmonizing Arbitration and Court Selection, 9 TRANSNAT'L L. & CONTEMP. PROBS. 19, 46-47 (1998).

105. *See* Rau, *supra* note 32, at 340; Park, *supra* note 77.

106. CRAIG, ET AL., *supra* note 104, at 515; *see also* Fluor Daniel Intercontinental, Inc. v. Gen. Elec., No. 98 Civ. 7181, 1999 WL 637236 (S.D.N.Y. Aug. 20, 1999). A rule providing arbitrators with such authority "is a necessary part of just about any arbitration regime." E-mail from Christopher R. Drahozal, Professor of Law, University of Kansas School of Law, to Richard C. Reuben, Associate Professor of Law, University of Missouri-Columbia School of Law (Aug. 6, 2002, 09:21 CST) (on file with author).

107. For a thorough exploration of these timing differences, see Natasha Wyss, First Options of Chicago, Inc. v. Kaplan: *A Perilous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351 (1997).

108. *See* Park, *supra* note 77, at 149-50.

109. *Id.* at 150.

110. *Id.*

111. *Id.* at 151.

112. *See* Park, *supra* note 104, at 53 n.164. For an analysis of how *First Options competence-competence* compares with international standards, see Shirin Philipp, *Is the Supreme Court Bucking the Trend?* First Options v. Kaplan *in Light of European Reform Initiatives in Arbitration Law*, 14 B.U. INT'L. L.J. 119 (1996).

113. *See* William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 143 (1997) (suggesting *Prima Paint* is a form of *competenz-competenz*).

4. The Doctrine of Separability

Although treated last here, the doctrine of separability is the most significant exception to the FAA's general rule that courts decide questions of arbitrability. Like the doctrine of default rules, the doctrine of separability roughly correlates with the questions of who decides whether the parties have agreed to arbitrate, and who decides whether a specific issue is within the scope of arbitration submission.[114] It addresses a very specific question: who decides whether a dispute over the validity of a contract containing an arbitration provision must be arbitrated when the allegation is that the very contract that contains the arbitration provision is itself a legally unenforceable contract? The traditional short answer, often shocking to initiates to the doctrine, is that the arbitrator decides this question of arbitrability. The problem is complicated and merits a closer look.

III. SEPARABILITY: THE GREATEST HAZARD IN THE BOG

When an arbitration provision is included in a larger contract, and the dispute is about the validity of that larger contract, the traditional view, at least for much of the last half of the twentieth century, has been that arbitrators, not courts, decide the validity of that larger contract. The arbitration provision is presumed to be valid as a contractual agreement that is separate and independent of the larger "container" contract. This is the doctrine of separability, which is predicated upon a principle of implied consent to arbitrability.

A. ILLUSTRATING THE PROBLEM

Suppose Buyer purchases residential property in Minnesota, and after taking possession discovers serious problems with the house's brick veneer, despite express assurances by Missouri Seller in the disclosure form stating that there are no "defects or problems, current or past, to the structure or exterior veneer."[115] Preliminary investigation indicates Seller likely was aware of the problem.

Under traditional principles of common law, the analysis is straightforward. The law provides Buyer a contract remedy in the form of an action alleging fraud in the inducement of the contract, which will entitle Buyer to some form of relief, either in monetary damages or in the rescission of

114. *See supra* notes 78-79 and accompanying text.

115. This hypothetical is drawn from *Marks v. Bean*, 57 S.W.3d 303 (Ky. Ct. App. 2001), which considered and rejected separability in holding that courts are to decide a fraud in the inducement claim directed at the container contract. Minnesota and Missouri have been chosen as forums to establish diversity jurisdiction to avoid the complicating question of federal preemption of state arbitration law. For a discussion, see Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 68. For a criticism, see David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. (forthcoming Winter/Spring 2004) (copy on file with author).

the contract. In other words, Buyer can just go to court and assert her rights under the law.[116]

Now, suppose that the parties used the local real estate board's standard form Sales and Purchasing Contract to effect the transaction, and that this form included a broadly worded arbitration provision in paragraph 15, stating simply: "All disputes arising under this contract shall be decided by arbitration."[117] Buyer files her fraud claim in federal district court, and Seller counters with a motion to compel the arbitration under section 4 of the FAA, alleging that the fraud claim should be decided by an arbitrator rather than the court because it is a dispute "arising under this contract."

The court is faced with a dilemma that again recalls the fundamental tension: on the one hand, as Seller contends, with a typical broadly worded arbitration provision, a post-contract dispute over whether the dispute must be arbitrated would seem to fall into the category of "all disputes arising under this contract." On the other hand, as Buyer would likely contend, the arbitration statute should be read to provide that the arbitration clause is enforceable only if the underlying contract itself is enforceable to begin with, and only a court of law has the power at law to make that determination.

The consequences of the decision for access to courts and law are enormous, as a trial court is obliged to proceed under applicable rules of procedure and evidence as well as the substantive law, and is subject to judicial review for the correction of legal errors. An arbitrator, however, is not so compelled, because arbitration is by definition an informal adjudicatory process that is not bound by the rule of law, and which, indeed, need not even be conducted by a lawyer.[118]

This is the problem that the separability doctrine seeks to address: whether a court or arbitrator should decide a dispute over the validity of a contract that includes an arbitration clause. In the early dawn of the modern ADR movement, when judicial hostility toward arbitration agreements still prevailed, the U.S. Supreme Court answered this question for purposes of the FAA in *Prima Paint v. Flood & Conklin Manufacturing. Co.*[119] by adopting a rule of "separability" that essentially allocates the decision to the arbitrator when the challenge involves the main "container" contract.[120] Although relatively obscure today, this decision has had a profound impact on the law of modern arbitration, effec-

116. Hayford, *supra* note 115, at 68.

117. Many state real estate boards have, in fact, included mandatory arbitration clauses in their standard form real estate purchase agreements. *See, e.g.*, Purchase Agreement Approved by the Minnesota Association of Realtors (copy on file with author). For a discussion of the growth of arbitration in the construction industry, see Colleen A. Libbey, *Working Together While "Waltzing in a Minefield": Successful Government Construction Contract Dispute Resolution with Partnering and Dispute Review Boards*, 15 OHIO ST. J. ON DISP. RESOL. 825, 849 n.7 (2000).

118. *See supra* note 13 and accompanying text.

119. 388 U.S. 395 (1967).

120. *Id.* at 403-04.

tively initiating the Supreme Court's extraordinary push to get lower courts to abandon their hostility to agreements to arbitrate, to take the FAA seriously,[121] and ushering in the modern age of judicial support for arbitration and other ADR methods.

B. *Prima Paint* and Separability

Before *Prima Paint*, most courts held that if a party challenged the validity of a contract that included an arbitration provision on the kinds of contractual grounds contemplated by the FAA, the question would be decided by a court.[122] However, the U.S. Court of Appeals for the Second Judicial Circuit had reached an opposite conclusion, holding in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*[123] that a broad arbitration provision in a larger contract was a separate contract for purposes of the "who decides" question, and that courts would decide challenges directed exclusively at the narrow arbitration provision, while arbitrators would decide challenges to the validity of the broader container contract.

The Supreme Court's 6-3 decision in *Prima Paint* settled this split in the circuits by adopting the rule of *Robert Lawrence*. The case arose out of a consulting contract under which Flood & Conklin was to perform certain work for Prima Paint's paint manufacturing business for six years.[124] When the relationship broke down, Prima Paint started making its payments to an escrow company instead of Flood & Conklin, and told the consultants that as far as Prima Paint was concerned, Flood & Conklin had breached its contract by fraudulently representing that it was solvent when in fact Flood & Conklin was about to file for bankruptcy.[125]

Flood & Conklin responded with a notice of intent to arbitrate pursuant to a broad general arbitration clause in the consulting contract, which provided that "any controversy or claim arising out of or related to this Agreement . . . shall be settled by arbitration."[126] Prima Paint responded in turn by filing suit in federal district court seeking to rescind the consulting contract on formation grounds, arguing that Flood & Conklin had fraudulently induced it to enter the contract by holding itself out as solvent. Applying the Second Circuit's rule of *Robert Lawrence*, the trial

121. The Court decided two other issues that were extremely important to the Court's current FAA jurisprudence, but beyond the scope of this article. First, the Court held that the consulting agreement giving rise to the arbitration involved interstate commerce in a manner sufficient to trigger the application of the Federal Arbitration Act as an initial matter. Second, the Court held that the FAA is constitutional under Congress's Commerce and Maritime powers.

122. *See, e.g.*, Lummus Co. v. Commonwealth Oil. Ref. Co., 280 F.2d 915, 923-24 (1st Cir. 1960). *See generally* Katherine Van Wezel Stone, Private Justice: The Law of Alternative Dispute Resolution 514 (2000); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 Va. L. Rev. 1305, 1355 (1985).

123. 271 F.2d 402 (2d Cir. 1959).

124. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 360 F.2d 315, 317 (2d Cir. 1966). The rest of the facts are drawn from the circuit court opinion in *Prima Paint* unless otherwise noted.

125. *Id.* at 316, 317.

126. *Prima Paint*, 388 U.S. at 398.

court ruled that the fraud claim had to be decided in arbitration.[127] The Supreme Court, in an opinion by Justice Abe Fortas, affirmed,[128] stating:

> Under § 4 . . . the federal court is instructed to order arbitration to proceed once it is satisfied that the 'making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language *does not permit* the federal court to consider claims of fraud in the inducement of the contract generally.[129]

An incredulous Justice Hugo Black, in a dissent joined by Justices William O. Douglas and Potter Stewart, wrote:

> The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so. . . . [ ] I am fully satisfied that a reasonable and fair reading of [the FAA's] language and history shows that both Congress and the framers of the Act were at great pains to emphasize that nonlawyers designated to adjust and arbitrate factual controversies arising out of valid contracts would not trespass upon the courts' prerogative to decide the legal question of whether any legal contract exists upon which to base an arbitration.[130]

C. CRITICISMS OF *PRIMA PAINT* SEPARABILITY

Justice Black's dissent provides, at the very least, a road map for a more formal critique of the Court's holding on separability; although to date it has drawn only minimal attention by scholars. Even then it has been viewed with considerable skepticism by scholars from across the ideological spectrum—including those on both sides of the mandatory arbitration debate.[131] These passing shots cry out for a more substantial

127. *Prima Paint*, 360 F.2d at 318.
128. *Prima Paint*, 388 U.S. at 402-04.
129. *Id.* at 403-04 (emphasis added).
130. *Id.* at 407 (Black, J., dissenting).
131. *See, e.g.*, Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 128-32 (1996) (calling for *Prima Paint* to be overruled); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1426-56 (1991) (opposing separability except for situations in which proof of the defense would be "ineffective to undermine the resisting party's consent to arbitration"); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 456 (1993) ("The Court's construction of the FAA moved court access for common law claims from an inalienable right to one more easily alienable than many other underlying rights."); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 949 (1999) (stating that the role of state law in regulating arbitration is diminished by the

analysis.

1. The Statutory Analysis Critiques

The Court rested its opinion exclusively on its analysis of the statutory language "the making of the agreement to arbitrate" in section 4 of the FAA, and related language in section 3.[132] However, this set of critiques suggests that the Court's analysis frustrated at least two cardinal canons of statutory interpretation—the "whole act rule" and the "rule against surplusage"—and even then is logically flawed.

a. Canons of Statutory Construction Violated

The "whole act rule" is a universal principle of statutory interpretation that calls for a court to consider a statutory provision not in isolation but rather in relationship to other provisions of the Act as a whole.[133] In *Prima Paint*, however, this critique would contend that the Court failed to interpret the language in sections 3 and 4 in light of the FAA's fundamental operating provision: the section 2 reversal of the ouster doctrine.[134] A more faithful application of the "whole act rule" would have construed the technical implementation provisions of sections 3 and 4 to facilitate rather than defeat section 2's assurance of the arbitration provision's contractual validity—thus vesting the arbitrability of the container contract's validity in the courts.

Similarly, this critique would contend that the Court's construction vio-

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separability doctrine); David E. Feller, *Fender Bender or Train Wreck: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 ST. LOUIS U. L.J. 561, 561, 565, 572 (1997) (stating that *Prima Paint* marks the beginning of the U.S. Supreme Court's "rewriting" of the FAA into a docket-clearing device); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 83-84 (arguing that the Court's reasoning in *Prima Paint* begs the question); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1952-53 (1996) (describing the Court's reasoning in *Prima Paint* as "evasive, somewhat tortuous reasoning"); Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 765 (1990) (stating that the Court's decision in *Prima* Paint had no policy justification); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996) (calling *Prima Paint* part of the "shantytown" of U.S. Supreme Court's arbitration law); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 100 (1997) (stating that it is "difficult to imagine a factual scenario in which a party would use fraud solely to impose an arbitration clause and not to affect other essential terms of a contract"). *But see* Rau, *supra* note 32, at 341 (describing the prospect of arbitrator incompetence to decide jurisdiction as a "conceptual horror"); Park, *supra* note 77, at 143 (stating that the separability doctrine gives arbitrators the power to invalidate the main agreement without affecting their jurisdiction to hear the case); Stipanowich, *supra* note 97, at 872 (endorsing procedural arbitrability for construction disputes).

132. *See supra* notes 69-70.

133. For an extensive discussion of the "whole act rule," see WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND STATUTORY INTERPRETATION 263-76 (2000), which notes that the rule is universally followed in both federal and state courts, in civil courts, as well as the courts of other common-law countries.

134. *Prima Paint*, 388 U.S. at 400.

lates the "rule against surplusage,"[135] effectively rendering the "at law or equity" provision in section 2's "savings" clause inoperative because principles of law and equity do not apply in arbitration proceedings.[136] Since issues of law and equity can only be decided by courts (or administrative agencies by valid delegation), the "rule against surplusage" would compel a construction of sections 3 and 4 that would give the "at law or equity" clause meaning by holding that contractual defenses to the validity of the container contract would be decided by a court of law or equity, just as "any other contract."[137]

A related criticism is that *Prima Paint* further undercuts the "at law or equity" provision in derogation of a corollary to the "rule against surplusage"—that the legislature intends for each provision to add something to the statutory scheme and does not want one provision to be applied in a way that undercuts other provisions. *Prima Paint*'s construction instead effectively overrides the plain language and implication of the statute's primary operative provision, rendering it effectively inoperative in container contract situations.[138]

b. Logic is Fallacious

Another statutory critique is that the Court's interpretation is logically fallacious for "begging the question." In particular, the major premise of the Court's logical argument is that section 4's specific reference to "the making of the agreement for arbitration" does not "permit" courts to consider issues other than the agreement to arbitrate.[139] However, this merely "begs the question," *petitio principii*, because it assumes the very proposition that it states. When it states that section 4 does not "permit" the courts to consider any other issues, it is assuming that there is no other plausible interpretation of the "making" clause.[140] Yet, as the authors of a prominent arbitration treatise observe, "[n]othing would have prevented the Court in *Prima Paint* from holding that the making of an arbitration clause is in issue whenever the making of the agreement containing it is in issue."[141]

c. Legislative History Ignored

Justice Black anchored his dissent in *Prima Paint* in the legislative his-

135. The Rule Against Surplusage generally holds that every word drafted into a statute is intended to have operative effect. *See* ESKRIDGE ET AL., *supra* note 133 at 266-68.

136. The relevant part of section 2 is: "shall be valid, irrevocable, and enforceable, save upon such grounds as exist *at law or in equity* for the revocation of any contract." 9 U.S.C. § 2 (1999) (emphasis added).

137. *See supra* note 66 and accompanying text.

138. *See* ESKRIDGE ET AL., *supra* note 133, at 263.

139. *See supra* note 69.

140. RUGGERIO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 201-07 (1989).

141. MacNeil, *supra* note 27, § 15.2 n.13.

tory of the FAA,[142] and those arguments still have force. While Congress did not specifically address separability, the scant legislative record suggests that the congressional subcommittees were led to understand that agreements to arbitrate would be entered into on the basis of actual consent, and that courts would decide whether the parties consented to arbitration when questions of consent arose—including when arbitration provisions were included in container contracts.[143]

2. *The Institutional Competence Critique*

A rational rule for allocating decisional authority on the "who decides" question might look to the relative institutional competencies of courts and arbitrators.[144] Whether a contract has been formed is a quintessential question of law over which courts have long been recognized as having special competence and experience. By contrast, the institutional competence critique would contend that arbitrators have no special competence to bring to the determination of questions of law. To the contrary, service as an arbitrator requires no legal training; one need not be a lawyer or former judge to be a perfectly good arbitrator. Rather, the arbitrator's institutional competence comes from other sources, such as

142. *See, e.g.*, *Prima Paint*, 388 U.S. at 412-16 (Black, J., dissenting). For a discussion of the Court's reluctance to interpret statutes (including the FAA) in light of their historical context, see PAMELA S. KARLAN, DISARMING THE PRIVATE ATTORNEY GENERAL 20-26 (Stanford Pub. Law & Legal Theory, Working Paper No. 36, 2002).

143. At a 1923 Senate subcommittee hearing, Senator Thomas J. Walsh of Montana asked W.H.H. Piatt of the ABA: "If [a party] should attack it on the ground of fraud, *to rescind the whole thing* . . . I presume that it [would] merely [be] (sic) a question of whether he did make the arbitration agreement or not, . . . and then he would possibly set up that he was misled about the contract and entered into it by mistake . . . ." Piatt deftly dodged the question, and his failure to respond to or correct Walsh's express assumption that the Court would consider contract defenses, specifically fraud, when an arbitration provision was in a container contract may reasonably have left the impression that the stated assumption was not incorrect. *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 13 (1923).

Such an impression would have been reinforced by the Act's primary drafter, Julius Henry Cohen, when he assured the 1924 Joint Committee that the parties' constitutional right to trial by jury remained intact under the Act, subject only to a voluntary waiver of that right through a contractually valid agreement to arbitrate a dispute. Said Cohen "you can waive that [jury trial right]. And you can do that in advance. Ah, but the question whether you waive it or not depends on 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." This is the language of actual consent to arbitration, not implied consent or separability. *Arbitration of Interstate Commercial Disputes, Joint Hearings before the Subcomms. on the Judiciary*, 68th Cong. 17 (1924).

144. The U.S. Supreme Court's decision in *Howsam*, in part relied upon the analysis of institutional competence. *See Howsam*, 123 S. Ct. at 592. Institutional competence analysis derives from the "legal process school," which, *inter alia*, legitimized judicial review by reference to the institutional competency of the courts. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). For a modern take, see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394 (1996), which states that "contemporary law and economics and outsider scholarship" seek "to locate law, social policy, and social change in a closely analyzed institutional context."

the sophistication of their understanding of the context in which the dispute arose (including local and industry customs and practices), their personal stature as an authority to the disputing parties, as well as their procedural knowledge of arbitration and the arbitration process's inherent capacity for the efficient resolution of disputes. As a result, institutional competence analysis would suggest that courts be allocated the question of the formation of the container contract, and that interpretation questions be allocated to the arbitrator. As Justice Black recognized, it seems especially odd, even "fantastic," to allocate to arbitrators the legal question of whether a legal contract has been validly formed when that arbitrator may not have the background or experience necessary to make that determination.[145]

3. *The Contract Law Doctrinal Critique*

A third critique is that *Prima Paint* separability perverts contract law because it assumes away the fundamental principle of contractual consent, thus impeding the applicability of affirmative defenses to the formation of a contract that would vitiate the enforceability of a contract containing an agreement to arbitrate[146] and elevating arbitration provisions in contracts above all other provisions.[147] The effect is to "move[ ] court access for common law claims from an inalienable right to one more easily alienable than many other underlying rights."[148]

As Professor Ware has argued, separability's principle of implied consent to arbitration is a "legal fiction" because the doctrine implies or imputes agreement to the "separated" arbitration agreement that may or may not exist.[149] Says Ware:

> Had a contract consisting of just the arbitration clause been presented to the parties, they might have given their voluntary consent to it. But, that is just speculation. And imposing duties based on speculations about what the parties would have voluntarily consented to is profoundly different from imposing duties based on what

145. *Prima Paint*, 388 U.S. at 407 (Black, J., dissenting).
146. *See* Stempel, *supra* note 131, at 1383-414.
147. *See Prima Paint*, 388 U.S. at 411 (Black, J., dissenting).
148. Shell, *supra* note 131, at 456.
149. Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 131 (1996). Separability proponents might find some doctrinal comfort in Section 211(1) of the Restatement of the Law of Contracts, "Standardized Agreements," which generally provides for implied assent to all boilerplate terms not objected to in standardized agreements. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979). However, recognizing the potential for overreaching and other abuses inherent in the unilateral imposition of contractual terms through a standardized agreement, the drafters of the Restatement also provided exceptions to mitigate that risk. Subsection 211(3) in particular provides that a term would not be a part of the agreement "[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term." *Id.* The Reporter's Comments lend support for the argument that an arbitration provision waiving all legal rights and remedies is the very type of unanticipated term contemplated by section 211(3). *See id.* cmt. f, illus. 7 (explaining that a contractual clause negating liability for personal injuries beyond that imposed by law is unenforceable).

the parties did, in fact, voluntarily consent to. The former has no place in contract law while the latter is the essence of contract law.[150]

4. The Ethics Critique

The heart of this criticism is self-interest, that there is something fundamentally improper about allocating the decisional authority over the validity of the container contract to a person or entity that would stand to profit from that decision. In the public court system, it has long been clear that personal profiteering from judicial authority offends the most fundamental notions of due process.[151] While courts have yet to recognize state action in arbitrations conducted under the Federal Arbitration Act[152]—a necessary predicate for enforceable due process standards—professional and institutional ethical norms applicable to both arbitrators and judges overwhelmingly reject the notion of adjudication by a decision maker with a stake in the dispute without some form of meaningful, actual consent to waive the conflict of interest.[153]

It seems beyond question that an arbitrator has a stake in the outcome with respect to arbitrability decisions generally, including the separability context in particular. If the decision favors arbitrability, the arbitrator retains jurisdiction and the (often substantial) fees that can accompany it.[154] If the decision is against arbitrability, then jurisdiction is extinguished, as are the fees that accompany them. In the intense competition for arbitration services, the reality is that arbitrability decisions can be made not only by reference to the potential income for a single case, but also for entire streams of later cases that may or may not be available to the arbitrator depending upon the arbitrator's performance in a single matter.[155]

To be sure, the overwhelming majority of arbitrators must be presumed to be people of integrity and good will, and the self-interest concern may

150. Ware, *supra* note 149.

151. *See* Connally v. Georgia, 429 U.S. 245 (1977) (finding that payment to a justice of the peace who signs search warrants on a per-warrant-issued basis creates a sufficient pecuniary interest to establish bias for purposes of due process); Gibson v. Berryhill, 411 U.S. 564 (1973) (showing that a state agency that regulates optometry and is also composed of independent optometrists is biased in proceedings against optometrists who work for corporations because they have a pecuniary interest in limiting entry into the field and excluding chain stores); Tumey v. Ohio, 273 U.S. 510 (1927) (finding that a defendant's due process rights were violated when the local mayor presided over the trial where the defendant was convicted for unlawful possession of liquor).

152. For arguments that arbitrations conducted under the FAA constitute "state action," for purposes of due process, see Reuben, *supra* note 2.

153. *See, e.g.*, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canons I and II (Rev. 1999); CODE OF PROF'L RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES §§ 1, 2 (Rev. 2000), *available at* 1999 WL 1627991.

154. *See* Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 307 (1999) (observing that the view that arbitration is inexpensive is not necessarily accurate, given some estimates that arbitrators' fees average $700 per day).

155. For a discussion of repeat player concerns, see *infra* note 315 and accompanying text.

be no greater in the separability context than in other arbitrability contexts. However, the fact is that the arbitrator has a stake in the outcome when deciding arbitrability—including the validity of the container contract—and that creates at least the perception of a conflict of interest that would not inure to the container contract problem if container contract validity was decided by the courts.[156]

5. *The Pragmatism Critique*

The separability doctrine may also be criticized on pragmatic grounds that tend to reflect the workability of the doctrine in light of other criticisms.[157] In advancing this critique, Professor Sternlight has underscored the difficulty of disentangling a party's assent to the arbitration provision from the assent to the container contract, and has questioned why someone intending to defraud another would focus on the arbitration provision rather than "something big like the price or quality of the goods or services at issue."[158] Moreover, even assuming one is able to identify fraud that is directed at an arbitration provision that would permit judicial access, it is difficult to disentangle that fraud from any fraud that might also involve the container contract, and the so-called "national policy favoring arbitration" counsels courts to defer such mixed cases to arbitrators rather than decide them at law.[159]

6. *The Rule of Law Critique*

The rule of law critique focuses on the reasonable expectations of parties to their "day in court" for the resolution of legal disputes, and on how the doctrine of separability frustrates those expectations by routing the merits of disputes over the formation of the container contract to arbitrators.[160]

Legal scholars have long recognized that the expectation of one's "day in court" is a fundamental tenet of the American justice system.[161] Peo-

156. *See* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968) (holding arbitrators under the FAA to the same standards of neutrality and impartiality as Article III judges).

157. *See supra* notes 132-56 and accompanying text.

158. Sternlight, *supra* note 131, at 100 n.87.

159. *See supra* note 99 and accompanying text.

160. The "day in court" expectation is a socially learned construct that the law has come to respect through a variety of mechanisms, such as the doctrines of unconscionability and reasonable expectations, and in variety of contexts. *See* JEFFREY STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 4.09 (2d ed. 1999 & Supp. 2002). For a more extensive discussion in the arbitration context, see Richard C. Reuben, *Democracy and Dispute Resolution: The Problem With Arbitration*, 67 LAW & CONTEMP. PROBS. (forthcoming Winter/Spring 2004).

161. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1167 (2001) (citing, *inter alia*, RONALD DWORKIN, *Principle, Policy, Procedure*, *in* A MATTER OF PRINCIPLE 72, 73 (1985); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1177 ("However articulated, defended, or accounted for, the sense of legal rights as claims whose realization has intrinsic value can fairly be called rampant in our culture and traditions.")).

ple reasonably expect to have a court decide whether they have been fraudulently or otherwise unlawfully induced into signing a contract. In particular, they reasonably expect to be able to assert their legal challenges to the enforceability of the contract before a court of law, they reasonably expect the court to apply the law to their dispute, and they reasonably expect that a court of appeals will be available to correct any errors of law. Yet for many contracting parties, particularly consumers and workers, the first time they learn of the arbitration provision is when they try to assert their claims in a court of law and are met with a responsive FAA section 4 motion to compel the arbitration.[162] Arguments over the equality of the arbitral forum aside,[163] an arbitration proceeding is not a court of law. For some litigants, to be deprived of one's day in court is bad enough, but to be thrust into a forum in which standard contract defenses have no legal force may be even more disconcerting.

As I have discussed elsewhere,[164] emerging trust theory would suggest that such a dissonant experience may diminish the affected person's level of trust in the courts and the rule of law as an institution.[165] Trust generally is a function of met expectations, and with respect to legal institutions, the empirical research has consistently shown that the willingness to comply voluntarily with legal rules is dependent upon the perceived fairness of the process by which the rule was created and applied.[166] Separability calls that notion of perceived fairness into question by defeating one's expectation that a legal dispute arising out of a transaction will be decided by a court of law, unless the parties "clearly and unmistakably" agree to use a different process.

Trust in the courts is one of the most precious elements of the social capital of our legal system.[167] Continuing to sacrifice that capital on separability's altar of judicial efficiency is a high price to pay for a doctrine with little other credible justification.

D. SIGNIFICANCE OF *PRIMA PAINT* SEPARABILITY

While the foregoing critiques raise serious questions about the veracity of *Prima Paint*'s rule of separability, few would quarrel with its significance. *Prima Paint* substantially enhanced the authority of arbitrators by

162. *See First Options*, 514 U.S. at 940-41.

163. *See* Reuben, *supra* note 2, at 606-08; Carrington & Haagen, *supra* note 46, at 649.

164. *See* Reuben, *supra* note 160 and sources cited therein.

165. The concept of trust has been analyzed from a variety of different scholarly disciplines. For an attempt to categorize the streams of trust research flowing from psychology, sociology, political science, anthropology, history, and sociobiology, see P. Worchel, *Trust and Distrust*, *in* THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 174-87 (W.G. Austin & S. Worchel, eds., 1979).

166. *See* Reuben, *supra* note 160 (citing TOM TYLER, WHY PEOPLE OBEY THE LAW (1990)).

167. *See* Wayne D. Brazil, *Court ADR: 25 Years After* Pound*: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 97 (2002). For a discussion of trust in courts, see TOM TYLER, WHY PEOPLE OBEY THE LAW (1990). For a compilation of research on trust and government more generally, see VALERIE BRAITHWAITE & MARGARET LEVI, EDS., TRUST & GOVERNANCE (1998).

allocating to them questions over the validity of container contracts, and it is for this reason that some have argued that *Prima Paint*'s central importance has been to incorporate a version of *kompetenz-kompetenz* into American arbitration law.[168] Moreover, many courts have extended separability beyond the fraud context to include other defenses to contract formation in the federal courts such as mistake, illegality, and frustration of purpose.[169] However, in so doing, *Prima Paint* has also significantly restricted the ability of parties to have the merits of their disputes decided according to the rule of law, as discussed further below.[170] It has also generated enormous confusion and uncertainty, as both state and federal courts have wrestled with its implications for access to justice, and the fundamental tension, in particular cases before them.[171]

1. The Introduction of Implied Consent Theory

Beyond the mechanical doctrine of separability, *Prima Paint* also laid the foundation for a line of U.S. Supreme Court cases that inherently endorse what may be described as a principle of implied consent to arbitration.[172] Indeed, while not stated in *Prima Paint*, it is this principle of implied consent—or, more accurately, imputed consent—to arbitration that gives separability any analytical coherence under contract law. After all, the "separated" arbitration "contract" recognized by separability is not created according to traditional contract formation principles of manifestation of independent assent and consideration.[173] Rather, separability imputes assent and consideration from the container contract to the "separated" contract for arbitration by virtue of the construction of the FAA, not by the conduct of the parties.[174] That is to say, by assenting to the terms of the container contract, a party is also implied by law to have assented to the terms of the arbitration provision that is the subject of the second contract; the assent and consideration supporting the larger container contract is imputed to the separated "arbitration contract." It is this imputed consent that makes it theoretically possible for the arbitra-

168. *See* William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 709 n.101 (1989) (stating that separability "serves a function related to that of competence/competence").

169. *See* 2 MACNEIL ET AL., *supra* note 27, § 15.3.2 and cases cited therein; *see also* Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002) (rejecting illegality exception to *Prima Paint*); Buckeye Check Cashing, Inc. v. Cardegna, 824 So. 2d 228 (Fla. Dist. Ct. App. 2002) (same).

170. *See infra* notes 183-90 and accompanying text.

171. *See infra* notes 191-207 and accompanying text.

172. Professor Stempel has been a leading proponent of a vigorous requirement of consent to arbitration, and a critic of its decline. *See, e.g.*, Stempel, *supra* note 49, 1381-407; Stempel, *supra* note 131, at 1383-90.

173. *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 204-05 (3d ed. 1990).

174. Some courts have been willing to find implied consent to arbitrate arising from the conduct of the parties, although the theoretical construct I am proposing here is somewhat different in that it describes the legal fiction of separability, rather than the actions of a particular party. *See, e.g.*, Pervel Indus., Inc. v. T M Wallcovering, Inc., 871 F.2d 7 (2d Cir. 1989). *See generally* 2 MACNEIL ET AL., *supra* note 27, § 17.3.1.3.

tion provision to survive as an independent contract when the larger contract that contains it is found to be defective by an arbitrator.

Perhaps unwittingly, the Supreme Court has built upon this foundation of implied consent in a series of FAA cases upholding predispute arbitration provisions.[175] Most notably in a pair of cases in the late 1980s involving Shearson/American Express,[176] the Court reversed its own precedent barring the waiver of the judicial forum, *Wilko v. Swan*,[177] and upheld the enforceability of predispute arbitration provisions against claims that such provisions should not be enforced because they are included in contracts of adhesion.[178] The Court's decision to reverse *Wilko* recognized that the FAA permitted the waiver of the judicial forum, and while the opinion speaks in terms of furthering the "national policy favoring arbitration," the Court's willingness to enforce a predispute arbitration provision necessarily reflects an operating assumption that a waiver of judicial access rights may be implied or imputed from the larger container contract at issue.[179] After all, the nature of the claim that the Court rejected in the *Shearson* cases was that there was no actual consent.[180] The Court later extended this principle significantly in *Gilmer v. Interstate/Johnson Lane*,[181] a major decision permitting the implied waiver of court access even for statutory discrimination claims through predispute arbitration provisions in employment contracts of adhesion.[182]

2. *The Contraction of Access to Justice*

The expansion of separability and its related principle of implied consent to arbitration has had the effect of contracting access to justice with respect to the validity of both the arbitration provision and the larger container contract.

At the level of the larger container contract—the primary substantive concern for most parties—the rule of separability makes it virtually impossible for a party to have a fraud, mistake, or other contract formation

175. For concise discussions, see Carrington & Haagen, *supra* note 46, at 363-79; Stempel, *supra* note 49, at 1408-17; and Sternlight, *supra* note 47, at 644-74.

176. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).

177. Wilko v. Swan, 346 U.S. 427 (1953).

178. *See, e.g.*, *McMahon*, 482 U.S. at 223-24.

179. *See Rodriguez*, 490 U.S. at 481; *accord* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626 (1984) (stating that "although the parties' intentions control . . . those intentions are generously construed as to issues of arbitrability"); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (holding that "[a]s a matter of federal law, any doubts . . . should be resolved in favor of arbitration").

180. Indeed, in the *Shearson* cases, rather than require actual consent to arbitration, the Court shifted the burden to the plaintiff "to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *See, e.g.*, *McMahon*, 482 U.S. at 227.

181. 500 U.S. 20 (1991). The *Gilmer* case generated, and continues to generate, a storm of controversy far too extensive to discuss here. For a sampling of perspectives, see Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 979 n.131 (2000).

182. *Gilmer*, 500 U.S. at 26.

challenge to that underlying contract heard and decided by a court of law, according to the rule of law.[183] By definition, separability requires such challenges to be heard by the arbitrator, who may but need not necessarily apply such rules.[184]

Similarly, at the narrower level of the arbitration provision itself, the rule of separability makes it highly unlikely that the enforcement of the "separated" arbitration contract will be defeated by a formation-based challenge, apart from unconscionability or other public policy defenses.[185] Rare is the case in which a party seeking to avoid arbitration will be able to point to a deformity of contract formation that is directed exclusively at the arbitration clause and not at all to the larger container contract. For this reason, despite the express language of the FAA, and despite the presumably millions of arbitrations conducted under its authority since its enactment in 1925,[186] there are few reported cases invalidating arbitration agreements on traditional contract grounds other than unconscionability.[187] Rather, the formation challenges to the underlying transaction are rarely heard and decided under the law, as one's "day in court" never, in fact, arrives.[188]

The net effect of separability is to remove from the public courts, and the public law, an untolled but potentially vast number of cases involving validity challenges to contracts that include an arbitration provision—a trend likely to continue because of the continuing push toward form contracts[189] and the inclusion of arbitration provisions in those contracts.[190]

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183. *See generally* Stempel, *supra* note 131.

184. *See supra* notes 12-13 and accompanying text.

185. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000); Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1981). For a discussion with extensive case citations, see F. PAUL BLAND, JR., ET AL., NATIONAL CONSUMER LAW CENTER, CONSUMER ARBITRATION AGREEMENTS §§ 4.1-4.4 (2001).

186. The 2001 case load for the AAA alone was 218,000—capping seven years of caseload expansion. *See* Annual Report, American Arbitration Association 1 (2001).

187. 2 MACNEIL ET AL., *supra* note 27, § 19.2.1; WARE, *supra* note 27, § 2.24. Of course, unconscionability defenses inherently are directed at the arbitration provision, not the container contract, although they may relate to the similar claims directed at the container contract.

188. I do not mean to suggest that all arbitrators necessarily operate lawlessly. Surely many (if not most) arbitrators are conscientious, and may well look to legal standards to guide their judgment. Rather my point is simply that they have no obligation to apply those standards unless the parties so specify in their submission to arbitration, or unless mandated by the arbitral rules under which the proceeding is taking place. To be clearer, I see this as a benefit of arbitration, in that it unchains the decision maker from the rigidities of legal rules, and therefore is a strong reason to choose arbitration as a dispute resolution process in an appropriate case.

189. For an argument that efficiency interests will continue to push contract formation toward standardization, see Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997).

190. For a discussion of the growing popularity of contractual arbitration, set in the context of an argument in favor of increased regulatory oversight of arbitrators, see Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need For Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337-41 (2002), and sources cited therein.

3. *The Legacy of Doctrinal Confusion*

This is a harsh result, and one that appeals to the rule-of-law side of the fundamental tension, for the rule-of-law values that were embraced in the legislative compromise in the FAA do not square easily with the notion that one may be completely cut off from the possibility of having one's dispute decided according to the rule of law. This dissonance is felt in the tortured case law that has followed *Prima Paint* in both federal and state courts.

The lower federal courts are of course obligated to follow *Prima Paint*'s rule of separability, although clearly they have done so with varying degrees of fidelity.[191] State courts, however, are not similarly bound by the so-called "Federal Rule,"[192] and the picture we see in those decisions is much more troublesome.[193] In this regard, conventional wisdom holds that separability is also the majority rule in the states,[194] and it is indeed technically accurate to say that a majority of states have enacted "some form" of separability.[195] However, closer analysis reveals a much deeper level of reticence in the states, likely reflecting both the fundamental tension as well as other substantive problems with separability.[196] Instead, it is clear that the states do not view separability as a rule of such overwhelming normative desirability as to compel unanimity.

As a matter of common law, just over half of the states and the District of Columbia—28 jurisdictions—have clearly adopted some form of the separability doctrine.[197] However, only 17 of them have adopted it without limitation,[198] while 11 others have adopted separability only in lim-

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191. See *infra* note 202 for federal appellate cases limiting separability to void contracts and situations alleging ineffective assent.

192. 1 DOMKE, *supra* note 12, § 8.02. While *Prima Paint* is binding on federal courts (albeit narrowed by several), state courts have been much more reticent about adopting separability. *See infra* notes 199-207 and accompanying text.

193. Reasonable questions may be raised about whether state court decisions that are inconsistent with Prima Paint are preempted by that decision under *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and related cases. However, because of the complexity of their analysis, they are beyond the scope of this article. Rather, I assume these state court rulings are valid and not preempted by the FAA.

194. *See* Stone, *supra* note 122, at 516; 1 DOMKE, *supra* note 12, § 8.02.

195. *See* UNIF. ARBITRATION ACT § 6(d) cmt. 4 (2000).

196. *See supra* notes 131-67 and accompanying text.

197. *See infra* notes 198-99.

198. The seventeen states (including the District of Columbia) that have adopted *Prima Paint* without limitation are: Alabama (Old Republic Ins. Co. v. Lanier, 644 So.2d 1258 (Ala. 1994)); Arizona (Flower World v. Wenzel, 594 P.2d 1015 (Ariz. Ct. App. 1978)); Connecticut (Two Sisters, Inc. v. Gosch & Co., 370 A.2d 1020 (Conn. 1976.)); Delaware (Anadarko Petroleum Corp. v. Panhandle E. Corp., No. 8738, 1987 WL 13520 (Del. Ch. July 7, 1987)); District of Columbia (Hercules & Co. v. Shama Rest. Corp., 613 A.2d 916 (D.C. 1992)); Hawaii (Lee v. Heftel, 911 P.2d 721 (Haw. 1996)); Illinois (Aste v. Metro. Life Ins. Co., 728 N.E.2d 629 (Ill. App. Ct. 2000)); Iowa (Dacres v. John Deere Ins. Co., 548 N.W.2d 576 (Iowa 1996)); Massachusetts (Quirk v. Data Terminal Sys., Inc., 475 N.E.2d 1208 (Mass. 1980)); Michigan (Scanlon v. P & J Enters., Inc., 451 N.W.2d 616 (Mich. Ct. App. 1990)); Montana (Mueske v. Piper, Jaffray & Hopwood, Inc., 859 P.2d 444 (Mont. 1993)); Nevada (Sentry Systems, Inc. v. Guy, 654 P.2d 1008 (Nev. 1982)); Pennsylvania (Flightways Corp. v. Keystone Helicopter Corp., 331 A.2d 184 (Pa. 1975)); South Carolina (South Carolina Pub. Serv. Auth. v. Great W. Coal, 437 S.E.2d 22 (S.C. 1993));

ited form.[199] For example, a common approach to constraining separability has been to limit its application to situations in which the claim is that the container contract is voidable[200] and not applying separability to situations in which the claim is that the container contract is void[201] or non-existent.[202] Other courts have limited separability to the

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Texas (Gerwell v. Moran, 10 S.W.3d 28 (Tex. App.—San Antonio 1999, no pet.)); Virginia (Ryan Med., Inc. v. Univ. of Va. Alumni Patents Found., No. LR-3818-1, 1990 WL 751070 Va. Cir. Ct. Feb 21, 1990)); and Washington (Pinkis v. Network Cinema Corp., 512 P.2d 751 (Wash. Ct. App. 1973)). It should be noted that the rulings from seven of these jurisdictions are not from the courts of last resort in their states, meaning that the issue has not been finally decided in those states, and could go the other way, opposing or limiting separability. Those states are Arizona, Delaware, Illinois, Michigan, Texas, Virginia, and Washington.

199. The eleven states that have adopted *Prima Paint* in limited form are: California (Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061 (Cal. 1996)); Colorado (R.P.T., Inc. v. Innovative Communications., 917 P.2d 340 (Colo. Ct. App. 1996)); Austin v. U.S. West, Inc., 926 P.2d 181 (Colo. Ct. App. 1996)); Georgia (Results Oriented, Inc. v. Crawford, 538 S.E.2d 73, 78 (Ga. Ct. App. 2000)); Indiana (Goebel v. Blocks & Marbles Brand Toys, Inc., 568 N.E.2d 552 (Ind. Ct. App. 1991)); Kansas (City of Wamego v. L.R. Foy Constr. Co., 675 P.2d 912 (Kan. Ct. App. 1984)); Louisiana (George Engine Co. v. S. Shipbuilding Corp., 376 So. 2d 1040 (La. Ct. App. 1979)); Maryland (Holmes v. Coverall N. Am., Inc., 633 A.2d 932 (Md. Ct. Spec. App. 1993)); Minnesota (Atcas v. Credit Clearing Corp. of Am., 197 N.W.2d 448 (Minn. 1972)); New York (Teleserve Sys. Inc. v. MCI Telcomms. Corp., 659 N.Y.S.2d 659 (1997)); North Dakota (Country Kitchen of Mount Vernon, Inc. v. Country Kitchen of W. Am., Inc., 293 N.W.2d 118 (N.D. 1980)); and Ohio (Weiss v. Voice/Fax Corp., 640 N.E.2d 875 (Ohio Ct. App. 1994)).

200. "Voidable" contracts are those "where one party was an infant, or where the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract." RESTATEMENT (SECOND) CONTRACTS § 7 cmt. b (1981).

201. "Void" contracts are those which, when breached, "the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor." RESTATEMENT (SECOND) CONTRACTS § 7 cmt. a (1981). These will typically include contracts that the law will not enforce as a matter of policy (i.e., because it deals with an illegal subject matter).

202. With "non-existent contracts," often called "void" contracts, the nature of the claim is that there never was an agreement to arbitrate because the party sought to be compelled into arbitration was not a party to a contract with an arbitration provision. *See, e.g.*, Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 55 (3d Cir. 1980) (holding that the question of whether a particular individual has authority to bind a party must be determined by the court, not by an arbitrator).

Courts in this regard often appear to further limit the application of the separability doctrine by favoring findings of voidness or non-existence rather than voidability to permit the courts to retain jurisdiction over the dispute. *See, e.g.*, Three Valleys Mun. Water Dist. v. E. F. Hutton & Co., 925 F.2d 1136, 1140-42 (9th Cir. 1991) (holding that separability is "limited to challenges seeking to *avoid* or *rescind* a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to"); Jolley v. Welch, 904 F.2d 988, 994 (5th Cir. 1990) (affirming district court's referral of dispute to a magistrate where there was a possibility of forgery of signatures on the contract containing the arbitration provision); Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998, 1000 (11th Cir. 1986) (stating that "where the allegation is one of . . . ineffective assent to the contract, the issue [of arbitrability] is not subject to resolution pursuant to an arbitration clause contained in the contract documents"); Nature's 10 Jewelers v. Gunderson, 648 N.W.2d 804 (S.D. 2002) (holding that the arbitration provision in a franchise contract was not enforceable because the franchise registration had expired, leaving the contract void); Barden & Robeson Corp. v. Hill, 539 S.E.2d 106 (W. Va. 2000) (holding that the right to arbitrate is waived when not asserted in responsive pleading and the allegation is that the contract is void). *But see* Timberton Golf, L.P. v. McCumber Constr., Inc., 788 F. Supp. 919, 924-25 (S.D. Miss. 1992) (compelling an arbitration clause despite finding that the underlying contract was void). For a general discussion, see Steven Walt, *Decision by Divi-*

narrow "fraud in the inducement" context in which it arose in *Prima Paint.*[203] Still others have simply decided the dispute before them on other grounds.[204] In addition, three states have mixed authority, but may fairly be characterized as having adopted a limited form of *Prima Paint.*[205]

On the other hand, however, twenty-three states have either refused to adopt the separability doctrine or have no authority on it at all. Nine states have refused to adopt it at common law, deliberately rejecting separability in appellate rulings,[206] while fourteen of the twenty-three states have issued no authority on the question in the nearly thirty-five years that *Prima Paint* has been the law.[207]

Finally, state legislatures have expressed little interest in codifying *Prima Paint*, although the Revised Uniform Arbitration Act (RUAA) would codify it in states in which the RUAA is adopted.[208] While virtually all states have enacted general arbitration statutes,[209] only three arguably even address separability—New Jersey,[210] New York,[211] and

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sion: The Contractarian Structure of Commercial Arbitration, 51 RUTGERS L. REV. 369 (1999).

203. California is a good example. *See* Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061 (Cal. 1996).

204. *See, e.g.*, Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 590 (7th Cir. 2002) (Easterbrook, J.) (decided on other grounds).

205. The three states that have mixed authority, both appearing to reject and to adopt *Prima Paint* in at least limited form are: California, *compare* Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 673 P.2d 251 (Cal. 1983) (following *Prima Paint*), *with Rosenthal*, 926 P.2d 1061 (Cal. 1996) (limiting *Prima Paint* to claims of fraud in the inducement); Louisiana, *compare* George Engine Co. v. S. Shipbuilding Corp., 376 So. 2d 1040 (La. Ct. App. 1979), *with* TRCM v. Twilight P'shp, 706 So.2d 1037 (La. Ct. App. 1998); and Ohio, *compare* Weiss v. Voice/Fax Corp., 640 N.E.2d 875 (Ohio Ct. App. 1994), *with* Duryee v. Rogers, No. 98AP-1255, No. 98AP-1256, 1999 WL 744341 (Ohio Ct. App. Sept. 23, 1999). Because of the nature of the contrast as being between appellate and supreme courts, or because of the weight of lower court rulings in a particular direction, I further categorize all three states—California, Louisiana, and Ohio—as having adopted *Prima Paint* in limited form. *See supra* note 199.

206. The nine states rejecting *Prima Paint* are: Florida (Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000)); Kentucky (Marks v. Bean, 57 S.W.3d 303 (Ky. Ct. App. 2001)); New Hampshire (Pittsfield Weaving Co., Inc. v. Grove Textiles, Inc., 430 A.2d 638 (N.H. 1981)); New Jersey (Quigley v. KPMG Peat Marwick, LLP, 749 A.2d 405 (N.J. Sup. Ct. 2000) (but see *infra* note 210 for statutory authority authorizing parties to adopt separability by contract)); New Mexico (Shaw v. Kuhnel & Assocs., 698 P.2d 880 (N.M. 1985)); North Carolina (Paramore v. Inter-Regional Fin. Group Leasing Co., 316 S.E.2d 90 (N.C. Ct. App. 1984)); Oklahoma (Shaffer v. Jeffery, 915 P.2d 910 (Okla. 1996)); South Dakota (Nature's 10 Jewelers v. Gunderson, 648 N.W.2d 812 (S.D. 2002)); and Tennessee (Frizzell Constr. Co. v. Gatlinburg, L.L.C., 9 S.W.3d 79 (Tenn. 1999)).

207. The 14 states without common-law authority on *Prima Paint* are: Alaska, Arkansas, Idaho, Maine, Mississippi, Missouri, Nebraska, Oregon, Rhode Island, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

208. UNIF. ARBITRATION ACT § 6(c) (Rev. 2000).

209. For a full listing of these state statutes, see Reuben, *supra* note 181, at 976 n.108.

210. *See* N.J. STAT. ANN. § 2A:23A-5 (West 2000) (explicitly providing arbitrator with jurisdiction over questions of whether the dispute is covered by the arbitration provision, and whether the whole contract was induced by fraud, while exempting fraudulent inducement claims directed at the arbitration provision).

211. *See* N.Y. C.P.L.R. 7501 (McKinney 1998). The statute does not discuss the doctrine, but the "Practice Commentary" following the statute does. The commentary cites a

Utah.[212] Even then, none of those states appears to adopt separability legislatively; to the contrary, Utah's ambiguous statute may more easily be read to reject *Prima Paint*.[213]

IV. A RAY OF LIGHT: *FIRST OPTIONS*, *HOWSAM*, AND AN APPARENT CHANGE OF COURSE

Despite the many state and federal decisions limiting separability, for years *Prima Paint* has stood as a towering landmark. However, the rise of the ADR movement in the last quarter of the twentieth century, and its apparent embrace of implied consent to arbitrability, brought the issue of arbitrability back to the Court in *First Options* in 1995, and, more recently, in *Howsam* in 2002, and to a lesser extent *PacificCare* in 2003.[214] The analysis in the more recent cases suggests that the Court may be charting a different, simpler course on FAA arbitrability as a whole by making clear that courts, not arbitrators, are to decide questions of arbitrability, by clearly distinguishing what is (and what is not) a question of arbitrability, and by further articulating a presumption that an arbitration provision's silence on the "who decides" question should be construed as an intent of the parties for courts to retain jurisdiction to decide arbitrability. This development has potentially serious implications for the doctrine of separability, for it brings to the surface a fissure deeply embedded in the Supreme Court's case law over the nature of assent required to establish an agreement to arbitrate.

A. *First Options v. Kaplan*

1. The Dispute

First Options arose with the stock market crash of 1987.[215] Manual Kaplan was a private stock trader doing business through MKI, a company that Kaplan and, apparently, his wife, Carol, solely owned. First Options was a "clearing firm" that handled MKI's trades on the floor of the Philadelphia Stock Exchange.[216] When the markets crashed on October 19, 1987, MKI lost more than $12 million, leaving a deficit of $2.1

number of cases, including *Weinrott v. Carp*, 298 N.E.2d 42, (N.Y. 1973), for the proposition that New York consistently follows the *Prima Paint* doctrine. *See* Vincent C. Alexander, *Practice Commentaries to § 7501, C7501:4, Threshold Questions: What Issues Did the Parties Agree to Arbitrate?* (McKinney 1998). For a case reaching an opposite result, see *Teleserve System, Inc. v. MCI Telecommunications Corp.*, 659 N.Y.S.2d 659 (N.Y. App. Div. 1997).

212. UTAH CODE ANN. § 78-31a-3 (1996). It provides: "A written agreement to submit any existing or future controversy to arbitration is valid, enforceable, and irrevocable, except upon grounds existing at law or equity to set aside the agreement, *or when fraud is alleged as provided in the Utah Rules of Civil Procedure.*" *Id.* (emphasis added).

213. *Id.* Indeed, fraud is the only specifically listed exception to the general rule that arbitration agreements are enforceable if valid as a matter of contract.

214. *See supra* note 35.

215. *First Options*, 514 U.S. at 940.

216. Kaplan v. First Options of Chi., 19 F.3d 1503, 1506 (3d Cir. 1993).

million in its First Options account.[217] First Options sought recovery from both MKI and from the Kaplans personally. A series of disputes followed, which finally led to a work-out agreement consisting of four documents and a continuing relationship between MKI and Kaplan.[218]

That relationship continued to be contentious, however, and in 1989 First Options submitted all of its disputes with Kaplan to an arbitration panel of the Philadelphia Stock Exchange, pursuant to a broad arbitration provision in one of the four work-out documents.[219] MKI accepted arbitration, but the Kaplans filed written objections to the arbitration of the First Options's claims against them personally, contending that those documents did not include an arbitration provision and that the Kaplans therefore had not agreed to arbitrate those disputes.[220] The Kaplans participated in a pre-hearing discovery conference in 1990, but their new counsel failed to renew the Kaplans' objection to the arbitration panel's jurisdiction.[221] There was no progress on the case until 1992, when the Kaplans, again represented by new counsel, renewed their objection in a motion to dismiss the personal claims against them. The arbitration panel rejected the motion without comment, and finally entered an award totaling more than $6 million against the Kaplans and MKI, jointly and severally.[222]

The Kaplans filed a petition to vacate the award against them personally in federal district court under section 10 of the FAA. The court rejected that claim and instead granted First Options's cross-motion to confirm the award, apparently ruling that the Kaplans had generally consented to the arbitration by virtue of the arbitration provision in the one work-out document, and that they had waived their objections to arbitral jurisdiction by participating in the 1990 discovery conference.[223] The Kaplans appealed to the U.S. Court of Appeals for the Third Circuit, which affirmed the award against MKI but reversed the award against the Kaplans personally.[224]

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217. *Id.*

218. The four work-out agreement documents were: (1) a Letter Agreement executed by First Options, MKI, Mr. Kaplan, Mrs. Kaplan, and certain other entities and individuals; (2) a Guaranty executed only by MKI; (3) a Subordinated Loan Agreement executed by First Options, MKI, and a separate entity; and (4) a Subordinated Promissory Note executed by MKI. *Id.*

219. The arbitration clause in the Subordinated Loan Agreement provided in relevant part:

> "[A]ny controversy arising out of or relating to this [Subordinated Loan] Agreement, the Letter Agreement, the Subordinated Notes or any other document referred to herein or therein or the breach thereof shall be submitted to and settled by arbitration pursuant to the Constitution and Rules of the Exchange. The parties hereto and all who may claim under them shall be conclusively bound by such arbitration."

Id. at 1507 n.5.

220. *First Options*, 514 U.S. at 941.

221. *Kaplan*, 19 F.3d at 1508.

222. *Id.*

223. *Id.*

224. *Id.* at 1510-23.

2. The U.S. Supreme Court's Decision

A unanimous U.S. Supreme Court affirmed the Third Circuit ruling in a decision that was framed in terms of the standards of judicial review for arbitration awards.[225] Justice Stephen Breyer, writing for the Court, said there were two related issues: whether reviewing courts should give de novo review to arbitrator decisions on the arbitrability of a dispute, and whether appellate courts should give de novo or deferential review to district court rulings on motions to vacate an award under section 10 of the FAA.[226]

a. Scope

The Court focused its opinion primarily on the first issue. Breyer emphasized the narrow nature of the issue the Court was deciding, noting that there were three types of disagreements at issue in the Kaplan dispute: (1) the disagreement about whether the Kaplans were personally liable (the merits), (2) the disagreement about whether they had agreed to arbitrate that dispute (the arbitrability of the dispute), and (3) the disagreement over who would decide whether there was an agreement to arbitrate (who decides arbitrability).[227] Breyer made clear that the Court was only considering the third question, the "who decides" question. For the sake of clarity and accessibility, I shall refer to this typology of disagreement as Tier I, Tier II, and Tier III questions.

b. The Rule Announced

The Court said the answer to the Tier III "who decides" question was "fairly simple" when considered in light of the first principles of the FAA: that an agreement to arbitrate is first and foremost a contract to waive one's presumptive right to access courts and the law. Breyer wrote:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . so the question "who has the primary power to decide arbitrability" turns upon whether the parties agreed to submit that question to arbitration. If so, then the court should defer to the arbitrator's arbitrability decision. If not, then the court should decide the question independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties.[228]

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225. The Court's "standard of review" frame is odd, but significant. The reasoning of the attorneys for First Options may have been strategic, to take advantage of the heavy judicial presumption against review of arbitral decisions. Moreover, the effect of the Third Circuit's decision was to create a conflict with the Eleventh Circuit's decision in *Robbins v. Day*, 954 F.2d 679, 681-82 (11th Cir. 1992), thus increasing the likelihood of Supreme Court review, especially given the unexceptional merits of the Third Circuit's opinion.

226. *First Options*, 514 U.S. at 941.

227. *Id.* at 942. This structure is consistent with the structure used in this article. *See supra* notes 77-79 and accompanying text.

228. *Id.* at 943.

In other words, the answer to the Tier III "who decides" question is found in the contract. If the parties clearly and unmistakably agreed to submit the Tier II arbitrability question to the arbitrator, then courts should generally honor that intent with deferential review of an arbitrator's ruling that there is an agreement to arbitrate. If that intent is not clear and unmistakable, however, the courts should not give deference to an arbitrator's ruling on this issue.

c. Presumptions in Applying the Rule

Crucially, the Court's opinion emphasized certain presumptions that govern the application of the rule.[229] The most significant presumption is that if the agreement to arbitrate is silent on arbitrability, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so."[230] That is, when considering a Tier III "who decides" question, the operating assumption is that courts are to decide if there is a valid agreement to arbitrate (the Tier II question) unless the parties have "clearly and unmistakably" manifested their intent to have arbitrators decide that question.

This was a deliberate step for the Court, extending beyond the collective bargaining context an important precedent establishing the "clear and unmistakable" requirement for labor arbitrations, *AT&T Technologies, Inc. v. Communications Workers*.[231] While this extension did not create a new rule of law per se, the Court recognized that its application to a new context would have a ripple effect on the law of that new context, and took care to address those consequences. In particular, the Court recognized that the *AT&T Technologies* presumption of judicial determination "reverses"[232] the more familiar presumption that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" that the Court had articulated in the oft-cited *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*.[233]

However, the Court reasoned that it is "understandable" that the law have different presumptions for situations in which there are questions regarding the *scope* of an arbitration agreement and for situations in which the question is whether there is a valid agreement to arbitrate at all.[234] In the *scope* context, ambiguity should cut in favor of arbitrability because "the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitra-

229. For an argument that this portion of *First Options*, and indeed, that much of the opinion is dicta, see Rau, *supra* note 32, at 287-303. For a more thorough discussion, see *infra* notes 322-33 and accompanying text.

230. *Id.*

231. *First Options*, 514 U.S. at 944 (citing AT&T Techs. Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)); *see also Warrior & Gulf*, 363 U.S. at 583.

232. *First Options*, 514 U.S. at 945.

233. 460 U.S. 1, 24-25 (1983), *cited in* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626 (1984).

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

tion as seen in *Moses H. Cone*, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter (issues will be deemed arbitrable unless 'it is clear that the arbitration clause has not included' them)."[235] By contrast, the *validity* context is guided by "the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, [so] one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[236]

d. The Application of the Rule

The Court's application of the rule and related presumptions suggests an equally important trajectory for future doctrines that appear to be confirmed in *Howsam*, as the Court said First Options could not show that the Kaplans "clearly and unmistakably" agreed to arbitrate the "who decides" issue. In this regard, two points are particularly significant.

First, the Court rejected First Options's argument that a "clear and unmistakable" agreement to arbitrate could be inferred from the Kaplans' participation in the arbitration after having filed the written objection to the arbitrator's jurisdiction.[237] Rather, as a matter of law, the Court said that merely arguing the jurisdiction issue to an arbitrator does not fairly imply a willingness to be bound by the arbitrator's decision on that issue.[238]

This aspect of the Court's holding is particularly important because it seems to support the suggestion that a judicial interpretation of "clear and unmistakable" waiver cannot be based on implied consent, as *Prima Paint* and following cases had permitted.[239] Indeed, the justices' vigorous questioning of counsel for First Options during oral arguments focused almost exclusively on the propriety of First Options' argument that the Kaplans' actual intent to arbitrate the arbitrability issue could be implied from their conduct, specifically their participation in the arbitration.[240] By stark contrast, no questions or comments from the justices suggested support on the Court for the concept of implied consent to arbitrate at

235. *Id.* at 945.
236. *Id.*
237. *Id.* at 946.
238. In this regard, the Court noted that the law of the circuit indicated that the Kaplans could argue the arbitrability issue without losing their right to appeal on that ground. Moreover, under these facts, the Kaplans were still bound to arbitrate the MKI disputes, so declining to participate was not an option. *Id.*
239. *See supra* notes 172-82 and accompanying text.
240. Transcript of Oral Argument at *4-28, 53-54, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995) (No. 94-560), *available at* 1995 WL 242250. "[Counsel for First Options:] I think everyone in this case agrees that the parties are entitled to allow the arbitrators to decide the issue of arbitrability. The only question is how they do that, or how they signal that, whether that has to be for some reason especially clear and unmistakable . . . ." *Id.* at *53.

least Tier III arbitrability. The Court's unanimous decision to require "clear and unmistakable" intent to arbitrate the Tier III "who decides" issue seems to speak for itself.

Second, the Court expressly rejected efficiency-based arguments as a basis for finding that the Kaplans agreed to arbitrate, requiring instead individualized contractual analysis. As did many successful litigants before them, First Options strongly advanced a policy argument that the FAA's "national policy favoring arbitration" should lead to a presumption that the Kaplans agreed to arbitrate the "who decides" question.[241] The effect of this argument would have been to establish a judicial policy that would have allocated disputes over the "who decides" issue to arbitrators, subject to deferential review by the courts, ostensibly to further the oft-cited individual and institutional interests in preventing "delay and waste in the resolution of disputes."[242] Remarkably, given its recent no-holds-barred jurisprudence of *Gilmer* and *Allied Bruce Terminex v. Dobson*,[243] the Court dismissed that argument as "legally erroneous . . . . After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms."[244]

The Court's unanimous and explicit willingness to reject an analysis that would have promoted judicial economy in favor of an admittedly less-efficient individualized analysis is consistent with, and even underscores, the importance that the Court appears to be attaching to the requirement of an actual agreement to arbitrate the "who decides" question. This conclusion, as the Court itself stressed, "flow[s] inexorably from the fact that arbitration is simply a matter of contract between the parties."[245] In other words, the national policy regarding arbitration is not one favoring arbitration as an institution, but rather one that seeks to preserve the rights of individual parties to contract for the arbitration of disputes if they so desire.[246]

3. *The Return to Actual Consent Theory?*

The Court's decision in *First Options* was its most significant on arbitrability since *Prima Paint*, and in this respect it is equally significant that

241. *Id.* First Options's argument that the Kaplans had agreed to arbitrate was based exclusively on the Kaplans' participation in the arbitration proceeding. *See* Brief for the Petitioner at 14-16, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995) (No. 94-560).

242. *First Options*, 514 U.S. at 946.

243. 513 U.S. 265 (1995) (holding that the term "commerce" in the FAA is to be given its broadest possible construction). Justice Breyer's opinion in *Allied-Bruce* was released in January 1995, before the May 1995 release of *First Options*.

244. *First Options*, 514 U.S. at 947 (citations omitted).

245. *Id.* at 943.

246. For further discussion of the "national policy" regarding arbitration see Sternlight, *supra* note 11, in which the author argues that the Supreme Court's expressed preference for binding arbitration is unsupported by the legislative history of the Federal Arbitration Act and is also unwise as a matter of policy.

the decision was unanimous, without even a concurring opinion to suggest a hint of dissent.[247]

At the core, *First Options* operates from a very different theoretical basis than *Prima Paint.* Where the underlying theory of *Prima Paint* is one of implied consent, the underlying theory of *First Options* is one of actual consent. In this regard, *First Options* builds upon a line of cases pre-dating *Prima Paint*, beginning with *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,[248] in which the Court emphasized a union's voluntary choice in negotiating an arbitration provision in a collective bargaining agreement. The Court upheld the validity of the arbitration provision,[249] but also recognized that "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit."[250] The Court expanded upon *Warrior & Gulf* in *AT&T Technologies, Inc. v. Communications Workers*, making it clear that "whether the parties agreed to arbitrate" is "undeniably an issue for judicial determination . . . unless the parties clearly and unmistakably provide otherwise."[251] In so doing, the Court reversed an appellate court ruling ordering the parties to arbitrate Tier III arbitrability.[252]

First Options extends this line of cases, and their "clear and unmistakable" requirement, beyond the collective bargaining context and into the realm of contractual arbitrations covered by the FAA.[253] Thus, under *First Options*, courts are to decide questions of at least Tier III arbitrability in both collective bargaining and private contractual contexts, unless the parties "clearly and unmistakably" allocate that power to the arbitrator.[254] A court may not imply this "clear and unmistakable" intent

247. On the strategic use of concurring opinions, see generally Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083 (1995); Laura K. Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777 (1990); and Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394 (1952).

248. 363 U.S. 574 (1960). *Warrior & Gulf* was one of the "Steelworkers Trilogy" of cases generally upholding the validity of arbitration in the collective bargaining context. *See also* United Steelworkers v. Am. Mfg., 363 U.S. 564 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 583 (1960). These cases are often cited for the proposition that courts should apply a presumption of arbitrability when enforcing arbitration provisions in collective bargaining agreements. *See also* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) (establishing enforceability of collective bargaining agreements in federal courts).

249. *Warrior & Gulf*, 363 U.S. at 579-81.

250. *Id.* at 582

251. *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986).

252. *Id.* at 651-52.

253. *See* Wright v. Universal Mar. Servs. Corp., 525 U.S. 70, 79- 81 (1998) (holding that a waiver of statutory rights must at least be clear and unmistakable); Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 476 (1989) (holding that federal law does not preempt capacity of parties to choose law that will govern arbitration); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-20 (1985) (holding that the FAA's basic purpose is to "ensure judicial enforcement of privately made agreements to arbitrate").

254. *First Options*, 514 U.S. at 943-44.

from an arbitration provision that is silent on the question,[255] nor may a court impute such an intent from the conduct of the parties in participating in the arbitration over objection.[256] Acquiescence to the arbitration of the "who decides" question must be "clear and unmistakable."[257]

The Court has continued to extend this principle, most recently refusing to find that an employment arbitration agreement bound the Equal Employment Opportunity Commission as a third party to the contract because the EEOC was never a party to the arbitration agreement.[258] In so doing, the Court stressed that lower courts are to "look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement."[259]

B. *Howsam v. Dean Witter Reynolds*

The Court's 2002 term decision in *Howsam* built upon *First Options* and continued to send strong signals about movement toward an actual consent standard. While *First Options* clarifies the allocation of judicial and arbitral roles and related presumptions with respect to Tier III questions, *Howsam* clarifies the definition of arbitrability by at least attempting to draw a clear line between questions of arbitrability that are to be decided by courts, and those matters that bear on the decisional allocation between courts and arbitrators but are not questions of arbitrability. This clarified an important question left open by *First Options*: whether its refashioned arbitrability analysis included a place for what historically had been called "procedural arbitrability." The answer, as we shall see, was "yes, but not within the arbitrability analysis."

1. The Narrow Issue and Decision in Howsam

Howsam focused on whether courts or arbitrators were to decide whether an investor's claim against a broker was timely filed under the securities industry's so-called "six year" rule for filing such claims. It arose out of an investor's lawsuit against a securities broker, which was compelled to arbitration under a broad general arbitration provision in the industry's standard customer contract.[260] Under the rule, "[n]o dispute, claim, or controversy *shall be eligible* for arbitration under this Code where six (6) years have elapsed from the occurrence or event giv-

255. *Id.* at 944.
256. *First Options*, 514 U.S. at 946.
257. *See* Rau, *supra* note 32, at 303.
258. Equal Employment Opportunity Comm'n v. Waffle House, 534 U.S. 279 (2002).
259. *Id.* at 294.
260. As in other contexts, mandatory securities arbitration is controversial. *Compare* Margaret M. Harding, *The Cause and Effect of the Eligibility Rule in Securities Arbitration: The Further Aggravation of Unequal Bargaining Power*, 46 DEPAUL L. REV. 109 (1996) (criticizing arbitration provisions in investor-broker contracts required for the opening of accounts), *with* Deborah Masucci, *Securities Arbitration—A Success Story: What Does the Future Hold?*, 31 WAKE FOREST L. REV. 183, 185 (1996) (contending that mandatory securities arbitration has helped stave off litigation costs).

ing rise to the act or dispute, claim, or controversy."[261]

The question that had deeply split the lower courts was whether the "eligible for arbitration" language was more akin to a statute of limitations, and therefore a procedural issue that traditionally would be decided by the arbitrator, or whether it was a threshold jurisdictional requirement that traditionally would be decided by a court. Five federal circuits had drawn the analogy to a statute of limitations,[262] one way or another, and five circuits had gone the other way, finding the language to set a substantive jurisdictional requirement for judicial determination.[263]

The Tenth Circuit in *Howsam* ruled that the eligibility determination was to be made by the arbitrator, and the U.S. Supreme Court agreed, on an 8-0 vote.[264] Justice Breyer, continuing to establish himself as the Court's leader on arbitration issues,[265] again wrote the opinion for the Court.[266]

2. *The Decision's Broader Doctrinal Significance*

On its facts, *Howsam* was important to the securities industry because it settled the question of whether the court or arbitrator was to decide the six-year eligibility issue.[267] However, *Howsam*'s broader doctrinal significance can be found in both how the Court chose to reach its decision, and in how the Court chose not to reach its decision, because both sets of choices addressed questions that were left open by the *First Options* case.

3. *The Rationale Accepted by the Court and its Significance*

Breyer's opinion turned exclusively on what before *First Options* would have been termed a procedural arbitrability issue: that the eligibility determination was procedural and not substantive in nature. However, the Court labeled this determination a "procedural question" that "falls within the class of gateway procedural issues that do not present what our

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261. NASD CODE OF ARBITRATION PROCEDURE § 10304 (2002) (formerly known as NASD Code § 15) (emphasis added).

262. *See, e.g.*, Painewebber Inc. v. Elahi, 87 F.3d 589 (1st Cir. 1996); Painewebber Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996); Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750 (5th Cir. 1995); FSC Sec. Corp. v. Freel, 14 F.3d 1310 (8th Cir. 1994); O'Neel v. Nat'l Ass'n of Sec. Dealers, Inc., 667 F.2d 804 (9th Cir. 1982).

263. Painewebber, Inc. v. Hofmann, 984 F.2d 1372 (3d Cir. 1993); Dean Witter Reynolds, Inc. v. McCoy, 995 F.2d 649 (6th Cir. 1993); Smith Barney, Inc. v. Sarver, 108 F.3d 474 (6th Cir. 1997); Edward D. Jones & Co. v. Sorrells, 957 F.2d 509 (7th Cir. 1992); Cogswell v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474 (10th Cir 1996); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381 (11th Cir. 1995).

264. Justice Sandra Day O'Connor recused herself from the case. Howsam v. Dean Witter Reynolds, Inc., 123 S.Ct. 588, 593 (2002).

265. In addition to *First Options* and *Howsam*, Justice Breyer also wrote the majority opinion in *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995), which gives the broadest possible construction to the term "commerce" in the FAA.

266. Justice Clarence Thomas wrote a concurring opinion. *Howsam*, 123 S. Ct. at 593.

267. *See, e.g.*, Reed v. Mut. Serv. Corp., 131 Cal. Rptr. 2d 524 (Cal. Ct. App. 2003); Gregory J. Schwartz & Co. v. Fagan, No. 229389, 2003 WL 217855 (Mich. Ct. App. Jan. 31, 2003).

cases have called "questions of arbitrability."[268]

Breyer's opinion was grounded in the *First Options* analysis, particularly its "strong pro-court presumption"[269] that courts are to decide "questions of arbitrability" to "avoid[ ] the risk of forcing parties to arbitrate a matter they may well not have agreed to arbitrate."[270] After expressing the Court's frustration with the malleability and ubiquity of the term "arbitrability,"[271] Breyer articulated a relatively specific definition of "questions of arbitrability" that would be subject to what he called "the interpretive rule of *First Options*."[272] This, Breyer said, was the "narrow" set of questions in which "contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate."[273]

By contrast, Breyer also took care to delineate the questions that do not fall within this "more limited scope" of arbitrability, and therefore are to be decided by arbitrators rather than courts of law. These include "'procedural' questions which grow out of the dispute and bear on its final disposition," and "allegations of waiver, delay, or a like defense to arbitrability."[274] Because such claims are "an aspect of the controversy" that called the arbitration provision into play,[275] Breyer said it is "reasonable to infer" that the parties intended for the arbitrator to decide the gateway issue.[276]

While this new "aspect of the controversy" test for determining procedural arbitrability at least provides a framework for analyzing the gateway issue, its malleability unfortunately makes it most useful in the clearest cases instead of the more difficult "close" calls, in which judicial guidance would be most helpful. For this reason, one suspects Breyer took the crucial move of justifying the inference by reference to party expectations. In effect, the opinion says that when deciding closer cases courts should align the decision maker with the institutional competence of that decision maker to make the particular gateway decision, thus promoting the efficiency goals that likely influenced the parties to choose arbitration in the first instance. Applying this institutional competence

268. *Id.* at 592.
269. *Id.*
270. *Id.*
271. Said Breyer, "[l]inguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits." Id.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at 593. For an example of a case applying the broad latitude for arbitral authority for questions of scope under *First Options* and *Howsam*, see Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union, Local 791, 321 F.3d 251, 254-55 (1st Cir. 2003).
276. *Id.*

principle to the six-year rule, Breyer said the NASD arbitrators are "comparatively more expert about the meaning of their own rule, [and] are comparatively better able to interpret and apply it."[277]

The Court's decision to treat the six-year rule as a procedural matter was significant for several reasons.

First, it resolved an important question left open in *First Options*: whether in fact the Court would continue to recognize procedural arbitrability as a set of issues that would be resolved by the arbitrator rather than the court. The Court's language in *First Options* regarding "arbitrability" was not nearly as nuanced as pre-*First Options* doctrine would have commanded,[278] and a strong reading of *First Options* could plausibly have led to the conclusion that procedural arbitrability questions would be "arbitrability issues" in the new *First Options* regime. If so, they would need to be resolved by courts, rather than arbitrators, unless the parties clearly and unmistakably provide otherwise. Under this view, the courts would still have been required to interpret arbitration provisions with reference to the presumption that "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[279]

While it seemed unlikely, and certainly undesirable, for the Court to jettison the doctrine of procedural arbitrability, just how the doctrine would fit within the *First Options* analysis was less obvious. *Howsam* answered that question by recognizing procedural matters as issues that are not "questions of arbitrability."[280] One may reasonably question whether the Court's new nomenclature will engender more confusion than clarification, especially since the principal case upon which the Court relied was the seminal case defining procedural arbitrability, *John Wiley & Sons*. But it settles the law to know both that the procedural arbitrability doctrine is still viable, and, perhaps more important, how it is to be treated analytically in the post-*First Options* regime.

A second reason that the Court's treatment of the six-year rule as a procedural issue rather than an arbitrability issue is significant is that it underscores the Court's appreciation for restoring a sense of reality to the law of arbitrability. Although the opinion does not make the point, one does not have to read too far between the lines to see that the Court in *Howsam* recognized that it was dealing with a situation in which both parties acknowledged that there was a valid agreement to arbitrate. Just as it recognized in *First Options* the underlying reality that there simply was not an arbitration provision in the work-out agreement over which First Options was seeking to compel arbitration, the parties in *Howsam* had clearly agreed to arbitrate at least some disputes—and indeed Howsam selected the NASD's arbitration forum from among other possibili-

277. *Id.*
278. *See id.*
279. *First Options*, 514 U.S. at 945 (citing *Moses H. Cone*, 460 U.S. at 24-25 (1983)).
280. *Howsam*, 123 S. Ct. at 592-93. The Court's phrasing is so cumbersome as to give rise to the temptation to simply refer to this class of matters as "procedural non-arbitrability."

ties.[281] In *Howsam* there was no contention that the container contract was non-existent (as in *First Options*), void *ab initio* as a matter of policy,[282] or otherwise voidable at the election of the aggrieved party. Rather, the only disagreement was over who was to decide the "eligibility" issue in this particular dispute—the Tier III issue decided in *First Options*.[283] As the Court has held repeatedly since *Mitsubishi Motors*, and restated in *First Options*, such scope issues receive a presumption in favor of arbitrability—a presumption in this case fortified by a recognition of the unique institutional competence of NASD arbitrators to resolve questions over the meaning of NASD rules.

Finally, the Court's decision to rely exclusively on the procedural non-arbitrability analysis is important because Mrs. Howsam offered the Court several other significant grounds for ruling in her favor that would have addressed questions that remained unanswered after *First Options*—and the Court refused to accept all of them. Each of these issues merits consideration.

4. *Rationales Not Adopted by the Court*

First Options has been justifiably criticized for failing to state just how "clear and unmistakable" the waiver of the judicial access right needs to be, and how such waiver is to be manifest.[284] The petitioner in *Howsam* asked the Court to clarify this requirement by holding that the "clear and unmistakable" requirement was met by a broad arbitration clause,[285] or that, alternatively, it was met by the combination of a broad arbitration clause and supporting documents that incorporate the arbitration of arbitrability issues into the arbitration provision by reference.[286] Both questions were profoundly important to the future reach of what may be the emerging *First Options* doctrine, and were the basis of the decision below.[287] As a result, the Court's silence on both of these issues speaks volumes—especially considering the efficiency interests that would mitigate against waiting until later cases to decide those questions.

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281. *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 237 (4th ed. 2003).

282. *Ab initio* is Latin for "from the beginning," BLACK'S LAW DICTIONARY 4 (7th ed. 1999), and refers to those cases in which the allegation is that while there was an agreement that include an arbitration provision, it is one that the law will not enforce as a matter of policy (i.e., because it deals with an illegal subject matter). For a discussion, see Joshua R. Welsh, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts*, 86 MARQ. L. REV. 581, 599-610 (2001).

283. Unlike the Kaplans, Howsam did not proceed to the arbitration under protest. *Howsam*, 123 S. Ct. at 591 ("The agreement also provides that Howsam can select the arbitration forum. And Howsam chose arbitration before the NASD.").

284. *See* Guy Nelson, Note, *The "Clear and Unmistakable" Standard: Why Arbitrators, Not Courts Should Determine Whether a Securities Investor's Claim is Arbitrable*, 54 VAND. L. REV. 591, 594-95 (2001).

285. *See* Brief for the Petitioner at 32-37, Howsam v. Dean Witter Reynolds, 123 S. Ct. 588 (2002) (No. 01-800).

286. *Id.* at 38-40.

287. It is a telling irony that the basis of the Supreme Court's decision, procedural arbitrability, was not argued in or decided by the Tenth Circuit.

a. The "Broad Arbitration Clause" Argument

In addition to procedural arbitrability, a primary argument of Howsam was that Dean Witter Reynolds' "clear and unmistakable" intent to waive court access rights on the Tier III issue was manifest through the broad arbitration clause submitting "all disputes arising under the contract" to arbitration.[288] In other words, the heart of the argument is that the intent to arbitrate arbitrability is subsumed within the class of disputes covered by the broad arbitration clause. This reflects an important question left open by *First Options*. The Court's refusal to endorse this rationale when given such an open opportunity strongly suggests that it is unwilling to do so, and further supports the theory that the Court is moving toward an actual consent model of arbitrability, one marked by an express and explicit waiver of court access rights.

Indeed, this is the second time in as many opportunities that the Court has rejected the broad arbitration clause argument. *First Options* itself was decided in the context of the Court's interpretation of a broad general arbitration provision calling for "any controversy arising out of or relating to this . . . Agreement . . . [to be] submitted to and settled by arbitration."[289] Despite the subtle invitation by counsel for First Options at oral argument, the Court declined to find First Options' broad arbitration clause sufficient to establish "clear and unmistakable" intent to arbitrate the "who decides" question.[290] Rather, the Court explicitly established a contrary presumption: that the absence of clear and unmistakable waiver requires a court to presume that the parties did not intend to arbitrate the "who decides" issue.[291] While the Court was not explicit in its ruling that a broad general arbitration provision cannot satisfy the "clear and unmistakable" waiver requirement, as a theoretical matter, such an understanding would seem to follow *a priori* from the rule that the Court did announce: that an arbitration provision's silence on arbitrability as a matter of law must be presumed to mean that the parties intended for courts to decide such questions. The Court's refusal to adopt, or even acknowledge, the "broad arbitration clause" argument again in *Howsam* is entirely consistent with such an understanding.

This deliberate decision not to incorporate an endorsement of the broad arbitration provision argument into its *Howsam* analysis has enor-

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288. *See* Brief for the Petitioner, *supra* note 241, at 39-40. This inquiry may also be viewed as a scope issue, the question thus being whether the enforceability of an arbitration provision itself may be deemed to fall within the scope of a broad arbitration provision. *See supra* notes 231-36 and accompanying text.

289. *See supra* note 219.

290. "QUESTION: Are you saying that the clear and unmistakable standard doesn't apply, or that when they go to the arbitrator and say, we don't think we belong before you but we're ready to let you decide it, that that's a clear and unmistakable submission that the arbitrators' decision will get only deferential review?
MR. [JAMES] HOLZHAUER: Exactly. The submission of the issue to arbitration is a clear and unmistakable agreement to submit the issue to arbitration." *See* Transcript of Oral Argument, *supra* note 240, at *20-21.

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

mous significance, as *amicus curiae* participating in the case stressed to the Court.[292] As a practical matter, given the pervasiveness of such provisions, the acceptance of this argument would have greatly constrained the reach of the *First Options* ruling if the Court had second thoughts about it. More theoretically, such a ruling would have reinforced the implied consent theory of arbitrability that, among other things, supports the separability doctrine. After all, the most obvious way to preserve *Prima Paint*'s allocation of the decision regarding the container contract validity to the arbitrator under *First Options* is by an understanding that would include the container contract issue as falling within the scope of a broad arbitration clause, as a few courts to date have held.[293] Such a "broad arbitration clause" argument was plainly inconsistent with both the facts and the theoretical foundation of *First Options*, and the Court's second refusal to adopt it in as many opportunities should lay to rest any claim to the argument's legitimacy, and discourage any efforts to resurrect it in the future.

b. The "Incorporation by Reference" Argument

The Court also refused to accept a related "implied consent" argument: Howsam's contention, citing *Mastruobono v. Shearson Lehman Hutton, Inc.*,[294] that an extrinsic expression of intent to arbitrate arbitrability may be incorporated by reference into a broad arbitration provision.[295]

Unlike the broad arbitration clause issue, this question was not considered in *First Options*, and the logic of the argument is essentially as follows: while the broad arbitration clause in the Dean Witter customer contract mandates arbitration of all disputes, it gives Mrs. Howsam the option to choose to have that arbitration conducted "before any self-regulatory organization or exchange of which Dean Witter is a member."[296] By selecting the NASD as her provider, Mrs. Howsam agreed to arbitrate according to NASD rules, including the NASD Code of Arbitration Procedure. Rule 10304 of that Code provides that "[t]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code . . . ."[297] Therefore, the incorporation argument concludes, "[t]he arbitrators are . . . designated to interpret and apply § 10304, and in doing so, to determine what claims are eligible thereunder for submission to arbitration."[298]

As with the "broad arbitration clause" argument, the Court's unwillingness to accept the incorporation argument is consistent with a move-

292. *See* Brief of Amicus Curiae Trial Lawyers for Public Justice and AARP in Support of Neither Party at 15-18, Howsam v. Dean Witter Reynolds, Inc., 123 S. Ct. 588 (2002) (No. 01-800).
293. *See infra* note 346 and accompanying text.
294. 514 U.S. 52 (1995), *cited in* Brief for the Petitioner, *supra* note 241, at 31-32.
295. *See* Brief for the Petitioner, *supra* note 241 at 39-40.
296. *Howsam*, 123 S. Ct. at 591.
297. NASD CODE OF ARBITRATION PROCEDURE § 10324 (2002).
298. Brief for the Petitioner, *supra* note 241, at 33.

ment toward an actual consent theory because the purported incorporated agreement to arbitrate arbitrability provides even less evidence of a "clear and unmistakable intent" to waive judicial access than may be found in a broad arbitration provision. After all, an incorporated expression of intent is one step removed from the arbitration provision itself, mere boilerplate referenced by more boilerplate. While such a procedure would clearly be more efficient for brokers and the courts, *First Options* was quite clear in rejecting efficiency rationales in favor of what appears to be a more specific case-by-case analysis "to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms."[299] The Court's refusal to acknowledge the argument is consistent with that repudiation.

Like the "broad arbitration clause" argument, the "incorporation" argument has practical significance outside of the securities context. One common and sensible response to *First Options* by arbitration service providers has been to incorporate language into their rules expressly allocating the arbitrability decision to the arbitrators. For example, the American Arbitration Association has amended its commercial rules to provide that 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."[300] The purpose of this amendment, particularly its inclusion of the term "scope," is to "further clarif[y] the arbitrator's power to rule on any challenge to jurisdiction."[301]

The fact that the Court refused even to acknowledge this argument suggests little support within the Court for such a strategy, even though some lower courts have been more receptive.[302] Indeed, if the Court continues moving toward an actual consent theory of arbitrability, such strategies for accommodating *First Options* should be unavailing. The mere addition of a clause referencing extrinsic standards—including the intent to arbitrate arbitrability—surely would give little comfort to courts that require "clear and unmistakable" evidence of such waiver because they are "understandably" concerned about "forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[303]

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299. *First Options*, 514 U.S. at 947.

300. Commercial Dispute Resolution Procedures of the American Arbitration Association, R. 8(a) (amended 1999). It is also in the process of changing its rules for other types of arbitration in the same way. Telephone interview with Frank T. Zotto, Vice President-Case Management, American Arbitration Association (June 14, 2002).

301. *See* Am. Arbitration Ass'n Commercial Arbitration Rules Subcomm., Am. Arbitration Ass'n, *Commentary on the Revisions to the Commercial Arbitration Rules of the American Arbitration Association*, *in* ADR CURRENTS (Dec. 1998).

302. Two district courts have recently upheld the Rule 8 approach as a sufficiently "clear and unmistakable" waiver of intent to arbitrate arbitrability. Sleeper Farms v. Agway, Inc., 211 F. Supp. 2d 197 (D. Me. 2002); Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc., 203 F.R.D. 677, 685 (S.D. Fla. 2001).

303. *First Options*, 514 U.S. at 945.

C. Some Open Questions After *First Options* and *Howsam*

In addition to providing support for the proposition that the Court may be moving toward an actual consent theory of arbitrability, the foregoing discussion demonstrates how the Court's decision in *Howsam* appears to have resolved three questions left open by *First Options*. The Court directly settled the continued legitimacy and analytical place of procedural arbitrability by using this as the exclusive basis for its decision, finding procedural matters not to be arbitrability issues at all. Similarly, the Court's refusal to incorporate into its analysis the "broad arbitration clause" and the "incorporation by reference" argument should relegate those claims to the dustbin of other discredited arguments.

There are, however, at least three other major arbitrability issues raised by the Court's decision in *First Options* that remain open after *Howsam*. The first is whether the "clear and unmistakable" requirement for waiver of court access rights on the Tier III "who decides" question also applies to Tier II questions over whether there was in fact an agreement to arbitrate. The second is the impact of *First Options* and *Howsam* on the doctrine of *competence-competence*. Finally, the third question is what impact *First Options* and *Howsam* have on the doctrine of separability.

1. *Does "Clear and Umistakable" Apply to* First Options *Tier II Issues?*

The bulk of the Court's work in *First Options* addressed an issue relating to the first of these questions—whether there was an agreement to arbitrate, in particular, the more arcane issue of "who decides" whether there is an agreement to arbitrate, which the Court referred to as the "third type of disagreement" in *First Options*.[304] The Court in *First Options* tells us to apply a "clear and unmistakable" test to this third type of disagreement, but the opinion is ambiguous on whether the "clear and unmistakable" standard also applies to Tier II disagreements—the more common question on the merits of whether the parties agreed to arbitrate the dispute. In other words, if the parties have left the decision on this question to the court (by virtue of silence on the Tier III question), by what standard is a court supposed to determine if the parties have agreed to arbitrate a dispute? "Clear and unmistakable," as with Tier III questions? A lower standard? Moreover, how much evidence, and what kind of evidence, may a trial court look at in making this determination? Under the *First Options* regime, which way should the presumption fall? Is this a scope issue, which would lead to a presumption favoring arbitration of the issue? Or is it a validity question, which would lead to a presumption of judicial resolution?

Certainly it can be argued either way, and in this regard, the Court's decision in *Howsam* provides some guidance by referring to institutional competence as a likely source of party expectations with regard to ques-

304. *Id.* at 942.

tions of arbitrability. Moreover, as a matter of policy, if the Court's concern is party consent to arbitration, to ensure that parties are not compelled to arbitrate issues that they have not submitted to arbitration,[305] there seems to be little reason to apply a lesser standard of proof to the merits of the question of whether the parties agreed to arbitrate than is applied to the predicate question of "who decides" that question. On the other hand, it can be argued that this second-level question is merely one of interpreting an otherwise enforceable contract, thus calling for the lesser standard of proof *First Options* requires for matters of scope.[306] While the issue might take some percolation in the lower courts, it is a question the Supreme Court will likely need to decide as it develops the *First Options* regime.

2. *What are the Implications for Competence-Competence?*

First Options also leaves open the question of *competence-competence*, in particular whether arbitrators have the authority to decide the scope of their own jurisdiction. *First Options* cuts new ground on this dimension by clearly permitting arbitrators to exercise this power "when the parties [have] submitted that matter to arbitration."[307] Significantly, too, the Court appears to have allocated that decision to arbitrators as an initial matter in these situations, instructing lower courts that they "must defer to an arbitrator's arbitrability decision" when the parties have clearly and unmistakably entrusted it to arbitrators.[308] It is this "potentially troublesome" aspect of the case that some arbitration scholars have treated as the most doctrinally significant part of the *First Options* opinion in a lively debate on the issue of whether arbitrability should be a mandatory or default rule—that is, whether parties *should* be able to waive the statutory power of the courts to decide the arbitrability question—and the degree to which arbitrators should be able to determine the scope of their own jurisdiction.[309] While the Court's resolution of this issue has been controversial, it has in any event been decided. The open question raised by *First Options*, however, is whether, and the degree to which, arbitrators have this power in the absence of specific contractual authorization. That is, whether arbitrators have the inherent power—the *competence-competence*—to determine the scope of their jurisdiction, including the power to invalidate the contract granting them arbitral authority. *Howsam* indicates that they do.

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305. *Warrior & Gulf*, 363 U.S. at 582.
306. *First Options*, 514 U.S. at 945.
307. *Id.* at 943.
308. *Id.*
309. *See* Park, *supra* note 77 (raising the question); Tom Carbonneau, *A Comment Upon Professor Park's Analysis of the Dicta in* First Options v. Kaplan, INT'L ARB. REP., Nov. 1996, at 18 (arguing that arbitrability is a mandatory rule and may not be waived by party agreement); Alan Scott Rau, *Arbitration as Contract: One More Word About* First Options v. Kaplan, INT'L ARB. REP., Mar. 1997, at 21 (arguing that arbitrability is a default rule and may be waived by party agreement); Tom Carbonneau, *Le Tournoi of Academic Commentary on* Kaplan*: A Reply to Professor Rau*, INT'L ARB. REP., Apr. 1997, at 35.

Take, for instance, the illustrative example offered in Part II, in which the purchaser of real estate attempts to void a contract on the basis of fraud or material misrepresentation that there are no problems with the exterior brick veneer.[310] It is clear under *First Options* that the arbitrator would have the authority to invalidate the container contract if the arbitration provision specifically granted the arbitrator the power to decide that question. However, it is less clear under *First Options* whether the arbitrator would have such authority pursuant to a broad general arbitration provision that did not include such express authority. *Howsam*, however, recognizes that certain aspects of arbitral jurisdiction may be decided by the arbitrator—assuming there is a valid arbitration provision (such matter to be determined by a court unless the parties otherwise agree). As *Howsam* itself demonstrates, an arbitator's authority to decide whether a matter is eligible for jurisdiction before the arbitrator necessarily implies that the arbitrator has the jurisdictional autonomy to make that determination. This is the essence of *competence-competence*, and, as such, specific incorporation of the doctrine into the post-*First Options* law of arbitrability would appear to be a mere formality, ripe for easy resolution in a future case.

3. *The Doctrine of Separability*

The last open question after *First Options* and *Howsam* is the future of the doctrine of separability. As discussed in the next section, the demise of separability seems appropriate as a matter of theory, doctrine, and practicality.

V. TAKING *FIRST OPTIONS* SERIOUSLY: THE DEMISE OF SEPARABILITY

Howsam seems to support the argument that the Court is rethinking, clarifying, and perhaps simplifying the law of arbitrability. The further it moves along such a path toward actual consent to arbitration, the clearer it becomes how *First Options* "sits uneasily alongside" of *Prima Paint*.[311] In this part, I describe the nature of the tension between these cases, how the lower courts have responded to it, and the impact of *Howsam*.

A. THE TENSION BETWEEN *FIRST OPTIONS* AND *PRIMA PAINT*

1. *Generational Friction*

As we have seen, *Prima Paint* and *First Options* are a generation apart.[312] *Prima Paint* was decided at a time when the Supreme Court realized that it would take more than legislation to change distrustful judi-

310. *See supra* notes 115-17 and accompanying text.

311. Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 590 (7th Cir. 2002) (Easterbrook, J.) (decided on other grounds).

312. *See* Stempel, *supra* note 55, at 310-24 (comparing old and new arbitration); *supra* note 53 and accompanying text.

cial attitudes regarding arbitration. *First Options* was decided a quarter of a century later, after the judicial mind had been turned, at least as a general matter,[313] and after experience with "new" arbitration began to identify some of its frailties (including the potential for abuse in situations of power imbalance,[314] problems of repeat player effects,[315] and personal and social costs of these problems in terms of public perceptions of the law[316]). Therefore, while the underlying sentiment of *Prima Paint* may have been a call to promote arbitration by enhancing the power of arbitrators, that sentiment in *First Options* appears to have been to return the judicial pendulum to the FAA's statutory roots in contract and actual assent.[317] Indeed, this more moderated approach toward arbitration has generally characterized the Court's decisions in the steady flow of opinions since *First Options*.[318]

2. *Jurisprudential Differences*

The generational differences between the *First Options* and *Prima Paint* decision, and the ongoing struggle over the fundamental tension, underscore the significance of the opposing analytical foundations supporting the two cases. As we have seen, *Prima Paint* was erected on a pedestal of implied consent to arbitration.[319] *First Options* explicitly rejects implied consent and its underlying rationale of efficiency, and instead insists on a "clear and unmistakable" intent to arbitrate in the contract at issue.[320] *Howsam* provides further evidence that the Court is moving toward a posture of some form of actual consent. While a more

313. Judicial attitudes are always subject to the fundamental tension in individual cases. *See supra* notes 42-54 and accompanying text.

314. *See* sources cited *supra* note 16.

315. *See* sources cited *supra* note 17. For a general discussion of advantages enjoyed by repeat players in the civil litigation context, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). For a summary of empirical studies in the employment context, see Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 889-902 (2002) and studies cited therein (documenting "repeat player effect" but noting there can be many explanations for the phenomenon). For a general discussion in the ADR context, see Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 20 (1999). For arguments applying repeat player as a basis for rejecting the enforcement of executory arbitration agreements in the non-union employment context, see Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996).

316. *See* Reuben, *supra* note 2, at 633-41.

317. *See* Reuben, *supra* note 50.

318. *See, e.g.*, Equal Employment Opportunity Comm'n v. Waffle House, 122 S. Ct. 754 (2002) (rejecting arguments that an arbitration agreement bars the EEOC from pursuing victim-specific judicial relief on behalf of an employee); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (leaving open the possibility that the imposition of forum fees may be sufficient to invalidate an arbitration agreement); Wright v. Universal Mar. Servs. Corp., 525 U.S. 70 (1998) (refusing to compel arbitration of an ADA claim under a collective bargaining agreement because longshoreman's waiver of federal forum was not "clear and unmistakable").

319. *See supra* notes 172-82 and accompanying text.

320. *First Options*, 514 U.S. at 943; *see supra* notes 248-59 and accompanying text.

explicit statement from the Court would be helpful, lower courts should be mindful of this trajectory and proceed accordingly.

3. *Technical Inconsistency*

This generational and jurisprudential inconsistency between *First Options* and *Prima Paint* is felt at the level of formal positive law.

Under *First Options* and *Howsam*, courts, not arbitrators, decide questions of at least Tier III arbitrability, unless the parties "clearly and unmistakably" give this power to the arbitrator.[321] If, however, the arbitration provision is included in a larger contract, and the dispute is about the validity of that larger contract, *Prima Paint*, on the other hand, requires courts to presume that the parties have agreed to arbitrate merely by entering into the larger contract, regardless of its validity. The tension seems palpable.

In an often brilliant work, Professor Alan Rau offers what may be respected as the classic defense of *Prima Paint*, suggesting that "[t]here is not the slightest conflict between *Kaplan* and *Prima Paint* as properly understood."[322] Both cases simply require the validity of the arbitration provision to be decided by a court when the challenge is directed at that provision.[323] Because *First Options* dealt only with the Tier III "who decides" question, it merely made explicit a rule of law that Rau says had always been assumed to be true, and which was not even challenged in *Prima Paint*:[324] courts decide questions of arbitrability of agreements to arbitrate.

By contrast, Rau asserts that *Prima Paint* is a "second level" or Tier II question, which he reframes as "who is actually to decide the merits of the fraudulent inducement claim?"[325] As "properly understood,"[326] *Prima Paint* is merely a default rule case, establishing the default rule that arbitrators, rather than courts, are to decide whether the parties agreed to arbitrate a dispute regarding the container contract unless the parties agree otherwise.[327] Rau recognizes that the default rule set by the *Prima*

321. *Howsam* defines such questions in terms of "the kind of narrow circumstance where the contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought they had agreed that an arbitrator would do so, and consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 123 S. Ct. at 592.

322. *See* Rau, *supra* note 32, at 331.

323. Again, if this were all that *First Options* was about, one would have to wonder why the Court bothered to grant review when it could have affirmed the appellate ruling by simply denying review. *See supra* note 225.

324. Rau, *supra* note 32, at 339.

325. *Id.*

326. *Id.* at 336. Rau's discussion here is unclear. The Court framed the second-level question in terms of "whether they agreed to arbitrate the merits." *First Options*, 514 U.S. at 942. However, Rau frames it as "*who* is actually to decide the merits of the fraudulent inducement claim," which seems to reflect the Tier III disagreement over "who decides" the Tier II question rather than the decision on the arbitrability of the merits. Rau, *supra* note 32, at 339 (emphasis added).

327. Rau, *supra* note 32, at 339.

Paint court is a judicial rather than legislative policy choice that "like any background rule [is] made largely on the basis of functional considerations."[328] But he says this judicial policy choice is justified to "overcome the conceptual horror of an arbitral decision of contract invalidity that 'calls into question the validity of the arbitration clause from which [the arbitrators] derive their power'" and to recognize the "probable competence of the arbitrators, by presuming that they have been entrusted by the parties with the power to make a virtually non-reviewable decision on the issue of validity."[329]

While such "functional considerations" may have been a motivating factor in *Prima Paint* when it was drafted, they clearly did not animate the policy choice that the Supreme Court in fact made a generation later in *First Options*. To the contrary, *First Options* expressly rejected such a "functional" choice supporting broad arbitral power to decide jurisdiction in favor of the opposite policy choice: that courts are to look beyond efficiency interests and decide on a case-by-case basis whether the parties have agreed to arbitrate Tier III questions, unless the parties have "clearly and unmistakably" allocated that decision to the arbitrator.[330]

Rau is undoubtedly correct in his conclusion that both cases insist on judicial resolution of the Tier III "who decides" arbitrability issue—a point well worth clarifying given the conceptual confusion that has shrouded arbitrability in general. That is not the rub between the cases, however. Rather, the rub is over who decides whether the container contract itself is valid—or, put in the rubric of *First Options*: the Tier III question of who decides the Tier II dispute over whether the parties agreed to arbitrate the validity of the container contract.

Prima Paint, of course, allocates that decision to the arbitrator as a matter of default, under a theory of implied consent to arbitrate.[331] *First Options* does not specifically address the issue of the applicability of its principles to the arbitrability of container contracts, speaking only to arbitrability in general, without regard to the nuanced distinctions that have so hindered visibility within this Serbonian bog of law. However, if *First Options* is to be taken seriously, particularly in light of *Howsam*, then the validity of the container contract would have to be allocated to the courts unless the parties "clearly and unmistakably" agreed otherwise because *First Options* sets the default on the "who decides" question with the courts, not the arbitrators.

Because the Court did not address this point of friction between *First Options* and *Prima Paint* directly, it remains open and in need of judicial resolution. However, the Court's unanimous opinions in both *First Options* and *Howsam* were grounded in the need for the law to support the

328. *Id.*

329. *Id.* at 341.

330. *First Options*, 514 U.S. at 947.

331. *See* Rau, *supra* note 32, at 335-38.

parties' expectations[332] and to prevent the possibility that a court "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, and not an arbitrator would decide."[333] Such reasoning leads logically only to one conclusion: that courts should decide the validity of the container contracts, unless the parties clearly and unmistakably agree to allocate that function to the arbitrator. Indeed, it borders on the absurd to suggest that a court troubled by such concerns would endorse a rule compelling into arbitration a party to a legally unenforceable contract merely because of the presence of an arbitration provision in the otherwise unenforceable contract.

B. How the Lower Courts Have Responded to the Tension

The lower courts are only beginning to meaningfully address the tension between *First Options* and *Prima Paint*. While several have noted it,[334] only two appellate courts—one federal and one state—have given the tension principled analysis: the Fourth Circuit in *Gregory v. Interstate/Johnson Lane*,[335] and the Supreme Court of Alabama in *Ex Parte Helen Perry*.[336]

Interestingly, both cases took very different routes to the very similar result of applying *First Options*. In *Gregory*, the Fourth Circuit took a broad view of *First Options*, reversing a district court decision applying *Prima Paint* to a securities brokerage contract containing an arbitration clause because the district court "had not adequately considered the 'first principle' of arbitration law" relied upon in *First Options*, that courts are to decide arbitrability absent the "clear and unmistakable" agreement of the parties.[337] In *Perry*, however, the Alabama Supreme Court acknowledged it was taking a narrower view of *First Options*, all but reversing a prior attempt to square *First Options* and *Prima Paint*.[338] Yet in both cases, the courts ended up deciding the arbitrability issues, as *First Options* would require, because the facts in both cases were claims that the container contracts had not been properly signed, and therefore were void *ab initio*—that is to say, never existed in the first place.[339] As noted earlier,[340] this voidness rationale is one that some courts historically have used to limit *Prima Paint* and retain jurisdiction over a contract with an arbitration clause, by holding that courts are to decide the arbitrability of

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332. *See Howsam*, 123 S. Ct. at 592.

333. *First Options*, 514 U.S. at 945; *see supra* notes 231-36 and accompanying text.

334. *See, e.g.*, Cular v. Metro. Life Ins. Co., 961 F. Supp. 550, 555 n.4 (1997) (citing several Southern District of New York district court cases "questioning the continued validity" of *Prima Paint* in light of *First Options*).

335. 188 F.3d 501 (4th Cir. 1999) (unpublished).

336. 744 So. 2d 859 (Ala. 1999).

337. *Gregory*, 188 F.3d at 501.

338. *Perry*, 744 So. 2d at 864 (criticizing its earlier decision in Allstar Homes, Inc. v. Waters, 711 So. 2d 924 (Ala. 1997) for "expanding too broadly the rationale of the Supreme Court in *First Options*").

339. Also taking this approach is *Campaniello Imports Ltd. v. Saporiti Italia S.P.A.*, No. 95 Civ 7685 (RPP), 1996 WL 437907, at *8-9 (S.D.N.Y. Aug. 2, 1996).

340. *See supra* notes 200-02 and accompanying text.

container contracts that are claimed to be void, rather than merely voidable.[341]

Indeed, in its attempt to square the two cases, the Alabama Supreme Court went so far as to suggest that *First Options* is limited to the void contract context,[342] because the Kaplans had claimed in *First Options* that they were not subject to arbitration because they had not signed an agreement to arbitrate *First Options*' claims against them personally. However, given the Court's conceptualization of the issues in *First Options,* such an approach would essentially limit *First Options* to its facts, despite the manner in which that analysis is applied in *First Options* itself,[343] and without regard to the analytical shift in *First Options* that *Howsam* seems to confirm.[344] As the Fourth Circuit recognized in *Perry*, addressing a slightly different issue, "*Kaplan* cannot be limited to the factual circumstance with which the court was faced in that case. The clear import of the language and logic in *Kaplan* is that, when given the opportunity, a district court should decide the threshold arbitrability issue before sending the case to an arbitration panel."[345]

To date, *Gregory* and *Perry* are the only meaningful judicial efforts to grapple with the tension between *First Options* and *Prima Paint.* The remainder of the cases recognizing it have greeted the tension with varying forms of aversion, and varying levels of doctrinal integrity.

Some courts have attempted to get around the problem by resorting to the "broad arbitration clause" argument, holding that the "clear and unmistakable" intent to arbitrate the "who decides" question may be inferred from a broad general arbitration provision.[346] While this approach has the elegance of simplicity, efficiency, and at least some analytical principle, with *Howsam* it has now been rejected by the Supreme Court twice, and other courts have properly rejected this rationale.[347]

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341. *See, e.g.*, Jolley v. Welch, 904 F.2d 988, 993-94 (5th Cir. 1990), *cert. denied*, 498 U.S. 1050 (1991); Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140 (9th Cir. 1991); Chastain v. Robinson-Humphrey Co., Inc., 957 F.2d 851, 854 (11th Cir. 1992).

342. Ironically, this is the same argument made frequently by courts seeking to limit *Prima Paint. See, e.g., supra* notes 200-02 and accompanying text.

343. *See supra* notes 237-46 and accompanying text.

344. The Alabama Supreme Court's approach still would not resolve the tension between *Prima Paint* and *First Options* because that tension arises when there is an allegation that the container contract is voidable because of the availability of an affirmative defense to its enforcement, as with the consulting contract in *Prima Paint*, despite the validity of the arbitration provision.

345. *Gregory*, 188 F.3d at 501 n.7.

346. *See, e.g.*, Bell v. Cendant Corp., 293 F.3d 563 (2d Cir. 2002) (applying Connecticut law); Painewebber Inc. v. Bybyk, 81 F.3d 1193, 1200 (2d Cir. 1996) (applying New York law); *Ex parte* Helen Perry, 744 So. 2d 859, 864 (Ala. 1999); Cummings & Lockwood, P.C. v. Simses, No. CIV. 301CV422PCD, 2001 WL 789313, at *3 (D. Conn. July 5, 2001) (ignoring and misapplying *First Options*); Arriaga v. Cross Country Bank, 163 F. Supp. 2d 1189 (S.D. Calif. 2001) (same); Kamaya Co., Ltd. v. Am. Prop. Consultants, Ltd., 959 P.2d 1140, 1145-46 (Wash. Ct. App. 1998) (noting questions of other courts about continued validity of *Prima Paint*).

347. *See, e.g.*, Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000) (holding that a contract that violates usury law cannot be referred to arbitration, reversing

Other judicial approaches to results that support the continued vitality of *Prima Paint* separability are even less principled. For example, some courts have cited *First Options*, but applied *Prima Paint*, with no discussion of the tension between them, much less discussion of the reason it was choosing *Prima Paint* or *First Options*.[348] A variation of this approach has been to acknowledge the tension between the cases, but to summarily reject without analysis the claim that *First Options* overruled *Prima Paint*.[349] More commonly, courts have either simply ignored *First Options* and applied *Prima Paint*, or have decided the cases on other grounds.[350] Finally, there are cases, like *Perry* and *Gregory*, that have cited *Prima Paint*, but have applied *First Options* in fact by deciding the arbitrability issue themselves.[351]

C. THE DEMISE OF SEPARABILITY

The Court's continued apparent momentum toward actual consent in *Howsam* only emphasizes the tension between *First Options* and *Prima Paint*. However, resolution will come only when the Court addresses the question squarely and revisits the separability doctrine. When it does, the Court should repudiate separability, and make clear that the validity of an arbitration provision in a container contract is contingent upon the validity of the container contract itself, and that courts are to decide that issue. Significantly, as we shall see, this need not constitute a formal overruling of *Prima Paint*. Rather, a modernization of *Prima Paint* would

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lower court referral that relied on *Prima Paint*); Frizzell Constr. Co. v. Gatlinburg, 9 S.W.3d 79, 85 (Tenn. 1999) (effectively applying *First Options* rather than *Prima Paint* analysis in holding that courts decide questions of contract formation directed at container contract); Duryee v. PIE Mut. Ins. Co., No. 98AP-1255, 98AP-1256, 1999 WL 744341 (Ohio Ct. App. Sept. 23, 1999) (citing *First Options* as support for limiting *Prima Paint* to voidable contracts); Berger v. Cantor Fitzgerald Sec., 942 F. Supp. 963 (S.D.N.Y. 1996) (questioning continued validity of *Prima Paint* in light of *First Options* and deciding fraud issue directed at container contract); Aviall, Inc. v. Ryder Sys., Inc., 913 F. Supp. 826, 831 (S.D.N.Y. 1996) (same); Maye v. Smith Barney, Inc. 897 F. Supp. 100, 106 n.3 (S.D.N.Y. 1995). Still, the issue remains theoretically open.

348. *See, e.g.*, Harris v. Green Tree Fin. Corp., 183 F.3d 173, 178-79 (3d Cir. 1999); Brown v. Miguens, No. 02 Civ.5278 JSM, 2003 WL 1090304 (S.D.N.Y. March 11, 2003); Luna v. Household Fin. Corp., 236 F. Supp. 2d 1166 (W.D. Wash. 2002); Bosinger v. Phillips Plastics Corp., 57 F. Supp. 2d 986, 992 (S.D. Cal. 1999); Capitol Vial, Inc. v. Weber Scientific, 966 F. Supp. 1108, 1111 (M.D. Ala. 1997); Miner Enters., Inc. v. Adidas AG, No. 95 C 1872, 1995 WL 708570 (N.D. Ill. Nov. 30, 1995); Acquaire v. Canada Dry Bottling, 906 F. Supp. 819, 825 (E.D.N.Y. 1995).

349. *See, e.g.*, Wright v. SFX Entm't Inc., No. 00 CIV 5354 SAS, 2001 WL 103433, at *4 n.7 (S.D.N.Y. Feb. 7, 2001) (clearly overstating circuit precedent).

350. *See, e.g.*, Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 590 (7th Cir. 2002) (Easterbrook, J.); Sleeper Farms v. Agway, Inc., 211 F. Supp. 2d 197 (D. Me. 2002).

351. *See, e.g.*, Montrose v. Conseco Fin. Servicing Corp., CIV.A. 5:00-0434, 2000 WL 33775396 (S.D. W. Va. Dec. 20, 2000); Audio Video Ctr., Inc. v. First Union Nat'l Bank, 84 F. Supp. 2d 624, 626-28 (E.D. Pa. 2000) (holding that fraud in execution of the contract, including the arbitration provision, must be decided by court); Cowen v. Tecnoconsultant Holdings Ltd., No. 96 Civ. 3748 (BSJ), 1996 WL 391884, at *3-4 (S.D.N.Y. July 11, 1996) (holding that parties intended for arbitrators to decide timeliness of litigation under NASD six-year rule).

recognize its core principle of arbitral authority, or *competence-competence* while shedding its controversial and overbroad husk of separability.

1. Why Separability Should be Repudiated

As we have seen, separability is not compelled by the traditional rules of statutory interpretation,[352] the legislative history of the FAA,[353] nor the substantive law of contracts.[354] Rather, as Professor Rau has observed, separability is merely a judicial policy choice that is "made largely on the basis of functional considerations."[355] As Professor Ian MacNeil has also argued,[356] this judicial policy choice could have gone the other way: "Nothing would have prevented the Court in *Prima Paint* from holding that the making of an arbitration clause is in issue whenever the making of the agreement containing it is in issue."[357]

With the benefit of nearly thirty-five years of experience with separability, the rise of the "new arbitration," and the Court's own apparent movement toward actual consent to arbitrability, the Court should revisit that policy choice and restore the policy choice made by Congress in 1925 by repudiating separability, returning to the courts all arbitrability questions, as defined in *Howsam*, that are not "clearly and unmistakably" given to arbitrators by the parties.

In considering whether to overrule a rule of law, which is farther than the Court need go in revisiting *Prima Paint*, the Court typically considers such pragmatic factors as whether it has proven unworkable, the degree to which reversal of the rule would create hardship of upset settled expectations, the degree to which the rule is merely a remnant of otherwise abandoned doctrine, and the degree to which its prior justification has been vitiated by a change in the facts surrounding the rule at issue.[358] These standards counsel in favor of repudiating separability, while retaining *Prima Paint*'s core notion of arbitral autonomy.

a. Unworkability

The enormous confusion and uncertainty over the scope and application of separability in the state and federal courts bears testament to the doctrinal unworkability of separability.[359] It operates at a level of abstraction and "functional consideration"[360] that is far removed from the daily experiences of contracting parties, as well as the reasonable expectations of those parties that the Supreme Court emphasized in *Howsam*

352. *See supra* notes 132-41 and accompanying text.
353. *See supra* notes 142-43 and accompanying text.
354. *See supra* notes 146-50 and accompanying text.
355. Rau, *supra* note 32, at 339.
356. Professor Rau also acknowledges that the Court could have reached a different result, but supports its ruling on separability. *Id.* at 336-38.
357. MacNeil, *supra* note 27, at 15.2 n.13.
358. *See* Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 854-55 (1992) and cases cited therein.
359. *See supra* notes 191-207 and accompanying text.
360. *See supra* note 328 and accompanying text.

are the touchstone of the gateway arbitrability determination.[361] As such, in addition to placing decisional authority at the lowest level of institutional competence, separability can undermine public confidence in the rule of law by failing to meet party expectations with respect to having their "day in court" for a decision on the merits of their legal dispute.[362] If a goal in law is to provide clear and stable guidance so that parties may properly order their affairs,[363] the judicially created rule of separability fails miserably.

b. Changed Circumstances

Separability is a vestige of an era of law that has long passed, when judicial hostility toward agreements to arbitrate continued to endure despite the legislative reversal of the ouster doctrine and when "old" arbitration was just beginning to expand beyond its traditional home in collective bargaining.[364] It was important for the Supreme Court to send a strong message to the lower courts about the legitimacy of the FAA and the need for the lower courts to respect and enforce the statute's obligation to enforce arbitration provisions according to their terms.[365]

That era of arbitration has long given way to the "new" arbitration.[366] While the fundamental tension can still be seen in the reluctance to enforce arbitration provisions in egregious individual cases, the courts no longer operate under a sense of institutionalized distrust of arbitration. To the contrary, the more common criticism of the courts is that they have been too supportive of arbitration,[367] although that mood too seems to be passing. Even then, however, courts are learning and coming to understand the potential for abuses as they confront the thorny issues arising from abusive arbitration provisions that implicate the most fundamental of legal rights. While separability and its principle of implied consent may have been justified at the time *Prima Paint* was decided in light of *Wilko* and as a demonstration of judicial support for the FAA, it is no longer necessary or appropriate given the change in judicial attitudes and the robust societal support for voluntary arbitration.[368] A requirement of actual assent to arbitrability is far more appropriate in today's sophisticated times, as the Court's opinions in *First Options* and *Howsam* clearly

361. *Howsam*, 123 S. Ct. at 593.

362. *See supra* notes 144-45, 160-67 and accompanying text.

363. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 157 (1964) (arguing for an instrumental understanding of the rule of law). *But see* JOHN RAWLS, A THEORY OF JUSTICE 235-40 (1971) (arguing that law should promote the liberty of citizens).

364. *See supra* notes 55-57 and accompanying text.

365. For a discussion of judicial reluctance to enforce the FAA, see Reuben, *supra* note 2, at 601 and cases cited therein.

366. *See supra* note 58 and accompanying text.

367. *See, e.g.*, Carrington & Haagen, *supra* note 46; Sternlight, *supra* note 47.

368. Such support may be seen in the many state and federal court ADR programs. *See supra* notes 6-7. Moreover, approximately 4,000 businesses have signed the CPR Corporate Policy Statement on Alternatives to Litigation (the corporate "Pledge"), under which they commit to explore the use of ADR in disputes with other signers. For specific signatories, see http://www.cpradr.org.

reflect. A remnant of that former time, separability has outlived its usefulness.

c. No Hardship in Repudiation of Separability

As fundamentally a functional housekeeping rule for allocating decisional authority, it is difficult to see how parties might be inclined to rely on the doctrine of separability in ordering their private contractual affairs—at least in a way that is normatively desirable.[369] Therefore a judicial decision repudiating separability should hardly be disruptive of settled expectations. To the contrary, given the confused state of the positive law, one might reasonably question whether any contemporary reliance upon separability exists, much less is justified.

The only potential hardship that would be suffered by repudiation of separability is in judicial economy, and, as the Supreme Court clearly stated in *First Options*, this is an illegitimate basis for judicial policy with regard to arbitrability. "After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, "'are enforced according to their terms, and according to the intentions of the parties."[370]

2. *Whither* Prima Paint*: Toward an American Competence-Competence*

Significantly, the repudiation of separability need not, and should not, constitute a formal overruling of *Prima Paint*. Rather, it should come in the form of a reinterpretation, or evolved understanding, of *Prima Paint*'s core principle of arbitral authority. As Professors Alan Rau and William Park have suggested, the most significant virtue of this aspect of *Prima Paint* is that it avoids, in Rau's words, "the conceptual horror of an arbitral decision of contract invalidity that calls into question the validity of the arbitration clause from which [the arbitrators] derive their power."[371] Rau and Park are in my view correct about the need for American law to accommodate some form of *competence-competence*, and that it is this principle that lies at the legitimate core of *Prima Paint*'s rule of separability. If separability is viewed as the remedy for this problem, however, the remedy is overbroad, no matter how well-intended. An arbitrator does not need to have the *exclusive* power to decide the validity of a container contract, nor even the first power to decide its validity,[372] in order to have enough power to avoid this "conceptual horror." Rather, an arbitrator simply needs to have the *actual* power to make such a ruling if and when

369. One can always imagine an "evil-doer" intending to defraud, swindle, or otherwise hoodwink another relying on separability as yet another barrier to ultimate accountability to the rule of law. The law should hardly support such a result.

370. *First Options*, 514 U.S. at 947 (citations omitted).

371. Rau, *supra* note 32, at 340.

372. *See supra* notes 107-10 and accompanying text.

appropriate, and it is this understanding of *Prima Paint* that can and should survive the ultimate repudiation of separability.

Clearly, more consideration than is appropriate here should be given to the question of how to define and implement an American doctrine of *competence-competence*, in light of the unique characteristics of our law and culture, as well as the dearth of international experience in dealing with these questions. However, such an understanding preserves the core concern of *Prima Paint*, sheds its obsolescent husk of separability, and brings *Prima Paint* into full alignment with *First Options* and *Howsam*, the plain language and legislative intent of the FAA, the reasonable expectations of the contracting parties today, and indeed, international norms regarding arbitral authority.[373] Under such an interpretation, arbitrators have the authority to decide the validity of container contracts—as long as they are acting pursuant to a grant of authority that provides "clear and unmistakable" evidence of the parties' intent to arbitrate that issue, the validity of which would be decided if necessary by a court of law.

Admittedly, such an understanding introduces an interesting anomaly: the prospect of a court of law determining that the container contract is valid, thus enforcing the arbitration provision contained therein, only to have the arbitrator decide the container contract is invalid and therefore unenforceable.[374] This is no cause for concern, however. To the contrary, it is a possibility for an arbitral result that is precisely what the parties in fact bargained for in deciding to arbitrate rather than adjudicate in court. Judicial decision making and arbitral decision making proceed under different standards,[375] and it is not difficult to see how decision making that is constrained by the rule of law—evidentiary law, procedural law, as well as substantive law—could lead to, even compel, a different result than a decision made in a process that is unfettered by such limitations. It is impossible to say in the abstract which decision-making process is "fairer"—as in fact, either could be "fairer" than the other, depending upon the circumstances. But this trade-off in legal standards for other process virtues is precisely what the parties' choice of adjudication before an arbitrator or a court of law is all about—and why it is so important that consent to such choice be actual rather than implied.

VI. CONCLUSION

Nearly a half century ago, at the early dawn of the modern ADR movement, the U.S. Supreme Court created a rule of separability in *Prima Paint*, instructing courts to presume that parties intended to arbitrate the validity of contracts with arbitration provisions when the challenge to those contracts is not directed exclusively at the arbitration clause, and laying a foundation for an implied consent theory of arbi-

373. *See* CRAIG ET AL., *supra* note 104, at 515-16.
374. *See supra* notes 12-14 and accompanying text.
375. *See supra* notes 12-14 and accompanying text.

trability. From a policy perspective, *Prima Paint*'s goals of promoting arbitration and securing the jurisdiction of the arbitrator were laudable. But they come at the high cost of precluding judicial access for many parties seeking to have a court, rather than an arbitrator, decide whether a contract in which they have purportedly entered is enforceable as a matter of contract law.

More recently, the Court appears to be moving toward a different approach; one emphasizing actual rather than implied consent, by insisting in *First Options* and *Howsam* that questions about whether parties have agreed to arbitrate are to be decided by courts, unless the parties clearly and unmistakably waive that right. The tension between these two cases is palpable, and calls for a determination by the Supreme Court as to which will prevail. The better view, the view supported by the text and legislative history of the Federal Arbitration Act, the view that enhances rather than diminishes rule of law values, the view that appears to be supported by all nine members of the current U.S. Supreme Court, is that *First Options* should prevail. Carefully implemented to preserve arbitral *competence-competence*, such a development would simplify and clarify this unnecessarily complicated area of law, assure the jurisdictional autonomy of arbitrators, fulfill rather than defeat the reasonable expectations of parties in arbitration, return the doctrine to the clear legislative intent of the FAA, and, in the end, restore access to justice for contracts with arbitration clauses.