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## A Contractual Dilemma: Where Arbitration Agreements and Delegation Provisions Collide

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## NOTE

# A Contractual Dilemma: Where Arbitration Agreements and Delegation Provisions Collide

*Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432 (Mo. 2020) (en banc).

Trent H. Hamoud\*

### I. INTRODUCTION

Interpretation of arbitration agreements continues to present unique and challenging issues in Missouri law. Arbitration is a mainstay of the wider field of alternative dispute resolution, seeking to merge the competing interests of would-be litigants in a speedier, less expensive, less formalized environment. Delegation provisions, however, serve as an additional analytical hurdle in determining when and what disputes can be rightfully sent to arbitration. At first glance, a seemingly irreconcilable dilemma is presented. Must assent to the arbitration agreement, and thus the delegation provision, exist before the dispute will be sent to arbitration? Or is the simple appearance of a delegation provision, combined with an absence of an explicit challenge to that same provision, *per se* sufficient to send the arbitrability dispute to the arbitrator?

The American Bar Association defines arbitration as “a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments.”<sup>1</sup> Delegation provisions are separate agreements between parties allowing for threshold issues of the arbitration agreement, such as whether a particular

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1. *Arbitration*, A.B.A., [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/arbitration/](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/) [https://perma.cc/MM8E-RZNU] (last visited Oct. 6, 2020).

controversy is included within the agreement, to be decided through arbitration.<sup>2</sup> So widespread is the use of arbitration agreements in American society that it is estimated more than sixty million American workers are bound by individual agreements.<sup>3</sup> Notably, approximately eighty percent of the largest companies designate workplace-related disputes for arbitration.<sup>4</sup>

Part II of this Note summarizes the facts and procedural background of Theroff's employment dispute. Part III outlines the legal background relevant to the Supreme Court of Missouri's ruling, explaining the common law evolution of arbitration and providing a brief primer on pertinent contract law principles. Part IV details the *Theroff* court's divided ruling, which ultimately held that there was neither an agreement to compel arbitration nor assent to the delegation provision.<sup>5</sup> Part V distinguishes related U.S. Supreme Court cases, while briefly opining on possible implications of the principal opinion's reasoning and the enforcement or lack thereof of arbitration agreements and delegation provisions, more generally.

## II. FACTS AND HOLDING

*Theroff v. Dollar Tree Stores, Inc.* arose from an employment dispute.<sup>6</sup> Plaintiff Nina Theroff alleged she was constructively discharged by Defendants Dollar Tree Stores, Inc. ("Dollar Tree") and store manager Janie Harper when her request for a reasonable workplace accommodation was refused.<sup>7</sup> Specifically, Theroff wished to allow her service dog to accompany her.<sup>8</sup>

After Plaintiff Nina Theroff applied for a job at Dollar Tree, she was invited to the store for an interview with Assistant Manager Kayla Swift.<sup>9</sup> It was during this interview that Theroff informed Swift she was legally blind and required the use of various assistive devices.<sup>10</sup> Swift then told Theroff that she was hired and directed her to return to the store a few days later to complete electronic hiring paperwork.<sup>11</sup>

One of the documents digitally signed by Theroff, and at issue in the present case, was a mutual agreement to arbitrate claims.<sup>12</sup> Under the mutual

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2. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010).

3. Imre S. Szalai, *The Failure of Legal Ethics to Address the Abuses of Forced Arbitration*, 24 HARV. NEGOT. L. REV. 127, 129 (2018).

4. *Id.*

5. *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 440 (Mo. 2020) (en banc).

6. *Id.* at 435.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

agreement, it was specified that JAMS employment arbitration rules and procedures controlled.<sup>13</sup> JAMS Rule 11(b) grants the arbitrator the authority to determine jurisdictional and arbitrability disputes.<sup>14</sup>

Theroff alleged she only brought a small magnifier with her to the interview, as she was not told in advance that the hiring paperwork was to be completed electronically.<sup>15</sup> Noticing that use of the magnifier on the computer screen would take some time, Swift offered to help Theroff complete the hiring paperwork by taking control of the keyboard and directing Theroff for certain information, such as her address, phone number, and account information, unless Swift thought it would be faster for Theroff to enter the information herself.<sup>16</sup> With the entire process lasting approximately thirty minutes, Theroff maintains that Swift never discussed arbitration, waiver of a jury trial, or JAMS Rules.<sup>17</sup>

Swift's version of events substantially differs from Theroff's account. Swift denies that she assisted Theroff in navigating the electronic hiring paperwork.<sup>18</sup> Swift also disputed that Theroff was legally blind or even that Theroff informed her of her need to use assistive devices because of her visual impairments.<sup>19</sup> Swift stated that she did not electronically sign the mutual agreement for Theroff, nor field any of Theroff's questions relating to the mutual agreement.<sup>20</sup> Questioning revealed inconsistencies regarding Swift's awareness of facts regarding Theroff's hiring.<sup>21</sup>

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13. *Id.* JAMS, formerly "Judicial Arbitration and Mediation Services," is recognized as a top provider of alternative dispute resolution services in the U.S. and abroad. Richard Chernick & Robert B. Davidson, *JAMS: A Longstanding Provider of Dispute Resolution Services to the International Business Community*, 15 AM. REV. INT'L ARB. 593, 593 (2004). JAMS Rules are modeled after guiding principles of cost and time efficiency, prompt communication, and streamlined proceedings. Arno L. Eisen & Felix Lautenschlager, *I Like Jams on My Toast: The Jams International Arbitration Rules in A Nutshell*, 11 VINDOBONA J. 187, 188–89 (2007). As one might surmise, JAMS Rules are procedural in nature, and "provide that the contract shall be governed by the 'rules of law' agreed upon by the parties." *Id.* at 202. If no such choice of law provision is explicitly provided for by the parties, JAMS Rules "instruct the Tribunal to apply the law or rules of law which it deems most appropriate." *Id.*

14. *Theroff*, 591 S.W.3d at 435.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* (noting that the circuit court did not make any findings).

After an evidentiary hearing, the circuit court overruled the motion to compel arbitration.<sup>22</sup> Both the Missouri Court of Appeals for the Western District and the Supreme Court of Missouri affirmed the circuit court.<sup>23</sup> The highest court held that there existed neither a valid agreement to compel arbitration, nor assent to the delegation provision.<sup>24</sup>

### III. LEGAL BACKGROUND

Before close attention is given to the *Theroff* opinion, a brief background discussion is first necessary. This Part begins by introducing the Federal Arbitration Act of 1925 and the Missouri Uniform Arbitration Act, as well as how these Acts mesh with contracts of adhesion and the unconscionability defense. Next, key U.S. Supreme Court and Supreme Court of Missouri decisions in the arbitration space are examined. Finally, this Part concludes by teeing up the critical topics of delegation provisions and severability.

#### A. *The FAA and UAA*

Courts today understand arbitration as a contract matter.<sup>25</sup> Therefore, elementary contract principles such as mutual assent – offer plus acceptance – and consideration dictate the validity of an arbitration agreement.<sup>26</sup> But what exactly constitutes an arbitration agreement? As noted above, arbitration is defined as “a private process where disputing parties *agree* that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments.”<sup>27</sup> From this definition, it becomes evident that assent is a critical component in upholding an arbitration agreement.<sup>28</sup>

A review of courts’ historical treatment of arbitration agreements sheds light on the modern jurisprudence. One might find interesting that one of the earlier high court cases regarding arbitration is a Pennsylvania probate case from 1791.<sup>29</sup> The Seventeenth and Eighteenth Centuries saw courts refusing to compel arbitration under the doctrines of ouster and revocability.<sup>30</sup> Early

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22. *Id.* at 434–35.

23. *Id.* at 435.; *Theroff v. Dollar Tree Stores, Inc.*, No. WD 80812, 2018 WL 1914851, at \*4 (Mo. Ct. App. Apr. 24, 2018).

24. *Theroff*, 591 S.W.3d at 440.

25. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

26. *See Theroff*, 591 S.W.3d at 437.

27. *Arbitration*, *supra* note 1 (emphasis added).

28. *See Theroff*, 591 S.W.3d at 437 (citing *Green v. Cole*, 103 Mo. 70, 15 S.W. 317, 318 (Mo. 1891)) (“It is a well[-]settled principle of law that to constitute a contract[,] the minds of the parties must assent to the same thing in the same sense.”).

29. *Cornogg v. Abraham*, 1791 WL 481, at \*1 (Pa. 1791).

30. *See David Horton, Arbitration About Arbitration*, 70 STAN. L. REV. 363, 371 (2018). Here, the doctrines of ouster and revocability are referring to the jurisdiction of courts to hear disputes otherwise displaced by an arbitration agreement. The doctrine of ouster provided that “parties cannot ‘oust’ courts’ power to resolve legal

common law contradictions between contract theory and arbitration are perhaps best illustrated by courts recoiling at the prospect that more sophisticated parties could escape judicial oversight altogether if they instead contracted upfront for resolution of a future dispute by another party arising from that same contract.<sup>31</sup> It was not until the adoption of the Federal Arbitration Act of 1925 (“FAA”) that arbitration agreements could be reconciled with more traditional “freedom to contract” principles.<sup>32</sup>

The FAA can be placed into further context through this economic and historical lens. Consider *Lochner v. New York*, the case that would ultimately lead to the early Twentieth Century period of American jurisprudence known as the Lochner Era.<sup>33</sup> *Lochner* represented a strong deference by the Supreme Court to economic due process rights and freedom of contract.<sup>34</sup> While *Lochner* has long since been overruled and today largely stands as no more than a relic of a laissez-faire economic past, “many of the arguments made to

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claims, and [the doctrine of] revocability condoned a party’s unilateral revocation of an arbitration agreement.” Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1, 3–4 (2004).

31. See Horton, *supra* note 30, at 377 n.97 (“See, e.g., *Kill v. Hollister* (1746) 95 Eng. Rep. 532, 532; 1 Wils. K.B. 129, 129 (refusing to dismiss a case concerning an insurance policy that contained an arbitration provision because ‘the agreement of the parties cannot oust this [c]ourt’ of jurisdiction); *Vynior’s Case* (1609) 77 Eng. Rep. 597, 599–600; 8 Co. Rep. 81b–82b (voiding an arbitration award made after one party tried to revoke the arbitration agreement).”).

32. *Id.* at 377–78. A close study of the legislative history of the FAA establishes that its “purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). Therefore, judicial enforcement, rather than expediency, was the “overriding goal” of the FAA. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

33. *Lochner v. New York*, 198 U.S. 45, 73–74 (1905), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 413–14 (1937) (upholding state minimum wage law for women as not violative of the Due Process Clause under the Fourteenth Amendment) (striking down state law setting bakers’ hours as it conflicted with the liberty of contract protected by the Due Process Clause under the Fourteenth Amendment). The Lochner Era is defined as “[t]he time from 1890 to 1937, in which the United States Supreme Court, using a broad interpretation of due process that protected economic rights, tended to strike down economic regulations of working conditions, wages or hours in favor of laissez-faire economic policy.” *Lochner Era*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/lochner\\_era](https://www.law.cornell.edu/wex/lochner_era) [https://perma.cc/3DZW-2RT6] (last visited Oct. 7, 2020).

34. *Lochner*, 198 U.S. at 56.

support a broad application of the [FAA] recall *Lochner's* libertarian underpinnings.”<sup>35</sup>

The FAA, however, does not stand in isolation in Missouri arbitration law. Missouri’s Uniform Arbitration Act (“UAA”) provides that any written contract or agreement submitting any controversy between parties is valid, enforceable, and irrevocable, absent some limited exceptions.<sup>36</sup> In practice, one key difference between the FAA and the UAA is that the latter contains a conspicuousness requirement, while the former does not.<sup>37</sup> While the UAA will exclusively control for an entirely Missouri-based employer, challenges may arise in those instances where the FAA supersedes the UAA.<sup>38</sup> Therefore, by the Supremacy Clause of the U.S. Constitution, the FAA controls whenever the UAA would otherwise conflict with federal law.<sup>39</sup>

### B. Adhesion Contracts and the Unconscionability Defense

Certain contracts of adhesion can constitute a limited exception under the UAA.<sup>40</sup> An adhesion contract is created by a party with disproportionately stronger bargaining power, offered by that party to its weaker counterpart on a “take this or nothing basis.”<sup>41</sup> That a contract is one of adhesion, however, does not necessarily mean under contemporary doctrine that it is one of unconscionability.<sup>42</sup> Resistance by American courts to arbitration agreements can be closely traced to the evolution of the unconscionability defense in

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35. *Id.*; Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 805 n.13 (2009).

36. MO. REV. STAT. §§ 435.350–435.470 (1980).

37. Specifically, under the UAA, an arbitration agreement must be accompanied by a notice stating: “THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.” MO. REV. STAT. § 435.460 (1980).

38. *See, e.g.*, *Duggan v. Zip Mail Services, Inc.*, 920 S.W.2d 200, 203 (Mo. Ct. App. 1996) (holding agreement unenforceable under the UAA due to lack of key conspicuousness provision, but still enforceable under the FAA).

39. *Id.*

40. MO. REV. STAT. § 435.350 (1996).

41. *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 438 (Mo. 2015) (en banc) (quoting *Robin v. Blue Cross Hosp. Servs., Inc.*, 637 S.W.2d 695, 697 (Mo. 1982) (en banc)). (The terms of an adhesion contract “are imposed upon the weaker party who has no choice but to conform,” and such terms “unexpectedly or unconscionably limit the obligations and liability of the drafting party.”) An adhesion contract is not *per se* invalid under Missouri law, however. *Id.*

42. *See Susan Landrum, Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 769 (2014) (concluding that “[a]lthough a court may ultimately determine that a contract of adhesion is procedurally unconscionable, most state courts have held that a contract of adhesion is not *per se* unconscionable.”).

contract law.<sup>43</sup> Modernly, the two species of the unconscionability defense are procedural and substantive unconscionability.<sup>44</sup> Procedural unconscionability involves the mechanics of contract formation, whereas substantive unconscionability involves the actual terms of the contract itself.<sup>45</sup> As applied to arbitration, cases asserting substantive unconscionability could contest the guiding rules, chosen arbitrator(s), and provision for or disallowance of appeal.<sup>46</sup> Procedural unconscionability, however, involves the mechanics of the formation of the contract.<sup>47</sup> Cases challenging an arbitration agreement on the basis of procedural unconscionability often allege that the agreement was offered on a take-it-or-leave-it basis or otherwise buried in the fine print of the agreement.<sup>48</sup>

### C. Key Cases

A slew of important U.S. Supreme Court cases helped topple the initial resistance to arbitration clauses. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, the Court stated that the FAA evinced a “liberal federal policy [by Congress] favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”<sup>49</sup>

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43. See David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 391–94 (2012).

44. *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 508 n.2 (Mo. 2012) (en banc) (quoting *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. 2006) (en banc)). “[I]t is inaccurate to suggest [in Missouri] that an agreement or provision must be separately found to be both procedurally and substantively unconscionable to be invalid.” *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 432–33 (Mo. 2015) (en banc) (citing *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 492, n.3 (Mo. 2012) (en banc)). Instead, “[i]t is more accurate to state that a court will look at both the procedural and substantive aspects of a contract to determine whether, considered together, they make the agreement or provision in question unconscionable.” *Id.* at 433.

45. *Robinson*, 364 S.W.3d at 508 n.2 (quoting *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. 2006) (en banc)) (noting that “[p]rocedural unconscionability focuses on such things as high pressure sales tactics, unreadable fine print, or misrepresentation among other unfair issues in the contract formation process,” whereas “[s]ubstantive unconscionability means an undue harshness in the contract terms”).

46. See Horton, *supra* note 43, at 393.

47. *Robinson*, 364 S.W.3d at 508 n.2 (quoting *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. 2006) (en banc)).

48. See Horton, *supra* note 43, at 393.

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



And in *AT&T Mobility LLC v. Concepcion*, the Court held, by a five-to-four decision, that the FAA superseded a California rule invalidating consumer contract provisions that require individual arbitration and that waive any right to bring forth a class action.<sup>50</sup>

The *Circuit City Stores Inc. v. Adams* result turned on the decision in *Allied-Bruce Terminix Companies, Inc. v. Dobson*.<sup>51</sup> The *Allied-Bruce* Court held that the interstate commerce language of the FAA should be assigned a broad interpretation.<sup>52</sup> Concurring in the judgment of the majority, Justice Sandra Day O'Connor rested on *stare decisis* considerations.<sup>53</sup> O'Connor's departure from the majority, however, rested in her belief that the FAA should not be given such a broad interpretation.<sup>54</sup> Still rejecting the view that Congress intended for the FAA to apply in state courts, as supported by her prior dissents,<sup>55</sup> Justice O'Connor concluded that Congress, rather than the Court, should expand the scope of the FAA.<sup>56</sup> The green light was now shining bright for the U.S. Supreme Court to extend the FAA to employment contracts.

It is here that the tensions between state and federal arbitration law start to become further evident. In *Circuit City*, again by a five-to-four decision, the U.S. Supreme Court held that the FAA covers employment contracts of workers unless that class of workers has been *specifically* exempted from the FAA, as is the case with seamen and railroad workers.<sup>57</sup> In a contested analysis, the majority applied the maxim *ejusdem generis* to reach the conclusion that the FAA specifically excluded only transportation workers.<sup>58</sup> The *Circuit City* Court further concluded that the use of the phrase "affecting

50. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

51. *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995).

52. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 268 (1995).

53. *Id.* at 284 (O'Connor, J., concurring).

54. *Id.* at 282 (warning that "[t]he reading of § 2 adopted today will displace many state statutes carefully calibrated to protect consumers.").

55. See *Perry v. Thomas*, 482 U.S. 483, 494–95 (1987) (O'Connor, J., dissenting); see also *York Int'l v. Alabama Oxygen Co., Inc.*, 465 U.S. 1016 (1984) (O'Connor, J., dissenting); *Southland Corp. v. Keating*, 465 U.S. 1, 21–36 (1984) (O'Connor, J., dissenting).

56. *Allied-Bruce Terminix Companies, Inc.*, 513 U.S. at 284 (O'Connor, J., concurring).

57. *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 124 (2001) (emphasis added).

58. *Id.* at 115. *Ejusdem generis* means "[o]f the same kind, class, or nature." *Ejusdem Generis*, BLACK'S LAW DICTIONARY (2d ed. 1910) (noting that "[i]n statutory construction, the 'ejusdem generis rule' is that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.").

commerce” evidenced Congress’s intent to enforce arbitration agreements under federal law courtesy of the Commerce Clause.<sup>59</sup>

Finally, a few recent Supreme Court of Missouri cases on arbitration are worth highlighting. The Supreme Court of Missouri in *State ex rel. Newberry v. Jackson* recently unanimously agreed that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.”<sup>60</sup> *Eat v. CMH Homes, Inc.* states that a lack of mutuality in an arbitration agreement does not necessarily result in a nullification of the arbitration agreement.<sup>61</sup>

#### D. Delegation Provisions and Severability

The final key background topic necessary to understanding arbitration clauses involve delegation provisions and severability. A delegation provision is an agreement to send to arbitration threshold issues relating to the arbitration agreement.<sup>62</sup> In a five-to-four decision, the U.S. Supreme Court held in *Rent-A-Center, West, Inc. v. Jackson* that a court may hear only those challenges specifically leveled at a delegation provision.<sup>63</sup> However, a challenge to the agreement as a whole, absent such a specific challenge, could only be heard by the arbitrator.<sup>64</sup>

Severability is a fairly straightforward concept. The FAA renders delegation provisions severable from the rest of the contractual agreement.<sup>65</sup> Thus, a court could strike down a delegation provision without invalidating the rest of the wider contractual agreement.<sup>66</sup> Such a judicial maneuver has several important implications. Again, in the employment context, a party would first need to directly challenge a delegation provision’s validity *prior to* a challenge to the remainder of the employment agreement, including the

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59. *Circuit City Stores Inc.*, 532 U.S. at 115 (citing *Allied-Bruce Terminix Companies, Inc.*, 513 U.S. at 277).

60. *State ex rel. Newberry v. Jackson*, 575 S.W.3d 471, 474–75 (Mo. 2019) (en banc), *abrogated by* *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432 (Mo. 2020) (en banc) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

61. *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 434 (Mo. 2015) (en banc).

62. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010). Thus, by this definition, a delegation provision amounts to arbitration about arbitration! *See Horton*, *supra* note 30.

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

64. *Id.*

65. *Id.* at 70 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006)).

66. *Id.* at 70–71 (2010).

arbitration agreement.<sup>67</sup> Consider the significant controlling weight afforded delegation provisions from *Henry Schein, Inc. v. Archer & White Sales, Inc.*, where the U.S. Supreme Court held that a court may not rule on the threshold issue of arbitrability even where the “argument that the arbitration agreement applies to a particular dispute is wholly groundless.”<sup>68</sup> Such a result would seem to suggest that courts are essentially powerless in addressing threshold issues of arbitrability, potentially risking far from optimal results. However, the U.S. Supreme Court provided critical guidance in *New Prime v. Oliveira*, holding that a court should first determine whether the “contracts of employment” exclusion under Section 1 of the FAA applies *before* ordering arbitration.<sup>69</sup> Indeed, it is only for a contract falling within the scope of the FAA that a court may exercise the severability principle.<sup>70</sup> Thus, *New Prime* not only stands for a rejection of an expansive interpretation of the FAA by the United States Supreme Court, but also a close reading of the entire statute that rejects viewing any one section in isolation.<sup>71</sup>

#### IV. INSTANT DECISION

In *Theroff*, the Supreme Court of Missouri held that there neither existed a valid agreement to compel arbitration, nor assent to the delegation provision.<sup>72</sup> This Part first examines the principal opinion’s determination of the existence of an arbitration agreement as well as the controlling weight of the delegation provision.<sup>73</sup> Finally, this Part concludes by briefly examining the concurring and dissenting opinions.

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67. *Id.* (emphasis added).

68. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). “When the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.” *Id.* at 528.

69. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019) (emphasis added). “The parties’ private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum.” *Id.* at 537–38.

70. *Id.* at 538. (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967)).

71. See Imre S. Szalai, *The Supreme Court’s Landmark Decision in New Prime Inc. v. Oliveira: A Panoptic View of America’s Civil Justice System and Arbitration*, 68 EMORY L.J. ONLINE 1059, 1072 (2019).

72. *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 439–40 (Mo. 2020) (en banc).

73. As a majority of the Judges did not agree on a single opinion, the use of the term “Principal Opinion” was adopted from the case to refer to that part of the opinion that provided the underlying rationale for the disposition of the case as a whole. Plurality opinions are synonymous with principal opinions. James A. Bloom, *Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of United States v. Winstar Corp.*, 85 WASH. U. L. REV. 1373, 1376 n.16 (2008).

*A. The Principal Opinion*

The principal opinion, written by Judge Mary R. Russell, affirmed the order overruling Defendants' motion to compel arbitration and stay proceedings.<sup>74</sup> The Court found no support necessary to reverse the circuit court's order overruling the motion to compel.<sup>75</sup> In reviewing the case, the court first analyzed whether there actually existed a mutual agreement to arbitrate under Section 435.355.1 of the Missouri Revised Statutes, since this was a necessary prerequisite to compelling arbitration.<sup>76</sup>

Theroff disputed that she actually "signed" the agreement because she did not explicitly authorize Swift to make the operative click.<sup>77</sup> Alternatively, even if Theroff herself clicked the agreement suggesting her consent, Theroff was not placed on adequate notice of the existence of the agreement – Swift did not inform Theroff of the agreement and Theroff could not read it because of her blindness.<sup>78</sup> Defendants, however, argued that not only was Theroff aware of the arbitration agreement and had knowledge of its existence, she signed it.<sup>79</sup>

The court reasoned that Theroff's assertions that she did not see, read, know of, or assent to the arbitration agreement essentially amounted to a challenge to the arbitration agreement's existence.<sup>80</sup> Thus, Theroff's argument that assent – or a meeting of the minds – did not occur served as a challenge to the existence of the agreement, itself a prerequisite to compelling arbitration.<sup>81</sup> The court further observed that, by this same reasoning, the circuit court impliedly found there was no agreement to compel arbitration by overruling the motion to compel.<sup>82</sup> Unfortunately, no express findings of fact

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74. *Theroff*, 591 S.W.3d at 439.

75. *Id.* (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976) (en banc)).

76. *Id.* at 436.

77. *Id.* at 436–37.

78. *Id.*

79. *Id.* at 437.

80. *Id.* at 438. The Court made this inference despite Theroff never expressly citing Mo. Ann. Stat. § 435.355.1 in challenging "the existence of the agreement to arbitrate." *Id.*

81. *Id.* at 438–39; *see also* *Arrowhead Contracting, Inc. v. M.H. Washington, LLC*, 243 S.W.3d 532, 535 (Mo. Ct. App. 2008) ("The existence of a contract necessarily implies there has been a meeting of the minds between the parties.") (internal quotations omitted).

82. *Theroff*, 591 S.W.3d at 439.

or law were provided by the circuit court's order.<sup>83</sup> Deferring to the trial court's witness credibility assessment, the court affirmed the lower court's order.<sup>84</sup>

As a final matter, the court addressed the effectiveness of the delegation provision.<sup>85</sup> Whether a contract falls within the coverage of the FAA is a preliminary inquiry to be applied before applying the FAA's severability principle.<sup>86</sup> This inquiry results in a separate challenge to the arbitration agreement, or delegation provision, apart from the overall contract.<sup>87</sup> The court reasoned that because there did not exist an agreement between the parties to arbitrate, by extension, there could not exist "clear and unmistakable evidence of the existence of assent to a delegation provision."<sup>88</sup>

### B. *The Concurrence*

Judge Patricia Breckenridge concurred in the principal opinion.<sup>89</sup> The concurrence acknowledged that the holdings of the U.S. Supreme Court case of *Rent-A-Center, West, Inc. v. Jackson*,<sup>90</sup> quoted in three recent Missouri cases,<sup>91</sup> "were broad enough to imply that the failure of a party to separately challenge a delegation clause in an arbitration agreement required a court to sustain a motion to compel arbitration so that formation disputes, including challenges to the delegation clause, could be decided by the arbitrator."<sup>92</sup>

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83. *Id.* However, while the lower court did not make specific findings of fact, it is worth emphasizing that the plurality nonetheless concluded that the judge must have necessarily found an absence of assent. *Id.* at 441.

84. *Id.* at 439 (noting that "[t]he circuit court could have believed Theroff's account that she could not see the screen, was not able to view or read the arbitration agreement on her own because she did not have the proper assistive device, or did not know the arbitration agreement was included in the onboarding material through which Swift verbally guided her ... this Court cannot say otherwise."). It is worth noting that this ruling does not mean the case is over. The facts of the underlying claim still have to be decided and fought over.

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

86. *Theroff*, 591 S.W.3d at 440 (citing *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019)).

87. *Id.* (same).

88. *Id.* (concluding that, "[u]nder these facts, the circuit court cannot delegate the matter to an arbitrator whose very existence depends upon an agreement.").

89. *Id.* (Breckenridge, J., concurring).

90. *Rent-A-Ctr., W., Inc.*, 561 U.S. at 68.

91. *See State ex rel. Pinkerton v. Fahnstock*, 531 S.W.3d 36, 43 (Mo. 2017) (en banc); *see also Soars v. Easter Seals Midwest*, 563 S.W.3d 111, 114 (Mo. 2018) (en banc); *State ex rel. Newberry v. Jackson*, 575 S.W.3d 471, 474 (Mo. 2019) (en banc).

92. *Theroff*, 591 S.W.3d at 441 (Breckenridge, J., concurring).

However, *Rent-A-Center*'s holding was recently clarified by the U.S. Supreme Court in *New Prime*.<sup>93</sup>

*New Prime* held that it is a court's responsibility to determine whether a contract lies within Sections 1 and 2 of the FAA *before* compelling arbitration.<sup>94</sup> This holding means arbitration should only be ordered by the court where there exists a contract evidencing a transaction involving commerce.<sup>95</sup> The concurrence reasoned that even in the absence of a party's explicit challenge to a delegation provision, the court must still determine whether the FAA applies and, consequently, its own authority to send the dispute to arbitration.<sup>96</sup> The problem with the dissenting opinions' reasoning, as the concurrence sharply notes, "would have the Court put the cart before the horse" in first determining the appearance of an arbitration provision without first asking whether a contract even exists.<sup>97</sup>

### C. Judge Powell's Dissent

Judge W. Brent Powell dissented in the principal opinion, arguing that the principal opinion represented a departure from previous authority.<sup>98</sup> More specifically, Powell contended that Theroff, by not explicitly challenging the "existence or validity of the delegation provision," instead only challenged the *formation* of the greater arbitration agreement.<sup>99</sup> Because such a formation dispute amounted to a "threshold [issue] of arbitrability," the circuit court lacked authority, mandating reversal of the circuit court's order.<sup>100</sup>

### D. Judge Fischer's Dissent

Judge Zel M. Fischer also dissented in the principal opinion.<sup>101</sup> Like Powell's dissent, Fischer argued that the principal opinion disregarded

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93. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537–38 (2019).

94. *Id.* at 537.

95. *Theroff*, 591 S.W.3d at 441 (Breckenridge, J., concurring).

96. *Id.* at 441–42.

97. *Id.* at 442.

98. *Id.* (Powell, J., dissenting). Powell drew distinctions against three Supreme Court of Missouri cases. *See State ex rel. Newberry v. Jackson*, 575 S.W.3d 471 (Mo. 2019) (en banc); *see also Soars v. Easter Seals Midwest*, 563 S.W.3d 111 (Mo. 2018) (en banc); *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36 (Mo. 2017) (en banc).

99. *Theroff*, 591 S.W.3d at 442 (Powell, J., dissenting).

100. *Id.* (quoting *Pinkerton v. Fahnestock*, 531 S.W.3d 36, 43 (Mo. 2017) (en banc)).

101. *Id.* at 446 (Fischer, J., dissenting).

previous authority.<sup>102</sup> Fischer criticized the principal opinion's reliance on a "flawed distinction" between a contract's "existence" or "conclusion" and its "formation."<sup>103</sup> Since the issue at hand was whether the arbitration agreement *existed*, as Theroff argued that she never assented to it, this was equivalent to asking whether a contract was actually *formed*.<sup>104</sup> And since the "plain terms" of the delegation clause assigned "gateway questions of arbitrability," including questions over a contract's formation, to an arbitrator, reversal was required.<sup>105</sup>

## V. COMMENT

This Part first critiques the principal opinion, concurrence, and two dissents in *Theroff*. Next, the societal considerations of the decision are laid forth. Finally, this Part concludes by returning to the original contractual dilemma presented at the beginning of this Note.

### A. *Theroff* Takeaways

The principal opinion has taken a pragmatic step towards precedent regarding the treatment of arbitration and delegation clauses in *Theroff*. *Theroff* raises legitimate concerns about the grounding of the Supreme Court of Missouri's decision when compared to U.S. Supreme Court and Missouri precedent, fundamental contract questions, and other practical concerns. However, despite these concerns, the principal opinion's ruling cleanly resolves *Theroff* by minimizing the more drastic impacts that could be realized if the approaches called for in both dissents were instead utilized.

Judge Powell's dissent raised the concern that Theroff did not specifically challenge the arbitration provision, but rather the formation of the greater arbitration agreement.<sup>106</sup> And since formation disputes were threshold issues of arbitrability, Powell argued that the court did not have jurisdiction to hear them.<sup>107</sup> Similarly, Judge Fischer argued that "gateway questions of arbitrability," including questions over a contract's formation, must be sent to an arbitrator, further rejecting the premise that there existed a difference between formation and existence.<sup>108</sup>

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102. *Id.* at 446–47. Fischer drew distinctions against two Supreme Court of Missouri cases. *See generally* *State ex rel. Newberry v. Jackson*, 575 S.W.3d 471 (Mo. 2019) (en banc); *see also* *Soars v. Easter Seals Midwest*, 563 S.W.3d 111 (Mo. 2018) (en banc).

103. *Theroff*, 591 S.W.3d at 446 (Fischer, J., dissenting).

104. *Id.* at 447.

105. *Id.* (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010)).

106. *Id.* at 444 (Powell, J., dissenting).

107. *Id.* at 442 (quoting *Pinkerton v. Fahnestock*, 531 S.W.3d 36, 43 (Mo. 2017) (en banc)).

108. *Id.* at 447 (Fischer, J., dissenting) (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010)). Indeed, Judge Fischer concurred with Judge Powell, but

Both of these arguments are not easily reconciled with *New Prime*. *New Prime* held that it is a court's responsibility to first determine whether a contract lies within Sections 1 and 2 of the FAA before compelling arbitration.<sup>109</sup> In other words, a court must find the existence of a valid contract prior to submitting the parties to arbitration. Further, the Supreme Court of Missouri recently unanimously agreed that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.”<sup>110</sup> This would suggest that where, as here, there did not exist “clear and unmistakable evidence of the existence of assent to a delegation provision,” the dispute clearly cannot be sent to arbitration.<sup>111</sup>

Judge Breckenridge's concurrence succinctly grasps the oft-conflicting interests at play when a court is to initially consider the applicability of a delegation clause. On the one hand, *Rent-A-Center* could be interpreted broadly such that where a party fails to separately challenge a delegation clause in an arbitration agreement, the rule should be formation and delegation provision disputes are to be resolved by the arbitrator.<sup>112</sup> But it follows from *New Prime* that arbitration should only be ordered by the court where there exists a contract evidencing a transaction involving commerce.<sup>113</sup> This becomes a simple logical inquiry when stripped down to its core: was an arbitration agreement even formed by the parties? If the answer is no, as here, then it plainly follows that the invalid agreement is not covered by the FAA. One can follow this one-step inquiry to reach the same result regarding treatment of the delegation provision under Judge Breckenridge's framework.

### B. Societal Considerations

There still remain outstanding concerns regarding matters of efficiency, justice, and public policy regarding arbitration agreements and delegation provisions. Mutuality of obligation in an arbitration agreement seems to touch

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only separately dissented to address the “flawed distinction” between “existence” and “formation.” *Id.* at 446.

109. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019).

110. *State ex rel. Newberry v. Jackson*, 575 S.W.3d 471, 474–75 (Mo. 2019) (en banc), *abrogated by Theroff*, 591 S.W.3d at 432 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

111. *Theroff*, 591 S.W.3d at 440 (concluding that, “[u]nder these facts, the circuit court cannot delegate the matter to an arbitrator whose very existence depends upon an agreement.”).

112. *Id.* at 441 (Breckenridge, J., concurring).

113. *Id.*



all three concerns.<sup>114</sup> Consider the situation where an arbitration agreement between an employer and employee explicitly grants in the employer, but not the employee, the option to litigate a certain number of issues, rather than arbitrate them.<sup>115</sup> Interestingly, the Supreme Court of Missouri case of *Eat v. CMH Homes, Inc.* states that a lack of mutuality in an arbitration agreement does not necessarily result in a nullification of the arbitration agreement; rather, it is one factor to consider in deciding whether the agreement is unconscionable.<sup>116</sup> This lack of mutuality suggests that the valid existence of a delegation provision *could* turn on the presence or lack of consideration.

*Theroff* serves as a further illustration of the benefits and detriments that arbitration agreements present for employers and employees alike. Dollar Tree's significant bargaining power as a large, commercial party leaves no doubt that it is the more sophisticated and knowledgeable drafting party than the employees on the other side of the bargaining table.<sup>117</sup> What is especially concerning is where, as here, this asymmetry in bargaining power correlates with an especially disparate impact on disabled employees, like *Theroff*. This could extend to concerns for non-English speakers, minorities, and people with less education or experience with contracts. Additionally, as a private proceeding between parties, an arbitrator's decision lacks precedential power that would be respected by the courts.<sup>118</sup> However, arbitration may not best serve society in this context, as employment law would be further advanced and respected instead by public adjudication.<sup>119</sup>

A legitimate efficiency argument also exists in support of arbitration agreements. Arbitration offers a more informed, timely, economical, and private resolution of a dispute than if that same dispute was adjudicated in court.<sup>120</sup> Arbitration is often less costly than litigating, due in part to arbitration's limited allowance for discovery, less formal structure, and highly limited scope of judicial review.<sup>121</sup> Because of its lower cost structure, some employees may have a greater incentive to bring forth a claim in arbitration that they otherwise would not have litigated in court.<sup>122</sup> Furthermore, arbitration benefits the public in that it shifts a pre-defined number of claims

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114. See *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 433 (Mo. 2015) (en banc) (quoting *Aden v. Dalton*, 341 Mo. 454, 107 S.W.2d 1070, 1073 (Mo. 1937)) (noting that "[m]utuality of contract means that an obligation rests upon each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound.").

115. See *id.* at 434.

116. *Id.*

117. See E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 608 (2009).

118. *Id.*

119. *Id.*

120. *Id.* at 605.

121. *Id.* at 606.

122. *Id.* at 607.

that would have otherwise been brought forward in court to the arbitrator's purview, therefore freeing-up and reallocating the public's limited resources – including courtrooms, judges, and juries – for other claims.<sup>123</sup> And if an employer is subjected to a lesser amount of litigated claims, a standard economic analysis would seemingly posit that consumers would benefit from lower prices.<sup>124</sup>

The approaches advanced by the principal and concurring opinions in *Theroff* appropriately balance these competing interests, while maintaining a fair and predictable outcome for employees and employers alike. The principal opinion found that assent – or a meeting of the minds – did not occur, which served as a challenge to the existence of the agreement, itself a prerequisite to compelling arbitration.<sup>125</sup> The principal opinion further concluded that because there was no agreement between the parties to arbitrate, there could not be “clear and unmistakable evidence of the existence of assent to a delegation provision.”<sup>126</sup> Along this same line, the concurrence reasoned that even in the absence of a party's explicit challenge to a delegation provision, the court must still determine whether the FAA applies and, consequently, its own authority to send the dispute to arbitration.<sup>127</sup>

### C. Confronting the Contractual Dilemma

Now armed with the necessary analytical backing, the original dilemma can be confidently approached. Must assent to the arbitration agreement, and thus the delegation provision, exist before the dispute will be sent to arbitration, or is the simple appearance of a delegation provision, combined with an absence of an explicit challenge to that same provision, *per se* sufficient to send the arbitrability dispute to the arbitrator? In answering this

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123. *Id.* at 606.

124. See Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 85 (2017). However, “[w]hile [the assertion that adhesive consumer arbitration agreements result in lower prices for consumers, especially in highly competitive industries] is the standard economic analysis, the one study attempting to assess it empirically found no statistically significant evidence to support it.” *Id.* at 84.

125. *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 438–39 (Mo. 2020) (en banc); see also *Arrowhead Contracting, Inc. v. M.H. Washington, LLC*, 243 S.W.3d 532, 535 (Mo. Ct. App. 2008) (“The existence of a contract necessarily implies there has been a meeting of the minds between the parties.”) (internal quotations omitted).

126. *Theroff*, 591 S.W.3d at 440 (concluding that, “[u]nder these facts, the circuit court cannot delegate the matter to an arbitrator whose very existence depends upon an agreement.”).

127. *Id.* at 441–42 (Breckenridge, J., concurring).

question, one cannot help but be reminded that there exists a presumption of arbitrability for contracts containing an arbitration clause.<sup>128</sup> However, this presumption is flipped when considering the validity of a delegation provision, or arbitrability about arbitrability.<sup>129</sup>

Keeping in mind this “reverse presumption,”<sup>130</sup> the result reached in *Theroff* starts to come into focus. As the concurrence sharply observes, the approaches taken by the dissents “would have the Court put the cart before the horse” in first determining the appearance of an arbitration provision without first asking whether a contract even exists.<sup>131</sup> Viewed in this light, assent to both the arbitration agreement and delegation provision thus becomes a critical threshold inquiry to establishing not only application of the FAA, but also the court’s own authority to hear and transfer the dispute to arbitration, if necessary.<sup>132</sup>

*Theroff* illustrates a necessary, baseline level of judicial scrutiny to delegation provisions and arbitration agreements in a current economic environment where many Missouri and American workers face significant bargaining challenges. Notably, while as many as a third of American workers were unionized in the mid-1950s, today, approximately just 10.5% of Americans belong to a union.<sup>133</sup> Indeed, it is perhaps no coincidence that it is amongst this backdrop of organized labor’s decline that a new employment law scheme has emerged across the country.<sup>134</sup> The needle must be carefully thread in deciding whether to settle employment disputes by arbitration or litigation. This decision requires not only close scrutiny of the actual agreement between the parties, but consideration of the wider factors presented above.

## VI. CONCLUSION

Under a backdrop of convincing precedent and extensive interpretations from the U.S. Supreme Court, the principal opinion in *Theroff* declined to find the existence of either a valid agreement to compel arbitration or assent to the

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128. *See* AT & T Techs., Inc. v. Comm’ns Workers of Am., 475 U.S. 643, 650 (1986).

129. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 79 (2010) (Stevens, J., dissenting); *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944–45 (1995).

130. *See* Rent-A-Ctr., W., Inc., 561 U.S. at 79 (quoting *First Options of Chicago, Inc.*, 514 U.S. at 945 (1995)).

131. *Theroff*, 591 S.W.3d at 442 (Breckenridge, J., concurring).

132. *Id.* at 441–42.

133. Marick Masters, *How organized labor can reverse decades of decline*, WAYNE ST. U. (Aug. 2, 2019) <https://clas.wayne.edu/news/how-organized-labor-can-reverse-decades-of-decline-36673>.

134. James Ottavio Castagnera & Michael Ostrowski, *Alternative Dispute Resolution: Employment Law*, 57 AM. JUR. TRIALS 255 (1995).

delegation provision.<sup>135</sup> Although the court was substantially divided, the principal opinion's findings are not chiefly problematic provided prior decisions at odds in this area. In short, the plurality's ruling gives Missouri courts limited autonomy to make a fact-based inquiry about whether there even exists a valid contractual agreement before sending the parties to arbitration. Such a decision could arguably invite more litigation between parties that dispute threshold issues of arbitrability, such as here, thus effectively nullifying one of the oft-advanced benefits of arbitration, which is lower costs. However, what is sacrificed in terms of cost or efficiency is gained when it comes to protecting the concerns raised by parties with weaker bargaining power, such as in *Theroff*. This problem, it would seem, would be a preliminary matter best left for resolution by the courts.

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135. *Theroff*, 591 S.W.3d at 439–40.