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ARTICLES

***PRIMA PAINT* PUSHED COMPULSORY ARBITRATION UNDER THE *ERIE* TRAIN**

Richard L. Barnes^{*}

I. INTRODUCTION

This article asks what remains if you sever part of a contract that was a nullity. If a contract is a legal nullity, it would seem intuitive that any lesser part would amount to nothing as well. In *Prima Paint v. Flood & Conklin Manufacturing Co.*,¹ however, the Supreme Court held that federal law demanded severability of an arbitration clause, even when a party claimed that the entire contract (including, therefore, the agreement to arbitrate) was void—in that particular case, due to fraud in the inducement. Specifically, the Court held, “[A] 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.’”²

The peculiar calculus of the Court is a result of a federal norm favoring compulsory arbitration clauses. While the federal norm encourages the salvage of an arbitration provision, state common-law doctrines that limit contract power suggest that the same compulsory arbitration provisions may be vulnerable to charges of adhesion or unconscionability. Can the value of enforcing a compulsory arbitration provision be so great that the arbitration clause will retain its force despite the destruction of the encompassing contract? While the common law answer would seem to be “no,” a series of Supreme Court cases appears to urge “yes.”³ This article argues principally that the Supreme Court was wrong when it found a remainder in *Prima Paint*. By doggedly favoring arbitration, the Court has reawakened concerns thought to have been put to rest by *Erie R. R. Co. v. Tompkins*.⁴

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

2. *Id.* at 403.

3. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Southland Corp. v. Keating*, 465 U.S. 1 (1983); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Prima Paint*, 388 U.S. 395; *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1955).

4. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1937). *Erie* was the end of *Swift v. Tyson*, 41 U.S. 1 (1842), with the latter’s notion that there is a federal general common law separate from and possibly even above that of the states. *Erie*, 304 U.S. at 79.

Because federal substantive law includes the Federal Arbitration Act of 1925 (FAA)⁵ and state substantive law includes doctrines of adhesion and unconscionability,⁶ there are two quite different norms to apply to challenges to contracts with arbitration clauses. The Court's articulation of the FAA norm is that arbitration is the proper forum because the parties have chosen it.⁷ Classical contract doctrines, however, require an examination of the entire contract to properly judge the enforceability of the compulsory arbitration clause,⁸ which the common law would view as just another contract provision. Both norms rest on entrenched substantive law and only come into conflict in the limited scenario of a contract containing a putative compulsory arbitration clause. The way Supreme Court holdings have brought together these different and unrelated norms results in heightened conflict. However, this article argues that this conflict can be reduced by proper federal deference to state common law, the kind of deference suggested by *Erie*. Unfortunately, even fairly recent Supreme Court opinions do not indicate an inclination by the Court to move in this direction.⁹

Supreme Court cases, by urging severance of the arbitration clause and then enforcing it, have formed a counterintuitive position. The arbitrator will receive challenges to the whole contract, including those based on classical contract doctrines. The trial court, on the other hand, will retain only challenges to the clause itself. State courts will be limited to inquiries about the arbitration provision's validity, while the arbitrator receives sweeping challenges to the entire contract.

Three illustrations will serve to highlight the surprising range of situations in which these norms will clash. As you read through each, please keep in mind that, in the absence of a compulsory arbitration clause, the trial court would have all issues of formation and defects in bargaining

5. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2000).

6. U.C.C. § 2-302 (1998); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934 (9th Cir. 1992) (“[W]e have previously held that state law adhesion principles may not be invoked to bar arbitrability of disputes under the [Federal] Arbitration Act.” (quoting *Cohen v. Wedbush*, 841 F.2d 282, 286 (9th Cir. 1988))).

7. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Southland Corp. v. Keating*, 465 U.S. 1 (1983); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1955).

8. See, e.g., *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 126 N.E.2d 271, 273. (“A cardinal principle governing the construction of contracts is that the entire contract must be considered.”).

9. The 2006 case *Buckeye Check Cashing, Inc. v. Cardegna* attempted to resolve the conflict by stating that the federal arbitration norm was one of pre-eminent importance. See *Buckeye*, 546 U.S. at 446. *Buckeye* held that if there is a challenge to a contract as a whole, the arbitration provisions of that contract are enforceable and severable from the contract, and the validity of the entire contract must be considered by an arbitrator. If the challenge is specifically against the arbitration provisions, then those specific provisions are considered instead by a trial court. See *id.* at 448–49.

before it. If the FAA is applied the way the Supreme Court now reads it, those challenges must be referred to the arbitrator.

One: suppose you go to a travel agent and purchase a cruise. The price is set, your cabin, meals, and entertainment packages are reserved, but while the price is paid, it is understood that the tickets will not be issued for a number of weeks. When they arrive in the mail, they contain a provision exculpating the cruise line for negligence, lack of seaworthiness and even intentional torts by its crew. Obscure language also states that all terms are nonnegotiable. If unacceptable, your sole choice is to cancel, but the price is nonrefundable. Should you have any dispute about quality or service you must arbitrate the matter in Florida. You live in Seattle, Washington.¹⁰ *Post-Buckeye*, the arbitrator will decide if the exculpatory clause is binding.

Two: suppose instead that you, a resident of New Mexico, are in the market for a new home computer. You call a toll free number and order a \$600 computer using a credit card. It arrives. Included is a “warranty” that states any defects or dissatisfaction with the terms can be remedied by return of the computer in its original condition, shipping paid by you, within 48 hours. Beyond this time you must arbitrate any dispute in Illinois with all arbitration fees and expenses borne by you.¹¹ *Post-Buckeye*, the arbitrator will decide if the limited warranty is binding.

Three: suppose instead that you use your ATM card to remove \$200 from your Tucson, Arizona bank. As you return to the car you are met by a polite, but insistent, masked bandit. While pointing a handgun at you, she hands you a piece of paper and says, “Sign this and hand over the cash or I will shoot you.” You comply. She gives you a copy of the paper which purports to be an “agreement.” In part, it provides for a waiver of all intentional torts and crimes. It states that this ‘waiver’ is in return for “entertainment provided.” Any dispute must be arbitrated in New York at your sole expense.¹² *Post-Buckeye*, the arbitrator will decide the effect of the waiver.

The Court has come to this counterintuitive position through a series of cases headlined by *Prima Paint*,¹³ *Southland Corp. v. Keating*,¹⁴ and *Buckeye*.¹⁵ These three together will be used to outline the evolution of the

10. This hypothetical is inspired, loosely, by the facts of *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

11. This hypothetical is inspired, loosely, by the facts in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) and *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196 (C.D. Cal. 2006).

12. This hypothetical is wholly fictional, although the nature of the contract as one of voidable fraud in the factum or the like is apparent in the positive law of the U.C.C. See U.C.C. § 3-305(a)(1) cmt.1 (discussing defenses that make an instrument a nullity, such as infancy and extortion “at the point of a gun”).

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

14. See *Southland Corp. v. Keating*, 465 U.S. 1 (1983).

15. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

doctrine and establish the Court's current position. On the other side of the normative fence is the principle of federalism and the constitutional value of deference to state authority on matters of state law. *Erie*¹⁶ will be used to ventilate the possibility that the *Prima Paint* line of cases has gone too far to establish a norm favoring arbitration.

A. *ERIE R. R. CO. V. TOMPKINS*

Erie arose out of a negligence claim for injury on the railroad's property caused by the railroad's equipment.¹⁷ Under Pennsylvania law, mere negligence would not have been allowed as a basis for the claim, as that state's law required wonton or willful conduct.¹⁸ Since there were no allegations of wonton or willful conduct, the railroad sought a dismissal. The plaintiff parried by asking the federal court to determine what the local law should be under the *Swift v. Tyson* doctrine, and in doing so, to apply the simple negligence standard.¹⁹

The *Erie* court overruled *Swift v. Tyson*.²⁰ *Erie* held that federal courts are not free to exercise independent judgments concerning what they believed to be a state's common law.²¹ Rather than some "transcendental body of law outside of any particular state,"²² in diversity cases federal courts must apply the state's law as articulated by the state's legislature and courts.²³ The common law should be that of the state where the federal court sits rather than some general, federal common law.²⁴

Thus, when a federal court seeks to apply common-law contract doctrines such as adhesion or unconscionability, or even the test of whether an invalid term is severable from the entire contract, the Court should apply the understanding of the state's substantive law. There is no proper federal common law to apply.²⁵

B. *PRIMA PAINT AND ITS PROGENY*

The slide away from *Erie*'s deferential federalism began in *Prima Paint*'s relatively benign holding. The majority concluded that the FAA applied to a sale of a paint business since this was a transaction in interstate

16. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1937).

17. *Id.* at 69.

18. *Id.* at 70.

19. *See id.*

20. *Id.* at 79–80.

21. *Id.* at 79.

22. *Erie*, 304 U.S. at 79.

23. *Id.*

24. *Id.*

25. *See id.* Although expressed in terms of negligence liability, this federalism principle seems to control in any discussion of common-law contract doctrine.

commerce.²⁶ As part of that contract, the parties had agreed to arbitrate any controversy.²⁷ The FAA was held to demand that the federal court order arbitration once it was satisfied that the making of the arbitration agreement itself was not in controversy.²⁸ By limiting the holding to admiralty and interstate commerce cases, the Court constrained the sweep of this novel idea of the “separability”²⁹ of the arbitration clause. It did not have to deal with the issue of which substantive rules should apply in diversity cases.³⁰ The Court viewed its holding as an invocation of the FAA’s principles to be enforced under the interstate commerce clause power, and therefore in this case, federal substantive law was applied to a federal question in a commerce clause setting.³¹

The jurisdiction of the federal court to order arbitration was grounded in Congress’ express authority to regulate interstate commerce as evidenced by the FAA itself. It was not an acceptance of Congress’ power to regulate contracts in the broader, common law, sense.³² In the Court’s view, Congress could compel arbitration as a procedure in order to foster arbitration in admiralty and interstate commerce cases.³³ Had the doctrine become quiescent at this point, less controversy would have come from it.

Southland, our second pertinent case, picked up from *Prima Paint*. The Court stated that “The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause.”³⁴ After describing the plenary nature of the Interstate Commerce Clause power,³⁵ the majority said the Act was one intended to apply to state as well as federal suits. The Court held that California’s attempt to foreclose arbitration in franchise investment agreements violated the Supremacy Clause even though the California statute was intended only to reach California lawsuits brought in California state courts.³⁶ By doing so, the Court extended the *Prima Paint* holding to state courts and what started as a rule to constrain federal courts in matters of federal substantive law became

26. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967). The business served at least 175 customers in several states. *Id.*

27. *Id.* at 398.

28. *Id.* at 400.

29. *Id.* at 403. The idea was first offered by the Second Circuit in *Robert Lawrence Co. v. Devonshire*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), and *cert. dismissed*, 364 U.S. 801 (1960).

30. *See Prima Paint*, 388 U.S. at 405.

31. *See id.* at 403.

32. *See id.*

33. *Id.* The stinging dissent by Justice Black refutes this illogical conflation of the question of federal power to regulate commerce with the more limited congressional power to create federal law that will then be applied in diversity cases. *Id.* at 411.

34. *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1983).

35. *Id.* at 11–13.

36. *Id.* at 16 & n.11.

a constraint on state courts applying state common law and statutory rules of general import.

The culmination of this line of cases occurred in *Buckeye*. In *Buckeye*, the plaintiffs brought a class action suit in Florida state court.³⁷ The Florida Supreme Court had applied Florida law.³⁸ Under Florida law a defense of unlawfulness, if proved, voided the entire contract.³⁹ The plaintiff had alleged, among other violations, usury, which tainted the entire contract and called for its complete negation including the arbitration clause. Therefore the Florida Court reasoned that state law prohibited sending it to an arbitrator as required by the FAA, since that clause was of no legal effect.⁴⁰

The Supreme Court reversed. For the majority, the result was dictated by combining the holdings of *Prima Paint* and *Southland*.⁴¹ *Prima Paint* made arbitration a substantive rule in which the clause could be separated from all other considerations, and *Southland* made that rule of substance a part of state law.⁴² The action of the court should have been stayed pending arbitration unless the arbitration clause itself was put in issue, in which case the court could have retained the case for the limited determination of arbitration clause validity.⁴³ The *Buckeye* rule went from a substantive federal provision in federal matters, to a federal common-law principle that displaces state statutory and common-law doctrines such as voidness and severability. Now part of the federal substantive law with its Supremacy Clause power, this principle must override any Florida rule the Florida Supreme Court wishes to apply.⁴⁴

The damage to *Erie* and preemption principles should be obvious. The FAA has become a substantive rule of a federal common law applied in virtually all settings and levels of the state and federal systems. It established a separability doctrine⁴⁵ that essentially eliminates the common

37. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

38. *See Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005).

39. *See id.* at 863.

40. *See id.* at 865.

41. *Buckeye*, 546 U.S. at 445.

42. The Court stated:

Prima Paint and Southland answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.

Id. at 445–46.

43. *Id.*

44. *See id.* at 446–47. *See also* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 411 (1967).

45. *See Prima Paint*, 388 U.S. at 411.

law doctrines associated with void/voidness distinctions and their attendant severability doctrines.⁴⁶

Because *Erie* ended the general federal common law and particularly the notion that such a law might be superior to state common law,⁴⁷ the Supreme Court lacks constitutional authority to prescribe or preempt common law rules for state courts. This would include these doctrines as well as the doctrines of adhesion and unconscionability.

Herein lies the *Erie* problem: Without *Buckeye* and its severability rule, the place to challenge the deal or any part of the deal is in court. When severed, the arbitration clause imposes arbitration only by self-reference. The common law lacks a neutral rule that would send the deal to the arbitrator. By declaring the preeminence of the FAA policy favoring arbitration, the Court seems to have done exactly that which was prohibited by *Erie*: It has created what amounts to a “law derived from judicial decisions rather than from statutes or constitutions.”⁴⁸

However, the language and holding of *Buckeye* have induced fictions and doctrinal wandering by the lower courts.⁴⁹ The present state of understanding has encouraged some courts to apply both state contract-law doctrines and the Court-suggested severability of the arbitration provision in good faith. Other courts, however, have continued to manipulate the doctrines—chiefly by discouraging arbitration.⁵⁰ *Buckeye* urges the trial court, whether federal or state, to take a nullity, parse it, and reanimate one of those components. The only way the contract is referred to the arbitrator is by dint of the compulsory arbitration provision itself.

Clearly, Congress could have prescribed rules for maritime, international, Indian and interstate commerce matters, but there is no evidence in the FAA of such an intent. Neither does there exist support for the claim that the Court would be without power to interpret the FAA in such a way to implement such rules. To this point the Court has offered a limited holding: the FAA demands a severability doctrine, a constructive gloss, to protect the policy of arbitration. This article will show that this announcement by the Court was an unnecessary and unfortunate

46. *Buckeye*, 546 U.S. at 447.

47. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1937) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State. . . . And no clause in the Constitution purports to confer such a power upon the federal courts.”).

48. See BLACK’S LAW DICTIONARY ABRIDGED 221 (7th ed. 2000) (defining common law). See also *Erie*, 304 U.S. at 78 (“There is no federal general common law.”).

49. See *infra* note 170 and accompanying text.

50. See, e.g., *Martz v. Beneficial Mont., Inc.*, 135 P.3d 790, 796 (Mont. 2006) (Cotter, J., dissenting) (urging, albeit implicitly, that counsel plead arbitration cases carefully so as to permit judicial review).

aggregation of power that should have been more carefully considered. The *Buckeye* rule, if not a direct violation of *Erie's* rule, founders on its interstitial principles. 'Severability' has encouraged lower courts to damage the common law from which it was drawn.

II. THE *PRIMA PAINT/BUCKEYE* LINE OF CASES AND THE CIRCUIT SPLIT

In *Prima Paint*,⁵¹ Flood and Conklin ("Flood") sought to enforce a compulsory arbitration provision in their agreement with Prima Paint ("Paint").⁵² The agreement in this case was ancillary to the sale of Flood's manufacturing business to Paint.⁵³ Three weeks after the sale, the parties signed a consulting agreement that contained an arbitration clause.⁵⁴ As with many agreements containing compulsory arbitration provisions, there was much more to the agreement than a commitment to arbitrate. The consulting agreement was an elaborate statement of the personal services to be performed by Flood's chairman and included duration and non-competition terms.⁵⁵ Among the other provisions were payment terms and contingencies for financial problems.⁵⁶ In sum, it was a detailed expression of the parties' entire understanding related to the consulting agreement.⁵⁷ The parties agreed to a broad arbitration clause with a mandate to arbitrate any dispute in the City of New York using the rules and procedures of the American Arbitration Association.⁵⁸

After a dispute arose resulting in cross claims of breach, fraud and varying interpretations of the duties owed by Flood to Paint, Flood served a notice of intent to arbitrate.⁵⁹ Paint responded with a suit in the District Court of New York and Flood moved the Court to stay, pending arbitration.⁶⁰ The District Court granted this motion to stay; Paint appealed and the Second Circuit dismissed the appeal.⁶¹ The Supreme Court took the petition for certiorari, in part to resolve a conflict between the Second and First Circuits over who should resolve a claim that the entire contract was affected by fraud in the inducement.⁶²

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

52. *Id.* at 398.

53. *Id.* at 397.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Prima Paint*, 388 U.S. at 397-98.

58. *Id.* at 398.

59. *Id.*

60. *Id.* at 398-99.

61. *Id.* at 399.

62. *Id.* at 402-03.

In its holding, the Court limited its opinion to cases of interstate commerce where the federal court was applying federal law.⁶³ It held that federal law demanded the separability of the arbitration clause.⁶⁴ The Court believed that interstate commerce cases alleging fraud in the inducement of the arbitration clause and brought in federal court under federal jurisdiction belonged in federal court, in accordance with the FAA.⁶⁵ The Court reasoned, “[I]f 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.”⁶⁶

This suggests three categories of potential challenges: (1) challenges to the enforceability of the arbitration clause itself on grounds that attach only to the clause; (2) challenges to the enforceability of the arbitration clause itself on grounds that attach to both the clause and the contract as a whole; and (3) challenges to the contract as a whole, which if upheld would include the arbitration clause, on the sole ground that it is a part of the unenforceable whole. Fairly read, the holding of *Prima Paint* says that the third category must go to the arbitrator. That is, as a matter of federal principle, any impact of the unenforceability of the whole contract has to be “separated” from the impact to the arbitration agreement. In simple terms, the arbitrator should decide the issue of the whole contract’s unenforceability. This conclusion led to considerable confusion in the country’s lower courts.⁶⁷

There are circuit court opinions from the First,⁶⁸ Second,⁶⁹ Third,⁷⁰ Fifth,⁷¹ Sixth,⁷² Eighth,⁷³ Ninth,⁷⁴ and Eleventh⁷⁵ Circuits that deal with the

63. *Prima Paint*, 388 U.S. at 405–07.

64. *Id.* at 402–04 & nn.8 & 11. The Second Circuit, in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), created the idea of a “separable” arbitration clause. *Prima Paint*, 388 U.S. at 402 n.8.

65. *Prima Paint*, 388 U.S. at 403.

66. *Id.* at 403–04.

67. Some twenty years later, in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the court extended this federal rule to litigation in state courts and applied *Prima Paint*’s concept of separability to the case. Then twenty years after *Southland*, in *Buckeye*, the Court applied the separability test in the context of a common-law challenge to the entire contract as void because of illegality on usury grounds. *Buckeye Check Cashing, Inc. v. Cardegna* 546 U.S. 440, 443 (2006). The *Southland* and *Buckeye* extensions of *Prima Paint* have caused a more problematic split than that supposedly resolved in *Prima Paint*.

68. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999).

69. *JLM Ind., Inc., v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004).

70. *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256 (3d Cir. 2003).

71. *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002); *Rojas v. TK Commc’ns, Inc.*, 87 F.3d 745 (5th Cir. 1996).

72. *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483 (6th Cir. 2001); *Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000).

73. *Madol v. Dan Nelson Auto. Group*, 372 F.3d 997 (8th Cir. 2004); *Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692 (8th Cir. 1994).

question of how to separate the issue of arbitration clause enforceability from the issue of the validity of the entire contract. Almost all of these opinions were decided between the 1983 *Southland* decision and the 2006 *Buckeye* decision. *Buckeye*, which reversed the Florida court's use of the common-law distinction of "void/voidable," appeared to have resolved much of the split.⁷⁶

Prior to *Buckeye*, a distinct majority of circuits had held that the real issue was not the "void/voidability" distinction, but whether the challenge was to the arbitration clause itself, or whether the challenge merely infected the clause due to attacks on the whole contract.⁷⁷ Nonetheless, some circuit courts had allowed a weakness of the whole to be the grounds for attacking the arbitration provision.⁷⁸ The result was that those courts that had looked to state law for such distinctions as "void" and "voidable" were now required to decide if any state doctrine limiting the contract as a whole would be relevant in assessing a challenge to the arbitration clause.⁷⁹

Buckeye's rejection of the "void/voidable" distinction, though offered on the basis of federal policy, is likely to fragment judicial opinion about how to handle challenges that are directed at both the arbitration clause and the entire contract. *Buckeye* appears to demand that the state courts now act in a way contrary to traditional common-law doctrines.⁸⁰ By refusing the "void/voidability" distinction, the Supreme Court eviscerated the common-

74. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (en banc); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001).

75. *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005).

76. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006).

77. *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005); *JLM Indust., Inc., v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004); *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004); *Madol v. Dan Nelson Auto. Group*, 372 F.3d 997 (8th Cir. 2004); *Burden*, 267 F.3d 483. Decisions in the Third, Seventh, Eighth, Ninth, and Eleventh Circuits found that state law determined whether a contract was void or voidable, and if void that the *Prima Paint* holding would not apply. Although refusing to accept in full the logic of its sister circuits, the Sixth Circuit acknowledged the logic of not requiring a referral to an arbitrator if the contract was a nullity. *Burden*, 267 F.3d at 488.

78. See *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 264–65 (3d Cir. 2003); *Burden*, 267 F.3d at 488–89; *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936–37 (9th Cir. 2001). Some of the difference can be accounted for in the distinction between void and voidable contracts. See *Burden*, 267 F.3d at 488–89 (citing cases supporting the distinction from the Third, Seventh, Eighth, Ninth and Eleventh Circuits, although the court chose not to adopt the distinction). This distinction was specifically rejected by *Buckeye*. See *Buckeye*, 546 U.S. at 448.

79. There is also the issue of the split between the highest state courts and the federal circuits. Although rejected in *Buckeye*, it is apparent that Florida views the matter quite differently. *Buckeye*, 546 U.S. at 446. Also, *Armendariz v. Found. Health Psychcare Serv. Inc.*, 6 P.3d 669, 689–90 (Cal. 2000) shows that California would be in line with Florida. The RESTATEMENT (2D) OF CONTRACTS, § 163 (1981), is strong evidence that most common-law courts would fall in line with the void/voidable distinction used by Florida, as well as the thoughtful approach of California in *Armendariz*.

80. *Armendariz*, 6 P.3d at 696. There were important contractual, legal and equitable reasons for this result. *Id.*

law doctrine of severability. *Buckeye's* rule was no longer the basic "separability" rule articulated in *Prima Paint*; it became an *Erie* violation that demanded state law accommodation of what is now a federal general law competitor. The 'zero minus a part leaves something rule' of *Buckeye* demands major adjustments in the common law. These will be taken up below in the context of *Armendariz v. Foundation Health Psychcare Services, Inc.* and *Nagrampa v. MailCoups, Inc.*⁸¹ It becomes clear that a more sensitive reading of *Erie* principles demands a zone of deference for these common-law rules and, if observed, the zone would obviate the problematic zero-sum game of *Buckeye*.

III. THE SUBSTANTIVE NORM OF ARBITRATION PROMOTION: THE FAA AND *BUCKEYE* LINE

A. THE FEDERAL ARBITRATION ACT

The FAA should be placed in its historical context. Passed in 1925, the FAA came thirteen years prior to *Erie R.R. Co. v. Tompkins*, which reversed the *Swift v. Tyson* line of cases.⁸² The *Swift v. Tyson* line had encouraged federal courts to think of themselves as somewhat removed from the state law principles and doctrines present in cases of diversity of citizenship.⁸³ Therefore, at the time of the FAA's passage, the notion of a federal common law and a strong procedural basis had not yet suffered *Erie's* blow.

The FAA was probably one attempt to ameliorate these tensions between state and federal common law that continued to build and eventually led to *Erie*. Federal courts were as prone to prejudice against arbitration as the state courts. There was a long history of denying effect to arbitration agreements, even in the face of carefully negotiated bargains by similarly situated parties. The ability of federal courts to articulate doctrines and principles on behalf of the state, free of the constraints of *stare decisis*, exacerbated the hostility toward arbitration: A federal judge could find state doctrines and principles to deny arbitration and, even if faced with some discomfort because of the doctrine favoring arbitration, could fashion a response that was hostile by looking at more general principles and speculating about the development of the law generally rather than examining the law particular to the state and the facts at bar. The federal courts saw in the FAA a Congressional response

inten[ded] . . . to create a new body of substantive law relative to arbitration agreements affecting commerce or maritime transactions. Thus we think we are here dealing not with state-

81. See discussion *infra* Parts IV.A, IV.B.1.

82. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

83. *Id.* at 74.

created rights but with rights arising out of the exercise of the Congress of its constitutional power to regulate commerce and hence there is invoked no difficult question of constitutional law under *Erie*.⁸⁴

Having limited the development of *Swift v. Tyson* rules, at least within the purview of its power to regulate maritime and interstate commerce,⁸⁵ Congress's actions effected a shift in the viewpoint of some courts.⁸⁶ Hostility towards compulsory arbitration was no longer as fashionable.⁸⁷ In diversity jurisdiction cases, that shift worked a change for some states as well.⁸⁸

A remaining question was whether the FAA had also created an impediment to traditional doctrines that limited the availability of arbitration. The face of the statute made plain that while Congress intended a welcoming attitude toward arbitration, it did not aim to set aside those traditional limits. The validating provision of the FAA is Section 2, but even it makes it clear that validity is mandated "save upon such grounds as exist at law or in equity for the revocation of any contract."⁸⁹ In other words, as long as a court treats arbitration agreements as it would any other consensual provision, it can consider legal or equitable limits on the bargain. Even if the result is one that invalidates the arbitration clause, it is acceptable if the court reaches its conclusion after an even-handed application of doctrines and principles that it would apply in good faith to other provisions of the contract. So the question became the relative status of arbitration as compared to such limiting doctrines as adhesion and unconscionability. Cases beginning with *Prima Paint* and continuing through *Buckeye* endeavored to solve this puzzle. Ultimately, however, they further muddied the waters.

84. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), and *cert. dismissed*, 364 U.S. 801 (1960).

85. Section 2 of the FAA 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.*

9 U.S.C. § 2 (2000) (emphasis added).

86. *See Grand Bah. Petroleum Co., Ltd. v. Asiatic Petroleum Corp.*, 550 F.2d 1320, 1324 (2d Cir. 1977).

87. *Id.*

88. *See infra* discussion Part IV.A.

89. 9 U.S.C. § 2.

B. BUCKEYE'S NORMS

John Cardegna and Donna Reuter were Florida residents who filed a “putative class action” in a Florida trial court.⁹⁰ In part they alleged that violation of Florida usury laws and consumer protection provisions made their agreements with Buckeye criminal and void. Buckeye moved to compel arbitration of these issues and the trial court refused, holding instead that resolution of the validity issue was a matter for the court. On appeal, the Florida Supreme Court agreed with the trial court and said that under Florida law the issue of validity was for the court to decide, in order to prevent arbitration “breath[ing] life into a contract that not only violate[d] state law, but also [was] criminal in nature.”⁹¹

The Supreme Court reversed the Florida Supreme Court, noting two types of challenges to the validity of the agreement under Section 2 of the FAA.⁹² One type challenges the agreement as a whole: in this case, the entire set of terms that governed the advance against deferred presentment. The other challenges the arbitration term itself.⁹³ The Court extended the holdings of *Prima Paint*⁹⁴ and *Southland*⁹⁵ to state four rules: (1) as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract; (2) unless the challenge to validity goes to the arbitration clause itself, the arbitrator is to consider the contract’s validity in the first instance; (3) this substantive law of arbitration applies to state as well as federal courts; and (4) “[B]ecause respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.”⁹⁶

Buckeye offers a serious impediment to courts that wish to apply substantive state law doctrines of adhesion and unconscionability. Should a

90. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). As a part of each “deferred-payment” transaction with Buckeye, “they [the drawers] received cash in exchange for a personal check in the amount of the cash plus a finance charge.” For each transaction, they signed an arbitration agreement drafted by Buckeye, the payee, which was included in the “Agreement” between the parties. *Id.* at 442.

91. *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 862 (Fla. 2005) (quoting *Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 123 (2000)).

92. *Buckeye*, 546 U.S. at 447.

93. See U.C.C. § 1-201(3) (2004), which distinguishes between “agreement” as a bargain between parties, and a “contract.” A “contract” is the legal obligation between parties arising as a result of the agreement under the U.C.C. and other laws. U.C.C. § 1-201(12) (2004). This notion of “agreement” in the Code, and therefore all 50 states, for this commercial paper transaction (covered by Article 3 of the Code and by the Article 1’s general provisions) demonstrates the uncertainty faced by the Court. Although the preemption argument makes Florida law largely irrelevant, whether Congress intended to displace common-law and Uniform law concepts of “agreement” and “contract” remains questionable.

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

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

96. *Buckeye*, 546 U.S. at 445–46.

court wish to apply these doctrines to a contract that contains a compulsory arbitration clause, it can do so only if the challenging party claims the clause itself must fail because it was negotiated by adhesion or unconscionability. The impediment is a product of the Court's attempt to paint *Buckeye* as a simple deduction from the *Prima Paint* and *Southland* decisions.⁹⁷

The Court "reaffirmed" that, regardless of the identity of the court as state or federal, a challenge to the contract in its entirety must first be presented to the arbitrator.⁹⁸ This led to a counterintuitive position: The arbitrator hears challenges to the whole contract, including those based in classical contract theory and doctrine. State courts steeped in classical contract doctrines such as illegality, fraud in the factum, discharge in bankruptcy and the like are presumably in the best position to consider challenges to a contract—or a clause in it—based on these classical contract doctrines. But they may only consider challenges to the clause itself! These contract doctrines treated the presence of any such deficiency as having negated the entire contract. If the product of illegality or fraud in the factum, it was as if the contract had never existed. The common-law doctrine of severability was nonexistent in this context, although the word "severable" could be found in classical doctrine in other closely allied concepts.⁹⁹ As a result, contextual consideration, not severability, was the classical norm.

A look at the history of adhesion and unconscionability in the Supreme Court decisions before *Erie*, as well as the common law developments before that case, will allow us to see that the norm of contextual consideration is so well established that it demands *Erie* deference today.

IV. THE NORM OF CONTRACT LIMITATIONS: ADHESION AND UNCONSCIONABILITY IN THE COMMON LAW

As a pre-*Erie* statute, the FAA can be assumed to include contract doctrines that the Court had established as substantive rules prior to its 1925 enactment. In other words, the FAA simply added to the pre-*Erie* landscape and became just another part of the federal substantive law. In dealing with common carriers, insurance policies and towage contracts, the Court handled the types of fact patterns that led to the standard form or 'off the rack' provisions which the merchants wrote for themselves and their

97. See *supra* note 42.

98. *Buckeye*, 546 U.S. at 449.

99. See, e.g., E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.30 (2001) (discussing mitigating doctrines to the requirement of definiteness in a contract, including that "if . . . only part of the agreement is indefinite, the remaining part may be regarded as 'divisible' or 'severable' and may be enforced according to its terms").

customers.¹⁰⁰ As such they were very much within the mainstream of adhesion and unconscionability developments of the general law of contracts in the nineteenth century.

Perhaps the best illustration of the Court's pre-*Erie* understanding of the limits on form contracts imposed by common-law doctrines, such as adhesion, is *New York Central Railroad Co. v. Lockwood*.¹⁰¹ In *Lockwood*, the Court held that a common carrier could not validly exempt itself from liability for its own negligence.¹⁰² Lockwood, traveling along with his livestock on a train, was injured as a result of the carrier's negligence.¹⁰³ Lockwood brought a claim to recover damages for his injuries, and the carrier sought to defend itself by arguing that its "contract" with Lockwood absolved it of liability for its own negligence.¹⁰⁴

The signed "contract," in the form of a "pass," stated that Lockwood and his livestock were traveling at their own risk, and it declared that acceptance of the "pass" was a "waiver of all claims for damages for any injuries received on the train."¹⁰⁵ The carrier argued that these terms were absolute in their meaning, and therefore such terms must be construed to exempt the carrier from liability for all injuries, including those caused by the carrier's own negligence.¹⁰⁶ The Court vigorously disagreed and refused to allow the carrier-drafted pass to exculpate the carrier for its own negligence.¹⁰⁷ This attempt to excuse the carrier's negligence was seen as repugnant to the law and anything but just and reasonable.¹⁰⁸ The Court stated that this principle, especially when taken together with the bargaining inequality of the parties, the compulsion placed on the customer to accept the contract, and the duty of the carrier to act with reasonable care, operated with full force to render the terms at issue void and unenforceable.¹⁰⁹ Essentially then, the Court found that the alleged bargain was unenforceable, not only because it was unjust and unreasonable, but also because it lacked the essential element of voluntary assent.¹¹⁰

100. See, e.g., *R.R. Co. v. Lockwood*, 84 U.S. 357, 376–77 (1873).

101. *Id.*

102. *Id.* at 384.

103. *Id.* at 357–59.

104. *Id.*

105. *Id.* at 357.

106. *Lockwood*, 84 U.S. at 362–63.

107. *Id.* at 381–84.

108. *Id.* at 381–82.

109. *Id.*

110. See *The Kensington*, 183 U.S. 263, 268 (1902). By way of contrast, in *Baltimore & Ohio Sw. Ry. Co. v. Voight*, 176 U.S. 498, 507–514 (1900), the Court upheld a contract exonerating a railroad carrier from all liability, including for its own negligence, to a particular passenger. However, in that case, the Court found it determinative that the passenger in question was not an ordinary passenger, but rather an express carrier that held a position of equal bargaining power with the railroad, freely entered into the contract, and received the benefits of the contract. *Id.* Similarly, in *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 292–95 (1932), the Court held that

Without categorizing with language of adhesion or unconscionability, the Court found the contract to be violative of sound policy.¹¹¹ The analysis sounded very much like classical adhesion tests, however. First, “[t]he carrier and his customer [did] not stand on a footing of equality.”¹¹² The customer was one of millions who could not afford to haggle or stand out from the crowd.¹¹³ The Court stated:

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, . . . then, if the customer chose to assume the risk of negligence, it would with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different and especially so under the modified arrangement which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit. . . . These circumstances . . . show that the conditions imposed by common carriers ought not to be adverse . . . to the dictates of public policy and morality.¹¹⁴

The Court pointed out that exculpation clauses came into vogue among carriers who wished to avoid liability for *non-chargeable* accidents. That is, the carriers had at first sought only to avoid liability for pure accidents for which they were not responsible. The Court approved of these clauses. The difference between the older clauses and this new variety was that the older exemptions were just and reasonable because they did not amount to an abandonment of the carrier’s obligations to the public.¹¹⁵ The Court recognized that standardized forms were being used to effect a change:

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident,

parties of equal bargaining power, dealing at arm’s length, could validly contract so as to exempt one party from liability for negligence to the other. Here, a tank steamer owner entered into a contract with a tugboat owner, whereby the tugboat owner agreed to supply tugs to take the steamer through a certain stretch of water to its destination. The Court found it determinative that this was an arm’s-length transaction between parties of equal bargaining power, and that the steamer owner was not under any compulsion to accept the terms of the contract. *Id.*

111. *Lockwood*, 84 U.S. at 379–85.

112. *Id.* at 379.

113. *Id.*

114. *Id.* at 379–80. The Court concluded that the railroad’s obligations were akin to that of a fiduciary and thus it was charged with a duty to ensure that its contracts with the public were “just and reasonable.” *Id.* From there it was a short step to the holding that the carrier could not in justice and reasonableness exculpate itself for negligence. *Id.* at 384.

115. *Id.* at 381.

without any negligence or fraud on their part; when they ask to go still further and to be excused for negligence, an excuse so repugnant to the law of their foundation and to the public good, they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.¹¹⁶

Lockwood provides an excellent analogy for how the Court ought to evaluate compulsory arbitration clauses. Just as is true of exculpatory clauses like the one at issue in *Lockwood*, courts should be able to consider arbitration clauses in their individual contexts, and ask about the fairness of the respective deals as a whole. This requires more court involvement than simply severing the arbitration clause and making an automatic referral to the arbitrator. It is also likely to require a court, in evaluating the deal's overall fairness, to consider other norms, which may be difficult to reconcile with the federal policy favoring arbitration above all else.

A. COMPETING NORMS: ADHESION AND UNCONSCIONABILITY VERSUS THE LIMITED REMEDY OF COMPULSORY ARBITRATION

Fostering arbitration was the main federal goal of the FAA, but there were other policies recognized by the federal courts, Congress and the states at the time of the Act's passage. These other norms were competitive with, if not hostile to, arbitration.¹¹⁷ They were hostile to the extent that compulsory arbitration clauses had the effect of limiting litigants' available remedies, whereas other norms and policies tended to broaden the remedies. The development of these norms shows an implicit policy favoring consumer protection.

Adhesion and unconscionability can be major palliatives of this tension. If used properly, adhesion and unconscionability are less manipulative and therefore present less of a risk of abuse than doctrines such as duress, the pre-existing duty rule and misunderstanding. They can also be better used to avoid the manipulations by litigants and courts who wish to avoid the arbitration mandated by the FAA.¹¹⁸

116. *Lockwood*, 84 U.S. at 381–82.

117. Cases such as *Lockwood*, with its focus on equality of bargaining power, illustrate one such norm. See discussion *supra* Part IV.

118. Manipulation is a danger with doctrines so closely allied. One court has stated, “[t]he fact that a contract is an adhesion contract is significant to determining whether it is procedurally unconscionable, but [is] ‘not dispositive of this point.’” *Pritchard v. Dent Wizard Int’l Corp.*, 275 F. Supp. 2d 903, 917 (S.D. Ohio 2003). Another court has flatly stated that an adhesive contract does not necessarily contain unconscionable terms. See *Walters v. A.A.A. Waterproofing, Inc.*, 85 P.3d 389, 393–94 (Wash. Ct. App. 2004). At least one court has more carefully crafted the relationship between adhesion and unconscionability: “[T]he *danger* of an adhesion contract is

A California case will help better fix the roles of adhesion and unconscionability in constraining the limitation of remedies inherent in compulsory arbitration. *Armendariz v. Foundation Health Psychcare Services, Inc.*¹¹⁹ began as a complaint by two employees claiming wrongful termination by their employer on account of their sexual preferences.¹²⁰ Armendariz and a co-worker were hired in 1995.¹²¹ Both employees filled out and signed application forms, which contained a compulsory arbitration clause for any future claim of wrongful termination.¹²² A provision making it compulsory to arbitrate any such claim was also set forth in a separate agreement, which termed the agreement to arbitrate, “a condition of my employment.”¹²³ The agreement further provided that this remedy precluded all others “including but not limited to reinstatement.”¹²⁴ Significantly, the employer was not similarly constrained.¹²⁵ What the employees basically received was employment in return for a severe restriction on their usual common-law remedies while the employer had to give nothing up (other than payment, presumably) for their services.

The *Armendariz* Court applied well-developed California principles of adhesion and unconscionability to reach the conclusion that the compulsory arbitration clause failed because of contractual weaknesses. Its application of those common-law principles and doctrines was no more than an evenhanded extension of the general law into the compulsory arbitration setting. *Post-Buckeye*, however, it is much harder for courts to so reasonably act.

B. *BUCKEYE'S* FAILURE TO ACCOUNT FOR THE SUBSTANTIVE NORMS UNDERLYING ADHESION AND THE RESULTING *ERIE* PROBLEM

The *Buckeye* insistence on the severability of the arbitration clause as a matter of federal substantive law creates a dissonance. *Buckeye* acknowledged that the FAA was intended by Congress to overcome federal

that it *might contain* unconscionable clauses, and adhesion contracts are *scrutinized* to avoid enforcement of unconscionable clauses.” *Faber v. Menard, Inc.*, 267 F. Supp. 2d 961, 974 (N.D. Iowa 2003). That court goes on to say, however, that “the fact that a contract is one of adhesion does not necessarily make it unconscionable or unenforceable under Iowa law.” *Id.*

119. *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669 (Cal. 2000).

120. *Id.* at 674–75.

121. *Id.* at 674.

122. *Id.* at 675.

123. *Id.*

124. *Id.* at 675.

125. *Armendariz*, 6 P.3d at 690–92. The court calls this disparity a lack of “even [a] modicum of bilaterality.” *Id.* at 691 (quoting *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Cal. Ct. App. 1997)). Perhaps not the most felicitous of phrases, but an adequate description of the deal’s complete lack of evenhandedness.

judicial resistance to arbitration.¹²⁶ The Court also conceded that Section 2 of the FAA embodied a national policy favoring arbitration, *but only on an equal footing with contract provisions generally*.¹²⁷

Rather than discuss the analysis of the *Buckeye* court, however, a very recent case deserves examination. *Nagrampa v. MailCoups, Inc.*¹²⁸ presented a procedural posture similar to *Southland*, as it arose in California and applied California substantive law. But unlike *Southland*, it had *Buckeye*'s elaboration of severability with which to test the California common law of adhesion and unconscionability as applied to compulsory arbitration agreements.

1. *Nagrampa v. MailCoups, Inc.*

Imagine you are Connie Nagrampa, an entrepreneurial-minded and experienced seller and manager in direct marketing.¹²⁹ You have six years of experience and earn about \$100,000 per year working for one company,¹³⁰ but you are approached by a competitor to become a franchisee of its direct marketing business.¹³¹ This new company expects a franchisee to recruit businesses and advertise the franchisee's services and products through the direct mailers' coupons.¹³² Coupons are printed with the advertisers' information and mailed by the direct marketer at its expense to households it targets for the service. Readers may receive similar bundles of coupons in the mailings typically addressed to "occupants" or "current resident." Such coupons may also say one's name with an alternative "or current addressee."

A MailCoups representative approaches you, encourages your participation, and offers a notebook tailored to your franchise area, including a spreadsheet with expected costs and profits.¹³³ You are impressed by a suggested 41% rate of return on investment and when you contact the representative this rate of return is confirmed as "about right."¹³⁴ Within months you sign a thirty-page franchise agreement for a ten-year term.¹³⁵ The agreement includes an arbitration provision less than a page in length, which requires you to arbitrate all disputes, but allows MailCoups to protect its service marks in court.¹³⁶ Both parties are bound to arbitration

126. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

127. *Id.*

128. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (en banc).

129. *See id.* at 1265.

130. *See id.*

131. *See id.*

132. *See id.* at 1265–67.

133. *See id.*

134. *See Nagrampa*, 469 F.3d at 1265–67.

135. *See id.*

136. *Id.*

under the American Arbitration Association rules and the arbitration site is to be Boston, Massachusetts.¹³⁷

Despite your best efforts, including more than sixty hours per week of labor, the business fails.¹³⁸ You offer to pay “amounts due,” but in short order it becomes apparent that this amount is disputed and you will not be able to pay MailCoups’ claims.¹³⁹

Nagrampa did not seek invalidation of the franchise agreement as a whole. She challenged the arbitration provision as unconscionable. In an *en banc* opinion, the Ninth Circuit reversed the trial court’s holding that the matter should be referred to arbitration.¹⁴⁰

The majority concluded that the trial court could have properly retained the case despite the *Buckeye* rule of severability.¹⁴¹ The majority of judges believed that Nagrampa’s six separate causes of action involved allegations about the arbitration clause itself rather than the entire contract.¹⁴² Nagrampa’s complaint did not challenge the entire agreement. For the majority, the allegations of adhesion and unconscionability were sufficiently particularized to address the clause so that it avoided the *Buckeye* pitfall.¹⁴³

Nagrampa’s first three claims were founded in misrepresentation, fraud, and deceit and sought damages as well as attorney’s fees and any other relief the court might deem appropriate.¹⁴⁴ The fourth cause of action claimed violation of California franchise law and sought damages, attorney’s fees and other proper remedies.¹⁴⁵ The fifth and sixth causes challenged the validity and enforceability of the arbitration provision itself.¹⁴⁶ One of these claims was based on a violation of the California Consumer Legal Remedies Act and alleged that the arbitration provision, since it was so one-sided that it did not fall from the reasonable

137. *Id.* at 1266.

138. *Id.* at 1297–98 (O’Scannlain, J., dissenting).

139. *Id.* at 1280.

140. *Nagrampa*, 469 F.3d at 1281.

141. *Id.* at 1284–85.

142. *Id.* at 1281.

143. *Id.* at 1264. MailCoups sought arbitration and made a demand under the contract that Nagrampa honor the clause by arbitrating in Los Angeles, California. *Id.* at 1265. Nagrampa’s attorney objected to arbitration. He raised the issue of validity of the arbitration clause, disagreed that Nagrampa was bound to arbitrate, and particularly objected to the Los Angeles venue and the arbitration fee clause. *Id.* at 1266. “[T]he arbitrator suggested that arbitration proceed in Fresno, California, as a more cost-efficient and convenient venue. MailCoups vigorously objected to the Fresno venue, and the AAA case manager confirmed that the arbitration would take place in Boston, Massachusetts.” *Id.* Nagrampa’s response was to file suit against MailCoups in the Superior Court of California in Contra Costa County. *Id.*

144. *Nagrampa*, 469 F.3d at 1266.

145. *Id.*

146. *Id.*

expectations of *Nagrampa*, was unduly oppressive, unlawful, or unfair.¹⁴⁷ The other claimed a violation of the California unfair competition law,¹⁴⁸ alleging that *Nagrampa*, as “a private attorney general,”¹⁴⁹ could seek MailCoups’ abandonment of its demands for arbitration.¹⁵⁰ This cause of action was styled as a request for a preliminary and permanent injunction of MailCoups to prevent it from unilaterally imposing this arbitration provision on *Nagrampa*.¹⁵¹

Fairly read, these six causes of action targeted the arbitration clause. Not one of them sought a remedy directed at the contract as a whole.¹⁵² This did not end the controversy, however. In looking at the majority and the dissents, a dialogue developed—some might say a dialogue over a matter of semantics. The opinion of the author is that there was more substance to the argument between the judges. Examining the exchange as a dialogue shines a light into the recesses of *Buckeye* and, in those shadows, spotlights the Court’s recent slide toward *Erie* violations.

The dialogue is something like this:

Judge for the Majority (MJ) is seated at a conference table with materials spread before him. Dissenting Judge (DJ) enters the room, grabs a book off a shelf and says, “If I may interrupt you, I have seen the *Nagrampa* draft and I don’t see how you can accommodate *Buckeye*. The draft seems wrong to me.”

MJ set aside his notepad and said, “Well, help me out. What’s troubling you?”

DJ pulled out a chair, eased onto it, and said, “I suppose my problem is that the opinion does not seem to recognize our limited role. We should not be looking at the substance if the arbitration clause is valid.”

“True,” MJ said, “but we can look at it if there is a problem with the clause. The *Buckeye* line of cases requires the federal court to give the case to arbitration if the challenge is to the enforceability of the contract as a whole. None of *Nagrampa*’s challenges are to the contract as a whole; each one refers to the arbitration clause. If each is a challenge to the validity of the arbitration clause, then the challenges can remain in the federal court system.”

“Exactly,” DJ responded. “*Nagrampa* said her basis for challenging the arbitration clause was unconscionability, so she can’t escape talking about

147. CAL. CIV. CODE §§ 1750–1784 (West 2006). In essence it was unconscionable. *Nagrampa*, 469 F.3d at 1266.

148. *Nagrampa*, 469 F.3d at 1266. See also CAL. BUS. & PROF. CODE §§ 17200–17208 (West 2006).

149. *Nagrampa*, 469 F.3d at 1266.

150. *Id.*

151. *Id.*

152. *Id.*

procedural unconscionability, and in California, that warrants an examination of her allegations that the contract, not just the clause, was a ‘take-it-or-leave-it’ deal.¹⁵³

“You are confusing California law,” MJ said. “California’s law of unconscionability has two elements: procedural and substantive.¹⁵⁴ Nagrampa wanted to use adhesion to establish the procedural part of California’s test.¹⁵⁵ For the substantive unconscionability element, she wanted to prove unfairness of the clause.¹⁵⁶ In fact, the threshold inquiry under California unconscionability analysis is whether the arbitration agreement is adhesive.¹⁵⁷ So her challenge was directed at the clause, it just had two parts.”¹⁵⁸

DJ said, “You are just saying the ‘crux of the complaint’ is about the arbitration clause, but the facts Nagrampa allege go to the formation of the entire contract, so *Buckeye* requires that the claim be submitted to the arbitrator.”¹⁵⁹

“No,” MJ said. “That is not what Nagrampa alleges and it is not what we are holding. While the facts could entangle the whole contract, the plaintiff seeks only to invalidate the arbitration clause.”¹⁶⁰

“But that is exactly the problem,” DJ said. “While you insist that none of Nagrampa’s claims would result in invalidity of the entire contract, the possibility is the very heart of *Buckeye*. It is for the arbitrator, not the district court, to decide the question of invalidity. And the arbitrator should decide it on whether the challenge directly affects the entire contract.”¹⁶¹

MJ sighed and said, “No, you are not listening. Nothing in Nagrampa’s claims challenged the entire contract because her cause of action did not seek to invalidate the entire contract. Anything she said about the entire contract was only due to California’s pleading rules requiring her to state more facts than one typically sees in the federal courts.¹⁶² Because she did not make a claim of overall invalidity, it cannot directly affect the overall validity.”¹⁶³

DJ’s voice took on an edge. “You are the one not listening,” he said. “You are not listening to *Buckeye* and the Supremes. *Buckeye* drew a distinction between two types of challenges. You can have a challenge to

153. *Id.* at 1297–98 (O’Scannlain, J., dissenting).

154. *Id.* at 1280.

155. *Nagrampa*, 469 F.3d at 1281–82.

156. *Id.* at 1284–85.

157. *Id.* at 1281.

158. *Id.* at 1269–70.

159. *Id.* at 1298–99 (O’Scannlain, J., dissenting).

160. *Id.* at 1270–71.

161. *Nagrampa*, 469 F.3d at 1298–99 (O’Scannlain, J., dissenting).

162. *Id.* at 1270 n.3.

163. *Id.* at 1270–71.

the contract as a whole or to the arbitration clause, but in cases like this both must go to the arbitrator. One is a challenge that directly affects the entire agreement and the other challenge is that the provision is illegal or otherwise a violation of policy which would invalidate the whole contract. What you have tried to do here is collapse them into the category of ‘seeking invalidation.’ The Court did not do that. The *Buckeye* opinion uses the word ‘challenges’ and only requires that the challenge ‘directly affect’ the contract.”¹⁶⁴

“You’re wrong,” MJ said. “*Buckeye* was a challenge to the entire contract as void *ab initio* on the grounds of usury. It was not a challenge to the clause itself so that is dicta, but more importantly the ‘challenge’ has to be to validity. You still do not understand that what we have here is not a challenge to validity. Nagrampa is utilizing a classic contract doctrine, one that applies to contracts generally. She is simply using facts that could have been used to challenge the whole, but she is using them to bolster what is a limited challenge to the arbitration clause itself. We look at the overall transaction to see what went on with the individual clause. That is just basic contract law. It’s the kind of thing we are supposed to do as a federal court. It’s impossible to avoid if you really want to examine a particular provision under general contract law. There was no challenge to the whole. She challenged only the arbitration part. None of her causes of action was against the whole contract. What you have left out is the parenthetical phrase of Section 2 of the FAA. What else could Congress have meant by allowing challenges to the arbitration clause on such grounds as apply to the contracts generally? Even *Buckeye* allows ‘challenges [to] the contract as a whole, *either* on a ground that directly affects the entire agreement (e.g., *the agreement was fraudulently induced*), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.”¹⁶⁵

What should DJ have said?

The dialogue fails at this point because the dissent’s reasoning fails for the author. We could extend the liberty already taken and fill in a fictional repost, but it seems unnecessary to prove the point. The majority has the better argument. As *Buckeye* stands, the Supreme Court appears to have distinguished between ‘challenges’ to the arbitration clause and to the contract as a whole. This part was deductive for the Court, though counterintuitive. Thus, if a plaintiff alleges a cause of action intended to invalidate the whole contract, it must go to the arbitrator. If the cause alleges invalidity of the arbitration clause itself, it can stay with the court.

164. *Id.* at 1299 (O’Scannlain, J., dissenting). See also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006).

165. *Buckeye*, 546 U.S. at 444 (emphasis added).

This was the holding in *Prima Paint* and *Southland* also.¹⁶⁶ As a matter of substantive federal law, the Court asked the trial court to determine what type of challenge was being made, and if the challenge was to both, to sever the clause.¹⁶⁷

The nuance added by the *Buckeye* court was a refusal to let the Florida Supreme Court use classic contract doctrine. The *Buckeye* court held that even if the challenge amounted to one that would invalidate the contract, *ab initio* (that is, make it void and not simply voidable), then the Court should have sent the matter to the arbitrator to consider. The Court made it clear that any state court rule about nonseverability was overridden by the FAA's implicit substantive rule demanding severability.¹⁶⁸ What it did not address is a situation like that in *Nagrampa*, where when the facts indicate overall adhesion and unconscionability, the state law would appear to allow a challenge to the individual clause based on infirmities of bargaining and then the challenge is only to that clause. In other words, there was nothing to sever in *Nagrampa* unless the federal court reconstructed the complaint as one that challenged the overall contract. This, the majority was not willing to do, but it appears the dissenters were.¹⁶⁹

2. The Insidious *Erie* Effect of *Buckeye*

Cases like *Nagrampa* are likely to proliferate.¹⁷⁰ What was a logical deduction from prior FAA cases became an insidious troublemaker in

166. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Southland Corp. v. Keating*, 465 U.S. 1 (1983).

167. *See Buckeye*, 546 U.S. at 445–46.

168. *Id.* at 446–48.

169. The disadvantage to litigants, such as Connie Nagrampa, is that any claim must always be tied to the arbitration clause itself. This will impinge on the value of the cause of action if there are good facts that go to the whole contract or other provisions, but cannot be attributed to the arbitration clause itself. This is a small price to pay if the facts are good as to both—a small price indeed if the jurisdiction permits alternative pleading and the worst that happens is the court retains the challenge to the clause and refers the other claims. At worst one is no worse off than if one had not styled the complaint in the alternative and had been referred from the outset. But a very large price is, the state's rules may prevent two “bites” at these facts on the basis of claim preclusion doctrine. This appears to be the case in California. *See Nagrampa*, 469 F.3d at 1270 n.3. *See also* *Martz v. Beneficial Mont., Inc.*, 135 P.3d 790, 795–96 (Mont. 2006) (Nelson, J., specially concurring) (“To say that my concurrence is without enthusiasm, however, . . . grossly overstates my exuberance for our decision.”); FED. R. CIV. P. 13(a) (compulsory counterclaims). *Compare* FED. R. CIV. P. 8 (federal pleading requirements) with CAL. CIV. PROC. CODE § 425 (West 2006) (requiring complaint to contain “a statement of the facts constituting the cause of action, in ordinary and concise language”).

170. *See, e.g.*, *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 396 (5th Cir. 2006); *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.3d 245, 249 (2d Cir. 1991); *Rubin v. Sona Int'l Corp.*, 457 F.Supp.2d 191, 192 (S.D.N.Y. 2006); *USA Payday Cash Advance Ctr. #1, Inc. v. Evans*, 637 S.E.2d 418, 421 (Ga. Ct. App. 2006); *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 96 (N.J. 2006).

Buckeye. The conclusion in *Buckeye* was that, because the plaintiff “challenge[ed] the Agreement, but not specifically its arbitration provisions, those provisions [were] enforceable apart from the remainder of the contract.”¹⁷¹ Florida’s attempt to avoid this conclusion by referencing Florida’s common law, making the entire contract void, was “simply rejected.”¹⁷² The Court acknowledged what might appear to be an anomaly: The rule allows a court to enforce an arbitration clause, send the matter to arbitration and have the arbitrator invalidate the entire contract on a common-law ground. The Court believed *Prima Paint* and its brethren cases resolved this “conundrum” in favor of enforcement of the arbitration provision. The arbitration agreement was to be vindicated even if the contract bargain, as a whole ultimately (after submission to arbitration) would not be preserved.¹⁷³

Here is the *Erie* issue: The question of severability will now turn on a federal court’s view of state common law. *Erie* does not prohibit federal courts from having a role in the development of the common law. What *Erie* stands for is that as a matter of the constitutional principles of federalism, the federal courts should not create or develop a freestanding common law, one distinct from, and therefore unsupported by, the state authorities which legitimize the common law.¹⁷⁴ States have autonomy and independence as a constitutional matter. The content and development of state law is vested with the state legislatures and judiciary and no interference with either should be tolerated except when concerning matters specially authorized by the Constitution.¹⁷⁵ Most particularly, there is no “transcendent body of law outside of any particular state.”¹⁷⁶ Instead, the common law, so far as it is enforced in a state, is not the common law generally, but that of the particular State and the authority for it must, in the final analysis, lie with the State’s legislature and courts.¹⁷⁷ By applying the Court’s notions of federal policy and what constitutes severability in contract actions to state court proceedings, the *Southland* and *Buckeye* courts slipped over the *Erie* edge.

The Court’s holding in *Southland* really emphasizes this problem. In that case, the Court held that challenges to the validity of the arbitration agreement, even though they were of state-court origin, would be subject to the *Prima Paint* rule.¹⁷⁸ Insofar as claims were made under California law

171. *Buckeye*, 546 U.S. at 446.

172. *Id.*

173. *Id.* at 448–49.

174. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1937).

175. *Id.* at 79.

176. *Id.*

177. *Id.*

178. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1983).

concerning this, those claims would be tested using the two-part test of *Prima Paint*. What happens next is a dichotomy. One branch leads to a flat conclusion that there is no evidence that Congress did not intend to affect state as well as federal court proceedings, as occurred in *Southland*¹⁷⁹ and *Buckeye*,¹⁸⁰ because Congress has the power to regulate interstate commerce. The other branch is the one the author suggests here. It is an alternative that is more sensitive to *Erie* and its teachings about the federal-state relationship.

When a suit is commenced in state court and removed on the basis of diversity, the federal court is the forum. However, the law should remain that of the state of removal, with consideration given to choice-of-law issues. By extending the FAA policy to reach state court proceedings, the *Southland* case impacted more than federal substantive law; it insidiously affected the common law's development. It urged an adoption or creation of something akin to a federal common law of contracts. In this way *Southland* worked far greater changes than those initially contemplated by Congress, which had intended to limit the FAA's effects to federal court proceedings.¹⁸¹

What the Court appears to have meant, at least with its holding in *Prima Paint*, is that to accomplish Congress' goal of encouraging enforcement of freely bargained arbitration clauses, courts must ferret out illegitimate claims of unenforceability and the most obvious are those that attack the entire contract.¹⁸² The Court should have made reference to *Erie* and urged state courts and the federal trial courts sitting within a forum as courts of citizen-diversity to apply the state doctrines of severability. How this zone of deference works can be seen if we adjust and reinvigorate the Court's statement about 'separability' with infusions of the longer-standing common law of 'severability.'¹⁸³

What the Court announced was a useful tool designed to accomplish a real goal, but it was not in line with substantive law. The substantive rule was the one contained in the FAA mandate to treat compulsory arbitration on equal footing with all other contract provisions. However, the Court gives the tool a gloss of "federal substantive law."¹⁸⁴ I would be more sanguine about the damage to state common law doctrine if Congress had stated that, as a congressional finding of fact, it was a necessity of interstate regulation of commerce that arbitration clauses be severed if attacked on

179. *Id.* at 15.

180. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006).

181. *Id.*

182. *See id.*

183. *See discussion supra* Part IV.B.1; *Buckeye*, 546 U.S. at 444–47.

184. *Buckeye*, 546 U.S. at 445 (quoting *Southland*, 465 U.S. at 12).

grounds of adhesion or unconscionability.¹⁸⁵ However, Congress made no such statement or findings.

If this doctrine of separability, announced in *Prima Paint* and elaborated in its progeny, did not come from Congress, then it is a creature of the Court. As such, it must be seen for what it is: a zombie orphan of the discredited *Swift v. Tyson* federal common law, and a direct violation of *Erie*. If the Court had drawn on state-court doctrines of severability, it could have legitimized the *Buckeye* doctrine by framing it within the zone of state common law, specifically that of Florida.¹⁸⁶ Instead, the Court states that the rule of severability arises from “the FAA’s substantive command that arbitration agreements be treated like all other contracts.”¹⁸⁷ It was Florida doctrine that void contracts are not to be salvaged, and even individual parts that are otherwise valid are not to be enforced.¹⁸⁸ Relying on *Prima Paint*, the Court rejected this notion, again on the basis of the federal substantive rule drawn from the FAA.¹⁸⁹

The Court is so focused on the need to sever, it does not address the illogical position that the FAA requires the same treatment for all contracts, yet under Florida law, the contract *would* receive the same exact treatment: a refusal to sever. What the Court’s holding amounts to, therefore, is more than a mandate for equal treatment. By dictating what will be the Florida version of severability, the *Prima Paint/Southland/Buckeye* rule saves the compulsory arbitration clause where any other contract term would be void,

185. Articulating the FAA policy and separating it from the Court’s gloss goes a long way toward weakening the Court’s position. Beginning in *Prima Paint* the Court has pursued a formula that is based on “notion[s] that the severability rule would further a liberal policy of promoting arbitration.” *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 421 (Black, J., dissenting) (internal quotations and citations omitted). The court sought to sever attacks on the clause and consider them for what they are: attacks on arbitration as a limited remedy. It appears that the Court may have thought this would undercut attacks on arbitration clauses. It does help to isolate the prejudice that clearly existed at the time the FAA was passed and continues in some forms today.

For the legislative history of the Federal Arbitration Act, see IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 120–25 (1992); *Martz v. Beneficial Mont., Inc.*, 135 P.3d 790, 792 (Mont. 2006) (Nelson, J., specially concurring) (“My frustration with our inability to reach a legally correct, fair and just result in this case stems directly from the fact that the United States Supreme Court has, from the beginning, improperly conflated the Federal Arbitration Act (FAA) into something which Congress never intended it to be.”).

186. This would have presented some problems for the Court. Florida’s common law of illegality made the entire contract unenforceable if there was a violation of usury law. That is, if the interest rates charged were so outrageous as to violate Florida’s usury law, that would make the whole contract, including the arbitration provision, a legal nullity under Florida common law. This the Court refused to countenance. *Buckeye*, 546 U.S. at 446.

187. *Id.* at 447.

188. *Id.* at 446.

189. *Id.*

making the treatment of contracts with compulsory arbitration clauses quite *unequal*.

While the Court's focus on the policy of the FAA can be lauded for its support of that Act's norms, it should be questioned for its lack of concern for *Erie* principles. What makes the need for some zone of deference urgent is the context of diversity cases. In a diversity case, such as *Nagrampa*,¹⁹⁰ there is more to the *Erie* problem:

[Thirty-five] years after the passage of the Arbitration Act, the Second Circuit completely rewrote it. Under its new formulation, § 2 now makes arbitration agreements enforceable "save upon such grounds as exist at *federal* law for the revocation of any contract." And under § 4, before enforcing an arbitration agreement, the district court must be satisfied that "the making of the agreement for arbitration, *as a matter of federal law*, is not in issue." . . . Judge Medina . . . formulated the separability rule . . . because of his notion that the separability rule would further a "liberal policy of promoting arbitration."¹⁹¹

Southland and *Buckeye* exacerbated the *Erie* problem. If Justice Black saw *Prima Paint* as a kind of heresy, then recent cases represent lunatic heresy. What was said in *Prima Paint* affected the federal court's view of the law and would have resulted in different interpretations of the substantive doctrine of severability depending on the courthouse in which one filed suit.¹⁹² With these later cases the Court is not only affecting the interpretation of federal substantive law, it is using this weak reed to force the state courts to rewrite substantive common law. The severability rule urged by the Court in *Buckeye* is a controversial doctrine at the least, and in most states will simply be contrary to settled principles of law. State courts will have to change the common law or introduce an *Erie*-specific fix for matters involving compulsory arbitration clauses. This remedy would provide for severability in those cases, but recognize that the doctrine would be quite different from the severability rules found, generally, in contracts and specifically, in adhesion and unconscionability cases.

The Court could have, at any step along its current course, limited the *Erie* impact of its strategy to foster voluntary bargains leading to arbitration. First, it could have resisted the impulse to *extend* the reach of

190. Justice Black, in his dissent in *Prima Paint*, raised the *Erie* concern along with the lack of history and intent to support the extension of the FAA into interstate commerce. *Prima Paint*, 388 U.S. at 417–22 (Black, J., dissenting). His argument was that *Erie* does not allow the Court to create a substantive rule of severability to be applied in federal court, but which the state court across the street would refuse to apply. *Id.* at 416–17. Even the dissenters conceded that the FAA was intended to apply to diversity cases without which application its reach would have been severely limited. *Id.*

191. *Prima Paint*, 388 U.S. at 421 (Black, J., dissenting).

192. *Id.* at 416–17.

the FAA beyond the limited commerce cases suggested by the Act's history. This was too late after *Prima Paint* in 1967. Next it could have chosen not to extend the reach of the FAA to state-court proceedings. This was too late after the *Southland* case of 1983. Finally, it might have limited *Southland*'s reach by recognizing common-law voidness arguments. This was too late after *Buckeye* and the Court's rejection of Florida doctrine on voidness as a reason not to refer.

Buckeye and its progenitors have left us with the very broadest construction of the FAA's purpose and scope. Even voidness *ab initio* will not suffice as a ground on which all contracts can be challenged, and therefore ought to be available under Section 2 of the Act. There are three responses. The most consistent with the developments so far is for the Court to follow the lead of the dissent in *Nagrampa*.¹⁹³ The Court could, in the next opportune case, conclude that the severability rule requires that any semblance of a challenge to the whole contract will be taken in that vein, without regard to the actual remedy sought or cause of action stated. It could even be more draconian and add that challenges that require inquiries into the facts surrounding the entire contract amount to a challenge of the full contract even though the style of the pleading asserts only invalidity of the arbitration clause. The *Nagrampa* majority opinion suggests a distinct lack of desire to go this route, however.

The *Nagrampa* majority distinguished Connie Nagrampa's allegations from those in *Buckeye*. The *Nagrampa* opinion recognized that *Buckeye* had already rejected common law severability rules and that it had held that the enforceability of an arbitration agreement could not turn on state policy and contract law. The majority knew that any conclusion that the contract in *Nagrampa* was void would achieve no purpose, given the *Buckeye* holding. *Buckeye* made it plain that an attack on the contract as a whole, even if it leads to a conclusion that the contract was void *ab initio*, should be referred to the arbitrator.¹⁹⁴ The Court also recognized that there was the potential for the manipulation in the *Buckeye* line of cases.¹⁹⁵ The remedy offered by the majority was to hold that Nagrampa's challenges were consistently directed at the arbitration clause alone.¹⁹⁶ In their view, her challenges never approached a claim concerning the whole contract, not even one alleging voidness.¹⁹⁷

193. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1298 (9th Cir. 2006) (O'Scannlain, J., dissenting) (stating that the Court's holding was incorrect because it ignored Supreme Court precedent by hearing a challenge to the validity of the contract as a whole when it should have been heard by an arbitrator, since the challenge did not specifically target the arbitration clause).

194. *Nagrampa*, 469 F.3d at 1269–70.

195. *Id.* at 1276–77.

196. *Id.*

197. *Id.*

Having concluded that the challenge was to the arbitration provision itself, the *Nagrampa* court articulated the California rule based on California precedent.¹⁹⁸ The court said that California analyzes contract provisions for both procedural and substantive unconscionability. It is true that the California law on unconscionability in adhesion is complex, but this is only the beginning of the dispute between the majority and dissent. California law handles adhesion and unconscionability in its own, perhaps peculiar, way, as can be seen in the California case of *Armendariz*.¹⁹⁹ The California Supreme Court in *Armendariz* held that it could legitimately consider the compulsory arbitration provision, which the court then deemed unconscionable on the basis of California precedent.²⁰⁰

The *Nagrampa* majority correctly pointed out that in California, adhesion is a threshold inquiry for an unconscionability analysis.²⁰¹ This is a bit of an oversimplification. Adhesion—under California law—signifies only that a standardized contract has been imposed by a party of superior bargaining strength, and that the subscribing party had the choice to adhere or reject, but was not in a position to bargain.²⁰² Thus in California, as in most states, adhesion does not automatically destroy an agreement; rather the court must also find the presence of other factors which render it unenforceable.²⁰³

California recognizes two bases for refusing to enforce an adhesive deal. The first is that the contract includes a term or terms that are outside of the adhering party's reasonable expectations.²⁰⁴ The second is that either the contract as a whole or an individual provision is unconscionable.²⁰⁵ The

198. Recall that *Nagrampa* arises in California even though the agreement called for the application of Massachusetts law. *See id.* at 1265–66. If we look at the substantive law of adhesion and unconscionability of California, and the rift it caused between the majority and dissenters, the depth of the change and the *Erie* implications become apparent. *See id.* at 1276.

199. *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 689–90 (Cal. 2000).

200. An interesting insight into the *Erie* issue begins with a notation by the *Nagrampa* court that the arbitration agreement selected Massachusetts as the arbitration forum, but both parties conceded that the applicable franchise agreement and substantive law was that of California. The District Court applied California law in determining whether the arbitration provision was unconscionable, *Nagrampa*, 469 F.3d at 1266–67, and did this despite the fact that the provision of the agreement specified the application of Massachusetts law. *Id.* at 1267. The district court determined that the parties had waived this provision through the course of conduct and pleading, a finding with which the Ninth Circuit agreed. This left the court with a classic diversity issue—the substantive law should have been Massachusetts but because of the conduct of parties it was California law. Had MailCoups received what they sought, the arbitrator in Massachusetts would have applied California law to the transaction. Without knowing more about the substantive law of Massachusetts and of California, it seems non-controversial to assert that the potential for diverse results arises.

201. *Nagrampa*, 469 F.3d at 1281.

202. *See Armendariz*, 6 P.3d at 689–91.

203. *Id.*

204. *Id.*

205. *Id.*

California courts appear to equate the terms “unconscionable” and “oppressive” even though unconscionability has its roots in equity, and oppression appears to be a statement about the lack of a voice in the exchange.²⁰⁶ California law—drawn from its case law, the U.C.C. and other legislative mandates—allows a California court to find the contract as a whole, or any provision of it, unconscionable.²⁰⁷ At least through *Armendariz*, California courts believed it would be possible to invalidate a particular provision of the contract on the basis of unconscionability, even if some of the unconscionability analysis was based on the bargaining and setting of the contract as a whole.²⁰⁸

This understanding of California law was critical to *Nagrampa*, where the Court decided that California law controlled in that diversity action.²⁰⁹ Let us return to the majority/dissent dialogue:

DJ started to rise from his chair, obviously a bit miffed. MJ gestured for him to stay and said, “Wait. Please give me a second to explain why we need to keep the case in court.”

Slowly settling back onto the edge of his chair DJ said, “What you need to explain is why a court is the more appropriate place for an attack on the contract.”

MJ paused and said, “MailCoups concedes that the contract was non-negotiable and that Connie Nagrampa’s only choice was to sign it or make no franchise deal. Under California law, a contract of adhesion is either inherently oppressive and therefore automatically procedurally unconscionable, or there is a separate element of oppression needed to cast it as procedurally unconscionable.²¹⁰ So, all we need is to find some oppressiveness and no matter which is true this contract is procedurally unconscionable.”²¹¹

DJ said, “Well, the problem with that is you are looking at the context of the full contract, and nearly all our sister circuits agree that any argument about unconscionability must be directed to the arbitration clause, not the entire contract.²¹² The FAA does not allow a federal court to consider

206. *Id.* See also *id.* at 690 (explaining that the nature of oppression is one more akin to surprise, and as such it is more procedural than substantive).

207. *Id.* at 689–91.

208. *Armendariz*, 6 P.3d at 689–90.

209. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1263–64 (9th Cir. 2006).

210. *Id.* at 1281–82.

211. *Id.*

212. The *Nagrampa* court reviewed decisions from the Second, Third, Fifth, Sixth, Eighth and Eleventh Circuits. See *id.* at 1271–75. It concluded that only the Eleventh Circuit was in substantial disagreement with the other circuits. It referred to *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 877 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006), as the aberrant decision. In *Jenkins* the plaintiffs’ complaint amounted to a claim of adhesion in a check-cashing agreement. *Jenkins*, 400 F.3d at 871–72. The court deciding that case held the adhesion claim must pertain specifically *and exclusively* to the arbitration agreement. *Id.* at 877.

claims alleging that the contract, as a whole, is adhesive. Those are for the arbitrator.”²¹³

“But that misstates California law,” MJ responded. “California looks at adhesion only as a part of unconscionability. For the court to declare a contract unconscionable, the court must find some proportion of procedural unconscionability and substantive unconscionability together. It’s unclear how much, but it is a sliding scale. Some of each is required to invalidate the deal, so any court wishing to follow the California common law must consider procedural unconscionability. If procedural unconscionability is in large part adhesion then it means the court—not the arbitrator—needs to look at the circumstances of the bargain.”²¹⁴

“But I don’t buy Nagrampa’s claim that the arbitration clause was procedurally unconscionable,” DJ said. “The whole argument that the clause was adhesive assumes that this sophisticated business person simply failed to read the contract. Or, even worse, that she did not have to understand the import of a clause that clearly required her to arbitrate in Massachusetts.²¹⁵ And even if we buy that argument, there is no showing that the clause itself is grossly unfair.²¹⁶ What’s the big deal about spending a couple thousand dollars to take a nice trip to Boston and state her case? I don’t mind staying at a La Quinta Inn. I saw Rachel Ray’s show on Boston. \$40 a day is enough for some good food. What’s the hardship?”²¹⁷

“The big deal is that these are matters a court must consider to comply with California law,” MJ responded. “To decide whether the arbitration clause was unconscionable, it has to look at substance and procedure.²¹⁸ More importantly, these are matters that require an examination of how the provisions were reached, because you have to have both substantive and procedural elements to find unconscionability. So even though there is not much evidence of procedural unconscionability in the making of the contract, there is enough if the court finds an offsetting amount of substantive unconscionability in the arbitration term.”²¹⁹

“There you go repeating the error again,” DJ replied. “You insist on using evidence of the overall bargaining to attack the arbitration clause. Show me the specific challenge to the arbitration clause based on the

The *Nagrampa* court believed that the Eleventh Circuit applied the *Prima Paint* line of cases too narrowly. Thus the court should not have dealt with allegations that both the contract as a whole and the arbitration agreement individually were adhesive. *Nagrampa*, 469 F.3d at 1274.

213. *Nagrampa*, 469 F.3d at 1298–99 (O’Scannlain, J., dissenting).

214. *Id.* at 1281–82.

215. *Id.* at 1301 (O’Scannlain, J., dissenting).

216. *See id.* at 1302, 1305 (O’Scannlain, J., dissenting).

217. *See id.* at 1288–1290 (discussing the “reasonableness of the ‘place and manner’ provisions in the arbitration clause”).

218. *Id.* at 1280.

219. *Nagrampa*, 469 F.3d at 1284.

bargaining that occurred. If you can't talk about the clause without talking about the whole contract, then you are violating *Buckeye*.

"She has to attack the arbitration clause with specificity, and every time she mentions procedure, she mentions the setting and process of the entire agreement, not the clause itself."²²⁰

Here is where the opinion fails, as neither side ever reaches the *Erie* concerns. Let us continue with the dialogue in a wholly speculative extension of the arguments so that the real issue is broached.

MJ said, "See you are not listening again. I am using procedural unconscionability for the whole contract because the clause was not individually bargained for. How am I supposed to attack an individual process that does not exist?"

DJ smiled and said, "Bingo."

MJ said, "OK, but what does 'bingo' mean? Are you saying that a court can never use the contractual setting and bargaining process to attack the arbitration clause?"

DJ said, "Yes, if what that amounts to is a challenge to the contract as a whole, then *Buckeye* and all our sister circuits agree that we must send it to the arbitrator for decision."

MJ said, "Suppose for a minute you are the lawyer for Connie Nagrampa and you have the job of deciding whether to arbitrate or file suit. If it will be more expensive to arbitrate in Boston than to sue locally, and money is an issue, how do you frame the issue so that you can stay in court in Contra Costa County?"

DJ asked, "So you want me to pretend I am representing Nagrampa and you want me to find a way to stay in local court. Suppose I just say that it is not possible?"

MJ said, "But even *Buckeye* leaves open the possibility of severing the claims. Why are you not willing to try?"

DJ said, "I don't want to try because I don't see how her claim regarding the arbitration clause can be separated from any claim she might have involving the whole contract. If I do try to remove the arbitration clause alone, maybe it will preclude my claims relating to the whole contract. It seems to me that *res judicata* could preclude me if I miss on this one clause, so if I really care about representing her, then maybe I should go to Boston and arbitrate the whole thing like my client agreed to in the first place."

MJ said, "I think we are making progress. The similarity in facts raises the concerns about claim preclusion and *res judicata*, right?"

DJ said, "I suppose so. . . . yes . . . I will go along with that. It seems to me that her real claim is that the contract is invalid because she did not like

220. *Id.* at 1298–1300 (O'Scannlain, J., dissenting).

the result and would like to escape it, but claiming only that the arbitration clause was invalid may use up her chances to attack it.”

“If you were to reword your concerns,” MJ said, “And if you said that you wanted only to ‘challenge’ the arbitration clause, how would you do so? Remember, you need to look at the facts of the whole contract, but cannot claim the invalidity of the whole deal. Would you be able to?”

DJ said, “If I understand your question, the answer is ‘no.’ The fact that I could have argued the whole deal was invalid but I did not challenge it was the very basis for claim preclusion and *res judicata*. Pleading the facts surrounding the arbitration clause legitimately raised the facts surrounding the whole.”

MJ said, “Then just consider what *Erie* demands. We must permit a ‘challenge’ to the arbitration clause in this case. Think about the word ‘severable’ and ask yourself where the Court got it. It is not part of the statute. It was never mentioned in the legislative history. It appears to have been a logical deduction in the *Bernhardt*²²¹ case thirty-five years after the Act was passed. It was added to the gloss of the statute long before it was even considered a possibility that the FAA applied in state-court actions. So it was no big deal for the Court to add some substantive gloss about a statute applied in federal litigation only by the federal courts. But *Buckeye* really forces us to step into a mess. That word which, by the way, was once ‘separability’ has become ‘severability’ and applies now in state court cases.”

“So what?” DJ interrupted. “That’s all settled at this point. I hope you are not trying to overturn *Buckeye*, because the last I checked, the Supremes have the final say on what a federal statute means. If they want gloss, they can have gloss.”

MJ waved this off and said, “But can they have gloss that amounts to a rule that affects common-law doctrine where its authority does not come from the common law itself?”

“Sure they can—if it is a constitutional limitation or is a congressional mandate based on the authority of Congress to regulate commerce,” DJ said.

MJ pursued, “What if the effect is not only to regulate commerce, but to impose a shift in common-law doctrine?”

“What do you mean?” DJ asked.

“*Buckeye* does not just regulate commerce,” MJ answered. “‘According to the dictates of Congress’ means ‘according to the gloss of the Court,’ as you conceded with the severability test. That gloss has to have a source. Where does this notion of ‘separability,’ or ‘severability’ or whatever you call it come from if Congress did not ask for it?”

221. See *supra* notes 3, 7 and accompanying text.

“Well, I am not a historian,” DJ answered, “and I don’t recall a citation by the Court as to its source. My best recollection is that the Second Circuit, maybe Judge Medina, in an old opinion,²²² first suggested it as the way to ensure that the court did not abuse the policy of the Act by skirting the issue to attack the contract as a whole.”

MJ said, “So you will concede that it sounds suspiciously like the severability doctrine familiar to us in the context of common law and equitable doctrines of severing one clause of the contract to save the rest?”²²³

DJ shrugged, “Sure, I agree it always seemed vaguely familiar and contractual; those are some of its strengths to me.”

MJ continued, “So what we have is a vague common-law doctrine with a purpose to do federal, substantive duty, but in the end its impact is to do away with common-law doctrines such as the ‘void’ and ‘voidable’ distinction nixed in *Buckeye* and the adhesion and unconscionability distinctions that you would like to have disappear in this case. Well, my friend, it sounds like federal common law. It’s being used like a general federal common law to radically rewrite state law. To me that is a general federal common law. It is *Swift v. Tyson* all over again and a grave violation of the *Erie* doctrine.”

DJ paused and then said, “OK, not to concede the point but let’s just take for granted an *Erie* concern; what is the harm in allowing the Court to dictate the content of a common-law rule like severability if it is using it for a good purpose?”

MJ said, “If you mean ‘what harm other than having the common law depend on whether the contract contains an arbitration clause and what we as federal judges think the rule of law should be,’ I am not sure. But that seems to me a pretty substantial impact. By what right do we ignore California’s law that an unconscionable contract is a nullity. The California courts have said that even conscionable individual provisions should not be saved where the whole is void?²²⁴ Seems to be enough of an *Erie* concern to me that we ought to find a way to avoid creating separate bodies of law based on courthouse and pleading happenstance. It certainly should not depend on the Court saying what it thinks the common law of unconscionability ought to be just to add gloss to a federal statute.”

222. See *supra* note 191 and accompanying text.

223. See *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 695–99 (Cal. 2000). It is logical that *Nagrampa*, a California case should have drawn on fundamentals of California law including the notion of severability that is basic to the doctrine of unconscionability and formed the basis in *Armendariz* for the California Supreme Court’s refusal to sever and save the arbitration clause.

224. See *Armendariz*, 6 P.3d at 695–99.

Not liking where the discussion was headed, DJ said, “As I suggested earlier, you just want to reargue the void/voidable distinction that *Buckeye* ended.”

“Well, I thought we were rethinking that as part of a friendly discussion,” MJ responded, “but that is not my main point.”

“You can get there any time, as far as I am concerned,” DJ smirked.

“Well, I think rewriting common-law contracts every time an arbitration clause comes before the Supreme Court is problematic enough, but let me try to show you a real world effect:

“Go back for a second to that other cause of action Connie Nagrampa might have brought. You remember: the one challenging the whole contract. We need to preserve that second cause of action concerning the contract as a whole and the only way to do that is to take either challenge she may have.²²⁵ So long as they are pled in the alternative we ought to retain both. We need to do that to prevent *res judicata* problems.

“I think that Connie Nagrampa was more of a gambler than I would have been. She did not challenge the contract as a whole. Every one of her six causes of action went to the clause itself. But to plead the facts to upset the arbitration clause, she had to plead the facts that could have, and I emphasize *could* have, been used in an attack on the contract as a whole. But she did not make that attack. As you pointed out, any lawyer worth his salt will see the overlap of facts and see that pleading one necessitates pleading the other or risking claim preclusion.²²⁶ Then as long as the complaint is limited to a claim that the arbitration clause itself is invalid, her gamble will pay off only if we keep this action.”

“So she was stupid or her lawyer committed malpractice,” DJ said. “*Buckeye* does not allow us to cover for the mistakes of the plaintiff’s bar. We should refer her to arbitration.”

“But don’t you see another possibility?” MJ asked. “Suppose honesty instead of incompetence. Suppose they really did believe in the overall contract. Maybe she really did see that she was bound to pay something. She did offer to settle before she realized how much they wanted and how little she had left. Maybe she really was willing to talk about the meaning of the contract and had no desire to attack its overall enforceability.

“If she really only had a beef against the arbitration provision, then she should have attacked only it and she might have risked claim preclusion over the entire contract. Maybe she was willing to take the risk in order to litigate locally. Maybe it really was about avoiding the expense and perceived unfairness of arbitration. If so, we owe it to her to allow the

225. *Nagrampa*, 469 F.3d at 1270 n.3.

226. *See, e.g.*, ANN TAYLOR SCHWING, 1 CAL. AFFIRMATIVE DEF. § 14:1 (2007 ed.) (outlining California’s law of *res judicata*).

specific complaint even if it requires sifting through facts that go to the making of the contract as a whole.”

DJ said, “Maybe this; maybe that. That is all speculation and it seems to me that *Buckeye* requires us not to speculate, but to liberally construe the arbitration policy. I would refer any case where the facts alleged a challenge to the whole contract.”

MJ said, “Well I just disagree then because now you are confusing the word ‘challenge’ with the phrase ‘raise facts which could lead to a challenge of.’ She did the second, not the first.”

DJ said, “I think that I finally see your point on that one, but we will disagree about the conclusion. She may have been challenging only the arbitration clause, and to do that meant she had to raise facts that could have been used to challenge the whole contract. It may be that California law even requires her to raise those facts to make her allegations about procedural and substantive unconscionability law viable. But that’s because California law is worse than murky. Don’t you agree?”

[MJ nods to this.]

DJ continued, “But just as *Buckeye* extended the idea of *Southland*, I think this case, were it to go to the Court, would be the vehicle to extend *Buckeye*.”

MJ asked, “So where do you see that extension going?”

DJ settled in, gazing toward the ceiling and said, “Well no one has asked about my interest in being elevated to the Show, but if I were on the Court and this case came up I would extend *Buckeye*. I think the FAA and similar tools are needed. We need to rein in these frivolous claims of contract unfairness. And we have too much litigation in this Circuit anyway. It would be useful to refer more of it to arbitration. So, I would take the next opportunity to hold that the severability rule requires that any semblance of a challenge to the whole contract will be taken in that vein without regard to the actual remedy sought or cause of action stated. It could even be more draconian. I might add that challenges that require factual inquiries into context or setting of the entire contract are *per se* challenges to the full contract. I might also throw in an inquiry into the waiver doctrine and make almost any contact with the arbitration forum an additional basis to deny the parties their chance to stay in court.”

“Wow,” MJ said. “How about a middle ground? Maybe altering the severance doctrine? Could we allow court attacks on the arbitration clause if and only if the attack is clearly addressed at that one clause, even though the facts would have supported a broader attack? I know it’s a pretty limited pleading strategy, but at least it would allow the litigants and the state courts to decide the effect of severing.”

“No,” DJ said. “That is too close to reverting to something like a writ-pleading system, an ugly system of civil procedure. I know *Erie* allows a

good deal of discretion in adopting procedural rules in federal court, but that seems to require the states to adopt or respond with changes to their pleading systems and they would be peculiar to contract law, maybe even peculiar to contracts containing compulsory arbitration clauses. I believe in the federal/state division of responsibility. We already have too much federal activism.

“So, no. No middle ground yet. You’re going to have to convince me that *Buckeye* does not demand a referral in this case.”

MJ paused, “OK. It’s a bit abstract, but you have to start with a basic hypo: Suppose that Nagrampa came into court and alleged that the MailCoups representative showed up at her house and held a gun on her until she signed the contract. The contract she was shown was twenty-three pages long and there was not chance to read or think—it was ‘Sign, or die.’”

“Good grief, you sound like a law teacher steeped in the common law to the point your tweeds have all turned brown,” DJ snickered. “But to answer your question, that is a fraud in the factum or extortion defense²²⁷ that would void the whole . . . deal. . . .” DJ trailed off.

“But *Buckeye* appears not to allow a court to examine the contract, even if it’s extortionate. The extortion challenge is still to the whole contract,” MJ finished for DJ. [DJ stares with a sinking expression.] MJ continues, “So *Buckeye*’s gloss of severability does more than prevent challenges based on the void/voidability distinction. It ends all court challenges to the contract as a whole even in the presence of outrages such as physical duress and worse.

“*Buckeye* allows you to take a nullity, legally a nothing in California and probably every other state, and once you sever it, once you deduct it from the whole, you have something that can be saved. I am sorry, but that is simply ridiculous.²²⁸ Surely you would not say that the extorted deal I posited for you should have any life breathed into it. The only way it gets to an arbitrator is on its own terms. No common-law rule would demand arbitration of the question of enforceability of the whole deal. That is the *Erie* problem. Without *Buckeye* and its severability rule, the place to challenge the deal or any part of the deal is in court. There is no neutral rule of the common law that would send the deal to the arbitrator. In every case where the whole contract is void, allowing the arbitrator to examine the deal is not only recognition, but vindication of the clause. The wrongdoer gets exactly what he sought with that particular term.”

227. See U.C.C. § 3-305(a)(1) (2002); RESTATEMENT (2D) OF CONTRACTS § 175 (1981).

228. In addition, California law would not have allowed the Court to sever. See *Nagrampa*, 469 F.3d at 1293–94.

“But tell me what you would do then, without challenging *Buckeye*, because I am not going there,” said DJ. “It seems unfair that I am the only one who has to come up with a good idea.”

MJ thought for several moments and said, “I know you won’t like it, but I think *Erie* is the key. I don’t like where we are headed. Reading the old cases, I have always been uncomfortable so I admit I don’t like the current state of the law and especially don’t like how *Buckeye* extended the old cases. I think Frankfurter and Black would be apoplectic if they weren’t already dead. But here is where *Buckeye* has to be limited at least. The *Buckeye* rule only has simplicity in its favor. Its downside is that the federal courts are already, through severability, dictating common-law pleading systems and encouraging a radical rewrite of unconscionability and adhesion. By taking the arbitration clause out of its context as part of a bargained-for exchange, the Court is giving it greater validity than we give to the contract itself. The bargain itself is being radically shifted to accommodate a gloss by the Court. That gloss is forcing the adoption of a different set of common-law doctrines.

“The Court could limit the *Buckeye* case to its facts. Instead of creating a series of rules that address particular common-law doctrines such as the ‘void/voidable’ distinction, we should give deference to the state courts and their expertise in contract formation. The Court could offer a test that demands an examination of the good faith and reasonable scope of the pleadings and the trial court’s findings. If a trial court, whether federal or state, determines that the challenge is being made in good faith and is reasonably intended to place into controversy the arbitration clause’s validity as a separate matter, then the court can retain the case.

“Then only where it is a bad-faith plea, one that seeks to color itself as a challenge to the arbitration clause but in fact is a challenge to the whole contract and has no reasonable chance of success as a challenge to the clause, should the case be referred. This is the kind of test that district courts are used to dealing with.”

DJ chuckled, “Dreamer. That pretty much proves it. I am a lot closer to elevation to the Court than you will ever be.” Continuing to chuckle, he rose and exited the conference room.

V. CONCLUSION

The Court should limit the *Buckeye* case to its facts. Although the FAA expresses an important federal norm and even though that norm could be interpreted in such a way that would limit common-law contractual constraints, the Court should resist this temptation. As it now stands, the *Buckeye* line gives no deference to the state courts and their expertise in contract formation. While *Nagrampa* and similar *Buckeye* progeny could be

used to strengthen the notion of contract severability, the Court should resist this temptation.

A reversal of *Buckeye* is unnecessary. What is needed is an examination of the *Erie* principles and recognition that the Court has allowed the FAA norms to place its holdings in the interstices of the *Erie* doctrine.

An *Erie* zone of deference prevents federal courts from expressing rules that have the effect of a federal common law, rules which improperly displace the true common law. A trial court should be given the opportunity to examine the challenges to the agreement and determine the likelihood of success on the merits of a challenge to the arbitration clause alone. It should conduct this review in the context of the state's common law limits on contracts. Only where it is a bad-faith plea, one seeking to color itself as a challenge to the arbitration clause but which in fact is a challenge to the validity of the contract as a whole, should the case be referred. History shows that adhesion and unconscionability have an important role to play in contracts, even if a contract contains a compulsory arbitration provision. An *Erie* zone of deference for basic contract principles would prevent a constitutional problem without significant impact on Congress's intention to foster arbitration.