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At the Crossroads of Federalism and Arbitration: The Application of *Prima Paint* to Purportedly Void Contracts

BY PIERRE H. BERGERON*

A seemingly simple question has yielded considerable litigation with conflicting results: whether an arbitrator, rather than a court, must determine if a contract containing an arbitration clause is void. This question arises against a backdrop of strong judicial support of the Federal Arbitration Act ("FAA").[1] While courts have historically demonstrated a mistrust of the arbitral forum, the United States Supreme Court has struggled over the past few decades to overcome this hostility.[2] One of the primary means for facilitating arbitration is the "severability" doctrine embraced by the Supreme Court in its seminal *Prima Paint* decision.[3] The *Prima Paint* Court recognized that a claim for fraud in the inducement could not defeat arbitration unless it was specifically directed at the arbitration clause.[4] Thus, the arbitration clause was to be evaluated separately from the underlying contract.

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[1] 9 U.S.C. §§ 4–13 (2004).

[2] The Court requires that lower courts "rigorously enforce agreements to arbitrate." Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). The mandatory provisions of the FAA do not permit parties to "ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." Southland Corp. v. Keating, 465 U.S. 1, 7 (1984). Any doubts concerning arbitration must be resolved in favor of arbitration, *see, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983), and the "party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2000).

[3] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[4] *Id.* at 406.

Left open by *Prima Paint*, however, is the question of whether the same analytical framework governs an allegation that the underlying contract is void. Drawing a distinction between void and voidable contracts, litigants have argued, and some courts have held, that the reach of *Prima Paint* stops at the frontier of void contracts. Such a position, as explained below, poses threats to the severability doctrine because the lines of demarcation between void and voidable contracts are not always clear and because any weakening of the severability doctrine will encourage a doctrinal shift in attacking arbitration agreements.[5]

Yet, that is precisely what many commentators are advocating: curtailment or outright repudiation of the severability rule.[6] Concerns for federalism motivate many of these attacks. As the Supreme Court has forced reluctant states to follow the strictures of the FAA, the states' ability to regulate contracts containing arbitration clauses has noticeably waned. The exertion of federal power in the arbitration realm contrasts sharply with the recent tidal wave of "states' rights" federalism decisions during Rehnquist's tenure as Chief Justice, and the juxtaposition of these two lines of jurisprudence may understandably leave many scratching their heads.[7] Opponents of intrusion of the FAA into the states' realm have accordingly championed federalism as a means for limiting (or eliminating) *Prima Paint*.[8]

Considered against this backdrop, the continued vitality of the *Prima Paint* severability doctrine, as well as its application to purportedly void contracts, assumes great significance. The answer to the void contract question will carry wide-reaching implications for arbitration doctrine, as well as in the broader context of the federalism debate. Given the stakes, it may not be surprising that this area of the law is punctuated by case law that appears to be in tension, which gives proponents of restricting *Prima Paint* new ammunition. Perhaps more importantly, a sharp federal/state divide has emerged on the void contract question. While three federal circuits have recently applied the severability doctrine to allegedly void contracts,[9] state courts have shown little

[5] *See infra* Section I.C.

[6] *See infra* note 41.

[7] *See, e.g.*, Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Procedure*, 77 NEB. L. REV. 397, 400 (1998) ("The Court's continued willingness to find that the FAA preempts state arbitration law is strikingly contrary to the deference the Court has otherwise shown to state sovereignty in other areas of the law.").

[8] *See infra* Section I.B.

[9] Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002); Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002); Burden v. Check Into Cash of Ky., L.L.C., 267 F.3d 483 (6th Cir. 2001).

hesitation in charting an alternative course.[10] Adding to the confusion is existing commentary on this subject, which misapprehends a line of cases on signatory power and seeks to portray them as in conflict with recent federal appellate decisions.[11] However, this "conflict" is largely illusory because these federal cases can be interpreted harmoniously.

This article seeks to reconcile the federal authority and argues that the courts and commentators are asking the wrong question. Rather than focusing on the void/voidable distinction, courts should evaluate the arbitrability question by asking if the challenge to arbitration implicates the underlying agreement and, if so, whether the party resisting arbitration can raise a credible issue of signatory assent. Only if this latter showing can be made should the court decline (at least temporarily) to direct the matter to arbitration. Under this rule, certain—although not all—void contracts would be arbitrated. This position, of course, presupposes that *Prima Paint* should retain its vitality.

Part I examines the *Prima Paint* decision and highlights Justice Black's dissent, which provides the framework for arguments in favor of an exception for void contracts. This part also introduces the rising chorus of commentary that argues for the repeal or modification of *Prima Paint*. Part II turns to the so–called "signatory power" line of cases that have spawned so much confusion, and it introduces the question of assent. With that foundation in mind, Part III considers how federal and state courts have applied *Prima Paint* in the context of contracts alleged to be void *ab initio*. This Part highlights the doctrinal flaws in the states' approach to this question and discusses the impact of federalism on their analysis. Finally, Part IV argues for retention of the severability doctrine and explores the consequences of applying the *Prima Paint* rule to void contracts. Throughout the article, the role of federalism will be considered in relation to *Prima Paint* and its application to void contracts. In particular, Part IV outlines a role for state law that is consistent with the *Prima Paint* regime.

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[10] *See, e.g.*, Onvoy, Inc. v. Shal, L.L.C., 669 N.W.2d 344 (Minn. 2003); Nature's 10 Jewelers v. Gunderson, 648 N.W.2d 804 (S.D. 2002).

[11] *See, e.g.*, Tanya J. Monestier, *"Nothing Comes of Nothing". . . Or Does It??? A Critical Re–Examination of the Doctrine of Separability in American Arbitration*, 12 AM. REV. INT'L ARB. 223 (2001); Andre V. Egle, Note, *Back to* Prima Paint Corp. v. Flood & Conklin Manufacturing Co.: *To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement*, 78 WASH. L. REV. 199 (2003); Joshua R. Welsh, Note, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts*, 86 MARQ. L. REV. 581 (2002).

I. *PRIMA PAINT* AND THE SEVERABILITY DOCTRINE

A. *The Severability Doctrine*

Any discussion of the arbitrability of allegedly void contracts under the FAA must begin with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[12] In *Prima Paint*, the Supreme Court recognized and embraced the severability rule that treats arbitration clauses as separate from the underlying agreements in which they are contained.[13] *Prima Paint* involved a situation in which one party sought to avoid arbitration by claiming that the underlying contract was procured by fraud. Although some courts had followed this rule and recognized that a court, rather than an arbitrator, should determine whether fraud infected the contract, the Supreme Court squarely rejected that approach:

> We hold, therefore, that in passing upon a [section] 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.[14]

As a result, only if the party resisting arbitration could demonstrate that the fraud went to the making of the agreement to arbitrate could the court "proceed to adjudicate it."[15]

In reaching this result, the Court grounded its decision upon section 4 of the FAA.[16] Focusing on the language regarding the "making of the agreement for arbitration," the court determined that any issue which goes to the making of the agreement to arbitrate—such as a claim of fraudulent inducement of the arbitration provision—would require

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[12] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[13] *See id.* at 403–04.

[14] *Id.* at 404. The First Circuit was the most visible proponent of the minority approach, which recognized that the "severability" question was one of state law. *See, e.g.*, Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915, 923–24 (1st Cir. 1960).

[15] *Prima Paint*, 388 U.S. at 404.

[16] Section 4 provides, in pertinent part:

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . if the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be an issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4 (2004).

judicial resolution.[17] Conversely, the Court declined to read the FAA as permitting courts "to consider claims of fraud in the inducement of the contract *generally*."[18] This specific/general dichotomy has led some courts writing in the aftermath of *Prima Paint* to adopt a fairly simple analytical structure: if the challenge is targeted at the arbitration clause, it secures judicial resolution, whereas if it more broadly calls into question the underlying contract, then the matter is referred to arbitration.[19]

However convenient this mode of analysis might be, and despite its appropriateness for most garden–variety challenges to the enforceability of arbitration provisions, *Prima Paint* does not speak directly to situations in which a contract is claimed to be void. Justice Black's dissent, however, foreshadowed this very issue. Ever the textualist, Justice Black began his dissent with an analysis of the language of the FAA.[20] Section 4, with its "making of the agreement for arbitration" provision, does not provide an "explicit answer" in Justice Black's eyes to the severability point. Instead, it "merely poses the further question of what kind of allegations put the making of the arbitration agreement in issue."[21] Shifting attention to sections 2 and 3, Justice Black concluded that they simply require that arbitration agreements be enforced "unless the court, not the arbitrator, finds grounds 'at law or in equity for the revocation of any contract.'"[22] Justice Black believed that fraud undoubtedly fell in this category.[23]

Unable to discern any direct support for the severability rule in the text of the FAA, Justice Black dusted off the legislative history and provided several examples of legislators who presumed that an attack on a contract containing an arbitration provision based on fraud would be decided by a court.[24] Justice Black also relied on a common sense

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[17] *Prima Paint*, 388 U.S. at 403–04.

[18] *Id.* at 404.

[19] Professor Rau correctly criticizes this oversimplification of *Prima Paint*. *See* Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 333–34 (1999) (calling this a "bizarre and inexplicable misreading"). As explained more fully below, this approach fails to appreciate the importance of assent. *See infra* notes 57–94 and accompanying text.

[20] *Prima Paint*, 388 U.S. at 412 (Black, J., dissenting) ("Let us look briefly at the language of the Arbitration Act itself as Congress passed it.").

[21] *Id.* at 410 (Black, J., dissenting).

[22] *Id.* at 412 (Black, J., dissenting) (quoting section 2 of the FAA).

[23] *Id.* at 413 (Black, J., dissenting) ("Fraud, of course, is one of the most common grounds for revoking a contract.").

[24] *Id.* at 413–14 (Black, J., dissenting). While Justice Black's survey of the legislative history does not establish that a claim for fraud automatically secures a judicial audience, it does indicate that Congress may not have contemplated the severability rule as adopted by the Court. Presumably because the majority believed the

approach to the question: when fraud induces a party to enter into a contract, it induces that party to enter the *entire* contract, including any arbitration provision. He could not accept the notion that the contract could be broken down into discrete subparts—some of which were immune (at least in judicial eyes) from the fraud.[25]

Although Justice Black could not secure a majority for his position in *Prima Paint*, advocates of excluding void contracts from arbitration essentially echo his reasoning.[26] Justice Black recognized that "a court might, after a fair trial, hold the entire contract—including the arbitration agreement—void because of fraud in the inducement . . . . If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, *there is absolutely no contract, nothing to be arbitrated*."[27] The fact that the fraud could invalidate the entire contract, including the arbitration agreement, however, gave the Supreme Court majority no pause in ratifying the severability doctrine. Nevertheless, critics of arbitrability of void contracts generally argue that an arbitration clause contained in a contract deemed to be void *ab initio* can have no legal effect because the underlying contract does not exist. This point will be discussed in greater detail below in Part III.

B. *Determining That the FAA is Based on the Commerce Power*

Prima Paint's importance is not confined to the severability doctrine; another facet of the opinion also contributed greatly to the expansion of the FAA's scope.[28] Before *Prima Paint*, the Supreme Court had avoided determining under which power Congress had acted in promulgating the FAA. *Prima Paint*, however, was a diversity case, which forced the Court to decide whether the FAA was substantive or procedural under the *Erie* regime.[29]

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language of the FAA was clear on this point, it offered no response to the legislative history argument. *See also* Harding, *supra* note 7, at 450 ("The commentary has overwhelmingly and sharply criticized the Court's treatment of legislative history [in *Prima Paint*].").

[25] *See Prima Paint*, 388 U.S. at 407.

[26] *See, e.g.*, Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 110 n.9 (3d Cir. 2000) ("The dissenting opinion in *Prima Paint* does imply that the majority in that case rejected the void/voidable distinction."); Welsh, *supra* note 11, at 606 ("Justice Black, in his *Prima Paint* dissent, seemingly spoke to a situation not all that dissimilar from the situation in *Burden*.").

[27] *Prima Paint*, 388 U.S. at 412 (Black, J., dissenting) (emphasis added).

[28] *See* Harding, *supra* note 7, at 455 ("The second and arguably more far-reaching consequence [of *Prima Paint*] has been the applicability of the FAA to state court proceedings.").

[29] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *See also* Harding, *supra* note 7, at 449–50 (describing the Court's post-*Erie* options). For a more complete description of

The majority did not pause long in answering this question, devoting barely a paragraph to its analysis. It concluded that "it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"[30] Not surprisingly, Justice Black was incredulous in his dissent on this point. He again turned to the legislative history, which appeared to bolster his point that Congress "relied primarily on its power to create general federal rules to govern federal courts" in promulgating the FAA.[31] In the end, Justice Black sounded the federalism theme that has been echoed by commentators (as well as some courts) ever since. He stressed the need to find the agreement "valid and legally existent under state law" and bemoaned the ability given to federal courts by the majority to fashion federal law "inconsistent with state law."[32]

To Justice Black's chagrin, *Prima Paint* laid the groundwork for the expansion of the FAA into state courts. Two decades later, in *Southland Corp. v. Keating*,[33] the Court took this next logical step and applied the FAA to state courts.[34] The effects of *Prima Paint* and *Southland* should not be underestimated: "[b]y binding to the terms of the FAA all state courts, where most contract litigation takes place, the Supreme Court greatly extended the reach of the statute."[35] This expansion, as we shall see below, has not arrived without consequence.

The majority in *Southland* confronted a decision by the California Supreme Court holding that certain disputes were exempt (courtesy of a state statute) from arbitration. To support its conclusion that the FAA applied in state courts and preempted inconsistent state law, the Court returned to *Prima Paint*, suggesting that *Prima Paint* made this result inevitable: "[t]he statements of the Court in *Prima Paint* that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well

the history surrounding the diversity question and arbitration, see Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 186–89 (2002); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1309–21 (1985).

[30] *Prima Paint*, 388 U.S. at 405 (quoting H.R. REP. NO. 96, at 1 (1924); S. REP. NO. 536, at 3 (1924)).

[31] *Id.* at 418 (Black, J., dissenting).

[32] *Id.* at 422 (Black, J., dissenting). Justice Black repeatedly stressed that the outcome in *Prima Paint* would have differed had it been brought in state court. *Id.* at 424–25.

[33] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[34] By the time *Southland* was handed down, "[t]he clash between federal and state law was unavoidable . . . ." Harding, *supra* note 7, at 461.

[35] Hirshman, *supra* note 29, at 1346.

as federal courts."[36] Sidestepping "ambiguities" in the legislative history, the Court focused on the congressional purpose behind the FAA as well as the practical implications of a contrary rule.[37]

Dissenting in *Southland*, Justice O'Connor embarked on a tour of the FAA's legislative history, which convinced her that Congress never intended to compel application of the FAA in state courts. Because she believed that the 1925 Congress viewed the FAA as merely a procedural mechanism,[38] the statute could not be wielded as a substantive right for preemption purposes.[39] The federalism theme is echoed throughout her dissent.[40]

Prima Paint and *Southland* emanate from the Supreme Court's functionalist interpretation of the FAA.[41] Although many argue that the Court elevated policy goals above legislative history, even Justice O'Connor, who authored the stinging dissent in *Southland*, has since acquiesced in the Court's end result.[42] Justice Thomas appears to be the

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[36] *Southland*, 465 U.S. at 12.

[37] *Id.* at 13–15; *see also* Hayford & Palmiter, *supra* note 29, at 192 ("[T]he Court chose to remake jurisdictional history, transporting the jurisdictionally cautious 1925 statute into the rich post–New Deal jurisdictional environment."). For a recent defense of the *Southland* majority's view of legislative history, see Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002).

[38] *See Southland*, 465 U.S. at 26 (O'Connor, J., dissenting) ("Congress *believed* that the FAA established nothing more than a rule of procedure, a rule therefore applicable only in the federal courts.").

[39] This analysis, of course, is built on Justice Black's dissent in *Prima Paint*. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (Black, J., dissenting).

[40] *See, e.g.*, *Southland*, 465 U.S. at 23 (O'Connor, J., dissenting) ("Congress intended to require federal, not state, courts to respect arbitration agreements.").

[41] *See, e.g.*, Harding, *supra* note 7, at 463–64; Hayford & Palmiter, *supra* note 29, at 189 ("And as federal dockets became more congested, the Court became increasingly sympathetic toward the arbitration alternative."). *But see* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 956–61 (1999) (finding the docket management explanation unsatisfying). For contemporary commentary on the FAA, see Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926).

[42] *See, e.g.*, Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (O'Connor, J., concurring):

> Though wrong, *Southland* has not proved unworkable and, as always, 'Congress remains free to alter what we have done.' Today's decision caps this Court's efforts to expand the Federal Arbitration Act. Although each decision has built logically upon the decisions preceding it, the initial building block in *Southland* laid a faulty foundation. I acquiesce in today's judgment because there is no 'special justification' to overrule *Southland*.

Id. at 284 (internal citations omitted); *cf.* Drahozal, *supra* note 37, at 105 ("[T]here are 'strong indications' in the legislative history that the drafters of the FAA intended it to apply in state court . . . .").

only justice who continues to insist that the FAA does not apply in state courts.[43] This perception of judicial efficacy has contributed to the criticisms of the Supreme Court's pro–arbitration march and, more specifically, to *Prima Paint* itself. In the aftermath of *Southland* and two other notable Supreme Court arbitration decisions,[44] one commentator concluded that only "genuinely arbitration–specific but content–neutral state laws . . . present[] a viable limit on the scope of the federal arbitration scheme."[45] Given the ever–shrinking province of state law in the arbitration realm, it is not surprising that *Prima Paint* and its progeny have engendered a backlash, fueled in large part by federalism concerns.

C. Severability Under Fire

Despite the fact that *Prima Paint*'s severability doctrine has emerged as one of the "cornerstones" of arbitration law,[46] it has come under increasing attack in recent years. Countless commentators have called for the modification, if not outright repeal, of the severability doctrine.[47]

What seems to trouble most commentators is that the severability doctrine is a fiction that some believe is cut from whole cloth.[48] While

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[43] *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 459 (2003) (Thomas, J., dissenting) ("I continue to believe that the Federal Arbitration Act . . . does not apply to proceedings in state court."). Although Justice Scalia had previously sided with Justice Thomas on this issue, he did not join Justice Thomas' dissent in *Bazzle*.

[44] The other two cases of the FAA trilogy are *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

[45] Hirshman, *supra* note 29, at 1336–37. Professors Hayford and Palmiter elaborate on the role of state law in application of the FAA in Hayford & Palmiter, *supra* note 29, at 175.

[46] Rau, *supra* note 19, at 331.

[47] *See, e.g.*, Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789 (2002); Richard C. Reuben, *First Optics, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 827 (2003) (arguing that "the separability doctrine should be repudiated as archaic, unworkable, and broader than necessary to accomplish its legitimate policy goals"); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1456 (1991) ("*Prima Paint* must be modified . . . ."); Van Wezel Stone, *supra* note 41, at 948–49 (criticizing *Prima Paint*); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 135 (1996) (arguing that the Supreme Court should overrule *Prima Paint*'s severability doctrine); Todd Baker, Comment, *Arbitration: Arbitration in the 21st Century: Where We've Been, Where We're Going*, 53 OKLA. L. REV. 653 (2000).

[48] Justice Black dubbed the Court's reasoning "fantastic." *Prima Paint*, 388 U.S. at 407 (Black, J., dissenting); *see also* Stempel, *supra* note 47, at 1456 ("*Prima Paint* is premised on a false dichotomy to the extent that it separates issues of consent to the arbitration clause from issues of consent to the entire contract."); Ware, *supra* note 47, at

Prima Paint has been challenged on a number of grounds, perhaps the most persuasive attack, and the one now gaining widest currency, is based on federalism concerns.[49] Commentators have maintained that *Prima Paint* accomplished a fundamental shift in "arbitration federalism" because it "displaced state arbitration law in federal court."[50] This shift, however, has precipitated vigorous challenges to the new regime. Singing the federalism tune, other commentators have attacked the federal government's "intru[sion] into states' abilities to protect their citizens"[51] through a broad application of the FAA and have argued that "[e]ach state should have the opportunity to fashion its own laws to provide procedural and substantive protections during arbitration."[52] They have also documented a "much deeper level of reticence in the states" to the severability rule and have surmised that "the states do not view separability as a rule of such overwhelmingly normative desirability as to compel unanimity."[53] For their part, state–court judges have allowed federalism concerns to influence their analysis on the *Prima Paint* question.[54]

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131 ("The severability doctrine is a legal fiction . . . ."). *But see* Rau, *supra* note 19, at 341 ("The thrust of the notion of 'separability,' then, is not merely to create a fiction by which we can overcome the conceptual horror of an arbitral decision of contract invalidity that 'calls into question the validity of the arbitration clause from which [the arbitrators] derive their power.") (internal citations omitted).

[49] The remainder of the grounds will be discussed in greater detail in Part IV, *infra* notes 218–78 and accompanying text.

[50] Hayford & Palmiter, *supra* note 29, at 189; *see also* Baker, *supra* note 47, at 680 ("Federal decisions should not infringe upon individual states' power to interpret the law of their respective states.").

[51] Pittman, *supra* note 47, at 791.

[52] *Id.* at 798. Concerning *Prima Paint*, Professor Pittman posits that:

> one can conclude that *Prima Paint* is just another case of the Court's 'evolutive' interpretation in favor of a broad all–encompassing application of the FAA that serves the Court's own desires to reduce the workload in the courts even if such a desire is contrary to congressional intent and purposes.

Id. at 861. Even those who do not necessarily challenge *Prima Paint* readily acknowledge that "the Court has significantly federalized commercial arbitration." Hayford & Palmiter, *supra* note 29, at 176.

[53] Reuben, *supra* note 47, at 852. Professor Reuben catalogs various states by whether they have embraced *Prima Paint*. *Id.* at 852–54. This analysis is questionable, however, because it does not clarify whether it is limited to contracts governed by the FAA or to all contracts. More importantly, some of the representative cases do not actually support the categorization. For example, the study claims that Florida "reject[ed]" *Prima Paint* in its *Party Yards* decision. *Id.* at 854 n.206. As is explained below, the Florida appellate court declined to extend *Prima Paint* in that case to void contracts, but it did not purport to repudiate the severability doctrine. *See infra* note 223 and accompanying text.

[54] *See, e.g.*, Onvoy, Inc. v. Shal, L.L.C., 669 N.W.2d 344, 359 (Minn. 2003) (Gilbert, J., concurring in part) ("We must therefore be vigilant to preserve and improve Minnesota's ADR system where possible and should not be so eager to defer to the

Arbitral bodies, on the other hand, have embraced the severability doctrine. The American Arbitration Association's commercial dispute rules exemplify this position:

> The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.[55]

An important reality drives rules such as these: if a holding by the arbitrator that invalidated the contract thereby deprived the arbitrator of jurisdiction, it might send the arbitration system careening into chaos.[56] Parties would spend considerable time and expense proceeding through arbitration, only to be told at the end of their journey to return to court to recommence the whole exercise. This would also (perhaps subtly, perhaps not) encourage arbitrators not to find that the underlying contract was invalid for precisely the same reasons.

Suffice it to say, the battle over *Prima Paint* carries important consequences. Those championing a retreat from severability may be encouraged by a recent line of state–court decisions refusing to apply *Prima Paint* to claims involving purportedly void contracts. As discussed more fully below, these decisions are motivated more by federalism concerns than adherence to FAA norms.

II. A QUESTION OF ASSENT

The landscape of authority on the void/voidable question reveals three possible means for challenging the arbitrability of a dispute. A party might argue: 1) that at least one of the parties did not assent to the agreement in the first instance; 2) that the underlying agreement is void (generally based on state law), thereby preventing enforcement of an arbitration clause contained in the contract; or 3) that no contract exists because the contract is voidable for some reason. *Prima Paint* provides

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federal system unless clearly required under federal law."). *Onvoy* is discussed in greater detail below. *See infra* notes 206–15 and accompanying text.

[55] American Arbitration Association Commercial Rule 7(b), *available at* http://www.adr.org. *See also infra* notes 231–34 and accompanying text.

[56] *See* Rau, *supra* note 19, at 341; Monestier, *supra* note 11, at 227 ("The doctrine is necessary to ensure that an arbitrator's jurisdiction is not clouded by challenges to the validity of the underlying contract.").

an explicit answer to the third scenario, but litigants, courts, and commentators divide over how to reconcile the other two situations.

Closer inspection of the case law unveils the source of the misunderstanding. While courts are generally in agreement that cases in the first category (no assent) should not be arbitrated because one of the parties has not consummated an agreement to arbitrate, this harmony unravels when courts and commentators seek to utilize the concept of "no arbitration for want of assent" within the void contract realm. Contracts without assent are void. However, that does not mean that all void contracts escape arbitration.

Part of the problem arises because the focus on whether a contract is void or voidable in conjunction with determining arbitrability really asks the wrong question. The touchstone of arbitrability is assent. As a result, courts should ask whether the parties manifested assent to arbitrate instead of embarking on the void/voidable analysis. However, because courts have generally confronted the issue within the void/voidable framework, this article will assess how courts have responded to this question. Part IV will return to the matter of reframing the question with a focus on assent.

A. The "Signatory Power" Cases

Before analyzing the cases that specifically address the void contract argument, it is necessary to survey the so-called "signatory power" cases. This line of federal appellate cases stands for the proposition that when signatory power is implicated, such as when the party challenging arbitrability claims forgery or that its agent lacked authority to bind it to the agreement, a court, rather than an arbitrator, must determine whether the contract exists. The leading cases cited for this proposition hail from the Third, Ninth, and Eleventh Circuits.[57] Commentators and litigants alike have misconstrued this authority, however, and sought to utilize it as support for the proposition that courts must *always* pass on alleged void contracts.[58] These cases do not support such a rule; rather, they highlight the role that assent plays under the FAA.

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[57] *See, e.g.*, Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (3d Cir. 2000); Chastain v. Robinson–Humphrey Co., 957 F.2d 851 (11th Cir. 1992); Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136 (9th Cir. 1991). Other cases generally cited in similar vein include *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986) and *Sphere Drake Ins. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001). In *All American Insurance Co.*, Judge Easterbrook famously quipped, "No contract, no power." *Id.* at 591.

[58] *See, e.g.*, Egle, *supra* note 11, at 212 ("The Third, Ninth, and Eleventh Circuits have held that *Prima Paint* does not apply to contracts that are fraudulently executed,

1. Three Valleys

The progenitor of this line of cases is the Ninth Circuit's decision in *Three Valleys Municipal Water District v. E.F. Hutton & Co.*[59] Dissenting in *Three Valleys*, Judge Hall feared that the majority's opinion would "transform this area of the law into a morass of questionable distinctions."[60] While this prediction has unfortunately proven to be accurate, the signatory power cases can be harmonized with the void contract authority.

Three Valleys involved a scenario in which the party challenging arbitrability claimed that the agent who signed the contract in question lacked authority to bind the principal. The defendant prevailed at the district court by arguing that *Prima Paint* required an arbitrator to determine any issue regarding the underlying contract—including the threshold question of contract assent.[61] The Ninth Circuit, however, refused to read *Prima Paint* "so broadly" and instead limited the severability doctrine to attempts to avoid or rescind a contract.[62] In other words, challenges "to the very existence of a contract that a party claims never to have agreed to" may secure a judicial audience.[63] To emphasize this point, the Ninth Circuit painted a parade of horribles about what might transpire if the district court's rule prevailed:

> A contrary rule would lead to untenable results. Party A could forge party B's name to a contract and compel party B to arbitrate the question of the genuineness of its signature. Similarly, any citizen of Los Angeles could sign a contract on behalf of the city and Los Angeles would be required to submit to an arbitrator the question whether it was bound to the contract, even if its charter prevented it from engaging in any arbitration.[64]

The court explained that *Prima Paint* applied to "voidable" contracts,[65] which seemed to imply that it did not extend to "void"

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such as in situations where a party asserts that the arbitration clause is invalid because the underlying contract is void from its very inception.").

[59] Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136 (9th Cir. 1991).

[60] *Id.* at 1147 (Hall, J., dissenting in part).

[61] This is precisely the oversimplification criticized by Professor Rau. *See* Rau, *supra* note 19, at 333.

[62] *Three Valleys*, 925 F.2d at 1140.

[63] *Id.*

[64] *Id.*

[65] *Id.*

contracts.[66] The language selected by the Ninth Circuit ultimately generated considerable confusion: "a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate. Only a court can make that decision."[67] While the Ninth Circuit spoke of the existence of the agreement to arbitrate, subsequent cases have subtly shifted focus to the "existence" of the underlying agreement.[68]

Judge Hall, however, was unmoved by the majority's concerns. Highlighting the risks of focusing on the contract's existence, she cautioned that "if disputes that concern the 'making' of contracts must be litigated rather than subjected to arbitration, arbitration's potential as an alternative dispute resolution mechanism is substantially limited."[69] Instead, Judge Hall sought to focus the analysis on section 4 of the FAA and *Prima Paint*, arguing that the court should limit its inquiry to the making of the agreement to arbitrate.[70]

2. Chastain

The Eleventh Circuit, in *Chastain v. Robinson–Humphrey Co.*,[71] dealt almost exactly with the hypothetical situation posed by the Ninth Circuit in *Three Valleys*. The case involved a dispute over a securities trading account that the customer attempted to pursue in litigation. Although the defendant had a customer agreement purportedly signed by the plaintiff containing a broad arbitration clause, all parties recognized that the signature on the agreement did not belong to the plaintiff.[72] When the defendant moved to compel arbitration, the plaintiff submitted a detailed affidavit explaining that she had never signed the agreement at issue, and the defendant never disputed that fact.[73] While the defendant pointed to *Prima Paint* in an effort to support arbitrability of the dispute,

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[66] Subsequent Ninth Circuit authority has clarified, however, that *Prima Paint* indeed applies to void contracts. *See infra* notes 139–42 and accompanying text. Commentators have nevertheless interpreted *Three Valleys* as drawing such a distinction. *See, e.g.*, Monestier, *supra* note 11, at 225 ("The Ninth Circuit in *Three Valleys* clearly demarcated between contracts that are voidable at the option of one of the parties and those that are void *ab initio*.").

[67] *Three Valleys*, 925 F.2d at 1140–41 (internal footnote omitted). In a footnote, the court dismissed the defendant's contention that this was essentially adopting Justice Black's position from his *Prima Paint* dissent. *Id.* at 1141 n.4.

[68] *See, e.g.*, Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 106 (3d Cir. 2000).

[69] *Three Valleys*, 925 F.2d at 1145 (Hall, J., dissenting).

[70] *Id.* at 1145–47. She also argued that this result was dictated by prior Ninth Circuit precedent. *See* Teledyne, Inc. v. Kone Corp., 892 F.2d 1404 (9th Cir. 1990).

[71] Chastain v. Robinson–Humphrey Co., 957 F.2d 851 (11th Cir. 1992).

[72] *Id.* at 853.

[73] *Id.*

the Eleventh Circuit refused to extend the severability doctrine quite that far, explaining, "*Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract *never existed at all*."[74] In support of this notion, the Eleventh Circuit cited *Three Valleys* and quoted the hypothetical posed by the Ninth Circuit regarding forgery.[75] Though the court did not specify what quantum of evidence would be sufficient to initially defeat arbitration, it did require the party resisting arbitration to "substantiate the denial of the contract with enough evidence to make the denial colorable."[76]

3. Sandvik

Another case often cited in tandem with *Three Valleys* and *Chastain* is the Third Circuit's decision in *Sandvik A.B. v. Advent International Corp.*[77] *Sandvik* involved a commercial dispute between two parties to a joint–venture agreement with a curious twist. The party that brought suit to enforce the contract (Sandvik) simultaneously opposed the other party's (Advent) motion to compel arbitration, while Advent, which maintained that its agent did not have authority to enter into the agreement, sought to enforce the arbitration provision as severable under *Prima Paint*.[78] After sorting through the factual and procedural morass, the Third Circuit turned to the crux of the case. Like *Three Valleys*, the case raised the question of whether an allegation that a party lacked signatory power could (at least temporarily) defeat arbitration. Although Advent raised the *Prima Paint* banner, the Third Circuit quickly recognized that *Prima Paint* "did not grapple with what is to be done when a party contends not that the underlying contract is merely voidable, but that no contract ever existed."[79] Turning to *Three Valleys* for support, the Third Circuit concluded "that the doctrine of severability presumes an underlying, existent, agreement."[80] The shift in emphasis of "exist–ence" from *Three Valleys* was thus completed.

While *Sandvik* may have been explainable enough if it had stopped at that point, the Third Circuit continued to elaborate on the void/voidable distinction: "We draw a distinction between contracts that

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[74] *Id.* at 855.

[75] *Id.*

[76] *Id.* Of course, the detail in the plaintiff's affidavit, when coupled with the defendant's acknowledgment of the forgery, easily satisfied this threshold.

[77] Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (3d Cir. 2000).

[78] *Id.* at 100.

[79] *Id.* at 105.

[80] *Id.* at 106.

are 'asserted to be void' or non–existent, as is contended here, and thus are merely 'voidable,' as was the contract at issue in *Prima Paint*, for purposes of evaluating whether the making of an arbitration agreement is in dispute."[81] Despite the fact that the contract at issue in *Sandvik* was alleged to be non–existent because the agent lacked signatory power, the Third Circuit painted with a broader brush in its discussion of void contracts. Recapitulating prior precedent, the court concluded that its jurisprudence "supports distinguishing between void and voidable contracts."[82] The court then purported to expand the significance of this distinction to the *Prima Paint* context, notwithstanding its recognition that Justice Black's dissent in *Prima Paint* appeared to imply that the majority rejected the void/voidable distinction.[83] The court justified its minimalization of Justice Black's dissent by concluding that Justice Black was really just talking about voidable, not void, contracts.[84]

At first glance, the opinion in *Sandvik* appears to support the notion that void contracts should be excluded from the severability doctrine. However, the Third Circuit's extended discussion of void contracts is, in large part, *dicta*.[85] The basis of the holding rested on the same signatory power issue that motivated the Ninth Circuit in *Three Valleys*. Any attempt to sweep all void contracts within the ambit of that holding asks too much. Moreover, the court was in actuality applying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("CREFAA"),[86] which is in many respects similar to the FAA. However, CREFAA contains an important distinction. In one of its provisions, it provides that a court refer matters to arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[87] While it is unclear exactly how much weight the Third Circuit attributed to this aspect of CREFAA, the court did take care to point out that its conclusion was consistent with the "null and void"

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[81] *Id.* at 107.

[82] *Id.* at 109. In this regard, the court cited *Conners v. Fawn Mining Corp.*, 30 F.3d 483 (3d Cir. 1994), a case that did not involve *Prima Paint.*

[83] *Sandvik*, 220 F.3d at 110 n.9.

[84] *Id.* As explained throughout this article, the confusion over void and voidable contracts (as indicated in *Sandvik*) counsels against relying on the difference to draw a bright line distinction for arbitrability.

[85] District courts, however, appear to have taken *Sandvik*'s dicta seriously. The Middle District of Pennsylvania interpreted *Sandvik* as holding that the severability doctrine "does not permit enforcement when the encompassing contract is considered void *ab initio*." Bertram v. Beneficial Consumer Discount Co., 286 F. Supp. 2d 453, 457 (M.D. Pa. 2003).

[86] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[87] *Id.* at art. 2, § 3.

provision of CREFAA.[88] Obviously, the FAA contains no provision resembling the null and void clause of CREFAA.

B. Assent and the FAA

Motivating these decisions is the underlying notion of contractual assent. Not only is assent one of the basic cornerstones of contract formation, but it is also a foundation upon which the FAA is built.[89] The Supreme Court has repeatedly stressed the importance of assent in the context of the FAA: "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."[90] Accordingly, courts recognize a "fundamental principle" of arbitration: that "arbitration cannot be forced upon a party absent its consent."[91] Professor Rau accurately captures the point: "The need to find such assent is a conceptual cornerstone of *Prima Paint* . . . ."[92] The question of assent in the context of the severability doctrine walks hand–in–hand with the mandate of section 4 of the FAA that asks whether the "making" of the agreement to arbitrate has been put in issue.[93] Congress wanted to be sure that, before directing parties to arbitration, the court was comfortable that they had actually agreed to that method of dispute resolution. After all, an agreement to arbitrate forsakes a party's constitutional right to a jury trial, as well as other procedural benefits of litigation. Therefore, imbedded in the basic structure of the FAA is a need to establish that the parties actually agreed to arbitrate in the first place.[94] Unfortunately, the question of assent often seems to get lost in the void/voidable jurisprudence discussed below.

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[88] *Sandvik*, 220 F.3d at 110. However, in a subsequent opinion, the Third Circuit took care to minimize the distinction between CREFAA and the FAA: "Notably, although we supported our conclusion [in *Sandvik*] with references to the 'null and void' language in Article II of the Convention, we based our decision on straightforward notions of contract law rather than on any technical interpretation of the language of the treaty." China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 282 (3d Cir. 2003).

[89] Illustrating the importance of assent, Professor Barnett argues for a consent theory of contractual obligation. *See* Randy E. Barnett, *A Consent Theory of Contracts*, 86 COLUM. L. REV. 269 (1986).

[90] Mitsubishi Motors Corp. v. Solee Chrysler–Plymouth, Inc., 473 U.S. 614, 626 (1985); *see also* EEOC v. Waffle House, Inc., 534 U.S. 279, 293–94 (2002).

[91] Will–Drill Res., Inc. v. Samson Res. Co., 352 F.3d 211, 218 (5th Cir. 2003).

[92] Rau, *supra* note 19, at 336; *see also id.* at 335–36 (recognizing that "the only important question" for *Prima Paint* "is the existence of a legally enforceable assent to submit to arbitration"); *id.* at 303 ("[A]ctual consent is *both* sufficient and necessary as a foundation for arbitral jurisdiction.").

[93] 9 U.S.C. § 4 (2004).

[94] This argument should also answer, at least in part, critics of the severability doctrine. *See, e.g.*, Van Wezel Stone, *supra* note 41, at 965 ("Thus, the effect of the

III. TACKLING THE VOID/VOIDABLE QUESTION

A. Void and Voidable Contracts

While courts may become bogged down in labeling contracts as void or voidable, the distinction may, as a practical matter in the arbitration realm, be elusive.[95] In simplest terms, voidable contracts are those which "one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance,"[96] while for void contracts "the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor."[97]

The problem in placing undue reliance on the formulistic distinction between void and voidable contracts is largely twofold. First, the end result for both types of contracts—assuming the disadvantaged party does not wish to ratify the agreement—is the same: the contract is unenforceable.[98] Dwelling on the somewhat metaphysical question of whether the contract came into existence in the first place is thus, at the end of the day, a red herring. While the question may be of academic interest (or a quagmire for first-year contracts students), it has no practical relevance unless a rigid distinction between void and voidable contracts is drawn under the FAA.

Second, and perhaps most important, the distinction between void and voidable contracts is not a bright line. For example, contracts that once were considered void are now labeled as voidable,[99] some courts disagree about whether certain types of contracts are void or voidable,[100] and some types of contracts are void in some instances but voidable in

separability doctrine is to restrict, if not eliminate, contractual defenses based on lack of consent when arbitration clauses are involved.").

[95] *See, e.g.*, Monestier, *supra* note 11, at 235 (recognizing that the void/voidable distinction is "highly artificial" for purposes of severability because in both cases "the agreement of the parties is not legally binding"); Rau, *supra* note 19, at 336 n.129 (calling the distinction between void and voidable contracts in this context "little more than formalism, a pointless verbal game"); Ware, *supra* note 47, at 134 (noting that it is "often difficult to distinguish" between void and voidable contracts).

[96] RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981).

[97] *Id.* § 7 cmt. a.

[98] We see the confusion on this point reflected in Justice Black's *Prima Paint* dissent, where he imagines that a court could find the contract "void because of fraud in the inducement." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (Black, J., dissenting).

[99] JOSEPH M. PERILLO, 7 CORBIN ON CONTRACTS § 27.2 (2002) (recognizing that contracts with minors "formerly . . . were void" but that "[i]t is almost everywhere agreed that even such transactions are merely voidable rather than void").

[100] *Id.* § 27.10 (recognizing that contracts with the mentally infirm are largely held to be voidable, but acknowledging contrary authority).

others.[101] Commentators have accordingly cautioned against placing undue reliance on this largely artificial distinction.[102] Courts, on the other hand, although sometimes criticizing the distinction, have generally gravitated towards it for analytical purposes under the FAA.[103]

Perhaps illustrating the need to avoid rigid adherence to the void/voidable distinction for purposes of arbitrability, one district court recently considered whether a plaintiff's attack on arbitration should be classified as fraudulent inducement (voidable) or fraud in the factum (void).[104] To answer this question, the court was obliged to consider the origins of the distinction, and it accordingly provided a history of the doctrine hearkening back to "medieval England."[105] After concluding this tour (and concluding that the allegation was fraudulent inducement), the court acknowledged the absurdity of its task: "We cannot resist noting the irony in how a distinction created by sixteenth–century courts of equity to attract cases from the courts of law provided the opportunity for the federal courts to deflect adjudicatory responsibility onto arbitrators."[106] Ill–suited though it may be, courts continue to conduct this analysis and therefore it is important to understand how they have sought to reconcile these questions.

B. Federal Courts Respond to the Void Contract Argument

1. *Recent Rejections of This Argument*

With the signatory power cases in mind, it is appropriate to shift focus to the federal treatment of the void contract question, where a trio of recent decisions confirm that federal courts permit such matters to be arbitrated. The first of the trio, the Sixth Circuit's decision in *Burden v. Check Into Cash of Kentucky, L.L.C.*,[107] involved plaintiffs seeking to avoid *Prima Paint's* severability doctrine by claiming that the underlying contracts violated state usury laws and thus were void *ab initio.*[108]

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[101] *Id.* § 28.8 ("Normally, duress renders a transaction voidable at the election of the coerced party. In highly unusual situations, however, duress renders the transaction void.").

[102] *See supra* note 95.

[103] *See, e.g.*, Sphere Drake Ins. v. Clarendon Nat'l Ins. Co., 263 F.3d 26, 31 (2d Cir. 2001) ("Although this is a distinction that may have a metaphysical ring, it is a useful distinction for present purposes.").

[104] Giannone v. Ayne Inst., 290 F. Supp. 2d 553, 561–64 (E.D. Pa. 2003).

[105] *Id.* at 563–64.

[106] *Id.* at 564 n.14.

[107] Burden v. Check Into Cash of Ky., L.L.C., 267 F.3d 483 (6th Cir. 2001).

[108] *Id.* at 486.

Reasoning that a contract that never came into existence could not bind a party to arbitration, the plaintiffs pointed to the signatory power line of cases, arguing that those cases refused arbitration when the underlying contract never existed.[109] While acknowledging that "[s]everal of our sister circuits have found that *Prima Paint* does not apply to allegations of nonexistent contracts," the Sixth Circuit recognized that these authorities generally involve "questions of signatory power, not contract content."[110] The court found that, because the challenge to arbitrability in the case before it did not involve the narrow question of signatory power (because plaintiffs conceded that they executed the contracts at issue), the attack on the contract as a whole (including arguments based on allegations of illegality) had to be decided by an arbitrator, consistent with *Prima Paint*.[111]

Although the end result in *Burden* is clear enough, the circuitous route by which the court arrived there has engendered much confusion.[112] The Sixth Circuit began its *Prima Paint* analysis by noting that the Third and Ninth Circuits had previously held that the severability doctrine "applies to voidable, but not void, contracts."[113] Proceeding from this premise, the Sixth Circuit then appeared to attribute significance to the void/voidable distinction, characterizing it as "relevant for *Prima Paint* analysis because a void contract, unlike a voidable contract, was never a contract at all."[114] While at this point in the opinion the plaintiffs may have expected victory, the Sixth Circuit quickly did an about-face. Citing a prior Sixth Circuit case[115] wherein the court discussed the fraud in the factum/fraud in the inducement distinction for arbitration purposes, the *Burden* court concluded that:

> It is not clear that citation to *Prima Paint*, without more, answers the void *ab initio* question, inasmuch as *Prima Paint* failed to address the void *ab initio* question. Indeed, if anything, we are inclined to find that *Prima Paint* supports, rather than prohibits, excluding nonexistent

[109] *Id.* at 488–89.

[110] *Id.*

[111] *See id.* at 490.

[112] Welsh, *supra* note 11, at 607 (characterizing the *Burden* analysis as "haphazard"). In light of some of *Burden's* confusing language, one district judge, sitting by designation on the Sixth Circuit, criticized the analysis and called for the entire Circuit to revisit *Burden*. *See* Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Kean–Argovitz Resorts, 383 F.3d 512, 518–21 (6th Cir. 2004) (Cleland, J., concurring). The full Circuit declined the invitation. *See* 2004 U.S. App. LEXIS 24581 (6th Cir. Nov. 18, 2004) (denying rehearing en banc petition).

[113] *Burden*, 267 F.3d at 488 (citing *Sandvik* and *Three Valleys*). As shown above, this conclusion oversimplifies the cases cited by *Burden*.

[114] *Id.*

[115] C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp., 912 F.2d 1563 (6th Cir. 1990).

> contracts from the severability doctrine, because an allegation of a void contract raises exactly the same question as an allegation of a fraudulently induced arbitration agreement: whether the arbitrator has any power at all.[116]

After this detour, the Sixth Circuit professed to avoid the question it had raised concerning void/voidable contracts and arbitration.[117] At the same time, however, it set limits on the scope of the Third and Ninth Circuits' precedent relied upon by the plaintiffs, concluding that these cases spoke of contract assent rather than contract content.[118] In other words, any attempt to avoid arbitration by challenging the content of the underlying contract—as the plaintiffs did by raising the illegality defense—would fail based on *Prima Paint*. To be sure, the Sixth Circuit declined to opine on the precise *Three Valleys* scenario, but its end result suggests that claiming that a contract is "void" will only suffice to avoid arbitration if signatory consent is implicated.[119]

In refusing to allow void *ab initio* allegations to defeat arbitrability, both the Eleventh Circuit in *Bess v. Check Express*[120] and the Fourth Circuit in *Snowden v. CheckPoint Check Cashing*[121] embraced *Burden* without dwelling on its problematic dicta.[122] Both cases involved almost identical factual scenarios, with the plaintiffs selecting judicial forums based on claims that the underlying contracts were void *ab initio* as illegal under state law.

The Fourth Circuit in *Snowden* paid little heed to these arguments. Framing the issue within the context of *Prima Paint*, the Fourth Circuit explained that the severability doctrine generally channeled attacks on the underlying contract to arbitration. A possible exception arises, as recognized by the Sixth Circuit in *Burden*, when the "party seeking to avoid arbitration contends that it never assented in the first place to the contract containing the arbitration provision."[123] In the Fourth Circuit's view, challenges like the plaintiffs', based on illegality, did not provide a "viable basis" for avoiding arbitration because they implicate the

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[116] *Burden*, 267 F.3d at 489.

[117] *Id.*

[118] *Id.*

[119] The Sixth Circuit recently clarified that it accepts the exception carved out by *Three Valleys*. *See* Fazio v. Lehman Bros., 340 F.3d 386, 397 (6th Cir. 2003).

[120] Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002).

[121] Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002).

[122] In reaching its result, the Fourth Circuit "note[d] that our conclusion is squarely in accord with the Sixth Circuit's recent and well-reasoned decision in *Burden* . . . . In that case, the Sixth Circuit rejected the same void *ab initio* arguments that Snowden presses in the present appeal." *Snowden*, 290 F.3d at 637–38.

[123] *Id.* at 637.

contract as a whole and thus fall within the *Prima Paint* doctrine.[124] To support its position, the Fourth Circuit turned to *Burden*.[125]

Bess likewise involved an attack on a contract containing an arbitration clause, claimed by the plaintiff to be illegal under state law. The Eleventh Circuit refused this attempt to avoid arbitration, recognizing that the plaintiff "challenges the *content* of the contracts, not their *existence*."[126] As a result, allegations that the contract was a product of or permeated by illegality did not place the "making of the arbitration agreement in issue."[127] Under *Prima Paint*, a claim that a contract is void *ab initio* thus "is an issue for the arbitrator," not for the court.[128]

Upon considering plaintiff's arguments based on the signatory power line of cases, *Bess* paid particular attention to the court's prior decision in *Chastain* before concluding:

> [T]he focus of the court's decision in *Chastain*, as just explained, was on the question of assent, *i.e.*, whether the parties mutually had agreed to the contracts. By contrast, Colburn urges that the transactions in this case are void, not because he failed to assent to the essential terms of the contracts, but because those terms allegedly render the contracts illegal under Alabama law. At bottom, Colburn challenges the *content* of the contracts, not their *existence*. Indeed, unlike the contracts in *Chastain*, both the arbitration agreement and the deferred payment contracts were signed by Colburn, and there is no question about Colburn's assent to those contracts.[129]

Thus, the Eleventh Circuit, which issued the *Chastain* opinion, has subsequently explained that it cannot support the notion that void contracts are exempt from the *Prima Paint* rule.[130]

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[124] *Id.*

[125] *Id.* at 637–38.

[126] Bess v. Check Express, 294 F.3d 1298, 1305 (11th Cir. 2002).

[127] *Id.* at 1304 (internal quotations omitted).

[128] *Id.* at 1306.

[129] *Id.* at 1305–06.

[130] Lest any doubt remain, the Eleventh Circuit soon reiterated the *Bess* holding in *John B. Goodman, Ltd. v. THF Construction, Inc.*, 321 F.3d 1094 (11th Cir. 2003). Recognizing that the court in *Bess* had "held the issue of whether the deferred payment transactions were void as illegal was for the arbitrator, not the court, to decide," the Eleventh Circuit again applied this reasoning to compel arbitration notwithstanding a challenge to the legality of the underlying contract. *Id.* at 1096. Because the plaintiff "challenges the performance of the contracts, not their existence," and because plaintiff did not contest assent to the contracts, "this case falls within the 'normal circumstances' as explained in *Prima Paint*, *Chastain*, and *Bess*, in which the parties signed a presumptively valid agreement to arbitrate any disputes, including those relating to the validity or enforceability of the underlying contract." *Id.* at 1096 (emphasis omitted).

In *Burden*, *Snowden*, and *Bess*, the plaintiffs marshaled the same array of authority, but in each case the federal appellate courts recognized that these cases involved "questions of signatory power, not contract content."[131] As a result, the courts refused to extend the signatory power cases to encompass all void contracts.

2. *Summarizing the Federal Perspective*

Other federal circuits appear generally to be in accord with the views of the Fourth, Sixth, and Eleventh Circuits, as the First, Fifth, Seventh, and D.C. Circuits have all reached similar results.[132] While some of these cases do not specifically address the void contract issue, no other circuit (with the possible exceptions of the Second and Third) has refused to extend *Prima Paint* to void contracts.[133] One could argue that the Supreme Court has encouraged this trend by enforcing arbitration agreements notwithstanding underlying challenges based on the

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[131] *Bess*, 294 F.3d at 1305–06; Burden v. Check Into Cash of Ky., L.L.C., 267 F.3d 483, 489 (6th Cir. 2001) (distinguishing *All American Ins. Co.*, *Sandvik*, *Three Valleys*, and *Chastain*); *Snowden*, 290 F.3d at 637 (same).

[132] *See, e.g.*, Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 472 n.2 (5th Cir. 2002) (finding that the district court erroneously held that *Prima Paint* did not apply "to defenses which render a contract void"); Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 53 (1st Cir. 2002) ("[Plaintiffs] do not allege that [defendant] engaged in illegal conduct with respect to the arbitration clause itself."); Sweet Dreams Unlimited, Inc. v. Dial–A–Mattress Int'l, 1 F.3d 639, 642 (7th Cir. 1993); National R.R. Passenger Corp. v. Consol. Rail, 892 F.2d 1066, 1070 (D.C. Cir. 1990) (holding that the district court "erred in treating the arbitration clause as unenforceable merely because the substantive contract provision in dispute between the parties may—if the district court is correct about public policy—be unenforceable"); Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1162 (5th Cir. 1987) ("Because the Lawrences do not attack the arbitration agreement itself, *Prima Paint* requires that their claim of illegality be arbitrated pursuant to the contract."); 4 AM. JUR. 2D *Alternative Dispute Resolution* § 78 ("[W]here the alleged illegality goes to a portion of the contract that does not include the arbitration agreement, the entire controversy, including the issue of illegality, remains arbitrable.").

[133] Overlooked by the Fourth, Sixth, and Eleventh Circuits, however, is a 2001 decision from the Second Circuit, *Sphere Drake Insurance v. Clarendon National Insurance Co.*, 263 F.3d 26 (2d Cir. 2001). *Clarendon*, like *Sandvik*, involved the application of the CREFAA, rather than the FAA, yet some of the language employed by the Second Circuit recognized parallels between the two regimes. *Id.* at 30 n.2.

In this dispute between sophisticated commercial parties, Sphere Drake sought to avoid its commitment to arbitrate by arguing that all of the contracts in which the arbitration provisions appeared were void *ab initio*. To reach such a result, Sphere Drake posited that its agent breached fiduciary duties by entering into reinsurance contracts that were "commercially absurd" as well as "economically disastrous." *Id.* at 29. In discussing the distinction between void and voidable contracts, the Second Circuit noted the Third Circuit's decision in *Sandvik* as well as the Ninth Circuit's opinion in *Three Valleys*, two of the "signatory power" cases described above. *Id.* at 31.

Racketeer Influenced and Corrupt Organizations Act ("RICO") or on violations of federal policies, such as antitrust claims.[134] Indeed, the Sixth Circuit held arbitrable a claim of a contractual relationship gone awry by virtue of criminal conduct in part because "claims that, if true, amount to criminal behavior under RICO and antitrust laws have been held arbitrable by the Supreme Court."[135]

But can the signatory power cases sit comfortably alongside other federal authority? Much of the confusion about the signatory power cases can be traced to the word "existence," which courts have wielded somewhat haphazardly. Properly understood, the use in signatory power cases of the notion of contract existence revolves around whether the parties agreed to arbitration in the first place. This is what the Ninth Circuit in *Three Valleys* had in mind.[136] For example, if the parties agreed to arbitrate, but one party subsequently determined that the contract ran afoul of state law, the underlying contract at least came into existence, which gives an arbitrator jurisdiction. By the time we arrive at *Sandvik*, however, the shift in emphasis from the existence of the agreement to arbitrate to contract existence has been accomplished.[137] State courts have seized on this shift to justify the exclusion of void contracts from the arbitral realm.[138]

As evidence that the signatory power cases can coexist with the *Burden–Snowden–Bess* trilogy, both the Ninth and Eleventh Circuits have subsequently explained that *Prima Paint* controls an allegation of a void contract. In *3H & Associates, Inc. v. Hanjin Engineering & Construction Co.*,[139] one party claimed that the underlying "contract was illegal," and thus "arbitration could not be compelled."[140] If the signatory power cases truly meant that all void contracts escaped arbitration, the

[134] *See, e.g.*, PacifiCare Health Sys., Inc. v. Book, 123 S. Ct. 1531 (2003) (reversing denial of arbitration when plaintiffs argued that the arbitration agreements' prohibition on punitive damages in a RICO action denied them meaningful relief); *id.* at 1534 ("Notwithstanding Vimar's insistence that the arbitration agreement violated federal policy as embodied in COGSA, we declined to reach the issue and held that the arbitration clause was, at least initially, enforceable.") (describing Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995)).

[135] Fazio v. Lehman Bros., 340 F.3d 386, 394 n.1 (6th Cir. 2003).

[136] Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140–41 (9th Cir. 1991). Judge Hall dissented, however, fearing that the majority's opinion swept more broadly. *See id.* at 1445–57 (Hall, J., dissenting).

[137] One can easily see the possibility for confusion here. *See, e.g.*, Reuben, *supra* note 47, at 853 n.202 (equating "non–existent contracts" with "void" contracts).

[138] *See infra* Part IV.B.

[139] 3H & Assoc. v. Hanjin Eng'g & Constr. Co., No. 97-16751, 1998 WL 657722, at *2 (9th Cir. Sept. 3, 1998). Admittedly, Ninth Circuit rules prohibit citation to unpublished decisions, so this case is not technically precedent.

[140] *Id.*

Ninth Circuit should have agreed with this argument. Instead, the court was dismissive, holding that it "is incorrect as a matter of law."[141] Because there was no claim that the arbitration clause was illegal, the parties were "entitled to have an arbitrator determine whether the contract was illegal."[142] Likewise, the Eleventh Circuit in *Bess* laid to rest any doubts that *Chastain* controlled the void contract question.[143] These subsequent decisions offer some of the most persuasive evidence that the reach of the signatory power decisions is limited, and that reliance on the latter to support exclusion of void contracts from arbitration is misplaced.

C. The Void Contract Question in State Courts

1. *Whether* Prima Paint *Applies in State Courts*

Because the Supreme Court grounded the severability rule on section 4 of the FAA,[144] consideration of whether the rule applies in state courts seems first to beg the question of whether section 4 applies in state courts. The Supreme Court has twice addressed the latter question but has never resolved it: "[w]hile we have held that the FAA's 'substantive' provisions—§§ 1 and 2—are applicable in state as well as federal court . . . we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court . . . are nonetheless applicable in state court."[145]

Focusing on the section 4 issue, post-*Prima Paint* commentary was initially skeptical that state courts would be bound by the *Prima Paint* severability doctrine.[146] *Southland,* however, seemed to dictate a contrary

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[141] *Id.*

[142] *Id.* (citing *Prima Paint*); *see also* Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 476 (9th Cir. 1991) (distinguishing *Three Valleys* and reversing the district court's decision that there was no contract, and thus no arbitration clause, because it violated *Prima Paint*).

[143] *See supra* notes 126–29 and accompanying text.

[144] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 (1967) ("[W]e think that Congress has provided an explicit answer. That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement.").

[145] Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 n.6 (1989); *see also* Southland Corp. v. Keating, 465 U.S. 1, 16 n.10 (1984) ("[W]e do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state–court proceedings.").

[146] *See, e.g.*, P. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 731–32 (2d ed. 1973) (noting that *Prima Paint* "carefully avoided

result, but few courts have actually paused to consider whether *Prima Paint* applies at all in state courts in *Southland*'s aftermath.[147]

Courts have nevertheless gradually recognized that the *Prima Paint* rule is one of federal substantive law, regardless of its underpinnings.[148] Indeed, when the California Supreme Court recently addressed this matter, it relegated its discussion to a footnote:

> The *Prima Paint* court restricted its discussion to the standard to be applied in federal court. For that reason, and because the decision relies on language in section 4 of the USAA, rather than section 2 . . . one might question whether its rule applies in state courts even in transactions subject to the USAA. However, because the holding of *Prima Paint* is a substantive one limiting the circumstances under which arbitration clauses may be refused enforcement, it would appear to preempt contrary state law under the analysis of [*Southland*], and would apply in both state and federal courts.[149]

Other state courts, to the extent they have considered it, appear to agree that *Prima Paint* controls in contracts governed by the FAA.[150] That has not deterred state courts from refusing to apply the severability doctrine in contracts outside the scope of the FAA[151] or, as we shall see, in applying it inconsistently with their federal counterparts.

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any explicit endorsement of the view that the Arbitration Act embodied substantive policies that were to be applied to all contracts within its scope, whether sued on in state or federal courts"); Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 395–96 (1992) ("Other state courts, however, refused to apply the FAA, ruling that the holding in *Prima Paint* was limited to federal diversity cases."); Hirshman, *supra* note 29, at 1326–27.

[147] *See e.g.*, Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 84–85 (2003).

[148] The Supreme Court has encouraged this trend. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), the Court cited *Prima Paint* as an "example" of the FAA creating "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."

[149] Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061, 1073 n.8 (Cal. 1996). Likewise, the Eleventh Circuit in *Bess* confirmed that *Prima Paint* was a "question of federal law" and refused the plaintiffs' efforts to apply state law for the analysis. Bess v. Check Express, 294 F.3d 1298, 1306 n.3 (11th Cir. 2002).

[150] *See, e.g.*, *In re* Arbitration between A/S J. Ludwig Mowinckles Rederi & Dow Chem. Co., 255 N.E.2d 774, 775–76 (N.Y. 1970) ("*Prima Paint* leaves no plausible alternative but application of the Federal statute in state courts as well as in Federal courts.").

[151] *Cf.* Reuben, *supra* note 47, at 854 & n.206.

2. *The Varied State Applications of* Prima Paint

Notwithstanding the dictates of the Supreme Court, "[m]any courts have simply been unwilling to follow *Prima Paint*."[152] Perhaps not surprisingly, several of these examples hail from state courts.[153] Indeed, some commentators have actually argued that state courts are not bound by the severability rule.[154]

Consistent with the federalism concerns about severability's reach, some state judges have bristled at the functionalist explanation for the Supreme Court's pro–arbitration jurisprudence. In a particularly memorable exchange between the Montana Supreme Court and its federal counterpart, one state justice railed against "federal judges who consider forced arbitration as the panacea for their 'heavy case loads' and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy."[155] Though perhaps not expressed quite as bluntly, state courts in other jurisdictions have likewise shown little enthusiasm for *Prima Paint*. Courts in Alabama, South Dakota, Florida, and Minnesota have all recently refused to invoke the *Prima Paint* doctrine against a claim of an underlying void contract. As demonstrated below, the reasoning of all of these decisions is faulty—most misinterpret authority or simply fail to cite any to support their rulings, suggesting that federalism concerns have crept into the decisional calculus.

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[152] Ware, *supra* note 47, at 132. Professor Reuben echoes these sentiments: "The lower federal courts are of course obligated to follow *Prima Paint*'s rule of separability, although clearly they have done so with varying degrees of fidelity." Reuben, *supra* note 47, at 852.

[153] *See, e.g.*, Rau, *supra* note 19, at 332 ("Perhaps it is only natural to find the greatest confusion in the opinions of those state courts that have only recently and reluctantly been dragged into the modern era of arbitration—and that have been gamely, if haplessly, struggling with what it all means.").

[154] Reuben, *supra* note 47, at 852. As will be explained below, such a position is difficult to defend.

[155] Casarotto v. Lombardi, 886 P.2d 931, 939 (Mont. 1994) (Trieweiler, J., concurring), *cert. granted and judgment vacated sub nom.* Doctor's Assocs., Inc. v. Casarotto, 515 U.S. 1129 (1995).

a. Alabama

Historically, Alabama has not been particularly fond of arbitration.[156] While dragged reluctantly into the mainstream of enforcing arbitration agreements under the FAA, vestiges of Alabama's hostility to arbitration remain, as reflected in the Alabama Supreme Court's opinion in *Alabama Catalog Sales v. Gloria Harris M.Q., Inc.*[157] Like *Burden*, *Snowden*, and *Bess*, *Alabama Catalog Sales* arose in the context of a deferred presentment transaction.[158]

Writing before those federal decisions were handed down, the Alabama Supreme Court confronted the issue of whether an allegation that a contract is voided by illegality defeats arbitration.[159] Before commencing its analysis, the court explained its view of *Prima Paint*, which set the tone for the remainder of the opinion. The court stated, "Like a majority of courts, this Court reads *Prima Paint* narrowly."[160] Such a statement beckons further scrutiny. In support of this proposition, the court turned to a prior Alabama decision,[161] which, in turn, relied on *Three Valleys*. As discussed above, *Three Valleys* declined to extend *Prima Paint* to encompass claims that a party never entered into a contract.[162] The remainder of the "majority" of courts reading *Prima Paint* narrowly, however, was never revealed.

Nevertheless, seizing on the "existence" language from *Three Valleys*, the Alabama Supreme Court concluded that the plaintiff "challenge[d] the very existence of the contracts" by contending that they were illegal.[163] Framed thusly, the court had little trouble in concluding that "no claims arising out of or relating to the contracts are subject to arbitration."[164]

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[156] *See, e.g.*, Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645 (1999); David F. Sawrie, Note, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51 VAND. L. REV. 721, 741–43 (1998).

[157] Alabama Catalog Sales v. Gloria Harris M.Q., Inc., 794 So. 2d 312 (Ala. 2000).

[158] This backdrop is important because Alabama courts have also evinced little fondness for deferred presentment transactions, even concluding that they do not affect interstate commerce (and thus do not trigger the FAA). *See, e.g.*, Alternative Fin. Solutions, L.L.C. v. Colburn, 821 So. 2d 981 (Ala. 2001).

[159] *Alabama Catalog Sales*, 794 So. 2d at 314.

[160] *Id.* at 314 n.2.

[161] *See* Shearson Lehman Bros. v. Crisp, 646 So. 2d 613 (Ala. 1994).

[162] *See, e.g.*, *supra* notes 59–70 and accompanying text.

[163] *Alabama Catalog Sales*, 794 So. 2d at 316.

[164] *Id.* at 317. Interestingly, the court cites the Second Circuit's *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 462 F.2d 673 (2d Cir. 1972), as support for this pronouncement. *See Alabama Catalog Sales*, 794 So. 2d at 317.

This decision prompted a dissent. Justice See faulted the majority's reading of *Three Valleys*, emphasizing that the distinction between the cases was that the plaintiff in *Alabama Catalog Sales* admitted to signing the agreement.[165] In fact, the majority in *Alabama Catalog Sales* premised its opinion on a reading of *Three Valleys* that has been discredited by subsequent authority. By construing *Three Valleys* to preclude arbitration as long as a question was raised as to the existence of the underlying contract, the majority's decision conflicts with the more recent understanding that *Three Valleys* and cases of similar ilk do not stand for the broad proposition that any challenge to the validity of a contract secures a judicial forum. Rather, they emphasize that only when the case involves "questions of assent to the general contract,"[166] does the trial court intervene.[167] As in *Sandvik*, however, the confusion appears to stem at least in part from the meaning of the word "existence." In other words, should the court focus on the existence of the underlying contract (as prescribed by the majority) or the existence of the agreement to arbitrate (as the dissent would have it)?

b. South Dakota

Alabama, however, would not be the last state to refuse to apply *Prima Paint* to allegedly void contracts. In *Nature's 10 Jewelers v. Gunderson*,[168] the South Dakota Supreme Court confronted a similar legal issue on vastly different facts. The defendant in *Nature's 10* held itself out as a franchiser offering the opportunity to participate in the retail sale of jewelry at discount prices.[169] The company, however, had allowed its franchise registration (required under South Dakota law) to expire. After this expiration, the plaintiff, who was obviously unaware that the registration had lapsed,[170] sought to open a franchise and

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[165] *See Alabama Catalog Sales*, 794 So. 2d at 318 (Lyons, J., dissenting). Another justice also dissented, and quoted a lengthy passage from *In re Arbitration Between Nuclear Electric Insurance, Ltd. & Central Power & Light Co.*, 926 F. Supp. 428 (S.D.N.Y. 1996). *See, e.g.*, *Alabama Catalog Sales*, 794 So. 2d at 318–20 (Lyons, J., dissenting). However, the result in *Nuclear Electric* preceded the Second Circuit's decision in *Clarendon*.

[166] Bess v. Check Express, 294 F.3d 1298, 1306 (11th Cir. 2002).

[167] In the nearly three years since *Alabama Catalog Sales*' issuance, no state court outside of Alabama has even cited the decision, and the only two federal courts to consider it have refused to follow its lead. *See id.* at 1306 n.3; Arnold v. Goldstar Fin. Sys., Inc., No. 01 C 7694, 2002 WL 1941546, at *8 (N.D. Ill. Aug. 20, 2002).

[168] Nature's 10 Jewelers v. Gunderson, 648 N.W.2d 804 (S.D. 2002).

[169] *Id.* at 805.

[170] *Id.*

subsequently entered into a franchise agreement with the defendant.[171] Only after pouring substantial funds into this endeavor did the plaintiff discover that the company was essentially a scam: it fulfilled none of the promises that induced the plaintiff to enter into the transaction.[172]

In the resulting litigation, the defendant moved to compel arbitration based on the parties' agreement, and the trial court granted the application.[173] The case, however, took an interesting twist on appeal to the South Dakota Supreme Court. While the plaintiff sought reversal primarily on the basis of waiver, the court reached that result on an issue that none of the parties even briefed: whether a void contract precludes arbitration.[174] Seizing on the expiration of the franchise registration, a majority of the court concluded that the underlying contract could not be valid because it was unlawful under South Dakota law.[175] The court then reasoned that an obligation to arbitrate could not spring from a void contract, but the only support cited for this proposition was a Florida appellate decision.[176]

Aside from resting its decision on a point never raised by either party, perhaps the most curious feature of the majority's opinion is that it does not even acknowledge the FAA or *Prima Paint*. Indeed, a reader might understandably wonder whether the court was even applying the FAA, given that it only cited to state statutory and decisional authority. The dissent, however, points out that it was "uncontested" that the FAA governed the agreement at issue.[177] Moreover, the majority could not have simply overlooked *Prima Paint* because that case served as the foundation of the dissent.[178] The majority offered no response to the dissent's *Prima Paint* discussion.

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[171] *Id.*

[172] *Id.* at 806. The court chronicles these empty promises in vivid detail, which, as described below, may help explain its end result.

[173] *Id.*

[174] *Id.* at 807–09 (Konenkamp, J., dissenting). Justice Konenkamp was at a loss as to how the court could even address the void contract issue given that neither the trial court, nor the parties, considered it. He explained in detail why appellate courts do not pass on such waived issues absent the most compelling circumstances. *Id.* ("In our system of justice, litigants are entitled to notice that an issue is under consideration and to an opportunity to present evidence and argument."). The majority made no effort to dispute Justice Konenkamp's description of the record.

[175] *Id.* at 807 ("Because there was no effective registration statement on file, the agreement between Nature's 10 and Savage was unlawful from its inception.").

[176] *Id.* at 807 (citing Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000)) (discussed below). *See infra* notes 181–86 and accompanying text.

[177] *Id.* at 809 (Konenkamp, J., dissenting).

[178] *Id.* at 809–10 (Konenkamp, J., dissenting). Another interesting twist in this case is that the dissent relies on the Second Circuit's *Clarendon* decision to attack the majority. *See id.* at 810–11. Justice Konenkamp did not engage in a detailed analysis of the void/voidable distinction because "plaintiffs never even argued—much less produced

What appeared to be motivating the majority was its concern about the fraudulent nature of the defendant's representations. Although *Prima Paint* directs claims of fraudulent inducement of the underlying contract to arbitration, the majority side–stepped that issue by dwelling on the franchise registration issue. The majority's emphasis on the broken promises, as well as its closing point, however, betrays its true concerns: "*None of the promises were fulfilled.* The corporation evaporated. This Court will not permit the individuals who committed the illegal acts on behalf of the corporation to benefit from the arbitration clause in the illegal contract."[179] *Nature's 10* thus illustrates the dangers of a court pre–judging a case before the allegations have been proven and allowing it to influence the arbitrability issue. It also exemplifies a state court elevating its public policy goals above the FAA.

c. Florida

Florida has a mixed record on the *Prima Paint* issue. A pair of intermediate appellate decisions handed down prior to the *Burden–Snowden–Bess* trilogy refused to apply *Prima Paint* to claimed void contracts,[180] while another intermediate appellate decision written in the wake of the federal decisions ruled to the contrary. As a result of this conflict, the Florida Supreme Court granted review of the latter case.[181]

In *Party Yards, Inc. v. Templeton,*[182] the court considered whether an allegation that a contract was usurious (and thus illegal) would defeat arbitrability.[183] The court answered that question in the affirmative, although it appeared to couch its conclusion based on the language of the agreement. The arbitration provision at issue extended to any controversy "arising under" the agreement, and the Florida court determined that the usury violation "does not arise under an agreement. Rather, it arises under state statutory law."[184] Citing to the principle of the FAA placing arbitration clauses on equal footing with other contractual provisions, the

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evidence to show—that the contract is void. Nor have they argued that the arbitration clause itself is voidable." *Id.* at 811.

[179] *Id.* at 807 (emphasis added).

[180] *See* Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000); FastFunding The Co. v. Betts, 758 So. 2d 1143 (Fla. Dist. Ct. App. 2000).

[181] Buckeye Check Cashing, Inc. v. Cardegna, 824 So. 2d 228 (Fla. Dist. Ct. App. 2002), *review granted,* 844 So. 2d 645 (Fla. 2003). The author drafted the appellate brief, as well as the supreme court brief, for the defendant in *Buckeye.*

[182] *Party Yards,* 751 So. 2d at 121.

[183] The court deemed this question a matter of "first impression." *Id.* at 123.

[184] *Id.*

court refused to elevate the arbitration clause above state law.[185] In support of its ultimate holding, the Florida court relied on the line of signatory power cases discussed *supra*.[186] The court did not, however, have the benefit of the recent federal appellate decisions.[187]

In *Buckeye Check Cashing, Inc. v. Cardegna*,[188] another Florida appellate court followed *Bess* while distinguishing *Party Yards*, holding that void *ab initio* allegations could not defeat arbitration.[189] Although the plaintiffs in that case cited *Chastain*, the court recognized that *Chastain* involved a situation in which one party claimed that she had not signed the agreement at issue.[190] Likewise, the court understood that any consideration of *Chastain* had to be informed by the Eleventh Circuit's subsequent decision in *Bess*, which rejected that proposition of law.[191] As in *Bess*, no question existed regarding assent to the contracts, and the plaintiffs failed to challenge the arbitration provisions themselves: "appellees did not argue that they did not enter into the arbitration agreement, nor did they challenge the validity of the terms of the arbitration agreement."[192] Absent such challenges, the plaintiffs could not call into question the making of the agreement for arbitration, and thus the court was required to compel arbitration.[193]

The court also distinguished *Party Yards* based on the fact that the *Party Yards* court limited its decision to situations where "the language in the arbitration provision of the contract is not broad enough to encompass a usury violation."[194] By contrast, the language of the arbitration provisions in the contracts at issue in *Buckeye* "expressly includes statutory claims and is broad enough to encompass a usury violation."[195]

With the Supreme Court of Florida poised to settle the conflict between *Buckeye* and *Party Yards*, an interesting wrinkle has emerged in this debate. The same appellate district that handed down *Party Yards*

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[185] *Id.* The focus on state law also suggests that federalism concerns influenced the outcome.

[186] *Id.* at 124.

[187] A subsequent decision from the same appellate district followed *Party Yards* without critical analysis. *See* FastFunding The Co. v. Betts, 758 So. 2d 1143 (Fla. Dist. Ct. App. 2000).

[188] Buckeye Check Cashing, Inc. v. Cardegna, 824 So. 2d 228 (Fla. Dist. Ct. App. 2002), *review granted*, 844 So. 2d 645 (Fla. 2003).

[189] *See Buckeye*, 824 So. 2d at 231.

[190] *Id.* at 230–31.

[191] *Id.*

[192] *Id.* at 232.

[193] *Id.*

[194] Party Yards, Inc. v. Templeton, 751 So. 2d 121, 123 (Fla. Dist. Ct. App. 2000).

[195] *Buckeye*, 824 So. 2d at 231 n.1.

appears to have reversed itself in *FastFunding The Co., Inc. v. Betts.*[196] Without expressly overruling *Party Yards*, the court cited *Buckeye* favorably: "We agree with the reasoning of the Fourth District . . . ."[197] This recent decision also offers a graphic example of the costs involved in forcing courts, rather than arbitrators, to decide the void contract issue.[198]

As this article was about to go to press, the Supreme Court of Florida released its much–awaited decision in *Buckeye.*[199] The court continued the trend of state courts finding that allegations of void contracts kept the dispute out of arbitration. And, again, the court turned to the rigid void/voidable distinction and placed reliance on the signatory power cases.[200] When confronted with the Eleventh Circuit's contrary decision in *Bess*, the majority opinion sought to distinguish it because "*Bess* was expressly resolved under federal law, not state law principles."[201] At the same time the court invoked Florida public policy and contract law principles to avert arbitration, it never disputed that the matter was being decided under the FAA.[202] Nor did it offer an explanation for how such state–law principles can escape the preemptive scope of the FAA.

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[196] *See* FastFunding The Co., Inc. v. Betts, 852 So. 2d 353 (Fla. Dist. Ct. App. 2003) [hereinafter *FastFunding II*].

[197] *Id.* at 355. An intervening decision may have changed the court's tune. In *Betts v. Ace Cash Express, Inc.*, 827 So. 2d 294 (Fla. Dist. Ct. App. 2002), the same appellate district ruled that the deferred presentment transactions under attack in *Buckeye* and *Party Yards* did not run afoul of Florida law. Because the underlying agreements could no longer be deemed illegal and void, it took the wind out of *Party Yards'* sails. In fact, two of the judges in *FastFunding II* were members of the *Party Yards* panel. This development thus suggests that *Party Yards* was responding to a perceived inequity rather than attempting to achieve doctrinal harmony.

[198] *FastFunding II* made its debut before the appellate court in 2000 when the court instructed the trial court to resolve the void contract issue. Three years after the appellate decision, and several years after filing, the case returned for an encore in the appellate court only for the parties to discover that they indeed had to arbitrate their dispute. Such a result is inimical to the FAA's basic goals of resolving cases quickly and inexpensively.

[199] Cardegna v. Buckeye Check Cashing, Inc., No. SC02–2161, 2005 WL 106966 (Fla. Jan. 20, 2005) [hereinafter *Buckeye II*].

[200] *Id.* at *3.

[201] *Id.* at *4. The majority made no other effort to distinguish (or disavow) the wealth of federal authority. Further, the attempt to distinguish *Bess* overlooked the fact that the issue of state law arose in *Bess* when the party resisting arbitration sought to invoke state law to avoid arbitration (much like the plaintiffs did in *Buckeye*). The Eleventh Circuit refused this invitation because federal law governed the analysis. *See* Bess v. Check Express, 294 F.3d 1298, 1306 n.3 (11th Cir. 2002). In other words, the court rejected precisely the same argument that the Florida Supreme Court ultimately followed.

[202] *Buckeye II*, 2005 WL 10966 at *8 (Cantero, J., dissenting) ("The parties concede that they are governed by the FAA.").

A concurring justice on the Florida Supreme Court concluded that the issue was indeed one of federal law but simply refused to follow the weight of federal authority.[203] He feared that the federal cases "go too far towards treating arbitration clauses as a class of 'super' clauses, immune from a state's otherwise generally applicable contract law."[204] Dissenting, Justice Cantero agreed that federal law governed the analysis but could conceive of no reason for departing from the weight of federal authority. He distinguished the signatory power cases and appreciated the confusion caused by the void/voidable distinction:

> Thus, the distinction in the cases is not between voidable contracts (which are arbitrable) and void contracts (which are not), as the majority finds. Rather, it is between contracts to which the plaintiff admittedly assented, but now claims are *either* void or voidable, and contracts to which the plaintiff gave no assent.[205]

The majority did not respond to these points in its opinion.

e. Minnesota

In *Onvoy, Inc. v. Shal, L.L.C.*,[206] Minnesota became the second state court (behind South Dakota) to exclude void contracts from arbitration since the trio of federal appellate decisions.[207] It also became the second such court to ignore these opinions.

The party resisting arbitration in *Onvoy* claimed that the underlying contract was void by virtue of an interested–director or ultra vires transaction.[208] Although the dispute was between two commercial parties, the court took care to note its sympathies for "critics of the broad federal policy favoring arbitration" who bemoan the implications for consumer plaintiffs.[209] By embracing the principle that courts should decide the void contract issue, the Minnesota Supreme Court believed that its rule

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[203] *Id.* at *5 (Bell, J., concurring).

[204] *Id.* at *6 (Bell, J., concurring).

[205] *Id.* at *13 (Cantero, J., dissenting).

[206] Onvoy, Inc. v. Shal, L.L.C., 669 N.W.2d 344 (Minn. 2003).

[207] The court began its opinion by noting that the FAA applied to the dispute and that federal law governed, notwithstanding the fact that Minnesota state law did not embrace the severability doctrine. *Id.* at 351. The divergence between state and federal law on the severability point may have motivated the court's ultimate decision. In any event, the contrast highlights the federalism aspect of this question.

[208] *Id.* at 353–54.

[209] *Id.* at 352 n.6. One of the concurring justices elaborated on this point in detail, writing separately "to highlight my concerns regarding the potential for abuse of power when parties with unequal bargaining power contract to arbitrate their disputes." *Id.* at 357 (Anderson, J., concurring).

"leaves room for consumers to escape obvious abuses of power in contracting."[210]

To reach this result, the court turned to the Second Circuit's decision in *Sphere Drake Insurance Co. v. Clarendon*, the Third Circuit's decision in *Sandvik*, and the Ninth Circuit's infamous *Three Valleys* decision.[211] Interpreting these cases as "carv[ing] out an exception" to *Prima Paint*, the court drew a rigid distinction between void and voidable contracts.[212] While the party seeking arbitration pointed to *Prima Paint*, the court did not mention any of the recent federal or state decisions on point,[213] thus making no effort to reconcile its decision with any contrary authority.

Much like *Nature's 10* and *Alabama Catalog Sales*, *Onvoy* sounds a protectionist theme. The court refused to yield to the FAA when what it considered the core interests of its citizens were at stake. The concurring opinions only highlight this point as they stress the need to protect Minnesota consumers (notwithstanding the fact that this was a commercial dispute)[214] and to protect Minnesota's alternative dispute system from undue federal encroachment.[215] The sharp federal/state divide, as well as the states' protectionist motifs, illustrate that commentators are not the only ones attacking *Prima Paint* based on federalism concerns.

f. Summarizing the State Perspective

The cases highlighted above demonstrate that the states, though perhaps not unanimously, have generally resisted applying *Prima Paint* to void contracts.[216] While these decisions have not been explicit

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[210] *Id.* at 352. Interestingly, as support for this proposition, the court cited a Minnesota statute allowing courts to refuse to enforce unconscionable contracts. Unconscionability is a doctrine suited to remedying "obvious abuses of power in contracting" because it generally considers both procedural and substantive aspects of the contract. *Id.* The court did not explain how (or whether) unconscionability fails to fulfill its purpose, as it proceeded to decide the void–contract question.

[211] *Id.* at 353. The court also pointed to *Chastain* and *I.S. Joseph*. *Id.* at 354.

[212] *Id.* at 353.

[213] Consequently, it is not clear whether the party seeking arbitration neglected to discover the federal appellate decisions or whether the court intentionally disregarded them.

[214] *Onvoy*, 669 N.W.2d at 357–58 (Anderson, J., concurring).

[215] *Id.* at 359 (Gilbert, J., concurring in part and dissenting in part).

[216] A pair of recent state court cases, however, suggests a possible softening of this trend. Both the California Supreme Court and a Texas appellate court have followed federal authority on the void contract question. *See* Saint Agnes Med. Ctr. v. Pacific Care of Cal., 82 P.3d 727, 734–35 (Cal. 2003); Dewry v. Wegner, 138 S.W.3d 591 (Tex. Ct. App. 2004) (following the Fifth Circuit decision in *Will–Drill Resources, Inc. v. Samson*

repudiations of the severability doctrine, they have revealed states' underlying hostility to the concept. This hostility becomes more pronounced in cases that do not involve the FAA, as some states, freed of federal preemption concerns, have refused to incorporate severability principles under state law.[217]

The most recent state decisions are also conspicuous for their failure to reconcile their positions with contrary federal appellate court decisions. The distinction between signatory assent and other void contract challenges appears to have fallen on deaf ears. In addition, the protectionist theme that resonates throughout these opinions illustrates the danger of courts prejudging disputes on the merits and presuming that arbitrators are not capable of reaching the correct result for themselves. This is precisely what the severability rule was designed to avoid.

IV. TOWARDS A MORE COHERENT FRAMEWORK FOR SEVERABILITY

The divisions in the case law led to the following question: is there hope for a more consistent regime? To address that question, however, we must first decide whether to retain the embattled severability doctrine. If *Prima Paint* survives, then the next question becomes whether the void/voidable distinction imposes any limitation on the severability doctrine.

A. *Whither* Prima Paint*?*

1. *One Recent Attack*

In one of the more recent attacks on *Prima Paint*, Professor Reuben offers three basic reasons for jettisoning severability: it is unworkable, circumstances have changed, and repudiation will cause no hardships.[218] Each of these shall be examined in turn.

Res. Co., 352 F.3d 211 (5th Cir. 2003) discussed *infra* notes 246–50). The Supreme Court of Connecticut also seemed to reach the same result, although it did not profess to apply the FAA. *See* Nussbaum v. Kimberly Timbers, Ltd., 856 A.2d 364 (Conn. 2004).

[217] *See, e.g.*, Marks v. Bean, 57 S.W.3d 303, 307 (Ky. Ct. App. 2001) ("The Minnesota, Tennessee and Louisiana approaches make more sense to us than *Prima Paint* and its separability doctrine.") (footnotes omitted), *overruled in part by* Louisville Peterbilt, Inc. v. Cox, 132 S.W.3d 850 (Ky. 2004); Atcas v. Credit Clearing Corp. of Am., 197 N.W.2d 448 (Minn. 1972), *overruled in part by* Onvoy, Inc. v. Shal, L.L.C., 669 N.W.2d 344 (Minn. 2003); Shaffer v. Jeffery, 915 P.2d 910 (Okla. 1996) ("But the separability doctrine has not met with universal favor."); *see also* Strickland, *supra* note 146, at 405 ("Some states, however, reject this doctrine of separability.").

[218] *See* Reuben, *supra* note 47, at 879–81.

To be sure, confusion exists in the case law regarding *Prima Paint*, particularly with respect to the void contract issue. But that alone does not render severability "unworkable." As explained more fully below, an appreciation of the scope of the signatory power cases and the importance of assent leads to a more consistent regime.[219] While no regime (or even a world without severability) would be devoid of confusion, the framework proposed by this article should make severability function more smoothly.

Professor Reuben's second criticism is based on a change in circumstances: by this he means that courts are no longer as hostile to arbitration as they were when the Supreme Court handed down *Prima Paint* in 1967.[220] Now that the old attitude has changed (and, some would argue, gone too far the other way), the foundation of *Prima Paint* has eroded. The erroneous assumption upon which this argument is built is that *Prima Paint* was not designed simply to overcome judicial reluctance to embrace the FAA. Instead, *Prima Paint* was a practical response to a problem that the Court recognized could quickly unravel the FAA.[221] If any party could escape its commitment to arbitrate by alleging fraud, courts would essentially be compelled to decide dispositive issues at the outset, and the agreement to arbitrate would not be worth the paper on which it was written. Therefore, shifting judicial attitudes do not command overturning *Prima Paint*.

Reuben's third criticism is that repudiation will cause no hardship. Detractors from *Prima Paint* acknowledge that repudiation of the severability doctrine would render arbitration "slower and costlier," and would often obligate courts to resolve "issues that will often be intimately intertwined with the merits that will go to the arbitrator if the court finds that the parties have formed an enforceable container contract."[222] Yet they typically gloss over these concerns without pausing to appreciate what the practical implications would be. As the Florida appellate decision illustrated in *FastFunding II*, these costs would be substantial.[223] The parties in that case litigated for nearly five years, including two trips to the appellate court, before finally being told that they had to settle their dispute in the forum to which they initially agreed—arbitration. Scenarios such as this would be repeatedly played

[219] *See infra* notes 232–34 and accompanying text.

[220] *See* Reuben, *supra* note 47, at 879–81.

[221] *See, e.g.*, Stempel, *supra* note 47, at 1390 ("*Prima Paint* was a breakthrough for supporters of arbitration in that it prevented parties from avoiding arbitration by asserting a contract rescission defense based on nonarbitration provisions of the contract.").

[222] Ware, *supra* note 47, at 136. Professor Pittman believes that the rationale behind *Prima Paint* was to "reduce the workload in the courts." Pittman, *supra* note 47, at 861.

[223] FastFunding The Co., Inc. v. Betts, 852 So. 2d 353 (Fla. Dist. Ct. App. 2003).

out in courts across the country if severability fell by the wayside. Accordingly, the repercussions of repudiation would be palpable.

As a result, these arguments for eliminating severability prove unsatisfying because they fail to grasp the purpose of *Prima Paint* or the reality of repudiation. Because numerous others have also attacked severability, however, it is appropriate to see if any of their arguments carry more persuasive force.

2. *Did the Supreme Court Get It Wrong?*

Another justification for abolishing severability is that the Supreme Court simply got it wrong when it analyzed the legislative history in 1967.[224] Even if Justice Black had the better of the legal reasoning,[225] as Professors Hayford and Palmiter point out:

> There is no use crying over spilt milk. The Court's revisionism, effectively creating a national policy favoring arbitration, has shown itself to have legs . . . . Whatever the statute may have meant originally and however its drafters may have conceived the legislation's original jurisdictional reach, it has become today a national charter of private arbitral freedom.[226]

The point made by Justice O'Connor in her *Southland* dissent rings true here as well: Congress has made no effort to intervene and advise the Court that it botched the analysis.

Moreover, although there are certainly legitimate counter–arguments, the FAA does focus attention on the making of the agreement to arbitrate. Congress could have altered the focus to the making of the underlying agreement (as some courts have subsequently done), but it did not. From this perspective, the Supreme Court's decision is defensible. And it is difficult to deny that *Prima Paint* played an integral role in solidifying a national policy in favor of arbitration. In short, an argument that the Supreme Court made a misstep in 1967 does not support a radical reshaping of the FAA at this point.

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[224] Professor Reuben labels this the "statutory analysis" critique. *See* Reuben, *supra* note 47, at 842.

[225] *See, e.g.*, Harding, *supra* note 7, at 452 ("The legislative history makes at least one thing clear: the Court's pronouncement in *Prima Paint* that it was 'clear beyond dispute' that Congress was relying on its interstate commerce power when it enacted the FAA was certainly an overstatement."). *But see* Drahozal, *supra* note 37, at 122–60 (defending *Southland's* interpretation of legislative history).

[226] Hayford & Palmiter, *supra* note 29, at 178–79. The "remaking of the statute, far from cataclysmic, has proceeded in stages." *Id.* at 182.

3. *Other Challenges*

A host of other challenges have been made to *Prima Paint*, based on a variety of theories. These include institutional competence, ethics, and that severability leaves litigants with few viable challenges to arbitration.[227] Each of these points merits a few words.[228]

The institutional competence attack posits that judges are better equipped than arbitrators to decide questions of law regarding contract formation. Perhaps so, but one could expand this argument and say that judges are more qualified to interpret federal law regarding antitrust, RICO, and the panoply of employment antidiscrimination statutes. In other words, the argument proves too much; if it were accepted, it would justify repealing the FAA. And the argument also betrays hostility to arbitration. Why should we presume that arbitrators are incompetent and incapable, rather than well–trained and fair?[229]

The ethics critique suggests that it is improper to delegate to paid arbitrators the authority to determine the validity of the underlying contract if it provides them with jurisdiction.[230] This critique, however, actually supports severability. Recall the arbitration rule from the FAA quoted earlier in the article, which makes clear that if the arbitrator determines that the underlying contract is invalid, he or she nevertheless retains jurisdiction over the dispute.[231] In the absence of severability, a finding of contractual infirmity would place the arbitrator in an awkward position that the ethics critique understandably laments. What the critique misses, however, is that severability resolves this problem.

The reality of endorsing the severability doctrine is that it sharply curtails the available challenges to arbitration: "[r]are is the case in

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[227] Reuben, *supra* note 47, at 842–47; Baker, *supra* note 47, at 676 ("The next problem with the Court's reading of the FAA is that complex questions of law are now left to arbitrators.").

[228] Professor Reuben also argues that the Supreme Court's decisions in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002), "raise serious questions about the continued vitality of *Prima Paint*'s doctrine of separability." Reuben, *supra* note 47, at 826. Professor Rau, by contrast, dismisses the notion that *Kaplan* undercuts *Prima Paint*. *See* Rau, *supra* note 19, at 337 ("It should be clear enough by this point that there is not the slightest conflict between *Kaplan* and *Prima Paint* as properly understood."). This article addresses the continuing vitality of *Prima Paint*; thus, an in–depth look at subsequent Supreme Court cases that do not specifically speak to *Prima Paint* or severability is beyond its scope.

[229] *See, e.g.*, Stempel, *supra* note 47, at 1402 ("This view posits that arbitrators should be presumed to make the correct decision on the question of legality."). Needless to say, one could probably find both arbitrators and judges to illustrate either perspective.

[230] Reuben, *supra* note 47, at 846–47.

[231] *See supra* note 47 and accompanying text.

which a party seeking to avoid arbitration will be able to point to a deformity of contract formation that is directed exclusively at the arbitration clause and not at all to the larger container contract."[232] At the same time, this limitation should not overlook the fact that procedure under the FAA "is particularly generous in allowing an objecting party recourse to a court either before, during, or after an arbitration in order to seek a judicial determination of the scope of consent."[233] And, as explained below, parties retain the ability to challenge the arbitration clauses specifically on grounds such as unconscionability, which is far from a hollow right.[234]

4. *Upholding* Prima Paint

In the face of such challenges, severability must stand. Severability allows for an effectively functioning FAA and honors the intent of the parties who have agreed to arbitrate. Because this article has repeatedly emphasized the time and cost savings achieved through severability, it will not belabor that point. But it is appropriate to say a few words about the parties' intent.

When two parties execute an agreement with a broad arbitration clause directing all disputes arising out of, or relating to, the contract to arbitration, they generally expect (at the outset, at least) to resolve their differences in arbitration. If the parties prefer to leave certain matters, such as fraudulent inducement, to judicial resolution, they are certainly free to do so. Assuming that they have not, however, severability is consistent with contractual expectations. In the absence of severability, parties would have no basis for the expectation that they would actually have to arbitrate their dispute; their lawyer would simply advise them that they could avoid arbitration if they could conceive of a means to attack the entire agreement.

Equally important, severability keeps courts from delving into the merits of the parties' dispute when they have already agreed to arbitration. If, for example, the court were vested with the power to determine fraudulent inducement in the underlying agreement and found no such fraud, it would then direct the parties to arbitration with an advisory opinion on the merits for the arbitrator. If the arbitrator then disagreed with the court, the parties might soon find themselves running in circles. In short, if the parties have agreed to arbitration, then the court should not rule on the merits of their dispute.

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[232] Reuben, *supra* note 47, at 851.

[233] Rau, *supra* note 19, at 352 (internal quotations omitted).

[234] *See infra* notes 257–60 and accompanying text.

Aside from the structure of the FAA and the parties' intent, severability is also consistent with international arbitration regimes.[235] Although the international view is certainly not dispositive, it does suggest that the concerns of opponents of *Prima Paint* may be exaggerated. One need only glance at rules for international arbitration to appreciate the acceptance of severability, even as applied to purportedly void contracts. The International Chamber of Commerce,[236] the United National Commission on International Trade Law,[237] and the AAA[238] have all adopted rules permitting an arbitrator to retain jurisdiction notwithstanding a finding that the underlying contract was void. Far from an aberration, severability comports with the practice in other corners of the globe.

B. Reassessing the "Void" Contract Question

Assuming the continued vitality of *Prima Paint*, the next question is how far the severability doctrine reaches. Rather than address this question in the context of the void/voidable framework, an appreciation of the distinction drawn by the signatory power cases reveals that courts and parties are asking the wrong question when they focus on whether the underlying contract should be classified as void or voidable. The question should instead be twofold: 1) does the challenge to arbitration implicate the underlying agreement rather than the arbitration clause specifically; and 2) if so, can the party resisting arbitration make a colorable showing that it did not assent to arbitration in the first place. Becoming bogged down in the sometimes metaphysical debate between void and voidable contracts only diverts attention from the assent question. Using a categorical approach to void and voidable contracts is also problematic because certain subsets of each demand judicial scrutiny on the threshold issue of assent.

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[235] For a general discussion of this area, see Note, *Arbitration Under Private International Law: The Doctrines of Separability and Competence de la Competence*, 17 FORDHAM INT'L L.J. 599 (1994); Monestier, *supra* note 11, at 232–34.

[236] ICC Rules of Arbitration, art. 6 ("[T]he Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement.").

[237] UNCITRAL Rules, art. 21 ("A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.").

[238] AAA International Arbitration Rules, art. 15 ("A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.").

This framework naturally leads to the question: why devote such attention to assent?[239] The answer begins with the Supreme Court and ends with the language and purpose of the FAA. "Arbitration," as the Supreme Court famously reminds us, "is a matter of consent not coercion."[240] And as described above, the FAA, like basic contract doctrine, depends on mutual assent. Moreover, the FAA focuses on the making of the agreement to arbitrate, which complements due regard for assent.

Immediately, of course, line drawing problems emerge. One might argue that if assent is so important, why not focus on any issue implicating the voluntariness of consent to ensure that parties (particularly consumers) freely relinquished their right to a judicial forum?[241] The assent window, however, should not be widened to allow all such challenges to escape arbitration because they pose the risk of swallowing the rule. Once we proceed down the path of examining the "quality" of the party's consent, we soon find ourselves walking in the wrong direction. As explained throughout, the efficacy of the severability doctrine is realized in directing all disputes about the merits of a particular matter to arbitration, regardless of the collateral consequences to contract formation. If the parties have agreed to send all of their disputes to arbitration (including ones about fraud and the like), courts should not delay that process. For this reason, assent should not earn the distinction of being simply the newest theory for wreaking havoc in arbitration jurisprudence. Rather, it should be limited so that a party cannot secure a judicial audience simply by claiming that they had no choice but to sign the contract (because it was boilerplate, etc.).[242]

Recognition of the importance of assent to arbitration goes a long way to resolving the confusion that permeates judicial decisions on this subject and to providing a more consistent framework.[243] Acceptance of

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[239] After all, "[t]he requirement of mutual assent to form a contract may be the most underappreciated aspect of contract law." Ware, *supra* note 47, at 113.

[240] Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989); *see also* AT&T Tech., Inc. v. Communications Workers, 475 U.S. 643, 648 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed so to submit.").

[241] For instance, Professor Ware devotes substantial attention to the issue of voluntary consent in his article. *See* Ware, *supra* note 47, at 138–59.

[242] As discussed below, such an argument could form the basis for an unconscionability challenge, which implicates the arbitration agreement specifically, but not the issue of assent.

[243] For example, a circuit split over whether mental incapacity defeats arbitrability could better be resolved if the courts applied the assent test. *See* Spahr v. U.S. Bancorp Inv., Inc., 330 F.3d 1266 (10th Cir. 2003) (finding that mental capacity is a question for the court); Primerica Life Ins. Co. v. Brown, 304 F.3d 469 (5th Cir. 2002) (directing parties to arbitration). The Fifth Circuit applied the overly simplistic view of *Prima Paint*

the principles embraced in the signatory power line of cases also defuses a hypothetical used to call the severability doctrine into question. For example, some commentators have presumed that strict application of *Prima Paint* would compel arbitration in a scenario in which one party claimed that it signed an arbitration agreement under duress.[244] The most extreme scenario would involve one party pointing a gun at the other party and forcing the party to sign the agreement.[245] Because the touchstone of these cases is assent, then a basic application of their principles would dictate that a court should determine the threshold claim of assent; in the duress example, it would decide whether the party was in fact improperly coerced into signing.[246]

The duress exception, however, is fairly narrow. Contract law generally recognizes that questions of duress do not implicate contractual consent—the party has made a choice, after all. Certain extreme forms of duress, however, such as the at–gunpoint scenario, "involve the absence of consent rather than coerced consent."[247] As a result, an employee could not claim, for example, a failure of assent when his employer required him to execute an arbitration agreement under penalty of loss of employment.[248]

Perhaps a more realistic (and modern) example of assent arises in some agreements executed via computer. In *Specht v. Netscape Communications Corp.*,[249] the Second Circuit framed a question of arbitrability regarding a contract executed over the Internet within the rubric of assent. The plaintiffs in *Specht* had downloaded free software from the Internet, and the defendant argued that, by consummating that transaction, they had thus agreed to the software's license agreement.[250] Unlike typical "clickwrap" transactions, however, the web site at issue

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that, because the party challenged the underlying agreement, they must reconvene in arbitration. *Id.* at 472–73. Yet the Tenth Circuit's analysis was no more sound; it concluded that, if the challenge goes both to the entire contract and to the arbitration agreement, the court must decide the dispute. *Spahr*, 330 F.3d at 1270. The confusion in both cases could be resolved by evaluating the problem in terms of assent.

[244] *See, e.g.*, Ware, *supra* note 47, at 130.

[245] *Id.* at 134.

[246] Professor Rau likewise explains that "[t]here is simply no agreement to *anything*, for example, where a signature has been forged, or where an authentic signature was obtained at gun point." Rau, *supra* note 19, at 335.

[247] PERILLO, *supra* note 99, § 28.8. *But see* Lawrence Kalevitch, *Contract, Will & Social Practice*, 3 J.L. & POL'Y 379, 393–95 (1995) (criticizing the view that duress does not generally implicate assent).

[248] PERILLO, *supra* note 99, § 28.3.

[249] Specht v. Netscape Communications Corp., 306 F.3d 17 (2d Cir. 2002).

[250] *Id.* at 20–21.

simply invited consumers to download, and the license terms were not available on that web page.[251]

Without so much as mentioning *Prima Paint*, the court dove directly into the assent analysis. Applying California law, the court concluded that a consumer does not manifest assent by clicking on a download button "if the offer did not make clear to the consumer that clicking on the download button would signify assent" to any sort of license agreement.[252] Because the license terms in *Specht* were buried on other web pages and it was not apparent from the download page that the consumer was agreeing to anything, the court had little trouble finding a lack of assent that defeated arbitrability. At the same time, the extreme nature of this case suggests a limited application of its scope. The Second Circuit was quick to distinguish this case from other "clickwrap" or Internet transaction cases because in the latter examples "there was much clearer notice . . . that a user's act would manifest assent to contract terms."[253] Similarly, in the world of paper contracts, courts generally enforce arbitration clauses contained in documents that are incorporated by reference into the agreement signed by the party resisting arbitration.[254]

In one of the most recent attempts to harmonize the divergent opinions on the void/voidable contract question, the Fifth Circuit struggled to find a coherent framework in *Will–Drill Resources, Inc. v. Samson Resources Co.*[255] The case involved a contract for the sale of real property in which one party maintained that the "agreement" was actually an offer to purchase the property that was never transformed into a binding contract. Predictably, the parties exchanged jabs with respect to *Prima Paint*, severability, and the void contract question. After sifting

[251] *Id.* at 23–24. The court defined "clickwrap" as an agreement that "presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked." *Id.* at 22 n.4.

[252] *Id.* at 29.

[253] *Id.* at 33–34. The court cited, among others, *America Online, Inc. v. Booker*, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001), *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. Ct. App. 1999), and *Hotmail Corp. v. Van Money Pie, Inc.*, No. C98–20064 JW, 1998 U.S. Dist. LEXIS 10729 (N.D. Cal. Apr. 16, 1998).

[254] *See, e.g.*, Aceros Prefabricados, S.A. v. Tradearbed, Inc., 282 F.3d 92, 97–98 (2d Cir. 2002); R.J. O'Brien & Assoc., Inc. v. Pipkin, 64 F.3d 257, 260 (7th Cir. 1995) ("A contract . . . need not contain an explicit arbitration clause if it validly incorporates by reference an arbitration clause in another document."); First Investors Corp. v. Am. Capital Fin. Servs., Inc., 823 F.2d 307, 309 (9th Cir. 1987); Maxum Founds., Inc. v. Salus Corp., 779 F.2d 974, 978 (4th Cir. 1985) ("It is well settled that, under the Federal Arbitration Act, an agreement to arbitrate may be validly incorporated into a subcontract by reference to an arbitration provision in a general contract."). *But see* Van Wezel Stone, *supra* note 41, at 1017–24 (attacking the incorporation by reference rationale).

[255] Will–Drill Res., Inc. v. Samson Res. Co., 352 F.3d 211 (5th Cir. 2003).

through the mess, as well as the relevant case law on the subjects, the Fifth Circuit endeavored to articulate a standard applicable to disputes of this nature. The Fifth Circuit concluded that the severability doctrine:

> [R]ests on the assumption that there is an underlying agreement. That one of the parties later disputes the enforceability of that *agreement* does not change the fact that at some point in time, the parties reached an agreement, and that agreement included the decision to arbitrate disputes arising out of that agreement.[256]

Dancing around the void contract question, the Fifth Circuit found that even if an arbitrator found that the underlying agreement was void, "the agreement existed long enough to give the arbitrator the power to decide the dispute."[257] In the end, the court rested its analytical framework on the *existence* of the underlying agreement: "[w]e therefore conclude that where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute."[258]

While the Fifth Circuit admitted that it drew a "fine distinction" between existence and enforceability that "will occasionally be elusive,"[259] the court ignored the obvious alternative: it could have simply adopted assent, rather than contractual existence, as its guiding principle. Perhaps in most cases, the results under either scenario would be the same. However, focusing on assent, as this article argues, comports with the structure and purpose of the FAA, as well as basic contractual principles.

Properly understood, then, the inquiry on void contracts really asks whether courts or arbitrators should resolve disputes about the enforceability of the underlying contract because questions of assent will be decided by the court. This focus on assent, however, certainly will not satisfy those who maintain that void contracts should *never* be arbitrated. Their basic arguments against applying *Prima Paint* to allegedly void contracts (aside from the previously discussed detour about "existence") are that such a rule impermissibly restricts a state's rights to govern contract law and improperly elevates arbitration clauses above "normal" contracts.[260]

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[256] *Id.* at 218.

[257] *Id.* at 218–19. Interestingly, the court provides no citation for this proposition. Again, it illustrates the perils of an undue emphasis on whether the contract is void or voidable.

[258] *Id.* at 219.

[259] *Id.*

[260] *See, e.g.*, Welsh, *supra* note 11, at 610–13; Baker, *supra* note 47, at 676.

1. *The Role of State Law*

The concerns about erosion of state law and ability to police contracts are not illegitimate, but misplaced. Applying *Prima Paint* to void contracts poses no greater threat to federalism than imposing *Prima Paint* in state courts in the first place. The framework and structure of the FAA are admittedly expansive and leave little room for states to step in and assert their own contractual policies.[261] But there are important exceptions. As Professors Hayford and Palmiter argue, state law still plays a vital role in "arbitration federalism."[262]

First, section 2 of the FAA instructs courts to turn to state law when the party resisting arbitration levels a challenge at the making of the agreement to arbitrate.[263] Perhaps the challenge that has proved most effective in this regard is attacks on an arbitration agreement based on unconscionability.[264] Numerous courts, federal and state alike, have refused to enforce arbitration agreements based on a finding of unconscionability. Courts have made the unconscionability finding on a number of grounds, including fees charged for arbitration,[265] unreasonable time limitations periods,[266] and retention unilateral rights to modify the arbitration agreement.[267] The doctrine of unconscionability

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[261] *See, e.g.*, Harding, *supra* note 7, at 425 ("The Court's broad interpretation of the FAA has challenged the role of the states in regulating a specific kind of contract, arbitration agreements, a field traditionally handled by the states."); Hirshman, *supra* note 29, at 1336 ("Thus, under a broad construction of *Prima Paint*, the FAA itself should effectively shut off almost all application of state law to cases under the statute."); Stempel, *supra* note 47, at 1392 ("The net effect of *Prima Paint* is to restrict the activities of courts in policing arbitration agreements for consent and fairness.").

[262] *See* Hayford & Palmiter, *supra* note 29.

[263] *See* 9 U.S.C. § 2 (2000):

> A written provision in any maritime transaction or a contract evidencing a transaction involving interstate 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 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.

Id.

[264] *See, e.g.*, Hirshman, *supra* note 29, at 1337 (noting that state law challenges such as unconscionability "present[] a viable limit on the scope of the federal arbitration scheme"); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001 (1996).

[265] *See, e.g.*, Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003).

[266] *See, e.g.*, Alexander v. Anthony Int'l, L.P., 341 F.3d 256 (3d Cir. 2003).

[267] *See, e.g.*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004).

accordingly has emerged as an important check on the enforcement of arbitration agreements.

Second, Professors Hayford and Palmiter propose a notion of "arbitration federalism" that recognizes the ability of state law to fill in the gaps left open by the FAA. Divining three "spheres of preemption," they argue that, in the first sphere, state law is displaced in the preemptive core of essential matters addressed by the FAA.[268] The second sphere involves the preemptive boundary of "non–essential matters addressed by the FAA."[269] Because the FAA did not intend to "occupy the field" on these matters, states have a role to play as long as they generally promote, rather than hinder, arbitration.[270] The final sphere considers matters that are not addressed by the FAA.[271] Within this sphere, the validity of state law is presumed, though it should be consistent "with the twin purposes of the FAA: namely, to overcome hostility to arbitration and to effectuate the parties' arbitration agreement."[272]

Third, and this is perhaps to state the obvious, state law helps determine whether the parties assented to the contract in the first place. As a result, if a party challenges the contract based on forgery, lack of agent authority, certain types of duress or other similar means, state law resolves the dispute.[273]

Finally, arbitrators are constrained by state law in rendering their awards. To be sure, the grounds for vacating an award under the FAA are extremely limited.[274] However, courts will not enforce arbitration awards that are made in manifest disregard of the law.[275] Manifest disregard of

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[268] *See* Hayford & Palmiter, *supra* note 29, at 193–94; *see also id.* at 195 (recognizing "a clear and manifest purpose of Congress to preempt a field traditionally occupied by state law") (internal quotations omitted).

[269] *Id.* at 195–96.

[270] *Id.* at 195–200.

[271] *Id.* at 200 ("The FAA's coverage is incomplete.").

[272] *Id.* at 201 ("So long as a state does not seek to introduce revocation standards or limits on an arbitration agreement not applicable to other contracts, state arbitration rules meant to give content to the parties' arbitral intentions further the FAA's pro–arbitration policies."). In their article, Professors Hayford and Palmiter survey the Revised Uniform Arbitration Act.

[273] *See, e.g.*, Fazio v. Lehman Bros., 340 F.3d 386, 394 (6th Cir. 2003) ("Ordinary state–law principles that govern the formation of contracts will apply to this analysis.") (internal quotations omitted); Hayford & Palmiter, *supra* note 29, at 177 (recognizing that the FAA treats "the question of contract revocation, on generally applicable grounds such as fraud, duress, and unconscionability, as one of state law—leaving no federal role").

[274] *See* 9 U.S.C. §§ 10–11 (2000). For a more thorough discussion of this area, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996).

[275] *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995) ("When faced with questions of law, an arbitration panel does not act in

the legal standard accordingly answers an extreme hypothetical; applying *Prima Paint* to contracts claimed to be illegal would force parties in, say, a murder–for–hire contract, to go to arbitration. While such a dispute would be directed to arbitration, presumably no arbitrator would enforce the underlying contract, but even if he or she did, a court would not enforce the arbitrator's award because it would be in manifest disregard of the law.[276]

Therefore, state law can and should play an important role in ensuring that arbitration agreements are not unconscionable, providing background rules where the FAA is silent, determining whether assent to the agreement took place, and guiding the arbitrator's decision. While this role may not be as prominent as states would prefer,[277] it nevertheless strikes an appropriate balance between the need for uniformity required by the FAA and the states' desire to police contractual relationships.

2. *Elevating Arbitration Provisions Above "Normal" Contracts?*

The claim that sending a "void" contract to arbitration elevates the arbitration provision above normal contracts confirms a fundamental misunderstanding of the severability doctrine. Despite the fact that "the contract may well be void and rife with fraud, . . . these facts do not void the arbitration clause, which must be analyzed independently."[278] Perhaps the best way to appreciate the impact of severability is to imagine an arbitration clause in a void contract and then to imagine that same clause being lifted from that agreement and inserted in a contract between two parties for the sale of an apple. If the arbitration provision in the latter agreement is enforceable, it should likewise be enforceable in the former. Therefore, invoking an arbitration provision in a void

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manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.").

[276] *See, e.g.*, Theis Research, Inc. v. Brown & Bain, 240 F.3d 795, 796 (9th Cir. 2001) ("TRI's assertions that the arbitration award was invalid because it was based on an illegal contract are properly resolved in the context of TRI's motion to vacate the award."); Stempel, *supra* note 47, at 1402 ("In addition, an egregious arbitrator error concerning contract illegality can be viewed by the court as a 'manifest disregard of the law.'"). Litigation on alleged "illegal" contracts is often more contentious than the obvious examples of a murder–for–hire or drug–selling contract.

[277] *See, e.g.*, Hirshman, *supra* note 29, at 1336 ("[U]nder a broad construction of *Prima Paint*, the FAA itself should effectively shut off almost all application of state law to cases under the statute."). As explained above, this statement is somewhat of an exaggeration.

[278] *Fazio*, 340 F.3d at 394.

contract does not "elevate" it above other contractual provisions—severability simply mandates that it is scrutinized independently of the contract in which it is contained.

In the end, those who assail the fiction of severability are prone to overlook the fiction inherent in "void" contracts. That is to say, if the party seeking to avoid arbitration freely entered the contract upon its own accord, then the post hoc effort to invalidate the contract cannot wipe it from existence. Only through legal presumptions can we arrive at such a result.

V. CONCLUSION

Although severability may very well be a doctrine born of convenience, it quickly established itself as an indispensable component of arbitration law under the FAA regime. *Prima Paint* therefore ushered in the modern era of arbitration with its twin holdings: acceptance of severability and recognition that the FAA was based on Congress's commerce power. The latter aspect of the decision paved the way for enforcement of the FAA in state courts and concomitant preemption consequences.

Now that the state–court step has been taken, should we, as several commentators have urged, retreat from *Prima Paint* out of concern for federalism? After all, a federalism revolution has unfolded in other corners of the law, such as the federal government's interstate commerce powers. Severability, however, ensures that courts avoid deciding the merits of the underlying dispute, prevents trivialization of the FAA by sending disputes to the forum to which the parties have agreed, and honors the parties' choice. Chipping away at the severability doctrine does not honor parties' intent; rather, it provides parties with an impetus to seek creative ways to avoid arbitration. Many contractual disputes involve one party claiming that the underlying contract is in some way invalid. Transferring all such cases to the judicial arena would jeopardize the FAA, for every crevice in the severability doctrine would certainly be exploited.[279] For these reasons, the attacks on *Prima Paint* ultimately fall flat.

Yet the more nuanced void contract question persists. As explained throughout this article, reliance on the artificial distinction between void and voidable contracts has resulted in a patchwork of decisions left floundering without a compass. The Fifth Circuit's proposal, narrowing

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[279] *See, e.g.*, Monestier, *supra* note 11, at 239 (suggesting that a distinction between void and voidable contracts for purposes of severability "promotes manipulation of pleadings and abuse of process").

attention to a distinction between contractual existence and continuing enforcement, fares little better. Rather than encourage strategic shifts in litigation tactics, this article proposes a framework for addressing the void contract question that is faithful to the structure and purpose of the FAA. Settling the focus on the question of assent will return the inquiry to the threshold of the agreement to arbitrate, where the FAA directs us. Applying *Prima Paint* to void contracts thus does not represent a radical expansion of severability—indeed, Justice Black essentially forewarned of this possibility in his dissent.

There remains, though, the question of what to do with state law. To be sure, the Supreme Court's expansive interpretation of the FAA has swept it aside in many respects. However, that certainly does not mean that state law plays an inconsequential role in the modern application of the severability doctrine. As explained above, the FAA requires that courts turn to state law to evaluate specific challenges to the arbitration clause and leaves open numerous gaps that state law can fill. Furthermore, state law resolves the critical question of whether the parties assented to the agreement and places an important check on the ability of arbitrators to disregard fundamental state policies. While this role for state law may not be as prominent as some courts and commentators would prefer, it should not be so readily discounted.

Federalism concerns accordingly should not derail the severability doctrine. Although the two concepts might seem to make strange bedfellows, increasingly they are becoming intertwined. The Supreme Court's definition of the FAA's turf can, and should, survive so long as we appreciate the role reserved for state law. The severability doctrine should accordingly retain its place at the "cornerstone" of arbitration law[280] and should be applied to void and voidable contracts alike, with a healthy regard for issues of assent.

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[280] Rau, *supra* note 19, at 331.