

‘PRIMA PAINT’ PUSHED COMPULSORY ARBITRATION UNDER THE ‘ERIE’ TRAIN

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Abstract

As the face of commerce changes, the law usually follows, albeit at some distance. The United States Supreme Court has recently stepped up the pace. In a line of cases, some old, some recent, but all feeding off of one another, the Court has held that challenges to agreements which contain arbitration provisions must go to the arbitrator first. Courts may hear formational challenges only where they challenge the arbitration provision alone. In the Supreme Court, arbitration, with its vast potential for abuse as well as for good, has found a friend.

The Court’s doctrine of choice, “severability,” raises serious concerns for the hallmark decision, Erie Railroad Co. v. Tompkins. Erie’s firm principle that federal courts may not (constitutionally) create a general federal common law is imperiled by the Court’s use of severability. A recent en banc decision from the Ninth Circuit, offered in the form of an engaging dialogue between a majority judge and a dissenting judge, demonstrates where the Supreme Court has gone awry and offers a fix. The solution offered is an Erie-based zone of deference for state contract law that both, is constitutional and respects the dictates of the Federal Arbitration Act.

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I. INTRODUCTION

This article asks what remains if you sever part of a contract that was a nullity. The claim here is that the Supreme Court was wrong in *Prima Paint* when it found a remainder.¹ If a contract is a legal nullity it would seem intuitive that any lesser part would amount to nothing as well. The peculiar calculus of the Court is a result of a federal norm—that compulsory arbitration clauses are favored. While the federal norm encourages the salvage of the arbitration provision, state common law doctrines which limit contract power suggest that same provision may be vulnerable to charges of adhesion or unconscionability. Can the value of enforcing a compulsory arbitration provision be so great that the arbitration clause can retain its force despite destruction of the encompassing contract? While the common law answer would seem to be “no,” a series of Supreme Court cases appears to urge “yes.”² By doggedly favoring arbitration the Court has reawakened concerns from *Erie Railroad Company v. Tompkins*.³

By urging severance of the arbitration clause and then enforcing it, Supreme Court cases has taken a counter intuitive position. The arbitrator will receive challenges to the whole contract including those on the basis of classical contract theory and doctrine. The trial court, on the other hand, will retain only challenges to the clause itself. State courts will be limited to inquiries about the arbitration provision while the arbitrator receives sweeping challenges to the entire contract.

Three illustrations serve to highlight the surprising range of challenges that must be referred to the arbitrator post-*Buckeye*.

One: suppose you go to a travel agent and purchase a cruise. The price is set, your cabin, meals, and entertainment packages are reserved, but while the price is paid it is understood that the tickets will not be issued for some weeks. When they arrive in the mail they contain a provision exculpating the cruise line for negligence, lack of seaworthiness and even intentional torts by its crew. Obscure language also states that all terms are nonnegotiable. If unacceptable your sole choice is to cancel, but the price is nonrefundable. Should you have any dispute about quality or service you must arbitrate the matter in Florida. You live in Seattle, Washington.⁴

1. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006).

2. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198(1955); *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Southland Corp. v. Keating*, 465 U.S. 1 (1983); *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204 (2006).

3. 304 U.S. 64 (1937). *Erie* was the end of *Swift vs. Tyson*, 41 U.S. 1 (1842), and its notion that there is a federal general common law separate from and possibly even above that of the states. 304 U.S. at 79.

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

Two: suppose instead you are in the market for a new home computer. You call a toll free number and order a \$600 computer using a credit card. It arrives. Included is a "warranty" that states any defects or dissatisfaction with the terms can be remedied by return of the computer in its original condition, shipping paid by you, within 48 hours. Beyond this time you must arbitrate any dispute in Illinois with all arbitration fees and expenses borne by you.⁵

Three: suppose instead that use your ATM card to remove \$200 from your Tucson, Arizona bank. As you return to the car you are met by a polite—but insistent—masked bandit. While pointing a handgun at you she hands you a piece of paper and says, "Sign this and hand over the cash or I will shoot you." You comply. She gives you a copy of the paper which purports to be an "agreement." In part, it provides for a waiver of all intentional torts and crimes. It states that this 'waiver' is in return for "entertainment provided." Any dispute must be arbitrated in New York at your sole expense.⁶

Because federal substantive law includes the Federal Arbitration Act of 1925 (FAA)⁷ and state substantive law includes doctrines of adhesion and unconscionability,⁸ we have two quite different norms to apply in these illustrations. The Court's articulation of the FAA norm is that arbitration is the proper forum because the parties have chosen it.⁹ The classical contract doctrines require an examination of the entirety to properly judge the enforceability of one of the contract's provisions.¹⁰ Both norms rest on entrenched substantive law and both are implicated where the parties to a putative contract include a compulsory arbitration clause. It is the way these different and unrelated norms have been brought together by Supreme Court holdings that causes the conflict. The claim made here is that the conflict can be reduced by proper federal deference toward state common law, the kind of deference suggested by *Erie*.

The 2006 case, *Buckeye Check Cashing v. Cardegna*,¹¹ attempted to resolve the conflict by stating the federal arbitration norm as one of pre-eminent importance.¹² However, the language and holding of *Buckeye*

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

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

7. 9 U.S.C §§ 1-16 (2000).

8. Federal Arbitration Act, *as adopted*, 9 U.S.C. §§ 1-16 (1928).

9. See cases cited in *supra* note 2.

10. For instance, adhesion and unconscionability are embraced in the RESTATEMENT (2D) OF CONTRACTS, the Uniform Commercial Code and common-law cases throughout the 50 states.

11. 126 S.Ct. 1204 (2006).

12. *Id.* at 1209-10.

have induced fictions and doctrinal wandering by the lower courts.¹³ The present state of understanding has encouraged some courts to apply both norms in good faith, but other courts have continued to manipulate the doctrines chief among these is the discouragement of arbitration.¹⁴ *Buckeye* urges the trial court, whether federal or state, to take a nullity, parse it, and reanimate one of those components. The only way the contract is referred to the arbitrator is by dint of the compulsory arbitration provision itself.

Herein lies the *Erie* problem. Without *Buckeye* and its severability rule the place to challenge the deal or any part of the deal is in court. When severed the arbitration clause imposes arbitration only by self-reference. There is no neutral rule of the common law that would send the deal to the arbitrator. In every case where the whole contract would be void, a nullity, allowing the arbitrator to examine the whole is not only recognition, but vindication of the arbitration clause. The wrongdoer gets exactly what he sought by inclusion of a compulsory arbitration clause.

Because *Erie* ended the federal general common law, the Supreme Court lacks constitutional authority to prescribe common law rules for state courts. This would include the doctrines of adhesion and unconscionability, both of which are often used to challenge contracts. First, a clarification about the claim made here: Congress could have prescribed such rules for maritime, international, Indian and interstate commerce, but there is no evidence in the FAA of such an intent. Neither is the claim that the Court is without power to interpret the FAA in such a way as to derive those rules. To this point, the Court has offered a limited holding: the FAA demands a severability doctrine, a constructive gloss, to protect the policy of arbitration.

This Article will show that this announcement by the Court was an unnecessary and unfortunate aggregation of power that should be carefully thought out. The claim here is that the *Buckeye* rule, if not a direct violation of *Erie*'s rule, founders on its interstitial principles. "Severability" has encouraged lower courts to damage the common law from which it was drawn.

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

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,¹⁵ Flood and Conklin ("Flood") sought to enforce a compulsory arbitration provision in

13. See *infra* discussion of *Armendariz* notes ___ to ___; discussion of *Nagrampa* notes ___ to ___.

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

15. 388 U.S. 395 (1967).

their agreement with Prima Paint (“Paint”).¹⁶ As with many compulsory arbitration provisions there was much more to the agreement than a commitment to arbitrate. The agreement in this case was ancillary to the sale of Flood’s paint manufacturing business to Paint.¹⁷ Some three weeks after the sale the parties signed the consulting agreement which contained the arbitration clause.¹⁸ The consulting agreement was an elaborate statement of the personal services to be performed by Flood’s chairman and included duration and non-competition terms.¹⁹ Among the other provisions were payment terms and contingencies for financial problems.²⁰ In sum, it was a detailed expression of the parties entire understanding related to the consulting agreement.²¹ The parties agreed to a broad arbitration clause with a mandate to arbitrate any dispute in the City of New York using the rules and procedures of the American Arbitration Association.²² After a dispute arose as to cross claims of breach, fraud and varying interpretations of the duties owed by Flood to Paint, Flood served a notice of intent to arbitrate.²³ Paint responded with a suit in the District Court of New York and Flood moved the Court to stay pending arbitration.²⁴ The District Court granted the motion to stay pending arbitration; Paint appealed; and, the Second Circuit dismissed the appeal.²⁵

The Supreme Court took the petition for certiorari, in part, to resolve a conflict between the Second and First Circuits. Those Circuits disagreed as to who should resolve a claim that the entire contract is affected by fraud in the inducement.²⁶

In *Prima Paint*, the Court limited its opinion to cases of interstate commerce where the federal court was applying federal law. It held that federal law demanded the separability of the arbitration clause.²⁷ The Court believed that with respect to interstate commerce cases brought in federal court where jurisdiction would be with the federal court but for the arbitration clause that the FAA provided a federal rule.²⁸ Even in this narrow area the Court said, “Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to

16. *Id.* at 398.

17. *Id.* at 397.

18. *Id.*

19. *Id.* at 397.

20. *Id.*

21. *Id.*

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

23. *Id.* at 398.

24. *Id.* at 398-99.

25. *Id.* at 399.

26. *Id.* at 402.

27. *Id.* at 401-03, nn.8, 11. The Second Circuit, in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir 1959), created the idea of a “separable” arbitration clause. *Id.* at 402 n.8.

28. *Id.* at 403.

the “making” of the agreement to arbitrate—the federal court may proceed to adjudicate it.”²⁹

This suggests three categories: (1) challenges to the enforceability of the arbitration clause itself on grounds that attach only to the clause, (2) challenges to the enforceability of the arbitration clause itself on grounds that attach to both the clause and the contract as a whole, and (3) challenges to the contract as a whole which if upheld would include the arbitration clause on the sole ground that it is a part of the unenforceable whole. The holding of *Prima Paint*, fairly read, says no more than that the third category must go to the arbitrator. That is, as a matter of federal rule any impact of unenforceability of the whole contract had to be “separated” from the impact as to the arbitration agreement. In simple terms, let the arbitrator decide the issue of the whole contract’s unenforceability. Setting aside the federalism weakness, for the moment, consider where this led.³⁰

There were Circuit Court opinions from the First,³¹ Second,³² Third,³³ Fifth,³⁴ Sixth,³⁵ Eighth,³⁶ Ninth,³⁷ and Eleventh³⁸ Circuits, which dealt with the question of how to separate the issue of arbitration clause enforceability from the issue of the validity of the entire contract. Almost all of these were decided between the 1983 *Southland* decision and the 2006 *Buckeye* decision. In reversing the Florida court’s use of the common law distinction of void from voidable the Court appeared to have resolved much of the split.³⁹ *Nagrampa v. MailCoups, Inc.*,⁴⁰ a Ninth Circuit case, decided after *Buckeye*, establishes that the split has evolved and deepened.⁴¹ Prior to the distinct majority of Circuits had

29. *Id.* at 403-04

30. Some 20 years later, in *Southland*, the court extended this federal rule to litigation in state courts and included the separability test. Then some 20 years after *Southland* in *Buckeye* the Court applied the separability test in the context of a common law challenge to the entire contract as void because of illegality on usury grounds. The *Southland* and *Buckeye* extensions of *Prima Paint* have caused a more problematic split than that supposedly resolved in *Prima Paint*.

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

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

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

34. *Washington Mut. Finance Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002) and *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996).

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

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

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

38. *Jenkins v. First American Cash Advance of Georgia*, 400 F.3d 868 (11th Cir. 2005).

39. 126 S. Ct. at 1209.

40. 469 F.3d 1257 (9th Cir. 2006) (en banc).

41. *Compare id.* at 1263-94 (majority opinion) *with id.* at 1294-1306 (O’Scannlain, J., dissenting).

held, that the real issue is not the void/voidability distinction, but whether the challenge, no matter the ground, was to the arbitration clause itself, or merely infected the clause through attacks on the whole contract.⁴² Nonetheless some circuit courts had allowed a weakness of the whole to be the grounds for attacking the arbitration provision.⁴³ The result is that those courts which had looked to state law for such distinctions as void and voidable were now required to decide if any state doctrine that limits the contract as a whole would be relevant in assessing a challenge to the arbitration clause.⁴⁴

After an exploration of the *Buckeye* logic, we will return to this split. *Nagrampa, v. MailCoups, Inc.*⁴⁵ will be used to show how *Buckeye* deepened the gulf. *Buckeye's* rejection of the void/voidable distinction, even though offered on the basis of federal policy, is likely to fragment judicial opinion about how to handle challenges that are directed at both the arbitration clause and the entire contract. *Buckeye* appears to demand that the state courts apply that norm in a way contrary to traditional common law doctrine.⁴⁶

By refusing the void/voidability distinction the Supreme Court eviscerated the common law doctrine of severability. *Buckeye's* rule was longer the basic "separability" rule articulated in *Prima Paint* it had become an *Erie* violation that demanded state law accommodation of what is now a federal general law competitor. The 'zero minus a part leaves something rule' of *Buckeye* demands major adjustments in the common

42. *JLM Indiana, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004); *Washington Mut. Finance Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001); *Madol v. Dan Nelson Automotive Group*, 372 F.3d 997 (8th Cir. 2004); *Jenkins v. First American Cash Advance of Georgia*, 400 F.3d 868 (11th Cir. 2005). Decisions in the Third, Seventh, Eighth, Ninth, and Eleventh Circuits found that state law determined whether a contract was void or voidable and if void that the *Prima Paint* holding would not apply. *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 488 (6th Cir. 2001) (Although refusing to accept the logic in full of its sister circuits, the Sixth circuit acknowledged the logic of not requiring a referral to an arbitrator if the contract was a nullity.).

43. See *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 264-65 (3d Cir. 2003); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 488-89 (6th Cir. 2001); *Ticknor v. Choice Hotels, Int'l, Inc.*, 265 F.3d 931, 936-37 (9th Cir. 2001). Some of the difference can be accounted for in the distinction between void and voidable contracts. See *Burden*, 267 F.3d at 488-89 (The Court cited cases supporting the distinction from the Third, Seventh, Eighth, Ninth and Eleventh Circuits although the Court chose not to adopt the distinction.) This distinction was specifically rejected by *Buckeye*. See 126 S. Ct. at 1209.

44. There is also the issue of the split between the highest state courts and the federal circuits. Although rejected in *Buckeye* it is apparent that Florida views the matter quite differently. *Id.* at 1209. Also *Armendariz v. Foundation Health Psychare Inc.*, 6 P.3d 669, 689-90 (Cal. 2000) shows that California would be in line with Florida. The RESTATEMENT (2D) OF CONTRACTS, § 163, is strong evidence that most common law courts would fall in line with the void/voidable distinction used by Florida as well as the thoughtful approach of California in *Armendariz*.

45. 469 F.3d 1257 (9th Cir. 2006) (en banc).

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

law. These will be taken up below in the context of *Armendariz v. Foundation Health Psychcare Services, Inc.*⁴⁷ and *Nagrampa v. MailCoups, Inc.*⁴⁸ A proper reading of *Erie* would create a zone of deference for these rules and obviate the problematic adjustments.

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

A. *The Federal Arbitration Act*

The FAA became law in 1925.⁴⁹ Section 2 of the Act provides:

“That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*”⁵⁰

The *Marine Transit* Court had no difficulty with the proposition that Congress’s power to regulate maritime and interstate commerce encompassed the creation of an exclusive remedy such as specific performance.⁵¹ Thus extended, that power certainly encompassed a direction to the court to recognize arbitration as the exclusive remedy where the parties had agreed to it.⁵² The Court clarified Congress’s role as one of setting jurisdictional limits and providing for remedies in pursuit of its power to regulate maritime and interstate commerce.⁵³ Its conclusion was that the constitutional question of authority to provide or dictate a remedy is not limited to “ancient and established forms.”⁵⁴ Instead it is for Congress to decide whether a jury trial or some other procedure is more just,⁵⁵ or simply more appropriate.

The FAA should be placed in its historical context. Passed in 1925, the FAA came 13 years prior to *Erie Railroad Company v. Tompkins*⁵⁶ which reversed the *Swift v. Tyson* line of cases.⁵⁷ The *Swift* line had en-

47. 6 P.3d 669 (Cal. 2000).

48. 469 F.3d 1257 (9th Cir. 2006) (en banc).

49. See 9 U.S.C. §§ 1-16 (2000); *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 269 n.1 (The *Marine Transit* case sets forth the full language of the 1925 Act.).

50. 9 U.S.C. § 2 (as quoted in *Marine Transit*, 284 U.S. at 269 n.1) (emphasis added).

51. *Marine Transit*, 284 U.S. at 277-78.

52. *Id.* at 277-79.

53. *Id.* at 277-78.

54. *Id.* at 278-79.

55. *Id.*

56. 304 U.S. 64 (1938).

57. 41 U.S. 1 (1842)

couraged federal courts to think of themselves as somewhat removed from the state law principles and doctrines present in cases of diversity of citizenship.⁵⁸ So at the time of the FAA's passage the notion of a federal common law and a strong procedural basis having not yet suffered the blow of *Erie*.

The FAA was probably the answer to one of the building tensions of the *Swift* era. The Act can be seen as one attempt to ameliorate the tensions that continued to build and eventually led to *Erie*. Federal courts were as prone to prejudice against arbitration as the state courts. There was a long history of denying effect to arbitration agreements even in the face of carefully negotiated bargains by similarly situated parties. The ability to articulate doctrines and principles on behalf of the state without the more limited constraints in following *stare decisis* exacerbated the felt-hostility toward arbitration. Thus a federal judge could find state doctrines and principles to deny arbitration and even if faced with some discomfort in the doctrine toward arbitration could fashion a response that was hostile by looking at more general principles and speculating about the development of the law generally rather than the law particular to the state jurisdiction and the facts at bar. In order to affect this substantive trend Congress acted:

“We find a reasonably clear legislative intent . . . to create a new body of substantive law relative to arbitration agreements affecting commerce or maritime transactions. Thus we think we are here dealing not with state-created rights but with rights arising out of the exercise of the Congress of its constitutional power to regulate commerce and hence there is invoked no difficult question of constitutional law under *Erie*.”⁵⁹

Congress having shortcut the development of *Swift v. Tyson* rules, at least within the purview of Congress's power to regulate maritime and interstate commerce, we see a mandated shift in the viewpoint of some courts.⁶⁰ Hostility toward compulsory arbitration was no longer as fashionable.⁶¹ Given diversity jurisdiction, that shift worked a change in result for some state results as well.⁶²

One question left was whether there was also created an impediment to traditional doctrines that limited the availability of arbitration. The face of the statute said that while Congress intended a welcoming attitude toward arbitration it did not intend to set aside those traditional limits. The validating provision of the FAA is Section 2, but even it

58. *Erie*, 304 U.S. at 74.

59. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir.), *cert. denied*, 364 U.S. 801 (1960).

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

61. *Id.*

62. *See infra* notes 73 to 96 and accompanying text.

makes it clear that validity is mandated, “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁶³ In other words so long as a court treats arbitration agreements as they would any other consensual provision it can consider legal or equitable limits on the bargain. Even if the result is one that invalidates the arbitration clause it is allowed to do so if the court reaches its conclusion after an even-handed application of doctrines and principles that it would apply in good faith to other provisions of the contract. So the question became the relative status of arbitration as compared with such limiting doctrines as adhesion and unconscionability.

B. *The Buckeye Decision*⁶⁴

John Cardegna and Donna Reuter were Florida residents who filed putative class action was in a Florida trial court.⁶⁵ They alleged, in part: violation of Florida usury laws and consumer protection provisions which made the agreement criminal and void. Buckeye moved to compel arbitration of these issues and the trial court refused, holding instead that resolution of validity issues was a matter for the court. On appeal, the Florida Supreme Court determined that under Florida law the issue of validity was for the court in order to prevent arbitration breathing life into a contract that not only violated state law, but was criminal in nature.⁶⁶

The Supreme Court reversed the Florida Supreme Court’s judgment, noting two types of challenges to the validity of the agreement under Section 2 of the FAA.⁶⁷ One type of challenge is to the agreement as a whole, in this case that would be the entire set of terms which governed the advance against deferred presentment. The other is a challenge to the arbitration term itself.⁶⁸ The Court extended the holdings of *Prima Paint Corp. v. Flood & Conklin Manufacturing. Co.*,⁶⁹ and *Southland Corp. v. Keating*,⁷⁰ to say four things: (1) as a matter of substantive federal arbitration law an arbitration provision is severable from the re-

63. 9 U.S.C. § 2.

64. 126 S. Ct. 1204

65. *Id.* at 1207. As a part of each transaction the drawers signed an arbitration agreement drafted by Buckeye, the payee and included in the “Agreement” between the parties. *Id.* at 1207.

66. *Cardegna v. Buckeye Check Cashing Co.*, 894 So. 2d 860, 862 (Fla. 2005).

67. *Buckeye*, 126 S. Ct. at 1209-10.

68. *See* U.C.C. §§ 1-201(3), (12). Agreement in the Code and therefore all fifty states for this commercial paper transaction which is covered by Article 3 of the Code and therefore by Article 1 general provisions demonstrates how shaky is the ground on which the Court treads. Granted that the preemption argument makes Florida law largely irrelevant it also begs the question of whether Congress intended to displace common law and Uniform law concepts of agreement and contract. Was that really the intent of a 1925 statute that was though by its drafters to be a statement about federal actions?

69. 388 U.S. 395 (1967).

70. 465 U.S. 1 (1984).

mainder of the contract, (2) unless the challenge to validity goes to the arbitration clause itself the arbitrator is to consider the contract's validity in the first instance, (3) this substantive law of arbitration applies to state as well as federal courts, and (4) "We conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court."⁷¹

Buckeye offers a serious impediment to courts that wish to apply substantive state law doctrines of adhesion and unconscionability. The impediment is a product of the Court's attempt to paint *Buckeye* as a simple deduction from the *Prima Paint* and *Southland* decisions. The majority opinion said:

Prima Paint and *Southland* answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. The parties have not requested and we do not undertake reconsideration of those holdings. Applying them to this case, we conclude that because respondents challenge the Agreement, but not specifically its arbitration provision, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.⁷²

The Court "reaffirmed" that regardless of the identity of the court, as state or federal, a challenge to the contract in its entirety must first be presented to the arbitrator.⁷³

This led to a counter-intuitive position. The arbitrator gets challenges to the whole contract including those on the basis of classical contract theory and doctrine. State courts which are steeped in classical contract doctrine such as illegality, fraud in the factum, discharge in bankruptcy and the like only consider challenges to the clause itself. These classic doctrines treated the presence of any such deficiency as having negated the entire contract. It was as if the contract had never existed if it were the product of illegality or fraud in the factum. There was no common law doctrine of severability in this context although the word severable could be found in classical doctrine in other, closely allied concepts.⁷⁴

71. *Buckeye*, 126 S. Ct. at 1209.

72. *Id.* at 1209.

73. *Id.*

74. Farnsworth, ___ at ___.

A look at the history of adhesion and unconscionability in the Supreme Court decisions before *Erie* as well as the common law developments will allow us to see that contextual consideration, not severability, was the classical norm. This norm demands is so well established that it demands *Erie* deference today.

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

As a pre-*Erie* statute, the FAA can be assumed to include contract doctrines that the Court had established as substantive rules prior to its 1925 enactment. In other words the FAA simply added to the pre-*Erie* landscape and became just another part of the federal substantive law. In dealing with common carriers, insurance policies and towage contracts the Court handled the types of fact patterns that led to the standard form or ‘off the rack’ provisions which the merchants wrote for themselves and their customers.⁷⁵ As such, they were very much within the mainstream of adhesion and unconscionability developments of the general law of contracts in the 19th century. They involved more than just of the federal law of contracts.

Perhaps the best illustration of the Court’s pre-*Erie* understanding of the limits on form contracts imposed by common law doctrines, such as adhesion, is *New York Central Railroad Co. v. Lockwood*.⁷⁶ In *Lockwood*, the Court held that a common carrier could not validly exempt itself from liability for its own negligence.⁷⁷

Lockwood, traveling along with his livestock on a train, was injured as a result of the carrier’s negligence.⁷⁸ Lockwood brought a claim to recover damages for the injuries caused by the carrier, and the carrier sought to defend itself by arguing that its contract with Lockwood absolved it of liability for its own negligence.⁷⁹

The signed agreement, in the form of a “pass” stated that Lockwood and his livestock were traveling at their own risk, and it declared that acceptance of the “pass” was a waiver of all claims for damages for any injuries received on the train.⁸⁰ The carrier argued that these terms were absolute in their meaning, and thus, that such terms must be construed to exempt the carrier from liability for all injuries, including those caused by the carrier’s own negligence.⁸¹ The Court vigorously disagreed and refused to allow the carrier-drafted pass to exculpate the

75. *N.Y. Central R.R. Co. v. Lockwood*, 84 U.S. 357 (1873)

76. 84 U.S. 357 (1873).

77. 84 U.S. at 357-58.

78. *Id.* at 357-59.

79. *Id.*

80. *Id.*

81. *Id.* at 362-63.

carrier for its own negligence.⁸² The Court conceded that a carrier could have limited its liability by a special contract provided that the contract was just and reasonable. This attempt to excuse the carrier's negligence was seen as repugnant to the law and anything but just and reasonable.⁸³ The Court stated that this principle, especially when taken together with the inequality of the parties, the compulsion placed on the customer to accept the contract, and the duty of the carrier to act with reasonable care, operated with full force to render the terms at issue void and unenforceable.⁸⁴ Essentially then, the Court found that the alleged bargain was unenforceable, not only because it was unjust and unreasonable, but also because it lacked the essential element of voluntary assent.⁸⁵ While New York was one of the more liberal jurisdictions in allowing exculpation, the Court felt the need to deny the exculpatory effect to this standard form contract prepared by the railroad.⁸⁶

Sound public policy was offered as the reason why the contract was unenforceable. Without categorizing with language of adhesion or unconscionability the Court found the contract to be violative of sound policy.⁸⁷ The analysis sounded very much like classical adhesion tests. First, "[t]he carrier and his customer [did] not stand on a footing of equality."⁸⁸ The customer was one of millions who could not afford to haggle or stand out from the crowd.⁸⁹ The railroad was one of the large corporations in whom the power and wealth of the industry was concentrated.⁹⁰ Had the drover been aware of the term there still would have been no bargaining.⁹¹

82. *Lockwood*, 84 U.S. at 381-84.

83. *Id.* at 381-82.

84. *Id.*

85. See *The Kensington*, 183 U.S. 263, 268 (1902). By way of contrast, in *Baltimore & Ohio Southwestern Railway Co. v. Voigt*, 76 U.S. 498 (1900), the Court upheld a contract exonerating a railroad carrier from all liability, including for its own negligence, to a particular passenger. *Id.* at 507-14. However, in this case, the Court found it determinative that the passenger in question was not an ordinary passenger, but rather, an express carrier, which held a position of equal bargaining power with the railroad, freely entered into the contract, and received the benefits of the contract. *Id.* at 507-14.

Similarly, in *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291 (1932), the Court held that parties of equal bargaining power, dealing at arms length, could validly contract so as to exempt one party from liability for negligence to the other. Here, a tank steamer owner entered into a contract with a tugboat owner, whereby the tugboat owner agreed to supply tugs to take the steamer through a certain stretch of water to its destination. *Id.* at 292-95. The Court found it determinative that this was an arm's-length transaction between parties of equal bargaining power, and that the steamer owner was not under any compulsion to accept the terms of the contract. *Id.* at 292-95.

86. *Lockwood*, 84 U.S. at 379-85

87. *Id.*

88. *Id.* at 379.

89. *Id.*

90. *Id.*

91. *Id.* The railroad's freight agent testified that they made forty or fifty contracts every week and had carried on the business for years, and no other arrangement was ever made be-

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment: then, if the customer chose to assume the risk of negligence, it would with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different and especially so under the modified arrangement which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as the see fit These circumstances . . . show that the conditions imposed by common carriers ought not to be adverse . . . to the dictates of public policy and morality.⁹²

The Court pointed out that exculpation clauses came into vogue among carriers who wished to avoid liability for *non-chargeable* accidents. That is, the carriers had at first sought only to avoid liability for pure accidents for which they were not responsible. The Court approved of these. The difference between the older clauses and this new variety was that the older exemptions were just and reasonable because they did not amount to an abandonment of the carrier's obligations to the public.⁹³ The Court recognized that the standardized forms were being used to work a change.

“Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further and to be excused for negligence, an excuse so repugnant to the law of their foundation ad to the public good, they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.”⁹⁴

The remedy, as the *Lockwood* Court's analysis demonstrates, is to consider arbitration clauses in their context and ask about the fairness of the deal as a whole. To do so requires more of a court than simply severing the arbitration clause and making an automatic referral to the arbitrator.

cause the only alternative offered was the tariff rate which at three times the cost was not feasible. *Id.*

92. *Lockwood*, 84 U.S. at 379-80. The Court concluded that the railroad's obligations were akin to that of a fiduciary and thus it was charged with a duty to ensure that their contracts with the public were “just and reasonable.” *Id.* From there it was a short step to the holding that the carrier could not in justice and reasonableness exculpate itself for negligence.

93. *Id.* at 381.

94. *Id.* at 381-82.

A. *Competitive Norms*

Fostering arbitration was the significant federal goal of the FAA. But, there were other policies recognized by the federal courts, Congress, and the states at the time of the Act's passage. These other norms are were competitive if not hostile to that of fostering arbitration. They were hostile to the extent that compulsory arbitration clauses had the effect of limiting litigants' available remedies. Compulsory arbitration imposes remedial limits on the parties.

Although *Buckeye* and the arbitration norms raise federal issues they do not constitute federal questions giving rise to separate causes of action nor did they invoke federal question jurisdiction.⁹⁵ Their treatment should have conformed to the dictates of *Erie* because the deference spoken of in *Erie* served not only the federalism value, but was far more likely to give us a vibrant and responsive common law, a common law formed primarily by the state court judges who administered it on a daily basis.⁹⁶

1. *Adhesion and Unconscionability versus the Limited Remedy of Compulsory Arbitration*

Among the consumer protection innovations of the late 20th century was the formal acceptance of adhesion and unconscionability as part of the Restatement 2d and Uniform Commercial Code.⁹⁷

U.C.C. § 2-302 began as a classic expression of Karl Llewellyn's concern about the validity of bargain for terms. Contract terms are validated by negotiation bargaining.⁹⁸ **Was officially infused by bargaining contract terms can even override legislative and judicial expressions of what constitutes appropriate terms.**⁹⁹ By the time of the 1943 draft the

95. See *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 n.9 (1984).

96. *Id.*

97. In addition, the federal statutes and regulations recognize the value of context and liberal remedies. For instance the Magnuson Moss Warranty Act, 15 U.S.C. § 2301(1) (1982), has a basic predicate of the act is that sales of consumer goods even that take place locally have an impact on national policy national economic decisions. The act finds consumer products to mean tangible personal property distributed commerce which are normally used for personal, family, or household purposes. The primary mechanism for the implementation of its policy is a requirement of disclosure of warranties. The act limits the type of disclaimer which can be used to prevent implied warranties of merchantability and merchantability as well as fitness from being applicable to any sale. Magnuson Moss then represents a federal substantive policy steeped in the contextualism of adhesion doctrine. It is very much about the notice and bargaining opportunities that are reduced if the consumer is treated to a deal wrapped in obscure language. It is especially true in the situation of most consumer warranties, warranties that are take-it-or-leave-it documents. The only consumer power being to find a competitor to issue better warranties. Obviously it was Congress' judgment that this was unrealistic and led to the use of the now ubiquitous "full warranty" "limited warranty" dichotomy.

98. See RESTATEMENT (2D) OF CONTRACTS § 71 (1981). See also U.C.C. § 2-102.

99. See Arthur Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485, 489-94 (1967) (Llewellyn's initial draft did not use the phrase procedure unconscionability but the 1950s he reiterated the need for courts to examine the bargain and un-

possibility of fundamental unfairness, an unfairness so unacceptable that could not be relieved by simple knowledge or even bickering over the term had been introduced and adopted.¹⁰⁰

In its current iteration, § 2-302 still shows its origins, Llewellyn's crafting and yet is very much a statement about where the law is going. Its comments offer cases to support the rule. But even though this authority is sparse and not very strong, § 2-302 has become a powerful tool for courts to police bargains on their substance as well as the procedure.¹⁰¹ The Uniform Commercial Code offers other rules that relate to this issue of liberal vs. limited remedies. These other rules bolster the UCC approach of liberality. Section 2-316 provides for disclaimer of warranties under only certain circumstances. This section requires both notice in a particularized form and a positive statement about what is and is not permitted. Section 2-316 then represents a significant substantive limitation on contract bargaining, a limitation that encourages non-adhesive bargaining by increasing the flow of information and particularizing its content.¹⁰²

questionably accept only the dickered terms. *See* KARL LLEWELLYN, *THE COMMON-LAW TRADITION* (1950).

100. *See* Leff, *supra* note 99 at 491-92.

101. *See id.*

102. By its positive dictates, U.C.C. § 2-316 affects both procedural and substantive unconscionability norms. Its requirements of notice and demand for particular language impacts the parties' ability to eliminate Code warranties such as the implied warranty of merchantability. *See id.* § 2-316(3). The disclaimers must be conspicuous, *see* U.C.C. § 2-316(2), and their substance limited by a statutory presumption of internal consistency. *See id.* § 2-316(1). A more straightforward constraint on a seller's ability to limit remedies is contained in U.C.C. § 2-719. Again a federal source provides insight into the desire to not confine remedies. Denominated a trade regulation rule the Holder in due course regulations from the Federal Trade Commission preserve customers claims and defenses even though they've made a Holder in due course transaction. That is a seller or other business which sells her finances consumer goods must put a prominent notice any instrument which is used to finance the consumer transaction. The notice which must contain particular language in the particular signs and prominence states, and essence, that any holder of this consumer credit contract will be subject to claims and defenses which the debtor could've asserted against the original seller of the goods or services. 16 C.F.R. §§ 433.2(a), (b). If a seller should fail to include such legend of failure is deemed to be the deceptive or unfair practice under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(4)(a). If the notice is present a note remains negotiable, but there cannot be a Holder in due course thus the original consumer issuer may assert any of his defenses against this to holders in contravention of the usual Holder in due course role of the uniform commercial codes. *See* U.C.C. §§ 3-104, 3-405, 3-406. While the FTC rule has limitations, the most obvious being that any seller who refuses to place the notice does not subject distant holders to its import, it is important expression of Congress is intended to preserve remedies and import imposition of unfair transactions on consumers. Only sellers who our regular engaged in selling releasing goods or services to consumers must comply with a rule. 16 C.F.R. § 433.1. In addition to the only transactions covered are those which are purchased money loan transactions. In addition, while the Federal Trade Commission enhance the power to issue cease and desist order's there are no civil penalties of a couple to the consumer and no private causes of action. *See* 16 C.F.R. § 433.1.

Limitations on consequential are also questionable. *See* U.C.C. § 2-719(3) in addition if circumstances caused an otherwise exclusive or limited remedy to feel it's essential purpose

A California case will help us better fix the roles of adhesion and unconscionability in constraining the limitation of remedies that is inherent in compulsory arbitration. *Armendariz v. Foundation Health Psychcare Services, Inc.*¹⁰³ began as a complaint by two employees claiming wrongful termination by their employer on account of their sexual preference.¹⁰⁴ Armendariz and a co-worker were hired in 1995.¹⁰⁵ Both employees filled out and signed application forms, which contained a compulsory arbitration clause for any future claim of wrongful termination.¹⁰⁶ A provision making it compulsory to arbitrate any such claim was also set forth in a separate agreement, which termed the agreement to arbitrate, "a condition of my employment." The agreement further provided that this remedy precluded all others "including but not limited to reinstatement."¹⁰⁷ It is significant to note that the employer was not similarly constrained.¹⁰⁸ So what the employees received was employment in return for a severe restriction on their usual common law remedies while the employer suffered no constraint.

The *Armendariz* Court applied well-developed California principles of adhesion and unconscionability to reach the conclusion that the compulsory arbitration clause failed because of contractually weaknesses. Its application of those common law principles and doctrines was no more than an evenhanded extension of the general law into the compulsory arbitration setting.

Adhesion and unconscionability can be major palliatives of this tension. Adhesion and unconscionability are now sufficiently well established to be found in the Uniform Commercial Code.¹⁰⁹ The irony is that the drafters of the Sales Article urged courts to be self-aware, analytical and forthright in approaching issues of fairness. In doing so they asked for a concomitant avoidance of the more manipulative doctrines seen by the drafters as impingements to good law. Some of these included classic doctrines that dealt with problems of adhesion before the Code and Restatement provisions were: duress, the pre-existing duty rule, and misunderstandings.¹¹⁰ If used properly adhesion and unconscionability are less manipulative and therefore present less of a risk of abuse. They can also be better used to avoid the manipulations by litigants and

to remedy is displaced and the remedies available under the substantive norms of article to our imposed as a substitute remedies. *See* U.C.C. § 2-719(2).

103. 6 P.3d 669 (Cal. 2000).

104. 6 P.3d at 674.

105. *Id.* at 674-75.

106. *Id.* at 675.

107. *Id.*

108. *Id.* at 690-92. The court calls this a lack of even a modicum of bilaterality. *Id.* Perhaps not the most felicitous of phrases, but an adequate description of the deals complete lack of evenhandedness.

109. U.C.C. § 2-302.

110. *See* Leff, *supra* note 99.

courts who wish to avoid the mandate to arbitrate contained of the FAA.¹¹¹

B. Buckeye Fails to Account for the Substantive Norms Underlying Adhesion

The *Buckeye* insistence on the severability of the arbitration clause as a matter of federal substantive law creates a dissonance. It is important then to see the logic behind its announcement in *Buckeye*. It was not part of the FAA and developed only gradually as the *Prima Paint* line of cases lengthened. *Buckeye* acknowledged that the FAA was intended by Congress to overcome federal judicial resistance to arbitration.¹¹² Congress enacted the federal arbitration act. The Court also conceded that § 2 of this act embodied a national policy favoring arbitration, but only on an equal footing with contract provisions generally.¹¹³ In the *Prima Paint*¹¹⁴ case the court addressed the reality that challenges to a compulsory arbitration clause could be of two types. The first is a challenge to the clause itself and the other a challenge to the clause as part of the entire contract. The Court in *Prima Paint* held that if the challenge were to the agreement as a whole then arbitrator should make the decision, but a challenge to the arbitration agreement alone was subject to separation and retention by the court. As of the decision in *Prima Paint* the FAA had been applied to federal litigation but not to state court litigation.

In *Southland Corp. vs. Keating*,¹¹⁵ the Court held that challenges to the validity agreement to arbitrate, even though they were of state court origin would be subject to the *Prima Paint* rule.¹¹⁶ Insofar as the claims were made under California law as to validity of the compulsory arbitration agreement those claims would be tested using the two-part test of *Prima Paint*. Rather than discuss the analysis of the *Buckeye* court lets look at a very recent case that presented a procedural posture simi-

111. Manipulation is a danger with doctrines so closely allied. One court has stated, “the fact that a contract is an adhesion contract is significant to determining whether it is procedurally unconscionable, but ‘not dispositive of this point.’” *Pritchard v. Dent Wizard Int’l Corp.*, 275 F. Supp. 2d 903, 917 (S.D. Ohio 2003). Another court has flatly stated that an adhesive contract does not necessarily contain unconscionable terms. *See Walters v. A.A.A. Waterproofing, Inc.*, 85 P.3d 389, 393-94 (Wash. Ct. App. 2004). Some courts have more carefully crafted the relationship between adhesion and unconscionability when it has been stated that “the danger of an adhesion contract is that it *might contain* unconscionable clauses, and adhesion contracts are *scrutinized* to avoid enforcement of unconscionable clauses.” *Faber v. Menard, Inc.*, 267 F. Supp. 2d 961, 974 (N.D. Iowa 2003). The court would go on to say, however, that “the fact that a contract is one of adhesion does not necessarily make it unconscionable or unenforceable under Iowa law.” *Id.*

112. *Buckeye Check Cashing, Inc. vs. Cardegna*, 126 S. Ct. 1204, 1207 (2006).

113. *Id.* at 1207.

114. 388 U.S. 395 (1967).

115. 465 U.S. 1 (1984).

116. *Id.*

lar to *Southland*. That is, it arose in California and applied California substantive law, but unlike it had *Buckeye*'s elaboration of the severability test to test the California common law of adhesion and unconscionability as it applied to compulsory arbitration agreements.

I. *Nagrampa v. MailCoups, Inc.*¹¹⁷

Imagine you are Connie Nagrampa an entrepreneurial minded and experienced seller and manager in direct marketing.¹¹⁸ You have six years experience and earn about \$100,000 per year working for one company,¹¹⁹ but you are approached by a competitor to become a franchisee of the direct marketing business.¹²⁰ This new company expects a franchisee to recruit businesses will advertise their services and products through the direct mailers coupons.¹²¹ Coupons are printed with the advertisers information and mailed by the direct marketer and its expense to households it targets for the service. Readers may receive similar bundles of coupons in your mailed typically addressed to "occupants" or "current resident." Perhaps such coupons may say your name with an alternative "or current addressee."

A MailCoups representative approaches you and she is encouraging of your participation and offers a notebook tailored to your franchise area including any spreadsheet with expected costs and profits.¹²² You are impressed by a suggested 41% rate of return on investment and when you contact the representative this rate of return is confirmed as "about right."¹²³ Within months you sign a thirty page franchise agreement for a ten-year term.¹²⁴ The agreement includes an arbitration provision less than a page in length, which requires you to arbitrate all disputes, but allows MailCoups to protect its service marks in court.¹²⁵ Both parties are bound to arbitration under the American Arbitration Association rules and the arbitration site is to be Boston, Massachusetts.¹²⁶ Despite your best efforts, including more than 60 hours per week labor, the business failed.¹²⁷ You offered to pay "amounts due," but in short order it became apparent that this amount was disputed and you were not able to pay MailCoups' claims.¹²⁸

117. 469 F.3d 1257 (9th Cir. 2006) (en banc).

118. 469 F.3d at 1265.

119. *Id.*

120. *Id.*

121. *Nagrampa*, 469 F.3d at 1265-67.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Nagrampa*, 469 F.3d at 1265-68.

127. *Nagrampa*, 469 F.3d at 1294-95 (O'Scannlain, J., dissenting).

128. *Id.*

Nagrampa did not seek invalidation of the franchise agreement as a whole. She challenged the arbitration provision along as unconscionable. In an *en banc* opinion, the Ninth Circuit reversed the trial court's holding that the matter should be referred to arbitration.¹²⁹

The majority concluded that the trial court could have properly retained the case despite the *Buckeye* rule on severability.¹³⁰ The majority of judges believed that Nagrampa's six separate causes of action involved allegations about the arbitration clause itself rather than the entire contract. Nagrampa's complaint did not challenge the entire agreement. For the majority the allegations of adhesion and unconscionable were sufficiently particularized to address the clause so that it avoided the *Buckeye* pitfall.¹³¹

Nagrampa's first three claims were founded in misrepresentation fraud and deceit and sought damages as well as attorney's fees and any other relief the court might deem appropriate.¹³² The fourth cause of action claimed violation of California franchise law and sought damages attorney's fees and other proper remedies.¹³³ The fifth and sixth causes challenged the validity and enforceability of the arbitration provision of itself.¹³⁴ One claim was based on a violation of the California Consumer Legal Remedies Act¹³⁵ and alleged that the arbitration provision, because it was so one-sided that it did not fall from the reasonable expectations of Nagrampa, was unduly oppressive, unlawful, or unfair.¹³⁶ The other claimed a violation of the California unfair competition law.¹³⁷ This cause alleged that Nagrampa a private attorney general could seek MailCoups abandonment of its demands for arbitration.¹³⁸ This cause of action was styled a request for preliminary and permanent injunction of MailCoups to prevent it from unilaterally imposing this arbitration provision on Nagrampa.¹³⁹

129. 469 F.3d at 1263 (majority opinion)

130. *Id.* at 1293-94 (O'Scannlain, J., dissenting).

131. *Nagrampa*, 469 F.3d at 1264. MailCoups sought arbitration and made a demand under the contract that Nagrampa carry out the clause by arbitrating in Los Angeles, California. *Id.* at 1265-66. Nagrampa's attorney objected to arbitration. He raised the issue of validity of the arbitration clause, disagreed that Nagrampa was bound to arbitrate, particularly objected to the Los Angeles venue, and the arbitration fee clause. *Id.* at 1266. The arbitrator suggested the arbitration could proceed in Fresno as more cost-efficient and less inconvenient venue however MailCoups objected to the Fresno venue and the AAA case manager confirmed the arbitration would have to take place in Boston. *Id.* Nagrampa's response to all this was to file suit against MailCoups in the Superior Court of California in Contra Costa County. *Nagrampa*, 469 F.3d at 1266-67.

132. 469 F.3d at 1266.

133. *Id.*

134. *Id.*

135. CAL. CIV. CODE § 1780 (West 2006).

136. CAL. CIV. CODE § 1750-1785 (West 2006). In essence it was unconscionable. 469 F.3d at 1266.

137. 469 F.3d at 1266. *See also* CAL. BUS. AND PROF. CODE §§ 17200 to -208 (West 2006).

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

139. *Id.*

In the majority's view Nagrampa did not seek invalidation of the franchise agreement as a whole.¹⁴⁰ Fairly read, the six causes of action targeted the arbitration clause. Not one of them sought a remedy directed at the contract as a whole.¹⁴¹ This did not end the controversy, however. In looking at the majority and the dissents, a dialogue developed—some might say a dialogue over a matter of semantics. I think it was more. Examining the exchange as a dialogue shines a light into the recesses of *Buckeye* and, in those shadows, spotlights the Court's recent slide toward *Erie* violations.

The dialogue is something like this:

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

MJ set aside his notepad and said, "Well, help me out. What's troubling you?"

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

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

"Exactly," DJ responded. "Nagrampa said her basis for challenging the arbitration clause was unconscionability so she can't escape talking about procedural unconscionability and in California that means a look at her allegations that the contract, not just the clause was a 'take-it-or-leave-it' deal.¹⁴²

"You are confusing California law," MJ said. "California's law of unconscionability has two elements, procedural and substantive.¹⁴³ Nagrampa wanted to use adhesion to establish the procedural part of California's test.¹⁴⁴ For the substantive unconscionability element she wanted to prove unfairness of the clause.¹⁴⁵ In fact, the threshold inquiry under California unconscionability analysis is whether the arbi-

140. *Id.*

141. *Id.*

142. 469 F.3d at 1297-98 (O'Scannlain, J., dissenting).

143. *Nagrampa*, 469 F.3d at 1280.

144. *Id.* at 1281-82.

145. *Id.* at 1284-85.

tration agreement is adhesive.”¹⁴⁶ So her challenge was directed at the clause, it just had two parts.”¹⁴⁷

DJ said, “You are just saying the ‘crux of the complaint’ is about the arbitration clause, but the facts Nagrampa allege go to the formation of the entire contract so *Buckeye* requires that the claim be submitted to the arbitrator.”¹⁴⁸

“No,” MJ said. “That is not what Nagrampa alleges and it is not what we are holding. While the facts could entangle the whole contract the plaintiff seeks only to invalidate the arbitration clause.”¹⁴⁹

“But that is exactly the problem,” DJ said. “You are insisting that none of Nagrampa’s claims would invalidate the entire contract, but that is the very *Buckeye* violation that will occur. It is for the arbitrator, not the district court, to decide the question of invalidity. And the arbitrator should decide it on whether the challenge directly affects the entire contract.”¹⁵⁰

MJ sighed and said, “No, you are not listening. Nothing in Nagrampa’s claims challenged the entire contract because her cause of action did not seek to invalidate the entire contract. Anything she had to say about the entire contract was just because California pleading rules required her to state more facts than you typically see in the federal courts.¹⁵¹ Because she did not make a claim of over all invalidity it cannot directly affect the over all validity.”¹⁵²

DJ’s voice took on a bit of an edge. “You are the one not listening,” he said. “You are not listening to *Buckeye* and the Supremes. *Buckeye* drew a distinction between two types of challenges. You can have a challenge to the contract as a whole or to the arbitration clause, but in cases like this both must go to the arbitrator. One is a challenge that directly affects the entire agreement and the other is that the provision is illegal or otherwise a violation of policy which invalidates the whole. What you have tried to do here is collapse them into one category of seeking ‘invalidation.’ The Court did not do that. The *Buckeye* opinion uses the word ‘challenges’ and only requires that the challenge ‘directly affect’ the contract.”¹⁵³

“You’re wrong,” MJ said. “*Buckeye* was a challenge to the entire contract as void *ab initio* on the grounds of usury. It was not a challenge to the clause itself so that is dicta, but more importantly the ‘challenge’ has to be to validity. You are still not understanding that what we have

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

147. *Id.* at 1269-70.

148. *Id.* at 1298-99 (O’Scannlain, J., dissenting).

149. *Id.* at 1270-71.

150. *Id.* at 1298-99 (O’Scannlain, J., dissenting).

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

152. *Id.* at 1270-71.

153. *Nagrampa*, 469 F.3d at 1299 (O’Scannlain, J., dissenting). *See also Buckeye*, 106 S. Ct. at 1208.

here is no challenge to validity. It is a classic contract doctrine that Nagrampa is using, one that applies to contracts generally. She is simply using facts that could have been used to challenge the whole, but she is using them to bolster what is a limited challenge to the arbitration clause itself. We look at the over all transaction to see what went on with the individual clause. That is just basic contract law. It's the kind of thing we are supposed to do as a federal court. It's impossible to avoid if you really want to examine a particular provision under general contract law. There was no challenge to the whole. She challenged only the arbitration part. Not one of her causes of action was to the whole. What you have left out is the parenthetical phrase of §2 of the FAA. What else could Congress have meant by allowing challenges to the arbitration clause on such grounds as apply to the contracts generally. Even *Buckeye* allows 'challenges to the contract as a whole, either on a ground that directly affects the entire agreement (e.g., *the agreement was fraudulently induced*), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.'"¹⁵⁴

DJ should have said . . . ??

The dialogue fails at this point because the dissent's reasoning fails for me. We could extend the liberty already taken and fill in a fictional repost, but it seems unnecessary to prove the point. The majority seems to have the better argument. As *Buckeye* stands the Court appears to have distinguished between 'challenges' to the arbitration clause and the contract as a whole. This part was deductive for the Court though counter-intuitive. Thus if a plaintiff alleges a cause of action sounding in the invalidation of the whole contract it must go to the arbitrator. If the cause alleges invalidity of the arbitration clause itself it can stay with the court. This was *Prima Paint* and *Southland* also. As a matter substantive federal law the Court asked the trial court to determine what type of challenge was being made and if the challenge was to both to sever them.¹⁵⁵

The nuance added by the *Buckeye* court was a denial to allow the Florida Supreme Court its use of classic contract doctrine. The *Buckeye* court held that even if the challenge amounted to one that would invalidate the contract, *ab initio*, that is make it void and not simply voidable, then the Court should have sent the matter to the arbitrator to consider. The Court made it clear that any state court rule about non-severability was overridden by the FAA's implicit substantive rule demanding severability.¹⁵⁶ What it did not address is a situation like that in *Nagrampa* where the facts indicate overall adhesion and unconscionability, the state law would appear to allow a challenge to the individual clause based on infirmities of bargaining and the challenge is only to that

154. *Buckeye*, 126 S. Ct. at 1208 (emphasis added).

155. *Id.* at 1209.

156. *Id.* at 1209-10.

clause. In other words there was nothing to sever in *Nagrampa* unless the federal court reconstructed the complaint as one that challenged the overall contract. This, the majority was not willing to do, but it appears the dissenters were willing to do so.¹⁵⁷

2. *The Insidious Erie Effect of Buckeye*

As the majority and dissenters in *Nagrampa* demonstrate with their failure to communicate, cases like *Nagrampa* are likely to proliferate.¹⁵⁸ What was a logical deduction from prior FAA cases became an insidious troublemaker in *Buckeye*. It is beyond the scope here to challenge the logical deduction portion of *Buckeye*. That includes these three steps: (1) the FAA was intended to overcome judicial resistance to the enforcement of freely bargained arbitration agreements;¹⁵⁹ (2) as a matter federal arbitration law a substantive rule of severability allows the arbitration provision to be considered separately from the validity of the whole contract; and, (3) this rule of severability applies to state as well as federal court proceedings. The conclusion then in *Buckeye* was that because the plaintiff “challenge[ed] the Agreement, but not specifically its arbitration provisions, those provisions [were] enforceable apart from the remainder of the contract.”¹⁶⁰ Florida’s attempt to avoid this conclusion by referencing Florida’s common law, which made the entire contract void was “simply rejected.”¹⁶¹ The Court acknowledged what might appear to be an anomaly. The rule allows a court to enforce an arbitration clause, send the matter to arbitration and have the arbitrator invalidate

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

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

159. *Buckeye*, 126 S. Ct. at 1208.

160. *Id.* at 1209.

161. *Id.*

the entire contract on some common law ground. The court believed this "conundrum" to have been resolved by the *Prima Paint* line in favor of enforcement of the arbitration provision. The arbitration agreement was to be vindicated even if the contract bargain, as a whole, was ultimately not given any power.¹⁶²

Here is the insidious *Erie* issue. The question of severability will now turn on a federal court's view of state common law. As in *Nagrampa*, all it takes is a state court suit and the removal of that suit to the local district court on the basis of diversity for the district court to be offered an opportunity to consider a wealth of common law issues. The *Nagrampa* court addressed a number of matters raised by the intersection of the common law doctrines of adhesion/unconscionability and *Buckeye's* interpretations of the FAA. Among these are some that seem to be classic common law issues, including:

- (1) What was the scope and nature of the claim stated;
- (2) what were the elements of unconscionability;
- (3) what was the difference between adhesion and unconscionability;
- (4) what was the difference between procedural and substantive unconscionability;
- (5) what were the relative roles of oppression and unfairness in unconscionability;
- (6) what should have been the effect on the whole contract of a clause that was deemed unenforceable due to adhesion or unconscionability;
- (7) would it have been proper for the court to strike a provision of the contract as unconscionable or adhesive and enforce the remainder; and,
- (8) what would have been the effect on the whole contract of a finding that a provision violated public policy.¹⁶³

What will happen next is a branching. One branch leads to a flat conclusion, as occurred in *Southland*¹⁶⁴ and *Buckeye*¹⁶⁵, that Congress has the power to regulate interstate commerce and there is no evidence that Congress did not intend to affect state court proceedings as well as federal.

162. *Id.* at 1210.

163. This is not intended as an exhaustive list of the common law matters implicated by what the *Buckeye* court saw as a matter of federal substantive law: arbitration clauses are severable. *Nagrampa's* majority and dissenting opinions offer more than 80 pages of rich fodder for debate and controversy.

164. *Southland*, 465 U.S. at 15

165. *Buckeye*, 126 S. Ct. at 1210.

The other branch is the one followed here. It is proffered as an alternative, more sensitive to *Erie* and its teachings about the federal-state relationship. When a suit is commenced in state court and removed on the basis of diversity something significant is happening. The federal court is the forum, but the law should remain that of the state of removal, with consideration given to choice of law issues. By extending the FAA policy to reach state court proceedings the *Southland* case impacted more than federal substantive law, it insidiously affected common law development. It urged an adoption or creation of something akin to a federal common law of contracts. In this way *Southland* worked far greater changes than those initially contemplated by Congress which had intend to limit the FAA's effects to federal-court proceedings.¹⁶⁶

Erie does not prohibit federal courts from having a role in the development of the common law. What it said was that as a matter of constitutional principles of federalism the federal courts should not create or develop a freestanding common law, one distinct from, and therefore unsupported by the state authorities, which legitimize the common law.¹⁶⁷ States have autonomy and independence as a constitutional matter. The content and development of state law is vested with the state legislatures and judiciary and no interference with either should be tolerated except as to matters specially authorized by the Constitution.¹⁶⁸ Most particularly there is no "transcendent body of law outside of any particular State."¹⁶⁹ Instead, the Court said the common law, so far as it is enforced in a State, is not the common law generally, but that of the particular State and the authority for it must, in the final analysis, lie with the State's legislature and courts.¹⁷⁰ By applying the Court's notions of federal policy and what constitutes severability in contract actions to state court proceedings the *Southland* and *Buckeye* courts slipped over the *Erie* edge. The slippage was probably unselfconscious and induced by a worthy norm, that of fostering arbitration, but it is nonetheless a damaging slip.

What the Court appears to have meant is that to accomplish Congress' goal of encouraging enforcement of freely bargained arbitration clauses we must ferret out illegitimate claims of unenforceability and the most obvious are those that attack the entire contract.¹⁷¹ What the Court should have done was make reference to *Erie* and urge state courts and the federal trial courts (sitting within a state as courts of citizen-diversity) to apply the state doctrines of severability. The work-

166. *Id.*

167. *Erie*, 304 U.S. at 78-79.

168. *Id.* at 79.

169. *Id.*

170. *Id.*

171. *See id.*

ing of this zone of deference can be seen if we adjust and reinvigorate the Court's statement about severability.

What the Court announced then was a tool. It is a useful tool, one designed to accomplish a real goal but it was not the real substantive law. The substantive rule was that contained in the FAA mandate to treat compulsory arbitration on equal footing with all other contract provisions. But the Court gives the tool a gloss of "federal substantive law."¹⁷² I would be more sanguine about the damage to state common law doctrine if Congress had stated that as a congressional finding of fact that it was a necessity of interstate regulation of commerce that arbitration clauses be severed if attacked on grounds of adhesion or unconscionability.¹⁷³

If this tool of federal law did not come from Congress then it is a creature of the Court. As a creature of the Court it must be seen for what it is: a zombie orphan of the discredited *Swift v. Tyson* federal common law. If the Court had drawn on state court doctrines of severability it could have legitimized the *Buckeye* doctrine by framing it within the zone of state common law, specifically that of Florida.¹⁷⁴ Instead the Court said the rule of severability arises from, "the FAA's substantive command that arbitration agreements be treated like all other contracts."¹⁷⁵ It was Florida doctrine that void contracts are not to be salvaged and even individual parts that are otherwise valid are not to be enforced.¹⁷⁶ Relying on *Prima Paint* the Court rejected this, again on the basis of federal substantive rule drawn from the FAA.¹⁷⁷

172. *Buckeye*, 126 S. Ct. at 1208-09.

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

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

174. This would have presented some problems for the Court. Florida's common law of illegality made the entire contract unenforceable if there was a violation of usury law. Thus the interest rates charged were so outrageous that the entire contract including the arbitration clause was void. That is, the whole contract, including the arbitration provision, was a legal nullity under Florida common law. This the Court refused to countenance. *Buckeye*, 126 S. Ct. at 1209.

175. *Id.*

176. *Id.*

177. *Id.*

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

While the Court's focus on the policy of the FAA can be lauded for its support of that Act's norms it should be questioned for its lack of concern for *Erie* principles. What makes the need for some zone of deference, as urged here, urgent is the context of diversity cases such as *Nagrampa*.¹⁷⁸ In a diversity case such as *Nagrampa* there is more to the *Erie* problem:

Thus, thirty-five years after the passage of the Arbitration Act, the Second Circuit completely rewrote it. Under its new formulation, § 2 now makes arbitration agreements enforceable' save upon such grounds as exist at *federal* law for the revocation of any contract.' And under § 4, before enforcing an arbitration agreement, the district court must be satisfied that 'the making of the agreement for arbitration, *as a matter of federal law*, is not in issue.' . . . Judge Medina...formulated the separability rule . . . because of his notion that the separability rule would further a 'liberal policy of promoting arbitration.'¹⁷⁹

Nagrampa is not only a diversity case, but one removed from state court and is one step beyond the controversial application of the FAA in *Prima Paint*. What *Southland* and *Buckeye* have done is exacerbate the *Erie* problem. If Justice Black saw *Prima Paint* as a kind of heresy then recent cases represent lunatic heresy. What was said in *Prima Paint* affected the federal court's view of the law and would have resulted in different interpretations of the substantive doctrine of severability depending on which courthouse you filed suit in.¹⁸⁰ Now the court is not only affecting the interpretation of federal substantive law it is using this weak reed to force the state courts to rewrite their substantive common law. Make no mistake, the severability rule urged by the Court in *Buckeye* is controversial doctrine at the least and in most states will be simply contrary to settled principles of law. So what the state courts will

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

179. *Id.* at 421 (Black, J., dissenting).

180. *Prima Paint*, 388 U.S. at 416-17.

have to do is change the common law or introduce an *Erie*-specific fix for matters involving compulsory arbitration clauses. This rule would provide for severability in those cases, but recognize that the doctrine would be quite different from the severability rules found, generally in contracts and specifically, in adhesion and unconscionability cases.

The Court could have, at any step, along its current course limited the *Erie* impact of its strategy to foster voluntary bargains leading to arbitration. First, it could have resisted the impulse to extend it beyond the limited commerce cases suggested by the Act's history. This was too late after *Prima Paint* in 1967. Next it could have chosen not to extend it to state court proceedings. This was too late after the *Southland* case of 1983. Finally, it might have limited *Southland*'s reach by recognizing common law voidness arguments. This was too late after *Buckeye* and the courts rejection of Florida doctrine on voidness as a reason not to refer.

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

The *Nagrampa* majority went to some length to avoid this draconian conflation. The majority distinguished Connie Nagrampa's allegations from those in *Buckeye*. The *Nagrampa* opinion recognized that *Buckeye* had already rejected common law severability rules and that it had held that the enforceability of an arbitration agreement could not turn on state policy and contract law. The majority knew that any conclusion that the contract in *Nagrampa* was void would achieve no purpose given the *Buckeye* holding. *Buckeye* made it plain that an attack on the contract as a whole, even if it leads to a conclusion that the contract was void *ab initio*, should be referred to the arbitrator.¹⁸¹ The court also recognized that there was the potential for the manipulation in the *Buckeye* line of cases.¹⁸² The remedy offered by the majority was to hold that Nagrampa's challenges were consistently directed at the arbitration

181. *Nagrampa*, 469 F.3d at 1269-70.

182. *Id.* at 1276-77.

clause alone.¹⁸³ In their view her challenges never approached a claim as to the whole contract, not even one of voidness.¹⁸⁴

Having concluded that the challenge was to the arbitration provision itself the court articulated the California rule based on California precedent.¹⁸⁵ The court said California analyzes contract provisions for both procedural and substantive unconscionability. It is true the California law on unconscionability in adhesion is complex. However, this is the beginning of the creation of the dispute between the majority and dissent for which the majority is at least in part responsible to. The court should recognize that California law handles adhesion and unconscionability in its own and perhaps peculiar way by relying on the California case of *Armendariz vs. Foundation Health Psychcare, Inc.*¹⁸⁶ The California court in *Armendariz* concluded that it could legitimately consider the compulsory arbitration provision and deemed to be unconscionable on the basis of California precedent.¹⁸⁷

The *Nagrampa* court looked at sister circuits and their resolution of the issue of what implications are to be drawn from a defense of adhesion if the defense challenges the arbitration agreement in the context of the contract as a whole.¹⁸⁸ The *Nagrampa v. MailCoups* opinion goes to some length to survey and analyze the various circuit holdings.¹⁸⁹ The court reviewed decisions from the Second, Third, Fifth, Sixth, Eighth and Eleventh circuits.¹⁹⁰ The court concluded that only the Eleventh Circuit was in substantial disagreement with the other circuits. It referred to *Jenkins vs. First American Cash Advance of Georgia, LLC*,¹⁹¹

183. *Id.*

184. *Id.*

185. Recall that *Nagrampa* arises in California even though the agreement called for the application of Massachusetts law. See *Nagrampa*, 459 F.3d at 1265-66. If we look at the substantive law of adhesion and unconscionability of California and the rift it caused between the majority and dissenters the depth of the change and the *Erie* implications become apparent. See *id.* at 1276.

186. 6 P.3d 669, 689-90 (Cal. 2000).

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

188. *Nagrampa*, 469 F.3d at 1271-72.

189. *Id.* at 1271-75.

190. See *id.*

191. 400 F.3d 868, 877 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1457 (2006).

as the aberrant decision.¹⁹² The *Nagrampa* court believed that the Eleventh Circuit applied the *Prima Paint* line of cases too narrowly. The Eleventh Circuit held that the adhesion claim must pertain specifically *and exclusively* to the arbitration agreement. Thus the court should not have dealt with allegations that both the contract as a whole and the arbitration agreement individually were adhesive.¹⁹³

The *Nagrampa* majority correctly pointed out that in California adhesion is a threshold inquiry for an unconscionability analysis.¹⁹⁴ This is a bit of an oversimplification. Adhesion—in California law—signifies only that a standardized contract has been imposed by a party of superior bargaining strength and the subscribing party had the choice to adhere or reject, but was not in a position to bargain.¹⁹⁵ But in California, as in most states, adhesiveness does not automatically destroy an agreement rather the court must also find the presence of other factors which render it unenforceable.¹⁹⁶

California recognizes two bases for refusing to enforcement of an adhesive deal. The first is that the contract includes a term or terms that are outside of the adhering party's reasonable expectations.¹⁹⁷ The second is that the contract as a whole or the individual provision is unconscionable.¹⁹⁸ The California courts appear to equate the terms "unconscionable" and "oppressive" even though unconscionability has its roots in equity, and oppression which appears to be a statement about the lack of a voice in the exchange.¹⁹⁹ California law—drawn from its case law, the U.C.C. as well as other legislative mandates—allows a California court to find the contract as a whole or any provision of it unconscionable.²⁰⁰ At least through *Armendariz*, the California courts believed it would be possible to invalidate a particular provision of the contract on the basis of unconscionability even if some of the unconscionability analysis was based on the bargaining and setting of the contract as a whole.²⁰¹

This understanding of California law was critical to *Nagrampa*, a diversity case in which the Court decided that California law controlled.²⁰²

Let's return to the majority/dissent dialogue:

192. In *Jenkins* the plaintiffs' complaint amounted to a claim of adhesion in check-cashing agreement. *Jenkins*, 400 F.3d at 871-72.

193. *Nagrampa*, 469 F.3d at 1274.

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

195. See *Armendariz*, 6 P.3d at 689-91.

196. *Id.*

197. *Id.*

198. *Id.*

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

200. *Armendariz*, 6 P.3d at 689-91.

201. *Id.* at 689-90.

202. *Nagrampa*, 460 F.3d at 1263-64.

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

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

MJ paused and said, “MailCoups concedes that the contract was non-negotiable and that Connie Nagrampa’s only choice was to sign it or make no franchise deal. Under California law a contract of adhesion is either inherently oppressive and therefore automatically procedurally unconscionable or there is a separate element of oppression needed to cast it as procedurally unconscionable.²⁰³ So all we need is to find some oppressiveness and no matter which is true this contract is procedurally unconscionable.²⁰⁴”

DJ said, “Well, the problem with that is you are looking at the context of the full contract and all our sister circuits agree that any argument about unconscionability must be directed to the arbitration clause, not the entire contract. The FAA does not allow a federal court to consider claims alleging the contract, as a whole, is adhesive. Those are for the arbitrator.²⁰⁵”

“But that misstates California law,” MJ responded. “California looks at adhesion only as a part of unconscionability. For the court to declare a contract unconscionable the court must find some proportion of procedural unconscionability and substantive unconscionability together. Its unclear how much, but it is some kind of sliding scale so that some of each is required to invalidate the deal so any court wishing to follow the California common law would have to consider procedural unconscionability. If procedural unconscionability is in large part adhesion then it means the court—not the arbitrator—needs to look at the circumstances of the bargain.²⁰⁶”

“But I don’t buy Nagrampa’s claim that the arbitration clause was procedurally unconscionable,” DJ said. “The whole argument that the clause was adhesive assumes that this sophisticated business person simply failed to read the contract. Or, even worse that she did not have to understand the import of a clause that clearly required her to arbitrate in Massachusetts.²⁰⁷ And even if we buy that argument there is no showing that the clause itself is grossly unfair.²⁰⁸ What’s the big deal about spending a couple thousand dollars to take a nice trip to Boston and state her case? I don’t mind staying at a La Quinta Inn. I saw Ra-

203. *Id.* at 1281-82.

204. *Id.*

205. *Id.* at 1298-99 (O’Scannlain, J., dissenting).

206. *Id.* at 1281-82.

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

208. *Id.* at 1302, 1305-06.

chel Ray's show on Boston. \$40 a day is enough for some good food. What's the hardship?"²⁰⁹

"The big deal is that these are matters a court must consider to comply with California law," MJ responded. "To decide whether the arbitration clause was unconscionable it has to look at substance and procedure.²¹⁰ More importantly they are matters that require looking at how the provisions were arrived at because you have to have both substantive and procedural elements for unconscionability. So even though there is not much evidence of procedural unconscionability in the making of the contract there is enough if the court finds an offsetting amount of substantive unconscionability in the arbitration term."²¹¹

"There you go repeating the error again," DJ replied. "You insist on using evidence of the overall bargaining to attack the arbitration clause. Show me the specific challenge to the arbitration clause based on the bargaining that occurred with regard to it alone. If you can't talk about the clause without talking about the whole deal then you are violating *Buckeye*."

"She has to attack the arbitration clause with specificity and every time she mentions procedure she mentions the setting and process of the entire agreement, not the clause itself."²¹²

Here is where the dialogue of the opinion fails as the two sides never join issue over the *Erie* concerns. Let's continue with the dialogue in a wholly speculative extension of the arguments so that the real issue is broached.

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

DJ smiled and said, "Bingo."

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

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

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

209. *Id.* at 1300.

210. *Id.* at 1280 (majority opinion).

211. *Id.* at 1283-84.

212. *Id.* at 1298-1300 (O'Scannlain, J., dissenting).

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

MJ said, “But even *Buckeye* leaves open the possibility of severing the claims, why are you not willing to try?”

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

MJ said, “I think we are making progress. It is the similarity in facts that raises the concerns about claim preclusion and *res judicata*, right?”

DJ said, “I suppose so . . . yes . . . I will go along with that. It seems to me that her real claim is that the contract is invalid because she did not like the result so she would like to escape it but claiming only that the arbitration clause was invalid may use up her chances to attack it.”

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

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

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

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

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

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

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

"What do you mean?" DJ asked.

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

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

MJ said, "So you will concede that it sounds suspiciously like the severability doctrine that is familiar to us in the context of common law and equitable doctrines of severing one clause of the contract to save the rest or even doctrines of equitable and common law reformation such as the blue pencil rule in covenants not to compete and the like."²¹³

DJ shrugged, "Sure I agree it always seemed vaguely familiar and contractual that is one of its strengths to me."

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

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

MJ said, "If you mean what harm other than having the common law depend on whether the contract contains an arbitration clause and what

213. It is logical that *Nagampa*, a California case should have drawn on fundamentals of California law including the notion of severability that is basic to the doctrine of unconscionability and formed the basis in *Armendariz* for the California Supreme Court's refusal to sever and save the arbitration clause. See *Armendariz*, 6 P.3d at 695-99.

we as federal judges think the rule of law should be, I am not sure. It seems to me to be a pretty substantial impact. By what right do we ignore California's law that an unconscionable contract is a nullity and even conscionable individual provisions should not be saved where the whole is void.²¹⁴ Seems to be enough of an *Erie* concern to me that we ought to find a way to avoid creating separate bodies of law based on courthouse and pleading happenstance. It certainly should not depend on the Court saying what it thinks the common law of unconscionability ought to be just to add gloss to a federal statute."

Not liking where the discussion was headed DJ said, "You just want to reargue the void/voidable distinction that *Buckeye* ended."

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

"You can get there any time so far as I am concerned," DJ smirked.

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

"Go back for a second to that other cause of action Connie Nagrampa might have brought. You remember: the one challenging the whole contract. We need to preserve that second cause of action as to the contract as a whole and the only way to do that is to take either challenge she may have.²¹⁵ So long as they are pled in the alternative we ought to retain both. We need to do that to prevent res judicata problems."

"I think that Connie Nagrampa was more of a gambler than I would have been. She did not challenge the contract as a whole. Every one of her six causes of action went to the clause itself. But to plead the facts to upset the arbitration clause she had to plead the facts that could have, and I emphasize *could have*, been used in an attack on the contract as a whole. But she did not make that attack. As you pointed out any lawyer worth his salt will see the overlap of facts and see that pleading one necessitates pleading the other or risking claim preclusion.²¹⁶ Then so long as the complaint is limited to a claim that the arbitration clause itself is invalid her gamble will pay off only if we keep this action.

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

"But don't you see another possibility?" MJ asked. "Suppose honesty instead of incompetence. Suppose they really did believe in the overall contract. Maybe she really did see that she was bound to pay something. She did offer to settle before she realized how much they wanted and

214. This is again the holding of *Armendariz*. See 6 P.3d at 674-75.

215. *Nagrampa*, 469 F.3d at 1269-70, 1270 n.3.

216. See, e.g., ANN TAYLOR SCHWING, 1 CAL. AFFIRMATIVE DEF. § 14:1 (2006 ed.) (outlining California's law of res judicata).

how little she had left. Maybe she really was willing to talk about the meaning of the contract and had no desire to attack its overall enforceability.

"If she really only had a beef against the arbitration provision then she should have attacked only it and she might have risked claim preclusion as to the entire contract. Maybe She was willing to take the risk in order to litigate locally. Maybe it really was about avoiding the expense and perceived unfairness of arbitration. If so we owe it to her to allow the specific complaint even if it requires sifting through facts that go to the making of the contract as a whole."

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

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

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

MJ nods to this.

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

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

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

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

“No,” DJ said. “That is too close to reverting to something like a writ-pleading system. That would be an ugly system of civil procedure. I know *Erie* allows a good deal of discretion in adopting procedural rules in federal court, but that seems to require the states to adopt or respond with changes to their pleading systems and they would be peculiar to contracts law, maybe even peculiar to contracts containing compulsory arbitration clauses. I believe in the federal/state division of responsibility. We already have too much federal activism.

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

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

“Good grief, you sound like a law teacher steeped in the common law to the point your tweeds have all turned brown,” DJ snickered. “But to answer your question that is a fraud in the factum or extortion defense²¹⁷ that would void the whole . . . deal . . .” DJ trailed off.

“But *Buckeye* appears not to allow the court to look at it even if its extortion. The extortion challenge is still to the whole contract,” MJ finished for DJ. DJ stares with a sinking expression. MJ continues, “So then rephrase the holding of *Buckeye* to say that the gloss of severability does more than prevent challenges based on the void/voidability distinction. It ends all court challenges to the contract as a whole even outrages such as physical duress and worse.

“*Buckeye* allows you to take a nullity, what is legally a nothing in California and probably every other state and once you sever it, once you deduct it from the whole, to have something that can be saved. I am sorry, but that is simply ridiculous.²¹⁸ Surely you would not say that the extorted deal I posited for you should have any breath of life breathed into it. The only way it gets to an arbitrator is on its own terms. No common law rule would demand arbitration of the question of enforceability of the whole deal. That is the *Erie* problem. Without *Buckeye* and its severability rule the place to challenge the deal or any part of the

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

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

deal is in court. There is no neutral rule of the common law that would send the deal to the arbitrator. In every case where the whole contract is void, allowing the arbitrator to examine the deal is not only recognition, but vindication of the clause. The wrongdoer gets exactly what he sought with that particular term."

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

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

"The Court could limit the *Buckeye* case to its facts. Instead of creating a series of rules that address particular common law doctrines such as the void/voidable distinction, we should give deference to the state courts and their expertise in contract formation. The Court could offer a test that demands an examination of the good faith and reasonable scope of the pleadings and the trial courts findings. If a trial court, no matter whether federal or state determines that the challenge is being made in good faith and is reasonably intended to place into controversy the arbitration clause's validity as a separate matter then the court can retain the case.

"Then only where it is a bad faith plea, one that seeks to color itself as a challenge to the arbitration clause but in fact is a challenge to whole contract and has no reasonable chance of success as a challenge to the clause should the case be referred. This is the kind of test that district courts are used to dealing with. It is analogous to summary judgment, demurrer and adequacy of the evidence tests that federal courts see in a number of contexts. In addition appellate courts will see the same similarity to tests by which they review dispositional rulings from below."

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

V. CONCLUSION

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

A reversal of *Buckeye* is not necessary. What is needed is an examination of the *Erie* principles and recognition that the Court has allowed the FAA norms to place its holdings in the interstices of the *Erie* doctrine.

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