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“NEW PRIME” AND NEW OPPORTUNITIES?

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The *New Prime, Inc. v. Oliveira*, No. 17-340 (2019), decision has drawn recent attention, particularly because it limited the application of the Federal Arbitration Association (FAA) in a way unseen since *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). My colleagues, particularly Imre Szalai and Richard Bales, have already commented on this departure in arbitration law in their contributions to this mini-symposium.

This particular essay focuses on the textual analysis used by Justice Gorsuch and its implication on other arbitration case law. Over arbitration law's most recent four decades, the Court has utilized a wide variety of tools of statutory interpretation in its analyses, including reading particular text in isolation, reading the text in context with the whole Act (the “whole act rule”), considering legislative history, using canons of statutory interpretation, accounting for historical perspective, and accommodating broad policy concerns. Although a deep dive into all of these tools over time would itself be fodder for an interesting law review article, this essay focuses on what the *New Prime* decision might mean for the whole act rule.

Under the whole act rule, a particular portion of a statute should be read in context with the remainder of the statute to give the whole statute consistent meaning. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Penn. L. Rev. 1007, 1037 (1989). In interpreting the FAA, however, many opinions utilize interpretations of one portion of the FAA without considering the effect on other parts of the statute. The 1984 decision of *Southland v. Keating*, 465 U.S. 1 (1984), provides the best example of this error. The *Southland* majority found Section 2 to be substantive law worthy of preemptive power, while giving little serious consideration to Sections 3, 4, and other portions of the statute that apply only in federal courts by the language of the act. See *id.* at 29-30 (O'Connor, Justice, dissenting).

New Prime, by contrast, seeks to read FAA Sections 1-4 together. *New Prime*, slip opn. at 3. The Court, for the first time, stated that “antecedent statutory provisions limit the scope of the court’s powers under §§3 and 4” to compel arbitration. *Id.* It further noted: “§1 helps define §2’s terms.” *Id.* Ultimately, the Court held “[g]iven the statute’s terms and sequencing” the determination of whether a dispute falls within the §1 exception should occur first, prior to compelling arbitration under §§3 and 4. *Id.* at 4. This analysis shows how the provisions of the Act can be read as a cohesive whole.

If the Court is now serious about reading all of the FAA together, this analysis could lay the groundwork for arguments overturning large portions of arbitration jurisprudence – including preemption and separability doctrines. The doctrine of preemption articulated in *Southland* is based on a reading of §2, to the exclusion of the jurisdictional language articulated in §§3 and 4. The earlier *Prima Paint* decision, establishing the “separability” doctrine, reads §4 without first considering §2. *Prima Paint Corp. v. Flood & Conklin, Mfg. Co.*, 338 U.S. 395, 403 (1967); *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) (extending the separability doctrine to cases involving delegation clauses). How might the Court determine these cases under a true textualist approach considering not only small portions of the FAA but the whole act?[1]

[1] Admittedly, a whole act textualist approach does not necessarily cure the problems that befell arbitration jurisprudence when the Court in *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956), ruled that arbitration is “substantive” for the purposes of the *Erie* doctrine. Most of arbitration’s most convoluted jurisprudence can be traced back to *Bernhardt*, but resolving those issues would go well beyond the scope of this short essay.



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