BOOK REVIEW

CONSTITUTIONAL CONUNDRUMS
IN ARBITRATION

ARBITRATION AND THE CONSTITUTION,
PETER B. RUTLEDGE (CAMBRIDGE UNIVERSITY PRESS, 2013)

S.I. Strong*

I. INTRODUCTION

In the immortal words of *Grease*, some things “go together, like rama-lama-lama, ka-dinga-da-dinga-dong.”1 Though everyone has their own list of favorite pairings, some sure-fire winners are hot dogs and baseball, Mom and apple pie, Justice Scalia and original intent.

Other combinations are not so easy to anticipate, at least until some far-reaching visionary has taken that all-important first step, leading the rest of the world to say “yes, of course, we see it now.” Again, individual preferences vary, but some possible unions include surfing and kite flying (now an Olympic sport),2 bacon and chocolate (now available at an internet source near you),3 and arbitration and constitutional law.

This last item is the topic of Professor Peter Rutledge’s new book from Cambridge University Press, *Arbitration and the Constitution*,4 and the focus of this review essay, which will consider, among other things, whether these two subjects are as compatible as, say, hot dogs and baseball. The core of the analysis appears in Part II, which outlines and evaluates the material presented by

---

1 See *We Go Together*, on *Grease: The Original Soundtrack from the Motion Picture* (1978).
4 See *Peter B. Rutledge, Arbitration and the Constitution* (2013).
Rutledge in his book. This section sets the book within the context of existing forms of constitutional and arbitral scholarship and considers whether Rutledge succeeds in his bold experiment of blending together two such seemingly diverse areas of law.

Most book reviewers appear to spend an inordinate amount of time faulting authors for not including various topics that the reviewers believe are important. Rather than criticizing Rutledge for a book that could have been, but was not in fact written, those types of aspirational comments are limited to Part III, entitled “A Reviewer’s Wish List.” That section covers what, in this reviewer’s mind, should be covered in the second edition of the book, for there is no doubt that a second edition is warranted. Indeed, as this essay will show, the intersection between arbitration and constitutional law is an important topic deserving of serious scholarly attention.

II. The First Edition

A. Preliminary Matters

Rutledge is not the first commentator to contemplate the connections between constitutional law and arbitration. Over the years, others have touched on various aspects of the relationship between the two fields, considering issues ranging from state action and due process to treaty interpretation and comparative constitutional law.5 However, up until now, no one has attempted to ad-

dress the constitutionality of arbitration in a comprehensive and methodical manner. As a result, the scope of the Rutledge text provides certain unique benefits not available elsewhere.

One of the other advantages of Arbitration and the Constitution is its timeliness. Over the last few years, the United States Supreme Court has become fascinated with arbitration. A number of these matters carry constitutional implications, and it is likely that any cases that come to the Court in the future will turn even more clearly on matters of constitutional import.

The situation is even more pressing elsewhere in the judiciary. Lower courts are clearly struggling with a variety of constitutional concerns, ranging from matters arising under the Bill of Rights to


7 For example, several recent matters have addressed the issue of federal preemption, which gives rise to Supremacy Clause concerns. See U.S. CONST. art. VI, cl. 2; Sutter, 133 S. Ct. at 2064; AT&T Mobility LLC, 131 S. Ct. at 1740; RUTLEDGE, supra note 4, at 79–124.

8 See Strong, Constitutional, supra note 5 (discussing the types and number of arbitration cases that have recently sought certiorari for constitutional reasons).

those under the Supremacy Clause. This phenomenon (i.e., the constitutionalization of arbitration) is consistent with examples seen in other countries, where an increasing number and diversity of constitutional claims relating to arbitration are being brought. Furthermore, a number of research organizations, including the American Law Institute and the Federal Judicial Center, have recently focused their attention on arbitration and have reflected the kind of sophisticated doctrinal and theoretical analyses that are increasingly becoming the norm in both domestic and interna-


tional arbitration. Collectively, these developments suggest that the time is ripe for a serious and comprehensive study of the constitutional implications of arbitration.

Methodologically, *Arbitration and the Constitution* has two distinct aims.

First, as a positive matter, the book aims to chart systematically the breakdown of the wall separating . . . [arbitration and constitutional law] and the alloying of their various principles. Second, as a normative matter, this book also (at times) critiques these developments.16

The book also adopts an intriguing and ambitious thematic goal, with Rutledge presenting as his thesis the idea that

[O]ver the past half century, constitutional norms increasingly have worked their way into arbitration law and, to a lesser extent, arbitration law has influenced the development of constitutional norms. Tellingly, this seepage between the two disciplines has not occurred with a great deal of systematic thought or deliberation. Instead, it has tended to take place through incremental developments in various fields of arbitration, often occurring in isolation from each other and with little consideration of the broader implications of the growing interconnectivity of these two disciplines.17

This emphasis on subtle forms of “seepage” rather than more direct doctrinal influences allows Rutledge to integrate case law and analysis from surprisingly diverse areas of law and to expand his discussion beyond well-known landmark cases within the core of the arbitral canon.18 Furthermore, the breadth of the analytical framework permits (if not requires) the introduction of examples from the entirety of arbitration law. Indeed, the text is peppered with references to a wide variety of arbitral procedures, including those involving investment, employment and consumer disputes,19 although Rutledge sensibly limits most of his analysis to a single area of law, namely commercial arbitration.20

In many authors’ hands, this type of wide-ranging discussion could prove problematic, since the various types of arbitration are

---

16 Rutledge, supra note 4, at 5.
17 Id.
18 See infra note 161 and accompanying text.
19 Chapter 2, for example, focuses primarily on treaty-based arbitration. See infra notes 47–62 and accompanying text.
20 See Rutledge, supra note 4, at 8.
quite distinct as a practical and jurisprudential matter. Rutledge has written extensively on many different forms of arbitration and is therefore well-suited to this type of diverse cross-disciplinary analysis. Furthermore, the ability to draw from so many different types of dispute resolution mechanisms yields a much more interesting and jurisprudentially rigorous discussion than would be possible in a single-subject study.

Structurally, the book is arranged into three sections of two chapters each, resulting in six numbered chapters in addition to a short introduction and conclusion. Given its ambitious scope, the text is relatively short, coming in at just over 200 pages. However, the length is consistent with the author’s apparent aim to produce a text suitable for readers from a variety of backgrounds rather than create a comprehensive treatise appropriate only for specialists within a narrow field.

The first section of the book introduces basic issues relating to separation of powers. Chapter 1 focuses on the “structural limits on Congress’s ability to require judicial enforcement of an arbitrator’s award absent de novo review of the award” while Chapter 2 discusses certain specialized forms of arbitration, including arbitration under various international trade agreements such as the North American Free Trade Act (NAFTA). In some ways, this is the weakest section of the book, not because of any analytical flaws, but simply as a matter of presentation, which appears somewhat rushed. It is unfortunate that these chapters are the reader’s first introduction to Rutledge’s ideas, since the book grows stronger as it goes on.

21 See id. at 6–7; STRONG, GUIDE, supra note 13, at 4–5.
23 See RUTLEDGE, supra note 4, at 1–208.
The second section also considers separation of powers issues, but on a vertical rather than horizontal plane. Thus, Chapter 3 discusses the Federal Arbitration Act25 and the extent to which that enactment applies to individual U.S. states, while Chapter 4 considers choice-of-law provisions in the context of federalism.26 In this discussion, Rutledge is able to draw on and critique the work of numerous courts and commentators, although the book provides its own unique perspective on the various issues.

The third section shifts away from structural issues in constitutional law and focuses instead on “the relationship between arbitration and individual liberties.”27 Chapter 5 therefore considers whether arbitration constitutes state action, while Chapter 6 discusses whether arbitration impermissibly infringes on the constitutional right to a jury trial. These issues have been relatively well-addressed by both courts and commentators, which allows Rutledge to contrast his analytical innovations to preexisting law and practice in a useful and interesting manner. The book then concludes with a brief discussion of overarching themes and areas of future research.

Having introduced the basic structure of the text, it is time to consider Rutledge’s analysis in more detail. Each of the three substantive sections is considered separately, as is the book’s conclusion.

B. Separation of Powers

_Arbitration and the Constitution_ begins with a separation of powers discussion arising out of Articles II28 and III29 of the U.S. Constitution. Although this is for many readers an extremely interesting topic, since few people conceptualize arbitration in the

26 See Rutledge, _supra_ note 4, at 9–10.
27 _Id._ at 10–11.
28 See U.S. CONST. art. II, §2, cl. 2 (stating that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments”); _see id._ art. II, §3 (stating that the president “shall take Care that the Laws be faithfully executed”).
29 _See id._ art. III, §1 (“The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”).
context of separation of powers concerns, the discussion is unfortunately the weakest of the book. Ironically, the majority of the problems appear to arise because the author is trying to do too much in too brief a space. As a result, the analysis is often conclusory in nature, which can create a certain amount of confusion in the reader’s mind.

Chapter 1 begins by focusing on whether arbitration impermissibly ousts the constitutional jurisdiction of Article III courts. As Rutledge correctly notes, this issue was at one time quite problematic for arbitration, since the concept of widespread contractual freedom to grant jurisdiction to a private arbitrator is largely an invention of the late twentieth century. This is not to say that arbitration was non-existent prior to contemporary times, since there is evidence (including the existence of an arbitration provision in George Washington’s will) that suggests that arbitration was not as rare or disfavored in the early years of the United States as is sometimes believed. However, the routine use of arbitration may have been restricted to certain limited subject-matter areas, geographic regions and/or socio-economic groups.

In considering the Article III argument, Rutledge reviews several rationales supporting the constitutionality of arbitration. For example, arbitration is often deemed constitutionally valid because the parties are said to “have waived their right to an Article III

However, Rutledge finds that approach problematic to the extent that it is based on the presumption that Article III rights are personal to the litigant and thus waivable. The text introduces a number of decisions ranging from Printz v. United States to U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership to support the proposition that Article III rights are not subject to individual waiver, but this discussion is unfortunately marred by its brevity, a problem that also arises elsewhere. In many cases, the problem may be a function of the book’s overall length, since 208 pages do not allow detailed discussion of numerous issues. However, Rutledge does himself a disservice by not fleshing out his arguments more completely.

Chapter 1 moves on to consider several other theories regarding Article III concerns, devoting a short paragraph to each before settling on appellate review theory as the analytical paradigm of choice. According to this model, arbitration is legally defensible because judicial review of arbitral awards affords courts with a constitutionally sufficient amount of oversight over the dispute. In this section, Rutledge modifies the conventional approach somewhat by relying on a number of cases and theories from outside the arbitral field, an analytical technique that is consistent with his desire to place arbitration law within a larger body of constitutional analysis. A number of Rutledge’s propositions (such as his statement that “[t]he upshot of . . . the modified appellate review theory is to vary the degree of constitutionally required review along two axes”) are intriguingly complex and merit more detailed discussion, since they suggest an entirely new way of looking at the way in which judicial review operates.

---

34 Rutledge, supra note 4, at 18.
35 See id. at 19–20, 22.
38 See Rutledge, supra note 4, at 23.
39 For example, in various places throughout the book, Rutledge simply cites a proposition that is said to be associated with the relevant decision, and then either agrees or disagrees with the characterization noted. See, e.g., id. at 23, 28–31, 38–39. Unfortunately, this type of approach does not allow the reader to form his or her own conclusions about the strength of the argument or the relevance of the authorities cited.
40 See id. at 24–25.
41 See id.
42 See id. at 5.
43 Id. at 39.
44 For example, the mathematical reference may warrant a graphic of some sort, although Rutledge may have concluded that any type of visual aid that was even vaguely reminiscent of algebra or geometry would unnerve those lawyers who are math-phobic. See id.
The book considers the viability of appellate review theory with respect to three different types of proceedings: private commercial arbitration, NAFTA arbitration and investment arbitration. Although this section demonstrates the author’s facility with a wide range of arbitration law, the presentation could be somewhat confusing to those readers who are not as familiar with each of these individual processes. Therefore, it might be useful if Rutledge spent a bit more time describing the various procedures and explaining why each example is relevant to the overall theme of the book.

The next chapter, Chapter 2, remains within the same general subject matter area as Chapter 1 (i.e., separation of powers) but moves from an Article III judicial branch analysis to an Article II executive branch analysis. Here, Rutledge departs from his usual focus on commercial and other forms of private arbitration and instead concentrates on various types of treaty-based arbitration that might be said to infringe on certain executive powers.

Rather than taking an expansive approach to the issue, Rutledge frames his analysis within the context of a single long-running dispute involving Canadian softwood lumber. He begins by discussing various issues relating to the Appointments Clause, which is an approach that has been used by a number of other

---

45 See id. at 44–53.
46 For example, the discussion of commercial arbitration considers both domestic and international proceedings, which could be problematic if readers do not have a grasp of the fundamental differences between the two mechanisms. See id. at 44–49. Although the author has correctly stated the basic propositions of law, most readers will not have the same facility with the cases and context as the author and therefore will not be able to judge the propriety of the various proposals and conclusions contained in this section.
47 See U.S. Const. arts. II–III; Rutledge, supra note 4, at 54–55.
48 See Rutledge, supra note 4, at 55. The emphasis here is on trade and investment arbitration, which both involve public law proceedings against a state or state entity. See id. Although international commercial arbitration also involves certain international treaties and can include a state as a party, commercial proceedings are private in nature and therefore do not give rise to Article II concerns. See U.S. Const. art. II; Rutledge, supra note 4, at 55; see also Inter-American Convention on International Commercial Arbitration, art. 5, Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975) [hereinafter Panama Convention]; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 (hereinafter New York Convention); Born, supra note 14, at 91–105; Emmanuel Gaillard & John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration 190–92, 247–300 (1999) [hereinafter Fouchard Gaillard Goldman].
49 See Coalition for Fair Lumber Imports Exec. Comm. v. United States, 471 F.3d 1329 (D.C. Cir. 2006); Rutledge, supra note 4, at 55–57, 63. This matter continues to be very active. See, e.g., John R. Crook, United States, Canada Arbitrate Softwood Lumber Disputes at London Court of International Arbitration; Canada Prevails in Most Recent Case, 106 Am. J. Int’l L. 869, 869–72 (2012).
scholars working on the constitutionality of NAFTA arbitration.\(^{50}\)
Indeed, there is a significant amount of literature concerning the
constitutional implications of NAFTA arbitration, although Rut-
ledge only mentions a few of these authorities in passing.\(^{51}\)

In many ways, the approach to existing scholarship is surpris-
ing, given the caliber of the authors who have been overlooked.\(^{52}\)
However, Rutledge appears to bypass conventional commentary so
as to develop more novel arguments by analogy. This kind of
cross-disciplinary analysis is both innovative and informative,
providing a kind of broad lateral thinking that is welcome (and indeed
necessary) in this field. Of course, some examples work better
than others,\(^{53}\) but the approach is nevertheless refreshing. Ulti-
ately, Rutledge concludes that “because the mechanism for ap-
pointing arbitrators to binational panels does not aggrandize a

\(^{50}\) See U.S. CONST. art. II, §2, cl. 2; see e.g., Richard Albert, The Cult of Constitutionalism, 39
FLA. ST. U. L. REV. 373, 375 (2012); Michael C. Dorf, Fallback Law, 107 COLUM. L. REV. 303,
317 (2007); Jean Galbraith, Prospective Advice and Consent, 37 YALE J. INT’L L. 247 (2012);
John Yoo, Rational Treaties: Article II, Congressional-Executive Agreements, and International

\(^{51}\) Rutledge relies primarily on a number of articles arising out of a symposium conducted in
1992. See Rutledge, supra note 4, at 58, 60; Jim C. Chen, Appointments with Disaster: The
Unconstitutionality of Binalaritl Arbitral Review under the United-States-Canada Free Trade
Agreement, 49 WASH. & LEE L. REV. 1455 (1992); William J. Davey, The Appointments Clause
and International Dispute Settlement Mechanisms: A False Conflict, 49 WASH. & LEE L. REV.
1315, 1316–17 (1992); Alan B. Morrison, Appointments Clause Problems in the Dispute Resolution
Provisions of the United States-Canada Free Trade Agreement, 49 WASH. & LEE L. REV.
1299 (1992). However, there appears to be a wealth of more recent commentary that might be
equally or perhaps even more appropriate to discuss. See Albert, supra note 50, at 375; Dorf,
supra note 50, at 317; Galbraith, supra note 50, at 247; Yoo, supra note 50, at 7–8.

\(^{52}\) For example, it seems strange not to mention the work of Bruce Ackerman and Laurence
Tribe, particularly since Ackerman’s and Tribe’s analyses are more recent than most of the arti-
cles cited in the book. See Rutledge, supra note 4, at 58, 60; Bruce Ackerman & David
Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation,

\(^{53}\) For example, in discussing whether the use of arbitration in NAFTA disputes violates the
Appointment Clause, Rutledge notes, without more, that critics of the process “point to the
Supreme Court’s decision in Buckley v. Valeo.” Rutledge, supra note 4, at 60; see also 424
U.S. 1, 126 (1976). Unfortunately, these critics are never named and no citation is given for this
proposition, nor is the decision in Buckley discussed. See Buckley, 424 U.S. at 126. Farther
down the page, in the discussion of the NAFTA defendants’ position, Rutledge cites to one
(rather dated) work, but it is unclear whether that article also covers issues from the critics’
perspective. See Rutledge, supra note 4, at 60; see also Homer E. Moyer, Chapter 19 of the
This ambiguity is somewhat frustrating to the reader and suggests that the book could be im-
proved by a more consistent and comprehensive approach to citation of authorities.
coordinate branch of government, it does not run afoul of the Appointments Clause.”

Rutledge also discusses the constitutionality of NAFTA arbitration under the Take Care Clause, which requires the president to “take Care that the Laws be faithfully executed.” Rutledge again introduces somewhat disparate case law, including a decision regarding background checks on handgun purchases. While this discussion is intriguing, it is based on unsupported references to “NAFTA’s opponents,” who are said to have made the initial analogy to the handgun case. This kind of veiled references to unnamed authorities can become problematic, since it suggests an ongoing debate to which the reader is not privy. Furthermore, the lack of information about cases and commentators referred to in the text thwarts the reader’s ability to evaluate the strength of the relative positions taken by other authors and the merits of Rutledge’s own proposals and analyses. However, the fact that the reader wants to know more about these issues is to Rutledge’s credit and demonstrates the importance and timeliness of the subject matter.

The last part of Chapter 2 considers whether the Appointments Clause and the Take Care Clause carry any implications for private (i.e., non-treaty-based) arbitration involving the United States. This analysis requires detailed consideration of whether and to what extent the U.S. government can enter into binding arbitration, an often-ignored issue that Rutledge handles well.

54 Rutledge, supra note 4, at 63.
55 U.S. Const. art. II, §3; see also Rutledge, supra note 4, at 64.
56 See Printz v. United States, 521 U.S. 898 (1997); Rutledge, supra note 4, at 65.
57 Rutledge, supra note 4, at 65; see also Printz, 521 U.S. at 898.
58 Problems with supporting authorities are seen elsewhere in this chapter. See Rutledge, supra note 4, at 60; see also supra note 53.
59 For example, Rutledge runs through three other Supreme Court decision in short order. See Rutledge, supra note 4, at 68–69; see also Plaut v. Spendthrift Farm, 514 U.S. 211 (1995); Dames & Moore v. Regan, 453 U.S. 654 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the “Steel Seizure” case); see also supra notes 36–39 and accompanying text.
60 See U.S. Const. art. II, §2, cl. 2; id. §3; Rutledge, supra note 4, at 70.
Though short, this section is extremely interesting and carries potentially far-reaching implications for both domestic and international arbitration.\textsuperscript{62}

\section*{C. Federalism}

The second section in \textit{Arbitration and the Constitution} is much stronger than the first, likely because the author can draw on the work of a large number of courts and commentators before providing his own unique insights. The focus here is on federalism, with Chapter 3 taking on the thorny question of federal preemption of state law under the Supremacy Clause.\textsuperscript{63} The discussion distinguishes between the enforcement of arbitration agreements, arbitral procedure and the enforcement of arbitral awards, thereby breaking down the proceedings sequentially and considering issues that arise at the beginning of the arbitration, during the pendency of the arbitration and after the arbitration has ended.\textsuperscript{64}

Federal preemption of state arbitration law is a subject that has been well canvassed by both courts and commentators,\textsuperscript{65} which

\begin{itemize}
\item See infra notes 219–35 and accompanying text. The issue of whether a state may subject itself to private arbitration is under debate in a number of countries around the world. \textsc{See Julian D.M. Lew et al., Comparative International Commercial Arbitration} \textsc{¶¶27-5 to 27-15, 27-35 to 27-83 (2003); Strong, Colombia, supra note 5, at 75–79.}
\item See \textit{U.S. Const.} art. VI, cl. 2; \textsc{Rutledge, supra note 4, at 79.} Interestingly, some commentators have framed federal preemption as “subconstitutional” or as reflecting a “second order constitutionalism.” \textsc{Samuel Issacharoff & Catherine M. Sharkey, Backdoor Federalization, 53 UCLA L. REV. 1353, 1356 & n. 7 (2006).} Although Rutledge does not discuss this issue directly in Chapter 3, he does note in the conclusion that future research should consider the way “constitutional influence varies with the issue,” which could encompass inquiries of this nature. \textsc{Rutledge, supra note 4, at 206; see also infra notes 167–78 and accompanying text.}
\item \textsc{Rutledge, supra note 4, at 81–99.}
allows Rutledge to consider a number of well-known Supreme Court precedents, including, most prominently, *Southland Corp. v. Keating*66 and *AT&T Mobility LLC v. Concepcion*.67 However, Rutledge goes beyond standard analyses and proposes a new paradigm that “consider[s] the effort by the Court to reallocate horizontal separation of powers at the state level.”68 This model suggests that although the current approach to arbitration agreements “purports to preserve room for federal principles” by indicating that “generally applicable state-law contract defenses govern the FAA [Federal Arbitration Act],” the decisions actually exhibit a different, and inherently anti-federalist, perspective to the extent that they “expand the power of state courts” while simultaneously “limit[ing] the tools available to state legislatures.”69

Rutledge believes that this new approach is reflected in the Supreme Court’s 2011 decision in *AT&T Mobility LLC v. Concepcion*, which he frames as indicating that “the mere fact that an anti-arbitration rule falls within a generally applicable state contract doctrine supplies merely a necessary – but no longer sufficient – condition for that rule to survive Section 2 preemption. Instead, the rule must undergo a second level of federal review.”70 If true,

The next subject addressed in the book involves federalism and arbitral procedure.\footnote{See Rutledge, supra note 4, at 93–97.} Interestingly, Rutledge believes the Supreme Court has exhibited a “comparatively greater tolerance of federalism principles in the context of arbitration procedures” than with respect to enforcement of arbitration agreements.\footnote{Id. at 96. The sentence quoted refers to “arbitration awards,” but the rest of the paragraph discusses arbitration agreements, suggesting the author simply misspoke in that one line. The introduction to the next subsection also suggests Rutledge meant to say “arbitration agreements” in the sentence quoted. See id. at 97.} This “tolerance,” which “can be understood as an effort . . . to support arbitration as an institution,”\footnote{Id at 97.} arises as a result of various gaps in the FAA, which create “the conditions for state law to play a role in arbitral procedures.”\footnote{Id at 94.}

The final section in Chapter 3 considers the enforcement of arbitral awards. Here, Rutledge believes that U.S. law “displays a solicitude for federalism similar to that shown in the context of ar-
bitral procedure,” since “the law here . . . leaves space for states that adopt anti-arbitration positions (. . . with limited exceptions).” Although this analysis adequately covers the various statutory issues, it unfortunately does not engage with the significant number of judicial decisions relating to domestic and international enforcement of arbitral awards. As a result, the discussion is disappointingly short and does not demonstrate the kind of insight exhibited by the author elsewhere in the chapter.

Indeed, some of the Chapter 3 analysis is deeply innovative. For example, at one point the text introduces the concept of “a ‘law market’ for different arbitral procedures,” noting that “diversity can actually benefit arbitration, for it encourages parties to site their disputes in jurisdictions whose mix of procedural devices best serves the parties’ interests.” This idea, which involves a sophisticated law-and-economics approach to arbitration that is developed more robustly in Rutledge’s other writings, could be usefully applied to enforcement procedures in international commercial arbitration, since parties in those situations are often faced with a wide range of possible venues for enforcement of an award. However, Rutledge devotes only a paragraph to international enforcement issues in his section on awards, thereby missing an opportunity to demonstrate the usefulness of this “law market” methodology.

The second chapter in this section, Chapter 4, considers arbitration and the choice of law, focusing on whether “parties can (and should be able to) contract around” certain rules regarding the preeminence of federal law. Questions relating to the proper limits of party autonomy in arbitration have become increasingly urgent in recent years, although choice of law concerns have not

---

76 Id. at 97.  
77 Id. at 97–99.  
78 RUTLEDGE, supra note 4, at 96–97.  
80 See RUTLEDGE, supra note 4, at 99.  
81 See id. at 101.  
received as much attention as waivers of class proceedings. Nevertheless, this area of law will likely come under increasing fire as parties become more creative in their litigation tactics, and Supremacy Clause concerns could be among the issues raised.

When considering the scope and effects of procedural autonomy in arbitration, the book distinguishes between three related questions: choice of law in the arbitration agreement, choice of forum for the hearing on the merits and choice of forum for any procedural challenges. The primary analytical framework is contractual in nature, in that it characterizes some legal principles in arbitration as akin to mandatory rules of law and others as comparable to default rules.

The discussion about choice of law in arbitration agreements focuses on three core cases from the arbitral canon: Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, Mastrobuono v. Shearson Lehman Hutton, Inc., and Preston v. Ferre. Rutledge parses through the various decisions and ultimately concludes that these cases illustrate the Supreme Court's view of arbitration as shifting "from a 'default' system to an increasingly 'mandatory' one . . . without much systematic examination or input from the political branches." Though the dis-


83 See U.S. CONST. art. VI, cl. 2.
84 See Rutledge, supra note 4, at 104.
85 See id. at 104–06. This approach is consistent with the maxim that arbitration is a "creature of contract." Thomas J. Stipanowich, Arbitration and the Multiparty Dispute: The Search for Workable Solutions, 72 IOWA L. REV. 473, 476 (1987).
90 Rutledge, supra note 4, at 113.
discussion could be expanded to reflect some of the commentary in this field, Rutledge’s analysis is well in line with standard interpretation of the case law.91

Next, the book considers “[t]he law governing arbitration proceedings[, which] has followed a very different course from the Volt-Preston line” of cases.92 The issue here involves “choices about forums, whether arbitral or judicial,”93 and the extent to which “the choice of forum influence[s] the arbitrator’s resort to the forum state’s arbitral law.”94

The analysis relies primarily on Green Tree Financial Corp. v. Bazzle95 and focuses on the way in which that decision “acknowledged that one of the main goals of the arbitrators was to render an enforceable award under South Carolina law with respect to the permissibility of multi-party arbitration.”96 According to Rutledge, “the arbitrators’ decision to follow the state court’s reasoning” in a preliminary proceeding “indicated that an arbitrator wanted to construe state law in the same manner as the state courts in order to secure an enforceable arbitral award,” thereby underscoring the importance of state law in the choice of forum analysis.97 However, Rutledge admits that the arbitrator’s approach did not constitute “a persuasive argument on appeal in Bazzle itself,” which could be seen as undercutting Rutledge’s conclusions about the importance of state law in determinations relating to the choice of forum.98 Unfortunately, the text does not provide further insights into how Bazzle affects the importance of state law in this field.99

Chapter 4 concludes with an analysis of the way in which federalism and personal autonomy interact with the enforcement of arbitral awards. The core decision in this discussion is Hall Street Associates, L.L.C. v. Mattel, Inc., which addressed parties’ ability

92 Rutledge, supra note 4, at 113.
93 Id.
94 Id. at 115.
96 Rutledge, supra note 4, at 115.
97 Id. at 115–16. In Bazzle, the South Carolina state court had ruled on a preliminary issue regarding the propriety of class arbitration in one of the joined cases, and the arbitrator had followed that determination. See Bazzle, 530 U.S. at 453 (Breyer, J.); see also Rutledge, supra note 4, at 115.
98 Rutledge, supra note 4, at 116; see also Bazzle, 530 U.S. at 453 (Breyer, J.).
99 Rutledge, supra note 4, at 115–16; see also Bazzle, 530 U.S. at 453 (Breyer, J.).
to expand judicial review of arbitral awards through contractual measures.\(^\text{100}\) According to Rutledge, the issue here involves “regulatory concerns about the investment of judicial resources,”\(^\text{101}\) with federal courts coming to a different conclusion about the appropriate balance than various state courts and legislatures.\(^\text{102}\)

The disparity between state and federal treatment of enforcement issues allows Rutledge to engage in a brief discussion of the benefits of diversity that can arise from robust protection of federalist values.\(^\text{103}\) Thus, the book asks whether these differences constitute a salutary development[.\] For one thing, from the perspective of federalism values, the answer would seem to be an unequivocal yes. It enables parties, through their affirmative choice, to give effect to state regulatory decisions designed to give even greater effect than the federal standard. To be sure, the greater diversity of state practice – and the variation from federal practice – tolerated by these rules dampens the uniformity goals that animated decisions such as Southland. Yet perhaps this is a sensible price – at least in cases where the federalism values are wedded with freedom-of-contract values (that is, giving effect to the parties’ choices about the scope of judicial review of the award).\(^\text{104}\)

The discussion goes on to consider these issues from a law-and-economics perspective, a technique that Rutledge uses to advantage elsewhere.\(^\text{105}\) Regardless of whether one ultimately agrees with the conclusions outlined in the book, the methodological approach provides an intriguing and sophisticated means of analyzing judicial decisions concerning the enforcement of arbitral awards.

\section*{D. Individual Liberties}

The third and final section of \textit{Arbitration and the Constitution} moves away from questions of institutional design and into the


\(^{101}\) Rutledge, \textit{supra} note 4, at 117.

\(^{102}\) See \textit{Hall St.}, 552 U.S. at 590; N.J. STAT. ANN. §2A: 23B-4(c) (West 2003); Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 101 (Tex. 2011); Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 598–99 (Cal. 2008); Rutledge, \textit{supra} note 4, at 120–21.

\(^{103}\) See Rutledge, \textit{supra} note 4, at 121–22.


\(^{105}\) See Rutledge, \textit{supra} note 4, at 122; see also Rutledge, \textit{Convergence, supra} note 22, at 52–61.
realm of individual rights, beginning in Chapter 5 with a discussion of state action and the Due Process Clauses. In considering whether and to what extent arbitration constitutes state action, the text engages with the work of commentators such as Sarah Cole, Richard Reuben and Jean Sternlight while also addressing a diverse array of judicial authorities, including decisions (such as *Gilmour v. Interstate/Johnson Lane Corp.* that lie at the heart of modern arbitration law as well as opinions (such as *Shelley v. Kramer*) that exist outside the arbitral mainstream. The discussion incorporates certain ideas (such as concerns about judicial ouster) that were addressed earlier in the book while also introducing entirely new concepts. In so doing, the text confidently walks the line between generalist and specialist audiences, providing an analysis that is both nuanced and appropriately aimed at readers who may only have a passing knowledge of one or the other of the two areas of law.

Rutledge concludes, consistent with other authorities, that arbitration does not constitute state action, which eliminates any formal need for arbitration to adopt principles of procedural due process. However, Rutledge also believes that, “as with other topics analyzed throughout this book, constitutional principles have seeped into arbitration through other mechanisms.” In this case, Rutledge believes that constitutional concepts of procedural fairness have entered into the arbitral realm by virtue of various voluntary due process protocols.

The book does not spend a great deal of time outlining the content of the individual protocols and focuses instead on the reasons why the arbitral and business communities developed these

---

106 See U.S. Const. amend. V, XIV; Rutledge, supra note 4, at 127.
107 See Rutledge, supra note 4, at 129–44; Cole, supra note 5; Reuben, supra note 5; Sternlight, *Constitutionality*, supra note 5.
110 See Rutledge, supra note 4, at 129–44.
111 See id. at 133; see also supra notes 30–46 and accompanying text.
112 See Rutledge, supra note 4, at 145. The one exception to this general proviso is court-annexed arbitration, which Rutledge believes does in fact constitute state action. See id. at 131; see also Amy J. Schmitz, *Nonconsensual + Nonbinding = Nonsensical?*, 10 Cardozo J. Conflict Resol. 587, 603–06 (2009) (discussing constitutional challenges to court-annexed arbitration).
113 Rutledge, supra note 4, at 145.
114 See id. at 145–56.
2013] CONSTITUTIONAL CONUNDRUMS 61

particular devices.\textsuperscript{115} This discussion is quite extensive and considers the evolution of the protocols from a sociological, economic and political perspective.\textsuperscript{116} While the economic analysis is easily the most sophisticated, the breadth of the discussion is quite useful in rounding out the reader’s understanding of the various forces at work.\textsuperscript{117}

The book then goes on to evaluate other ways that due process principles “have seeped into arbitration.”\textsuperscript{118} For example, Rutledge considers how various due process principles are reflected in judicial interpretations of the leading treaty on international enforcement of arbitration agreements and awards in commercial disputes (the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention).\textsuperscript{119} While the discussion is interesting and the emphasis on international dispute resolution welcome, it is unclear why the book focuses solely on international matters, since domestic arbitrations far outnumber international proceedings.\textsuperscript{120} Furthermore, the New York Convention is meant to be interpreted pursuant to international, rather than domestic

\textsuperscript{115} Although some additional detail about the content of the protocols would be welcome, the level of generality is sufficient to Rutledge’s primary point, which is that these protocols exist and have been developed as a means of addressing certain perceived problems with the fairness of arbitral procedures. See id. at 148. Those who wish to consider the various protocols themselves will find a wealth of information readily available. See, e.g., AMERICAN ARBITRATION ASSOCIATION, RULES AND PROCEDURES, www.adr.org (reproducing a number of due process protocols); Bone, supra note 82, at 1366 n.155; Christopher R. Drahozal & Samantha Zyontz, Private Regulation of Consumer Arbitration, 79 TENN. L. REV. 289, 300–52 (2012); Erin O’Hara O’Connor et al., Customizing Employment Arbitration, 98 IOWA L. REV. 133, 151–52 (2012); Thomas J. Stipanowich, The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes, 60 U. KAN. L. REV. 985, 998–1001, 1011–20 (2012).

\textsuperscript{116} See Rutledge, supra note 4, at 150–56.

\textsuperscript{117} See id.

\textsuperscript{118} Id. at 156.


\textsuperscript{120} Compare Born, supra note 14, at 69, 162 (citing number of annual filings at various international arbitral institutions) with Theodore J. St. Antoine, ADR in Labor and Employment Law During the Past Quarter Century, 25 ABA J. LAB. & EMP. L. 411, 442–43 (2010) (suggesting there were approximately 25,000 labor arbitration awards in 2008); see also Richard C. Reuben, Personal Autonomy and Vacatur After Hall Street, 113 PENN ST. L. REV. 1103, 1128 (2009) (estimating the number of domestic arbitrations “at least in the hundreds of thousands”).
standards, which could create some analytical difficulties to the extent that Rutledge is focusing on the incorporation of domestic constitutional principles into arbitral law and procedure.\(^{121}\)

Confusion also exists regarding Rutledge’s third example of the increasing influence of constitutional due process in arbitration.\(^{122}\) Here, Rutledge focuses on treaty design issues, particularly in the context of the work of the United Nations Commission on International Trade Law (UNCITRAL) on transparency in international investment arbitration.\(^{123}\) Although these developments may indeed reflect the incorporation of due process concerns in arbitration, it is not clear that these principles are based on the U.S. Constitution rather than some other source.\(^{124}\) Indeed, commentators typically do not tie due process in international arbitration to any particular constitutional norm. Instead, the concept of due process in international arbitration “refers to a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called *principe de la contradiction* and equal treatment.”\(^{125}\) “In many national laws this core is described as *ordre public* or public policy,” which may or may not be constitutional in nature.\(^{126}\)


\(^{122}\) See Rutledge, supra note 4, at 159–61.


\(^{124}\) See U.S. Const. amends. V, XIV.

\(^{125}\) Kaufmann-Kohler, supra note 14, 1321–22 (citations omitted). This principle “is often understood as a ‘hard’ rule of law, a kind of a core or foundation of all other procedural rules, the violation or disregard of which will lead to unenforceability of the award or decision given.” Matti S. Kurkela & Hannes Snellman, *Due Process in International Commercial Arbitration* 1 (2005).

\(^{126}\) Kurkela & Snellman, supra note 125, at 4; see also Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. Cal. L. Rev. 1153, 1203
Furthermore, the minimum due process requirements in arbitration are relatively straightforward when compared to standards reflected in most national legal orders and simply indicate “that parties be provided with (1) reasonable notice and (2) an opportunity to be heard.”127 While these principles have been said to form a “so-called due process defense [that] has been interpreted to ‘essentially sanction[] the application of the forum state’s standards of due process,’” the “forum” in question is typically the seat of arbitration, which may be located somewhere other than where the judicial proceeding in question is taking place.128 Therefore, while Rutledge’s hypothesis about the incorporation of U.S. constitutional principles may be correct in some cases (i.e., in situations where the arbitration is seated in the United States), it is less clear that U.S. due process concerns are or should be relevant to judicial proceedings relating to arbitrations seated elsewhere.129 This is particularly true in the context of investment arbitration, which is typically governed almost entirely by international (rather than national) principles of substantive and procedural law.130

The book concludes in Chapter 6 with a discussion of the way in which the constitutional right to trial by jury is affected by arbitration.131 Although the analysis is expanded to include issues arising under both state and federal law,132 the text nevertheless recognizes that this particular debate is virtually unique to the

---

127 Weston, Universes, supra note 5, at 1770.
129 See Strong, Guide, supra note 13, at 33-36; see also infra note 202 and accompanying text.
131 See Rutledge, supra note 4, at 170; see also U.S. Const. amend. VII.
132 See Rutledge, supra note 4, at 171 n. 5 (listing various state constitutional provisions).
United States, since few other countries provide for civil trial by jury.\footnote{See id. at 173–74.}

In this section, Rutledge focuses on a series of related questions, including first, whether the jury right is waivable; second, whether the right (if waivable) can be disposed of on a pre-dispute basis; and third, whether the right (if waivable on a pre-dispute basis) has in fact been waived by the language adopted by the parties.\footnote{See id. at 172–73.} Although “[m]ost debates among scholars and in judicial decisions concern the third issue,” Rutledge fortunately does not limit himself in that manner.\footnote{Id. at 173.} Instead, he undertakes a more wide-ranging analysis that provides useful insights that are relevant not only to parties’ ability to waive a jury trial, but also to their ability to waive other sorts of procedural rights.\footnote{The issue of waiver is becoming increasingly important in arbitration. See supra note 84 and accompanying text.}

The discussion begins by considering whether the right to a jury trial is private (i.e., individual) or public in nature.\footnote{See Rutledge, supra note 4, at 175.} Although the various arguments are relatively well-known\footnote{See id.; see also Katherine V.W. Stone & Richard A. Bales, Arbitration Law 382 (2010) (citing various articles by Jean Sternlight and Stephen Ware debating waivers of Seventh Amendment jury rights through arbitration); Michael L. Moffitt, Customized Litigation: The Case for Making Civil Procedure Negotiable, 75 Geo. Wash. L. Rev. 461, 494 (2007); Peristadt, supra note 5, at 208; Elizabeth Thornburg, Designer Trials, 2006 J. Disp. Resol. 181, 183–91.} and the outcome something of a foregone conclusion,\footnote{Although Rutledge spends a significant amount of time discussing whether and to what extent the right to a jury should be alienable, he admits that courts and commentators have universally concluded that such rights are waivable. See Rutledge, supra note 4, at 177–84.} the analysis is nevertheless helpful, since it demonstrates the types of issues that may arise in other contexts, such as those involving waivers of class and collective relief.\footnote{See supra note 84 and accompanying text.  Class waivers were recently addressed by U.S. Supreme Court, after having been initially addressed in 2011. See Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).}

This section also includes several innovative observations. For example, the text notes that, “[a]s a matter of state constitutional law, . . . alienation of the parties’ jury right might be . . . unenforceable even in the non-arbitral context.”\footnote{Rutledge, supra note 4, at 182.} Because “the FAA does not preempt generally applicable state constitutional guarantees that, as a matter of state law, are not alienable,” waivers that are valid as a matter of federal law may be invalid as a matter of state
law.\footnote{142}{Id.} As Rutledge notes, this is an important point given the current debate regarding the enforceability of class waivers in arbitration.\footnote{143}{See id. at 183–84; STRONG, CLASS, supra note 67, ¶¶4.85–4.121, 5.51–5.57; see also AT&T Mobility LLC, 131 S. Ct. at 1740; Am. Express Co. v. Italian Colors Rest., 133 S. Ct. at 2304. At this point, it is unclear whether and to what extent the ability to proceed as a class should be considered procedural or substantive, and whether that ability should be considered a right or a remedy. See STRONG, CLASS, supra note 67, ¶¶4.1–08, 5.70–80; Strong, Canada, supra note 71, at 972–75. While such issues are beyond the scope of the current discussion, it is important to note that although some procedural rights can be considered “subconstitutional,” they are often necessary to support constitutional principles of fairness in adjudication. See Judith Resnik, Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism, 56 ST. LOUIS U. L.J. 917, 966 (2012) (discussing “the development of a host of sub-constitutional discovery rights in both civil and criminal cases” to ensure “the legitimacy of civil judgments”); see also Alexandra D. Lahav, The Case for “Trial by Formula,” 90 TEX. L. REV. 571, 607 (2012) (suggesting “there is a basis in the existing doctrine and the language of the Equal Protection and Due Process Clauses for establishing a right to outcome equality in adjudication” and that “[t]hat right has even been recognized by the Supreme Court”). As such, the right to proceed as a class could be characterized as falling within the right to an effective remedy, which is protected as a type of fundamental or core constitutional right in some jurisdictions. See S.I. Strong, Cross-Border Collective Redress and Individual Participatory Rights: Quo Vadis?, 32 CIV. JUST. Q. __ (forthcoming 2013); S.I. Strong, Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation, 45 ARIZ. ST. L. J. 233 (2013).\footnote{144}{A significant number of courts disagree on the grounds that individual waivers of collective provisions are unenforceable because the right to proceed collectively is not individual in nature. See Raniere v. Citigroup Inc., 827 F. Supp. 2d 294, 314 (S.D.N.Y. 2011); see also STRONG, CLASS, supra note 67, ¶¶4.97–4.100.\footnote{145}{See 29 U.S.C. §216(b) (2012); Owen v. Bristol Care, Inc., 707 F.3d 1050, 1054 (8th Cir. 2013); Vilches v. The Travelers Cos., 413 Fed. App’x 487, 494 (3d Cir. 2011); Torres v. United Healthcare Servs., Inc., 920 F. Supp. 2d 368 (E.D.N.Y. 2013); STRONG, CLASS, supra note 67, ¶¶4.97–4.100. Disputes based on the federal Truth in Lending Act (TILA) may also result in bilateral arbitration, despite provisions in TILA specifically allowing for class actions. See 15 U.S.C. §§1601 et seq. (2012); THOMAS H. OEHMKE, COMMERCIAL ARBITRATION §16:13 (2012); Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive? 42 WM. & MARY L. REV. 1, 13–14, 63–65, 80–83 (2000) (discussing TILA claims).\footnote{146}{See CAL. LAB. CODE §§2698–2699.5 (2012); see id. §2699.}}Indeed, class arbitration provides a useful illustration of the potential for different outcomes under state and federal law. For example, most federal courts\footnote{144}{A significant number of courts disagree on the grounds that individual waivers of collective provisions are unenforceable because the right to proceed collectively is not individual in nature. See Raniere v. Citigroup Inc., 827 F. Supp. 2d 294, 314 (S.D.N.Y. 2011); see also STRONG, CLASS, supra note 67, ¶¶4.97–4.100.\footnote{145}{See 29 U.S.C. §216(b) (2012); Owen v. Bristol Care, Inc., 707 F.3d 1050, 1054 (8th Cir. 2013); Vilches v. The Travelers Cos., 413 Fed. App’x 487, 494 (3d Cir. 2011); Torres v. United Healthcare Servs., Inc., 920 F. Supp. 2d 368 (E.D.N.Y. 2013); STRONG, CLASS, supra note 67, ¶¶4.97–4.100. Disputes based on the federal Truth in Lending Act (TILA) may also result in bilateral arbitration, despite provisions in TILA specifically allowing for class actions. See 15 U.S.C. §§1601 et seq. (2012); THOMAS H. OEHMKE, COMMERCIAL ARBITRATION §16:13 (2012); Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive? 42 WM. & MARY L. REV. 1, 13–14, 63–65, 80–83 (2000) (discussing TILA claims).\footnote{146}{See CAL. LAB. CODE §§2698–2699.5 (2012); see id. §2699.}}appear to take the view that waivers of the collective action provisions of the federal Fair Labor Standards Act (FLSA) can be upheld.\footnote{145}{See 29 U.S.C. §216(b) (2012); Owen v. Bristol Care, Inc., 707 F.3d 1050, 1054 (8th Cir. 2013); Vilches v. The Travelers Cos., 413 Fed. App’x 487, 494 (3d Cir. 2011); Torres v. United Healthcare Servs., Inc., 920 F. Supp. 2d 368 (E.D.N.Y. 2013); STRONG, CLASS, supra note 67, ¶¶4.97–4.100. Disputes based on the federal Truth in Lending Act (TILA) may also result in bilateral arbitration, despite provisions in TILA specifically allowing for class actions. See 15 U.S.C. §§1601 et seq. (2012); THOMAS H. OEHMKE, COMMERCIAL ARBITRATION §16:13 (2012); Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive? 42 WM. & MARY L. REV. 1, 13–14, 63–65, 80–83 (2000) (discussing TILA claims).\footnote{146}{See CAL. LAB. CODE §§2698–2699.5 (2012); see id. §2699.}}However, this approach can be contrasted with the treatment of claims arising under California’s Private Attorney General Act of 2004 (PAGA),\footnote{146}{See CAL. LAB. CODE §§2698–2699.5 (2012); see id. §2699.} which was created as “a means of ‘deputizing’ citizens as private attorneys general to enforce the Labor Code,” and, as such, provides relief “for the benefit of the general public rather than the party
Numerous California state courts have held that waivers of PAGA provisions reflecting the right to bring a claim on behalf of “other current or former employees” are unenforceable, even in the wake of the U.S. Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, because that decision did not address waivers of state laws that are intended to benefit the public.148

This phenomenon would, perhaps, be sufficient to prove Rutledge’s point about the different treatment of waiver analyses under state and federal law, but further analytical complexities arise as a result of federal court treatment of PAGA claims.149 Interestingly, the majority of federal decisions, including *Kilgore v. KeyBank, National Association* from the Ninth Circuit, depart from California state precedent and hold that waivers of PAGA’s representative relief provisions are enforceable and that PAGA claims may be arbitrated on an individual basis.150 While this result may seem to violate certain principles of federalism (and would thus be interesting to contemplate in the context of Rutledge’s Chapter 4 analysis),151 the Ninth Circuit did suggest in *Kilgore* that the California state approach to PAGA may remain viable in cases where the underlying statutory claims rely on state, rather than federal, law.152 These issues, which will doubtless be further deve-

---

147 Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854, 862–83 (Cal. Ct. App. 2011), *cert. denied*, 132 S. Ct. 1910 (2012). Claims proceeding under PAGA are distinguishable from claims proceeding under Rule 23 of the Federal Rules of Civil Procedure because the claimant in a PAG dispute is said to act “as the proxy or agent of state labor law enforcement agencies . . . in a proceeding that is designed to protect the public, not to benefit private parties.” *Id.* at 861; see also FED. R. CIV. P. 23.


149 See Rutledge, supra note 4, at 182.


151 See supra notes 81–105 and accompanying text.

152 See Kilgore, 673 F.3d at 962.
oped in future judicial opinions, could benefit from analyses based on Rutledge’s distinction between the ability to waive a jury trial under federal versus state law.\footnote{See Rutledge, supra note 4, at 182.}

The book then turns to the question of whether the right to a jury may be waived prior to the onset of the dispute in question. Here, Rutledge claims that

\[\text{the argument against pre-dispute waiver rests on the assumption that, until the parties know the complete contours of a dispute, they lack the necessary information to make a fully informed choice whether to exercise, or waive, their right to a jury trial. Pre-dispute arbitration clauses force parties to make a decision about that important right before they have full (or at least adequate) information the nature of their dispute.}\footnote{Id. at 185.}

Having framed the debate as an informational dilemma, Rutledge then looks at other situations where procedural rights can be waived without the benefit of full information about the ramifications of that decision.\footnote{See id. at 186–87.} Drawing on fields as diverse as European consumer law, rental car agreements and the Arbitration Fairness Act allows Rutledge to evaluate the various policies at stake and determine why the risk of impropriety is deemed to be too high in some contexts but not in others.\footnote{See id. at 186; see also Directive 2005/29, of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Practices, 2005 O.J. (L 149) 22 (EC) (Unfair Commercial Practices Directive); Directive 98/27, of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers’ Interests, 1998 O.J. (L 16) 51 (EC); Directive 93/13, of the Council of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 (EEC); Commission Green Paper on Consumer Collective Redress, COM (2008) 794 (Nov. 27, 2008); Arbitration Fairness Act of 2011, S. 987, 112th Cong, (2011); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011).} Although Rutledge recognizes that pre-dispute arbitration agreements have long been considered appropriate in the United States and that his analysis is not likely to turn the tide of U.S. jurisprudence, the discussion usefully demonstrates why parties are allowed to waive their right to a jury trial before all the information about the dispute is available.\footnote{See Rutledge, supra note 4, at 188–89.}

The third and final issue in this chapter involves the type of language that is necessary to waive the right to a jury trial.\footnote{See id. at 189.} Although questions relating to the sufficiency of jury waivers have
been addressed at length by numerous courts and commentators, Rutledge provides his own unique analytical twist by comparing pre-dispute jury waivers to waivers of other types of procedural rights. For example, he notes that criminal defendants are allowed to waive certain important procedural rights (such as the right to the assistance of counsel, certain Fourth Amendment rights or the right to a Miranda warning), but only pursuant to various safeguards ranging from a writing to a discussion with the judge in open court. Alternatively, he notes that some types of transactions require witnesses to confirm that the parties are capable of undertaking certain duties or surrendering certain rights.

Rutledge considers each type of procedural protection to determine whether it would be appropriate to impose a similar burden on parties seeking to waive their right to a jury trial through use of a pre-dispute arbitration agreement. After evaluating the various transaction costs associated with each of the possible alternatives, he concludes that the best means of protecting the right to a jury trial is to use a standardized model arbitration clause that incorporates language that is deemed sufficient to put the parties on notice of the rights that they are waiving. In many ways, this approach is similar to the due process protocols discussed in Chapter 5, since it relies on arbitral organizations developing model clauses designed to ensure complete waiver of the jury right, and courts supplying feedback on the adequacy or inadequacy of those waivers (based upon the underlying policy considerations identified . . . [in the text]). Over time, model clauses might provide “safe harbor” language assured to pass judicial muster, whereas more adventurous clauses risk closer judicial examination and scrutiny.


160 See Rutledge, supra note 4, at 192–95.

161 See id. at 192; see also U.S. CONST. amend. IV.

162 See Rutledge, supra note 4, at 193.

163 See id. at 192–95.

164 See id. at 200.

165 Id.
To some extent, this type of mechanism already exists, at least in the context of institutional (administrated) arbitration or in ad hoc arbitrations proceeding under the UNCITRAL Arbitration Rules, since UNCITRAL and the various arbitral institutions all propose standard model clauses that have been well-tested in courts. However, Rutledge is right to note that there is no model clause for domestic ad hoc arbitrations similar to that provided by UNCITRAL in the international context.

E. The First Edition Conclusion

Arbitration and the Constitution includes a short conclusion that sums up the major themes of the book and outlines various areas requiring additional research in the future. Though brief, this section offers some interesting ideas and should not be overlooked.

First, according to Rutledge, “the central lesson of this book is that constitutional values have not influenced arbitration at the level of direct doctrinal incorporation.” Although constitutional principles have not been directly incorporated into arbitration, Rutledge nevertheless believes that a number of “subdoctrinal influences,” such as those arising out of international treaties and due process protocols, exist. Furthermore, “because the debate over constitutional principles in arbitration takes place at the subconstitutional level,” pressure is also exerted by certain “dialogic influences.” Together, these factors result in “a far greater dialogue between institutions of the state as well as with private parties than if the constitutional doctrine occupied the entire field.”

Rutledge then turns to a brief discussion of the ways in which research in this field might develop in the future. One issue that he

---

167 See Rutledge, supra note 4, at 203–08.
168 See id. at 203.
169 Id. at 205.
170 Id. at 206.
171 Id.
CARDOZO J. OF CONFLICT RESOLUTION [Vol. 15:41

believes needs more attention involves the question of “why the form of constitutional influence varies with the issue.” 172 This sort of broad-based inquiry would be difficult for most researchers to undertake, since it requires detailed comparisons of multiple issues drawn from various fields of arbitration law. However, Rutledge is correct to identify this as a useful area for future examination, since such analyses would draw various elements of arbitral law together into (one assumes) a more cohesive whole. 173

Rutledge also suggests an increased emphasis on comparative constitutional law. 174 Again, his proposals are well taken, since very little comparative work has been done regarding the ways in which different countries treat arbitration domestically. 175 In many ways, this gap in scholarship is understandable, since arbitration can sometimes be viewed as being subject to historical, political and cultural influences that make comparative analysis difficult. 176 However, concerns about national distinctiveness have been overcome in other areas of law, 177 which suggests that it would be possi-

172 See id. at 207–08.
173 Alternatively, this discussion could suggest the fragmentation of arbitration law, which would also be useful to know. Indeed, the field often suffers from the failure to appreciate the distinctions between the different branches of arbitration, which can result in inappropriately broad-brushed analyses by courts, including the U.S. Supreme Court. See Strong, Guide, supra note 13, at 3–5; Strong, First Principles, supra note 15, at 211–41 (discussing factual and analytical errors made by the Supreme Court in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), and Stolt-Nielsen SA v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758 (2010)).
174 See Rutledge, supra note 4, at 207.
176 At once time, the boundaries of comparative law were narrowly drawn to avoid any issues that might be subject to political or historical influences. See Harold C. Gutteridge, Comparative Law: An Introduction to the Comparative Method of Legal Study & Research 29 (2d ed. 1949); K. Zweigert & H. Kotz, An Introduction to Comparative Law 39 (Tony Weir trans., 1998).
177 For example, constitutional law was itself one time considered to be an inappropriate subject for comparative study due to the influences of history, culture and politics. See Vicki C. Jackson, Methodological Challenges in Comparative Constitutional Law, 28 Penn. St. Int’l L. Rev. 319, 323–26 (2010); David S. Law & Mila Versteeg, The Evolution and Ideology of Global Constitutionalism, 99 Cal. L. Rev. 1163, 1169 (2011); Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale L.J. 1225, 1270 (1999). However, those qualms have largely been overcome. See Law & Versteeg, supra, at 1168–70; Tushnet, supra, at 1228–30.
III. THE SECOND EDITION (A REVIEWER’S WISH LIST)

The conclusion of *Arbitration and the Constitution* identifies a number of areas where additional research is warranted, thereby opening the door to speculation about other issues that could be usefully addressed by Rutledge or other commentators, either in individual articles or in a subsequent edition of this book. Indeed, a second edition of *Arbitration and the Constitution* would be very welcome, since the confluence of arbitration and constitutional law gives rise to a number of important concerns that would benefit greatly from Rutledge’s comprehensive approach.

Although every reader will have his or her own wish list of items that merit further attention, four issues come to this reviewer’s mind as being particularly deserving of Rutledge’s scholarly consideration. Each is discussed separately below.

A. Scope and Applicability of Constitutional Standards Relating to Jurisdiction

The first issue that should be included in the second edition of *Arbitration and the Constitution* involves the scope and applicability of various constitutional standards relating to the jurisdictional reach of U.S. courts. It is well-established that courts must establish personal jurisdiction and, in some cases, subject-matter jurisd-

---

178 Functionalism would appear to be a particularly promising methodological approach, since it allows researchers to look past superficial differences and focus on the operational attributes of the matter under discussion, a technique that would appear highly appropriate in cases involving arbitration, which can vary considerably even within a single legal system. *See Strong, Guide, supra* note 13, at 4–5 (describing different types of arbitration in the United States); *Strong, First Principles, supra* note 15, at 241–45 (discussing core attributes of arbitration); Ralf Michaels, *The Functional Method of Comparative Law*, in *The Oxford Handbook of Comparative Law* 339, 342, 357 (Mathias Reiman & Reinhard Zimmerman eds., 2006). Functionalism also “overcomes the epistemic/doctrine difference between civil and common law by declaring it functionally irrelevant.” *Id.* at 342. However, other comparative methodologies may also be appropriate. *See Tushnet, supra* note 177, at 1228–29 (discussing functionalism, expressivism and bricolage).

179 Personal jurisdiction must be established in both state and federal court. Some states extend their jurisdictional reach to the full extent permitted by the U.S. Constitution. *See Cal.*
diction before a particular matter can be adjudicated in litigation. However, courts are also asked to decide various issues relating to arbitration, and questions exist as to whether the constitutional standards for jurisdiction that were developed for use in litigation can or should apply equally to judicial proceedings connected with arbitration. Because the two types of jurisdiction (personal and subject-matter) give rise to different sets of concerns, they are considered separately.

1. Personal Jurisdiction

The scope and content of the various constitutional tests relating to personal jurisdiction are well-established, with numerous U.S. Supreme Court opinions describing the standards necessary to establish specific or general jurisdiction over the person of the defendant. Judicial guidance also exists regarding the parameters relating to in rem or quasi-in rem jurisdiction.

These standards appear to give rise to few difficulties in situations involving domestic arbitration. However, problems can arise in cases that fall under one of the two international treaties commonly used to enforce arbitration agreements and awards in the United States (i.e., the New York Convention or the Inter-American Convention on International Commercial Arbitration, more commonly known as the Panama Convention). Here, the core concern is that constitutional tests for jurisdiction are not men-

---


181 These matters may arise before, during or after the conclusion of the arbitration itself. See Strong, Guide, supra note 13, at 37–87. Although some requests for judicial assistance are inappropriate, some types of court intervention are necessary and consistent with the aims and structure of arbitration. See Strong, Borders, supra note 79, at 9–17.


It is perhaps possible to defend the application of U.S. constitutional standards in some cases by relying on Article III of the New York Convention, which states that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”\footnote{186 Id.} However, Article III also indicates that the recognition process is to be undertaken pursuant to “the conditions laid down in the following articles,” which many commentators believe should be construed to prohibit the imposition of any national rule of procedure that would block confirmation or enforcement of an award for any reason other than those outlined in Article V of the Convention.\footnote{187 Id. arts. III, V; see also Park, supra note 185, at 1263–64; Park & Yanos, supra note 185, at 254–56, 264; Strong, Invisible Barriers, supra note 5, at 450–52.}

Although this problem has not often been considered by U.S. courts, it has arisen a few times in recent years.\footnote{188 See First Invest. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, 703 F.3d 742, 749–50 (5th Cir. 2012); Dardana Ltd. v. A.O. Yuganskneftegaz, 317 F.3d 202, 208 (2d Cir. 2003); Glencore Grain, 284 F.3d at 1120–28; Base Metal Trading, 283 F. 3d at 214–15; CME Media Enterprises B.V. v. Zelezny, No. 01 Civ. 1733(DC), 2001 WL 1035138, at *3-5 (S.D.N.Y. Sept. 10, 2001).} Because the issue reflects a potential conflict between international and constitutional law, judges typically turn to the Supremacy Clause for gui-
dance and give primacy to the constitutional tests for jurisdiction.

Although some sort of consensus may be building with respect to the applicability of constitutional standards regarding personal jurisdiction in some arbitration-related matters, a number of questions remain open. For example, most of the analysis to date has taken place in the context of the enforcement of arbitral awards, and it is unclear whether the same jurisdictional tests can or should be applied in situations relating to the enforcement of arbitration agreements or the provision of any sort of interim assistance during the pendency of the arbitral proceedings. The problem here is that the language in Article III of the New York Convention that ostensibly justifies reliance on national procedural law only refers to enforcement of arbitral awards and is silent regarding any other type of proceeding. Furthermore, this is one of the areas where the text of the Panama Convention differs from that of the New York Convention, giving rise to questions as to whether disputes arising under the two treaties should be construed similarly.

Additional concerns arise in cases where personal jurisdiction is based on Rule 4(k)(2) of the Federal Rules of Civil Procedure, commonly referred to as the federal long-arm statute. While this provision specifically states that jurisdiction may only be exercised if it is “consistent with the United States Constitution and laws.”

189 The U.S. Constitution takes priority over treaties. See U.S. Const. art. VI, cl. 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803); see also Reid v. Covert, 354 U.S. 1, 16–17 (1957); Restatement (Third) of the Foreign Relations Law of the United States §111 cmt. a (1987); Kesavan, supra note 121, at 1480; Strong, Constitutional, supra note 5.

190 See U.S. Const. art. VI, cl. 2; First Invest., 703 F.3d at 749–50; Dardana, 317 F.3d at 208; Glencore Grain, 284 F.3d at 1120–28; Base Metal Trading, 283 F. 3d at 214–15; CME Media, 2001 WL 1035138 at *3-5; Lawrence W. Newman & David Zaslowsky, The Clash Between the New York Convention and the U.S. Constitution, N.Y. L.J., Mar. 28, 2013; Park, supra note 185, at 1263–64; Park & Yanos, supra note 185, at 254–56, 264; Strong, Invisible Barriers, supra note 5, at 450–52.


192 See New York Convention, supra note 48, art. III; Panama Convention, supra note 48, art. 4; see also Born, supra note 14, at 2337, 2348, 2400–02, 2714.

193 Compare New York Convention, supra note 48, art. III, with Panama Convention, supra note 48, art. 4.

194 See Fed. R. Civ. P. 4(k)(2); Dardana, 317 F.3d at 207-08; Glencore Grain, 284 F.3d at 1127; Base Metal Trading, 283 F.3d at 215; Strong, Invisible Barriers, supra note 5, at 449–51.

195 Fed. R. Civ. P. 4(k)(2) (“For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.”). The first element of this test will always be met in cases falling under the New York or Panama Convention. See 9 U.S.C. §§203, 302 (2012); Strong, Invisible Barriers, supra note 5, at 449–51.
“[t]he 4(k)(2) regime has not been constitutionally tested.” 196 Therefore, questions arise not only with respect to the relationship between Rule 4(k)(2) and the various international treaties relating to international commercial arbitration, but also with respect to a second matter, namely whether Rule 4(k)(2) might permit or require different outcomes depending on whether the court relies on the Fifth Amendment or the Fourteenth Amendment to establish the outer boundaries of constitutional due process. 197 This creates significant problems in constitutional jurisprudence 198 and raises questions about whether Rule 4(k)(2) should be analyzed under other constitutional provisions so as to allow the due process clauses to retain their symmetry. 199 Although this debate will primarily be waged in civil procedure circles, it is important to consider whether and to what extent these matters also affect arbitration.

2. Subject matter jurisdiction

Personal jurisdiction is not the only area of concern. Issues also arise with respect to federal subject-matter jurisdiction, again primarily in international disputes. Here the difficulties arise as a result of confusion on the part of some U.S. courts regarding the applicability of the New York and Panama Conventions to arbitra-

---


197 See U.S. CONST. amends. V, XIV; New York Convention, *supra* note 48; Panama Convention, *supra* note 48; Fed. R. Civ. P. 4(k)(2). The distinction arises because “a federal long-arm statute in diversity cases [could] be longer than the statute that would apply in state court.” Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L. J. 1, 50 n. 203 (2010); Vail, *supra* note 196, at 525 (providing a hypothetical showing the opportunity for different treatment under the two amendments). Disputes involving international commercial arbitration have been heard in state court, although in much small numbers than in federal court. *See Strong, Borders, supra* note 79, at 2–3. Some states have even enacted their own statutes concerning international commercial arbitration. *See Drahozal, supra* note 65, at 101.

198 See Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) (“To suppose that ‘due process of law’ meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.”); *see also* Lawrence v. Texas, 539 U.S. 558, 576 (2003) (equating Fifth and Fourteenth Amendment due process); Vail, *supra* note 196, at 525.

199 See Fed. R. Civ. P. 4(k)(2); Vail, *supra* note 196, at 525–26 (“The concerns of international and interstate relations that territoriality addresses seem less awkwardly addressed by constitutional provisions other than the Due Process Clauses, such as the Commerce Clause and federal powers over foreign relations. The Due Process Clauses should retain their symmetry.”).
tions seated in the United States.200 According to Sections 203 and 302 of the FAA, federal subject-matter jurisdiction exists in cases involving the New York and Panama Conventions, respectively.201 However, some courts fail to appreciate that the two conventions apply not only in situations involving agreements and awards arising out of “foreign” arbitrations (i.e., proceedings seated outside the United States), but also to agreements and awards arising out of “non-domestic” arbitrations (i.e., proceedings seated in the United States but involving certain international attributes).202

This misunderstanding has led a number of courts to improperly characterize certain matters as falling under Chapter 1 of the FAA (the “domestic” chapter) rather than Chapter 2 or 3 (the “international” chapters).203 This practice is problematic because Chapter 1 of the FAA, unlike Chapters 2 and 3, does not provide for federal subject-matter jurisdiction.204 Although it might appear to be easy for parties to an international dispute to establish the existence of some independent basis for being in federal court, that is not always the case.205

Denial of federal subject-matter jurisdiction in cases involving the New York and Panama Conventions not only violates the express terms of the FAA, it could also lead to a breach of international law if the matter is dismissed from federal court,206 since it is

---

201 See 9 U.S.C. §§203, 302 (2012). This approach is consistent with constitutional provisions granting federal courts jurisdictions over treaty-related concerns. See U.S. Const. art. III, §2; Wright & Miller, supra note 180, §3563.
202 For example, Chapter 2 of the FAA applies to agreements and awards relating to foreign arbitrations (i.e., arbitrations that are or were seated outside of the United States) and also to arbitrations that are or were seated within the United States and that arise (1) between a U.S. and foreign party; (2) entirely between foreign parties; or (3) entirely between U.S. citizens, but only if there is a sufficient international nexus. See 9 U.S.C. §§2–202; Strong, supra note 13, at 26. A similar test is used in cases falling under Chapter 3. See 9 U.S.C. §302.
204 See id. §§1–16, 203, 302; Strong, supra note 13, at 24–25; Hulbert, supra note 200, at 49–50.
206 See 9 U.S.C. §§1–307. A breach of the New York or Panama Convention arises whenever a court in a country that is bound by the Convention “does not apply the Convention, misapplies it or finds questionable reasons to refuse recognition or enforcement that are not covered by the
unclear whether and to what extent the two conventions apply in U.S. state courts. Indeed, significant questions exist about the constitutional status of the New York and Panama Conventions, as discussed in the following subsection.

B. Constitutional Status of Treaties Relating to Arbitration

Although parties routinely rely on both the New York and Panama Conventions in matters proceeding in U.S. courts, the precise status of the conventions within the U.S. constitutional order remains unclear. Indeed, a circuit split has recently arisen as to whether the New York Convention is self-executing in nature. Although the current debate focuses primarily on issues
relating to international insurance disputes,213 questions about the self-executing nature of the New York and Panama Conventions also affect other areas of arbitral law and practice, including those relating to form requirements (which describe which arbitration agreements and arbitral awards fall under the relevant treaties)214 and manifest disregard of law as a means of vacating an arbitral award in disputes falling under the treaties.215

Although commentators have begun to consider the various issues relating to the constitutional status of the New York Convention, much more work remains to be done in this regard.216 Furthermore, even the most preliminary studies have yet to be undertaken with respect to the Panama Convention, even though the increasing amount of arbitration involving U.S. and Latin American parties suggests that the Panama Convention will become increasingly important in the coming years.217 This is an issue of


216 See Strong, Constitutional, supra note 5.

217 See Panama Convention, supra note 48; Juan M. Alcalá, Arbitration in Latin America: A First Look at the Impact of Legislative Reforms, 13 L. & BUS. REV. AM. 995, 995–1000 (2007). The Panama Convention prevails over the New York Convention in situations where both conventions apply and a majority of the parties are from countries that are members of the Organization of American States. See New York Convention, supra note 48; Panama Convention, supra note 48; 9 U.S.C. §305.
significant interest to the Organization of American States (OAS), which has recently undertaken a special training initiative to introduce national judges to the particularities of the Panama Convention.\textsuperscript{218}

\section*{C. Constitutional Entitlements of States and State Actors}

A third set of issues that would benefit from additional research involves the constitutional due process rights of states and state entities that are participating in judicial proceedings relating to arbitration.\textsuperscript{219} Analysis of this question often begins with the U.S. Supreme Court’s 1966 decision in \textit{South Carolina v. Katzenbach}.\textsuperscript{220} That case denied certain due process rights to sister states in domestic U.S. litigation on the grounds that “the word ‘person’ in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union.”\textsuperscript{221}

The Supreme Court did not have the opportunity to consider whether this holding had any applicability in the international context prior to 1992. However, the Court refused to take a firm position on the issue at that time and simply noted in \textit{Republic of Argentina v. Weltover, Inc.} that it was “assuming, without deciding, that a foreign state is a ‘person’ for purposes of the Due Process Clause.”\textsuperscript{222}

Although the statement in \textit{Weltover} was only made \textit{ober dicta}, it was enough to change the lower federal courts’ approach to the due process rights of foreign states.\textsuperscript{223} For example, prior to 1992, federal courts took the view that foreign states were entitled to the

\textsuperscript{219} See U.S. \textit{CONST. amends. V, XIV}. The question here focuses on whether the defendant (in this case, a state or state actor) has a constitutionally sufficient number of minimum contacts to be haled into U.S. court. See \textit{Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102} (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, SA v. Hall, 466 U.S. 408, 414–15 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); see supra notes 179–208 and accompanying text.
\textsuperscript{220} See 383 U.S. 301 (1966).
\textsuperscript{221} \textit{Id.} at 323–24.
\textsuperscript{223} See \textit{id.}.
full panoply of due process protections under the U.S. Constitution. However, that position changed in *Price v. Socialist People’s Libyan Arab Jamahiriya*, when the Circuit Court of the District of Columbia relied on both *Katzenbach* and *Weltover* to conclude that “absent some compelling reason to treat foreign sovereigns more favorably than ‘States of the Union,’ it would make no sense to view foreign states as ‘persons’ under the Due Process Clause.”

Soon afterward, the debate about the due process rights of states and state actors was transferred into the arbitral realm through a series of decisions relating to the enforcement of arbitral awards under the New York Convention. These cases triggered the same concerns that arise with respect to non-state actors, namely the need to establish personal jurisdiction over every defendant in every case or controversy, even in matters relating to arbitration. As a result, courts were asked to determine whether

---

224 See *id.*; Texas Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981); Strong, FSIA, supra note 5, at 341–42.

225 See *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002); see also *Weltover*, 504 U.S. at 619; *Katzenbach*, 383 U.S. at 323–24. In reaching this determination, the court stated that

> we think it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the very fabric of that system. The States are integral and active participants in the Constitution’s infrastructure, and they both derive important benefits and must abide by significant limitations as a consequence of their participation. . . . However, a “foreign State lies outside the structure of the Union.” . . . Given this fundamental dichotomy between the constitutional status of foreign states and States within the United States, we cannot perceive why the former should be permitted to avail themselves of the fundamental safeguards of the Due Process Clause if the latter may not.

It is especially significant that the Constitution does not limit foreign states, as it does the States of the Union, in the power they can exert against the United States or its government. Indeed, the federal government cannot invoke the Constitution, save possibly to declare war, to prevent a foreign nation from taking action adverse to the interest of the United States or to compel it to take action favorable to the United States. It would therefore be quite strange to interpret the Due Process Clause as conferring upon Libya rights and protections against the power of federal government.

*Price*, 294 F.3d at 96–97 (citations omitted). The fact that the dispute involved a terrorist act may have been relevant, since the court may have been influenced by a desire not to allow a morally repugnant act to go unaddressed as a result of a procedural loophole. The terrorism exception to foreign sovereign immunity, which formerly appeared at 28 U.S.C. 1605(a)(7), now appears at 28 U.S.C. 1605A.


227 See supra notes 179–208 and accompanying text.
and to what extent the constitutional tests for due process applied to foreign states and state actors.\(^{228}\)

Although there have only been a limited number of decisions rendered to date, it appears as if courts are currently inclined to extend the *Katzenbach* analysis to arbitration-related proceedings involving foreign states.\(^{229}\) Although some commentary exists on these and related matters, a number of questions remain unanswered.\(^{230}\) For example, one court has specifically recognized that the issue of whether and to what extent a state or state-related entity is entitled to foreign sovereign immunity is different than whether that same actor is entitled to constitutional due process.\(^{231}\) Further research on this subject would be useful.

Another line of inquiry could consider due process concerns in arbitration-related proceedings involving domestic state actors.\(^{232}\) However, before tackling this issue, it would be necessary for courts and commentators to reach a better understanding of the extent to which the U.S. federal government and individual state governments can enter into arbitration agreements as a matter of federal or state law.\(^{233}\) Both of these are important questions, since states and state actors are becoming involved in arbitration in-

\(^{228}\) See *Frontera*, 582 F.3d at 398–401; *TMR Energy*, 411 F.3d at 299–302.

\(^{229}\) See *Katzenbach*, 383 U.S. at 323–24; *Frontera*, 582 F.3d at 398–401; *TMR Energy*, 411 F.3d at 299–302; *Strong, Guide*, supra note 13, at 90–92. At this point, the only cases that exist have involved enforcement actions involving foreign states. However, it is possible for similar concerns to arise in other types of judicial proceedings, such as motions to compel arbitration or to provide some sort of interim relief. See *Strong, Guide*, supra note 13, at 37–87 (noting courts can become involved in the arbitral process before, during and after the hearing); *Strong, Borders*, supra note 79, at 9–17 (distinguishing legitimate from illegitimate interventions).


\(^{231}\) See *Frontera*, 582 F.3d at 400. The Foreign Sovereign Immunities Act includes a number of different provisions that might establish an exception to the immunity of a state or state entity or instrumentality involved in arbitration. See 28 U.S.C. §§1605(a)(1), 1605(a)(2), 1605(a)(6) (2012); Strong, *FSIA*, supra note 5, at 343–54.

\(^{232}\) See Spangenberg, supra note 230, at 453–54.

\(^{233}\) This is an issue that has only received scant scholarly attention. See *supra* note 61.
creasing numbers, both domestically and internationally. Notably, these discussions could likely be usefully integrated with Rutledge’s existing analyses on separation of powers and the delegation of quasi-judicial authority.

D. Constitutional Entitlements to Preclusion Under the Full Faith and Credit Clause

The fourth and final line of research that might be included in future editions of Arbitration and the Constitution involves whether and to what extent the Full Faith and Credit Clause applies to arbitration, both in the context of state actors and non-state actors. Although federal courts are not required to give full faith and credit to unconfirmed arbitral awards, confirmed awards appear to be given full preclusive effect and recognition under the principles of full faith and credit. This distinction between confirmed and unconfirmed awards appears to carry over to the interstate context as well.

234 The U.S. government has indicated its willingness to engage in alternative dispute resolution procedures, including arbitration, in a variety of contexts. See supra note 61 and accompanying text. Foreign states are also becoming increasingly amenable to arbitration in both the international commercial and investment contexts. See Lew et al., supra note 62, ¶¶27-5 to 27-15, 27-35 to 27-83; Strong, Colombia, supra note 5, at 75–79.

235 See also supra note 61 and accompanying text.


238 Some analytical variations may arise as a result of whether the award was rendered in state or federal court and whether it arose under state or federal law. See 9 U.S.C. §13 (2012); In re Khaligh, 338 B.R. 817, 825 (9th Cir. 2005); see also Jarred Pinkston, In Rem Jurisdiction in an Action to Confirm and Enforce a Foreign Arbitral Award Generally and Jurisdiction Based Upon the Presence of a U.S. Subsidiary Specifically, 30 REV. LITIG. 415, 438 n. 91 (2011).

239 See Caperton v. A.T. Massey Coal Co., 690 S.E.2d 332, 361 (W. Va. 2009); Directory Assistants, Inc. v. Cooke, Cameron, Travis and Co., 49 So.3d 1175, 1180 (Ala. Ct. App. 2010); Infinite Public Relations, LLC v. Rubenstein & Rubenstein, 831 N.Y.S.2d 359 (Table), at *3 (N.Y. Sup. Ct. 2006); Jacobs v. Yale University, No. 277513, 2000 WL 1530030, at *7–8 (Ct. Sup. Ct. Sept. 21, 2000). However, full faith and credit may be rendered in some jurisdictions even if an appeal of a confirmation decision is pending. See Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 270 (Tex. Ct. App. 2004) (“While we acknowledge that it is a close issue, we believe the weight of authority suggests that an arbitration award has preclusive effect even though an appeal of the award is pending. As discussed below, courts have concluded this because an arbitration award has the same effect as a final judgment; in fact, courts have held that an arbitration award can have preclusive effect, even though it is not confirmed and a judgment is not entered.”).
However, there is very little research available generally on preclusion in arbitration, particularly in the constitutional context.\textsuperscript{240} Furthermore, it appears that some types of judicial decisions, such as those relating to arbitrability, may not be subject to the same degree of deference under a Full Faith and Credit analysis as confirmation of an arbitral award.\textsuperscript{241} Some distinctions might also be made based on the types of claims at issue\textsuperscript{242} or the number of parties involved.\textsuperscript{243} Additional research on any or all of these issues would be very useful.

IV. CONCLUSION

As the preceding shows, arbitration intersects with constitutional law in a significant number of ways. These areas of overlap trigger questions of fundamental import, including those regarding core structural concerns (ranging from separation of powers and federalism concerns in the first edition to treaty interpretation and interstate preclusion issues in the much-anticipated second edition) as well as those relating to a number of individual liberties (such as the right to a jury trial and perhaps the ability to proceed as a class). Indeed, arguments have even been based on the First Amendment.\textsuperscript{244}

Although these connections appear self-evident when presented in \textit{Arbitration and the Constitution}, the ease with which Rutledge introduces these issues belies the novelty of his basic premise, namely that arbitral concerns can and should be considered from a constitutional perspective. Indeed, after reading this book, it appears strange that no one has thought to put arbitration within a comprehensive constitutional framework before this time. There may be a number of reasons for this oversight, including arbitration’s (now hopefully outmoded) reputation as a practical rather than doctrinal discipline or the dearth of constitutional scholars who are equally adept in arbitration law, but none of these expla-

\textsuperscript{240} See Born, supra note 14, at 2880–2915; Strong, Guide, supra note 13, at 85–87.
\textsuperscript{241} See U.S. Const. art. IV, §1; Rourke v. Amchem Products, Inc., 863 A.2d 926, 940 (Md. 2004). But see id. at 948 (Bell, C.J., dissenting).
nations can be used to justify a continued lack of attention to arbitration’s constitutional implications.

Therefore, it would seem that *Arbitration and the Constitution* constitutes one of those few pieces of scholarship that really opens the door to a new way of thinking about a particular issue. While the combination of arbitration and constitutional law may not yet be as predictable as Mom and apple pie, the visionary work of Professor Peter Rutledge has been invaluable in introducing this important subject to audiences in the United States and beyond.