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Arbitration Federalism: A State Role in Commercial Arbitration

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ARBITRATION FEDERALISM: A STATE ROLE IN COMMERCIAL ARBITRATION

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I. INTRODUCTION

Two decades ago the Supreme Court interpreted the Federal Arbitration Act of 1925 (FAA) as proclaiming a “national policy favoring arbitration.”¹ Since then the Court has significantly federalized commercial arbitration. Does this new “arbitration federalism” leave a role for the states? Given the growing use of private arbitration, this question is central to the future of civil litigation.

The Supreme Court’s stated understanding of the FAA has sent mixed signals about a state law-making role in commercial arbitration. On the one hand, the Court has interpreted the FAA to preempt state laws that negate or undermine the enforceability of commercial arbitration

1. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

clauses—leaving no latitude for state regulation. On the other hand, the Court has understood the FAA to treat the question of contract revocation, on generally applicable grounds such as fraud, duress, and unconscionability, as one of state law—leaving no federal role. Additionally, on a variety of other matters affecting arbitration, the Court seems to recognize that the FAA speaks either ambiguously or not at all, such as post-award judicial review, arbitrators' standards of conduct and arbitral procedures—leaving potential gaps in the Act's pro-arbitration policy.

In this Article we outline a blueprint of "arbitration federalism"—the principles of FAA preemption—under which states assume a collaborative role in furthering the national policy favoring commercial arbitration.² At the center of the blueprint lies the strong preemptive core of the FAA, which the Supreme Court has used to strike down state laws that undermine the validity of commercial arbitration agreements. States can no longer harbor their historical hostility toward arbitration. Invalid are state laws that bar arbitration (whether in specified business dealings³ or consumer transactions⁴), that shunt certain disputes to state court,⁵ that limit the remedial power of arbitrators,⁶ and that impose disclosure burdens uniquely on arbitration agreements.⁷ In this core, the validity of arbitration agreements and the matters that can be arbitrated are beyond state regulation. States can at most mimic the federal pro-arbitration standards.

Beyond this core, however, lies a murky sphere (a kind of boundary) where the FAA speaks, but without the same clarity and force as in the legislation's provisions on enforceability and arbitrability. For example, although the FAA specifies standards for judicial review of arbitral awards, lower federal courts have uniformly discerned additional (though various) grounds for vacating arbitral awards.⁸ Although the FAA implies

2. This Article does not address arbitration of employment disputes, a topic the Supreme Court recently brought within the FAA ambit. *See Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (holding that employment agreements, other than for transportation workers, are covered by the FAA).

3. *Southland*, 465 U.S. at 16 (preempting state statute that precluded arbitration of disputes arising in franchise agreements).

4. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (preempting state statute invalidating pre-dispute arbitration agreements, which had been applied to consumer termite-control contract).

5. *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (preempting state statute that prohibited arbitration in wage disputes).

6. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (preempting state court decision that punitive damages could not be given in arbitration, including securities arbitration).

7. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (preempting state statute requiring conspicuous disclosure of arbitration clause in franchise agreements).

8. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial*

that arbitrators have significant discretion in fulfilling their duties, no FAA standards specify arbitrator behavior and answerability. At the boundary, the preemptive scope of the new arbitration federalism is sketchy, suggesting the usefulness of a state role to provide guidance, subject to the general pro-arbitration policies articulated in the FAA.

As to some matters essential to effective arbitration, mostly involving the arbitral process, the FAA is palpably silent. Nowhere does the FAA mention pre-hearing discovery, summary disposition, consolidation of claims, or provisional remedies. All are critical—as they are in court adjudication—to fair and efficient dispute resolution. Whether Congress (or the Supreme Court) imagined that these matters would be resolved through private agreement, standardized arbitration rules, or industry practice is unclear. In this large penumbra, state law in the form of default procedural rules holds out great promise, limited only by the gravitational pull of the FAA's pro-arbitration imperative.

Although some have decried the Supreme Court's revamped "arbitration federalism" as judicial legerdemain, given the FAA's original limited purpose to validate arbitration agreements only in federal court, there is no use in crying over spilt milk.⁹ The Court's revisionism, effectively creating a national policy favoring arbitration, has shown itself to have legs.¹⁰ Reflecting the Court's continuing eagerness to unclog the federal judiciary's civil dockets and its abiding respect for private ordering in commercial matters, the judicially revised FAA resonates.¹¹ Whatever the statute may have meant originally and however its drafters may have

Arbitration Awards, 30 GA. L. REV. 731, 763-838 (1996) (describing the numerous nonstatutory grounds for vacatur embraced and applied by the U.S. Circuit Courts of Appeals).

9. Paul D. Carrington & Paul A. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 333.

10. The Court's seminal FAA preemption case, *Southland*, has withstood a barrage of criticism from inside and outside the Court. Justice O'Connor's well-researched dissent laid out a powerful case against the majority's preemptive analysis. See *Southland Corp. v. Keating*, 465 U.S. 1, 21-36 (1984) (O'Connor, J., dissenting). A decade later, twenty state attorneys general filed briefs to overturn the *Southland* preemption. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284 (1995). Justice Thomas, who joined the Court after *Southland*, continues to dissent from any decision based on its holding. See *Doctor's Assocs.*, 517 U.S. at 689 (Thomas, J., dissenting) (decrying the Court's "remaking of arbitration law" in its FAA preemption cases). Justice Scalia, though accepting *Southland* for the purposes of deciding cases with the majority, has announced his willingness to join four other Justices who might choose to abandon the *Southland* preemption. *Terminix*, 513 U.S. at 284-85 (Scalia, J., dissenting) ("*Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes. . . . I shall not in the future dissent from judgments that rest on *Southland*. I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time.").

11. See Alan R. Palmiter, *The CTS Gambit: Stanching the Federalization of Corporate Law*, 69 WASH. U.L.Q. 445 (1991) (describing the Supreme Court's predilection for incorporation-based private ordering in corporate law).

conceived the legislation's original jurisdictional reach, it has become today a national charter of private arbitral freedom.

But the Supreme Court's arbitration federalism is incomplete. For the most part, state arbitration statutes modeled on the 1955 Uniform Arbitration Act (UAA)¹² are as sparse as the FAA. To date, the state legislative adaptations of the UAA, as interpreted and applied by state courts, have not filled the voids left by the FAA in any systematic or consistent fashion. And law, like nature, abhors a vacuum.

In this Article we assert that states retain a vital, even essential, role in furthering the goals of a national pro-arbitration policy. State arbitration rules, particularly when cast as default rules from which parties can opt out, offer wide hope: the efficient filling of gaps left in parties' agreements, economical specification of cumbersome terms, instructive experimentation among the states, and sensitivity to specific commercial practices. State arbitration law can also serve to overcome the lingering judicial (and legislative) hostility to pre-dispute arbitration and to give balanced life to privately negotiated arbitration agreements. In the process, state law would fulfill the twin promises of the FAA to eradicate the legal system's entrenched hostility to arbitration and to honor the parties' arbitration choice.

The January 2001 promulgation of the Revised Uniform Arbitration Act (RUAA) by the National Conference of Commissioners on Uniform State Laws (NCCUSL) portends a new era in state involvement in the arbitration process. Over time, RUAA promises to catalyze a state role in the federalism scheme envisioned in the Supreme Court's embrace of commercial arbitration. It is an ineluctable role that arises from the intersection of the pro-arbitration public policy identified by the Court and the minimalist nature of the federal statute.

We review and critique RUAA's attempt to add clarity and certainty to the arbitration process, within the preemption blueprint drawn by the Supreme Court's "arbitration federalism."¹³ In general, the RUAA accepts that the proper role for state arbitration law is to provide default rules and standards in areas not expressly regulated by the FAA or pertinent federal case law. Yet the RUAA occasionally wanders from the blueprint's possibilities, seeking sometimes to over-regulate the arbitration process and other times merely to mimic the FAA's barebones approach. We lay out considerations for state legislative drafters and state judges who will be responsible for formulating a revised state role in the revamped "arbitration federalism."

12. UNIF. ARBITRATION ACT (1955).

13. This blueprint is based on the experience of one of the authors as Academic Advisor to the Drafting Committee appointed by the National Conference to revise the 1955 Uniform Arbitration Act.

II. SCOPE OF THE FEDERAL ARBITRATION ACT

A. *FAA Text: Validation and Enforcement of Commercial Arbitration*

The Federal Arbitration Act grew out of a business-led reform movement in the 1920s to overcome the longstanding judicial hostility to the enforcement of pre-dispute agreements to arbitrate.¹⁴ Passed without dissent in 1925¹⁵ and amended only lightly since,¹⁶ the FAA is a quick read.¹⁷ Its focus is on judicial respect for commercial arbitration at the front end and back end of the arbitral process.

At the front end, the Act announces the validity and enforceability of arbitration clauses “in any maritime transaction or a contract evidencing a transaction involving commerce.”¹⁸ The only express limitation is when the clause would be revocable “upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁹ The FAA further directs

14. The Supreme Court had issued Congress an invitation to act. *See Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 120-22 (1924). “In the absence of statute it is the general rule that executory contracts to submit disputes to arbitration will not be specifically enforced. . . . If there be a right to specific performance of an arbitration provision in a collective bargaining agreement we must find it in an act of Congress.” *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81, 84 (1956).

15. The original FAA bill, which had died late in the 1922 legislative session, was reintroduced in late 1923. The federal bills were subject to joint hearings before subcommittees of the House and Senate Judiciary Committees. The House Judiciary Committee favorably reported the House bill, which passed the House unanimously without amendment on June 6, 1924. The Senate Judiciary Committee made amendments to the Senate bill and favorably reported the revised bill to the Senate, which passed the bill without amendment on January 21, 1925. The House concurred in the Senate amendments, and the bill was signed into law by President Coolidge on February 12, 1925. “[N]ot a single dissenting vote was registered in either House or Senate.” American Bar Association Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153 (1925). The United States Arbitration Act became effective January 1, 1926.

16. Act of July 30, 1947, Pub. L. No. 80-282 §1, 61 Stat. 669; Act of July 31, 1970, Pub. L. 91-368, §2, 84 Stat. 692; Act of Nov. 16, 1988, Pub. L. 100-669, §1, 102 Stat. 3969; Act of Nov. 19, 1988, Pub. L. 100-702, § 1019(b), 102 Stat. 4642; Act of Dec. 1, 1990, Pub. L. 101-650, § 325(a)(1), 104 Stat. 5089.

17. *See* Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2000).

18. *Id.* § 2. The Supreme Court has read the FAA’s coverage to extend to the full limits of Congress’s modern commerce clause powers. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-78 (1995) (finding “intent to exercise Congress’ commerce power to the full”).

19. Federal Arbitration Act, 9 U.S.C. § 2 (2000). The Supreme Court has stated this is the only limitation on the validity and enforceability of an arbitration agreement in a maritime or interstate contract. *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984). Furthermore, the only revocation standards that courts can use are those that apply generally to contracts. *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

“courts of the United States” when presented with a valid arbitration agreement to stay their proceedings and to compel arbitration against recalcitrant parties²⁰ and, if necessary, to name arbitrators and order the attendance of witnesses.²¹

At the back end, the Act outlines the procedures for U.S. district courts to confirm and enforce arbitral awards.²² The Act specifies limited procedural and substantive grounds for district courts to vacate arbitral awards.²³ In addition, the Act permits district courts to modify or correct awards in cases of evident material mistake or other technical defects.²⁴ The Act sets out procedures for obtaining these orders²⁵ and cuts off interlocutory appeals once the district court has determined that a controversy is arbitrable.²⁶

The FAA’s twin purposes, according to the Supreme Court, are to eradicate judicial hostility to pre-dispute arbitration agreements and to

20. Federal Arbitration Act, 9 U.S.C. § 3 (2000). The FAA compels arbitration if a party has improperly filed suit: “any of the courts of the United States . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.” *Id.* In addition, the FAA authorizes U.S. district courts, upon petition and after a hearing, to order arbitration if a party has failed to submit to arbitration as provided by agreement: “any United States district court which, save for such agreement, would have jurisdiction under title 28 . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.” *Id.* § 4.

21. *Id.* § 5. If no arbitrator or method for appointment is specified in the parties’ agreement, “the court” may appoint an arbitrator. *Id.* Furthermore, “any United States district court” where the arbitrators are sitting may compel the attendance of witnesses and hold them in contempt for failing to appear. *Id.*

22. *Id.* § 9. Upon application for a court order confirming an arbitral award, “the United States court in and for the district” where the award was made “must grant such an order” unless “vacated, modified or corrected.” *Id.* The section specifies the methods for service of notice of the application to enter the award: if the adverse party is a resident of the “district,” service is as prescribed for “an action in such court,” if the adverse party is a non-resident, service is by “the marshal of any district” where the adverse party may be found. *Id.*

23. *Id.* § 10. A party to the arbitration may apply to have the district court vacate the award on one of four grounds: (1) corruption, fraud, or undue means; (2) evident arbitrator partiality or corruption; (3) arbitrator misconduct; or (4) excess or imperfect execution of arbitrator powers. *Id.* After vacating an award, the court may direct an arbitral rehearing. *Id.*

24. *Id.* § 11. The district court may modify the award upon the application of any party if (a) there was an evident material miscalculation or mistake in the award, (b) the arbitrators awarded on a significant matter not submitted to them, or (c) the award is imperfect in form not affecting the merits of the controversy. *Id.* The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. *Id.*

25. *Id.* §§ 12-13. As with the procedures for the entry of an arbitral award, the FAA contemplates service of process comparable to that for other actions in federal district court. *Id.*

26. *Id.* § 16. As amended by the Judicial Improvements and Access to Justice Act of 1988, the FAA bars appellate review of interlocutory pro-arbitration orders to ensure that the appeals process does not undermine expeditious arbitration. *Id.* Appellate review of such orders is postponed until after the entry of an arbitral award. *Id.*

protect party expectations by putting arbitration agreements on the same footing as other contracts.²⁷

B. *FAA Metamorphosis from “Federal” to “National” Arbitration Policy*

The FAA was originally intended as the “federal” piece in the national movement to legitimize executory arbitration clauses. Over time the Supreme Court has remade the FAA into the cornerstone of a new “arbitration federalism.” The remaking of the statute, far from cataclysmic, has proceeded in stages. Drawing from *Erie* in diversity cases, the Court came to interpret the FAA to supersede state anti-arbitration standards in federal diversity cases. Then, applying a post-New Deal preemption analysis, the Court expanded this “substantive” pro-arbitration policy into a “national policy” applicable in state courts. Finally, on the assumption Congress had acted pursuant to its full commerce clause powers in enacting the FAA, the Court extended this “national policy” to all commercial contracts. Over time, as the Court’s attitude toward private arbitral choice shifted, the original FAA’s notions of circumscribed federal power succumbed to new jurisdictional understandings.

1. The Original “Federal Courts” Legislation

The United States Arbitration Act of 1925, as the federal law was first named, was not meant to be “national.” Rather, the legislation’s proponents sought a federal statute that would enact a pro-arbitration policy in *federal* courts.²⁸ In passing federal legislation, Congress joined a national movement to legislate, jurisdiction by jurisdiction, a legal climate favorable to commercial arbitration.

Congress intended modestly that the FAA would compel *federal* courts to respect arbitration agreements and place them on the same footing as other commercial contracts, just as comparable state statutes compelled *state* judges to abandon their antagonism to arbitration. As the Senate Report explained, the federal legislation had a narrow reach, complementing the firmer and broader jurisdictional reach of state arbitration law: “The bill, while relating to maritime transactions and to

27. As the Supreme Court stated in *Southland*, “the purpose of the act was to assure those who desired arbitration . . . that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures.” *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1995) (quoting *Metro Indus. Painting Corp. v. Terminal Constr. Corp.*, 287 F.2d 382, 387 (2d Cir. 1961) (Lombard, C.J., concurring)). The Court concluded: “The problems Congress faced were therefore twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements.” *Id.* at 14.

28. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 83-121 (Oxford Univ. Press, 1992) (describing the political impetus and enactment of the U.S. Arbitration Act).

contracts in interstate and foreign commerce, follows the lines of the New York arbitration law enacted in 1920, amended in 1921, and sustained by the decision of the Supreme Court of the United States in . . . 1924.”²⁹

That the Act was meant to extend only to the validation and enforcement of arbitration agreements in *federal* courts is clear from every direction—the statutory text refers only to *federal* courts—namely, “courts of the United States” and “United States district courts.”³⁰ The legislative history focuses exclusively on the history of *federal* judicial antagonism to arbitration and the nature of federal court jurisdiction.³¹ Contemporary commentators went to lengths in describing the *federal* jurisdictional aspects (and pitfalls) of the legislation.³² Early lower courts explained that the statute was not meant to confer validity on arbitration agreements generally, but to deal with the “conduct of suits in federal court.”³³ Subsequent legislative changes clarified which *federal* courts would have jurisdiction over original cases and appeals.³⁴

29. S. REP. NO. 569-536, at 3 (1924).

30. See generally Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2000). The text of the Act speaks exclusively to “courts of the United States,” including the “United States district court” and “the United States court in and for the district [where an arbitral award was made].” See, e.g., Federal Arbitration Act, 9 U.S.C. §§ 9-11 (2000). The Act thus adopts the same language—“courts of the United States”—as other contemporary statutes addressed to federal courts. See, e.g., 28 U.S.C. § 2201 (2000) (pertaining to declaratory judgments); FED. R. EVID. 501; Norris LaGuardia Act, 29 U.S.C. § 104 (2000); see also *Boys Mkts., Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 247 (1970). To designate both federal and state courts, federal statutes use a different vocabulary—namely, “courts in the United States” or “courts within the United States.” See, e.g., 11 U.S.C. § 306 (2000); 22 U.S.C. § 2370(e)(2) (2000); 28 U.S.C. § 1738 (2000).

31. H.R. REP. NO. 96, at 2 (1924) (“The bill . . . provides a procedure in the Federal courts for [arbitration agreements] enforcement”). After a thorough review of the legislative history, Justice O’Connor concluded: “One rarely finds a legislative history as unambiguous as the FAA’s. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.” *Southland*, 465 U.S. at 25 (O’Connor, J., dissenting).

32. See Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 277-78 (1926); Wesley A. Sturges & Irving Olds Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROB. 580, 586-88, 604 (1952) (commenting on federal act’s limited coverage of maritime transactions and transactions in commerce); Note, *Scope of the United States Arbitration Act in Commercial Arbitration: Problems in Federalism*, 58 NW. U. L. REV. 468, 492 (1963); see also *Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc.*, 62 F.2d 1004, 1006 (2d Cir. 1933).

33. *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3, 5 (3d Cir. 1943) (stating that conferring validity on arbitration agreements generally would be “a matter outside the scope of federal powers”); see also *Int’l Union United Furniture Workers of Am. v. Colonial Hardwood Flooring Co.*, 168 F.2d 33, 36-37 (4th Cir. 1948) (finding that FAA directives are addressed only to courts of the United States, within the plenary jurisdiction of the Congress to regulate federal court procedures).

34. In 1954, in a purely clerical change, Congress inserted “United States district court” in

The FAA created no new rights and no independent federal-question jurisdiction.³⁵ Rather, cast as a “procedural” statute, it declared the validity of arbitration agreements and mandated procedures to ensure their enforceability in the federal court “in which such suit is pending” or “which, save for such agreement, would have jurisdiction” over the controversy between the parties.³⁶ The statutory text and legislative history reflect the pains the drafters took to avoid the jurisdictional problems that would have arisen if Congress in 1925 had attempted to legislate broadly concerning a commercial matter affecting state jurisdiction.³⁷ The FAA’s non-controversial enactment buttresses that it was understood to be little more than “federal courts” legislation, surely not a significant departure from contemporary jurisdictional assumptions.

At the time of the FAA’s enactment, commercial disputes fell within the jurisdiction of either state courts applying state law or federal courts sitting in diversity applying federal common law. This presented serious jurisdictional obstacles to all-encompassing national arbitration legislation, given the reigning assumptions that Congress lacked the power to regulate

section 4 as a substitute for “court of the United States.” H.R. Rep. No 83-198b, at 8 (1954); S. REP. NO. 83-2498, at 8 (1954), reprinted in 1954 U.S.C.C.A.N. 3991, 3998 (explaining that substitution “because, among Federal courts, such a proceeding would be brought only in a district court”).

35. 65 Cong. Rec. 1931 (1924). On the House floor Representative Graham, one of the bill’s sponsors, emphasized: “[The bill] creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.” *Id.* The ABA Committee wrote: “The jurisdiction exists in those cases in which, under the Judicial Code, the Federal Courts would normally have jurisdiction of the controversy between the parties.” Committee on Commerce, Trade & Commercial Law, *The United States Arbitration Act and Its Application*, 11 A.B.A. J. 153, 154 (1925).

36. Federal Arbitration Act, 9 U.S.C. §§ 3, 4 (2000). Numerous passages in the legislative history echo the “federal courts” theme. The House Report stated:

Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. . . . The bill declares that such agreements shall be recognized and enforced by the courts of the United States. . . . The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

H.R. REP. NO. 96, at 1-2. The Act’s principal drafter, Julius Cohen, stated before the Joint Committee: “The theory on which you do this is that you have the right to tell the Federal courts how to proceed.” *Arbitration of Interstate Commercial Disputes: Hearing Before the Joint Comm., of Subcomm. on the Judiciary*, 68th Cong. 17 (1924) (statement of Mr. Cohen, American Bar Association).

37. The House Committee, recognizing the jurisdictional thin ice on which Congress was treading, specified an alternative justification for legislative power: “The control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.” H.R. REP. NO. 96, at 1.

state court procedure or to specify rules of decision in federal diversity cases.³⁸ Any broad congressional enactment to compel judicial enforcement of private commercial arbitration would have skated on very thin jurisdictional ice.

The FAA was to be the federal piece of the national, state-led movement to legitimize commercial arbitration jurisdiction by jurisdiction.³⁹ As explained in the House Report, the states would continue to determine the validity of arbitral clauses in cases arising under state court jurisdiction: “Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made.”⁴⁰

38. In 1925, U.S. commercial law lived under the shadow of *Swift v. Tyson*, which had given to the federal courts sitting in diversity the task of creating a general common law applicable to national commerce. 41 U.S. 1 (1842). Whether out of deference or jurisdictional impotence, Congress had accepted the fashioning of a federal common law in diversity cases as a bulwark against state commercial hindrance and backwardness. Herbert Hovenkamp, *Federalism Revised*, 34 HASTINGS L.J. 201 (1982) (reviewing TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM (1981)) (describing Justice Story’s purpose in *Swift v. Tyson* to overcome the parochialism of state commercial law). The fundamental implication of *Swift* that federal courts (not Congress) offered protection to businesses operating in the national economy was in the 1920s largely accepted as an integral part of American federalism. As Justice Brandeis was to observe in *Erie*, “The federal courts assumed, in the broad field of ‘general law,’ the power to declare rules of decision which Congress was confessedly without power to enact as statutes.” *Erie R.R. v. Tompkins*, 304 U.S. 64, 72 (1938). Although in the mid-1920s there was growing criticism of this federal judicial law-making, particularly over commercial matters, *Swift* was still alive and well. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923) (re-examining the legislative history of the Rules Decision Act and concluding that Congress had intended that the federal courts would defer to both state legislative and judge-made law, absent a controlling federal law). For example, the Supreme Court in 1928 reaffirmed the power of federal courts to determine the validity of commercial practices in the face of contrary state judicial doctrine. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 530 (1928). Eventually, when the Supreme Court overruled *Swift* in 1938, thirteen years after the FAA’s enactment, the decision in *Erie* would come as “unexpected.” See J.H. FRIENDENTHAL ET AL., *CIVIL PROCEDURE* (3d ed. 1999).

39. As the ABA Committee on Commerce, Trade and Commercial Law explained, the FAA is a “a single step in a movement of growing momentum [which] declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts. It does not encroach upon the province of the individual States.” Committee on Commerce, *supra* note 35, at 155.

40. Before the Joint Committee, Mr. Cohen (the principal drafter of the federal legislation) stated:

Nor can it be said that the Congress of the United States, directing its own courts . . . would infringe upon the provinces or prerogatives of the States. . . . [T]he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced. . . . There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission

This dual-track federalism animated the arbitration reform movement and judicial decision-making during the first thirty years after the FAA's enactment. Ultimately, the state movement culminated in 1955 with the promulgation by the National Conference of Commissioners on Uniform State Laws of the Uniform Arbitration Act, one of the most successful of the uniform laws.⁴¹

2. The FAA Applied in Diversity Cases

The "arbitration federalism" originally envisioned by the FAA rested on jurisdictional assumptions that supplied a simple rule of thumb: the validity of an arbitration clause depended on the court having jurisdiction over the dispute. On the assumption arbitration clauses would appear in federal court either in a "maritime transaction" or "a contract evidencing a transaction involving commerce," Congress covered its bases.⁴² But the tidy assumption that an interstate transaction would be governed by federal law was brought into question in 1938 with the Supreme Court's decision in *Erie Railway v. Tompkins*, which curbed the power of federal courts to create "federal common law" in diversity suits.⁴³

The effect of *Erie* on the FAA, however, was slow in fully manifesting itself. Although *Erie* toppled the assumption of *Swift v. Tyson* that federal courts can create national commercial policy in diversity cases—an assumption that had hobbled the FAA drafters and led them to draft a procedural statute—it was not immediately clear whether arbitration agreements in diversity cases would be judged by federal or state standards. In 1945, the Supreme Court had held in *Guaranty Trust Co. v. York*⁴⁴ that federal courts sitting in diversity were not to apply federal rules that "substantially affect the enforcement of the right as given by the state," suggesting the FAA's arbitration mandate would be trumped in

to arbitration enforcement.

Arbitration of Interstate Commercial Disputes: Hearing on H.R. 646 and S. 1005 Before the Joint Comm. of Subcomm. on the Judiciary, 68th Cong. 39 (1924). Post-enactment explanations echoed this idea. See Cohen & Dayton, *supra* note 32, at 276 (stating that "whether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought").

41. The Act, adopted in 1955 and revised in 1956, was a successor to an earlier state uniform act promulgated by the National Conference of Commissioners on Uniform State Laws in 1924. See MACNEIL, *supra* note 28, at 54-57 (describing state movement to adopt modern general arbitration statutes, a majority based on the UAA); see also Stephen J. Ware, "Opt-in" for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act, 8 AM. REV. INT'L ARB. 263 (1999) (reporting that 35 states have enacted the Uniform Arbitration Act and 14 other states have substantially similar laws).

42. Federal Arbitration Act, 9 U.S.C. § 2 (2000).

43. 304 U.S. at 78.

44. 362 U.S. 99 (1945).

diversity cases by contrary outcome-determinative state arbitration standards.⁴⁵

In 1957, the Supreme Court seemed to agree in *Bernhardt v. Polygraphic Co. of America*,⁴⁶ a federal diversity case in which the defendant had moved for a stay pending arbitration as provided in the parties' employment contract.⁴⁷ The Court found arbitration, compared to court litigation, to be outcome determinative and commented "arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State" and a change "from a court of law to an arbitration panel may make a radical difference in ultimate result."⁴⁸ But the Court sidestepped the *Erie* question with a cramped interpretation of the jurisdictional reach of FAA section 2 and concluded the in-state employment contract did not involve "interstate commerce."⁴⁹ The Court held that state law, which permitted pre-award revocation by either party, governed their agreement.⁵⁰

Evidencing a lingering judicial suspicion of arbitration, the *Bernhardt* Court explained the reasons for Vermont's anti-arbitration policy:

Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and . . . the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial.⁵¹

Following the lead of *Bernhardt*, lower courts sitting in diversity resolved the conflict between the FAA and state arbitration standards by applying the state standards.⁵² Under this outcome-determinative approach, uniformity became the watchword in upholding state policies inimical to arbitration.

45. *Id.* at 109.

46. 350 U.S. 198 (1956).

47. *Id.* at 199.

48. *Id.* at 203.

49. *See id.* at 201-02.

50. *Id.* at 211-12.

51. *Id.* at 203.

52. *See, e.g.,* Warren Bros. Co. v. Cardi Corp., 471 F.2d 1304, 1307-10 (1st Cir. 1973) (holding in a diversity action that Massachusetts law governed whether court action should be stayed pending arbitration); Reeves v. Tarvizian, 351 F.2d 889, 891 (1st Cir. 1965) (holding that Massachusetts law controlled the question of whether an arbitration award is *res judicata* and enforceable by a court order); Formigli Corp. v. Alcar Builders, Inc., 329 F.2d 79, 81 (3d Cir. 1964) (citing *Bernhardt* and holding in diversity action that an arbitration agreement is enforceable when the substantive law of the forum state made the agreement binding).

In 1964, the Supreme Court in *Hanna v. Plumer*⁵³ abandoned its outcome-determinative approach in diversity cases, deciding that a federal policy (such as the pro-arbitration policy of the FAA) would trump contrary state law—even if the federal policy determined the outcome.⁵⁴ The Court held that *Erie* was not meant merely to ensure uniform decisions between federal diversity and state cases, but rather to implement federal policy.⁵⁵ In the face of a valid federal rule or statute, federal courts sitting in diversity are to apply federal law.⁵⁶

The lesson of *Hanna v. Plumer* was soon applied to an arbitration agreement in a federal diversity case. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁵⁷ the Supreme Court held that FAA standards (not contrary state standards) governed the validity of commercial arbitration clauses in federal diversity cases.⁵⁸ The Court turned to FAA section 4 to determine whether a claim of fraud in the inducement of a contract, which included an arbitration clause, should be resolved by the federal court sitting in diversity or referred to arbitration.⁵⁹ The Court found that, except where the parties intend otherwise, FAA section 4 mandates that

if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the “making” of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.⁶⁰

Prima Paint was an ineluctable application of *Hanna v. Plumer*: “Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate.”⁶¹ True to the “federal courts” nature of the FAA, *Prima Paint* made questions of arbitrability a matter of federal law, both as to procedure and substance, when in federal court.⁶²

53. 380 U.S. 460 (1965).

54. *Id.* at 473-74.

55. *Id.*

56. *Id.*

57. 388 U.S. 395 (1967).

58. *Id.* at 401.

59. *Id.* at 400.

60. *Id.* at 403-04.

61. *Id.* at 405.

62. The Court then gratuitously concluded that “the [FAA] is based upon and confined to the incontestable federal foundations of ‘control over interstate commerce and over admiralty.’” *Id.* (quoting H.R. REP. NO. 96, at 1 (1924)).

Prima Paint reflected two fundamental shifts in “arbitration federalism.”⁶³ First, the Court’s decision to make the FAA fully applicable in diversity cases, even if arbitration would “significantly affect the result of a litigation,” reflected a judicial willingness to draw jurisdictional lines whose effect favored arbitration.⁶⁴ Second, the Court’s decision displaced state arbitration law in *federal court*.⁶⁵

But *Prima Paint* seemed to leave intact the original assumption when the FAA was enacted that the validity of an arbitration clause depends on the court where the dispute is brought. Under the Court’s approach, an arbitration clause could well be valid in federal court under FAA standards, yet invalid in state court under hostile state law. This too was about to change.

3. The New “National Policy” Favoring Arbitration in State Court

The FAA’s original “arbitration federalism” had no preemptive effect, given its limited role to validate and enforce arbitration agreements in federal court. In fact, during the FAA’s first sixty years, only a handful of state cases even considered the question of FAA preemption, and they uniformly held that the statute was procedural, applicable only in federal court.⁶⁶ But as the role of federal law grew generally during the post-New Deal era, so too did the Court’s preemption jurisprudence. When comprehensive federal legislation spoke, the Court held that inconsistent state laws had to give way.⁶⁷ And as federal dockets became more congested, the Court became increasingly sympathetic toward the arbitration alternative.⁶⁸

In the 1984 watershed case of *Southland Corp. v. Keating*, the Supreme Court combined its robust preemption jurisprudence and its new-found acceptance of arbitration to transform the FAA into a “national” policy

63. See Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985) (recognizing that *Prima Paint* was the pivotal point in the Court’s jurisdictional expansion of the FAA).

64. See generally *Prima Paint*, 388 U.S. at 395.

65. See generally *id.*

66. See, e.g., *Wilson & Co. v. Fremont Cake & Meal Co.*, 43 N.W.2d 657 (Neb. 1950) (ignoring request to apply FAA sections 2, 3 and 4); *Deep S. Oil Co. v. Texas Gas Corp.*, 328 S.W.2d 897, 906 (Tex. Civ. App. 1959) (refusing to give a declaratory judgment based on FAA section 2, which the court viewed as procedural and applicable only in federal court).

67. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (invalidating state alien registration law in light of federal statute governing same conduct). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6-28, 6-29 (3d ed. 2000).

68. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 3 (1983) (upholding power of federal court to compel arbitration, where state court might not); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633-34 (1985) (requiring that potentially complex antitrust claims be arbitrated).

favoring arbitration.⁶⁹ In an appeal from a California Supreme Court decision applying a California statute that barred arbitration of franchise disputes in the state, the Court imaginatively marshaled bits and pieces from prior FAA opinions, all of which had arisen in *federal* court, to erect an imposing preemption structure applicable in *state* court.⁷⁰ From *Prima Paint*, the Court took the premise that the FAA rested “on the authority of Congress to enact substantive rules under the Commerce Clause.”⁷¹ From a concurring opinion in a Second Circuit decision, the Court extracted that the purpose of the Act was to assure the enforceability of arbitration in interstate contracts.⁷² From an earlier Court decision involving the effect on arbitration of parallel state court proceedings, the Court took from a footnote that the FAA “creates a body of federal substantive law”⁷³ and from *dicta* that “Federal law in the terms of the Arbitration Act governs that issue in either state or federal court.”⁷⁴ Citing to an observation by Justice Black in his *Prima Paint* dissent, the Court added that “when Congress exercises its authority to enact substantive federal law under the Commerce Clause, it normally creates rules that are enforceable in state as well as federal courts.”⁷⁵

Having laid out the structure of its syllogism, the *Southland* Court then turned to the FAA’s legislative history. Although recognizing that “the legislative history is not without ambiguities,” the Court concluded that “Congress had in mind something more than making arbitration agreements enforceable only in the federal courts.”⁷⁶ In response to a mountain of evidence ably compiled by Justice O’Connor in her dissenting opinion, that the 1925 Congress and the Act’s drafters viewed the legislation as only federal, the majority decision latched onto a passage in a House Report that stated: “The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving

69. See generally *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

70. See generally *id.*

71. *Id.* at 1. In *Prima Paint*, the Court examined the legislative history of the Act and concluded that the statute “is based upon . . . the incontestable federal foundations of ‘control over interstate commerce and over admiralty.’” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (quoting H.R. REP. No. 96, at 1 (1924)).

72. *Southland*, 465 U.S. at 813 (quoting *Metro Indus. Painting Corp. v. Terminal Constr. Corp.*, 287 F.2d 382, 387 (2d Cir. 1961) (Lumbard, C. J., concurring)) (stating that “the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures”).

73. *Id.* at 12 (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983)).

74. *Id.* (citing *Moses Cone*, 460 U.S. at 23).

75. *Id.* (citing *Prima Paint*, 388 U.S. at 420 (Black, J., dissenting)).

76. *Id.*

interstate commerce or within the jurisdiction [of] admiralty, or which may be the subject of litigation in the Federal courts.”⁷⁷

The *Southland* majority then revealed its agenda. Transporting the 1925 Congress to 1984, the Court “inferred . . . that Congress would be less likely to address a problem whose impact was confined to federal courts” in the face of “a problem of large significance in the field of commerce.”⁷⁸ Although entirely imaginable that a post-New Deal Congress would take *national* aim at “the rule . . . that equity will not specifically enforce any arbitration agreement,” the *Southland* majority was purposefully oblivious to the legislation’s context.⁷⁹ Referring to the legislative history about the longstanding judicial antagonism to arbitration, the majority sought to disguise its slight of hand with a rhetorical flourish: “Surely this makes clear that the House Report contemplated a broad reach of the Act, unencumbered by state law constraints.”⁸⁰

Absent from the majority’s discussion was any mention of the contemporaneous movement in *state* legislatures to modernize state arbitration statutes. Although noting the two obstacles that commercial arbitration faced in 1925, namely “the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements,” the Court assumed these to be the problems that *Congress* faced.⁸¹ But in 1925 a congressional attempt to eradicate state animosity towards arbitration would have usurped jurisdictional boundaries.⁸² The *Lochner*-era Congress lacked the power to legislate substantive standards applicable in state courts.⁸³ Although

77. *Id.* at 12-13 (citing H.R. REP. No. 96, at 1 (1924)).

78. *Id.* at 13.

79. *See id.*

80. *Id.*

81. *Id.* The *Southland* majority pointed to a perplexing ambiguity in the FAA text. If the statute was indeed “federal courts” legislation, why did its drafters feel compelled to limit the FAA to “contracts ‘involving commerce’”? *Id.* As the Court pointed out, no similar limitations exist in other federal statutes that prescribe federal court procedures. But far from suggesting jurisdictional boldness, the “contracts involving commerce” proviso evidences jurisdictional caution. Congress enacted the FAA on the basis of the pre-*Erie* understanding that in diversity cases federal courts (not Congress) have plenary power to adopt their own “general common law.” Only if legislating within its enumerated powers, arguably, could Congress intrude on this judicial law-making authority. Thus, to make arbitration agreements fully enforceable in federal court, the 1925 Congress sought to improve the statute’s chances in a jurisdictional challenge by exercising its power over “contracts involving commerce.” To have simply compelled federal courts in diversity cases to accept arbitration agreements would have been legislative overreaching—at least by pre-*Erie* standards.

82. *Id.* at 13.

83. *Lochner v. New York*, 198 U.S. 45, 53-58 (1905) (invalidating state minimum-hours law as unconstitutional exercise of police powers and interference with employer and employee due process rights under the Fourteenth Amendment).

hostility toward arbitration agreements was widely dispersed in state and federal courts, the FAA's sponsors sought only an end to federal judicial hostility. The sponsors understood that state legislation would have to deal with state judicial hostility.

Yet the *Southland* majority disregarded, even disdained, the constitutional and jurisdictional strictures that Congress faced in 1925: “[W]e cannot believe Congress intended to limit the Arbitration Act to disputes subject only to federal court jurisdiction.”⁸⁴ Instead, the Court chose to remake jurisdictional history, transporting the jurisdictionally cautious 1925 statute into the rich post-New Deal jurisdictional environment. “In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”⁸⁵

In remaking history, the Court had made law. Nowhere is the declaration of a “national” policy—as opposed to the “federal” policy discerned a year earlier in *Moses Cone*⁸⁶—to be found in the text of the statute, its legislative history, or the contemporary apologia of the Act's sponsors. In subsequent cases the Court would elevate this declaration to statutory-like prominence, citing not to statutory text or legislative history but rather to a “national policy” as the basis for its fulsome preemption jurisprudence.⁸⁷

4. The FAA's Extension to all Contracts in “Interstate Commerce”

The FAA's original “arbitration federalism” assumed that the bulk of commercial disputes would be heard in state courts, with only the admiralty and transaction across state lines going to federal court. The FAA sought to deal with the latter and left to state arbitration law the former. But the Supreme Court's post-New Deal jurisprudence revamped the assumptions of Congress's limited powers, expanding significantly congressional “commerce clause” powers over matters previously entrusted to the states.⁸⁸

In 1995, the Supreme Court completed its revision of the FAA when it focused its temporal prism on the meaning of “commerce” in the act. In

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

85. *Id.* at 10.

86. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

87. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995); *Perry v. Thomas*, 482 U.S. 483, 489 (1987).

88. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937) (permitting regulation of labor relation at manufacturing plant whose work stoppage would have an effect on interstate commerce); *United States v. Darby*, 312 U.S. 100, 123 (1941) (upholding regulation of wages and hours of workers who produced goods that had an impact in other states).

Allied-Bruce Terminix Cos. v. Dobson, the Court held the term should be understood in light of the Court's post-New Deal jurisprudence, not according to contemporary understandings of the 1925 legislation's drafters.⁸⁹ In this case, the Court invalidated an Alabama statute applied to invalidate a pre-dispute arbitration agreement in a consumer termite-control contract.⁹⁰

Specifically, the Court found that the words "involving commerce" to be the functional equivalent of the phrase "affecting commerce," which the Court said normally signals Congress's intent to exercise its commerce power to the fullest.⁹¹ Building on the *Southland* supposition of a national policy, the Court held that "a broad interpretation of this language is consistent with the [FAA's] basic purpose, to put arbitration provisions on 'the same footing' as a contract's other terms."⁹² Under the Court's "arbitration federalism," the FAA carves out no "statutory niche in which a State remains free to apply its anti-arbitration law or policy."⁹³

III. ARBITRATION FEDERALISM: THE BLUEPRINT

By reading the FAA's pro-arbitration, pro-contract philosophy in the light of *current* jurisdictional doctrines, the Court effectively legislated a new federalism for commercial arbitration. Does the Court's "arbitration federalism" nullify any meaningful state involvement in commercial arbitration? Or, consistent with the original assumptions of a federal-state partnership, does the revamped FAA contemplate a state role? We can glean an answer from the Court's preemption decisions since *Southland*. Ultimately, the twin purposes which the Supreme Court identified as animating the FAA's enactment also define the scope of its preemptive reach: to overcome the long-standing hostility to pre-dispute arbitration agreements and to give effect to the parties' private arbitration agreement.

A. Spheres of Preemption

The Supreme Court's preemption decisions lay out a blueprint for the preemptive reach of the Court's "arbitration federalism." Most of the decisions have dealt with state laws inimical to commercial arbitration, and the Court has shown little reluctance to preempt them. The story for state arbitration law, structured as a set of default rules, seems quite different. So long as state law seeks to promote commercial arbitration and to give effect to the parties' contractual choices, the Court in word and

89. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).

90. *Id.* at 281-82.

91. *Id.* at 273-74 (citing *Russell v. United States*, 471 U.S. 858, 859 (1985)).

92. *Id.* at 275 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

93. *Id.* at 273.

deed has opened the way for a significant state role. This section explores the nature of the blueprint.

1. Preemptive Core: Essential Matters Addressed by the FAA (validity and arbitrability)

The Supreme Court has on five occasions invoked its national policy favoring arbitration to invalidate state “attempts to undercut the enforceability of arbitration agreements.”⁹⁴ The common theme has been that the FAA, at its core, preempts state laws that invalidate arbitration agreements or limit the matters that can be arbitrated. Specifically, the Court has struck down

- a California statute that mandated that franchise disputes be resolved only in court—*Southland Corp. v. Keating*⁹⁵
- a California statute that limited wage-collection actions to state court, “without regard to the existence of any private agreement to arbitrate”—*Perry v. Thomas*⁹⁶
- an Alabama statute that invalidated pre-dispute arbitration clauses in consumer transactions—*Allied-Bruce Terminix Cos. v. Dobson*⁹⁷
- a New York case that precluded the awarding of punitive damages by arbitrators—*Mastrobuono v. Shearson Lehman Hutton, Inc.*⁹⁸
- a Montana statute that specified front-page notice in any contract with an arbitration clause—*Doctor’s Associates, Inc. v. Casarotto*.⁹⁹

Despite concerns that arbitration agreements are often the product of unequal bargaining—the Justices noted the “relative disparity in bargaining positions” in franchise agreements¹⁰⁰ and the concern for “exploitative employers” in wage disputes¹⁰¹—the Court concluded that in each case the FAA left no room for the particular state regulation. Even when state disclosure requirements did not preclude arbitration in *Casarotto*, the Court rejected the state’s singling out of arbitration for suspect status.¹⁰²

94. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

95. *Id.* at 17.

96. 482 U.S. 483, 484 (1987).

97. 513 U.S. 265, 281-82 (1995). The Court quoted Justice Hough’s observation that the hostility was rooted in judicial jealousy of any intrusions on their jurisdiction. *Id.* at 270 (quoting *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 211, n.5 (1956)) (Frankfurter, J., concurring).

98. 514 U.S. 52, 64 (1995).

99. 517 U.S. 681, 689 (1996).

100. *Southland*, 465 U.S. at 20 (Stevens, J., concurring and dissenting).

101. *Perry*, 482 U.S. at 495 (O’Connor, J., dissenting).

102. 517 U.S. at 687 (quoting *Scherk v. Alberto Culver*, 417 U.S. 506, 511 (1974)).

At its core, as fashioned by the Supreme Court, the FAA reflects “a clear and manifest purpose of Congress” to preempt a field traditionally occupied by state law.¹⁰³ On the questions of validity and arbitrability, the Court has left state law no room to maneuver. In effect, the Court has occupied the field.¹⁰⁴ Not only can states not declare arbitration clauses to be invalid, but states are also precluded from creating revocability standards that apply specially to arbitration clauses. Moreover, any question of an arbitration clause’s revocability on grounds of fraud, unconscionability, or duress is for the arbitrator to decide.¹⁰⁵

Significantly, none of the Supreme Court cases preempting state anti-arbitration rules has involved statutory provisions or case law that was part of a state’s arbitration law. At the core, the Court’s preemption analysis merely aims at cleaning away any lingering anti-arbitration sentiment found in state statutes and case law.

2. Preemptive Boundary: Non-essential Matters Addressed by the FAA (judicial stays and enforcement and review of arbitral awards)

The FAA, though “national” in its abrogation of the long-standing hostility to pre-dispute arbitration agreements, does not contain a “national” set of arbitration rules. As the Supreme Court has recognized, many of the FAA provisions are directed explicitly to federal courts, such as the provisions on court stays and orders to arbitrate¹⁰⁶ and the standards for the review and enforcement of arbitral awards.¹⁰⁷ Other provisions deal with court procedures that are uniquely federal, such as the appealability of arbitration orders under the federal “final judgment rule.”¹⁰⁸ In other

103. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-61 (1978) (stating traditional preemption standard and invalidating state tanker safety requirements that were more stringent than federal standards).

104. In fact, Professor Laurence Tribe cites to *Southland* as an example of a case finding an “actual conflict” between federal and state law, where federal and state enactments are directly and facially contradictory. TRIBE, *supra* note 67, § 6-29.

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

106. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476-77 n.6 (1989) (“by their terms [§§ 3 and 4] appear to apply only to proceedings in federal court”); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984) (“we do not hold that §§ 3 and 4 . . . apply to proceedings in state courts”). As Justice Stevens pointed out in *Southland*, there is no indication Congress meant to entirely displace state law authority. *Id.* at 18 (Stevens, J., dissenting and concurring).

107. Federal Arbitration Act, 9 U.S.C. § 9 (2000) (discussing procedures for district courts to confirm award), *id.* § 10 (discussing grounds upon which district court can vacate award), *id.* § 11 (discussing grounds upon which district court can modify or correct awards), *id.* § 12 (discussing procedures to give notice of review of award), and *id.* § 13 (discussing procedures in district court for vacating, modifying, or correcting award).

108. Federal Arbitration Act § 16 permits immediate appeals from pro-arbitration orders cast as “final decisions” (such as a final order compelling arbitration), but fails to address the possibility

instances, important FAA provisions, such as those dealing with judicial review of arbitral awards, have been interpreted to include implicit conditions not expressly stated in the statute.¹⁰⁹ On matters that the FAA addresses, are state arbitration rules bound to mimic their federal counterparts?

The Court's FAA decisions make clear two points. First, whatever the arbitration rules laid out by the FAA, statutory arbitration rules are generally subject to private agreement otherwise.¹¹⁰ That is, the FAA merely gives effect to the parties' agreement, but does not in itself compel arbitration. Second, the Court has never stated, or even intimated, that the areas addressed by the FAA are meant to occupy the field.¹¹¹ The FAA hardly represents the kind of dense, intertwined regulatory scheme that suggests exclusive federal regulation of the field.¹¹² Instead, arbitration rules have traditionally come from state arbitration law. In fact, anticipating a supplemental role for state arbitration law, the *Casarotto* Court framed the preemption issue not as whether state law addresses a matter affecting arbitration, but as whether state law "undermines the goals and policies of the FAA."¹¹³

of independent interlocutory proceedings (such as mandamus).

109. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996).

110. This is largely true for the UAA. *See infra*, text accompanying notes 183-86. This default nature of the arbitration statutes may even extend to the arbitration agreements that specify the standards for judicial review. *See* Stephen J. Ware, "Opt-in" for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act, 8 AM. REV. INT'L ARB. 263, 267 (1997) (asserting that parties can specify extra-statutory grounds for judicial review of arbitral awards, such as for consistency with "public policy," since judicial function in arbitration cases is to effectuate parties' agreement).

111. In some instances, even though state law does not conflict with federal law, preemption occurs if Congress has validly decided to "occupy the field." Such preemption is not to be inferred lightly. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (stating that such preemption should occur only if there are "persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained").

112. Such "field preemption" arises in such areas as motor vehicle regulation, *see* Castle v. Hayes Freight Lines, Inc., 348 U.S. 61, 63-64 (1954) (interpreting comprehensive Motor Vehicles Act to preempt state suspension of carrier), and alien registration, *see* Hines v. Davidowitz, 312 U.S. 52 (1941).

113. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996). In effect, the Court has suggested that FAA preemption falls in the "conflict preemption" category, where Congress has not focused on the issue, and state law is preempted only if it conflicts with the accomplishment of federal statutory objectives. *See* English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990) (discussing the three types of preemption: "express preemption" when Congress declares an intention to preclude state regulation; "implied preemption" when the structure or objectives of a congressional enactment implies preclusion; and "conflict preemption" when Congress has not addressed the issue and general policies of federal supremacy apply).

As to FAA provisions whose applicability in state court is in doubt, the Supreme Court has made clear that, whatever the FAA may say, it is subject to private agreement otherwise. In *Volt Information Sciences, Inc. v. Stanford University*,¹¹⁴ the Court accepted a role for state arbitration law—a “counterpart” to the federal legislation—when its purpose is to facilitate and rationalize the arbitration process.¹¹⁵ In the case, the Court interpreted the parties’ generic choice of law clause to incorporate California’s arbitration rules into their agreement, given the state’s apparent desire to foster arbitration.¹¹⁶ The Court concluded the parties had effectively authorized the stay of arbitration (but not its preclusion) to permit the resolution of pending court litigation between a party to the arbitration agreement and third parties not bound by it.¹¹⁷ The Court pointed out that the FAA has no provision dealing with multiparty contract disputes in which not all the parties have agreed to arbitrate.¹¹⁸ Creating an opening for state arbitration rules, the Court explained: “There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”¹¹⁹

The Court lauded the California approach, finding that its rules are “manifestly designed to encourage resort to the arbitral process” and that its legislation “generally foster[s] . . . federal polic[ies] favoring arbitration.”¹²⁰ The *Volt* rule of construction, which effectively incorporated into the parties’ agreement a term there was no indication they had contemplated, permits state arbitration rules to displace FAA silence.¹²¹ This comports with the Court’s general preemption approach not to invalidate state law merely because it may offend some general and abstractly-framed federal purpose, such as to promote arbitration.¹²² In

114. 489 U.S. 468 (1989).

115. *Id.* at 470.

116. *Id.*

117. *Id.* The California Arbitration Act permits state courts to stay arbitration if there are pending issues in related litigation involving third parties not bound by the arbitration agreement, if there might be a danger of conflicting rulings on common issues of law or fact. CAL. CIV. PROC. CODE § 1281.2(c) (2001).

118. *Volt*, 489 U.S. at 476 n.5; see also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-19 (1985) (accepting that “the Act’s drafters did not explicitly consider the prospect of bifurcated proceedings”).

119. *Volt*, 489 U.S. at 475.

120. *Id.* at 476 & n.5.

121. *Id.* at 476.

122. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983) (refusing to preempt state moratorium on nuclear power plant construction, since there was no indication Congress intended to promote nuclear power “at all costs”). Conversely, state law is preempted if its manifest effect is to penalize activities that federal law seeks to encourage. See *Nash v. Fla. Indus. Comm’n*, 389 U.S. 235, 236-40 (1967) (invalidating state law that precluded

Volt, the Court justified its rule of construction as consistent with the FAA policy to legitimate arbitration agreements and ensure that “arbitration proceed in a manner provided for in [the parties’] agreement.”¹²³

This rule of construction dissolves, however, when a generic choice of law clause refers to state law that is hostile to arbitration. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,¹²⁴ the Court rejected the idea that the parties’ generic choice-of-law clause incorporated state law that precluded arbitration of punitive damages claims.¹²⁵ Faced with what appeared to be the same question as in *Volt*, the Court refused to infer that the parties had incorporated anti-arbitration state case law.¹²⁶ Although presenting its inquiry as what “the contract has to say about the arbitrability of petitioners’ claim for punitive damages,”¹²⁷ the contract was silent on the issue, and the Court’s rule of construction carried the day in the face of contractual silence on the issue.¹²⁸ The presumption that the parties intended to make all issues arbitrable, absent an “unequivocal” contrary intent, supplied the rule of decision.¹²⁹ When an ambiguity (or silence) arises in a contract containing an arbitration clause, the Court explained “due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.”¹³⁰

Both cases turned on how to interpret a generic choice of law clause in a contract with an arbitration clause.¹³¹ In *Mastrobuono*, the Court assumed the parties had intended to arbitrate every aspect of any dispute, nullifying the state rule that limited the scope of arbitration.¹³² In *Volt*, the Court assumed the parties intended to be bound by state arbitration rules meant to rationalize the arbitration process, even though the effect was that

unemployment benefits for any fired employee, including one fired for filing an unfair labor practice charge against her employer under federal law).

123. 489 U.S. at 474-75 (quoting Federal Arbitration Act, 9 U.S.C. § 4 (2000)) (citations omitted).

124. 514 U.S. 52 (1995).

125. *Id.* at 60-61. The Court also rejected that the arbitration clause’s reference to the rules of the National Association of Securities Dealers (NASD) excluded an award of punitive damages in arbitration. *Id.* In fact, the reference to NASD rules, whose arbitration manual contemplates punitive damages as a remedy, suggested the opposite. *Id.*

126. *Id.* at 58.

127. *Id.*

128. *See generally id.*

129. *Id.* at 59.

130. *Id.* at 62 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)) (citation omitted).

131. *See id.* at 64 (Thomas, J., dissenting) (finding the choice of law clauses involved in *Volt* and *Mastrobuono* to be indistinguishable).

132. *See generally id.*

their dispute would be “litigated rather than arbitrated.”¹³³ What distinguishes the cases is that the *Volt* procedures were part of a state arbitration law “manifestly designed to encourage resort to the arbitral process”¹³⁴ and the *Mastrobuono* prohibition against a punitive arbitral award reflected the “ancient judicial hostility to arbitration.”¹³⁵

Although cast in terms of party intent, *Volt* and *Mastrobuono* are essentially decisions concerning the contours of “arbitration federalism.”¹³⁶ State law intended to limit arbitration, absent the clearest drafting by the parties, triggers judicial rejection. In *Mastrobuono*, to avoid New York’s limitation on the scope of arbitration, the Court unleashed an interpretive arsenal.¹³⁷ The Court delved into the rules of the arbitration fora chosen in the agreement,¹³⁸ it distinguished between substantive and procedural rules adopted in a choice of law clause,¹³⁹ and it invoked the rule of construction that ambiguities are interpreted against the drafter.¹⁴⁰ On the other hand, state law meant to promote arbitration receives a judicial embrace, even when inimical to arbitration in a particular case. In *Volt*, the Court noted the pro-arbitration animus of California’s arbitration rules and readily accepted the state court’s finding that the parties had intended to incorporate the rules into their agreement:

133. *Volt*, 489 U.S. at 487 (Brennan, J., dissenting).

134. *Id.* at 476.

135. *Mastrobuono*, 514 U.S. at 56.

136. This is a novel approach to defining the preemptive reach of federal law. As Justice Brennan pointed out in his *Volt* dissent: “Choice-of-law clauses simply have never been used for the purpose of dealing with the relationship between state and federal law. There is no basis whatever for believing that the parties in this case intended their choice-of-law clause to do so.” *Volt*, 489 U.S. at 490 (Brennan, J., dissenting). Attempting to minimize the Court’s preemption analysis, Justice Thomas sought to characterize the *Mastrobuono* decision as involving “nothing more than a federal court applying Illinois and New York contract law to an agreement between parties in Illinois.” *Mastrobuono*, 514 U.S. at 71-72 (Thomas, J., dissenting).

137. *See generally Mastrobuono*, 514 U.S. 52.

138. The *Mastrobuono* Court considered the stock exchange rules under which the arbitration was to be conducted, finding that they did not “limit an arbitrator’s discretion to award punitive damages.” *Id.* at 61 n.5.

139. The Court conjectured that the parties might have intended only to include “New York’s substantive rights and obligations, and not the State’s allocation of power between alternative tribunals.” *Id.* at 60. This analysis, applied in *Volt* to the California rules applicable to bifurcated proceedings, would suggest an opposite result in that case. If the bifurcation rules were viewed as distributing authority between courts and arbitrators, then it would not have been covered by the parties’ choice of law clause, rendering it unenforceable. *See id.* at 67 (Thomas, J., dissenting).

140. Relying on the rule of construction that “a court should construe ambiguous language against the interest of the party that drafted it,” the *Mastrobuono* Court concluded the brokerage firm had drafted an ambiguous contract and “cannot now claim the benefit of the doubt.” *Id.* at 62-63. The Court failed to point out that applying this same rule of construction in *Volt* would have led to the opposite result. In that case, the construction contract had apparently been drafted by the owner, and its ambiguity argued against using the state’s rule on staying arbitration. *See generally Volt*, 489 U.S. at 468.

Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.¹⁴¹

Viewing the issue as a potential conflict between state arbitration law and the FAA's policy favoring arbitration, the Court concluded the conflict did not exist.¹⁴² Had one existed, however, the strong impression is that the Court's interpretation of party intent might well have gone the other way.¹⁴³ Thus, when state arbitration law supplements the federal pro-arbitration design, the Court has shown a willingness to accept its validity.¹⁴⁴

3. Preemptive Penumbra: Matters Not Addressed by the FAA

The FAA's coverage is incomplete. The statute, aimed at the enforceability of arbitration agreements and awards, does not specify the process of arbitration or the role of courts in that process. For example, there is no mention of how arbitrators (or judges) should handle pre-hearing information exchanges, requests for summary disposition without a full evidentiary hearing, consolidation of multiple claims or multiple arbitrations, provisional remedies such as interim relief, and the availability of injunctive relief. Nor have any of the Supreme Court's preemption cases addressed this penumbra.

Given this silence, general preemption principles presume the validity of state law.¹⁴⁵ As the Court said in *Volt*, "There is no federal policy favoring arbitration under a certain set of procedural rules."¹⁴⁶ In fact, the

141. *Volt*, 489 U.S. at 476. The Court noted that "California has taken the lead in fashioning a legislative response to this problem" of bifurcated judicial-arbitral proceedings. *Id.* at 476 n.5.

142. *Id.* at 476.

143. The notion that the FAA governs not only the validity and enforceability of arbitration agreements, but also "questions of interpretation and construction" arising under the agreements, has a long judicial history. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 409 (2d Cir. 1959) (commenting that under the "sweeping scope" of the FAA, the two questions are "inextricably intertwined").

144. In general, the Court has shown a willingness to uphold state law that supplements federal law. See *TRIBE*, *supra* note 67, at 1195-96 & n.3.

145. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556-57 (1985) (declining to infer preemption in the face of congressional ambiguity); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (refusing to construe federal statute to restrict state power unless Congress has made "its intention to do so unmistakably clear in the language of the statute").

146. *Volt*, 489 U.S. at 476.

Court has stated that some matters may be appropriate for state law, such as whether class action claims can be arbitrated.¹⁴⁷

The guiding preemption principle would seem to be whether the state arbitration rule is consistent with the twin purposes of the FAA: namely, to overcome hostility to arbitration and to effectuate the parties' arbitration agreement.¹⁴⁸ That is, state arbitration rules should readily pass preemption muster if their effect is to foster "privately negotiated arbitration agreements" and to place them on "the same footing as other contracts."¹⁴⁹ So long as a state does not seek to introduce revocation standards or limits on arbitration agreements not applicable to other contracts, state arbitration rules meant to give content to the parties' arbitral intentions further the FAA's pro-arbitration policy.

Such an approach is consistent with *Volt*, a case in which state arbitration law supplied terms in the absence of explicit bargaining.¹⁵⁰ If state arbitration rules supply terms the parties would likely have bargained for had they considered the issue—that is, "majoritarian default terms"—arbitration contracts are put on similar grounds as other contracts. In other contractual contexts, when private intentions are ambiguous or vague, rules of construction become the operative elements of the enforceable agreement.¹⁵¹

Whether state arbitration rules could be mandatory, incapable of agreement otherwise, is problematic under the Supreme Court's arbitration federalism. If terms are made mandatory because any agreement otherwise would suggest a bargaining failure,¹⁵² this approach contradicts the FAA presumption that arbitration agreements are valid, unless shown to be revocable under generally applicable grounds such as duress, fraud, or unconscionability. For example, any immutable arbitration rule aimed at

147. *Southland Corp. v. Keating*, 465 U.S. 1, 9 (1984) (suggesting that whether class action claims are arbitrable is a matter of state law).

148. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983) (describing preemption principles when Congress has not addressed the issue, but where state law stands as an obstacle to the accomplishment of federal statutory objectives).

149. *Volt*, 489 U.S. at 472, 478; see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 938-47 (1995); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985); *Southland*, 465 U.S. at 16 (quoting H.R. REP. No. 96, at 1 (1924)).

150. *Volt*, 489 U.S. at 472-73.

151. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 261 (1985).

152. Such arguments have been made to explain mandatory terms in corporate law, which imposes immutable terms on corporate parties, such as fiduciary duties and responsibilities to creditors. See Lucian Arye Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989) (summarizing symposium articles on topic of mandatory terms in a corporate law system of default rules).

arbitration clauses in adhesion contracts would run afoul of the FAA's preemptive core.¹⁵³

Can arbitration rules ever be mandatory? If incorporated into the parties' agreement, whether by a specific choice-of-law clause or general choice-of-law principles, mandatory rules can be seen as fitting within the FAA philosophy of giving content to the parties' agreement. Nothing in the Supreme Court's arbitration decisions suggests that the FAA preempts party choice of law in structuring the conduct of the arbitration. In fact, the comments and policy articulated by the Court are to the contrary.

The important question would be whether state arbitration rules, not explicitly incorporated into an arbitration agreement, but applicable under choice-of-law principles, should be seen as an element of party choice. Although language in *Volt* and *Casarotto* suggests that the FAA preempts state laws which render arbitration agreements unenforceable,¹⁵⁴ this language should be understood as reiterating the FAA's preemptive core aimed at mandatory rules that undermine enforcement of arbitration agreements. That is, the Court has not sought to limit what rules the parties can choose, or be said to have chosen, to govern their arbitration. Just because a state-provided rule may be outcome-determinative (such as a rule of mandatory discovery with sanctions for noncompliance) does not mean that the rule is preempted. Instead, the rule can be seen merely as giving content to the arbitration promise. In *Volt* itself, the California rule permitting a stay of arbitration proceedings had the effect of shifting the dispute to a judicial forum, but this was not sufficient to render the rule unenforceable.¹⁵⁵

Moreover, state-created arbitration rules serve as a check on arbitration's propriety, adding to its legitimacy. The existence of some oversight, even in the form of default rules from which the parties can opt out, is consistent with the functioning of other markets in private law—in particular the market for corporate charters.¹⁵⁶ That arbitration rules are formulated by lawmakers, presumably for the public good, not only

153. See Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 491-93 (1998) (arguing that to create legitimacy for arbitration in contracts of adhesion, either the FAA must be amended to require notice of arbitration clauses, states must amend contract law to allow consensual defenses, or arbitration service providers can refuse to administer arbitrations that do not meet minimum requirements).

154. *Volt*, 489 U.S. at 478; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (citing 2 I. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 19.1.1, at 19:4 to 19:5 (1995) (under *Southland* and *Perry*, "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted")).

155. See generally *Volt*, 489 U.S. at 468.

156. This is essentially the role of corporate lawgivers. See Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990).

simplifies the drafting of arbitration clauses, but also permits the introduction of some balance in the terms of arbitration. If permitted, lawmakers will be able to address issues of bargaining inequality by fashioning default arbitration rules that promote arbitration's fairness. If private parties consider the terms too burdensome, they can opt out and agree to different terms. But even free market advocates recognize a role for government in supplying default terms and intervening in cases of contractual overreaching.¹⁵⁷

In fact, the Supreme Court has accepted that regulatory oversight buttresses the legitimacy of arbitration. In deciding that claims under the Securities Exchange Act of 1934 are arbitrable, the Court attached significant weight to the SEC's regulatory oversight of securities firms and their arbitration procedures.¹⁵⁸

Although it might be argued that an FAA-anchored "arbitration federalism" that recognizes a state rule-making role risks overlapping, inconsistent arbitration standards, uniformity is readily supplied through choice-of-law rules that give effect to the parties' choice of standards. Such a system works well with respect to corporate charters, whose validity arises as a matter of federal constitutional law, but whose terms and enforcement are a matter for the state in which the parties choose to incorporate.¹⁵⁹ In much the same way, the FAA creates uniform, national standards for the validity of arbitral agreements and perhaps their enforcement, leaving to party choice the remaining terms, such as the process of arbitration and standards of decision. This framework is particularly efficient in that it allows for different states to compete for arbitration business by offering arbitration rules that optimally accommodate the competing objectives of dispute-resolution cost savings and of fairness. A similar competition in corporate charters has proved highly beneficial in resolving corporate relational issues.

B. *A Blueprint for "Arbitration Federalism"*

What role does state law have in this revamped "arbitration federalism"? The Supreme Court's FAA jurisprudence lays out a blueprint. Drawn from the twin purposes of the FAA, the blueprint has two aspects. First, it is prohibitive: state law can neither be hostile to arbitration nor undermine the parties' agreement. Second, it is hortatory: state law must seek to facilitate arbitration and to give content and effect to the parties' choice.

157. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 80-82 (Harv. Univ. Press 1995) (describing the standard limitations on contractual freedom: duress, infancy, insanity, and fraud).

158. *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 223 (1987).

159. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93-94 (1987).

At a basic level, the blueprint forbids any state law (statutory or judicial) that singles out arbitration for suspect treatment.¹⁶⁰ As *Casarotto* makes clear, state law cannot seek to regulate arbitration in ways other contractual dealings cannot.¹⁶¹ Although the Court has interpreted the FAA to permit state courts to decide the validity of an arbitration agreement, under traditional contract revocation standards, the message seems clear that state courts are to use long-standing, established principles.¹⁶² That is, arbitration-specific standards of duress, fraud, or unconscionability are beyond the pale.

Moreover, state law cannot undercut the parties' arbitral agreement. The blueprint creates a presumption, rebuttable only under traditional contract revocation standards, that arbitration agreements reflect mutual party intent. Thus, despite state legislative doubts about the fairness and efficacy of arbitration, the Court in *Southland* and *Perry v. Thomas* assumed that the parties had chosen arbitration and that the FAA compels their choice to be respected.¹⁶³ But mandatory state arbitration rules, unlike default rules, stand on shaky ground. Only if the mandate parallels the FAA's regulation, for example, of the review and enforcement of arbitral awards, or the mandatory terms are surely those the parties would have included in their agreement, or the provision is essential to the fair and effective functioning of the arbitration process would state regulation seem to fit the blueprint.

The blueprint accepts a state role—specifically, state-provided default terms meant to facilitate arbitration.¹⁶⁴ This is the central meaning of *Volt*, the only case in which the Supreme Court has passed on a provision in a state arbitration statute that was meant to foster, not hinder, arbitration.¹⁶⁵ If the state provision is not hostile to arbitration—but seeks to rationalize the arbitral process by making it more expeditious, fair, or legitimate—the provision fits the blueprint. State law need not mimic the FAA, as was the case in *Volt* in which the California statute (unlike the FAA) created rules for bifurcated proceedings.¹⁶⁶ Moreover, in some instances state provisions

160. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (observing that Congress passed the FAA “to overcome courts’ refusals to enforce agreements to arbitrate”); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55 (1995).

161. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

162. *Id.*

163. See generally *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987).

164. See Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1378 (1985) (concluding that the state law-making after *Southland* is limited to providing “neutral rules of contract formation and enforcement addressed only to the arbitration clause . . . [which] will be examined in light of the federal policy favoring arbitration”).

165. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

166. See *id.*

may actually limit arbitration, as happened in *Volt* in which the dispute was not arbitrated since state provisions gave priority to parallel court proceedings.¹⁶⁷

In drawing the blueprint, the Supreme Court has acknowledged that ideally the subject and process of arbitration should be the result of careful and thoughtful framing of the arbitration agreement. The Supreme Court has repeatedly emphasized the primacy of the parties' agreement, as when it engaged in a tortuous search in *Mastrobuono* for the agreement's intent regarding punitive damages.¹⁶⁸ If the agreement is incomplete, however, there is great efficiency in gap-filling default rules.¹⁶⁹ Whether structured as majoritarian default rules, which attempt to anticipate what most parties would want, or tailored default rules, which leave to a decision-maker to gauge the parties' particular intent,¹⁷⁰ state arbitration law has the potential to create greater certainty and fairness. If the parties can choose their arbitration regime or opt out of specific rules—something absent in each of the Supreme Court cases preempting state arbitration rules—the blueprint would seem to accept well-meaning state involvement.

How can states carry out their role? The blueprint does not provide a single preemption formula. Rather, as we have seen, the Supreme Court's "arbitration federalism" is concentric and textured. At its preemptive core, the "national policy favoring arbitration" preempts state laws (judicial or legislative) inimical to the enforcement of private arbitration agreements. The Supreme Court has made clear that states cannot interfere with the front end of arbitration—the validity and enforceability of arbitration clauses—except "upon such grounds as exist at law or in equity for the revocation of any contract."¹⁷¹ To date, five of the six preemption cases decided by the Court have involved decidedly anti-arbitration state legislation or case law.¹⁷² In each case, the Court has concluded that states are not "free to apply [their] anti-arbitration law or policy."¹⁷³

At the fringes of this core, in a boundary where the FAA text addresses certain arbitration matters but with less clarity, the Supreme Court has seemed to read the Act as countenancing a facilitative state role, so long

167. *See id.*

168. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55-64 (1995).

169. *See* ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 1 (AEI Press 1993).

170. *See* Ayres & Gertner, *supra* note 151, at 91.

171. *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (citing Federal Arbitration Act, 9 U.S.C. § 2 (2000)).

172. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono*, 514 U.S. 52; *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Perry*, 482 U.S. 483; *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

173. *See generally* cases cited *supra* note 172.

as it is consistent with private arbitral choice. In *Volt*, the one post-*Southland* case that involved a state *arbitration statute*, aimed at promoting arbitration, the provision at issue sought to facilitate arbitration by (among other things) rationalizing bifurcated court and arbitration proceedings.¹⁷⁴ The Court construed the parties' agreement as one opting into the state's arbitration regime—even though the statute's effect was to give precedence to court proceedings over arbitration.¹⁷⁵ State law that seeks to vindicate and facilitate the parties' arbitral choice stands on favored ground.

Thus, state arbitration rules that clarify the procedures and standards mentioned by the FAA would seem to pass preemption muster if their form is as a default and their intent is pro-arbitration. This means that state rules that describe the details of staying court proceedings (FAA § 3), compelling arbitration (FAA § 4), naming arbitrators (FAA § 5), or compelling the attendance of witnesses (FAA § 7) would seem to be appropriate if the parties can still choose their own procedures and the state rules are meant to facilitate arbitration. The Supreme Court's statement that there is "no federal policy favoring arbitration under a certain set of procedural rules"¹⁷⁶ suggests significant latitude for states to choose court procedures that carry out the basic FAA purposes of assuring the parties' arbitration agreement is given effect—however the state court goes about doing this. For example, a state rule that specified a method for the court to appoint an arbitrator where the parties had not (from a list submitted by the parties or by reference to an arbitration organization) would seem consistent with the FAA's purposes, even though it does not mimic the FAA. Just because the FAA addresses a subject does not mean it is exclusive or exhaustive.

State rules that address back-end issues—vacatur, confirmation, modification, and enforcement of awards—are trickier. Here the FAA addresses these topics with some specificity, such as the grounds for vacatur. The Supreme Court has not addressed the preemptive effect of these provisions; the tenor of the provisions is to limit the ability of a court to undo an arbitral award by hook or crook. Any state rule on these subjects would have to be consistent with this pro-arbitration intent, but not necessarily be slavish to the federal counterpart. For example, a state rule that mandated a hearing before a court concluded that there had been a mistake in the award or that there were grounds for vacating it—though not specified in the FAA—would seem entirely consistent with the purpose to limit judicial interference with the award. An interesting question is whether state arbitration law could modify the grounds for

174. *Volt*, 489 U.S. at 476 n.5.

175. *Id.* at 479.

176. *Id.* at 476.

vacatur, to provide clarity or create additional grounds. Here, to effectuate the “national policy favoring arbitration,” state rules would seem more constrained. Unless they tracked those grounds specified in the FAA or inferred by federal courts, state-created vacatur standards would seem to be off-limits.

Beyond this boundary lies a penumbra as to which the FAA is silent and the Court has yet to address. With respect to the many procedural details that arise during an arbitration—such as the discovery of information, qualifications of arbitrators, the hearing of evidence, summary disposition and consolidation of claims, and pre-award arbitral rulings—the potential role of state arbitration law is significant. Consistent with the twin purposes of the FAA, state law has the potential to fill in and give meaning to the parties’ arbitration agreement and to assuage the continuing hostility toward arbitration. An example is the uncertain status of pre-hearing discovery, a matter on which the federal courts are divided.¹⁷⁷ State law, cast as a set of default rules, could specify the content of discovery, the nature of any exemptions, and the methods of enforcement. Although such issues as arbitrator disclosure of conflicts of interest, party representation by an attorney, and arbitrator immunity are not addressed in the FAA and seldom the subject of federal case law, they are significant to fair and efficient arbitration. Their resolution, whether by majoritarian or tailored default rules,¹⁷⁸ would have the purpose to effectuate the parties’ arbitration agreement.

In fact, state inaction might well be inconsistent with the “national policy favoring arbitration.” The current legal environment for arbitration,

177. Some courts have interpreted FAA § 7 (which is silent on the subject) as permitting arbitrators to compel pre-hearing discovery from third-party witnesses. *See American Federation of Television and Radio Artists AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999). The Fourth Circuit has decided such discovery is available only on a showing of “special need or hardship.” *Comsat Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999). The Fourth Circuit reasoned that “parties to an arbitration agreement forgo certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes.” *Id.* at 276. Given the FAA’s silence, those courts willing to infer an arbitrator’s authority to order pre-hearing discovery must grapple with how the court’s subpoena powers can be used to compel a reluctant third-party witness. *See Amgen, Inc. v. Kidney Ctr. of Delaware County Ltd.*, 885 F. Supp. 878, 882 (N.D. Ill. 1995). In *Amgen* an arbitrator in Chicago issued a deposition subpoena to a third party in Pennsylvania. When the third party refused to be deposed, the party seeking the testimony first moved to compel in Pennsylvania federal court, but was rebuffed since the FAA specifies that compliance must be sought where the arbitration is conducted. When the party moved to compel compliance in Illinois federal court, the court decided the party could have its lawyer issue the subpoena under the same of the Illinois enforcement action and then seek compliance, if necessary, in Pennsylvania federal court under Federal Rule of Civil Procedure 45. This “procedural gymnastics” has been criticized as a flawed reading of FAA § 7, which arguably addresses only hearings subpoenas, not discovery subpoenas. *See Sean T. Carnathan, Discovery in Arbitration?*, *BUS. LAW TODAY* 22, 25 (Mar./Apr. 2001).

178. *See Ayres & Gertner, supra* note 151, at 87.

with its many gaps and uncertainties, undermines arbitral efficiency by forcing the parties to resort to ad hoc judicial litigation to resolve these open questions. The current piecemeal approach serves neither the interests of the parties nor the process of commercial arbitration.

In an important sense, the Supreme Court's new "arbitration federalism" has not been a federal grab. Commercial arbitration, far from being snatched from state authority to be placed under federal oversight, was essentially removed from *all* government regulation and oversight. Under the watchwords of "private choice,"¹⁷⁹ the Supreme Court has used the FAA to fashion a protective mantel under which arbitration agreements are valid and enforceable. In this framework, a state role naturally arises—through default provisions from which the parties can opt out or mandatory rules that can be seen as implicit in any promise to arbitrate—to clarify the FAA's procedural rules and to fill in its gaps.

IV. STATE ROLE IN "ARBITRATION FEDERALISM"

The resurrection of the FAA by the Supreme Court through its "national policy favoring arbitration" has led to greatly expanded use of commercial arbitration over the last fifteen years. For example, in 1981 the American Arbitration Association (AAA) reported 6,448 commercial arbitration case filings. By 1992 that number had grown to 13,603. In 1999, the AAA reported 16,882 commercial arbitration cases filed.¹⁸⁰ Judicial Arbitration and Mediation Services (JAMS), the other well-known arbitration organization with nationwide scope, reported 15,010 commercial arbitration case filings in 1997 and 18,000 case filings in 1999.¹⁸¹

Arbitration clauses have found their way into the fabric of our commerce: securities brokerage agreements, Internet purchases, airline tickets, consumer credit transactions, employment contracts, and franchiser-franchisee agreements to mention a few. And courts have accepted arbitration in even the most complex and high-stakes civil disputes.¹⁸² Not surprisingly, these procedures routinely give rise to vexing

179. One of the central purposes of the FAA is to give meaning to private choice. *Volt*, 489 U.S. at 476 (describing federal policy "to ensure the enforceability, according to their terms, of private agreements to arbitrate"); *see also* *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-64 (1995).

180. 2000 Annual Report of the American Arbitration Association *available at* <http://www.adr.com>.

181. Judicial Arbitration and Mediation Services (JAMS) 2000 Annual Report.

182. *See* *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 996 (Cal. 1994) (affirming arbitrator's remedial order in an arbitration that took 355 hearing days and four and one-half years to complete); *GAF Corp. v. Werner*, 485 N.E.2d 977, 979 (N.Y. 1985) (upholding arbitrability of indemnity claim by the chief executive officer of a public corporation, even though arbitration raised issues of fiduciary duty normally subject to judicial review during litigation).

questions concerning the starting, conducting, and reviewing of an arbitration.

As we have seen, the FAA offers little guidance. Contemplating a simple procedure between merchants, the framers of the FAA failed to address a variety of issues. Current state arbitration statutes—most modeled on the basic elements of the federal Act—echo this lack of clarity and definition. In this section we identify specific issues susceptible to state arbitration law. In particular, we consider how well the RUAA follows the “arbitration federalism” blueprint laid out by the Supreme Court, and we comment on its method and substance.

A. State Arbitration Law: UAA to RUAA

1. Uniform Arbitration Act of 1956

The Uniform Arbitration Act was promulgated by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1955.¹⁸³ It was modeled on the arbitration statutes of New York and some fifteen other states and was intended to “make the arbitration process effective, provide necessary safeguards, and provide an efficient procedure when judicial assistance is necessary.”¹⁸⁴ The drafters of the Uniform Act intended its terms to “meet problems not anticipated by the parties when the agreement [for arbitration] was made and for which no provision exists in the [arbitration] agreement.”¹⁸⁵ Despite that laudable goal, the UAA is incomplete, especially when it is viewed in the context of contemporary commercial arbitration. Among the questions it fails to address are the following.

Commencement of Arbitration

- How does a party commence an arbitration proceeding?
- Who decides whether the dispute is arbitrable by what criteria?
- Can (must) overlapping arbitration proceedings be consolidated?

Arbitrator Selection

- Must arbitrators disclose facts reasonably likely to affect their impartiality?
- Are arbitrators (or arbitration organizations) immune from civil actions?
- Can arbitrators be required to testify in another proceeding?

183. UNIF. ARBITRATION ACT, Prefatory Note (1955).

184. *Id.*

185. *Id.*

Power of Arbitrators

- Can arbitrators direct provisional remedies?
- Can arbitrators order discovery and issue protective orders?
- Can arbitrators manage the arbitration process, such as by deciding motions for summary dispositions and holding pre-hearing conferences?
- Can an arbitrator order non-compensatory remedies, particularly attorney fees, punitive damages, or other exemplary relief?

Power of Courts

- Can courts enforce a pre-award ruling or order by an arbitrator?
- Can parties contract for an expanded court review for errors of law by arbitrators?¹⁸⁶

Although some of these matters would seem susceptible to party agreement, the fact is the parties rarely specify the details of their arbitration.¹⁸⁷

2. Revised Uniform Arbitration Act of 2000

The RUAA walks a fine line, expanding the UAA while at the same time seeking to satisfy the preemptive blueprint laid out in the Supreme Court's FAA decisions. The RUAA Drafting Committee accepted that "front-end" issues of enforceability and substantive arbitrability are controlled exclusively by the FAA's "national policy favoring arbitration." For these issues, the RUAA mostly mimics the FAA. The Committee also assumed that the validity of an arbitration agreement is exclusively a matter for state law, under generally applicable state "contract formation" law. The RUAA creates no special rules concerning consent, disclosure, consideration, or unconscionability that apply only to arbitration agreements.

Having fixed the poles of the "preemption continuum," the RUAA drafters focused their attention on the remaining issues they assumed were

186. REV. UNIF. ARBITRATION ACT, Prefatory Note (2000).

187. This is especially true for widely-used adhesion contracts, particularly in business-consumer and employment settings. See generally Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers and Due Process Concerns*, 72 TUL. L. REV. 1, 17-39 (1997); Miriam A. Cherry, Note, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN'S L.J. 267, 278-84 (1998); Donna Meredith Matthews, Note, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 370-85 (1997).

open to state law-making. The RUAA Drafting Committee worked from the premise that arbitration is a consensual process in which the autonomy of the parties to frame their own arbitration procedures should be given primary consideration. Thus, in seeking to supplement the sparse legal framework of the FAA and filling the voids left in state arbitration statutes fashioned after the UAA, the drafters cautiously framed the RUAA mostly as a set of default rules. Those default rules are intended to channel the law of commercial arbitration process in directions that will ensure that the process becomes a truly viable alternative to traditional litigation.¹⁸⁸

The RUAA also has an interesting *renvoi* aspect. An arbitration agreement subject to the RUAA provisions, either by virtue of a contractual proviso or general choice of law analysis, would seemingly apply whether the action was in federal or state court. That is, to the extent any RUAA provisions are different from their FAA counterparts, the RUAA provisions might be seen as incorporated into the parties' agreement and thus superseding any federal rules.

B. *Proper Role for State Arbitration Law*

State arbitration law, drafted in the shadow of the "national policy favoring arbitration," has great potential. Bright line rules can expedite the arbitration process, particularly given the many gaps and interpretive pitfalls of the FAA. Compared to judicial case law, well-framed statutory rules can provide clarity and knowability, as well as the potential for diversity or uniformity across states. State legislatures, compared to state judges, have greater incentives to adopt rules that minimize arbitration costs. Framed as default rules, state rules would facilitate party choice. In fact, decisive action by state legislatures seems essential to the maturation and institutionalization of commercial arbitration.

Before the Supreme Court's resuscitation of commercial arbitration, gaps in the legal framework for arbitration were of little consequence. Today, the absence of definitive, bright-line standards pertaining to arbitral matters between submission of a dispute to arbitration and issuance of the award frequently lead to extended court battles. The burgeoning state case law on the questions of arbitration procedure, arbitrator authority, remedies, and the like evidences both the many gaps in the FAA and the inevitability of a state role in filling them.

Most arbitration-related litigation happens in the state courts. With little reason to believe Congress will refine the FAA framework, meaningful clarification of the rules of commercial arbitration must come from the states.¹⁸⁹ In fact, the Supreme Court's decision in *Volt* can be seen

188. REV. UNIF. ARBITRATION ACT, Prefatory Note (2000).

189. Some writers have assumed that arbitration reform must come from Congress. *See, e.g.,*

as an invitation for greater state participation in areas outside the FAA preemptive core.

But what form should this state guidance take? Perhaps arbitration rules could be developed, case-by-case, through judicial application of existing state arbitration acts and development of a state common law for issues not addressed by those statutes. This approach, however, offers no guarantee of a coherent product consistent with the FAA. In addition, such a passive approach would surely take decades to effect.

Statutory rules make more sense than ad hoc judicial interpretation and law-making. For one, the FAA is silent on many points and incomplete on others. These gaps are not easily filled, as shown by the current piecemeal activity in the federal courts, particularly concerning judicial review of arbitral awards. Neither systematic nor expeditious, judicial interpretation of a deficient text imposes significant uncertainty and litigation costs on a process meant to avoid both. Without a complete or determinative text, judges have had to speculate what arbitration rules the FAA envisions. Invariably, there has been and will be inconsistency in interpreting the FAA, with the result that the outcome of arbitration will often turn on which court considers the arbitration agreement's validity or enforcement.

Default rules, the general approach of the RUAA, also offer the parties useful short-cuts or starting points in the arbitration drafting process. Statutory rules that anticipate what most parties would have bargained for, had they considered the many aspects of their arbitration, create drafting and negotiation efficiencies. Statutory rules that leave discretion to the arbitrator on such matters as hearing schedules and protective orders create the possibility of tailored solutions. Only when a provision goes to the essence of the arbitration agreement, and opting-out would violate the spirit of an arbitration, are mandatory provisions appropriate.

State legislatures also have a variety of competencies that make them more suited to the task. They have greater fact-finding competence than do state judges, and statutory text can more quickly and permanently create clarity than textured judicial case law. They have greater experience in setting default rules meant to reduce the costs of economic activity, as demonstrated in the movement of the last decade to modernize business organization laws. They show greater responsiveness to market participants who rely on default rules. States are also able to experiment, a luxury much less available to all-encompassing federal law.

Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1069-93 (1998) (urging that the FAA be revised to assure arbitration agreements are voluntary and that arbitrators provide written opinions on statutory claims).

C. “Arbitration Federalism” Blueprint Applied to the RUAA

The RUAA drafters were keenly cognizant of the concentric “arbitration federalism” blueprint. Like the UAA, the RUAA retains much of the flavor of the FAA provisions regarding “front end” issues (stays of judicial proceedings and compulsion of arbitration) and “back end” issues (vacatur, modification, correction, and confirmation of awards)—as demanded by the FAA’s preemptive core.¹⁹⁰ But as to issues mentioned in the FAA or federal case law, the RUAA cautiously adds new guidance—as the blueprint seems to contemplate. As to issues not addressed in the FAA, the RUAA addresses a variety of topics, often with remarkable caution—even though the blueprint authorizes a greater state role.

1. RUAA and the FAA Preemptive Core

The RUAA accepts the FAA’s preemptive core: agreements to arbitrate, if valid under state contract law, must be enforced in state court.¹⁹¹ As compelled by *Southland*, the RUAA provision is substantive and mandatory. The only real departure from the FAA is a provision that emphasizes the limited role of a court in compelling arbitration: a “court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.”¹⁹² Although there have been calls for states to bolster the unconscionability and duress standards for arbitration clauses, the RUAA drafters resisted the temptation. Nor did they have a choice, as the Supreme Court has made clear, the FAA does not tolerate arbitration-specific standards.

a. Contract Revocation

The RUAA Drafting Committee concluded that the “equal footing” rule requiring that the enforceability of arbitration agreements be decided by the same state law standards applied in determining the validity of all contracts precludes the states from legislating specific, arbitration-only enforceability rules.¹⁹³ The major concern here is the enforcement of non-negotiated adhesion arbitration agreements between parties of unequal economic strength in the employer-employee, business-consumer, franchiser-franchisee, and other commercial sectors. There is a split of opinion among scholars as to whether government regulation of these adhesion arbitration agreements is necessary in order to protect the interests of the “little guys” in the world of commerce.¹⁹⁴ Regardless, it is

190. See generally REV. UNIF. ARBITRATION ACT (2000).

191. *Id.* Prefatory Note.

192. *Id.* § 7(d).

193. *Id.* Prefatory Note.

194. See, e.g., Carrington & Haagen, *supra* note 9, at 384 (citing Thomas J. Stipanowich,

clear that ensuring that recalcitrant parties to arbitration agreements are not unfairly forced to honor their arbitration bargains is a task left to state and federal court judges applying state contract law principles in the commercial arbitration venue.¹⁹⁵

b. Punitive Damages

The RUAA outlines when and under what standards arbitrators may award punitive damages.¹⁹⁶ Although *Mastrobuono* makes clear that a state law cannot prohibit the arbitrability of a claim for punitive damages, the RUAA drafters chose to specify when punitive damages claims can be arbitrated. Under the RUAA § 21(a) “[a]n arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.”¹⁹⁷ The provision suggests punitive damages can be arbitrated only when the state permits punitive damages in its courts. Further, the provision suggests that arbitrators must follow any court procedures applicable for imposing punitive damages, presumably on penalty of vacatur.

The RUAA approach is meant to be pro-arbitration. However, it actually may limit the arbitrability of punitive damages claims beyond that contemplated by *Mastrobuono*. For example, punitive damages could not be awarded under an arbitration agreement subject (under general choice of law principles) to state provisions modeled on the RUAA, if the state did not permit punitive damages in a court action involving the same dispute. If the parties had provided that “all claims” would be subject to arbitration, the RUAA-based provision arguably would frustrate the parties’ intention and be preempted. Or the state provision, a default rule, would be trumped by the parties’ agreement. In either event, the RUAA provisions on punitive damages would seem to frustrate the parties’ intentions—a result inconsistent with the “arbitration federalism” blueprint.

Rethinking American Arbitration, 63 IND. L.J. 425, 452-76 (1988)) (arguing that consumers bound by unnegotiated arbitration clauses have lost significant due process protections, resulting in a dilution of substantive rights); Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 J. ILL. L. REV. 695, 698-771 (finding in a sample of arbitration clauses that both “unfair” and “fair” terms are common and arguing that business reputation and arbitration organizations constrain opportunism and make regulation unnecessary).

195. See REV. UNIF. ARBITRATION ACT § 6, cmt. 7 (2000).

196. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-64 (1995).

197. REV. UNIF. ARBITRATION ACT § 21(a) (2000). Section 21(e) stipulates that if an arbitrator awards punitive damages or other exemplary relief “the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.” *Id.*

c. Arbitral Remedies

Beyond punitive damages, the RUAA addresses two additional remedial matters. First, it expressly permits arbitral awards of “reasonable attorney’s fees and other reasonable expenses of arbitration[,] if such award is authorized by law.”¹⁹⁸ The provision seems largely uncontroversial, essentially confirming that arbitrators have the power to include in an award what a court might in a judgment. Phrased as a default provision, it would appear to give effect to the usual arbitration agreement. This seems fully consistent with the “arbitration federalism” blueprint which accepts arbitration as a substitute for court litigation.

Second, the RUAA permits arbitrators to “order such remedies as the arbitrator considers just and appropriate under the circumstances” and specifies that a court may not vacate or refuse to confirm an award because a remedy granted by an arbitrator “could not or would not be granted by the court” in a civil action.¹⁹⁹ This provision makes possible extra-legal arbitral powers. Although a default provision, it seems more a “penalty” default than “majoritarian;” one intended to compel the parties to clarify the arbitrator’s remedial authority.²⁰⁰

Do parties to an arbitration agreement typically agree to give the arbitrator extra-legal powers, including the power to disregard law? If not, one of the parties (such as the seller in a consumer transaction) would presumably insist that such power be excluded. In this sense, a penalty default would seem inconsistent with the party autonomy or contractual focus of the “arbitration federalism” blueprint. A provision that parties would presumably avoid hardly seems consistent with the pro-arbitration blueprint. Yet perhaps this “penalty” default merely reflects an assumption about the bargaining process, in which the party wishing to avoid extra-legal powers is more likely to be the drafter. And absent an opt-out, the default protects arbitration finality by preventing a party unhappy with an arbitration result from seeking judicial review on the ground the arbitrator granted an extra-legal remedy.²⁰¹

2. RUAA and the FAA “Boundary”

As to the matters addressed by the FAA and federal case law, the RUAA takes a mostly cautious approach. As to front- and back-end

198. *Id.* § 21(b).

199. *Id.* § 21(c).

200. *Id.* Under § 21(a) of the RUAA, judicial review can be waived contractually.

201. Limiting vacatur is consistent with the contractual view of arbitration. If the parties agree to accept the award of an arbitrator as final and binding, judicial review through vacatur should not be available to a party displeased with the arbitral result.

matters, the RUAA drafters carefully followed the discernible FAA approach.²⁰² Yet as to other matters, such as arbitrator disclosure and immunity, the RUAA sets its own independent course.

a. Front-End Issues

On front-end matters, such as judicial stays and compulsion of arbitration, the RUAA echoes the FAA. For the most part, the RUAA tracks the FAA standards for judicial orders directing that arbitration proceed and staying parallel court actions.²⁰³ Further, the RUAA codifies the approach established by the Supreme Court on who decides whether a dispute is arbitrable, directing the court to decide matters of substantive arbitrability and leaving to arbitrators disputes over procedural arbitrability.²⁰⁴

Significantly, the RUAA drafters simplified the procedure for obtaining judicial enforcement of arbitration agreements by reiterating the UAA rule that application for judicial relief (for enforcement of the arbitration agreement or otherwise) is to be made and decided as a motion, rather than by trial as provided in the FAA.²⁰⁵ As a result, state actions to enforce arbitration agreements under the RUAA are not complicated by jury trial rights, as is true under the FAA. The RUAA also specifies proper venue in actions to enforce an arbitration agreement.²⁰⁶

The RUAA, however, shies from some issues for which guidance would have been useful. For example, the question of bifurcated procedures is common when in a multi-party transaction less than all the parties have an arbitration agreement. Likewise, the RUAA fails to provide guidance on the procedures for arbitration of class claims.

202. Besides the front-end issues of stays and compelling arbitration and the back-end issues of involving reviewing and confirming arbitral awards, the RUAA drafters identified three issues—arbitral awards of punitive damages, arbitrator immunity, and arbitrator disclosure—as being subject to substantial, ascertainable federal law.

203. REV. UNIF. ARBITRATION ACT §§ 6, 7 (2000).

204. *Id.* § 6(b)-(c).

205. Compare UNIF. ARBITRATION ACT § 16 (providing that “application[s] to the court under this [A]ct shall be by motion and shall be heard in the manner and upon the notice . . . for the making and hearing of motions”), with Federal Arbitration Act, 9 U.S.C. § 4 (2000) (which permits a party alleged to be in default under an agreement to arbitrate, that is not within admiralty jurisdiction, to demand a jury trial on the issue). This streamlining of the process for determining the validity of an arbitration agreement has been upheld as a valid exercise of state power. See *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, 1068-72 (Cal. 1996) (determining that the jury trial rights of Federal Arbitration Act § 4 did not preempt a state statute permitting a bench determination of the issue).

206. REV. UNIF. ARBITRATION ACT § 26 (2000). It is unclear whether the provision would apply in federal court, even if the parties had opted into a state’s arbitration law based on RUAA. Arguably, federal venue provisions would apply, even in the face of the RUAA venue provisions which arose as a matter of private party choice.

Although there is reason to believe that the FAA's preemptive core would require arbitrability if all class members had arbitration agreements with the respondent, the procedures by which class arbitration would be conducted seem a particularly appropriate topic for state arbitration law.

b. Appointment of Arbitrator

The FAA provides a method for judicial appointment of an arbitrator (or arbitrators as provided in the agreement) if the agreement is silent or its appointment or vacancy-filling mechanisms fail.²⁰⁷ The RUAA largely tracks the FAA, authorizing courts (on the motion of a party) to appoint an initial or successor arbitrator.²⁰⁸ Like the FAA, the arbitrator-selection provisions of the RUAA give content to the parties' agreement that an arbitrator will resolve their dispute—consistent with the blueprint.

c. Provisional Arbitral Awards

There is some federal case law on whether a court can grant interim relief in an arbitration proceeding before an arbitrator is appointed. The majority view is that courts may order temporary or preliminary injunctive relief, if necessary to maintain the status quo in a matter that eventually will be decided in arbitration governed by the FAA.²⁰⁹ The RUAA adopts a similar tack, granting state courts authority to order provisional remedies "to protect the effectiveness of the arbitration proceeding."²¹⁰ Further, the RUAA grants the arbitrator authority to order provisional remedies the arbitrator finds necessary for an effective, fair, and expeditious arbitration, to the same extent that would occur in a civil action.²¹¹ State courts are then empowered to enter, after an expedited process, a court order confirming the arbitrator's provisional remedy, subject to the RUAA's vacatur, modification, and correction provisions.²¹²

207. Federal Arbitration Act, 9 U.S.C. § 5 (2000).

208. REV. UNIF. ARBITRATION ACT § 11(a) (2000). Likewise, the RUAA requires that "when an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed . . . to continue the proceeding and to resolve the controversy." *Id.* § 15(e).

209. See *Peabody Coalsales Co. v. Tampa Elec. Co.*, 36 F.3d 46, 47-48 (8th Cir. 1994); *Blumenthal v. Merrill, Lynch, Pierce, Fenner & Smith*, 910 F.2d 1049, 1051-53 (2d Cir. 1990); *Merrill, Lynch, Pierce, Fenner & Smith v. Dutton*, 844 F.2d 726, 727 (10th Cir. 1988). *Contra* *Merrill, Lynch, Pierce, Fenner & Smith v. Hovey*, 726 F.2d 1286, 1291-92 (7th Cir. 1984).

210. REV. UNIF. ARBITRATION ACT § 8(a) (2000).

211. *Id.* § 8(b), cmt. B (citing as examples of appropriate provisional remedies: attachment, replevin, sequestration to preserve assets, and orders directing parties to undertake certain acts that affect the subject matter of an arbitration proceeding). The Comment observes that a party can seek court enforcement of a provisional remedy order issued by an arbitrator under these provisions.

212. *Id.* § 18. Comment 4 to this section clarifies that an arbitrator's award denying a request for a pre-award ruling is not subject to immediate court review, but only after the award is issued. There is no parallel FAA provision addressing pre-award rulings by the arbitrator, though the

RUAA's approach, which significantly expands the limited federal approval of *judicial* power to issue protective provisional orders, clarifies the court and arbitrator roles. Does it conform to the "arbitration federalism" blueprint? If an arbitration agreement is meant to resolve a dispute as fully as would a court proceeding, the importance of provisional remedies cannot be gainsaid. In fact, any state law that limited the powers of courts to protect the arbitration process or of arbitrators to fashion appropriate relief would arguably violate the FAA's preemptive core as evidencing a hostility to fulsome, effective arbitration.

d. Back-End Issues

On back-end matters, such as vacatur and confirmation of awards, the RUAA again stakes a mostly cautious course. For example, the RUAA provisions on modification and correction of arbitral awards follow closely the FAA, apparently on the grounds that the FAA provisions are straightforward and the subjects of only sparse case law.²¹³ Likewise, the RUAA tracks the FAA regarding the entry of a judgment after a court confirms, vacates, modifies, or corrects an arbitral award.²¹⁴ On the assumption little would be gained by deviating from the FAA, the RUAA drafters played it safe.

This was also the drafters' approach in the one area that has been a federal jumble—vacatur. The FAA's statutory standards are seemingly clear and unambiguous.²¹⁵ Yet the twelve federal circuits have embraced

limited federal case law under the FAA supports the notion that courts may enforce pre-award rulings. See *Island Creek Coal Sales Co. v. City of Gainesville, Fla.*, 729 F.2d 1046, 1048 (6th Cir. 1984); *S. Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 693-95 (S.D.N.Y. 1985).

213. Compare REV. UNIF. ARBITRATION ACT § 24 (2000) with Federal Arbitration Act, 9 U.S.C. § 11 (2000).

214. Federal Arbitration Act § 13(c) (2000); REV. UNIF. ARBITRATION ACT § 25(a) (2000). In one important respect, the RUAA breaks new ground. The RUAA, unlike the FAA, addresses costs and attorney's fees and permits courts to allow reasonable costs of the motion to confirm, vacate, modify, or correct the award. *Id.* § 25(b). These costs can include attorney's fees and other reasonable expenses of post-award litigation. The Drafting Committee commented that authorizing the shifting of attorney's fees and other expenses related to post-award litigation would "tend to discourage all but the most meritorious challenges of arbitration awards." *Id.* § 25, cmt. 3.

215. Under the FAA § 10(a), a federal district court may vacate a challenged award:

- (1) If the award was procured by corruption, fraud, or undue means.
- (2) If there was evident partiality or corruption in the arbitrators, or either of them.
- (3) If the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) If the arbitrators exceeded their powers, or so imperfectly executed them that

one or more nonstatutory vacatur grounds, many with little or no relation to the stated statutory grounds.²¹⁶ Relying on the Supreme Court's veiled sanction of the "manifest disregard of the law" ground for vacatur in its 1953 opinion in *Wilko v. Swan*²¹⁷ and the "essence from the agreement" standard drawn from labor arbitration law,²¹⁸ the circuit courts have treated the four statutory grounds merely as a baseline.

The widespread judicial adoption of such vacatur standards as "manifest disregard of the law," a "public policy" exception, and the manifold judge-made adaptations of the "essence from the agreement" standard cries out for statutory clarification. The failure of the federal courts to provide the arbitration bar a consistent, discernible body of vacatur law when awards are challenged, coupled with congressional inaction, was tantamount to an invitation to the RUAA drafters to propose an ordered, uniform state approach.

For the RUAA drafters, however, the specter of federal preemption carried the day. Worried that the Supreme Court (or even Congress) might eviscerate or limit vacatur grounds beyond those specified in the FAA, the RUAA drafters chose a meek solution and essentially restated the FAA's statutory language.²¹⁹ This leaves state courts in a continuing quandary as to whether the federal common law of vacatur preempts state court review of arbitral awards.²²⁰ Ironically, this hesitancy leaves state courts in a worse quandary than lower federal courts, which at least know which circuit dictates their approach. Even if the federal courts eventually arrive at a consensus on nonstatutory vacatur grounds, it is unclear whether state courts would feel compelled uniformly to follow.

The RUAA drafters also considered permitting parties to contract for expanded judicial review of arbitral awards on grounds not sanctioned by current law. By such contractual devices, parties could agree to judicial

a mutual, final, and definite award upon the subject matter submitted was not made.

Federal Arbitration Act § 10(a).

216. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 757 (1996).

217. 346 U.S. 427, 436-37 (1953).

218. *United Steelworkers v. Ent. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

219. In this regard, the RUAA is modeled precisely on the FAA. Compare REV. UNIF. ARBITRATION ACT § 23(a)(1)-(4) (2000) with Federal Arbitration Act, 9 U.S.C. § 10(a)(1)-(4) (2000). The RUAA departs from and expands on the FAA in two respects, directing courts to vacate an award if there was no agreement to arbitrate and when the arbitration was commenced without proper notice. REV. UNIF. ARBITRATION ACT § 23(a)(5)-(6) (2000).

220. See Paul Turner, *Preemptor: The United States Arbitration Act, the Manifest Disregard of the Law Test for Vacating an Arbitration Award, and State Courts*, 26 PEPP. L. REV. 519, 520-21 (1999) (state court judge concluding that state courts are not compelled to apply "manifest disregard" vacatur ground, though state legislatures could adopt such a rule).

review (by both lower and appellate courts) for either errors of law or fact, or both. Whether court jurisdiction could be created by party agreement, something not expressly contemplated by the FAA, raised questions of justiciability and preemption. In addition, “opt-in” review could undermine the finality of the arbitration process, leading the drafters to demur and to wait for more developed federal case law.²²¹ This caution, however, hardly promotes the FAA’s purpose of giving effect to private arbitral freedom and can be criticized as accepting an unnecessarily cramped view of the FAA as both a ceiling and a floor.

e. Arbitrator Disclosure

The FAA addresses, but only obliquely, disclosure of arbitrator conflicts of interest. Section 10(a)(2) permits an arbitral award to be vacated for evident partiality by a neutral arbitrator or corruption or misconduct of any arbitrator (neutral or party-appointed) if it prejudices the rights of any party.²²² Federal courts have held that failure by a neutral arbitrator to disclose dealings or relationships that cast doubt on the arbitrator’s impartiality can warrant vacatur under the FAA.²²³

The federal “materiality” threshold for arbitrator disclosure, however, is unclear.²²⁴ Seizing the opportunity to sharpen and clarify, the RUAAs Drafting Committee laid out a statutory standard for arbitrator disclosure that places an affirmative, continuing duty on arbitrators to make a reasonable inquiry and to disclose to the parties “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding.”²²⁵ An arbitrator’s non-disclosure, or a party’s timely objection to a disclosing arbitrator’s continued service, may trigger vacatur.²²⁶ The RUAAs make a neutral arbitrator’s failure to

221. See REV. UNIF. ARBITRATION ACT § 23, cmt. B (2000).

222. Federal Arbitration Act, 9 U.S.C. § 10(a)(2) (2000).

223. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 147-49 (1968).

224. This split arises from the divergent standards articulated by Justice Black’s plurality opinion and Justice White’s concurring opinion in *Commonwealth Coatings*. Black opined that “any dealings that might create an impression of possible” or create “even an appearance of bias” by a neutral arbitrator constituted evident partiality justifying vacatur. *Id.* at 149-50. White advocated a narrower standard requiring disclosure only when an arbitrator has “a substantial interest in a firm which has done more than trivial business with a party.” *Id.* at 151-52 (White, J., concurring).

225. Federal Arbitration Act, 9 U.S.C. § 12(a)-(b) (2000). Among the facts subject to the inquiry and disclosure are financial or personal interests in the outcome of the arbitration proceeding and an existing or past relationship with any of the parties, their counsel or representatives, a witness, or another arbitrator. *Id.*

226. *Id.* §12(c)-(d).

disclose “a known, existing, and substantial relationship with a party” presumptive grounds for vacatur.²²⁷

Showing none of the caution the RUAA drafters had exhibited toward vacatur standards, the drafting committee acted boldly in addressing arbitrator disclosure. The disclosure provisions effectively resolve a split in federal case law, explicitly link disclosure and vacatur, and openly address the question of disclosure’s timing. The provisions appear to be mandatory—that is, the parties could not specify a lower materiality threshold or dilute the effects of non-disclosure.²²⁸ Although the disclosure provisions might be criticized as imposing more burdens than necessary, line-drawing inevitably invites such criticism. The RUAA drafters’ desire to create clarity in substance and procedure comports with the “arbitration federalism” blueprint by promoting the legitimacy of arbitration and giving substance to basic standards of arbitrator conduct, standards that would seem implicit in any arbitration agreement.

f. Arbitrator Immunity

Finding a “functional comparability” of arbitrators and judges, many federal courts have held that arbitrators are generally immune both from civil actions arising out of the arbitral office²²⁹ and from process when summoned to testify with regard to that service.²³⁰ The RUAA codifies this federal common law and extends immunity to arbitration organizations, such as the American Arbitration Association and Judicial Arbitration and Mediation Services.²³¹ Subject to certain exceptions, the RUAA also renders arbitrators incompetent to testify in any judicial or administrative proceeding and shields them from being compelled to produce records pertaining to the arbitration proceeding, to the same extent as state judges.²³² These provisions appear to fit the “arbitration federalism”

227. *Id.* § 12(e). This presumption is consistent with and builds upon Section 11(b) of the RUAA, which bars an individual with “a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party” from serving as a neutral arbitrator. *Id.* § 11(b).

228. REV. UNIF. ARBITRATION ACT § 4(b)(3) (2000) provides that the parties to an arbitration agreement may not “agree to restrict unreasonably the right under Section 12 [of the RUAA] to disclosure of any facts by a neutral arbitrator.” *Id.* § 4(b)(3).

229. *See Butz v. Economou*, 438 U.S. 478, 511-13 (1978) (establishing that extension of judicial-like immunity to non-judicial officials is appropriate if there is a “functional comparability” between that official’s acts and judgments and the acts and judgments of judges); *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1209 (6th Cir. 1982) (applying the “functional comparability” standard).

230. *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 697-99 (2d Cir. 1978).

231. REV. UNIF. ARBITRATION ACT § 14(a)-(b) (2000) (statutory grant of immunity intended to supplement any immunity afforded arbitrators by any other law).

232. *Id.* § 14(d). The exceptions to immunity arise when an arbitrator or arbitration

blueprint. Not only do they codify the pro-arbitration approach of federal law, but supplement it with greater protective clarity and certainty. Moreover, just as federal law in this regard appears to be mandatory, not subject to party opt-out, the state provisions assure arbitrators of non-waivable immunity.²³³

3. RUAA and the FAA “Penumbra”

As to those issues that neither the FAA nor federal case law addresses, the RUAA propounds a variety of solutions. For the most part, the RUAA drafters assumed that federal silence constituted an invitation to active state lawmaking. This activism was especially prominent with respect to the arbitration proceeding, which the FAA only lightly touches in its provision authorizing arbitrators to compel witnesses and documents for the arbitration hearing.²³⁴ Finding no evidence in the FAA’s legislative history or elsewhere that this was the only matter which state law might address, the drafters assumed state law had wide latitude to improve and facilitate the arbitration process.

In the end, the RUAA significantly expands the UAA in these regards, providing detailed guidance on the conduct of the arbitration proceeding. The RUAA Drafting Committee spent more than three years deliberating on these procedural matters, and their product is a significant improvement over the largely silent FAA and the sketchy UAA.

a. Initiation and Notice

The RUAA, unlike the FAA, addresses how an arbitration is to be commenced. The claimant commences an arbitration by giving notice as provided in the parties’ agreement or, absent agreement, by certified or registered mail, or by service “as authorized for the commencement of a civil action.”²³⁵ The RUAA also specifies when notice is received.²³⁶ These

organization asserts a claim against a party to the arbitration or when there is prima facie evidence supporting vacatur on the grounds of corruption, fraud or other undue means, evident partiality by a neutral arbitrator, or corruption or misconduct by an arbitrator. Moreover, the RUAA allows a court to order attorneys’ fees against a party that unsuccessfully sues an arbitrator or seeks to compel an arbitrator to testify or produce records in violation of the Act. *Id.* §14(e) (applying also to arbitration organization).

233. *Id.* § 14(a)-(c).

234. Federal Arbitration Act, 9 U.S.C. § 7 (2000).

235. REV. UNIF. ARBITRATION ACT § 9(a) (2000). In general, notice is given to another person by “taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.” *Id.* § 2.

236. *Id.* § 2(b)-(c) (a person has notice when “the person has knowledge of the notice or has received notice . . . when it comes to the person’s attention or the notice is delivered at the person’s place of residence or place of business, or at another location held out by the person as a place of delivery of such communications”).

provisions, styled as default provisions, provide traditional due process clarity that has become standard in arbitration. They facilitate an orderly arbitral process, thus carrying out the parties' agreement. As such, they fit neatly in the "arbitration federalism" blueprint.

b. Consolidation

Complex, multi-party disputes can propagate multiple arbitrations, and without some mechanism for consolidation, there is a serious risk of multiple, inconsistent outcomes. As the Supreme Court noted in *Volt*, the FAA provides no explicit guidance, and state courts are split on whether they can order the joinder of multiple arbitral claims arising from related facts.²³⁷ The RUAA drafters chose a default rule, subject to agreement otherwise, that empowers the courts to order consolidation in appropriate circumstances.²³⁸ The drafters viewed the rule as a "penalty" default that would coax the parties to address the issue in negotiating their arbitration agreement.²³⁹ That is, the drafters anticipated that many parties would *not* want to be compelled to bring their claims in one arbitration. If so, the provision skates on thin preemption ice, to the extent it consciously undermines the parties' intentions.

c. Management of Arbitral Hearing

Questions often arise over the scope and depth of the arbitrator's authority and duties at the pre-hearing stage, with regard to conduct of the hearing, in deciding the controversy, and in framing and issuing the award. The current reality is that the parties seldom address these matters in the arbitration agreement. Consequently, default statutory standards can play an important role.

The RUAA speaks in broad terms of the arbitrator's authority to manage the arbitration process, both before and during the hearing.²⁴⁰ It asserts that an "arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding," including the power to hold pre-hearing conferences with the parties and at the hearing to "determine the admissibility, relevance, materiality and weight of any evidence."²⁴¹ Significantly, the RUAA

237. *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989).

238. REV. UNIF. ARBITRATION ACT § 10(a) (2000) ("upon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings"). The court, among other things, is to balance the prejudice to the interests of the parties that may be worked by a grant or denial of the consolidation motion. *Id.* § 10(b).

239. *Id.* § 3, cmt. 4.

240. *Id.* § 15(a).

241. *Id.* Comment 1 to Section 15 confirms that subsection (a) is intended to grant arbitrators wide latitude, *inter alia*, in determining what evidence should be considered, observing that the

provides that any party to an arbitration proceeding that wishes to be represented by a lawyer is entitled to such representation.²⁴²

Some of the specific arbitrator powers and duties are:

- The arbitrator must give not less than five days notice of the time and place of the arbitration hearing; the arbitrator may adjourn the hearing from time to time; and the arbitrator may hear and decide the controversy even if a party duly notified of the proceeding does not appear.²⁴³
- The arbitrator may issue a subpoena for the attendance of a witness and for production of documents at the hearing.²⁴⁴ Although this provision tracks the FAA, the RUA goes on to authorize arbitrators to order the deposition of witnesses, to permit discovery as they deem appropriate, and to take action against a noncomplying party in the same manner as a court in a civil action.²⁴⁵ Arbitrators may also issue protective orders to prevent the disclosure of privileged or confidential information, trade secrets, and other information subject to protection by a court in a civil action.²⁴⁶
- Arbitrators can rule on a request for summary disposition of a claim or a particular issue, either when all interested parties agree or upon the request of one party, made with notice to all other parties and after all parties have a reasonable opportunity to respond.²⁴⁷ The drafting committee sought to overcome the judicial hesitancy to endorse summary dispositions and their tendency to closely scrutinize such arbitral rulings.²⁴⁸
- The arbitrator must make a “record” of the award, which must be signed or otherwise authenticated by the arbitrator.²⁴⁹ The award must indicate which arbitrators concur in it, and each party must be provided a copy of the award.²⁵⁰

rules of evidence do not apply in arbitration. The Comment notes further that Section 23(a)(3) of the Act permits vacatur if an arbitrator refuses to consider material evidence in a manner that substantially prejudices the rights of a party. *Id.* § 25, cmt. 1.

242. *Id.* § 16. Section 4(b)(4) provides that an employer or labor organization, party to a labor arbitration proceeding, may waive the Section 16 right to representation by a lawyer. *Id.* § 15(a).

243. *Id.* § 15(a).

244. *Id.* § 17(a).

245. *Id.* § 17(b)-(c).

246. *Id.* § 17(e).

247. *Id.* § 5(b).

248. Federal Arbitration Act, 9 U.S.C.A. § 15, cmt. 3 (2000).

249. REV. UNIF. ARBITRATION ACT § 19(a) (2000).

250. *Id.* §§ 19-20.

- The award must be made within the time specified by the arbitration agreement, or if the arbitration agreement does not specify a time, within the time ordered by the court.²⁵¹
- The parties may directly request the arbitrator to modify or correct the award.²⁵² This solves the dilemma of the common law doctrine of *functus officio*, which holds that arbitrators who have issued their awards are powerless to take any further action, on the theory that the arbitral office is extinguished with the issuance of the award.²⁵³ The RUAA sets out three circumstances when post-award arbitral modification or correction is permitted: (1) evident miscalculation or mistakes; (2) failure of the award to resolve a submitted claim; and (3) clarification of the award.²⁵⁴ This largely restates the FAA grounds for modification and correction.²⁵⁵

These provisions, except for those related to legal representation and the subpoena of witnesses and documents, are cast as default terms that can be waived or modified by agreement.²⁵⁶ This reflects the general RUAA approach to anticipate and fill in gaps in arbitration agreements, but to also respect party autonomy when specified.²⁵⁷

The RUAA provisions on legal representation, discovery and form of award—some aspects cast as mandatory provisions—introduce into arbitration potentially cumbersome procedures that have led many parties to choose arbitration in the first place. They move arbitration toward civil litigation—a prospect implicitly shunned in every arbitration agreement. Some of these provisions are drafted as defaults from which the parties can opt-out, reflecting an assumption by the RUAA drafters that most parties would view these procedures as implicit in their bargain. In this sense, they fit within the arbitration federalism blueprint. But others do not. For example, is an arbitrator’s subpoena power an inextricable element of the “national policy favoring arbitration”? The Supreme Court has intimated precisely the opposite: “There is no federal policy favoring arbitration

251. *Id.* § 19(a).

252. *Id.* § 20.

253. See Peter Seitz, *Problems of the Finality of Awards or Functus Officio and All That*, in LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS, PROCEEDINGS OF THE SEVENTEENTH ANNUAL MEETING 165 (M. Kahn ed., 1964); see also *Mercury Oil Refining Co. v. Oil Workers Int’l Union*, 187 F.2d 980, 983 (10th Cir. 1951).

254. REV. UNIF. ARBITRATION ACT § 20(a) (2000).

255. Federal Arbitration Act, 9 U.S.C. § 11 (2000).

256. REV. UNIF. ARBITRATION ACT § 17(a)-(b) (2000). Both of these matters are addressed in Section 4 of the RUAA, creating a preemption-based imperative for demarcating these matters as “non-waivable” under state arbitration law. *Id.* § 4(b)(1).

257. *Id.* § 4.

under a certain set of procedural rules.”²⁵⁸ In fact, it is possible to imagine an arbitration agreement under which each party would be left to its own proofs, without recourse to the compulsion of further evidence.

Nonetheless, the provisions on legal representation may be justified as mandatory. The right to counsel for all parties to an arbitration is such a fundamental element of a fair proceeding that exclusion of that right by agreement would arguably be ipso facto unconscionable, especially when the agreement is not freely negotiated between equal parties.²⁵⁹ In this regard, this state mandate would seem within the “arbitration federalism” blueprint. State regulation that assures the fundamental fairness of arbitration fosters its legitimacy—consistent with the animating purpose of the FAA.

V. CONCLUSION

The Supreme Court’s proclamation of a national pro-arbitration policy emanating from the Federal Arbitration Act abets and assures the increasing importance of commercial arbitration in civil litigation. The skeletal nature of the FAA, with its limited focus on the front and back ends of the arbitration process, leaves a void as to many arbitral matters that experience has shown can be filled effectively only by thoughtful, deliberate legislative action. Given the remote prospect of congressional action to amend the FAA, the task of bringing commercial arbitration into the 21st century falls to the states.

The arbitration federalism constructed by the Supreme Court presents the states with both great opportunity to lead and substantial risk of failure. State rules of commercial arbitration must be founded on a clear understanding of the role contemplated by the states under this new federalism. Those who would wish to eviscerate or regulate arbitration by rejoining at the state level the battles lost before the Supreme Court risk muddling the debate and slowing progress toward closing a rational, plausible state response. Refusing to acknowledge the dramatic shift in arbitration policy and resisting the Supreme Court’s pro-arbitration

258. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989).

259. For the proposition that there is a fundamental due process right to representation by counsel in a civil proceeding in a court of law, see, e.g., *Texas Catastrophe Prop. Ins. Ass’n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992) (“there is a constitutional right to retained counsel in civil cases, and . . . this right may not be impinged without compelling reasons.”) and *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir. 1983) (“the right to counsel in civil cases is no less fundamental [than the right to counsel in criminal cases] and springs from both statutory authority and from the constitutional right to due process of law”). *Cf. Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm’n*, 837 F.2d 600, 618 (3d Cir. 1988) (holding that a person has no general constitutional right to representation by counsel in civil cases).

imperative would inevitably lead to preemption of any state arbitration regulation.

The RUAA is an important and edifying act of realism. The product of a methodical, thoughtful effort to balance the limits on state arbitration authority and provide a framework for contemporary commercial arbitration, the RUAA walks a delicate line. It avoids intruding into matters where the FAA can be seen as occupying the field. Yet its essentially default nature avoids FAA preemption by giving structure to commercial arbitration, while respecting the parties' autonomy to choose their own arbitral agreement. Although some aspects of the RUAA invite refinement and expansion, any tinkering with state arbitration rules would do well to do what the RUAA drafters did. Always cognizant of the "federal arbitration" blueprint, the drafters kept in mind two animating questions: Does the rule facilitate and foster commercial arbitration? Does the rule protect and promote the parties' arbitral expectations?

