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ARBITRATION AND THE CONSTITUTION

By
Gabrielle Gilbeau *

I. INTRODUCTION

*Arbitration and the Constitution*¹ is authored by Peter B. Rutledge, a professor of Law and the Herman E. Talmadge Chair at the University of Georgia School of law. Rutledge is an internationally recognized figure in the field of international dispute resolution. The culmination of years of thinking, speaking, teaching and writing about arbitration inspired Rutledge to write *Arbitration and the Constitution*. Many of Rutledge's insights into the field of arbitration and the Constitution are a result of conversations with other professors, judges, lawyers and students.²

Arbitration and the Constitution, while not the first publication relating to this subject, examines the compatibility of arbitration and the Constitution using a novel, comprehensive, and methodical method. Notably, Rutledge sets out to achieve two separate goals with his methodical examination of the constitutionality of arbitration.³ Rutledge first charts the breaking down of the separation between arbitration and the Constitution and then provides a critique of those changes.⁴

Rutledge introduces the thesis of his work, the theory of “seepage⁵,” rather than direct doctrinal influences, to examine the relationship that arbitration and constitutional law have upon each other. He asserts that constitutional norms infiltrate arbitration law through the actions of all three branches of government, shaping the future course of arbitration.⁶ This focus on “seepage” allows Rutledge to examine diverse case law and

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¹ PETER RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* (2013).

² *Id.* at ix.

³ *Id.* at 5 (“First, as a positive matter, the book aims to chart systematically the breakdown of the wall separating the two disciplines and the alloying of their various principles. Second, as a normative matter, the book also (at times) critiques these developments.”).

⁴ *Id.*

⁵ RUTLEDGE, *supra* note 1, at 5 (“Over the past half century, constitutional norms increasingly have worked their way into arbitration law and, to a lesser extent, arbitration law has influenced the development of constitutional norms. Tellingly, this seepage between the two disciplines has not occurred with a great deal of systemic thought or deliberation. Instead, it has tended to take place through incremental developments in various fields of arbitration, often occurring in isolation of each other and with little consideration of the broader implications of the growing interconnectivity of these two disciplines.”).

⁶ *Id.* (“[S]eepage takes various forms. In some cases, constitutional norms have affected arbitration law through the design of treaties or statutes by the executive or legislative branches. In other cases, constitutional norms have affected arbitration law through judicial interpretation of those treaties or statutes.”).

move beyond familiar significant cases. Starting with *Mitsubishi*, Rutledge begins his writing with the downfall of the non-arbitrability doctrine, allowing for the initial breakdown of the wall between arbitration and the Constitution.⁷ He then uses a mixture of novel cases to iterate the various arguments for the constitutionality of arbitration.

II. OVERVIEW

Arbitration and the Constitution is organized into three sections, each containing two chapters, for a total of six distinct chapters. Every chapter/section contains a short introduction and conclusion. Although the book covers a wide breadth of material, it is fairly short at just over 200 pages.⁸

The book's first section discusses issues relating to the separation of powers of to judicial review and executive powers. Chapter One examines whether there are "structural limits on Congress's ability to require judicial enforcement of an arbitrator's award absent de novo review of the award."⁹ Chapter Two focuses on "separation-of-powers issues raised by more specialized forms of arbitration."¹⁰

The second section of the book also examines separation of powers, but focuses on vertical separation-of-powers principles involving federalism and the states.¹¹ Chapter Three looks at the Federal Arbitration Act (FAA)¹² and how it effects the states.¹³ Chapter Four discusses choice-of-law provisions in arbitration agreements and resulting federalism concerns.¹⁴

The third section focuses on "the relationship between arbitration and individual liberties."¹⁵ Chapter Five tests whether arbitration should be considered "state action" and the due process issues involved in arbitration.¹⁶ Chapter Six looks at other constitutional

⁷ *Mitsubishi Motors Corp. v. Soler*, 473 U.S. 614 (1985).

⁸ RUTLEDGE, *supra* note 1.

⁹ *Id.* at 9.

¹⁰ *Id.*

¹¹ *Id.*

¹² Federal Arbitration Act, 9 U.S.C. §§1-307(2012).

¹³ RUTLEDGE, *supra* note 1, at 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 10-11.

liberties, such as the right to a jury trial, and explores why an arbitration agreement is a valid waiver of one's constitutional rights.¹⁷

III. PART I. ARBITRATION AND SEPARATION OF POWERS

A. Chapter One: Arbitration and Judicial Review

Chapter One opens by examining whether arbitration is incompatible with the constitutionally-granted jurisdiction of Article III¹⁸ courts.¹⁹ Rutledge notes that prior to the twentieth century, arbitration agreements were rarely enforced as the agreements were viewed as “unenforceable attempts to appropriate [the court’s] jurisdiction.”²⁰ Early courts did not anchor their decisions on Article III. Most courts prior to the twentieth century relied on the “jurisdictional ouster” argument to invalidate arbitration clauses, which they deemed to be contrary to public policy.²¹ Presently, Article III attacks upon arbitration have consistently been rejected by the Supreme Court.²²

Rutledge examines several justifications used to support the constitutionality of arbitration with regard to Article III courts. Rutledge first looks at the argument that arbitration is valid because the parties “have waived their right to an Article III forum.”²³ Rutledge finds this reasoning, supported by *CFTC v. Schor*,²⁴ troublesome, taking issue with the presumption that Article III confers onto individuals both personal rights, which may be waived, and non-personal rights, which are nonwaivable.²⁵

¹⁷ RUTLEDGE, *supra* note 1, at 11.

¹⁸ See U.S. CONST., art. III, §1 (“The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”).

¹⁹ RUTLEDGE, *supra* note 1, at 16.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 53.

²³ RUTLEDGE, *supra* note 1, at 18.

²⁴ *CFTC v. Schor*, 478 U.S. 833, 851-53 (1986) (asserting that Article III confers a “personal right” by citing dicta from earlier decisions); *but see* 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 (1997) (“Even the Court’s Decision in *CFTC v. Schor* which accepted denial of an Article III court in one context, recognized that a broad denial of the Article III jurisdiction might well be unconstitutional even if parties had waived their rights.”)

²⁵ RUTLEDGE, *supra* note 1, at 18.

Rutledge examines the language of Article III, as well as several cases, to support his conclusion that Article III rights are not personal rights to individuals, which are subject to waiver.²⁶ He states that “[t]extually, it is difficult to argue that Article III confers a personal right.”²⁷ Rutledge posits that, structurally, Article III does not support the conclusion that it provides for a personal right, as the first articles of the Constitution focus on the “structural organization of our [] government; most of the discussion of rights appears in the amendments.”²⁸ This section of the book, however, is very brief, and Rutledge does not hash out his arguments as completely as possible to ensure clarity is achieved for his reader.

The book then moves on to a very brief examination of two other justifications for the permissibility of arbitration in regard to Article III jurisdiction, before settling upon the “appellate review theory” as the most convincing rationale for the permissibility of arbitration with regard to Article III.²⁹ Rutledge does not go into much detail on the other two possible justifications for permissibility of arbitration with regard to Article III, devoting just a short paragraph to each.³⁰

The appellate review theory establishes the presumption that arbitration is valid, because the provision of judicial review of arbitral awards provides enough oversight by constitutional courts to satisfy the requirements of Article III.³¹ The theory is rooted in two sets of values: the benefits of Article III courts and the benefits of non-Article III tribunals.³² Rutledge lists the benefits of Article III courts, including separation of powers, fairness, and judicial integrity, and weighs them against the benefits of non-Article III entities, which include expertise, efficiency in governmental functions, flexibility, fairness, and sovereign immunity.³³ The text goes on to support a modified appellate review theory, where there is at least some degree of Article III review of

²⁶ See *Printz v. United States*, 521 U.S. 898 (1997) (demonstrating how separation of powers principles generally prohibit one branch from performing the functions of another); see also *U.S. Bancorp Mtg Co. v. Bonner Mall P’ship*, 513 U.S. 18 (1994) (supporting the idea that public interests are undermined when the judiciary is undermined).

²⁷ RUTLEDGE, *supra* note 1, at 19.

²⁸ *Id.*

²⁹ RUTLEDGE, *supra* note 1, at 24-25 (looking at a literalist interpretation method and distinction between “cases” and “controversies” method of justification for the constitutionality of arbitration).

³⁰ *Id.* at 24-25.

³¹ *Id.* at 25-26; see *Crowell v. Benson*, 285 U.S. 22, 62-65 (1932); see also Richard H Fallon, Jr., *Of Legislative Courts, Administrative Agencies and Article III*, 101 HARV. L. REV. 915, 933 (1988) (“The core claim of [appellate] review theory is that sufficiently searching review of a legislative court’s or administrative agency’s decisions by a constitutional court will always satisfy the requirements of Article III.”).

³² RUTLEDGE, *supra* note 1, at 34.

³³ *Id.* at 34-36.

arbitral decisions, but deference to non-Article III entities remains paramount.³⁴ Rutledge concludes that the appellate review theory supports the constitutionality of the jurisdictional oust of Article III courts by arbitral agreements by carefully balancing the values of each against the other.³⁵

B. Chapter Two: Arbitration and Executive Power

Chapter Two, like Chapter One, focuses on separation of powers, but shifts away from the Article III courts to the Article II executive branch.³⁶ In this chapter, Rutledge turns away from commercial and private arbitration and focuses on trade and investment treaty-based arbitration and the possible intrusion on certain Article II executive powers.³⁷

Rutledge takes a narrow approach to his examination of the interaction between arbitration and the executive branch, focusing on issues related to the Appointments Clause³⁸ and the Take Care Clause.³⁹ More specifically, the text examines the constitutionality of the North American Free Trade Agreement (NAFTA).⁴⁰ To illustrate his position, Rutledge examines a case involving a dispute over Canadian softwood lumber, which arose from treaty agreements between the United States and Canada.⁴¹ The case raised the question of whether the arbitrators were “officers of the United States,” and if so, whether vesting others with the power to appoint arbitrators in such

³⁴ RUTLEDGE, *supra* note 1, at 41.

³⁵ *Id.* at 53.

³⁶ *See* U.S. CONST., art. II-III; RUTLEDGE, *supra* note 1, at 55.

³⁷ RUTLEDGE, *supra* note 1, at 55.

³⁸ *See* U.S. CONST., art. II, §2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States, whose Appointments are not herein provided for, and which shall be established by Law, but the Congress may by law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments.”); *see also* RUTLEDGE, *supra* note 1, at 55.

³⁹ *See* U.S. CONST., art. II, §3 ([The President] shall take Care that the Laws be faithfully executed ...”); *see also* RUTLEDGE, *supra* note 1, at 64.

⁴⁰ North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

⁴¹ RUTLEDGE, *supra* note 1, at 56; *see also* Coalition for Fair Lumber Imports Executive Comm. v. United States, 471 F.3d 1329 (D.C. Cir. 2006); *see also* John J Garman and Matthew K Bell, *The North American Free Trade Agreement: Looking at the Binational Panel System Through the Lens of Free Enterprise Fund*, 10 RICH. J. GLOBAL L. & BUS. 525, 538 (2011) (“The appointment of panelists by foreign governments is in no way reconcilable with the mandates of the Appointments Clause. ... The Constitution, in no way, gives foreign powers the authority to appoint panelists.”).

treaty-disputes usurped the powers vested in the President.⁴² Rutledge concludes his examination by stating that “because the mechanism for appointing arbitrators to binational panels does not aggrandize a coordinate branch of government, it does not run afoul of the Appointments Clause.”⁴³

Chapter Two concludes with an examination of whether the Appointments Clause and the Take Care Clause have any effects on private arbitration involving the United States as a party.⁴⁴ After utilizing several authorities and conducting a thorough analysis considering whether and to what extent the United States government can enter into binding arbitration, Rutledge asserts that private contractual arbitration with the United States does not offend the Appointments Clause.⁴⁵ that the Take Care Clause is not an impediment because, in most cases, there is not a positive law that states the United States may, or may not, enter into arbitration agreements, therefore, there is no law to “faithfully execute.”⁴⁶

Ultimately, Chapter Two asserts that Article II is not an impediment to arbitration.⁴⁷ In most contexts, the manner of appointing arbitrators has been found to be consistent with the Appointments Clause.⁴⁸ Furthermore, the decision rendered by an arbitrator does not impinge the President’s power to “Take Care” that the laws of the United States be “faithfully executed.”⁴⁹

IV. PART II: ARBITRATION AND FEDERALISM

A. Chapter Three: Arbitration, State Action

In Chapter Three, Rutledge tackles the problem of federal preemption of state law under the Supremacy Clause.⁵⁰ This chapter examines the enforcement of arbitration agreements, arbitral procedure, and the enforcement of arbitral awards.⁵¹

⁴² RUTLEDGE, *supra* note 1, at 57.

⁴³ *Id.* at 63.

⁴⁴ *See* U.S. CONST., art. II, §2, cl. 2; U.S. CONST., art. II, §3; RUTLEDGE, *supra* note 1, at 70.

⁴⁵ RUTLEDGE, *supra* note 1, at 72.

⁴⁶ RUTLEDGE, *supra* note 1, at 73.

⁴⁷ *Id.* at 74.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See* U.S. CONST., art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United states, shall be the supreme Law of the Land; and the judge in every State shall be bound thereby,

Starting his examination at federal preemption of state law, Rutledge examines several well-known Supreme Court cases where federal preemption of state arbitration law has been upheld.⁵² In one example, *Southland Corp. v. Keating*, the Supreme Court held that Section 2 of the FAA⁵³ preempted a California state franchising law voiding arbitration clauses in franchise agreements.⁵⁴ In doing so, the Court first concluded that Section 2 applied to state court.⁵⁵ The Court relied on three main justifications for their decision. First, the court relied on its earlier decision in *Prima Paint*⁵⁶ and *Moses Cone*^{57, 58}. Second, the Court looked to the legislative history of the FAA to determine that the legislature had intended the FAA to apply in state court.⁵⁹ Finally, the Court applied federal policy favoring the enforcement of arbitration agreements, which required that Section 2 be applied evenly across state and federal courts.⁶⁰

Chapter Three moves on to examine federalism and its bearing on arbitral procedure.⁶¹ Rutledge claims that the Supreme Court has shown a “comparatively greater tolerance of federalism principles in the context of arbitration procedures” than

any Thing in the Constitution of Laws of any state to the Contrary notwithstanding.”); RUTLEDGE, *supra* note 1 at 79.

⁵¹ RUTLEDGE, *supra* note 1, at 81-99.

⁵² *Southland v. Keating*, 465 U.S. 1 (1984); RUTLEDGE, *supra* note 1 at 83-86; *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); RUTLEDGE, *supra* note 1 at 91-92; *Doctors Associates v. Casarotto*, 517 U.S. 681 (1996); *Perry v. Thomas*, 482 U.S. 483 (1987); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967); RUTLEDGE, *supra* note 1 at 83-86.

⁵³ 9 U.S.C. §2 (2006) (“A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

⁵⁴ *Southland v. Keating*, *supra* note 47.

⁵⁵ RUTLEDGE, *supra* note 1, at 83.

⁵⁶ *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, *supra* note 47 (Stating that Section 2 applied in a diversity case.).

⁵⁷ *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, *supra* note 47 (Stating, in dicta, that Section 2 created substantive federal law that applied to both federal and state courts.).

⁵⁸ RUTLEDGE, *supra* note 1, at 83.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 93-97.

with enforcement of arbitration agreements and awards.⁶² Rutledge argues that this loosening of federal control is likely an effort “to support arbitration as an institution”⁶³ and allows an opportunity “for state law to play a role in the arbitral procedures.”⁶⁴

Finally, Chapter Three concludes with an examination of the enforcement of arbitral awards. Section 10 of the FAA clearly states that its application is limited to U.S. District courts.⁶⁵ The limited application of Section 10, coupled with the limits of removability of arbitration actions to federal court, provides states an opportunity to take an important role in enforcement proceedings.⁶⁶ States with anti-arbitration statutes governing the enforcement of awards have greater power than those governing the procedural aspects of arbitration.⁶⁷ This gives the losing party in arbitration proceedings a great incentive to seek vacatur in the most arbitration-unfriendly forum available to them.⁶⁸ Once an arbitral award is vacated, the state’s decision is backed by full faith and credit principles.⁶⁹ In this manner, the laws governing enforcement of arbitral awards grant state courts and legislatures tremendous room to promote anti-arbitration sentiment.⁷⁰ Rutledge’s explanation and depth of analysis on this matter was unsatisfying in its brevity.

B. Chapter Four: Arbitration and Choice of Law

Chapter Four focuses on arbitration agreements and choice of law provisions, evaluating freedom of contract principles and whether “parties can (and should be able to) contract around” rules that support federal law.⁷¹ Rutledge examines three critical choice of law provisions.⁷² First, he examines choice of law clauses in the arbitration agreements.⁷³

⁶² RUTLEDGE, *supra* note 1, at 96.

⁶³ *Id.* at 97.

⁶⁴ *Id.* at 94.

⁶⁵ 9 U.S.C. §10 (2006); RUTLEDGE, *supra* note 1 at 97.

⁶⁶ RUTLEDGE, *supra* note 1, at 97.

⁶⁷ *Id.*

⁶⁸ *Id.* at 98.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ RUTLEDGE, *supra* note 1, at 101.

⁷² *Id.* at 104.

⁷³ *Id.*

Next, the text moves to choice of forum provisions for the hearing on the merits. Finally, the chapter moves into choice of forum clauses for any procedural challenges.⁷⁴

This chapter first focuses on choice of law provisions in the arbitration agreement. Rutledge utilizes three well known cases⁷⁵ to reach his claim that the Supreme Court's opinion of federal preemption has shifted "from a 'default' system to an increasingly 'mandatory' one."⁷⁶ Rutledge argues that this conclusion is supported by the Court's decisions that have trimmed the ability of parties, through choice of law or forum clauses, to choose favorable state arbitration laws at the expense of federal laws to the contrary.⁷⁷

The text then moves to an examination of the "law governing arbitration proceedings."⁷⁸ This section examines "the relationship among federalism, choice and arbitral procedure," which has "focused principally on the choices about forums, whether arbitral or judicial,"⁷⁹ and to what extent "the choice of forum influence[s] the arbitrator's resort to the forum state's arbitral law."⁸⁰ Rutledge argues that choice of forum clauses may allow the arbitrator to look to state law to determine the procedures to follow, and also, that the arbitrator might be influenced by the state law grounds for vacatur of arbitral awards.⁸¹

Rutledge focuses on *Green Tree Financial Corp. v. Bazzle*⁸² to demonstrate the influence state law can have on arbitration proceedings. In *Bazzle*, "the arbitrator's decision to follow the state court's reasoning" in an arbitration proceeding "indicated that an arbitrator wanted to construe state law in the same manner as the state courts in order to secure an enforceable award."⁸³ The Court acknowledged that "one of the main goals of the arbitrators was to render an enforceable award under South Carolina law with respect to the permissibility of multi-party arbitration."⁸⁴

⁷⁴ RUTLEDGE, *supra* note 1, at 104.

⁷⁵ *Volt Info. Scis, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Preston v. Ferrer*, 552 U.S. 346 (2008).

⁷⁶ RUTLEDGE, *supra* note 1, at 113.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 113.

⁸⁰ *Id.* at 115.

⁸¹ RUTLEDGE, *supra* note 1, at 115.

⁸² *See Green Tree Corp. v. Bazzle*, 539 U.S. 444, 453 (2003).

⁸³ RUTLEDGE, *supra* note 1, at 115-16.

⁸⁴ *Id.* at 115.

Choice of forum on the part of the parties can influence the arbitrator to fall back on the forum state's arbitral law.⁸⁵ Arbitrators may look to state law to determine what procedures should be followed, or they may be influenced by a state's laws which contain the grounds for award vacatur.⁸⁶ Rutledge posits that arbitrators have a natural yearning to render enforceable awards, and, therefore, may follow state laws as closely as possible to ensure that their awards are not vacated.⁸⁷

The end of Chapter Four is devoted to a consideration of how federalism and personal autonomy correlate with the enforcement of arbitral awards in both state and federal courts.⁸⁸ Rutledge examines *Hall Street v. Mattel*,⁸⁹ which addresses the parties' ability to expand judicial review of their arbitral awards by contract.⁹⁰ Rutledge examines the issue of federal courts and state courts coming to different conclusions about the appropriate balance in their enforcement of arbitral awards.⁹¹ The text briefly goes on to explore the disparity between federal and state enforcement of arbitral awards and the benefits that protection of federalist values provides.⁹²

V. PART III: ARBITRATION AND INDIVIDUAL RIGHTS

A. Chapter Five: Arbitration, State Action and Due Process

Chapter Five initiates the text's discussion of individual rights by starting with an evaluation of state action and the Due Process Clauses.⁹³ Rutledge examines whether

⁸⁵ RUTLEDGE, *supra* note 1, at 115.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 116.

⁸⁹ See *Hall Street Associates L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

⁹⁰ RUTLEDGE, *supra* note 1, at 117.

⁹¹ *Id.*

⁹² *Id.* at 121 (“[F]rom the perspective of federalism values ... [i]t enables parties, through their affirmative choice, to give effect to state regulatory decisions designed to give even greater effect than the federal standard. To be sure, the greater diversity of state practice - and the variation from federal practice - tolerated by these rules dampens the uniformity goals that animated decisions such as *Southland*. Yet perhaps this is a sensible price - at least in cases where the federalism values are wedded with freedom-of-contract values (that is, giving effect to the parties' choices about the scope of judicial review of the award.”).

⁹³ See U.S. CONST., amends. V, XIV; RUTLEDGE, *supra* note 1, at 127.

arbitration falls within state and looks to judicial decisions, such as *Gilmer* in his evaluation.⁹⁴

Rutledge concludes that arbitration is not a state action, eliminating any strict requirement for procedural due process in the arbitration process.⁹⁵ This does not mean, however, that there is no constitutional “seepage” which permeates the arbitration process.⁹⁶ Constitutional protections and procedural fairness have made their way into the arbitration process through voluntary due process protocols, implemented by various sources over time.⁹⁷

After stating his conclusion, that arbitration is not a state action, the author presents a question: “If arbitral institutions are not constitutionally obligated to subject the arbitrations they administer to protections of procedural due process, why have they chosen to do so voluntarily?”⁹⁸ To answer this complex question, Rutledge presents four possible explanations.⁹⁹

First, the text presents the logical explanation that the “introduction of due process norms into arbitration is a natural product of the doctrine.”¹⁰⁰ This explanation is grounded in the standards for judicial review of arbitral awards.¹⁰¹ However, this explanation fails for two reasons.¹⁰² One reason is that due process protocols cannot be explained by this theory, and due process extends more protection than would be provided under constitutional standards.¹⁰³ Another reason is that the “logical explanation cannot account for the timing of the development of the due process protocols.”¹⁰⁴

The second explanation is sociological, arising from literature on the socialization of attorneys.¹⁰⁵ Under this theory, attorneys who partake in alternative dispute resolution

⁹⁴ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁹⁵ RUTLEDGE, *supra* note 1, at 145.

⁹⁶ *Id.* at 145.

⁹⁷ *Id.* at 145-56.

⁹⁸ *Id.* at 148.

⁹⁹ *Id.* at 149-56.

¹⁰⁰ RUTLEDGE, *supra* note 1, at 148.

¹⁰¹ *Id.*

¹⁰² *Id.* at 149.

¹⁰³ *Id.*

¹⁰⁴ RUTLEDGE, *supra* note 1, at 149-56.

¹⁰⁵ *Id.* at 150.

have been socialized to observe certain values, including due process and fairness.¹⁰⁶ Unfortunately, this theory cannot account for the timing of the development of due process protocols, nor the initial resistance of arbitration to accept the protocols.¹⁰⁷ Additionally, the failure of arbitrators to follow certain rules and enforcement of those awards is incompatible with this explanation. One would expect that arbitral institutions would be ensuring that all faulty or unjust arbitral awards were remedied.¹⁰⁸

The third possible explanation examined by Rutledge is economic, under which arbitration can be conceptualized as a product competing against other alternative dispute resolution services.¹⁰⁹ Accordingly, due processes protocols are a way for arbitral institutions to distinguish themselves and become more appealing to the consumer.¹¹⁰ While this theory is appealing, due process protocols do not favor the arbitral institutions, but rather the consumer.¹¹¹ The economic theory creates a system that serves the best interests of the participants in the arbitral process.¹¹² By serving the parties' interests, the arbitral institution reduces the risk of disruption to the process and creates a predictable, secure proceeding.¹¹³ Further, the economic explanation can provide an adequate explanation to the scope and timing of the protocol's development, unlike the previous two theories.¹¹⁴ Providing greater scope to the due process protections under the protocols than would be minimally available leads the parties to feel more secure in the arbitral award.¹¹⁵ As to the timing of the protocol's development, arbitration institutions began to shift their focus toward procedural fairness after *Gilmer*.¹¹⁶ *Gilmer* gave arbitration institutions the incentive to review and update their due process protocol to ensure the fairness of their proceedings.¹¹⁷ This theory leaves holes to be examined in

¹⁰⁶ RUTLEDGE, *supra* note 1, at 150.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 151.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ RUTLEDGE, *supra* note 1, at 152.

¹¹² *Id.* at 154.

¹¹³ *Id.*

¹¹⁴ *Id.* at 152.

¹¹⁵ *Id.* at 154.

¹¹⁶ RUTLEDGE, *supra* note 1, at 154; *see also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹¹⁷ *Id.*

why arbitral institutions do not have complete due process protocols or protections in place, requiring a political argument to complete the picture.¹¹⁸

The fourth, and final, explanation is political.¹¹⁹ Rutledge posits that politics might explain how the norms developed, stating that “[p]rivate norms such as voluntarily adopted industry standards can regulate private behavior. Public law can form a similar function.”¹²⁰ This law can come in various forms, from formal legislation to administrative agency oversight.¹²¹ Rutledge states that “regulation by the protocols emerged as a second-best solution for the various participants in the arbitral system.”¹²²

Chapter Five then turns to an evaluation of ways that due process principles have entered arbitration over time, especially in international treaties.¹²³ While Rutledge’s thesis, which states that United States constitutional principles have “seeped” into the arbitration process may be correct, it is unclear whether United States constitutional concerns would be relevant to arbitrators or arbitral proceedings abroad. This section of the book seems incongruous with the author’s thesis. Proving that United States constitutional norms have infiltrated foreign arbitration affairs would be difficult. Instead, Rutledge’s argument could have been more convincing if he had focused on domestic arbitration proceedings, rather than international arbitration.

B. Chapter Six: Arbitration and the Jury Right

The final chapter, Chapter Six, discusses how the constitutionally granted right to a jury trial is influenced by developments in arbitration law.¹²⁴ The author delves into both state and federal law implications, as juries are a facet of both federal and state proceedings and have an important impact on the outcome of a dispute.¹²⁵ A subject of hot debate, some people believe that juries tend to award larger damages than judges.¹²⁶ Other times, the fear of having their case before a jury is enough to force parties to settle

¹¹⁸ RUTLEDGE, *supra* note 1, at 155.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ RUTLEDGE, *supra* note 1, at 156.

¹²⁴ See U.S. CONST., amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be reserved.”); RUTLEDGE, *supra* note 1 at 170.

¹²⁵ RUTLEDGE, *supra* note 1, at 171.

¹²⁶ *Id.*

before the dispute proceeds to trial.¹²⁷ Waiver of this important right will likely affect a litigant's incentives when it comes to desired outcome of the arbitral proceeding.¹²⁸

Rutledge moves in Chapter Six to answer the question of whether an arbitration clause effectively waives a party's right to a jury trial.¹²⁹ To answer this question, the author examines several related questions: (1) whether the right to a jury is waivable at all; (2) if a waivable right can be disposed of on a pre-dispute basis; and (3) whether the right, if both waivable and one that can be waived pre-dispute, has in fact been waived by the parties in the language they choose in their arbitration agreement.¹³⁰

In examining whether a jury right can be waived, Rutledge states that, in most instances, constitutional jurisprudence is to recognize the possibility of waiver.¹³¹ To determine if a right is waivable, the author considers whether a jury right is private (i.e., individual) or public in nature.¹³² Rutledge relies upon the Seventh Amendment, which includes opportunities for waiver, to establish that the right to a jury is a waivable right under federal law.¹³³ It is "clear [] that parties in noncriminal matters likewise can waive their rights."¹³⁴ The text points out that the ability to alienate one's jury right is not without costs, both to the party and to society.¹³⁵

FAA preemption may provide the escape hatch for dealing with the question of alienability of one's state right to a jury. If this were the case, the alienability of one's state right to a jury would be preempted by the FAA due to the Supremacy clause. This line of reasoning is not without flaw, however, because state guarantees to a jury trial are not blatant anti-arbitration clauses. As such, the state guarantees might be able to survive a Section 2 challenge.¹³⁶ If these state guarantees to a trial by jury were in the form of an anti-arbitration statute, a Section 2 challenge may be more effective. This area of law is

¹²⁷ RUTLEDGE, *supra* note 1, at 171.

¹²⁸ *Id.* at 172.

¹²⁹ *Id.* at 172.

¹³⁰ *Id.* at 172-73.

¹³¹ *Id.* at 177.

¹³² RUTLEDGE, *supra* note 1, at 175.

¹³³ *Id.* at 176; *see also* U.S. CONST., amend. VII.

¹³⁴ RUTLEDGE, *supra* note 1, at 177.

¹³⁵ *Id.* at 178-79 ("When one waives the jury right, we might worry about whether that decision was truly voluntary (who would give up the right to be judged by his or her peers)? ... waiver of my right to the jury affects those who otherwise would have the opportunity to serve on my case and, thereby, in some small way, shape the process whereby disputes in our society are resolved (and law is shaped).").

¹³⁶ *Id.* at 183.

still developing, and the circumstances under which a waiver is possible is still to be fully determined.¹³⁷

The next section of this chapter examines the pre-dispute waiver. Rutledge explains his argument as follows:

The argument against pre-dispute waiver rests on the assumption that, until the parties know the complete contours of a dispute, they lack the necessary information to make a fully informed choice whether to exercise, or waive, their right to a jury trial. Pre-dispute arbitration clauses force parties to make a decision about that important right before they have full (or at least adequate) information on the nature of their dispute.¹³⁸

Rutledge acknowledges that pre-dispute arbitration agreements have historically been acceptable in the United States.¹³⁹ Concluding this section, the author states that it is “therefore unsurprising that the most serious debates have turned not on the categorical possibility (or impossibility) of pre-dispute waiver but, instead, the conditions under which such waiver can be effective.”¹⁴⁰

The final section of Chapter Six involves an examination of the requisite language to waive the right to a trial by jury.¹⁴¹ The text describes various safeguards that are implemented in other proceedings before a party can waive an individual right.¹⁴² Rutledge examines several of these methods, including the cooling-off period, witnesses, attorneys, pendency of the litigation, and judges.¹⁴³

After an analysis of various waivers of other types of procedural rights, Rutledge provides his own variation to the pre-dispute jury waiver.¹⁴⁴ He examines the possibility of including an explicit jury waiver in the arbitration agreement, which he argues would provide “the clearest evidence that the assent to arbitration includes an assent to waiver of

¹³⁷ RUTLEDGE, *supra* note 1, at 184.

¹³⁸ *Id.* at 185.

¹³⁹ *Id.* at 188-89.

¹⁴⁰ *Id.* at 189.

¹⁴¹ *Id.*

¹⁴² RUTLEDGE, *supra* note 1, at 192 (for example, giving *Miranda* warnings to arrestees, or other safeguards, such as a formal writing or discussion with attorneys and judges before a waiver is considered valid).

¹⁴³ *Id.* at 192-95.

¹⁴⁴ *Id.* at 192.

jury right.”¹⁴⁵ Less convincing, he states that an arbitration clause, which contains provisions where a party gives up their “right to litigate claims ‘through a court,’” could be read to imply consent to a waiver of a jury right.¹⁴⁶ Finally, Rutledge mentions the general arbitration clause, without elaborate mention of one’s jury right.¹⁴⁷ In these cases, Rutledge justifies the dismissal of one’s jury right to the assumption that “when a party [agrees] to arbitration, it is understood what arbitration meant.”¹⁴⁸

Following his analysis, Rutledge concludes that a standard arbitration clause containing language sufficient to put the parties on notice of the rights that they are waiving should be considered a valid waiver of the party’s right to a jury trial.¹⁴⁹

VI. CONCLUSION

Arbitration and the Constitution contains a brief conclusion that acts as a summary for the major themes of the book.¹⁵⁰ Rutledge states that the wall between arbitration and the constitution, while once quite solid and firm, “endures today, but is not as firm as it was a century or even a half-century ago. The past six chapters have sought to describe the contours of the wall, the areas of seepage, and the consequences of that seepage.”¹⁵¹

The first theme encompassed in this book is the limited doctrinal impact that the constitution has had on arbitration law.¹⁵² While there have, doubtless, been constitutional impacts on arbitration law, the constitutional values have not affected arbitration to the extent of “direct doctrinal incorporation.”¹⁵³

A second theme examined in this book was the sub-doctrinal influences asserted upon arbitration law, such as international treaties and due process protocols.¹⁵⁴ Without direct doctrinal incorporation, arbitration institutions have been influenced by constitutional limits in a softer and less concrete manner.¹⁵⁵

¹⁴⁵ RUTLEDGE, *supra* note 1, at 198.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 198.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 200.

¹⁵⁰ RUTLEDGE, *supra* note 1, at 203-08.

¹⁵¹ *Id.* at 203.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 205.

¹⁵⁵ RUTLEDGE, *supra* note 1, at 205.

Finally, the third theme of this book was the “dialogic influence[.]”¹⁵⁶ As stated by Rutledge, “[t]hat is, because the debate over constitutional principles in arbitration takes place at the sub-constitutional level, it facilitates a far greater dialogue between institutions of the state as well as with private parties.”¹⁵⁷

Arbitration and the Constitution is a very brief overview of the constitutional principles engaged in arbitration proceedings. Rutledge does a fabulous job presenting his thesis of the “seepage” of constitutional norms into the arbitration sphere, while backing up his research and claims with a mix of case law and writings by other experts in the field. While it was clear that the author’s goal was to present a boiled-down and digestible version of his claims, there were several instances where subjects could have been provided with much greater breadth and detail to make them more understandable to a someone unfamiliar with the field. In some instances, his use of many foreign treaties and commercial arbitration agreements muddied his points and were confusing as he attempted to tie them back into United States constitutional and arbitration law principles.

I would recommend this book to individuals wishing to explore the intersection of constitutional and arbitration law in many areas where the case law is still developing. This book is written to be accessible to readers with various levels of proficiency in the subject, not only specialists within the field of arbitration law. The brevity of this book, while occasionally doing its content a disservice, provides a satisfying, but not overly burdensome, overview to the reader of the current state of the law regarding arbitration and the Constitution. Rutledge does a thorough job confronting both sides of many possible arguments for and against different aspects of arbitration law with respect to the United States Constitution.

¹⁵⁶ RUTLEDGE, *supra* note 1, at 206.

¹⁵⁷ *Id.*