

THE MINIMAL ROLE OF FEDERALISM AND STATE LAW IN ARBITRATION

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One of arbitration doctrine's greatest anomalies is the narrow, subordinate role presently played by state arbitration laws. Put simply, the Supreme Court has shaped a Federal Arbitration Act ("FAA") that routinely trumps state laws dealing with arbitration and created a situation in which applications of state arbitration law are the exception.¹ No matter that "arbitration is the creature of contract"² and that federalism principles call for great sensitivity toward state policies in the contract realm. No matter that state and federal arbitration laws appear to be procedural. No matter that state arbitration legislation regulates contracts and consumer transactions, traditionally subject matter left to the state police powers. As articulated by the Supreme Court's anti-state law opinions in *Southland v. Keating*,³ *Doctor's Associates, Inc. v. Casarotto*,⁴ and *Green Tree Financial Corp. v. Bazzle*,⁵ federal law has been permitted to run roughshod over the subtleties of state efforts to regulate aspects of arbitration. With only the strident voice of Justice Thomas in consistent objection,⁶ a Supreme Court, supposedly in the midst of enhanced emphasis of federalism values,⁷ has

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¹ See, e.g., Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006) (criticizing Supreme Court preemption decisions regarding arbitration as intruding on state powers); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004) (chronicling rise of federal arbitration law and diminished power of the states in the regulation of arbitration and criticizing Supreme Court's inattention to federalism policies).

² See, e.g., *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (asserting that "arbitration is a matter of contract"); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 709 n.17 (1999) (noting 177 cases found that used the phrase "arbitration is the creature of contract"). A Westlaw search on May 3, 2007, revealed a whopping 390 state and federal cases using the phrase "arbitration is the creature of contract."

³ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁴ *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

⁵ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

⁶ See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting) (setting forth position and supporting reasoning that the FAA does not apply in state courts). Justice Thomas continues to adhere to this position. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); *Bazzle*, 539 U.S. at 460 (Thomas, J., dissenting); *Casarotto*, 517 U.S. at 689 (Thomas, J., dissenting).

⁷ See David J. Barron, *Fighting Federalism With Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 FORDHAM L. REV. 2081, 2081 (2006) (referring to a "recent federalism revival"); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429 (2002) (referring to a "federalism revolution" and a "pro-federalism majority" of the Supreme Court);

created an arbitration framework in which state arbitration law occupies a decidedly secondary role. Federalism policies are inexplicably ignored in the present set of arbitration decisions and, sadly, the word “federalism” fails to appear in any major arbitration preemption majority opinion.⁸

This Essay will focus on how the present lowly status of state arbitration law evolved and evaluate whether it seriously undermines important federalism policies. In this Essay, I emphasize several reasons that explain the weakened status of state arbitration law. Part I traces and critiques the set of cases dealing with federal arbitration preemption of state arbitration law. It will be clear that I regard the set of Supreme Court arbitration decisions to create an atrophied role for state arbitration regulation, to ignore respected, long-standing tenets of federalism, and to use a strange, unorthodox mode of preemption analysis almost preordained to overwhelm state arbitration law.

The second reason for the weakened status of state arbitration law and policy regards the set of cases expanding power of the arbitrator to decide particular legal issues in the course of arbitration. Although these arbitrability decisions advance the significant policy of party autonomy,⁹ they diminish the power of state law, even in areas such as contracts, historically left to the states as a matter of federalism. Here, as well as in ordinary preemption contexts, federal arbitration policy has been allowed to trump state laws that normally form the subject of federalism deference.

At the same time, the theme of both *Volt* and *Mastrobuono* places broad authority in the parties’ hands to select their own procedural rules that govern arbitration. Because the parties may select state law, state law application can occur in a “backdoor” fashion, through party selection rather than by regulation.¹⁰ While some commentators perceive this opt-in process as a way to justify state arbitration laws,¹¹ the difficulty and inherent obscurity of the opt-in process will mean that only the most knowledgeable future disputants know of such an opportunity to select state law. The third reason that state arbitration law occupies a secondary role is its narrow application to only intrastate commerce. The broad Breyer interpretation of the FAA’s jurisdictional sweep in

Denise C. Morgan, *Introduction: A Tale of (at Least) Two Federalisms*, 50 N.Y.L. SCH. L. REV. 615, 615 (2006) (asserting that “the U.S. Supreme Court has breathed life into” federalism); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 2 (2004) (concluding that the “‘Federalist Revival’ is now a decade old”).

⁸ The only arbitration opinion that uses the word federalism is Justice Thomas’ dissent, joined by Justice Scalia, in *Dobson*, 513 U.S. at 292 (Thomas, J., dissenting) (suggesting that the Court should “resolve the uncertainty [regarding the scope of the FAA] in light of core principles of federalism”).

⁹ See EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 3-7 (2006) (emphasizing that party autonomy is the most important policy underlying arbitration).

¹⁰ See *id.* at 74-79 (characterizing party selection of state law as a “back door” way to activate state law); Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 211 (2002) (setting forth a positive vision of state arbitration laws, one of “great potential” and noting that parties may opt in to application of state laws).

¹¹ See generally Hayford & Palmiter, *supra* note 10; Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67.

the *Terminix* decision effectively limited state arbitration law to a narrow ambit.¹² I conclude that if we were starting afresh, a broad, “affecting interstate commerce” approach would be entirely defensible. Nevertheless, because efforts to amend the Federal Arbitration Act appear doomed to predictable failure, I argue for some greater interim deference toward state laws that purport to regulate arbitration.

I. HOW MISGUIDED FEDERAL PREEMPTION TRUMPS PRO-ARBITRATION STATE LAWS

A. *A Brief Review of Preemption Doctrine*

In order to understand the wrongheaded nature of the Supreme Court’s arbitration preemption decisions, it is essential to review preemption methodology generally.

Arbitration preemption should be identical to any other form of federal preemption. Rather than look for mere differences in state and federal law, courts should look for suspect state laws that prevent the fulfillment of the core policies underlying federal arbitration law. True incompatibility or conflict between state and federal law is essential to strike down state law on implied preemption grounds.¹³ As ably articulated by Professor Caleb Nelson, “preemption occurs if and only if state law contradicts a valid rule established by federal law”¹⁴

The proper test for evaluating the potential preemption of state arbitration laws mirrors the typical approach to constitutional preemption questions. The court should try to identify serious conflicts between state and federal arbitration laws. In the words of Professor Laurence H. Tribe, preemption analysis involves a search for “actual conflict” to determine if the “federal and state enactments are directly and facially contradictory.”¹⁵ This type of potential preemption question has been labeled “conflict preemption.”¹⁶ The nature of the conflict between state and federal law need not be textual or literal; the laws do not need to be “contradictory on their face.”¹⁷ Preemption can occur where state laws conflict with “the precise objectives that underlie” federal law.¹⁸

¹² *Dobson*, 513 U.S. at 282 (holding that a lowly termite crawling in Birmingham, Alabama, is in interstate commerce, thereby triggering the substantive powers of the FAA).

¹³ It is clear that there is no intent behind federal law to preempt the arbitration field; field preemption is inapplicable.

¹⁴ Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231 (2000) (criticizing existing preemption cases as overly broad and ambiguous).

¹⁵ 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-29, at 1179 (3d ed. 2000). Professor Tribe cites and quotes from *Savage v. Jones*, 225 U.S. 501, 533 (1912) (holding that state law is preempted when federal law “is in actual conflict with the law of the State”). *Accord* *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (stating that preemption applies when “state law is in actual conflict with federal law”).

¹⁶ KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 329 (15th ed. 2004).

¹⁷ 1 TRIBE, *supra* note 15, at 1181.

¹⁸ *Id.*

Preemption analysis mandates strict focus upon the policies and goals underlying federal law.¹⁹ Once a conflict between state and federal law appears, conflicting policies need to be identified and fully vetted to assure that an apparent conflict is real. Attention to both federal and state law is essential; there cannot be a fatal conflict unless the policies behind the two laws are truly contradictory. Professor Tribe emphasizes the need for careful inquiry into policies when he asserts that “the Court has come to uphold state regulations that supplement federal efforts so long as compliance with the letter or effectuation of the purpose of the federal enactment is not likely to be significantly impeded by state law.”²⁰ He urges deference toward state law unless “compliance with both federal and state regulations is a physical impossibility.”²¹ Tribe also identifies widespread use of “obstacle preemption,” a judicial inquiry as to whether the application of state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²²

Professor Christopher Drahozal’s helpful study of arbitration preemption stresses that “[m]ost implied preemption cases involve obstacle preemption.”²³ An obstacle preemption test is ordinary and to be expected. Drahozal also posits that subjects that are traditionally occupied by the states warrant a presumption against preemption and asserts that “[c]ontract law certainly would be an area that states have ‘traditionally occupied,’” thereby triggering a presumption against preemption.²⁴

The obstacle test, although ambiguous and far from ideal, is alive and well in modern preemption decisions. For example, in *Crosby v. National Foreign Trade Council*²⁵ the Supreme Court used the obstacle test to find Massachusetts’ Burma Law, legislation that narrowed the ability of the state to trade with companies that did business with Myanmar, preempted by federal law. The Court reasoned that the Burma law was “an obstacle to the accomplishment of Congress’s full objectives under” federal law.²⁶ Necessarily included in application of the obstacle test was consideration of congressional intent in order to evaluate the potentially conflicting purposes behind federal law.²⁷ Similarly, Justice Stevens used the obstacle test in *Sprietsma v. Mercury Marine*.²⁸ The decision concluded that state common law tort claims alleging that boat engines should have been equipped with propeller guards were not preempted by the Federal Boat Safety Act. In rejecting the argument that the state law was an

¹⁹ See Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 397 (2004) (stating that preemption “depends on congressional intent” and quoting *Retail Clerks International Ass’n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963) (“The purpose of Congress is the ultimate touchstone.”)).

²⁰ 1 TRIBE, *supra* note 15, § 6-30, at 1195-96.

²¹ Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

²² 1 TRIBE, *supra* note 15, § 6-28, at 1176 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

²³ Drahozal, *supra* note 19, at 398.

²⁴ *Id.*

²⁵ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

²⁶ *Id.* at 373.

²⁷ *Id.* at 375-78 (identifying goals supporting federal law and analyzing whether these purposes truly conflict with state law).

²⁸ *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

obstacle to the policies underlying federal law, the *Sprietsma* opinion focused on the “main goals” of the federal legislation, promoting boating safety and achieving uniformity in boat manufacturing.²⁹

Some preemption decisions include federalism policies in the mix of factors relevant to applying the obstacle test. Where Congress legislates “in a field which the States have traditionally occupied . . . [,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”³⁰ Justice Stevens has emphasized that “[o]ur presumption against pre-emption is rooted in the concept of federalism.”³¹

This mini-review of preemption doctrine and methodology yields several conclusions. We should anticipate that a court, confronted with a state statute that is allegedly preempted by the FAA, would apply the obstacle approach. In addition, federalism policies should be employed in the preemption analysis to trigger a presumption against preemption because state regulation of contracts, the general subject matter of arbitration clauses, is traditionally left to state regulation. As the following discussion demonstrates, however, these conclusions have been largely ignored by the Supreme Court’s arbitration decisions.

B. A Brief and Intentionally Superficial Review of Federalism Policies: On Innovation, Deference, Comity, Cooperation, and Dignity

This all too brief subsection offers a succinct review of federalism policies that facilitates the subsequent analysis of preemption cases. While federalism is a value that seemingly should lack the contours of the rule of law, its subtle policies are significant and merit careful focus because of the huge potential impact of federalism values.

At the heart of federalism lies respect for the states or for a shared system of dual governance between the state and federal government.³² Although this respect applies readily in the legislative process where elected representatives of Congress may defer passing federal laws out of respect for state competence or values, federalism applies as well in the judicial branch where Supremacy Clause interpretations often trigger examination of federalism values and tenets.

Federalism’s lack of rule-based content makes it a subtle and sometimes vague concept. A decision can articulate great respect for state laws and then apply federal law. Judicial applications of federalism do not necessarily achieve a right-wrong result. Federalism can be a process of showing awareness of the value of state laws and policies. Indeed, commentators have long

²⁹ *Id.* at 69-70. For other modern uses of the obstacle methodology, see, e.g., *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644, 658-60 (2003) (affirming reversal of trial court use of obstacle test) and *United States v. Locke*, 529 U.S. 89, 107 (2000) (holding Washington oil tanker regulations to be preempted under obstacle approach).

³⁰ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

³¹ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting).

³² See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (noting that “[d]ual sovereignty is a defining feature of our Nation’s constitutional blueprint”).

analogized federalism to due process by suggesting that federalism “should operate basically as a due process clause for state geographical units.”³³

Deference to state law is part of a robust conception of federalism. Deference embraces a degree of self restraint, a reluctance to apply federal law automatically or summarily. Deference to state law facilitates the autonomy of state lawmakers to forge new ground and to act independently.³⁴

There are times when adherence to federalism values forms a foundation for federal-state cooperation or collaboration. A federal law may provide state funding if certain conditions, dictated by federal legislation or federal agency rule, are met.³⁵ Mutual respect between sovereign powers triggers a collaborative, interactive process in this vision of federalism.³⁶ Expertise or funding abilities can serve as a basis for the cooperation between states and the federal government.

Comity is also central to federalism. Comity involves respect for the laws of another sovereign power; it operates state to state. Comity also demonstrates a degree of deference as well as prudential discretion.

Dignity is also a value relevant to federalism. When state policies are ignored without consideration, the dignity central to a shared system of governance in a federal system suffers. Federalism needs relative parity among sovereigns to achieve the advantages of an effective federal, dual-sovereign system.³⁷ Federal-state parity is difficult to achieve without each sovereign exhibiting dignity toward the laws and policies of the other.

In an arbitration system of interactive federalism, one would expect to see these federalism values explicitly set forth and discussed in cases involving preemption issues. State arbitration law predates the FAA and holds great potential value. State arbitration laws provide a laboratory for experimentation in developing new arbitration laws. For example, the detailed provisions of the Revised Uniform Arbitration Act relating to arbitrator disclosure give real content when compared with the vague disclosure norms of the FAA.³⁸ Comity and respect are also concepts that one would anticipate being at the core of cases dealing with possible arbitration preemption issues. The fact that state arbitration laws often regulate contracts and consumer laws, fields historically left for state regulation, would seemingly guarantee some mention of deference, comity, and mutual respect between dual sovereigns.

A study of cases dealing with arbitration preemption should unearth rich decisional consideration of the federalism tenets set forth in this subsection. As

³³ Frank R. Strong, *Cooperative Federalism*, 23 IOWA L. REV. 459, 459 (1938).

³⁴ See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (listing several virtues of federalism including innovation, experimentation, decentralization, and enhanced citizen involvement).

³⁵ See, e.g., 42 U.S.C. § 9611 (2000) (permitting states to spend federal money to pursue environmental clean-up goals of federal law).

³⁶ See, e.g., Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005) (describing the death of a system of dual federalism with rigid boundaries and, instead, the promise of interactive federalism characterized by interconnected and overlapping federal and state powers).

³⁷ See, e.g., *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (observing that states “entered the federal system with their sovereignty intact”).

³⁸ See UNIF. ARBITRATION ACT § 12 (revised 2000).

the following section shows, however, the leading arbitration federalism decisions offer scant attention to such principles.

C. Abandonment of the Obstacle Test in Arbitration Preemption: Contrasting Volt and Casarotto and Southland

While the Supreme Court has decided numerous preemption cases involving arbitration, three decisions, *Southland*, *Volt*, and *Casarotto*, stand as the leading cases on arbitration methodology. Deconstruction of these cases, however, yields a surprisingly strange set of conclusions that appears to defy orthodox conceptions of preemption and federalism.

Southland v. Keating is a landmark decision that preempted state franchise law while somehow mislabeling a system of federal arbitration procedure as a substantive regulatory scheme. Professors Margaret Moses and David Schwartz have rightly criticized *Southland's* law of sensitivity toward the clear lack of preemptive intent inherent in the FAA.³⁹ The *Southland* decision inaccurately structured federal-state relations in arbitration to make preemption of state arbitration laws a very real possibility and opened the doors of state and federal courts for subsequent preemption attacks of state laws. Most importantly, *Southland* worked its sea-change without full consideration that federalism was a legitimate issue; the majority opinion ignored the federalism principles set forth in the earlier subsection of this Essay.

Chief Justice Burger's majority opinion summarily found that the California Franchise Investment Law, which, as interpreted by the California Supreme Court, mandated judicial consideration of the legislation, was preempted. A coherent preemption methodology was missing from *Southland's* blockbuster holding. The majority opinion simply characterized the California law as undercutting the enforceability of arbitration agreements and, wham, the deed was done; preemption applied.⁴⁰ Missing from the *Southland* analysis was any reference to the presumption against preemption triggered by traditional use of state law and regulation. The importance of the historic regulation of franchising by the states failed to register with Chief Justice Burger.

In great contrast, Justices Stevens and O'Connor correctly understood the federalism consequences at stake in *Southland*. Justice O'Connor's dissent accused the majority of trampling on state policy interests, noting that the federal courts need to permit states the option to develop "their own methods for enforcing the new federal rights."⁴¹ Justice Stevens, who concurred and dissented in *Southland*, observed that the California law at issue was "in a field traditionally occupied by state law."⁴²

The Supreme Court's decision in *Volt* represents a typical and appropriate application of the obstacle preemption test. There the parties agreed to arbitrate in a standard form arbitration agreement used in a construction contract. Included in this agreement was a sentence calling for the application of state

³⁹ Moses, *supra* note 1, at 129-30; Schwartz, *supra* note 1, at 8-9 (describing *Southland* as "plainly wrong" in interpreting congressional intent of the FAA).

⁴⁰ *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984).

⁴¹ *Id.* at 31-33 (O'Connor, J., dissenting) (this dissenting opinion was joined by Justice Rehnquist).

⁴² *Id.* at 18 (Stevens, J., concurring in part and dissenting in part).

law. California law authorized local courts to enter stays of arbitration pending resolution of related litigation that might preclude common issues of fact. The preemption argument contended that application of the state efficiency rule was in conflict with the pro-arbitration policies of the FAA; enforcement of the stay order would, in effect, prevent the arbitration from continuing. In upholding the stay of arbitration and refusing to find the local California procedural law to be preempted, the opinion of Chief Justice Rehnquist observed that state arbitration law would be preempted only when it “stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress.”⁴³ Rehnquist found the state law to be consistent with the FAA, reasoning that “[t]here is no federal policy favoring arbitration under a certain set of procedural rules.”⁴⁴ The local state arbitration procedures were characterized as mere “state rules governing the conduct of arbitration.”⁴⁵

Volt represents the high water mark of arbitration preemption cases. It employed the straightforward and normal obstacle test. It was sensitive toward state litigation policies that were found not to harm federal arbitration policy. *Volt* described the California rules as “manifestly designed to encourage resort to the arbitral process”⁴⁶ and emphasized that the state rule at issue “generally fostered the federal policy favoring arbitration.”⁴⁷ *Volt*’s conventional preemption analysis made the effort to identify the policies underlying federal arbitration law and signaled that state laws relating to arbitration procedure would be likely to survive preemption attack.⁴⁸

It should be noted, however, that *Volt* failed to identify or discuss apparent federalism values that were clearly relevant to the decision. The *Volt* decision could have emphasized the specific value of state laws that served to coordinate inevitable litigation collaterally related to pending arbitration. It did not. *Volt* also could have generally acknowledged that state arbitration legislation provided value when it offered detailed procedures not addressed by a sparse FAA largely devoid of procedural niceties. The presence of efficient and gap-filling state law demonstrated a sort of interactive federalism. It did not. California’s regulation of collateral litigation, a realistic everyday fact of life in construction arbitration, touched on a subject interconnected with the FAA’s call for the enforcement of agreements to arbitrate. This is the sort of interactive or interconnected style of federalism that permits concurrent regulatory collaboration between state and federal governments.⁴⁹

⁴³ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁴⁴ *Id.* at 476.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at n.5.

⁴⁸ *Id.* at 476 (concluding that state law was consistent with federal policy “to ensure the enforceability, according to their terms, of private agreements to arbitrate”).

⁴⁹ See Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 *FORDHAM L. REV.* 2133 (2006) [hereinafter Schapiro, *Stevens’s Interactive Federalism*] (setting out notion of interactive federalism as rooted in opinions of Justice Stevens); Robert A. Schapiro, *Monophonic Preemption*, 102 *Nw. U. L. REV.* (forthcoming 2007) (manuscript at 2, on file with Nevada Law Journal) (asserting that the “key problem for federalism is not

If the *Volt* decision represents a middling high-water mark of arbitration federalism, *Casarotto* is its nadir. There, the Supreme Court invalidated a Montana law that mandated arbitration clauses to be underlined in all capital letters and be placed at page one of a contract. The reasoning of Justice Ginsburg, writing for the majority, eschewed any reference to the obstacle approach to assessing alleged Supremacy Clause issues of preemption. Instead, it quickly concluded that the Montana legislation was preempted by “singling out arbitration provisions for suspect status.”⁵⁰ Rather than look closely at the policies that support the federal and state laws at issue, the singling out test is a shortcut that appears to look only for provisions of state law that purport to regulate arbitration specifically. In the methodology of the *Casarotto* decision, once state law is deemed to “single out” arbitration for different treatment, preemption seems to apply almost automatically. Singling out analysis smacks of a variety of per se illegality because of its conclusionary labeling and truncated form of inquiry.⁵¹

If the *Casarotto* decision had applied the obstacle test rather than the “singling-out” alternative, there is a good chance that the case would have come out differently. Consider the purpose of the Montana law. Montana’s legislation seemed designed to increase the likelihood that signers of agreements containing arbitration clauses would understand that they had, indeed, contracted to arbitrate. This was legislation with the goal of pumping up the consent volume. The important inquiry is whether such a provision was really in conflict with the goals of the FAA. An ordinary preemption analysis would have identified the primary policy supporting the FAA to be that of enforcing agreements to arbitrate.⁵² Congress passed the FAA to achieve enforcement of arbitration agreements. Montana’s legislation seems totally compatible with this simple goal because it is designed to improve the odds for knowledgeable “agreements” to arbitrate. A state law intended to improve the consent process appears compatible in purpose with a more general FAA, which seems designed to enforce agreements to arbitrate. In a phrase, it would be hard for the signer to miss the arbitration clause under the Montana legislation at issue.

My primary criticism is that the style of preemption used in *Casarotto* is unorthodox. The truncated, unusual, and almost preemption per se analysis used by the *Casarotto* majority is remarkable. Careful attention to legislative intent behind federal law is conspicuously missing. The brevity of inquiry, while commendable in the abstract, is lamentable. The opinion lacks any reasoning describing why the obstacle approach fails to apply.

The *Casarotto* opinion also fails to discuss or even refer to federalism values that might suffer because of the preemption holding. Neither the word

separating state from federal power, but managing the overlap of state and federal law”). See generally Schapiro, *supra* note 36.

⁵⁰ Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 682 (1996).

⁵¹ See, e.g., Edward Brunet, *Streamlining Antitrust Litigation by “Facial Examination” of Restraints: The Burger Court and the Per Se-Rule of Reason Distinction*, 60 WASH. L. REV. 1 (1984) (tracing costs as well as benefits of a per se form of methodology).

⁵² See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 111-14, 117-19, 139 (1992); Barbara Ann Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61, 83-90 (1985) (attacking *Southland* as inconsistent with the legislative history of the FAA).

“federalism” nor the precedent of *Volt* warrant a mention in the quick dash to a decision in *Casarotto*. The presumption against federalism was ignored, despite the fact that Montana’s sphere of regulation was that of contract law, the quintessential subject traditionally left to state regulation and presumed to be left to the states under normal tenets of federalism.⁵³

My analysis of these arbitration preemption decisions is not based upon advocating universal use of the ambiguous obstacle test. The obstacle test has been appropriately criticized for unnecessarily preempting valid state laws because of its broad and muddled sweep.⁵⁴ The obstacle branch of implied conflict preemption is simply too ambiguous, and, because of its uncertainty, risks improper incursions on federalism by overturning perfectly valid state laws.⁵⁵ Professor Nelson articulates a tighter, more precise preemption approach that triggers the Supremacy Clause “if and only if state law contradicts a valid rule established by federal law” and notes that “the mere fact that federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes.”⁵⁶ My use of the obstacle test in attacking arbitration preemption doctrine is based only upon its typical use and its inherent respect for at least some of the federalism values that merit attention in any preemption context. If the law were to shift in the direction advocated by the set of constitutional law scholars cited in this paragraph, there is no doubt that *Casarotto* would have been decided differently.

Several states that had legislation similar to that held preempted by the *Casarotto* opinion have simply ignored the case and left their laws on the books. New York mandates that arbitration clauses in HMO contracts be printed in at least 12-point boldface type and placed above the signature line.⁵⁷ Until it was held to be preempted in 2005, Texas required that arbitration clauses in personal injury contracts be signed by the attorneys of the contracting parties.⁵⁸

Whether such clauses are preempted may depend on the divide between the *Casarotto* and *Volt* decisions. Because such clauses improve the knowing assent to arbitration, I believe that they advance the FAA’s primary goal, that of enforcing real agreements to arbitrate. Yet, these clauses are similar to the Montana legislation found to be preempted per se in *Casarotto*. There is no

⁵³ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (observing that Congress may legislate in areas traditionally left to the states but noting that “Congress does not exercise [this power] lightly”).

⁵⁴ See generally Nelson, *supra*, note 14, at 231-32, 278-90.

⁵⁵ See Paul E. McGreal, *Some Rice with Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 833 (1995) (referring to obstacle preemption as “largely ad hoc”); Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743, 1751 (1992) (noting that “today we cannot begin to predict when preemption will occur”).

⁵⁶ Nelson, *supra* note 14, at 231-32. Professor Nelson advocates “a more particularized inquiry into whether the relevant federal statute establishes a valid rule that contradicts state law.” *Id.* at 290.

⁵⁷ N.Y. PUB. HEALTH LAW § 4406-a (McKinney 2007).

⁵⁸ See *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69-70 (Tex. 2005) (holding required attorney signature to be preempted because it adds an additional requirement to arbitration and thereby inhibits enforceability).

question that such clauses “single out” arbitration for separate treatment and, for that reason, would be preempted under the unequal footing approach.

The “singling out” test is unworkable in some cases. Consider, for example, the existence of state legislation that makes it more difficult to vacate arbitral awards by placing a time limit on when motions seeking vacatur can be filed. The FAA requires that such motions to vacate be filed in three months,⁵⁹ but several states mandate earlier filings of motions to vacate. These state laws clearly single out arbitration for separate treatment from other processes of dispute resolution. Not surprisingly, however, caselaw has upheld such time limit legislation, finding the time limits not in “conflict with the FAA’s ‘primary purpose.’”⁶⁰ If the singling out or unequal footing approach were consistently used, many state arbitration laws that call for special treatment of arbitration would be found preempted, despite the fact that such laws encourage arbitration and make it a more attractive feature.

II. FEDERALISM VALUES SUFFER THROUGH DECISIONS THAT SUBORDINATE APPLICATION OF STATE LAW TO ALLOCATION OF LEGAL ISSUES TO THE ARBITRATOR

This part focuses not on arbitration preemption, the bastion of federalism tension, but on the line of cases allocating the decision of various arbitration issues to the arbitrator rather than a court. Federalism policies can suffer from insensitive tradeoffs in areas other than preemption and are presently being ignored or cut back in a rush to increase the decisional authority of the arbitrator. Arbitrability decisions that assign legal questions to the arbitrator rather than a judge result in state laws being found irrelevant to arbitration.

Recently I have written praising the trend to allocate decisional power to the arbitrator.⁶¹ I regard this trend as advancing party autonomy, a crucial policy value underlying arbitration. Disputants need to be empowered in many ways and allowing them the authority to design arbitration procedures is an important matter. If the parties allocate specific duties to the arbitrator, courts should normally defer to such explicit party choice and textual clarity, assuming no contrary policy of greater import. The arbitration disputants, in a sense, own their own dispute, and efficiency dictates that they should have the power to shape it intentionally.⁶² They have both the incentive and information to

⁵⁹ 9 U.S.C. § 12 (2000).

⁶⁰ *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391, 1395-96 (D.C. Cir. 1995) (using obstacle test to hold that Connecticut’s 30 day limit for filing motion to vacate award is not preempted by longer 90 day period of FAA); *accord* *New England Utils. v. Hydro-Quebec*, 10 F. Supp. 2d 53, 59 (D. Mass. 1998) (upholding Massachusetts legislation requiring a motion to vacate arbitration to be filed within 30 days of delivery of the award).

⁶¹ See BRUNET, SPEIDEL, STERNLIGHT & WARE, *supra* note 9, at 3-7 (emphasizing the value in allocating substantial authority to the arbitration parties).

⁶² See Carrie Menkel-Meadow, *Whose Dispute is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) (emphasizing ownership of dispute by the parties to the dispute themselves).

make correct bilateral choices on such procedural matters. Normally, party choice or autonomy should not be disturbed.⁶³

Arbitration operates in a contract model in which arbitration legislation constitutes a set of default rules that apply only when the parties fail to legislate the terms of arbitration.⁶⁴ Numerous arbitration landmarks stress the decisional powers of the parties to custom forge the terms of the conflict. *Mastrobuono v. Shearson Lehman Hutton, Inc.*⁶⁵ interpreted the arbitration agreement to empower the arbitrators to award punitive damages by reasoning that “parties are generally free to structure their arbitration agreements as they see fit.”⁶⁶ *Volt* upheld the parties’ choice of California procedure by asserting that the court’s role was to “ensur[e] that private agreements to arbitrate are enforced according to their terms.”⁶⁷ *First Options of Chicago, Inc. v. Kaplan*⁶⁸ echoed this theme by stating that “the basic objective in [the arbitration area] is . . . to ensure that commercial arbitration agreements, like other contracts, ‘are enforced according to their terms.’”⁶⁹

Justice Stephen Breyer has articulated this party autonomy and arbitrator authority theme in several arbitration opinions, including *First Options of Chicago* and the plurality opinion in *Bazzle*. Careful analysis of *Bazzle*, however, reveals a position that allows arbitrator power to trump important federalism values and to do so with minimal concern for state law and policy.

In *Bazzle*, a plurality of the Supreme Court remanded to an arbitrator the critical decision of whether to interpret the contract to permit class action arbitration. The decision stands as one allocating great power to the arbitrator and, at the same time, diminishing the authority of the state courts to decide critical issues of a legal nature. As correctly interpreted by Professor Buckner, the *Bazzle* decision “held that an arbitrator, not the court, should determine the availability of classwide arbitration where the parties’ arbitration agreement is silent on the issue.”⁷⁰ At a time when the business and consumer law communities want a certain and predictable ruling on the legality of arbitrating class actions, it seems surprising that the *Bazzle* decision would summarily bypass broad state law application for an ad hoc decision by an arbitrator.

The most interesting thing about the important *Bazzle* decision may be its failure to address the affront to the South Carolina Supreme Court. After all, the state’s highest court had already held that a class action in arbitration could continue where the parties’ contract was silent regarding whether to permit classwide arbitration and that, on the record, the arbitrator had properly used

⁶³ See, e.g., *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (asserting that courts should uphold arbitration procedures set forth in agreement except for “flipping a coin or studying the entrails of a dead fowl”).

⁶⁴ See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39 (1999); Ware, *supra* note 2.

⁶⁵ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

⁶⁶ *Id.* at 57 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

⁶⁷ *Volt*, 489 U.S. at 479.

⁶⁸ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

⁶⁹ *Id.* at 947 (quoting *Mastrobuono*, 514 U.S. at 54).

⁷⁰ Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 302 (2004).

the class action procedure. In allocating decisional power to the arbitrator, not the court, Justice Breyer's opinion simply ignores the diminished authority of the states to set forth rules of procedure regulating arbitration. This slight toward state law is all the more real because of the silence of federal law regarding class action arbitration. Nothing in the FAA speaks to this issue. Justice Stevens' concurring opinion makes this point when asserting that "[t]here is nothing in the Federal Arbitration Act that precludes either of these [class action arbitration] determinations [from being decided] by the Supreme Court of South Carolina."⁷¹

At the very least, the set of *Bazzle* opinions should have balanced the need for the arbitrator to decide the propriety of the class action against the virtues of allowing state power over arbitration procedures not addressed by the FAA. One can imagine a high quality argument that the states should be able to regulate arbitration procedures, particularly where there appears no contrary intent in the text of the FAA. Indeed, proponents of the Revised Uniform Arbitration Act tout the Act's comparatively detailed procedures as a reason to select it.⁷² The state arbitration acts offer sets of arbitration procedure far more detailed than the minimal procedures set forth in the FAA, making state arbitration procedure a major selling point to informed counsel who draft arbitration clauses.

Moreover, the ability to initiate class actions in arbitration is more than just a procedure. The issue of whether to permit arbitration of classwide claims is part of consumer protection regulation and contract law, traditionally the domain of state law.⁷³ This is a question where some degree of Supreme Court respect or deference toward state law and consideration of a presumption toward state law should have occurred. Instead, the set of *Bazzle* opinions summarily allocated the propriety of class treatment issue to the arbitrator without examining the federalism tensions presented.⁷⁴

*Buckeye Check Cashing, Inc. v. Cardegna*⁷⁵ also illustrates the trumping of state consumer protection law development by allocating decisional power to

⁷¹ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454-55 (2003) (Stevens, J., concurring in part and dissenting in part).

⁷² See, e.g., Hayford & Palmiter, *supra* note 10, at 211 (asserting that state "[b]right line rules can expedite the arbitration process . . .").

⁷³ It might be argued that the Federal Trade Commission regulates consumer transactions under the regulatory powers delegated by Congress in the Federal Trade Commission Act, 15 U.S.C. §§ 41, 45 (2000) (creating F.T.C. and delegating task of regulating deceptive practices to agency). This, however, represents gap filling federal regulation that lacks effect to preempt state consumer laws. Some of the F.T.C.'s legislation and regulations provide an example for what Professor Schapiro terms interactive federalism. See Schapiro, *supra* note 36; Schapiro, *Stevens's Interactive Federalism*, *supra* note 49. The Magnuson-Moss Warranty Act encourages manufacturers to settle consumer warranty claims through informal settlement techniques. 15 U.S.C. § 2310(a) (2000). The states have created so called automobile lemon-law legislation to complement the federal law. See, e.g., N.Y. GEN. BUS. LAW § 198-a(k) (McKinney 2007) (allowing automobile purchaser to select binding arbitration of lemon law claim); OR. REV. STAT. § 646.355 (2005) (making lemon law arbitration results binding on the seller only).

⁷⁴ For the argument that the *Bazzle* decision also usurps the powers of the state judiciaries, see David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 553 (2004).

⁷⁵ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

the arbitrator. In *Buckeye*, the Supreme Court held that a challenge to contractual validity that attacks the contract as a whole should be decided by the arbitrator and not the court.⁷⁶ Without any specific mention of federalism implications, the *Buckeye* decision decided that claims of usury and Florida lending and consumer law should not be allocated to the courts for decision, but, instead, must go to the arbitrator. Arbitrator decisions on such legal issues are likely to be more discretionary and to rely less on legal doctrine than decisions on such questions by the court. Moreover, arbitrator decisions on these legal attacks on a contract are unlikely to be transparent and to develop the growth of the rule of law; they will usually not be included in a written award and, accordingly, will be unavailable to the public. Like many of the Court's modern arbitration opinions, *Buckeye* ignored any deference to state regulation of lending and consumer transactions, matters traditionally left to the states. Federalism analysis was, once again, lacking.

Defenders of *Bazze* and other decisions that increase the power of the arbitrator under the rationale of party autonomy will no doubt point out that the courts will uphold a party choice of state arbitration law. In this way, state laws and policies relating to arbitration will apply in what I term a back door manner. While I acknowledge the appeal of this argument and laud the use of party autonomy, it needs to be emphasized that only those attorneys well versed in arbitration will have the expertise to take advantage of this option. Because most lawyers are unaware of the niceties of arbitration, state laws are likely to only occasionally be selected.

CONCLUSION

I am certainly not the first to criticize the arbitration preemption decisions of the Supreme Court. Arbitration scholars have done a commendable job picking apart the Court's rewriting of the Federal Arbitration Act. Professor David Schwartz critiques the Court's "federalism mistakes" and statutory construction errors in his 2004 article.⁷⁷ Professor Christopher Drahozal recognizes the lack of a coherent doctrine in arbitration preemption decisions and correctly highlighted the "notable absence" of the presumption against preemption in cases involving state contract principles.⁷⁸ Professor Margaret Moses criticizes the set of Supreme Court arbitration preemption decisions as a "major intrusion upon the police powers of the states."⁷⁹ Professor Carole J. Buckner writes that *Bazze* empowers the parties to delegate to the arbitrator the authority to decide purely procedural issues once thought to be the province of the judge who would often use state law and concludes that this decision increases federal powers.⁸⁰

⁷⁶ *Id.* at 446. Justice Scalia's opinion relied heavily upon the severability doctrine set forth in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). See generally Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107 (2007).

⁷⁷ Schwartz, *supra* note 1.

⁷⁸ Drahozal, *supra* note 19, at 425.

⁷⁹ Moses, *supra* note 1, at 132.

⁸⁰ Buckner, *supra* note 70, at 304.

An amended FAA would specifically articulate no intent to preempt the field of arbitration. No serious proposal to eliminate state arbitration laws exists. Much of my criticism lies with the style of preemption analysis employed by the Supreme Court. With minimal explanation, the Supreme Court's puzzling *Casarotto* decision abandoned the orthodox obstacle test and replaced it with a type of per se approach that automatically calls for preemption provided that state law "singles out" arbitration for special treatment. Professor David Schwartz has referred to the Court's federalism mistakes.⁸¹ My critique laments the lack of any sensitivity toward state laws or candid discussion of federalism in Supreme Court arbitration decisions. The fact that the word federalism has been avoided or ignored by the majorities in the set of arbitration preemption decisions needs to be considered a tragic case of the lack of respect and comity toward state law.

The recent allocation of greater decisional power to the arbitrator also trumps the power of state courts and state rules of law. Arbitrators are now free to apply their own brand of procedures, which can ignore state law of the seat of arbitration. Meaningful judicial review of these decisional choices by arbitrators is almost non-existent. In the rush to create a judge-made powerful federal arbitration law, the Court has once more relegated state law to an unnecessarily narrow and secondary status and left its application to those clients lucky enough to have an attorney able to counsel a difficult opt-in to state arbitration procedure. True, state arbitration law can be selected by the parties and will gain acceptance through this sort of "back door" process. Yet, state arbitration laws, together with related federalism values, are too important to be limited in application to purely intrastate applications and the opt-in, back door context. The passionate affection for federal arbitration and party autonomy, while sensible in the vague abstract, appears to frustrate application of modern and innovative state laws that should be presumed to be valid.

⁸¹ Schwartz, *supra* note 1.