Personal Autonomy and Vacatur After *Hall Street*

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I. INTRODUCTION

The Alternative Dispute Resolution movement of the last quarter of a century has been built on the pillar of party autonomy.[1] Indeed, the very predicate of the movement is that parties can do a better job of resolving their disputes through private ordering than public courts can through public ordering.

In this regard, arbitration is no different than negotiation, mediation, or any other alternative dispute resolution process. Among other things, arbitration empowers parties to choose to opt out of public ordering from the outset, to choose their decision makers, to decide which issues those decision makers will adjudicate, to determine the standards the decision maker will use in deciding the dispute, and even to decide whether the

1. *See, e.g.*, REVISED UNIFORM ARBITRATION ACT, Prefatory Note 1 (reflecting the importance of party autonomy in the arbitration context by listing it as the first principle that guided the drafters of the Act). For similar evidence in the mediation context, see Uniform Mediation Act, Prefatory Note 1 ("[Act] promotes the autonomy of the parties."). For a discussion of the democratic character of the autonomy consideration in dispute resolution, see Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (2004).

decision that is ultimately rendered will be supported by reasons.[2] All of this makes arbitration a very flexible process, readily adaptable by parties to accommodate their needs and interests.

The Federal Arbitration Act ("FAA") is the primary statute regulating commercial arbitration in the United States.[3] The FAA governs all arbitrations that are conducted pursuant to a written arbitration agreement and that are about a subject that affects commerce,[4] broadly construed.[5] Historically, arbitrations under the FAA have been thought to be final and binding,[6] meaning that they are not subject to substantive review for errors of law or fact. In recent years, however, some parties have expanded their autonomy over the process by contractually agreeing to permit courts to engage in substantive review, sometimes called "enhanced judicial review" or "contracted judicial review,"[7] of arbitral awards under the FAA for errors of law.

In *Hall Street Associates v. Mattel, Inc.*,[8] the U.S. Supreme Court resolved a clear and deep split in the circuits and emphatically rejected this practice. This decision constitutes arguably the most significant constraint on party autonomy in arbitration that the Court has imposed.[9] This holding by the Court was a landmark in and of itself. But in so ruling, the Court also staked out three additional important mileposts for arbitrations conducted under the FAA. First, the Court held that the grounds for judicial review under the FAA are limited to those grounds that are specifically enumerated in the statute.[10] This is significant because the decision affects the many so-called "non-statutory" grounds for judicial review of arbitration awards under the FAA, such as manifest

2. *See* LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION & LAWYERS 652-54 (3d ed. 2005) [hereinafter RISKIN].

3. 9 U.S.C. §§ 1-14 (2006).

4. 9 U.S.C § 1 (2006).

5. *See* Allied-Bruce Terminix Cos. Inc. v. Dobson, 513 U.S. 265 (1995) (endorsing a reading of the FAA that extends the reach of the Act to the limits of Congress' power under the Commerce Clause).

6. *See* LARRY E. EDMONSON, GABRIEL M. WILNER & MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION: THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION 1:1, 1-1 (rev. ed. 2007); IAN R MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW 2:3, 2.1.1 (Supp. 1999) [hereinafter MACNEIL].

7. *See, e.g.*, EDWARD J. BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 81 (2006) ("Party self-autonomy values are advanced by decisions willing to enforce contractually enhanced review." Brunet also specifically refers to such review as "enhanced judicial review.").

8. 128 S. Ct. 1396 (2008).

9. *See id.* at 1406-08.

10. *See id.* at 1400 ("The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive.").

disregard of the law and public policy.[11] Second, the Court continued to open the door for parties to consider grounding their arbitrations in mechanisms other than the FAA, such as state arbitration law.[12] This is significant because conventional wisdom has long held that state arbitration law was largely preempted by the FAA. Finally, the Court held that the finality goals of arbitration outweigh the freedom of contract of participants.[13]

The Court's ruling was surprising to some, especially because the Court had previously held that party autonomy, not efficiency, was the touchstone of arbitration under the FAA.[14] The ruling was also surprising in that it significantly constrains courts in their ability to reverse egregious arbitration awards, limiting them to grounds specifically enumerated in the FAA and that do not include substantive review.

In this article, I will explore why the Court came to these conclusions, consider the state of vacatur law after the opinion, and address some of the more salient policy issues that lie in the wake of the decision. In Part II, I will provide a brief overview of vacatur under the Federal Arbitration Act before *Hall Street*. In Part III, I will focus on the *Hall Street* case, discussing the notion of contracted judicial review, the facts of the case, and the Court's decision. I will offer three rationales for explaining the Court's opinion: the triumph of the New Textualist model of statutory interpretation (at least for this case), pragmatic considerations, and process characteristics and values theory, which I incorporate throughout this article. In Part IV, I will describe the state of vacatur law after the Court's opinion, and provide my own insights into how courts should handle certain controversial issues likely to arise. In particular, I will argue that after *Hall Street* none of the non-statutory grounds for review of arbitration awards should be available, with the

11. *See, e.g.*, W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983) (violates public policy); Wilko v. Swan, 346 U.S. 427, 436 (1953) (manifest disregard of the law), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Hoffman v. Cargill, Inc., 236 F.3d 458, 462 (8th Cir. 2001) (award may be vacated if "not susceptible of the arbitrator's interpretation"); Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1223 (11th Cir. 2000) (arbitrary and capricious); Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 331 (1st Cir. 2000) (award may be vacated if contrary to the "plain language" of the contract).

12. The court began this process in Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989). *See infra* note xx and accompanying text. *See generally* STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 40-44 (2d ed. 2007).

13. *See Hall Street*, 128 S. Ct. at 1405 ("Instead of fighting the text, it makes more sense to see the [FAA] as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.").

14. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985).

exception of the public policy ground. In Part V, the conclusion, I will argue that rather than shrinking personal autonomy, the Court actually expanded it by pointing to avenues in which it may be expressed, including in the form of contracted judicial review. These avenues point to mischief for arbitration, however, as they allow for the evisceration of arbitration finality, a cornerstone of the process under the FAA. Courts and legislatures should resist the temptation to permit contracted judicial review, even in these avenues opened up by the Supreme Court in *Hall Street.*

II. BACKGROUND

A. The Federal Arbitration Act

The FAA was enacted in 1925 to reverse legislatively the historic "ouster doctrine," a centuries-old common law doctrine under which courts refused to enforce agreements to arbitrate.[15] The heart of the act is Section 2, which provides that arbitration agreements will be enforced just like any other agreement, as long as the agreement is enforceable as a matter of contract law.[16] The remaining sections compel courts to support the arbitration process as Congress envisioned it in 1925. For example, Section 4 of the Act permits a court to compel an unwilling party into arbitration if it is satisfied that there is an enforceable agreement to arbitrate,[17] and Section 3 permits it to stay related legal proceedings.[18] Section 7 of the FAA also permits an arbitrator to summon and hear witnesses during the arbitration.[19]

Critically, for our purposes, Section 9 permits the arbitrator to issue an award that may be entered as a court judgment if one of the parties so requests, and indeed requires courts to confirm an award, unless it is vacated, modified, or corrected under Sections 10 or 11.[20] Because the *Hall Street* opinion construes Sections 10 and 11, it is worth looking at them more closely.

15. For a definitive legislative history of the FAA, see generally IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992) (a thorough review of the evolution of the American arbitration law).

16. *See* 9 U.S.C. § 2 (2006).

17. *See id.* § 4.

18. *See id.* § 3.

19. *See id.* § 7.

20. *See id.* § 9. Section 13 prescribes the documentation that must be filed along with a motion to confirm an arbitration award under Section 9. *Id.* § 13.

B. The Statutory Grounds for Vacatur

There are four statutory grounds for vacating an arbitration award under the FAA, all of which are found in Section 10(a) of the FAA and none of which were directly at issue in *Hall Street*. All four set a high bar for proponents to meet, furthering the FAA's vision of arbitration as a final and binding dispute resolution process.

Section 10(a)(1) provides for an award to be vacated "where the award is procured by corruption, fraud, or undue means."[21] The standard is high. For example, fraud under this section "must (1) be established by clear and convincing evidence, (2) materially relate to an issue in the arbitration, [and] (3) neither have been brought to the attention of the arbitrator and the issue handled by them, nor have been discoverable upon the exercise of due diligence prior to the arbitration."[22]

Section (10)(a)(2) provides that an arbitral award may be vacated "where there was evident partiality or corruption in the arbitrators, or either of them."[23] In applying this provision, the courts have distinguished between "active" and "passive" partiality.[24] "Active partiality" refers to actions by the arbitrator that demonstrate a predisposition in favor or against one of the parties.[25] "Passive" partiality refers to circumstances surrounding the arbitrator that may give rise to inferences of partiality, even where there is no demonstration of active partiality, such as an arbitrator's relationship with one of the parties.[26] *Gaines Construction Co. v. Carol City Utilities, Inc.*,[27] provides an example of both. There, a Florida appeals court rejected the arbitrator's dominance and control of one of the parties as a basis to vacate because of active partiality, but agreed that a business relationship

21. *Id.* § 10(a)(2).

22. MACNEIL, *supra* note 6, § 40.2.2. *See, e.g.*, Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988) (award vacated when it was discovered that key plaintiff witness on wrongfulness of the defendant's conduct had completely falsified his credentials, and arbitrator clearly relied on this testimony in reaching a decision).

23. 9 U.S.C. § 10(a)(2) (2006).

24. *See generally* MACNEIL, *supra* note 6, § 28.1.3.

25. *See* SAMUEL ESTREICHER ET AL., ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA 53 (2004) ("'Active' partiality—arbitrator statements or actions that demonstrate animus or favoritism towards a party. . . .")

26. *See* ESTREICHER, *supra* note 25 ("'[P]assive' partiality—that is, a relationship between arbitrator and another participant that raises partiality concerns."); *see also* Gaines Constr. Co. v. Carol City Utils., Inc., 164 So. 2d 270, 272 (Fla. Dist. Ct. App. 1963) (the arbitrator was an employee of one party and had a financial interest in the business of the other).

27. 164 So. 2d at 272 ("[W]e do not find that the arbitrator was motivated by corrupt or illegal motives, but that he was susceptible, under the facts disclosed, to having his judgment biased by his conduct toward and his association with an officer and/or stockholder of the appellee corporation during the course of the arbitration.").

between the arbitrator and one of the parties was cause to vacate on the ground of passive partiality.[28]

Section 10(a)(3) provides that an arbitral award may be vacated "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."[29] This ground allows for objections to the way in which the arbitrator actually conducted the hearing, such as claims that one party was denied a fundamentally fair hearing, was denied the right to counsel, was prejudiced by an ex parte hearing or the refusal of the arbitrator to grant a subpoena or discovery request.[30] The high threshold requires proponents to show that the misbehavior, in the words of one court, "so prejudiced the rights of a party that it denies the party a fundamentally fair hearing."[31] Such prejudice is ordinarily not found unless the aggrieved party's right to be heard is "grossly and totally blocked."[32]

Section 10(a)(4) provides that an arbitral award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[33] Arbitrators exceed their powers when they issue an award on an issue not presented to them in the submission to arbitration, or when they fail to adhere to other constraining criteria prescribed by the parties, such as arbitration rules that the parties may have drafted into their arbitration provisions or a choice-of-law provision.[34] It is well-established that arbitrators do not exceed their powers by misconstruing contracts, or making errors of law or fact.[35] As the U.S. Supreme Court observed in *United Paperworkers International Union v. Misco, Inc.*,[36] a collective bargaining case frequently cited in FAA cases, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious errors does not suffice to overturn his decision."[37] An arbitral award is "mutual, final, and

28. *See id.*
29. 9 U.S.C. § 10(a)(3) (2006).
30. *See* MACNEIL, *supra* note 6, §§ 40.4.1, 40.4.2.
31. Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089, 1094 (3d Cir. 1987).
32. Cofinco, Inc. v. Bakrie & Bros., N.V., 395 F. Supp. 613, 615 (S.D.N.Y 1975).
33. 9 U.S.C. § 10(a)(4) (2006).
34. *See* MACNEIL, *supra* note 6, § 40.5.2.
35. *Id. See, e.g.*, Siegel v. Titan Indus. Corp., 779 F.2d 891, 892-93 (2d Cir. 1985) ("The erroneous application of rules of law is not a ground for vacating an arbitrator's award . . . nor is the fact that an arbitrator erroneously decided the facts. . . ." (citations omitted)).
36. *See* United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 38 (1987).
37. *See id.*

definite" under Section 10(a)(4) if it resolves all issues submitted to arbitration and determines each issue fully so that no further litigation is necessary to finalize the obligations of the parties.[38]

C. The Non-statutory Grounds

The lower federal and state courts have come to recognize a variety of grounds in addition to the statutory grounds that may be used to vacate an arbitration award. While numerous, their deployment rarely results in vacatur.

1. Manifest Disregard of the Law

The manifest disregard standard is a non-statutory ground that emanates from dicta in the *Wilko v. Swan*[39] case, in which the Supreme Court said: "In unrestricted submissions,[40] the interpretations of law by arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."[41] *Wilko* was overruled on other grounds,[42] but this particular dictum lives on, in part because it was cited approvingly in a 1995 Supreme Court case, *First Options of Chicago v. Kaplan*.[43]

As I have written elsewhere,[44] manifest disregard can be seen as a remnant of the old ouster doctrine, when courts believed that agreements to arbitrate improperly ousted them of jurisdiction over matters of law.[45] While the ouster doctrine was swept away legislatively with the FAA, and later judicially by the Supreme Court,[46] suspicion of arbitration has

38. *See* Conn. Tech. Dev. Co. v. Univ. of Conn. Educ. Props., 102 F.3d 677, 686 (2d Cir. 1996).

39. 346 U.S. 427, 436 (1953).

40. *See id.* Unrestricted submissions are submissions that do not require the arbitrator to apply relevant rules of law. *See id.* Restricted submissions, by contrast, require the arbitrator to apply relevant legal rules. *See id.*

41. *See id*.

42. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

43. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (noting that parties can seek vacatur in a narrow set of instances); *see also Wilko v. Swan*, 346 U.S. 427, 436-437 (parties bound by arbitrator's decision not in 'manifest disregard' of the law), *overruled on other grounds*, *Rodriguez*, 490 U.S. 477.

44. *See* Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L. REV. 271, 303 (2007) [hereinafter Reuben, *Process Purity*].

45. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 977-78 (2000).

46. *See generally* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (distinguishing *Wilko* in holding that Securities fraud claims under the 1933 Act and under RICO may be compelled to arbitration where the brokerage agreement includes a mandatory arbitration clause); *see also Rodriguez*, 490 U.S. 477 (formally overruling *Wilko*).

lingered in the minds of many courts, fueled in part by the rise of mandatory arbitration; the prospect of judicial review for manifest disregard has given the courts comfort in moving forward with mandatory arbitration.[47] As the Supreme Court said reassuringly in *Gilmer v. Interstate/Johnson Lane*, "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue."[48] Even apart from the mandatory context, the continued existence of the "manifest disregard" doctrine at common law preserves at least the threat that an arbitration award can be invalidated because of the sovereignty of the law, providing an indirect constraint on arbitral discretion. Manifest disregard thus hangs like Damocles' sword over the head of arbitrators.[49]

While nearly all courts claim the power to set aside an arbitral award on the ground of manifest disregard,[50] few in fact do.[51] One study of vacatur of 336 federal and state employment arbitration awards between 1975 and 2006 found that manifest disregard was the most common ground for seeking relief—30.4 percent of all appellate cases studied—but was only successful in 7.1 percent of the cases.[52] Another study, of all state and federal cases in which a party sought vacatur between January 1, 2004 and October 31, 2004, 182 cases, reached similar results: manifest disregard was the second most frequently raised reason cited for vacatur—28.6 percent—but succeeded in only 3.8 percent of the cases (two cases).[53]

47. *See* Reuben, *Process Purity*, *supra* note 45, at 303 and sources cited therein.

48. 500 U.S. 20, 32 n.4 (1991) (quoting *McMahon*, 482 U.S. at 232).

49. William W. Park, *The International Currency of Arbitration Awards*, *in* International Arbitration 2007, at 309, 342 (PLI Litg. & Admin. Practice Course, Handbook Series No. 10796, 2007), WL 756 PLI/Lit 309.

50. *See* Birmingham News Co. v. Horn, 901 So. 2d 27, 48-49 (Ala. 2004) (citing cases).

51. For a recent case vacating on manifest disregard grounds, see *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68 (1st Cir. 2008) (panel manifestly disregarded law by dismissing counterclaims as a sanction despite statutory requirement that lesser sanctions be tried first). Interestingly, the *Kashner* decision came down nearly three months after *Hall Street*, but the decision does not mention the Supreme Court ruling.

52. *See* Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 189 (2008).

53. *See* Lawrence R. Mills, J. Lani Bader, Thomas J. Brewer & Peggy J. Williams, *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23.

Montes v. Shearson Lehman Bros, Inc.[54] is an often-cited example of the rare case accepting a manifest disregard challenge. In that case, counsel specifically asked the arbitrators to ignore the law in her closing arguments.[55] Under these circumstances, the court said it was "able to clearly discern from the record that this is one of those cases where manifest disregard of the law is applicable, as the arbitrators recognized that they were told to disregard the law (which the record reflected they knew) in a case in which the evidence to support the award was marginal. Thus, nothing is contained in the record to refute the suggestion that the law was disregarded. Nor does the record clearly support the award."[56]

Similarly, in *Halligan v. Piper Jaffray, Inc*.,[57] the Second Circuit found that the arbitrator's award was in manifest disregard of the law because Halligan had presented overwhelming evidence of age discrimination, that both parties had agreed upon the law governing the claim and explained it to the arbitrator, and that the arbitrator still ruled against the age discrimination claim in a decision unaccompanied by a written and reasoned decision.[58] The court remarked that "[i]n view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both."[59] In the absence of an opinion explaining

54. *See* Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456 (11th Cir. 1997). *But see* B.L. Harbart Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 911 (11th Cir. 2006) ("'Four facts came together in *Montes* and will seldom recur: Those facts are that: 1) the party who obtained the favorable award had conceded to the arbitration panel that its position was not supported by the law, which required a different result, and had urged the panel not to follow the law; 2) that blatant appeal to disregard the law was explicitly noted in the arbitration panel's award; 3) neither in the award itself nor anywhere else in the record is there any indication that the panel disapproved or rejected the suggestion that it rule contrary to law; and 4) the evidence to support the award is at best marginal.'" (quoting *Montes*, 128 F.3d at 1464 (Carnes, J., concurring))).

55. *Montes*, 128 F.3d at 1459. Specifically, counsel stated that

> [y]ou have to decide whether you're going to follow the statutes that have been presented to you, or whether you will do or want to do or should do what is right and just and equitable in this case. I know it's hard to have to say this and it's probably even harder to hear it but *in this case this law is not right*. Know that there is a difference between law and equity and I think, in my opinion, that difference is crystallized in this case. *The law says one thing. What equity demands and requires and is saying is another*. What is right and fair and proper in this? *You know as arbitrators you have the ability, you're not strictly bound by case law and precedent*. You have the ability to do what is right, what is fair and what is proper, and that's what Shearson is asking you to do.

Id.

56. *Id.* at 1462.

57. *See* Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 203-04 (2d Cir. 1998).

58. *See id.*

59. *Id.* at 204.

the award, the court went on to express its "firm belief that the arbitrators have manifestly disregarded the law or the evidence or both."[60]

There are different formulations in the cases, but most courts have concluded that parties seeking vacatur on this ground must show the award was inconsistent with clear controlling law, the arbitrator knew what the controlling law was, and intentionally chose to ignore or disregard it.[61] Significantly, a mere error of law or failure to apply the law does not rise to the level of manifest disregard of the law.[62]

2. Other Non-Statutory Grounds

Manifest disregard is the primary non-statutory ground, but courts have also recognized other non-statutory grounds, expressing a willingness to overturn arbitration awards that violate public policy, are arbitrary or capricious, or are simply irrational.

a. Public Policy

Some courts have vacated awards that they found to be in violation of public policy.[63] For example, the Connecticut Supreme Court found that an arbitration award reinstating a state employee violated public policy because the employee violated a criminal statute and employment regulations set forth by its employer.[64] Similarly, a federal district court in California vacated on public policy grounds an award that called for the payment of certain commissions that were argued to be illegal under

60. *Id.*

61. For a detailed discussion of the articulation of the standard in the different circuits, see Lindsay Biesterfield, *Courts Have the Final Say: Does the Doctrine of "Manifest Disregard" Promote Lawful Arbitral Awards or Disguise Unlawful Judicial Review?*, 2006 J. DISP. RESOL. 627, 632 n.56 (2006). For a general discussion, see Stephen L. Hayford, *Reining in the 'Manifest Disregard' of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 124-25 (1998). For a proposal to codify manifest disregard, see Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234 (2007).

62. *See, e.g.*, San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961); *see also* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards For Vacatur*, 66 GEO. WASH. L. REV. 443, 465-76 (1998).

63. *See, e.g.*, Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813, 816 (D.C. Cir. 2007) (describing manifest disregard and public policy exceptions as additional to statutory grounds for judicial review under FAA); *see also* MACNEIL, *supra* note 6, § 40.8.2; Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990).

64. Connecticut v. AFSCME, Council 4, Local 387, AFL-CIO, 747 A.2d 480, 485-86 (2000).

Saudia Arabian law, U.S. Department of Defense regulations, and the Foreign Corrupt Practices Act.[65]

Such victories for the public policy ground are rare, however, as claims that an arbitral award violates public policy are overwhelmingly rejected. For example, the Sixth Circuit rejected a claim that enforcing a contract with an indefinite term between a county and an engineering firm was against state policy relating to contracts of public bodies.[66]

A two-step analysis is generally used to decide whether an arbitral award violates public policy. First, the court determines whether an explicit, well-defined and dominant public policy can be identified; it will not be content with speculative public interests. If so, the court then decides if the arbitrator's award violated the public policy. In this regard, it is important to note that an award will only be vacated on public policy grounds when "enforcement of the award compels one of the parties to take action which directly conflicts with public policy."[67] The reviewing court is not concerned with the correctness of the arbitrator's decision, but rather with the lawfulness of enforcing the award. The rationale behind the public policy challenge is that parties can no more expect a court to approve an arbitration award that is illegal or contrary to public policy than they can expect a court to enforce such a contract between them.[68]

b. Arbitrary and Capricious

Some courts recognize a defense to enforcement of an arbitral award where it is contended that the award is arbitrary and capricious. Acting in an investor-broker suit, for example, the Eleventh Circuit found that an arbitral panel's refusal to award mandatory statutory damages was arbitrary and capricious and did not have to be enforced.[69]

65. Northrop Corp. v. Triad Fin. Establishment, 593 F. Supp. 928 (C.D.Cal. 1984), *judgment reversed in part by*, Northrop Corp. v. Triad Int'l Marketing S.A., 811 F.2d 1265 (9th Cir. 1987).

66. Bd. of County Comm'rs v. L. Robert Kimball & Assocs., 860 F.2d 683, 685-88 (6th Cir. 1988), *cert. denied*, 494 U.S. 1030 (1990).

67. *See* Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 782 (11th Cir. 1993).

68. Town of S. Windsor v. S. Windsor Police Union Local 1480, 770 A.2d 14, 23-24 (2001).

69. Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992); *see also* B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 910 (11th Cir. 2006) (arbitrary and capricious, manifest disregard of the law, and public policy grounds for vacatur supplement the FAA's statutory grounds for vacatur); U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 847 F.2d 775 (11th Cir. 1988).

As a general matter, an award is arbitrary and capricious if it exhibits a wholesale departure from the law,[70] if a legal ground for the arbitrator's decision cannot be inferred from the facts of the case, if the decision is not grounded in the contract,[71] or if the reasoning is so faulty that no judge or group of judges could ever have conceivably made such a ruling.[72] The party seeking vacatur has a heavy burden of proof, being required to refute every rational basis on which the arbitrator could possibly have relied.[73]

As with other non-statutory grounds, these claims almost always fail, as *Brown v. Rauscher Pierce Refsnes*[74] illustrates. The Browns had sued their stock broker for various allegations, including churning, unsuitable transactions, and the failure of their broker to register in the state of Florida.[75] An arbitrator ultimately awarded them $16,000 in damages and $4,000 in forum fees—considerably less than the $721,000 the Browns had sought.[76] They sought to vacate the award as being arbitrary and capricious, and violative of public policy because the arbitrator did not award damages in the amount compelled by statute for failure to register violations.[77] The court rejected the claim, accepting the arbitrator's finding that the failure to register was inadvertent, rather than willful, and therefore not arbitrary and capricious.[78]

c. Irrationality

Some courts have also indicated that arbitration awards may be vacated if they are irrational—that is, they fail to draw their essence from the underlying agreement. This non-statutory ground[79] is generally derived from "the essence test" articulated in *United Steelworkers v.*

70. *Ainsworth*, 960 F.2d at 941 ("An award is arbitrary and capricious only if 'a [legal] ground for the arbitrator's decision cannot be inferred from the facts of the case.'" (quoting Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1990))).

71. *U.S. Postal Serv.*, 847 F.2d at 778; Bhd. of R.R. Trainmen v. Cent. of Georgia Ry. Co., 415 F.2d 403, 412 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970).

72. Safeway Stores v. American Bakery and Confectionery Workers, Local 111, 390 F.2d 79, 82 (5th Cir. 1968) (award may be vacated as arbitrary and capricious "if the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling").

73. *See Ainsworth*, 960 F.2d at 941; *see also* Cray v. Nationsbank of NC, NA, 982 F. Supp. 850, 852 (M.D. Fla. 1997) (rejecting claim that award was arbitrary and capricious because employee who was not found constructively discharged was nonetheless ordered to be reinstated).

74. 994 F.2d 775, 779 (11th Cir. 1993).

75. *Id.* at 778.

76. *Id.*

77. *Id.* at 779.

78. *Id.* at 782.

79. *See*, *e.g.*, Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 353 (5th Cir. 2004).

Enterprise Wheel & Car Corp.,[80] another labor case that is often cited in commercial cases.[81] There, the Court said that an "award is legitimate only so long as it draws its essence from the collective bargaining agreement."[82] As the Fifth Circuit has further elaborated the test, "[t]o draw its essence from the contract, an arbitrator's award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter and purpose of the agreement. The award must, in some logical way, be derived from the wording or purpose of the contract."[83] As another court has put it "[f]or a Court to grant vacatur on the grounds that an award is totally irrational, there must be no proof whatever to justify the award."[84]

Again, as with the other non-statutory grounds, arbitration awards are rarely vacated as irrational.

D. Summary

Successful challenges to arbitral awards are rare. The FAA provides for the vacatur of an award that is procured by fraud or is otherwise corrupt, decided by a partial arbitrator, issued pursuant to a fundamentally unfair process, or exceeds the scope of the parties' submission to arbitration. Courts have also recognized non-statutory grounds for vacating arbitration awards, most notably for arbitration awards that are in manifest disregard of the law, that violate public policy, that are arbitrary or capricious, or that are simply irrational. The standards for both statutory and non-statutory awards are high because of the importance of finality to the arbitration process. Substantive review generally undermines the finality of arbitration, and courts have been reluctant to take that step.

80. 363 U.S. 593 (1960).

81. *See, e.g.*, Jenkins v. Prudential-Bache Sec., 847 F.2d 631, 634 (10th Cir. 1988) ("[T]he 'essence of the contract' analysis applies equally to judicial review under 9 U.S.C. § 10."). The comparison between labor and FAA cases is somewhat imprecise because labor cases allege breach of contract, while FAA cases do not necessarily allege breach of contract.

82. 363 U.S. at 597.

83. *See* Prescott v. Northlake Christian Sch., 141 F. App'x 263, 272 (5th Cir. 2005); Glover v. IBP, Inc., 334 F.3d. 471, 475 (5th Cir. 2003) (citing Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir.1990)).

84. Yonir Techs., Inc. v. Duration Sys. (1992) Ltd., 244 F. Supp. 2d 195, 210 (2002); *see also* Mastec N. Am., Inc. v. MSE Power Sys., Inc., 581 F. Supp. 2d 321, 328 (N.D.N.Y. 2008) (citing *Yonir Techs.*, 244 F. Supp. 2d at 209) (rejecting the irrationality claim).

III. *HALL STREET*

A. Contracted Judicial Review

Contracted judicial review is another form of non-statutory grounds for vacatur. In this situation, the parties are asking for awards to be set aside if they do not follow the legal standards set forth in the arbitration agreement, typically the law generally or the law of a specific jurisdiction. The lower courts have badly split on whether parties have this authority.

Courts that have endorsed contracted judicial review have used a variety of theories, including freedom of contract[85] and the interpretation of Section 10 as a default rule.[86] Courts have also rejected the proposition on a variety of grounds, either because it would frustrate the purposes of the FAA, or because the parties do not have the power to establish federal court jurisdiction by contract.[87]

The Supreme Court decided *Hall Street* to resolve the split in the lower federal courts.

B. Facts

The facts in *Hall Street Associates v. Mattel, Inc*., are complex. The case involved a landlord-tenant dispute between Hall Street Associates and Mattel, Inc., for a toy manufacturing site in Beaverton, Oregon.[88] The lease provided that Mattel would indemnify Hall Street Associates for any costs resulting from Mattel's failure to comply with environmental laws.[89] In 1998, the property's water well was found to

85. *See* Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287 (3d Cir. 2001) (endorsing substantive review if the statute clearly provides for it); Syncor Int'l Corp. v. McLeland, 120 F.3d 262 (4th Cir. 1997) (accepting substantive review for "errors of law or legal reasoning").

86. Gateway Techs., Inc. v. MCI Telecomm. Corp., 64 F.3d 993 (5th Cir. 1995) (permitting substantive review because Section 10 of FAA is a default provision). For scholarly commentary arguing that Section 10 is a default provision, see Stephen J. Ware, *"Opt-In" for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act*, 8 AM. REV. INT'L ARB. 263, 270 (1997).

87. Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987 (9th Cir. 2003) (en banc) (reversing circuit panel decision endorsing contracted substantive review) (defeats purpose of arbitration); Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001) (contracted judicial review frustrates purpose of FAA); Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991) (federal jurisdiction cannot be created by contract).

88. Hall St. Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1400 (2008).

89. *Id.*

have high levels of trichloroethylene (TCE) and other pollutants, and in a consent decree Mattel agreed to clean up the site.[90]

Mattel tried to terminate the lease in 2001, but Hall Street Associates resisted because Mattel had not yet indemnified it for the costs of the cleanup.[91] Mattel prevailed on the termination issue in a bench trial, and the parties tried to mediate the indemnification issue.[92] When the mediation stalled, the parties agreed to arbitrate the indemnification issue. Critically, the arbitration agreement included a provision, approved by the district court, permitting the court to review the arbitrator's award for legal error.[93] Specifically, it provided that the U.S. District Court for the District of Oregon "shall vacate, modify, or correct any award: (i) where the arbitrator's finding of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."[94]

The arbitrator decided for Mattel, holding that the pollution standards under the Oregon Drinking Water Quality Act were laws that dealt with "human health" rather than "environmental contamination" requiring indemnification under the lease.[95] Hall Street moved to vacate the award as legally erroneous under Oregon law, and the district court agreed. Upon remand, the arbitrator awarded judgment to Hall Street Associates, finding that failure to comply with the state drinking water standards constituted environmental contamination requiring indemnification under the lease.[96] This time Mattel appealed to the district court, relying on a recent en banc circuit precedent, *Lapine Technology Corp. v. Kyocera Corp.*,[97] which held that judicial review provisions in arbitration agreements were unenforceable.[98] The Ninth Circuit agreed with Mattel that the review provision was unenforceable and ordered the district court to reinstate the original arbitration award in favor of the toy manufacturer.[99]

The district court, however, ruled in favor of Hall Street, holding that the arbitrator's interpretation of the lease was implausible and therefore exceeded the scope of his authority under 9 U.S.C. § 10(a)(4).[100] The Ninth Circuit again reversed, holding that

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1400-01.
95. *Id.* at 1401.
96. *Id.*
97. 341 F.3d 987, 1000 (9th Cir. 2003).
98. *Hall Street*, 128 S. Ct. at 1401.
99. *Id.* at 1407-08.
100. *Id.* at 1401 n.1.

implausibility was not a ground for vacating an arbitration award, and again ordered the original arbitration award in favor of Mattel to be reinstated.[101] The Supreme Court granted review in the case to decide whether parties may contract for judicial review under the FAA.[102] After oral arguments, the Court expanded its consideration by asking the parties for supplemental briefing on whether the parties' judicial review agreement would be supported by grounds other than the FAA.[103]

C. The Supreme Court's Decision

The U.S. Supreme Court held that the FAA Sections 10 and 11 "provide the FAA's exclusive statutory grounds for expedited vacatur and modification."[104] It considered two arguments: First, Hall Street's common law argument that the Court's authorization of manifest disregard in *Wilko v. Swan* opened the door for the expanded review sought in this case; second, Hall Street's general freedom of contract argument. Each will be discussed in turn.

1. The *Wilko* Argument

Hall Street Associates argued that as a common law matter, the U.S. Supreme Court itself put "the camel's nose" under the tent of contracted review generally when it authorized manifest disregard review in *Wilko v. Swan*. If judges can add grounds for judicial review of arbitration awards, so can parties, *Hall Street* argued.[105]

The Court rejected this argument as "too much for *Wilko* to bear."[106] To begin with, the Court noted that in *Wilko* it had refused to hold that arbitral awards are subject to general review for legal error—the very

101. *Id.* at 1401.

102. Hall St. Assocs., LLC v. Mattel, Inc., 196 F. App'x 476 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 2875 (2007).

103. Specifically, the Court said:

> The parties are directed to file supplemental briefs addressing the following questions: (1) Does authority exist outside the Federal Arbitration Act (FAA) under which a party to litigation begun without reliance on the FAA may enforce a provision for judicial review of an arbitration award? (2) If such authority does exist, did the parties, in agreeing to arbitrate, rely in whole or part on that authority? (3) Has petitioner in the course of this litigation waived any reliance on authority outside the FAA for enforcing the judicial review provision of the parties' arbitration agreement?

Hall St. Assocs., LLC v. Mattel, Inc., 128 S. Ct. 644 (2007).

104. *Hall Street*, 128 S. Ct. at 1403.

105. *Id.*

106. *Id.* at 1404.

thing that Hall Street was asking the Court to do in the case at bar.[107] The Court also noted that "manifest disregard" in the *Wilko* dictum is devoid of specific meaning. The Court stated that it could mean a new ground for review.[108] But then it could also simply refer collectively to all of the Section 10 grounds. Or, it could refer just to Sections (10)(a)(3) or 10(a)(4), the subsections authorizing vacatur when arbitrators are "guilty of misconduct" or "exceeded their powers."[109] But, the Court saw "no reason to accord it the significance that Hall Street urges''—that courts may vacate arbitration awards as being in manifest disregard of the law when the award is legally erroneous.[110] Beyond that understanding of what manifest disregard does not mean, the Court chose to leave manifest disregard, as it has in the past,[111] "as we found it, without embellishment."[112]

2. The Freedom of Contract Argument

The court also rejected *Hall Street*'s second argument, that the judicial review provision should be enforced because Congress' intent in passing the FAA was to enforce agreements to arbitrate as they are drafted.[113] In effect, the argument is one of contractual freedom: the purpose of the FAA is to enforce agreements to arbitrate as drafted, parties should be able to draft provisions as they would like—including with expanded judicial review.

The Court acknowledged that arbitration provides for considerable freedom in shaping the arbitration process. However, the Court also said that the way in which parties exercise their contractual freedom still has to be consistent with the express terms of the FAA. The Court therefore analyzed the text of the statute first by reference to the text of Section 10 itself, and then by reference to the rest of the statute.[114]

The Court's Section 10 analysis centered on the well-established doctrine of *ejusdem generis.* Under this doctrine, when a statute sets forth a series of specific items and then ends with a general term, that

107. *Id.* ("The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law." (citing Wilko v. Swan, 346 U.S. 427, 436-437 (1953))).

108. *Id.*

109. *Id.*

110. *Id.*

111. For the immediately preceding reference to *Wilko* and the concept of manifest disregard, see First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

112. *Hall Street*, 128 S. Ct. at 1404.

113. *Id.* (The FAA is "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered." (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985))).

114. *Id*. at 1403-06.

general term is understood to be limited to subjects that are similar in kind with the preceding specific terms.[115] In its *ejusdem generic* analysis, the Court listed more than a half dozen terms in Sections 10 and 11 that the Court said stood for the proposition that "extreme arbitral misconduct" provides a basis for vacatur or modification: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] powers," "evident material miscalculation," "evident material mistake," and "awards upon a subject matter not submitted. . . ."[116] These specific terms were all followed by the general term "imperfect[ions]" that go to "a matter of form not affecting the merits."[117] Applying the doctrine of *ejusdem generis*, the Court said the general term "imperfect[ions]" would be limited by the specific words of "extreme arbitral misconduct" and therefore could not provide a "textual hook for expansion"[118] to include errors of law through contracted judicial review. "'Fraud' and mistake of law are not cut from the same cloth," the Court said.[119]

In so many words, the Court also used the Whole Act Rule to further its analysis, although it did not refer to the doctrine by name. Under the Whole Act Rule, courts interpret the meaning of a statute by reference to other parts of the same statute.[120] In this case, the Court said "expanding the categories would rub too much against the grain of the Section 9 language, where provision for judicial confirmation carries no hint of flexibility."[121] Section 9 provides that courts "must grant" an order confirming an arbitration award unless there is a motion to vacate, modify, or correct under Sections 10-11,[122] and, in the Court's view, is part of the legislative bargain trading off substantive judicial review in Sections 10 and 11 in exchange for the "streamlined treatment" for motions to confirm, vacate, or modify arbitration awards in Sections 9-11.[123] Without the statutory availability of confirmation, parties would have to negotiate a separate contract in order to receive judicial enforcement of an arbitration award.

115. *See* WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, & ELLIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 852-54 (4th Ed. 2007) [hereinafter ESKRIDGE].

116. *Hall Street*, 128 S. Ct. at 1404.

117. *Id*.

118. *Id.*

119. *Id.* at 1405.

120. For an extensive discussion of the "whole act rule," see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION, 263-76 (2000) (noting that the rule is universally followed in both federal and state courts, in civil courts, as well as the courts of other common-law countries).

121. *Hall Street*, 128 S. Ct. at 1405.

122. 9 U.S.C § 9 (2006).

123. *Hall Street*, 128 S. Ct. at 1405.

Rather than "fighting the text," the Court said Sections 9-11 should be read together as supporting a national policy favoring the arbitration of disputes "with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[124] In other words, the court concluded that the FAA adopts a particular understanding of arbitration as a process that included the concept of finality, which is not waivable by the parties. Here, the Court was clearly concerned with the possible impact of contracted review on the finality of the arbitration process. The Court noted that "[a]ny other reading opens the door to full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time consuming judicial review process and bring arbitration theory to grief in post-arbitration process."[125]

There were two dissents: one by Justice Stevens, writing for himself and Justice Anthony M. Kennedy, and the other by Justice Stephen Breyer, writing alone. Stevens' dissent said the majority's decision "conflicts with the primary purpose of the FAA, and ignores the historical context in which it was passed."[126] This dissent is discussed more fully below.[127] Justice Breyer issued a short dissent emphasizing that the FAA "does not *preclude* enforcement of such an agreement."[128] Breyer's approach was philosophically different than the majority's approach. Where the majority sought to determine whether there was a textual basis *permitting* judicial review of arbitration awards, for Justice Breyer the proper inquiry was whether the statute precluded contracted judicial review.[129] Since the majority had not demonstrated a statutory intent to *preclude* judicial review, Breyer said he would "simply remand the case with instructions that the Court of Appeals affirm the District Court's judgment enforcing the arbitrator's final award."[130]

IV. UNDERSTANDING *HALL STREET*

The Court's perhaps surprising opinion can be explained on at least three grounds: statutory interpretation, pragmatic concerns about opening the door to expanded judicial review, and sensitivity to the unique characteristics and values of the arbitration process.

124. *Id.*
125. *Id.*
126. *Id.* at 1408.
127. *See infra* notes 151-58, and accompanying text.
128. *Hall Street*, 128 S. Ct. at 1410 (Breyer, J., dissenting).
129. *Id.* at 1410.
130. *Id.*

A. The Fight Over Statutory Interpretation

One way to explain the decision is that it was as much about the court's approach to statutory interpretation as it was about the contours of arbitration under the FAA. For the last few decades the Court has struggled over modes of statutory interpretation. For more than a generation between the 1950s and the 1970s, legal process theory dominated statutory interpretation. Ascertaining statutory purpose was the hallmark of this school, and the Court would divine statutory intent by reference to the plain language of the statute and the legislative history behind the statute, as well as any other extrinsic sources that might help the court interpret and apply the purpose of the statute, including other statutes, other significant societal events at the time of enactment, or even newspaper reports about issues relevant to the legislation.[131]

With the arrival of Justice Antonin Scalia on the Court in 1986, as well as the arrival of certain conservative federal circuit judges—most notably Seventh Circuit Judges Frank Easterbrook and Richard Posner—the Supreme Court and the lower federal courts have moved toward a more textualist approach. Professor Eskridge has called this movement "the New Textualism."[132] The root of the new textualism is the belief that legislative intent and statutory meaning can only be drawn from the text of the statute. Other tools of interpretation simply are irrelevant to the inquiry of statutory intent.

Far removed from the legal process school judges, the New Textualists stand in contrast even to the traditional textualists, who would look at the text of the statute as the primary source of meaning, but would also use other tools of statutory interpretation, most notably legislative history, to discern statutory meaning when the statute itself is

131. *See* Holy Trinity Church v. United States, 143 U.S. 457 (1892) (demonstrating breadth of resources upon which a court may draw to discern legislative intent).

132. *See* Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Dialogue*, 112 HARV. L. REV. 4, 14-26 (1997) (distinguishing textualism from purposivism); William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (documenting the rise of the new textualism); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992) (placing new textualism in context with prior theories); John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005) (distinguishing textualism and intentionalism); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684-89 (1997) (describing textualist arguments against "genuine legislative intent"); Judge Patricia Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990).

ambiguous.[133] For the New Textualists, legislative history should not even be consulted to confirm the apparent meaning of a statutory text. Rather, the plain language of the text of the statute is controlling, and if any clarification or confirmation is required, it should come from the structure of the statute, interpretations given similar statutory provisions, and canons of statutory interpretation.[134]

This battle over interpretation was born out in the *Hall Street* case, with New Textualism bringing together an ideologically mixed group of justices in the 6-3 majority: Justice David Souter, writing the opinion for the court, joined by Chief Justice John Roberts Jr. and Justices Antonin Scalia, Clarence Thomas, Ruth Bader Ginsburg, and Samuel Alito.[135]

The Court's analysis of the statute in Part III focused exclusively on the statutory text of Section 10(a) and how it squared with the rest of the Federal Arbitration Act, rather than using legislative history to determine the intent or purpose of the statute. Indeed, the Court defined its task as attempting to square the claimed freedom of contract with the statutory text.[136]

Since the statute did not say whether its list of grounds for vacatur was exclusive, the statutory language was clearly ambiguous and required additional inquiry for interpretation. Rather than consult the legislative history or other extrinsic aids to discern the statute's purpose or intent, Justice Souter focused instead on the structure of the statute and canons of interpretation. With respect to structure, Souter looked at the enforcement provisions as a whole—Sections 9-11—and found that they embodied a legislative bargain that traded off judicial review of arbitration awards in favor of streamlined judicial treatment of motions to confirm, vacate, or correct arbitration awards.[137] In this way, the structure of the act promotes the use of arbitration by assuring that it remains an efficient alternative to public adjudication.[138]

Similarly, the Court also took a Whole Act approach in rejecting Hall Street's argument that Section 10(a) is merely a default rule that can be freely varied by the parties. The Court pointed to Section 5 of the

133. *See* ESKRIDGE, *supra* note 115, at 667-684 (New Textualism) (critiquing arguments that legislative history should never be considered).

134. *See* ESKRIDGE, *supra* note 115, at 623-24.

135. *Hall Street*, 128 S. Ct. at 1399.

136. *Id.* at 1404 ("But to rest this case on the general policy of treating arbitration agreements as enforceable as such [because of the freedom of contract] would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.").

137. *Id.* at 1402.

138. *Id.* at 1405. For an argument that the *Hall Street* result is inefficient, see David K. Kessler, *Why Arbitrate? The Questionable Quest for Efficiency in* Hall Street Associates, LLC v. Mattel, Inc., ___ FLA. ST. BUS. L. REV. ___ (forthcoming 2009).

FAA as an example of a default rule in that statute.[139] That provision deals with arbitral selection and provides that

> [i]f in the agreement provision be made for a method of naming or appointing an arbitrator . . . such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, . . . then upon application of either party to the controversy, the court shall designate and appoint an arbitrator.[140]

Finally, Justice Souter also used the doctrine of *ejusdem generis* to support his textual argument.[141] As noted above, this doctrine is a time-honored canon of statutory interpretation holding that general words followed by specific words should be limited to the character of the specific words.[142] Here, Justice Souter identified more than a half dozen words in both Section 10 and Section 11, the modification provision, to suggest that the chief concerns of the provisions were "extreme arbitral [mis]conduct."[143] Hall Street was seeking review for mistakes of law, which Justice Souter said simply was not "cut from the same cloth" as fraud.[144]

From a statutory interpretation perspective, it is particularly telling that the majority opinion does not even purport to determine statutory purpose or intent; rather, it simply seeks to determine whether the words of the statute permit the construction sought by Hall Street Associates. Nor does the opinion mention legislative history until a footnote to its final words, and even then only in support of Justice Souter's conclusion that "whatever the consequence of our holding, the statutory text gives us no business to expand the statutory grounds."[145]

Footnote 7 then describes how "[t]he history of the FAA is consistent with our conclusion."[146] In this regard, the majority—excluding Justice Scalia, who refused to join this part of the opinion[147]—looked at the New York statute upon which the FAA was modeled, noting that its limited grounds for vacatur and modification are "virtually identical" to those in the FAA.[148] The Court also looked at a brief tendered to the House and Senate Subcommittees of the Committees on

139. *Hall Street*, 128 S. Ct. at 1405.
140. *Id*.
141. *Id*. at 1404.
142. *See supra* notes 115-19, and accompanying text.
143. *Id.* at 1404.
144. *Id.* at 1405.
145. *Id.* at 1406.
146. *Id.* at 1406 n.7.
147. *Id*. at 1400.
148. *Id*. at 1406 n.7.

the Judiciary by a principal drafter of the statute, Julius Henry Cohen; the brief stated that awards may be vacated or modified "then and then only" if they meet the standards set forth in Sections 10 or 11.[149] Cohen also testified that the New York law was different than the Illinois law then in effect, "which required an arbitrator, at the request of either party, to submit any question of law arising during arbitration to judicial determination."[150]

The dissent by Justices Stevens and Kennedy presents a stark contrast in modes of statutory interpretation, reflecting more of a legal process perspective. It heavily emphasized congressional intent, purpose, and history. Justice Stevens said the "core purpose" of the FAA was "to abrogate the general common-law rule against specific enforcement of arbitration agreements" and "to ensur[e] that private arbitration agreements are enforced according to their terms."[151] For Justice Stevens, purpose trumps text,[152] and the Court's refusal to enforce "perfectly reasonable judicial review provisions in arbitration agreements fairly negotiated by the parties and approved by the district court"[153] "defeats the primary purpose of the statute."[154] Justice Stevens said the purpose of effectuating party agreements to arbitrate also trumps the Court's reliance on the "wooden application of the 'old rule of ejusdem generis.'"[155] Stevens concluded his opinion by echoing Hall Street Associates' freedom of contract argument, saying "[a] decision '*not to regulate*' the terms of an agreement that does not even arguably offend any public policy whatsoever, 'is adequately justified by a presumption in favor of freedom.'"[156]

Finally, it is worth noting that Stevens also relies on other extrinsic tools to support his conclusion. He refers to "the historical context"[157] and later cites two law review articles as supporting his conclusion that arbitration awards were subject to "thorough and broad judicial review."[158] Again, New Textualism would eschew references to such extrinsic interpretive aids.

In sum, then, statutory interpretation may provide one reason to explain the Court's decision in *Hall Street*. Justices frustrated by the

149. *Id.*
150. *Id.*
151. *Id.* at 1408.
152. *Id.* at 1409 (The "purpose [of the FAA] also provides a sufficient response to the Court's reliance on statutory text.").
153. *Id.* at 1408.
154. *Id.* at 1409.
155. *Id.*
156. *Id.* at 1409-10.
157. *Id.* at 1408.
158. *Id.* at 1409 n.3.

indeterminacy of intent and purpose in the FAA context may simply have thought textualism was the best approach. However, such formalism often masks other concerns, and it may well be that the decision is better explained by pragmatic concerns that the Court might have had with respect to contracted judicial review.

B. Pragmatic Considerations

The Court's decision can also be explained by pragmatic concerns—in particular the potential reach of an unbridled freedom of contract argument. On its terms alone, the freedom of contract bows to no inherent limitations, and Hall Street Associates was essentially arguing that the FAA should be interpreted to endorse party contracting power over all aspects of arbitration, including judicial review.

But adopting such an approach would open the door to difficult questions that would consume much judicial time and resources as the courts decided just how much freedom parties might have in prescribing the rules that would be applied by federal courts reviewing arbitration awards. Would parties, for example, be able to specify the legal rules that a reviewing court would be required to use—perhaps even requiring the court to apply a standard for review that is inconsistent with present law?[159] Could courts be precluded from applying a particular rule of law if that is what the parties wanted and to which they agreed? Would the courts have to apply or construe a substantive rule that the parties had drafted into their agreement, perhaps one that was unique in that it had not been adopted by any federal court, or perhaps by the relevant circuit? What if the rule directly contradicts the circuit's law or U.S. Supreme Court precedent?[160]

Reliance on a broad freedom of contract invites rather than resolves such questions, and would lead to an inefficient use of the limited resources of the courts. Indeed, from the perspective of the courts, it is hard to imagine a move more detrimental to judicial efficiency than permitting expanded judicial review. The introduction of substantive judicial review of arbitration awards by contract opens the courthouse doors to an entire class of cases—appeals of arbitration awards—not currently eligible for consideration by the federal courts, and a relatively

159. Professor Rau has suggested, for example, that Prima Paint is a default rule that parties may freely contract around. *See* Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 236 (1997).

160. For discussion of a creative ADR structure that began with arbitration but was followed by a negotiation that resulted in a contractual agreement to establish a private system of law, see Robert H. Mnookin & Jonathan D. Greenberg, *Lessons of the IBM-Fujitsu Arbitration: How Disputants Can Work Together to Solve Deeper Conflicts*, DISP. RESOL. MAG., Spring 1998, at 16.

large class at that. What is more, those doors are not opened once but twice, at the trial level and then at the appellate level reviewing those trial level decisions. While records are not kept on the number of arbitrations conducted every year, and providers jealously guard such information as proprietary, it seems reasonable to assume the total number of cases arbitrated annually in the United States is at least in the hundreds of thousands, if only because of the proliferation of mandatory arbitration provisions in standard form contracts. This would put considerably more pressure on the dockets of the current federal bench and perhaps even require its expansion to accommodate the additional workload.

Since traditional notions of judicial prudence militate against opening the door to such substantive and procedural problems,[161] it is not surprising for the Court to take a narrower approach to the freedom of contract, endorsing party freedom to contract in ways consistent with the language of the statute. Such an approach respects party autonomy to contract on a wide variety of issues—who the arbitrator is, the way the arbitrator is chosen, the standards for decision, what issues are arbitrable[162]—while at the same time avoids embroiling the courts in questions that are not necessary to resolve in order to give meaning and effect to the statute as drafted.

C. Process Characteristics and Values[163]

A third explanation for the Court's seemingly odd result is that it was taking into account the unique process characteristics and values of the arbitration process, as historically understood under the Federal Arbitration Act. The most significant of these virtues for purposes of

161. For a discussion of prudentialism, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 59-73 (1982) (describing prudential argument as one of six categories of approaches); *see also* Damien Schiff, *Nothing New Under the Sun: The Minimalism of Chief Justice Roberts and the Supreme Court's Recent Environmental Law Jurisprudence*, 15 MO. ENVTL. L & POL'Y REV. 1, 14-26 (2007). *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 69-70, 111-98 (1962) (regarding the "Passive Virtues" as related to prudentialism).

162. *Hall Street*, 128 S. Ct. at 1404.

163. By process characteristic and value theory, I am referring to my proposal for distinguishing between dispute resolution processes according to several different dimensions of process characteristics and values: party autonomy, level of formality, efficiency, the decision maker, the standard for decision, the form of the decision, the enforceability of the decision, finality, privacy, and civility. According to the theory, these distinctions should be considered when regulating a dispute resolution process, either formally through legislation, administrative or judicial rules or informally through industry standards. *See* Reuben, *Process Purity*, *supra* note 44, at 277-84.

this case are the distinct but interrelated characteristics of finality and efficiency.

1. Finality and Efficiency

Finality is a defining difference between commercial arbitration under the FAA and public adjudication, a structural characteristic that distinguishes arbitration from other dispute resolution processes. Unlike public adjudication, which provides appellate review to assure the trial judge's proper and accurate application of the law to the facts, the decisions of arbitrators are generally not subject to substantive review for correctness or accuracy. Indeed, the notion of substantive "correctness" or "accuracy" historically has had little place in arbitration precisely because arbitration calls for the exercise of worldly judgment that is informed by a variety of considerations that may not lend themselves to an objective notion of correctness or accuracy, such as knowledge of economic considerations in the securities industry or professional standards and practices in the construction industry. Federal and state courts alike have been consistent in their support of the finality of arbitration, even refusing to disturb arbitration awards that are clearly erroneous on their face.[164]

Finality helps to achieve efficiency in arbitration, another process characteristic and value, and an important goal for many choosing arbitration as a means to resolve their disputes. The potential for efficiency has been an important virtue of commercial arbitration throughout its Anglo-American history. Arbitration became formalized in the commercial context with the rise of the craftsmen's gilds and Court Merchant fairs of the twelfth and thirteenth centuries.[165] Efficiency was particularly important in these contexts because of the need of parties to get their dispute resolved and move on with their lives. The Court Merchant fairs, for example, involved itinerant merchants who traveled from town fair to town fair peddling their wares.[166] Speed of resolution and finality of result were particularly important to these traveling merchants because they were often in a community only for a short period of time.

Today, the potential efficiency advantages of speedy resolution and lower costs continue to be among the more compelling reasons parties

164. *See, e.g.*, Major League Baseball Players Assoc. v. Garvey, 532 U.S. 504 (2001); Moncharsch v. Heily & Blase, 832 P.2d 899 (Cal. 1992).

165. *See* Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 133-34 (1934).

166. *See generally* JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 71-83 (1918).

have for choosing arbitration. Arbitration can be faster and cheaper than the courts, in part because it averts the long waiting time for a trial in some jurisdictions, the large legal and expert witness fees generated by extensive pre-trial discovery and long, complex trials, and the delay to the implementation of an adjudicatory decision that can be caused by appeals.[167]

The Supreme Court's decision explicitly preserves these qualities of arbitration. In a crucial part of the opinion Souter says limited review is "needed to maintain arbitration's essential virtue of resolving disputes straightaway."[168] While the language is a bit odd, it is clear that Souter is considering finality, and that he sees the relationship between finality and efficiency. "Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,' and bring arbitration theory to grief in post-arbitration process."[169]

Thus, under a process characteristics and values approach, the Court's decision simply reflects a decision to preserve, as much as possible, FAA arbitration's core characteristics and values of finality and efficiency as understood by the enacting Congress.

2. Reversing Field?

The Court's holding on this point clearly privileges finality over party autonomy, which is also an arbitration process virtue. This seems at odds with an earlier case in which the Court was confronted with the tension between efficiency and autonomy, and came down on the side of autonomy. In that case, *Dean Witter Reynolds, Inc. v. Byrd*,[170] the action arose from a brokerage agreement that included an arbitration clause and involved both federal securities claims and related state law claims.[171] The investor had filed in federal district court, but the broker moved to sever the state law claims so that they could be arbitrated pursuant to the agreement.[172] (The broker assumed the federal claims were not arbitrable under the law at the time.)[173] The Supreme Court held that the state claims were arbitrable, even though it meant the case would be

167. *See generally* Riskin, *supra* note 2, at 652-54.
168. *Hall Street*, 128 S. Ct. at 1405.
169. *Id.*
170. 470 U.S. 213 (1985).
171. *Id.* at 214-15.
172. *Id.*
173. *Id.* at 215. In *Wilko v. Swan*, 346 U.S. 427 (1953), the court had held that a predispute agreement to arbitrate certain claims under the Securities Act of 1933 was unenforceable. *See id.* at 216 n.1.

heard in both arbitration (on the state claims) and in federal court (on the federal claims).[174] In so holding, the court said: "The legislative history of the Act establishes that the purpose behind its passage was to ensure the judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."[175]

Some have suggested *Hall Street* is a reversal of the Court's position in *Byrd*.[176] However, such an understanding ignores the real differences between finality and efficiency as process values. Finality is about the degree to which a decision is reviewable, while efficiency is about whether the process saves the parties and the system time, money, and other resources. As process values, they are related but distinct. Finality fosters efficiency, but it is not the same as efficiency.

Under this view, to equate *Byrd* with *Hall Street* is to mix apples and oranges. *Byrd* said institutional efficiency is not enough to trump party autonomy, while *Hall Street* said that finality is enough to trump party autonomy. This interpretation makes perfect sense when you consider that Congress had a particular form of arbitration in mind when it enacted the Federal Arbitration Act in 1925, one that was built upon the twin pillars of the enforcement of arbitration agreements and the finality of arbitral awards.

According to Professor Schmitz, Congress was drafting against the backdrop of the common law history of arbitration in England and the United States.[177] Common law courts had an ambivalent relationship with arbitration, recognizing on the one hand arbitration's potential to enhance party autonomy, while on the other its capacity to undermine their own power as courts of law.[178] As a result, courts were reluctant to enforce agreements to arbitrate, but were willing to enforce arbitral awards as final and binding.[179] This general posture, however, did not prevent some courts from meddling with arbitration agreements when they so desired, using such techniques as finding the award "not sufficiently definite" or "complete and mutual" enough to be enforced.[180] They were also willing to set aside arbitration awards on grounds of

174. *Dean Witter Reynolds*, 470 U.S. at 216-17.
175. *Id.* at 219.
176. *See* Kessler, *supra* note 138.
177. *See generally* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123 (2002). Significantly, none of this background was available to the court since it used a New Textualist approach to analyzing the statute. *See supra* notes 132-58, and accompanying text.
178. Schmitz, 37 GA. L. REV. at 139-40.
179. *Id.*
180. *Id.* at 141.

contract interpretation or public policy, as well as for legal errors, if the arbitration agreement so provided.[181]

Schmitz demonstrates that the drafters of the U.S. Arbitration Act, and its virtually identical predecessor, the New York Arbitration Law, sought to clear up this confusion in the common law on judicial review by setting up a system of limited, non-substantive review: the streamlined approach to enforcement in Sections 9 and 10.[182] As described above, the grounds in Section 10 were limited to procedural irregularity, and courts in Section 9 were required to confirm awards when asked by a party unless the grounds for vacatur in Section 10 were satisfied. "Drafters of the legislation aimed to preserve the efficiency and simplicity of arbitration, and to protect its self-contained process based on equity, norms, and custom," Schmitz explains.[183] Indeed, to maintain the distinction between arbitration and public adjudication, the drafters also rejected the English rule permitting review of errors of law and deliberately established a model of arbitration as a process whose results were final and binding.[184] Thus, the drafters "sought to ensure the independence of arbitration from the judiciary by crafting legislation that would require strict enforcement of not only arbitration agreements, but also awards."[185]

Thus, it is not surprising for the *Hall Street* Court to distinguish *Byrd* by saying *Byrd* was "merely trying to explain that the inefficiency and difficulty of conducting simultaneous arbitration and federal-court litigation was not a good enough reason to defer the arbitration."[186] Since the purpose of the FAA was to enforce agreements to arbitrate, generalized claims of efficiency could not possibly trump enforceability in *Byrd*. However, since the purpose of the act was also to implement a model of arbitration that was characterized by finality, and thus efficiency, the expanded review argument must fail in *Hall Street* because expanded review would undermine the finality and efficiency of the arbitration process itself. Put another way, the personal autonomy argument prevailed in *Byrd* because it was set against a mere generalized claim of efficiency, while the argument failed in *Hall Street* because it would have caused a change in the *structure* of the FAA arbitration process itself that would make the process less efficient. It is this practical dynamic that would "bring arbitration theory to grief in post-

181. *Id.* at 141-42.
182. *Id.* at 134, 143.
183. *Id.* at 144.
184. *Id.* at 149-50.
185. *Id.* at 144.
186. Hall St. Assocs., LLC v. Mattel, Inc., 128 S.Ct. 1396, 1406 (2008).

arbitration process,"[187] and which the Court properly rejected from a process characteristics and values perspective.

IV. VACATUR AFTER *HALL STREET*

The Supreme Court's decision in *Hall Street* will impact both the statutory and non-statutory grounds for vacatur described in Part II of this Article.[188] With regard to statutory grounds, *Hall Street* can be expected to focus practitioners' attention on Section 10(a)(4) as a possible way around *Hall Street* to provide substantive judicial review for parties who want to contract for it. Courts should resist this temptation, however, because this approach would permit parties to accomplish indirectly what *Hall Street* forbids them to accomplish directly, as discussed more fully below. For non-statutory grounds, the opinion should effectively eliminate all but the public policy ground, in my view, also discussed in more detail below.

A. Statutory Grounds

The FAA's statutory grounds do not provide for substantive judicial review of arbitration awards, and *Hall Street* limits the grounds for judicial review of arbitration awards to those specifically enumerated in the statute. Still, litigants who lose in arbitration can reasonably be expected to want to have adverse decisions set aside, and to focus their attention on Section 10(a)(4) of the FAA as an attempt to avoid the *Hall Street* decision.[189]

1. The Expansion of Section 10(a)(4)

In relevant part, Section 10(a)(4) of the FAA allows for the vacatur of awards "where arbitrators exceed their powers . . .," and leaves parties seeking to use it to obtain judicial review with at least two options.[190] Under the first option, parties may argue that an implied condition of the arbitral award is that it be consistent with the law of the relevant jurisdiction. Or, the parties can be more proactive, and draft substantive review provisions into their arbitration clauses. For example, they may insert clauses into arbitration provisions that preclude an arbitrator from making an error of law, or an error of fact, or deciding the case in a way

187. *Id.* at 1405.

188. *See supra* notes 21-84.

189. 9 U.S.C. § 10(a)(4) (2006). See Carroll Neesemann, *Helping the Supreme Court Help Arbitration: Narrowing the Grounds for Review of Awards in Hall Street and Beyond*, 1 N.Y. DISP. RESOL. L. 13, 14 (Fall 2008), for an article urging practitioners to take this approach.

190. 9 U.S.C. § 10(a)(4) (2006).

that reflects the other major non-statutory grounds (public policy, arbitrary and capriciousness, and irrationality).[191] Such a provision would provide a firm basis to challenge an award that was legally erroneous, based on factual error, etc., as exceeding the power of the arbitrator.

The parties in *Wood v. Penntex Resources*,[192] a post-*Hall Street* case, included just such a provision. The case involved a corporate takeover contract that included a provision in its arbitration clause prohibiting "clearly erroneous findings of fact."[193] The losing party in the arbitration sought to have the award vacated on the ground that it exceeded the scope of the arbitrator's powers under Section 10(a)(4) because the award included two alleged errors of fact-finding.[194]

Should such a claim be permitted after *Hall Street*? There are compelling arguments going both ways.

On the one hand, party autonomy remains a coveted value of the arbitration process and dispute resolution in general, and parties have long been able to define the scope of the arbitrator's authority by determining which issues may be arbitrated under the agreement. In this regard, exceeding-powers review is simply another way in which the arbitrator's power is defined.[195] Under this view, an award based on clearly erroneous findings of fact should permit the arbitration loser to bring the claim, as in *Wood v. Penntex Resources*, and to have the award set aside. Such an award would exceed the scope of the arbitrator's authority under Section 10(a)(4).

Conversely, one could also argue that such an approach would improperly circumvent the central holding of *Hall Street*: that the grounds for the substantive judicial review of an arbitration award are limited to those specifically enumerated in the act. This is the view that the U.S. District Court for the Southern District of Texas actually took in

191. See Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 431-33 (2003), for a suggestion to this effect.

192. Civil Action No. H-06-2198, 2008 WL 2609319 (S.D. Tex. June 27, 2008).

193. *Id.* at *2 (with the full stockholder's purchase agreement stating that "The arbitrators' decision will be considered as a final and binding resolution of the disagreement, will not be subject to appeal and may be entered as an Order in any court of competent jurisdiction in the United States; provided that this Agreement confers no power or authority upon the arbitrators to render any decision that is based on clearly erroneous findings of fact, that manifestly disregards the law, or exceeds the powers of the arbitrator, and no such decision will be eligible for confirmation.").

194. *See id.* at *5.

195. *See* Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469 (2008) (arguing that the *Hall Street* Court improperly constrained personal freedom in arbitration).

Wood v. Penntex Resources. Refusing to vacate the arbitration award, the court stated:

> Under the narrow reading of *Hall Street* Wood urges, parties could expand the statutory grounds for vacatur to include other errors or defects simply by defining an arbitrator's power as not including the power to make awards based on those errors or defects. The reviewing court would then have to review the award to determine if it was based on any of those errors or defects, and if so vacate the award. [This] would result in precisely the 'full bore legal and evidentiary appeals' that the Court held the FAA precluded.[196]

In my view, the *Wood* court properly held that parties should not be able to accomplish indirectly what *Hall Street* prohibits them from accomplishing directly. The fundamental principle behind *Hall Street* is a rule of judicial non-intervention—that courts are not to meddle with arbitration awards—except under the limited circumstances that Congress has specified. A process characteristics and values perspective helps to explain the appropriateness of the *Wood* court's approach.

2. A Process Values and Characteristics Perspective

In a previous article, I suggested that the essential process characteristics and values of a dispute resolution process could be defined along several dimensions: party autonomy, level of formality, efficiency, the decision maker, the standard for decision, the form of the decision, the enforceability of the decision, finality, privacy, and civility.[197] Several of these dimensions would be adversely affected with respect to arbitration under the FAA if the courts permit Section 10(a)(4) to be used as a vehicle for expanded substantive review of arbitration awards.

a. Efficiency

As experience in the public adjudication system itself suggests, a losing litigant in adjudication with an opportunity to appeal will often take advantage of the opportunity to appeal.[198] If courts permit Section

196. *Id.* at*8.

197. *See* Reuben, *Process Purity*, *supra* note 44.

198. Empirical researchers looking at federal courts, for example, have found a significant level of appeals, although there is significant variation in the assessment of the federal rate depending upon the data set and other research parameters. Cornell Law School empiricist Theodore Eisenberg found a federal appeal rate of 10.9% for all federal civil cases filed between 1987 and 1996. Theodore Eisenberg, *Appeal Rates in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 663, 664 tbl.1 (2004). Other researchers have found lower rates. *See, e.g.*,

10(a)(4) to be used as a vehicle for expanding substantive judicial review, then one can only assume that, at the minimum, sophisticated users with bargaining power can reasonably be expected to include such excess-power provisions just to preserve the option of appealing an adverse decision; indeed, this may well be the real motivation behind party interest in contracted judicial review to begin with.[199]

It is one thing for parties to choose to waive their interest in the efficiency of arbitration; but, the implications for the courts are quite significant in terms of the potential, increased workload that would result from the broad use of substantive review provisions. To be sure, one can certainly argue that there would not be any more cases, that the cases currently in the system as non-statutory grounds cases would simply be recharacterized as Section 10(a)(4) cases. But one may just as easily speculate—more plausibly in my view—that even just a few successful cases could give hope to many disgruntled litigants, potentially increasing the number of cases that the courts would have to consider—possibly at both the trial and appellate levels. What is not speculative, however, is that refusing to permit the expanded use of Section 10(a)(4) would remove those claims from the system entirely. Thus, expanded substantive review through Section 10(a)(4) would likely be inefficient for the courts.

b. Standard for Decision

Arbitrators who are directed to follow the law in the arbitration submission will have little reason to change their practices if enhanced substantive review is permitted through an expanded Section 10(a)(4). However, arbitrators who are not directed to follow the law, presumably the more common situation,[200] will have an incentive to further legalize their arbitral decision making, to the detriment of the process.[201]

Carol Krafka, Joe S. Cecil, & Patricia Lombard, *Stalking the Increase in the Rate of Federal Civil Appeals*, 18 JUST. SYS. J. 233, 244 (1996) ("The relationship between appeals and district court terminations [has remained] steady through the years, with approximately 8.6 appeals filed for every 100 district terminations."). Others have said it is higher, "approximately 13 percent," Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 556-57 (2006), while others place it in the 10.3 percent to 18.6 percent range, when high-appeal cases, such as prisoner and federal civil rights appeals, are factored into the analysis. *See* Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1609 n.38 (2000). One can reasonably expect results that are not too dissimilar for state courts.

199. It is unclear just how many parties in fact seek to contract for judicial review. The anecdotal evidence is that the practice is rare, although it is an empirical question worth pursuing. Still, I am skeptical given that finality is one of the reasons why parties might seek to choose arbitration to resolve a dispute.

200. Whether there are more arbitration clauses with provisions directing the arbitrator to follow the law than not is an empirical question upon which I have seen no

Arbitrators who do not base their decisions on legal standards today have the capacity and comfort of doing so precisely because there is no appellate body to "second-guess" their decisions. In an environment of substantive judicial review through Section 10(a)(4), it is reasonable to expect this to change quite dramatically. Arbitrators can be expected to rely less on equity, justice, industry standards, or other norms that could be interpreted by a reviewing court as legally or factually erroneous, arbitrary and capricious, in violation of public policy, or irrational. Few neutrals like to be reversed, a dynamic that is only exacerbated by the fact that arbitration is a system that is largely regulated by the free market, where reversal and affirmation rates can easily be exploited in the competition for market share.[202] While only time will tell, one can reasonably foresee arbitral decision making becoming less adaptive to the situation and more closely tethered to pre-existing legal norms in such an environment.

The institutionalization of this type of formalization would be devastating to FAA arbitration as we know it. Along with finality, the flexibility of decision making and the ability of the arbitrators to ground their rulings in norms other than law go to the heart of arbitration as a dispute resolution process and its distinction from public adjudication. It is this flexibility that allows arbitrators to season their judgment with their experience, their knowledge of the field, and practical common sense. Without this kind of flexibility, you simply do not have arbitration—certainly not the concept of arbitration that led Congress to endorse arbitration so strongly in the Federal Arbitration Act.[203]

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research. Given that the standard form arbitration clauses provided by the American Arbitration Association and JAMS do not include judicial review provisions, I would assume that the majority of arbitration clauses do not include such provisions. *See* American Arbitration Association, Drafting Dispute Resolution Clauses—A Practical Guide (2007); JAMS, JAMS Guide to Dispute Resolution Clauses for Commercial Contracts (2006), http://www.jamsadr.com/adrtips/clauses.asp (last visited Jan. 11, 2009).

201. For a fuller articulation of concerns about the legalization of arbitration, see Thomas Stipanowich, *Arbitration: The 'New Litigation'*, Nov. 7, 2008, http://ssrn.com/abstract=1297526. For concerns about a similar phenomenon in mediation, see Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR'*, 19 FLA. ST. U. L. REV. 1 (1991).

202. There has been surprisingly little research on competition within the ADR industry, but it certainly exists. *See, e.g.*, ADR Brief, *The AAA's Not-So-Happy New Year*, 24 ALTERNATIVES TO HIGH COST LITIG. 19 (Feb. 2006) (describing increased competition in the ADR provider field); David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63-APR DISP. RESOL. J. 37, 45 (2008) (noting how general statistics on the use of neutrals are not kept); Anthony M. Aarons, *Packaging ADR: The Industry Is Still Searching for a Way to Make Money*, CAL. LAW., Feb. 1998, at 26 (detailing competition in the ADR industry).

203. *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 272-73 (1926) ("There is no opportunity for vacation upon a

c. Form of Decision

Enhanced substantive judicial review through Section 10(a)(4) may also change the form of arbitral decisions. Courts will need to have written and reasoned decisions to review, and arbitrators will be obliged to provide them. This will come at a financial cost to the parties, who will have to pay for the arbitrator's time drafting the opinion. One may reasonably expect that court review will also result in delay in at least some cases, perhaps many, as arbitrators labor more defensively to produce written and reasoned awards that will withstand the scrutiny of a reviewing court. Again, this dynamic would defeat the efficiency goals of the arbitration process, and the parties' interest in expeditious dispute resolution.

d. Formality

Raising the level of judicial review through Section 10(a)(4) can also be expected to raise the level of formality of arbitration hearings. Legal counsels of course must represent their arbitration clients as diligently and zealously as their clients in public adjudication.[204] In an environment of enhanced substantive judicial review through Section 10(a)(4), one can reasonably anticipate lawyers being compelled to prepare the case for review during the arbitration proceeding itself just as they do during a trial proceeding. This means not only raising more objections, but also introducing more defensive evidence aimed at bolstering one's own prospects upon appeal or blunting the force of the other party's appeal.

e. Privacy

Finally, the privacy of arbitration would be severely compromised by a regime in which substantive review of arbitration awards was available through Section 10(a)(4). As noted above, substantive judicial review would require a record that a court can review, and a federal district court would generally be required to issue a written and reasoned opinion in its review of the award.[205] That opinion would necessarily include information that the parties might have chosen arbitration to

technical ground. The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced.").

204. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 & 1.3 (2007) (calling for "competent" and "diligent" representation); *see also* John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 219-24 (2008), for a succinct discussion on zealous representation.

205. *See* FED. R. APP. P. 10 (requirement of a record).

avoid making public, such as the identities of the parties, the facts of the dispute, the amount in controversy, and the arguments made by the parties. An opinion designated for publication could be reported by newspapers, broadcasted over the airways, and made available on commercial reporting services, such as Westlaw and Lexis/Nexis. Moreover, any documents received by the trial court would be freely available as public records.[206] While one or both of the parties could seek an order sealing the proceedings, the movant bears a high burden of proof and may not succeed.[207]

3. Substantive Arbitral Review: Appellate Arbitration

But what if the parties want to contract for some kind of substantive review? In my view, substantive review is still possible under *Hall Street*—although by arbitrators, not by courts. That is to say, what *Hall Street* said the FAA prohibits is the parties contracting for public substantive judicial review in a public court because error of law is not a ground for vacating an arbitral award. However, the *Hall Street* decision does not preclude the parties from engaging in private substantive review by another arbitrator or arbitral panel, a possibility for which major arbitration provider rules currently provide.[208]

Parties may have legitimate reasons for desiring substantive judicial review of an arbitration award, such as when the economic or other stakes are particularly high, or when they want the substantive law applied but do not want the delay that comes with public courts. The ability to tailor the arbitration process to the particular needs of the parties is one of the strengths of the process, and having opted out of the public system of law by choosing arbitration, the parties may still tailor the process to their needs by including a provision calling for substantive review by a private arbitrator. Such review fosters important freedom of contract and personal autonomy values in arbitration, and parties should

206. *See, e.g.*, Nixon v. Warner Commc'ns., Inc., 435 U.S. 589, 597 (1978) (recognizing a long-standing tradition of allowing the public "to inspect and copy public records and documents, including judicial records and documents").

207. *See* FED. R. CIV. PRO. 26(c) (authorizing the issuance of protective orders). Because of the presumption favoring public access to judicial proceedings, moving parties bear the burden of proof, which often requires a showing of good cause and specific harms that will be incurred by one or more of the parties if the information is disclosed. Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 547 (7th Cir. 2002) (parties secrecy agreement does not warrant maintaining documents under seal); United States v. Amodeo (*Amodeo I*), 44 F.3d 141, 146 (2d Cir. 1995) (establishing a presumption of access).

208. See, for example, JAMS Optional Arbitration Appeal Procedure, which may be found on its web site at http://www.jamsadr.com/rules/optional.asp (last visited on Jan. 11, 2009).

be able to trade off efficiency for substantive review at this level if they so desire.

Arbitral review would be similar to judicial review in the public system. Rather than being appeals in the public law sense of being limited to questions of law, however, such private arbitral appeals are more in the nature of a second round of arbitration, where finding of facts could be subject to review in addition to the arbitrator's legal determinations. Since private arbitral review would simply be a second arbitration, the award by the reviewing arbitrator or arbitral panel should be eligible for confirmation by the courts because the confirmation provision of the FAA does not distinguish between trial and appellate levels of arbitral decision making.[209]

Arbitral review would not adversely affect the arbitration process to the same degree as public judicial review. Private review does not implicate society's efficiency interests in the courts, and the proper allocation of judicial resources, because courts (and the public) are not required to bear the burden of this party choice. The parties alone pay those costs. Moreover, unlike a reviewing court, a reviewing arbitral panel would not need to review the case for compliance with the legal rules but could assess the validity of the ruling below on whatever standards that the arbitrator used to decide the case, such as industry standards, customs, or practices. While private arbitral review may result in more written and reasoned opinions, adding to formality, this additional level of formalization, by itself, is hardly a cause for alarm, and indeed, some parties already exercise this design option. Parties would not necessarily be more inclined to choose lawyers as arbitrators because the basis of decision would not be legal unless the parties directed the arbitrator to apply legal standards. Finally, arbitral review would not implicate the privacy concerns that public judicial review implicates because the arbitral reviews would be private proceedings rather than public hearings.

B. Non-Statutory Grounds

The foregoing discussion addressed only how the statutory grounds will be more important in a post-*Hall Street* world. By holding that the statutory grounds are "exclusive,"[210] the Supreme Court appears to have precluded the lower courts from considering arguments that an arbitral award may be vacated on non-statutory grounds. The analysis is more finely grained, however.

209. 9 U.S.C. § 9 (2006).
210. Hall St. Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1400 (2008).

1. Arbitrary and Capricious, Irrationality Review

As noted above, *Hall Street* rests on the principle that courts generally may not meddle with arbitration awards. Arbitration is a final process, and courts may not second guess arbitral awards. But what about awards that are truly bizarre? The common law grounds of arbitrary and capricious and irrationality review are aimed at such awards. Do they survive *Hall Street*?

In my view, the answer is no. These review standards are not statutory grounds under Section 10(a) and under *Hall Street*, and thus, it is unnecessary and inappropriate for courts to hear such claims. In choosing arbitration, parties make a calculated choice: that the benefits of the process outweigh the virtues of the public litigation process, virtues that include substantive review for arbitrariness and capriciousness and rationality in the form of judicial commitments to the rule of law.[211] With arbitration, the arbitrator's discretion is generally not constrained by rule of law norms. Rather, the arbitrator is afforded great latitude to reach a decision based upon the facts presented without second-guessing by the courts. However, what may seem perfectly rational to an arbitrator and a prevailing party may seem irrational to a losing party. As the Supreme Court has consistently repeated, as long as the decision draws its essence from the contract, its substantive legitimacy cannot be questioned by a court.[212] For cases in which the decision is not drawn from the essence of the contract, Section 10(a)(4) provides an adequate remedy—not because the awards are arbitrary and capricious or are irrational, but because they exceed the scope of the arbitrator's authority since the award is not drawn from the essence of the contract that the arbitrator has been authorized to interpret by the parties. As such, arbitrary and capricious review and irrationality review are unnecessary components of the architecture of arbitration, and should be shed as inconsistent with the Court's opinion in *Hall Street*.

2. Public Policy Review

The public policy exception presents a closer call than the arbitrary and capricious and irrationality non-statutory grounds. Under the precise language of the *Hall Street* opinion, the public policy exception should no longer be available as a basis for vacating an arbitration award.[213] It

211. *See* RISKIN, *supra* note 2, at 651-53.

212. United Steelworkers of America v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); Major League Baseball Players Assoc. v. Garvey, 532 U.S. 504 (2001); United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987).

213. *Hall Street*, 128 S. Ct. at 1400.

is not a statutory ground, and *Hall Street* limits the universe of valid grounds for vacatur to the statutory grounds. A strict reading of this produces an anomalous result in the public policy context, however. Consider for example the case of *Northrop Corp. v. Triad Financial Establishment*,[214] in which an arbitration award itself compels a party to perform an illegal act. In that case, a federal district court in California used the public policy ground to vacate an arbitration award that called for the payment of certain commissions that were illegal under Saudi Arabian law, U.S. Department of Defense regulations, and the federal Foreign Corrupt Practices Act.[215] If the Supreme Court decision in *Hall Street* is taken seriously, the award should not be set aside, despite the fact that it forces the parties to subject themselves to criminal liability if they comply with the arbitrator's order.

Such a result would frustrate public policy because the result is inconsistent with the contractual foundations of arbitration itself in that contract law does not permit the enforcement of contracts to perform illegal acts.[216] Moreover, the Supreme Court has long recognized a public policy exception to vacatur in the labor arbitration context. In *United Paperworkers International v. Misco*,[217] the Court said a court's refusal to enforce an arbitrator's interpretation of a collective bargaining agreement is limited to situations where the contract as interpreted would violate some explicit public policy that is "well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."[218] The Court applied this holding to reverse a district court judge's vacatur of an arbitrator's reinstatement of a worker terminated for drug use; the district court had ordered the dismissal of the worker because it said reinstatement would violate the public policy against the operation of dangerous machinery by persons under the influence of drugs.

214. Northrop Corp. v. Triad Fin. Establishment, 593 F. Supp. 928 (C.D. Cal. 1984).

215. *Id.* at 936-42.

216. RESTATEMENT (SECOND) OF CONTRACTS, §178 (1981) ("When a term is unenforceable on grounds of public policy."); E. ALLAN FARNSWORTH, CONTRACTS § 5.2, at 332-33 (1982) ("One policy that has endured is that against the commission or inducement of torts and similar wrongs."); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 781 (2d ed. 1977). *See, e.g.*, Sayres v. Decker Auto. Co., 145 N.E. 744, 745 (N.Y. 1924) (holding that agreement by seller of automobile to give buyer incorrect bill of sale to defraud insurance company is unenforceable because "the direct object of the parties is to do an illegal act").

217. 484 U.S. 29 (1987). For earlier consideration of public policy defenses to the enforcement of an arbitral award, see *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757 (1983) (enforcement of collective bargaining agreement would not compromise public policy requiring obedience to court orders or public policy favoring voluntary compliance with Title VII).

218. *Misco*, 484 U.S at 43.

Misco came up in the collective bargaining context, and the Supreme Court has never explicitly or impliedly extended it to the commercial context under the FAA. Lower courts, however, have applied it in the FAA context,[219] and the policy concerns supporting limited vacatur under federal labor law are similar to the policy concerns supporting limited vacatur under the Federal Arbitration Act, under which commercial arbitration arises.[220] In the labor context, limited judicial review of arbitration serves the strong federal policy favoring the settlement of labor disputes by arbitration as an alternative to the strike or other forms of workplace disruption.[221] In the commercial context, limited judicial review serves the strong federal policy favoring arbitration as a method of dispute resolution preferred by Congress in cases in which the FAA applies.[222] Both contexts recognize the importance of finality as an arbitration process characteristic and value, and yet both contexts have recognized a public policy exception to the general rule of finality.

The public policy exception is well-grounded and well-established, and nothing in the *Hall Street* opinion evinces an intent to eliminate it. It seems likely that courts will recognize a public policy exception to the seemingly strict rule of *Hall Street*, at least for illegal arbitration awards. Parties should not be expected to break the law in order to comply with an arbitration award. Less certain is whether courts will extend that exception to include the broader class of "well defined and dominant" policies recognized in *Misco*.[223] Time will tell.

219. *See, e.g.*, Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 951 (Utah 1996) (considering, but not finding, award violated public policy); Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 241-42 (1st Cir. 1995) (same); Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1012-13 (10th Cir. 1994) (same).

220. For a discussion, see LAURA J. COOPER, DENNIS R. NOLAN, & RICHARD A. BALES, ADR IN THE WORKPLACE 11-12 (2d ed. 2005).

221. FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS 7 (Marlin M. Volz & Edward P. Goggin eds., Supp. 2008, 5th ed. 1996); *see also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." (citing United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960))).

222. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 12 (1984) ("Congress declared a national policy favoring arbitration and withdrew [the states' power] to require a judicial forum for the resolution of claims that the contracting parties agreed to solve by arbitration."); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is in the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

223. United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 43-44 (1987).

3. Manifest Disregard Review

The availability of manifest disregard review was a nettlesome issue before *Hall Street*, and remains difficult after the opinion. On the one hand, the Court's broad limitation of vacatur to the statutory grounds would seem to foreclose manifest disregard review because manifest disregard is a common law ground rather than a statutory ground. However, there are at least two plausible arguments that the doctrine survives *Hall Street*.

The first is tied to the statute itself, and can be thought of as a labeling argument. As discussed above,[224] the *Hall Street* Court speculated that manifest disregard may simply be a label for judicial review under some or all of the statutory grounds. Under this view, manifest disregard survives because it is merely a way of describing the statutory grounds; it is not an independent ground for vacatur. This argument is not persuasive, however, because it presupposes a very different understanding of manifest disregard than what courts have traditionally interpreted the doctrine to mean. As discussed above, courts traditionally have understood manifest disregard to mean that the arbitrator knew the law and deliberately ignored it in reaching a decision.[225] This is a far cry from the fraud, partiality, and misconduct that lie at the heart of the first three statutory grounds. The fourth statutory ground, exceeding-powers review, presents a closer call, because it is technically possible to fit the lack of fidelity to the law within exceeding-powers review, as discussed above.[226] However, because it would frustrate the process characteristics and values of arbitration under the FAA, as also discussed above,[227] manifest disregard review should not be viewed as synonymous with exceeding-powers review.

The second argument that manifest disregard survives derives from what the Court did not do: expressly repudiate the manifest disregard doctrine.[228] Instead, the Court simply refused to "accord it the significance that *Hall Street* urges": that manifest disregard means that courts can vacate arbitral awards that are based on mere errors of law.[229] Since the Court did not affirmatively disavow its manifest disregard dictum, one may argue that the common law standard for manifest

224. *See supra* notes 108-09.
225. *See supra* note 61.
226. *See supra* notes 190-96 and accompanying text.
227. *See supra* notes 197-207 and accompanying text.
228. Hall St. Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1404 (2008).
229. *Id*. at 1404.

disregard—knowledge of the law and deliberate disregard of it—remains intact.

The arguments for and against the continued viability of manifest disregard in the wake of *Hall Street* are compelling and have generated support in the lower courts since *Hall Street*. Some courts have held that manifest disregard is dead after *Hall Street* because it is not a ground that is expressly included in the Section 10(a) grounds for vacatur.[230] At the same time, some courts have held that manifest disregard doctrine does survive *Hall Street*, citing primarily both the labeling and repudiation

230. *See, e.g.*, Citigroup Global Mkts., Inc. v. Bacon, No. 07–20670, 2009 WL 542780, at *8 (5th Cir. Mar. 5, 2009) (manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA); Prime Therapeutics LLC v. Omnicare, Inc., 555 F. Supp. 2d 993, 998 (D. Minn. 2008) (interpreting *Hall Street* as the end of manifest disregard review); ALS & Assocs., Inc. v. AGM Marine Constructors, Inc., 557 F. Supp. 2d 180 (D. Mass. 2008) ("[M]anifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]." (quoting Ramos-Santiago v. UPS, 524 F.3d 120, 124 n.3 (1st Cir. 2008))); Robert Lewis Rosen Assocs., Ltd. v. Webb, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008) ("the manifest disregard standard is no longer good law"); Hereford v. D.R. Horton, Inc., No. 1070396, 2008 WL 4097594, at *5 (Ala. Sept. 5, 2008) ("[M]anifest disregard of the law is no longer an independent and proper basis under the Federal Arbitration Act for vacating, modifying, or correcting an arbitrator's award.").

rationales.[231] Still other courts have simply found that it is an open question.[232]

Clearly, the U.S. Supreme Court is going to need to step in to resolve the schism in the lower courts and to settle the question once and for all. When it does, the Court should finally lay the ghost of manifest disregard to rest. For so-called general submissions to arbitration, in which the arbitrator is not instructed to follow the law, manifest disregard review is bad policy. For so-called "restricted submissions," in which the arbitrator is directed to follow the law, manifest disregard of the law is unnecessary because restricted submissions are generally not available after *Hall Street*.

231. *See, e.g.*, Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1283 (9th Cir. 2009) ("*Hall Street Associates* did not undermine the manifest disregard of law ground for vacatur."); Kashner Davidson Sec. Corp. v. Mscisz, 531 F.3d 68, 79 (1st Cir. 2008) (vacating an arbitration award on grounds of manifest disregard); Parnell v. Tremont Capital Mgmt. Corp., No. 07-0752-cv, 2008 WL 2229442, at *1 (2d Cir. May 30, 2008) (recognizing manifest disregard standard); Halliburton Energy Servs., Inc. v. NL Indus., 553 F. Supp. 2d 733 (S.D. Tex. 2008) (acknowledging, applying, but not finding manifest disregard after *Hall Street*); Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 93-96 (2d Cir. 2008) (recognizing continuing viability of manifest disregard); MasTec N. Am., Inc. v. MSE Power Sys., Inc., 581 F. Supp. 2d 321, 325, (N.D.N.Y. 2008) (stating *Hall Street* limits manifest disregard to the Section 10 bases); Chase Bank USA, N.A. v. Hale, 859 N.Y.S.2d 342, 349 (N.Y. App. Div. 2008) (viewing manifest disregard as an interpretation of Section 10); Reeves v. Chase Bank USA, NA, No. 4:07CV1101 HEA, 2008 WL 2783231, at *3 (E.D. Mo. July 15, 2008) (finding manifest disregard to be a ground for vacatur); Fitzgerald v. H&R Block Financial Advisors, Inc., No. 08-10784, 2008 WL 2397636, at *4 (E.D. Mich. June 11, 2008) (noting that manifest disregard of the law is a separate standard, distinct from the FAA); LaPine v. Kyocera Corp., No. C 07-06132 MHP, 2008 WL 2168914, at *6 (N.D. Cal. May 23, 2008) (recognizing manifest disregard is coextensive with exceeding powers review); Jimmy John's Franchise, LLC v. Kelsey, 549 F. Supp. 2d 1034, 1037 (C.D. Ill. 2008) (finding manifest disregard is available where arbitrator directs parties to violate the law); Joseph Stevens & Co., Inc. v. Cikanek, No 08 C 706, 2008 WL 2705445, at *4 (N.D. Ill. July 9, 2008) ("[W]e have defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory ground-'where the arbitrators exceeded their powers.'" (citing Wise v. Wachovia Sec., LLC., 450 F.3d 265, 268-69 (7th Cir. 2006))).

232. *See, e.g.*, DMA Int'l v. Qwest Commc'ns Int'l, No. 08-CV-00358-WDM-BNB, 2008 WL 4216261, at *4 (D. Colo. Sept. 12, 2008) (not deciding impact of *Hall Street* on precedents authorizing manifest disregard review); *see also* Rogers v. KBR Technical Servs. Inc., No. 08-20036, 2008 WL 2337184, at *2 (5th Cir. June 9, 2008) (recognizing that *Hall Street* "calls into the doubt" the continuing existence of manifest disregard but court declines to decide whether or not the doctrine exists); Acuna v. Aerofreeze, Inc., No. 2:06-CV-432 (TJW), 2008 WL 4755749, at *2 (E.D. Tex. Oct. 29, 2008) (opting to analyze case under manifest disregard standard after noting that Eighth Circuit has not yet clearly ruled on the vitality of manifest disregard); Millmaker v. Bruso, No. H-07-3837, 2008 WL 4560624, at *6 n.8 (S.D. Tex. Oct. 9, 2008) (same); COKeM Int'l, Ltd. v. Riverdeep, Inc., Nos. 06-CV-3331 (PJS/RLE), 06-CV-3359 (PJS/RLE), 2008 WL 4417323, at *3-4 (D. Minn. Sept. 24, 2008) (finding no basis for vacatur "even assuming that this remains a proper ground for vacatur after *Hall Street*").

a. General Submissions to Arbitration

Manifest disregard has no place in the modern structure of arbitration for general submissions to arbitration—that is, submissions to arbitration that do not call for the arbitrator to apply the law. As noted above,[233] manifest disregard is a paternalistic remnant of the era of judicial distrust of arbitration that undermines party autonomy, relies on an unsupported rationale, and ultimately is nonsensical.

i. Manifest disregard undermines party autonomy

If courts actually applied manifest disregard on a regular basis, the doctrine would undermine the principle of party autonomy by depriving parties of their ability to have disputes decided by norms other than law.

For general submissions, arbitrators have the discretion to use non-legal standards for their decisions, such as industry customs and standards. This discretion and flexibility of judgment is one of the process values and characteristics of arbitration that the parties are bargaining for when they choose the arbitration process. The availability of manifest disregard review would frustrate this discretion, however. Consider the arbitrator in a generally submitted employment wrongful termination case who permits parties to argue the law but then determines that the case is better decided on the grounds of the practices of that particular workplace, such that the ultimate award is inconsistent with the known law. If manifest disregard is taken seriously, such an award should be subject to vacatur because the arbitrator knew the law and deliberately ignored it, resulting in a decision that is in manifest disregard of the law. Yet such a result would undermine party autonomy by invalidating the very reasons the parties chose the arbitration process to resolve their dispute: to get the arbitrator's best judgment as to the best resolution of the dispute.

Continuing to apply the manifest disregard standard also creates peculiar incentives for the arbitrator with respect to the rule of law. For one, the arbitrator has the incentive to avoid consulting the law that is applicable to the dispute. Recall that the standard for manifest disregard review is that the arbitrator's award was inconsistent with the law, that the arbitrator knew what the law was and deliberately disregarded it. Under this standard, the arbitrator is better off simply not knowing what the law is—hear no evil, see no evil, do no evil.[234] This seems undesirable and inconsistent with arbitration's liberal rule of

233. *See supra* notes 44-49.

234. For fuller discussion, see Reuben, *Process Purity*, *supra* note 44, at 305-06.

admissibility of evidence,[235] including evidence of legal standards; parties may be better served, at least in some if not many cases, if the arbitrator at least considers the law for what it is worth. Continuing to apply manifest disregard also leads to a disincentive for arbitrators to draft written opinions that would reveal their reasoning—including whether they knew and considered applying the law. Again, this seems normatively undesirable given that research has shown that written awards give parties greater satisfaction in adjudicated awards.[236]

When they contract to take their cases out of the public system, parties are opting for an informal system of "rough justice," and the possibility of the abnormal award is simply one of those risks that is a part of the parties' bargain to arbitrate rather than decide their disputes in a court of law. By giving the courts the final say over an arbitral award, manifest disregard promotes paternalism of the law rather than autonomy of the parties to have their disputes decided notwithstanding the law.

ii. Manifest disregard relies on an unsupported rationale

The principal warrant for manifest disregard is that the possibility of judicial review keeps arbitrators honest, and allows for grievous errors to be remedied. Therefore, its utility should be measured by the degree to which it accomplishes this goal. Unfortunately, there is no evidence whatsoever upon which the claim is based. To the contrary, it is sheer speculation that manifest disregard achieves this salutary effect. Given the paucity of awards that have actually been vacated on manifest disregard grounds, the claim seems barely plausible on its face.[237] Deterrence theory suggests that at least intermittent enforcement is necessary for a rule to have some effect.[238]

Even if manifest disregard had some deterrent effect, it is by no means clear that it is the most significant constraining force on arbitral decision-making. Rather, if there is going to be a real constraining force on the "bizarre" arbitration award, the reputational market would seem more likely.[239] Competition for arbitration business is fierce, with much

235. ELKOURI & ELKOURI, *supra* note 221, at 407.

236. *See, e.g.*, Barbara Black & Jill Gross, *Perceptions of Fairness of Securities Arbitration: An Empirical Study*, 2009 J. DISP. RESOL. 349 (finding in survey of securities industry arbitration that 55.48 percent of investors said they would have been more satisfied if they had an explanation of the award).

237. *See supra* notes 52-53 and accompanying text.

238. For the seminal work on deterrence theory, see Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (concluding that because the cost of increasing the fine is marginal to that of the cost of increasing surveillance, the best public policy is to maximize the fine and to minimize surveillance).

239. For discussion of reputational effects, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in*

of the work going to senior members of what is in effect a "good old boys" club.[240] Reputation is the arbitrator's stock in trade, ultimately determining whether the arbitrator will be selected for cases or will not. Again, it is an empirical question beyond the scope of this article, but common sense suggests that an arbitrator is more likely to be careful in rendering the award because of concerns about his reputation than for fear of being vacated because of manifest disregard of the law, especially when application of the doctrine is so rare.

iii. Manifest disregard is ultimately nonsensical

For general submissions to arbitration, manifest disregard review is ultimately nonsensical. Because the arbitrator is not required to follow the law, it makes little sense to evaluate the arbitrator's decision on the basis of how well it complies with the law. Indeed, if the arbitral decision is not based on law and is instead based on some other norm, such as industry custom or practice, manifest disregard effectively constitutes a substitution of judgment by the court for the decision of the arbitrator.

b. Restricted Submissions

The foregoing discussion applies to general submissions in which the arbitrator has no constraints on her judgment. So-called restricted submissions, which compel the arbitrator to apply the law,[241] require additional analysis.

With restricted submissions, the arbitrator may make an initial decision on the law, but the parties reserve for the court the power to make a final decision, thus allowing for judicial review for questions of

Litigation, 94 COLUM. L. REV. 509, 522-46 (1994) (discussing how the lawyer's reputational market can assist in sorting among types of lawyers); Paul M. Schwartz & Edward J. Janger, *Notification of Data Security Breaches*, 105 MICH. L. REV. 913, 929-32 (2007) (discussing use of reputational sanctions to influence firm behavior in providing data security); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of Legal Professionalism and the Beginning of Professional Pluralism*, 90 U. ILL. L. REV. 475, 485-97 (2005) (discussing importance of reputation to collaborative lawyers).

240. *See* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 30-31 (1996) (noting, in international context, a community "often referred to as a club—connected by personal and professional relations cemented by conferences, journals, and actual arbitrations").

241. Significantly, *Wilko v. Swan*, 346 U.S. 427, 436 (1953), the taproot of manifest disregard, was a case involving an unrestricted submission. *See generally* C.J.S. *Arbitration, Matters Which May Be Ordered, Awarded, or Decided Under Submission—General, Special or Restricted Submission* § 161 (2005) (outlining and defining the difference between general and specific submission in the case of arbitration disputes).

law. This is an arbitrability issue in that the parties simply are withholding final decisional authority over questions of law in their submission, thus retaining the status quo for final decisions on questions of law: judicial review.

One important consequence of the *Hall Street* decision is to limit the degree to which parties may engage in restricted submissions. Indeed, one could forcefully argue that the opinion invalidates restricted submissions because its narrow holding is that parties may not contract for judicial review by a public court of law. In this regard, it is important to remember that the *Hall Street* agreement itself was a restricted submission that was rejected by the Court as being beyond the contracting capacity of the parties.

While *Hall Street* thus limits the availability of restricted submissions, it need not be read to eliminate them entirely. As described above, the parties may still engage in restricted submissions under *Hall Street*, so long as the review is by a private arbitrator rather than a public court.[242] What *Hall Street* prohibits is substantive judicial review by public courts of law, not substantive review as a categorical matter, as discussed above. Parties may still engage in restricted submissions that would permit substantive judicial review by private arbitrators, who can issue decisions that are fully enforceable arbitration awards.

4. Contracted Judicial Review

The foregoing discussion illustrates the significant impact that *Hall Street* likely will have on non-statutory grounds for judicial review of arbitration awards. Arbitrary and capricious and irrationality review should be treated as eliminated under the case. Manifest disregard review, too, should be viewed as no longer available after *Hall Street*. And while courts may be tempted to treat public policy review as superseded by the opinion, the better view is that it survives *Hall Street*, at least for claims that an arbitration award is itself illegal.

Contracted judicial review is the fourth non-statutory ground, and the one directly presented in the *Hall Street* case. Ironically, it may represent one of the strongest non-statutory grounds after *Hall Street*. In a separate Part IV, a lengthy passage of dictum,[243] the Court raised the possibility that contracted judicial review might be possible if the

242. *See supra* notes 208-09 and accompanying text.

243. I refer to dictum here in the technical sense of not being essential to the court's holding that the statutory grounds are exclusive. *See* BLACK'S LAW DICTIONARY 1102 (8th ed. 2004) (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)").

arbitration was conducted under authority other than the FAA, such as state statutory law or the common law, or that of the courts.[244] While this part of the opinion is perhaps the most obscure, it may well prove the most significant, important for both the law of vacatur, as well as the law of FAA preemption more generally.

a. Part IV of the *Hall Street* Opinion

Part IV of the opinion was the culmination of a flash of the Court's own insight into the issues that began with a question at oral arguments. Justice Breyer had asked whether the agreement should be treated as an exercise of the district court's authority to manage its cases under Federal Rule of Civil Procedure 16.[245] The Court later ordered supplemental briefing on the questions of whether authority existed outside of the FAA upon which parties could rely for purposes of contracting for judicial review, whether the parties in fact relied upon such authority, and whether the petitioners in this case had waived the right to rely on such authority before the high court.[246]

"The FAA is not the only way into court for parties wanting review of arbitration awards,"[247] the Court later explained in Part IV of the opinion. "They may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."[248] The unusual posture of the *Hall Street* case presented a third option: that the agreement to arbitrate could arise under the authority of the courts, specifically Federal Rule of Civil Procedure 16. After all, in *Hall Street*, the arbitration agreement was entered into during the course of the district court litigation, and was adopted as a court order by the district court.[249]

The Court's intellectual sojourn stopped there, however, as the Court acknowledged that the parties and the lower courts before it had relied on the FAA as the primary source of authority governing the arbitration provision at issue.[250] The Court also acknowledged that the Rule 16 issue implicated issues of waiver and the interplay of the FAA with Rule 16 and the Alternative Dispute Resolution Act of 1998 that were not argued below or at the Supreme Court.[251] Therefore, the Court

244. Hall St. Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1406 (2008).
245. *See* Transcript of Oral Argument at 11-12, Hall Street, 128 S. Ct. 1396 (No. 06-989).
246. *See supra* note 103.
247. *Hall Street*, 128 S. Ct. at 1406.
248. *Id.*
249. *Id.* at 1407.
250. *Id.*
251. *Id.* at 1407-08.

concluded it could not decide these issues in the first instance, and left them for further consideration by the Ninth Circuit Court on remand.[252]

b. Vacatur

The Court's dictum strongly suggests three sources of authority that parties may rely upon if they want to have contracted judicial review: state statutory law, the state common law of contract, and the inherent authority of the courts. Under this approach, the parties would not rely on the Federal Arbitration Act for the enforcement of their arbitration award; rather, they would look to these other sources of authority. For the reasons briefly sketched below, it seems likely that all three may be successful vehicles for the enforcement of arbitration provisions calling for substantive judicial review.

i. State statutes

All states have arbitration statutes, most of which are modeled after the Uniform Arbitration Act[253] or the more recent Revised Uniform Arbitration Act ("RUAA").[254] Neither uniform law directly authorizes contracted judicial review of an arbitration award, and indeed, the drafters of the RUAA declined to include such a provision.[255] New Jersey, for example, has a statute in place that provides for contracted judicial review of arbitration awards.[256]

Still other states may construe their arbitration laws to allow for contracted review. California has already taken that step in *Cable Connection, Inc. v. DirectTV, Inc.*,[257] ruling shortly after *Hall Street* was decided that under California Arbitration Act (CAA)[258] "parties may

252. *Id.*

253. The National Conference of Commissioners on Uniform State Laws says the Uniform Arbitration Act has been adopted by 49 jurisdictions. *See* Uniform Law Commissioners, Final Acts and Legislation, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=2&tabid=60 (last visited Jan. 16, 2008).

254. As of this writing, 13 jurisdictions had passed the Revised Uniform Arbitration Act: Alaska, Colorado, the District of Columbia, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. *See* Uniform Law Commissioners, Uniform Arbitration Act (2000), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (last visited Jan. 2, 2009).

255. *See* Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 84-85 (2001).

256. N.J. STAT. ANN. § 2A:23B-4(c) (West 2003) ("nothing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion").

257. 190 P.3d 586 (Cal. 2008).

258. CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 2008).

obtain judicial review of the merits [of an arbitration award] by express agreement."[259]

The *Cable Connection* court's holding turned on language contained in an earlier case, *Moncharsh v. Heily & Blase*,[260] in which that court stated that "'*in the absence of some limiting clause* in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute.'"[261] Using this language along with dicta in some other cases,[262] the *Cable Connection* court stated that under its precedents "[i]f the parties constrain the arbitrators' authority by requiring a dispute to be decided according to the rule of law, *and* make plain their intention that the award is reviewable for legal error, the general rule of limited review [is] displaced by the parties' agreement."[263]

The *Cable Connection* court distinguished *Hall Street* by noting that Part IV of the *Hall Street* opinion "left the door ajar for alternate routes to an expanded scope of review."[264] It observed that the parties did not specify in their contract whether enforcement proceedings were to be brought in state or federal court, and stated that Section 10 and Section 11 of the FAA only apply to review by "the United States court in and for the district where the award was made."[265] It then proceeded to rule that the arbitration was conducted under the California arbitration statute because the petition to vacate in *Cable Connection* "was filed, argued, and appealed in state court, and before the *Hall Street* decision both parties proceeded on the theory that the CAA was controlling."[266]

The *Cable Connection* court also declined to view *Hall Street* as "persuasive authority for a restrictive interpretation of the review provisions in the CAA."[267] The court relied on *Moncharsh* and the

259. *Cable Connection*, 190 P.3d at 589.

260. 832 P.2d 899 (Cal. 1992).

261. *Id.* at 912 (emphasis added) (emphasis omitted) (quoting Crofoot v. Blair Holdings Corp., 260 P.2d 156, 186 (Cal. Dist. Ct. App. 1953)).

262. *See, e.g.*, Baize v. Eastridge Cos., 47 Cal. Rptr. 3d 763 (Cal. Ct. App. 2006) (noting that an expanded scope of review would be available under a clause specifically tailored for that purpose); Pac. Gas & Elec. Co. v. Superior Court, 19 Cal. Rptr. 2d 295 (Cal. Ct. App. 1993) (same). *But see, e.g.*, Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co., 53 Cal. Rptr. 2d 50 (Cal. Ct. App. 1996) (declining to enforce a contract clause calling for judicial review of an arbitration award on its merits); Crowell v. Downey Comm. Hosp., 115 Cal. Rptr. 2d 810 (Cal. Ct. App. 2002) (same).

263. *Cable Connection*, 190 P.3d at 600.

264. *Id.* at 596.

265. *Id.* at 597 n.12 (quoting 9 U.S.C. §§ 10(a), 11(a) (2006)).

266. *Id.* This explanation is not entirely satisfying in light of the fact that Section C of the arbitration contract stated "[t]his Section and any arbitration conducted hereunder shall be governed by the United States Arbitration Act (9 U.S.C. Section 1, et seq.)." *Id.* at 590 n.3.

267. *Id.* at 600.

legislative history of the CAA to distinguish the state statute from the FAA.[268] Both of those authorities favored effectuating the intent of contracting parties even to the extent of altering the usual scope of review with respect to arbitration awards.[269] In the view of the California Supreme Court, "[t]he scope of judicial review is not invariably limited by statute; rather, 'the parties, simply by agreeing to arbitrate, are deemed to accept limited judicial review *by implication*.'"[270] *Hall Street* notwithstanding, "[i]t follows that [parties] may expressly agree to accept a broader scope of review."[271]

Cable Connection plainly sets up a model that is an alternative to *Hall Street* for states that want to endorse contracted judicial review of arbitration awards. One can imagine that at least some other states may take the *Cable Connection* approach rather than the *Hall Street* approach.

ii. State contract law

Part IV of the Hall Street opinion further suggested that state contract law could provide a basis for providing for contracted judicial review of arbitration awards. Under this approach, the parties would not rely on the Federal Arbitration Act or their state arbitration statutes for the enforcement of the award, but rather would state in their contractual arbitration provisions that the enforcement of the award was based on principles of state contract law.

A comprehensive review of state contract laws is beyond the scope of this article, but courts have expressed a willingness to enforce such contracts as long as they do not call for review according to standards that are unfamiliar to the courts. The standards that parties ask the courts to use are important to the courts, as the famous concurrence of Judge Alex Kozinski in *Lapine Technology v. Kyocera* attests.[272] Kozinski concurred with the majority decision to permit contracted substantive review, taking comfort that the work it would create for the courts was no different than the work that district courts perform on "appeals from administrative agencies and bankruptcy courts, or on habeas corpus."[273] But he said he would "call the case differently if the agreement provided

268. *See id.* at 599-602.

269. *See id.* at 602 ("In California, the policy favoring arbitration without the complications of traditional judicial review is based on the parties' expectations as embodied in their agreement, and the CAA rests on the same foundation.").

270. *Id.* (quoting Vandenberg v. Superior Court, 982 P.2d 229, 239 (Cal. 1999)).

271. *Id.*

272. Lapine Tech. Corp. v. Kyocera Corp.,130 F.3d 884 (9th Cir. 1997), *overruled by*, Kyocera Corp. v. Prudential-Bache Trade Servs. Inc., 341 F.3d 987 (9th Cir. 2003).

273. *Lapine*, 130 F.3d at 891.

that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl."[274]

Similarly, the *Cable Connection* court found that concerns about unfamiliar standards of review are "unfounded."[275] The court said it had "discovered no case where the parties attempted to make the courts apply an unusual standard of review."[276] The court further noted that "just as the parties to any contract are limited in the constraints they may place on judicial review," standards such as Kozinski's "'flipping a coin or studying the entrails of a dead fowl' would be unenforceable," presumably on public policy grounds.[277]

As long as the standards are consistent with the types of standards that courts are accustomed to applying, courts may be willing to enforce contracts with judicial review provisions on state contract grounds.

iii. Inherent authority

The Court's opinion finally suggests that parties may be able to call upon the inherent powers of the courts to manage their dockets as a basis for contracting for expanded judicial review of arbitration awards. The *Hall Street* case itself provides a good example. The parties had agreed to have a discrete issue in the litigation decided by an arbitrator, and to have that arbitral award subject to review by the court that retained continuing jurisdiction over the case.[278] Courts have already been recognized as having the "inherent power" to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[279] This inherent power has been held to include the power to dismiss an action based on forum non conveniens,[280] the power to vacate its own judgment upon proof that a fraud has been perpetrated upon it,[281] and the power to punish for contempt.[282] Again, courts may have little trouble extending such power to include the judicial review of an arbitration award issued pursuant to an agreement of the parties in pending litigation, so long as the agreement called for review according to standards that are familiar to courts.

274. *Id.*
275. *Cable Connection*, 109 P.3d at 605.
276. *Id.*
277. *Id.*
278. *See* Hall St. Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1400-01 (2008).
279. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991).
280. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947).
281. *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244-45, 248-50 (1944).
282. *See* Ex parte Robinson, 86 U.S. 505, 510 (1873).

c. Preemption

FAA preemption has historically been viewed as broad. After all, the Court had ruled in *Southland v. Keating* that the FAA preempts state laws that are hostile to the enforcement of an arbitration provision.[283] The Court later applied that principle to find FAA preemption of a state law that merely required notice of an arbitration provision to be conspicuous in *Doctor's Associates, Inc. v. Casarroto*,[284] and held that the FAA and its principle of preemption reached conduct at the furthest reach of Congress' Commerce Power in *Allied Bruce Terminix Companies v. Dobson*.[285]

The *Cable Connection* court recognized the significance of the preemption issue raised by *Hall Street*, but rejected the argument that the CAA was preempted by the FAA.[286] The court reasoned that if the Supreme Court had intended to "impose a *uniform* national policy *requiring* judicial review solely on the grounds stated in the FAA,"[287] it would not have left open other avenues for judicial review such as those provided by state statutory or common law or the trial court's review under its inherent power to manage its docket.[288] Accordingly, the court concluded that "the *Hall Street* holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations."[289]

Several additional arguments against preemption were persuasive to the *Cable Connection* court. The first is that FAA preemption is primarily concerned with state laws that would contravene the enforcement provisions of Section 2 of the FAA.[290] This has certainly been the Court's emphasis in the Court's major FAA preemption cases.[291] A related argument is that the FAA's vacatur provision, Section 10, is a procedural rule that is directed to "the United States court in and for the district wherein the award was made,"[292] and therefore does not

283. *See* Southland Corp. v. Keating, 465 U.S. 1, 10-12 (1984).

284. *See* 517 U.S. 681, 687-88 (1996).

285. *See* 513 U.S. 265, 276-77 (1995).

286. Cable Connection, Inc. v. DirectTV, Inc., 109 P.3d 586, 599 (Cal. 2008) ("[W]e do not believe that the *Hall Street* majority intended to declare a policy with preemptive effect in all cases involving interstate commerce.").

287. *Id.*

288. *Id.* (quoting Hall St. Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1407 (2008)).

289. *Id.*

290. *Id*. at 597.

291. *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-688 (1996); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 272-273 (1995); Perry v. Thomas, 482 U.S. 483, 490-491 (1987); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

292. 9 U.S.C. § 10 (2006).

preempt contrary state laws.[293] Other sections of the FAA, most notably Sections 3 and 4, have been found to reflect Congress' intent to limit the applications of those provisions to the federal courts.[294] A third argument is that the provisions of the CAA did not undermine the policy of the FAA; to the contrary, to the extent that the policy of the FAA is to enforce the agreement of the parties,[295] state law provisions authorizing party contracted review agreements promote that policy.[296]

The *Cable Connection* court's reliance on Part IV of the *Hall Street* opinion is well placed. It hardly seems that the Court would have opened the door to the state law and inherent powers approaches if the Court believed they were preempted.

The other rationales reflect other approaches to preemption that have been used by courts or proposed by legal commentators.[297] In a trenchant analysis of FAA preemption decisions and scholarship, Professor Drahozal provides a helpful framework for determining whether "second generation" state arbitration laws—that is, laws that focus on arbitration procedures rather than the enforceability of arbitration provisions—would be preempted by the Federal Arbitration Act.[298] A state law permitting contracted judicial review of an arbitration award would be such a "second generation" state arbitration law.

"Step One" of the analysis asks: "Does the State Law Apply to Contracts Generally or Does it Single Out Arbitration Agreements for Special] Treatment?"[299] This step implements the U.S. Supreme Court's decisions in *Southland Corp. v. Keating*,[300] *Allied-Bruce Terminix v. Dobson*,[301] and *Doctor's Associates v. Casarroto*.[302] As discussed above, under those decisions, state laws that single out arbitration provision for special treatment or are hostile to arbitration are preempted by the FAA.[303]

293. *Cable Connection*, 109 P.3d at 597.

294. *See, e.g.*, Volt Info. Scis. v. Leland Stanford Junior Univ., 489 U.S. 468, 477 n.6 (1989); Southland Corp., 465 U.S. at 16 n.10; Cronus Invs., Inc. v. Concierge Servs., 35 Cal.4th 376, 389-390 (Cal. 2005).

295. *See, e.g.*, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

296. *Cable Connection*, 109 P.3d at 598.

297. For a discussion, see generally Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004) [hereinafter Drahozal, *Preemption*].

298. *Id.* at 395.

299. *Id*. at 408.

300. 465 U.S. 1 (1984) (FAA preempts California state law anti-waiver provision).

301. 513 U.S. 265 (1995) ("What States may not do is decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause.").

302. 517 U.S. 681 (1996) (FAA preempts state law requiring notice of mandatory arbitration provision in conspicuous type on first page of contract).

303. *See* notes 283-84 and accompanying text.

"Step Two" of the analysis asks: "Have the Parties Contracted for Application of the State Law to the Arbitration Proceeding?"[304] This step embraces the Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*,[305] as explained by *Mastrobuono v. Shearson Lehman Hutton, Inc*,[306] and *First Options of Chicago v. Kaplan*.[307] These decisions emphasize that arbitration is a matter of contract, and that one of the central policies of the FAA is to enforce the agreements of the parties as they are written, even if the effect of the agreement is to displace the FAA.

"Step Three" of the analysis asks: "Does the State Law Invalidate the Parties' Agreement to Arbitrate?"[308] This step recognizes the primary force of Section 2's enforcement provisions, and the fact that the first generation cases have focused on the preemption of state law provisions that would have invalidated an otherwise valid arbitration provision.[309] This is the core of FAA preemption.

"Step Four" of the analysis asks whether the statute is valid under five different theories of FAA preemption:

The Keystone Theory—based on the Montana Supreme Court's decision in *Keystone, Inc. v. Triad Systems, Corp.*,[310] the *Keystone* theory of preemption holds that "[a] state law is not preempted, even if it singles out arbitration, so long as the law does not invalidate the parties' arbitration agreement."[311]

The Revised Uniform Arbitration Act Theory—based on the approach taken by the drafters of the RUAA, this approach consists of a continuum of preemption.[312] On one side of the continuum are so-called "front end" issues, including the agreement to arbitrate and the arbitrability of the dispute, and "back end issues," including modification, confirmation, and vacatur of the award, that are most likely to be preempted.[313] On the other end of the continuum are state laws that deal with so-called "procedural" issues, including discovery and immunity, which are less likely to be preempted.[314] In between are so-

304. Drahozal, *Preemption*, *supra* note 297, at 411.
305. 489 U.S. 468 (1989) (parties may agree to have arbitration covered by state law rather than FAA, even if the state law would otherwise be preempted by the FAA).
306. 514 U.S. 52 (1995) (distinguishing *Volt* as a case in which it deferred to the California courts' interpretation of a contract).
307. 514 U.S. 938, 943 (1995).
308. Drahozal, *Preemption*, *supra* note 297, at 415.
309. *Id*.
310. 971 P.2d 1240 (Mont. 1998).
311. Drahozal, *Preemption*, *supra* note 297, at 417.
312. *Id*.
313. Hayford, *supra* note 255, at 74-75.
314. *Id.* at 76.

called "borderline issues," including punitive damages and provisional awards, on which a given court can go either way.[315]

The Anti-FAA theory—Professors Ian Macneil, Richard Speidel, and Thomas Stipanowich suggest that a state arbitration law will be preempted if it "limit[s] or obstruct[s] explicit FAA provisions or general federal arbitration law."[316] In other words, as Drahozal puts it, the provision is "anti-FAA."[317]

The Pro-Contract Theory—Professor Stephen Ware suggests that a state arbitration law will be preempted if it conflicts with a provision of the arbitration agreement.[318] For Ware, Section 2 "gives the terms of arbitration agreements the force of federal law."[319]

Applying Drahozal's framework to the issue of a hypothetical state law authorizing judicial review shows some support for the notion that state arbitration laws permitting contracted judicial review would survive preemption.

Step 1—Does the state law single out arbitration for differential treatment?—presents something of a barrier because a state law authorizing parties to elect judicial review of arbitration awards clearly would single out arbitration. However, the central concern with the singling out of arbitration provisions is that they be singled out for non-enforcement. As the Supreme Court said in *Allied-Bruce Terminix v. Dobson*, "What [S]tates may not do is decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause."[320] A judicial review statute does not affect the enforceability of all or part of an arbitration provision; it merely adds a term to be enforced. To the extent that it singles out arbitration, it does so in a way that is benign rather than hostile, and therefore, squarely falls within *Allied-Bruce* and *Doctor's Associates.*

Step 2 of the analysis is less problematic. It questions whether the parties have contracted for application of the state law to the arbitration proceeding, and my hypothetical statute merely authorizes the parties to contract to have their arbitration award subject to judicial review if they agree to do so. As such, the provision would fall squarely within the party agreements recognized by *Volt* and *First Options*.

315. *Id.* at 75.
316. MACNEIL, *supra* note 6, § 10.8.2.4, at 10:93.
317. Drahozal, *Preemption*, *supra* note 297, at 418.
318. *Id*.
319. Stephen J. Ware, *Punitive Damages in Arbitration, Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 554 (1994).
320. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 281 (1995).

Step 3 is also not problematic. It asks whether the state law invalidates the parties' agreement to arbitrate, and in my hypothetical, it is simply a part of the agreement to arbitrate. While such an agreement could lead to a judicial decision vacating an arbitral award that was inconsistent with the law, in no way could the enforcement of the clause invalidate the initial agreement to arbitrate.

The final step, Step 4, is more of a mixed bag. A state law authorizing judicial review clearly would not be preempted under the *Keystone* theory because it does not invalidate the arbitration provision, as discussed above. Under the RUAA, a judicial review provision would likely be preempted because it is a "back end" issue that "speak[s] to the most essential dimensions of the commercial arbitration process (in that [it] go[es] to the essence of the agreement to arbitrate and the role of the judiciary in holding parties to those agreements)."[321]

This leaves two more theories. The first is the anti-FAA theory, and the result here is ambiguous. On the one hand, a state judicial review law would not interfere with the express language of the FAA. On the other, it would undermine the FAA's principle of finality, upon which the *Hall Street* majority in part rested its reasoning. The final theory is Professor Ware's contract theory, which would be no barrier here as the state law authorizing judicial review would be reinforcing a term in the contract rather than interfering with it.

In sum, as a general matter these theories tend to show some support for the idea that a state law authorizing parties to contract for expanded judicial review would not be preempted. Indeed, to the extent that Part IV of the *Hall Street* opinion tends to show that FAA preemption is narrower than many have perceived, the opinion may reach much farther than the mere vacatur context presented by *Hall Street Associates.*

d. A Process Characteristics and Values Caveat

In this section, we have discussed the importance of Part IV of the *Hall Street* opinion for the law of vacatur and for the law of preemption. For vacatur, the impact is to shift efforts to enforce judicial review provisions away from the FAA and toward state law and the courts themselves, forums that may well be hospitable to such claims. Although not certain, it seems likely that such efforts would not be preempted by the Federal Arbitration Act because they do not invalidate the agreement to arbitrate or interfere with the policies of the Federal Arbitration Act.

321. Hayford, *supra* note 255, at 75.

While party agreements for substantive judicial review of arbitration awards may thus be lawful under state law and the inherent power of the courts, that does not mean that courts and legislatures should take advantage of this opportunity. To the contrary, state legislatures should decline to pass laws permitting contracted judicial review. Similarly, state and federal courts should not enforce party contracted review agreements on public policy grounds.[322] As discussed above,[323] contracted judicial review may honor party contractual intentions, but it undermines many of the core process characteristics and values of the arbitration process. In particular, it eviscerates finality, which is a cornerstone of the arbitration process, and can lead to the formalization of a process that is intended to be informal.[324]

From a process characteristics and values perspective, party desire for contracted judicial review raises the question of what the parties really want out of their dispute resolution process. By agreeing to judicial review of arbitration awards, the parties manifest their intent to have legal standards apply to their dispute. This is not inherently problematic, but if this is what the parties want, they should select a process that, unlike arbitration, relies upon the law throughout the process. Staying with traditional courts is of course one option. While such a selection would have the benefit of the law, it comes at the sacrifice of other arbitration process virtues, such as informality, efficiency, and privacy.

Another perhaps more attractive option would be to use the private judging process, sometimes pejoratively called the "rent-a-judge" process.[325] Available in many states,[326] parties under this process essentially hire a retired or senior judge to preside over their case privately, applying the law fully and rendering a decision that may be entered as an enforceable court judgment, and which is fully reviewable

322. Issues of finality are implicated with much less force in the context of judicial review of arbitration awards pursuant to agreements entered into as a part of a larger litigation effort. It would therefore be proper for the courts to review arbitration awards in this narrow context.

323. *See* notes 163-69 and accompanying text.

324. *See id.*

325. *See generally* Barlow F. Christensen, *Private Justice: California's General Reference Procedure*, 1982 AM. BAR. FOUND. RES. J. 79; Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592, 1599-1600 (1981); Anne S. Kim, Note, *Rent-a-Judges and the Cost of Selling Justice*, 44 DUKE L.J. 166, 168-80 (1994).

326. The procedure was pioneered in California, but is also available in several other jurisdictions, including Colorado, Indiana, New York, Ohio, Rhode Island, South Dakota, Texas, and Washington. *See* Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592, 1594 (1981).

by the state's appellate courts. From a process characteristics and values perspective, private judging offers numerous advantages to parties who want arbitration with judicial review. The process promotes autonomy because its engagement is a choice of the parties, as is the selection of the judge. It is more efficient because the parties do not have to wait for court congestion to clear; a private judge can hear them immediately. The decisionmaker will follow the law, and issue a decision that is both enforceable and reviewable according to traditional legal standards. Finally, while it is not as informal as arbitration, private judging does share the arbitration virtue of privacy. For these reasons, private judging may be a more fitting option for parties who want decisions to accord with legal rules but do not want to engage in the traditional litigation process.[327]

V. CONCLUSION

The U.S. Supreme Court's opinion in *Hall Street* is a landmark by anyone's definition. By limiting vacatur grounds to those expressly enumerated in the statute, the Court rewrote the law of vacatur by eliminating or casting doubt upon the many non-statutory common law grounds for vacatur that have surfaced in the courts over the years. As I have argued, courts should find most of those grounds—manifest disregard, arbitrary and caprious, and irrationality—to be eliminated by the Court's sweeping opinion. The narrow public policy vacatur ground should survive the opinion to the extent it rests on the solid public policy of preventing the enforcement of illegal arbitration awards.

Some will argue that the opinion reduces party autonomy by precluding the parties from contracting for judicial review under the Federal Arbitration Act.[328] I take a contrary view, and believe the opinion expands rather than contracts party autonomy in arbitration.

To the extent that parties want to continue to take advantage of the streamlined confirmation procedures of the FAA, the Court's ruling permits them to opt for substantive review by an arbitrator or an arbitral panel. More significantly, perhaps, the opinion also provides parties the autonomy to opt out of the FAA entirely if they want to pursue substantive judicial review of their arbitration awards. The parties likely will be able to agree to judicial review of arbitration awards and have that agreement enforced as a matter of contract, rather than enforcing the award under the FAA. As long as the agreement calls for the use of

327. For the classic work on tailoring particular disputes to dispute resolution processes, see Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49 (1994).

328. *See, e.g.*, Rau, *supra* note 159.

decisional standards that are familiar to the courts, it is likely that courts will provide judicial review of arbitration awards pursuant to such agreements. Further, parties may opt out of the FAA and proceed to enforce the agreement under state arbitration laws, to the extent such laws provide for or are construed to permit expanded substantive review. Finally, courts may permit parties to choose to arbitrate discrete issues in cases they are trying before a court, and agree to have those arbitral awards reviewed by that court as a part of the court's inherent power to control its docket.

It is difficult to see how the availability of such options constitutes a meaningful contraction of autonomy in arbitration. True, it places an outer limit in that the parties cannot, under *Hall Street*, fundamentally alter the basic structure of the arbitration process under the FAA by displacing finality with substantive legal review. But such a limitation merely respects the differences in dispute resolution processes, and compels parties to use processes that are appropriate to their goals and objectives. For arbitration under the FAA, autonomy may be a cardinal virtue of the arbitration process, but finality is its cornerstone.