Be Quick-but Don't Hurry: Competing Purposes of the Federal Arbitration Act and Hall Street Associates v. Mattel

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"Be quick—but don’t hurry" is an old adage attributed to the great basketball coach, John Wooden. Coach Wooden was likely trying to teach his players to play both fast and confident while avoiding the mistakes that accompany rushing. Though on its face alternative dispute resolution has very little to do with basketball, the aphorism holds form in the context of arbitration. As companies become more specialized and supply chains swell, parties want disputes to be settled quickly and amicably so that their relationships and businesses can continue with minimal disruption.

Enter binding arbitration: the answer to quicker, cheaper dispute resolution. Arbitration’s great virtue is in its customization. It can be tailored to be as quick and efficient or as thorough and reaching as the parties desire within the broad confines outlined in statutes that authorize such agreements. Some parties choose to provide for what they have determined to be the best of both worlds: arbitration subject to judicial review for errors of law. These parties wish for a quick, cordial process, but one that is less susceptible to mistaken conclusions of law. They want speed, but not at the expense of the correct outcome. The United States Supreme Court has recently hindered parties from striking their own balance between speed and review by blocking the enforcement of expanded judicial review of arbitral awards in *Hall Street Associates v. Mattel, Inc.* (*Hall Street*).

The purpose of this Note is twofold: first, to give relevant background and history of the circumstances giving rise to the Supreme Court’s decision in *Hall Street*, and second, to take a critical look at the effect of *Hall Street* on both federal and state arbitration law. Part I of this Note details relevant background information. Part II illustrates the competing lines of jurisprudence leading up to the *Hall Street* decision. Part III lays out the facts and opinion of the Supreme Court’s decision in *Hall Street* and the California Supreme Court’s decision in *Cable Connection, Inc. v. DIRECTV*. Part IV critically analyzes *Hall Street* by examining whether it was the right case for this issue. Then, Part V argues that the case has little effect on federal law because of the narrowness of

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1. John Wooden was the spectacular UCLA basketball coach who won ten NCAA Titles. See ANDREW HILL WITH JOHN WOODEN, BE QUICK—BUT DON’T HURRY (2001).

the holding. Finally, this Note shows that state arbitration laws will become the focus of more legislative and judicial attention in light of the California Supreme Court's response to the opinion.

I. FAA BACKGROUND: CONGRESS REACTS TO COURT HOSTILITY TOWARD ARBITRATION AGREEMENTS

The Federal Arbitration Act (FAA) was created with the central purpose of ensuring "that private agreements to arbitrate are enforced according to their terms." This policy is clearly set forth in the substantive portion of the FAA, section 2. In enacting the FAA to "abrogate the general common-law rule against specific enforcement of arbitration agreements," Congress also recognized that the FAA furthers the purposes of both efficiency and expediency. While the FAA usually serves both speed and party autonomy concurrently, sometimes these purposes come into direct conflict. The Supreme Court had determined that in such instances, the policy of enforcing agreements controls.

In addition to section 2, the FAA has procedural provisions detailing the process of confirming an arbitral award in federal court. Section 9 provides that if parties agree that a judgment of the court shall be entered upon the award, an arbitration award "must be confirmed.


4. FAA Section 2 provides in pertinent part:
   A written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof; or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.


7. See id.

8. Id. at 219 ("The legislative history of the Act establishes that the purpose behind its passage was to ensure 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.").


10. Id. § 9.
are provided for in sections 10 and 11.\textsuperscript{11} Section 10 provides that an award may be vacated for the following grounds: (1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct that prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers.\textsuperscript{12} The section 10 grounds for vacatur are narrow and limited by design to further the policy of keeping courts from using judicial review specifically to prevent enforcement of arbitration agreements.\textsuperscript{13}

Section 11 allows a court to modify an award for one of the following reasons: (1) a material miscalculation of the award; (2) the arbitrators awarded on a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; or (3) the award is imperfect in matter of form not affecting the merits of the controversy.\textsuperscript{14} The grounds for modification are also exceptionally narrow, minimizing judicial review of awards to matters of abuse of power or error in calculation.

The advantage of agreeing to the procedural provisions of the FAA is that the action is treated like a motion and not a normal contract action for specific performance.\textsuperscript{15} As such, section 9 provides for a streamlined and expedited process for confirmation of an arbitral award. The "[i]f the parties in their agreement have agreed" language allows parties to displace the federal procedure with a state court's procedure.\textsuperscript{16} Because the FAA does not provide independent federal court jurisdiction,\textsuperscript{17} the vast majority of states have passed some form of the Uniform Arbitration Act (UAA) to allow their courts to confirm arbitral awards.\textsuperscript{18} The UAA contains almost identical language as the FAA with respect to grounds for confirmation, vacatur, and modification of awards.\textsuperscript{19}

\textsuperscript{11} \textit{Id.} §§ 10–11.
\textsuperscript{12} \textit{Id.} § 10(a)–(d).
\textsuperscript{13} \textit{Hall St. Assocs. v. Mattel, Inc.}, 128 S. Ct. 1396, 1409 (2008) (Stevens, J., dissenting).
\textsuperscript{15} \textit{Hall St.}, 128 S. Ct. at 1402.
\textsuperscript{16} \textit{See} Volt Info. Scis. v. Bd. of Trs. of the Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.").
\textsuperscript{17} \textit{Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.}, 460 U.S. 1, 26 n.32 (1983).
\textsuperscript{18} \textit{7 Gabriel M. Wilner, ET AL., Domke on Commercial Arbitration} § 2 (3d ed. 2008) (Forty-nine states have passed some form of the Uniform Arbitration Act).
\textsuperscript{19} The UAA provides in pertinent part:
In front of this historical and legislative backdrop appears *Hall Street*. The Supreme Court granted certiorari in this case in order to resolve a split among the circuits regarding contractually expanded judicial review of arbitration awards. Because arbitration awards can be vacated or modified only for the narrow reasons laid out in sections 10 and 11 of the FAA, the parties in *Hall Street* contracted to have their arbitration award subject to modification for an additional ground—error of law. Based on precedent alone, it appeared the Supreme Court would enforce the agreement as written. In a surprising about-face, the Supreme Court instead held that the grounds for vacatur and modification under sections 10 and 11 of the FAA are exclusive, thus defeating the contractual intent of the parties.

II. THE CONTROVERSY TIPS OFF: CIRCUITS BEGIN TO SPLIT

While there was split authority concerning whether judicial review of arbitration awards could be expanded by contract, a

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Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

1. the award was procured by corruption, fraud, or other undue means;
2. there was:
   A. evident partiality by an arbitrator appointed as a neutral arbitrator;
   B. corruption by an arbitrator; or
   C. misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
3. an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding;
4. an arbitrator exceeded the arbitrator’s powers;
5. there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or
6. the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

21. *Id.* at 1402.
22. *Id.* at 1400–01.
majority of circuits had ruled that such expansions were authorized under the FAA. In one of the first and most definitive opinions on the subject, *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, the Fifth Circuit held that parties may contractually modify the standard of review of an arbitration award, stating "[s]uch a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract and 'the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties.'" The *Gateway* court noted that "[a]rbitration under the FAA is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." Lastly, the Fifth Circuit pronounced the grounds for vacatur and modification in FAA sections 10 and 11 to be default provisions capable of being expanded by contract. This reasoning was generally accepted by the Third, Fourth, and Sixth Circuits with little question.

The First Circuit expanded on the *Gateway* reasoning in *Puerto Rico Telephone Co. v. U.S. Phone Manufacturing Corp.* The questions presented in *Puerto Rico* were whether and how parties could contract for expanded judicial review. The First Circuit concluded that the grounds for vacatur could be expanded by

25. The First, Third, Fourth, Fifth, and Sixth Circuits held that these agreements were valid. See P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21 (1st Cir. 2005); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287 (3d Cir. 2001); Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 U.S. App. LEXIS 21248 (4th Cir. Aug. 11, 1997); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993 (5th Cir. 1995); Jacada, Ltd. v. Int'l Mkgt. Strategies, 401 F.3d 701 (6th Cir. 2005). The Ninth and Tenth Circuits held that expanded judicial review was invalid. See Kyocera Corp., v. Prudential-Bache Trade Servs., 341 F.3d 987 (9th Cir. 2003); Bowen v. Amoco Pipeline, Inc., 254 F.3d 925 (10th Cir. 2001). The Second, Seventh, and Eight Circuits did not have a definitive holding on the issue. See Hoeft v. MVL Group, Inc., 343 F.3d 57, (2d Cir. 2003), Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991); Schoch v. InfoUSA, Inc., 341 F.3d 785 (8th Cir. 2003).

26. 64 F.3d 993, 996 (5th Cir. 1995) (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995)).

27. Id. (quoting Mastrobuono, 514 U.S. at 57).

28. Id. at 997.

29. See Roadway Package Sys., Inc., 257 F.3d at 293 (“We now join with the great weight of authority and hold that parties may opt out of the FAA’s off-the-rack vacatur standards and fashion their own (including by referencing state law standards.”); Syncor Int'l Corp., 1997 U.S. App. LEXIS 21248 (an unreported Fourth Circuit opinion holding the FAA’s grounds for modification and vacatur are expandable by contract, citing the Fifth Circuit’s decision in *Gateway*); Jacada, Ltd., 401 F.3d at 712 (holding by implication that one can expand judicial review by agreement).


31. Id. at 23.
The court continued, noting the inclusion of a generic choice of law provision did not displace the judicial review limits imposed by the FAA. Finally, the First Circuit declared that in order to achieve displacement of the FAA grounds for vacatur, the agreement must contain “clear contractual language.”

The Ninth Circuit, in *Lapine Tech. Corp. v. Kyocera Corp.*, originally followed the reasoning of the Fifth Circuit. The Ninth Circuit said:

Thus, we fully agree with the Fifth Circuit. Federal courts can expand their review of an arbitration award beyond the FAA’s grounds, when (but only to the extent that) the parties have so agreed. To do otherwise would make hostility to arbitration agreements erumpent under the guise of deference to the arbitration concept.

However, in *Kyocera Corp. v. Prudential-Bache Trade Services*, the Ninth Circuit, en banc, overruled its earlier holding in *Lapine*. Finding support in the decisions of the Seventh, Eighth, and Tenth Circuits, the court held that parties are able to modify the process of arbitration to best suit their needs but cannot go beyond the grounds for vacatur provided in the FAA. In addition to the problems created by the plain language of the FAA, the Ninth Circuit found expanded judicial review unworkable because it would decrease the speed and efficiency of arbitration, erode the finality of arbitration awards by subjecting them to another layer of review, and create jurisdiction by contract.

The circuit courts fractured along the precise lines one would anticipate. Courts allowing expanded judicial review supported the

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32. *Id.*
33. *Id.* at 29.
34. *Id.* at 31.
36. *Id.* at 889.
38. *See Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 935 F.2d. 1501, 1504–05 (7th Cir. 1991) (holding that parties cannot contract for expanded judicial review of arbitration awards under the Labor Management Relations Act, 29 U.S.C. § 185, while looking to the FAA for guidance); Schoch *v. InfoUSA, Inc.*, 341 F.3d 785, 789–90 (8th Cir. 2003) (acknowledging that expanded judicial review of arbitration awards is not yet a “foregone conclusion” but resolving the case on other grounds); Bowen *v. Amoco Pipeline, Inc.*, 254 F.3d 925, 937 (10th Cir. 2001) (holding parties may not contract for expanded judicial review of arbitration awards).
40. *Id.* at 998–1000.
policy of enforcing agreements by their terms as the overriding consideration. Courts that denied enforcement of such agreements showed concern over the independence of the arbitration process and uneasiness that federal court procedure could be written by contract. Clearly, the United States Supreme Court would have to impose uniformity on the body of arbitration law.

III. Hall Street Associates v. Mattel: The Struggle Between Enforcing Agreements and the Independence of Arbitration Awards

A. Procedural Background

In many ways, Hall Street was not an ideal case to address the issue of expanded judicial review of arbitration awards. Because of its singular facts and procedural history, Hall Street is not easily analogized to other cases. The conflict in Hall Street began with a lease dispute between Hall Street Associates (Hall Street), lessor, and Mattel, lessee. Interestingly, the lease agreement did not contain an arbitration provision. Beginning in 1981, Mattel and its predecessors used the leased property as a manufacturing site. In 1998, the well water of the site was tested and showed high levels of trichloroethylene. As more pollutants were found, Mattel eventually stopped drawing from the well and signed a consent order to have the Oregon Department of Environmental Quality provide for cleanup of the site.

In 2001, Mattel gave notice to Hall Street that it intended to terminate the lease and vacate the premises. Hall Street brought suit in the United States District Court of Oregon, contesting Mattel’s right to vacate on the date it had chosen and claiming a right to indemnification for the cleanup of the site. In a bench trial on the termination issue, Mattel ultimately prevailed. With respect to the indemnification issue, Hall Street and Mattel attempted mediation, which failed. The parties then agreed to arbitrate and asked the district court to enter the agreement as an order.

42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
district court agreed to the wishes of the parties, approved the parties’ arbitration agreement, and entered the order.\textsuperscript{51}

In the arbitration agreement, the parties negotiated for and agreed to a provision stating that the district court could vacate, modify, or correct an award “where the arbitrator’s conclusions of law [were] erroneous.”\textsuperscript{52} Once submitted for arbitration, the arbitrator decided for Mattel on the basis that the indemnification clause requiring compliance with all applicable federal, state, and local environmental laws did not compel compliance with the Oregon Drinking Water Act (ODWA).\textsuperscript{53} The arbitrator explained that the ODWA was not an environmental law because it dealt primarily with human health as opposed to property contamination.\textsuperscript{54} Thus, the ODWA was outside the purview of the indemnification clause.

Hall Street then filed a motion with the district court to vacate the arbitrator’s award on the ground that not treating the ODWA as an environmental law was an error of law.\textsuperscript{55} The district court, using the standard for vacatur in the arbitration agreement, agreed, vacated the award, and remanded the case back to the arbitrator for further consideration.\textsuperscript{56} The arbitrator followed the court’s ruling and found for Hall Street upon reconsideration.\textsuperscript{57} Both parties then sought modification of the second arbitration award. The district court corrected the arbitrator’s calculation of interest but otherwise upheld the arbitrator’s second award.\textsuperscript{58}

After the confirmation of the corrected award, both parties appealed the decision to the Ninth Circuit.\textsuperscript{59} For the first time, Mattel argued that the Ninth Circuit’s decision in \textit{Kyocera Corp. v. Prudential-Bache Trade Services}\textsuperscript{60} prevented enforcement of the parties’ expanded judicial review provision.\textsuperscript{61} The Ninth Circuit reversed in favor of Mattel, ruling that expanded judicial review provisions were unenforceable and severable.\textsuperscript{62} The Ninth Circuit instructed the district court to confirm the award unless it could be

\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.} at 1400–01.
\textsuperscript{53} \textit{Id.} at 1401.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} 341 F.3d 987, 1000 (9th Cir. 2003).
\textsuperscript{62} \textit{Hall St.}, 128 S. Ct. at 1401.
\textsuperscript{63} \textit{Id.}
vacated under FAA section 10 or modified under section 11. On remand, the district court vacated the award for "implausible interpretation of the lease." Implausibility not being a ground for vacatur under the FAA, the Ninth Circuit again reversed on appeal. Finally, the United States Supreme Court granted a writ of certiorari.

B. The Majority Opinion

Justice Souter, who wrote the majority opinion in the six–three decision, first addressed the notion that expanded judicial review was impossible because it would "create federal jurisdiction by private contract." The Court, acknowledging that the FAA is "something of an anomaly in the field of federal-court jurisdiction," pointed out that the FAA requires an independent jurisdictional basis. Because the FAA does not grant jurisdiction, Justice Souter discarded the notion that enforcing an agreement’s judicial review provision would create federal jurisdiction by private contract. The Justice instead narrowed the issue to the scope of judicial review permissible under the FAA.

Next, the Court addressed the mechanism for enforcement of an arbitration award provided by the FAA’s procedural rules—sections 9–11. An application for an order to confirm, correct, or modify an award receives streamlined treatment under the FAA. Under section 9, these types of applications are treated as motions, eliminating the need for a separate, and more time consuming, contract action. Justice Souter noted that section 9, which contains

64. Id. 65. Id. 66. Id. 67. Id. 68. Hall St., 128 S. Ct. 1396, 1400–08 (2008) (J. Scalia joined as to all but footnote seven). 69. Id. at 1402 n.2. 70. Id. (quoting Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.32 (1983)). 71. Id. at 1402 n.2. A federal court only has subject matter jurisdiction of a claim if it falls under federal question jurisdiction or diversity jurisdiction. 28 U.S.C. § 1331 (2006) (defining federal question jurisdiction as “jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”); 28 U.S.C. § 1332 (2006) (defining diversity jurisdiction as a matter in controversy exceeding $75,000 and involving diversity of citizenship, e.g., citizens of different states). 72. Hall St., 128 S. Ct. at 1402 n.2. 73. Id. at 1402. 74. Id. 75. Id.
the words "must" confirm "unless," is not written like a default provision that can be supplemented by contract.

Hall Street argued against section 10 being the exclusive grounds for vacatur by pointing to a supposed judicially-created "manifest disregard" ground mentioned in a 1953 Supreme Court decision, *Wilko v. Swan.* Hall Street pointed to this decision as evidence that the Court has recognized other grounds for vacatur other than those explicitly set forth in the FAA. Justice Souter noted that *Wilko* did not decide the issue of expanded grounds for vacatur and dismissed the language as being mere dicta in a case that had since been overturned on other grounds. Hall Street maintained that if judges can add grounds to vacate (the "manifest disregard" ground) to the FAA, then so too can contracting parties. Justice Souter torpedoed this reasoning by pointing out that the cited "manifest disregard" language expressly rejects review for an arbitrator's legal errors and may, in fact, just refer to all of the section 10 grounds collectively.

Then, Hall Street argued that as a "creature of contract," the arbitration agreement should be upheld according to the FAA's primary purpose of enforcing agreements according to their terms. For both textual and interpretive reasons, the majority read sections 10 and 11 as being exclusive. Justice Souter disagreed with resting the holding on the general purpose of the FAA because the act is

76. 9 U.S.C. § 9 (2006) (providing in relevant part that "at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title") (emphasis added).


78. *Hall St.,* 128 S. Ct. at 1403; *Wilko v. Swan,* 346 U.S. 427, 436–37 (1953) ("In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.").

79. *Hall St.,* 128 S. Ct. at 1403.

80. *Id.*

81. *Id.*

82. *Id.* at 1404.

83. *Id.* (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985); see also Volt Info. Scis. v. Bd. of Trs. of the Leland Stanford Jr. Univ., 489 U.S. 468, 478–79 (1989) ("In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'").

84. *Hall St.,* 128 S. Ct. at 1404.
textually at odds with contractually expanded judicial review.\textsuperscript{85} Beyond the previously mentioned argument that section 9 is not written as a default provision, Justice Souter further urged that the grounds for vacatur could not be expanded to legal error because such a reading of the statute would run contrary to the \textit{ejusdem generis} canon of statutory construction.\textsuperscript{86} Even if sections 9–11 were flexible enough to allow for modification by contract, permitting vacatur for legal error would be out of the purview of the statute’s grounds for vacatur, as these grounds are limited to what the majority categorizes as “egregious departures from the parties’ agreed-upon arbitration.”\textsuperscript{87}

After dispensing with Hall Street’s arguments regarding the primary purpose of enforcing private parties’ agreements, the majority suggested that it “makes more sense” to read sections 9–11 as encouraging a national policy in favor of arbitration while allowing just enough review to “maintain arbitration’s essential virtue of resolving disputes straightaway.”\textsuperscript{88} The Court saw further expansion of judicial review of arbitration awards as destructive to the arbitration process itself—relegating arbitration to an initial step before traditional litigation.\textsuperscript{89}

Finally, the Supreme Court suggested the narrowness of its holding by stating “we do not purport to say that [sections 10 and 11] exclude more searching review based on authority outside the statute.”\textsuperscript{90} The majority further stated that parties wishing this kind of expanded review of awards “may contemplate enforcement under state statutory or common law.”\textsuperscript{91} The holding of \textit{Hall Street} is limited “to the scope of the expeditious judicial review under sections 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.”\textsuperscript{92} Beyond the possibility of seeking review based on state statutory and common law, the Court acknowledged that this type of agreement

\begin{itemize}
  \item\textsuperscript{85} \textit{Id.}
  \item\textsuperscript{86} \textit{Id.} at 1404–05. \textit{Ejusdem generis} is “[a] canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.” \textit{Black’s Law Dictionary} 556 (8th ed. 2004).
  \item\textsuperscript{87} \textit{Hall St.}, 128 S. Ct. at 1404–05 (The §§ 10–11 grounds for vacatur and modification for “[c]orruption,” “fraud, evident partiality,” “misconduct,” “misbehavior,” “exceed[ing] powers,” “evident material miscalculation,” “evident material mistake,” “award[s] upon a matter not submitted,” and “imperfect[ions],” are nothing like review of evidence and conclusions of law).
  \item\textsuperscript{88} \textit{Id.} at 1405.
  \item\textsuperscript{89} \textit{Id.}
  \item\textsuperscript{90} \textit{Id.} at 1406.
  \item\textsuperscript{91} \textit{Id.}
  \item\textsuperscript{92} \textit{Id.}
\end{itemize}
may be enforceable if it is entered into in the course of district court litigation. The Court left open the question of whether the agreement should be treated as an exercise of a district court’s authority to manage its cases under Federal Rule of Civil Procedure 16.

With seemingly more questions created than resolved, the Court remanded the case to the Ninth Circuit to explore whether this agreement was within the district court’s authority to manage litigation. While the Supreme Court agreed with the Ninth Circuit’s decision with regard to the exclusive nature of the grounds for vacatur and modification of the FAA, this conclusion did not dispose of the case.

C. The Dissenting Opinions

The first of two dissenting opinions was penned by Justice Stevens and joined by Justice Kennedy. Justice Stevens took exception to what he saw as the majority’s misuse of the history of the FAA. Justice Stevens pointed out that the FAA was passed to overcome the general hostility courts had toward arbitration before 1925. Based on this “settled understanding of the core purpose of the FAA,” Justice Stevens stated his belief that “the interests favoring enforceability... are stronger today than before the FAA was enacted.”

Justice Stevens read the majority opinion as reaching its decision based on the litigants “trading” an acceptance of limited judicial review in exchange for expedited federal enforcement of their arbitration award. Justice Stevens stated that section 9 does not require an application be given expedited treatment, implying that if parties choose not to have expedited treatment, they should be able to get around the majority’s exclusivity ruling. The bottom line on this point of reasoning is that if the parties do not avail themselves of the expedited review under section 9, there is no longer a ground

93. Id. at 1407.
94. Id.
95. Id. at 1408.
96. Id.
97. Id. at 1408–10 (Stevens, J., dissenting).
98. Id. at 1408.
99. Id. at 1409.
100. Id.
101. Id.
102. Id. This type of agreement would be entered into under 9 U.S.C. § 2 of the FAA but would be enforced by a federal court as a contract action, presumably.
for the majority's tradeoff. With regard to the majority's application of *eiusdem generis*, Justice Stevens reasoned that the text of sections 9–11 does not compel an exclusivity reading—such a reading defeats the core purpose of the statute. Justice Stevens suggested that "a listing of grounds that must always be available to contracting parties simply does not speak to the question of whether [the parties] may agree to additional grounds for judicial review." Justice Stevens colorfully explained that the FAA is best understood as a shield against the courts from unduly interfering with arbitration awards. To use the FAA as a sword to "cut down parties' 'valid, irrevocable, and enforceable' agreements to arbitrate their disputes" is contrary to the FAA's essential purpose. Because of his belief that the FAA's primary purpose is enforcing parties' agreements, Justice Stevens stated that even if he believed the issue of expanded judicial review was debatable, he would still rule in favor of party autonomy. Finally, Justice Stevens expressed his disbelief as to why the Court would be unwilling to enforce an agreement that does not violate any public policy.

Justice Breyer wrote separately to assert his agreement with both the majority and Justice Stevens that the FAA does not preclude enforcement of an agreement to expand judicial review of arbitration awards. Since both sides concurred on this central point, Justice Breyer would not have remanded the case because Mattel could not point to any "statute, rule, or other public policy that the agreement might violate." Rather, Justice Breyer would simply have instructed the court of appeals to affirm the arbitrator's final award.

The majority and dissent mirror the very issues over which the circuit courts split. On the one hand, the *Hall Street* majority focuses on considerations of finality, efficiency, and expedience as well as a desire to prevent arbitration from becoming a prelude for

103. *Id.* at 1409.
104. *Id.*
105. *Id.*
106. *Id.* (citing 9 U.S.C. § 2 (2006)).
107. *Id.* at 1409–10.
108. *Id.* at 1410.
109. *Id.* (Breyer, J., dissenting).
110. *Id.* at 1406–07 (majority opinion) (noting that the FAA "is not the only way into court for parties wanting review of arbitration awards"); *id.* at 1409–10 (Stevens, J., dissenting) (noting that the FAA is a "shield meant to protect parties from hostile courts, not a sword with which to cut down parties' 'valid, irrevocable, and enforceable' agreements to arbitrate their disputes subject to judicial review for errors of law").
111. *Id.* at 1410 (Breyer, J., dissenting).
112. *Id.*
On the other hand, the dissenting opinions are concerned that the courts are not enforcing parties' agreements as written, thus frustrating what Justices Stevens, Kennedy, and Breyer see as the primary purpose of the FAA. The majority emphasizes sections 9 and 10 as being controlling in this case. The dissent understands section 2 and the policy of party autonomy as being the central issues. In view of these competing purposes, Hall Street exemplifies how a decision promoting expedient and efficient decision-making in arbitration can frustrate party intent and autonomy.

The Hall Street decision represents a barrier to federal enforcement of expanded judicial review clauses under the FAA. Because the decision is not controlling with respect to state arbitration laws, it is only natural that parties desiring more searching review of their arbitration awards will move from federal courts and the FAA to state courts and state arbitration laws. One such case has already come before a state supreme court, and that decision rejected the Hall Street reasoning.

IV. STATE LAW REJECTION OF HALL STREET

On August 25, 2008, the Supreme Court of California in Cable Connection, Inc. v. DIRECTV left no doubt that California arbitration law permits expanded judicial review of arbitration awards. DIRECTV provides satellite broadcast television nationwide through “sales agency agreements.” A class of dealers

113. See also Kyocera Corp. v. Prudential-Bache Trade Servs., 341 F.3d 987 (9th Cir. 2003); Schoch v. InfoUSA, Inc., 341 F.3d 785, 789–90 (8th Cir. 2003); Bowen v. Amoco Pipeline, Inc., 254 F.3d 925, 937 (10th Cir. 2001); Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc., 935 F.2d 1501, 1504–05 (7th Cir. 1991).


115. Certiorari may have been improvidently granted because this agreement may have been outside of section 9 of the FAA. Because of the Supreme Court's language regarding the applicability of Rule of Civil Procedure 16, this case may have been better understood as a litigation management case and not an FAA case.

116. 190 P.3d 586 (Cal. 2008) (at the time of this writing this is the first and only state supreme court to address Hall Street with respect to state arbitration law on the expanded judicial review of arbitration awards).

117. Id. at 590.
sued DIRECTV in Oklahoma for wrongfully withholding commissions and assessing improper charges. As provided by the sale agency agreement, the Oklahoma court directed the parties to submit the matter to arbitration in Los Angeles so the arbitrator could determine whether the arbitration could be conducted on a class wide basis. The arbitration panel decided the class issue in the affirmative.

DIRECTV petitioned to vacate the award for an error of law—a ground specifically included in the arbitration agreement. The trial court vacated the award, agreeing with DIRECTV. The court of appeal reversed, holding that reviewing an arbitration award for legal error exceeded the trial court’s jurisdiction and that provisions authorizing such review are unenforceable. Finally, the California Supreme Court granted a petition for review.

The California Supreme Court ruled that expanded judicial review provisions were enforceable under the California Arbitration Act’s (CAA) procedures for vacatur, confirmation, and modification. The court directly addressed the issue of federal preemption by ruling that “the FAA’s procedural provisions are not controlling, and the determinative question is whether CAA procedures conflict with [FAA section 2].” Finding no conflict in either the FAA itself or the Hall Street decision, the California Supreme Court determined that the United States Supreme Court did not intend to affect state court procedures with the limits it imposed on the FAA’s procedures.

Turning to the CAA’s procedures, the California Supreme Court found that expanded judicial review has a basis in the statutes. The court enforced the provision, utilizing section 1286.2(4), which states that an award can be vacated if the arbitrators exceeded their

118. Id.
119. Id.
120. Id. at 591.
121. Id. at 590 n.3 (“The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.”).
122. Id. at 591.
123. Id.
124. Id.
125. Id. at 599; see CAL. CIV. PROC. CODE § 1286–1286.8 (West 2007 & Supp. 2009).
126. Cable Connection, 190 P.3d at 598.
127. Id. at 599 (noting that the Supreme Court unanimously left open the possibility of other avenues of enforcement).
128. Id. at 600.
This reasoning is in direct contrast to the *Hall Street* decision that glossed over the "exceeded power" ground as just another in a line of "egregious departures" from the arbitration. By expressly limiting the power of the arbitrators in its arbitration agreement, DIRECTV was able to have its expanded judicial review clause enforced under the CAA. Interestingly, the court recognized that expedience is only a virtue for those who seek it, noting that "the parties . . . are best situated to weigh the advantages of traditional arbitration against the benefits of court review for the correction of legal error."132

V. **Hall Street's Impact: A Technical Answer, Not Necessarily a Solution**

*Hall Street's* peculiar factual and procedural history made it unsuitable for deciding the issue of expanded judicial review. Since judicial review of arbitration awards naturally implicates policy considerations of the judiciary and arbitrators, one must critically evaluate the policies at stake in agreements authorizing this type of review. *Hall Street* will also undoubtedly affect the law and arbitration processes on both the federal and state level. This section will examine *Hall Street's* practical effects on judicial review of arbitration awards and some possible solutions to alternate enforcement in different forums.

A. **A Critical Look at the Decision**

What makes *Hall Street* particularly unfortunate is the fact that the original lease did not call for arbitration—the parties agreed to arbitrate after litigation had begun. Considering the parties negotiated during litigation for arbitration, it is unlikely they would have agreed to the provision absent a clause for judicial review of

129. *Id.* at 600 (citing CAL. CIV. PROC. CODE § 1286.2 (4) (West 2007 & Supp. 2008) (“The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.”)).


131. *See Cable Connection*, 190 P.3d at 590 n.3. Candidly, this appears to be a hyper-technical reading of the statute's power of the arbitrator clause in an attempt to distinguish *Cable Connection* from *Hall Street*. *Cable Connection* may be best understood as a rejection of the reasoning in *Hall Street*. It was within the power of the California Supreme Court to reject the reasoning of *Hall Street* and interpret its state law as consistent with judicial review for arbitration awards.

132. *Id.* at 604.

133. *Hall St.*, 128 S. Ct. at 1400.
the arbitrator's award. The peculiar facts of this case also make Hall Street less than ideal for deciding the issue of expanded judicial review of arbitration awards. Hall Street argued in its supplementary brief and at oral argument that the expanded judicial review provision was not even an action under FAA section 9. Instead, Hall Street urged that the case be treated as a "federal district court action in which the court entered as its order the parties' stipulation to arbitrate certain issues with legal-error review." Because the agreement to arbitrate between the parties was approved and entered as an order by the district court, this type of action could be viewed as within a district court's power to manage a case under Rule 16 of the Federal Rules of Civil Procedure. If this agreement is indeed outside of section 9 (Hall Street is pressing the issue on remand) then it may have been more appropriate to dismiss the case, as the exclusivity of FAA section 9 was not before the Court.

Perhaps the most striking feature of the Hall Street decision is the Court's use of sections 9–11—sections that were originally understood to keep courts from meddling with arbitration decisions—to ultimately undo the intentions of the parties. As Justice Stevens explained, the limited grounds for vacatur, modification, or correction in sections 10 and 11 were to protect the integrity of the arbitration process from the courts. The fear at the time the FAA was passed was that broad judicial review could render the arbitration process impotent and unnecessary as courts would ultimately have the last word on disputes without this protection. In Hall Street, the ultimate irony is that in order to

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134. This assumption is based on the fact that Hall Street brought its action in district court originally. The parties negotiated and agreed to this particular provision as a condition of moving to arbitration. Hall St. Assocs. v. Mattel, Inc., 113 F. App'x 272, 273 (9th Cir. 2004); Petitioner's Supplemental Brief at 4, Hall St., 128 S.Ct. 1396 (No. 06-989).
135. See Petitioner's Supplemental Reply Brief at 1, Hall St., 128 S. Ct. 1396 (No. 06-989); Transcript of Oral Argument at 26, Hall St., 128 S. Ct. 1396 (No. 06-989).
137. Hall St., 128 S. Ct. at 1407 (the Court recognizes an alternate approach under these facts may be possible because of the district court's order). See Fed. R. Civ. P. 16 (this rule governs a federal court's power with respect to pretrial conferences, scheduling, and case management). This Note will not address whether judicial review of an arbitration award for errors of law is possible under the Federal Rules of Civil Procedure. It will instead focus on the effect of the Hall Street holding on arbitration agreements that are not approved by a court beforehand.
139. See id. at 1409 (Stevens, J., dissenting).
140. Id.
141. Id. at 1409 n.3.
“protect” the integrity of the arbitration process and ensure the finality of the award, the Supreme Court ruled in a manner that destroyed the arbitration process as agreed upon by the parties and was contrary to the purpose of section 2 of the FAA.\textsuperscript{142}

In its opinion, the Court expressed concern that arbitration will become “merely a prelude to a more cumbersome and time-consuming judicial review process.”\textsuperscript{143} Unfortunately for Hall Street and Mattel, that is precisely the setup they desired at the beginning of their dispute. By specifically contracting for expanded judicial review, it is evident that both Mattel and Hall Street were willing to sacrifice some of the finality, speed, and cost benefits of the arbitration process in order to hedge against the risk that the arbitration award may be granted on an erroneous conclusion of law.

Interestingly, Mattel did not argue—nor did the Supreme Court address—the possibility of expanded judicial review standing contrary to public policy. Courts cannot be expected to make accurate conclusions of law without appropriate and detailed judicial fact-finding.\textsuperscript{144} In some cases, it may be unclear from the outset what facts will be important for a court to properly apply the law. If an arbitrator did not make a finding crucial to the application of the law, a court will be unable to determine if an error of law was made.

The Supreme Court has noted that arbitrators have “no obligation to the court to give their reasons for an award.”\textsuperscript{145} The First, Second, and Seventh Circuits have held that arbitrators are not even required to make formal findings of fact.\textsuperscript{146} Agreements that allow a court to vacate an award for an error of law bring into question the arbitration process itself. If formal findings of fact need

\textsuperscript{142} 9 U.S.C. § 2 (2006) (Arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”).

\textsuperscript{143}  Hall St., 128 S. Ct. at 1405.

\textsuperscript{144} Robert Pitofsky, Arbitration and Antitrust Enforcement, 44 N.Y.U. L. REV. 1072, 1076–77 (1969) (arguing that arbitrator decisions are unsuitable for judicial review in the antitrust context). But see John R. Allison, Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies, 64 N.C. L. REV. 219, 240–44 (1986) (examining the arguments about the effects of arbitrator decisions on antitrust claims, including creating a void of precedent, a lack of guidance for businesses, and difficulty in determining if a policy is furthered or frustrated by arbitration).

\textsuperscript{145}  United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960).

\textsuperscript{146}  Raytheon Co. v. Automated Bus. Sys., Inc., 882 F.2d 6, 8 (1st Cir. 1989). See also Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985) (settled that “arbitrators may render a lump sum award without disclosing their rationale for it”); Shearson Hayden Stone, Inc. v. Liang, 653 F.2d 310, 312 (7th Cir. 1981) (settled that “arbitrators may render a lump sum award without disclosing their rationale for it”).
to be made, parties are pushed further from arbitration and closer to full-blown litigation. This, of course, could lead to courts requiring a detailed reasoning of arbitrators’ decisions in order for courts to ascertain how the law was applied. As court involvement increases in this process, arbitration becomes a new species of judicial litigation. It becomes more practical for a court to have sole jurisdiction, thus ensuring it has all the information needed to correctly apply the law.\footnote{Another interesting phenomenon that could occur is the creation of “two appeals of right.” The first appeal would be the lower court reviewing the arbitrator’s decision. The second appeal would be the appeals court reviewing the lower court’s decision. The possible issues created here are outside of the scope of this Note.}

An argument can be made that a court should be amenable to overseeing an arbitrator’s conclusions of law before it can be “forced” by contract to do so. That concern, however, does not appear to underlie the decision in \textit{Hall Street} since the Court alluded to other avenues to get precisely the amount of judicial review of an arbitration award that the contract provision in this case sought to obtain.\footnote{\textit{Hall St.}, 128 S. Ct. at 1406–07 (review of this sort may be enforced under state statutory or common law, or under a court’s power to manage cases).} Also, while the concern that courts may be “forced” to review arbitration awards exists in some cases, the district court in \textit{Hall Street} approved the agreement and entered it as an order evidencing its amenability to the provision.\footnote{Id. at 1405 (“There is nothing malleable about ‘must grant,’ which unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies.”).}

The Court also purported to protect the integrity of the parties’ arbitration awards from rogue courts.\footnote{Id. at 1400.} Unfortunately, the Supreme Court is protecting the parties from the very “evil” they sought when negotiating such a provision. The argument that this decision protects those who seek the benefits of the arbitration process is specious when applied to a case like \textit{Hall Street}. Because parties must contract for an agreement expanding the grounds for vacatur, a nonexclusive ruling on the FAA grounds does not authorize courts to review all arbitration awards for errors of law—only those awards where the parties have agreed to such review. As a procedural device, these agreements allow parties to get precisely the amount of court involvement they want in their arbitration process \textit{if} the parties clearly evidence such an intention. Utilizing the framework provided in \textit{Puerto Rico Telephone Co.}, the Court could have allowed parties to displace the FAA standard of review by using
clear contractual language, allaying any fear of unwanted judicial interference in arbitration.\textsuperscript{151}

It is, perhaps, the ironic nature of the \textit{Hall Street} opinion that causes the most cognitive dissonance. The majority intended for its decision to protect the expectations of the parties that arbitration agreements are final and binding.\textsuperscript{152} In order to effectuate that result, the Court had to defeat the expectations of the parties by not enforcing their contract according to its terms.\textsuperscript{153} In addition to contradicting the parties' contractual intentions, this decision promotes the speedy resolution of claims for parties who would prefer extra review to speed. To rule that FAA sections 10 and 11 are merely threshold provisions for vacatur and modification that can be expanded by contract does no harm to those parties who desire the fastest and most binding forms of arbitration. Parties that wish to arbitrate would simply have another option to tailor their agreements to meet their needs.

\textbf{B. Hall Street: Not an End, Merely a Stumbling Block to Judicial Review of Arbitration Awards}

The Supreme Court acknowledged its inability to predict the practical impact of its decision on arbitration.\textsuperscript{154} Hall Street and its amici\textsuperscript{155} argued that an exclusivity reading would drive parties away from arbitration because it would reduce the flexibility and utility of the process.\textsuperscript{156} Mattel, along with its amici,\textsuperscript{157} argued that parties will flee from the courts, presumably to later use the courts to obtain the proverbial "second bite of the apple."\textsuperscript{158} Regardless of what the net effects are on arbitration in general, it is clear that parties who still favor more searching review of arbitration awards will be

\textsuperscript{151} P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 31 (1st Cir. 2005).
\textsuperscript{152} Hall St., 128 S. Ct. at 1405.
\textsuperscript{153} For a critical look at the contradictory nature of a decision against enforceability of expanded judicial review, see Tom Cullinan, \textit{Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements}, 51 VAND. L. REV. 395, 422 (1998).
\textsuperscript{154} Hall St., 128 S. Ct. at 1406 ("We do not know . . . whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts.").
\textsuperscript{155} Including the Pacific Legal Foundation, the New England Legal Foundation and National Federation of Independent Business Legal Foundation, and CTIA—the Wireless Association.
\textsuperscript{156} Hall St., 128 S. Ct. at 1406.
\textsuperscript{157} Including the American Arbitration Association and the United States Council for International Business.
\textsuperscript{158} Hall St., 128 S. Ct. at 1406.
required to look for procedures and enforcement outside of the FAA.

*Hall Street* alludes to a few different enforcement options for parties seeking more searching judicial review.\(^{159}\) First, parties may be able to bring their action under state law.\(^{160}\) A state law action necessarily implicates federal preemption by the FAA. The FAA’s substantive provision was intended to create uniform federal substantive law of arbitration that preempts inconsistent state law.\(^{161}\) Nonetheless, the United States Supreme Court has never held that the FAA’s procedural provisions apply in state courts.\(^{162}\) The Supreme Court has not directly addressed the preemptive effect of sections 9–11; however, the language of these sections is directed to application in the federal courts.\(^{163}\) Therefore, it appears unlikely that enforcement of an expanded judicial review clause under state law would be barred by federal preemption.

The second issue to be examined with respect to state law enforcement is whether the statutes authorizing state arbitration contain “textual features at odds with enforcing a contract to expand judicial review following the arbitration.”\(^{164}\) States that have adopted the UAA are susceptible to a similar textual reading as that made by the Supreme Court in *Hall Street*. Adding to the uncertainty and further complicating commercial planning, the UAA’s comments to section 23 directly address why an “opt-in” provision for expanded judicial review was left out during the latest

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159. See id. (“The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law . . . .”).

160. *Id.*

161. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”).


163. 9 U.S.C. § 9 (2006) (“[s]uch application may be made to the United States court in and for the district within which such award was made”).

164. *Hall St.*, 128 S. Ct. at 1399.
revisions completed in 2000.\textsuperscript{165} The UAA cites inconsistent federal law, preservation of the finality of arbitration awards, and the existence of appellate arbitration panels as reasons an “opt-in” provision was omitted.\textsuperscript{166} These comments, while not dispositive—and clearly not law—give some ammunition in UAA states that the grounds for vacatur, modification, and correction are exclusive, just as in the FAA.

Unlike the California case, \textit{Cable Connection}, the agreement in \textit{Hall Street} did not place an error of law outside the arbitrator’s power: it merely directed the district court to vacate, modify, or correct the award for an error of law.\textsuperscript{167} Although likely unsuccessful in light of the \textit{ejusdem generis} argument set forth by the majority in \textit{Hall Street}, parties that do not contemplate having a state forum for the enforcement of their arbitration agreement (maritime actions, for instance) may be able to use a clause like the one in \textit{Cable Connection} to obtain the enforcement of their agreement under the FAA.\textsuperscript{168} By defining an error of law as outside the arbitrator’s power under the agreement, it may squeeze judicial review of errors of law into the narrow grounds of section 10 of the FAA.

The \textit{Cable Connection} decision may change the behavior of some parties that use judicial review provisions. Sophisticated parties may forum shop for the most favorable state arbitration law. In order to obtain the arbitration process that is most consistent with the parties’ view of alternate dispute resolution, these parties will now likely look to the most permissive state law, creating a “race to the bottom” among the states.\textsuperscript{169} The Supreme Court has stated that “[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”\textsuperscript{170} In fact, the Court has gone as far as to say that parties may specify “by contract the rules under which that arbitration will be conducted. Where . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to

\textsuperscript{165} \textit{UNIF. ARBITRATION ACT} § 23 cmt. B, 7 U.L.A. 78 (2009).
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Hall St.}, 128 S. Ct. at 1400–01.
\textsuperscript{168} \textit{Id.} at 1404–05.
\textsuperscript{169} See \textit{Ligget Co. v. Lee}, 288 U.S. 517, 558–59 (1933) (Brandeis, J. dissenting) Justice Brandeis coined the idea of a “race to the bottom” among the states in the context of corporate law. As states began competing among each other to make themselves more attractive to businesses for revenue generating purposes, many states began to remove “safeguards” in their corporate organization statutes. Other states would respond in kind to compete with these changes in corporate law, leading to a race to the least restrictive rules.
the terms of the agreement is fully consistent with the goals of the FAA." 171 Parties willing to sacrifice some speed, convenience, and finality for additional assurance that the decision has been made in accordance with the law may find themselves contracting for California’s substantive and procedural law under the CAA.

Practically speaking, Hall Street and Cable Connection divide the world into three classes of parties seeking judicial review of arbitral awards. First, there are California parties seeking judicial review of their arbitration awards. Those parties must be clear in displacing the FAA rules of procedure with those of the CAA to avoid the Hall Street ruling. Second, there are those parties outside of California seeking to avoid Hall Street by using their own state’s arbitration act. Those parties should take care to explicitly displace the FAA’s procedures with those of their state’s arbitration rules. While this will not guarantee enforcement, it will sidestep the Hall Street decision, directing the state court to apply and interpret state law, not the FAA.

Finally, there is a third class of parties that do not contemplate a state court venue. Those parties that either choose to use the federal courts or must use a federal forum (e.g., maritime parties) should avoid Hall Street’s narrow holding by declaring expressly that the parties do not agree to the expedited section 9 procedures. Further, “federal forum” parties can attempt to limit the power of the arbitrator expressly, like the parties in Cable Connection, but this is simply a hyper-technical argument172 that may be moot in light of the ejusdem generis argument.173 Any party that would not want arbitration without the expanded judicial review should include in the agreement that the review clause is not severable. By declaring the clause nonseverable, a court decision holding that expanded review is not possible in its jurisdiction would destroy the whole agreement to arbitrate.

VI. CONCLUSION

Hall Street purports to have “resolved” a circuit split among federal courts, but in actuality it has merely shifted the battleground. Prior to Hall Street, circuits were split on the exclusivity of FAA sections 9–11. Following Hall Street, a split may well develop as to whether expanded judicial review provisions are authorized by section 2 (as opposed to section 9) or Federal Rule of Civil

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171. Id.
172. See supra text accompanying note 129.
173. Hall St., 128 S. Ct. at 1404–05.
Procedure 16. The Supreme Court has addressed the technical question of the exclusivity of FAA sections 9–11 without addressing the fundamental policy question of whether courts should be the overseers of arbitration awards.

Hall Street has undoubtedly thrown state arbitration laws without clear “opt-in” judicial review provisions into doubt by leaving the possibility open for state enforcement, while denying, or at least partly denying, federal enforcement. Finally, the Hall Street decision did not have occasion to rule on whether parties may place an error of law outside the power of the arbitrator by contract, thus allowing possible judicial vacatur for an error of law under FAA section 10(d). Ultimately this decision will prompt state action, either judicial or legislative, to clarify the issue of expanded judicial review, as well as federal action, in order to test the limits of the decision. For those parties who still want a process that is quick but does not hurry, perhaps they would do well to heed another adage of the “Wizard of Westwood,” John Wooden. “Don’t let what you cannot do interfere with what you can do.” Although the section 9 procedures are “out-of-bounds” for parties seeking judicial review of their arbitration awards, there are still alternate routes for enforcement.

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174. See id. at 1406–07; see also supra text accompanying note 137.
175. See Brad A. Galbraith, Note, Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the “Manifest Disregard” of the Law Standard, 27 IND. L. REV. 241, 264 (1993) for an argument that the improvement of the arbitration process itself is the best way to ensure correct decisions under the law, not involving the courts.
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