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BUSINESS LAW—The Hall Street Hangover: Recovering and Discovering Avenues for Review of Arbitration Awards; *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008)

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CASE NOTE

BUSINESS LAW—The *Hall Street Hangover: Recovering and Discovering Avenues for Review of Arbitration Awards*; *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008)

Codie Henderson*

INTRODUCTION

In 1925, Congress enacted the Federal Arbitration Act (FAA) under its Commerce Clause power in order to make arbitration clauses just as enforceable as other common contract provisions.¹ The FAA has sixteen sections, but only three will be important for this study: §§ 9, 10, and 11. When the FAA is the controlling law, § 9 allows a party who is victorious in arbitration to seek judicial enforcement of the arbitration award within one year of the arbitrator's decision.² When entering judgment on the award, "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections ten and eleven."³ Section 10 allows a court to vacate an award if the arbitrator made one of four errors.⁴ Whether these four errors, coupled with three opportunities in § 11 to modify or correct an award, are the exclusive instances when a court may alter an arbitration decision became the epicenter of *Hall Street Associates v. Mattel, Inc.*⁵

* Candidate for J.D., University of Wyoming, 2011. I would like to thank my family, friends, and professors for their encouragement and unwavering support. I would also like to thank the members of the *Wyoming Law Review* Board for their guidance throughout this project.

¹ Cynthia A. Murray, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 76 ST. JOHN'S L. REV. 633, 635 (2002) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270–71 (1995)).

² Brief for Respondent-Appellee at 3, *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (No. 06-989), 2007 WL 2731409 [hereinafter Respondent].

³ 9 U.S.C. § 9 (2006).

⁴ 9 U.S.C. § 10 (2006). A court may vacate an arbitration award under the FAA in four instances:

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) 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; or (4) 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.

Id.

⁵ 128 S. Ct. at 1401.

The dispute that gave rise to this litigation emerged from a simple rental agreement between landlord (Hall Street) and tenant (Mattel).⁶ The lease stipulated the tenant must indemnify the landlord for any costs resulting from a violation of environmental law.⁷ In 1998, testing discovered high levels of contamination in the leased property's well water.⁸ When Mattel attempted to vacate the property and terminate the lease, Hall Street sought indemnification from Mattel for contamination clean up costs.⁹ At trial, Mattel emerged victorious on the termination issue but agreed to arbitrate the indemnification claim.¹⁰ Again, the result was for Mattel.¹¹

The parties' arbitration agreement gave the district court power to vacate the arbitration award if the arbitrator committed legal error.¹² Legal error, however, is not an established standard of review within the FAA.¹³ Thus, this was a nonstatutory—contract-based—ground for review.¹⁴ Twice the district court vacated or modified the arbitration award based on party motions by invoking the parties' nonstatutory standard of review.¹⁵ On appeal, the United States Court of Appeals for the Ninth Circuit declared the award should be confirmed unless there were grounds for vacating or modifying the award in §§ 10 and 11 of the FAA.¹⁶

The United States Supreme Court agreed with the Ninth Circuit, holding that §§ 10 and 11 of the FAA provide the exclusive grounds for modifying or vacating an arbitration award.¹⁷ Ostensibly, this decision precludes nonstatutory

⁶ *Id.* at 1400.

⁷ *Id.* The lease stated Mattel was also responsible for its predecessor's environmental violations. *Id.*

⁸ *Id.* The main contaminant that was the impetus of Mattel's environmental violation was trichloroethylene (TCE). *Id.* Mattel's predecessors, the GAF Corporation and Sawyers, Inc., used TCE as a degreaser until 1981. Respondent, *supra* note 2, at 4. They disposed of the degreaser waste through the use of a septic tank and a drain field, both of which were on the property. *Id.*

⁹ *Hall Street*, 128 S. Ct. at 1400. Arbitration was not the party's first choice. *Id.* They first attempted mediation, but when that failed the parties drafted an arbitration agreement. *Id.* The agreement was not a part of the original contract. *See id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1404–05.

¹⁴ *See id.* at 1400–01 (alluding to the dispute between FAA review standards and those based in contract).

¹⁵ Respondent, *supra* note 2, at 11–12.

¹⁶ *Hall Street*, 128 S. Ct. at 1401 (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 994 (9th Cir. 2003)).

¹⁷ Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 471–72 (2006).

grounds of review.¹⁸ However, despite appearances, *Hall Street* may not have completely eliminated opportunities for contract drafters to expand beyond the FAA.¹⁹

This case note argues the Supreme Court correctly decided *Hall Street* on the whole, but grounds for review—outside of the FAA—may still exist.²⁰ First, this note discusses why the decision is correct in light of the purposes of litigation and arbitration.²¹ Second, is an explanation of how this decision fulfills the historical goals of the FAA.²² Third, is a search for viable nonstatutory grounds of review in order to give practitioners a list courts may accept.²³ Finally, this note explores alternatives to using nonstatutory grounds of review for those who desire a method of appealing an arbitration award that does not tread near *Hall Street*.²⁴

BACKGROUND

Mere decades ago arbitration clauses were common only in contracts involving construction and labor agreements; however, today such clauses seem ubiquitous.²⁵ Early courts did not deem arbitration a suitable alternative to litigation until 1925.²⁶ These courts viewed arbitration as a threat to judicial power and often refused to acknowledge contractual agreements to arbitrate.²⁷ Courts used theories, such as the “revocability doctrine” to dismiss arbitration agreements on the rationale that arbitrators were partisans loyal only to the party who chose them.²⁸ Thus, by appearing concerned for justice, courts rationalized their hostility for arbitration by masking it in benevolence.²⁹ However, arbitration’s

¹⁸ Jon Polenberg & Quinn Smith, *Can Parties Play Games with Arbitration Awards? How Mattel May Put an End to Prolonged Gamesmanship*, 83 FLA. B.J. 36, 36 (2009).

¹⁹ See *infra* note 91 and accompanying text.

²⁰ See *infra* notes 89–94 and accompanying text.

²¹ See *infra* notes 95–120 and accompanying text.

²² See *infra* notes 121–30 and accompanying text.

²³ See *infra* notes 131–67 and accompanying text.

²⁴ See *infra* notes 168–75 and accompanying text.

²⁵ Kenneth F. Dunham, *Binding Arbitration and Specific Performance Under the FAA: Will This Marriage of Convenience Survive?*, 3 J. AM. ARB. 187, 188–89 (2004).

²⁶ Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 137–38 (2002).

²⁷ *Id.*; see also *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 120–21 (1924) (noting courts previously declined to enforce arbitration agreements).

²⁸ Schmitz, *supra* note 26, at 138.

²⁹ *Id.*

potential as an expedient, cost-effective, and private means of dispute resolution soon caught on, and a reform movement spawned in the early 1900s.³⁰ The movement culminated with the passage of the FAA in 1925.³¹

The precursors to the FAA are found in the 1920 New York Act, which has been coined the “nation’s first ‘modern’ arbitration statute.”³² In fact, sections of the FAA came directly from the New York Act.³³ One of the hallmarks of the New York Act is that it advocated limited judicial review.³⁴ In contrast to the New York Act was the Illinois Arbitration Statute, preceding the New York Act by three years.³⁵ The 1917 Illinois statute allowed for broad judicial review and court interference when arbitration did occur.³⁶ During the reform movement eventually leading to the FAA, Congress recognized two conflicting approaches to judicial review.³⁷ On one hand, it could have chosen the Illinois model that sanctioned judicial interference in every step of the arbitration process, including review of awards.³⁸ Alternatively, it could have chosen the New York approach that buttressed the reform movement’s objective of creating a method of dispute resolution insulated from “judicial second-guessing.”³⁹ Congress settled on the New York tenet of limited review as its framework; however, which proposition the FAA stood for was not always clear to courts.⁴⁰

Up until *Hall Street*, many courts accepted nonstatutory standards of review for arbitration awards.⁴¹ These standards included review when an award was

³⁰ Brief for United States Council for International Business as Amicus Curiae Supporting Respondent at 6–7, *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (No. 06-989), 2007 WL 2707883 [hereinafter *International Business*].

³¹ *Id.*

³² *Id.* (citing IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION* 34–37, 84–88 (Oxford Univ. Press 1992)).

³³ *Id.* at 8; see N.Y. LAW § 7511 (McKinney 1920).

³⁴ *International Business*, *supra* note 30, at 8.

³⁵ *Id.*; see 710 ILL. COMP. STAT. 5/12 (1917).

³⁶ *International Business*, *supra* note 30, at 8.

³⁷ Bradley T. King, “*Through Fault of Their Own*”—*Applying Bonner Mall’s Extraordinary Circumstances Test to Heightened Standard of Review Clauses*, 45 B.C. L. REV. 943, 955–56 (2004) (indicating the presence of two conflicting statutes).

³⁸ *Id.* (noting the Illinois statute conflicted with the New York Act’s limited review procedure).

³⁹ *Id.* at 956.

⁴⁰ See generally Stanley A. Leasure, *Arbitration After Hall Street v. Mattel: What Happens Next?*, 31 U. ARK. LITTLE ROCK L. REV. 273, 283 (2009). Prior to *Hall Street*, two inconsistent views of the FAA proliferated. *Id.* The Ninth and Tenth Circuits refused contractual expansion of review for arbitration awards while the First, Third, Fourth, Fifth, and Sixth Circuits approved expansion. *Id.* Thus, *Hall Street* can be viewed as the attempted resolution of the circuit splits and court confusion regarding FAA application. See *id.* at 288–97.

⁴¹ See Polenberg & Smith, *supra* note 18, at 36 (“[*Hall Street*] challenged *long-held notions* about the available standards of review governing arbitration awards.”) (emphasis added).

arbitrary and capricious, completely irrational, or when the arbitrator disregarded the essence of the party's contract.⁴² An award could also be overturned if it manifestly disregarded the law or violated public policy.⁴³ Many nonstatutory standards of review can be traced back to one United States Supreme Court case: *Wilko v. Swan*.⁴⁴ *Wilko* referenced the term "manifest disregard" of the law as a nonstatutory standard of review, but never accurately defined it.⁴⁵ This ambiguity left the door open for parties to create nonstatutory grounds for review while leaving courts in limbo regarding whether nonstatutory grounds could be upheld.⁴⁶

While many seized upon *Wilko's* vague "manifest disregard" of the law standard to validate nonstatutory standards of review, another more conservative line of thought developed foreshadowing the *Hall Street* decision.⁴⁷ In *Bowen v. Amoco Pipeline Co.*, the United States Court of Appeals for the Tenth Circuit stated its ability to review an arbitration award was extremely limited; in fact, the court believed it to be one of the narrowest review standards in the law.⁴⁸ The court

⁴² See, e.g., *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1134 (3d Cir. 1972) (noting an award may be set aside if it is completely irrational); *Van Horn v. Van Horn*, 393 F. Supp. 2d 730, 746 (N.D. Iowa 2005) (listing arbitrary and capricious as an accepted standard of review); *Evans Indus., Inc. v. Int'l Bus. Machs. Co.*, No. Civ.A. 01-0051, 2004 WL 241701, at *5 (E.D. La. Feb. 6, 2004) (recognizing an arbitration award can be vacated if it fails to draw its essence from the contract).

⁴³ See, e.g., *Sarofim v. Trust Co. of the W.*, 440 F.3d 213, 216 (5th Cir. 2006) (clarifying an arbitration award may be vacated when it is contrary to public policy); *Tanoma Mining Co. v. Local Union No. 1269*, 896 F.2d 745, 749 (3d Cir. 1990) (declaring "manifest disregard" of the law is an accepted standard of review).

⁴⁴ *Polenberg & Smith*, *supra* note 18, at 36 (citing *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953)).

⁴⁵ See 346 U.S. at 436–37.

⁴⁶ *Leasure*, *supra* note 40, at 283. Some amiable appellate courts believed expanded review was acceptable. *Id.* In *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995), the Fifth Circuit declared judicial review for errors of law would be permitted because arbitration, at its core, is a facet of contract where private parties' wishes should not be circumvented by a policy in favor of arbitration. See *Leasure*, *supra* note 40, at 289 (citing *Gateway*, 64 F.3d at 996). Moreover, the Fifth Circuit noted the FAA may not prevent parties from creating standards of review that fall outside of the FAA. *Id.* at 289–90 (quoting *Gateway*, 64 F.3d at 996). To do so would be contrary to the FAA's purpose of guaranteeing arbitration agreements are enforced as the parties agreed. See, e.g., *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001) (holding nonstatutory grounds for review of arbitration awards is in agreement with the purpose of the FAA). Courts reaching these decisions usually found a party's freedom to contract trumped limited review. *Leasure*, *supra* note 40, at 288. The First Circuit followed a similar line of thinking. See *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005) (noting that even if following the FAA provided a more efficient means of resolving disputes, enforcing party's agreements would still be more important).

⁴⁷ *Murray*, *supra* note 1, at 633.

⁴⁸ 254 F.3d 925, 932 (10th Cir. 2001) (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)).

believed narrow review standards were essential if arbitration was to maintain its virtue as an economical and expeditious method of dispute resolution.⁴⁹ Staying steadfast in its belief, the Tenth Circuit declared, except for a few judicially created exceptions, the FAA provided the only grounds for review.⁵⁰ Support for the *Bowen* decision came from the court's belief that if review standards outside of the FAA were forced upon courts, private parties would be impermissibly modifying the judicial process.⁵¹ The court also based this conclusion on its recognition of a Supreme Court decision allowing parties to dictate how arbitration was administered, but precluding provisions requiring courts to review awards for defects not listed in the FAA.⁵²

The Tenth Circuit was not alone in its holding that the FAA provides the exclusive grounds for review of arbitration awards. In *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, the Ninth Circuit reached a similar conclusion.⁵³ Moreover, in similar fashion to the Supreme Court in *Hall Street*, the Ninth Circuit cited efficiency, flexibility, informality, and simplicity as determinative factors.⁵⁴ Thus, while one line of thinking advocated expanded judicial review by purporting to defend freedom of contract from attack, the other analyzed the repercussions of expanded review and reached a conclusion vindicated by *Hall Street*.⁵⁵

PRINCIPAL CASE

Hall Street Associates v. Mattel, Inc. presented the question of whether parties could draft an arbitration agreement allowing a court to review an arbitration award for errors of law.⁵⁶ However, in a broader sense, the question was whether the FAA provided the exclusive grounds for vacatur of an arbitration award, or

⁴⁹ *See id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 933.

⁵² Leasure, *supra* note 40, at 284 (citing *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)).

⁵³ 341 F.3d 987, 994 (9th Cir. 2003) (“The [FAA] enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard.”).

⁵⁴ *Id.* at 998–1000.

⁵⁵ *See* Leasure, *supra* note 40, at 283. The development of nonstatutory standards of review began after *Wilko* and continued until *Hall Street* was decided. *See* Polenberg & Smith, *supra* note 18, at 36–37. This was also the period where different lines of thinking developed between the federal circuit courts necessitating the granting of certiorari by the United States Supreme Court. *See* Leasure, *supra* note 40, at 283.

⁵⁶ Polenberg & Smith, *supra* note 18, at 36; *see* *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

whether a private party could contractually add review standards not contained in the FAA.⁵⁷

The original reason for filing suit in *Hall Street* bears little resemblance to the protracted case it became. Originally, the dispute centered on Mattel's ability to terminate a lease agreement and whether, upon termination, Mattel must indemnify Hall Street for violations of environmental law by previous tenants.⁵⁸ When litigation in the United States District Court for the District of Oregon failed to resolve the indemnification question, the parties resorted to arbitration.⁵⁹ The arbitration agreement provided that "the [c]ourt shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."⁶⁰ After arbitration rendered an award in favor of Mattel, Hall Street made a motion in district court to vacate or modify the award.⁶¹ The court invoked the standard of review contracted for by the parties and vacated the award.⁶² Citing *LaPine Technology Corp. v. Kyocera Corp.*, the court held parties can create nonstatutory grounds for review.⁶³ On remand, the arbitrator found for Hall Street.⁶⁴ Both parties then sought modification under the agreement's review standards; however, only interest calculations were changed.⁶⁵ Both parties then appealed to the Ninth Circuit.⁶⁶

The Ninth Circuit had recently overruled *LaPine* in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*⁶⁷ As a result, Mattel altered its argument to

⁵⁷ *Hall Street*, 128 S. Ct. at 1400. Although one standard of review caused the controversy, the Court expanded the issue to consider the exclusivity of the FAA instead of focusing on the party's review standard specifically. *Id.* at 1401.

⁵⁸ *Id.* at 1400.

⁵⁹ *Id.* The parties also attempted to mediate the indemnification claim, however, when that too was unsuccessful they resorted to arbitration. *Id.*

⁶⁰ *Id.* at 1400–01.

⁶¹ *Id.* at 1401.

⁶² *Id.* The standard of review contracted for contained "errors of law," and it was on this basis the court remanded to the arbitrator. *Id.* The original contract provided for indemnification if either Mattel or its predecessors violated Oregon environmental law. *Id.* at 1400. The high levels of chemical contamination found in the property's well water violated the Oregon Drinking Water Quality Act; however, the arbitrator's original decision was that the water quality act was not applicable environmental law. *Id.* at 1401.

⁶³ 130 F.3d 884, 889 (9th Cir. 1997). *LaPine Tech.* was the first decision of three. See Leasure, *supra* note 40, at 286–88. In this case, the Ninth Circuit found expanded judicial review preferable; however, it later overruled this case in the third and final decision. *Id.*

⁶⁴ *Hall Street*, 128 S. Ct. at 1401. On remand, the arbitrator concluded the Oregon Drinking Water Quality Act was an environmental law. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 341 F.3d 987, 1000 (9th Cir. 2003).

reflect the ruling and contended legal error was no longer an enforceable judicial review standard.⁶⁸ The Ninth Circuit then reversed in favor of Mattel.⁶⁹ The district court, on remand, found for Hall Street again and the Ninth Circuit again reversed.⁷⁰ The United States Supreme Court finally granted certiorari to ultimately resolve the issue.⁷¹

Majority Opinion

The Court reached its 6 to 3 decision by initially explaining that the FAA's purpose was to give arbitration agreements the same enforceability as other contract provisions.⁷² However, the Court acknowledged uncertainty as to what extent review standards for arbitration awards were also enforceable.⁷³ The resulting issue is typically whether grounds for vacating or modifying an award are limited or expansive.⁷⁴ With this in mind, the Court addressed Hall Street's efforts to demonstrate the FAA was not exclusive.⁷⁵ As expected, Hall Street focused on *Wilko* to establish the acceptance of nonstatutory grounds for review.⁷⁶ The Court, however, clarified that while *Wilko* may support the proposition that courts can expand judicial review when necessary, *Wilko* does not support an inference that private parties can do the same.⁷⁷ Moreover, a close reading of *Wilko* seems to reject general judicial review of awards.⁷⁸

⁶⁸ *Hall Street*, 128 S. Ct. at 1401.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 1402. Chief Justice Roberts and Justices Souter, Thomas, Ginsburg, Alito and Scalia, made up the majority. *Id.* at 1399. Justices Stevens and Breyer both filed dissenting opinions, while Justice Kennedy joined in Justice Stevens's dissent. *Id.*

⁷³ *Id.* at 1403 ("The Courts of Appeals have split over the exclusiveness of these statutory grounds when parties take the FAA shortcut to confirm, vacate, or modify an award, with some saying the recitations are exclusive, and others regarding them as mere threshold provisions open to expansion by agreement.").

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.* (citing *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953)). Hall Street claimed that *Wilko* established "manifest disregard" of the law as grounds for judicial review. *Id.* Many courts believed *Wilko* stood for this proposition and Hall Street used these cases as ammunition for its argument. *See, e.g.*, *McCarthy v. Citigroup Global Mkts. Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoefl v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003).

⁷⁷ *Hall Street*, 128 S. Ct. at 1404.

⁷⁸ *Id.* Hall Street purported that *Wilko* implicitly sanctioned standards of review outside of the FAA. Brief of Petitioner-Appellant at 13–14, *Hall Street*, 128 S. Ct. 1396 (No. 06-989), 2007 WL 2197585. However, while *Wilko* did use the term manifest disregard, the Court rejected the idea that it was a standard of review in federal courts. *Wilko*, 346 U.S. at 436–37. Thus, the Court in *Hall Street* failed to believe general review was permissible given the context and disapproval in *Wilko*. *Hall Street*, 128 S. Ct. at 1398–99.

Central to the Court's holding was its conclusion that the policy of enforcing arbitration agreements can only go as far as the textual elements of the FAA allow.⁷⁹ The Court was mindful of the enforcement policy but concluded the FAA text gives no hint of flexibility.⁸⁰ Specifically, the Court was persuaded by the FAA's provision declaring a court "must grant" an order confirming an arbitration "unless" review is warranted under §§ 10 through 11.⁸¹ Thus, any agreement allowing for expanded judicial review appeared at odds with the text of the FAA.⁸² The Court concluded this point by clarifying that parties should not fight the FAA text and instead should recognize a "national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."⁸³ The review standards, of course, were only those enumerated in §§ 10 through 11 of the FAA.⁸⁴

Dissenting Opinion

Justice Stevens filed a dissent, with which Justice Kennedy joined and Justice Breyer agreed.⁸⁵ The dissent concluded if the policy behind the FAA is truly to encourage enforcement of agreements to arbitrate then the clearly expressed intentions of the parties should be honored.⁸⁶ This point was highlighted when Justice Stevens declared the FAA should be a "shield meant to protect parties from hostile courts, not a sword with which to cut down parties' . . . agreements to arbitrate."⁸⁷ Moreover, if a subsidiary purpose of the FAA is to encourage use of arbitration then courts should not refuse to honor valid and negotiated arbitration agreements for fear of undermining this purpose.⁸⁸

ANALYSIS

In *Hall Street*, the United States Supreme Court correctly concluded that judicial review of arbitration awards should be limited to situations listed in the FAA.⁸⁹ Any other conclusion would undermine the fundamental qualities of

⁷⁹ *Hall Street*, 128 S. Ct. at 1405.

⁸⁰ *Id.*

⁸¹ *Id.* (quoting 9 U.S.C. § 9 (2000)).

⁸² *Id.* The Court also rejected an argument that the FAA was a default statute parties could use when the agreement did not provide the review standards. *Id.* The Court supplemented this conclusion by providing an example of what a flexible, default provision would look like. *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1408 (Stevens, J., dissenting).

⁸⁶ *Id.* at 1408–09. Justice Breyer's dissenting opinion merely cited the same points found in Justice Stevens's dissent. *See id.* at 1410 (Breyer, J., dissenting).

⁸⁷ *Id.* at 1409 (Stevens, J., dissenting).

⁸⁸ *Id.*

⁸⁹ *See supra* notes 20–22 and accompanying text.

arbitration, as well as blur the line between arbitration and litigation.⁹⁰ Although the Court reached the correct holding, the decision is not as decisive as it may appear at first blush. Late in the opinion, the Court declared that perhaps there could be other “more searching [grounds for] review based on authority outside the statute.”⁹¹ Thus, while *Hall Street* seems to limit judicial review to grounds listed in the FAA, it appears there is still opportunity to seek judicial review on a nonstatutory basis.

In reaching its decision, the United States Supreme Court concerned itself with whether letting parties expand the grounds for judicial review would make arbitration a prelude to litigation.⁹² If parties were able to contract for a court to review the award for any possible error occurring during arbitration, then judicial review would almost certainly follow arbitration as a means of escaping an unfavorable ruling.⁹³ However, it appears that not only would arbitration be a prelude to litigation, but the line between the two may become blurred, resulting in increased demand on courts and arbitrators alike.⁹⁴

Impacts of an Alternative Holding

If parties were free to weave a tapestry of various grounds for judicial review, courts would be forced to undergo a time consuming review of a case’s merits.⁹⁵ This could result in arbitration becoming the first stage of a trial and district courts becoming appellate divisions.⁹⁶ Aside from the obvious fact that docket loads could also increase, review of arbitration cases would be difficult due to the dissimilarity between litigation and arbitration.⁹⁷ As one commentator put it, “arbitration and litigation are fundamentally different games played according

⁹⁰ See *infra* notes 95–120 and accompanying text.

⁹¹ *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008).

⁹² *Id.* at 1405.

⁹³ See David W. Rivkin & Eric P. Tuchmann, *Protecting Both the FAA and Party Autonomy: The Hall Street Decision*, 17 AM. REV. INT’L ARB. 537, 540–41 (2006).

⁹⁴ *Id.*

⁹⁵ *Id.*; see also Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT’L ARB. 147, 150 (1997) (postulating parties’ vast ability to shape the arbitration process decreases the need for judicial review, thus saving precious judicial resources).

⁹⁶ See Rivkin & Tuchmann, *supra* note 93, at 540–41. Making district courts a type of appellate court would be a burden, as the district courts’ traditional role is merely to affirm an arbitration award expeditiously. See *id.* at 541.

⁹⁷ International Business, *supra* note 30, at 17. Litigation has stricter rules of evidence and more rigid rules of procedure compared with arbitration. See Rivkin & Tuchmann, *supra* note 93, at 541. Because litigation and arbitration are so different, reviewing courts may have little idea from the record, if a record even exists, as to what actually occurred during arbitration. See Schmitz, *supra* note 26, at 192–95 (“[I]n most cases such [judicial] review [of arbitration awards] is awkward and unrealistic because the arbitration record and opinion will not be sufficient for a court’s substantive review.”).

to different rules.⁹⁸ Courts would be forced to reconstruct cases using rules they are unfamiliar with, possibly resulting in a skewed interpretation by the judge.⁹⁹ However, by limiting judicial review to certain grounds in the FAA, courts will be aware of what standard they are to use instead of being subject to any creative standard a party can fathom.¹⁰⁰

If any nonstatutory grounds for review were permissible, arbitrators, like courts, would also be forced into unfamiliar territory. For example, arbitrators may adopt stricter rules of evidence, hoping that if a party appealed the decision it would withstand judicial scrutiny.¹⁰¹ Arbitration's flexibility would be undermined by rigid procedure markedly like litigation, resulting in a prolonged dispute that contravenes the fundamental purpose of arbitration.¹⁰²

Congress's goal of making arbitration quick and cost effective would also be frustrated if the Court held in favor of Hall Street.¹⁰³ One of the principle features of arbitration is that the time needed to resolve a dispute is substantially shorter than litigation.¹⁰⁴ While cases awaiting trial may be prolonged for years, parties submitting to arbitration can often times have their case resolved within a month.¹⁰⁵

Shortening the time a dispute is pending should result in parties saving money.¹⁰⁶ The Supreme Court has previously recognized that arbitration is effective as a means of reducing the expenses of litigation usually associated with

⁹⁸ Schmitz, *supra* note 26, at 193.

⁹⁹ See International Business, *supra* note 30, at 17–18 (arguing courts will be substantially burdened if forced to use unfamiliar rules, reconstruct an arbitrator's finding of facts, and discern the arbitrator's legal reasoning years after arbitration took place).

¹⁰⁰ See Schmitz, *supra* note 26, at 190, 195 (noting expanded review would give the courts unexpected work and authority that was not specifically assigned to them by the legislature under the FAA).

¹⁰¹ Rivkin & Tuchmann, *supra* note 93, at 541 (declaring arbitrators would feel compelled to judicialize their procedures given the likelihood of judicial review).

¹⁰² *Id.*

¹⁰³ Brief for American Arbitration Association as Amicus Curiae Supporting Respondent at 8–9, *Hall Street*, 128 S. Ct. 1396 (No. 06-989), 2007 WL 2707884. One of the principle problems with typical litigation is the time it takes to get a case heard by the courts. Leon Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME L. REV. 182, 188–89 (1965–1966).

¹⁰⁴ Sarpy, *supra* note 103, at 188–89.

¹⁰⁵ *Id.*; see also Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 403 (2002) (noting statistics support the proposition that arbitration resolves disputes within a year while litigation averages two and one-half years).

¹⁰⁶ Sarpy, *supra* note 103, at 189. Lawyers' fees are often the most recognized savings, as the shorter the dispute, the less time clients are charged. *Id.* Private arbitration also has another advantage because it does not involve a public venue where resolving disputes becomes plagued by bailiff and

prolonged disputes.¹⁰⁷ Moreover, if the parties to a dispute are businesses, they can allocate funds to new business ventures that may have been saved to pay for an adverse judgment.¹⁰⁸

A further testament that the *Hall Street* decision is correct rests on the fact that arbitration is private, while litigation is not. Parties are able to resolve their dispute without subjecting themselves to the scrutiny of the public forum.¹⁰⁹ This is especially important if the parties are businesses. Businesses who are involved in trials that in rare instances become public spectacles risk alienating consumers and tarnishing their reputations.¹¹⁰ Arbitration allows these businesses—and their management—to discretely resolve a dispute, thereby limiting information released to the public.¹¹¹

A fundamental problem with judicial review on the whole is that judges have the opportunity to second guess arbitrators who are experts in their fields.¹¹² When chosen for their expertise, arbitrators bring with them knowledge of customs and standards specific to the field at issue.¹¹³ In a world that operates on increasingly specialized and technical language, expert arbitrators have become a necessity.¹¹⁴ More often than not, judges are not equipped with knowledge regarding engineering or construction, for example.¹¹⁵ However, an alternate holding in *Hall Street* would make these experts subservient to judges who do not possess the equivalent knowledge necessary to reach the best possible conclusion.¹¹⁶

Not to be ignored is the finality and certainty arbitration was designed to provide. One of the many goals of the FAA was to see that arbitration awards were final by protecting them from judicial interference.¹¹⁷ The FAA provides that

clerk fees. *Id.* Private arbitration comes at no cost to the public, thus, parties should expect a savings by eliminating the court fees. *Id.*; see also Wharton Poor, *Arbitration Under the Federal Statute*, 36 YALE L.J. 667, 676 (1927) (explaining a case which goes to trial may be prolonged by multiple appeals and reversals, ultimately resulting in costs exceeding the amount in dispute).

¹⁰⁷ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

¹⁰⁸ Sarpy, *supra* note 103, at 189.

¹⁰⁹ See Nickolas J. McGrath, *McCauley v. Halliburton Energy Services, Inc.: Treatment of a Motion to Stay Proceedings Pending an Arbitrability Appeal*, 83 DENV. U. L. REV. 793, 794 (2006).

¹¹⁰ Sarpy, *supra* note 103, at 189.

¹¹¹ See Schmitz, *supra* note 26, at 158.

¹¹² See *id.* at 161–62.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Gregg A. Paradise, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 FORDHAM L. REV. 247, 254–55 (1995).

¹¹⁷ Rivkin & Tuchmann, *supra* note 93, at 538.

arbitrators will conduct the arbitration and weigh the merits of the case; courts will only step in to review the case when necessary according to §§ 9 through 11.¹¹⁸ Moreover, the statute's inflexible language, which declares a court "must" confirm an award unless grounds for vacatur or modification are established in §§ 10 and 11, is a testament that arbitration awards were to be final.¹¹⁹ Finally, arbitration has been described as an act which "settle[s] or end[s] disputes through final and binding third party determinations."¹²⁰ This distinguished arbitration as a separate process, not a mere prologue to litigation.

The Correct Decision in Light of Legislative History

The benefits of arbitration listed above are buttressed by the legislative history of the FAA. The FAA's drafters modeled it on sections of the New York Arbitration Act.¹²¹ Julius Cohen was the principle drafter of both the New York Act and the FAA.¹²² In 1924, during congressional hearings evaluating national adoption of the FAA, Cohen noted under the New York Act, courts vehemently supported arbitrators and the decisions they rendered.¹²³ Supporting the arbitrator also meant limiting judicial interference in the process.¹²⁴ Because Congress lifted sections of the FAA from the New York Act, it is logical that the meaning and purpose of the act transferred as well.¹²⁵ Thus, finality is an inherent goal of the FAA.¹²⁶ Cohen went on to express pride in participating in the FAA drafting, because it was a means to make "the commercial world less expensive and more expeditious."¹²⁷ Cohen's statements taken together with the known tenets of the New York Act

¹¹⁸ *Id.* (noting arbitrators are in charge of resolving the controversy, whereas, courts are only responsible for enforcing the final award).

¹¹⁹ *Id.* (quoting 9 U.S.C. §§ 9–11 (2000)).

¹²⁰ Schmitz, *supra* note 26, at 125.

¹²¹ King, *supra* note 37, at 955.

¹²² Respondent, *supra* note 2, at 29.

¹²³ *Id.* at 31 ("[Courts had] given the strongest support to the powers of the arbitrators thereunder and to the finality of their awards, and [had] refused to permit the invasion of technicalities in the application of the [Act] or the determination of rights under it." (quoting *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Senate and House Subcomms. of the Comms. on the Judiciary*, 68th Cong. 10, 40 (1924) [hereinafter 1924 Hearings])).

¹²⁴ *See id.* at 31–32.

¹²⁵ *Id.* at 31 ("In using the language of the New York Arbitration Act, Congress intended to adopt the settled meaning those terms had already acquired."); *see Perkins v. Berger*, 145 F.2d 856, 857 (D.C. Cir. 1944) (noting when Congress adopts a state statute, prior interpretation of that statute transfers as well); *Hartford Accident & Indem. Co. v. Hoage*, 85 F.2d 411, 413 (D.C. Cir. 1936) (clarifying when Congress borrows language from a state statute, the state's construction and understanding of that statute are deemed to transfer with the statute's text).

¹²⁶ *See King*, *supra* note 37, at 948.

¹²⁷ 1924 Hearings, *supra* note 123, at 10, 13.

demonstrate Congress purposely chose the New York Act as a model to protect arbitration's benefits by preventing expanded judicial review.¹²⁸

The Supreme Court correctly decided *Hall Street* because any other conclusion would ignore history, as well as undermine the time-honored benefits of arbitration.¹²⁹ Expanded review would cost more, take longer, burden courts and arbitrators, call finality into question, expose private matters to public scrutiny, and take the decision out of the most qualified hands.¹³⁰ Fortunately, the Supreme Court reached the correct conclusion and recognized an alternate holding would destroy all the FAA drafters helped create.

Expanding Review Despite the Hall Street Decision

The *Hall Street* decision is correct on the whole, and ostensibly stands for the proposition that expanded judicial review of arbitration awards, outside the FAA, is forbidden.¹³¹ The Court, however, did not completely exclude opportunities to add nonstatutory grounds for review.¹³² In what appears to be a moment of inconsistency, the Court declared, “we do not purport to say that [§§ 10 and 11] exclude more searching review based on authority outside the statute as well.”¹³³ This fortuitous statement may be an opening which practitioners can slip nonstatutory grounds for review through in order to give their clients one more layer of protection.¹³⁴

One of the first nonstatutory grounds to be considered is the enigmatic “manifest disregard” of the law.¹³⁵ *Hall Street* attempted to prove manifest disregard of the law was a viable standard of review based on *Wilko*.¹³⁶ While *Hall Street* has come to represent the demise of nonstatutory standards of review in general, the Court was forced to address manifest disregard specifically in response to *Hall Street*'s argument.¹³⁷ Instead of eliminating the standard, the Court declared manifest disregard was merely a reference to review exceptions in FAA § 10.¹³⁸

¹²⁸ See Respondent, *supra* note 2, at 32–33 (quoting 1924 Hearings, *supra* note 123, at 34).

¹²⁹ See Rivkin & Tuchmann, *supra* note 93, at 537. For those who agree with limited review there is evidence that the international trend has also been in this direction. International Business, *supra* note 30, at 21–28.

¹³⁰ See *supra* notes 95–120 and accompanying text.

¹³¹ See Rau, *supra* note 17, at 502–03.

¹³² *Id.* at 502–06.

¹³³ *Hall Street*, 128 S. Ct. at 1406.

¹³⁴ Rau, *supra* note 17, at 502–06.

¹³⁵ Polenberg & Smith, *supra* note 18, at 36.

¹³⁶ *Hall Street*, 128 S. Ct. at 1403.

¹³⁷ *Id.* at 1403–04.

¹³⁸ *Id.* at 1404 (“Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them.”).

By addressing and dismissing manifest disregard specifically, it would seem the issue should be resolved; however, confusion about the standard's existence has survived.¹³⁹ Courts have avoided discussing whether manifest disregard is still viable in light of *Hall Street*, instead of unequivocally declaring that the standard is no longer an option for review.¹⁴⁰ However, within this confusion there may still exist an opportunity to use the standard.

In *Vaughn v. Leeds, Morelli & Brown, P.C.*, the United States Court of Appeals for the Second Circuit recognized that although the *Hall Street* decision severely limits the grounds for judicial review of arbitration awards, manifest disregard of the law is still a viable option.¹⁴¹ The Second Circuit even goes so far as to provide a three-part test for courts to use in deciding whether an arbitrator's decision is in manifest disregard of the law.¹⁴² The Supreme Court's choice in *Hall Street* not to unequivocally exclude review standards outside of the FAA has allowed manifest disregard to be resurrected after its apparent demise.¹⁴³

The *Vaughn* court is not alone in its decision to continue to acknowledge the manifest disregard standard. Wisconsin courts have since kept the standard as well. In *Sands v. Menard, Inc.*, the court noted it was content with its conclusion that manifest disregard remained viable due to the Supreme Court's declaration that

¹³⁹ Robert Ellis, *Imperfect Minimalism: Unanswered Questions in Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), 32 HARV. J.L. & PUB. POL'Y 1187, 1192–93 (2009).

¹⁴⁰ See *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 (1st Cir. 2008) (declining to decide whether *Hall Street* precludes use of manifest disregard because the parties' claim did not invoke FAA review); *Halliburton Energy Servs., Inc. v. NL Indus. Inc.*, 306 F. App'x 843, 843 (5th Cir. 2009) (per curiam) (refusing to decide whether manifest disregard survived *Hall Street* because the plaintiffs would not meet the burden even if it still existed); *Franko v. Ameriprise Fin. Servs., Inc.*, No. 09-09, 2009 WL 1636054, at *4 (E.D. Pa. June 11, 2009) (noting the parties would not meet the manifest disregard burden and, as a result, there is no need to examine whether the standard remains valid in light of the *Hall Street* decision).

¹⁴¹ 315 F. App'x 327, 330 (2d Cir. 2009).

¹⁴² *Stolt-Nielsen SA v. AnimalFeeds Int'l. Corp.*, 548 F.3d 85, 93 (2d Cir. 2008). The Second Circuit explained the test as follows:

First, we must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators. . . . Second, once it is determined that the law is clear and plainly applicable, we must find that the law was in fact improperly applied, leading to an erroneous outcome. . . . Third, once the first two inquiries are satisfied, we look to a subjective element, that is, the knowledge actually possessed by the arbitrators. In order to intentionally disregard the law, the arbitrator must have known of its existence, and its applicability to the problem before him.

Id. (citation omitted).

¹⁴³ *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009). *But see Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355–58 (5th Cir. 2009) (disagreeing with other federal circuit courts' continued acceptance of manifest disregard as a valid standard or review).

“the FAA is not the only way into court for parties wanting review of arbitration awards.”¹⁴⁴ The *Sands* court used this language as an example of the Supreme Court’s willingness to let state courts expand beyond the FAA.¹⁴⁵

Another possible nonstatutory ground for vacatur is the “public policy exception.”¹⁴⁶ The resilience of this standard of review may be related to its historical presence and value to courts.¹⁴⁷ Preceding *Hall Street*, courts were willing to enforce arbitration agreements that allowed vacatur if the award violated defined public policy.¹⁴⁸ Courts may still accept public policy as a viable standard of review for arbitration awards because public policy is dissimilar to other review standards.¹⁴⁹ The difference is challenging an award on public policy grounds does not require a review of the merits of the case.¹⁵⁰ A court can simply defer to the arbitrator’s method for reaching the decision and come to a conclusion.¹⁵¹ This should alleviate any concern that expanded review will undermine arbitration’s efficiency. Additionally, public policy has an established history in the law and would be difficult to supplant.¹⁵² At least one court, the United States District

¹⁴⁴ 767 N.W.2d 332, 335 (Wis. Ct. App. 2009) (quoting *Hall Street*, 128 S. Ct. at 1406). Some courts have also been willing to expand review on their own volition, using manifest disregard as a judicially created exception to the rule that review is limited to §§ 10 and 11 of the FAA. See *DMA Int’l, Inc. v. Qwest Commc’ns Intern.*, No. 08-CV-00358-WDM-BNB, 2008 WL 4216261, at *4–5 (D. Colo. Sept. 12, 2008) (implying a distinction between private agreements to expand review and judicially created grounds for vacatur may not have eliminated judicial expansion for review of arbitration awards).

¹⁴⁵ See *Sands*, 767 N.W.2d at 335.

¹⁴⁶ Richard C. Reuben, *Personal Autonomy and Vacatur after Hall Street*, 113 PENN ST. L. REV. 1103, 1106–07 (2009).

¹⁴⁷ See Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597, 615 (2009) (“[F]ederal courts began using the public policy exception as an extra-statutory basis for vacatur under the FAA, reasoning the public policy exception was inherent in all contracts, and arbitrations were essentially dispute mechanisms generated by contract.”). But see Stuart M. Widman, *Hall Street v. Mattel The Supreme Court’s Alternative Arbitration Universes*, DISP. RESOL. MAG., Fall 2008, at 24, 27 (implying *Hall Street* signals the end for nonstatutory review standards, including review for violation of public policy).

¹⁴⁸ Aaron S. Bayer & Joseph M. Gillis, *Significant Questions, Little Guidance Arbitration After Hall Street*, FOR THE DEF., Nov. 2008, at 44, 48 (citing *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987)); Murray, *supra* note 1, at 652.

¹⁴⁹ Bayer & Gillis, *supra* note 148, at 48.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* (“Courts have long refrained from enforcing, and thereby putting the State’s imprimatur on, contracts that violate important public policies.”); see also Rau, *supra* note 17, at 501–02. Appalled at the Court’s failure to declare public policy as a necessary exception to the holding, commentator Rau noted:

Since externalities—negative social effects—necessarily limit every exercise of contractual autonomy, vacatur for violation of “public policy” is a necessary fail safe, universally understood in every existing legal system as a ground (whether

Court for the District of Massachusetts, has recognized a public policy exception, even though it declined to address whether *Hall Street* precluded the manifest disregard standard.¹⁵³ This post-*Hall Street* decision may prove useful to those trying to vacate an arbitration award using grounds for review outside the FAA.

The “arbitrary and capricious” standard of review has also been called into question by *Hall Street*.¹⁵⁴ Because it is a nonstatutory ground for review, apparently it has been abolished like many others by *Hall Street*.¹⁵⁵ However, on one occasion a court examined the possibility of vacating an award under this standard.¹⁵⁶ The court acknowledged *Hall Street* brought into question whether the standard still existed, but nevertheless decided to examine the dispute using the arbitrary and capricious standard because that is what the parties contracted for.¹⁵⁷ While this standard does seem less likely to be a viable option, parties should at least consider it.

A Saving Grace for the Hesitant

A tactic noted by some commentators is to parallel a contract-based grounds for review with one present in the FAA.¹⁵⁸ The theory proposes, the more a party’s contract-based grounds for review appear to merely be a unique way of expressing an FAA standard, the greater the chance of court acceptance.¹⁵⁹ There is at least some evidence to support this theory. In *Franko v. Ameriprise Financial Services Inc.*, the United States District Court for the Eastern District of Pennsylvania

“statutory” or “non statutory”) for refusing to honor an award. However rarely successful, it must somehow be made to fit within the architecture of our law of arbitration.

Id.

¹⁵³ *Globe Newspaper Co. v. Int’l Ass’n of Machinists*, No. 08-cv-11945-DPW, 2009 WL 2425798, at *3 (D. Mass. Aug. 5, 2009). The court traced public policy’s validity as a standard of review to the common law principle that courts do not have to enforce illegal contracts. *Id.* Public policy allows the award to be vacated if it violated excepted public policy standards, which should be determined by prevailing laws and precedents. *Id.*

¹⁵⁴ *Widman*, *supra* note 147, at 27.

¹⁵⁵ *Polenberg & Smith*, *supra* note 18, at 36.

¹⁵⁶ *See Waddell v. Holiday Isle*, No. 09-0040-WS-M, 2009 WL 2413668, at *11 (S.D. Ala. Aug. 4, 2009); *see also Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320, 1326 (11th Cir. 2005).

¹⁵⁷ *Waddell*, 2009 WL 2413668, at *11.

¹⁵⁸ *See Bayer & Gillis*, *supra* note 148, at 49; *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 351 (N.Y. Sup. Ct. 2008) (declaring so long as the public policy exception is merely a court’s interpretation of § 10(a)(4) of the FAA it would survive *Hall Street* so long as a party did not claim it was a nonstatutory standard of review).

¹⁵⁹ *Bayer & Gillis*, *supra* note 148, at 49. The statutory requirement that arbitrators not exceed their power may be broad enough to encompass many nonstatutory standards. *Id.*

noted the previously discussed “manifest disregard” of the law standard closely mirrors § 10 of the FAA allowing a court to vacate the award if an arbitrator exceeded his or her powers.¹⁶⁰ Moreover, standards allowing review when the arbitrator “fails to draw [his or her decision from the] essence” of the contract is also similar to § 10 because arbitrators are bound by the contract.¹⁶¹ Therefore, if nonstatutory grounds for review are close enough in purpose to statutory grounds for review, it may survive the *Hall Street* limitation.

Another option may be to use state law to avoid the *Hall Street* decision. In *Cable Connection, Inc. v. DIRECTV, Inc.*, the California Supreme Court recognized that *Hall Street* left a loophole allowing a state court to use state law to expand judicial review.¹⁶² This loophole was of course the Supreme Court’s reference to allowing a “more searching review [for expanded judicial review] based on authority outside the statute.”¹⁶³ The contract in *Cable Connection* provided: “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.”¹⁶⁴ The court concluded that *Hall Street* only restricted arbitration under the FAA and does not preempt state arbitration statutes allowing expanded review.¹⁶⁵ The court rationalized its decision by noting the intention of the FAA is to see that private parties’ arbitration agreements are enforced.¹⁶⁶ Thus, so long as the parties’ valid arbitration agreement is being enforced in accordance with FAA policy, the court felt free to use the state’s arbitration act and allow expanded judicial review.¹⁶⁷

Alternatives to Nonstatutory Review Standards

Parties can always attempt to protect themselves by carefully defining the arbitration process in the agreement.¹⁶⁸ Parties are free to decide how arbitrators are selected, what issues can be arbitrated, and even what qualifications an

¹⁶⁰ *Franko*, 2009 WL 1636054, at *4; see also *Comedy Club*, 553 F.3d at 1290; *Stolt-Nielson*, 548 F.3d at 94 (noting manifest disregard is “a judicial gloss on the specific grounds for vacatur enumerated in § 10 of the FAA”).

¹⁶¹ *Bayer & Gillis*, *supra* note 148, at 49.

¹⁶² 190 P.3d 586, 596 (Cal. 2008).

¹⁶³ *Hall Street*, 128 S. Ct. at 1406.

¹⁶⁴ *Cable Connection*, 190 P.3d at 590.

¹⁶⁵ *Id.* at 599.

¹⁶⁶ *Id.* The FAA policy favoring enforcement of arbitration agreements was meant to stem the tide of judicial hostility towards arbitration agreements but was never meant to sanction expanded judicial review. See *Schmitz*, *supra* note 26, at 144–45.

¹⁶⁷ *Cable Connection*, 190 P.3d at 599. The court believed so long as FAA policy was being met, there was no need to make state arbitration statutes conform, especially in light of the Court’s recognition of grounds for review based on state law. See *id.* at 598–99.

¹⁶⁸ See *Rivkin & Tuchmann*, *supra* note 93, at 540–41 (explaining the *Hall Street* decision only limited subsequent review of arbitration awards, not the procedures used to conduct arbitration).

arbitrator must possess.¹⁶⁹ This freedom, of course, comes with the caveat that parties are free to define arbitration procedure but not judicial review, except for very limited circumstances as addressed above.¹⁷⁰

If parties are set on contracting for expanded review of the award, and fear using nonstatutory grounds for judicial review, then contracting for review by an appellate arbitration panel is a viable option.¹⁷¹ Appellate arbitration services, such as the American Arbitration Association, allow parties to contract for a panel of arbitrators to review the award using standards of review to which the parties agree.¹⁷² These can even include review for “manifest disregard of the law or facts,” “clear errors of law,” and “because of clear and convincing factual errors.”¹⁷³ If parties wish to have an element of the judiciary present they can also place a retired judge on the panel.¹⁷⁴

While at first glance it may appear that *Hall Street* has eliminated all grounds for judicial review of arbitration awards, clever drafters in courts sympathetic to expanded review may be able to go beyond the FAA in order to seek favorable terms for their clients. Some courts still recognize manifest disregard of the law, as well as the public policy exception.¹⁷⁵ Moreover, carefully drafting the procedure used during arbitration and allowing for review by an appellate arbitration panel may provide the safeguards that have in many ways been taken away by *Hall Street*.

CONCLUSION

On the whole, the United States Supreme Court correctly decided *Hall Street* by limiting review of arbitration awards to circumstances present within the FAA.¹⁷⁶ It recognized allowing expanded judicial review would place undue pressure on arbitrators and courts alike, as well as undermine the qualities that

¹⁶⁹ 4 AM. JUR. 2D *Alternative Dispute Resolution* § 17 (2009); see also Smit, *supra* note 95, at 150 (“[P]arties have a large measure of freedom to shape the arbitration in the way they see fit.”).

¹⁷⁰ See *supra* notes 131–67 and accompanying text.

¹⁷¹ See Rivkin & Tuchmann, *supra* note 93, at 542–43; see also Poor, *supra* note 106, at 676 (concluding if parties are unwilling to accept an arbitrator’s decision it is within their power to agree for review by an appeal board).

¹⁷² AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 37 (2007); see also THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & DISPUTE RESOLUTION, ARBITRATION APPEAL PROCEDURE (2007), <http://www.cpradr.org/ArbitrationAppealProcedure/tabid/79/Default.aspx>.

¹⁷³ AMERICAN ARBITRATION ASSOCIATION, *supra* note 172, at 37.

¹⁷⁴ Respondent, *supra* note 2, at 48 (citing IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW § 27.2.3, at 27:4–7 (1995)).

¹⁷⁵ See *supra* notes 135–53 and accompanying text.

¹⁷⁶ See *supra* notes 89–90 and accompanying text.

make arbitration an actual alternative to traditional litigation.¹⁷⁷ However, while the decision was correct, it is not as decisive as it may appear.¹⁷⁸ Grounds for review still exist, in some courts, outside of the statute in the forms of manifest disregard, public policy, state law, and possibly arbitrary and capricious.¹⁷⁹ If parties fear challenging *Hall Street* or believe courts in their jurisdictions are hostile to nonstatutory review standards, then carefully tailoring the arbitration agreement and allowing for review by an appellate arbitration panel may give parties the protective review parachute purportedly taken away by *Hall Street*.¹⁸⁰

¹⁷⁷ See *supra* notes 95–130 and accompanying text.

¹⁷⁸ See *supra* notes 91–94 and accompanying text.

¹⁷⁹ See *supra* notes 131–67 and accompanying text.

¹⁸⁰ See *supra* notes 168–74 and accompanying text.