

CONTRACTING AROUND *HALL STREET*

by  
Christopher R. Drahozal\*

*This Article examines the extent to which expanded court review of arbitration awards remains available after the Supreme Court’s decision in Hall Street Associates, L.L.C. v. Mattel, Inc.—that is, whether parties can contract around Hall Street. It finds only a limited likelihood that expanded-review provisions are enforceable after Hall Street in federal court, but a greater likelihood in state court (assuming the state arbitration law permits parties to contract for expanded review). First, contract provisions limiting the arbitrators’ authority to make legal errors should permit expanded review under the FAA (in both federal court and state court), but courts since Hall Street have not been receptive to the argument. Second, under a narrow interpretation of the Supreme Court’s decision in Volt, parties are unlikely to be able to contract out of the FAA altogether. As a result, confirmation of an award in federal court under the FAA likely would preclude a court from relying on an expanded-review provision authorized by state law to vacate the award. Third, whether expanded review is available in state court depends on (1) whether state arbitration law authorizes expanded review; and (2) the scope of FAA preemption. Under at least some theories of FAA preemption, state laws authorizing expanded review would not be preempted by the FAA in state court.*

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\* John M. Rounds Professor of Law, University of Kansas School of Law; Associate Reporter, RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION. The views stated in this Article are the author’s personal views and should not be attributed to the other Reporters or to the American Law Institute. Thanks to Steve Ware for helpful comments on a prior draft of this Article.

## I. INTRODUCTION

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court held that parties cannot by contract expand the grounds available for vacating arbitration awards under the Federal Arbitration Act (FAA).<sup>1</sup> The Court reasoned that the plain language of the FAA sets out the “exclusive grounds” for vacating arbitration awards:<sup>2</sup> if no statutory vacatur ground is met, under section 9 of the FAA the court “must grant” an order confirming the award.<sup>3</sup> As the Court explained: “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. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.”<sup>4</sup> As a result, parties cannot add to the statutory vacatur grounds set out in section 10 of the FAA.<sup>5</sup> They cannot, for example, specify in their arbitration agreement that courts should review legal rulings of arbitrators de novo or factual rulings under a clearly erroneous standard.

The *Hall Street* Court explicitly left open, however, the possibility that parties might be able to rely on some authority other than the FAA to enforce an agreement providing for expanded court review of awards. According to the Court, “[t]he 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, for example, where judicial review of different scope is arguable.”<sup>6</sup> Thus, in holding that section 10 provides the “exclusive regime[]” for review of awards under the FAA, the Court made clear that it did “not purport to say that [section 10] exclude[s] more searching review based on authority outside the statute as well.”<sup>7</sup>

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<sup>1</sup> 128 S. Ct. 1396, 1408 (2008).

<sup>2</sup> *Id.* at 1403.

<sup>3</sup> Federal Arbitration Act, 9 U.S.C. § 9 (2006) [hereinafter FAA].

<sup>4</sup> *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1405.

<sup>5</sup> Section 10(a) of the FAA provides as follows:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—(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.

FAA, 9 U.S.C. § 10(a).

<sup>6</sup> *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1406.

<sup>7</sup> *Id.*

In this Article, I examine the availability of expanded review after *Hall Street*.<sup>8</sup> My focus is strictly on the legal enforceability of expanded-review provisions. I have stated my views on the policy question elsewhere,<sup>9</sup> and others have debated the policy consequences of the *Hall Street* decision on numerous occasions.<sup>10</sup> On the legal question, I conclude that parties have only a limited likelihood of successfully enforcing an expanded-review provision in federal court after *Hall Street* (due in large part to my view that parties are limited in their ability to contract out of the FAA by choosing state arbitration law). In state court, by contrast, parties are more likely to be successful in obtaining expanded review of an arbitral award—assuming the state permits expanded review as a matter of its own arbitration law, and with the caveat that the scope of FAA preemption as to issues such as award confirmation and vacatur remains uncertain.

For purposes of my analysis, I make several assumptions. First, I assume that at least some parties prefer arbitration with expanded court

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<sup>8</sup> For selected other writings discussing the implications of *Hall Street*, see John James Barceló III, *Expanded Judicial Review of Awards After Hall Street and in Comparative Perspective*, in RESOLVING INTERNATIONAL CONFLICTS—LIBOR AMICORUM, TIBOR VÁRADY I (Peter Hay et al. eds., 2009); Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 535–36 (2009); David K. Kessler, *Why Arbitrate? The Questionable Quest for Efficiency in Arbitration After Hall Street Associates*, 8 FLA. ST. U. BUS. L. REV. 77 (2009); Stanley A. Leasure, *Arbitration After Hall Street v. Mattel: What Happens Next?*, 31 U. ARK. LITTLE ROCK L. REV. 273 (2009); Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469 (2006); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103 (2009); David W. Rivkin & Eric P. Tuchmann, *Protecting Both the FAA and Party Autonomy: The Hall Street Decision*, 17 AM. REV. INT'L ARB. 537 (2006); Timothy Tyler & Archis A. Parasharami, *Finality over Choice: Hall Street Associates, L.L.C. v. Mattel, Inc. (U.S. Supreme Court)*, 25 J. INT'L ARB. 613 (2008); Nicholas R. Weiskopf & Matthew S. Mulqueen, *Hall Street, Judicial Review of Arbitral Awards, and Federal Preemption*, 29 REV. LITIG. 361 (2010); Brian T. Burns, Note, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street*, 78 FORDHAM L. REV. 1813 (2010); Matthew M. Mitzner, Note, *Snatching Arbitral Freedom from Hall Street's Clenched Fist*, 29 REV. LITIG. 179 (2009).

<sup>9</sup> See Christopher R. Drahozal, *Default Rule Theory and International Arbitration Law (with Comments on Expanded Review and Ex Parte Interim Relief)*, INT'L ARB. NEWS, Winter 2004–2005, at 2, 3 [hereinafter Drahozal, *Default Rule Theory*]; Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 426–27 (2003) [hereinafter Drahozal, *Contracting Around RUAA*].

<sup>10</sup> Compare, e.g., Tyler & Parasharami, *supra* note 8, at 621 (“In short, the decision in *Hall Street* represents a step backwards from the Court’s repeated recognition that the FAA treats the contractual choices of the parties as paramount in favor of an approach that emphasizes arbitration’s purposes of finality and efficiency.”) with Reuben, *supra* note 8, at 1107 (“These avenues point to mischief for arbitration, however, as they allow for the evisceration of arbitration finality, a cornerstone of the process under the FAA. Courts and legislatures should resist the temptation to permit contracted judicial review, even in these avenues opened up by the Supreme Court in *Hall Street*.”).

review of awards to arbitration without expanded review. The limited court review of arbitration awards can make arbitration a less desirable means of dispute resolution for “bet-the-company” cases, such as cases in which “an aberrational award could have a devastating effect on the company.”<sup>11</sup> Expanded review may reduce the risk of such aberrational arbitration awards—sometimes called “knucklehead awards”<sup>12</sup> or “‘roll-the-dice’ or ‘Russian roulette’ arbitration” awards<sup>13</sup>—making arbitration a more attractive dispute resolution option. While expanded-review agreements are not commonplace, they do exist (or at least did prior to *Hall Street*),<sup>14</sup> and might have been more common had there not been doubt as to their enforceability.

Second, I assume that the contract giving rise to the arbitration is subject to Chapter One of the FAA; that is, it “evidenc[es] a transaction involving commerce.”<sup>15</sup> This assumption does not impose much of a limitation, as the Supreme Court has held that the FAA extends to the full reach of Congress’s Commerce Power.<sup>16</sup> However, I exclude from my analysis international arbitration awards, which are subject to a more complex regime of governing law.<sup>17</sup>

Third, I assume that the parties wish to enter into a pre-dispute, rather than a post-dispute, arbitration agreement. Again, this is not a dramatic limitation, because most arbitrations arise out of pre-dispute, rather than post-dispute, agreements.<sup>18</sup> This focus, however, excludes

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<sup>11</sup> Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 79–80 (2008).

<sup>12</sup> Carroll E. Neesemann, *Contracting for Judicial Review: Party-Chosen Arbitral Review Standards Can Inspire Confidence in the Process, and Is Good for Arbitration*, DISP. RESOL. MAG., Fall 1998, at 1, 18.

<sup>13</sup> Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 104 (1997).

<sup>14</sup> Drahozal, *Default Rule Theory*, *supra* note 9, at 3 & n.15 (citing, e.g., *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2002)).

<sup>15</sup> FAA, 9 U.S.C. § 2 (2006).

<sup>16</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995).

<sup>17</sup> Of course, the structure of the analysis likely would be similar for international arbitration awards, with the exception, as noted in the text, of a differing applicable law. For an analysis of the enforceability of expanded-review provisions in international arbitration agreements, see Barceló, *supra* note 8.

<sup>18</sup> SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION (2009), [http://www.searlearbitration.org/report/empirical\\_results.php](http://www.searlearbitration.org/report/empirical_results.php) (“[V]irtually all of the 301 cases in the case file sample—290 (or 96.3%) arose out of pre-dispute agreements; 11 (or 3.7%) arose out of post-dispute agreements to arbitrate.”); Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, 1(2) ICC INT’L CT. ARB. BULL. 14 (1990), *reprinted in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 65, 66–67 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (“Of the cases submitted to the ICC Court, only four [of 237] in 1987 and six [of 215] in 1989 resulted from a *compromis*, that is, an agreement to submit an already-existing dispute to arbitration.”); Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 319 (2003) (“AAA found only 6%

cases like *Hall Street* itself, which arose out of a post-dispute agreement to arbitrate.<sup>19</sup> Accordingly, I do not consider here whether expanded-review provisions might be enforceable under the inherent powers of the district court or similar theories, which are most likely to be relevant to post-dispute arbitration agreements.<sup>20</sup>

This Article proceeds as follows: Part II sets out in general terms possible options available to parties in seeking to confirm and vacate arbitration awards; Part III examines theories under which expanded-review provisions might be enforceable in federal court; and Part IV examines theories under which expanded-review provisions might be enforceable in state court.

## II. CONFIRMING AND VACATING ARBITRATION AWARDS

The prevailing party in an arbitration has various options for seeking to collect on an arbitral award.<sup>21</sup> One possibility, of course, is that the losing party will comply with the award voluntarily—i.e., without any court involvement.<sup>22</sup> If the losing party does not comply with the award voluntarily, the prevailing party may proceed to court to seek to have the

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(69/1148) of their 2001 employment arbitrations were the result of post-dispute agreements. In 2002, the frequency of post-dispute agreements was even lower, 2.6% (29/1124).”).

<sup>19</sup> The most notable effect of this focus is to exclude from discussion the issue left open in *Hall Street* of whether an expanded-review provision might be enforceable when it is approved and entered as an order by a federal district court.

<sup>20</sup> I also do not consider alternatives to expanded-review provisions that some have suggested, such as using arbitral appeals panels or excluding legal or other issues from arbitration. *E.g.*, Rau, *supra* note 8, at 472–76; Reuben, *supra* note 8, at 1139–40; Tyler & Parasharami, *supra* note 8, at 619.

<sup>21</sup> The discussion in this Part assumes that the claimant is the prevailing party and the respondent the losing party. But most of the discussion also applies to the reverse case, in which the respondent is the prevailing party and the claimant is the losing party. An exception, of course, is the possibility of voluntary compliance with the award, which typically would not be relevant when the respondent is the prevailing party.

<sup>22</sup> Little empirical evidence is available on the extent to which voluntary compliance occurs. In the international arbitration context, Richard Naimark and Stephanie Keer studied the post-award experience of parties in a sample of 100 American Arbitration Association/International Centre for Dispute Resolution arbitration awards in which “the claiming/filing party declared itself to be the winner in the case.” Richard W. Naimark & Stephanie E. Keer, *Post-Award Experience in International Commercial Arbitration*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 269, 270 (Christopher R. Drahozal & Richard W. Naimark eds., 2005). In those 100 cases, “74 awards were complied with in full, 4 were partially complied with, and 22 were renegotiated—post award—to establish final settlement terms.” *Id.* But in those 100 cases, “67 of the awards were confirmed by a court and one was confirmed with some alteration of the terms of the award.” *Id.* at 271. In a substantial number of those cases, the prevailing party “attributed compliance to voluntary action by the parties” rather than to the court confirmation order. *Id.*

award confirmed—i.e., turned into a court judgment with “the same force and effect, in all respects, as” any court judgment.<sup>23</sup> Conversely, the losing party may seek to have the award vacated—i.e., rendered null and void.<sup>24</sup> Typically, a court resolves a petition to confirm and a cross-petition to vacate (or vice versa) in a single proceeding. This Part describes briefly the choices of forum and applicable law that may be available to the party seeking confirmation and the party seeking vacatur.<sup>25</sup>

First, the prevailing party has a choice between bringing a confirmation action in federal court or in state court. To proceed in federal court, the court must have subject matter jurisdiction over the case (as well as personal jurisdiction over the defendant, and the like).<sup>26</sup> Alternatively, the prevailing party may instead seek confirmation of the award in state court.<sup>27</sup> Indeed, Stephen Huber states that “[m]ost cases that are subject to the [FAA] are heard in state, rather than federal, courts.”<sup>28</sup>

Second, the prevailing party likely has a choice among various sources of law under which to seek confirmation of the award. As the Supreme Court indicated in *Hall Street*, the FAA provides an expedited procedure by which parties may seek to have an award confirmed.<sup>29</sup> In addition (or instead), the prevailing party might be able to rely on state arbitration law for confirmation of the award. Most states have enacted either the Uniform Arbitration Act or the Revised Uniform Arbitration Act, both of which—like the FAA—provide for the court to confirm the award unless a ground for vacatur is established.<sup>30</sup> Finally, the prevailing

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<sup>23</sup> FAA, 9 U.S.C. § 13 (2006).

<sup>24</sup> *Id.* § 10; see 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2673–74 (2009) (“[I]f an award is ‘annulled,’ ‘set aside,’ or ‘vacated’ in the place where it was made, then the award arguably ceases to have legal effect or existence (or becomes null), at least under the laws of the state where it was annulled, just as an appellate court decision vacates a trial court judgment.”).

<sup>25</sup> For a survey of the possibilities, in the context of enforcing an international arbitration award in the United States, see GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 881–904 (2d ed. 2001).

<sup>26</sup> *E.g.*, 4 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT §§ 38.1.4–6 (Supp. 1999).

<sup>27</sup> *Id.* § 38.1.8; see *Weldon v. Asset Acceptance, L.L.C.*, 896 N.E.2d 1181, 1184 n.2 (Ind. Ct. App. 2008) (“[I]t is well established that state courts have concurrent jurisdiction with federal courts to enforce the FAA.”).

<sup>28</sup> Huber, *supra* note 8, at 513.

<sup>29</sup> *Hall St. Assocs., L.L.C., v. Mattel, Inc.*, 128 S. Ct. 1396, 1400 (2008).

<sup>30</sup> UNIF. ARBITRATION ACT § 11 (1956), 7 U.L.A. 488 (2009) (“[T]he Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13.”); UNIF. ARBITRATION ACT § 22 (2000), 7 U.L.A. 76 (2009) (“[T]he court shall issue a confirming order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.”); see Huber, *supra* note 8, at 521 (“It is only a small exaggeration to state that the

party might be able to rely on state common law as authority for confirming an arbitration award. A state common law action to confirm an award would not follow the same expedited procedures as actions under the FAA or the applicable state arbitration statute, however.<sup>31</sup> Moreover, some states, by enacting arbitration statutes, supplanted the common law entirely.<sup>32</sup> In those states, the common law would not be available as an alternative basis for confirmation of an award.

Conversely, the losing party in the arbitration may seek to have the award vacated in those venues and under those same authorities, in theory at least. Whether the FAA preempts state vacatur standards that differ from those under the FAA—of particular relevance here, of course, would be a state law permitting parties to contract for expanded review—is uncertain, and is discussed in further detail throughout the next two Parts.

### III. CONTRACTING AROUND *HALL STREET* IN FEDERAL COURT

The Supreme Court's decision in *Hall Street* foreclosed the most direct option for expanded review in federal court—a contract provision specifying the applicable (expanded) standard of review of the award in court. This Part considers two other options for obtaining expanded review in federal court.<sup>33</sup> First, it sets out an argument for enforcing expanded-review provisions under section 10(a)(4) of the FAA,<sup>34</sup> which permits awards to be vacated when the arbitrators exceed their

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statutory standards for reviewing arbitration awards have been materially identical throughout the United State[s] for the last 50 years. The one main difference between the federal and state statutes is that the FAA is addressed to federal district courts, while the UAA is addressed to that state's district courts (or similar trial courts of general jurisdiction).”).

<sup>31</sup> See Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1057 (1961) (“In the United States, no state arbitration statute makes any provision for the enforcement of foreign arbitral awards; therefore, there is no summary procedure to confirm an interstate or foreign award in the state courts.” (citation omitted)).

<sup>32</sup> E.g., GA. CODE ANN. § 9-9-2(c) (2007) (Georgia) (“This part shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate disputes can be enforced . . . .”); *Godfrey v. Hartford Cas. Ins. Co.*, 16 P.3d 617, 621 (Wash. 2001) (“We have said on numerous occasions arbitration in Washington is exclusively statutory: ‘Contrary to the practice and procedure in the vast majority of the states, this jurisdiction does not recognize or permit common law arbitration. . . . In this state, the proceeding is wholly statutory and the rights of the parties thereto are governed and controlled by statutory provisions.’” (quoting *Puget Sound Bridge & Dredging Co. v. Lake Wash. Shipyards*, 96 P.2d 257, 259 (1939))).

<sup>33</sup> The possible enforceability of expanded-review provisions in state court is examined in Part IV, *infra*.

<sup>34</sup> FAA, 9 U.S.C. § 10(a)(4) (2006).

authority.<sup>35</sup> Second, it examines whether expanded-review provisions are enforceable in federal court under state arbitration laws permitting expanded review.

A. *Under the FAA*

Historically, expanded-review provisions differed in form from the provision in *Hall Street*. In *Hall Street*, the clause dictated to the federal district court judge the standard of review to be applied. The clause stated that “[t]he [District] Court 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.”<sup>36</sup> An alternative drafting approach, however, is to direct the provision not to the court but to the arbitrators, such as by requiring that the arbitrators follow the law or by denying the arbitrators the authority to make legal or other errors.<sup>37</sup> If the arbitrators fail to comply with the provision, such as by making an error of law, the court would vacate the award on the ground that the arbitrators exceeded their authority. The effect of the clause is the same, but instead of adding a ground for vacating awards, it relies on an express statutory ground for vacatur. Prior to *Hall Street*, the available authority tended to support this approach.<sup>38</sup> Since *Hall Street*, however, courts have largely rejected the approach as an attempt to evade *Hall Street*.

Most of the cases that support this approach come from state court rather than federal court.<sup>39</sup> Several state courts adopted this approach

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<sup>35</sup> I have discussed this argument previously: see Drahozal, *Default Rule Theory*, *supra* note 9, at 4–5; Drahozal, *Contracting Around RUAA*, *supra* note 9, at 431–33; as have others, see *infra* text accompanying notes 51–56.

<sup>36</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400–01 (2008).

<sup>37</sup> *E.g., Quinn v. NAFTA Traders, Inc.*, 257 S.W.3d 795, 797 (Tex. Ct. App. 2008) (examining an arbitration agreement providing that “[t]he arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law”).

<sup>38</sup> See *infra* text accompanying notes 39–50. Justice Stevens, in dissent in *Hall Street*, cites Justice Story’s opinion in *Kleine v. Catara*, 14 F. Cas. 732, 735 (C.C.D. Mass. 1814) (No. 7869), for the proposition that “parties to an ongoing lawsuit [may] agree to submit their dispute to arbitration subject to the caveat that the trial judge should refuse to enforce an award that rests on an erroneous conclusion of law[.]” *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1408 (Stevens, J., dissenting). While the proposition is correct, as discussed in the text, I am not sure that *Kleine v. Catara* is good authority for it. Justice Stevens quotes the following language from *Kleine v. Catara* as support: “If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission; they may restrain or enlarge its operation as they please.” *Kleine*, 14 F. Cas. at 735. But that language seems to refer to the parties’ ability to exclude legal issues from arbitration altogether (i.e., “to reserve the law for the decision of the court”) rather than providing for de novo review of arbitrator decisions on legal issues.

<sup>39</sup> Note that the National Arbitration Forum (NAF) took the position that awards issued in arbitrations it administered were subject to de novo review for legal errors



prior to *Hall Street*.<sup>40</sup> After *Hall Street*, the California Supreme Court, in *Cable Connection, Inc. v. DirecTV, Inc.*, held that, as a matter of California arbitration law, parties may contract for expanded review by limiting the authority of the arbitrators.<sup>41</sup> According to the court:

[T]o take themselves out of the general rule that the merits of the award are not subject to judicial review, the parties must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts. Here, the parties expressly so agreed, depriving the arbitrators of the power to commit legal error. They also specifically provided for judicial review of such error.<sup>42</sup>

The court also rejected the argument that the FAA preempted its interpretation of California law, concluding that “the *Hall Street* holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations.”<sup>43</sup>

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because its arbitration rules required the arbitrators to follow the law. See Edward C. Anderson, *Awards Made Under an Agreement to Follow the Law Are Reviewable by the Court*, METRO. CORP. COUNS., Nov. 2000, at 43 (“Under such a circumstance, the court confirming an award is not only qualified, but is required, to review the arbitrator’s decision for legal accuracy. If, under the parties’ contract, the arbitrator’s power is constrained by the law, the court could not confirm an award which exceeded that power.”); The National Arbitration Forum Blog, *The Word on Hall Street Is No Expanded Review*, Mar. 25, 2008, <http://arbitration-forum.blogspot.com/2008/03/word-on-hall-street-is-no-expanded.html> (“The Court’s holding does not sound the death knell for heightened judicial review under the FAA, because parties to an arbitration agreement can still guard against legal error by agreeing that the arbitrator must follow the law or adopting rules (e.g., the National Arbitration Forum *Code of Procedure*) that require the arbitrator to follow the law. That way, if the arbitrator disregards o[r] misapplies the law, the award is subject to vacatur on the statutory basis that the arbitrator exceeded [his] powers.”). Of course, the NAF no longer is administering new consumer arbitrations as part of a consent decree it entered in 2009 to settle a suit against it by the Minnesota Attorney General alleging fraud and deceptive trade practices. Consent Judgment, *Minn. v. Nat’l Arbitration Forum, Inc.*, No. 27-CV-09-18550 (D. Minn. July 17, 2009), available at <http://pubcit.typepad.com/files/nafconsentdecree.pdf>.

<sup>40</sup> For cases decided prior to *Hall Street*, see, for example, *Faherty v. Faherty*, 477 A.2d 1257, 1264 (N.J. 1984) (“[A]n award shall be vacated when the arbitrator exceeded his power. Since the parties agreed that the arbitrator would decide legal issues in accordance with the law of New Jersey, the award should not have granted [relief not permitted by New Jersey law].”); *Metro. Waste Control Comm’n v. City of Minnetonka*, 242 N.W.2d 830, 832 (Minn. 1976) (“The scope of the arbitrators’ power is controlled by the language of the submission. Where the arbitrators are not restricted by the submission to decide according to principles of law, they may make an award according to their own notion of justice without regard to the law. Where the arbitrators are restricted, however, they have no authority to disregard the law . . . .” (internal citations omitted)).

<sup>41</sup> 190 P.3d 586 (Cal. 2008). The arbitration clause in *Cable Connection, Inc.* provided that “[t]he 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.” *Id.* at 604 n.20.

<sup>42</sup> *Id.* at 604.

<sup>43</sup> *Id.* at 599.

The Seventh Circuit's decision in *Edstrom Industries, Inc. v. Companion Life Insurance Co.*<sup>44</sup> also provides some support for this approach. In *Edstrom*, the arbitration clause "included an 'express stipulation that the arbitrator shall strictly abide by the terms of this [policy] and shall strictly apply rules of law applicable thereto,' namely the rules of Wisconsin law."<sup>45</sup> The court of appeals vacated the award on the ground that the arbitrator had exceeded his authority by failing altogether to apply the applicable law.<sup>46</sup> As the court explained, "the arbitrator cannot disregard the lawful directions the parties have given them. If they tell him to apply Wisconsin law, he cannot apply New York law."<sup>47</sup> Arguably, it follows that if the parties require the arbitrators to apply that law correctly, they exceed their authority should they fail to do so. The case was decided while *Hall Street* was pending before the Supreme Court, but the court of appeals expressly distinguished *Edstrom* from *Hall Street*, explaining that "[t]he question in our case is different. It is whether the arbitrator can be directed to apply specific substantive norms and held to the application."<sup>48</sup>

Interestingly, the United States Supreme Court implicitly acknowledged this excess-of-authority argument in its oft-cited dicta in *Wilko v. Swan*: "In unrestricted submissions, . . . 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."<sup>49</sup> An unrestricted submission is one that does not require the arbitrators to follow the law. As stated by the Court in *Wilko*, such a submission is not subject to review for legal error. By contrast, a restricted submission is one that requires the arbitrators to follow the law.<sup>50</sup> Under a restricted submission, courts would review the arbitrators' legal rulings de novo. The restriction on the submission, although different in form from the expanded-review provision in *Hall Street*, has the same effect.

Leading academic commentators likewise have recognized the ability of parties to contract for expanded review by limiting the authority of arbitrators—dating back prior to the enactment of the FAA. Wesley Sturges wrote in his arbitration treatise in 1930 (relying on cases that predated the FAA):

With respect to matters of law, it is frequently said that, if arbitrators are required by the terms of a given submission to decide

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<sup>44</sup> 516 F.3d 546 (7th Cir. 2008).

<sup>45</sup> *Id.* at 549.

<sup>46</sup> *Id.* at 549–53.

<sup>47</sup> *Id.* at 552.

<sup>48</sup> *Id.* at 550.

<sup>49</sup> *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

<sup>50</sup> Drahozal, *Default Rule Theory*, *supra* note 9, at 5. More precisely, submissions can be restricted in any number of ways. But in this context, the most relevant restriction is one that requires the arbitrators to follow the law.

“according to law,” an award may be vacated as for mistake of law if the arbitrators decide contrary to law. . . . Their award may fall even though they have misjudged the law, for they depart, it is said, from their authority under the submission.<sup>51</sup>

Likewise, Philip G. Phillips in a 1934 article in the *Harvard Law Review* stated that “[i]n all states, if the parties provide in their arbitration agreement that the arbitrators must decide according to law, the courts will hold the arbitrators to that agreement and will review their law on appeal.”<sup>52</sup> Phillips adds that “it takes very strong language to achieve that result, and courts do not thus construe an arbitration agreement unless clearly forced to do so.”<sup>53</sup>

Modern commentators have reached the same conclusion. For example, Alan Scott Rau has argued that “[a] contract that *withdraws* errors of law from the authority conferred on the arbitrator—that, in other words, places issues of law ‘beyond the scope of the submission’ to binding arbitration—should, then, allow an aggrieved party on ‘review’ to invoke § 10(a)(4).”<sup>54</sup> Similarly, Thomas J. Stipanowich concluded, well before *Hall Street*, that “[w]hile it is presumably not within the power of parties to contract to expand the statutorily-conferred scope of review . . . the parties may accomplish the same goal indirectly” by relying on the “excess of authority” statutory ground.<sup>55</sup> While modern commentators are not unanimous in support of this approach,<sup>56</sup> the weight of the authority is favorable to it.

Since *Hall Street*, however, courts have tended to reject the argument that parties can contract around *Hall Street* by restricting the arbitrators’ authority.<sup>57</sup> The California Supreme Court’s decision in *Cable Connection*,

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<sup>51</sup> WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS § 366, at 793–94 (1930) (adding that the argument “has rarely been made effective to set aside any award, and, further, that the courts will not readily construe the terms of a submission agreement as requiring the arbitrators to decide according to law”).

<sup>52</sup> Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 603 (1934).

<sup>53</sup> *Id.* at 603–04.

<sup>54</sup> See Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT’L ARB. 225, 239 (1997).

<sup>55</sup> Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 486 n.339 (1988).

<sup>56</sup> See, e.g., Reuben, *supra* note 8, at 1135 (“In my view, the *Wood* court properly held that parties should not be able to accomplish indirectly what *Hall Street* prohibits them from accomplishing directly. The fundamental principle behind *Hall Street* is a rule of judicial non-intervention—that courts are not to meddle with arbitration awards—except under the limited circumstances that Congress has specified.”).

<sup>57</sup> *Francis v. Landstar Sys. Holdings, Inc.*, No. 3:09-cv-238-J-32JRK, 2009 U.S. Dist. LEXIS 118897, at \*20–24 (M.D. Fla. Nov. 25, 2009) (holding that review for “excess of authority” does not permit the court to review the merits of an award, even when arbitration rules provide that the “Arbitrator’s authority is strictly limited to resolving the Dispute on the basis of such applicable state or federal law”); *Wood v. Penntex Res. LP*, No. H-06-2198, 2008 U.S. Dist. LEXIS 50071, at \*20–21 (S.D. Tex. June 27, 2008) (“This reading would impermissibly circumvent *Hall Street*.”); *Feeny v. Dell*,

*Inc.* is an exception, obviously. The usual rationale is that accepting the argument would permit the parties to evade the holding of *Hall Street*. Several courts—from the Seventh Circuit and elsewhere—have limited the Seventh Circuit’s decision in *Edstrom*, treating the case as involving something like “manifest disregard of the law” rather than expanded review.<sup>58</sup> Again, the general concern seems to be that allowing parties to contract for expanded review by restricting the authority of the arbitrators would permit them to evade *Hall Street*.

In my view, these post-*Hall Street* courts have it backwards. Rather than evading *Hall Street*, reliance on section 10(a)(4) of the FAA as a basis for vacating awards is conforming to *Hall Street*—the parties are seeking vacatur only on grounds set out in the FAA. Moreover, given the long pedigree of this argument, which predates *Hall Street* by decades, it hardly seems designed as an evasion of *Hall Street*. Instead, I would characterize it as a return to a well-accepted means of contracting for expanded review. That said, given the strong resistance to this argument since *Hall Street* (with occasional exceptions), parties cannot be confident that a court will permit expanded review on such a theory.

#### B. Under State Arbitration Law

The Court in *Hall Street* left open the question of whether parties could use state arbitration law as a basis for seeking expanded review of awards. The Court made clear that “[i]n holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on

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*Inc.*, No. 03-1158, 2008 Mass. Super. LEXIS 104, at \*5–8 (Mass. Super. Ct. Apr. 4, 2008) (following *Hall Street* and refusing to enforce expanded-review provision), *rev’d on other grounds* by 908 N.E.2d 753 (Mass. 2009); *Quinn v. NAFTA Traders, Inc.*, 257 S.W.3d 795, 799 (Tex. Ct. App. 2008) (“[O]ur adoption of Nafta’s argument would allow Nafta to accomplish indirectly what we have already concluded it cannot do directly, that is, contractually expand judicial review of the arbitration decision.”).

<sup>58</sup> *Rent-a-Center, Inc. v. Barker*, 633 F. Supp. 2d 245, 256–57 (W.D. La. 2009) (“Unlike *Edstrom*, where the arbitrator did not even mention the relevant statute, the Arbitrator in this case laid out the relevant standard and proceeded to apply it.”); *Williams v. RI/WFI Acquisition Corp.*, No. 06 C 2103, 2009 U.S. Dist. LEXIS 11115, at \*8 (N.D. Ill. Feb. 11, 2009) (“[In *Edstrom*,] the arbitrator did not even attempt to apply the relevant statutory provision and ignored the statute.”); *In re Raymond Prof’l Group, Inc.*, 397 B.R. 414, 431 (Bankr. N.D. Ill. 2008) (“Until *Hall Street* was decided, the Seventh Circuit panel opinion in *Edstrom Indus.* could have been read to expand the standard of review for vacating an arbitration award. However, after *Hall Street*, the *Edstrom Indus.* opinion must be read more narrowly. Under this reading, the arbitrator’s complete disregard of applicable law found by the *Edstrom Indus.* opinion was determined from the face of the award and that justified reversal under accepted standards. *Edstrom Indus.* must therefore be read as limited to those facts.”).

authority outside the statute as well.”<sup>59</sup> Conversely, of course, it did not expressly affirm the availability of such an option.<sup>60</sup>

This Section considers three possible ways by which a party might rely on state arbitration law in seeking to vacate an arbitral award in federal court. First, the party might rely on both the FAA and state law, or only state law, in seeking to vacate the award. Second, the parties might seek to contract out of application of the FAA, instead contracting for state arbitration law to govern their agreement to arbitrate. Third, state arbitration law might apply in diversity cases in federal court under *Erie Railroad Co. v. Tompkins*.<sup>61</sup>

#### 1. *State Law as an Alternative Basis for Confirmation*

As discussed above, in theory, at least, a losing party can seek to vacate an arbitration award under state arbitration law as well as (or perhaps in lieu of) the FAA, even in federal court. For example, the losing party might seek vacatur in federal court under both the FAA (which does not, per *Hall Street*, permit expanded review) as well as under a state arbitration law (which, say, does permit expanded review). Alternatively, the losing party might seek vacatur in federal court only under a state arbitration law permitting expanded review. Given *Hall Street*, an attempt to vacate an award under the FAA based on the grounds specified in an expanded-review provision will fail (subject to the possible argument noted above).<sup>62</sup> But what about the vacatur action based on state arbitration law? Obviously, the holding in *Hall Street* does not apply to state arbitration statutes. To what extent does the FAA, as interpreted in *Hall Street*, preempt expanded review under state arbitration statutes?<sup>2</sup>

Although the answer may differ in state court, as discussed below,<sup>63</sup> in federal court it seems likely that the state-law vacatur action would be preempted. In such a case, one would expect the prevailing party to file a cross-motion seeking confirmation of the award under the FAA. Under the FAA, the court “must grant” the motion to confirm unless one of the statutory grounds for vacatur is established.<sup>64</sup> Again, under *Hall Street*, the court is limited to the statutory grounds. If the court confirms the award under the FAA, section 13 of the Act provides that “[t]he judgment so

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<sup>59</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008). Section 11 of the FAA sets out grounds on which awards can be modified. FAA, 9 U.S.C. § 11 (2006).

<sup>60</sup> The Court indicated that it “express[ed] no opinion on . . . whether the District Court’s authority to manage litigation independently warranted that court’s order on the mode of resolving the indemnification issues remaining in this case.” *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1407–08. Its opinion seemed to find that *Hall Street* had relied on the FAA rather than state arbitration law and so did not evaluate the availability of that option either. *Id.*

<sup>61</sup> 304 U.S. 64 (1938).

<sup>62</sup> See *supra* Part III.A.

<sup>63</sup> See *infra* Part IV.

<sup>64</sup> FAA, 9 U.S.C. § 9.

entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.”<sup>65</sup> A state-law-based attempt to vacate an award confirmed by a federal court under the FAA necessarily would conflict with the right to confirmation under the FAA. Under the Supremacy Clause, the FAA would preempt such a reliance on state law. The existence of state law authority permitting expanded-review provisions would not, in such a case, provide the parties with an effective alternative means of enforcing an expanded-review provision in federal court.

## 2. *Opting Out of the FAA*

State law enforcing expanded-review provisions thus would be ineffective so long as the award was subject to confirmation under the FAA. Only if the award was not subject to confirmation under the FAA might expanded review under state law be available. Of course, if the reason the award could not be confirmed under the FAA was the presence of a statutory ground for vacatur (such as evident partiality), then the expanded-review provision would be irrelevant. Instead, there must be some other reason for confirmation not to be available under the FAA. This Section considers two possibilities—first, the lack of an “entry-of-judgment” clause in the arbitration agreement, and, second, a provision choosing state arbitration law in lieu of the FAA.

In the Supreme Court, Hall Street argued that it was not limited to the FAA vacatur grounds because the parties had not “agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration,” as required by section 9 of the FAA.<sup>66</sup> The Court concluded that the “entry-of-judgment” provision was irrelevant to the statutory interpretation question before it,<sup>67</sup> but did not explicitly resolve the broader implication of Hall Street’s position—that a party can effectively opt out of the FAA vacatur standards by not satisfying the requirements of section 9 of the FAA. Courts have not been consistent in determining what language is sufficient to satisfy the “entry-of-judgment” requirement. Some, however, interpret the requirement very leniently—such that virtually any provision for final and binding arbitration satisfies it.<sup>68</sup> Accordingly, a party could not be confident that it could draft an arbitration clause providing for binding arbitration that did not also satisfy section 9.

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<sup>65</sup> FAA, 9 U.S.C. § 13.

<sup>66</sup> Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1405 n.6 (2008) (quoting FAA, 9 U.S.C. § 9).

<sup>67</sup> *Id.* (“The sentence nowhere predicates the court’s judicial action on the parties’ having agreed to specific standards; if anything, it suggests that, so long as the parties contemplated judicial enforcement, the court must undertake such enforcement under the statutory criteria.”).

<sup>68</sup> Weiskopf & Mulqueen, *supra* note 8, at 19 (citing cases).

As for contracting expressly for application of state arbitration law, it is certainly true that cases and commentators support the ability of parties to contract out of the FAA altogether by agreeing to the application of state arbitration law.<sup>69</sup> These sources commonly cite the U.S. Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*<sup>70</sup> as authority for this proposition.<sup>71</sup> But in my view, this position misunderstands the decision in *Volt*.<sup>72</sup> As I have explained elsewhere, *Volt* is an incorporation-by-reference case. By agreeing to California arbitration law in *Volt*, the parties effectively made that law part of their agreement, such that it became enforceable as if it were a term of that agreement.<sup>73</sup> The case

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<sup>69</sup> See, e.g., Huber, *supra* note 8, at 535 (citing cases).

<sup>70</sup> 489 U.S. 468, 477 (1989).

<sup>71</sup> Oberwager v. McKechnie Ltd., No. 08-117, 2009 U.S. App. LEXIS 23006, at \*6 (3d Cir. Oct. 20, 2009) (unpublished opinion) (dicta) (discussing “the long-standing rule that, under certain circumstances, parties may choose to opt out of the FAA”); Huber, *supra* note 8, at 535 (“Under *Volt*, the [*Ekstrom v. Value Health, Inc.*, 68 F.3d 1391 (D.C. Cir. 1995)] decision is clearly correct—parties can choose to arbitrate disputes, which are otherwise subject to the FAA, under the law of a particular state.”); cf. Mitzner, *supra* note 8, at 193–94 (recognizing that “this is an odd use for a choice of law clause” because “[t]ypically, choice of law clauses are used to specify horizontal choices, between the states—not vertical choices, between federal and state”).

<sup>72</sup> The court of appeals' decision in *Ekstrom*, cited by Professor Huber, supports my interpretation. See Huber, *supra* note 8. The court in *Ekstrom* held that by agreeing to Connecticut arbitration law, the parties agreed to comply with Connecticut's 30-day time limit for bringing an action to vacate an award. According to the court: “[A]t oral argument appellants conceded that, under *Volt*, if the Merger Agreement had explicitly called for the application of Connecticut's 30-day limitation period, such a provision would trump the FAA's three-month period. We can discern no material difference between such a hypothetical provision and the actual one in the parties' Merger Agreement calling for the application of Connecticut law.” *Ekstrom*, 68 F.3d at 1396. By comparison, were the parties' agreement explicitly to call for expanded review, under *Hall Street*, such a provision would not be enforceable. *Ekstrom* came out the way it did because the parties' agreement to comply with a shorter deadline for filing a vacatur action was not precluded by the FAA.

<sup>73</sup> As I have explained elsewhere:

The fact setting of *Mastrobuono* illustrates the point. Under ordinary FAA preemption principles, the New York law that precludes arbitrators from awarding punitive damages would be preempted. But nothing in the FAA requires the parties to arbitrate claims for punitive damages. If the parties wish to exclude punitive damages claims from arbitration, they are free so to provide in their contract. Even though the result is the same as under the New York law, there is nothing for the FAA to preempt: it is the parties' agreement, and not New York law, that prevents arbitration of the punitive damages claim.

There are a variety of ways that parties can draft a contract provision that precludes the award of punitive damages. They can waive any claim for punitive damages. They can deny the arbitrator the authority to award punitive damages. They can do both. Such clauses are common ways to exclude punitive damages claims from arbitration. But there are other ways the parties might draft such a provision. They could state that New York law precluding the award of punitive damages applies to their arbitration proceeding. More generally, they could

does not stand for the ability of parties to contract out of the FAA altogether; rather, it contemplates that when parties agree to a provision (or provisions) of state arbitration law, courts should enforce that provision as if it were part of the parties' agreement.<sup>74</sup>

Under such an incorporation-by-reference understanding of *Volt*, contracting for state arbitration law would not result in an enforceable agreement for expanded review. By agreeing to the arbitration law of a state that permits expanded review, under *Volt* the parties are essentially incorporating an expanded-review provision into their arbitration

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agree that New York arbitration law governs their arbitration. Or they could agree that New York law governs their contract. It is by no means clear that this last provision incorporates the New York rule on punitive damages into the parties' contract, but arguably that is what it does. Indeed, in *Volt* the Supreme Court took as given the California court's interpretation of a general choice-of-law clause as incorporating by reference California arbitration law, although the Court rejected such an interpretation on its own in *Mastrobuono*.

Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 411–12 (2004) [hereinafter, Drahozal, *Federal Arbitration Act Preemption*] (citations omitted) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995)).

<sup>74</sup> Note that this conclusion does not depend on whether the provision of the state arbitration law is pro-arbitration:

It does not matter whether the state rule at issue or the state's arbitration law generally is pro-arbitration, at least as to this incorporation by reference issue. Indeed, in the [punitive damages] illustration above [Drahozal, *Federal Arbitration Act Preemption*, *supra* note 73, at 411–12], the state rule plainly is not pro-arbitration in any reasonable sense of the word. A simple example makes the point even more clear. Under the FAA, the parties clearly could exclude tort claims from their arbitration agreement. Nothing in the FAA requires them to arbitrate tort claims; instead, the FAA requires enforcement of the parties' agreement to arbitrate. Kansas law precludes arbitration of tort claims. Application of such a law to an arbitration agreement governed by the FAA ordinarily would be preempted by the Act. If, however, the parties define the scope of their arbitration agreement as "we agree to arbitrate all claims that are arbitrable under Kansas law (ignoring federal law)," the result should be the same as if they contracted expressly for tort claims not to be arbitrable. It does not matter whether the state law is pro- or anti-arbitration, so long as the parties agree to it.

The trickier issue under *Volt* is identifying when such an incorporation by reference occurs. An easy case is when the parties expressly reference a particular state law rule in their contract. A much harder case is when the parties include a general choice-of-law clause in their contract. In *Mastrobuono*, the Supreme Court construed such a clause as only referring to state substantive contract law, not state arbitration law. But as *Volt* indicates, interpreting such clauses generally is up to the state courts, so long as the state courts' interpretation is not so unreasonable as itself to be preempted by the FAA.

*Id.* at 412–13 (citations omitted). It was only in reviewing the reasonableness of the state court's interpretation of the general choice-of-law clause that the Court considered whether the state arbitration law was "pro-arbitration." See *Volt Info. Scis. Inc.*, 489 U.S. at 476 ("Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.").



agreement. But *Hall Street* holds that the parties cannot contract for additional vacatur grounds beyond those provided in the FAA. Just as parties cannot expressly agree to an expanded-review provision under *Hall Street*, they also cannot agree to such a provision by incorporating it by reference into their contract.

Of course, if the Supreme Court were to hold that parties can opt out of the FAA altogether, rejecting this narrower understanding of *Volt*, then parties presumably would be able to choose state arbitration law permitting expanded review. But so far the Court has not so held. Until it does, contracting for state arbitration law to apply should not permit the parties to contract around *Hall Street*.

### 3. *Diversity Cases and Erie*

A final possibility that has been suggested is that *Erie Railroad Co. v. Tompkins*<sup>75</sup> requires the application of state arbitration law in diversity cases in federal court. Professor John Barceló has contended as follows:

In general, . . . the applicable *Erie* doctrine provides that in [an action not based on federal substantive law—as is the case for a set aside action, which, even when FAA Chapter 1 applies, does not arise under federal substantive law] federal courts must apply federal procedural law and state substantive law. But is the standard (or ground) for court review of an award “procedural” or “substantive” under the *Erie* doctrine? Though the answer is not clear cut, existing case law supports the conclusion that the issue is substantive and, thus, that the federal court must apply the standards in the state arbitration statute for reviewing awards.<sup>76</sup>

Barceló relies principally on the Supreme Court’s decision in *Gasperini v. Center for Humanities, Inc.*<sup>77</sup> In that case, the Court held that in a diversity action in federal court, a heightened state court standard for reviewing jury verdicts, rather than the more deferential standard in the Federal Rules of Civil Procedure, should govern.<sup>78</sup> Barceló analogized the heightened standard for review of jury verdicts to state law standards for court review of arbitration awards, concluding that “[t]he analogy to federal court review of arbitral awards seems straightforward. In our scenario, [the state’s] purpose is clearly substantive (to reject awards founded on errors of law), and requiring a federal district court to apply the state review standard would, as in *Gasperini*, avoid forum shopping.”<sup>79</sup>

*Gasperini*, however, did not involve a direct conflict between a state rule and a contrary federal statute, such as the FAA.<sup>80</sup> In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, however, the Supreme Court flatly held that

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<sup>75</sup> 304 U.S. 64 (1938).

<sup>76</sup> Barceló, *supra* note 8, at 14.

<sup>77</sup> *Id.* at 14–15 (citing 518 U.S. 415 (1996)).

<sup>78</sup> *Gasperini*, 518 U.S. at 429–31.

<sup>79</sup> Barceló, *supra* note 8, at 14–15.

<sup>80</sup> See *Gasperini*, 518 U.S. at 427 n.7 (“Federal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies.”).

the FAA governs over state arbitration law in such a case.<sup>81</sup> The issue in *Prima Paint Corp.* was whether a court could rule on an allegation of fraud in the inducement of the main contract (which included an arbitration clause), or whether that issue was a matter for the arbitrator.<sup>82</sup> The Supreme Court held that under section 4 of the FAA the issue was one for the arbitrator rather than the court, contrary to the state law rule applicable in state court.<sup>83</sup> The Court rejected a constitutional challenge under *Erie* as follows:

The point is made that, whatever the nature of the contract involved here, this case is in federal court solely by reason of diversity of citizenship, and that since the decision in *Erie R. Co. v. Tompkins*, federal courts are bound in diversity cases to follow state rules of decision in matters which are “substantive” rather than “procedural,” or where the matter is “outcome determinative.” The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of “control over interstate commerce and over admiralty.”<sup>84</sup>

Perhaps *Prima Paint* is distinguishable because it is based on section 4 of the FAA rather than sections 9 and 10. But it is not obvious why that should be so. Accordingly, the argument that the *Erie* doctrine requires federal courts to apply state arbitration laws permitting expanded review in diversity cases is unpersuasive.

#### IV. CONTRACTING AROUND *HALL STREET* IN STATE COURT

Alternatively, a party might go to state court in an attempt to obtain court review of an arbitral award on contractually specified grounds. There are several prerequisites for such an approach to succeed.

First, the case must be one that is brought in, and stays in, state court. If a party can bring the case in the first instance in federal court, or can remove the case to federal court after it has been brought in state court, the analysis in the previous Part, rather than the analysis in this

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<sup>81</sup> 388 U.S. 395, 404–05 (1967).

<sup>82</sup> *Id.* at 403–05.

<sup>83</sup> *Id.* at 404. Although *Prima Paint* itself involved a stay petition under section 3 of the FAA, which contains different language from section 4, the Court found it “inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court.” *Id.*

<sup>84</sup> *Id.* at 404–05 (citations omitted).

Part, would apply.<sup>85</sup> To avoid such a possibility, parties that wish to rely on an expanded-review provision in state court should include a forum selection clause specifying the chosen state court forum and a waiver of the right of removal in their contract.<sup>86</sup>

Second, state arbitration law must permit the parties to contract for expanded review. At least one state arbitration law expressly permits parties to contract for expanded review.<sup>87</sup> In states with statutes that do not expressly address expanded review, courts are split on whether it is available. The leading case permitting expanded review is the California Supreme Court's decision in *Cable Connection, Inc.*, described above.<sup>88</sup> Other state courts, however, have followed the U.S. Supreme Court's analysis in *Hall Street* and concluded that their state arbitration laws do not permit parties to contract for expanded review.<sup>89</sup> Obviously, only if the applicable state arbitration law permits expanded review might going to state court be a fruitful strategy for obtaining expanded review.

Third, the FAA must not preempt the state law permitting expanded review. The Supreme Court has made clear that section 2 of the FAA—

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<sup>85</sup> See, e.g., *McQueen-Starling v. UnitedHealth Group, Inc.*, 654 F. Supp. 2d 154, 163 (S.D.N.Y. 2009) (“There is persuasive authority in this Circuit that the FAA standard of review applies to a motion to vacate an arbitration award that was originally brought in state court but has been removed to federal court.”); see *supra* Part III.

<sup>86</sup> Of course, if the parties can be confident that any dispute between them will not give rise to a case that could be brought in, or removed to, federal court, a waiver would not be necessary. But it still may well be prudent. Contractual waivers of the right to removal, if clear, generally are enforceable, and at least some courts have held that state-court forum-selection clauses waive the right to remove the case to federal court. See 14B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3721, at 97 (2009) (“The modern view . . . is that, in advance of suit, a defendant can contractually waive his right to remove to federal court an action brought against him in a state court, unless the Constitution or a federal statute grants the federal courts exclusive jurisdiction over that action.”); see, e.g., *ENSCO Int'l, Inc. v. Certain Underwriters at Lloyd's*, 579 F.3d 442, 443–44 (5th Cir. 2009) (“There are three ways in which a party may clearly and unequivocally waive its removal rights: ‘[1] by explicitly stating that it is doing so, [2] by allowing the other party the right to choose venue, or [3] by establishing an exclusive venue within the contract.’”) (quoting *City of New Orleans v. Mun. Admin. Servs., Inc.*, 376 F.3d 501, 504 (5th Cir. 1991)).

<sup>87</sup> N.J. STAT. ANN. § 2A:23B-4(c) (2009) (“[N]othing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such an expansion in a record.”).

<sup>88</sup> *Cable Connection, Inc. v. DirecTV, Inc.*, 190 P.3d 586, 606 (Cal. 2008); see *supra* text accompanying notes 41–42.

<sup>89</sup> *Brookfield Country Club, Inc. v. St. James Brookfield, LLC*, 683 S.E.2d 40, 43 (Ga. Ct. App. 2009) (“We conclude . . . that the Arbitration Code does not permit contracting parties who provide for arbitration of disputes to contractually expand the scope of judicial review that is authorized by statute.”), *cert. granted*, 2009 Ga. LEXIS 714 (Ga. 2009); *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, No. W2008-01366-COA-R3-CV, 2009 Tenn. App. LEXIS 189, at \*14–15 (Tenn. Ct. App. Apr. 23, 2009) (holding statutory grounds are exclusive and declining to follow *Cable Connection, Inc.*).

which makes arbitration clauses “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”<sup>90</sup>—applies in state court and preempts conflicting state law.<sup>91</sup> By contrast, the Court has strongly suggested (although not yet expressly held) that sections 3 and 4, which set out procedures for compelling arbitration and staying court proceedings pending arbitration, do not apply in state court.<sup>92</sup> By their terms, those provisions apply only in federal court. The Court has not yet addressed whether sections 9 and 10 of the FAA, dealing with the confirmation and vacatur of awards, apply in state court. Nor has the Court discussed the possible preemptive effect of the FAA on state vacatur standards (whether contractually based or not).<sup>93</sup>

If sections 9 and 10 of the FAA apply in their entirety in state court, their preemptive effect presumably is the same as described above—precluding reliance on state laws permitting expanded review. But the more likely result is that sections 9 and 10 of the FAA do not apply in state court—that, consistent with their terms, they apply only in federal court.<sup>94</sup> If so, then only section 2 of the FAA, which makes arbitration

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<sup>90</sup> FAA, 9 U.S.C. § 2 (2006).

<sup>91</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 13–16 (1984).

<sup>92</sup> *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1279 n.20 (2008) (“This Court has not decided whether §§ 3 and 4 apply to proceedings in state courts, and we do not do so here.”) (internal citation omitted); *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (“While we have held that the FAA’s ‘substantive’ provisions—§§ 1 and 2—are applicable in state as well as federal court, we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court.”) (internal citations omitted); *Southland Corp.*, 465 U.S. at 16 n.10 (“In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings.”).

That said, the Court’s decision in *Buckeye Check Cashing, Inc. v. Cardegna* comes pretty close to holding that sections 3 and 4 do not apply in state court. 546 U.S. 440 (2006). In *Buckeye*, the Court held that the separability doctrine of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* applies in state court and preempts conflicting state law. But to so hold, the *Buckeye* Court relied on section 2 of the FAA, rather than sections 3 and 4. 546 U.S. at 447. At least implicitly, that is a good indication that sections 3 and 4 do not apply in state court.

<sup>93</sup> By comparison, the California Supreme Court in *Cable Connections, Inc. v. DirecTV, Inc.* held that the FAA did not preempt California law permitting expanded review. 190 P.3d 586, 599 (Cal. 2008).

<sup>94</sup> Section 9 of the FAA provides that “[i]f no court is specified in the agreement of the parties, then such application [for confirming the award] may be made to the United States court in and for the district within which such award was made.” FAA, 9 U.S.C. § 9. Section 10 of the FAA provides that “[i]n any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award.” *Id.* § 10. According to Ian R. Macneil, Richard E. Speidel, and Thomas J. Stipanowich, “[w]ith one exception, the courts in which FAA §§ 9–11

agreements “valid, irrevocable, and enforceable,” provides a basis for preempting state arbitration law.<sup>95</sup> In such a case, the extent of FAA preemption is uncertain.

Elsewhere, I have described a number of theories of FAA preemption, which result in widely differing preemption outcomes.<sup>96</sup> Guidance from the U.S. Supreme Court is very limited, as its FAA preemption cases deal largely with the enforcement of arbitration agreements rather than the enforcement of arbitral awards. Possible theories of preemption include the following:<sup>97</sup>

- The “*Keystone Theory*” is named after a Montana Supreme Court case adopting a narrow view of FAA preemption, under which no state statutes are preempted by the FAA other than those that invalidate an arbitration agreement. Under this theory, state expanded-review statutes would not be preempted in state court.<sup>98</sup>
- The “*RUAA Theory*” is so named because it is the preemption theory that the drafters of the Revised Uniform Arbitration Act (RUAA) indicated they were following in drafting RUAA. Under the RUAA Theory, “state laws that deal with ‘front-end’ issues (the agreement to arbitrate and the arbitrability of a dispute) and ‘back-end’ issues (modification, confirmation, and vacatur of awards) are most likely to be preempted.”<sup>99</sup> Because expanded review is a “back-end” issue, it may well be that the FAA preempts state arbitration laws providing for expanded review.<sup>100</sup>

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proceedings are to take place were obviously intended by Congress to be federal, not state, courts.” MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 26, § 38.1.8. “The one exception is under FAA § 9, where the parties have the power to and do specify a court for confirmation, with nothing in the section explicitly limiting their power of selection to federal courts. Thus, for example, a clause providing for entry of judgment in a New York state court would appear to be effective under FAA § 9.” *Id.*

<sup>95</sup> FAA, 9 U.S.C. § 2.

<sup>96</sup> Drahozal, *Federal Arbitration Act Preemption*, *supra* note 73, at 417–20.

<sup>97</sup> Relying on the same framework, Richard Reuben reaches similar (albeit not quite identical) conclusions. *See* Reuben, *supra* note 8, at 1159–60.

<sup>98</sup> Drahozal, *Federal Arbitration Act Preemption*, *supra* note 73, at 417. Stephen Huber seems to take a comparable position, at least in the context of court review of arbitration awards. *See* Huber, *supra* note 8, at 536 (“[I]ndividual states may choose to adopt a different approach to contractual provisions regarding judicial review than that taken in the FAA (as interpreted by the Supreme Court).”).

<sup>99</sup> Drahozal, *Federal Arbitration Act Preemption*, *supra* note 73, at 417 (quoting Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 74–75).

<sup>100</sup> Hayford, *supra* note 99, at 85 (“[T]here is a legitimate question of federal preemption concerning the validity of a state law provision sanctioning contractual authorization of vacatur for errors of law when the FAA does not permit it.”). That said, such a result is by no means certain. To the extent this theory is based on the preemptive reach of section 2, the one provision of the FAA that the Supreme Court has held applies in state court, it might not result in preemption of state laws

- Under the “Anti-FAA Theory,” under which any state law that “limit[s] or obstruct[s] explicit FAA provisions” is preempted,<sup>101</sup> state arbitration laws permitting expanded review would seem to be preempted as contrary to *Hall Street*.
- The key underpinning of the “Pro-Contract Theory” is the view that section 2 of the FAA “gives the terms of arbitration agreements the force of federal law.”<sup>102</sup> If a state law conflicts with a provision of an arbitration clause, under this theory that state law is preempted. Here, because the state law would result in enforcement of, rather than nonenforcement of, expanded-review provisions, the state law would not be preempted.
- Finally, the “FAA Exclusivity Theory” posits that the FAA occupies the field of arbitration law, preempting all state arbitration laws. Under this theory, state laws providing for expanded review plainly would be preempted.<sup>103</sup> But the Supreme Court has made clear that the FAA does not occupy the field of arbitration law,<sup>104</sup> so this theory does not reflect current law.

Overall, then, the preemptive effect of the FAA as applied to confirmation and vacatur of arbitral awards is highly unsettled. State courts would seem more likely to enforce expanded-review provisions than federal courts (assuming the state arbitration law makes such provisions enforceable). But the uncertain reach of FAA preemption may create so much uncertainty about the ultimate enforceability of expanded-review provisions that parties may be unwilling to include such provisions in their contracts.<sup>105</sup>

## V. CONCLUSION

This Article examines the extent to which expanded court review of arbitration awards remains available after the Supreme Court’s decision

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authorizing expanded-review provisions (as opposed to, for example, a state law making all arbitration awards subject to de novo review in court).

<sup>101</sup> Drahozal, *Federal Arbitration Act Preemption*, *supra* note 73, at 418 (quoting MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 26, § 10.8.2).

<sup>102</sup> *Id.* at 419 (quoting Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 554 (1994)).

<sup>103</sup> *Id.*

<sup>104</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (“The FAA [does not] reflect a congressional intent to occupy the entire field of arbitration.”).

<sup>105</sup> *See* Leasure, *supra* note 8, at 310–11 (“[T]hose intrepid enough to take Justice Souter’s invitation to try to develop a means for expanded review outside the FAA can hardly do so with any confidence that whatever alternative they select will be sufficiently developed to avoid protracted post-arbitration litigation substantially similar to that experienced by Hall Street and Mattel.”).

in *Hall Street Associates, L.L.C. v. Mattel, Inc.*—that is, whether parties can contract around *Hall Street*. Although the Court left open the possibility that expanded review might be available on some basis other than the FAA, it did not analyze that possibility, much less decide that expanded review was available. This Article finds only a limited likelihood that expanded-review provisions are enforceable in federal court after *Hall Street*, but a greater likelihood that expanded-review provisions are enforceable in state court (assuming the state arbitration law permits parties to contract for expanded review).

More specifically, I conclude as follows: First, contract provisions limiting the arbitrators' authority to make legal errors should permit expanded review under the FAA (in both federal court and state court), but courts since *Hall Street* have not been receptive to the argument. Second, under a narrow interpretation of the Supreme Court's decision in *Volt*, parties are unlikely to be able to contract out of the FAA altogether. As a result, confirmation of an award in federal court under the FAA likely would preclude a court from relying on an expanded-review provision authorized by state law to vacate the award. Third, whether expanded review is available in state court depends on (1) whether state arbitration law authorizes expanded review, and (2) the scope of FAA preemption. Under at least some theories of FAA preemption, state laws authorizing expanded review would not be preempted by the FAA in state court. That said, the uncertainty over the scope of FAA preemption in the context of award confirmation and vacatur may discourage parties from agreeing to expanded review, even when authorized by state arbitration law.