

2013

Contractual Expansion of Judicial Review of Arbitration Awards in Missouri After Hall Street and Cable Connection

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Recommended Citation

Griffith, Benjamin A. (2013) "Contractual Expansion of Judicial Review of Arbitration Awards in Missouri After Hall Street and Cable Connection," *Saint Louis University Law Journal*: Vol. 58 : No. 1 , Article 16.
Available at: <https://scholarship.law.slu.edu/lj/vol58/iss1/16>

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**CONTRACTUAL EXPANSION OF JUDICIAL REVIEW OF
ARBITRATION AWARDS IN MISSOURI AFTER *HALL STREET* AND
*CABLE CONNECTION***

INTRODUCTION

When compared to a formal trial, there are a number of advantages to an arbitration proceeding.¹ Such advantages likely explain the rapid rise in popularity of arbitration.² One of the primary benefits of arbitration is the ability of contractual parties to define the parameters of how a particular arbitration will be conducted and to customize the dispute resolution process to their unique situation.³ Arbitration is about parties' freedom to opt out of the court system in favor of a private process designed to be faster, more efficient, and more accommodating than a trial.⁴ However, this freedom is not unlimited.⁵ It is subject to state and federal arbitration statutes that define the limits of the arbitration process.⁶ These statutory limits on parties' contractual freedom are intended to preserve the benefits of efficiency, finality, and autonomy.⁷ For example, finality is one area that legislatures generally do not allow parties to define by agreement.⁸ Typically, under state and federal statutes, there is no true appeal from an arbitration award, and arbitrators' decisions are final and binding unless certain limited exceptions are met.⁹ The importance of preserving arbitral finality stems from the notion that parties typically select arbitration because it is prompt, fair, and free from the delays or formalities associated with appellate justice.¹⁰ Although federal and state statutes generally do not provide for appeal of an arbitration award, there are

1. EDWARD BRUNET, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 431 (4th ed. 2011).

2. *Id.*

3. *Id.*

4. Brian T. Burns, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street*, 78 *FORDHAM L. REV.* 1813, 1814 (2010).

5. *Id.* at 1815.

6. *Id.*

7. *Id.*

8. BRUNET, *supra* note 1, at 433.

9. *Id.* at 433–34.

10. *Id.* at 433.

limited grounds available through which parties may have an award modified or vacated.¹¹

Sections 10 and 11 of the federal government's arbitration statute, the Federal Arbitration Act (FAA), provide a number of grounds through which a court can overturn or modify an award through what is referred to as "judicial vacatur."¹² However, those grounds are very limited.¹³ As a result, parties have recently been attempting to circumvent the statutory grounds for review by including provisions in their contracts that provide for judicial review of erroneous arbitration awards.¹⁴ This has created a tension between (1) parties' freedom to contract and to define the parameters of arbitration as they see fit and (2) state and federal statutory limits on judicial review designed to foster the goals and benefits of the arbitration process.¹⁵ As we will see, this conflict gives rise to a number of questions about the ability of parties to contract around the statutory limits on review. States and the federal government have recently resolved this conflict through a variety of methods: some states have opted to allow contractual expansion of review, while other states and the federal government have chosen to make these contractual provisions unenforceable.¹⁶ The purpose of this Comment is to predict which side of this controversy the state of Missouri, ultimately, will decide to align itself with.

Part I of this Comment provides the backdrop of federal arbitration legislation, beginning with the enactment of the FAA and its purpose and policy. Next, Part II explains some of the significant provisions of the FAA with regard to finality and grounds for judicial vacatur. Part III traces the line of the U.S. Supreme Court's preemption cases and discusses the areas of law in which the FAA preempts state arbitration law, as well as the areas where state law can still be applied. Part IV presents the U.S. Supreme Court case of *Hall Street Associates v. Mattel*, as well as the California Supreme Court case of *Cable Connection v. DIRECTV*. These two cases mark the beginning of divergent paths that federal and state courts have taken with regard to the contractual expansion of judicial review. Some states follow the U.S. Supreme Court's rationale in *Hall Street*, while others follow *Cable Connection's* reasoning and rely on their individual state statutes and common law. Part V

11. *Id.*

12. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 595 n.3 (2008) (Stevens, J. dissenting).

13. 9 U.S.C. §§ 10–11 (2006). As will be discussed in Part II, *infra*, the FAA applies to all arbitration agreements under the jurisdiction of Congress's Commerce Clause Power. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

14. Burns, *supra* note 4, at 1815.

15. See Rachel S. Portnoy, *Embracing the Alternative: Cable Connection, Inc. v. DIRECTV, Inc. Puts the Alternative Back into Alternative Dispute Resolution*, 44 NEW ENG. L. REV. 991–92 (2010).

16. See Parts IV and V *infra*.

provides examples of recent state court decisions on both sides of the controversy and examine why each state has ruled in the way that it has. Finally, Part VI analyzes Missouri's role in this line of cases and attempts to predict which line of reasoning (*Hall Street* or *Cable Connection*) the Supreme Court of Missouri may choose to follow. In addition to predicting which direction the Supreme Court of Missouri *would* take, this Comment also briefly discusses which direction Missouri *should* take, in light of policy and practical considerations.

I. THE HISTORY, PURPOSE, AND POLICY OF THE FAA

The first modern arbitration statute in the United States was New York's Arbitration Act of 1920.¹⁷ In 1922, a committee of the American Bar Association drafted a bill patterned after the New York Arbitration Act.¹⁸ This bill would later be enacted by Congress as the United States Arbitration Act of 1925 and would come to be referred to as the Federal Arbitration Act (FAA).¹⁹ At common law, arbitration agreements were seen as attempts to oust courts of jurisdiction.²⁰ This gave rise to judicial hostility towards arbitration and a refusal by courts to enforce agreements to arbitrate.²¹ Throughout much early U.S. Supreme Court jurisprudence, the Court permitted contracting parties to freely revoke an agreement to arbitrate at any time prior to the arbitrator's final ruling.²² As commerce in America began to thrive, however, the need for a quick and relatively inexpensive alternative to trial eventually resulted in the abandonment of hostility towards arbitration.²³ The 1920 New York Arbitration Act (the 1920 Act) was the first successful stride towards the universal enforcement of arbitration agreements.²⁴ By making pre-dispute agreements to arbitrate "valid and enforceable," the 1920 Act mandated court action to stay litigation pending the completion of arbitration.²⁵

The FAA has carried that notion forward and has represented a strong public policy in favor of arbitration and the freedom to contract, thereby abolishing the common law hostility towards arbitration.²⁶ Congress's intent in enacting the FAA was "to place arbitration agreements 'upon the same footing

17. BRUNET, *supra* note 1, at 449.

18. *Id.*

19. *Id.*

20. *Id.*

21. Burns, *supra* note 4, at 1817.

22. James E. Berger and Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J. L. & BUS. 745, 747 (2009).

23. *Id.* at 748.

24. *Id.* at 752.

25. BRUNET, *supra* note 1, at 449.

26. *Id.* at 449-50.

as other contracts, where they belong.”²⁷ The FAA was enacted pursuant to Congress’s Commerce Clause power and has been found to have significant preemptive force over state courts that restrict the enforceability of arbitration clauses.²⁸ The Supreme Court has recognized Congress’s intent to treat arbitration agreements the same as contracts and has instructed courts to enforce arbitration agreements according to their terms.²⁹ The Court has also stressed the finality of arbitral awards and instructed district courts to vacate an arbitrator’s award only under the narrow grounds enumerated in the FAA.³⁰

II. THE TEXT OF THE FAA

The following discussion provides an overview of the significant provisions of the FAA and how they operate. Section 2 states that a written provision in a contract “to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³¹ Section 2 is crucial to the goals of the FAA because it gives bite to Congress’s goal of placing arbitration agreements on the same footing as other contracts by requiring the judicial branch to enforce arbitration agreements.³² This section also includes the “savings” clause, which appears to bootstrap state contract defenses to suits arising under the FAA.³³ The “savings” clause allows parties to defend against performance of an arbitration agreement by utilizing state contract law defenses, such as duress or unconscionability.³⁴

Section 3 is an enforcement provision.³⁵ It requires courts, “on application of one of the parties,” to stay any suits brought in federal court if it is determined that there was a valid agreement to arbitrate the issue.³⁶ The stay remains in effect “until such arbitration has been had in accordance with the terms of the agreement.”³⁷ Section 3 of the FAA carves out one of the few roles that courts have in the arbitration process outside of entering judgment. If there is an agreement between the parties to arbitrate the issue, the court cannot hear that particular issue and is required to stay the action until arbitration has

27. Burns, *supra* note 4, at 1817–18 (quoting H.R. Rep. No. 68–96, at 1 (1924)).

28. 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, 636 (2002). See discussion in Part III *infra*.

29. *Id.* at 636–37.

30. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586–89 (2008).

31. Section 2 is the core provision of the FAA. 9 U.S.C. § 2 (2006).

32. Berger, *supra* note 22, at 754; BRUNET, *supra* note 1, at 450.

33. BRUNET, *supra* note 1, at 450.

34. Burns, *supra* note 4, at 1820.

35. BRUNET, *supra* note 1, at 450.

36. 9 U.S.C. § 3 (2006).

37. *Id.*

been conducted.³⁸ Section 4, additionally, allows a court to compel arbitration if a party refuses to arbitrate according to the agreement.³⁹

As required by § 2, the judicial branch is responsible for confirmation and entry of judgment on an arbitrator's award.⁴⁰ Section 9 of the FAA provides various requirements and processes for parties to have their arbitration award enforced by a court.⁴¹ The FAA states that "the court must grant such an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."⁴² Thus, § 9 provides a mandate for courts to enforce arbitrators' awards brought for confirmation unless the award can be vacated pursuant to §§ 10 or 11. As a result, the most important FAA language for the purposes of finality and judicial review are §§ 10 and 11.

Section 10 provides the limited grounds on which courts have the power to vacate arbitration awards.⁴³ The narrow scope of review under § 10 is what gives rise to the greater efficiency of arbitration. If courts were free to intervene or alter arbitrators' awards, then the advantage of a quick and inexpensive resolution of disputes would no longer be considered a characteristic of arbitration.⁴⁴ Under § 10(a), a court may vacate an award only:

- (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.⁴⁵

Courts generally consider § 10(a)(1) through (3) to raise concerns about the overall fairness and impartiality of the arbitration process itself.⁴⁶ The merits of the award tend to be disputed under § 10(a)(4) and are the most

38. Burns, *supra* note 4, at 1820.

39. 9 U.S.C. § 4 (2006); Burns, *supra* note 4, at 1821.

40. BRUNET, *supra* note 1, at 450.

41. 9 U.S.C. § 9 (2006); Berger, *supra* note 22, at 755.

42. 9 U.S.C. § 9.

43. Berger, *supra* note 22, at 755.

44. Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 61 DISP. RESOL. J. Nov. 2006–Oct. 2007, at 16, 18 (2006).

45. 9 U.S.C. § 10 (2006).

46. Helm, *supra* note 44, at 18.

frequently cited reason for vacating an arbitration award.⁴⁷ Section 10 is generally not interpreted to allow review of arbitration awards for errors of law or fact.⁴⁸ However, parties attempting to convince a court to overturn an arbitration award on the merits often contend that a contract provision providing for judicial review of an arbitrator's legal error falls within the purview of § 10(a)(4).⁴⁹ In other words, parties often argue that by committing an error of law, the arbitrator exceeded the powers granted to them in terms of the arbitration agreement.⁵⁰

Section 11 creates grounds on which a court may modify or correct the award (as opposed to complete vacatur).⁵¹ Section 11 allows modification or correction when there was a material miscalculation of figures, a mistake in the description of any person, property, or thing involved in the award, or other procedural defects.⁵² Similar to § 10, the text of § 11 also does not contemplate judicial review on the merits.⁵³

The lack of an explicit term in the FAA for review of arbitral awards on the merits leads to a number of important preemption issues. State law and the FAA may not be identical in their approach or statutory language.⁵⁴ Thus, it is important to know the circumstances under which the FAA will govern, thereby precluding review on the merits; and it is also important to know the circumstances when state law will be in play, potentially creating a different result. This leads into the next section of this Comment, which will discuss the preemptive power of the FAA and the situations in which state law is superseded by the FAA's terms.

47. *Id.* at 18, 20.

48. *Id.* at 20.

49. *Id.*

50. This is precisely the argument that the Supreme Court was presented with in *Hall Street v. Mattel*, prompting the Supreme Court to hold that the text of the FAA does not recognize legal or factual error as a valid basis for vacating an award. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (“[I]t would stretch basic interpretive principles to expand the stated grounds [for review under § 10 of the FAA] to the point of evidentiary and legal review generally.”). A full discussion of *Hall Street v. Mattel* will follow in Part IV *infra*.

51. 9 U.S.C. § 11 (2006); BRUNET, *supra* note 1, at 451.

52. 9 U.S.C. § 11.

53. *Id.*

54. Although they may not be identical in language, it is important to note that state statutory standards for judicial review of arbitration awards often closely track the text of the FAA. Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL., 509, 520 (2009). Most state arbitration statutes have enacted the Uniform Arbitration Act (UAA) substantially as written. *Id.* at 521. The UAA, like the FAA, traces its origin to the 1920 New York Arbitration Act, which has resulted in the striking similarity in text between the FAA and UAA-based state laws. *Id.* Currently thirty-seven of fifty states have enacted some version of the UAA as their state arbitration statute. *Id.*

III. THE FAA'S PREEMPTIVE EFFECT

A number of U.S. Supreme Court cases explicitly address the statute's scope. The first of which is *Prima Paint v. Flood & Conklin Manufacturing Company*.⁵⁵ In *Prima Paint*, the Court expanded a previous interpretation of the language of § 2 to not only be restricted to contracts "between merchants for the interstate shipment of goods" but also to extend to any contract "relating to interstate commerce."⁵⁶ In so ruling, the Court introduced the idea that would later be firmly decided in *Allied-Bruce Terminix*: that Congress intended the scope of the FAA to extend to the full measure of Congress's Commerce Clause power.⁵⁷ The effect of the Court's holding in *Prima Paint* was to make the FAA generally applicable in federal diversity cases as long as the case involved interstate commerce.⁵⁸

Although the Supreme Court in *Prima Paint* ruled that the FAA extended to all federal diversity cases involving interstate commerce, it did not address the question of the FAA's effect on state law until *Southland v. Keating*, in 1984.⁵⁹ State arbitration law is not always identical to the provisions of the FAA, so constitutional preemption issues are common in this area. In *Southland*, several standard franchise agreements between the franchisor and franchisees of 7-Eleven convenience stores contained arbitration clauses stating that:

[a]ny controversy or claim arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.⁶⁰

The franchisees attempted to file suit against Southland in California Superior Court alleging a number of claims, including several that arose under the California Franchise Investment Law.⁶¹ Southland answered with an affirmative defense of a failure to arbitrate.⁶² The California Superior Court granted Southland's motion to compel arbitration of all claims except those claims based on the Franchise Investment Law, holding that those claims were not arbitrable.⁶³ The California Court of Appeals reversed, holding that the Franchise Investment Law's invalidation of arbitration agreements was a

55. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

56. *Id.* at 401 n.7, 409.

57. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

58. Burns, *supra* note 4, at 1826.

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

60. *Id.* at 3–4.

61. *Id.* at 4.

62. *Id.*

63. *Id.*

violation of the Supremacy Clause and in conflict with the terms of the FAA.⁶⁴ The California Supreme Court subsequently reversed again, holding that the Franchise Investment Law required judicial consideration of claims arising under it and that the law did not contravene the FAA.⁶⁵

Thus, the question for the U.S. Supreme Court was whether the California Franchise Investment Law, requiring the invalidation of certain arbitration agreements otherwise enforceable under the FAA, violated the Supremacy Clause.⁶⁶ The Court held that the FAA was applicable in state court and, thus, that the California Franchise Investment Law was unconstitutional via the Supremacy Clause.⁶⁷ The Court primarily relied on Congress's Commerce Clause power and the legislative history of the FAA to come to its conclusion.⁶⁸ The Court found that the legislative history of the FAA expressed intent to remedy two problems: the common law hostility towards arbitration and the failure of state arbitration statutes to mandate enforcement of arbitration agreements.⁶⁹ The second problem meant that Congress, in enacting the FAA, must have intended to override state law constraints on the enforcement of arbitration agreements.⁷⁰ Citing *Prima Paint*, the Court also rejected the notion that the FAA was strictly procedural.⁷¹ Congress's election to exercise the Commerce Clause power "clearly implied that the substantive rules of the [FAA] were to apply in state as well as federal courts."⁷² The Court cautioned that the FAA must apply in state as well as federal court to foreclose state legislative attempts to undercut arbitration agreements and to prevent the frustration of Congressional intent to "place [. . .] arbitration agreement[s] . . . upon the same footing as other contracts, where [they] belong[]." ⁷³

After *Southland*, the Court decided *Perry v. Thomas* in 1987.⁷⁴ *Perry* expressly affirmed *Southland's* preemption analysis in its holding that California legislation—specifically the California Labor Code—was preempted by the FAA.⁷⁵ The California Labor Code allowed employees to litigate to collect wages regardless of any private agreement to arbitrate.⁷⁶ The plaintiff in *Perry* attempted to bring a claim in court against his employer for

64. *Southland*, 456 U.S. at 5.

65. *Id.*

66. *Id.* at 3.

67. *Id.* at 16.

68. Burns, *supra* note 4, at 1827.

69. *Southland*, 465 U.S. at 14.

70. *Id.*

71. *Id.* at 14–15.

72. *Id.* at 12.

73. *Id.* at 16 (internal quotation marks omitted).

74. *Perry v. Thomas*, 482 U.S. 483 (1987).

75. *Id.* at 492.

76. *Id.* at 484.

unpaid wages, despite the existence of an arbitration agreement between the parties.⁷⁷ The Court held that the FAA preempted the Labor Code and precluded the trial court from hearing the claim.⁷⁸ The holding was grounded in § 2 of the FAA, which was said to be “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”⁷⁹ Quoting *Southland*, the Court stated that arbitration is required “unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable ‘upon such grounds as exist at law or in equity for the revocation of any contract.’”⁸⁰ Thus, although *Perry* followed *Southland*’s preemption holding, it also directed lower courts to look to state contract law when interpreting whether an arbitration agreement was enforceable and, thus, subject to the FAA.⁸¹ *Perry* makes state contract law valid in determining whether an agreement to arbitrate has been made—and whether the FAA will be activated to preempt judicial resolution—as long as the state law (1) deals with the validity of contracts generally and (2) is not specifically geared towards invalidating arbitration agreements alone.⁸²

After *Perry* and *Southland* firmly held that the FAA preempted state arbitration law in diversity cases, the Supreme Court was confronted with the issue of whether the FAA still preempts state law if the arbitration agreement itself contains a choice-of-law clause opting for the application of state arbitration law.⁸³ The case, *Volt Information Sciences v. Board of Trustees of Stanford*, involved a construction contract with an arbitration clause stating, “The Contract shall be governed by the law of the place where the Project is located.”⁸⁴ A dispute over compensation led Volt to make a formal demand for arbitration, while Stanford University responded by filing an action in California Superior Court.⁸⁵ Stanford sought a stay of the arbitration pursuant to California arbitration law, which permits a court to stay arbitration where there is related pending litigation between a party to the arbitration agreement and third parties not bound by it.⁸⁶ The U.S. Supreme Court ultimately determined that, despite the acknowledgement of the parties that the case

77. *Id.* at 484–85.

78. *Id.* at 491.

79. *Perry*, 482 U.S. at 489 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

80. *Id.* (emphasis added).

81. *Id.* at 492 n.9.

82. *Id.*

83. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989).

84. *Id.*

85. *Id.* at 470–71.

86. *Id.* at 471.

involved interstate commerce, which would typically result in activation of the FAA and preemption of California law, California law nevertheless governed the arbitration due to the parties' contractual choice-of-law clause.⁸⁷ The Court held—with strong language that will become crucial in interpretations of later cases—that the FAA, under these circumstances, does not prevent application of state arbitration law, even when the state law directly conflicts with the FAA:

[T]he FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.⁸⁸

[I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.⁸⁹

However, parties do not have unlimited freedom to choose state arbitration law.⁹⁰ As evidenced in *Casarotto*, a case decided in 1996, state law will still be preempted if it undermines the goals and policies of the FAA, i.e., if it treats arbitration agreements differently than other contracts.⁹¹ In 1995, in *Allied-Bruce Terminix v. Dobson*, the Supreme Court foreclosed any remaining doubt on whether the scope of § 2 of the FAA was meant to include the full measure of Congress's Commerce Clause power or a lesser subset of applicability.⁹²

Prior to the decision in *Allied-Bruce*, state courts were inconsistently applying the “evidencing a transaction involving commerce” language in § 2.⁹³ Some state courts, including the Supreme Court of Alabama in the *Allied-Bruce* case, interpreted § 2's language as a requirement for the parties to have “contemplated” a connection to interstate commerce in order for the FAA to apply.⁹⁴ Other courts had interpreted § 2 as reaching to the outer limits of Congress's Commerce Clause power.⁹⁵ The Court resolved this inconsistency by concluding that the latter, broader reading of § 2 was what Congress

87. *Id.* at 476–77.

88. *Volt*, 489 U.S. at 478 (citations omitted).

89. *Id.* at 479..

90. Burns, *supra* note 4, at 1840.

91. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); Burns, *supra* note 4, at 1840.

92. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995).

93. *Id.* at 269–70.

94. *Id.* at 269.

95. *Id.* at 270.

intended.⁹⁶ This broad application of the FAA, laid down in *Allied-Bruce*, effectively extended the reach of the FAA to nearly every arbitration agreement that did not expressly opt for a particular state's arbitration law through a choice-of-law clause.

A year after the *Allied-Bruce* decision, the Supreme Court, in *Doctor's Associates, Inc. v. Casarotto*, was confronted with another question of state law preemption.⁹⁷ *Casarotto* involved a franchise agreement for the operation of a Subway restaurant in Montana.⁹⁸ Montana state law declared an arbitration clause unenforceable unless notice that the contract is subject to arbitration was typed in underlined capital letters on the first page of the contract; thus, the contract at issue in *Casarotto* did not comply with the Montana law.⁹⁹ The question for the Court was whether the Montana law applied to invalidate the arbitration agreement; or whether the FAA preempted the Montana law, thereby requiring enforcement of the arbitration clause despite its noncompliance with the Montana statute.¹⁰⁰ In holding that the FAA preempted the Montana law, the Court elaborated on its prior holding in *Perry* that § 2 allows state contract law principles to be applied to govern issues of the validity, revocability, and enforceability of contracts *generally*:

[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements

Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions Congress . . . requir[ed] instead that such provisions be placed "upon the same footing as other contracts."¹⁰¹

The Court's holding in *Casarotto* was merely a reaffirmation of the principle first introduced in *Perry*: that state contract law can be applied to invalidate an arbitration agreement that would otherwise be valid under the FAA; however, this is only permissible when the state law invalidates all contracts and does not isolate arbitration agreements.¹⁰²

The final case in the Supreme Court's preemption decisions is *Mastrobuono v. Shearson Lehman Hutton*.¹⁰³ *Mastrobuono* again dealt with a choice-of-law provision, in the context of a New York law that allowed courts, but not arbitrators, to award punitive damages.¹⁰⁴ The parties in the case had a

96. *Id.*

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

98. *Id.* at 682.

99. *Id.* at 683–84.

100. *Id.* at 683.

101. *Id.* at 686–87.

102. *Casarotto*, 517 U.S. at 686–87.

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

104. *Id.* at 53.

contract with arbitration and choice-of-law provisions that were separate from one another.¹⁰⁵ The choice-of-law clause provided for all disputes to be governed by the laws of the State of New York.¹⁰⁶ Since the arbitration clause was separate from the choice-of-law provision and expressed no intent to preclude an award of punitive damages, the Court held that the choice-of-law provision governed the substantive aspects of the arbitration and the arbitration clause governed the procedural aspects—per the terms of the FAA.¹⁰⁷ Thus, the Court's reasoning in *Mastrobuono* suggests that general choice-of-law clauses may not be sufficient if parties want state law to govern their arbitrations; instead, they must unequivocally indicate such an intent.¹⁰⁸

So what is the state of FAA preemption analysis after this line of cases? The Supreme Court has clearly stated that § 2 of the FAA invokes the broadest application of Congress's Commerce Clause power.¹⁰⁹ Thus, where the FAA applies, whether in state or federal court, it will preempt state arbitration law.¹¹⁰ Parties may, however, opt for an application of state law by including a choice-of-law provision in their contracts; as long as the applicable state statute places arbitration agreements on the same footing as other contracts (i.e. does not treat them differently).¹¹¹ What if there is no choice-of-law provision opting for state law; will the FAA still preempt in state court in cases not within the purview of the Commerce Clause? This is one area of FAA preemption that has not been explicitly addressed by the Supreme Court and will remain unsettled until a firm ruling is made.¹¹² The absence of an express holding by the Supreme Court that the FAA preempts all conflicting state law has allowed states to employ their own state arbitration law in certain situations, even when it clashes with the FAA.¹¹³ As will be evident in Parts IV and V of this Comment, this significant, undecided area of FAA preemption law is the primary source of the divergent paths taken by state courts on contractually expanded review after *Hall Street* and *Cable Connection*.

105. *Id.* at 54.

106. *Id.* at 53.

107. *Id.* at 63–64.

108. *See Mastrobuono*, 514 U.S. at 62–63.

109. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 11–12 (1984).

110. *Allied-Bruce*, 513 U.S. at 272; *Southland* 465 U.S. at 16.

111. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476–79 (1989).

112. *Burns*, *supra* note 4, at 1835–36.

113. *See Part IV infra.*

IV. EXPANDED JUDICIAL REVIEW: *HALL STREET* AND *CABLE CONNECTION*

Arbitration awards are intended to be final and binding on the parties involved.¹¹⁴ Congress established narrow grounds for judicial review of arbitration awards under § 10 of the FAA.¹¹⁵ The language of § 10 has been interpreted to not allow review of arbitral awards for errors of law or fact.¹¹⁶ As a result, if the arbitral award does not violate one of the four provisions of § 10, the reviewing court is required by the FAA to confirm it.¹¹⁷ But as we saw in *Volt*, the Supreme Court has stated:

[A]rbitration . . . [is] a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit the issues which they will arbitrate . . . so too may they specify by contract the rules under which the arbitration will be conducted.¹¹⁸

As a result, many parties have attempted to alter the judicial review provisions of the FAA through their arbitration agreements.¹¹⁹ Until the Supreme Court decided *Hall Street v. Mattel* in 2008, there was a federal circuit court split regarding whether or not this type of contractual expansion was permissible.¹²⁰ The First, Third, Fourth, and Fifth Circuits had previously held that heightened judicial review was permissible, primarily due to the fact that arbitration agreements should be enforced according to their terms.¹²¹ The Ninth and Tenth Circuits had held that FAA §§ 10 and 11 were the only permissible grounds for review, regardless of what the parties' contract stated.¹²² The Tenth Circuit's rationale for holding to the text of the FAA was that contractually expanded review would weaken the distinction between arbitration and judicial proceedings.¹²³

114. 9 U.S.C. § 9 (2006).

115. *Id.* § 10.

116. Helm, *supra* note 4, at 20.

117. Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 230–31 (1997).

118. *Volt Info. Scis., Inc.*, 489 U.S. at 479.

119. For example, clauses may attempt to allow courts to review arbitrator's awards for errors of law or fact, in contravention with the FAA.

120. Jeremy L. Zell, *Discerning the Validity of Arbitration Agreements Containing Heightened Judicial Review Clauses After Hall Street Associates, L.L.C. v. Mattel, Inc.*, 40 LOY. U. CHI. L. J. 959, 964 (2008).

121. *Id.* (citing *Puerto Rico Tel. Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, No. 96–2261, 1997 WL 452245 at *6 (4th Cir. Aug. 11, 1997); *Gateway Tech., Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 997 (5th Cir. 1995)).

122. *Id.* (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001)).

123. *Id.*

To resolve the split, *Hall Street* framed the issue as whether “statutory grounds for prompt vacatur and modification may be supplemented by contract.”¹²⁴ The case involved an arbitration agreement containing language that the U.S. District Court for the District of Oregon may enter judgment on the arbitrator’s award and that the court “shall” vacate or correct the award where the arbitrator’s conclusions of fact were not supported by substantial evidence, or where conclusions of law were erroneous.¹²⁵ A dispute subsequently arose between the parties under the lease containing the arbitration clause; the arbitration was held and an award was entered in favor of Mattel.¹²⁶ Hall Street appealed, seeking to have the award vacated due to errors of law.¹²⁷ Justice Souter’s majority opinion (1) held that the FAA’s enumerated grounds in §§ 10 and 11 were the exclusive grounds for modifying or vacating awards and (2) rejected Hall Street’s contention that expanded review should be allowed because arbitration is a creature of contract and parties would flee from arbitration if expanded review is not open to them.¹²⁸ The Court stated that “it makes more sense to see the . . . [FAA] . . . as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”¹²⁹ The controversial language of the *Hall Street* opinion, however, occurs towards the end when Justice Souter states:

[W]e do not purport to say that [§§ 10 and 11] exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable.¹³⁰

Thus, the Court explicitly ruled out the possibility that a contractual clause expanding judicial review would be enforceable in a case arising under the FAA.¹³¹ This particular quotation from the opinion, however, does leave open the possibility that in cases where state arbitration law applies, through choice-of-law clauses or otherwise, state courts may properly allow expanded review under state arbitration statutes or common law.¹³²

The dissent in *Hall Street*, written by Justice Stevens, took issue with the majority’s view of the policy served by the FAA, arguing that in light of the

124. *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

125. *Id.* at 579.

126. *Id.* at 580.

127. *Id.*

128. *Id.* at 586–590.

129. *Hall Street*, 552 U.S. at 588.

130. *Id.* at 590.

131. Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 905, 911–912 (2010).

132. *Id.* at 916–17.

historical context and the broader purpose of the FAA, “§§ 10 and 11 are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties’ ‘valid, irrevocable and enforceable’ agreements to arbitrate their disputes subject to judicial review for errors of law.”¹³³

Despite *Hall Street*’s holding, in 2008, the California Supreme Court in *Cable Connection v. DIRECTV* held that expanded judicial review was permitted under the California Arbitration Act (CAA).¹³⁴ The court considered whether parties should be able to contract for the right to seek judicial review in the event of legal error committed by an arbitrator.¹³⁵ The contract at issue included a judicial review provision stating 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.”¹³⁶ The initial ruling by the arbitrators was in favor of Cable Connection.¹³⁷ DIRECTV subsequently brought a motion in state court to vacate the award on several grounds, including that the award was (1) beyond the scope of the arbitrators’ powers and (2) subject to judicial review, because it contained errors of law.¹³⁸ The trial court accepted DIRECTV’s argument and vacated the award.¹³⁹ The California Court of Appeals reversed, holding that the trial court exceeded its authority in reviewing the merits of the arbitrators’ award.¹⁴⁰ The Court of Appeals based its decision on two prior California cases, *Crowell v. Downey Community Hospital Foundation* and *Oakland Alameda County Coliseum v. CC Partners*, that held similar expanded judicial review provisions to be unenforceable.¹⁴¹ In ruling that the review provision was unenforceable, the court also held the provision to be severable from the remainder of the arbitration award.¹⁴² DIRECTV then took its appeal to the California Supreme Court.¹⁴³

The California Supreme Court considered *Hall Street*’s preemptive effect on the case but determined that *Hall Street* left the door open for alternate

133. *Hall Street*, 552 U.S. at 595 (Stevens, J., dissenting).

134. *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. 2008).

135. *Id.* at 1339.

136. *Id.*

137. *Id.* at 1342.

138. *Id.*

139. *Cable Connection*, 190 P.3d at 591.

140. *Id.*

141. *Id.* (citing *Crowell v. Downey Cmty. Hosp. Found.*, 95 Cal.App.4th 730, 735–737 (Cal. Ct. App. 2002); *Oakland Alameda Cnty. Coliseum Auth. v. CC Partners*, 101 Cal.App.4th 635, 645 (Cal. Ct. App. 2002)).

142. *Id.* at 591.

143. *Id.* at 591.

routes to expanded review in state court.¹⁴⁴ The court reasoned that if *Hall Street* had been intended to impose a uniform national policy requiring judicial review solely on the grounds of the FAA, the *Hall Street* majority would not have explicitly left open the possibility of a different scope of review in state court.¹⁴⁵ As justification for allowing expanded review, *Cable Connection* noted *Hall Street*'s failure to consider the policy objective of enforcing contractual arrangements; instead, *Hall Street* chose to focus on whether the FAA's text was at odds with permitting contractual expansion of review.¹⁴⁶

DIRECTV, as an alternative to its preemption argument, contended that if the FAA did not apply in state court, then the *Hall Street* holding should be, at a minimum, persuasive in construing the scope of review permitted under the CAA.¹⁴⁷ Despite nearly identical text in the judicial review provisions of the FAA and the CAA, the *Cable Connection* court denied *Hall Street*'s persuasive authority and held that the CAA should be construed differently to allow for expanded review by contract.¹⁴⁸ In so ruling, the *Cable Connection* court relied on prior California case law and the legislative history of the CAA in its finding that there was both a statutory and common law ground for expanded review in California state court.¹⁴⁹ With regard to the statutory ground, the court acknowledged the parallel language in § 10(a)(4) of the FAA and Section 1286.2(a)(4) of the CAA, allowing for vacatur of an arbitration award where an arbitrator has exceeded their power.¹⁵⁰ Contrary to the U.S. Supreme Court's interpretation of the FAA's text in *Hall Street*, the *Cable Connection* court interpreted the "exceeding of powers" provision in the CAA as a statutory source for allowing contractual expansion.¹⁵¹ The court reasoned that a limiting clause (i.e. an expansive or restrictive review provision) in an arbitration agreement defines an arbitrator's powers, and, as a result, the merits of an award may come within the "ambit of the statutory grounds of review."¹⁵² The court also grounded its holding in its prior examination of California common law, in *Moncharsh v. Heily & Blasé*.¹⁵³ The *Moncharsh* opinion concluded that the California legislature, in enacting the CAA, intended to adopt the position that "in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or

144. *Cable Connection*, 190 P.3d at 595–99.

145. *Id.* at 599.

146. *Id.* at 598–99.

147. *Id.* at 596.

148. *Id.* at 592 n.4–7.

149. *Cable Connection*, 190 P.3d at 599–602.

150. *Id.* at 592 n.4–5.

151. *Id.* at 601.

152. *Id.*

153. *Id.* at 599.

of law, may not be reviewed except as provided in the statute.”¹⁵⁴ *Moncharsh* saw this language as a signal that the CAA, despite a failure to explicitly provide for expanded review by statute, did not preclude the parties from doing so by contract.¹⁵⁵ Thus, *Cable Connection* cited *Moncharsh*'s interpretation of the CAA as evidence that the statutory review provisions were meant to operate as default rules, only restricting review if the parties fail to agree otherwise.¹⁵⁶

After this landmark decision in California, a number of other state courts have similarly chosen to utilize their own state common law and statutory history to allow for expanded review, while several others have clung to *Hall Street*'s reasoning and expressed concern for the future of arbitration if expanded review is allowed.

V. STATE COURT TREATMENT OF *HALL STREET* AND *CABLE CONNECTION*

In the wake of *Cable Connection*, and in the absence of a U.S. Supreme Court holding to the contrary, it has become accepted in state courts and the academic community that *Hall Street* does not preclude state courts from enforcing expanded review clauses under state arbitration law.¹⁵⁷ The more common argument in recent state court proceedings by parties seeking to invalidate expanded review clauses is not that *Hall Street* preempts, but instead that *Hall Street*'s rationale should be persuasive in construing state arbitration law due to the similarity in language between the FAA and the majority of state statutes, as well as the policy concerns associated with expanded review.¹⁵⁸ The response of state courts to the persuasive authority argument has been inconsistent: a number of states have chosen to interpret their statutes in accordance with *Hall Street*,¹⁵⁹ whereas a number of other states have taken the alternate route and followed *Cable Connection*.¹⁶⁰

154. *Cable Connection*, 190 P.3d at 601 (citing *Moncharsh v. Heily & Blasé*, 3 Cal.4th 1, 25 (1992)).

155. *Id.* at 601–02.

156. *See id.*

157. *Berger*, *supra* note 22, at 786–87; *Burns*, *supra* note 4, at 1873; *Drahozal*, *supra* note 131, at 926–27; *Portnoy*, *supra* note 15, at 1011.

158. *See, e.g.*, *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 696 S.E.2d 663, 666 (Ga. 2010); *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 259 (Tenn. 2010).

159. *See, e.g.*, *Brookfield*, 696 S.E.2d at 667; *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725, 736 (Me. 2011); *Pugh's Lawn*, 320 S.W.3d at 261.

160. *See, e.g.*, *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011); *Raymond James Fin. Servs., Inc. v. Honea*, 55 So.3d 1161, 1170 (Ala. 2010); *HH East Parcel, LLC v. Handy & Harman, Inc.*, 947 A.2d 916 (Conn. 2008).

A. *States Following Hall Street*

1. Georgia

The Supreme Court of Georgia, in 2010, confronted the question of an expanded review provision in *Brookfield Country Club v. St. James-Brookfield*.¹⁶¹ The case involved a lease agreement between the parties that contained an arbitration clause with language providing for court vacatur of the arbitrator's award "if the court finds it inconsistent with applicable law or not supported by a preponderance of the evidence."¹⁶² The court framed the issue as a balancing of two countervailing policy considerations: (1) the rights of parties to set the terms of their contract, versus (2) the principle that expanded review would frustrate the efficient, final resolution of arbitral disputes, thereby eliminating arbitration's primary benefit of avoiding the cost and delay of litigation.¹⁶³

Despite a finding that *Hall Street* was not dispositive under Georgia state law, the court in *Brookfield* nevertheless sought guidance from *Hall Street's* holding because of the similarity between the Georgia arbitration statute and the FAA.¹⁶⁴ After an examination of *Hall Street*, the court concluded that the U.S. Supreme Court's reasoning was consistent with the statutory and interpretive law of Georgia, and its logic would therefore be adopted.¹⁶⁵ In addition, it was clearly stated in the *Brookfield* majority opinion that Georgia state arbitration law is "no longer governed by common law, but is wholly a creature of statute."¹⁶⁶ This is directly contrary to *Cable Connection*, which relied heavily on California common law in construing the CAA.¹⁶⁷ This choice by the Georgia Supreme Court to disregard common law is a clear decision to follow *Hall Street* in its entirety, as *Hall Street* expressly denounced all non-statutory bases for judicial review under the FAA.¹⁶⁸

Ultimately, the *Brookfield* court also sided with *Hall Street* in its decision on the countervailing policy considerations.¹⁶⁹ The court acknowledged the fundamental principle of freedom of contract but mirrored *Hall Street's* concern that expanded judicial review would "open[] the door to the full-bore legal and evidentiary appeals that can 'rende(r) informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,'

161. *Brookfield*, 696 S.E.2d at 663.

162. *Id.* at 664.

163. *Id.* at 665–66.

164. *Id.* at 666.

165. *Id.*

166. *Brookfield*, 696 S.E.2d at 667.

167. *Cable Connection, Inc.*, 190 P.3d at 599–600.

168. *Hall St. Assocs. v. Mattel, Inc.* 552 U.S. 576, 578 (2008).

169. *Brookfield*, 696 S.E.2d. at 667.

and bring arbitration theory to grief in post-arbitration process.”¹⁷⁰ This interest and importance in preserving the finality of arbitration proceedings, even in the face of valid, arms-length contractual provisions, is a common thread in *Hall Street* and the states that have chosen to align themselves with it.¹⁷¹

2. Tennessee

As in *Brookfield*, in 2010, the Tennessee Supreme Court also utilized *Hall Street*'s logic in *Pugh's Lawn Landscape v. Jaycon Development*.¹⁷² The arbitration agreement in question contained a provision providing the following: “[A]ny and all findings, rulings or judgments issued by the arbitrator shall be appealable, using the same standards of review, as if the finding, ruling or judgment in question was issued by [the trial court].”¹⁷³ The court explained that both the FAA and Tennessee Uniform Arbitration Act (TUAA) were enacted to promote the private settlement of disputes without resort to the courts; and accordingly, the scope of review advanced by the U.S. Supreme Court has equal application in a case under the TUAA “to the extent that such review furthers the common goal of the acts.”¹⁷⁴ After reviewing *Hall Street*, the Tennessee Supreme Court determined that the *Hall Street* rationale should apply with equal force in the case at bar.¹⁷⁵

The justification for adhering to the logic of *Hall Street* was twofold. First, the court relied on a textual argument to justify its holding.¹⁷⁶ The court observed that the language of the judicial review provisions in the TUAA was substantially similar to those in the FAA and, to the extent they were different, the TUAA was even more stringent.¹⁷⁷ The statutory review provisions of the TUAA direct that a court “shall” vacate an award when the enumerated circumstances are present; whereas, the language of the FAA provides that a court “may” vacate.¹⁷⁸ Since the TUAA employs more restrictive language than that of the FAA provision, the result must be that the TUAA's text does not allow for expanded review.¹⁷⁹

The court's second justification for its holding was that the General Assembly has directed that the TUAA be “construed so as to effectuate its general purpose to make uniform the law of those states which enact it.”¹⁸⁰

170. *Id.*

171. *See, e.g., Brookfield*, 696 S.E.2d at 667; *Pugh's Lawn*, 320 S.W.3d at 257–58.

172. *Pugh's Lawn*, 320 S.W.3d at 258–59.

173. *Id.* at 255.

174. *Id.* at 257–58.

175. *Id.* at 259.

176. *Id.*

177. *Pugh's Lawn*, 320 S.W.3d at 259.

178. *Id.*

179. *See id.* at 259–60.

180. *Id.* at 260.

When looking to other states, the court observed that a majority of states at the time had taken the view consistent with *Hall Street* and that only a select few states had sided with *Cable Connection*.¹⁸¹

The tension between the countervailing policy considerations again influenced the court's holding in *Pugh's Lawn*.¹⁸² In reaching its decision, the court also placed emphasis on the prior Tennessee Supreme Court case of *Arnold v. Morgan Keegan & Co.* In *Arnold*, the court reached the conclusion that the TUAA was enacted with the intent of limiting the trial court's authority to retry arbitration decisions.¹⁸³ Finality was once again the driving force behind the court's determination of legislative intent: "To permit a dissatisfied party to set aside the arbitration award and to invoke the Court's judgment upon the merits of the cause would render arbitration merely a step in the settlement of the dispute, instead of its final determination."¹⁸⁴

3. Maine

HL 1 v. Riverwalk, decided by the Supreme Judicial Court of Maine in 2011, was the most recent case interpreting a state arbitration statute to invalidate expanded review provisions.¹⁸⁵ *Riverwalk* involved a dispute over real estate development.¹⁸⁶ The operating agreement in force contained an arbitration clause that allowed each party to "retain his right to appeal any questions of law arising at the [arbitration]."¹⁸⁷ After arbitration was conducted and appealed up to the Supreme Judicial Court of Maine, the issue for the court was whether parties could contract for judicial review beyond that provided in the Maine Uniform Arbitration Act (MUAA).¹⁸⁸ The court initially applied the plain meaning rule to the judicial review provision of the MUAA section 5938 to determine whether the plain text of the statute was ambiguous.¹⁸⁹ Based on the lack of ambiguity, the court initially dismissed the need to look at legislative intent or the statute's history and policy to determine its meaning.¹⁹⁰ Upon examination of the plain text of section 5938, the court observed that a number of grounds for the vacatur of awards were present, but legal error was not among them.¹⁹¹

181. *Id.*

182. *Pugh's Lawn*, 320 S.W.3d at 257–58.

183. *Id.*

184. *Id.*

185. *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725 (Me. 2011).

186. *Id.* at 728.

187. *Id.* at 729–730.

188. *Id.* at 731.

189. *Id.*

190. *Riverwalk*, 15 A.3d at 731–32.

191. *Id.* at 733–34.

With the plain text of the MUAA lacking any explicit ground for review based on legal error, the court then addressed whether parties could alter the MUAA's terms via contract.¹⁹² Noting that *Hall Street* had applied a textual analysis of the statutory scheme and history of the FAA in arriving at its conclusion on this exact question, the *Riverwalk* court determined that a historical analysis of the legislative scheme was, in fact, appropriate despite the lack of ambiguity in section 5938 of the MUAA.¹⁹³

Similar to the Tennessee Supreme Court in *Pugh's Lawn*, the *Riverwalk* court cited the common origin of the FAA and the MUAA in New York's 1920 Arbitration Act and the resulting textual similarity between the two.¹⁹⁴ Even where the language is not identical, the MUAA, like the TUA, in *Pugh's Lawn*, contains language that is even more restrictive than the text of the FAA.¹⁹⁵ The MUAA contains a provision that is absent from the FAA, that even further restrains courts' review power: "But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award."¹⁹⁶ With *Hall Street's* interpretation of the FAA as a baseline, the *Riverwalk* court determined that the intent of the MUAA, if at all different from the FAA, would be even more restrictive on the scope of judicial review.¹⁹⁷

After examining the text of the MUAA, *Riverwalk* turned to a discussion of the policy considerations.¹⁹⁸ As expected, both parties took their respective positions on the tension between contractual freedom and arbitral finality.¹⁹⁹ The *Riverwalk* court, however, contrary to the previous two cases following *Hall Street*, dismissed the policy arguments altogether and returned to the text for its decision.²⁰⁰ The court characterized the policy concerns over the future of arbitration as "speculative;" stating instead that the text of the MUAA reflects only one policy: the policy of adhering to the narrow role that the statutory text carves out for courts.²⁰¹ It would thus be violative of that policy to allow parties to craft a contra-statutory role for courts through contract.²⁰²

192. *Id.* at 734.

193. *Id.* at 733.

194. *Id.* at 733.

195. *Riverwalk*, 15 A.3d at 733–34; *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 259 (Tenn. 2010).

196. *Riverwalk*, 15 A.3d at 734.

197. *See id.*

198. *Id.* at 735–36.

199. *Id.*

200. *Id.*

201. *Riverwalk*, 15 A.3d at 734.

202. *Id.*

B. States Following Cable Connection

1. Connecticut

In 2010, the Superior Court of Connecticut decided *East Greyrock v. OBC Associates*.²⁰³ The case was a civil action that pleaded damages for environmental contamination of real property.²⁰⁴ The parties to the case eventually submitted to voluntary arbitration and signed an agreement to arbitrate that contained a clause allowing for either party to appeal the arbitrator's award and seek full judicial review of questions of law.²⁰⁵ After the arbitration was concluded, the defendants initiated an appeal to the governing trial court seeking de novo review of several issues of law.²⁰⁶

The Superior Court of Connecticut, in considering the appeal, conceded that no judicial review is permissible on questions of law or fact when the parties to the arbitration agreement do not contractually alter the authority of the arbitrator; and in such cases, the arbitrator's award will be final and binding.²⁰⁷ However, the court took a different approach to the permissible scope of judicial review when the parties' agreement does opt to limit or expand the arbitrator's power.²⁰⁸ In footnote nine, the *East Greyrock* court determined that contractually expanded review was permitted due to *Cable Connection's* interpretation of *Hall Street* and the language of the *Hall Street* majority that seemingly left the door open for such an interpretation.²⁰⁹ The court in *East Greyrock* was further guided by *HH East Parcel v. Handy & Harman*, decided in Connecticut state court two months after *Hall Street*, in 2008.²¹⁰ *HH East Parcel* stated, in dictum, that parties to arbitration agreements remain free to contract for expanded review of an arbitrator's finding.²¹¹ The court in *East Greyrock* decided to follow its own state court precedent, and additionally the precedent set by California, instead of the U.S. Supreme Court's ruling in *Hall Street*.²¹²

203. *East Greyrock, LLC v. OBC Associates, Inc.*, No. X08CV044002173S, 2010 WL 3448075 (Conn. Super. Ct. Aug. 2, 2010).

204. *Id.* at *1.

205. *Id.* at *2.

206. *Id.* at *3.

207. *Id.* at *4.

208. *East Greyrock*, 2010 WL 3448075 at *4.

209. *Id.* at *4 n.9 (citing *HH East Parcel, LLC v. Handy & Harman, Inc.*, 947 A.2d 916 (Conn. 2008)).

210. *Id.*

211. *Id.*

212. *Id.*

2. Alabama

Another state electing to reject *Hall Street*'s reasoning in favor of *Cable Connection* was the state of Alabama in *Raymond James Financial Services v. Honea*.²¹³ The defendant in the original case, Raymond James Financial Services, appealed the lower court's review of an arbitration award originally decided in their favor.²¹⁴ The initial suit by Honea against Raymond James alleged abusive brokerage practices in violation of the Alabama Securities Act.²¹⁵ Upon the initiation of their business relationship, Raymond James and Honea entered into a client agreement that contained an arbitration provision.²¹⁶ The provision included language requiring arbitrators to resolve disputes "in accordance with applicable law," as well as a clause that granted both parties the right to appeal an arbitrator's decision that awarded punitive damages or that exceeded \$100,000.²¹⁷ Additionally, the arbitration provision required a reviewing court to conduct a de novo review of the transcript and exhibits from the arbitration hearing.²¹⁸ Following the trial court's vacatur of the arbitration award, Raymond James contended that an application of *Hall Street* was required to restrict the permitted grounds for review to those in § 10 of the FAA, thereby excluding the contractual review provision.²¹⁹ Honea, alternatively, took the position that although expanded review agreements may not be enforceable under the FAA, they are nevertheless enforceable under Alabama common law, which requires arbitration agreements to be enforced as written.²²⁰

The *Raymond James* court determined that an application of Alabama common law was appropriate.²²¹ The court concluded that it must uphold the expanded review provision because prior Alabama decisions had put strong emphasis on the principle that "courts must rigorously enforce contracts, including arbitration agreements, according to their terms in order to give effect to the contractual rights and expectations of the parties."²²² Therefore, despite no explicit citation to *Cable Connection*, the *Raymond James* court reached the same conclusion based on the same policy principle.²²³ *Raymond James*, like *Cable Connection*, based its holding on the judicial determination

213. *Raymond James Fin. Servs., Inc. v. Honea*, 55 So.3d 1161 (Ala. 2010).

214. *Id.* at 1162.

215. *Id.* at 1163.

216. *Id.* at 1162.

217. *Id.* at 1163.

218. *Raymond James*, 55 So.3d at 1163–64.

219. *Id.* at 1164.

220. *Id.* at 1166.

221. *Id.* at 1169.

222. *Id.*

223. *Raymond James Fin. Servs., Inc. v. Honea*, 55 So.3d 1161, 1168–69 (Ala. 2010); *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1361–62 (Cal. 2008).

that contractual freedom is more important than the quick, final resolution of disputes submitted to arbitration.

3. Texas

One of the most recent state courts to align itself with *Cable Connection* was the Supreme Court of Texas in 2011 in *Nafta Traders v. Quinn*.²²⁴ Quinn brought a sex discrimination claim against Nafta Traders (Nafta) under an employee contract that required all disputes to be resolved by arbitration.²²⁵ The arbitration clause contained an expanded review provision that precluded an arbitrator from committing errors of state or federal law.²²⁶ After the arbitrator ruled in favor of Quinn in the case, Nafta appealed to the district court requesting vacatur of the award under the review provision.²²⁷ Nafta asserted that the arbitrator had “exceeded his power” under the contract by issuing an erroneous award when the arbitration agreement did not allow for errors of law.²²⁸ The district court and court of appeals rejected Nafta’s argument, stating that “an arbitrator exceeds his power by deciding an issue the parties did not agree to submit to him, [but] he does not exceed his power by deciding matters incorrectly.”²²⁹

The Supreme Court of Texas subsequently reversed after considering *Hall Street* and the language and intent of the Texas Arbitration Act (TAA).²³⁰ Despite the textual similarities between the FAA and the TAA, the court found that the framework and policy of the FAA was not necessarily in accordance with that of the TAA.²³¹ Additionally, the *Nafta* court felt that the U.S. Supreme Court’s textual analysis in *Hall Street* was undermined by the Court’s failure to consider that legal error was incorporated into the statutory review ground of an “arbitrator exceeding their powers.”²³²

When parties have agreed that an arbitrator should not have authority to reach a decision based on reversible error—in other words, that an arbitrator should have no more power than a judge—a motion to vacate for such error as exceeding the arbitrator’s authority is firmly grounded in the text of [FAA §] 10. The Supreme Court’s reasoning that an arbitrator’s . . . legal errors are not

224. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

225. *Id.* at 87–88.

226. *Id.* at 88.

227. *Id.*

228. *Id.* at 89.

229. *Nafta*, 339 S.W.3d at 89.

230. *Id.* at 91–92. The *Nafta* court acknowledged *Hall Street*’s guidance, but distanced itself from any suggestion that *Hall Street* was binding: “[w]e must, of course, follow *Hall Street* in applying the FAA, but in construing the TAA, we are obliged to examine *Hall Street*’s reasoning and reach our own judgment.” *Id.*

231. *Id.* at 95.

232. *Id.* at 92.

the kind of “egregious departures from the parties’ agreed-upon arbitration” [that §] 10 addresses loses force when such errors directly contradict the parties’ express agreement and deprive them of the benefit of their reasonable expectations.²³³

Stemming from the prior discussion, *Nafta* framed the issue as whether parties can limit an arbitrator’s power to err.²³⁴ In reaching its conclusion, the *Nafta* court consulted the framework and policy of the TAA.²³⁵ Texas courts had repeatedly recognized the policy principle that men of full age and competent understanding have the utmost liberty to contract, and that such free and voluntary contracts must be honored by the state.²³⁶ The *Nafta* court found *Hall Street* to be at odds with this policy principle and found nothing in the text of the TAA to suggest that parties could not agree to limit the authority of an arbitrator to that of a judge.²³⁷ As a result, the court expanded the statutory interpretation of the “arbitrators [have] exceeded their powers” ground to encompass contractual prohibitions of legal error.²³⁸

Justice Hecht began the *Nafta* majority opinion by noting that “[t]he answer to most questions regarding arbitration ‘flow inexorably from the fact that arbitration is simply a matter of contract between the parties.’”²³⁹ This statement nicely summarizes the rationale of, not only the holding in *Nafta*, but also the primary justification for *Cable Connection*’s divergence from *Hall Street*.

VI. HOW SHOULD MISSOURI RESPOND?

The *Cable Connection* line of cases emphasizes the importance of freedom of contract with regard to arbitration. Alternatively, the cases aligning themselves with *Hall Street* hold to the notion that the primary and most significant purpose of arbitration is its final, binding, and expeditious nature; and that allowing parties to violate those essential policies of arbitration discourages the use of arbitration, which may lead to an increased burden on an already strained judiciary.²⁴⁰ These competing theories are the nuts and bolts of the two diverging lines of cases. The Supreme Court of Missouri has not yet ruled on the enforceability of expanded review provisions or indicated which countervailing policy consideration they may eventually deem more important. In this final section, the practical implications and policy arguments

233. *Id.* at 92–93.

234. *Nafta*, 339 S.W.3d at 93.

235. *Id.* at 95–96.

236. *Id.* at 96.

237. *Id.*

238. *Id.*

239. *Nafta*, 339 S.W.3d at 87.

240. *See supra* Part IV.

of both sides of the controversy will be considered. In addition, this Comment will also attempt to predict which side Missouri may ultimately join.

A number of legal scholars have considered the practical effects of the enforceability of expanded review clauses. In an article written in the *Dispute Resolution Journal* in 2007, prior to *Hall Street* and *Cable Connection*, Katherine Helm cautions against the enforcement of expanded review clauses.²⁴¹ Helm justifies deviation from complete, uninhibited freedom of contract in arbitration by citing the common law public policy exception.²⁴² She argues that under this exception a court's review should be highly deferential so as not to undermine the federal statute's explicit policy favoring arbitration.²⁴³ Allowing expanded review would only complicate the arbitration process.²⁴⁴ It would force arbitrators to issue lengthy written opinions and would result in a large number of appeals.²⁴⁵ This sacrifice of the benefits of arbitration may have the effect of discouraging parties from resorting to arbitration altogether.²⁴⁶ Helm contends that whenever parties agree to arbitrate, they are agreeing to accept whatever uncertainties might arise from the process, thereby making a conscious choice to trade formal procedures and judicial review for the simplicity, informality, and speed of arbitration.²⁴⁷

Cynthia Murray's 2002 article takes the opposing view to that of Helm and argues that it should be the parties' decision whether to forego the perceived benefits of arbitration in order to obtain expanded review.²⁴⁸ Citing FAA § 2 and *Allied-Bruce*, Murray notes that the primary purpose of the FAA, according to its text and the U.S. Supreme Court's prior holdings, is to place contracts on equal footing with other contracts.²⁴⁹ It follows, then, that in order for this stated purpose to be realized, parties should be able to structure arbitration agreements according to their wishes just as they may with any other contract.²⁵⁰ Murray also argues, contrary to Helm, that parties would be more likely to shy away from arbitration if they feel they have less control over the process.²⁵¹ Although lack of finality and speed may discourage some parties from choosing arbitration, the ability to fully control the parameters of

241. Helm, *supra* note 44, at 23.

242. *Id.*

243. *Id.* at 24.

244. *Id.*

245. *Id.*

246. Helm, *supra* 44, at 25.

247. *Id.* at 24.

248. Murray, *supra* note 28, at 655–56.

249. *Id.*

250. *Id.*

251. *Id.* at 656.

the arbitration is a far more important incentive for potential parties to arbitration agreements.²⁵²

A different theory in favor of expanded review is discussed by Rachel Portnoy in the *New England Law Review*.²⁵³ Portnoy documents the initial rise of arbitration in the 21st century and how it has become such a large business that checks and balances are necessary to “protect arbitration from itself.”²⁵⁴ She cites a growing concern over arbitrator partiality as the necessity for a mechanism to keep the arbitration process in check; and expanded judicial review is precisely the process to fill this need.²⁵⁵ With expanded review available to parties that prefer it, arbitration will be a more attractive dispute resolution process.²⁵⁶ As long as parties understand that they may be sacrificing speed, simplicity, or privacy by contracting for expanded review, it should be their choice to determine the fate of their own legal disputes.²⁵⁷

With these arguments in mind, which policy consideration will Missouri courts find more valuable? Which side will they eventually take? Finally, how will they justify their decision under Missouri arbitration law? The Missouri arbitration statute is, as in most states, substantially similar to the language of the FAA.²⁵⁸ The grounds for judicial review in section 435.405 mirror the textual provisions of the FAA.²⁵⁹ Missouri’s language is no more or less restrictive than that of the FAA.²⁶⁰ While that may seem to suggest potential conformity with *Hall Street*, recall that one of the primary justifications in *Pugh’s Lawn* and *Riverwalk* for following *Hall Street* was that the respective state statutes in question had additional language that was even more restrictive than the text of the FAA.²⁶¹ Similar, additional language is not present in the Missouri statute.²⁶² Although this is far from dispositive, and just as likely leaves Missouri courts free to construe the Missouri statute in accordance with the FAA due to their textual similarities; it is important to note that one of the significant grounds for the holdings in *Pugh’s Lawn* and *Riverwalk* is absent from the Missouri statute.

252. *Id.*

253. Portnoy, *supra* note 15, at 1009–10.

254. *Id.*

255. *Id.* at 1010.

256. *Id.*

257. *Id.* at 1010–11.

258. Estate of Sandefur v. Greenway, 898 S.W.2d 667, 669 (W.D. Mo. 1995) (citing Cairo v. Bodine, 685 S.W.2d 253, 257 (Mo. App. W.D. 1985)). See also Mo. Rev. Stat. §§ 435.350–470 (2000); 9 U.S.C. §§ 1–16 (2006).

259. *Id.*

260. *Id.*

261. See Section IV *supra*.

262. See Mo. Rev. Stat. §§ 435.350–470 (2000).

Additionally, there is some evidence in Missouri common law that contractual expansion of review is, at the very least, not precluded under the statute.²⁶³ In *Estate of Sandefur v. Greenway*, a Missouri Court of Appeals case preceding *Hall Street*, the court, in dicta, discussed the statutory grounds for vacatur under Missouri law:

[T]he binding arbitration award may not be set aside by a court, even in [sic] the court would have taken a different action. Referring back to the only methods of vacatur, as set out in [section] 435.405 in footnote one, the failure to follow the law as a court would have done, *without agreement to do so in the contract*, does not afford relief through the courts. . . . A disregard for the law is not one of the *statutory* bases for vacating an award.²⁶⁴

This statement by the court suggests that if the parties had in fact contractually required the arbitrator to follow the law, relief may have been possible through the courts. The court stated that legal error and manifest disregard of the law are not *statutory* bases for vacatur under the “exceeding of powers” ground, but it does not rule out the possibility that they may be *contractual* bases for vacatur.²⁶⁵

Outside of this case, Missouri common law provides little guidance towards which direction the state may take on the expanded review issue. It will likely hinge on judicial discretion and the balancing of policy considerations as it has in the states that have already considered the question. Based strictly on the policy issues, *Cable Connection*’s holding is the correct one for Missouri. Expanded judicial review by contract should be allowed in Missouri to honor parties’ consensual determinations on how their disputes should be resolved. Arbitration is a creature of contract; it is a voluntary process that parties choose to enter into as an alternative to litigation. Parties are already permitted to structure a number of features of arbitration to their specific situation. It is well-established that parties may determine: the types of damages that the arbitrator may award,²⁶⁶ what issues will be arbitrated,²⁶⁷ the rules that govern the arbitration,²⁶⁸ whether the arbitrator must provide a

263. *Sandefur*, 898 S.W.2d at 670.

264. *Id.* (emphasis added).

265. *Id.*

266. Murray, *supra* note 28, at 647.

267. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (“[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration . . .”).

268. *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

written opinion,²⁶⁹ the qualifications and methods of selection for arbitrators,²⁷⁰ and also the choice of substantive law.²⁷¹

There are a number of incentives and benefits to choosing arbitration, but the most important is the flexibility that it provides. Each set of parties is, in essence, creating their own “ideal” dispute resolution process based on their needs and value judgments. The flexibility that expanded review allows is precisely why it is the most effective choice. Opponents of expanded review speculate that it may jeopardize the future of arbitration because the important goals of finality and simplicity would be sacrificed; but they do not have to be. Just because expanded review is permitted does not mean all parties will utilize it. Different parties will inevitably value different aspects of arbitration more strongly, so why not let parties structure their agreements according to their individual value judgments. Many parties will undoubtedly still prefer traditional review standards in order to save time and money and traditional review will still be available to them. Allowing expanded review is not an elimination of finality and simplicity for those that prefer it; it is merely an authorization of alternatives for those that prefer the protection of judicial review.

CONCLUSION

As even *Hall Street* concedes, the FAA is motivated “first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered.”²⁷² *Cable Connection* correctly stated that the goals of finality and informality that *Hall Street* so highly values draw their strength from the contractual agreement between the parties.²⁷³ It is, accordingly, those parties that are in the best position to weigh the strengths and weaknesses of traditional arbitration review against the benefits of expanded review.²⁷⁴

In conclusion, when the Supreme Court of Missouri ultimately rules on the issue of contractually expanded judicial review, it should follow the lead set by

269. Murray, *supra* note 28, at 646. The American Arbitration Association discourages arbitrators from issuing opinions or explaining the reasons for their awards but parties may nevertheless require them to do so by contract. *Id.*

270. *Hall Street*, 552 U.S. at 586.

271. *Id.*

272. *Id.* at 585.

273. *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal.4th 1334, 1361 (2008).

274. *Id.*

Cable Connection. Allowing expanded review through contract will honor parties' intents, preserve the FAA's stated goal of placing arbitration agreements on equal footing with other contracts, and continue the growth of arbitration as a dispute resolution mechanism by increasing its adaptability and appeal.

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* J.D. Candidate, 2013, Saint Louis University School of Law. I would like to thank Professor Christine Rollins for her valuable time and insights on this topic. A heartfelt thanks also goes to my family for their love and encouragement. I would not be where I am today without their guidance. Finally, I would like to thank my better half, Anna, for her endless patience and loving support throughout this process.