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All Almost Quiet on the Expanded Review Front: Supreme Court Rejects Expansion of Judicial Review of Arbitration Awards

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ALL ALMOST QUIET ON THE EXPANDED REVIEW FRONT: SUPREME COURT REJECTS EXPANSION OF JUDICIAL REVIEW OF ARBITRATION AWARDS

Since ancient Greece, arbitration has developed into an attractive, cost efficient and timely alternative to litigation.[1] The United States Congress codified the Federal Arbitration Act (the "Act") in 1925 to help facilitate the recognition and growth of arbitration in the United States.[2] To maintain the private nature of arbitration and ensure out-of-court resolution of most disputes, the drafters of the Act created four narrow grounds for judicial review of an arbitrator's award: (1) arbitrator corruption, fraud or undo means; (2) evident partiality; (3) misconduct or misbehavior; and (4) [an] award in excess of tribunal power (hereinafter the "§ 10 Grounds").[3]

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[1] *See* Sabra A. Jones, *Historical, Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 242-51 (1928) (chronicling development of arbitration from ancient Greek and Roman times); Paul J. Krause, *Disregarding Manifest Disregard: Watts Shifts Standard for Vacating Arbitrators' Decisions*, 72 DEF. COUNS. J. 79, 79 (2005) (citing "speed, economy, finality, confidentiality, flexibility, arbitrator expertise, and neutrality of forum" as advantages of arbitration over traditional litigation); Ilya Enkishev, Comment, *Above the Law: Practical and Philosophical Implications of Contracting for Expanded Judicial Review*, 3 J. AM. ARB. 61, 65-65 & nn.16-17 (2004) (providing brief synopsis on history of arbitration).

[2] *See* Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000) (codifying federal arbitration law); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-20 & n.6 (1985)) (describing purpose of Act to "revers[e] . . . judicial hostility" to arbitration and put arbitration "[upon] the same footing as other contracts."). United States arbitration policy also aspires to facilitate arbitration as the preferred dispute resolution mechanism between international parties. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (noting emphatic United States public policy preference in favor of arbitration in international trade). This preference for arbitration arguably coincides with the international movement towards "A-national arbitration" which allows international business parties to avoid parochial national court systems through arbitration. *See* Thomas E. Carbonneau, Lex Mercatoria and Arbitration, 28-29 (Thomas E. Carbonneau, ed., 1998) (describing movement toward "A-national" arbitration). In this way, business parties can assess costs and risks at the outset of a transaction by ensuring that their reasonable expectations will be met in an arbitral tribunal that settles disputes without regard to domestic whimsy or national public policies. *Id.* Ideally, national courts called upon to enforce such awards avoid substantive considerations of the underlying dispute and assess only the validity of parties' agreements to arbitrate and the procedural fairness of the tribunal. *Id.*; *see* Celia Wasserstein Fassberg, *Lex Mercatoria--Hoist with Its Own Petard?*, 5 CHI. J. INT'L L. 67, 74 (2004) (discussing courts' modern treatment of international arbitration awards).

[3] *See* Federal Arbitration Act, 9 U.S.C. § 10 (2000). Section 10(a) of the statute states that a court may vacate an arbitrator's award where:

> (1) . . . the award was procured by corruption, fraud, or undue means; (2) . . . there was

For the last thirteen years, a circuit battle raged over party driven expansion of judicial review beyond the § 10 Grounds (hereinafter referred to as "Expanded Review").[4] This term, the Supreme Court resolved this split in *Hall Street Associates* v. *Mattel*,[5] holding that Expanded Review could not co-exist with the Act.[6]

The *Hall Street* Court resolved the circuit split and many pivotal questions relating to the Expanded Review doctrine.[7] First, the opinion resolved a jurisdictional squabble that both those in favor of Expanded Review (hereinafter "Pro-Expansion" circuits or commentators and "Pro-Expansionists") and those arguing against the doctrine (hereinafter "Anti-Expansion" circuits or commentators and "Anti-Expansionists") struggled with.[8] Next, the *Hall Street* Court eliminated the "manifest disregard" non-statutory standard of review that had also inspired considerable debate.[9]

> evident partiality or corruption in the arbitrators . . . ; (3) . . . the arbitrators were guilty of misconduct . . . by which the rights of any party have been prejudiced; or (4) . . . the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. Section 11 of the Act provides grounds for modification or correction of an award. 9 U.S.C. § 11 (2000).

[4] *Compare* Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 31 (1st Cir. 2005) (allowing parties to explicitly contract for Expanded Review beyond the § 10 Grounds), *and* Jacada (Europa) Ltd. v. Int'l Mktg. Strategies, Inc. 401 F.3d 701, 710 (6th Cir. 2005) (supporting Expanded Review), *and* Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) (noting parties' ability to replace Act § 10 "off-the-rack" standards with their own), *and* Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 U.S. App. WL 452245, at *6 (4th Cir. Aug. 11, 1997) (unpublished table decision) (holding "award may be vacated or corrected by judicial review . . . " for errors of law), *and* Gateway Techs., Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 997 (5th Cir. 1995) (finding parties may displace the § 10 Grounds), *with* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (holding against Expanded Review), *and* Schoch v. InfoUSA, Inc., 341 F.3d 785, 789 & n.3 (8th Cir. 2003) (expressing reservations about permissibility of Expanded Review), *and* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001) (observing no authority for parties to dictate terms to federal courts), *and* Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) (stating parties cannot create federal jurisdiction by contracting for Expanded Review).

[5] 128 S. Ct. 1396 (2008). Please note that as this article was going to press the *Hall Street* v. *Mattel* decision was published in the Supreme Court Reporter. Because of this timing the citations for the case in this article still refer to the Westlaw ™ citation: 2008 WL 762537 (U.S. 2008).

[6] *See id.* at *4 (holding against Expanded Review).

[7] *See infra* Part III (analyzing *Hall Street* opinion).

[8] *See* Hall Street v. Mattel, 2008 WL 762537, at *4 (U.S. 2008) (explaining Act does not bestow federal jurisdiction).

[9] *Id.*; *see* Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (overruled on other grounds) (noting an arbitrator's "manifest disregard" of law governing arbitration agreement may be grounds for vacating award). Each circuit has developed some derivation of "manifest disregard" review. Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV L.J. 234, 234 (2007). *But see*

Third, the Court confronted the Pro-Expansionist central contractualist argument by utilizing a textual and historical interpretation of the Act's grounds for confirmation and review of an arbitration decision.[10] Fourth, the Court emphatically held that unlike some Pro-Expansionists' suggestions, the § 10 Grounds for review and the § 11 standards for modification or correction are exclusive.[11] The opinion then bolstered its analysis with some key policy arguments against Expanded Review.[12] Finally, though the Court held that Expanded Review would no longer be permitted in federal courts applying the Act, the Court left open the possibility that parties could obtain Expanded Review in different settings.[13]

This note will argue that the *Hall Street* decision successfully resolved the circuit split and many of the questions regarding Expanded Review. Part I will discuss a brief history of the Act, chronicle the circuit split on Expanded Review, and list a few commentator suggestions that may still be of use after *Hall Street*. Part II will consider the *Hall Street* decision. Part III will analyze the opinion, focusing on how it (1) answered key questions relating to Expanded Review; (2) dismantled the Pro-Expansionist arguments; (3) missed a few crucial policy arguments suggesting against the doctrine; and (4) potentially confused the status of Expanded Review in non Act forums. Part III.F. will scrutinize the reservations the Court expressed about its holding. Part IV urges states to eradicate Expanded Review but offers three solutions for parties who still desire more searching review in the wake of *Hall Street*.

I. HISTORY

A. The Act and Judicial Review

An examination of § 10 of the Act and its underlying rationale

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Kenneth Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 OHIO ST. J. ON DISP. RESOL. 337, 351 (2000) (dismissing "manifest disregard" standard as "little more than a historical oddity that is rarely, if ever, successfully asserted."); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 172 (2003) (observing non-statutory grounds like "manifest disregard" "have been interpreted very narrowly."); Enkishev, *supra* note 1, at 66-67 (arguing labor arbitration exclusivity of non-statutory standards for review).

[10] *See* Hall Street v. Mattel, 2008 WL 762537, at *6-*7 (U.S. 2008) (presenting textual and historical arguments against Expanded Review).

[11] *Id.* at *7 (concluding textual analysis).

[12] *See id.* (listing policy arguments).

[13] *See id.* at *4 (holding Expanded Review no longer permissible in federal courts applying the Act). *But see id.* at *8 (outlining limitations to holding).

helps foster an understanding of the issues implicated by Expanded Review.[14] In 1925, Congress adopted the Act to streamline arbitration, eliminate traditional judicial hostility towards arbitration, and ensure the enforceability of private agreements to arbitrate.[15] Act §§ 9-11 provides the procedural mechanics by which parties can take an arbitration award to a court and confirm or attempt to vacate, correct, or modify that award.[16] The Act § 10 provides exceptionally limited grounds for judicial review of an arbitrator's decision.[17]

B. Federal Circuit Split on Expanded Review

The First, Third, Fourth, Fifth, and Sixth Circuits all held in favor

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[14] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-20 & n.6 (1985)) (explaining Act designed to "reverse judicial hostility" towards arbitration); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001) (arguing purpose of Act was to ensure limited and narrow review of arbitration awards).

[15] *See supra* note 2 and accompanying text (explaining Act's purpose).

[16] *See* 9 U.S.C. §§ 9-11 (2000) (providing Act mechanism for confirmation, vacatur, modification, or correction of arbitration award). The Act § 9 provides that a court must confirm an arbitration award presented it to unless the grounds for vacation (stipulated in § 10) or modification or correction (presented in § 11) are present. 9 U.S.C. §§ 9-11 (2000); *see* Enkishev, *supra* note 1, at 70 (analyzing text of the Act). Enkishev advocated a combined reading of Act §§ 9 and 10 explaining that § 9 mandates "that a court 'must'" confirm an arbitrator's award unless the award is vacated based on § 10. *Id.* Therefore, according to the author, a court "must" confirm an award unless a court finds grounds for review based on § 10. *Id.*

[17] *See supra* text accompanying note 3 (noting relevant language from § 10 Grounds); *see also* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003) (en banc) (reasoning § 10 Grounds "afford an extremely limited review authority, a limitation that is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures."); *Bowen*, 254 F.3d at 932 (10th Cir. 2001) (quoting ARW Exploration Corp v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995)) (explaining court's review of arbitration decision "is among the narrowest known to the law"). This narrow review ensures "judicial respect for" and finality of arbitration decisions. *Id.* at 935; *see also* Victoria L.C. Holstein, Article, *Co-Opting the Federal Judiciary: Contractual Expansion of Judicial Review of Arbitral Awards*, 1 J. AM. ARB. 127, 130-31 (2002) (explaining Act "curtails judicial post award intervention to a cursory review of whether the award was tainted by fraud, procedural infirmity, partiality, or arbitrator misconduct during the arbitral proceedings."); Bradley T. King, Note, *"Through Fault of Their Own" – Applying Bonner Mall's Extraordinary Circumstances Test to Heightened Standard of Review Clauses*, 45 B.C. L. REV. 943, 955-56 (2004) (citing Ian R. MacNeil et al., Federal Arbitration Law § 40.1.4 (Supp. 1999)) (observing drafters of Act deliberately opted to exclude provisions allowing for judicial review for legal error). Professor MacNeil argued that the American Bar Association (ABA) actually drafted the Act and that Congress merely rubber stamped that draft. King, *supra*, at 955. Also, King suggests that the ABA opted not to utilize two statutory templates existing at the time of drafting—the 1917 Illinois arbitration statute and the English Arbitration Act of 1889. King, *supra*, at 956. Both provided for more expansive judicial review. King, *supra*, at 956.

of Expanded Review.[18] These Pro-Expansion circuits first grounded their arguments in contractualist doctrine germinating from language found in *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*.[19] This strain of reasoning maintained that parties' agreements control the arbitration process (including the post-reward judicial review).[20] Based on this party autonomy, the Pro-Expansion circuits argued the § 10 Grounds are merely suggested templates readily replaceable by parties.[21] One Pro-Expansion commentator found yet another grounds to sanction Expanded Review—since the Supreme Court already endorsed the "manifest disregard" non-statutory standard, he argued the § 10 Grounds are non-exclusive.[22] Additionally, the First Circuit questioned the Anti-Expansion concern that Expanded Review improperly created federal jurisdiction.[23] Finally, many of the pivotal Pro-Expansion cases involved choice-of-law clauses in which the circuits, while holding in favor of Expanded Review, did not sanction the practice when parties included merely generic versions of these clauses.[24]

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[18] *See* Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 31 (1st Cir. 2005) (allowing parties to contract for Expanded Review with explicit language); Jacada (Europa) Ltd. v. Int'l Mktg. Strategies, Inc. 401 F.3d 701, 710 (6th Cir. 2005) (supporting Expanded Review); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) (noting parties' ability to replace the Act's "off-the-rack" standards with their own); Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 U.S. App. WL 452245, at *6 (4th Cir. Aug. 11, 1997) (unpublished table decision) (concluding Expanded Review available to parties); Gateway Techs., Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 997 (5th Cir. 1995) (finding parties may replace Act review standards with their own).

[19] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989); *see* Gateway, 64 F.3d at 996 (noting arbitration as "creature of contract"). The *Gateway* court quoted *Volt* to note that "it does not follow that the [Act] prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act." *Id.* (quoting *Volt*, 489 U.S. at 479).

[20] *Gateway*, 64 F.3d at 997. The *Gateway* court demonstrated that not only is contractual expansion of review permissible, but that "federal arbitration policy demands" that courts follow parties express intentions. *Id.*

[21] *See id.* at 996 (quoting *Volt*, 489 U.S. at 479) ("Parties may . . . specify by contract the rules under which . . . arbitration will be conducted."); *Roadway*, 257 F.3d at 293 ("Parties may opt out of the Act's off-the-rack vacatur standards and fashion their own . . . .").

[22] Goldman, *supra* note 9, at 183-84 (suggesting Supreme Court sanctioned non-statutory standards by endorsing "manifest disregard").

[23] *See Puerto Rico Tel.*, 427 F.3d at 30-31 ("[I]t is well settled that federal courts have jurisdiction over suits seeking to compel arbitration . . . only if the parties are . . . diverse . . . or some separate grant of jurisdiction applies.").

[24] *See id.* at 29-30 (holding generic choice-of-law clause not enough to activate Expanded Review); Jacada (Europa) Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 712 (6th Cir. 2005) (finding choice-of-law clause insufficient to allow Expanded Review); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) (concluding choice-of-law by itself would not allow parties to expand judicial review of arbitration awards). The *Puerto Rico Tel.* court based its analysis on Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995), a case also

The Ninth and Tenth Circuits held against Expanded Review, while the Seventh and Eighth Circuits expressed reservations about the doctrine's viability.[25] These Anti-Expansion Circuits underpinned their analysis with the following arguments: (1) the parties' contractual control over arbitration ended at the point when the arbitral tribunal makes its award; (2) Congress intended the Act to control federal law on arbitration, not to suggest guidelines dismissible by contractual whim; and (3) Expanded Review implicated several policy concerns relating to the potential of morphing arbitration into adjudication.[26] The policy concerns noted by the Anti-Expansion circuits were as follows, Expanded Review: (1) sacrificed the "simplicity, expediency, and cost-effectiveness of arbitration;" (2) undermined judicial respect for arbitration awards and the finality of an arbitral tribunal's decision; (3) prevented arbitrators from fashioning unique awards because of their fear of judicial scrutiny and blue-pencil; and (4) forced federal trial courts to sit as appellate courts.[27]

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dealing with a choice-of-law clause. *Puerto Rico Tel.*, 427 F.3d at 27-29. The *Mastrobuono* court concluded that parties could not inhibit the powers of an arbitrator though a generic choice-of-law clause. *Mastrobuono*, 514 U.S. at 63-64. Building from this premise, the *Puerto Rico Tel.* court cited *Mastrobuono* to conclude that, "a choice-of-law [clause], standing alone, generally will not be interpreted to require the application of state law restricting 'the authority of arbitrators.'" *Puerto Rico Tel.*, 427 F.3d at 28 (citing *Mastrobuono*, 514 U.S. 52 at 63-64).

[25] *See* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (holding Act standards of review are exclusive); Schoch v. InfoUSA, Inc., 341 F.3d 785, 789 & n.3 (8th Cir. 2003) (noting policy concerns with Expanded Review); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001) (concluding no authority existed for Expanded Review); Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) (stating parties cannot create federal jurisdiction by contracting for Expanded Review).

[26] *See* Hoeft v. MVL Group, 343 F.3d 57, 66 (2d Cir. 2003) ("Judicial review is not a creature of contract, and the authority of a federal court to review an arbitration award . . . does not derive from a private agreement."); *Kyocera*, 341 F.3d at 1000 (explaining when federal court receives dispute, parties' control over arbitration process ends); *Bowen*, 254 F.3d at 932 (noting purpose of the Act was to ensure limited and narrow review of arbitration awards). The *Bowen* court furthered that the Act's "limited review ensures judicial respect for the arbitration process and prevents courts from enforcing parties' agreements to arbitrate only to refuse to respect the results of the arbitration." *Bowen*, 254 F.3d at 935. The *Kyocera* court noted Congress passed the Act "to trade the greater certainty of correct legal decisions by federal courts for the speed and flexibility of arbitration determinations . . . ." *Kyocera*, 341 F.3d at 998; *see Schoch*, 341 F.3d at 789 & n.3 (enumerating various policy concerns inherent to Expanded Review).

[27] *See Bowen*, 254 F.3d at 936 n.7 (listing concerns about Expanded Review's effect on "simplicity, expediency, and cost-effectiveness of arbitration"); King, *supra* note 17, at 984-86 (noting importance of finality to arbitration). The *Bowen* court also cautioned that arbitrators are usually chosen for their particular knowledge and expertise in a given area and that Expanded Review would make them reluctant to create solutions tailored to resolve a particular dispute. *Bowen*, 254 F.3d at 936. Further, the *Bowen* court argued Expanded Review would force arbitrators to write more detailed opinions, slowing down the dispute resolution process. *Id.*; *see* Schoch, 341 F.3d at 785 & n.3 (warning Expanded Review "forc[ed] federal trial courts to sit as appellate courts"). Similarly, the *Kyocera* court felt Expanded Review transformed arbitration

Finally, the Seventh Circuit warned that Expanded Review impermissibly created federal jurisdiction.[28]

C. Two Useful Commentator Suggestions

Two commentators writing prior to *Hall Street* presented solutions that may work within the strictures of the Act (and its fresh interpretation) to allow parties varying degrees of more searching review.[29] Ilya Enkishev endorses Judge Posner's solution that an appellate arbitration panel ("Appellate Arbitration Solution") allows parties additional review while maintaining the limited role of the judiciary in arbitration and avoiding running afoul of the Act.[30] Kristen Blankley argues that parties should explicitly spell out the controlling law and procedures for an arbitration proceeding, then if the arbitrator grievously misapplies this groundwork, the reviewing court can offer relief under the "exceeding powers" provision in § 10(a)(4) of the Act ("End Around Solution").[31]

II. FACTS

The Supreme Court took up the issue of Expanded Review when it granted certiorari in *Hall Street Associates* v. *Mattel*.[32] This case involved a dispute between a landlord (Hall Street) and a tenant (Mattel) over an environmental indemnification provision in the parties' lease.[33] After

into "a prelude to a more cumbersome and time-consuming judicial review process." *Kyocera*, 341 F.3d at 998. The Bowen court furthered Expanded Review also "weaken[ed] the distinction between arbitration and adjudication." *Bowen*, 254 F.3d at 936.

[28] *Chicago Typographical Union*, 935 F.2d at 1504-05. The author of the opinion, Judge Richard A. Posner, also advocated that "if parties want, they can contract for an appellate arbitration panel to review the arbitrator's award." *Id.* at 1505.

[29] *See infra* text accompanying notes 30-31 (presenting solutions allowing for more searching review).

[30] *See* Enkishev, *supra* note 1, at 100-01 (citing *Chicago*, 935 F.2d at 1505 (7th Cir. 1991)) (presenting author's solution).

[31] *See* Kristen M. Blankley, *Be More Specific! Can Writing a Detailed Arbitration Agreement Expand Judicial Review Under the Federal Arbitration Act?*, 2 SETON HALL CIRCUIT REV. 391, 430 (2006) (describing mechanics of author's solution). The governing rules that the arbitrator is obliged to follow would be explicitly provided for in the agreement. *Id.* If the arbitrator grossly distorts these rules, the reviewing court can overturn the decision and still be operating inside the framework of the Act. *Id.* at 430-431. While the author also envisioned more thorough review via the judicially crafted "manifest disregard" framework, given the *Hall Street* Court's pronouncement on that standard, this prong of her approach is likely no longer effective. Hall Street Assocs. v. Mattel, 2008 WL 762537, at *5 (U.S. 2008).

[32] 2008 WL 762537, at *5.

[33] *Id.* at *2. The parties' lease stipulated that the tenant would indemnify the landlord for any costs stemming from a failure to follow environmental laws. *Id.* Tests of the property's well

Mattel gave notice of their intent to terminate the lease in 2001, Hall Street commenced suit in the United States District Court for the District of Oregon.[34] The district court then granted leave for the parties to arbitrate the indemnification issue and the parties agreed on an arbitration clause with Expanded Review for errors of law or fact.[35] After the arbitrator decided for Mattel, Hall Street sought to vacate the award in district court pursuant to § 10 of the Act and the parties' Expanded Review clause.[36] The district court utilized the Expanded Review clause, vacated the award based on the arbitrator's misapplication of the law, and remanded the case to the arbitrator.[37] Pursuant to the district court's instructions, the arbitrator reversed and found in favor of Hall Street.[38] After district court confirmation of this award, both parties appealed to the Circuit Court of Appeals for the Ninth Circuit.[39] The Ninth Circuit held that the Expanded Review clause was unenforceable, reversed in Mattel's favor, and remanded the case.[40] After the district court again ruled for Hall Street and the circuit court again reversed, the Supreme Court granted certiorari.[41]

At the outset of its discussion, the Court recited the purpose behind the Act's adoption and resolved a jurisdictional dispute relating to the Act.[42] As a starting point, the Court explained that Congress passed the Act to reverse then-existing judicial hostility to arbitration and to give arbitration agreements the same treatment that other contracts received.[43]

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water showed high levels of pollution, allegedly the product of discharges from Mattel's predecessor in interest. *Id.* Mattel signed a consent order with local officials agreeing to clean up the site. *Id.*

[34] *Id.* at *3.

[35] *Id.* The clause stated the grounds for Expanded Review, "(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." *Id.* (internal citation omitted).

[36] *Id.* The arbitrator decided that Mattel would not have to indemnify Hall Street by finding that the Oregon Drinking Water Act was a law related to human health as distinct from the environment. *Id.*

[37] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *3 (U.S. 2008). The district court found that the arbitrator failed to properly apply the environmental law, vacated his decision, and remanded the case to him with instructions to follow the environmental law. *Id.*

[38] *Id.*

[39] *Id.* at *3-*4.

[40] *Id.* The circuit court held that under its recent en banc decision in Kyocera v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003), expanded Review was no longer recognized in the Ninth Circuit. *Id.*

[41] *Id.* at *4. On remand the district court vacated the award, considering the arbitrator's interpretation of the lease "implausible." *Id.* The circuit court reversed finding that "implausibility" was not a grounds for vacatur found in the Act. *Id.*

[42] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *4 (U.S. 2008). The dispute related to the contention that Expanded Review would "create federal jurisdiction by private contract." *Id.* at *4 n.2.

[43] *See id.* at *4 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443

The Court reminded that the Act does not bestow federal jurisdiction, but controls only when parties meet federal jurisdictional benchmarks independent of the Act.[44] However, the Court explained that once parties meet this independent jurisdictional requirement, the Act makes arbitration agreements, "valid, irrevocable, and enforceable" as long as they involve "commerce."[45] The Court then noted the Act's mechanisms for confirmation, vacation, correction, or modification in §§ 9-11, helped achieve the Act's objectives and streamline enforcement of arbitration awards.[46]

After establishing touchstone policy, jurisdictional niceties, and mechanics of the Act, the Court announced its holding and proceeded to the heart of its reasoning against Expanded Review.[47] The Court first addressed a Pro-Expansionist argument raised by Hall Street.[48] Hall Street contended that the Court's endorsement of a non-§ 10 Ground for review in *Wilko* v. *Swan*,[49] opened the door to standards of review not found in the Act.[50] While the Court acknowledged that such an interpretation was arguable, it was first contradicted by the fact that "the statement [Hall Street] relie[d] on expressly reject[ed] just what Hall Street asks for here, general review for arbitrator's legal errors."[51] Further, the Court noted that Hall Street's reading was strained and listed two alternative interpretations of manifest disregard.[52] Specifically that the statement in *Wilko*: (1) merely referred to "the § 10 Grounds collectively;" or (2) that manifest disregard referred to § 10(a)(3)'s arbitrator "misconduct" or § 10(a)(4)'s

(2006)) (explaining purpose of Act to establish "national policy favoring [arbitration] and placing arbitration agreements on equal footing with other contracts.").

[44] *Id.* at *4. The Court quoted Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983), to establish that the Act is "something of an anomaly in the field of federal court jurisdiction" because parties must meet jurisdiction independent of the act. *Id.*

[45] *Id.* (quoting 9 U.S.C. § 2 (2002)). The Court furthered that so long as the underlying dispute involves "commerce," the Act will also apply in state courts where parties seek enforcement of awards. *Id.* (citing Southland Corp. v. Keating, 465 U.S. 1, 15-16 (1984)).

[46] *Id.*

[47] *Hall Street Assocs.*, 2008 WL 762537, at *4-*5.

[48] *Id.* at *4.

[49] 346 U.S. 427 (1953).

[50] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *4 (U.S. 2008). In deciding that the Securities Act of 1933 superseded any agreement to arbitrate claims stemming from violations of this act, the *Wilko* court remarked in dicta that, "the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts to judicial review for error in interpretation." *Wilko*, 346 U.S. at 436-37 (explaining principle overruled by Rodriquez de Quijas v. Shearson/American Express, Inc. 490 U.S. 477, 484 (1989)).

[51] *Hall Street Assocs.*, 2008 WL 762537, at *5 (pointing out contradiction in Hall Street's argument).

[52] *Id.* (presenting alternative interpretations of "manifest disregard").

"exceeding powers" language.[53] Though the Court demurred from expressly endorsing either of these alternative arguments, it concluded that "manifest disregard" implicated no new standard of review.[54]

The Court's textual interpretation of the Act anchored its reasoning against Expanded Review.[55] To begin with, the Court acknowledged the contractualist foundation of Hall Street's argument.[56] Namely, since the Act allows parties to customize many of the rules of arbitration proceedings and aims to enforce party agreements as written, courts ought to also enforce contracts for Expanded Review.[57] The *Hall Street* Court found this argument unsustainable against the textual features of the act.[58] The Court emphasized that under the doctrine of *ejusdem generis*, since §§ 10-11 set out specific terms focusing on "egregious departures from the parties agreed-upon arbitration," a general term found at the end of this statutory series is "confined to covering subjects comparable to the specifics it follows."[59] Accordingly, since this general term buttoned-up the grounds for review and confined them to matters referenced by the specific terms, the drafters of the Act left no room for Expanded Review.[60] Finally, the Court stressed that the mandatory language in § 9 ("must grant") commands courts to confirm awards unless one of the stipulated exceptions in §§ 10-11 are met.[61] The Court concluded this mandate provided no opportunity for reading Expanded Review into the Act.[62]

A bit later in its reasoning, the *Hall Street* Court bolstered its textual analysis with historical arguments relating to the passage of the

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[53] *Id.* (listing plausible "manifest disregard" interpretations).

[54] *Id.* ("[W]e see no reason to accord ["manifest disregard"] the significance that Hall Street urges."). Thus Court implied that the § 10 Grounds are the exclusive standards for review of arbitration awards. *Id.*

[55] *Id.* at *6-*7 (presenting textual argument).

[56] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *6 (U.S. 2008); *see id.* (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985)) (noting Act, "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered.").

[57] *Id.*

[58] *Id.* at *6-*7 (2008).

[59] *Id.* at *6. The specific terms the court listed were, "'corruption,''fraud,''evident partiality,' 'misconduct,' 'misbehavior,' 'exceed[ing] . . . powers,' 'evident material miscalculation,' 'evident material mistake,' 'award[s] upon a matter not submitted.'" *Id.* The general term the court cites was, "imperfections" relating to a "matter of form not affecting the merits." *Id.*

[60] *See id.* ("'Fraud' and mistake of law are not cut from the same cloth.").

[61] *See* Hall Street Assocs. v. Mattel, 2008 WL 762537, at *6 (U.S. 2008) ("There is nothing malleable about, 'must grant,' which unequivocally tells court to grant confirmation in all cases, except when one of the [§§ 10 or 11] exceptions applies.").

[62] *Id.*

Act.[63] The Court noted that the drafters of the Act based its text and principles on New York's 1920 arbitration statute.[64] Emphasizing its point, the Court recognized the similarities between the New York statute's and the Act's vacatur and modification or correction grounds.[65] Lastly, the Court contrasted the Act with the Illinois statute existing at the time which allowed for Expanded Review.[66] The Court found this conscious choice of the New York statute illustrated Congressional desire for exclusive vacatur grounds and limited review.[67]

The *Hall Street* Court hastily summarized some policy arguments against Expanded Review.[68] First, the Court stressed that limited review facilitated "arbitration's essential virtue of resolving disputes straightway."[69] If §§ 9-11 were read differently, arbitration would start to require "legal" and "evidentiary" appeals that would judicialize arbitration and detract from arbitration's status as a distinct and effective alternative to courts.[70] The Court quoted *Kyocera Corp.* v. *Prudential-Bache Trade Services, Inc.*,[71] explaining such a reading would "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."[72] According to the Court, such a reading would implicate the institutional integrity of arbitration by "bringing arbitration theory to grief in post-arbitration process."[73] Finally, the Court refused to consider what the greater implications of its holding against Expanded Review would be for parties seeking to resolve their disputes, but reemphasized that the Act's grounds for vacatur, modification or correction

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[63] *Id.* at *7-*8 & n.7. Justice Scalia agreed with the majority on all points except footnote seven, but gave no reasons for his disagreement. *Id.* at *2.

[64] *Id.* at *7 & n.7.

[65] *See id.* (labeling language "virtually identical").

[66] *See* Hall Street Assocs. v. Mattel, 2008 WL 762537, at *7 (U.S. 2008) (contrasting New York statute with Illinois Arbitration and Awards Act of 1917).

[67] *Id.* The Court illustrated this choice by noting the testimony of one of the New York statue's draftsman. *Id.* The Court noted that this same drafter, in a "contemporaneous campaign for promulgation of a uniform state arbitration law," contrasted the New York statute with the Illinois Arbitration and Awards Act of 1917 which allowed for Expanded Review based on errors of law. *Id.*

[68] *Id.* The opinion dedicated a mere two sentences to policy arguments. *Id.* The Court noted that the limited review found in §§ 9-11 of the Act established core policy objectives of the Act. *Id.*

[69] *Id.* (presenting policy argument relating to speed, efficiency, and cost-effectiveness of arbitration).

[70] *Id.* (arguing Expanded Review leads to judicialization of arbitration).

[71] 341 F.3d 987 (9th Cir. 2003).

[72] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *7 (U.S. 2008).

[73] *Id.*

were exclusive.[74] The Court referenced several *amici* submissions that argued either angle if the court struck down Expanded Review: some saw a flight from arbitration while others postulated a shift towards arbitration.[75]

Before concluding, the majority opinion delivered a curious reservation about its holding stating:

> In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purpose to say that they exclude more searching review based on authority outside the statute. The [Act] is not the only way into court for parties wanting review of arbitration award: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.[76]

The Court did not expound upon this language (hereinafter the "Cryptic Language") as to what alternative avenues parties could take to activate Expanded Review and it noted that the parties in the case-in-chief did not present such an avenue in their briefs.[77] Still, the Court explained that a question was raised at oral argument as to whether the arbitration agreement between Hall Street and Mattel could be considered "an exercise of the District Court's authority to manage its cases under Federal Rules of Civil Procedure 16."[78] The Court referred to the parties' supplemental briefs which discussed waiver and the interaction between the Act, Federal Rule of Civil Procedure 16 ("FRCP 16"), and the Alterative Dispute Act of 1998.[79] While refusing to consider the issue relating to FRCP 16, the Court explained that Hall Street could pursue it further on remand.[80] The Court then reiterated its holding against Expanded Review, but vacated the judgment and remanded the case based on these new issues.[81]

Three justices dissented from the majority opinion, arguing that

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[74] *Id.*

[75] *Id.*

[76] *See id.* at *8 (explaining reservation).

[77] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *8 (U.S. 2008).

[78] *Id.*

[79] *Id.* at *9.

[80] *Id.*

[81] *Id.*

Expanded Review should be permitted.[82] For example, Justice Stevens grounded his dissent on the contractualist maxim that Act policy is to "ensure agreements are enforced according to their terms."[83] Thus, he argued, the Court ought to give effect to "fairly negotiated" agreements to expand judicial review beyond the grounds presented in the Act.[84] Justice Stevens contended that because the parties expressly agreed on a provision for Expanded Review based on errors of law and the arbitrator committed a "rather glaring" error of law, the Court ought to support the district court's holding.[85] Further, Justice Stevens argued this contractualist goal of respecting parties' agreements overrides the majority's reading of the §§ 10-11 Grounds as exclusive.[86] Justice Stevens also disagreed with the majority's historical argument because he contended the purpose of §§ 10 and 11 was to reverse judicial hostility to arbitration, not to list exclusive grounds for review.[87]

III. ANALYSIS

The following discussion will show how the *Hall Street* Court, in holding that the Act's grounds for review are exclusive, did a successful job both in resolving many of the pivotal questions relating to Expanded Review and in succinctly and methodically disassembling the pillars of Pro-Expansionism. This analysis will demonstrate the Court's successful methodology when it: (1) resolved a small skirmish relating to the jurisdiction of the Act; (2) closed the door on the "manifest disregard" non-statutory standard; (3) demonstrated that contractualism yields to the text of the Act; (4) buttressed its textual interpretation with a historical analysis of the Act; and (5) emphasized some key policy objectives of the Act.[88] Regarding the latter point, this analysis will highlight two important policy

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[82] *See* Hall Street Assocs. v. Mattel, 2008 WL 762537, at *9-*11 (U.S. 2008) (Stevens, J., dissenting) (arguing for Expanded Review based on contractualism and an alterative historical interpretation); *id.* at *11 (Breyer, J. dissenting) (agreeing with Justice Stevens but calling for mere confirmation of the final arbitration award).

[83] *Id.* at *9 (Stevens, J., dissenting) (quoting Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478) (1989)).

[84] *Id.* at *9 (arguing for primacy of party intent).

[85] *Id.* at *10 (Stevens, J., dissenting).

[86] *Id.* (Stevens, J., dissenting).

[87] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *10 & n.3 (U.S. 2008) (Stevens, J., dissenting).

[88] *See infra* Part III.A. (discussing jurisdiction of the Act); *infra* Part III.B. (deconstructing "manifest disregard"); *infra* Part III.C. (presenting textual analysis of Act); *infra* Part III.D. (developing historical analysis); *infra* Part III.E. (noting policy concerns).

considerations that the Court failed to address.[89] Finally, the analysis argues that the Court took an unnecessary misstep when it inserted its "Cryptic Language," giving Expanded Review a lifeline that might allow the doctrine to endure, albeit not in federal court when the Act is in play.[90] The opinion will hypothesize, given this language, what category of cases might still be able to get Expanded Review.[91]

A. A Jurisdictional Primer

In reminding its audience of the unique jurisdictional characteristics of the Act, the Court settled a matter that had led to some debate amongst circuits and authorities on both sides of Expanded Review.[92] While the Court did not cite the opinion, this debate derives from Judge Posner's suggestion, in *Chicago Typographical Union No. 16.* v. *Chicago Sun-Times*,[93] that parties "cannot contract for judicial review of [an arbitration] award [because] federal jurisdiction cannot be created by contract."[94] Pro-Expansionists validly pointed out that this argument against Expanded Review was misplaced, while many Anti-Expansionists explained away this contention.[95] The Court resolutely put this matter to rest explaining that under the Act parties must independently meet diversity or federal question jurisdictional benchmarks to have an arbitration decision reviewed in federal court.[96] The Court also explained that to implicate the Act, the matter in dispute must involve "commerce."[97]

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[89] *See infra* Part III.E. (arguing Expanded Review inhibits unique arbitrator awards and chills "A-national" arbitration).

[90] *See infra* Part III.F. (analyzing Cryptic Language).

[91] *See infra* Part III.F. (hypothesizing avenues to Expanded Review opened by Cryptic Language).

[92] *Hall Street Assocs.*, 2008 WL 762537, at *4 & n.2.

[93] 935 F.2d 1501 (7th Cir. 1991).

[94] *Id.* at 1505. Though the Court did not cite *Chicago Typo*, footnote two's language closely mirrored the quote above from the Seventh Circuit. *Hall Street Assocs.*, 2008 WL 762537, at *4 n.2. The Court wrote "there is no merit in the argument that enforcing [an] arbitration agreement's judicial review provision would create federal jurisdiction by private contract." *Id.*

[95] *See* Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 30-31(1st Cir. 2005) ("It is well settled that federal courts have jurisdiction over suits seeking to compel arbitration . . . only if the parties are . . . diverse . . . or some separate grant of jurisdiction applies."). *But see* Holstein, *supra* note 17, at 145 (arguing Posner's jurisdictional warning was "rhetorical surrogate").

[96] *Hall Street Assocs.*, 2008 WL 762537, at *4.

[97] *Id.* (quoting 9. U.S.C. § 2 (2002)). The Court also reminded that Act can apply in state court if the underlying matter involves "commerce." *Id.*

B. Disregarding "Manifest Disregard"

In striking down "manifest disregard," the *Hall Street* Court struck a critical blow to Pro-Expansionists.[98] The debate swirling around "manifest disregard" baffled both sides and spawned a variety of theories.[99] Like *Hall Street*, Pro-Expansion courts and commentators founded their arguments on the notion that the Supreme Court would permit Expanded Review on other grounds like errors of law because it had already recognized a non-statutory standard.[100] First, the Court did a masterful job when it illustrated the logical contradiction in Hall Street's argument; the quotation from *Wilko*, supposedly endorsing a non-statutory standard, in reality rejected Expanded Review.[101] The Court then discussed the various interpretations of "manifest disregard" and though the Court refused to explain exactly what "manifest disregard" meant, they assertively mandated what it was not—a sanction of Expanded Review.[102]

C. Exclusivity of Act Standards of Review

After discrediting "manifest disregard," the Court went for the kill stroke on Expanded Review when it established that the Act's standards of review are exclusive.[103] The Court dedicated the bulk of its analysis against Expanded Review to a statutory interpretation of the Act's text.[104] The Court pitted strength against strength, setting up the Pro-Expansionists' strongest argument, contractualism, versus the most compelling Anti-Expansion counterpoint, textual interpretation of the

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[98] *See id.* at *4-*5 (analyzing "manifest disregard").

[99] *See* Goldman, *supra* note 9, at 183-84 (advocating Supreme Court endorsement of "manifest disregard" standard demonstrates § 10 Grounds are not exclusive). *But see* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 937 (10th Cir. 2001) (theorizing "manifest disregard" may derive from 9 U.S.C. § 10(a)(4)); Curtin, *supra* note 9, at 351 (describing "manifest disregard" standard, "[as] little more than a historical oddity that is rarely, if ever, successfully asserted."); Enkishev, *supra* note 1, at 66-67 (arguing labor arbitration exclusivity of non-statutory standards for review).

[100] *Hall Street Assocs.*, 2008 WL 762537, at *5 (contending "manifest disregard" blessed Expanded Review); Goldman, *supra* note 9, at 183-84 (arguing Supreme Court endorsement of "manifest disregard" standard demonstrates § 10 Grounds are not exclusive).

[101] *Hall Street Assocs.*, 2008 WL 762537, at *5.

[102] *See id.* (explaining, "we see no reason to accord ["manifest disregard"] the significance that Hall Street urges."). This ruling will likely put an end to the circuit-developed strains of review which evolved out of "manifest disregard." *Id.*; *see also* Drahozal, *supra* note 9, at 234 (explaining all circuits developed some form of "manifest disregard" review).

[103] *Hall Street Assocs.*, 2008 WL 762537, at *4 (holding against Expanded Review).

[104] *Id.* at *6-*7.

Act.[105]

The Court wisely began its textual synopsis by acknowledging the stalwart foundation of Pro-Expansion, that the goal of arbitration is to enforce parties' agreements as written.[106] First, nearly all authorities agree that arbitration is a "creature of contract" and that the contractual agreement between parties remains the foundation of arbitration.[107] While the majority did not specifically cite the opinion, the root of the contractualist argument in favor of Expanded Review lies in the edict found in *Volt*, which indicated that the fundamental arbitration policy is to, "ensure agreements are enforced according to their terms."[108] Indeed, some Pro-Expansion commentators contend that not only is Expanded Review permissible under United States arbitration policy, but the Supreme Court *requires* this faithfulness to parties' agreements when Expanded Review is properly invoked.[109] The Court also noted that arbitration allows parties to tailor many of the rules and procedures including choosing the applicable law.[110] Pro-Expansionists maintain that this autonomy ought to extend to judicial review.[111] The second part of the Pro-Expansion *Volt*–based analysis posits that because of this party autonomy, the § 10 Grounds only represent suggested templates or "off the rack" models, dismissible and replaceable by party will.[112]

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[105] *See infra* text accompanying notes 113-120 (analyzing *Hall Street* Court's examination of the Act's text).

[106] *Hall Street Assocs.*, 2008 WL 762537, at *6.

[107] *Id.* at *5. Without citing some of the Pro-Expansion opinions, in this section, the Court deftly evoked the analysis of these opinions by coining some of the key phraseology used by these courts, for example labeling arbitration as a "creature of contract." *Id.*; *see* Gateway Techs., Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 996 (5th Cir. 1995) (noting arbitration as "creature of contract").

[108] Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); *see Hall Street Assocs.*, 2008 WL 762537, at *9 (Stevens, J. dissenting) (utilizing *Volt* language to ground his dissent in favor of Expanded Review); Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 27 (1st Cir. 2005) (ruling for Expanded Review based on *Volt*); *Gateway*, 64 F.3d at 996-97 (founding Expanded Review argument on *Volt*).

[109] *See Gateway*, 64 F.3d at 997 (asserting Supreme Court demands adherence to party intentions).

[110] *Hall Street Assocs.*, 2008 WL 762537, at *5; *see Gateway*, 64 F.3d at 996 (quoting *Volt* 489 U.S. at 479) (arguing "parties may . . . specify by contract the rules under which . . . arbitration will be conducted.").

[111] *See Puerto Rico Tel.*, 427 F.3d at 31 ("The [Act's] ultimate purpose is to enforce the terms of the agreement to arbitrate . . . [courts] . . . are therefore bound by federal law to enforce the arbitration agreements as drafted.").

[112] *See Hall Street Assocs.*, 2008 WL 762537, at *10 (Stevens, J. dissenting) (describing §§ 10-11 grounds as starting point and a "shield ... [against] hostile courts."); Roadway Package System, Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) (classifying § 10 Grounds as "off-the-rack"); *Gateway*, 64 F.3d at 997 (labeling § 10 Grounds as "default"). The *Hall Street* Court referenced this notion by explaining that some circuits have labeled the review confirmation and

After setting up the pillars of the contractualist arguments in favor of Expanded Review, the Court cut this argument down with an incisive textual analysis of the Act.[113] The Court set the stage noting, "to rest this case on the general policy of treating arbitration agreements as enforceable . . . beg[s] the question, which is whether the FAA has textual features at odds with enforcing a contract with [Expanded Review]."[114] First, the Court closely analyzed the text of §§ 10-11 and found that all the terms dealing with review of arbitrator's decisions were explicit and focused on extreme conduct like arbitrator "fraud" or "bias."[115] Though the last term, "imperfections" suggested slightly more plasticity, the Court explained that under the *ejusdem generis* rule, this general term can only cover subjects expressed in the specific terms preceding it.[116] The Court found this tight drafting "at odds" with loose language allowing for Expanded Review.[117] Further anchoring Anti-Expansion with text of the Act, the Court focused its scrutiny on the mandatory language of § 9 of the Act.[118] The Court found "no hint of flexibility" in the instructions of § 9—a reviewing court "must grant" a confirmation order unless one of the specific exceptions found in § 10 or § 11 applies.[119] Thus the Court answered its own question as to whether the policy of enforcing agreements as written must yield to the text of the Act, "the text compels a reading of the §§ 10 and 11 categories as exclusive."[120]

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review mechanism as "default." *Hall Street Assocs.*, 2008 WL 762537, at *7.

[113] *See Hall Street Assocs.*, 2008 WL 762537, at *6-*7 (presenting textual analysis).

[114] *Id.* at *6.

[115] *Id.* The specific terms the Court listed were, "'corruption,' 'fraud,' 'evident partiality,' 'misconduct,' 'misbehavior,' 'exceed[ing] . . . powers,' 'evident material miscalculation,' 'evident material mistake,' 'award[s] upon a matter not submitted.'" *Id.*

[116] *Id.* Thus, by implication, any "imperfections" would have to relate only to the extreme conduct enumerated in the specific terms. *Id.*

[117] *Id.* The Court explained, "(s)ince a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instance of outrageous conduct with review for just any legal error." *Id.* The Court furthered, "'(f)raud' and mistake of law are not cut from the same cloth." *Id.* This reasoning comports with some Anti-Expansion circuits that utilized Congressional intent to advocate for the exclusivity of the § 10 Grounds. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 934 (10th Cir. 2001).

[118] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *6 (U.S. 2008); *see* Enkishev, *supra* note 1, at 70 (analyzing text of the Act).

[119] *Hall Street Assocs.*, 2008 WL 762537, at *6. With such strong language, the Court found no basis for extrapolating a reviewing ground not listed in the Act. *Id.*

[120] *Id.* at *6 (asking "whether the [Act] has textual features at odds with enforcing a contract [with an Expanded Review clause?]); *see id.* (answering question).

D. History Lesson

Next, the Court buttressed its textual interpretation with the historical circumstances surrounding the drafting of the Act.[121] The Court explained that the Act was based on the New York arbitration statute which provided the same limited grounds for vacatur, modification, or correction found in §§ 10 and 11 of the Act.[122] Further, the Court noted that another statute, the Illinois Arbitration Act and Awards Act of 1917—existing prior to the 1925 drafting of the Act—actually allowed for Expanded Review.[123] The Court found this contrast elucidating—Congress could have adopted a scheme permitting Expanded Review, but instead they choose to adopt the provisions of a statute that confined judicial review to narrow grounds like arbitrator fraud and bias.[124] The Court interpreted Congress' action as a manifestation of Anti-Expansionism.[125]

E. Policy

The *Hall Street* Court likely intended to keep its decision narrow and focused mainly on the text of the Act, however, the Court did mention some of the policy implicated by §§ 9-11.[126] The Court first evoked the speed and efficiency of arbitration when it noted that limited review facilitated, "arbitration's essential virtue of resolving disputes straightway."[127] By agreeing to arbitration, parties choose to sacrifice the deliberate accuracy of federal court decisions in exchange for rapid, flexible, and economical arbitration decisions.[128] Though the Court did not

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[121] *See id.* at *7 (developing historical analysis).

[122] *Id.*; *see also*, King, *supra* note 17, at 955-56 (citing Ian R. MacNeil et al., Federal Arbitration Law § 40.1.4 (Supp. 1999)) (observing drafters of Act deliberately opted to exclude provisions allowing for judicial review for legal error). King chronicled Professor MacNeil's argument that the American Bar Association actually drafted the Act and that Congress merely rubber stamped that draft. *Id.* at 955.

[123] *Hall Street Assocs.*, 2008 WL 762537, at *7. In further support of this concept, King noted that in addition to the Illinois statute, the English Arbitration Act of 1889 also provided for Expanded Review. King, *supra* note 17, at 956 (citing Ian R. MacNeil et al., Federal Arbitration Law § 40.1.4 (Supp. 1999)).

[124] *Hall Street Assocs.*, 2008 WL 762537, at *7. *But see id.* at *10 (Stevens, J. dissenting) (arguing adoption of §§ 10 and 11 designed to reverse judicial hostility to arbitration and not to provide exclusive grounds for review).

[125] *Hall Street Assocs.*, 2008 WL 762537, at *7.

[126] *See id.* at *7 (articulating policy arguments against Expanded Review). The opinion dedicated only two sentences outright to policy. *Id.*

[127] *Id.* at *7.

[128] Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 999 (9th Cir. 2003) (citing speed, efficiency, and cost-effectiveness of arbitration).

elaborate on this effect, Expanded Review threatens the benefits of expeditious, adaptive, and cost-efficient arbitration proceedings by adding at least another layer of detailed federal court searching.[129] Also, because arbitrators facing the specter of a merits review from a federal court would need to explain their findings of fact and write detailed opinions, they need more time to write awards.[130] As a result, parties to arbitration would face slower and more expensive proceedings.[131] In touting the virtues of speed and efficiency in arbitration, the *Hall Street* Court indicated that such factors weigh against Expanded Review.[132]

The Court then elaborated on the "judicializing" effect that Expanded Review has on arbitration.[133] The Court explained that Expanded Review would instigate appeals based on "legal" and "evidentiary" matters, grounds normally confined to decisions rendered in a court of law.[134] As the Court signaled, Expanded Review turns arbitration into a test run for litigation by transforming "informal arbitration [into] merely a prelude to a more cumbersome and time-consuming judicial review process."[135] Again, though the Court did not elaborate, as other authorities demonstrated, Expanded Review turns arbitration proceedings into "mini-district courts" which consider parties' issues and make determinations of fact while "forc[ing] federal trial courts to sit as appellate courts."[136] In listing this concern, the Court recognized that Expanded Review mars the distinction between arbitration and litigation, making arbitration an unrecognizable proceeding of questionable utility.[137]

The Court's last policy concern was closely tied to the preceding discussion on "judicialization."[138] The Court stressed that a narrow reading of the Act maintains the integrity of arbitration as an institution distinct

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[129] *See Kyocera*, 341 F.3d at 999 (noting trade-off contemplated by Congress in enacting the Act); Krause, *supra* note 1, at 79 (listing arbitration benefits of "speed, economy, finality, confidentiality, flexibility, arbitrator expertise and neutrality of forum").

[130] *See* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001) (describing effects of forcing arbitrators to write detailed opinions).

[131] *Id.*

[132] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *7 (U.S. 2008).

[133] *Id.* (discussing "legal" and "evidentiary" appeals).

[134] *Id.*

[135] *Id.* (quoting Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 998 (9th Cir. 2003)).

[136] *See* Schoch v. InfoUSA, Inc., 341 F.3d 785, 789 & n.3 (8th Cir. 2003) (describing ill effects of Expanded Review on roles of arbitrators and federal district courts).

[137] *Hall Street Assocs.*, 2008 WL 762537, at *7.

[138] *Id.* (discussing institutional integrity of arbitration).

from litigation.[139] The Court found that reading Expanded Review into §§ 9-11 of the Act would implicate the institutional integrity of arbitration by "bringing arbitration theory to grief in post-arbitration process."[140] Congress enacted the Act to provide a functional system where the arbitrator and the judiciary roles are clearly defined.[141] As the *Hall Street* Court acknowledged earlier in its opinion, parties to an arbitration proceeding tailor rules for an arbitrator to follow and specifically choose an arbitrator suited to resolve their dispute according to these rules.[142] However, once an arbitrator issues an award, that award is final and the judiciary, under mandate from the Act, examines the process and ensures that the arbitration was devoid of gross procedural errors.[143] A combination of *Hall Street*'s concern over Expanded Review's negative effect on "arbitration theory" with its narrow and exclusive reading of §§ 9-11 of the Act, demonstrated that the Court was concerned that the doctrine could have upset this framework established by Congress.[144]

Though the Court generally succeeded in striking down Expanded Review based on the text of the Act, the history of the Act, and the limited policy concerns addressed above, the Court could have strengthened the force of its argument with a least two further policy considerations.[145] First, an essential benefit of arbitration as an alternative mechanism for dispute resolution is that arbitrators, unfettered by wooden judicial procedure, have the power to fashion awards uniquely suited to a particular

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[139] *Id.*

[140] *Id.* (describing effect Expanded Review has on arbitration as a distinct mechanism for dispute resolution).

[141] *See* Hoeft v. MVL Group, 343 F.3d 57, 66 (2d Cir. 2003) ("Judicial review is not a creature of contract, and the authority of a federal court to review an arbitration award . . . does not derive from a private agreement."); Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (explaining when federal court receives dispute, parties' control over arbitration process ends); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001) (noting purpose of the Act was to ensure limited and narrow review of arbitration awards); Holstein, *supra* note 17, at 147 (arguing Act deliberately allocates control over arbitration to parties and circumscribes judiciary's role to limited review of arbitrator's decision).

[142] *See* Hall Street Assocs. v. Mattel, 2008 WL 762537, at *6 (U.S. 2008) ("[T]he [Act] lets parties tailor some, even many features of arbitration . . . .").

[143] *See* Holstein, *supra* note 17, at 130-31 (describing limited role of judiciary in reviewing arbitral award).

[144] See Holstein, *supra* note 17, at 147 (describing Act's division of labor between private parties and the judiciary); *see also Kyocera Corp.*, 341 F.3d at 998 (discussing harm done by Expanded Review to structural soundness of arbitration); *Hoeft*, 343 F.3d at 66 ("Judicial review is not a creature of contract and the authority of the federal court to review an arbitration award or any other matter—does not derive from a private agreement.").

[145] *See infra* text accompanying notes 146-151 (showing negative effect of Expanded Review on unique arbitrator awards and "A-national" arbitration).

dispute.[146] If Expanded Review was allowed and the doctrine became more prevalent, arbitrators may have curbed their use of such remedies out of fear of judicial overrule or revision.[147] Second, Expanded Review would have potentially deleterious effects on the international movement towards "A-national" arbitration.[148] International parties often choose arbitration as a way of resolving their disputes while avoiding the potential parochialism of national courts.[149] Expanded Review would have either shattered or seriously undermined commercial serenity by allowing a federal court to review the substantive considerations of the underlying dispute.[150] If Expanded Review clauses were given effect, international parties who have ostensibly chosen arbitration in order to avoid the partiality of domestic courts, may have found themselves rearguing their dispute according to United States law during the confirmation hearing.[151]

F. Cryptic Language

Though the *Hall Street* Court resolved the Expanded Review circuit split and answered many of the questions stemming from this doctrine, by inserting the Cryptic Language, the Court unnecessarily opened another mysterious chapter in this debate.[152] After dismantling the Pro-Expansion case, the Court explained that Expanded Review may be available, "based on authority outside the statue."[153] While Expanded Review is no longer available in federal courts applying the Act, the Court noted that parties may utilize "state statutory" schemes or "common law"

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[146] *See* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001) (discussing effect Expanded Review has on unique arbitrator awards).

[147] *Id.* (explaining chilling effect Expanded Review has on arbitrator creativity).

[148] *See* Carbonneau, *supra* note 2, at 28-29 (describing movement towards "A-national" arbitration).

[149] *See* Carbonneau, *supra* note 2, at 28 (explaining international parties' motivation for choosing arbitration). Ideally, national courts called upon to enforce such awards avoid substantive considerations of law by confirming the award as long as the parties' arbitration agreement is valid and the tribunal met certain procedural norms. Wasserstein, *supra* note 2, at 74.

[150] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (describing Supreme Court's preference for arbitration as dispute resolution mechanism for parties in international trade). Permitting a federal court to consider the substantive merits of an arbitration proceeding would arguably undermine the policy outlined in *Mitsubishi* and transform the confirmation proceeding into litigation. *Id.*

[151] *See* Schoch v. InfoUSA, Inc., 341 F.3d 785, 789 & n.3 (8th Cir. 2003) (explaining Expanded Review co-opts Federal Courts into reviewing merits of dispute).

[152] *See supra* text accompanying note 76 (reciting Cryptic Language).

[153] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *8 (U.S. 2008) (postulating non-Act avenues to Expanded Review).

schemes where more searching review is "arguable."[154] These comments beg the question, what category of disputes is the Court vaguely referencing here? Though this note advocates eradication of Expanded Review altogether, the following discussion will list the following potential avenues to or forums allowing Expanded Review: (1) FRCP 16; (2) confirmation and review in state courts where the underlying matter does not involve commerce; and (3) confirmation and review proceedings in state courts (in states with schemes hospitable to Expanded Review) in which the parties carefully and explicitly draft their review clauses.[155]

The first explanation to the Cryptic Language and the avenue towards possible Expanded is confined to the facts of *Hall Street* case. The Court referred to the parties' supplemental briefs which discussed the interaction between the Act, FRCP 16, and the Alterative Dispute Act of 1998.[156] The parties drafted and entered into their arbitration agreement while their district court litigation was pending and they did so with leave of the district court.[157] Therefore the Court questions whether the agreement (and its Expanded Review clause) should be considered "an exercise of the district court's authority to manage its cases under [FRCP 16]."[158] Though the Court failed to address this issue, the indication may be that in certain limited cases, a district court's authority under FRCP 16 supersedes the Act and allows for Expanded Review clauses.[159] However, given the mention of "state statutory" schemes for Expanded Review, the class of disputes hinted at by the Court likely exceeds those confined to the FRCP 16 issue.[160]

A second category of admittedly small and extremely rare disputes

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[154] *Id.* The Court also mentioned the "common law" as a potential source of authority for Expanded Review. *Id.* One possible explanation of the "common law" reference is that the Court was referring to contractual defenses such as waiver, which the Court noted the parties referenced in their supplemental briefs. *See id.* at *9 (discussing waiver arguments raised by parties' supplemental briefs). Yet, if the Court was referencing waiver, this subject would likely implicate formation and arbitrability defenses, not standards of review. *See* 9 U.S.C. § 2 (2000) (explaining arbitration agreements "shall be valid, revocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

[155] *See infra* Part IV.A. (urging state courts and judges to extirpate Expanded Review); *infra* text accompanying notes 156-160 (articulating FRCP 16 argument); *infra* text accompanying notes 161-163 (noting Court may be referencing disputes not effecting "commerce"); *infra* text accompanying notes 164-169 (theorizing Court may be signaling parties wanting Expanded Review can use explicit choice-of-law clauses to co-opt state schemes hospitable to the doctrine).

[156] *Hall Street Assocs.*, 2008 WL 762537, at *8-*9 (discussing FRCP 16 arguments raised by parties in supplemental briefs).

[157] *Id.* at *3 (reciting procedural history).

[158] *Id.* at *8 (suggesting FRCP 16 may control the parties' arbitration agreement).

[159] *Id.*

[160] *See infra* text accompanying notes 161-169 (theorizing disputes not effecting "commerce" and those involving state arbitration statutes may still get Expanded Review).

potentially addressed by the Cryptic Language would be those disputes involving matters not effecting "commerce."[161] As the *Hall Street* Court reminded, the Act applies in federal and state court, but only in cases involving "commerce."[162] Thus hypothetically, parties to a dispute not involving commerce could choose a state with a statutory scheme hospitable to Expanded Review, draft an arbitration agreement with an Expanded Review clause, and avoid the reach the Act.[163] While an illustrative example evades this author's creative thought, given the wide range of disputes that go to arbitration, one surely exists.

The most plausible route to Expanded Review implicated by the Cryptic Language may relate to utilization of a choice-of-law clause.[164] In mentioning "state statutory" schemes, perhaps in a tip of the cap to federalism and the broad jurisdictional reach of state courts, the Court left open the possibility that with very specific drafting, parties could craft an agreement allowing for Expanded Review of an arbitration agreement.[165] At least three Pro-Expansion circuits indicated that inclusion of a generic choice-of-law clause *on its own* was not enough to activate Expanded Review.[166] Similarly in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*,[167] a case involving a choice-of-law clause (but not Expanded Review), the Supreme Court also held that a generic choice-of-law clause *by itself* could not inhibit the powers of an arbitrator.[168] As a logical corollary, if parties combined: (1) a choice-of-law referencing a state favorably disposed towards Expanded Review, *and* (2) an explicit choice of this state's arbitration statute (which would include provisions for Expanded Review), they might have provided the missing ingredient needed to access

[161] *See infra* text accompanying notes 162-163 (explaining disputes not effecting "commerce" may get Expanded Review).

[162] Hall Street Assocs. v. Mattel, 2008 WL 762537, at *4 (U.S. 2008) (citing Southland Corp. v. Keating, 465 U.S. 1, 15-16 (1984)).

[163] *Id.* at *8 (referencing "state statutory" schemes where Expanded Review is "arguable").

[164] *See infra* text accompanying notes 165-169 (postulating Expanded Review may still be available in state courts with careful draftsmanship).

[165] *See Hall Street Assocs.*, 2008 WL 762537, at *8 (suggesting parties may still obtain Expanded Review under "state statutory" arbitration schemes).

[166] *See* Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 29-30 (1st Cir. 2005) (holding generic choice-of-law clause not enough to activate Expanded Review); Jacada (Europa) Ltd. v. Int'l Mktg. Strategies, Inc. 401 F.3d 701, 712 (6th Cir. 2005) (finding choice-of-law clause insufficient to allow Expanded Review); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) (concluding choice-of-law by itself would not allow parties to expand judicial review of arbitration awards).

[167] 514 U.S. 52 (1995).

[168] *See id.* at 63-64 (holding choice-of-law clause on its own not enough to curb arbitrator power).

Expanded Review.[169]

IV. SOLUTIONS

Though ultimately this note advocates for the eradication of Expanded Review, three compromise solutions are offered for parties in the wake of *Hall Street* who still want more searching judicial scrutiny. As a starting point, before these solutions are developed, this section will first issue a call to arms to state legislatures and courts to eradicate Expanded Review.[170] In recognition that there are parties who still desire Expanded Review, this note advocates two solutions that work with the Act: (1) the Appellate Arbitration Solution and (2) the End Around Solution.[171] Finally with the Cryptic Language as a backdrop, this note advocates a solution which utilizes skilled draftsmanship to get Expanded Review in a state confirming court (the "Artful Draftsman").[172] This solution along with the Appellate Arbitration Solution and the End Around Solution may help counter the postulated flight from arbitration that some *amici* in the *Hall Street* case warned would start if Expanded Review were disallowed.[173]

A. A Call to Arms

The *Hall Street* Court solved many of the open questions about Expanded Review and enshrined the exclusivity of the § 10 Grounds in federal courts applying the Act.[174]

Yet, the Court did arbitration a disservice by leaving the door to Expanded Review open through the Cryptic Language.[175] While the Court's analysis about text and history speak only on Expanded Review in relation to the Act, many of the policy arguments transcend the Act and implicate arbitration in all forums.[176] State arbitration statutes which allow

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[169] *See supra* text accompanying notes 166-168 (explaining generic choice-of-law clauses not enough to activate Expanded Review or inhibit arbitrator power). This may be the mechanism the Court had in mind when it referenced "state statutory" schemes for review. *Hall Street Assocs.*, 2008 WL 762537, at *8.

[170] *See infra* Part IV.A. (calling on states legislatures and courts to end Expanded Review).

[171] *See infra* Part IV.B. (outlining Appellate Arbitration Solution); *infra* Part IV.C. (describing End Around Solution).

[172] *See infra* Part IV.D. (developing Artful Draftsman solution).

[173] *See* Hall Street Assocs. v. Mattel, 2008 WL 762537, at *7 (U.S. 2008) (acknowledging *amici* concerns about potential flight from or towards arbitration).

[174] *See supra* Part III.A-E. (analyzing success of *Hall Street* decision).

[175] *See supra* Part III.F. (discussing Cryptic Language and open questions presented by it).

[176] *See supra* Part III.E. (discussing various policy implications of Expanded Review).

Expanded Review: defeat the speed and efficiency of arbitration, judicialize arbitration procedures, upset the balance between arbitral tribunals and confirming courts, prevent unique awards, and retard the growth and consistency of "A-national" arbitration.[177] In light of the *Hall Street* decision and these policy concerns, state legislatures should work to revise their arbitration statues to ensure that the judiciary's involvement in arbitration is limited and confined to egregious conduct like arbitrator bias or fraud.[178] Similarly, just as the *Hall Street* Court eliminated the supposedly judicially crafted "manifest disregard" standard of review, state supreme courts should eradicate standards tantamount to merits review when presented with the opportunity.[179] The end result would be a more consistent and effective arbitration system in the United States that would provide an attractive alternative to courts for both domestic and foreign parties.[180]

B. Appellate Arbitration Solution

As some parties may still want Expanded Review after *Hall Street*, Judge Posner's Appellate Arbitration Solution provides a balance, allowing parties to review errors of law or fact without resorting to Expanded Review via the courts.[181] Parties alleging gross procedural error or arbitrator misconduct still have access to the § 10 Grounds; but under this framework, they also can obtain review on the merits.[182] Potentially, parties can designate such a panel by inserting the following clause into their arbitration agreement: "Appellate Arbitration Panel: a three member arbitral panel shall govern the review proceedings for arbitrator errors of law or fact and shall be comprised of one designee with expertise in relevant matters selected by each party and a third arbitrator selected by the

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[177] *See supra* Part III.E. (noting various destructive effects of Expanded Review on arbitration).

[178] *See* Hall Street Assocs. v. Mattel, 2008 WL 762537, at *4 (U.S. 2008) (holding against Expanded Review). The Court's announced policy objectives of ensuring limited review and expeditious confirmation would inform such a revision. *Id.* at *7.

[179] *See id.* at *5 (eliminating "manifest disregard").

[180] *See supra* note 1 (discussing myriad benefits of arbitration).

[181] *See* Enkishev, *supra* note 1, at 100-01 (demonstrating how Appellate Arbitration Solution provides more focused review without running afoul of Act).

[182] *See* Chicago Typographical Union No. 16. v. Chicago Sun-Times, Inc. 935 F.2d 1501, 1505 (7th Cir. 1991) (presenting Judge Posner's solution for parties desirous of a review on merits). Though the Act does not authorize a judicial merits review of an arbitrator's decision, under Judge Posner's solution, parties agree when they draft their arbitration clause to allow an aggrieved party recourse to an appellate arbitration panel. *Id.*

two party-chosen appellate arbitrators."[183] Some potential shortfalls of this system include: (1) such a solution has an injurious effect on the speed, finality, and cost-effectiveness of arbitration; and (2) errors of law or fact may necessitate a jurist and not an arbitrator for proper review.[184] While an appellate arbitration panel will make an arbitration award less final, parties can build finality language into the arbitration agreement to this end before a dispute begins, giving the decision res judicata after review by the appellate panel.[185] Finally, if parties absolutely require a judicial mind to assess the legal soundness of an opinion, they can designate retired judges to act as arbitrators.[186]

C. End Around Solution

The End Around Solution provides a crafty mechanism, which works within the framework of the Act but allows parties more focused review.[187] This solution instructs parties to outline the rules and procedures in clear and explicit terms when drafting their arbitration clause.[188] Thus, any gross deviation from such rules allows the reviewing court to overturn the award under the Act § 10(a)(4) "exceeding powers" provision.[189] Given *Hall Street*'s emphatic destruction of the "manifest disregard" standard, this solution would not permit review for errors of law or fact, but aggrieved parties may have an easier time pointing out gross arbitrator error.[190] Like the Appellate Arbitration Solution, the End Around Solution offers a compromise allowing parties to shield themselves from rogue arbitrators while adhering to the letter and spirit of the Act.[191]

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[183] *See Chicago Typographical Union No. 16.*, 935 F.2d at 1505 (presenting Appellate Arbitration Solution). Such a clause would accord with Judge Posner's suggested solution. *Id.* This solution could be utilized regardless of whether the loopholes presented by the Cryptic Language are eventually closed. *See supra* Part III.F. (discussing Cryptic Language).

[184] *See* Krause, *supra* note 1, at 79 (touting arbitration virtues such as speed, flexibility and cost effectiveness).

[185] *See* King, *supra* note 17, at 984-86 (explaining importance of finality to arbitration).

[186] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (stating that purpose of the Act was, in part, to reverse judicial hostility to arbitration agreements). Critics of such a practice may note that the Appellate Arbitration Solution evidences judicial hostility towards arbitrator capabilities. *Id.*

[187] *See* Blankley, *supra* note 31, at 427-32 (outlining End-Around Solution).

[188] *See supra* text accompanying note 31 (describing mechanics of End-Around Solution).

[189] *See supra* text accompanying note 31 (describing End-Around Solution).

[190] *See* Hall Street Assocs. v. Mattel, 2008 WL 762537, at *5 (U.S. 2008) (discrediting "manifest disregard" standard).

[191] *Cf.* Enkishev, *supra* note 1, at 100-101 (demonstrating Appellate Arbitration Solution provides more focused review without violating the Act).

D. The Artful Draftsman

Without prejudice to this note's contention that states ought to extirpate all remaining forms of Expanded Review, the Artful Draftsman solution allows parties who want review for errors of law or fact to utilize the mechanism hinted at by the *Hall Street* Court.[192] The first step for parties using this solution is to find a state with an arbitration statute amendable towards Expanded Review and adopt this states scheme in their arbitration agreement through a "choice-of-law" clause.[193] The crucial second step would be for these parties to expressly indicate that they also desire this state's arbitration statute to control their arbitration agreement.[194] Despite the potential attraction of such a solution for those parties who want Expanded Review, only subsequent case law and eventual Supreme Court review will determine if this method is viable.[195]

V. CONCLUSION

After thirteen years, divided circuits, and countless commentator suggestions, the Supreme Court decided against Expanded Review. The Court utilized a textual interpretation of the Act, a historical examination of the Act's adoption, and a consideration of the negative implications of Expanded Review to resolve the split and hold against the doctrine.

In light of this decision, parties contemplating enforcement or review in federal courts can no longer draft arbitration agreements that allow for Expanded Review. Still, parties wanting to protect themselves from a run away award can still utilize the Appellate Arbitration Solution or the End Around Solution to get more focused award-scrutiny without running afoul of the Act. Moreover, parties utilizing the Artful Draftsman solution may avoid the Act altogether and obtain Expanded Review.

The *Hall Street* decision will help fortify the institutional framework of the Act and arbitration in the United States. Expanded

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[192] *See supra* text accompanying note 169 (demonstrating mechanics of Artful Draftsman solution).

[193] *See Hall Street Assocs.*, 2008 WL 762537, at *8 (suggesting state statutes are potential source of authority for Expanded Review); *supra* text accompanying note 169 (demonstrating parties desiring Expanded Review must first adopt a choice-of-law clause which chooses a state favorable to Expanded Review).

[194] *See supra* text accompanying note 169 (arguing by also explicitly referencing choice of a state arbitration statute, parties may provide the intent necessary to activate Expanded Review).

[195] *See* Hall Street Assocs. v. Mattel, 2008 WL 762537, at *8 (U.S. 2008) (developing Cryptic Language). Since the Court failed to provide any insight on the efficacy of a scheme like the Artful Draftsman, its viability remains speculative.

Review may have eventually led to a paradigm shift in United States arbitration policy. Given the high stakes involved in commercial disputes, losing parties with access to Expanded Review clauses would likely have always attempted a merits review to obtain another "bite at the apple." Notwithstanding the paucity of contracts with Expanded Review clauses, without the *Hall Street* decision, market forces might have made such clauses standard-form amongst commercial parties.

Yet, the *Hall Street* decision left one stone unturned. By inserting the Cryptic Language, the Court left the door on Expanded Review open. The policy arguments militating against Expanded Review in federal courts confirming or reviewing arbitration decisions conducted under the Act apply equally to any court asked to confirm an award. Arbitration conducted with Expanded Review clauses casts aside the normal institutional benefits of speed, cost effectiveness, efficiency, and finality in exchange for a protracted hybrid procedure barely distinguishable from litigation. A confirming court's task should be streamlined and confined to a screen for gross procedural errors or evident arbitrator bias. Thus, state courts and legislatures ought to recognize the wisdom of the *Hall Street* Court and eliminate Expanded Review in those jurisdictions which still sanction the doctrine. Expanded Review is on the run, but the task is left to states to completely close the door on the doctrine.

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