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## Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street

Brian T. Burns

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### Cover Page Footnote

J.D. Candidate, 2011, Fordham University School of Law. I would like to thank my faculty advisor, Professor Paul Radvany, for his guidance throughout this process. I would also like to thank my family and friends for their love and support.

# FREEDOM, FINALITY, AND FEDERAL PREEMPTION: SEEKING EXPANDED JUDICIAL REVIEW OF ARBITRATION AWARDS UNDER STATE LAW AFTER *HALL STREET*

*Brian T. Burns\**

*When the U.S. Supreme Court decided Hall Street Associates, L.L.C. v. Mattel, Inc. in March 2008, the Court held that under the Federal Arbitration Act (FAA), parties to an arbitration agreement may not contractually expand the grounds for judicial review of an arbitration award beyond the grounds enumerated in the FAA. In dicta, however, the Court expressly left open the possibility that parties nonetheless may obtain expanded review by relying on state arbitration law, rather than the FAA. This Note examines the availability of contractually expanded review under state law and addresses the question of whether, in light of Hall Street’s holding and despite its dicta, the FAA preempts state laws that otherwise would permit expanded review of arbitration awards. This Note looks at the history and development of the FAA and examines its preemptive effect on state laws. It then analyzes the arguments for and against the proposition that the FAA preempts state laws that permit expanded review. Finally, this Note argues that the FAA should preempt state laws that permit expanded review, unless the parties have expressly agreed that state arbitration law will apply to the exclusion of the FAA.*

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#### INTRODUCTION

Arbitration,<sup>1</sup> in large part, is about freedom.<sup>2</sup> It is about the freedom to opt out of the public dispute resolution system and into a privately ordered one designed to be faster, more efficient, and more accommodating than its public counterpart.<sup>3</sup> For adverse parties in a dispute, it is about the freedom to decide that a privately conducted arbitration proceeding is a superior alternative to public court adjudication.<sup>4</sup> And for those same parties, it is

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1. Arbitration can be defined as a “method of dispute resolution involving one or more neutral third parties who are [usually] agreed to by the disputing parties and whose decision is binding.” BLACK’S LAW DICTIONARY 119 (9th ed. 2009).

2. See Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1104 (2009). Through arbitration, parties can decide, for example, what claims to arbitrate, what arbitrators will decide their dispute, what law will govern their underlying rights in the dispute, and what procedures will govern the arbitration itself. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

3. See Reuben, *supra* note 2, at 1104–05.

4. See *id.*

about the freedom to shape the contours of their chosen alternative.<sup>5</sup> In short, arbitration is largely about the freedom to choose arbitration. However, the broad freedom arbitration affords is not without limits. It is subject to judicial and legislative limitations on the structure of the arbitral process designed to preserve arbitration's fundamental values of efficiency, finality, and autonomy.<sup>6</sup> Many of these limitations take the form of judicial review provisions. Judicial review provisions enumerate the grounds upon which a court may vacate, modify, or correct an arbitrator's award.<sup>7</sup> Sections 10 and 11 of the Federal Arbitration Act<sup>8</sup> (FAA) are examples of judicial review provisions.<sup>9</sup> The grounds for judicial review of arbitration awards are narrow.<sup>10</sup> However, in recent years, parties wanting to expand these grounds have included provisions in their arbitration agreements that provide, for example, that a court shall vacate an arbitrator's award if it is legally erroneous.<sup>11</sup> The validity of these provisions created a sharp conflict in the federal courts.<sup>12</sup>

In 2008, the U.S. Supreme Court weighed in on the issue with its decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>13</sup> In *Hall Street*, the Court decided that parties may not, by contract, expand the grounds for judicial review of arbitration awards beyond those grounds listed in §§ 10 and 11 of the FAA.<sup>14</sup> To the parties in *Hall Street*, this meant that the provision in their agreement that required vacatur of any award "where the

5. *See id.*

6. *See id.* at 1129–30 (discussing arbitration's core values).

7. *See Hall St.*, 128 S. Ct. at 1402 (describing the Federal Arbitration Act's (FAA) judicial review provisions).

8. 9 U.S.C. §§ 1–16 (2006). The FAA applies, at least in part, to all arbitration agreements involving interstate commerce. *See id.* §§ 1–2.

9. *See id.* §§ 10–11.

10. *See infra* notes 75–78 and accompanying text.

11. *See* Eric Chafetz, *The Propriety of Expanded Judicial Review Under the FAA: Achieving a Balance Between Enforcing Parties' Agreements According to Their Terms and Maintaining Arbitral Efficiency*, 8 CARDOZO J. CONFLICT RESOL. 1, 2 (2006) (noting the "recent trend" of parties attempting to expand the grounds for judicial review). This Note assumes that any contractually expanded review provision contains a standard of review that is generally familiar to courts. This will avoid the problem of expanded review provisions that provide for strange or unfamiliar standards of review. *See* *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (noting that expanded review provisions should not be honored when the parties, for example, ask the court to "review the award by flipping a coin or studying the entrails of a dead fowl"), *overruled by Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc). As an alternative to expanded judicial review provisions, parties may also provide for appellate arbitration, whose validity is not subject to the same controversy as expanded judicial review provisions. *See Kyocera*, 341 F.3d at 1000; Hans Smit, *Hall Street Associates v. Mattel: A Critical Comment*, 17 AM. REV. INT'L ARB. 513, 522 (2008) (acknowledging that "nothing prevents the parties from creating a system of appellate review within the arbitration structure").

12. *Hall St.*, 128 S. Ct. at 1403 & n.5 (noting and describing the circuit split over the validity of expanded review clauses). *See generally* Chafetz, *supra* note 11, at 17–36 (discussing the split of authority).

13. 128 S. Ct. 1396 (2008).

14. *Id.* at 1400–01.

arbitrator's conclusions of law [were] erroneous"<sup>15</sup> no longer stated a valid ground for judicial review under the FAA.<sup>16</sup> The Court, however, was careful to limit its holding to the FAA. In part IV of its opinion, the Court stated, "[W]e do not purport to say that [§§ 10 and 11] exclude more searching review based on authority outside the [FAA] as well."<sup>17</sup> This statement suggests that the Court did not intend categorically to preclude parties from obtaining expanded judicial review in all forums and under all circumstances. However, the Court did not address the possibility that FAA §§ 10 and 11 may preempt outside authority that otherwise would permit parties to expand the scope of judicial review by contract.

This Note examines that possibility. Specifically, this Note examines whether FAA § 10, as interpreted in *Hall Street*, preempts state laws<sup>18</sup> that permit parties to expand the grounds for judicial review of arbitration awards by contract.<sup>19</sup> Part I of this Note provides background information about the FAA and about the FAA's preemptive effect on state laws. In that context, it discusses the history and policies of the FAA and examines the development of the FAA's applicability in both federal and state court. Then it addresses the preemptive effect of the FAA by discussing federal preemption generally and the Supreme Court's jurisprudence on FAA preemption specifically. Finally, Part I discusses the *Hall Street* decision and provides an overview of state laws that purport to permit contractually expanded review. Part II examines the arguments for and against the proposition that FAA § 10, as interpreted in *Hall Street*, preempts state laws that permit expanded review. In that context, it examines § 10's applicability, § 10's role in the FAA, and the effect of a contrary state law on the policies of the FAA. It also examines the effect that a choice of arbitration law clause has on the analysis. Part III argues that § 10 should preempt state laws that permit contractually expanded review, unless the parties have expressly agreed that state arbitration law will apply to the exclusion of the FAA. It contends that this result is consistent with both *Hall Street* and with the policies underlying the FAA.

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15. *Id.*

16. *See id.*

17. *Id.* at 1406 (identifying "state statutory or common law" as examples of non-FAA alternatives for enforcement).

18. Such laws include those of California and New Jersey. *See infra* Part I.F.

19. This Note focuses primarily on the preemptive effect of § 10's vacatur provisions; it does not directly examine the preemptive effect of § 11, although the analysis should be the same as for § 10. *See Hall St.*, 128 S. Ct. at 1404–05 (analyzing the effect of §§ 10 and 11 in the same way).

I. THE EVOLUTION OF THE FAA, *HALL STREET*, AND STATE VACATUR LAWA. *The FAA's History*

Congress enacted the FAA in 1925.<sup>20</sup> The FAA was largely a response to the judiciary's long-standing refusal to enforce executory agreements to arbitrate.<sup>21</sup> Prior to the enactment of the FAA, an agreement to arbitrate was revocable until an award was rendered.<sup>22</sup> The rationale for this approach was the belief that specific enforcement of an agreement to arbitrate would "oust[]" the courts "from their jurisdiction."<sup>23</sup> The rule was well established in English common law, and U.S. courts, in turn, adopted it and refused to specifically enforce agreements to arbitrate.<sup>24</sup> U.S. courts criticized the common-law rule, but they refused to overturn it without legislative action.<sup>25</sup> Congress provided the necessary legislative action when it enacted the FAA.<sup>26</sup> Modeled after a New York statute passed in 1920,<sup>27</sup> the FAA makes agreements to arbitrate "valid, irrevocable, and enforceable."<sup>28</sup> This provision is the core of the FAA.<sup>29</sup> It, in effect, replaced the common-law prohibition on specific enforcement of arbitration agreements<sup>30</sup> and effectuated Congress's intent to place arbitration

20. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2006)). The United States Arbitration Act is now called the Federal Arbitration Act. *See Southland Corp. v. Keating*, 465 U.S. 1, 21 (1984) (O'Connor, J., dissenting) (noting the different names).

21. *See, e.g., Southland*, 465 U.S. at 13–14; H.R. REP. NO. 68-96, at 1–2 (1924); Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 524 (2009).

22. *See Southland*, 465 U.S. at 32 (O'Connor, J., dissenting); James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 747 (2009) (discussing the revocability doctrine).

23. H.R. REP. NO. 68-96, at 1–2.

24. *Id.* at 2. Despite their reluctance to specifically enforce arbitration agreements, courts did not wholly deprive arbitration agreements of validity. *See S. REP. NO. 68-536*, at 2 (1924). For example, a party could seek and receive monetary damages if another party breached an executory arbitration agreement. *Id.*

25. H.R. REP. NO. 68-96, at 2; *see Atl. Fruit Co. v. Red Cross Line*, 276 F. 319, 322 (S.D.N.Y. 1921) (acknowledging criticisms of the common-law rule but nonetheless applying it), *aff'd*, 5 F.2d 218 (2d Cir. 1924).

26. The FAA was drafted by the American Bar Association (ABA), H.R. REP. NO. 68-96, at 1, and was enacted by Congress with minimal revisions. *See IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 107 (1992) ("[T]he role of Congress in enacting the [FAA] was the limited one of making a few modest changes in what the A.B.A. presented to it and, finally, of putting its stamp of approval on the bar association's product.").

27. S. REP. NO. 68-536, at 3 (noting that the FAA follows the New York statute).

28. 9 U.S.C. § 2 (2006).

29. 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 9.3, at 9:30 (1995 & Supp. 1999) ("The elimination of revocability of executory arbitration agreements was (and is) the central feature differentiating modern arbitration statutes from earlier arbitration statutes . . .").

30. *See H.R. REP. NO. 68-96*, at 2 (discussing the common-law rule and stating that "[t]he bill declares simply that such agreements for arbitration shall be enforced").

agreements “upon the same footing as other contracts, where [they] belong[.]”<sup>31</sup>

In enacting the FAA, Congress relied on its power to regulate interstate commerce.<sup>32</sup> It also relied on its power to control procedure in the federal courts.<sup>33</sup> Congress described the enforcement of arbitration agreements as a matter of procedure for the court where an action to enforce an arbitration agreement was brought.<sup>34</sup> Congress derived this notion largely from the New York Court of Appeals, which, in interpreting the New York statute after which the FAA was patterned, characterized arbitration “as a form of procedure.”<sup>35</sup> As a result of this characterization, a New York federal court refused to apply the New York state arbitration law and instead applied common-law rules hostile to arbitration.<sup>36</sup> Thus, Congress opined, if the federal courts were to enforce agreements to arbitrate, they needed to have federal procedures in place that would allow them to do so.<sup>37</sup> The FAA, Congress said, provided those procedures and codified them into law.<sup>38</sup> This historical context suggests that the enacting Congress intended the FAA to apply only in federal courts.<sup>39</sup> The U.S. Supreme Court, however,

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31. *Id.* at 1.

32. *See* *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984); H.R. REP. NO. 68-96, at 1.

33. *Southland*, 465 U.S. at 28 & n.14 (O'Connor, J., dissenting) (arguing that the legislative history of the FAA relies more heavily on Congress's “power over the jurisdiction of the federal courts” than on its Commerce Clause power (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 & n.13 (1967))); H.R. REP. NO. 68-96, at 1 (stating that the FAA is a “matter . . . properly the subject of Federal action” because it provides for federal court procedures).

34. H.R. REP. NO. 68-96, at 1.

35. *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 270 (1921) (characterizing the enforcement of arbitration agreements as “part of the law of remedies” and noting that “[t]he rule to be applied is the rule of the forum”).

36. *See* *Atl. Fruit Co. v. Red Cross Line*, 276 F. 319, 323–24 (S.D.N.Y. 1921) (characterizing the New York law as a “new method of procedure,” and refusing to stay proceedings pending arbitration based on the New York law because “it is not within the power of the state to regulate the procedure and practice of a federal court”), *aff'd*, 5 F.2d 218 (2d Cir. 1924).

37. *See* H.R. REP. NO. 68-96, at 1.

38. *See id.* at 2 (“The bill . . . provides a procedure in the Federal courts for their enforcement.”).

39. *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting) (“One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts . . .”); *see Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 37 (1924) [hereinafter *Joint Hearings*] (brief of Julius H. Cohen, American Bar Association) (“A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws.”); *id.* at 40 (“There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.”); H.R. REP. NO. 68-96, at 1 (“Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made.”); *see also* MACNEIL, *supra* note 26, at 115 (noting that there was no opposition to the FAA and arguing

has rejected that conclusion.<sup>40</sup> Instead, the Court has held that the FAA creates substantive rights that are enforceable in both federal and state court.<sup>41</sup> This line of reasoning, discussed in detail in Part I.C.2, will be important in determining the scope of FAA preemption and the FAA's effect on state laws that permit parties to expand judicial review of arbitration awards by contract.

Unlike other federal statutes, the FAA does not create an independent basis for federal courts' subject matter jurisdiction.<sup>42</sup> This means that parties cannot properly proceed in federal court simply by asserting that the FAA applies to their arbitration agreement in the sense that the agreement involves interstate commerce.<sup>43</sup> For parties to proceed in federal court, they must assert a separate basis for subject matter jurisdiction outside the FAA,<sup>44</sup> such as diversity of citizenship<sup>45</sup> or the presence of a question of federal law apart from the FAA, in the underlying dispute.<sup>46</sup> The result of the FAA's independent jurisdictional requirement is that state courts are frequently required to apply the FAA.<sup>47</sup> State courts, however, may not necessarily be required to apply all individual provisions of the FAA.<sup>48</sup> This unsettled issue forms much of the controversy surrounding the validity of state laws that permit parties to expand the grounds for judicial review of arbitration awards. The next section provides a foundation for understanding that controversy by providing an overview of the relevant individual FAA provisions and the policies underlying the statute as a whole.

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that the lack of opposition suggests that Congress understood the FAA to be applicable only in federal courts).

40. *Southland*, 465 U.S. at 15 (“[W]e cannot believe Congress intended to limit the Arbitration Act to disputes subject only to *federal-court* jurisdiction.”). *Southland Corp. v. Keating*'s use of the legislative history of the FAA has been severely criticized. See *infra* note 135 and accompanying text.

41. *Southland*, 465 U.S. at 12.

42. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (noting that the FAA is “something of an anomaly in the field of federal-court jurisdiction” (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983))); *Southland*, 465 U.S. at 15 n.9; see 9 U.S.C. § 4 (2006) (permitting a court to compel arbitration pursuant to an agreement if the court, “save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties”).

43. See *Hall St.*, 128 S. Ct. at 1402 (stating that the FAA requires an “independent jurisdictional basis” (citing *Moses H. Cone*, 460 U.S. at 25 n.32)).

44. *Id.*

45. See 28 U.S.C. § 1332 (2006).

46. See *id.* § 1331.

47. See *Moses H. Cone*, 460 U.S. at 25 n.32 (“[E]nforcement of the Act is left in large part to the state courts . . . .”); 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.4, at 10:88 (noting that state courts deal with FAA cases).

48. See *infra* note 216 and accompanying text.

B. *Individual FAA Sections and Underlying Policies*

For the purposes of this Note, the following sections of the FAA are most relevant: §§ 2, 3, 4, 9, and 10. Each of these sections is discussed below.

Section 2. Section 2 of the FAA is the core provision of the Act.<sup>49</sup> It provides that a written agreement to arbitrate will be “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>50</sup> Section 2 applies to any “contract evidencing a transaction involving [interstate] commerce.”<sup>51</sup> The provision applies both to present agreements to arbitrate future disputes and to present agreements to arbitrate current disputes that have already arisen.<sup>52</sup>

The “saving” clause of § 2<sup>53</sup> serves to ensure that arbitration agreements are “placed upon the same footing as other contracts.”<sup>54</sup> The clause affords parties the ability to avoid performance of an arbitration agreement if their defense to the validity of the arbitration agreement is one that would allow them to avoid performance of any other contract.<sup>55</sup> It also preserves a role for state law in enforcing (or refusing to enforce) arbitration agreements.<sup>56</sup> Because contract law is generally a matter of state law, rather than federal,<sup>57</sup> the clause contemplates that state contract defenses will serve as a limit on the broad enforceability § 2 affords to arbitration agreements.<sup>58</sup> Furthermore, discerning the contours of state law’s role in governing arbitration agreements that are subject to the FAA will be important in analyzing the preemptive effect of the FAA on those state laws.

Section 3. Section 3 provides a procedure for enforcing a parties’ arbitration agreement. If a party enters into a contract containing a written arbitration agreement and, instead of arbitrating a dispute that arises from the contract, brings an action in federal court to resolve the dispute, the other party to the agreement can ask the court to stay the judicial proceeding until arbitration occurs “in accordance with the terms of the agreement.”<sup>59</sup> The court is obligated to grant the stay as long as the court finds that the disputed issue is “referable to arbitration.”<sup>60</sup> In determining

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49. 1 MACNEIL ET AL., *supra* note 29, § 9.3, at 9:30.

50. 9 U.S.C. § 2 (2006).

51. *Id.*; *see id.* § 1.

52. *Id.* § 2.

53. The “saving” clause refers to the following language: “save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.*

54. H.R. REP. NO. 68-96, at 1 (1924).

55. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). Such defenses include fraud, duress, and unconscionability. *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

56. *See Dobson*, 513 U.S. at 281 (noting that “§ 2 gives States a method for protecting” parties against “an unwanted arbitration provision”).

57. *See, e.g., Christopher R. Drahozal, Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 398 (2004).

58. *See Dobson*, 513 U.S. at 281.

59. 9 U.S.C. § 3 (2006).

60. *Id.*

whether an issue is referable to arbitration, the court should consider only whether the parties, in fact, entered into the arbitration agreement.<sup>61</sup>

Section 4. If a party to an arbitration agreement fails, neglects, or refuses to arbitrate according to the arbitration agreement, § 4 permits the aggrieved party to make a motion in “any United States district court” for a court order compelling the other party to arbitrate according to the agreement.<sup>62</sup> The court is required to grant the motion and compel arbitration as long as it finds that the arbitration agreement, in fact, was made and that the offending party is failing to comply with the agreement.<sup>63</sup>

Section 9. Section 9 permits a court to enter a judgment upon an arbitrator’s award.<sup>64</sup> Through this process, the award obtains the force of a court judgment, with which the parties must comply.<sup>65</sup> Section 9 permits a court to enter a judgment upon an award only if the parties have agreed to allow the court to do so.<sup>66</sup> Thus, the parties’ agreement must contain some language indicating that they intended the arbitrator’s award to be given the force of law.<sup>67</sup> Section 9 permits the parties to determine, in their agreement, which court shall enter judgment upon the award and to apply to that court for an order confirming the award.<sup>68</sup> It then provides that the court chosen by the parties “must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”<sup>69</sup> If the parties fail to specify a court, the parties may apply for an order confirming the award in the U.S. district court in the district where the award was rendered.<sup>70</sup>

Section 10. Section 10 provides the grounds upon which a court may vacate an arbitration award.<sup>71</sup> The party seeking to vacate the award must make a timely application to the court and notify its adversary of its intent

61. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Court drew its conclusion on the meaning of § 3 from the language of § 4, *see id.* at 403–04, which provides that a court shall grant an order compelling arbitration if the court finds that “the making of the agreement for arbitration . . . is not in issue.” 9 U.S.C. § 4.

62. 9 U.S.C. § 4.

63. *Id.*

64. *Id.* § 9.

65. *See D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006) (noting that confirmation gives an arbitration award “force and effect”).

66. 9 U.S.C. § 9 (stating that confirmation is available only “[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award”).

67. *See Lehigh Structural Steel Co. v. Rust Eng’g Co.*, 59 F.2d 1038, 1039 (D.C. Cir. 1932) (“[A] plaintiff must bring himself clearly within his statute before he is entitled to its remedy.”). Courts have found that language in an arbitration agreement stating that the award be final is enough to allow a court to enter judgment upon the award. *See Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 276 (1932) (finding “final and binding” sufficient); *Daihatsu Motor Co. v. Terrain Vehicles, Inc.*, 13 F.3d 196, 196 (7th Cir. 1993) (finding “finally settled” sufficient).

68. 9 U.S.C. § 9.

69. *Id.*

70. *Id.*

71. *See id.* § 10(a).

to do so.<sup>72</sup> Section 10 provides four grounds upon which “the United States court in and for the district wherein the award was made may make an order vacating the award.”<sup>73</sup> The four grounds are as follows:

- (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.<sup>74</sup>

These grounds for vacatur address “egregious departures” from the agreed-upon role of the arbitrators.<sup>75</sup> They address serious procedural irregularities<sup>76</sup> and erect high burdens for parties seeking to vacate an award.<sup>77</sup> In addition, courts generally apply a presumption against vacating an award and in favor of confirming it.<sup>78</sup>

In addition to the grounds stated in § 10, courts have also created a variety of nonstatutory grounds for reviewing arbitration awards.<sup>79</sup> These are grounds that, despite their ostensible absence from the statutory text,

72. *See id.* § 12 (“Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.”).

73. *Id.* § 10(a).

74. *Id.* § 10(a)(1)–(4).

75. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008); *see also Amalgamated Meat Cutters v. Cross Bros. Meat Packers, Inc.*, 518 F.2d 1113, 1121 (3d Cir. 1975) (noting that a court’s review of an arbitration award is “narrow in the extreme”).

76. *See Amy J. Schmitz, Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 145 n.119 (2002) (“Section 10 of the FAA prescribes limited grounds for judicial review focused on preservation of basic procedural fairness . . .”).

77. *Reuben*, *supra* note 2, at 1108 (discussing the strict requirements for each of the statutory grounds for review); *see Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) (“[T]he showing required to avoid summary confirmation is high.” (citing *Nat’l Bulk Carriers, Inc. v. Princess Mgmt. Co.*, 597 F.2d 819, 825 (2d Cir. 1979))); *Huber*, *supra* note 21, at 521–23 (describing the grounds for vacatur and the high standards required to meet them).

78. *See Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 798 (8th Cir. 2004) (“When reviewing an arbitral award, courts accord ‘an extraordinary level of deference’ to the underlying award itself . . .” (quoting *Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471*, 80 F.3d 284, 287 (8th Cir. 1996))); *Upshur Coals Corp. v. United Mine Workers, Dist. 31*, 933 F.2d 225, 228 (4th Cir. 1991) (“An arbitrator’s award is entitled to a special degree of deference on judicial review.” (citing *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987))); *see also Ottley*, 819 F.2d at 376 (noting the court’s obligation to confirm an award and the high standard required to avoid confirmation); *Schmitz*, *supra* note 76, at 151.

79. *See generally Reuben*, *supra* note 2, at 1110–16 (discussing nonstatutory grounds for review).

courts have invoked to vacate arbitration awards the courts felt were improper.<sup>80</sup> The most frequently alleged nonstatutory ground for vacatur is “manifest disregard of the law.”<sup>81</sup> Courts have also vacated awards on the grounds that the award was against public policy,<sup>82</sup> that the award was arbitrary and capricious,<sup>83</sup> or that the award was irrational.<sup>84</sup> Vacatur on any of these grounds is rare.<sup>85</sup> For the purposes of this Note, however, most of the statutory and nonstatutory grounds are not at issue.<sup>86</sup> This Note addresses the question of whether parties can provide for, and receive enforcement of, a standard of review that a court otherwise would not apply absent the provision in the parties’ agreement. An example of this is a provision that provides for vacatur if the arbitrator makes an error of law. For the purposes of this Note then, it is enough to acknowledge that the FAA does not recognize legal or factual error as a valid basis for vacating an award.<sup>87</sup> The limited review available under the FAA implicates the underlying policies of the FAA, which, to a very great extent, will influence the preemptive effect of its provisions.<sup>88</sup> These policies are discussed next.

80. See Huber, *supra* note 21, at 523.

81. Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 189 (2008); see Huber, *supra* note 21, at 523 (noting that recognition of the “Manifest Disregard” standard is widespread).

82. Reuben, *supra* note 2, at 1113; see *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012 n.1 (10th Cir. 1994) (“[T]he public policy exception provides an additional basis for reversing an arbitration award where the terms of the arbitration contract, either expressly or as interpreted by the arbitrators, violate public policy or where the award requires parties undertake some action in violation of public policy.”); *Northrop Corp. v. Triad Fin. Establishment*, 593 F. Supp. 928, 934 (C.D. Cal. 1984) (vacating award as contrary to public policy), *rev’d in part sub nom. Northrop Corp. v. Triad Int’l Mktg. S.A.*, 811 F.2d 1265 (9th Cir. 1987).

83. See *Ainsworth v. Skurmick*, 960 F.2d 939, 941 (11th Cir. 1992) (refusing to enforce an arbitration award because it was arbitrary and capricious); see also *Brown v. Rauscher Pierce Refsnes, Inc.*, 796 F. Supp. 496, 500 (M.D. Fla. 1992) (noting that the arbitrary and capricious standard is a ground for vacatur), *aff’d*, 994 F.2d 775 (11th Cir. 1993).

84. See *Rivera v. Thomas*, 316 F. Supp. 2d 256, 259, 262 (D. Md. 2004) (noting that irrationality is a ground for vacating an award and vacating the award on that ground).

85. Reuben, *supra* note 2, at 1110; see *LeRoy & Feuille*, *supra* note 81, at 189 (describing an empirical study that showed that “manifest disregard” resulted in vacatur in only 7.1% of the cases in which it was alleged).

86. However, an understanding of them is necessary to provide the context in which courts examine an agreement that attempts to contractually expand the grounds for review. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) (analyzing the validity of an expanded review clause in context with the existing standards of review).

87. See *id.* (“[I]t would stretch basic interpretive principles to expand the stated grounds [for review under the FAA] to the point of evidentiary and legal review generally.”); *Solvay Pharm., Inc. v. Duramed Pharm., Inc.*, 442 F.3d 471, 476 (6th Cir. 2006) (noting that neither legal nor factual error is grounds for reversing an arbitrator’s decision); *Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp.*, 86 F.3d 96, 100 (7th Cir. 1996) (holding that neither factual nor legal errors are grounds for vacatur under the FAA); *Florasynt, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984).

88. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

Section 2 reflects Congress's ultimate purpose in enacting the FAA: to ensure the enforceability of arbitration agreements.<sup>89</sup> Though this is a single policy, the FAA's development has revealed that this policy has component parts.<sup>90</sup> Those parts can be characterized as follows: first, courts acknowledge parties' freedom to choose arbitration by specifically enforcing parties' agreements to arbitrate;<sup>91</sup> second, courts preserve the value of the arbitration process by ensuring its finality;<sup>92</sup> third, courts recognize arbitration's potential to provide for the efficient resolution of disputes;<sup>93</sup> and fourth, courts construe arbitration agreements in a way that is "pro-arbitration."<sup>94</sup> Even as part of an overarching, single policy, however, these subpolicies have the potential to collide.<sup>95</sup> When they do—

89. *Id.* at 478 (recognizing "Congress' principal purpose of ensuring that private arbitration agreements are enforced"); S. REP. NO. 68-536, at 2 (1924) (noting that "[t]he purpose of the [FAA] is clearly set forth in section 2"); H.R. REP. NO. 68-96, at 1 (1924) ("The purpose of this bill is to make valid and enforceable agreements for arbitration . . ."); MACNEIL, *supra* note 26, at 150 (stating the policy as follows: "to permit people by contract to choose the alleged efficiencies of binding arbitration agreements").

90. See MACNEIL, *supra* note 26, at 149-50 (noting that the policy was "artificially split into conflicting policies").

91. See *Volt*, 489 U.S. at 478; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("Having made the bargain to arbitrate, the party should be held to it . . ."); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (noting that "[b]y compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act"); H.R. REP. NO. 68-96, at 1 ("[T]he effect of the bill is simply to make the contracting party live up to his agreement."); see also Reuben, *supra* note 2, at 1130 (noting that party autonomy is a "process virtue" of arbitration).

92. See *Hall St.*, 128 S. Ct. at 1405 (acknowledging "arbitration's essential virtue of resolving disputes straightaway" when interpreting the FAA); *Joint Hearings*, *supra* note 39, at 34 (describing the "limited" grounds for vacatur in § 10 and concluding that if an award meets a condition of § 10, "then and then only the award may be vacated"); H.R. REP. NO. 68-96, at 2 (suggesting that the FAA intended to ensure the finality of arbitration awards by stating that the award is only "subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form"); Schmitz, *supra* note 76, at 149-51 (describing the approach the FAA's drafter's took to finality and concluding that "[f]inality as defined by the judicial review limitations of the FAA sought to insulate arbitration from courts' 'Monday morning quarterbacking' and protect the allocation of power in the Act between arbitrators and courts").

93. See *Byrd*, 470 U.S. at 221 (noting that one policy underlying the FAA is the "encouragement of efficient and speedy dispute resolution"); H.R. REP. NO. 68-96, at 2 (noting that the FAA was intended to "reduc[e] technicality, delay, and expense to a minimum"); Reuben, *supra* note 2, at 1130 (acknowledging "FAA arbitration's core characteristics and values of finality and efficiency as understood by the enacting Congress").

94. 1 MACNEIL ET AL., *supra* note 29, § 10.9.1, at 10:105 n.2 (acknowledging the "pro-arbitration policy"). The "pro-arbitration policy" means that ambiguities in the parties' arbitration agreement should be interpreted in a way that ensures that the parties actually arbitrate their dispute. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.>").

95. See *Byrd*, 470 U.S. at 221 (noting a "conflict between two goals of the Arbitration Act").

as in the case of expanded review provisions—the court must decide which policy prevails.<sup>96</sup> The Supreme Court, for example, has decided that parties’ freedom to choose arbitration should prevail over a claim that arbitration, in a particular case, would be inefficient.<sup>97</sup> In contrast, the Court has also held, in *Hall Street*, that finality should prevail over parties’ freedom to expand the scope of judicial review under the FAA.<sup>98</sup> Moreover, the question this Note addresses—whether the FAA preempts state laws that permit parties to expand the scope of judicial review—turns largely on the same policy conflict at issue in *Hall Street*.<sup>99</sup> It also turns on the FAA’s applicability in state court.<sup>100</sup> The next section examines the development of that issue. Specifically, it addresses the FAA’s applicability in both federal and state court as well as the FAA’s scope.

### C. Applicability and Scope

For purposes of this Note, “applicability” refers to a court’s general obligation, absent a choice of arbitration law clause in the parties’ agreement, to apply the FAA to an arbitration agreement within the FAA’s scope. “Scope,” in turn, refers to the FAA’s reach in governing arbitration agreements. First, this section discusses the applicability of the FAA in federal diversity cases. Second, it discusses the applicability of the FAA in state court cases. Third, it discusses the scope of the FAA in both federal and state court.

#### 1. Applicability in Federal Diversity Cases<sup>101</sup>

The view that Congress enacted the FAA based on its power to prescribe procedure in federal courts threatened to severely limit the FAA’s applicability in light of the Supreme Court’s decisions in *Erie Railroad Co. v. Tompkins*<sup>102</sup> and *Bernhardt v. Polygraphic Co. of America*.<sup>103</sup> After *Erie*, Congress could no longer fashion substantive rules of decision based solely on its power to control jurisdiction in the federal courts.<sup>104</sup> Instead,

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96. *See id.* (choosing enforcement of the parties’ agreement over efficiency).

97. *See id.*; *infra* notes 350–52 and accompanying text.

98. *See* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404–06 (2008).

99. *See infra* Part II.A.2.

100. *See infra* Part II.A.1.

101. In cases where the underlying cause of action is based on federal law, the FAA unquestionably applies. 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.1, at 10:75 (“[W]here arbitrators award remedies for the violation of substantive federal rights, federal substantive law and the FAA govern their powers, not state law of any kind.”).

102. 304 U.S. 64 (1938).

103. 350 U.S. 198 (1956). The view that the FAA is based on Congress’s power to prescribe federal court rules became problematic because it raised a significant concern that the FAA may only be applied in cases where the controversy underlying the arbitration agreement was one involving federal law, and not in diversity cases. *See* *Southland Corp. v. Keating*, 465 U.S. 1, 23 (1984) (O’Connor, J., dissenting) (describing the concern about the FAA’s applicability in light of *Erie Railroad Co. v. Tompkins* and *Bernhardt v. Polygraphic Co. of America*).

104. *Erie*, 304 U.S. at 78; *see Southland*, 465 U.S. at 23 (O’Connor, J., dissenting).

federal courts whose jurisdiction was based on diversity of citizenship were obligated to apply state substantive law.<sup>105</sup> *Bernhardt*, in turn, decided that the legal obligation to arbitrate a dispute was a substantive one.<sup>106</sup> *Bernhardt* reasoned that because the obligation to arbitrate a dispute could affect the outcome of the controversy, such an obligation was one of substantive law.<sup>107</sup> Therefore, a federal court sitting in diversity should apply state law of arbitrability, and not the FAA, to a diversity action, unless the subject matter of the action was one over which Congress had authority—that is, for example, interstate commerce.<sup>108</sup> Justice Felix Frankfurter, nonetheless, in a concurring opinion, expressed the concern that application of the FAA in any diversity action could be constitutionally problematic.<sup>109</sup>

The Court addressed the constitutional concern in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>110</sup> In *Prima Paint*, the court grounded the FAA in Congress's power to regulate interstate commerce.<sup>111</sup> The Court defined the constitutional issue not as whether Congress could create substantive rules in diversity cases generally, but whether it could create rules for federal courts to follow in a subject matter area where Congress's authority to legislate was well established.<sup>112</sup> The Court answered that Congress could make such rules.<sup>113</sup> Congress's authority to control interstate commerce, the Court said, was "incontestable."<sup>114</sup> The Court thus "confined"<sup>115</sup> the FAA to Congress's power to regulate interstate commerce and, in doing so, made the FAA generally applicable in federal diversity cases, as long as the case involved interstate commerce.<sup>116</sup> The Court's decision in *Prima Paint* opened the door for its decision in *Southland Corp. v. Keating*,<sup>117</sup> where it decided that the FAA was applicable in state, as well as federal, court.<sup>118</sup>

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105. *E.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404–05 (1967). Federal courts, however, were not obligated to apply state substantive law if the Constitution or a federal statute governed the case. *See Erie*, 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."). A comprehensive analysis of the *Erie* doctrine and the law applied in federal court is beyond the scope of this Note, but this brief mention of those concepts serves as important background information in the development of the FAA's applicability.

106. *Bernhardt*, 350 U.S. at 202–03; *see Southland*, 465 U.S. at 23 (O'Connor, J., dissenting).

107. *Bernhardt*, 350 U.S. at 203.

108. *See id.* at 201–03.

109. *Id.* at 208 (Frankfurter, J., concurring).

110. 388 U.S. 395 (1967).

111. *Id.* at 405.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.* at 406.

117. 465 U.S. 1 (1984).

118. *Id.* at 16.

## 2. Applicability in State Court Cases

*Southland* was the Court's first opportunity to decide whether the FAA was applicable in state court.<sup>119</sup> It decided that it was.<sup>120</sup> In reaching its decision, the Court relied on *Prima Paint*'s implicit suggestion that, because the FAA was based on Congress's Commerce Clause power, it was applicable in both state and federal court.<sup>121</sup> The Court also relied on the legislative history of the FAA.<sup>122</sup> The legislative history of the Act, the Court concluded, suggested that in passing the FAA, Congress sought to remedy two problems: "the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements."<sup>123</sup> Congress's attention to the second problem, therefore, indicated its intent to give the FAA a broad reach, "unencumbered by state-law constraints."<sup>124</sup>

The Court rejected the idea that the FAA was strictly a procedural statute.<sup>125</sup> If Congress had intended to create only a set of procedural rules for the federal courts, it would not have limited the FAA to contracts "involving commerce."<sup>126</sup> Conversely, invocation of the commerce power would be necessary for the FAA to apply in state court.<sup>127</sup> Therefore, Congress's use of the phrase "involving commerce" indicated its intention that the FAA should apply in state court.<sup>128</sup>

Finally, the Court suggested that a contrary approach would create opportunities for forum shopping.<sup>129</sup> On the facts of *Southland*, California law would have made the parties' arbitration agreement unenforceable.<sup>130</sup> The FAA, however, would have required enforcement of the agreement.<sup>131</sup> Thus, if the FAA did not apply in California state court, enforcement of the agreement would depend entirely on which court—state or federal—heard the action for enforcement.<sup>132</sup> Congress, the Court concluded, could not have intended that a substantive right based on the Commerce Clause would be entirely dependent for its enforcement on the parties' choice of forum.<sup>133</sup> Thus, the result of *Southland* is that the FAA creates substantive law applicable in both state and federal court.<sup>134</sup> Although this result has been

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119. *Id.* at 24 (O'Connor, J., dissenting).

120. *Id.* at 16 (majority opinion).

121. *Id.* at 11–12.

122. *Id.* at 12–14.

123. *Id.* at 14.

124. *Id.* at 13–14.

125. *Id.* at 14–15.

126. *Id.* at 14 (quoting 9 U.S.C. § 2 (2006)) (internal quotation marks omitted).

127. *Id.*

128. *Id.* at 14–15.

129. *Id.* at 15.

130. *See id.* at 14–15.

131. *Id.* at 15.

132. *Id.*

133. *Id.*

134. *Id.* at 16.

severely criticized as contrary to Congress's intent,<sup>135</sup> the Supreme Court has repeatedly refused to overrule *Southland*.<sup>136</sup>

Although *Southland* unequivocally held that FAA § 2 applied in state court, it left open the question whether other provisions of the FAA were similarly applicable in state court.<sup>137</sup> At least one subsequent Supreme Court decision has left the question open as well.<sup>138</sup> The probable answer, discussed and analyzed in Parts II and III, turns largely on the language of the FAA, its underlying policies, and the relationship of the other FAA sections to § 2.<sup>139</sup> Those same considerations also influenced the Supreme Court's analysis of the scope of the FAA, which is the subject of the next section. In contrast to the question of the applicability of the FAA, which addressed whether the FAA applied in a particular forum, the question of the FAA's scope deals with whether a parties' agreement falls within the FAA's reach by virtue of the agreement's connection to interstate commerce.

### 3. Scope

In *Allied-Bruce Terminix Cos. v. Dobson*,<sup>140</sup> the Court held that the FAA extended to the full reach of Congress's Commerce Clause power.<sup>141</sup> As a result, *Dobson* made the FAA potentially applicable to nearly every

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135. *Id.* at 25 (O'Connor, J., dissenting); see *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285–88 (1995) (Thomas, J., dissenting); MACNEIL, *supra* note 26, at 139–44 (criticizing *Southland*'s use of legislative history and remarking that much of the Court's reasoning was "pure and simple nonsense"); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 125 (2006) ("Several justices and almost all of the commentators who have written about *Southland* agree that this case was wrongly decided and inconsistent with congressional intent."); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 5, 6 ("*Southland* is wrong, and the justifications for it are wrong."). *But see* Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105 (2002) (arguing that there is evidence that the framers of the FAA "intended it to apply in state court").

136. See *Preston v. Ferrer*, 128 S. Ct. 978, 983 n.2 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (recognizing *Southland*'s continued validity); *Dobson*, 513 U.S. at 272 (refusing to overrule *Southland* despite the support of twenty attorneys general for doing so).

137. *Southland*, 465 U.S. at 16 n.10 ("[W]e do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts."); see *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) ("[W]e have never held that §§ 3 and 4 . . . are nonetheless applicable in state court." (citing *Southland*, 465 U.S. at 16 n.10)); see also MACNEIL, *supra* note 26, at 149 (noting that after *Southland*, "[t]he distinct possibility now exists that some sections of this unitary statute are not enforceable in state court although others clearly are").

138. See *Volt*, 489 U.S. at 477 n.6.

139. See *infra* Parts II.A.1–2, III.

140. 513 U.S. 265 (1995).

141. *Id.* at 268.

arbitration agreement.<sup>142</sup> In reaching this conclusion, the Court analyzed § 2's provision that an arbitration agreement in "a contract evidencing a transaction involving commerce"<sup>143</sup> should be enforceable.<sup>144</sup> The Court first reasoned that the phrase "involving commerce" reflected Congress's intent to exercise the full extent of its Commerce Clause power.<sup>145</sup> A narrower reading of the phrase, the Court held, would create a "new, unfamiliar test lying somewhere in a no man's land between 'in commerce' and 'affecting commerce.'"<sup>146</sup> Such a test, the Court opined, would "breed[] litigation from a statute [the FAA] that seeks to avoid it."<sup>147</sup> The Court then reasoned that the phrase "a contract evidencing a transaction"<sup>148</sup> referred to any contract for a transaction that in fact touched interstate commerce, rather than to a contract that the parties, at the time of making the contract, contemplated as one that would involve interstate commerce.<sup>149</sup> The Court chose the "commerce in fact" interpretation because, according to the Court, the other interpretation would undermine the basic purpose of the FAA by encouraging litigation about the parties' contemplations at the time they entered into the agreement.<sup>150</sup> Thus, as long as a contract involves a transaction that in fact touches interstate commerce, the contract's arbitration agreement will fall within the FAA's reach.<sup>151</sup>

*Dobson* gave the FAA broad scope. In doing so, it limited the ability of state courts to apply their own arbitration law.<sup>152</sup> As long as a contract with an arbitration agreement fell within the outer limits of the commerce power, state courts could no longer apply state arbitration law solely on the grounds that the arbitration agreement did not sufficiently touch interstate commerce.<sup>153</sup> State courts, however, could still attempt to apply state arbitration law to an agreement involving interstate commerce on the

142. See MACNEIL, *supra* note 26, at 149 (noting that interstate commerce will "virtually always" be present in commercial arbitration agreements); Jill I. Gross, *Over-Preemption of State Vacatur Law: State Courts and the FAA*, 3 J. AM. ARB. 1, 35 (2004) ("[V]irtually any commercial transaction is likely to be controlled by the FAA.").

143. 9 U.S.C. § 2 (2006).

144. See *Dobson*, 513 U.S. at 268, 273, 276.

145. *Id.* at 273–77 (comparing the phrase "involving commerce" to the phrases "affecting commerce" and "in commerce," which Congress used in other statutes to differentiate the extent to which it was exercising its commerce power).

146. *Id.* at 275. Professor Ian R. Macneil and his coauthors find this line of the Court's reasoning to be a "comfort." 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.3, at 10:86.

147. *Dobson*, 513 U.S. at 275.

148. 9 U.S.C. § 2.

149. See *Dobson*, 513 U.S. at 277–78.

150. *Id.* at 278.

151. See *id.* at 281; Drahozal, *supra* note 57, at 402 ("Because the parties agreed that the transaction involved in the case was within the scope of the commerce power, the FAA applied . . .").

152. See *Dobson*, 513 U.S. at 272–73. By its broad interpretation of the FAA, the Court closed off "an important statutory niche in which a State remain[ed] free to apply its antiarbitration law or policy." *Id.* at 273.

153. See *id.* at 273–74.

grounds that particular FAA provisions did not apply in state court,<sup>154</sup> or on the grounds that the parties had agreed to apply state arbitration law.<sup>155</sup> The validity of these grounds for applying state arbitration law of vacatur is analyzed in Parts II and III. Furthermore, this Note assumes that all arbitration agreements involve interstate commerce. This assumption simplifies the analysis of FAA preemption by eliminating the need to address the caveat that if the FAA does not apply because the agreement does not involve commerce, then the FAA will not preempt the state law.<sup>156</sup> The next section sets out the basis for FAA preemption analysis by examining federal preemption of state law generally.

#### D. Preemption

##### 1. Generally

Congress may only legislate in certain areas of law.<sup>157</sup> In most of those areas, state legislatures may also make laws.<sup>158</sup> Thus there are significant areas of law where federal and state powers overlap.<sup>159</sup> In areas where Congress has authority to legislate, however, it also has the power to preempt—or displace—state law.<sup>160</sup> Congress's power to preempt state law is derived from the Supremacy Clause,<sup>161</sup> and courts, in discharging their duty to interpret the law, determine whether federal law preempts state law.<sup>162</sup> The answer is ultimately a question of congressional intent.<sup>163</sup> Furthermore, the Supreme Court has identified three categories of preemption that can occur: express preemption, field preemption, and conflict preemption.<sup>164</sup> Each is addressed below.

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154. See *infra* notes 381–88 and accompanying text.

155. See *infra* Parts I.D.2.c, II.C.

156. See *M & L Power Servs., Inc. v. Am. Networks Int'l*, 44 F. Supp. 2d 134, 142 (D.R.I. 1999) (holding a state arbitration law preempted but acknowledging that the holding did not affect certain state cases because those cases did not involve interstate commerce).

157. See, e.g., *United States v. Wall*, 92 F.3d 1444, 1445–46 (6th Cir. 1996) (noting that Congress “may exercise only those powers enumerated in the Constitution” (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819))).

158. E.g., *Printz v. United States*, 521 U.S. 898, 918–20 (1997) (acknowledging concurrent state and federal authority); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 (2000).

159. Nelson, *supra* note 158, at 225.

160. See *id.*

161. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992); *City of Philadelphia v. New Jersey*, 430 U.S. 141, 142 (1977) (per curiam); Nelson, *supra* note 158, at 234; see U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .”).

162. See Nelson, *supra* note 158, at 226–27 (describing the U.S. Supreme Court's approach to determining the preemptive effect of federal law).

163. *Barnett Bank v. Nelson*, 517 U.S. 25, 30 (1996); *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103–04 (1963) (“The purpose of Congress is the ultimate touchstone.”); Drahozal, *supra* note 57, at 397.

164. Nelson, *supra* note 158, at 226; see *Barnett Bank*, 517 U.S. at 31 (recognizing three types of preemption).

Express preemption occurs when a federal law includes a clause that expressly removes legislative authority from the states in a particular area of law.<sup>165</sup> Though Congress's authority to expressly preempt state law is well settled,<sup>166</sup> the Supreme Court favors reading express preemption clauses narrowly.<sup>167</sup> This is especially true when Congress is legislating in an area that is traditionally within the scope of the states' power to pass laws for the health, safety, and welfare of their citizens.<sup>168</sup> The FAA, however, does not have an express preemption provision.<sup>169</sup>

Field preemption occurs where Congress has impliedly occupied the entire field of a particular area of law.<sup>170</sup> Field preemption occurs when Congress has legislated "so pervasive[ly]" that it has "left no room" for states to pass additional laws in that field.<sup>171</sup> It may also occur where Congress is legislating in an area and the federal interest in that area is so dominant that states should not be permitted to enforce their own laws on the subject.<sup>172</sup> Field preemption, however, is rare,<sup>173</sup> and Congress has not preempted the entire field of arbitration law with the FAA.<sup>174</sup>

Federal law also preempts state law when the two "actually conflict[]" with each other.<sup>175</sup> This is called conflict preemption,<sup>176</sup> and it may occur when compliance with both the state law and federal law is a "physical impossibility."<sup>177</sup> It may also occur when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and

165. *Id.*; see, e.g., 46 U.S.C. § 4306 (2006) (containing an express preemption provision).

166. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983) ("It is well established that within constitutional limits Congress may preempt state authority by so stating in express terms." (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977))).

167. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517–18 (1992); Nelson, *supra* note 158, at 227.

168. Nelson, *supra* note 158, at 227; see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

169. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). *But see* Nelson, *supra* note 158, at 299 ("But § 2 [of the FAA] can readily be recast in the form of an express preemption clause; for most purposes, it is identical to a provision that 'no state or local government shall adopt or enforce any law or policy that makes a written arbitration agreement in a contract evidencing a transaction involving commerce invalid, revocable, or unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'").

170. Nelson, *supra* note 158, at 227.

171. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); Nelson, *supra* note 158, at 227.

172. *Rice*, 331 U.S. at 230.

173. See *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part); Nelson, *supra* note 158, at 227.

174. *Volt*, 489 U.S. at 477. *But see* 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.2, at 10:76–81 (offering arguments in favor of the view that the FAA preempts all state arbitration laws).

175. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

176. Nelson, *supra* note 158, at 227–28.

177. *Id.* at 228.

objectives of Congress.”<sup>178</sup> This type of conflict preemption is called obstacle preemption<sup>179</sup> and is the type of preemption most applicable to the FAA.<sup>180</sup> The next section discusses the issue of FAA preemption of state law in detail.

## 2. FAA Preemption of State Law

This section examines the preemptive effect of the FAA on contrary state law. First, it examines the general principles of FAA preemption. Second, it examines the Supreme Court’s jurisprudence on the subject. In that context, it examines the Court’s cases involving the preemptive effect of § 2’s mandate that agreements to arbitrate be held “valid, irrevocable, and enforceable.”<sup>181</sup> Third, this section examines the preemption of state law by other sections of the FAA. Finally, it examines the effect of preemption on a choice of arbitration law clause in the parties’ agreement.

The doctrine of conflict preemption prevents a state law from “stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>182</sup> This requirement leads to the core principle of FAA preemption: “state arbitration law cannot limit or obstruct FAA provisions.”<sup>183</sup> This section will examine this principle under the assumption that the parties have not explicitly agreed that state arbitration law would govern their agreement.<sup>184</sup>

### a. Section 2

Most of the Supreme Court’s jurisprudence on the preemptive effect of the FAA involves the application of § 2 to state laws that attempt to limit arbitrability of claims.<sup>185</sup> The Court’s decisions in this area rely on the assertion that Congress’s primary purpose in enacting § 2 was to hold parties to their agreements to arbitrate by making the agreements

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178. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

179. Nelson, *supra* note 158, at 228–29.

180. See *Volt*, 489 U.S. at 477 (noting that the FAA preempts state laws through obstacle preemption).

181. 9 U.S.C. § 2 (2006).

182. *Hines*, 312 U.S. at 67 (citing *Savage*, 225 U.S. at 533); see *supra* notes 175–78 and accompanying text.

183. 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.1, at 10:74 (calling the above quoted principle “[t]he bedrock for considering the scope of FAA preemption”). Professor Macneil and his coauthors draw this principle from *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Perry v. Thomas*, 482 U.S. 483 (1987); and *Southland Corp. v. Keating*, 465 U.S. 1 (1984). See 1 MACNEIL ET AL., *supra* note 29, § 10.8.1.3, at 10:73 n.31.

184. For the effect of a choice of arbitration law clause on the analysis, see *infra* Part I.D.2.c.

185. See 1 MACNEIL ET AL., *supra* note 29, § 10.8.3.2, at 10:97 (explaining that the Supreme Court has left open the applicability and preemptive effect of sections other than § 2).

enforceable in court.<sup>186</sup> Thus, the FAA created a “national policy favoring arbitration,”<sup>187</sup> and it therefore preempts state laws that undermine § 2’s command that arbitration agreements be held “valid, irrevocable, and enforceable.”<sup>188</sup>

In *Southland*, the U.S. Supreme Court dealt with a provision of the California Franchise Investment Law that the California Supreme Court interpreted to require a judicial, rather than arbitral, forum for resolving disputes that arose under the law.<sup>189</sup> As a result, the California Supreme Court refused to enforce the parties’ arbitration agreement, at least to the extent that it involved claims under the Franchise Investment Law.<sup>190</sup> The U.S. Supreme Court held that the California law requiring a judicial forum for resolution was preempted.<sup>191</sup> After determining that § 2 of the FAA applied in state court, the Court concluded that the California law was an “attempt[] to undercut the enforceability of [the] arbitration agreement[.]”<sup>192</sup> The California law, the Court reasoned, was in conflict with Congress’s purpose in enacting § 2.<sup>193</sup> Therefore, it violated the Supremacy Clause and was preempted.<sup>194</sup>

The Court faced a similar set of facts when it decided *Perry v. Thomas*.<sup>195</sup> In *Perry*, an employee sought judicial resolution of his claim against his employer for unpaid commissions, despite the fact that his employment agreement contained an arbitration clause that would have governed the dispute.<sup>196</sup> The employee relied on section 229 of the California Labor Code, which permitted court actions “for the collection of wages . . . ‘without regard to the existence of any private agreement to arbitrate.’”<sup>197</sup> The Court found that the state law was preempted.<sup>198</sup>

In *Doctor’s Associates, Inc. v. Casarotto*,<sup>199</sup> the Court again found that the FAA preempted a contrary state law.<sup>200</sup> Unlike the state laws in *Southland* and *Perry*, however, the Montana law at issue in *Casarotto*, on its face, did not restrict the arbitrability of any particular types of claims,

186. See *Casarotto*, 517 U.S. at 684–85; *Perry*, 482 U.S. at 489; *Southland*, 465 U.S. at 10.

187. *Southland*, 465 U.S. at 10.

188. 9 U.S.C. § 2 (2006).

189. *Southland*, 465 U.S. at 10; see CAL. CORP. CODE § 31512 (West 2006).

190. *Id.*

191. *Id.*

192. *Id.* at 16; see *supra* Part I.C.2 (discussing *Southland*’s analysis of the FAA’s applicability in state court).

193. See *Southland*, 465 U.S. at 10.

194. *Id.*

195. 482 U.S. 483 (1987).

196. See *id.* at 484–85.

197. *Id.* at 484 (quoting CAL. LAB. CODE § 229 (West 1971)).

198. See *id.* at 491 (“[U]nder the Supremacy Clause, the state statute must give way.”). The result will be the same when a state law attempts to provide an administrative, rather than judicial, forum for relief despite an agreement to arbitrate. See *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008).

199. 517 U.S. 681 (1996).

200. *Id.* at 688.

nor did it invalidate arbitration agreements generally.<sup>201</sup> Instead, the law in *Casarotto* required that any contract containing an arbitration clause must also contain a provision notifying the parties that the agreement is subject to arbitration.<sup>202</sup> The notice was required to be “typed in underlined capital letters on the first page of the contract.”<sup>203</sup> If the notice provision did not comply with the statute, “the contract may not be subject to arbitration.”<sup>204</sup> The Montana Supreme Court held that this provision rendered the parties’ arbitration agreement unenforceable because the agreement lacked the required notice provision.<sup>205</sup> The Montana court reasoned that the Montana notice requirement did not contravene the policies of the FAA because it did not, as a rule, invalidate arbitration agreements generally.<sup>206</sup> The Montana law merely reflected that state’s policy that arbitration agreements should be entered knowingly before they are enforced.<sup>207</sup>

The U.S. Supreme Court disagreed. Relying on the provision of FAA § 2 that arbitration agreements should be enforced “save upon such grounds . . . for the revocation of any contract,”<sup>208</sup> the Court reasoned that the Montana notice provision violated § 2 because it singled out arbitration agreements and made their enforcement contingent upon special requirements “not applicable to contracts generally.”<sup>209</sup> Application of the Montana statute, moreover, would make the entire arbitration agreement invalid.<sup>210</sup> Such a result, the Court held, would be “antithetical” to the purposes of the FAA.<sup>211</sup> Therefore, the Montana law was preempted.<sup>212</sup>

The foregoing discussion dealt with the preemptive effect of § 2 on conflicting state laws. The next section examines existing law on the issue of whether other sections of the FAA have a similar preemptive effect.

#### b. *Beyond § 2*

In federal diversity cases, all sections of the FAA govern,<sup>213</sup> unless the parties have specifically agreed that state arbitration law will apply to their

201. *See id.* at 685 (noting the Montana Supreme Court’s reasoning that the law “did not preclude arbitration agreements altogether”); *see also* Drahozal, *supra* note 57, at 403 (noting, after discussing *Southland* and *Perry*, that, in *Casarotto*, “the Court held preempted a different type of state statute than those it had faced previously”).

202. *Casarotto*, 517 U.S. at 683.

203. *Id.* (quoting MONT. CODE ANN. § 27-5-114(4) (1995) (amended 1997)).

204. *Id.* at 684 (quoting MONT. CODE ANN. § 27-5-114(4)).

205. *Id.*

206. *Id.* at 685 (recounting the Montana court’s analysis).

207. *Id.*

208. 9 U.S.C. § 2 (2006).

209. *Casarotto*, 517 U.S. at 687.

210. *Id.* at 688.

211. *Id.*

212. *Id.*

213. 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.2, at 10:80 (“In federal courts, all the sections of the comprehensive FAA will govern.”).

agreement.<sup>214</sup> Thus, in a diversity case, the FAA will preempt any state law that is different from any of its provisions, unless the parties have specifically agreed to those different rules.<sup>215</sup>

In state court, the analysis is more complicated. The Supreme Court has not definitively addressed the preemptive effect in state court of FAA sections other than §§ 1 and 2.<sup>216</sup> It has not held that, without an agreement to apply state arbitration law, other sections of the FAA preempt contrary state law in cases heard in state court.<sup>217</sup> The essential question on this topic is whether other sections of the FAA apply in state court.<sup>218</sup> If they do, they preempt contrary state laws, unless the parties have, within certain limits, agreed to apply those contrary state laws.<sup>219</sup> If the FAA provisions do not apply in state court, then they only preempt state laws that undermine the policies of the FAA.<sup>220</sup> This question is related to the

214. See *infra* Parts I.D.2.c, II.C.

215. 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.3, at 10:87 (“When [the parties] have not chosen state arbitration law, the court should, at the very least, exclude its application if it is even a slight hindrance to achieving the FAA’s goals and policies.”); Gross, *supra* note 142, at 16 (describing the issue of whether other FAA sections preempt state laws and acknowledging, “In federal court, the issue arises only if the parties’ arbitration agreement includes a choice-of-law clause designating a state’s law”); see also *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (“[B]ecause Congress has specified standards for confirming an arbitration award, federal courts must act pursuant to those standards and no others.”); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir.) (acknowledging that there is a “presumption that the FAA supplies the rules for arbitration”), *amended by* 289 F.3d 615 (9th Cir. 2002).

216. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (“[W]e have never held that §§ 3 and 4 . . . are nonetheless applicable in state court.”); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984) (“[W]e do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts.”); see also 1 MACNEIL ET AL., *supra* note 29, § 10.8.3.1, at 10:97 (“As to other sections [of the FAA], the Supreme Court has in certain respects left the issue of FAA applicability wide open.”); *Drahozal*, *supra* note 57, at 395 (noting that “[c]ourts have only begun to address preemption challenges to state laws regulating the arbitration process”); *Huber*, *supra* note 21, at 530 (arguing that the Court’s treatment of FAA preemption is “limited” and that “[o]nly sections 1 and 2 of the FAA preempt state law”).

217. See *Volt*, 489 U.S. at 477 & n.6; *Southland*, 465 U.S. at 16 & n.10.

218. See 1 MACNEIL ET AL., *supra* note 29, § 10.8.3.2, at 10:97 (phrasing the issue of preemption of other FAA sections in terms of those sections’ applicability); see also *Volt*, 489 U.S. at 476–77 (acknowledging that the argument that FAA sections cannot preempt state laws in state courts if those FAA sections do not apply in state court “is not without some merit”); *Huber*, *supra* note 21, at 530–31 (arguing that FAA sections other than § 2 cannot preempt state laws in state courts because the statutory language of those sections makes them inapplicable in state courts).

219. See 1 MACNEIL ET AL., *supra* note 29, § 10.8.3.2, at 10:97 (discussing preemption in state court and noting, “One thing remains clear, however: state law may not contravene FAA provisions”); cf. STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* § 2.46, at 125 (2d ed. 2007) (“Federal law preempts state grounds for vacatur not found in federal law.”).

220. See 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.4, at 10:93 (describing a three step analysis for determining whether, if a state court determines that a particular FAA provision does not apply in state court, that particular state law is nonetheless preempted). Step three asks, “Do those state rules limit or obstruct explicit FAA provisions . . . ?” *Id.* If they do, the state laws are preempted. *Id.*; see Nicholas R. Weiskopf & Matthew S. Mulqueen, *Hall Street, Judicial Review of Arbitral Awards, and Federal Preemption* 22 (St. John’s Univ.

question of the applicability of particular sections because the applicability question will often be analyzed with reference to the policies underlying the FAA.<sup>221</sup> Further, an initial determination that a particular FAA provision does not apply in state court followed by a subsequent determination that application of a related state law will undermine the policies of the FAA will result in application of the FAA provision.<sup>222</sup> With respect to § 10 of the FAA and state vacatur law, these issues are discussed in detail in Part II.<sup>223</sup> However, this section presents background information about the preemptive effect scholars and courts have attributed to FAA sections apart from § 2.

An FAA section can be applicable in state court in two ways. It may either apply by its terms, or it may apply as an “emanation[.]” from § 2.<sup>224</sup> A number of FAA sections, most notably §§ 3, 4, and 10, contain language directed at “courts of the United States,”<sup>225</sup> “United States district court[s],”<sup>226</sup> and “the United States court in and for the district wherein the award was made.”<sup>227</sup> By their terms, these sections do not apply in state court.<sup>228</sup> However, even if a section does not apply by its terms, it may still apply as an “emanation[.]” from § 2.<sup>229</sup> This idea describes a situation where § 2’s command that arbitration agreements be enforced cannot be fully honored without applying other FAA provisions.<sup>230</sup> Sections 3 and 4

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Sch. of Law Legal Studies Research Paper Series, Paper No. 09-0177, 2009), available at <http://ssrn.com/abstract=1473882> (making the assumption that state law governs postarbitration proceedings, but acknowledging that “there is potentially an additional layer of inquiry,” which is whether the state law conflicts with the policies of the FAA).

221. See Gross, *supra* note 142, at 29–31 (using the argument that most state vacatur laws do not undermine the policies of the FAA to support the conclusion that FAA § 10 does not apply in state court).

222. See 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.4, at 10:93. Professor Macneil and his coauthors acknowledge that this point—that an ostensibly inapplicable FAA provision is nonetheless applicable because a related state rule undermines the policies of the FAA—“may seem odd,” but, they continue, “no alternative exists once a state rule has been found to be anti-FAA and, hence, inapplicable.” *Id.*

223. See *infra* Part II.A.

224. See 1 MACNEIL ET AL., *supra* note 29, § 10.8.3.2, at 10:99; see also *Southland Corp. v. Keating*, 465 U.S. 1, 24 (1984) (O’Connor, J., dissenting) (noting that by requiring state courts to enforce § 2, the majority opinion essentially forces state courts to also enforce §§ 3 and 4 because of their relationship to § 2).

225. 9 U.S.C. § 3 (2006).

226. *Id.* § 4.

227. *Id.* § 10.

228. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (noting that §§ 3 and 4 “by their terms appear to apply only to proceedings in federal court”); Huber, *supra* note 21, at 530–31; see 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.4, at 10:89 (“[T]he Court still had to do something about the provisions that Congress simply could not have intended to apply to state courts.”).

229. 1 MACNEIL ET AL., *supra* note 29, § 10.8.3.2, at 10:97–99.

230. See *Southland Corp. v. Keating*, 465 U.S. 1, 24 (1984) (O’Connor, J., dissenting); Tom Cullinan, Note, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 416 (1998) (noting that state vacatur laws should be preempted, and the FAA thus applicable, when the state laws permit an expanded role for the judiciary in reviewing awards because that expanded role “undermines [§ 2’s] command of enforcement”).

provide an example. In order to effectively enforce an agreement to arbitrate, a court must stay a trial of an arbitrable issue and order the parties to arbitrate.<sup>231</sup> Other remedies—like damages for breach of contract—would be inadequate to ensure that the parties, in fact, did proceed to arbitration according to their agreement, as required by § 2.<sup>232</sup> Thus, when an FAA provision “speak[s] to the most essential dimensions of the commercial arbitration process,”<sup>233</sup> in the sense that it must be applied in order to give effect to § 2’s command of enforceability, then that FAA provision should, as an analytical matter, apply in state court.<sup>234</sup> Section 10’s relationship to § 2 in this regard is examined in detail in Part II.A.1.b and Part III.B.

However, even if a particular FAA provision does apply in a particular court, the parties may agree to arbitrate under different rules. The Supreme Court’s analysis of this issue is discussed next.

### c. Volt: *The Effect of a Choice of Law Clause*

Where the parties have included a provision in their agreement that state arbitration law will apply, the preemption analysis is different.<sup>235</sup> In those cases, courts may be justified in applying a state law that otherwise would be preempted by the FAA as long as the application of the state law does not undermine the policies of the FAA.<sup>236</sup> The Supreme Court articulated this principle in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*.<sup>237</sup>

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231. See *Southland*, 465 U.S. at 24 (O’Connor, J., dissenting) (“[T]he Court reads § 2 to require state courts to enforce § 2 rights using procedures that mimic those specified for federal courts by FAA §§ 3 and 4.”). Justice Sandra Day O’Connor thus concludes that “the Court has made § 3 of the FAA binding on the state courts.” *Id.* at 31 n.20; see also *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983) (“[S]tate courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act.”).

232. See *Southland*, 465 U.S. at 31–32 (O’Connor, J., dissenting) (noting that the majority’s opinion prevents state courts from providing any other remedy for breach of an agreement to arbitrate other than specific enforcement).

233. Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 75.

234. See *id.*

235. See *Drahozal*, *supra* note 57, at 411–12 (describing a situation where, under ordinary preemption principles, a state law would be preempted, but, because of the parties’ choice of arbitration law clause, it is not).

236. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 485 (1989) (Brennan, J., dissenting) (arguing that an agreement to arbitrate outside the FAA “would permit a state rule, otherwise preempted by the FAA, to govern [the] arbitration”); 1 MACNEIL ET AL., *supra* note 29, § 10.9.1, at 10:107; *Drahozal*, *supra* note 57, at 411–12.

237. 489 U.S. 468 (1989).

In *Volt*, the parties included a choice of law clause in their contract.<sup>238</sup> Their contract also contained an arbitration clause.<sup>239</sup> The California Court of Appeal interpreted the choice of law clause to mean that the parties intended California arbitration law to apply to their arbitration agreement.<sup>240</sup> California arbitration law, in turn, permitted a court to grant a stay of arbitration while a party to the arbitration litigated a related dispute with a third party.<sup>241</sup> The Supreme Court held that the California law was not preempted,<sup>242</sup> even though the FAA would have permitted the arbitration to proceed despite the related litigation.<sup>243</sup>

First, the Court deferred to the California Court of Appeal's interpretation of the choice of law clause.<sup>244</sup> The Court stated that the interpretation of the choice of law clause was a question of state contract law and therefore a matter reserved for the state courts.<sup>245</sup> Nonetheless, the Court considered—and rejected—two arguments for setting aside the California court's interpretation. First, the Court rejected the argument that interpreting the choice of law clause to incorporate California arbitration law would amount to a waiver of FAA § 4's "federally guaranteed right to compel arbitration."<sup>246</sup> The validity of such a waiver, the appellant argued, was a question of federal law that the Court should review.<sup>247</sup> The Court rejected this argument, reasoning that, contrary to the appellant's contention, the California court had not authorized a waiver of a federal right to compel arbitration.<sup>248</sup> Instead, the California court simply found that, by incorporating California arbitration law into the agreement, the parties agreed that there would be no right to compel arbitration in the circumstances contemplated by the California law.<sup>249</sup> Thus, the Court

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238. *Id.* at 470. The choice of law clause stated that the "Contract shall be governed by the law of the place where the Project is located." *Id.* (citation omitted) (internal quotation marks omitted).

239. *Id.*

240. *Id.* at 471–72.

241. *Id.* at 471.

242. *Id.* at 472–73 (affirming the California court's decision that the California law was not preempted).

243. *Id.* at 479.

244. *Id.* at 474–76 (rejecting arguments that the California court's interpretation of the choice of law clause should be set aside); Drahozal, *supra* note 57, at 405. This deference has been criticized. See Dean Witter Reynolds, Inc. v. Sanchez Espada, 959 F. Supp. 73, 83 (D.P.R. 1997).

245. See *Volt*, 489 U.S. at 474 ("[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review."). But see *id.* at 485 (Brennan, J., dissenting) (arguing that the question of whether parties have agreed to arbitrate according to state law is a question of federal law).

246. *Id.* at 474–75 (majority opinion) (quoting Appellant's Opening Brief at 17, *Volt* Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989) (No. 87-1318)).

247. *Id.* at 474.

248. See *id.* at 475.

249. *Id.*

concluded, there was no waiver of a right because there was “no such right in the first place.”<sup>250</sup>

The doctrine of incorporation by reference helps explain the Court’s reasoning here.<sup>251</sup> By finding that the parties had agreed that California arbitration law would govern their agreement, the California court essentially found that the parties made the provisions of California arbitration law provisions of their own agreement.<sup>252</sup> Thus, the parties in *Volt*, in effect, agreed that their arbitration would not proceed if there was related litigation pending between either party to the arbitration and a third party.<sup>253</sup> Section 4 of the FAA, which permits parties to apply for a court order compelling arbitration,<sup>254</sup> would not prohibit the parties from making such an agreement because § 4 only authorizes courts to compel arbitration “in the manner provided for in [the parties’] agreement.”<sup>255</sup> Under the particular circumstances in *Volt*, the agreement did not provide for arbitration.<sup>256</sup> Thus, “there [was] nothing for the FAA to preempt.”<sup>257</sup>

Second, the Court rejected the argument that the California court’s interpretation of the choice of law clause violated the “pro-arbitration” policy<sup>258</sup> of the FAA.<sup>259</sup> The Court reasoned that “[t]here is no federal policy favoring arbitration under a certain set of procedural rules.”<sup>260</sup> Therefore, the Court concluded, there is no harm in interpreting an agreement to incorporate a set of rules that “are manifestly designed to encourage resort to the arbitral process.”<sup>261</sup>

After upholding the California Court of Appeal’s interpretation of the choice of law clause, the Supreme Court addressed the preemption issue—that is, whether application of the California law, “in accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA.”<sup>262</sup> The Court held that it would not.<sup>263</sup> Emphasizing the parties’ freedom to shape their arbitration agreements,<sup>264</sup> the Court

250. *Id.*

251. *See* Drahozal, *supra* note 57, at 411.

252. *See id.* (“If the parties incorporate a state arbitration law by reference into their arbitration agreement, that law becomes part of their agreement . . .”).

253. *Volt*, 489 U.S. at 475.

254. *See* 9 U.S.C. § 4 (2006).

255. *See Volt*, 489 U.S. at 474–75 (alteration in original) (quoting 9 U.S.C. § 4) (holding that § 4 does not give parties the right to compel arbitration under any circumstances, only when their agreement provides for it).

256. *Id.* at 475.

257. Drahozal, *supra* note 57, at 412.

258. *See supra* note 94 and accompanying text.

259. *Volt*, 489 U.S. at 476.

260. *Id.*

261. *Id.*

262. *Id.* at 477–78.

263. *Id.* at 478.

264. *See id.* (“[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 . . .” (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Dean Witter Reynolds Inc. v.*

reasoned that enforcing an agreement that provides for “different rules than those set forth in the Act itself” would not undermine “the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.”<sup>265</sup> To the contrary, enforcing the parties’ agreement would serve to “give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.”<sup>266</sup> Thus, the Court held, the California law was not preempted.<sup>267</sup>

Parties’ freedom to choose state arbitration law, however, is not unlimited.<sup>268</sup> State laws will still be preempted if their application contravenes the policies and purposes of the FAA.<sup>269</sup> The extent of the FAA’s role in this context, however, is still uncertain.<sup>270</sup> One group of scholars, for example, suggests that *Volt* was intended to restrict parties’ freedom to choose state arbitration only to the extent that the chosen state’s entire body of arbitration law, as a whole, was hostile to arbitration.<sup>271</sup> The effect of an individual law on the policies of the FAA, they argue, was not intended to be the touchstone in determining the limitations on *Volt*.<sup>272</sup> Thus, a proper application of *Volt* should result in a situation where state law applies and the FAA is wholly excluded, unless the entire body of state arbitration law, as a whole, undermines the policies of the FAA.<sup>273</sup>

The Supreme Court, however, has suggested that this is not necessarily the case. In *Casarotto*, for example, the Court compared the state law at issue in *Volt* to the Montana notice requirement at issue in *Casarotto*.<sup>274</sup> Referring primarily to the individual rule at issue in *Volt* rather than to

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Byrd, 470 U.S. 213, 219 (1985); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)).

265. *Id.* at 479.

266. *Id.*

267. *See id.* at 478.

268. *See* 1 MACNEIL ET AL., *supra* note 29, § 10.9.2.2, at 10:114 (“*Volt* apparently does not give parties carte blanche to escape the FAA when it would otherwise apply.”); Chafetz, *supra* note 11, at 11–12 (discussing the limiting language of *Volt* and noting specifically that the Court’s use of the phrase “generally free” suggests that parties do not have “unfettered discretion to agree to any provision”).

269. 1 MACNEIL ET AL., *supra* note 29, § 10.9.2.2, at 10:114–115; Hayford, *supra* note 233, at 72.

270. *See* 1 MACNEIL ET AL., *supra* note 29, § 10.9.2.2, at 10:115 (noting that “this aspect of the case is murky”); Faith A. Kaminsky, Note, *Arbitration Law: Choice-of-Law Clauses and the Power To Choose Between State and Federal Law*, 1991 ANN. SURV. AM. L. 527, 528 (acknowledging that “the extent to which parties can opt out of the FAA remains unclear”).

271. *See* 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.3, at 10:85.

272. *See id.* § 10.9.2.2, at 10:115 (noting that, in *Volt*, “[t]he Court was not, therefore, deterred from enforcing a particular rule that in itself might be thought to undermine the FAA’s goals and policies”).

273. *See id.* § 10.8.2.3, at 10:85 (“Both that context and careful reading suggest that the Court was concerned only with circumstances where the FAA did not apply at all except as, at most, a kind of umbrella precluding application of an agreed-to state arbitration law with an overall hostility to arbitration.”).

274. *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996).

California's body of arbitration law as a whole,<sup>275</sup> the Court suggested that the particular Montana law at issue in *Casarotto* would have been preempted even if the parties agreed that Montana arbitration law would apply.<sup>276</sup> Thus, the possibility remains that even where the parties have agreed that state arbitration law will apply, a particular state law that conflicts with the policies of the FAA may be preempted, even if it is part of a body of arbitration law that, in total, is not hostile to arbitration.

Another limitation on parties' freedom to choose state arbitration law is the willingness of a reviewing court to interpret the agreement as actually incorporating state arbitration law.<sup>277</sup> The Supreme Court addressed this issue in *Mastrobuono v. Shearson Lehman Hutton, Inc.*<sup>278</sup> In *Mastrobuono*, an arbitrator awarded punitive damages to an investor in an action against the investor's broker.<sup>279</sup> The parties' agreement contained both a choice of law clause and an arbitration clause.<sup>280</sup> The choice of law clause provided that the contract "shall be governed by the laws of the State of New York."<sup>281</sup> New York law, however, prohibited arbitrators from awarding punitive damages.<sup>282</sup> The broker argued that the parties' choice of law clause incorporated the New York prohibition on punitive damages into the arbitration agreement;<sup>283</sup> therefore, under *Volt*, the award of punitive damages should be vacated because the arbitrator, in effect, rendered a decision on a claim that the parties did not agree to arbitrate.<sup>284</sup> The broker's argument succeeded in the lower courts.<sup>285</sup> The Supreme Court, however, reversed.<sup>286</sup>

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275. *See id.* ("The state rule examined in *Volt* determined only the efficient order of proceedings . . . . We held that applying the state rule would not 'undermine the goals and policies of the FAA' . . . ." (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989))).

276. 1 MACNEIL ET AL., *supra* note 29, § 10.9.2.2, at 10:115–:116 (discussing *Casarotto* and noting that "the clear implication of its language is that, even if the parties had chosen Montana arbitration law to govern, the Montana formality requirements would have conflicted with the FAA and hence would not have governed"); *see Casarotto*, 517 U.S. at 688 (comparing the laws at issue in *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University* and *Casarotto* and using that comparison to support the conclusion that the Montana law at issue in *Casarotto* was preempted).

277. *See Kaminsky, supra* note 270, at 528 (noting that courts have struggled to apply *Volt* because of the difficulties of discerning (1) the parties' intent with respect to the arbitration law they intended to govern their agreement and (2) the extent to which parties are permitted to opt out of the FAA).

278. 514 U.S. 52 (1995).

279. *Id.* at 53–55.

280. *See id.* at 58 n.2.

281. *Id.*

282. *Id.* at 55 ("[T]he New York Court of Appeals has decided that in New York the power to award punitive damages is limited to judicial tribunals and may not be exercised by arbitrators . . . ." (citing *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976))).

283. *Id.* at 56–57.

284. *See id.* at 58.

285. *Id.* at 54–55.

286. *Id.* at 55.

The Court acknowledged that parties could lawfully exclude punitive damages claims from their arbitration agreements.<sup>287</sup> However, the Court also acknowledged that, absent the parties' clear intent to do so, such claims would not be excluded and the FAA would preempt the New York rule to the contrary.<sup>288</sup> The question, then, was whether the parties intended the generic choice of law clause to incorporate New York arbitration law and its corresponding prohibition on punitive damages.<sup>289</sup> The Court held that the parties did not so intend.<sup>290</sup>

The Court held that the choice of law clause was best read as a declaration that New York law would govern the "rights and duties of the parties" in the underlying dispute.<sup>291</sup> The clause, the Court held, should not be read to include New York's "special rules limiting the authority of arbitrators."<sup>292</sup> The Court therefore found that the parties lacked the intent to exclude punitive damage claims and ordered enforcement of the award.<sup>293</sup> Other cases have similarly held that generic choice of law clauses are insufficient to incorporate state arbitration law into the parties' agreement.<sup>294</sup> Thus, if parties want state arbitration law to apply, their intent must be "abundantly clear."<sup>295</sup>

Much of the background information up to this point has described the principles of FAA preemption. These principles provide the context for the Supreme Court's decision in *Hall Street*. *Hall Street*, however, was not a case about preemption. Instead, it was a case about the proper interpretation of FAA §§ 9, 10, and 11 and their impact on clauses that purported to expand the grounds for judicial review of arbitration awards beyond the grounds enumerated in those sections. Nonetheless, the Court's interpretation of those FAA sections, which is discussed in detail in the next section, raises the distinct possibility that, under the principles discussed previously, state laws that take a contrary view are preempted.

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287. *See id.* at 57–58.

288. *Id.* at 59.

289. *See id.* at 58.

290. *Id.* at 61.

291. *Id.* at 63–64.

292. *Id.* at 64.

293. *Id.*

294. *See, e.g.,* *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001), *abrogated on other grounds by* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Coleman v. Assurant, Inc.*, 508 F. Supp. 2d 862, 868 (D. Nev. 2007); *L & L Kempwood Assocs., L.P. v. Omega Builders, Inc. (In re L & L Kempwood Assocs., L.P.)*, 9 S.W.3d 125, 127–28 (Tex. 1999); *see also* Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 556 (1994) ("[I]t is almost certainly a bad job of contractual interpretation to read a typical choice-of-law clause in an arbitration agreement as choosing to be governed by state arbitration law that would otherwise be preempted by the FAA.").

295. *UHC Mgmt. Co., Inc. v. Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998); *see* *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 131 (2d Cir. 1997); *Precision Press, Inc. v. MLP U.S.A., Inc.*, 620 F. Supp. 2d 981, 990 (N.D. Iowa 2009); *Lefkowitz v. HWF Holdings, LLC*, No. 4381-VCP, 2009 WL 3806299, at \*4 (Del. Ch. Nov. 13, 2009).

## E. Hall Street

In May 2007, the Supreme Court granted certiorari in *Hall Street*<sup>296</sup> to resolve a circuit split regarding the validity of expanded review provisions under the FAA.<sup>297</sup> Relying largely on the text of the FAA, the Court held that the FAA's grounds for review were exclusive and could not be expanded by private contract.<sup>298</sup>

*Hall Street* involved a dispute over a lease.<sup>299</sup> Mattel, the tenant, wanted to terminate the lease because the property was polluted.<sup>300</sup> When Mattel gave notice of its intent to terminate, the landlord, Hall Street Associates, objected.<sup>301</sup> Hall Street claimed that Mattel could not terminate the lease on its intended date.<sup>302</sup> Further, Hall Street claimed that the lease required Mattel to indemnify Hall Street for the costs of cleaning up the pollution.<sup>303</sup> The parties took their dispute to court, where the U.S. District Court for the District of Oregon found that Mattel was permitted to terminate the lease on the date it chose.<sup>304</sup> The court, however, did not decide the indemnification issue because the parties agreed to submit that issue to arbitration.<sup>305</sup> The court approved the parties' agreement and entered it as a court order.<sup>306</sup> The agreement contained the following expanded review provision: "The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."<sup>307</sup> After an award was rendered in favor of Mattel, Hall Street sought a court order vacating the award.<sup>308</sup> The arbitrator, Hall Street claimed, made a legal error.<sup>309</sup> Pursuant to the parties' agreement, the district court vacated the award and the arbitrator amended his decision.<sup>310</sup> The subsequent appeal process

296. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 127 S. Ct. 2875, 2875 (2007) (granting certiorari).

297. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 & n.5 (2008). The U.S. Courts of Appeals for the Ninth and Tenth Circuits comprised one side of the split, holding that parties may not expand the grounds for judicial review by contract. See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001). The other side of the split was comprised of the U.S. Courts of Appeals for the First, Third, Fifth, and Sixth Circuits; these courts held that parties could expand the grounds for review by contract. See *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005); *Jacada (Eur.), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005); *Roadway*, 257 F.3d at 288; *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995).

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

299. *Id.* at 1400.

300. See *id.*

301. See *id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 1400–01.

308. *Id.* at 1401.

309. *Id.*

310. *Id.*

eventually reached the Supreme Court.<sup>311</sup> There, Mattel argued that the FAA provided the exclusive grounds for vacating an arbitration award and that parties may not expand those grounds by contract.<sup>312</sup> The Supreme Court agreed.<sup>313</sup>

The Court began its analysis by addressing two of Hall Street's arguments in favor of permitting parties to expand judicial review by contract. Hall Street first argued that FAA § 10 was not exclusive because the Supreme Court itself had recognized grounds for review outside those enumerated in § 10.<sup>314</sup> Specifically, Hall Street argued, the Court recognized "manifest disregard of the law" as a ground for reviewing an award.<sup>315</sup> Therefore, FAA § 10 was not exclusive and parties could expand the grounds for review by private contract.<sup>316</sup> The Court disagreed on three grounds. First, the Court disagreed with Hall Street's logical "leap," which equated a judge's ability to expand the grounds for review through interpretation with the parties' ability to do the same by contract.<sup>317</sup> Second, the Court disagreed with Hall Street's definitive interpretation of "manifest disregard of the law" as a ground for review wholly outside the enumerated provisions.<sup>318</sup> Third, the Court noted that the language in *Wilko v. Swan*,<sup>319</sup> which Hall Street offered to support its position,<sup>320</sup> expressly prohibited the exact thing Hall Street was asking the Court to permit in this case: "general review for an arbitrator's legal errors."<sup>321</sup>

Hall Street then argued that its agreement to expand the grounds for judicial review should be enforced because the purpose of the FAA was to enforce parties' agreements to arbitrate.<sup>322</sup> The Court again disagreed.<sup>323</sup> The Court acknowledged that the parties' freedom to shape arbitral

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311. *See id.* (describing the winding route the case took to get to the Supreme Court).

312. *See id.*

313. *Id.*

314. *See id.* at 1403.

315. *See id.* Hall Street argued that the Court's previous decision in *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), recognized "manifest disregard of the law" as an independent ground for review. *See Hall St.*, 128 S. Ct. at 1403.

316. *See Hall St.*, 128 S. Ct. at 1403.

317. *See id.* at 1404.

318. *See id.* ("Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them."). The Court's treatment of the "manifest disregard" issue has led to a significant circuit split about the continued validity of the doctrine. *See generally* Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1 (2009), <http://www.yalelawjournal.org/content/view/817/20/>.

319. 346 U.S. 427, *overruled on other grounds by* *Rodriguez de Quijas*, 490 U.S. 477.

320. Hall Street Associates relied on the following language from *Wilko*: "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Wilko*, 346 U.S. at 436-37.

321. *Hall St.*, 128 S. Ct. at 1404.

322. *Id.*

323. *Id.*

proceedings was an important aspect of the arbitration process.<sup>324</sup> However, that freedom did not extend as far as Hall Street suggested; the text of the FAA, the Court said, prohibited such a result.<sup>325</sup>

Construing the statutory text, the Court reached two conclusions. First, the Court held that “the old rule of *ejusdem generis*”<sup>326</sup> did not permit supplementation of the enumerated grounds of § 10 to the point of authorizing vacatur for legal error.<sup>327</sup> Second, the Court held that the language of § 9, which provides that a court “must grant”<sup>328</sup> an order confirming an award unless the award is vacated according to § 10, was not a default provision that parties could alter by contract.<sup>329</sup>

The Court’s first conclusion relied on the substantial difference between legal and evidentiary errors on the one hand and the enumerated grounds for vacatur listed in § 10 on the other.<sup>330</sup> Section 10’s grounds for vacatur—“corruption,” “fraud,” “evident partiality,” and the like—deal with “egregious” and “outrageous conduct.”<sup>331</sup> Mistakes of law, the Court held, are simply not the same.<sup>332</sup> The Court supported its holding with reference to the canon of *ejusdem generis*.<sup>333</sup> The Court explained that when a statute contains a series of specific terms followed by a general term, the general term should be interpreted only to include “subjects comparable to the specifics it follows.”<sup>334</sup> Section 10, the Court continued, did not even contain such a general term.<sup>335</sup> Therefore, it would be unreasonable to interpret § 10 as allowing expansion to the point of legal error.<sup>336</sup> Because § 10 arguably lacks a textual basis for expansion altogether, allowing expansion to the point of legal error would go far beyond what is “comparable” to the enumerated terms.<sup>337</sup> Thus, § 10 forecloses such broad expansion.<sup>338</sup>

324. *Id.*

325. *Id.* at 1404–05. In dissent, Justice Stevens criticized the Court’s rejection of the freedom of contract argument as “flatly inconsistent with the overriding interest [of the FAA] in effectuating the clearly expressed intent of the contracting parties.” *Id.* at 1409 (Stevens, J., dissenting).

326. *Id.* at 1404 (majority opinion). *Ejusdem generis* can be defined as “[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.” BLACK’S LAW DICTIONARY 594 (9th ed. 2009).

327. *See Hall St.*, 128 S. Ct. at 1404–05.

328. 9 U.S.C. § 9 (2006).

329. *Hall St.*, 128 S. Ct. at 1405.

330. *See id.* at 1404–05.

331. *Id.* at 1404; *see* 9 U.S.C. § 10.

332. *Hall St.*, 128 S. Ct. at 1404–05.

333. *See id.*

334. *Id.* at 1404.

335. *See id.*

336. *Id.* In dissent, Justice Stevens referred to the majority’s application of *ejusdem generis* as “wooden.” *Id.* at 1409 (Stevens, J., dissenting).

337. *See id.* at 1404 (majority opinion).

338. *Id.* at 1406 (“[T]he statutory text gives us no business to expand the statutory grounds.”).

The Court's second conclusion relied on the text of § 9. The Court held that the language of § 9, which provides that a court "must grant"<sup>339</sup> an order confirming an award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11,"<sup>340</sup> was not a default provision that could be altered by private contract.<sup>341</sup> The language, the Court held, contained "nothing malleable," and "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies."<sup>342</sup> The Court then compared § 9 to § 5, which the Court described as "an example of what Congress thought a default provision would look like."<sup>343</sup> The two provisions, the Court suggested, simply could not both be read as default provisions.<sup>344</sup> Therefore, the Court held that § 10's grounds for vacatur could not be supplemented by contract.<sup>345</sup>

The Court's decision prized the finality of the arbitration process over the parties' autonomy in shaping that process.<sup>346</sup> In doing so, the Court recognized that the FAA "substantiat[ed] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."<sup>347</sup> The Court opined that a contrary result would "open[] the door to [] full-bore legal and evidentiary appeals . . . and bring arbitration theory to grief in post-arbitration process."<sup>348</sup>

In allowing finality to trump party autonomy, however, the Court did not overrule its prior decision in *Dean Witter Reynolds, Inc. v. Byrd*.<sup>349</sup> In *Byrd*, the Court ordered arbitration of an investor's state law claims against his broker, even though it meant that the investor's related federal claims (which the broker assumed were not arbitrable) would have been resolved separately in federal court.<sup>350</sup> The inefficiency of this result, the Court said, was outweighed by the need to honor the parties' autonomy in agreeing to

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339. *Id.* at 1405.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* Section 5 provides, "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein . . . the court shall designate and appoint an arbitrator or arbitrators . . ." 9 U.S.C. § 5 (2006).

344. *See Hall St.*, 128 S. Ct. at 1405.

345. *See id.* at 1406.

346. Reuben, *supra* note 2, at 1130; *see Hall St.*, 128 S. Ct. at 1404–05.

347. *Hall St.*, 128 S. Ct. at 1405. The Court viewed the FAA's limited review provisions as a tradeoff for the expedited treatment of awards. Reuben, *supra* note 2, at 1124; *see Hall St.*, 128 S. Ct. at 1402.

348. *Hall St.*, 128 S. Ct. at 1405.

349. 470 U.S. 213 (1985); *see Hall St.*, 128 S. Ct. at 1405–06; Reuben, *supra* note 2, at 1131.

350. *Byrd*, 470 U.S. at 217.

arbitrate.<sup>351</sup> Thus, the Court held, when the values of efficiency and autonomy conflict, the result should be resolved in favor of autonomy.<sup>352</sup>

This idea could be construed to mean that the Court in *Hall Street* should have honored the parties' freedom to expand the grounds for judicial review even though the result would have been inefficient—that is, it would have taken more time and resources to resolve the dispute.<sup>353</sup> However, the value of efficiency, which the Court subordinated to party autonomy in *Byrd*, and the value of finality, which the Court refused to subordinate in *Hall Street*, are distinct.<sup>354</sup> The distinction helps explain the result in *Hall Street*.

In *Hall Street*, finality trumped autonomy because a contrary result would endanger the institution of arbitration itself.<sup>355</sup> In *Byrd*, there was no such danger. There, the claim of inefficiency was a generalized one; it claimed that ordering arbitration would be inefficient for the system (that is, the parties, courts, and arbitrators) as a whole.<sup>356</sup> It was not a claim that the institution of arbitration itself would be damaged by forcing the parties to live up to their agreement to arbitrate.<sup>357</sup> Therefore, the result in *Byrd* is not contrary to the result in *Hall Street* because both decisions were, in effect, preserving the values of the arbitration process itself.<sup>358</sup> This conclusion is important. To the extent that *Hall Street's* recognition of the primacy of finality over autonomy reflects Congress's vision of the arbitration process, it will inform the scope of preemption of state laws that take a contrary view.

351. *See id.* at 221.

352. *See id.*

353. *See* Reuben, *supra* note 2, at 1131–33.

354. Professor Richard C. Reuben describes the distinction: “[f]inality is about the degree to which a decision is reviewable, while efficiency is about whether the process saves the parties and the system time, money, and other resources. . . . Finality fosters efficiency, but it is not the same as efficiency.” *Id.* at 1131.

355. *Id.*; *see* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008); THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL* 58–59 (2d ed. 2009) (arguing that expanded review “would deprive the arbitral process of its autonomy and injure the institution of private adjudication”).

356. Reuben, *supra* note 2, at 1131–33.

357. The threat posed by laws that permit contractually expanded review is largely the likelihood that expanded review provisions will become common (or even expected) in drafting arbitration agreements, thus depriving arbitration itself of finality. *See* Hayford, *supra* note 233, at 84–85 (noting that a legally sanctioned authorization to include expanded review provisions “would propel large numbers of attorneys to put review provisions in arbitration agreements, as a safe harbor in order to avoid manifold malpractice claims by their clients who lose in arbitration”); Alan Scott Rau, *Fear of Freedom*, 17 *AM. REV. INT’L ARB.* 469, 509–11 (2008). Professor Stephen L. Hayford continues, “Inclusion of opt-in provisions in arbitration agreements would virtually guarantee that, in cases of consequence, losers will petition for vacatur, thereby robbing commercial arbitration of its finality and making the process far more complicated, time consuming, and expensive.” Hayford, *supra*, at 85.

358. Reuben, *supra* note 2, at 1131–33. In *Dean Witter Reynolds, Inc. v. Byrd*, the Court preserved the value of enforceability of arbitration agreements. In *Hall Street*, the Court preserved the value of finality. *See id.*

The *Hall Street* Court, however, was careful to limit its holding to the FAA. In part IV of its opinion, the Court stated, “[W]e do not purport to say that [§§ 10 and 11] exclude more searching review based on authority outside the [FAA] as well.”<sup>359</sup> In doing so, the Court suggested that it did not intend to categorically foreclose the possibility of expanded judicial review in all circumstances.<sup>360</sup> The Court noted that “[t]he FAA is not the only way into court for parties wanting review of arbitration awards.”<sup>361</sup> The Court then identified three non-FAA avenues that might allow parties to obtain expanded review.<sup>362</sup> Those were (1) common law,<sup>363</sup> (2) state statutory law,<sup>364</sup> and (3) a court’s authority to manage its cases under Federal Rule of Civil Procedure 16.<sup>365</sup> The Court, however, decided nothing about the viability of these alternatives.<sup>366</sup> The viability of the second alternative—state statutory law—is the subject of this Note. Although the Court did not decide anything about the alternatives, it did remand the case in light of them.<sup>367</sup> The Court suggested that the third alternative in particular—a court’s authority to manage its docket—might be available because the *Hall Street* parties’ arbitration agreement was entered as a court order in the course of litigation.<sup>368</sup> To date, however, the lower courts have not decided this issue. Thus, barring a lower court finding to the contrary, the expanded review provision in the *Hall Street* parties’ arbitration agreement is invalid.

The Court’s suggestion that parties may be able to obtain expanded review by relying on state arbitration law would be wholly empty if no states in fact permitted such expanded review. That, however, is not entirely the case. The next section briefly examines the availability of expanded review under current state arbitration law regimes.

#### F. State Law on Vacatur

All states have their own arbitration statutes.<sup>369</sup> Many of these statutes are modeled after the Uniform Arbitration Act (UAA) or the Revised Uniform Arbitration Act (RUAA).<sup>370</sup> Both of these uniform acts are similar

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359. *Hall St.*, 128 S. Ct. at 1406.

360. See Reuben, *supra* note 2, at 1157 (“It hardly seems that the Court would have opened the door to the state law and inherent powers approaches if the Court believed they were preempted.”).

361. *Hall St.*, 128 S. Ct. at 1406.

362. *Id.* at 1406–07.

363. *Id.* at 1406.

364. *Id.*

365. *Id.* at 1407.

366. *Id.* at 1406–07.

367. *Id.* at 1407–08.

368. *Id.* at 1406–08.

369. Reuben, *supra* note 2, at 1152.

370. *Id.*; Gross, *supra* note 142, at 5 & n.19; see Uniform Law Commissioners, A Few Facts About the... Uniform Arbitration Act (2000), [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-aa.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp) (last visited Feb. 19, 2010) (noting that forty-

to the FAA in that neither one expressly authorizes parties to expand the grounds for judicial review by contract.<sup>371</sup> Further, a number of states have adopted *Hall Street's* approach when interpreting their own arbitration statutes.<sup>372</sup> These states have held that their own statutes, like the FAA, do not permit parties to expand the grounds for judicial review by contract.<sup>373</sup> However, a small number of states do permit parties to expand the grounds for judicial review; two such states are New Jersey and California.<sup>374</sup> In New Jersey, a statute explicitly authorizes parties to expand the scope of judicial review by contract.<sup>375</sup> In California, the California Supreme Court interprets the California Arbitration Act to permit expanded review, although the statute does not explicitly provide for it.<sup>376</sup> California's approach is particularly relevant because it was reaffirmed five months after the U.S. Supreme Court decided *Hall Street*.<sup>377</sup> In *Cable Connection, Inc. v. DIRECTV, Inc.*,<sup>378</sup> the California Supreme Court addressed the preemption concerns raised by *Hall Street* and rejected them.<sup>379</sup> The California court's reasoning will be presented and analyzed in Part II. To the extent that parties desiring expanded review of their arbitration awards will seek to invoke the arbitration laws of these states, an understanding of the likely preemptive scope of FAA § 10 on those state laws is critical.

This Part has discussed the background information necessary to understand the conflict surrounding the availability of expanded review under state arbitration law in light of *Hall Street*. Part II discusses the arguments for and against the proposition that the FAA's vacatur provisions preempt state laws that permit parties to expand the grounds for review by contract.

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nine states adopted the original UAA and providing a list of thirteen states that have adopted the RUAA).

371. Reuben, *supra* note 2, at 1152; see UNIF. ARBITRATION ACT (2000) § 23 cmt. B, 7 U.L.A. 79–83 (2009); UNIF. ARBITRATION ACT (1956) § 12(a), 7 U.L.A. 514.

372. See *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 683 S.E.2d 40, 44–45 (Ga. Ct. App. 2009); *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, No. W2008-01366-COA-R3-CV, 2009 Tenn. App. LEXIS 189, at \*12–15 (Tenn. Ct. App. Apr. 23, 2009); *Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795, 798–99 (Tex. App. 2008).

373. See, e.g., *Quinn*, 257 S.W.3d at 798–99.

374. Connecticut and Rhode Island may also permit such expansion. See *Garrity v. McCaskey*, 612 A.2d 742, 745 (Conn. 1992) (“When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties’ agreement.”); *Bradford Dyeing Ass’n v. J. Stog Tech GmbH*, 765 A.2d 1226, 1233 (R.I. 2001) (assuming, but not deciding, that Rhode Island law permits parties to expand the grounds for judicial review of arbitration awards by contract).

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

376. See *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 605 (Cal. 2008).

377. See *id.*

378. 190 P.3d 586.

379. *Id.* at 597–99.

## II. DOES THE FAA PREEMPT STATE LAWS THAT PERMIT CONTRACTUALLY EXPANDED REVIEW?

This part examines the arguments for and against the proposition that § 10 of the FAA, as interpreted in *Hall Street*, preempts state arbitration laws that otherwise would permit parties to expand the grounds for judicial review by contract. First, this part examines the arguments for and against preemption when the parties have brought an action to vacate an award in state court. In that context, it examines the conflict surrounding two issues: (1) whether § 10 is applicable in state courts and (2) whether a state law permitting expanded judicial review conflicts with the policies and purposes of the FAA. Second, it addresses the preemption analysis in federal court. Third, it addresses the effect that the parties' inclusion of a choice of arbitration law clause will have on the analysis.

### A. Preemption in State Court Proceedings

#### 1. The Applicability of § 10 in State Court

The conflict surrounding § 10's applicability in state court generally revolves around two issues: (1) whether the plain language of § 10 compels the conclusion that it is only applicable in federal court and (2) whether § 10 is best characterized as a procedural rule from which state courts are free, within certain limits, to deviate or as a substantive principle by which they are bound.<sup>380</sup>

##### a. *The Language of § 10*

Opponents of § 10's applicability in state court argue that the plain language of the statute prevents its application in state courts.<sup>381</sup> Section 10 provides that "the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration."<sup>382</sup> Section 10 is directed specifically to the U.S. district court—a federal court.<sup>383</sup> Therefore, the section should be inapplicable in state court proceedings.<sup>384</sup> Thus, state

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380. As discussed in Part I, if an FAA section is applicable in state court, the parties must comply with it, notwithstanding any state law to the contrary; thus, if § 10 applies in state court, it will preempt state laws that permit expanded review. *See supra* notes 218–22 and accompanying text.

381. Gross, *supra* note 142, at 31 ("[T]he precise language of section 10 strongly suggests it applies only in federal court."); Huber, *supra* note 21, at 530–31 ("To even consider the language of the statute is to doom arguments that the FAA provides the standards for judicial review of arbitration awards in state court."); *see Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 597 (Cal. 2008) (discussing the language of §§ 10 and 11).

382. 9 U.S.C. § 10(a) (2006).

383. Huber, *supra* note 21, at 531.

384. *Id.* ("Congress did not purport to address similar review by state courts."); *see Cable Connection*, 190 P.3d at 598 (stating that "[n]othing in the legislative reports and debates evidences a congressional intention that postaward and state court litigation rules be preempted so long as the basic policy upholding the enforceability of arbitration agreements

courts should be free to apply state vacatur law, even if it is different from the FAA.<sup>385</sup> Other sections of the FAA contain language similar to § 10,<sup>386</sup> and the Supreme Court has failed to hold that those analogous sections are applicable in state court.<sup>387</sup> Moreover, Congress never intended § 10 to apply in state court.<sup>388</sup>

While this last point is very likely true as a historical matter, it applies equally to all sections of the FAA—Congress never intended any of them to apply in state court.<sup>389</sup> Congress envisioned the FAA as a statutory scheme applicable solely in the federal courts.<sup>390</sup> Congress, however, also envisioned the FAA as a unitary statute that would apply in its entirety when it applied at all.<sup>391</sup> But after *Southland* and its progeny, the Supreme Court abandoned Congress's vision of an exclusively federal statute by making § 2 unquestionably applicable in state court.<sup>392</sup> In doing so, however, the Court failed to decide what should become of Congress's vision of a unitary statute. That vision, according to at least one set of commentators, could, and should, be realized.<sup>393</sup> A Supreme Court

remained in full force and effect.” (quoting *Siegel v. Prudential Ins. Co. of Am.*, 79 Cal. Rptr. 2d 726, 739 (Cal. Ct. App. 1998)); *Trombetta v. Raymond James Fin. Servs., Inc.*, 2006 PA Super. 229, ¶ 66, 907 A.2d 550, 568–69.

385. See Huber, *supra* note 21, at 531.

386. *Cable Connection*, 190 P.3d at 597 (noting the similarities in language between §§ 10 and 11 and §§ 3 and 4); Gross, *supra* note 142, at 31 (noting the similar language between § 10 and other sections of the FAA).

387. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 & n.6 (1989) (noting that the Court has “never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court . . . are nonetheless applicable in state court,” but assuming for purposes of the case that those sections could be applicable in state court); *Cable Connection*, 190 P.3d at 597. *But see* *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 & n.34 (1983) (stating that “state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act” and noting that, despite the language of § 3, “state courts have almost unanimously recognized that the stay provision of § 3 applies to suits in state as well as federal courts”); 1 MACNEIL ET AL., *supra* note 29, § 10.8.3.2, at 10:97 (noting that, for practical purposes, §§ 3 and 4 apply in state court).

388. See *supra* note 39 and accompanying text.

389. See *supra* notes 39, 135 and accompanying text.

390. See *supra* note 39 and accompanying text.

391. 1 MACNEIL ET AL., *supra* note 29, § 9.3, at 9:28 (noting that “on its face the FAA is an integrated, unitary statute dealing with arbitration” and “its words contain not a hint that Congress intended it to be applied piecemeal”); MACNEIL, *supra* note 26, at 106 (“There is thus no foundation for a belief that the A.B.A. and Congress had any intention of enacting anything but an integrated statute, either applicable in its entirety to any given proceeding in any given court or not at all.”); see *Commercial Metals Co. v. Balfour, Guthrie, & Co.*, 577 F.2d 264, 268 (5th Cir. 1978) (“The Arbitration Act was enacted as a single, comprehensive statutory scheme.”).

392. See *supra* notes 134–36 and accompanying text.

393. See 1 MACNEIL ET AL., *supra* note 29, § 9.3, at 9:34 (“The Court should take the first opportunity to state clearly what the framers of the FAA intended: The FAA is a unitary act, where any of it governs, all of it governs.”). Some state courts have impliedly taken this view by concluding that, without more, the full FAA should apply when an agreement involves interstate commerce. See *Lefkowitz v. HWF Holdings, LLC*, No. 4381-VCP, 2009 WL 3806299, at \*4 (Del. Ch. Nov. 13, 2009) (noting that the FAA applies to agreements involving interstate commerce and preempts state arbitration laws unless parties clearly

decision holding that all sections of the FAA apply in state court when interstate commerce is involved would produce just that result and preserve at least part of the FAA Congress intended to create.<sup>394</sup> An examination of the structure of the FAA supports the notion that § 10, as part of the unitary FAA, should apply in state court.

The structure of the FAA suggests that no individual provision was meant to apply without the others.<sup>395</sup> Individual sections, when read in isolation, appear to create an independent basis for federal courts' jurisdiction.<sup>396</sup> Such readings, however, are in direct conflict with the settled rule that the FAA does not provide such a basis for jurisdiction.<sup>397</sup> For example, § 10, when read without reference to the rest of the FAA, could reasonably be interpreted to mean that any party to any arbitration agreement could seek vacatur in federal court, as long as an arbitration award has been rendered.<sup>398</sup> That reading, however, is inaccurate. For parties to seek vacatur in federal court, an independent basis for jurisdiction is required.<sup>399</sup> Therefore, under this line of reasoning, § 10 should not be divorced from § 2 because § 2 provides the context for § 10's applicability, which includes the state court context.<sup>400</sup> A contrary conclusion would undermine the intent of the framers of the FAA.<sup>401</sup> Furthermore, "the very wording" of other FAA sections supports the conclusion that the FAA was intended to be applied as a unitary whole.<sup>402</sup> Thus, when § 2 applies—

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intend state arbitration law to apply); *WMS, Inc. v. Weaver*, 602 S.E.2d 706, 710 (N.C. Ct. App. 2004) (concluding that because the agreement involved interstate commerce, "[t]he FAA, therefore, controls," and making no other mention that state arbitration law might apply); *see also Allen & Co. v. Shearson Loeb Rhoades, Inc.*, 489 N.Y.S.2d 500, 502 (App. Div. 1985), *aff'd*, 490 N.E.2d 850 (N.Y. 1986).

394. *See* 1 MACNEIL ET AL., *supra* note 29, § 9.3, at 9:34.

395. *See id.* § 9.3, at 9:27.

396. *Id.*; *see Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956) (rejecting the argument that § 3 of the FAA covers all arbitration agreements, even those that do not involve interstate commerce).

397. *See supra* notes 42–46 and accompanying text.

398. *See* 1 MACNEIL ET AL., *supra* note 29, § 9.3, at 9:27 & n.5.

399. *See supra* notes 42–46 and accompanying text.

400. *See* MACNEIL, *supra* note 26, at 106 (arguing that "any idea that section 2 is somehow independent of the remaining sections, that it creates its own system of independent regulation separate from the remaining sections is a historical absurdity"). Professor Macneil bases his argument for a unitary FAA largely on his conclusion that the FAA was never intended to apply at all in state court and that, therefore, when it was applicable in federal court (because of the presence of interstate commerce) it would apply in its entirety. *See id.* at 106–07. Nonetheless, he advocates for the unitary approach, even in state court. *See* 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.2, at 10:76–81 (setting out arguments in favor of FAA preemption of all state law).

401. *See Commercial Metals Co. v. Balfour, Guthrie, & Co.*, 577 F.2d 264, 268–69 (5th Cir. 1978); *see also Bangor & Aroostook R.R. Co. v. Me. Cent. R.R. Co.*, 359 F. Supp. 261, 263 (D.D.C. 1973) (acknowledging that the FAA was enacted as a unitary statute); S. REP. NO. 68-536, at 2 (1924) (suggesting the unitary applicability of the FAA by noting that § 1 defines the contracts "to which the bill will apply"). *But see Drahozal*, *supra* note 135, at 168–69 (arguing that a narrower approach to FAA preemption would be consistent with the framers' intent).

402. 1 MACNEIL ET AL., *supra* note 29, § 9.3, at 9:28 (offering an example of how § 9 would have been written if it were "intended to stand alone").

whether in state court or federal—§ 10, and its prohibition on expanded review, should also apply. This would give effect to the FAA’s role as a “single, comprehensive statutory scheme.”<sup>403</sup>

However, this is not precisely the path courts have taken. After *Southland*, courts have divided FAA provisions into two categories: substantive provisions, which govern in state court, and procedural provisions, which, unless their application undermines the policies of the FAA, do not.<sup>404</sup> The next section examines the debate over § 10’s place in that dichotomy.

#### b. Section 10: Procedural or Substantive?

The terms “substantive” and “procedural” can mean different things in different contexts.<sup>405</sup> In the context of the FAA, the distinction divides provisions that apply in state court from those that do not. The distinction, however, is not without some murkiness.<sup>406</sup> Substantive FAA provisions govern in state court directly.<sup>407</sup> Procedural FAA provisions do not govern in state court at all, unless application of an analogous state procedural provision would undermine the policies of the FAA.<sup>408</sup> While there is no authoritative definition of either term in the context of the FAA, they can generally be categorized as follows. A substantive provision of the FAA is one that “create[s], define[s] and regulate[s] rights.”<sup>409</sup> A procedural provision is one that “prescribe[s] the manner in which arbitration is to be conducted.”<sup>410</sup> The murkiness arises when the FAA’s core substantive

403. *Commercial Metals*, 577 F.2d at 268.

404. See *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 597 (Cal. 2008); *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 793 (Mo. Ct. App. 1998); Kaminsky, *supra* note 270, at 528 (noting the difficulty of applying *Volt* because of the distinction between “substantive” and “procedural” provisions).

405. See *Guar. Trust Co. v. York*, 326 U.S. 99, 108 (1945).

406. See *infra* note 411 and accompanying text.

407. See *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008) (noting that the FAA “calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration”).

408. See *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 977 P.2d 769, 773–74 (Ariz. 1999) (“Each state is free to apply its own procedural requirements so long as those procedures do not defeat the purposes of the act.”); *Wells v. Chevy Chase Bank*, F.S.B., 768 A.2d 620, 627 (Md. 2001) (noting that state “procedural rules govern appeals, unless those rules undermine the goals and principles of the FAA”).

409. *Schwartz*, 969 S.W.2d at 795 (applying the FAA’s vacatur provisions as substantive federal law). Substantive FAA provisions may also be described as those whose application is “outcome determinative” in the sense that if they are not applied, state law will not require arbitration. Thomas A. Diamond, *Choice of Law Clauses and Their Preemptive Effect upon the Federal Arbitration Act: Reconciling the Supreme Court with Itself*, 39 ARIZ. L. REV. 35, 62–63 (1997).

410. Diamond, *supra* note 409, at 61. Professor Diamond offers the following examples of procedural provisions: “[r]ules concerning the process for compelling or commencing arbitration, selection of the arbitrators, the scope of discovery, the manner in which the hearing is conducted, and the process for confirming an award . . .” *Id.* at 61–62 (footnotes omitted). Although his mention of “the process for confirming an award” seems to implicate the grounds for vacatur in § 10, he describes this element in terms of when a timely motion

provision—§ 2—cannot be given effect without applying other provisions that fit the description of procedural provisions.<sup>411</sup> Thus, on the question whether § 10 is a substantive provision applicable in state court or a procedural provision that is not, the answer, at its core, will turn largely on § 10's relationship to § 2 in light of *Hall Street*.

The argument that § 10 is a procedural provision that should not apply in state court rests on the assertion that the law of vacatur “does not challenge the determination that the parties had an enforceable arbitration agreement.”<sup>412</sup> The application of vacatur provisions does not somehow render an arbitration agreement invalid.<sup>413</sup> Instead, “[v]acatur law prescribes the very narrow grounds on which a court will second-guess the arbitrators’ decision.”<sup>414</sup> Thus, application of § 10 in state court is not necessary to give effect to § 2's substantive command that arbitration agreements be enforced.<sup>415</sup> The two sections, moreover, address different questions. Section 2 asks whether the parties, having agreed to arbitrate, should be required to do so. Section 10, on the other hand, asks whether parties, having already arbitrated, should be permitted to have the court set aside an arbitrators’ award. A positive response to the second question in no way affects the answer to the first question.<sup>416</sup> Therefore, unless application of a state vacatur provision undermines the policies of the FAA, state courts should be free to apply state vacatur law, including state vacatur law that permits contractually expanded review.<sup>417</sup>

One may argue, however, that the above conclusion—that § 10's vacatur provisions do not affect the command of § 2—is not categorically

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must be made to seek vacatur, not in terms of the grounds upon which a court may vacate the award. *See id.* at 62 & n.223.

411. This situation implicates the applicability of FAA sections based on “emanations” from § 2. *See supra* notes 224–30 and accompanying text.

412. Gross, *supra* note 142, at 32; *see also* *Atl. Painting & Contracting, Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846–47 (Ky. 1984) (“The federal Arbitration Act covers both substantive law *and* a procedure for federal courts to follow where a party to arbitration seeks to enforce or vacate an arbitration award in federal court. The procedural aspects are confined to federal cases.”).

413. Gross, *supra* note 142, at 32; *see* *Strausbaugh v. H & R Block Fin. Advisors, Inc.*, No. 2005-CA-001083-MR, 2007 WL 3122257, at \*4 (Ky. Ct. App. Oct. 26, 2007) (characterizing vacatur provisions as procedural because “while [they] may affect the enforcement of an arbitration *award*, [they] in no way impact[] the enforceability of the arbitration agreement”).

414. Gross, *supra* note 142, at 32.

415. *See id.* (“Because vacatur is a courtroom procedure providing for limited judicial review of the arbitration process, preemption of rules limiting the enforcement and interpretation of a contract is inapposite.” (citing *Diamond*, *supra* note 409, at 61–62)); *see also* *Trombetta v. Raymond James Fin. Servs., Inc.*, 2006 PA Super. 229, ¶ 63, 907 A.2d 550, 568 (arguing that vacatur provisions are procedural and that they apply only “*after* the underlying arbitration agreement already has been enforced in accordance with the FAA”).

416. *See* Gross, *supra* note 142, at 32.

417. Huber, *supra* note 21, at 536 (arguing that “individual states may choose to adopt a different approach to contractual provisions regarding judicial review than that taken in the FAA (as interpreted by the Supreme Court [in *Hall Street*])”).

accurate.<sup>418</sup> One purpose of vacatur laws is to ensure that the arbitration process is brought to a conclusion.<sup>419</sup> To effectively accomplish that goal, vacatur laws should be narrow enough to avoid providing parties with “a vehicle for easily escaping the arbitration bargain.”<sup>420</sup> Vacatur laws achieve this goal by carefully defining the allocation of power between courts and arbitrators.<sup>421</sup> In doing so, vacatur laws provide a “clear parallel” to laws—like § 2—relating to the enforcement of agreements to arbitrate because they both define the “role of the judiciary in holding parties to [arbitration] agreements.”<sup>422</sup> Laws that limit the arbitrability of claims shift authority away from arbitrators and into courts; similarly, laws that permit broad or “far reaching”<sup>423</sup> judicial review of awards achieve the same result—that is, arbitrators are denied “the power to resolve a particular dispute or grant a particular remedy.”<sup>424</sup> Thus, laws that prevent this result are best characterized as substantive because they serve to ensure the “effectuation” of the arbitration process, both in its commencement and in its culmination.<sup>425</sup> Section 10 plays precisely this role and, according to this line of reasoning, should apply in state court as a substantive piece of federal arbitration law.<sup>426</sup>

The above argument, however, fails to consider that a state law authorizing expanded review is not the same as a state law generally providing for broader review than the FAA in all situations. The second

418. See Gross, *supra* note 142, at 32 (arguing that a vacatur law should be characterized as substantive—and thus affecting § 2 rights—only where it authorized broad review of an award).

419. Hayford, *supra* note 233, at 81.

420. *Id.*

421. Gross, *supra* note 142, at 32; see *Am. Tel. & Tel. Co. v. United Computer Sys., Inc.*, 7 F. App'x 784, 787 (9th Cir. 2001) (noting that vacatur law “affects the allocation of authority between courts and arbitrators”); *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 794–95 (Mo. Ct. App. 1998).

422. Hayford, *supra* note 233, at 75.

423. *Id.* at 81.

424. Diamond, *supra* note 409, at 62.

425. Hayford, *supra* note 233, at 75 (arguing that vacatur “concern[s] effectuation of the result of the arbitration process and thereby serve[s] to effectively culminate enforcement of contractual agreements to arbitrate”); see Cullinan, *supra* note 230, at 416 (connecting the concept of the scope of judicial review of awards to the concept of the enforceability of arbitration agreements and concluding that the FAA “should prevent state law expansion of the courts’ role in judicial review, because displacing finality undermines the FAA’s command of enforcement” (citing Zhaodong Jiang, Note, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 527–28 (1990))).

426. See Rau, *supra* note 357, at 503–04 (describing a court’s obligation to confirm an award as “a matter of federal substantive arbitration policy”); see also *DCR Constr., Inc. v. Delta-T Corp.*, No. 8.09-CV-741-T-27AEP, 2009 WL 5173520, at \*4 (M.D. Fla. Dec. 30, 2009) (“To the extent the award is not vacated, modified, or corrected, the FAA provides parties with a substantive right to a judgment confirming the award.”). At least one scholar argues that while the standard for judicial review of an arbitration award is substantive, that characterization serves to justify application of state law standards of review in federal court because of *Erie* principles. See John J. Barceló III, *Expanded Judicial Review of Awards After Hall Street and in Comparative Perspective*, in *RESOLVING INTERNATIONAL CONFLICTS: LIBER AMICORUM TIBOR VÁRADY 1*, 14–15 (Peter Hay et al. eds., 2009). This argument is criticized in Part III. See *infra* notes 519–20 and accompanying text.

type of law “would clearly be preempted;” the first, one commentator argues, would not.<sup>427</sup> He argues that a state law provision permitting expanded review “is not, in the relevant sense, a state law ground for vacating an arbitration award. Rather, it is the parties’ ground for vacating an arbitration award.”<sup>428</sup> Therefore, it should not be preempted. His argument, however, rests on an interpretation of § 10 that, after *Hall Street*, is no longer valid—that is, that § 10 is a default provision around which parties are free to contract.<sup>429</sup> *Hall Street* unequivocally rejected the argument that the FAA’s grounds for review are default provisions alterable by contract.<sup>430</sup> The commentator’s argument therefore fails. Moreover, a wide variety of other commentators argue, often without much analysis, that the FAA’s grounds for review preempt different state law grounds.<sup>431</sup>

The foregoing discussion of § 10’s applicability in state court implicates a related piece of the preemption analysis—that is, whether application of a state law permitting expanded review would undermine the policies of the FAA. If it would, then FAA § 10 will preempt the competing state law even if § 10 is not directly applicable in state courts.<sup>432</sup>

## 2. Section 10 and the Policies of the FAA

### a. *Expanded Review Does Not Undermine the Policies of the FAA*

The primary purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms.<sup>433</sup> Specifically, the FAA embodied Congress’s intent to address judicial hostility toward executory arbitration agreements.<sup>434</sup> Therefore, one may argue that a state law

427. Stephen J. Ware, “Opt-In” for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act, 8 AM. REV. INT’L ARB. 263, 270 (1997).

428. *Id.*

429. *See id.* (arguing that the “notion” that state laws providing for contractually expanded review are preempted “rests on the view that the federal grounds for vacating are a mandatory rule, *i.e.*, the parties may not, by contract, add additional grounds”).

430. *See supra* Part I.E.

431. *See* CARBONNEAU, *supra* note 355, at 58 (arguing, post-*Hall Street*, that “[i]f a form of review is unacceptable under the federal law, it should likewise be unavailable under state statutory regimes”); 1 MACNEIL ET AL., *supra* note 29, § 10.8.3.2, at 10:97 (“[A] state court vacating an award on grounds other than those allowed under the FAA would be violating the principles of *Perry v. Thomas* . . .”); WARE, *supra* note 219, § 2.46, at 125 (“Federal law preempts state grounds for vacatur not found in federal law.”); Ware, *supra* note 427, at 270 (“[S]tate law may not vacate arbitration awards on grounds not recognized by federal law.”); *cf.* Gross, *supra* note 142, at 31 (“The FAA preemption doctrine could possibly preclude application of that state’s vacatur law only if that law provides grounds broader than those allowed under the FAA.”). Additionally, the drafters of the RUAA, after significant debate, decided not to include a provision authorizing parties to contract for expanded review because of the high likelihood of preemption of such a law. *See* Hayford, *supra* note 233, at 84–86.

432. *See supra* notes 218–22 and accompanying text.

433. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

434. *See id.*; Huber, *supra* note 21, at 524 (“The FAA addresses only a single substantive problem: judicial hostility to executory arbitration agreements.”); *supra* Part I.A.

permitting enforcement of an agreed-upon term in the arbitration agreement does not contravene the FAA's purpose.<sup>435</sup> In fact, such a state law preserves the parties' autonomy to shape the contours of their own dispute resolution process.<sup>436</sup> Even though the appropriateness of such a law is open for debate, the existence of such a debate does not render a law that permits parties to contract for broad standards of review "hostile" to arbitration.<sup>437</sup> At most, such a law permits parties to invoke an arbitral feature about whose value reasonable people may disagree.<sup>438</sup>

Furthermore, the Supreme Court's jurisprudence on FAA preemption supports the conclusion that state laws are preempted only when they conflict with a term of the parties' arbitration agreement.<sup>439</sup> In the case of a state law permitting parties to contract for expanded review, however, the parties' agreement and the state law are in harmony.<sup>440</sup> The state law does not negate a term of the parties' agreement.<sup>441</sup> Therefore, it does not contravene the policy of FAA § 2 that arbitration agreements must be enforced.<sup>442</sup>

The disposition in *Hall Street* also supports this conclusion.<sup>443</sup> If the Court had meant to announce a mandatory, nationwide policy prohibiting contractually expanded review, then (1) it would not have suggested that other avenues for expanded review might be available,<sup>444</sup> and (2) it would

435. *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 598–99 (Cal. 2008); Huber, *supra* note 21, at 530; *see* Reuben, *supra* note 2, at 1160; *see also* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1409 (2008) (Stevens, J., dissenting) (arguing that refusing to enforce expanded review provisions "defeats the primary purpose of the [FAA]").

436. *See Hall St.*, 128 S. Ct. at 1408–09 (Stevens, J., dissenting).

437. Huber, *supra* note 21, at 530.

438. *See id.*; *see also* Ware, *supra* note 427, at 270 (arguing that a state law permitting contractual expansion of the grounds for review should not be preempted by the FAA because such a law merely permits the parties to contract for review; it does not require courts to conduct broad review of awards where the parties have not agreed to it).

439. *See* *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008) (holding that statutes that "lodg[e] primary jurisdiction" in an administrative forum, despite an agreement to arbitrate, are preempted); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996); *Perry v. Thomas*, 482 U.S. 483, 491 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). Professor Christopher R. Drahozal describes the idea that state laws are preempted only when they conflict with a provision of the arbitration agreement as the "Pro-Contract Theory" of preemption. *See* Drahozal, *supra* note 57, at 419.

440. Reuben, *supra* note 2, at 1160 ("[T]he state law authorizing judicial review would be reinforcing a term in the contract rather than interfering with it.").

441. *See id.*

442. *See id.*

443. *See* *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 599 (Cal. 2008); Huber, *supra* note 21, at 536; Reuben, *supra* note 2, at 1160 (suggesting that *Hall Street* "tends to show that FAA preemption is narrower than many have perceived"). *But see* Rau, *supra* note 357, at 503–04 (suggesting that *Hall Street* turned § 10 from a procedural provision, "manipulable by party agreement," into a mandatory rule of federal substantive policy).

444. *See* *Cable Connection*, 190 P.3d at 599; Huber, *supra* note 21, at 536 ("[T]he Supreme Court expressly limited its holding to the FAA and observed that different approaches to judicial review of arbitration awards might be adopted under state arbitration law."); Reuben, *supra* note 2, at 1157 ("It hardly seems that the Court would have opened

not have remanded the case for consideration by the lower courts on that very issue.<sup>445</sup> The Court's statements on the availability of non-FAA avenues for review, however, were dicta.<sup>446</sup> The Court did not address, or even mention, the possibility that its interpretation of §§ 9 and 10 may preempt contrary state laws when those state laws are analyzed under the principles of *Southland* and its progeny.<sup>447</sup> Thus, the Court's reference to state arbitration law as a potential source for obtaining expanded review should not be dispositive.<sup>448</sup>

b. *Expanded Review Undermines the Policies of the FAA*

A state law is preempted when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>449</sup> In the context of the FAA, the “full purposes and objectives of Congress”<sup>450</sup> include more than the FAA's “primary purpose”<sup>451</sup> of making agreements to arbitrate enforceable.<sup>452</sup> Congress envisioned an arbitral process characterized by speed, efficiency, and finality.<sup>453</sup> These “process characteristics and values,”<sup>454</sup> therefore, form a basis for preemption of contrary state law.<sup>455</sup> Thus, a state law that permits what the FAA forbids—that is, expanded review by private contract—is a contrary state law subject to preemption.<sup>456</sup> Such a law undermines not only the exclusive command of § 10, but also the enforceability command of § 2

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the door to the state law and inherent powers approaches if the Court believed they were preempted.”).

445. *Cable Connection*, 190 P.3d at 599.

446. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008) (acknowledging that the Court was “deciding nothing about other possible avenues for judicial enforcement of arbitration awards”); Reuben, *supra* note 2, at 1150–51.

447. See CARBONNEAU, *supra* note 355, at 58 (noting that *Hall Street's* suggestion that expanded review might be available under state law “does not account for the federal preemption doctrine”).

448. See *id.* (arguing that state laws that permit expanded review should be preempted and that *Hall Street's* reference to state law as a potential source of expanded review is “peculiar, if not incomprehensible”).

449. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

450. *Id.*

451. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

452. See 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.4, at 10:90 n.112; Reuben, *supra* note 2, at 1132; *supra* notes 90–94 and accompanying text (discussing the FAA's component policies).

453. See H.R. REP. NO. 68-96, at 2 (1924) (characterizing the FAA as intending to “reduc[e] technicality, delay, and expense to a minimum”); Reuben, *supra* note 2, at 1132; *supra* notes 90–94 and accompanying text.

454. Reuben, *supra* note 2, at 1132–33.

455. See *M & L Power Servs., Inc. v. Am. Networks Int'l*, 44 F. Supp. 2d 134, 141–42 (D.R.I. 1999) (finding a state law ground for vacatur preempted because it provided less protection for enforcement of the arbitration award than the FAA); Cullinan, *supra* note 230, at 416.

456. See CARBONNEAU, *supra* note 355, at 58–59; 1 MACNEIL ET AL., *supra* note 29, § 10.8.3.2, at 10:97.

because “displacing finality undermines the FAA’s command of enforcement.”<sup>457</sup>

### B. Preemption in Federal Court

In federal court, all sections of the FAA apply by their terms.<sup>458</sup> Therefore, unless the parties have expressly agreed that state law will apply, § 10 should govern any proceeding in federal court notwithstanding any different state vacatur law.<sup>459</sup> However, a number of federal courts have taken a slightly different approach.<sup>460</sup> These cases have held that state vacatur law may be applied in federal court, even where the parties have not agreed to its application, as long as the state law “does not limit a party’s ability to enforce an arbitration award.”<sup>461</sup>

In *M & L Power Services, Inc. v. American Networks International*,<sup>462</sup> for example, the U.S. District Court for the District of Rhode Island reasoned that one of Rhode Island’s state law grounds for vacatur limited a party’s ability to enforce an award.<sup>463</sup> Therefore, the court concluded that the Rhode Island law “violates Congress’ policy as set forth in the FAA.”<sup>464</sup> “As such,” the court continued, “it is preempted and may not be applied to any case to which the FAA applies—whether in federal or state court.”<sup>465</sup> Thus, the court applied FAA § 10. However, its reasoning suggests that had the Rhode Island law not undermined the policies of the FAA, the court

457. Cullinan, *supra* note 230, at 416 (citing Jiang, *supra* note 425, at 527–28); *see* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 935 (10th Cir. 2001) (“We would reach an illogical result if we concluded that the FAA’s policy of ensuring judicial enforcement of arbitration agreements is well served by allowing for expansive judicial review after the matter is arbitrated.”); CARBONNEAU, *supra* note 355, at 58–59 (arguing that a state law permitting expanded review “would deprive the arbitral process of its autonomy and injure the institution of private adjudication”); David W. Rivkin & Eric P. Tuchmann, *Protecting Both the FAA and Party Autonomy: The Hall Street Decision*, 17 AM. REV. INT’L ARB. 537, 540 (2008) (“[P]ermitt[ing] private parties to determine the scope of a court’s legal and factual review of an arbitral decision would have undermined the goals of the FAA and the effective functioning of the arbitration process.”).

458. 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.2, at 10:80–:81 (noting that “[i]n federal courts, all the sections of the comprehensive FAA will govern” and “the FAA is never only partially applicable in federal courts”); *see* 9 U.S.C. §§ 3, 4, 10 (2006) (referring to federal courts).

459. *See* Action Indus., Inc. v. U.S. Fid. & Guar. Co., 358 F.3d 337, 341 (5th Cir. 2004); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (“[B]ecause Congress has specified standards for confirming an arbitration award, federal courts must act pursuant to those standards and no others.”); 1 MACNEIL ET AL., *supra* note 29, § 10.8.1.3, at 10:73 (“Absent . . . party choice of state arbitration law, state arbitration law cannot, even in theory, limit or obstruct an explicit FAA provision.”).

460. *See* Penn Va. Oil & Gas Corp. v. CNX Gas Co., No. 1:06cv00090, 2007 WL 593578, at \*6 (W.D. Va. Feb. 22, 2007), *report and recommendation adopted*, No. 1:06cv00090, 2007 WL 805891 (W.D. Va. Mar. 15, 2007); *M & L*, 44 F. Supp. 2d at 141.

461. *M & L*, 44 F. Supp. 2d at 141; *see* Penn Va., 2007 WL 593578, at \*6.

462. 44 F. Supp. 2d 134.

463. *Id.* at 142 (holding that Rhode Island’s “complete irrationality” ground was preempted).

464. *Id.*

465. *Id.*

would have applied it, even though the case was in federal court and even though the parties had not agreed to apply Rhode Island arbitration law.<sup>466</sup>

This line of reasoning is unlikely to affect the application of *Hall Street* in cases where the parties are in federal court and where they have not specified that state arbitration law will apply.<sup>467</sup> In those cases, a federal court would likely find that a state arbitration law permitting expanded review was preempted because it would “limit a party’s ability to enforce an arbitration award.”<sup>468</sup> However, the reasoning is nonetheless significant because of the implications it has for the preemptive effect of § 10 in cases where parties have clearly expressed their desire to arbitrate according to state law. The *M & L* court, for instance, concluded that Rhode Island’s “‘complete irrationality’ doctrine cannot be imported into commercial arbitrations to which the FAA applies.”<sup>469</sup> The court already concluded that the Rhode Island law undermined the policies of the FAA<sup>470</sup> and, with the sentence quoted above, seemed to suggest that the result would have been the same even if the parties had agreed to apply Rhode Island arbitration law.<sup>471</sup> If that were indeed the court’s message, a state law permitting expanded review would likewise be preempted, despite a choice of arbitration law clause to the contrary.<sup>472</sup> The reasoning of an analogous federal court case, *Penn Virginia Oil & Gas Corp. v. CNX Gas Co.*,<sup>473</sup> is addressed in the next section, which deals in more detail with the effect of a choice of arbitration law clause on the analysis.

### C. Effect of a Choice of Arbitration Law Clause<sup>474</sup>

Where the parties have included a clause that expresses their clear intent to arbitrate according to state law, the preemption analysis is different. In such a situation, courts—both state and federal<sup>475</sup>—should enforce the

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466. See *id.* at 137 (noting that the parties disagreed about whether state law or the FAA would apply and addressing the question in terms of whether the state law would conflict with the FAA).

467. Cf. 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.2, at 10:80–81 (acknowledging that all sections of the FAA apply in federal court).

468. *M & L*, 44 F. Supp. 2d at 141; see *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935–37 (10th Cir. 2001) (holding that parties may not contract for expanded review under the FAA because allowing them to do so would undermine the policies of the FAA).

469. *M & L*, 44 F. Supp. 2d at 142.

470. *Id.*

471. See *id.* at 137 (failing to acknowledge an exception to preemption if parties agree to apply Rhode Island arbitration law).

472. Cf. *supra* notes 268–69 and accompanying text (noting that a state law may still be preempted even when the parties agree to it if the state law undermines the policies of the FAA).

473. No. 1:06cv00090, 2007 WL 593578, at \*6 (W.D. Va. Feb. 22, 2007), *report and recommendation adopted*, No. 1:06cv00090, 2007 WL 805891 (W.D. Va. Mar. 15, 2007).

474. This section will assume that the parties have clearly expressed their intent that state arbitration law would apply to their agreement so that any court—either state or federal—would be willing to recognize that the parties intended state arbitration law to apply.

475. The effect of a choice of arbitration law clause should be the same in federal court as in state court. Huber, *supra* note 21, at 514 (“That choice of law is controlling in any federal

chosen state's arbitration laws, even if those laws otherwise would be preempted by the FAA.<sup>476</sup> *Hall Street*, however, may have added a wrinkle to the analysis. *Hall Street* turned § 10 from a default provision alterable by contract into a mandatory rule of federal law.<sup>477</sup> It announced that federal law—in the form of the FAA—prohibits parties from expanding the grounds for judicial review by private contract.<sup>478</sup> In doing so, it raised the question whether agreements to arbitrate under state law—including those state laws that permit expanded review—are now nothing more than the functional equivalent of the precise maneuver *Hall Street* forbids—that is, a private agreement to expand the scope of judicial review.<sup>479</sup> The conflict surrounding this issue turns largely on the meaning of *Volt*. Specifically, it turns on the proper role of the FAA in cases where parties have agreed to arbitrate according to state law. This section examines three interpretations of *Volt*'s impact on that issue and the subtle, but important, consequences of each interpretation.

Professor Ian R. Macneil and his coauthors argue that, in *Volt*, the Court treated the FAA as “at most, a kind of umbrella.”<sup>480</sup> They argue that the *Volt* Court assumed that it was dealing with a situation where the FAA did not apply at all,<sup>481</sup> except as a foundational safeguard against the

or state court.”); see Drahozal, *supra* note 57, at 407–08 (arguing that a state law is not preempted if the parties agree that it will apply and making no distinction on this point whether the parties are in state or federal court); see also Flexible Mfg. Sys. Pty Ltd. v. Super Prods. Corp., 874 F. Supp. 247, 248–49 (E.D. Wis. 1994) (honoring the parties' agreement to arbitrate according to state law), *aff'd*, 86 F.3d 96 (7th Cir. 1996); Bd. of Trs. of Leland Stanford Junior Univ. v. Volt Info. Scis., Inc., 240 Cal. Rptr. 558, 560 (Ct. App. 1987) (honoring a choice to arbitrate according to state law), *aff'd*, 489 U.S. 468 (1989).

476. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. at 485 (Brennan, J., dissenting) (acknowledging that a choice to arbitrate according to state law “would permit a state rule, otherwise preempted by the FAA, to govern [the] arbitration”); see Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59 (1995) (noting that contractual intent can permit application of a state rule that would otherwise be preempted); Drahozal, *supra* note 57, at 411.

477. Rau, *supra* note 357, at 503–04; see Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1400 (2008) (holding that the FAA grounds for review are exclusive and cannot be modified by private contract); cf. Ware, *supra* note 427, at 270 (describing default rules and mandatory rules).

478. See *Hall St.*, 128 S. Ct. at 1404–05.

479. See McQueen-Starling v. UnitedHealth Group, Inc., 654 F. Supp. 2d 154, 163 (S.D.N.Y. 2009) (“[I]t is difficult to see how a contractual agreement by the parties to apply a state law standard of review could change the analysis, because contracting around the FAA is precisely the maneuver prohibited by *Hall Street* . . . .”); Robert Ellis, *Imperfect Minimalism: Unanswered Questions in Hall Street Associates, L.L.C. v. Mattel, Inc.*, 32 HARV. J.L. & PUB. POL'Y 1187, 1191, 1194–95 (2009) (noting that *Hall Street* left open the question of whether avenues outside the FAA are viable for obtaining expanded review); Smit, *supra* note 11, at 521 (describing the possibility of contracting for review under state law and concluding that “[i]t is hard to accept that the Supreme Court would sanction such a blatant attempt to circumvent its ruling”).

480. 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.3, at 10:85.

481. To achieve the result of complete FAA inapplicability, scholars and courts suggest that parties expressly provide for such an exclusion. See L & L Kempwood Assocs., L.P. v. Omega Builders, Inc. (*In re L & L Kempwood Assocs., L.P.*), 9 S.W.3d 125, 127–28 (Tex. 1999) (“The choice-of-law provision did not specifically exclude the application of federal

application of a body of state arbitration law that, as a whole, was hostile to arbitration.<sup>482</sup> Under this “umbrella” approach, the *Volt* Court upheld the application of the particular California provision not because the provision was, in itself, consistent with the policies of the FAA, but because it was part of a body of arbitration law that, as a whole, was not hostile to arbitration.<sup>483</sup> The same approach can be used to justify application of a state law that permits expanded review. As long as the parties have expressly agreed to be governed by state arbitration law, and as long as the body of state arbitration is not, as a whole, hostile to arbitration, then the agreement should be enforced because it rests comfortably under the FAA’s “umbrella.”<sup>484</sup>

Professor Macneil and his coauthors criticize the Supreme Court’s suggestion in *Casarotto* that the umbrella approach may not be wholly accurate.<sup>485</sup> In *Casarotto*, the Court implied that a particular Montana notice requirement provision would have been preempted even if the parties had agreed to apply Montana arbitration law.<sup>486</sup> This implication, Professor Macneil and his coauthors argue, is unsound.<sup>487</sup> Arbitration is a creature of contract, and broad recognition should be given to the parties’ contractual choices, unless the parties’ choice of state law falls outside the broad “umbrella” articulated in *Volt*.<sup>488</sup> Under this approach, a clearly expressed choice to be governed by state arbitration law permitting expanded review should be honored where the parties have provided for such review.

The “umbrella” approach, however, has not been applied neatly. At least one court has articulated the meaning of *Volt* in a way that, in light of *Hall*

law, and absent such an exclusion we decline to read the choice-of-law clause as having such an effect.” (footnote omitted)); *In re Chestnut Energy Partners, Inc.*, No. 05-09-00101-CV, 2009 WL 3353622, at \*10 (Tex. App. Oct. 20, 2009) (stating that a choice of law provision will not make the FAA inapplicable “unless the clause specifically excludes the application of federal law”); Drahozal, *supra* note 57, at 412 & n.149 (noting the importance of including language that expressly excludes application of federal law); Rau, *supra* note 357, at 504 (“At most, what is left to contracting parties in the future is an express exclusion of the FAA in favor of some state arbitration regime . . .”).

482. 1 MACNEIL ET AL., *supra* note 29, § 10.8.2.3, at 10:85; see also *Hackett v. Milbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95, 100 (N.Y. 1995) (giving full effect to the parties’ choice of state arbitration law without mentioning the possibility that the state laws might nonetheless be preempted if they conflicted with the purposes of the FAA).

483. See 1 MACNEIL ET AL., *supra* note 29, § 10.9.2.2, at 10:115; see also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 & n.5 (1989) (suggesting that the body of California arbitration law as a whole is not hostile to arbitration).

484. Interestingly, both California arbitration law, as a whole, and New Jersey arbitration law, as a whole, have been criticized in this regard. See 1 MACNEIL ET AL., *supra* note 29, § 10.9.1, at 10:107 n.10 (arguing that if the *Volt* Court had taken a more in-depth look at California arbitration law as a whole, “the Court might conceivably have reached a different conclusion” because the California law “regulates arbitration law considerably more than does the FAA”); Rau, *supra* note 357, at 504 n.112 (criticizing New Jersey’s laws).

485. See 1 MACNEIL ET AL., *supra* note 29, § 10.9.2.2, at 10:115–16.

486. See *supra* notes 274–76 and accompanying text.

487. 1 MACNEIL ET AL., *supra* note 29, § 10.9.2.2, at 10:116.

488. See *id.*

*Street*, threatens to undermine parties' ability to use clear choice of arbitration law provisions to obtain expanded judicial review. In *Flight Systems, Inc. v. Paul A. Laurence Co.*,<sup>489</sup> the U.S. District Court for the District of Columbia concluded that the parties agreed to arbitrate according to Virginia law, including its vacatur provisions.<sup>490</sup> In reaching its conclusion, the court described *Volt's* principle as follows: that courts should "enforce privately negotiated agreements to arbitrate in accordance with their terms as long as those terms are consistent with the goals of the FAA."<sup>491</sup> The court then compared Virginia's vacatur provisions to FAA § 10 and concluded that the Virginia provisions did not "directly conflict with the goals of the FAA."<sup>492</sup> Thus, the court applied Virginia's vacatur law.<sup>493</sup> However, it did so not because Virginia arbitration law, as a whole, fell under the FAA's "umbrella," but because Virginia's vacatur law in particular did not conflict with the FAA's vacatur law.<sup>494</sup> After *Hall Street*, this approach would result in preemption.<sup>495</sup> Any direct comparison of FAA § 10 to a state law that permits contractually expanded review would likely result in a finding that the two are in unmistakable conflict. In that situation, FAA § 10 would govern, despite the parties' choice of state arbitration law.

The reasoning in *Penn Virginia* is similar. Although that case did not involve a contractual choice to arbitrate according to state law,<sup>496</sup> its reasoning is important nonetheless. Like the *Flight Systems* court, the *Penn Virginia* court applied state vacatur law because it found that the state vacatur laws did not conflict with FAA § 10.<sup>497</sup> However, the court also reasoned that, even though the FAA applied in the sense that the agreement involved interstate commerce, it only governed the actual arbitration, not the postarbitration confirmation proceedings in court.<sup>498</sup> Applying the logic of *Flight Systems* and *Penn Virginia* to an agreement providing for both expanded review and arbitration according to permissive state law yields

489. 715 F. Supp. 1125 (D.D.C. 1989).

490. *Id.* at 1127–28.

491. *Id.* at 1127.

492. *Id.* at 1127 & n.3.

493. *Id.* at 1127–28.

494. *See id.*; 1 MACNEIL ET AL., *supra* note 29, § 10.9.2.2, at 10:117 (noting that the *Flight Systems, Inc. v. Paul A. Laurence Co.* court reached its conclusion by comparing the Virginia vacatur provisions to the FAA vacatur provisions).

495. *See* CARBONNEAU, *supra* note 355, at 58 ("If a form of review is unacceptable under the federal law, it should likewise be unavailable under state statutory regimes.").

496. *See* *Penn Va. Oil & Gas Corp. v. CNX Gas Co.*, No. 1:06cv00090, 2007 WL 593578, at \*5 (W.D. Va. Feb. 22, 2007) (noting that the parties' agreement did not specify what arbitration law was to be applied), *report and recommendation adopted*, No. 1:06cv00090, 2007 WL 805891 (W.D. Va. Mar. 15, 2007).

497. *Id.* at \*6. Though the comparison of the specific state vacatur law to FAA § 10 provided the primary grounds for the court's decision, the court also suggested that it was, at least to some extent, applying the "umbrella" approach. *See id.* ("I also find that there is nothing contained in the VUAA that hinders the enforceability, according to their terms, of private agreements to arbitrate.").

498. *See id.* at \*5.

two important propositions. The first is that a choice of arbitration law clause might be read to incorporate only state laws that govern the arbitration proceeding itself and not state law provisions on vacatur.<sup>499</sup> This possibility leaves courts free to apply § 10 to defeat an expanded review provision, despite the parties' choice of permissive state law.<sup>500</sup> It also, however, arguably leaves state courts free to apply state vacatur law even when the parties have agreed that the FAA will apply. The *Cable Connection* court used precisely this approach to justify applying California's vacatur law, even though the parties agreed that the FAA would apply.<sup>501</sup>

The second proposition is that, in applying *Volt* to determine the validity of a choice to arbitrate according to state laws that permit expanded review, courts may frame the issue as whether the state vacatur laws in particular, rather than the body of state arbitration law as a whole, conflict with FAA § 10.<sup>502</sup> Framed in that light, the state and federal laws surely conflict. Thus the state law would be preempted, despite the parties' clearly expressed choice to be governed by it.<sup>503</sup>

Another, more nuanced, reading of *Volt* may result in the same outcome. In *Roadway Package System, Inc. v. Kayser*,<sup>504</sup> the U.S. Court of Appeals for the Third Circuit reasoned that agreements containing choice of

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499. See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (arguing that parties lack the authority to shape postaward proceedings in court); Rivkin & Tuchmann, *supra* note 457, at 538 (noting that parties' freedom is limited to the arbitration itself).

500. It also arguably opens the door for courts to enforce what Professor Stephen K. Huber calls a "Mix and Match" approach. See Huber, *supra* note 21, at 543. If courts are willing to read choice of arbitration law clauses as incorporating only a portion of the chosen body of arbitration law, then parties could conceivably incorporate only the state law on vacatur while agreeing that all other aspects of their arbitration agreement would be governed by the FAA. See *id.* at 544 ("In view of the central place of freedom of contract in the arbitration jurisprudence of the Supreme Court, a reasonably clear 'pick and choose' approach is likely to be upheld by federal as well as state courts."). Such an approach would allow parties to avoid the "unanticipated peculiarities of state law." *Id.* at 543.

501. See *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 597 n.12 (Cal. 2008). The parties' agreement contained the following provision: "any arbitration conducted hereunder shall be governed by the United States Arbitration Act [FAA] (9 U.S.C. Section 1, et seq.)." *Id.* at 590 n.3. The court reasoned that because the parties did not specifically provide that the FAA's vacatur provisions would apply, and because the parties proceeded in state court as if state law applied, the California vacatur law should govern. *Id.* at 597 n.12.

502. See *Penn Va. Oil & Gas Corp. v. CNX Gas Co.*, No. 1:06cv00090, 2007 WL 593578, at \*6 (W.D. Va. Feb. 22, 2007), *report and recommendation adopted*, No. 1:06cv00090, 2007 WL 805891 (W.D. Va. Mar. 15, 2007); *Flight Sys., Inc. v. Paul A. Laurence Co.*, 715 F. Supp. 1125, 1127-28 (D.D.C. 1989).

503. See Louis Smith, *Grounds for Judicial Review of Arbitration Awards in the FAA Are Exclusive: Supreme Court Leaves Open Possibility for Review of a Different Scope Under State Law*, 192 N.J. L.J. 566, 566 (2008) (discussing *Hall Street* and acknowledging that parties "may expressly opt out of the FAA" but nonetheless noting that "statutes like those in New Jersey may ultimately be found to be pre-empted by the FAA").

504. 257 F.3d 287 (3d Cir. 2001), *abrogated on other grounds by* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

arbitration law clauses do not “cease being subject to the FAA.”<sup>505</sup> Instead, choice of arbitration law clauses allow parties to specify the rules for arbitration, as the FAA permits them to do.<sup>506</sup> When the parties agree that state arbitration law will apply, the FAA gives the choice of law term in their agreement the force of federal law, and courts are thus required to enforce it.<sup>507</sup> Thus, when a court enforces such an agreement, it enforces the state arbitration laws not as laws in themselves, but as provisions of the parties’ agreement.<sup>508</sup> The court does this because, as a matter of federal law, it is required to do so.<sup>509</sup> However, after *Hall Street*, courts must contend with another command of federal law—that is, that parties should not be permitted to supplement by contract the FAA’s grounds for review.<sup>510</sup> Thus, the result is a conflict between two important commands of federal arbitration law. The resolution of this conflict should turn largely on a balancing of the FAA’s underlying policies.

The above part presented and analyzed the arguments for and against the proposition that § 10, as interpreted in *Hall Street*, preempts state laws that permit contractually expanded review. The next part argues that unless the parties have expressly agreed that permissive state arbitration law will apply, § 10 should preempt state laws that otherwise would permit contractually expanded review.

### III. STATE LAWS PERMITTING CONTRACTUALLY EXPANDED REVIEW SHOULD BE PREEMPTED, WITH ONE EXCEPTION

This part argues that FAA § 10, as interpreted in *Hall Street*, preempts state laws that permit parties to contractually expand the grounds for judicial review of arbitration awards. However, it also argues that such state laws should not be preempted if the parties expressly agree that the entire body of that state’s arbitration law will apply to the complete exclusion of the FAA. It argues that the result should be the same in federal and state court.

First, this part addresses the preemption analysis in both federal and state courts where the parties have not clearly agreed that state arbitration law will apply. In the federal court context, it criticizes the approach taken by some federal courts whereby those courts apply (or even consider applying) state vacatur law instead of § 10. Such an approach is inconsistent with both the plain language of the statute and the intent of its framers. In the

505. *Id.* at 292.

506. *Id.*

507. *Ware*, *supra* note 294, at 554 (“The FAA is special because its core provision, Section 2, gives the terms of arbitration agreements the force of federal law.”); *see Roadway*, 257 F.3d at 292.

508. *Roadway*, 257 F.3d at 292 (“When a court enforces the terms of an arbitration agreement that incorporates state law rules, it does so not because the parties have chosen to be governed by state rather than federal law. Rather, it does so because *federal law* requires that the court enforce the terms of the agreement.”).

509. *Id.*; *see Ware*, *supra* note 294, at 554.

510. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400 (2008).

state court context, this part argues that, in light of *Hall Street*, § 10 should apply in state court as an “emanation” from § 2’s substantive command of enforceability.

Second, this part examines the circumstances under which parties may circumvent *Hall Street*’s prohibition on contractually expanded review. In that context, it argues that courts, in determining whether to enforce an expanded review provision, should apply a bright-line test. The test should require parties wanting expanded review to (1) provide for an expanded ground for review; (2) expressly provide that state arbitration law permitting expanded review will apply; and (3) expressly provide that the FAA will not apply. This approach effectively preserves the finality of the arbitration process as articulated in *Hall Street*. At the same time, it also recognizes a place for party autonomy in shaping the level of review of arbitration awards.

#### A. Preemption in Federal Court

In federal court, FAA § 10 should apply without discussion.<sup>511</sup> The plain language of the statute requires it.<sup>512</sup> Contrary approaches—like those in *M & L*<sup>513</sup> and *Penn Virginia*<sup>514</sup>—are unnecessary and unwise. Both of those cases permitted parties to litigate issues that were ambiguous at best, when such litigation was unnecessary. Surely the framers of the FAA did not intend to open the door for parties to litigate the issue of their nebulous, unarticulated intent in the face of a statute that tells the federal court exactly what to do. Moreover, such an approach encourages the losing party to an arbitration agreement containing an expanded review provision (which otherwise would be invalid in federal court under *Hall Street*) to litigate any colorable basis for claiming that the parties intended more accommodating state vacatur law to apply. This result, again, is inimical to the policies of the FAA.<sup>515</sup> It does nothing more than “breed[] litigation from a statute that seeks to avoid it.”<sup>516</sup>

Perhaps the reasoning of *M & L* and *Penn Virginia* can be better explained with reference to *Erie* principles. Both *M & L* and *Penn Virginia* recognized that the FAA was not intended “to occupy the entire field of arbitration.”<sup>517</sup> Perhaps those courts interpreted this to mean that federal

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511. See *supra* notes 213–15 and accompanying text.

512. See 9 U.S.C. § 10(a) (2006) (directing its provisions to “the United States court”); *supra* notes 458–59 and accompanying text.

513. See *supra* notes 462–66 and accompanying text.

514. See *supra* notes 496–98 and accompanying text.

515. See *supra* note 93 and accompanying text (describing the goal of the FAA to avoid the delays and inefficiencies of litigation).

516. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).

517. *M & L Power Servs., Inc. v. Am. Networks Int’l*, 44 F. Supp. 2d 134, 140 (D.R.I. 1999) (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989)); see *Penn Va. Oil & Gas Corp. v. CNX Gas Co.*, No. 1:06cv00090, 2007 WL 593578, at \*4 (W.D. Va. Feb. 22, 2007), *report and recommendation adopted*, No. 1:06cv00090, 2007 WL 805891 (W.D. Va. Mar. 15, 2007).

courts should apply substantive state arbitration laws—of which vacatur laws are arguably a part<sup>518</sup>—because *Erie* requires federal diversity courts to apply substantive state law.<sup>519</sup> This line of reasoning, however, misses the determinative point: that the conflict in this case is not between a state law and a rule of federal procedure or decisional law, but between a state law and a validly enacted federal statute that governs the situation at issue. In that case, the federal statute unquestionably governs.<sup>520</sup> There is thus no justification for applying state vacatur law in federal court where the parties have not clearly expressed their intent to apply state arbitration law. In state court, however, the analysis is more complex. The reason for the complexity is that state courts, unlike federal courts, may legitimately argue that § 10 does not apply to them and that, therefore, they are free to apply different state vacatur law, including vacatur law that permits expanded judicial review.<sup>521</sup>

### B. Preemption in State Court

The starting point for analyzing § 10's preemptive effect in state court is to analyze its applicability there.<sup>522</sup> And the starting point for that analysis is to recognize that the law surrounding the FAA's applicability in state court, especially as it relates to sections other than § 2 and to congressional intent, is confused.<sup>523</sup> It would be nearly impossible to justify § 10's applicability in state court based solely on Congress's intent—Congress almost surely had no intent to do so.<sup>524</sup> However, in light of *Southland* and its progeny, it would be too simplistic to dismiss § 10's applicability in state court on those same grounds.<sup>525</sup> The better approach would be to examine the relationship between § 2 and § 10 in light of both *Hall Street* and the FAA's underlying policies, and determine whether § 10 is best characterized as a substantive provision that is applicable in state court, in the sense that its application there is necessary to achieve § 2's command of enforcement.<sup>526</sup> This section takes that approach and argues that it is a substantive provision.

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518. See *supra* notes 418–26 and accompanying text; see also *infra* text accompanying notes 526–32.

519. See *supra* notes 105, 426 and accompanying text.

520. See *supra* note 105 and accompanying text (noting that in cases governed by federal statutes, the federal statute, and not state law, applies); *supra* note 161 (citing the Supremacy Clause).

521. See *supra* notes 381–88, 412–17 and accompanying text (arguing that § 10 does not apply in state courts).

522. See *supra* notes 218–23 and accompanying text.

523. See *supra* notes 135, 224 and accompanying text (describing the debate over the FAA's applicability in state court).

524. See *supra* notes 39, 135 and accompanying text (presenting arguments that Congress did not intend the FAA to apply in state court at all).

525. See *supra* notes 389–403 and accompanying text (arguing that Congress also intended the FAA to be a unitary statute).

526. See *supra* notes 224–34 and accompanying text.

The FAA requires that arbitration agreements be enforced according to their terms. But when a term in an arbitration agreement threatens to upset the values of arbitration as an institution, the FAA no longer requires its enforcement.<sup>527</sup> That was the case in *Hall Street*. The question here is whether that caveat is important enough to § 2's command of enforcement to require its application in state courts, where § 2 unquestionably governs. The answer should be yes. The justification for this result comes largely from the way that §§ 2 and 10 define the allocation of authority between courts and arbitrators. At both the front end and the back end of the arbitration process, the allocation of authority between courts and arbitrators largely dictates the extent to which the parties comply with the "arbitration bargain"<sup>528</sup> or, in other words, the extent to which the arbitration agreement is enforced.<sup>529</sup>

Section 2 defines the allocation of authority at the front end of the arbitration process. It determines that when the parties have agreed to arbitrate, the arbitrators—not the courts—will have the authority to decide the dispute. In doing so, § 2 is considered substantive and therefore preempts state laws that attempt to tip this allocation of authority in favor of the courts.<sup>530</sup> Similarly, § 10—and vacatur laws in general—define the allocation of authority at the back end of the arbitration process. Sections 9 and 10 provide that when parties have agreed that the arbitration award will be final and binding, the arbitrators—and not the courts—will have the authority to make the final award. Laws that provide broad grounds for review tip the allocation of this authority in favor of the courts. Such laws, in effect, take the authority to make the final decision out of the arbitrators' hands and put it into the courts', thus allowing the parties to "escap[e] the arbitration bargain."<sup>531</sup> An appropriately narrow vacatur provision is thus essential to the enforcement of arbitration agreements. Section 10 plays just that role in upholding § 2's command of enforcement. As such, § 10 is best characterized as a substantive provision of federal arbitration law.<sup>532</sup>

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527. See *supra* notes 349–58 and accompanying text (describing how the threat to finality addressed in *Hall Street* was a threat to the institution of arbitration itself).

528. Hayford, *supra* note 233, at 81.

529. See *supra* notes 419–25 and accompanying text.

530. See *supra* Part I.D.2.a (addressing the Supreme Court's jurisprudence on the preemptive effect of § 2).

531. Hayford, *supra* note 233, at 81.

532. Like § 2, § 10 delineates the boundaries of power between courts and arbitrators. Because §§ 2 and 10 firmly define where the court's power ends and the arbitrator's power begins, they are substantive. Other sections of the FAA provide only procedures for giving effect to that power. For example, § 2 provides that the court's power to decide a dispute ends where the parties have agreed to submit the dispute to an arbitrator. Sections 3 and 4, in turn, provide that a court may give effect to that balance of power by staying litigation and compelling arbitration. Sections 3 and 4 do not affect the allocation of power between the two adjudicators. Likewise, § 10 provides that a court's power to override an arbitrator's award ends where none of the statutory (and perhaps also judicially created) grounds are present. Section 9, in turn, provides a court with a procedure for giving effect to that allocation of power—that is, by confirming the award and making it into a judgment of the court. See *supra* notes 49–70 and accompanying text (describing particular FAA provisions).

Therefore, it should apply in state court and preempt state laws that alter the allocation of authority between courts and arbitrators by limiting parties' ability to enforce arbitration awards.

The above reasoning sets forth an analysis for determining that § 10, in fact, applies in state courts.<sup>533</sup> However, to the extent that state courts answer that question in the negative, they must still contend with the possibility that a state law ground for judicial review is nonetheless preempted because it undermines the policies of the FAA.<sup>534</sup> The *M & L* court adopted a test for answering that question: does the state law "limit a party's ability to enforce an arbitration award"?<sup>535</sup> A state law that permits contractually expanded review almost certainly does. Where the parties have provided for expanded review, application of a state law permitting such review would result in vacatur, whereas application of § 10 would result in confirmation. Thus, the state law would prevent a party from enforcing an award where the FAA otherwise would require it.<sup>536</sup> In such a situation, the state law should be preempted.

One could argue, however, that a state law permitting expanded review does not, as a law in itself, limit the parties' ability to enforce an award; it merely permits the parties to choose to limit their ability to enforce an award.<sup>537</sup> Therefore, it hardly undermines the FAA's purpose of ensuring enforcement of arbitration agreements according to their terms.<sup>538</sup> This is a persuasive point, but it overlooks an important, but subtle, aspect of *Hall Street* that undermines its persuasiveness: *Hall Street* equated review for legal error by contract with review for legal error generally.<sup>539</sup> In doing so,

533. If state courts agree that § 10 applies to them, then the analysis becomes the same as the analysis in federal court—that is, there would be no justification for applying state arbitration law unless the parties clearly agreed that state arbitration law would apply. *See supra* notes 218–19 and accompanying text; *supra* Part III.A.

534. *See supra* note 220 and accompanying text.

535. *M & L Power Servs., Inc. v. Am. Networks Int'l*, 44 F. Supp. 2d 134, 141 (D.R.I. 1999).

536. In addition, application of the state law in state court where the parties have not agreed expressly to apply state arbitration law would mean that parties would get a different result in state court than they would in federal court. While this situation is normally a reason for applying the state law in federal court, where, as here, there is a federal statute that covers the issue in both federal and state court (in the sense that the agreement involves interstate commerce), application of the federal law in state court is appropriate. *Cf. supra* note 357 (arguing that if an agreement contains an expanded review provision, losing parties will nearly always seek vacatur). The other side of this argument is that victorious parties will nearly always seek confirmation, even if the award is arguably erroneous. Such parties are likely to seek confirmation by whatever means are available, including removing the case to federal court to get a different result than they would obtain in state court.

537. *See supra* notes 427–28 and accompanying text (arguing that a state law provision permitting expanded review is not a state law ground for review, but the parties' ground for review).

538. *See supra* notes 433–45 and accompanying text (arguing that permitting contractually expanded review does not undermine the policies of the FAA).

539. The key phrase to support this conclusion is the Court's assessment that language in the *Wilko* case "expressly rejects just what *Hall Street* asks for here, general review for an arbitrator's legal errors." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008). *Hall Street*, however, was not asking for review for legal error generally; it was

*Hall Street* suggested that the distinction between the two is essentially meaningless—both pose the same systemic risk to the finality of arbitration and both threaten to transform arbitration into little more than a precursor to litigation.<sup>540</sup> Therefore, if one limits a party's ability to enforce an arbitration award, so does the other, and both should be preempted.<sup>541</sup> State laws permitting expanded review by contract thus cannot be justified on the ground that they pose a lesser (or even nonexistent) threat to the FAA's underlying policies than state laws that provide for broad review of arbitration awards in all cases.

The above arguments suggest that contractually expanded review may be categorically banned from any case in any court involving interstate commerce. However, that should not be the case. Arbitration is, after all, a creature of contract,<sup>542</sup> and parties that want expanded review should be able, within limits, to get it. That is precisely the suggestion of the *Hall Street* majority in part IV of its opinion.<sup>543</sup> The question remains, however, how to carve out an exception to *Hall Street*'s holding without eviscerating the holding's effectiveness. The next section addresses precisely that question.

### C. Obtaining Expanded Review Through Choice of Arbitration Law Clauses

If § 10 applies in both state and federal court, it will preempt state laws permitting expanded review in both venues, unless the parties have expressly agreed that state arbitration law will apply.<sup>544</sup> Thus, parties that want expanded judicial review must employ some combination of contractual provisions to obtain it. If such contractual provisions are to be enforced, they should clearly express the parties' unambiguous intent that an entire body of state arbitration law will apply to the full exclusion of the FAA.<sup>545</sup> Anything less should result in preemption.

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asking for permission to contract for such review if it so chose. *See supra* notes 312–14 and accompanying text. The language in *Wilko* did not reject that. *See supra* note 320. The Court's language, however, suggests that it did and, therefore, that the two are functionally equivalent.

540. *See supra* notes 355–58 and accompanying text (describing *Hall Street*'s assessment of the risks contractually expanded review poses to arbitration).

541. A state law that generally permitted review for legal error would undoubtedly limit a party's ability to enforce an award. *See supra* note 427 and accompanying text. Therefore, a law permitting parties to contract for the same standard would do the same.

542. *See supra* note 488 and accompanying text.

543. *See supra* notes 359–68 and accompanying text.

544. *See supra* notes 218–19 and accompanying text.

545. The issue of whether state or federal law should determine if the parties intended state arbitration law to apply should not be problematic here. By explicitly stating that the entire body of arbitration law will apply to the full exclusion of the FAA, the parties' intent should be clear under any standard. Moreover, requiring an unambiguous intent to apply state arbitration law to the exclusion of the FAA as a prerequisite to the enforcement of contractually expanded review provisions serves to prevent divergent outcomes in state and federal court. An unambiguous choice of arbitration law clause prevents a diverse party who is satisfied with an arguably legally erroneous award from removing the confirmation action

The starting point for analyzing the effectiveness of parties' attempts to circumvent *Hall Street* through a choice of arbitration law clause is a proper reading of *Volt*. The relevant question arising from *Volt* is whether, in light of the parties' clear intent to apply state arbitration law to the exclusion of the FAA, the FAA nonetheless plays some role beyond a mere "umbrella."<sup>546</sup> In other words, does the FAA in that situation require more than applying § 2 only as a threshold matter in order both to ensure enforcement of the parties' agreement to arbitrate according to state law and to prevent the parties from agreeing to arbitrate according to state laws that, as a whole, are hostile to arbitration? The FAA should not require more than that. Where the parties' agreement clearly provides that a body of state arbitration law should apply and a body of federal law—the FAA—should not, the parties' agreement should be honored, including provisions for expanded review, as long as the state law permits them. The content of individual state law provisions in that situation should be almost irrelevant.<sup>547</sup> Where the parties have agreed that an entire body of state arbitration law will apply, an approach that examines the effect of individual pieces of that body of law on the policies of the FAA serves no other purpose than to encourage unhappy parties to litigate that very question—that is, whether a particular provision of the agreed-upon state arbitration law undermines the policies of the FAA. This seems to be a question with much greater wiggle room than the question of whether the body of state law, as a whole, is hostile to arbitration.<sup>548</sup> Moreover, analysis of individual provisions when the parties have agreed to arbitrate according to the entire body of state law goes beyond analyzing the validity of the state laws in light of the parties' agreement. Where the parties have provided that the entire body of state arbitration law should apply, courts should analyze the effect on the FAA's policies of the precise thing the parties have agreed to—that is, the entire body of state law. In this situation, the question of the effect of individual provisions on the FAA's policies should be avoided in favor of honoring the parties' agreement. The

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from a state court that would vacate the award based on the validity of the expanded review provision to a federal court that would confirm the award under the FAA (unless some statutory ground for vacatur or correction were proven) on the ground that the expanded review provision is invalid under *Hall Street*. See *supra* notes 474–75 and accompanying text (noting that clear choice of arbitration law clauses should be treated the same in federal court as in state court).

546. See *supra* Part II.C (analyzing approaches to the role of *Volt* in situations where parties have agreed that state arbitration law would apply).

547. To the extent that the approaches taken in *Flight Systems* and, by analogy, *Penn Virginia* suggest that the role of the FAA in cases where *Volt* applies is to examine the effects of individual laws on the policies underlying the FAA, rather than the effect of the body of state arbitration as a whole on those same policies, those approaches should be disapproved. See *supra* notes 489–98 and accompanying text.

548. For example, examining the question of whether an expanded review provision undermines the policies of the FAA can become quite complex, see *supra* Part II.A.2, while the question of whether the body of arbitration as a whole is hostile to arbitration may be analyzed simply by asking if the body of state law reasonably discourages parties from resorting to arbitration. If it does, it is hostile; if not, it is not.

effect of an individual provision of agreed-upon state law should only become an issue when application of that particular law wholly prevents the parties from arbitrating at all, and where, under the circumstances, it would be manifestly unreasonable to believe that they had not agreed to do so.<sup>549</sup> Absent such a finding, all provisions of the chosen state's arbitration law—including those permitting expanded review—should be enforced.

The reasoning set forth above does not eviscerate *Hall Street's* holding. It is narrow enough, and places enough potential burdens upon parties, to make it meaningfully different from the private contractual review provision struck down in *Hall Street*. It aims to preserve arbitration's value of finality as articulated in *Hall Street* while recognizing party autonomy to shape the dispute resolution process. Its key point is that, in order to obtain expanded review, the parties must agree that the entire body of state arbitration law must apply to the full exclusion of the FAA. A "mix and match" approach should be preempted.<sup>550</sup> For example, an arbitration agreement that provides for expanded review and further provides that all provisions of the FAA will govern except that New Jersey vacatur law will apply is, in substance, no different from a private contractual review provision of the type rejected in *Hall Street*. Simply adorning an otherwise invalid clause with a reference to state law that otherwise has no bearing on the agreement is no less a threat to the finality of "arbitration theory"<sup>551</sup> than the same clause without the state law reference. A contrary conclusion would render *Hall Street's* holding meaningless. Thus there must be a tradeoff. *Hall Street* imagined the FAA's limited review provisions as a tradeoff for its expedited treatment of award confirmation proceedings.<sup>552</sup> Similarly, for parties wanting to obtain broader judicial review under state law, courts should require those parties to be willing to trade off the benefits of the FAA for the potential peculiarities of the chosen state's arbitration law. It is a compromise, but it is one that reasonably preserves *Hall Street's* message that permitting broad judicial review by contract threatens to transform arbitration into little more than a precursor to litigation, thus effectively "bring[ing] arbitration theory to grief in post-arbitration process."<sup>553</sup> However, it also balances *Hall Street's* holding with arbitration's virtue of allowing parties to shape the contours of their

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549. *Casaroto* may provide an example of this situation. See *supra* notes 274–76 and accompanying text (describing a situation where the Supreme Court suggested that a state law would have been preempted even if the parties agreed to arbitrate according to that state's arbitration laws). If the parties in *Casaroto* had agreed to arbitrate according to Montana law, application of the Montana notice requirement would have prevented the parties from arbitrating at all. Further, it would seem unreasonable to believe that the parties would have read and signed a contract containing an arbitration agreement and yet not intended to arbitrate unless the agreement also contained a notice of arbitration provision on the first page of the contract.

550. See *supra* note 500 (setting out one scholar's argument for a "Mix and Match" approach).

551. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008).

552. See *supra* note 347 and accompanying text.

553. *Hall St.*, 128 S. Ct. at 1405.

own dispute resolution process. In doing so, the solution this Note proposes hopes to be logical, reasonable, and consistent both with the values of the arbitration process and with the existing law surrounding the conflict. A bright-line rule permitting parties to obtain expanded review under state law by agreeing that an entire body of state arbitration law will apply to the exclusion of the FAA obtains just that result.

#### CONCLUSION

In many instances and for many parties, arbitration is superior to litigation as a method of dispute resolution. Arbitration's virtues—flexibility, efficiency, and finality—provide parties with the tools they need to resolve their disputes in the manner they desire. However, those virtues also require judicial protection. As this Note discusses, arbitration's virtue of providing parties with a final decision receives judicial protection in the form of narrow vacatur provisions, which, according to *Hall Street*, may not be expanded by private contract. And as this Note further discusses, *Hall Street's* interpretation of the FAA, in most cases, should preempt contrary state laws. Nonetheless, because of arbitration's contractual nature, parties who desire such expanded review should be able, within narrowly defined limits, to get it. This Note offers such a narrowly defined solution to that problem—that is, to enforce parties' agreements calling for expanded review when the parties agree to arbitrate according to an entire body of permissive state law and to the full exclusion of the FAA. Such a solution preserves both the finality of the arbitration process and the freedom parties have to shape that process through contractual provisions. In doing so, this Note hopes to offer a workable solution to an issue bearing practical consequences for both the judicial and arbitral communities.

*Notes & Observations*