

Arbitration Law: Who's in Charge?

Margaret L. Moses*

I. INTRODUCTION

The Federal Arbitration Act (FAA) that Congress adopted in 1925 bears little resemblance to the Act as the Supreme Court of the United States has construed it. The original Act was intended to provide federal courts with procedural law that would permit the enforcement of arbitration agreements between merchants in diversity cases.¹ The Supreme Court's construction of the statute, especially in the last twenty-five years, amounts to a judicially created legislative program, imposed without congressional input, that has vastly expanded the reach and focus of the original statute. As construed by the Supreme Court, the statute now permits arbitration of statutory

* Professor of Law and Associate Dean of Faculty Research and Development, Loyola University Chicago School of Law. The author gratefully acknowledges the comments and suggestions of Professors Edward Brunet, Alan Scott Rau, Spencer Weber Waller, Stephen J. Ware, and Michael J. Zimmer.

¹ The 1924 House Report provided, for example:

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. Before such contracts could be enforced in the Federal courts, therefore, this law is essential.

H.R. REP. NO. 68-96, at 1 (1924); *see also* *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 5–10 (1924) [hereinafter *Joint Hearings*] (describing the purpose of FAA as to provide an inexpensive way to resolve disputes of merchants or of anyone engaged in buying and selling); *id.* at 31 (statement of Thomas B. Paton, American Bankers' Association) (presenting ABA resolution of support, citing, in part, that "all merchants doing interstate and foreign business seek a method whereby disputes arising in their daily business transactions can be speedily, economically, and equitably disposed of"); *infra* text accompanying notes 134–153. *See generally* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (discussing Supreme Court arbitration jurisprudence); 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 (2006) (criticizing the Supreme Court's tendency to expand the scope of the FAA).

claims,² as well as arbitration under adhesion contracts where the weaker party has not given actual consent to arbitrate.³ Moreover, although workers were specifically excluded from the coverage of the original act,⁴ the Court's construction of the statute permits employers to impose arbitration on employees.⁵ The Court has also construed the statute to preempt state contract law that attempts to protect citizens from the abuses of arbitration.⁶ These are major expansions of the original statute, unforeseeable at the time of passage.⁷

The Court's construction of the FAA has had substantial consequences for our legal system. Taken together, the Courts' arbitration opinions reflect policies similar to those in vogue in the early twentieth century, favoring big business over consumers and employees while showing antipathy to state and federal laws and regulations protecting rights of individuals and small businesses.⁸ These policy deci-

² See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 486 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985).

³ See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268–69 (1995); *Gilmer*, 500 U.S. at 23. See generally Jean Sternlight, *Creeping Mandatory Arbitration: Is it Just?* 57 STAN. L. REV. 1631 (2005); David Schwartz, *If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration,"* 8 NEV. L.J. 400 (2007).

⁴ See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of W.H.H. Piatt, Chairman of the Committee of Commerce, Trade and Commercial Law of the American Bar Association) (explaining that the statute was not intended to cover workers); see also *Moses*, *supra* note 1, at 105–06 (discussing a letter from Herbert Hoover, then Secretary of Commerce, to Congress emphasizing that the legislation did not and should not apply to workers).

⁵ See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

⁶ See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996). For other cases holding that the FAA preempts state law, see *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995); *Perry v. Thomas*, 482 U.S. 483, 491 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); see also 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, 54 ("Southland and its progeny are the result of bad statutory interpretation and even worse federalism. The historical evidence demonstrates that Congress never intended to preempt state law regulating arbitration agreements.").

⁷ See *Carrington & Haagen*, *supra* note 1, at 402 ("[I]f the FAA had been presented to Congress, as legislation having the effects ascribed to them by the Court, [it would not] have been assured of a single vote of approval.").

⁸ See *Moses*, *supra* note 1, at 158 ("[T]he Court has used various statutory interpretation techniques to reduce the protections legislated in the fields of federal anti-trust, securities, and employment law and has intruded upon state police powers to

sions need to be carefully examined by today's Congress, which should not relinquish to the Court the right to legislate about arbitration or to determine arbitration policy. Congress has an obligation to ensure that legislation it has enacted serves the interest of its constituents, and does not become, through judicial construction, entirely different legislation that does not support and may even contradict the original statute that Congress enacted.⁹

One of the major paradigm shifts in arbitration has arisen out of the Supreme Court's decision to permit arbitration of statutory claims.¹⁰ Arbitration of statutory claims was not a purpose of the 1925 Act, which Congress adopted to permit enforcement of arbitration agreements in federal court for contract claims between merchants.¹¹ Moreover, statutory claims simply are not as well protected in an arbitration process as in a judicial process.¹² As will be discussed below, arbitration does not provide the same level of discovery or the same procedural rights as litigation, nor does it provide for meaningful judicial review.¹³ Thus, when disputes over matters affecting civil

prevent states from enforcing legislation designed to protect their citizens against an unfair or unreasonable imposition of arbitration.”).

⁹ There are currently some bills before Congress that, if adopted, would eliminate pre-dispute arbitration in certain areas, such as in consumer purchases, employment contracts, and nursing home contracts. *See, e.g.*, Arbitration Fairness Act of 2009, S. 931, H.R. 1020, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act of 2009, S. 512, H.R. 1237, 111th Cong. (2009); Consumer Fairness Act of 2009, H.R. 991, 111th Cong. (2009). These bills do not, however, address issues such as the broad preemption of state contract law by the FAA; the Court's delegation of power to decide claims under mandatory laws to citizen-arbitrators, whose awards are not subject to judicial review on the merits; the Court's judicially created policy of favoring arbitration over litigation; or the elimination of any possibility of judicial review in accordance with party agreement.

¹⁰ *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616 (1985) (requiring arbitration in Japan of U.S. antitrust claims raised by car dealership); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”); *Scherk v. Alberto-Culver*, 417 U.S. 506, 534 (1974) (holding that claims under the Securities Act of 1934 were arbitrable).

¹¹ *See Joint Hearings, supra* note 1, at 5–10.

¹² *See, e.g., Bernhard v. Polygraphic Co. of Am. Inc.*, 350 U.S. 198, 203 (1955). Arbitration carries no right to trial by jury Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial

Id.

¹³ *See Mitsubishi*, 473 U.S. at 649 n.14 (Stevens, J., dissenting) (“The factfinding process in arbitration usually is not equivalent to judicial factfinding. . . . [T]he usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath,

rights, securities regulations, consumer protection, or antitrust law arise, if an arbitrator gets it wrong on the law, there is no recourse for the aggrieved party. The grounds provided for review of an award under the FAA do not permit a court to review the award on the merits, but only allow review as to matters of fairness and arbitrator misconduct. The risk of having statutory claims decided by arbitrators is that the careful protections Congress included in these statutes will be undermined if parties are not allowed sufficient discovery and if there is no possibility for review on points of law.¹⁴ Yet Congress has not focused on how this Supreme Court policy of moving statutory claims into arbitration impacts these legislative protections.

Deferring to the courts is unreasonable when the courts are interpreting the FAA in a manner inconsistent with both the text and the purpose of the statute.¹⁵ Moreover, when the Supreme Court follows its own path, instead of construing the statute consistent with the will of Congress, it risks engaging in unconstitutional lawmaking.¹⁶

are often severely limited or unavailable.”) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57–58 (1974)).

¹⁴ According to Professor Stephen Ware, lack of any review of an arbitration award by a court for an error of law means that the law has been “privatized” in the sense that parties who arbitrate have contracted out of the law because they have consented to the arbitration award regardless of whether it was correct on the law. Stephen Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 711–12 (1999). Thus, arbitration of a claim arising under a mandatory law, such as antitrust, essentially permits parties to contract out of the law, rendering the law a default provision rather than a mandatory one. *Id.* at 705–07. Professor Ware argues that claims under mandatory rules should either be found to be inarbitrable, or, because mandatory rules trump freedom of contract, courts should review for errors of law any awards based on claims under mandatory rules. *Id.* at 733–39.

¹⁵ See, e.g., *Southland v. Keating*, 465 U.S. 1, 36 (1984) (O’Connor, J., dissenting) (describing the decision as “unfaithful to congressional intent, unnecessary, and . . . inexplicable. [It is an] exercise in judicial revisionism [that] goes too far.”); see also Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 674 (1996) (arguing that the Court’s FAA jurisprudence is inconsistent with the legislative history and that “the Court’s preference for arbitration over litigation, its conclusion that the FAA preempts all protective state legislation, and its assurance that arbitration is just as fair a forum as litigation for resolution of legal complaints are myths that the Court has expounded since 1983”).

¹⁶ See STEPHEN BREYER, *ACTIVE LIBERTY* 99 (2005) (“[I]nterpretation of a statute that tends to implement the legislator’s will helps to implement the public’s will and is therefore consistent with the Constitution’s democratic purpose. . . . [I]nterpretation that undercuts the statute’s objectives tends to undercut that constitutional objective.”); Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 962 (2007) (“[A]n overt effort to substitute an interpreter’s sense of what the statute

The Court's refusal to cooperate with the legislative commands of the FAA is evident in the Court's interpretive methodology in the case of *Hall Street Associates, L.L.C. v. Mattel, Inc.*,¹⁷ and in its earlier decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁸

This Article focuses on these two decisions in order to bring together several concerns about arbitration law. First, the Supreme Court has construed the FAA in a way that either undervalues or ignores both the text and the legislative history, and therefore Congress's statutory commands; this is demonstrated most recently by the Court's decision in *Hall Street*. Moreover, the Court's construction of the FAA, particularly in its decision in *Mitsubishi* that mandatory rules of law can be arbitrated, has undercut the protections Congress has adopted in the areas of civil rights, securities, consumer protection, antitrust, and employment. Arbitrators' rulings on mandatory rules of law have been largely unreviewable on the merits, and after *Hall Street*, appear absolutely unreviewable on the merits. The Court's result-oriented methodology has developed arbitration law in a direction unanticipated by the text or legislative history of the statute. The determination that arbitrator-citizens can enforce—or not enforce—Congress's regulatory laws without judicial review should prompt Congress to take a close look at how arbitration law is impacting not only individuals but also the entire justice system.

In both *Hall Street* and *Mitsubishi*, the Court had to interpret the FAA with respect to a situation about which the statute was silent; there was simply no statutory language that was plainly applicable.¹⁹ In *Hall Street*, the question was whether the parties' agreement to have their award reviewed by a court for errors of fact or law was enforceable under the FAA.²⁰ Resolving a split in the federal circuit courts, the Supreme Court held that parties cannot contract around the narrow grounds provided in the FAA for confirming, vacating, or modifying an arbitration award.²¹ According to the Court, the statutory grounds are mandatory and exclusive.²² The Court thus resolved the conflict by determining that in the absence of text dealing specif-

ought to mean for the meaning that the legislature intended to convey is an unconstitutional exercise of legislative power").

¹⁷ 128 S. Ct. 1396 (2008).

¹⁸ 473 U.S. 614 (1985).

¹⁹ *Hall St.*, 128 S. Ct. at 1403–04; *Mitsubishi*, 473 U.S. at 623–29.

²⁰ *Hall St.*, 128 S. Ct. at 1400.

²¹ *Id.* at 1404.

²² *Id.*

ically with the situation, the FAA prohibited access to the courts for expanded judicial review, even though agreed to by the parties.²³

In *Hall Street*, the Court focused primarily on the text of the FAA, holding that because the text did not specifically provide for judicial review based on party agreement, no such review was allowed.²⁴ In *Mitsubishi*, by contrast, the Court interpreted the silence of the statute to reach a very different conclusion. In that case, the Court found that because the text of the FAA said nothing about statutory claims, a presumption existed in favor of such claims.²⁵ In doing so, the Court vastly expanded the scope of the FAA by holding that antitrust claims were arbitrable.²⁶ As will be discussed below, in both cases, the decisions do not seriously engage the text or the legislative history and thus suggest that the Court has created its own arbitration law, independent of the history, purpose, or text of the statute that Congress enacted.

Taken together, the two cases show the Supreme Court moving arbitration law in a direction not only against the purposes of the FAA, but also against the interests of those individuals that Congress intended to protect by adopting laws to prevent abuses of civil rights, consumer rights, monopolies, and securities fraud. As many commentators and courts have noted, rights may not be as well protected in arbitration as in court.²⁷ Nonetheless, the Court has not only expanded the scope of the FAA to make claims under such statutes arbitrable, but also, in *Hall Street*, has narrowed defenses to enforcement of awards under those statutes.²⁸ As will be discussed below, in *Hall Street*, the Court not only denied parties the right to seek court review of the merits of an arbitrator's award, but also eliminated the safety valve used by some courts when arbitrators made egregious er-

²³ *Id.*

²⁴ *See id.* at 1404–05.

²⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 623–29 (1985).

²⁶ *See id.* at 628–29.

²⁷ *See, e.g., id.* at 649 n.14; *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 203 (1955); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360 (arguing that informal processes increase the risk of class-based discrimination); Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL'Y & L. 519, 520 (2004) (“Unfortunately, the very features that attract parties to ADR undermine the protection of an individual’s statutory rights. Because ADR is less formal and is not held to the same standards as judicial proceedings, there is a risk that laws may be misapplied, or not applied at all, and that justice will be exchanged for efficiency.”).

²⁸ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404–05 (2008).

rors of law, i.e., the vacatur of an arbitral award on the grounds of manifest disregard of the law.²⁹ This elimination of all possible judicial review for errors of law, combined with the large scale delegation to private citizen-arbitrators to make decisions on the law that are confidential and unreviewable on the merits, has vastly changed the landscape of the justice system. Congressional action is needed.

In Part II, this Article will consider the Court's decision in *Hall Street* that the text of the FAA does not permit expanded judicial review. Part III will focus on a comparison with the Court's very different interpretive approach to the statutory text in *Mitsubishi*, when it expanded the scope of the FAA to reach statutory claims. The comparison of the two cases demonstrates that the Supreme Court has applied its interpretive methodology in ways that minimize, if not eliminate, its obligation to construe the FAA in a manner consistent with the text and purpose of the statute. Finally, Part IV will consider the negative impact of these two cases on regulatory laws adopted by Congress and will discuss the need for Congress to take back legislative control of arbitration policy. It will then propose some alternatives that Congress should consider for dealing with the arbitration of statutory claims.

II. *HALL STREET* AND EXPANDED JUDICIAL REVIEW

A. *The Background of Expanded Judicial Review*

The underlying problem prompting some parties to agree to seek expanded judicial review of arbitral awards was the fear that a maverick arbitrator might render an award that was unquestionably wrong yet could not be vacated.³⁰ The narrow grounds specifically set forth in the FAA for vacating or modifying an award permit judicial review only for reasons that go to the integrity of the process, such as if a party was not permitted to present its case, if the arbitrator exceeded his powers, or if there was fraud or corruption.³¹ The statute does not provide for review based on an arbitrator's error of law or fact.

²⁹ *Id.*; see also *infra* note 122.

³⁰ For examples of parties' concerns about irrational awards, see Christopher Drahozal, *Standards for Judicial Review of Arbitral Awards in the United States: Mandatory Rules or Default Rules?*, 16-9 MEALEY'S INT'L. ARB. REP. 27, 28 (2001); Stephen A. Hochman, *Judicial Review to Correct Error – An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 104 (1997); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 248-53 (1999).

³¹ 9 U.S.C. § 10(a) (2006).

Arbitration is a creature of consent; therefore, a few parties who had concerns about arbitrator errors that could not otherwise be remedied began drafting arbitration clauses in which they agreed that the arbitrator's award would be subject to judicial review on the merits.³² A number of circuit courts enforced these agreements.³³ These courts emphasized freedom of contract, reasoning that under the FAA, the specific terms of the parties' private agreement to arbitrate must be enforced. As the U.S. Court of Appeals for the Fifth Circuit noted, "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."³⁴ Thus, courts supporting expanded judicial review found that the FAA grounds were default provisions and that parties could draft around them.³⁵ In addition, these courts also took note that "enforcing the arbitration agreement—even with enhanced judicial review—will consume far fewer judicial resources than if the case were given plenary adjudication."³⁶

Moreover, these courts believed that enforcing agreements for expanded judicial review served an important policy under the FAA, which was that courts should enforce an arbitration agreement according to its terms.³⁷ In other words, these courts reinforced the voluntary consensual underpinning of arbitration. This was consistent with the widespread view that arbitration offered the important ad-

³² Only a small number of parties appear to have actually entered into agreements for expanded judicial review of arbitral awards. See Reply Brief of Petitioner-Appellant at 18, *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (No. 06-989) ("[A]lthough the Fifth Circuit has permitted expanded judicial review provisions since 1995, Hall Street has been able to identify only three written district court decisions from that circuit in which a court applied such a provision in reviewing an arbitration award.") (footnote omitted).

³³ *Hall St.*, 128 S. Ct. at 1403 n.5 ("The First, Third, Fifth and Sixth Circuits, meanwhile, have held that parties may so contract. . . . The Fourth Circuit has taken [this] side of the [circuit] split in an unpublished opinion . . .") (citing *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997); *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995)).

³⁴ *Gateway*, 64 F.3d at 996 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)).

³⁵ See sources cited *supra* note 33.

³⁶ *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring), *vacated sub nom.*, *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.* 341 F.3d 987 (9th Cir. 2003) (en banc).

³⁷ See *id.* at 888 (majority opinion) ("[T]he primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with the agreements' terms").

vantage of permitting parties to tailor the process to suit their particular needs.³⁸

Other courts, however, refused to enforce party agreements for judicial review of an award on the merits. The U.S. Courts of Appeals for the Ninth and Tenth Circuits concluded that the narrow grounds set forth in the FAA are mandatory and exclusive, and that a party-determined expansion of judicial review was impermissible and conflicted with the policies of the FAA.³⁹ Those policies, according to the Tenth Circuit, supported the independence of arbitration from interference by the court.⁴⁰ The two circuit courts also found that parties have no power to go beyond the statute and to require additional review by the court.⁴¹ The Ninth Circuit noted, for example: “[B]ecause Congress has specified standards for confirming an arbitration award, federal courts must act pursuant to those standards and not others. . . . [P]rivate parties lack the power to dictate *how* the federal courts conduct the business of resolving disputes.”⁴²

The differences between the two positions were stark. The first position was that party agreements for judicial review of an award on the merits were enforceable because the FAA’s narrow grounds were default rules that would apply only if the parties did not agree otherwise.⁴³ Moreover, the first position viewed expanded judicial review as fully consonant with the FAA’s goal of enforcing parties’ agreements according to their terms.⁴⁴ The second position was that expanded judicial review was in conflict with the FAA because it would create new obligations for the courts, which therefore would interfere with the independence of the arbitral process.⁴⁵ Thus, FAA grounds were mandatory and exclusive, and parties could not contract around

³⁸ See, e.g., *id.* (“Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as [parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.” (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478–79 (1989)) .

³⁹ See *Kyocera Corp.*, 341 F.3d 987; *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936–37 (10th Cir. 2001).

⁴⁰ See *Bowen*, 254 F.3d at 935–36.

⁴¹ See *Kyocera*, 341 F.3d at 1000; *Bowen*, 254 F.3d at 936.

⁴² *Kyocera*, 341 F.3d at 1000.

⁴³ See sources cited *supra* note 33.

⁴⁴ See *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997), *vacated*, *Kyocera*, 341 F.3d 987.

⁴⁵ See *Bowen*, 254 F.3d at 935–36.

them. In March 2008, in *Hall Street*, the Supreme Court held that the grounds in the FAA were mandatory and exclusive.⁴⁶

B. *The Hall Street Decision*

1. The Lower Court Decisions

The *Hall Street* arbitration award occurred in a rather unusual context. In the midst of a federal lawsuit over obligations under a lease, the parties decided that one issue—the question of Mattel’s obligation to indemnify the landlord, Hall Street, for clean-up costs of environmental damage—would be submitted to arbitration.⁴⁷ The parties then entered into an arbitration agreement providing that any arbitration award would be reviewed by the district court for errors of fact or law.⁴⁸

The district court approved the agreement and entered it as an order.⁴⁹ After the arbitrator rendered an award in favor of Mattel, the district court, in accordance with the review permitted under the parties’ agreement, vacated it for an error of law.⁵⁰ On remand, the arbitrator ruled in favor of Hall Street.⁵¹ This time, the district court upheld the award.⁵² The Ninth Circuit reversed, however, on the grounds that the terms of the arbitration agreement providing for judicial review of the merits of the award were “unenforceable and severable.”⁵³

⁴⁶ See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406–08 (2008). The Court specifically did not decide, and remanded to the Ninth Circuit to determine, whether grounds outside the FAA, based on state statutory or common law, or on rules of the federal district court, could provide additional grounds for review. *Id.* at 1407–08.

⁴⁷ *Id.* at 1400.

⁴⁸ The arbitration agreement provided in pertinent part: “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.” *Id.* at 1400–01.

⁴⁹ *Id.* at 1400.

⁵⁰ *Id.* at 1401.

⁵¹ *Id.*

⁵² *Hall St.*, 128 S. Ct. at 1401.

⁵³ *Id.* After the Ninth Circuit’s reversal, the district court again decided in favor of Hall Street on different grounds, and the Ninth Circuit reversed again, after which the Supreme Court granted certiorari. *Id.* At the time the parties in *Hall Street* entered into their arbitration agreement, the Ninth Circuit had determined that agreements for expanded judicial review were enforceable. See *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 890–91 (1997). The court flip-flopped later in an en banc decision, *Kyocera v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (2003), so that by the time the parties in *Hall Street* appealed to the Ninth Circuit, *Kyocera* had

2. The Supreme Court Decision

a. The Stated Policy Basis

In holding that the FAA's grounds for review of an award were mandatory and exclusive, the Supreme Court denied the parties any access to the courts for review on the merits. Writing for the majority, Justice Souter gave a brief mention of a policy justification, stating that expanded judicial review would "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."⁵⁴ In other words, access to the courts for review on the merits would produce a less-efficient process. The Court gave no consideration to any of the policy reasons in favor of expanded judicial review, such as party autonomy, freedom of contract, and the driving purpose behind the FAA "of ensuring that private arbitration agreements are enforced according to their terms."⁵⁵ Though it acknowledged that "the FAA lets parties tailor some, even many features of arbitration by contract,"⁵⁶ the Court said nothing about arbitration's core premise of being consensual. Nor did it acknowledge, as the Tenth Circuit did, that expanded judicial review is still less of a burden on the courts than if the parties chose to litigate in the first instance.⁵⁷

The Court also failed to consider that even in jurisdictions where expanded judicial review was available, few parties had availed themselves of it.⁵⁸ The vast majority preferred traditional arbitration. But for parties who wanted a safety net, the Court's decision denied them the choice of court review to ensure that their dispute was not resolved by an award that rested on an erroneous conclusion of law.

b. Legislative History

In addition to briefly mentioning efficiency as a reason for its decision, the Court, in a footnote, also gave a passing nod to the legis-

overruled *LaPine*, making an agreement to review an arbitration award on the merits unenforceable in the Ninth Circuit.

⁵⁴ *Hall St.*, 128 S. Ct. at 1405 (quoting *Kyocera*, 341 F.3d at 998).

⁵⁵ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

⁵⁶ *Hall St.*, 128 S. Ct. at 1404.

⁵⁷ See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 n.6 (10th Cir. 2001) ("We recognize, of course, that even under expanded standards of review, arbitration reduces the burden on district courts.")

⁵⁸ See Reply Brief of Petitioner-Appellant, *supra* note 32, at 18.

lative history of the FAA.⁵⁹ It asserted that its decision was consistent with legislative history, citing testimony before the congressional subcommittees in 1924 that referred only to the specific grounds that are contained in the statute.⁶⁰

In his dissent, Justice Stevens stated that the Court's ruling not only conflicted with the core purpose of the FAA, but also ignored the historical context in which the Act was passed.⁶¹

Before 1925, courts routinely refused to specifically enforce an arbitration agreement, although they would enforce arbitration awards.⁶² A party to an arbitration agreement could simply refuse to arbitrate with no adverse consequences.⁶³ Although refusing to arbitrate was a breach of contract, it was difficult, if not impossible, to prove damages.⁶⁴ The FAA was enacted to require specific enforcement of the parties' agreement to arbitrate.⁶⁵ According to Justice Stevens, because the principal purpose of the FAA was to "ensur[e] that private arbitration agreements are enforced according to their terms,"⁶⁶ this purpose mandates "giv[ing] effect to parties' fairly negotiated decisions to provide for judicial review of arbitration awards for errors of law."⁶⁷

It is unlikely that it ever occurred to Congress or the drafters of the Act in 1924 that a party would want expanded judicial review, because courts were viewed as unsupportive of arbitration at the time.⁶⁸ The drafters and proponents of the Act simply argued that the law

⁵⁹ *Hall St.*, 128 S. Ct. at 1406 n.7. Justice Scalia, who joined in the opinion, did not join in this footnote. *Id.* at 1400 n.*.

⁶⁰ *See id.* at 1406.

⁶¹ *See id.* at 1408 (Stevens, J., dissenting).

⁶² *See id.*

⁶³ *See* S. REP. NO. 68-536, at 2 (1924) (noting that the arbitration agreement "was subject to revocation by either of the parties at any time before the award" and that this rendered the agreements "ineffectual" because "the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy").

⁶⁴ *See* IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 20 (1992); WESLEY A. STURGES, *A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS* 255-62 (1930).

⁶⁵ *Hall St.*, 128 S. Ct. at 1408 (Stevens, J., dissenting) ("[9 U.S.C. §2], which is the centerpiece of the FAA, reflects Congress' main goal in passing the legislation: 'to abrogate the general common-law rule against specific enforcement of arbitration agreements.'" (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part)).

⁶⁶ *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

⁶⁷ *Id.*

⁶⁸ *Id.*; S. REP. NO. 68-536, at 2 (1924).

was necessary in order for arbitration agreements to be enforced.⁶⁹ The narrow grounds for review served to prevent courts from interfering with the parties' choice to have an arbitrator, rather than a court, decide the dispute.⁷⁰ The focus was on restraining the courts, which were believed to be hostile to arbitration.⁷¹ There was no discussion of whether, if the parties themselves wanted more help from the court, they could agree on a more comprehensive review of the award. At that point in time, the drafters and proponents of the Act were simply eager to have legislation that would cause the courts to overcome their objections to arbitration, enforce the agreement to arbitrate, then step back and let the arbitrator decide the dispute.

The Court's refusal to consider seriously the legislative history and purpose of the Act no doubt reflects the influence of Justice Scalia and other "textualists," who have asserted that to the extent that any legislative intent is pertinent, that intent is found in the text of the statute, and that legislative history is irrelevant.⁷² Textualists express concern that a purpose-driven focus on legislative history permits too much judicial leeway, so that judges can look for and find support for any policy preferences they may have.⁷³ Although some textualists will agree that the context of language matters, to them the "context" only includes dictionary definitions, textual canons, points of grammar, and use of the same language in another part of the same statute or in a different statute.⁷⁴ In the textualists' view,

⁶⁹ See *Joint Hearings*, *supra* note 1, at 34–35 (brief of Julius Cohen, the principal drafter of the FAA); S. REP. NO. 68-536, at 2.

⁷⁰ See *Joint Hearings*, *supra* note 1, at 36 (because the grounds to vacate, modify, or correct the award are narrow, "[t]here is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been")

⁷¹ See *Joint Hearings*, *supra* note 1, at 39.

⁷² See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 29–37 (Amy Gutmann ed., 1997).

⁷³ See *id.* at 17–18 ("[U]nder the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires . . ."); see also Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting her colleague Judge Leventhal's observation that citing legislative history is akin to "looking over a crowd and picking out your friends").

⁷⁴ See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 44 (2006) ("[T]extualists . . . place heavy emphasis on dictionary definitions, the use of identical language in other statutory provisions, and 'textual' or 'linguistic' canons of construction that have nothing to do with statutory purposes or societal effects.") According to Justice Scalia, these interpretive aids are indicia of "'objectified' intent," which he views as "the intent that a reasonable person would gather from the text of

legislative history has no value because Congress can have no ascertainable group “intent.” From the textualists’ perspective, the various members of Congress frequently have very little knowledge about the particular legislation, or have different preferences, priorities, or views of the legislation’s purpose.⁷⁵ Moreover, the textualists raise an interest-group critique asserting the unreliability of legislative reports and drafting history because of manipulation by partisan participants.⁷⁶

Increasingly, however, there is scholarly and judicial support for a larger view of “context,” one that includes the historical context of the statute and that considers legislative history a part of the constitutional process deserving of consideration in the interpretation of any statute.⁷⁷ Both analytical philosophy and political science have contributed to our understanding of the validity of the collective intent of Congress,⁷⁸ and political science scholarship is undercutting the

the law, placed alongside the remainder of the *corpus juris*.” Scalia, *supra* note 72, at 17.

⁷⁵ See Molot, *supra* note 74, at 28 (“[B]orrowing heavily from public choice theory, textualists emphasized that the legislative process is messy and full of compromises, some principled and some unprincipled.”).

⁷⁶ See Charles Tiefer, *The Reconceptionalization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 215–16 (explaining that textualism “drew upon the Chicago School of public choice theory to show that Congress, as a diverse body of non-aggregable preferences, could not have a determinable group intent other than the formal one of enacted text”).

⁷⁷ See BREYER, *supra* note 16, at 99 (“[A]n interpretation of a statute that tends to implement the legislator’s will helps to implement the public’s will and is therefore consistent with the Constitution’s democratic purpose.”); Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL RTS. J. 1267, 1299 (2005) (“Because legislative history reflects the context of bicameralism and presentment, it provides the constitutionally preferred context for determining statutory meaning.”).

⁷⁸ See Tiefer, *supra* note 76, at 260–63.

[W]hen the kind of speech [legislators] produce is a statute, i.e., a sovereign command uttered by an institutional process, then, as in all such commands, the form of speech itself implies an aim. If the speech is uttered by an institution, then the aim is an institutional aim devised as a collective intent. . . .

. . . .

Importantly, procedural stages—like moving a legislative bill out of committee, passing the bill in one chamber, [or] reporting from conference . . . create ‘conditional rights. . . .’

. . . Procedural stages and conditional rights serve as the means for institutions to express intent. None of this depends upon a group mind, or upon all members of the institution having a subjective awareness of all these aspects.

Id.; see also James J. Brudney, *Intentionalism’s Revival*, 44 SAN DIEGO L. REV. 1001, 1002 (2007) (“Advocates for an intentionalist approach have applied lessons from political science, democratic constitutionalism, analytic philosophy, and developmental psy-

textualists' assertions, derived from public choice theory, that legislative history cannot be relied upon because it is based on compromise and opportunistic activity.⁷⁹ Theories of communication focus on statutory interpretation as "a constitutionally legitimate decoding of statutory commands,"⁸⁰ and find that an understanding of legislative history is necessary for a judge to be able to decode statutes accurately.⁸¹

Moreover, recent empirical research suggests that the liberal justices, the ones most likely to rely on legislative history, do not appear to do so in order to promote their preferred policy outcomes.⁸² A study focused on workplace lawsuits found that liberal justices used legislative history to help support pro-employer outcomes slightly more often than they did to justify pro-employee results.⁸³ Contrary to the textualists' view of legislative history as maximizing judicial leeway, the authors of this study concluded:

The liberals' regular and nuanced reliance on legislative history reflects their belief that history can help illuminate the dimensions and details of complex legislative deals. More important, these Justices' willingness to follow a legislative history trail leading away from their preferred policy perspectives indicates the principled nature of their interpretive approach.⁸⁴

Nonetheless, despite studies and scholarly commentary indicating that legislative history remains an important interpretive tool, in *Hall Street*, the Justices gave it very short shrift.

chology to help justify the existence and importance of a collective legislative purpose that can illuminate statutory meaning under the right conditions.") (footnotes omitted).

⁷⁹ See Tiefer, *supra* note 76, at 267–68 (stating that political science researchers "cast doubt on the existence of a level of interest group distortion sufficient to make legislative history generally misleading and unhelpful" and "found voting in most congressional committees did not nearly diverge from voting in full chambers to the extent the interest group critique might suggest"). Political scientists "have worked out new theories of the institutional role of committees that downplay concerns about extreme strategic distortion argued by the special interest critique." *Id.* at 268.

⁸⁰ Boudreau et al., *supra* note 16, at 959. While cautioning that "not all legislative history is created equal," the authors point out that when judges are privy to the legislative process, they "understand better the way that legislators compress statutory meaning and the way that they (the judges) should expand it." *Id.* at 973.

⁸¹ See *id.* at 973.

⁸² See James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 154 (2008).

⁸³ See *id.* at 153–54.

⁸⁴ *Id.* at 160.

c. The Statutory Text

In *Hall Street*, although the Court briefly expressed a concern about efficiency and noted its belief that its decision was consistent with legislative history, the core rationale for its decision rested on the text of the statute, or, more precisely, the absence of text.⁸⁵ Essentially, the Court determined that since the statute does not specifically provide that the parties can agree on other grounds for judicial review, the narrow statutory grounds are therefore exclusive.⁸⁶ According to the Court, even if the text of sections 10 and 11 of the FAA could be “supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally.”⁸⁷ The Court then pulled out the rule of *ejusdem generis*, for an “implicit lesson.”⁸⁸ This canon of construction is a short-hand way of saying that when several specific items are followed by a general item, the general item should be interpreted as being in the same category as the specific items.⁸⁹ If, for ex-

⁸⁵ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404–05 (2008).

⁸⁶ *Id.* at 1404.

⁸⁷ *Id.* The pertinent grounds for vacating an award in section 10 include the following:

- (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.

9 U.S.C. § 10(a) (2006). Under section 10, “[i]f an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.” *Id.* § 10(b). The pertinent grounds for modifying or correcting an award in section 11 include the following:

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Id. § 11.

⁸⁸ *Hall St.*, 128 S. Ct. at 1404.

⁸⁹ *Id.*

ample, there is a bill of sale for a farm that includes “cattle, hogs, and other animals,” the “other animals” would probably be interpreted as including other farm animals but not the pet puppy of the farmer’s child.⁹⁰ In sections 10 and 11, however, there is no general term that follows the several specific terms,⁹¹ so there is no reason for *ejusdem generis* to apply. But the Court’s “implicit lesson” is that, because a general term—if one existed—would be linked to the earlier specific terms, when there is *no term at all*, there can be “no textual hook for expansion.”⁹²

The Court’s “implicit lesson” is simply wrong because it is based on a false use of the canon. The application of *ejusdem generis* cannot legitimately be twisted into a means of creating a prohibition not found in the statute. When there is no prohibition in the text, the Court should look to the legislative history, the context of the statute, and any pertinent public policy to ascertain if there is any reason to have such a prohibition.⁹³

Moreover, the text itself provides a basis for supporting party autonomy. Section 10(a)(4) states that an award may be vacated “where the arbitrators exceeded their powers.”⁹⁴ The powers of arbitrators derive from the consent of the parties.⁹⁵ Thus, the text of section 10(a)(4) implies that Congress intended the parties to be able to determine the nature and extent of arbitrator power, which could reasonably include curtailing that power by making it subject to judicial

⁹⁰ Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 853 (1964).

⁹¹ See *Hall St.*, 128 S. Ct. at 1405.

⁹² *Id.* at 1404.

⁹³ Justice Stevens noted in his dissent that “[a] decision ‘*not to regulate*’ the terms of an agreement that does not even arguably offend any public policy whatsoever, ‘is adequately justified by a presumption in favor of freedom.’” *Id.* at 1409–10 (Stevens, J., dissenting) (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 320 (1993) (Stevens, J., concurring)).

⁹⁴ 9 U.S.C. § 10(a)(4) (2006).

⁹⁵ See MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 2 (2008) (“The parties’ consent provides the underpinning for the power of the arbitrators to decide the dispute. The parties’ consent also limits an arbitrator’s power because an arbitrator can only decide issues within the scope of the parties’ agreement.”); Edward Brunet, *The Core Values of Arbitration*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 3, 3 (2006) (“Arbitration rests on a firm foundation of party autonomy. The parties own the dispute, and should be able to control the details of their disputing process.”) (citation omitted); see also *Gateway Techs, Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995) (“Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)).

review on the merits.⁹⁶ Certainly, nothing in the statutory language contradicts this interpretation, and it reflects a more reasonable interpretation of the text than does the far-fetched and false application of *ejusdem generis*.

The Court has gone off track in its interpretive principles by essentially ignoring the legislative history and context of the statute. A number of scholars have asserted that although textualists claim that their objection to legislative history is that it permits judges to manipulate meaning, textualists themselves, by ignoring the historical context of the statute, can and do engage in greater manipulation of meaning to accord with their values.⁹⁷ A textualist judge may “confuse his own idiosyncratic reading of the statutory text with the clear meaning that a reasonable reader or legislator would assign to that text.”⁹⁸ In doing so, the judge is exacerbating, rather than eliminating, the problem of judicial leeway.

The interpretation of the FAA in *Hall Street* is an example of the Court being led astray by an overemphasis on textualism, including an inaccurate and improper resort to a canon of interpretation. The purpose of the FAA was to require courts to enforce arbitration agreements and to limit their interference with the process.⁹⁹ All of the narrow grounds of sections 10 and 11 pertain to the limited areas where courts would be authorized to interfere because the integrity of the process had been undermined by the arbitrator’s conduct or because mistakes of form had occurred.¹⁰⁰ The absence of a general

⁹⁶ See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 73 (1999) (“Congress would not have granted such express authority [in section 10(a)(4)] unless it intended some ability of the arbitral signatories to shape the nature of arbitration and judicial review.”).

⁹⁷ See, e.g., Molot, *supra*, note 74, at 49, 54.

If . . . modern textualists . . . place too much emphasis on statutory text as a means of cabining judicial leeway, they . . . run the risk that they . . . will render judges less, rather than more, faithful to Congress’s instructions.

. . . .
 . . . The more often judges exclude statutory purposes, and try to resolve (or eliminate) statutory ambiguity using textualist tools alone, the more likely it is that legislators’ purposes will be frustrated.

Id.

⁹⁸ *Id.* at 53.

⁹⁹ Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT’L ARB. 225, 231 (1997). The purpose of the limited review provisions of section 10 is “to insulate [awards] from parochial or intrusive judicial review” so that parties “need not fear an officious or meddlesome inquiry into the merits which would impair the efficacy of the arbitral process for them.” *Id.*

¹⁰⁰ See 9 U.S.C. §§ 10–11 (2006).

term pertaining to grounds for judicial review at the end of the list of specific grounds in sections 10 and 11 does not mean that the statute has anything at all to say about party agreements on judicial review. Sections 10 and 11 impose a limit on what *courts can do* under the statute.¹⁰¹ They do not, however, limit what *parties can agree to*. *Ejusdem generis* cannot be stretched to restrict what parties can agree to when the statutory text does not deal at all with party agreements. By twisting the use of *ejusdem generis*, and also by divorcing the text from the context and meaning of the statute at the time of its enactment, the Court has simply manipulated the text to reach the result it preferred: restricting parties' access to the courts.¹⁰²

d. The Elimination of "Manifest Disregard"

In addition to interpreting the statute to prohibit parties from agreeing to expanded judicial review, the Court also appeared to eliminate the judicially created ground for review known as "manifest disregard" of the law.¹⁰³ "Manifest disregard" has been applied by every federal circuit court¹⁰⁴ and the Supreme Court has occasionally referred to it when reviewing an arbitration award.¹⁰⁵ Courts have generally understood "manifest disregard" to mean that a court can vacate an award if an arbitrator knew what the law was but nevertheless disregarded it.¹⁰⁶ The courts probably created the doctrine because of an instinctive resistance to letting stand an award that was based on an egregious error of the law. Many courts have cited as authority the 1953 Supreme Court case of *Wilko v. Swan*.¹⁰⁷ In that case, the Court said in dicta that "[i]n unrestricted submissions . . . the interpretations of the law by the arbitrators, *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error

¹⁰¹ *See id.*

¹⁰² Some commentators have criticized the use of canons of construction for any purpose. For example, Richard Posner opined that canons of construction "no more enable difficult questions of interpretation to be answered than the maxims of everyday life enable the difficult problems of everyday living to be solved." RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 280 (1990). Professor Alan Scott Rau has specifically criticized the *Hall Street* decision for its "grotesque deficiencies in craftsmanship, in rhetoric, in argument," and as "represent[ing] a new low in context-free, policy-free, abstract, non-functional decision-making." Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 482, 485 (2008).

¹⁰³ *See Wilko v. Swan*, 346 U.S. 427, 436–37 (1953).

¹⁰⁴ *See* Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 234 (2007).

¹⁰⁵ *See, e.g., First Options of Chicago, Inc., v. Kaplan*, 514 U.S. 938 (1995).

¹⁰⁶ *See* Drahozal, *supra* note 104, at 234, 235–36.

¹⁰⁷ 346 U.S. 427.

in interpretation.”¹⁰⁸ In other words, if the arbitrator made an error of law, this would not be a ground for review unless the arbitrator’s interpretation was so extreme as to amount to a manifest disregard of the law. In that case, such disregard of the law could result in vacatur of the award.¹⁰⁹

Hall Street presented the Court with a “manifest disregard” argument: because judges had created “manifest disregard” as a ground for vacating an award that was not in the text of the FAA, the limited grounds of the statutory text were not exclusive.¹¹⁰ The Court’s response was that “Hall Street overlooks the fact that the statement it relies on [from *Wilko*] expressly rejects just what Hall Street asks for here, general review for an arbitrator’s legal errors.”¹¹¹ This response is not on point because it ignores the thrust of Hall Street’s argument. Hall Street never asserted that either the FAA or *Wilko* had provided for “general review of an arbitrator’s legal errors.”¹¹² Rather, its position was simply that a widely used judicially created ground for review undermines the position that the express statutory grounds are exclusive.¹¹³

Although the Court never responded directly to that argument, its opinion in *Hall Street* nonetheless appears to have eliminated “manifest disregard” as a separate ground for review of an award. The Court suggested that the *Wilko* dicta was “vague[]” and might have merely been a reference “to the [section] 10 grounds collectively, rather than an addition to them.”¹¹⁴ This was somewhat surprising because in 1995, in *First Options of Chicago v. Kaplan*,¹¹⁵ the Court, citing *Wilko* favorably in dicta, appeared to accept “manifest disregard” as a ground for vacating an award, stating:

The party still can ask a court to review the arbitrator’s decision, but the court will set that decision aside only in very unusual circumstances. *See, e.g.*, 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan*, 346 U.S. 427, 436–37, 98 L. Ed. 168, 74 S. Ct. 182

¹⁰⁸ *Id.* at 436–37 (emphasis added).

¹⁰⁹ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 (2008).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1404.

¹¹² *See id.*

¹¹³ The Court mentioned in passing that a “supposed judicial expansion by interpretation” might be different from a “private expansion by contract,” but still did not respond to Hall Street’s position concerning the nonexclusive character of the statutory grounds for review. *See id.*

¹¹⁴ *See id.* at 1404.

¹¹⁵ 514 U.S. 938.

(1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), *overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989).¹¹⁶

Thus, in *Wilko* and *First Options* the Court acknowledged that courts may set aside an arbitral award either under one of the grounds listed in the section 10 of the FAA, or because the arbitrator acted in "manifest disregard" of the law.¹¹⁷ Nonetheless, in *Hall Street*, the Court backpedaled, declaring that "[m]aybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the [section] 10 grounds collectively," or, maybe it was a "shorthand for [section] 10(a)(3) or [section] 10 (a)(4)."¹¹⁸ The Court then asserted that "[w]e, speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment."¹¹⁹ The Court's final word, however, appears to be the nail in the coffin of "manifest disregard." "[N]ow that its meaning is implicated, we see no reason to accord it the significance that *Hall Street* urges."¹²⁰ The significance urged by *Hall Street* was that "manifest disregard" was "a further ground for vacatur on top of those listed in [section] 10."¹²¹ Thus, the Court's decision that it was not a further ground appears to have eliminated "manifest disregard" as a separate ground for vacating an arbitral award, although some lower courts have a different view.¹²²

¹¹⁶ *Id.* at 942.

¹¹⁷ *See id.*

¹¹⁸ 128 S. Ct. at 1404.

¹¹⁹ *Id.* (citing *First Options*, 514 U.S. at 942).

¹²⁰ *Id.*

¹²¹ *Id.* at 1403.

¹²² After *Hall Street*, a number of federal courts have held that the decision made clear that manifest disregard of the law is not an independent basis on which to vacate an arbitration award. *See, e.g.*, *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008); *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp. 2d 993, 998–99 (D. Minn. 2008); *T. Co. Metals LLC v. Dempsey Pipe & Supply, Inc.*, No. 07-7747, 2008 U.S. Dist. LEXIS 112087, at *8 n.4 (S.D.N.Y. July 8, 2008); *Ascension Orthopedics, Inc. v. Curasan, AG*, No. 07-4033, 2008 WL 2074058, at *2 (S.D. Tex. May 14, 2008). Other federal courts take the position that *Hall Street* did not abrogate the manifest disregard doctrine altogether because it remains as a judicial gloss on the specific grounds for vacatur enumerated in section 10. *See, e.g.*, *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1289–90 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 145 (2009); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 93–95 (2nd Cir. 2008), *cert. granted*, 129 S. Ct. 2793 (2009). The Sixth Circuit has taken various positions. *See Martin Marietta Materials, Inc. v. Bank of Okla.*, 304 F. App'x 360, 363–64 (6th Cir. 2008) (manifest disregard maintains validity, but may be judicial gloss on 9 U.S.C. § 10); *Coffee Beanery Ltd. v. WW, LLC*, 300 F. App'x 415, 421 (6th Cir. 2008)

To the extent that it has eliminated “manifest disregard,” the Court has removed a safety net, albeit a narrow one. Arbitrating parties appear to have no right to any review of an arbitral award that rests on an arbitrator’s deliberate, erroneous conclusion of law. Such a result can impact not only our system of justice, but also how parties perceive the functioning of arbitration within that system. The absence of any possible review is particularly significant in light of the Supreme Court’s delegation to private citizen-arbitrators of the judicial power to decide claims under regulatory statutes.

III. THE *MITSUBISHI* DECISION

A. *Interpretive Methodology*

It is instructive to compare the interpretive methodology in *Hall Street* with the Supreme Court’s earlier decision in *Mitsubishi*, which held that antitrust claims were arbitrable under the FAA.¹²³ In *Hall Street*, the Court twisted a canon of construction to claim that the absence of any mention of additional grounds for review in the FAA

(award vacated because arbitrator acted in manifest disregard of the law), *cert. denied*, 130 S. Ct. 81 (2009); *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 561 n.2 (6th Cir. 2008) (holding manifest disregard to be a non-statutory ground for vacatur, but providing a “but see” cite to *Hall Street*). In October 2009, the Supreme Court denied certiorari in three cases that specifically raised the issue of whether “manifest disregard” was a valid ground for vacatur under the FAA. *See Improv W. Assocs. v. Comedy Club, Inc.*, 130 S. Ct. 145 (2009); *Grain v. Trinity Health*, 130 S. Ct. 96 (2009); *Coffee Beanery Ltd. v. WW, LLC*, 130 S. Ct. 81 (2009). On the other hand, the Supreme Court granted certiorari in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 129 S. Ct. 2793 (2009). Although the question presented in *Stolt-Nielsen* was whether, under the FAA, a class action can be imposed on parties whose arbitration clauses are silent on that issue, the Court may well deal with the question of manifest disregard because it was a basis for the district court’s vacatur of an arbitral award. *See Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 435 F. Supp. 2d 382, 387 (S.D.N.Y. 2006). It was reversed by the Second Circuit, *Stolt-Nielsen*, 548 F.3d at 102, which nonetheless contended that the manifest disregard doctrine survived in limited form. *Id.* at 93–95. Thus, the Supreme Court may soon give further guidance as to the doctrine of manifest disregard.

State courts as well, in applying the FAA, have adopted one of the two positions. One position is that, post-*Hall Street*, manifest disregard of the law “is no longer an independent and proper basis under the Federal Arbitration Act for vacating, modifying, or correcting an arbitrator’s award.” *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 381 (Ala. 2009); *see also Horton Homes, Inc. v. Shaner*, 999 So. 2d 462, 467 n.2 (Ala. 2008). The second position is that the concept of “manifest disregard” is an interpretive standard such that existing case law can be used to interpret section 10(a)(4) of the FAA. *In re Johnson*, 864 N.Y.S.2d 873, 886–87 (N.Y. Sup. Ct. 2008); *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 348–49 (N.Y. Sup. Ct. 2008).

¹²³ *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 619 (1985).

constituted textual evidence that the grounds were prohibited.¹²⁴ By contrast, in *Mitsubishi*, the Court decided that the absence of any mention in the FAA that statutory claims were covered constituted textual evidence that such claims were *not* prohibited.¹²⁵ According to the Court, such unmentioned claims were included within the scope of enforceable agreements to arbitrate.¹²⁶

In *Mitsubishi*, the dispute was between a Puerto Rican car dealership and Mitsubishi Motors Corporation, a Japanese corporation with its principal place of business in Tokyo.¹²⁷ The parties' contract provided for arbitration in Japan.¹²⁸ The Puerto Rican dealership raised antitrust claims that it believed should be litigated.¹²⁹ The Court held that arbitrators in Japan could determine the antitrust claims under U.S. law.¹³⁰

Mitsubishi was decided in 1985, before Justice Scalia joined the Court and before his brand of textualism had great influence there.¹³¹ Nonetheless, as in *Hall Street*, the Court in *Mitsubishi* did not pay serious attention to the legislative history of the FAA.¹³² Neither the text of the statute nor the legislative history provides that the FAA was intended to apply to statutory claims. The statutory text refers only to contract claims and maritime transactions. The pertinent language of section 2, which establishes the scope of the Act, states:

¹²⁴ See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404–05, 1408. The Court equated “no textual hook for expansion” with a statutory prohibition of expansion of grounds for review by party agreement, holding the stated statutory grounds were exclusive. *Id.*

¹²⁵ See 473 U.S. at 625–26.

¹²⁶ See *id.*

¹²⁷ *Id.* at 616–17.

¹²⁸ *Id.*

¹²⁹ *Id.* at 619.

¹³⁰ *Id.* at 638–40.

¹³¹ See Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 823 (2002) (“In 1986, President Reagan appointed Justice Scalia to the Supreme Court. Since joining the Court, Justice Scalia has sought to make a statute’s text the primary factor in statutory interpretation.”).

¹³² This is perhaps because the Court had earlier made a number of decisions which ignored the legislative history. Thus, to bring forth a careful analysis of legislative history in *Mitsubishi* might risk disturbing precedents set in earlier cases. See, e.g., *Southland v. Keating*, 465 U.S. 1 (1984). As Justice O’Connor noted in her dissent in *Southland*, the Court in that case, despite the facial silence of section 2 of the FAA, interpreted the statute to apply in state as well as federal courts. *Id.* at 22–23 (O’Connor, J., dissenting) (“The Court’s decision . . . utterly fails to recognized the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements.”)

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹³³

Nothing in this language provides that the Act applies to statutory claims. The focus is on contract claims between merchants or maritime parties involved in commerce. The statute is silent as to statutory claims. To assert that the FAA applies to statutory claims, one must resort to interpretive tools. One might, for example, argue from the text that the language of section 2 focusing on “a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof” could be interpreted to mean a statutory claim that arises under or out of a contract. This only becomes a plausible interpretation, however, if one ignores the historical context of the enactment and centuries of arbitration practice. For over three hundred years, arbitration was understood to be a way for disputes between merchants to be resolved among their peers, who understood business requirements and mores, rather than by judges, who were less informed about normal business practices.¹³⁴ A recent scholarly article has provided persuasive historical and textual evidence that the FAA is a direct descendent of the 1698 Arbitration Act, which was adopted by the English Parliament in order to strengthen the autonomy of arbitration as a means for promoting the economic interests of businesses, merchants, and traders.¹³⁵ Like the U.S. Congress of 1925, King William III and Parliament in 1698 wanted common law arbitrators to respond to merchants’ concerns that their disputes be resolved quickly and efficiently by individuals knowledgeable about business practices.¹³⁶ The focus was on contract

¹³³ 9 U.S.C. § 2 (2006).

¹³⁴ See Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 2–3, 21–22. LeRoy’s research revealed that very few courts reviewed statutory arbitrations. *Id.* at 22–23. Such arbitrations were a rare phenomenon. These unusual cases do not detract from the fact that until *Mitsubishi*, statutory claims were, with few exceptions (unknown to most people) simply not arbitrated.

¹³⁵ See *id.* at 15–16, 29–31. The author provides charts comparing the specific and sometimes identical language used in the FAA and in the 1698 Arbitration Act, as well as in William Blackstone’s Commentaries and other English treatises. See *id.* at 29, 31.

¹³⁶ See *id.* at 4.

disputes; statutory claims were simply not part of arbitration practice.¹³⁷

As inheritors of this tradition, members of the 1925 Congress indicated that arbitrators under the FAA would continue to decide the same kinds of business and merchant disputes that had been arbitrated for centuries.¹³⁸ Statutory claims were never mentioned in any of the hearings before Congress or in the written materials submitted to the congressional subcommittees.¹³⁹ The proponents of the Act were businessmen and their lawyers who wanted arbitration clauses between merchants to be enforced in federal court. Julius Cohen, one of the primary drafters of the Act, co-wrote an article shortly after the passage of the Act in which he explained the purpose and effect of the Act to the legal community.¹⁴⁰ Specifically, he noted that arbitration was “not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.”¹⁴¹ Rather, arbitration was well-suited to “the questions of law which arise out of [the] daily relations between merchants as to the passage of title, the existence of warranties or [related] questions of law.”¹⁴² This was consistent with the position presented by the proponents in the congressional hearings, which was that making arbitration agreements enforceable would enable merchants to resolve their contract disputes cheaply and easily.¹⁴³

B. A Paradigm Shift

A major paradigmatic and unexpected shift in arbitration practice followed the Supreme Court’s 1985 holding in *Mitsubishi* that an-

¹³⁷ See *id.* at 2–3, 21–22.

¹³⁸ For example, the House Report accompanying the bill provided as follows: Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

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

¹³⁹ See generally *Joint Hearings*, *supra* note 1; *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. (1923); S. REP. NO. 68-536 (1924); H.R. REP. NO. 68-96.

¹⁴⁰ Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926).

¹⁴¹ *Id.* at 281.

¹⁴² *Id.*

¹⁴³ See *Joint Hearings*, *supra* note 1, at 6 (statement of Charles Bernheimer, Chairman, Committee on Arbitration, Chamber of Commerce of the State of New York).

titrust claims could be arbitrated. The Court read the arbitration clause as not only encompassing a claim of failure to perform the contract, but also as including a claim of an independent violation of federal law.¹⁴⁴ Application of the FAA to independent violations of law outside of a contract was a new concept,¹⁴⁵ a concept created by the Court and not supported by either the text or the legislative history of the statute.¹⁴⁶ Moreover, at the time the Court decided *Mitsubishi*, the circuit courts that had been faced with the question of whether antitrust claims could be arbitrated had unanimously and unequivocally answered “no.”¹⁴⁷ The lead case on this point, *American Safety Equipment Corp. v. J.P. Maguire & Co.*,¹⁴⁸ provided four basic reasons why antitrust claims were not arbitrable. First, a claim under antitrust law is not a mere private matter.¹⁴⁹ A plaintiff asserting rights under the Act is acting as a private attorney general to protect the public interest in a competitive economy.¹⁵⁰ Second, alleged monopolists, who frequently engage in adhesion contracts with their customers, should not be able to determine the forum for deciding an antitrust claim.¹⁵¹ Third, because antitrust claims tend to be complex and fact-intensive, the kinds of evidence needed to prove a case is better able to be obtained and considered in a judicial forum than an arbitral one.¹⁵² Fourth, commercial arbitrators tend to be drawn from the business community and are likely to be focused on the issues between the

¹⁴⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985).

¹⁴⁵ Although *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), involved a claim of a breach of contractual warranties as well as a claim that the breach amounted to fraud under the securities laws, the Court in *Mitsubishi* considered for the first time “the question whether a standard arbitration clause referring to claims arising out of or relating to a contract should be construed to cover statutory claims that have only an indirect relationship to the contract.” *Mitsubishi*, 473 U.S. at 646–47 (Stevens, J., dissenting).

¹⁴⁶ As Justice Stevens explained, in his dissent,

The plain language of this statute encompasses Soler’s claims that arise out of its contract with Mitsubishi, but does not encompass a claim arising under federal law[] Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.

Mitsubishi, 473 U.S. at 646 (Stevens, J., dissenting).

¹⁴⁷ *Id.* at 656 (citing cases from the First, Second, Fifth, Seventh, Eighth, and Ninth Circuits).

¹⁴⁸ 391 F.2d 821 (2d Cir. 1968).

¹⁴⁹ *Id.* at 826.

¹⁵⁰ *Id.*

¹⁵¹ *See id.* at 827.

¹⁵² *See id.*

parties before them rather than on the public interest in those issues.¹⁵³

Another factor that may well have influenced the circuit courts was that Congress provided in the Sherman Act that antitrust claims could only be decided in federal court, not in state court.¹⁵⁴ If the courts of the sovereign states were not thought competent to decide antitrust claims, it is not surprising that the lower courts did not view arbitrators as having that competence.¹⁵⁵

Even though there was no evidence in the text of the statute or the legislative history that the FAA applied to statutory claims, and even though no lower court had ever found that antitrust claims were arbitrable under the FAA, the Supreme Court had no difficulty construing the FAA to cover the antitrust claims raised in *Mitsubishi*.¹⁵⁶ It did this in two steps. First, the Court emphasized a strong federal policy in favor of arbitration.¹⁵⁷ Second, it focused on the antitrust statute, asserting that if Congress had *not* intended the statute to be arbitrated, it would have so indicated within the statute itself.¹⁵⁸

1. Federal Policy as a Basis for the Shift

With respect to the strong federal policy, the Court stated that “the congressional policy manifested in the Federal Arbitration Act . . . requires courts liberally to construe the scope of arbitration

¹⁵³ *See id.*

¹⁵⁴ *See* Sherman Act, 15 U.S.C. § 15(a) (2006); *Gen. Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 287 (1922).

¹⁵⁵ One might argue that since parties can withdraw their antitrust dispute from a court for purposes of settlement, they should be able to withdraw or opt out of court jurisdiction for purposes of arbitrating antitrust claims. This would be a persuasive argument if it applied to postdispute decisions to arbitrate antitrust claims. It is less persuasive in a predispute situation, when parties have entered into a contract and agreed to arbitrate contractual disputes without any expectation that an antitrust claim might arise. Until *Mitsubishi*, parties could confidently assume that they had not agreed to arbitrate antitrust claims when they agreed to an arbitration clause in their contract. *See supra* text accompanying note 26. Because antitrust claims tend to arise in situations where one party is likely to have much more economic power than the other, it is quite plausible that the weaker party will have no leverage to resist an arbitration clause in the first instance. In arbitration, the weaker party will not have the same rights of discovery that it would have in court, which means it will be less able to establish its case under the laws Congress enacted for its protection. By making antitrust claims arbitrable, the Supreme Court has weakened the antitrust protections enacted by Congress.

¹⁵⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624–26 (1985).

¹⁵⁷ *See id.* at 625–26.

¹⁵⁸ *See id.* at 627–28.

agreements covered by that Act.”¹⁵⁹ The Court noted that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”¹⁶⁰

The claim that the FAA manifests a congressional policy favoring arbitration, widely repeated by the Supreme Court and the lower courts, is a judicial fiction. Congress should pay attention when the Court takes its name in vain. There is no evidence in the text or the legislative history of the FAA that Congress in any way favored arbitration over litigation.¹⁶¹ The goal of the FAA was to provide merchants who wanted to arbitrate the possibility of having their arbitration agreements enforced.¹⁶² At no time was there any discussion of “favoring” arbitration. At best, the FAA was simply supposed to make arbitration contracts as enforceable as other contracts.¹⁶³ Leveling the playing field does not indicate a preference for arbitration.

The first Supreme Court statement that there was a federal policy favoring arbitration came from dicta in the 1983 case of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*¹⁶⁴ There, the Court cited no authority supporting its dicta in either the text or the legislative history of the FAA. Rather, it appears that the Court may have relied upon lower court cases that appropriated from the collective bargaining context language that asserted arbitration was favored.¹⁶⁵ Indeed, in *Mitsubishi*, as if to supplement the *Moses Cone* dicta, the Court cited as authority for a federal policy favoring arbitration *United Steelworkers v. Warrior & Gulf Navigation Co.*, a labor arbitration case from the well-known *Steelworkers Trilogy*.¹⁶⁶ It is true that in labor law there are strong reasons to favor arbitration because

¹⁵⁹ *Id.* at 627.

¹⁶⁰ *Id.* at 626 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

¹⁶¹ See, e.g., *Moses*, *supra* note 1, at 123; Schwartz, *supra* note 6, at 29–30.

¹⁶² See *supra* notes 136–43 and accompanying text.

¹⁶³ See H.R. REP. NO. 68-96, at 1 (1924) (“An arbitration agreement is placed upon the same footing as other contracts, where it belongs.”).

¹⁶⁴ See 460 U.S. at 24–25 (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state or procedural policies to the contrary. . . . 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 . . .”).

¹⁶⁵ See, e.g., *Becker Autoradio U.S.A., Inc. v. Becker Audioradiowerk GmbH*, 585 F.2d 39, 44–45 (3d Cir. 1978) (citing a number of collective bargaining cases as support for the premise that there was a strong policy favoring arbitration).

¹⁶⁶ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 648–49 & n.14 (1985) (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581–83 (1960)).

of its contribution to industrial peace and the central role it plays in the institution of collective bargaining.¹⁶⁷ There is, however, no similar justification for favoring arbitration in a commercial or a non-union setting.¹⁶⁸ As noted by labor law professor Samuel Estreicher, “Arbitration in nonunion settings does not warrant an aggressive pro-arbitration policy akin to the *Steelworkers Trilogy*.”¹⁶⁹ Similarly, in a commercial setting there is no policy reason for favoring arbitration over litigation. Rather, contracts to arbitrate should be no more and no less enforceable than other contracts.¹⁷⁰

There is a significant difference in asserting, on the one hand, that there is a federal policy that arbitration agreements should be enforced according to the parties’ intent and proclaiming, on the other hand, that there is a federal policy that favors arbitration over litigation as a basis for broadening the scope of the FAA. It is reasonably consistent with the congressional policy of 1924 to say, as the U.S. Court of Appeals for the Second Circuit did in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, that there is a policy of promoting enforcement of arbitration agreements “to accord with the original intention of the parties”¹⁷¹ But it is substantially different to claim broadly, as the Court did in *Moses Cone*, that “the scope of arbitrable

¹⁶⁷ See *United Steelworkers*, 363 U.S. at 578 (“A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.”) (citation omitted).

¹⁶⁸ See Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHL-KENT L. REV. 753, 797 (1990).

¹⁶⁹ *Id.*

¹⁷⁰ In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967), the Court stated that “the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.” It should be noted, however, that this statement was made within the context of a general understanding that the contracts being considered were merchant contracts, not adhesion contracts. It is less clear that an arbitration agreement within an adhesion contract should be as enforceable as other contracts. The legislative history demonstrates the concern members of Congress had that arbitration not be mandated in a take-it-or-leave-it context. See *Joint Hearings*, *supra* note 1, at 9–15; see also *Moses*, *supra* note 1, at 106–08 (describing hearings where Congress members expressed concern about take-it-or-leave-it contracts). In an arbitration agreement, parties have given up important constitutional rights to a jury trial, and those rights should only be given up knowingly and voluntarily. See Jean Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 678–79 (2001). Thus, it makes sense to apply a different standard of enforceability to the separate agreement that constitutes an agreement to arbitrate within an adhesion contract to the extent that no actual (knowing and voluntary) consent was given. The arbitration clause should therefore be less enforceable than other agreements within an adhesion contract, if actual consent cannot be established, and jury trial rights were not surrendered knowingly and voluntarily.

¹⁷¹ 271 F.2d 402, 410 (2d Cir. 1959).

issues should be resolved in favor of arbitration”¹⁷² and to rely, as the Court did in *Mitsubishi*, on “the federal policy favoring arbitration” in order to expand the coverage of the statute.¹⁷³

Nonetheless, this judge-created policy to favor arbitration was the Court’s linchpin for determining that the FAA permitted anti-trust claims to be arbitrated. The *Mitsubishi* Court found “no reason to depart from [the policy favoring arbitration] where a party bound by an arbitration agreement raises claims founded on statutory rights.”¹⁷⁴ Thus, although the text and legislative history do not provide that the FAA applies to statutes, much less to antitrust claims, and do not suggest that Congress in any way favored arbitration over litigation, the “federal policy favoring arbitration” was the Court’s basis for significantly expanding the statute to cover an area of law that no previous court had ever held to be arbitrable.¹⁷⁵ Using its own judicially-created policy as a basis for expanding the scope of a statute far beyond its purpose is a clear example of the Court reaching beyond its constitutional powers and engaging in a legislative act.¹⁷⁶

2. The Antitrust Statute as a Basis for the Shift

In the second step of its analysis, in order to buttress its decision that the FAA covered statutory claims, the Court shifted focus away from the FAA and to the antitrust statute that provided the particular substantive right. The Court asserted that if Congress did not intend a particular statutory claim to be arbitrated, it had to indicate expressly that intention in the statute it enacted.¹⁷⁷ Thus, according to the Court, if nothing in the text or legislative history of the antitrust law indicated that claims under the law could not be arbitrated, it

¹⁷² *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

¹⁷³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citing *Moses Cone*, 460 U.S. at 24–25).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See, e.g.*, Boudreau et al., *supra* note 16, at 964 (“When an interpreter substitutes his or her own meaning for the meaning intended by Congress, the interpreter usurps the authority granted to the legislature by the Constitution. Such actions illegitimately undermine democratic principles.”); Molot, *supra* note 74, at 58 (“[T]he constitutional structure generally requires judicial fidelity to Congress. . . . To be truly faithful to Congress, and to fulfill their role in the constitutional structure, [judges should] respect Congress’s purposes and policies as well as the words Congress actually enacts into law[.]”).

¹⁷⁷ *Mitsubishi*, 473 U.S. at 628 (stating that “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue”).

meant the Court could assume that such claims should be arbitrated.¹⁷⁸

Of course, there is no indication that Congress ever foresaw a need to state that antitrust claims could not be arbitrated.¹⁷⁹ Providing specifically that antitrust claims were to be determined in federal court¹⁸⁰ suggests that Congress did not intend them to be arbitrated, but that was not sufficient for the *Mitsubishi* Court. Remarkably, it reached its decision without regard to an earlier Supreme Court decision interpreting the language in the Sherman Act to mean that an antitrust treble-damages case “can only be brought in a District Court of the United States.”¹⁸¹

The Court then discarded all of the policy reasons advanced by the Second Circuit in *American Safety* for finding antitrust claims not arbitrable¹⁸² and proceeded to emphasize the international nature of the claim as a further reason to find that the antitrust claims were arbitrable.¹⁸³ In future cases, however, the international rationale would dim, and the Court would simply find all statutory claims arbitrable.¹⁸⁴

¹⁷⁸ *Id.* (“We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.”).

¹⁷⁹ At the time of the enactment of the Sherman Act (1890) and the Clayton Act (1914), which preceded the 1925 FAA, arbitration agreements to resolve even contract disputes were not enforceable, so Congress would hardly have thought it necessary to say that antitrust claims could not be arbitrated. *See* Moses, *supra* note 1, at 123; *supra* notes 63–65.

¹⁸⁰ The Sherman Act provides in pertinent part,
[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district where the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.

15 U.S.C. § 15(a) (2006).

¹⁸¹ *Blumenstock Bros. Adver. Agency v. Curtis Publ’g Co.*, 252 U.S. 436, 440 (1920).

¹⁸² *See supra* text accompanying notes 148–153.

¹⁸³ *Mitsubishi*, 473 U.S. at 631.

¹⁸⁴ By the time of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), sixteen years had passed since *Mitsubishi* and the Court had found many different kinds of statutory claims arbitrable. In *Gilmer*, which involved a mandatory arbitration clause in an age discrimination case, the Court noted that “[i]t is now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.” *Id.* at 26.

3. The Supreme Court's Reasoning

It is striking, however, that although the Court pointed to no evidence in the text or legislative history of the FAA that the Act was intended to cover statutory claims, these lacunae did not present an impediment to arbitration of such claims because of the so called “strong federal policy” favoring arbitration.¹⁸⁵ One would think that this “strong federal policy,” which, according to the Court, ensures “that private arbitration agreements are enforced according to their terms,”¹⁸⁶ would have produced a different result in *Hall Street*, where the parties’ agreement provided for expanded judicial review. But in that case, the Court did not focus on the strong federal policy of enforcing the parties’ agreement according to its terms, but rather on an interpretation of the silence of the text. According to the Court, the absence in the statutory text of any reference to party consent to expanded judicial review meant it was prohibited. Ironically, in *Mitsubishi*, the Court reasoned by contrast that even though statutory claims were not mentioned in the text, the silence of the text meant that such claims were presumed to be arbitrable under the FAA.¹⁸⁷

The Supreme Court’s reasoning in these two cases appears not to be shaped by the FAA itself, but by the result the Court wished to reach. One could easily switch the reasoning between the two cases and reach the exactly opposite result. In *Hall Street*, because party agreements for expanded judicial review are not specifically prohibited by the statute, they should be enforced consistent with the strong federal policy to enforce arbitration agreements according to their terms. In *Mitsubishi*, because the text is focused on commercial contracts and maritime transactions, and because there is no indication in the legislative history that statutory claims were intended to be covered by the Act, the FAA should only apply to contract claims and maritime transactions. This reasoning—the reverse of the reasoning applied by the Court in the two decisions—produces results that are much more consistent with both the text and the legislative history of the Act. In other words, in both cases, the Court got it exactly wrong.

If one attempted to reconcile the decisions in the two cases, it could be argued that the reason the interpretive methodology differed was that the purpose in each case was the same: to interpret the statute as broadly as possible both by expanding the scope of the FAA

¹⁸⁵ See *Mitsubishi*, 473 U.S. at 628.

¹⁸⁶ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

¹⁸⁷ *Mitsubishi*, 473 U.S. at 628.

beyond the text of the statute in *Mitsubishi*, and by narrowing the defenses to enforcement in *Hall Street* through a strict reading of the statutory text. While this may be true, this simply demonstrates that the methodology was result-oriented, and that the result had nothing to do with legislative intent. Rather, the result sought and achieved was a judicial goal of reducing access to the courts by dramatically expanding the scope of the FAA, and narrowing the defenses to enforcement of arbitral awards.

In each of these two cases, the Court's decision limited access of parties to the courts. In *Hall Street*, by refusing to permit parties to agree to expanded judicial review, and by excluding "manifest disregard of the law" as a ground for judicial review, the Court eliminated court access that could provide a possible safety net for parties in the form of judicial review of the legal basis of an award.¹⁸⁸ In *Mitsubishi*, by expanding the coverage of the FAA to statutory claims, the Court denied access to courts for parties, including parties to adhesion contracts, whose claims might arise under statutes intended by Congress to protect parties' rights through litigation.¹⁸⁹

Neither of the Court's decisions is supported by the FAA's text, on which the Court, in both cases, claimed to rely. Moreover, the combination of the two decisions produced a very poor result. It is noteworthy that the Court in *Mitsubishi* gave lip service to the need to review arbitrators' decisions in this area. It suggested that if U.S. antitrust laws were not properly applied by a tribunal sitting in Japan, the Court would be able to take a "second look" at the enforcement stage, and potentially vacate an improper award under a public policy exception.¹⁹⁰ The Court has not, however, taken a "second look" at awards based on statutory claims.¹⁹¹ And yet, as will be discussed be-

¹⁸⁸ See *supra* Part II.B.

¹⁸⁹ See *supra* Part III.B.1-2.

¹⁹⁰ *Mitsubishi*, 473 U.S. at 638 ("Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."). The Court has also asserted that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987); see also Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 457 (1999).

¹⁹¹ See, e.g., Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17, 52 (2002) ("It has been well-documented that courts have yet to engage in the second look analysis that *Mitsubishi* contemplated."); McConaughay, *supra* note 190, at 457 ("The Court's 'second look' has not yet occurred."); Catherine A. Rogers, *The Arrival*

low, the expansion of arbitration to cover statutory claims creates a greater, not a lesser need, for meaningful judicial review. Rather than waiting for the Court to take a second look, it is time for Congress to take a close look at U.S. arbitration law, which no longer resembles the FAA enacted in 1925, but rather has been transmogrified into an altogether different law enacted by the Supreme Court.

IV. THE NEED FOR JUDICIAL REVIEW OF STATUTORY CLAIMS

A. *The Difference in Contract Claims and Statutory Claims*

Contract claims differ substantially from statutory claims. When an arbitrator is interpreting a contract, she is largely trying to determine what the parties intended, how they expected the contract to apply to the facts and circumstances that have occurred, what rights and obligations they allocated to each other, or how they would have allocated them if they had foreseen the events that actually occurred. These tend to be the kinds of issues that the parties, if they had been more careful or insightful or better able to anticipate future events, could have themselves negotiated in the contract. The arbitrator thus tends to function in this situation as a kind of agent—a private party that other private parties have asked to decide issues that were within their power to decide.¹⁹²

Claims under statutes raise quite different issues, because they do not deal simply with agreements between private parties. Instead, the Supreme Court's declaration that statutory claims are arbitrable was a major delegation of judicial power to private citizen-arbitrators, who have no accountability to the public. The arbitrator is no longer simply an agent for the parties, deciding issues that they could have negotiated themselves. Instead, he is implementing public law that

of the "Have-Nots" in *International Arbitration*, 8 NEV. L.J. 341, 367 n.154 (2007) ("[T]he Second Look Doctrine has proven to be largely an empty threat.").

¹⁹² See Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT, *supra* note 95, at 88, 113–14.

[T]he rationale for limiting vacatur of arbitration awards to grounds that correspond to the grounds for denying enforcement to contracts generally is that the arbitrator, as the parties' agent, is resolving questions that the parties could have resolved themselves when they drafted the contract. That rationale does not apply when the arbitrator is resolving issues the parties could not have resolved themselves when they drafted the contract. Those are issues about violations of rights conferred by mandatory rules. . . .

. . . [W]hen arbitrators hear claims arising out of mandatory rules, courts should review de novo the arbitrators' legal rulings on such claims.

Id.

has the power to impact not only the immediate parties but also the public interest and the decisions of Congress as to policies that best serve the public interest.

Thus, the Supreme Court's decision in *Mitsubishi* to permit arbitration of statutory claims created a major paradigm shift. Delegating the judiciary's power to enforce a statute to arbitrators who have no real accountability to reach a decision in accordance with the law is a huge step to take in the absence of congressional input. Further, this step has a real impact on the enforcement of the law. As Justice Stevens has noted, an arbitrator "has no institutional obligation to enforce federal legislative policy."¹⁹³ An arbitral tribunal will most likely view its obligations to the parties before it, not to the public interest.¹⁹⁴ As a result, when arbitrators are deciding claims under public law, there is a high potential for negative externalities. For example, if an arbitrator makes a wrong decision in a matter arising under the antitrust laws, that decision may negatively affect not only the claimants but the rights of everyone else affected by the anti-competitive behavior. As the Second Circuit noted in *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, "Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage."¹⁹⁵ Yet in arbitration, the public interest in how such laws are enforced may be detrimentally affected with no possible recourse.

Enforcement of other statutory claims raise similar concerns. In 1981, Chief Justice Burger in *Barrentine v. Arkansas-Best Freight System*,

¹⁹³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 649 (Stevens, J. dissenting).

¹⁹⁴ McConnaughay, *supra* note 190, at 515 n.243.

I wish to emphasize my belief that even exacting judicial review of mandatory law arbitral awards is woefully inadequate for the public judicial resolution of such claims. In my view, the substitution of private, privately paid arbitrators for a public judge, particularly for a U.S. district court judge, is so profound a deprivation of the intended enforcement schemes of most mandatory laws that even exacting arbitral adherence to public court rules of evidence and procedure is not likely to yield "correct" mandatory law results as consistently as public court adjudication. Private arbitrators, no matter how skilled, are appointed to serve the interests and expectations of the parties to the arbitration, not the public; arbitrators' interest in the legally correct resolution of mandatory law claims pales in comparison to their interest in resolving disputes in ways that serve their perceptions of the interests of the private parties before them.

Id.
¹⁹⁵ 391 F.2d 821, 826 (2d Cir. 1968).

Inc. discussing the possibility that employers might contract to arbitrate civil rights claims, said:

Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.¹⁹⁶

Nonetheless, today the Supreme Court's paradigm shift regarding statutory claims permits courts to do exactly what Justice Burger found objectionable: enforce arbitration agreements between employers and employees requiring arbitration of claims based on civil rights statutes. Congress should seriously question whether civil rights claims can be adequately protected when plaintiffs are denied access to the court.

Resolving statutory claims based on mandatory law outside of the court system also means that there is no judicial review on the merits to ensure that the law is properly applied. Moreover, the confidentiality of arbitral proceedings and the lack of any precedent created by awards not only prevent development of the law, but also will not clarify what the law requires or deter potential violators.

In addition, arbitration does not provide the same level of protection as the courts do because of the limitations on discovery.¹⁹⁷ The purpose of many of the laws that Congress has passed in the areas of antitrust, civil rights, consumer protection, and securities was to protect the weaker party.¹⁹⁸ Unlike cases between two merchants of

¹⁹⁶ 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting). In *Barrentine*, the Court held that employees could pursue their wage claims in federal court under the Fair Labor Standards Act (FLSA), and were not barred by arbitration under a collective bargaining agreement. *Id.* at 745 (majority opinion). Chief Justice Burger agreed that civil rights claims should have a judicial forum, but dissented as to FLSA claims. *Id.* at 750 (Burger, C.J., dissenting).

¹⁹⁷ See *Mitsubishi*, 473 U.S. at 648 n.14 (Stevens, J. dissenting); Carrington & Haagen, *supra* note 1, at 348 (“[I]t cannot be doubted that the availability of discovery assures that courts are in general more effective than arbitral tribunals in detecting wrongdoing and enforcing the rights of victims, whether of securities fraud, price-fixing conspiracies, race or gender discrimination, or environmental misdeeds.”).

¹⁹⁸ See Carrington & Haagen, *supra* note 1, at 332–33 (“[T]he Court has enforced arbitration clauses that were until recently deemed invalid impairments of rights conferred by Congress in its regulation of commerce, thereby weakening enforcement of the national law. . . . Those who have been prejudiced by the Court's handiwork include many American consumers, patients, workers, investors, shopkeepers, shippers, and passengers.”).

approximately equal bargaining power, in cases where bargaining power is unequal, the stronger party generally controls most of the documentation necessary to prove a violation. Because discovery is much more limited in arbitration than in litigation, a party making a complex statutory claim is likely to have greater difficulty proving its case in arbitration and therefore will be less able to vindicate the rights Congress intended the law to provide.

Moreover, *Hall Street* and *Mitsubishi* make clear that even though arbitrators have been given the power to resolve complex statutory claims, there is no judicial review possible to ensure that they carry out the aims of the enacting Congress. As noted above, the possibility of vacating an award on the basis of “manifest disregard of the law” appears to have been eliminated in *Hall Street*,¹⁹⁹ and the Court has never actually taken the “second look” that it claimed in *Mitsubishi* would be possible at the enforcement stage of an arbitration award involving statutory claims.²⁰⁰

Alarm bells should be sounding in Congress. The Court has delegated judicial power to private citizen-arbitrators to resolve disputes arising under public laws crafted by Congress to protect individual rights and promote fairness in commerce. All of this has been done with no input from Congress. It is time for Congress to focus on what is happening and to take back its legislative role.

B. Congress Should Get into the Act

The Supreme Court’s legislation on arbitration has occurred without the benefit of any comprehensive study of the field, collection and analysis of information, testimony at hearings, or any input of the kind generally made available to Congress when it is in the process of enacting important legislation. Thus, the FAA has evolved as a legislative program without any systemic coherence. The main factor motivating the Supreme Court appears to have been to remove as many disputes as possible from the courts. In the process, arbitration has mushroomed as a dispute settlement device without adequate attention to its overall impact within the system of justice, its potential abuses (including lack of actual consent) and its ability to undercut regulatory protections that Congress has included in statutes governing employment, civil rights, antitrust, securities, and consumer protection.

¹⁹⁹ See *supra* Part II.B.2.d.

²⁰⁰ See *supra* note 191.

Both the elimination of “manifest disregard of the law” as a separate ground for vacating an award that is based on an erroneous conclusion of law and the elimination of the possibility for parties to seek judicial review on the merits are at odds with the need to take a closer look at what private citizen-arbitrators are doing in terms of enforcing public laws. A number of commentators have posited that arbitration of public or mandatory laws should be subject to a higher level of scrutiny.²⁰¹ Professor Stephen Ware has stated that “courts should review arbitrators’ legal rulings on claims arising out of mandatory rules.”²⁰² An arbitrator should not be free to misapply mandatory rules, and his awards should be reviewed to ensure correct application of the law.²⁰³ Dean Philip J. McConnaughay has concluded that:

[T]he Supreme Court should clearly differentiate between the scope of review appropriate for nonmandatory law arbitral awards and the scope of review appropriate for mandatory law arbitral awards, confining review of the former to traditionally restrictive notions of basic procedural fairness, but expanding review of the latter to require close arbitral conformance to American standards of procedure and demonstrably correct outcomes.²⁰⁴

Commentators such as Professor Ware and Dean McConnaughay, as well as some members of the judiciary, see a distinct difference between arbitral awards based on contract, and awards based on

²⁰¹ See, e.g., Ware, *supra* note 192; McConnaughay, *supra* note 190, at 457, 514–15, 523.

Unless U.S. courts are determined to abdicate completely their responsibility for participating in the enforcement of mandatory U.S. law, they must undertake some review of international arbitral resolutions of claims arising under mandatory U.S. law, and their review must depart significantly from current standards that properly permit virtually no merits reviews of arbitral resolutions of nonmandatory law claims.

Id. at 514.

²⁰² Ware, *supra* note 14, at 739. While some arbitrations of contract claims involve interpreting statutes, such as provisions of the Uniform Commercial Code, see U.C.C. § 1-102(3) (2004), most of those provisions are default provisions that the parties can contract around. Thus, few mandatory provisions of law are involved. In contrast, in employment discrimination claims, for example, the provisions of Title VII of the Civil Rights Act of 1964 are mandatory. 42 U.S.C. § 2000e-2(a) (2006)

²⁰³ See Ware, *supra* note 192, at 114; see also Richard E. Speidel, *Speidel’s Revised Chapter 2 of the Federal Arbitration Act*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT*, *supra* note 95, at 352, 374 (proposing to amend Chapter 2 of the FAA to provide, in part, “In an arbitration subject to the [N.Y.] Convention, a court may . . . deny recognition and enforcement on grounds of public policy if the award decides issues of mandatory law in the United States and that award contains clear errors of law or fact.”).

²⁰⁴ See McConnaughay, *supra* note 190, at 523.

mandatory rules that parties are not allowed to contract around. The mandatory law awards should not be left to stand on an erroneous conclusion of law.²⁰⁵ As U.S. Court of Appeals for the Seventh Circuit Judge Diane Wood has noted, if “arbitration is to play a significant role in the enforcement of public law, then arbitration itself must become more publicly accountable.”²⁰⁶ Such accountability “may require a careful expansion of the grounds on which ultimate awards can be reviewed in the courts.”²⁰⁷ There is obvious concern within the legal community that the Court’s delegation to private citizen-arbitrators of broad power to decide questions of mandatory law with no possible review for error has had a deleterious effect on our legal system.

Congress should give very thoughtful consideration to whether the delegation to arbitrators of the judicial power to decide claims under regulatory statutes may undermine the protections that Congress intended to provide when it enacted specific statutes. If Congress determined that the intended protections are not adequately upheld through arbitration, it could reestablish what it intended when it originally enacted the FAA, i.e., that the FAA does not cover claims arising under statutes. This would simply return arbitration to the status it had for most of the time since the enactment of the FAA.²⁰⁸

Alternatively, Congress could undertake a review of each class of statutes (i.e., securities, antitrust, employment, civil rights, consumer protection) in order to consider the purpose and the remedy intended by Congress upon enactment. Those statutes whose remedies do not seem appropriate for arbitration because the protections they provide are better suited to be enforced in a judicial proceeding than an arbitral one should be excluded from the coverage of the FAA.

Congress could also determine that some claims, based on either statute or contract, might be reasonably arbitrated only if the decision to arbitrate was made postdispute, rather than predispute. In fact, the thrust of several bills currently pending before Congress is to render unenforceable any predispute arbitration agreement in cer-

²⁰⁵ *See id.*

²⁰⁶ Diane P. Wood, *The Brave New World of Arbitration*, 31 CAP. U. L. REV. 383, 411 (2003).

²⁰⁷ *Id.*

²⁰⁸ With the exception of *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), which found that a fraud claim should be arbitrated even though it was asserted under the Securities Exchange Act of 1934, no statutory claims were found arbitrable by the Supreme Court until *Mitsubishi* in 1985.

tain classes of cases. For example, the Fairness in Nursing Home Arbitration Act provides that predispute arbitration agreements between a long-term care facility and a resident of that facility are not valid and not specifically enforceable.²⁰⁹ Similarly, the Consumer Fairness Act of 2009 prohibits predispute arbitration clauses in consumer transactions or consumer contracts.²¹⁰ The most significant bill before Congress on arbitration, the Arbitration Fairness Act of 2009, would make unenforceable a “pre-dispute arbitration agreement . . . [that] requires arbitration of an employment, consumer, franchise, or civil rights dispute.”²¹¹

Drafters of these bills want to eliminate predispute arbitrations in situations where there is very different economic power and asymmetric knowledge between the parties to the agreement.²¹² Post-dispute arbitration is viewed as more acceptable because once the parties know and understand what issues are in dispute, if both parties agree to arbitrate, the process is more likely to be based on actual consent, rather than imposed by the economically powerful party on the weaker party.²¹³ In employment disputes, for example, if arbitra-

²⁰⁹ H.R. 1237, 111th Cong. § 17(b) (2009). The bill would amend Chapter I, Title 9, United States Code (the basic FAA provision) by adding a new section 17, which would define a long-term care facility and prohibit predispute arbitration agreements. The Senate version of the bill, S. 512, 111th Cong. (2009), contains very similar language, but would amend sections 1 and 2 of Chapter I of Title 9 to include this language, rather than adding it at the end in a new section.

²¹⁰ H.R. 991, 111th Cong. § 1003(a) (2009).

²¹¹ S. 931, 111th Cong. § 402(a) (2009). S. 931 differs in a number of ways from H.R. 1020, 111th Cong. (2009), which is similar to a prior bill that had been introduced in the previous Congress, H.R. 3010, 110th Cong. (2007). The major changes in the new Senate bill are: first, that it provides for all of its changes to be in a new Chapter 4 of the FAA, S. 931 § 3(a); second, that it defines franchise dispute as involving a franchisee having a principal place of business in the United States, *id.*; third, it appears to overturn the Supreme Court decision in *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009), by making clear that employees covered by collective bargaining agreements requiring arbitration will still have the right to raise statutory rights in court; and finally, although the court (rather than the arbitrator) is allocated the power to determine the validity and enforceability of the arbitration agreement, S. 931 § 3(a), this provision only applies to those agreements described in the new Chapter 4, and therefore is unlikely to have a major impact on international arbitration agreements. *Id.* Criticism of the earlier version of the bill, which was the same as the current House version, included suggestions that allocation to the court of the determination of an arbitration agreement's validity eliminated the widely accepted international doctrines of separability and competence-competence, and would therefore negatively affect international arbitrations. See Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT'L ARB. 455, 477–81 (2007).

²¹² See S. 931 § 2; H.R. 1020 § 2.

²¹³ See S. 931 § 2; H.R. 1020 § 2.

tion were only possible if chosen postdispute, employers would have more incentive to ensure that the process were perceived as fair, so that parties would choose arbitration.²¹⁴

These bills, if adopted, would forestall some of the abuses of arbitration, particularly when the stronger party imposes it on the weaker party without actual consent. None of this legislation, however, would deal with the problem of the need for a higher level of scrutiny of arbitration decisions determining questions of mandatory law. Even if all of the above referenced legislation were adopted, Congress should still confront the issue of judicial review of arbitral awards. Congress could, after first considering whether arbitration of rights granted under a regulatory statute is appropriate, determine that certain rights could be reasonably well protected in arbitration and, therefore, that arbitration of claims arising under such statute should be allowed. In such a case, it should then provide for appropriate judicial review of arbitral awards resolving claims under that statute. This could be done simply by providing as an additional ground under the FAA that any claims arising under the particular statute or statutes can be reviewed on the merits.

If such a framework were created, Congress should also consider whether it should be limited to domestic arbitrations. While there are reasons judicial review on the merits might not be advisable with respect to international awards,²¹⁵ such review should not cause a problem with respect to domestic awards. Having judicial review on the merits for awards based on mandatory law would serve the purposes of providing recourse for erroneous decisions, ensuring that the decision serves the public interest, and providing for the development of the law by creating precedents. It would help to keep these statutory protections from being undercut by private decision-makers with no accountability to the government or to the public interest.

²¹⁴ See, e.g., Sternlight, *supra* note 3 (discussing flaws in mandatory pre-dispute arbitration). See generally David Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009) (responding to criticisms of the Arbitration Fairness Act).

²¹⁵ Including mistake of law as an additional ground for review with respect to an international arbitration may cause enforcement problems in foreign jurisdictions. See Margaret L. Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 456–65 (2004). An award that was vacated on the basis of an erroneous conclusion of law might nonetheless be enforced in foreign jurisdictions. *Id.* Foreign jurisdictions may enforce a vacated award, unless it was vacated on narrow statutory or treaty-based grounds, which usually do not include mistake of law. *Id.*

Congress should also consider legislation to overturn the Court's decision in *Hall Street* on the question of expanded judicial review. If heightened judicial review were available for mandatory law claims, there would be less need for expanded judicial review because many claims would already be reviewable for mistakes of law. Nonetheless, there would still be arbitral awards based on contract claims not subject to heightened scrutiny, which some parties might wish to have reviewed by a court. Because arbitration is founded on consent, parties who consent to arbitration should be allowed to choose to arbitrate on the condition that the arbitrator's award be subject to court review. Denying the choice means that parties with that concern will simply litigate, so that the court would have the entire controversy before it rather than a mere review function. Before *Hall Street*, even when certain courts of appeals were willing to provide expanded judicial review, few parties requested it.²¹⁶ Thus, providing the choice to parties would not likely change the nature of arbitration, nor would it flood the courts with substantive challenges. Most parties arbitrating contract issues would still opt for an arbitration process that would end with a final and binding award, unreviewable on the merits.

As with claims under statutes, if Congress provided for review of legal errors whenever parties agreed to such review, there could be possible enforcement issues in some foreign courts,²¹⁷ but the practice would not present problems of enforcement in the United States. Parties aware that they might need to enforce an award in a foreign jurisdiction would simply not agree to expanded judicial review. Permitting parties the choice of expanded judicial review would affirm party autonomy and the advantage that arbitration offers of permitting parties to tailor a dispute process to their particular needs. It would also provide comfort to certain nervous parties who would like to arbitrate disputes but are afraid to "bet the company" on the unreviewable decision of a private citizen-arbitrator.

V. CONCLUSION

Major changes have taken place in the administration of justice in the last few decades. The Supreme Court's decision that private citizen-arbitrators can interpret and apply mandatory law, subject to no judicial review on the merits, undermines statutory protections created by Congress. The Supreme Court has undertaken the devel-

²¹⁶ See *supra* note 32.

²¹⁷ See Moses, *supra* note 215, at 456-65.

opment of the law of arbitration with disregard for the text and the legislative history of the FAA, such that it amounts to pure judicial legislation. This is not the proper role of the Supreme Court. Nonetheless, the Court has proceeded apace to lock in its legislative program. In its recent decision in *Hall Street*, it eliminated the possibility of judicial review of any mistakes of law by arbitrators, even where both parties agreed to it,²¹⁸ and it did so at a time when it was increasingly apparent that mandatory law should not be left to private citizen-arbitrators who have no accountability to apply the law in a way that will uphold the protections enacted by Congress.

It is time for Congress to reassert itself as the proper, constitutionally empowered source of arbitration laws and policies, and to take steps to protect the legislation it has enacted. Arbitration loses credibility as a process to the extent that it becomes increasingly inconsistent with the public's perception of a fair means of resolving disputes and of ensuring that legislated protections under mandatory law are enforced. By taking back the lead in determining the proper role and function of arbitration within our system of justice, Congress would go far toward preserving arbitration as a useful and workable means of resolving disputes. For this to happen, however, there must be a sense that the process is fair, and that arbitral awards resolving statutory claims will not stand upon erroneous conclusions of law.

²¹⁸ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403–05 (2008).