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## Finality over Choice: *Hall Street Associates, L.L.C. v. Mattel, Inc.* (U.S. Supreme Court)

Timothy TYLER and Archis A. PARASHARAMI\*

*In Hall Street Associates, L.L.C. v. Mattel, Inc., the U.S. Supreme Court held that, under the Federal Arbitration Act, parties to an arbitration agreement may not contract for broader judicial review of arbitral awards than the grounds provided for in the FAA itself. The Supreme Court's decision resolved a disagreement on this point among lower courts in the United States. The Court's decision will have no effect on international arbitration agreements in which the parties did not seek to expand judicial review. But it seems highly unlikely that courts will enforce provisions of arbitration agreements that do call for broader review by courts. The decision in Hall Street sought to resolve a tension between two competing values in arbitration law: the desire for quick and final decisions versus the goal of enforcing the contractual choices of parties. In Hall Street, finality won out over party autonomy. In the course of reaching its decision, the Supreme Court discussed, but left untouched, "manifest disregard of the law," an important common law ground on which an arbitration award may be vacated. The lower federal courts that have considered the issue all agree that arbitral awards are subject to review for manifest disregard of the law, though they differ on the nature and extent of that review. While the Supreme Court rejected the notion that the existence of the "manifest disregard" doctrine opened the door for private parties to expand judicial review by contract, it did not alter pre-existing case law on the availability of review of arbitral awards for "manifest disregard" of the law.*

### I. INTRODUCTION

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the U.S. Supreme Court held (6–3) that parties to an arbitration agreement may not supplement by contract the grounds for vacating (that is, setting aside) an arbitration award that are set out in section 10 of the Federal Arbitration Act (FAA), 9 U.S.C. s.10.<sup>1</sup> Prior to *Hall Street*, some courts of appeal held that private parties could by agreement tailor special standards of review beyond the text of section 10, while others held that private parties could not do so.<sup>2</sup> The Supreme Court resolved this disagreement, holding that statutory grounds preclude parties from contracting for tailor-made standards of review in vacatur proceedings.<sup>3</sup> In addressing the parties' arguments, the Court also examined whether the "manifest disregard of the law" standard for vacating arbitral awards—an important concept in U.S. arbitration law since *Wilko v. Swan*<sup>4</sup> over a half-century ago—adds to the statutory

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<sup>1</sup> *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

<sup>2</sup> *Id.* at 1403, n.5 (listing cases).

<sup>3</sup> *Id.* at 1400.

<sup>4</sup> 346 U.S. 427, 436–37 (1953) ("the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation.").

grounds set forth in section 10, or is instead a catch-all term summarizing some of those grounds. Although rejecting the argument that *judicially created* grounds for “expanded” review allowed *private parties* to expand court review by contract, the Court declined to decide whether *Wilko’s* reference to “manifest disregard” added to section 10’s express terms or was meant to summarize those statutory grounds.

The practical effect of *Hall Street* on international arbitrations having their seat in the United States is probably quite limited. Parties that did not specify special standards for court review in their contracts (likely the vast majority of businesses in international cases) will not have to change their contracts or practices. Those parties that did provide for a special standard of review beyond those contained in the text of section 10 of the FAA should consider the likely possibility that courts may invalidate these special review provisions. Those who wish to create some form of enhanced review must do so by creating or using an existing appeal procedure within the arbitration system or by using the blunt instrument of tailoring the scope of the arbitration clause to leave some matters to court determination entirely.

As a matter of the practice of international arbitration, the effect of *Hall Street* is (as the American Arbitration Association and like-minded *amici curiae* would have it) to bring the United States into conformity with many other jurisdictions, which do not allow parties to change by contract the standard of judicial review of arbitral awards.<sup>5</sup> A driving principle in many of these other jurisdictions has been to treat arbitration as a means of obtaining the quick and definitive resolution of disputes, i.e., finality.<sup>6</sup> This view of arbitration is in tension with the “contractual” model of arbitration: that its purpose is to enable parties to tailor the means of settling their disagreement according to their preferences. The decision in *Hall Street* moves U.S. practice closer to the international mainstream, in which the putative goals of finality and efficiency have—at least in this context—prevailed over party autonomy as the foundation of arbitration.

## II. HOW *HALL STREET* APPLIES TO INTERNATIONAL ARBITRATION

*Hall Street*, a domestic case (between two U.S. parties) affects international arbitrations with their seat in the United States. *Hall Street* applies to international arbitrations because parties that designate a seat in the United States by that choice subject themselves to the U.S. regime for vacating arbitration awards set forth in Chapter 1 of the FAA.<sup>7</sup> Although the New York Convention<sup>8</sup> and Chapter 2 of the FAA<sup>9</sup> govern judicial recognition and enforcement of awards falling under the Convention when the arbitration

<sup>5</sup> See *Hall Street*, Brief for Amicus Curiae American Arbitration Association, No. 06-989, 2007 WL 2707884, 24 (September 14, 2007) [hereinafter “AAA Amicus Br.”] (“arbitration statutes of most countries, many of which trace the UNCITRAL Model Law, provide for judicial review on strictly limited grounds.”).

<sup>6</sup> *E.g.*, *id.* See also *Hall Street*, Brief for Amicus Curiae United States Council for Int’l Business, No. 06-989, 2007 WL 2707883, 4-6 (September 14, 2007) [hereinafter “USCIB Amicus Br.”].

<sup>7</sup> *E.g.*, *Yusuf Ahmed Alghanim & Sons W.L.L. v. Toys “R” Us*, 126 F.3d 15, 20-21 (2d Cir. 1997).

<sup>8</sup> 21 U.S.T. 2517 (incorporated by the FAA).

<sup>9</sup> 9 U.S.C. ss.201-08.

occurs in the United States,<sup>10</sup> vacatur of New York Convention awards that have their seat in the United States is governed by FAA section 10, borrowed from the domestic FAA.<sup>11</sup> As the Court of Appeals for the Second Circuit has noted, “[a]lthough Article V [of the New York Convention] provides the exclusive grounds for refusing confirmation under the Convention, one of those exclusive grounds is where ‘[t]he award ... has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.’”<sup>12</sup> That provision thus allows for the operation of the FAA’s domestic vacatur procedures for arbitral awards made in the United States. Because the United States does not have a regime specific to vacating international awards that occur in the United States, the statute implementing the New York Convention borrows the standards from the “domestic” FAA.<sup>13</sup>

### III. HALL STREET AND THE ABILITY OF PARTIES TO STIPULATE STANDARDS OF REVIEW

*Hall Street* arose out of a lease dispute in Oregon between a landlord (Hall Street Associates, L.L.C.) and its tenant (Mattel, Inc.).<sup>14</sup> The leases provided that Mattel, a manufacturer, would indemnify Hall Street for expenses resulting from the failure of Mattel or its predecessor lessees to comply with federal, state, and local environmental laws.<sup>15</sup> Various tests later revealed significant amounts of pollution at the site operated by Mattel.<sup>16</sup> Mattel agreed with the Oregon Department of Environmental Quality to help clean up the site, and notified Hall Street that it was terminating the lease.<sup>17</sup> Hall Street filed suit, contesting the date of the termination of the lease and claiming that the lease required Mattel to indemnify its share of the clean-up costs.<sup>18</sup>

At trial, the parties proposed to submit the indemnification issue to arbitration. The district court approved the arbitration agreement, which stipulated that “[t]he Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of fact are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.”<sup>19</sup>

<sup>10</sup> See also, e.g., *Zeiler v. Deitsch*, 500 F.3d 157,164 (2d Cir. 2007) (“[j]udicial confirmation of the arbitration awards ... is therefore initially governed by the provisions of chapter 2 of the FAA, 9 U.S.C. secs. 201–8, and by the Convention, 21 U.S.T. 2517, as incorporated in the FAA.”).

<sup>11</sup> E.g., *Yustuf*, 126 F.3d 15; see also 9 U.S.C. s.208 (“Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States”).

<sup>12</sup> *Yustuf*, 126 F.3d at 20 (quoting 21 U.S.T. 2517, art.V(1)(e)); see also *Zeiler*, 500 F.3d at 164 (“since the arbitration took place in the United States, the awards ... are at the same time subject to the FAA provisions governing domestic arbitration awards”); *Sole Resort, S.A. de C.V. v. Allure Resorts Management, L.L.C.*, 450 F.3d 100, 102 n.1 (2d Cir. 2006); *Jacada, Ltd. v. Int’l Marketing Strategies, Inc.*, 401 F.3d 701, 709 (6th Cir. 2005); see also ALBERT JAN VAN DEN BERG, *THE NEW YORK CONVENTION OF 1958: TOWARD A UNIFORM JUDICIAL INTERPRETATION* 22 (1981) (“in the country of origin a losing party may obtain a setting aside on a ground not mentioned in Article V of the Convention.”).

<sup>13</sup> Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT’L ARB. 213, 238–41 (1996).

<sup>14</sup> 128 S. Ct. at 1400.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1400–01 (citing App. to Pet. For Cert. 16a).

The arbitrator decided in favor of Mattel, ruling that no indemnification was due. He reasoned that the clean-up costs were the result of a violation of the Oregon Drinking Water Quality Act (Oregon Act), which he characterized as an inapplicable public health law, rather than an environmental law under the lease terms.<sup>20</sup> Hall Street then filed a motion in district court seeking an order vacating, modifying, or correcting the arbitration decision.<sup>21</sup> The district court reviewed the decision for legal error as the arbitration agreement provided.<sup>22</sup> The court based its decision to use the standard of review in the arbitration agreement and not the standards provided by the FAA on the Ninth Circuit's decision in *LaPine Technology Corp. v. Kyocera Corp.*,<sup>23</sup> which had allowed parties to supplement by contract the FAA's judicial review provisions. The district court vacated the award and remanded it to the arbitrator, who this time found for Hall Street. The district court then upheld the arbitrator's second award. In the meantime, the Ninth Circuit in 2003 had overruled *LaPine* in *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*,<sup>24</sup> and on appeal the Ninth Circuit held that the special review provision in the arbitration agreement was unenforceable and could be severed from the rest of the arbitration agreement.<sup>25</sup> After another round of district court proceedings and appeal, the Supreme Court granted *certiorari* to determine whether "the grounds for" vacating or modifying an arbitral award "provided by [sections] 10 and 11 of the FAA are exclusive."<sup>26</sup>

In the Supreme Court, Hall Street and its *amici* made two principal arguments for enforcing contractually expanded standards of review. First, the Court's decision in *Wilko v. Swan*<sup>27</sup> had recognized "manifest disregard of the law" as a ground for vacating arbitration awards above and beyond those listed in section 10 of the FAA. If judges could add to the statutory grounds for vacatur, then so could parties. Second, section 10 of the FAA is essentially and only a default rule that comes into play when the parties do not contract for a tailored standard of review.<sup>28</sup>

As for the first argument, a bit of background is necessary. In the 1953 case of *Wilko v. Swan*, the Supreme Court addressed whether the Securities Act of 1933 voided an arbitration agreement, holding that it did.<sup>29</sup> (That holding was overruled over three decades later in *Rodriguez de Quijas v. Shearson/American Express, Inc.*)<sup>30</sup> The Court separately explained in *Wilko*, however, that "the interpretations of law by the arbitrators in contrast to manifest disregard, are not subject ... to judicial review for error in interpretation."<sup>31</sup> Thus was manifest disregard born.

<sup>20</sup> *Id.* at 1401.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 130 F.3d 884, 889 (9th Cir. 1997).

<sup>24</sup> 341 F.3d 987, 1000 (9th Cir. 2003) (en banc).

<sup>25</sup> *Hall Street*, 128 S. Ct. at 1401.

<sup>26</sup> *Id.*

<sup>27</sup> *Supra* note 4.

<sup>28</sup> *Supra* note 26.

<sup>29</sup> 346 U.S. at 432–35.

<sup>30</sup> 490 U.S. 477 (1989) (holding that claims under Securities Act of 1933 are subject to arbitration and overruling *Wilko*).

<sup>31</sup> 346 U.S. at 436.

Since then, the U.S. courts of appeals have split on the question whether *Wilko* could be read as adding “manifest disregard of the law” to the reasons for vacatur expressly listed in section 10 of the FAA,<sup>32</sup> or whether manifest disregard merely referred to provisions of section 10 “collectively.”<sup>33</sup> In *Hall Street*, the Court expressly recognized the split among the courts of appeals.<sup>34</sup>

An appreciation of the context in which the Court discussed manifest disregard helps make clear that the law on “manifest disregard” was left in its current state; that is to say, review for “manifest disregard” continues to be available in the various U.S. circuits in the manner set out in those circuit court of appeals’ decisions.<sup>35</sup> But the precise meaning of manifest disregard remains undefined by the Court.

In *Hall Street*, Justice Souter’s majority opinion characterized Hall Street’s argument as “the camel’s nose [in the tent]: if judges can add grounds to vacate (or modify) [under FAA section 11], so can contracting parties.”<sup>36</sup> In rejecting that argument, the Court was not required to decide whether manifest disregard is an extra-statutory ground to vacate an arbitrator’s award. The focus of the Court’s analysis was instead on the role that “manifest disregard” review played in the context of Hall Street’s argument. The Court was thus dealing with manifest disregard as an element in a logical chain: Hall Street contended that because (a) judges had created an extra-statutory ground for review (“manifest disregard”), then (b) parties were similarly entitled to contract for additional grounds beyond those listed in the statute. In dispatching that argument (“this is too much for *Wilko* to bear”)<sup>37</sup> there was no need for Justice Souter to reach the (unasked) question about the nature of manifest disregard. Instead, Justice Souter explained that Hall Street was mistaken for two reasons: (1) the argument required an unwarranted “leap from a supposed *judicial expansion by interpretation* to a *private expansion by contract*”; and (2) the argument overlooked the fact that *Wilko* itself, in describing manifest disregard, “*expressly rejects* just what Hall Street asks for here, general review for an arbitrator’s legal errors.”<sup>38</sup>

Indeed, emphasizing it was deciding nothing on this point, the Court summarized:

We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment ... and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.<sup>39</sup>

<sup>32</sup> See, e.g., *McCarthy v. Citigroup Global Markets, Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Prestige Ford v. Ford Dealer Computer Servs., Inc.* 324 F.3d 391, 395–6 (5th Cir. 2003); *Scott v. Prudential Secs, Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998).

<sup>33</sup> See *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 431 (2d Cir. 1974); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (2003) (“manifest disregard” shorthand for s.10(a)(3) or s.10(a)(4)); cf. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) (“Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. ss.10, 207”).

<sup>34</sup> 128 S. Ct. at 1403.

<sup>35</sup> See Christopher Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 234 (2007) (“based on the *Wilko* dictum, every United States Court of Appeals has adopted some form of ‘manifest disregard’ review”).

<sup>36</sup> 128 S. Ct. at 1403.

<sup>37</sup> *Id.* at 1404.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*



Second, as for the actual holding of the case, the Court rejected Hall Street's argument that section 10 of the FAA was a default rule that applies in the absence of a contractual agreement by the parties.<sup>40</sup> The Court underscored that, in its view, the result was compelled by the plain language of the FAA; it disavowed any position on the policy implications of its decision.<sup>41</sup> Sections 10 and 11 permit district courts to refuse to enforce arbitral awards only in "egregious" circumstances, such as "fraud," "evident partiality," "misconduct," and "corruption." Given this listing, the Court concluded that *ejusdem generis*, the statutory canon of construction counseled against the inclusion of mere legal error in such extreme company.<sup>42</sup> The Court also found exclusivity by reading sections 9, 10, and 11 together. The Court reasoned that the procedure for confirming awards under section 9 of the FAA (which provides that courts "must grant" an order seeking enforcement of the award unless vacatur or modification is "prescribed in sections 10 and 11") "does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else."<sup>43</sup> Contrasting with this mandatory language was section 5 of the FAA, the language of which expressly provides a default rule scheme in the absence of an agreement by the parties.<sup>44</sup> Thus, the Court held that the FAA's review provisions are exclusive: They are not prone to expansion by contract.

Two things are clear from the opinion in *Hall Street*. First, parties cannot contract for expanded review of arbitral awards beyond the grounds identified in the FAA. Second, *Hall Street* has not altered the pre-existing law on the "manifest disregard" standard; reports of its demise are greatly exaggerated.<sup>45</sup>

#### IV. HALL STREET'S PRACTICAL IMPLICATIONS

*Hall Street* will have little or no effect on parties that have not stipulated for special review provisions in their arbitration agreements. But those that do desire a more thoroughgoing scrutiny of arbitral awards than provided for in sections 10 and 11 of the FAA must now look for alternative means of creating enhanced review to guard against rogue awards.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1404.

<sup>42</sup> *Id.* For a cogent critique of this reasoning, see Alan Scott Rau, *Fear of Freedom*, 19 AM REV. INT'L ARB., Spring 2008 (forthcoming), available at <<http://ssrn.com/abstract=1133082>>, text accompanying notes 42–48.

<sup>43</sup> 128 S. Ct. at 1405 (citing 9 U.S.C. s.9).

<sup>44</sup> Section 5 of the FAA provides: "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; *but if no method be provided therein*, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and *unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.*" 9 U.S.C. s.5 (emphasis added).

<sup>45</sup> *But see* Lucy Reed & Phillip Riblett, *Hall Street: The Death Knell of Manifest Disregard of the Law*, 23–25 MEALEY'S INT'L ARB. REP. 19 (May 2008) ("Despite the fact that the manifest disregard defense was not directly before the Court in *Hall Street*, the Court's obvious displeasure with the development of this defense and its holding that Sections 10 and 11 of the FAA 'provide the FAA's exclusive grounds for expedited vacatur and modification' cast significant doubts on the availability of manifest disregard of the law as an independent defense to enforcement of arbitral awards going forward. That *Hall Street* is the Supreme Court's only thorough discussion of the matter post-*Wilko*, and that the Court stated its approach so directly, surely will send a powerful message to lower courts").

One alternative might be an appellate procedure *within* the arbitral process. For example, the Appeal Procedure for the CPR Institute for Dispute Resolution provides that the “parties to any binding arbitration conducted in the United States” may agree in writing that a party can appeal an arbitral decision under its Appeal Procedure.<sup>46</sup> This includes international arbitrations that occur in the United States.<sup>47</sup> The arbitral appeal tribunals are composed of three former U.S. federal court judges.<sup>48</sup> The CPR Appeal Procedure expands upon the grounds provided in the FAA for vacating, modifying, or correcting an award. Particularly relevant to those who seek the review of legal error denied by the Court in *Hall Street* is the fact that the Appeal Procedure provides, in addition to the grounds set out in section 10 of the FAA, for vacatur on the grounds that the decision “contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis.”<sup>49</sup> Moreover, in its *amicus curiae* brief in *Hall Street*, the American Arbitration Association noted that it, too, offers a model clause to parties who wish to contract for appeal to a second panel of arbitrators.<sup>50</sup> Parties “have the freedom to establish the standard of review that will be applied by the appellate arbitration panel.”<sup>51</sup>

Parties that wish to maintain some form of court review could also consider choosing arbitration in a seat using the regime of the English Arbitration Act 1996, which still allows appeals by parties who so agree.<sup>52</sup>

Yet another—far less satisfactory—method would be to carve certain classes of disputes from arbitration entirely and leave them to courts,<sup>53</sup> though that tactic would sacrifice the benefits of arbitration for those claims. Finally, parties can reconsider whether to use dispute review boards or similar devices in innovative ways, making arbitration an appellate instance, for example. These other options, of course, have their own virtues and demerits, but they cannot replace tailoring courts’ review standards.

## V. *HALL STREET*, INTERNATIONAL UNIFORMITY, AND FREEDOM OF CONTRACT

As various *amici* would have it, *Hall Street* brings U.S. arbitration practice into line with the other countries that do not allow contractually expanded judicial review,

<sup>46</sup> International Institute for Conflict Prevention & Resolution, CPR Arbitration Appeal Procedure Rule 1.1, available at <[www.cpradr.org/arb\\_appeal\\_procedure.asp?M=9.2.3.3](http://www.cpradr.org/arb_appeal_procedure.asp?M=9.2.3.3)>.

<sup>47</sup> Rule 1.1 applies by its terms to “any binding arbitration conducted in the United States” (*id.*), but we have been advised by the CPR that parties may contract around this territoriality requirement.

<sup>48</sup> *Id.* Rule 1.2.

<sup>49</sup> *Id.* Rule 8.2: “If the Tribunal hears the Appeal, it may issue an Appellate Award modifying or setting aside the Original Award, but only on the following grounds: a. That the Original Award (i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record; or b. That the Original Award is subject to one or more of the grounds set forth in Section 10 of the Federal Arbitration Act for vacating an award. The Tribunal does not have the power to remand the award.”

<sup>50</sup> AAA Amicus Br., *supra* note 5, at 22.

<sup>51</sup> *Id.* The AAA further notes that nothing in the UNCITRAL Rules prevents parties from providing for an arbitration appellate tribunal within the arbitration procedure itself.

<sup>52</sup> See USCIB Amicus Br., *supra* note 6, at 25–28; see also Rau, *supra* note 42, at 21–22, nn.61–62.

<sup>53</sup> See Rau, *supra* note 42, text accompanying notes 15–16.

evidencing speed, finality, and global uniformity over party autonomy.<sup>54</sup> The tension between these two views of arbitration and differing views about the implications of striking the right balance between the two can be seen in the large number of *amici curiae* that filed briefs debating the consequences that would result from permitting or denying contractual tailoring of standards of review.<sup>55</sup>

Mattel and its *amici* argued that parties would flee from arbitration if it were merely a prelude to the full-scale judicial process arbitration was meant to avoid. As the USCIB argued in its brief, expanded review is contrary to the “ethos” of arbitration and expanded judicial review “is antithetical to finality—an indispensable and irreducible characteristic of the arbitral process—and undermines arbitration as an efficient alternative means of resolving disputes.”<sup>56</sup> The American Arbitration Association echoed this argument, urging that respecting party wishes about the scope of judicial review would make arbitration a “prelude to litigation.”<sup>57</sup>

On the other hand, Hall Street and its *amici* argued that parties would decline to use arbitration if they could not tailor judicial review of the arbitral award.<sup>58</sup> As one organization explained in its *amicus* brief, “some parties will be unwilling to agree to arbitrate their disputes, or at least certain types of disputes, if they cannot contractually expand the bases for vacating or modifying the arbitrator’s decision. Among other things, parties may decide that they are unwilling to ‘bet the company’ on arbitration, where there is some risk of a rogue arbitrator issuing an unsupportable decision.”<sup>59</sup>

Notwithstanding the Court’s holding, at least one prominent scholar continues to support Hall Street’s position. Cutting against the grain of the “arbitration establishment,” Professor Alan Rau argues that finality and efficiency are “public interest” arguments that are beside the fundamental point of arbitration: “if there is any ‘public policy’ at all implicated in arbitration, it rather lies in making a relatively inexpensive and efficient process of dispute resolution available to the parties *if and to the extent they wish to take advantage of it.*”<sup>60</sup> The one-size-fits-all approach of refusing to respect party preference will make judicial review of arbitral awards a “Procustean bed to which the parties must

<sup>54</sup> See, e.g., Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 AM. REV. INT’L ARB. 215, 216 (1999) (“[t]he French courts, however, will not enforce agreements asking for greater judicial review than that available under French law.”). For a rebuttal to this argument, see Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 454 n.22 (2005) (review of legal error in France can be obtained indirectly as a claim that the arbitrator exceeded his arbitral authority).

<sup>55</sup> The CTIA (for which one of the authors of this article appeared on the brief), the Pacific Legal Foundation, the New England Legal Foundation, the American Arbitration Association, the United States Council for International Business.

<sup>56</sup> USCIB *Amicus Br.*, *supra* note 6, at 4.

<sup>57</sup> AAA *Amicus Br.*, *supra* note 5, at 6.

<sup>58</sup> 128 S. Ct. at 1406; see also Hall Street, Brief for Petitioner, No. 06-989, 2007 WL 2197585, at 39 (July 27, 2007); Hall Street, Brief for New England Legal Foundation et al. as *Amicus Curiae*, No. 06-989, 2007 WL 2344617, 15 (July 27, 2007).

<sup>59</sup> Hall Street, Brief for CTIA—The Wireless Association as *Amicus Curiae*, No. 06-989, 2007 WL 2197512, at \*8; also see generally William H. Knull, III & Noah Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT’L ARB. 531, 550–65 (2000).

<sup>60</sup> Rau, *supra* note 42, at 10.

adapt themselves even at the cost of amputated limbs.”<sup>61</sup> In the view of Rau and Hall Street, the Court sacrificed party autonomy at the altar of public utility.

Although the majority opinion argued that the statutory text was clear and declined to wade into these waters,<sup>62</sup> considerations of policy lurk conspicuously beneath the surface of Justice Souter’s statutory interpretation. In tone and implication, the majority appeared to agree with the “finality” rationale for arbitration, noting that deference to party choice “opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”<sup>63</sup> As such, expanded judicial review would “bring arbitration theory to grief in post-arbitration process.”<sup>64</sup> In dissent, Justice Stevens, joined by Justice Kennedy and in this respect by Justice Breyer, argued that the majority’s rejection of freedom to contract for the standard of review “forbids enforcement of perfectly reasonable judicial review provisions in arbitration agreements fairly negotiated by the parties and approved by the district court.”<sup>65</sup> Because in the dissenting justices’ view, enforcement of arbitration agreements according to their terms is the FAA’s “primary purpose,”<sup>66</sup> the dissent found precluding contractual judicial review “unnecessary” and “flatly inconsistent with the overriding interest [of the statute] in effectuating the clearly expressed intent of the contracting parties.”<sup>67</sup> In short, the decision in *Hall Street* represents a step backwards from the Court’s repeated recognition that the FAA treats the contractual choices of the parties as paramount in favor of an approach that emphasizes arbitration’s purposes of finality and efficiency.<sup>68</sup>

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<sup>61</sup> *Id.* at 11.

<sup>62</sup> *Hall Street*, 128 S. Ct. at 1406.

<sup>63</sup> *Id.* at 1405.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1408.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1409.

<sup>68</sup> Compare *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (“passage of the [FAA] was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered ... and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.”) (footnote omitted) and *Volt Info. Scis. v. Bd. of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989) (“parties are generally free to structure their arbitration agreements as they see fit. Just as they 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.”) with *Hall Street*, 128 S. Ct. at 1405 and *Preston v. Ferrer*, 128 S. Ct. 978, 986 (2008) (“A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results’”) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

