STATE REGULATION OF
ARBITRATION PROCEEDINGS:
JUDICIAL REVIEW OF ARBITRATION
AWARDS BY STATE COURTS

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I. INTRODUCTION AND OVERVIEW

The thesis of this Article can be stated simply and concisely: States possess the power to adopt standards for the conduct of arbitration proceedings and review of arbitration awards that are significantly different from federal law standards.1 The major

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objective of this Article is to explore the most important possibilities for reform of arbitration law and practice at the state level. State law standards will be of increasing importance in the reformation of arbitration practice. This Article focuses on the standards of review of arbitration awards employed by state courts, because the power to vacate an arbitration award is the sanction for defective arbitration proceedings. Many of my examples are drawn from Texas, where I have been teaching contracts and arbitration for many years, and from the Fifth Circuit—about which I have written at length.²

The idea of states serving as laboratories for testing alternative approaches to perceived problems is too well known to require amplification here. Suffice it to say that potential improvements in the arbitration process are better tried initially at the state rather than the federal level, due to lower degree of risk if a change is deemed not to be successful. Over time, other jurisdictions can examine what has been tried in various states, and adopt (perhaps in revised form) those ideas that proved sound.

In view of the dramatically expanded role of arbitration in the American legal system during the last quarter century, and the numerous concerns about these developments, expanding state court review of arbitration awards offers a promising route for those who believe that arbitration needs to be checked—both in the sense of limiting arbitration and in quality control of arbitral awards. For this heresy, I expect to become a pariah among persons associated with the organized arbitration community, which consistently op-

Peter B. Rutledge, Who Can Be Against Fairness: The Case Against the Arbitration Fairness Act, 9 CARDOZO J. CONFLICT RESOL. 267 (2008); Amy J. Schmitz, Curing Consumer Warranty Woes Through Regulated Arbitration, 23 OHIO ST. J. ON DISP. RESOL. 627 (2008); David S. Schwartz, The Federal Arbitration Act and the Power of Congress Over State Courts, 83 OR. L. REV. 541 (2004); Jeffrey W. Stempel, Mandating Minimum Quality in Mass Arbitration, 76 U. CINN. L. REV. 383 (2008); Paul Turner, Preemption: The United States Arbitration Act, The Manifest Disregard of the Law Test For Vacating an Arbitration Award, and State Courts, 26 PEPP. L. REV. 519 (1999); Stephen J. Ware, Principles of Alternative Dispute Resolution § 2.46 (2007); Maureen A. Weston, Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration, 88 MICH. L. REV. 449, 460 (2004). Many of these authors have discussed topics of relevance to this article in multiple publications, but I have limited myself to one citation per author, with a preference for the most recent publication.

poses any suggestion that courts do anything with respect to arbitration awards other than confirm them.³

States can adopt standards of review that are more restrictive or less restrictive than those found in federal law. However, the possibilities for different state standards are not symmetrical. Federal law allows only for very limited judicial review of arbitration awards, so there is little room for a state to select a narrower level of review. The sole notable example is the unwillingness of some states to recognize manifest disregard of the law as a non-statutory ground for vacating an arbitration award.⁴ By contrast, there is a vast potential scope for expanding the regulation of arbitrators and arbitration awards under state law.

Most cases that are subject to the Federal Arbitration Act ("FAA") are heard in state, rather than federal, courts.⁵ Indeed, this fact is an important rationale for writing this Article, and is central to its relevance. While the FAA establishes substantive federal law regarding arbitration agreements, the Act does not create an independent basis for federal court jurisdiction.⁶ Some other basis must be found to invoke federal jurisdiction—usually diversity jurisdiction, subject to a minimum amount in controversy (currently $75,000).⁷ The dollar limitation on diversity jurisdiction is important because many consumer and employment arbitration proceedings involve lesser dollar amounts. Attempts to argue that section 10 of the FAA provides an independent basis for federal jurisdiction to review arbitration awards have met with uniform rejection by the federal courts.⁸

The law of a particular state may become applicable to an arbitration proceeding in two very different ways. The primary focus

³ Full disclosure: My wife, Wendy Trachte-Huber, formerly served as a regional vice president, and national vice president for training, at the American Arbitration Association (AAA).
⁷ There is an independent basis for federal jurisdiction in several classes of cases that are commonly arbitrated: admiralty, international, and labor. In practice, judicial review in these cases almost always takes place in a federal court—either because the claim is initially brought in a federal court, or because a claim brought in a state court is removed to a federal court.
of this Article is on state court proceedings that are governed by the law of the jurisdiction where a post-arbitration challenge is heard. In addition, a choice of law provision will serve to make the law of the specified state determinative. That choice of law is controlling in any federal or state court. Although a general choice of law clause will not serve to invoke the arbitration law of a state, a clearly expressed desire to contract out of the FAA and into the arbitration law of a named state is permitted, indeed required, by the FAA. As the United States Supreme Court has framed the matter: “The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate.” The FAA does not require contracting parties to arbitrate pursuant to any particular set of rules, and that includes FAA rules.

This article proceeds on the assumption that its readers are generally familiar with American arbitration law and practice. One of the pleasures of publishing in a specialty journal is that the author can assume that the readers have a basic knowledge about the subject matter. This permits the author to assert that the United States Supreme Court strongly favors arbitration, and similarly uncontroversial propositions, without a lengthy explanation or a blizzard of footnotes that offers supporting evidence.

Part II of this Article presents a brief review of state and federal law standards for judicial review of arbitration awards. This body of law was already well established, although not codified, during the nineteenth century. Despite the vast changes in general arbitration law since that time—e.g., enforcement of executory arbitration agreements, statutory claims subject to arbitration, and the consumerization of arbitration—the law regarding judicial review of arbitration awards remains largely unchanged. With the enactment of the FAA at the national level, and the enactment of the Uniform Arbitration Act (“UAA”) by most states (either the 1955 or 2000 version), the statutory grounds for vacating arbitration awards are largely identical throughout the country.

A necessary precursor to the discussion of state law standards regarding arbitrators and arbitration awards is the consideration (and refutation) of arguments that state arbitration law initiatives are preempted by federal law, as explicated in decisions of the United States Supreme Court. The power to expand review of arbitration awards under state law, whether based on statutory or

common law developments, is considerable. Short of a large scale refusal to enforce arbitration awards, state standards for judicial review are not subject to FAA preemption.

After disposing of the canard that the FAA, supplemented by the arbitration jurisprudence of the United States Supreme Court, stands as a barrier to state law standards for review of arbitration awards, we turn to the central topic of the Article: State standards for judicial review of arbitration awards, and related state regulatory law. As with most rules, the ultimate occasion for enforcement may be a judicial proceeding but widespread compliance usually precludes the need for judicial action. For example, material violations of arbitrator disclosure rules can ultimately result in the vacatur of an arbitration award, but the preferred result (and far more common outcome) is that arbitrators comply with these rules and avoid any risk of an award being vacated.

The discussion of state law regulation of the arbitration process is a potentially vast topic, and no attempt at completeness is contemplated. Indeed, the discussion begins with a set of transactional assumptions designed to assume away a wide variety of potential arbitration issues. Largely, as a matter of self-discipline, I have adopted the “Top Ten” approach made famous by David Letterman, and limit my discussion to ten important state law arbitration process reforms. However, no attempt is made at rank ordering these topics, or the proposed reforms.

II. Grounds for Judicial Review of Arbitration Awards

The purpose of this section is to provide an overview of the standards used by American courts (of first instance) in reviewing arbitration awards, and to demonstrate the basic similarity of these standards throughout the federal and state court systems. There are, of course, some significant differences among jurisdictions in the standards used, and courts sometimes interpret broad standards such as “public policy,” “manifest disregard of the law,” and “evident partiality” in different ways. These matters are discussed at length in Part IV. At the same time, it is important to recognize that federal law and that of the individual states regarding judicial review of arbitration awards has a common core, due to the enactment of the FAA and of similar legislation in every state.
A. Judicial Review Prior to the Enactment of the FAA (1925)

The legal literature, both judicial and academic, would lead a casual reader to conclude that, prior to the enactment of the FAA in 1925, the American legal system was characterized by a general hostility to arbitration. A Westlaw search using the search term “hostility to arbitration” produced a list of no less than 464 federal court decisions and 933 law journals commenting on the topic. In one article, the section that discusses the adoption of the FAA is titled: “The FAA: A Response to Judicial Hostility toward Arbitration.”

The pre-FAA hostility to arbitration perspective is significantly over-inclusive. In the nineteenth century, American law was, indeed, hostile to suits seeking specific enforcement of executory agreements to arbitrate, but that same legal system was quite receptive to actions that sought enforcement (or vacatur) of arbitration awards. This approach to arbitration is fundamentally different from the current law, and thus may strike the reader as odd or even foolish—but that may only reflect the conceit of the present looking back at the past.

1. Burchell v. Marsh (1854)

Not only were American courts open to enforcing arbitration awards well before the adoption of the FAA, they also severely limited the available grounds for challenging an arbitration award. The leading case for this proposition is Burchell v. Marsh, a United States Supreme Court decision confirming an arbitration award that had been rejected by the district court. In 1854, the Court

11 Westlaw search of “All Feds” and “Journals and Law Reviews” databases conducted on July 6, 2008.
13 Despite the hostility of American and English courts to executory arbitration agreements, arbitration was commonly used for centuries, particularly among merchants. Blackstone noted the widespread use of arbitration to settle commercial disputes, writing of “the great use of these peaceable and domestic tribunals, especially in settling matters of account and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law.” 3 William Blackstone, Commentaries on the Laws of England 17 (1765).
14 Burchell v. Marsh 58 U.S. 344 (1854). General statements of the law in the United States during the nineteenth century reflect statements of doctrine, often by federal courts. The state of the living law in state courts, where law books were few and access to the limited number of reported cases was limited, is largely unknown. State law and local practice certainly varied over time, from place to place, and among different communities. A particularly valuable example is Bruce Mann, The Formalization of Informal Law: Arbitration Before the American Revolution,
already could begin its analysis without a discussion of the potential bases for setting aside an arbitration award, because these were “too well settled by numerous decisions to admit of doubt.”

The Supreme Court also had little to say about the factual underpinnings of the Burchell case. These were of little moment, being the province of the arbitrator.

If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court . . . will not set it aside for error, either in law or fact. [Otherwise, the court would substitute its judgment in place of the judges chosen by the parties and would make an award the commencement, not the end, of litigation.]

To vacate an arbitration award, “there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence . . . .” The Court cautioned that the establishment of gross mistake requires far more than the presence of a “mere error of judgment.”

Witnesses for Plaintiff Burchell were permitted to testify about certain slanderous language used by counsel for Defendant Marsh (and another merchant seller) in speaking to, and about, Burchell during the course of an earlier law suit to collect on overdue accounts receivable. Marsh argued that the admission of evidence regarding slander, combined with the impossibility of explaining the result without taking account of the slander argument, should lead the court to conclude that this evidence—characterized as “illegal” by the Supreme Court—played a role in the decision. The response of the Court was dismissive: The award said nothing about slander, and that was the end of the matter. This conclusion was essential because Burchell did not allege slander, and thus any indication that the award included compensation


15 Burchell, 58 U.S. at 349. The Court did recognize that the case law was not entirely consistent. “There are, it is true, some anomalous cases, which, depending on their peculiar circumstances, cannot be exactly reconciled with any general rule; but such cases can seldom be used as precedents.” Id.

16 Id. at 349.

17 Id. at 350.

18 Id. ]
for slander would have led to rejection of the award as beyond the submission. The Court refused to infer that the arbitrators had exceeded their authority.

As for the damages award, the parties chose arbitration and had to live with the award, however foolish—and the Court clearly had great doubt about both the amount of the award and the allocation of payment between the two losing parties. “It may be admitted, that, on the facts appearing on the face of the record, this court would not have assessed damages to so large an amount, nor have divided them so arbitrarily between the [two losing] parties . . . .” The dissenting opinion found even this characterization of the arbitrators’ decision to be unduly charitable, and would have vacated the award.

I think the damages allowed against the complainants, by the arbitrators, are so extravagant, disproportionate, and gross, as to afford evidence of passion and prejudice, and justified the judgment of the court below, in setting aside the award. It is difficult, if not impossible, to see, upon any other ground, how between four and five thousand dollars should have been allowed against one of the firms in the submission, and but some one thousand dollars against the other, under the circumstances of the case.

Had the award in Burchell been made by a court, instead of an arbitrator, the Supreme Court would have reversed that decision on one or more of the following grounds:

1. As a matter of law, because a principal was not responsible for slander by its Agent;
2. On evidentiary grounds, due to the admission of illegal evidence;
3. Due to factual findings that were clearly erroneous;
4. On the basis of the awarding of grossly excessive damages; or
5. Due to the disparity between the treatment of the two defendant firms.

2. A Minor Detour: Correcting Justice Stevens

The Burchell decision demonstrates that the principle of very limited judicial review of arbitration awards was well established in the United States long before the enactment of the FAA. Before
moving on, however, it is necessary to rebut a contrary statement by Justice Stevens, in his dissenting opinion in the case of Hall St. Assoc. v. Mattel. In the course of arguing in favor of the enforcement of contract standards of review, Justice Stevens observed that “[i]n the years before the passage of the FAA, arbitration awards were subject to thorough and broad judicial review.”22 This statement is patently wrong. Stevens cited two law review articles in support for his statement, but neither supports the asserted conclusion.23 His error was in reading material discussing the very different English approach to judicial review of arbitration awards as also reflecting the earlier American approach. (Stevens’ true error may have been to rely on the research of law clerks.)

English law took a fundamentally different turn from American law in the nineteenth century with respect to suspicion about arbitration.24 In England, executory arbitration agreements were enforced, but that approach was matched by thorough judicial review later in the process. In America, in contrast, executory arbitration agreements were not enforced, so judicial review of

22 Hall Street Assoc. v. Mattel, 128 S.Ct. 1396, 1409 n.3 (2008) (emphasis added).
23 The first citation was to an article by Julius Cohen, a leading actor in the adoption of the FAA. Julius Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 Va. L.Rev. 265, (1926). The pages cited by Justice Stevens discuss the enforcement of agreements to arbitrate, and say nothing about judicial review of awards. Id. at 270–71. A few pages later, however, the Cohen (and Dayton) article categorically states the opposite of what Justice Stevens asserts: “Despite the refusal of the courts to enforce arbitration agreements, they have been equally consistent in their refusal to upset the awards given by arbitrators when arbitration takes place.” Id. at 273 (emphasis added). The second reference was to a more recent article by Professor Cullinan that addressed expanded review by contract. Cullinan, supra note 12, at 408. Before discussing this topic, Cullinan briefly reviewed the pre-FAA history of arbitration in America, and the influence of English law. In so doing, Cullinan stated:

By adopting the English law, American courts were infected with a hostility toward arbitration . . . . The ultimate effect of this hostility was the courts’ refusal, with few exceptions, to force parties to fulfill executory agreements to arbitrate. While this hostility did not include judicial refusal to enforce the award of an arbitrator, such awards were subject to virtually unlimited judicial review, potentially eliminating any advantages derived from the use of arbitration.

Cullinan, supra note 12, at 408–09 (emphasis added). While not entirely clear, Cullinan surely intended “such awards” to refer to English rather than American law, with respect to the wide-ranging review that was exercised by English (but not American) courts. Any doubt about this reading of Cullinan is dispatched by a review of the sole source cited by Cullinan in support of his statement, in an article by Professor John Allison. “Nineteenth century legislation in England made future-disputes arbitration agreements enforceable and attempted to provide a procedural structure for judicial review of arbitration awards; however, this review continued to involve a thorough examination on the merits.” John R. Allison, Arbitration Agreements and Antitrust Claims: The Need For Enhanced Accommodation of Conflicting Public Policies, 64 N.C. L. Rev. 219, 225 (1986) (emphasis added).

arbitration awards was far more limited. The need for enforcement of executory arbitration agreements was a reason for enactment of the FAA, but this change was not matched with enhanced judicial review later in the process. Perhaps, America should move toward a more thorough and thoughtful review of arbitration awards, as seen in the English model.25

B. The FAA and UAA Judicial Review Provisions Are Materially Identical

Since the law regarding judicial review of arbitration awards was well-established long before the enactment of the FAA (and its predecessor New York arbitration statute), it is unsurprising that the FAA’s drafters focused entirely on the enforcement of executory arbitration agreements. No major adjustments regarding judicial review of arbitration awards were necessary because arbitration awards already were regularly enforced, and were subject to only limited judicial review. The federal statutory standards for judicial review of arbitration awards are found in section 10 of the FAA; and they have not changed since the enactment of the FAA in 1925.

The adoption of state statutory standards for judicial review of arbitration awards is more complex, but the end result is a set of standards that closely tracks the FAA. The central purpose of the National Conference of Commissioners on State Laws (“NCCUSL”) is accurately stated by its name: the promotion of uniform laws. To that end the NCCUSL has, since its creation in the late nineteenth century, promulgated model laws for adoption by individual states (and other American jurisdictions). The goal of uniform state laws is twofold: 1) that the law is materially identical in all adopting states; and 2) that the number of adopting states is large. Both are required to achieve reasonable national uniformity. Given these constraints, model laws promulgated by the NCCUSL tend to avoid controversial issues and innovative ideas, because these threaten the goal of achieving uniform state laws that is the NCCUSL’s raison d’etre.

The natural tendency of the NCCUSL to avoid innovation was reinforced in the arbitration context because the first attempt at

uniform state legislation in 1926 was a failure, and had to be withdrawn. The 1926 UAA did not provide for the enforcement of arbitration agreements, and was adopted in only a few states. In this context, a knowledgeable observer would be surprised, even astonished, if the provisions of the 1955 UAA did anything but closely track the provisions of the FAA. In fact, that is precisely what occurred, both in general and with respect to the particular judicial review provisions. The 1955 UAA was a grand success, was enacted substantially as written in at least 37 states, and similar judicial review provisions were enacted in nearly all other states. The 2000 UAA addressed arbitration issues that are not covered by the FAA or the 1955 UAA, but the judicial review provisions in the 2000 Act did not deviate materially from its federal and state law predecessors. The 2000 UAA altered the wording and organization of the vacatur provisions in several ways, but the differences are of style rather than substance. At present, most states have not yet enacted the 2000 UAA, but it is expected more will do so in ensuing years.

The provisions for confirmation or vacatur of final arbitration awards are found in section 12 of the 1955 UAA, and section 23 of the 2000 UAA. It is only a small exaggeration to state that the statutory standards for reviewing arbitration awards have been materially identical throughout the United State for the last 50 years. The one main difference between the federal and state statutes is that the FAA is addressed to federal district courts, while the UAA is addressed to that state’s district courts (or similar trial courts of general jurisdiction).

C. Statutory Standards of Review: A Very Brief Overview

The grounds for vacating an arbitration award can be conveniently organized into four categories, which largely, but not entirely, track the FAA and UAA. Each is considered briefly:

1. Arbitration award “procured by corruption, fraud, or undue means.” This standard addresses misconduct by a party to the arbitration. Words like “corruption” and “fraud” suggest more than mere wrongdoing. Whatever is meant by “undue means,” the additional term is limited, under the principle

of _ejusdem generis_, to problems as serious as fraud and corruption.

2. “Evident partiality or corruption.” This provision addresses substantive misconduct by the arbitrator (as opposed to errors in conducting the arbitration proceeding). This topic will be considered further in Part IV.

3. Arbitrators “exceeded their powers.” This standard reflects the fact that the power of the arbitrator to decide a matter is derived from the underlying agreement. Limitations on the authority of the arbitrator can also come from public law. The concept that arbitrators exceeded their authority is sufficiently general that it could provide a basis for vacating an award that a court regards as seriously erroneous (but not based on procedural irregularity or arbitrator bias).

4. Prejudicial misconduct in conducting the arbitration hearing. This category includes the failure to postpone a hearing despite sufficient cause; failure to hear “evidence pertinent and material;” or other arbitrator misconduct prejudicial to the rights of a party. Hearing issues rarely produce litigation, because standard arbitration practice is to permit the presentation of all proffered evidence, with any doubts affecting the weight given to the evidence rather than the admissibility thereof. Arbitrators are generous in granting postponements—too much so, in the view of some observers—and the failure to grant a postponement rarely meets the materiality standard.

Among the statutory grounds for vacating an arbitration award is that the arbitrator refused to hear evidence pertinent and material to the controversy. This basis for vacating an arbitration award is rarely considered by the courts because standard arbitration practice is to admit any and all evidence. The exclusionary rules of evidence simply are inapplicable in arbitration, absent express contrary agreement; therefore, everything is admitted for what it is worth. The probative value of any particular item of evidence can be argued by the parties and will be considered by the

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28 9 U.S.C. § 10(a)(4); U.A.A. § 12(a)(1)(3) (1955); U.A.A § 23(a)(4) (2000). The FAA also contemplates the possibility that the arbitrators so imperfectly exercise their powers “that a mutual, final, and definite award upon the subject matter was not made.” 9 U.S.C. § 10. Whatever this language means, if anything, this Article proceeds on the assumption that the arbitrator has made a definite and final award.

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arbitrator, but all such arguments go to the weight rather than the admissibility of the evidence.

This “admit (almost) everything” approach is reflected in the rules of arbitration-provider organizations. For example, the AAA’s Commercial Arbitration Rules permit parties to introduce “such evidence as is relevant and material,” and expressly state that “[c]onformity to the rules of evidence shall not be necessary.”\(^30\) The arbitrator is authorized to exclude only cumulative or irrelevant evidence. A separate and more restrictive provision is made for communications subject to legal privilege, notably attorney-client communications.\(^31\)

D. Non-Statutory Standards of Review

Two standards for review of arbitration awards are widely recognized by the courts, despite their absence from the FAA and both versions of the UAA—and which are accordingly called “non-statutory” grounds. These are Public Policy and Manifest Disregard of the Law. Each will be discussed in Part IV.

A few other non-statutory standards of review have, at times, been recognized in some jurisdictions, but these are of little, if any, importance today. Connecticut recognizes “egregious mis-performance of duty” by an arbitrator as a basis for vacating an award.\(^32\) The Eleventh Circuit has accepted “arbitrary and capricious” as a ground for vacatur.\(^33\) Several federal circuits have relied on a “completely irrational” standard.\(^34\) Most federal courts have rejected these categories.\(^35\) Borrowing from labor cases, courts sometimes note that an arbitration award failed to draw its essence from the underlying agreement (the “essence” test).\(^36\) One wonders why courts ever felt the need to establish these, or similar

\(^{30}\) American Arbitration Association, Commercial Arbitration Rules, R-31(a).

\(^{31}\) Id. at R-31(c).


\(^{34}\) See, e.g., Schoch v. InfoUSA, Inc., 341 F.3d 785, 788 (8th Cir.2003), cert. denied, 540 U.S. 1180 (2004); G.C. & K.B. Invs. v. Wilson, 326 F.3d 1096, 1105 (9th Cir. 2003), cert. dismissed, 124 S.Ct. 980 (2004); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 292 n.2 (3d Cir.2001).


\(^{36}\) United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (stating that an arbitration award “is legitimate only so long as it draws its essence from the collective bargaining agreement.”).
non-statutory standards, because the covered cases fit comfortably within the established categories of arbitrator exceeded authority or manifest disregard of the law.

III. FAA Preemption of State Law Relating to Arbitration

In enacting the FAA, Congress provided for the enforcement of executory arbitration agreements. In addition, the FAA provided procedures for the disposition of arbitration matters in federal courts. As the House of Representatives Report stated the matter:

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 . . . The Bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.37

The FAA addresses only a single substantive problem: judicial hostility to executory arbitration agreements. This proposition is not open to serious argument. Nothing in the language or purpose of the FAA, or subsequent Supreme Court decisions, suggests that the FAA applies in any way to post-arbitration proceedings in state courts. More needs to be said on this topic, however, because a considerable number of leading arbitration scholars believe that the scope of FAA preemption extends beyond pre-arbitration issues.

The array of leading arbitration scholars who have argued that the limited preemption of state law based on sections 1 and 2 of the FAA extends to other aspects of arbitration, notably judicial review of arbitration awards, is truly impressive. Ian Macneil, Dick Speidel and Tom Stipanowich categorically state that the “FAA preempts any state grounds for vacation unless the parties have clearly agreed to be bound by them.”38 More generally, their Trea-


38 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 40.1 (1994) [hereinafter Macneil Treatise]. Unfortunately, this fine Treatise is of diminishing current utility because it has not been updated since 1999 (with coverage through August 15,
tise argues that the FAA should be treated as preempting all state law.\textsuperscript{39} Stephen Ware adopts the same position: “Federal law preempts state grounds for vacatur not found in federal law.”\textsuperscript{40} Stephen Hayford and Alan Parmiter find that state courts are in a “quandary as to whether the federal common law of vacatur preempts state court review of arbitral awards.”\textsuperscript{41} Christopher Drahozal has devoted an entire article to FAA preemption beyond the enforcement of agreements to arbitrate, such as judicial review of arbitration awards, and discusses at length five different approaches to such preemption, and notes that the courts “have only begun to address preemption challenges to state laws regulating the arbitration process . . . .”\textsuperscript{42} Tom Carbonneau argues that the Supreme Court’s “doctrine on arbitration constantly endeavors to achieve the enforcement of arbitral agreements and awards . . . .”\textsuperscript{43}

Alan Rau regards state arbitration law as irrelevant to the arbitration of disputes subject to the FAA: “[T]he possible justification even for the continuing existence of state arbitration laws has always eluded me: But at least the potential damage they may cause is finite, limited as it is by their virtual irrelevance.”\textsuperscript{44} As for judicial review of arbitration awards, Professor Rau finds a cause for concern “when state courts are given a mandate to vacate awards in circumstances not contemplated by the federal statute . . . .”\textsuperscript{45} The UAA (and variants thereof) is state legislation “which in most cases of course should readily be swept aside in any event on grounds of federal preemption.”\textsuperscript{46}

The scholars quoted in the previous paragraph generally support the expansionist view of preemption, or at least are comfortable with such an approach. More surprisingly, even critics of this approach seem to accept the expansive view of FAA preemption. Margaret Moses, in an article whose theme is encapsulated in the title—“Statutory Misconstruction: How the Supreme Court Cre-

\textsuperscript{39} Id. § 10.8.2.2.
\textsuperscript{40} STEPHEN WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 2.46 (2007) (section titled “Federal Preemption of State Law”).
\textsuperscript{44} Id. at 197 n.90.
\textsuperscript{45} Id. at 192.
ated a Federal Arbitration Law Never Enacted by Congress”—observed that the FAA “has been construed to preempt state law . . . .” 47 Ed Brunet’s conclusion is that the FAA “routinely trumps state laws dealing with arbitration,” and that “applications of state arbitration law are the exception.” 48 On the merits, Brunet strongly disagrees with this result, referring to the “wrongheaded nature of the Supreme Court’s arbitration preemption decisions . . . .” 49

A. Scope of FAA Preemption: Southland and Allied-Bruce

In the Southland decision, the Supreme Court ruled that the FAA “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” 50 This substantive arbitration rule must be applied by state as well as federal courts. 51 Even in a context where the FAA clearly preempts state law regarding arbitration, the Supreme Court noted that state and not federal procedure governs in state courts.

In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings. 52

In Allied-Bruce, the Court clarified that in enacting the FAA Congress used the full reach of its power under the Commerce Clause. 53 The scope of commerce subject to the FAA is any “contract evidencing a transaction involving commerce . . . .” 54 While this language is unique to the FAA, the Allied-Bruce decision held that “involving” commerce was equivalent to the more common

49 Id. at 328.
51 Id.
52 Id. at 16 n.10.
“affecting” commerce. Effectively, all arbitration agreements are subject to the FAA. Rather than quibble about possible exceptions, this Article proceeds on the assumption that all transactions involve commerce.

B. Issues for Initial Decision by Arbitrators:
   The Separability Doctrine

In addition to preempting state law about the enforcement of agreements to arbitrate, the Supreme Court has also expanded the scope of issues that must be heard and decided, at least initially, in arbitration. The separability doctrine instructs the courts to examine the arbitration agreement and the general contract—often called “the container contract”—separately for purposes of determining whether the court or an arbitrator should consider a contract law defense. Prima Paint is the leading decision on this subject. Fraud in the inducement provides a common example. A claim that the party was fraudulently induced to enter into the arbitration agreement will be decided by a court. If, however, the claim of fraud in the inducement relates to the contract generally, the matter should be sent to the arbitrator. An important corollary of the separability doctrine is that the arbitrator is empowered to decide the entire dispute, even if the fraudulent inducement (or other contract) defense is successfully proven. This judicial approach is of importance for post-arbitration judicial review: when issues are decided initially in arbitration, the scope of judicial action prior to arbitration is reduced, while the range of potential post-arbitration review is expanded.

The impact of the separability doctrine is nicely illustrated by the Cardegna decision, where the Supreme Court held that not even a purportedly usurious agreement—illegal as a matter of state law—could be decided initially in a judicial forum. Cardegna reversed a decision of the Florida Supreme Court, which ruled that the legality of a contract should be decided by a court.

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57 Cardegna v. Buckeye Check Cashing Inc., 894 So.2d 860 (Fla. 2005) (holding that if the contract was deemed illegal, the dispute would be heard by a court; if legal, the matter would proceed to arbitration.).
In *Cardegna*, the Supreme Court once again reiterated its strong pro-arbitration views.\textsuperscript{58} Justice Scalia’s crisp opinion for the court laid to rest any doubts about the state of the law regarding several arbitration topics.\textsuperscript{59} For aficionados of Justice Scalia’s judicial handiwork, the only thing missing was the sharp language and cutting turn of phrase that often graces his dissenting opinions.\textsuperscript{60}

The Court reaffirmed *Prima Paint* and *Southland*, after which *Cardegna* was an easy case. Taken together, these decisions established three principles that required the *Cardegna* dispute to be sent to arbitration.

First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.\textsuperscript{61}

After *Cardegna*, the FAA clearly overrides virtually all state law efforts that purport to limit arbitration in transactions that have some relationship to interstate commerce, even cases heard by state courts applying state statutes. The Court concluded its opinion by reiterating the settled state of the law: “We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”\textsuperscript{62}

The State of Florida organized an amicus brief on behalf of the forty-two jurisdictions—forty states, plus Washington D.C. and Puerto Rico—in support of the approach adopted by the Florida Supreme Court.\textsuperscript{63} To appeal to the more conservative justices, the argument focused on states’ rights and the traditional consumer

\textsuperscript{58} *Cardegna*, 546 U.S. at 440.

\textsuperscript{59} The text of the entire decision, including Justice Scalia’s majority opinion for seven justices and Justice Thomas’s lone dissent, consumes only five pages. Justice Thomas dissented because he strongly believes that the FAA is inapplicable to state court proceedings. Accordingly, he would affirm the decision of the Florida Supreme Court. Justice Alito did not participate because he was not a member of the Court when the case was argued. *Cardegna*, 546 U.S. at 449.

\textsuperscript{60} Let me offer a professional confession on behalf of the professoriate. In general, law professors enjoy momentous or controversial decisions because they give us something new to teach about, and tend to produce interesting (even insightful) class discussion. For the same reason, we like dissenting opinions and outspoken jurists, such as Justice Scalia.

\textsuperscript{61} *Cardegna*, 546 U.S. at 445–46.

\textsuperscript{62} Id. at 449.

protection role of the states. Perhaps the most striking feature of the Cardegna decision is that the Court did not acknowledge, let alone discuss, this amicus brief—not even in a footnote.64

C. General Principles of FAA Preemption

The relevant law regarding the limited scope of the FAA preemption of state law was clearly summarized by the Supreme Court in its Volt decision.65

The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration [citation omitted]. But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Section 2 of the FAA provides for a judicial challenge to a purported arbitration agreement under generally applicable state contract law defenses, but states may not adopt special restrictive rules for arbitration.66

Even in Southland, while clearly establishing the broad scope of the FAA preemption of anti-arbitration state law restrictions, the Supreme Court made a point of stating that state courts were not subject to the other provisions of the FAA, which are explicitly directed to the federal courts.67 In Volt, the Supreme Court reaf-

64 In the closely related area of whether a party had agreed to contract (including whether an agent was authorized to bind the principal), many lower courts permit a judicial challenge to the existence of a binding agreement. The Court reserved the contract formation issue:

The issue of the contract’s validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent.

Cardegna, 546 U.S. at 444 n.1 (citations omitted). Strikingly, all the cases cited by the Court (from four different circuits) treated the contract validity issue as an exception to the Prima Paint separability rule, and that is the proper result.

firmed the *Southland* principle that FAA preemption is limited to pre-arbitration issues, and that only sections 1 and 2 of the FAA govern state court proceedings. “While we have held the FAA’s “substantive” provisions—§§ 1 and 2—are applicable in state as well as federal court we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court are nonetheless applicable in state court.”

Reaffirming *Volt’s* distinction between the “procedural” and “substantive” aspects of the FAA, the Supreme Court pointed out that the applicable California statute determined “only the efficient order of proceedings,” as opposed to affecting “the enforceability of the arbitration agreement itself.”

The Supreme Court has been quite clear about the limited extent of FAA preemption of state law. The Court has expressly ruled that the two most common bases for federal preemption of state law are inapplicable in context of arbitration: the FAA “contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.” Only sections 1 and 2 of the FAA preempt state law, and even then state courts may (and, in fact, do) use local rather than federal procedure. This approach reflects the plain meaning of the statute, and the goal of Congress in enacting the FAA “to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.”

The FAA only preempts state laws that frustrate this purpose because they are “hostile to arbitration.” Careful review of arbitration awards by state courts to ensure the integrity of the arbitration process is thought by many to be a sound approach. Reasonable people can disagree about this conclusion, but that hardly renders the different approach “hostile to arbitration.” Each state is entitled to reach its own conclusion on this matter.

### D. Statutory Language, or Which Part of the Plain Meaning Rule Don’t You Understand?

To even consider the language of the statute is to doom arguments that the FAA provides the standards for judicial review of

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68 *Volt*, 489 U.S. at 477 n.6 (citations omitted).
69 *Doctor’s Assocs.*, 517 U.S at 688.
70 *Volt*, 489 U.S. at 477.
arbitration awards in state court.73 Nothing more is required than the most elementary acquaintance with the Plain Meaning Rule. The FAA plainly states that its judicial review provisions are addressed only to the federal courts.

Section 10 of the FAA governs only the review of arbitration awards in federal district courts; Congress did not purport to address similar review by state courts. Subsection (a) is addressed to “United States” courts. Similarly, subsection (b) begins: “The United States district court. . . . ” Section 9 provides for review in “the United States court in and for the district within which such award was made” (unless the agreement of the parties provides otherwise). Section 11 also is addressed to “the United State court in and for the district wherein the award was made.”

E. Practical Limitations on Federal Preemption of State Law

Even if the FAA was deemed to have some preemptive impact on post-arbitration state court proceedings, the Supreme Court could not effectively establish standards for review of arbitration awards that would bind state courts. This is because the standards of review are quite general, and differences in underlying factual settings and arbitration agreements preclude the adoption of specific rules. Examples that will be discussed in Part IV are evident partiality, manifest disregard of the law, and contrary to public policy.

State courts are bound only by definitive United States Supreme Court decisions about federal law (lower state courts are bound by the decisions of higher state courts about both state and federal law). Justice Thomas summarized the matter this way:

The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation. In our federal system, a state trial court’s interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.74

73 Your author dearly wanted to have this section go on for several pages, expounding on how plain was the meaning of the relevant FAA language, but the matter is too clear to warrant extended discussion.

Not even the lowliest state trial court is bound by the area federal court of appeals’ determination about federal law, even if the court of appeals so ruled en banc and unanimously. State courts are bound only by higher state courts and the United States Supreme Court. This view is uncontroversial. The position taken by the Texas Supreme Court is illustrative. “While Texas courts may certainly draw upon the precedents of the Fifth Circuit . . . in determining the appropriate federal rule of decision, they are obligated to follow only higher Texas courts and the United States Supreme Court.”75

Only when the Supreme Court makes a definitive pronouncement on federal law must state courts fall into line.76 “Evident partiality” nicely illustrates the practical limits of federal law preemption. The Supreme Court addressed the meaning of “evident partiality” once, in 1968, and has not revisited the matter since. Meanwhile, the state and lower federal courts have adopted various approaches to “evident partiality” standards. Because only the Supreme Court can set a governing standard, a state may adopt a different view of the law than a federal court hearing a case based on the law of that state. The Texas Supreme Court and the Fifth Circuit (in a case arising under Texas law) have taken different positions on the appropriate test for determining “evident partiality,” with the state rule approach being distinctly more receptive to vacating arbitration awards than the federal rule. We will revisit this topic in Part IV.

F. State Court Review of Arbitration Awards

There is a considerable body of state court decisions that rely on state law as the basis for review of arbitration proceedings, including those that—consistent with Supreme Court decisions—take place prior to arbitration.77 Only a few examples will be dis-

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76 “An Arkansas trial court is bound by this Court’s (and by the Arkansas Supreme Court’s and Arkansas Court of Appeals’) interpretation of federal law, but if it follows the Eighth Circuit’s interpretation of federal law, it does so only because it chooses to and not because it must.” Lockhart, 506 U.S. at 76.

77 See, e.g., Rauh v. Rockford Prods. Corp., 574 N.E.2d 636 (Ill. 1991) (declining to follow a line of federal cases; applying vacatur provisions of the Illinois UAA); Atl. Painting & Contracting Inc. v. Nashville Bridge Co., 670 S.W.2d 841, 846 (Ky. 1984) (stating that three month
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Discussion here, because federal courts might dismiss these decisions as "self-serving declarations," reflecting no more than an expansive view of state law by those with a vested interest in that approach. However, the widespread review of arbitration awards under state law is consistent with Supreme Court doctrine, and the absence of any federal court rebuff offers at least implicit approval of existing practice.

Some states have enacted statutes that, compared to the FAA, broaden or limit the scope of appellate review of trial court decisions on motions to compel arbitration. For example, under Ohio law, an order granting or denying a stay of an action pending arbitration is a final order that is subject to immediate appellate review. Other states reach a result at variance with the FAA interpretation of local procedural rules. Where a party disputes the making or performance of the arbitration agreement, the FAA calls for a jury trial upon the request of either party. The California Supreme Court determined that state rather than federal law applied in state courts, and a jury trial was not authorized in this circumstance under California law.

In Bush v. Paragon Property, the Oregon Court, en banc, concluded that "Congress cannot, in the exercise of an Article I power, interfere with the authority of states to determine the structure of their own political systems." This result, and the underlying analysis, was based on the federalism decisions of the U.S. Supreme Court. Accordingly, the Oregon court ruled that section 16 of

limitation of FAA § 12 inapplicable in state courts; FAA’s procedural rules apply only in federal courts); Collins v. Prudential Ins. Co., 752 So.2d 825, 828–30 (La. 2000) (holding that state courts are not governed by section 16 of procedural rules); Xaphes v. Mowry, 478 A.2d 299, 301 (Me. 1984) (dismissing appeal due to absence of finality although arguably final under federal law—"this Court is not compelled to apply a jurisdictional rule of the federal courts merely because the motion for a stay . . . was filed pursuant to the [FAA]"); St. Fleur v. WPI Cable Sys./Mutron, 879 N.E.2d 27 (Mass. 2008) (stating that procedural provisions of FAA apply only in federal courts); McClellan v. Barrath Constr. Co., 725 S.W.2d 656, 658 (Mo. Ct. App. 1987) (holding that arbitration orders are unappealable—FAA procedural provisions not binding on state courts . . . so long as state procedures do not defeat rights granted by Congress); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992) ("When Texas courts are called on to decide if disputed claims fall within the scope of an arbitration clause under the [FAA], Texas procedure controls that determination.").

78 OHIO REV. CODE ANN. § 2711.02 (1953) (applicable revision enacted in 1990).
the FAA could not preempt a neutral state procedural rule. The Maryland Supreme Court reached the same result, after an exhaustive survey of state cases considering the application of section 16 in state courts:

Most state courts which have faced the issue of whether the FAA prevented appeal of an order compelling arbitration hold that their own procedural rules govern appeals, unless those rules undermine the goals and principles of the FAA, and then those courts find that their procedural rules do not impermissibly undermine the objectives of the FAA.83

Although it is beyond cavil that the arbitrability provisions of the FAA apply in state as well as federal court, state courts have refused to incorporate FAA procedures into the laws of their states.

Resort to state procedure by state courts is not limited to transactions involving commerce where the arbitration agreement is silent about the applicable law. A state court will apply state court procedure even where the arbitration agreement specifies that the FAA provides the applicable law, and permit an appeal of a trial court order directing the parties to arbitration.84 The Peabody decision by the Arizona Supreme Court provides an example: “[t]he FAA does not . . . require submission to federal procedural law. Each state is free to apply its own procedural requirements so long as those procedures do not defeat the purposes of the [FAA].”85 Georgia has adopted the same approach, rejecting FAA preemption arguments in permitting an immediate appeal from an order directing parties to arbitrate.86

The Eckstrom decision is particularly significant because an influential federal court of appeals applied Connecticut arbitration procedure where the parties had elected the arbitration law of that state.87 Connecticut law requires an appeal within 30 days after an arbitration award, whereas the FAA allows 90 days.88 The motion

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to vacate met the 90-day, but not the 30-day, standard. The parties chose Connecticut law, and, therefore, the state filing period applied. This finding required the party seeking review to argue that the FAA rule preempted the different state rule—an approach that the federal court rejected. Under Volt, the Eckstrom decision is clearly correct—parties can choose to arbitrate disputes, which are otherwise subject to the FAA, under the law of a particular state.89

G. The Supreme Court on Judicial Review of Arbitration Awards: Hall Street

In its recent Hall Street decision the Supreme Court, for the first time, examined the intersection of federal and state law in the review of arbitration awards. While the Court’s discussion is dicta, it supports the limited preemption position taken in this Article. In Hall Street, the Court held that contracting parties lacked the power to modify the FAA standards of judicial review for arbitration awards.90 “The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive. . . . [T]he text compels a reading of the §§ 10 and 11 categories as exclusive.”91 A central argument for expanded judicial review was by analogy to manifest disregard of the law, a widely recognized non-statutory basis for judicial review of arbitration awards. This argument could be met with the response that it is one thing for the judiciary to recognize a non-statutory ground for review, and quite another to permit private parties to do so by contract.92 Speaking more expansively, however, the Court also cast doubt on the viability of manifest disregard as a distinct basis for vacating an arbitration award. This topic is considered further in Part IV.

89 Volt, 489 U.S. at 478. The FAA “simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”

90 Hall St., 128 S.Ct. at 1396 (citing Cardegna, 546 U.S. at 443). The arbitration agreement was reached during the course of litigation, and was adopted by the District Court as a court order. This raised the possibility that the order could be upheld as a valid exercise of the district court’s authority to manage its docket, and raised “issues of waiver and the relation of the FAA both to Rule 16 and the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 et seq. Because these issues were not considered by the lower courts, the case was remanded for further proceedings.

91 Id. at 1403.

92 Id. at 1403–04.
The Supreme Court also reiterated the frequently cited rule that the FAA does not create an independent basis for federal jurisdiction,93 and once again pointed out that section 4 addresses only “action by a federal district court . . . .”94 The legislative objective in enacting the FAA was restated: “Congress enacted the FAA to replace judicial indisposition to arbitration with a national policy favoring arbitration and plac[ing] arbitration agreements on equal footing with all other contracts. That, and only that, is what Congress did in changing the prior law.”95

The most important aspect of Hall Street, for purposes of this article, is that the Supreme Court expressly limited its holding to the FAA and observed that different approaches to judicial review of arbitration awards might be adopted under state arbitration law.

In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.96

Put another way, individual states may choose to adopt a different approach to contractual provisions regarding judicial review than that taken in the FAA (as interpreted by the Supreme Court). We shall return to this option shortly, in Part IV.

IV. STATE LAW STANDARDS FOR REVIEW OF ARBITRATION AWARDS

With the legitimacy of state regulation of the arbitration process through standards for judicial review of arbitration awards established, a vast array of options might be considered—and there is no logical stopping point. My solution to this difficulty is a “Top Ten” list of arbitration review reforms that states should consider.

93 Id. at 1402 (citing Mercury, 460 U.S. at 25 n.32).
94 Id. at 1402 (emphasis added).
95 Id. at 1402 (citing Cardegna, 546 U.S. at 445).
96 Hall St., 128 S.Ct. at 1406 (emphasis added).
Arbitration standards might be the product of legislation, judicial decisions, or even (in some jurisdictions) remnants of common law arbitration. An administrative agency might be used to combine the advantages of expertise, rule making (with public input), and experience-based adjustments. In the many states with a unified bar—which determines who qualifies to become an attorney, and maintains continuing supervision of members of the bar—attorney-arbitrators already are subject to direct regulation by an administrative agency.

My objective here is not to draft legislation or design standards, but to examine an array of ideas whose adoption would significantly impact arbitration practice. It is important to note that while the review of arbitration awards by the judiciary provides the ultimate nexus for the application of arbitration standards, the impact of such rules and standards extends far beyond the relatively few instances in which a court actually examines an arbitration award. Arbitrators and providers of arbitration services will regularly comply with behavioral rules if failure to do so may result in the vacating of an arbitration award.

A. Some Simplifying Transactional and Legal Assumptions

In order to facilitate a focus on arbitration process and post-arbitration judicial review under state law, I propose to assume away a variety of potential issues that are beyond the scope of this article. Except as otherwise noted, the discussion of state law initiatives that follows is premised on the following assumptions:

1. A written agreement to arbitrate all disputes “arising out of or relating to” the dealings between two parties exists. It is contained in a binding contract (offer, acceptance, considera-

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tion, and parties with capacity), signed by authorized agents of
the parties (this puts aside the complexities associated with
multiple-party proceedings);
2. The underlying transaction “involves commerce,” and
therefore is subject to the FAA;
3. The dispute is within the scope of the agreement to
arbitrate;
4. The agreement does not provide for the arbitration to be
governed by the arbitration law of a particular state. Where
such a choice is clearly and explicitly made, the arbitration law
of that state unquestionably governs, because the FAA autho-
rides such a choice; and this is true even when the matter arises
in a federal court;
5. The arbitration proceeding results in a written (but not
necessarily a reasoned) final award. This puts aside partial,
and incomplete awards;
6. All the arbitrators serve as neutrals—even if some of the
arbitrators were appointed by the parties. This is the default
position under the AAA-ABA Arbitrator Ethics Rules;98
7. In post-arbitration litigation, the parties file suit in a
timely manner in a state court with venue. The losing party
seeks vacatur of the award, while the prevailing party seeks
confirmation of the award.99 This puts aside split decisions
where each party prevails on at least one issue;
8. The case is properly before the state court, either because
there is no basis for federal jurisdiction or, where federal jurisdic-
tion was available, neither party made a timely motion for
transfer to a federal court;
9. Because there is a separate basis for federal jurisdiction in
admiralty, international, and labor arbitration disputes, these
cases are almost always decided by federal courts—either be-
cause the claim is initially brought in a federal court, or be-
cause a claim brought in state court is removed to federal
court. Accordingly, these matters are not considered; and

98 Non-neutral, partisan arbitrators are called “Canon 10” arbitrators under the 2004 AAA-
ABA Arbitrator Ethics Rules. Under the 1977 AAA-ABA Rules, the default position was that
party-appointed arbitrators were assumed to be party partisans. Indeed, this change represents
the most important difference between the 1977 and 2004 Rules.
99 Occasionally, a party that receives a positive award nevertheless asks a court to vacate the
award because the “prevailing” party views the award as entirely inadequate. See, e.g.,
Brabham, 376 F.3d at 377. The determination of which party qualifies as “prevailing” may have
independent importance under statutes that permit recovery of attorney’s fees and costs by the
prevailing party.
10. The state has enacted the UAA, or an arbitration statute with substantially similar provisions for judicial review of arbitration awards.

B. State Law Arbitration Standards: The Top Ten Reform Ideas


In the *Hall Street* decision, the United States Supreme Court rejected expanded judicial review by contract under the FAA; however, the Court also noted that a different result might pertain under state law: “The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law. . . .”

Any state now can authorize private parties to expand the scope of judicial review of arbitration awards by agreement. Contracting parties can agree to be bound by the arbitration law of a state that enforces contractual expansion of the scope of review. Such an election, provided the agreement calls for reasonable review of the sort commonly provided by courts, should be enforced as choice of law provisions by the courts of other states and also in the federal courts.

a. California—Judicial Decision

Only months after *Hall Street*, the California Supreme Court, in the *Directv* decision, held that the California Arbitration Act (CAA) permits parties to contract for “judicial review of legal error in the arbitration award.” The determination of the U.S. Supreme Court about the meaning of the FAA did not bind the California Supreme Court in its determination about the meaning of the CAA. The *Hall Street* decision was expressly limited to the FAA, and the Supreme Court expressly contemplated the possibility of a different result under state law.

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

101 Cable Connection, Inc. v. Directv, Inc., 190 P.3d 586, 589 (2008). The court also considered the important topic of the availability of class-wide arbitration where the agreement is silent on this topic, and returned the matter to the arbitrators for reconsideration. *Id.*

102 “The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under [the FAA], deciding nothing about other possible avenues for judicial enforcement of arbitration awards.” 128 S.Ct. at 1406 (emphasis added).
The California court relied on its Moncharsh decision for the proposition that the California Legislature allowed for limited judicial review of arbitration awards, absent a contractual alteration of the scope of review. Accordingly, the court enforced the arbitration provision that called for an award to be vacated for legal error. “The California rule is that the parties may obtain judicial review of the merits by express agreement.” This statement is correct by definition, because the California Supreme Court has the last word in the interpretation of California statutes.

The arbitration agreement in Directv specified that “any arbitration conducted hereunder shall be governed by the United States Arbitration Act.” The California court rejected the argument that this constituted a choice of law clause requiring the court to follow the FAA judicial review provisions, because the contract specified only that the arbitration was governed by the FAA, not post-arbitration judicial proceedings. Further support was found in the text of sections 10 and 11 of the FAA, which are expressly limited to proceedings in United States district courts. An arbitration provision that clearly called for the application of the FAA judicial review procedures would be honored by California courts.

The California Supreme Court did address the concern about unusual contractual review provisions, including Judge Kozinski’s imaginative examples of requirements that a court review an arbitration award “by flipping a coin or studying the entrails of a dead fowl.” A “parade of horribles” could easily have been constructed, but the court replied that it knew of no instances where a contract called for application of an unfamiliar form of judicial review. However, a parade of reasonable review provisions that go beyond “legal error” also can easily be constructed—and innovative attorneys in California and elsewhere are likely to try.

The California Supreme Court majority discerned important public policy benefits from the contractual review standards approach.

The benefits of enforcing agreements like the one before us are considerable, for both the parties and the courts. The development of alternative dispute resolution is advanced by enabling

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103 Directv, 190 P.3d at 590.
104 In any event, this argument was waived as it was not raised in the trial court or the court of appeals.
105 LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (cited in Directv, 190 P.3d at 606). Contracting parties, looking to effectively transact economic activity, never seem to choose the sort of crazy contract terms that so swiftly come to the minds of professors and judges.
private parties to choose procedures with which they are comfortable. . . . The judicial system reaps little benefit from forcing parties to choose between the risk of an erroneous arbitration award and the burden of litigating their dispute entirely in court. . . . Incorporating traditional judicial review by express agreement preserves the utility of arbitration as a way to obtain expert factual determinations without delay, while allowing the parties to protect themselves from perhaps the weakest aspect of the arbitral process, its handling of disputed rules of law.106

The reader need not agree with this balancing of values to recognize that a state, whether by legislation or judicial decision, can legitimately reach this conclusion. Of course, other states can conclude that finality and limited review are more important values.

The dissenting (and concurring) opinion of Justice Moreno in Directv is striking for what it concedes to the majority. Although rejecting the majority’s reading of the CAA, Moreno agreed that parties “may define the arbitrator’s powers in such a way as to broaden somewhat the scope of judicial review beyond the usual narrow grounds for such review set forth in Moncharsh . . . .”107 More important for present purposes, the dissent conceded that the state legislature could permit expanded judicial review by contract, while arguing that the legislature failed to do so.108

On policy grounds, the dissent worried that the majority approach would “fundamentally refashion arbitration from being a means of binding dispute resolution to being essentially a preliminary fact-finding procedure, with trial and appellate courts required to settle decisive legal questions.”109 One might prefer that such policy decisions be made explicitly by the legislative branch of government, but the principle that states need not follow the FAA is clear.

b. New Jersey—Legislation

New Jersey provides an example of legislation that permits expanded review by agreement. In enacting the 2000 UAA, New Jersey added a non-uniform provision: “nothing in this act shall preclude the parties from expanding the scope of judicial review of

106 Directv, 190 P.3d at 605–06 (citations omitted).
107 Id. at 609 (Moreno, J., dissenting).
108 “The judicial acts of confirming, correcting or vacating arbitration awards are governed by statute, and the parties have no power to alter the circumstances under which such acts occur except to the extent that the relevant statutes permit such alteration.” Id. (emphasis added).
109 Id. at 614.
an award by expressly providing for such expansion."110 This provision reflects an earlier decision by the New Jersey Supreme Court.111 A New Jersey attorney recommends that parties seeking expanded review under New Jersey law should make a clear selection the New Jersey UAA as the applicable law.112

c. Texas—Common Law

The states have quite different histories regarding arbitration law and practice, sometimes stretching back before statehood.113 Common law and statutory arbitration rules may co-exist, even as the role of common law arbitration has receded dramatically in recent years. Such is the case in Texas, which enacted its first arbitration statute in 1846114—as required by the Texas Constitution.115 The most recent major arbitration legislation was in 1965, when Texas enacted the UAA (with some variants, and subsequent minor amendments).116 Common law arbitration was never abolished, however, although arbitration agreements are presumed to arise under the statute unless the parties provide otherwise.117

An article written by a sitting United States district court judge argues persuasively that agreements for expanded judicial review are enforceable under the common law of arbitration, even if they are not enforceable under the Texas General Arbitration Act ("TGAA").118 Common law arbitration is entirely a creature of"
contract, and is governed by contract law rather than the TGAA. There is a strong public policy in favor of freedom of contract, so a provision for expanded review should be honored since it is not illegal or contrary to public policy.119

The legislative route to expanded review by contract is also being pursued in Texas. During the 2007 legislative session—the Texas legislature still only meets biannually—the Senate passed, and the House considered, a bill that would authorize courts to use the same standard of review of an arbitration award “as if the judgment were entered by a court sitting without a jury.”120 The serious consideration given to this approach by the legislature might influence the judiciary in determining whether the TGAA permits expanded judicial review. One might think that the Directv decision would also be a factor favoring expanded review, but California innovations are less well-received in Texas than in most other states.

d. Mix and Match?

Is the choice of the law of a particular state’s arbitration law an all-or-nothing proposition, or could parties provide for the use of several bodies of arbitration law? Specifically, can parties agree to arbitration pursuant to the FAA, with judicial review pursuant to the law of a named state? Parties interested in expanding the scope of review rightly might be concerned that, in selecting the law of a particular state that permits such review, they have also subjected themselves to unanticipated peculiarities of state law. Most significantly, some states still limit the scope of disputes subject to arbitration—law that is preempted by the FAA but revived when parties choose state arbitration law.

For example, the Texas UAA includes non-uniform provisions that provisionally exclude two types of transactions from statutory arbitration:

a. Acquisitions of goods, services, or credit by individuals up to $50,000, unless the agreement to arbitrate is signed by each party and that party’s attorney.121
b. Personal injury claims, unless each party, upon the advice of counsel, agrees to arbitrate, and the arbitration agreement is signed by both parties and their attorneys.\textsuperscript{122} These limitations are, of course, preempted by the FAA, but they can be revived when parties choose to arbitrate under the TGAA. No doubt there are similar traps for the unwary in the law of other states.

In view of the central place of freedom of contract in the arbitration jurisprudence of the Supreme Court, a reasonably clear “pick and choose” approach is likely to be upheld by federal as well as state courts. However, attempts to pick and choose among the laws of several states for reviewing awards constitute an additional level of complexity that risks rejection by the courts.

2. Professional Regulation of Arbitrators

The permission of state government is required to cut hair, clean septic tanks, trim trees, massage bodies, sell food, stuff animals (taxidermist), and to undertake a vast array of other economic activities. (An exception is commonly made for \textit{pro se} and volunteer activities.) Consequently, it is easy to make an \textit{a fortiori} argument for regulating arbitrators—whether through full-scale professional licensure of the sort to which physicians and attorneys are subject, or some lesser form of regulation. Professional regulation has largely been left to the states, although the federal government could, under the commerce clause, engage in expansive occupational regulation, and has done so in a few instances. The most notable example of resorting to this approach is the regulation of the securities industry, which includes arbitration as its universally used method of dispute resolution.

The justification for occupational regulation is to promote the general welfare by facilitating the recovery of lost property, preventing fraud, identifying wrongful activity, and establishing minimum standards (fees are commonly imposed to cover the costs associated with regulation). Many have argued that too many occupations are subject to licensure, that the extent of regulation is excessive, and that the primary beneficiaries are the licensed workers rather than the public. However, elected state legislatures throughout America continue to support occupational regulation,

\textsuperscript{122} \textsc{Tex. Civ. Prac. & Rem. Code Ann.} § 171.002(a)(3), (c) (Vernon 2009).
and the courts have almost always acquiesced. Serious professional regulation is of two types: certification and licensure.

a. Certification

Under a certification system, the government certifies that individuals have specified skills, but the same activities may be performed by uncertified persons. This definition excludes private assertions of quality such as “best buy” ratings from Consumer Reports, Newsweek’s rankings of professional schools, or membership in exclusive professional organizations that admit only people with specified qualifications. Anyone may engage in the business of helping people with the design of a house, for example, but in most states the title of “architect” is reserved for individuals who have met state certification standards. As with accountants and appraisers, this example is not a pure one, because in each instance some work—typically the most complex, prestigious, and remunerative work—is reserved for licensed practitioners.

b. Licensure

Under a licensing system, the practice of an activity is limited to persons who have met the standards for licensure established by state law. The standards typically include education (both pre-licensing and continuing education), examination, practice, and work experience. An unlicensed person who performs the licensed activity, or holds oneself out to the public as providing such services, engages in unauthorized practice, and is subject to legal sanction. One of the important functions of state professional associations, such as state bar associations, is to police against unauthorized practice.

The licensing of arbitrators (and also other dispute resolution professionals) has been suggested before, but heretofore no state has adopted such a scheme. Even if the type of comprehensive

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123 See generally Walter Gellhorn, The Abuse of Occupational Licensure, 44 U. CHI. L. REV. 6 (1976). Professor Gellhorn was perhaps the leading administrative law teacher and scholar of the twentieth century, and clearly not a reflexive opponent of government regulation or intervention in the economy.

124 While unauthorized practice could be subject to civil (or even criminal) sanctions, the usual sanctions approach is an indirect one. A court issues an injunction against the unauthorized practice, and any subsequent sanction is for failure to obey the injunction rather than the unauthorized practice itself.

125 See, e.g., Jeffrey Stempel, Keeping Arbitrations From Becoming Kangaroo Courts, 8 Nev. L.J. 251, 260–64 (2007); Peter B. Rutledge, Toward a Contractual Approach For Arbitral Immunity, 39 GA. L. REV. 151 (2004); Cameron L. Sabin, The Adjudicatory Boat Without a Keel:
licensure system that is a way of life for attorneys is never enacted, some features of a licensure regime could be adopted. The availability of the professional licensure model also provides an a fortiori argument for implementing lesser forms of regulation.

3. Arbitrator Disclosure Standards—and Taking Them Seriously

California has adopted mandatory ethics standards that specify extensive, minimum, disclosure standards for arbitrators. These standards are not subject to contractual waiver. California is hardly alone in mandating extensive disclosures by arbitrators—of both pre-selection and during the arbitration process. Of particular note and importance are the long-established standards issued jointly by the American Bar Association (“ABA”) and the AAA. Similar principles are embodied in the AAA Commercial Arbitration Rules, as well as the rules of the other major arbitration organizations, notably the National Association of Securities Dealers (“NASDAQ”) and the New York Stock Exchange (“NYSE”). In view of the abdication by the Securities and Exchange Commission (“SEC”) of its oversight responsibilities in recent years, a new look at qualifications and neutrality of securities arbitrators seems in order.

Both the Ninth Circuit and the California Supreme Court have ruled that the California Ethics Rules are preempted by the Securities Exchange Act. These courts declined to adopt a limited pre-emption approach by striking some, rather than the entire body, of ethics rules. Both decisions are limited to the securities context, and they do not purport to limit the application of the California Ethics Rules in other situations. These decisions also are limited to


the current California Rules, major arbitration organizations, and providers of securities arbitrators—notably, neither decision decrees that all state rules regarding arbitrator ethics are preempted. The leading state case outside the securities arena upheld the California Ethics Rules.128

Rules must have consequences, else they are merely suggestions. The California Ethics Rules have an important consequence: failure to make the required disclosures can result in vacatur of the ensuing arbitration award. Unfortunately, the courts are generally unwilling to enforce arbitrator disclosure standards, notwithstanding that they are incorporated into the arbitration agreement between the parties. As Judge Richard Posner put the matter,

> even if the failure to disclose was a material violation of the ethical standards applicable to arbitration proceedings, it does not follow that the arbitration award may be nullified judicially. Although we have great respect for the [AAA] Commercial Arbitration Rules and the [AAA/ABA] Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award’s validity.129

In plain English, the arbitrator standards that the parties contracted for are worthy of “respect” but not worthy of enforcement. Provider organizations, such as the AAA, are welcome to impose sanctions on arbitrators they appoint, but such is not the business of the courts, which are limited to applying the FAA or UAA judicial review provisions. As we have learned during the current recession, however, markets require adult supervision. Arbitrators and organizations that provide arbitration services are protected from being sued by quasi-judicial immunity, so recourse against them is unavailable.130 This is true even where the party stated the basis for an award to be vacated, but the arbitrator refused to withdraw and the provider organization agreed.

The quasi-judicial immunity approach, which effectively means total immunity, is far too well established through judicial decisions to be changed, except through legislation.131 A provider

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130 See e.g., Corey v. New York Stock Exch., 691 F.2d 1205 (6th Cir. 1982); Austern v. Chicago Bd. Options Exch., Inc., 898 F.2d 882 (2d Cir. 1990); Olsen v. Nat’l Ass’n of Sec. Dealers, 85 F.3d 381 (8th Cir. 1996).
131 For a comprehensive review of arbitral immunity and a critique of the scope of immunity, see Weston, supra note 1.
organization could purchase insurance and contract to provide payments to the parties when an arbitration award is vacated due to disclosure failures by an arbitrator (or other failures that lead to an award being vacated). This approach would lead to a dramatic increase in compliance by provider organizations, as well as improved policing of the arbitrators that are named to their panels. In addition, parties seeking arbitrators would have an added incentive to have a third-party nominate arbitrators, rather than continuing to make use of the troubled party appointment approach.

Judicial willingness to enforce state-mandated disclosure rules would have a remarkable and rapid impact on the behavior of provider associations. The provision of demonstrably neutral, as well as substantively qualified, arbitrators, perhaps accompanied by an insurance option, could easily be turned into a competitive advantage by the major provider organizations. The goal of greater disclosure is greater disclosure, not increased litigation. Indeed, expanded (and consistent) disclosure should improve the arbitration process and provide a shield against judicial vacatur of awards. Failure to object to a proposed arbitrator after proper disclosure constitutes a waiver of objections. As the level of disclosure increases, any particular failure to disclose is less likely to be treated as material. The legal hook for vacating awards due to inadequate disclosure is the long-established statutory ground of “evident partiality.” As such, we turn next to a further examination of this topic.

4. Evident Partiality as Basis for Vacating Arbitration Awards

“Evident partiality” is the legal standard for vacatur of an arbitration award due to an appearance of improper arbitrator bias. Proof of actual bias is all but impossible, short of a string of incriminating e-mails, so apparent bias is the only realistic option for establishing that vacatur is warranted. This open-textured, flexible term is found in the FAA and both versions of the UAA. The usual consequence of a finding of arbitrator partiality is that the arbitration award must be vacated and the arbitration process started anew, because the authority of courts to remand a matter to an arbitrator, or to modify an arbitral award, is quite limited. Acceptance of an arbitrator by a party after timely disclosure of all material information constitutes a waiver of the power to object, and protects the award from challenge by the losing party.

Serious thinking about evident partiality requires a dose of legal realism. The party raising the evident partiality claim is always
the one that lost in arbitration, so courts are properly suspicious that the real complaint about the arbitration is the outcome rather than the bias of the arbitrator. The usual claim is that, had the complaining party only known—fill in factual information gleaned from an exhaustive study of the arbitrator’s background—then that party would have sought to remove the arbitrator. This approach does not bespeak cynicism; rather, it merely recognizes that firms and individual are rational maximizers who pursue their own self-interests.

Bias is a more difficult problem with arbitrators than with judges. Judges are neutrals with expertise in judicial procedure, but not in particular substantive topics, who do not depend on the parties for appointment, do not lose income if they recuse themselves, and are not concerned about future clients. Arbitrators, by contrast, are often chosen precisely because of their industry or subject-matter expertise. As such, the choice reflects the reality that performance as an arbitrator can directly affect future income (e.g., board certified orthopedic surgeon, CPA, executive experience in reinsurance industry, licensed architect, structural engineer), or does so indirectly through the selection of a provider organization that maintains specialized panels of arbitrators.

In general, disclosure solves all claims of arbitrator bias, because failure to object constitutes waiver of any bias claim based on disclosed information. Upon occasion, a provider organization will reject a challenge to an arbitrator, but this approach puts at risk the ensuing arbitration award if the complaining party loses. The losing party can make the powerful argument that it is not merely engaging in 20-20 hindsight, as evidenced by the pre-arbitration complaint about the arbitrator’s bias.

It should not surprise any student of the law that reasonable people can, and do, disagree about the meaning of a general term like “evident partiality,” both in the abstract and in its application to particular circumstances. All discussions on the subject necessarily begin with the Commonwealth Coatings decision, the one and only time the Supreme Court has examined the topic of arbitrator partiality.132 There are two basic approaches to evident partiality, commonly described as broad (more receptive to vacating arbitration awards) and narrow (less generous to vacating arbitration awards). These terms are relative, because courts vacate arbitra-

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tion awards due to evident partiality (or any other reason) only infrequently.

The meaning of Commonwealth Coatings is disputed, because there was not a majority opinion. Justice Black wrote for four justices, while Justice White wrote a concurring opinion for two justices, in which Justice White also joined in Justice Black’s opinion. Some courts have used the absence of a majority opinion to treat Justice White’s opinion (for two justices) as the narrow holding of the Court, and rejected the approach taken by Justice Black’s plurality opinion (for four justices).

Justice Black’s opinion mandated the disclosure of dealings between parties “that might create an impression of possible bias,” with the consequence of nondisclosure being vacatur of the arbitration award. It was not “the purpose of Congress” to support decisions by “arbitration boards that might reasonably be thought biased against one litigant and favorable to another.” Some courts have adopted the “appearance of bias” standard, while other courts have adopted a more rigorous standard and required that evidence of partiality must be “direct, definite and capable of demonstration rather than remote, uncertain or speculative” in order to vacate an arbitration award.

Justice White, while pointing out the importance of full disclosure of potential conflicts, cautioned against overly strict disclosure requirements because the parties to an arbitration commonly are sophisticated commercial organizations. On the merits, Justice White agreed with Justice Black, and nothing in the concurring opinion questions the “impression of possible bias standard.” The opening sentence of Justice White’s opinion states that he was “glad to join” in Justice Black’s opinion. Justice White was clear that any non-trivial prior business relationships between a party and an arbitrator’s firm must be disclosed. Justice White’s opinion did not discuss, let alone disavow, Justice Black’s appearance of bias standard, but White was concerned that “evident partiality” might be read too broadly by other courts.

Despite the divergent views about the scope of evident partiality among both federal and state courts, the Supreme Court has not revisited this topic. As a result, the applicable law regarding evi-

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133 Id. at 149.
134 Id. at 150.
135 ANR Coal Co. v. Cogenetrix of N.C. 173 F.3d 493, 500 (4th Cir. 1999) (quoting Consol. Coal Co. v. Local 1643, United Mine Workers of Am., 48 F.3d 125 (4th Cir. 1995)).
136 Commonwealth Coatings Corp., 393 U.S. at 150 (White, J., concurring).
dent partiality in a jurisdiction can vary depending on whether a case is heard in state or federal court. This statement does not just reflect a theoretical possibility; it describes the state of the law in Texas today. The decisions of the Texas Supreme Court in *TUCO*, and of the Fifth Circuit in *Positive Software*, are representative of the two central approaches to evident partiality.

In *TUCO*, the Texas Supreme Court adopted the broad view of evident partiality, and vacated the arbitration award.\(^{137}\) The rule adopted by the Texas Supreme Court was that an arbitration award will be vacated if a neutral arbitrator fails to “disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator’s partiality.”\(^{138}\) One of the arbitrators failed to disclose that during the hearing of the dispute an attorney at the law firm representing the prevailing party in the arbitration had referred a major piece of work to the arbitrator (neither of the attorneys at the law firm knew of the activities of the other). This situation easily meets the “reasonable impression of partiality” test.\(^{139}\)

In *Positive Software*, the Fifth Circuit (en banc), in a dispute arising under Texas law, adopted the narrow view of evident partiality.\(^{140}\) Typifying the disdain of federal courts for the handiwork of their state court brethren, neither the majority nor the dissenting opinion in *Positive Software* discusses the *TUCO* decision. The losing party in *Positive Software* sought to have the arbitration award vacated because arbitrator Shurn failed to disclose a prior co-counsel relationship between his law firm (“Firm A”) and the law firm representing New Century (“Firm B”), the prevailing party in the arbitration.\(^{141}\) Firm A, including Shurn, and Firm B, including Camina, the partner who represented New Century, had jointly spent several years as co-counsel representing Intel Corporation in a major patent matter. By the time this high stakes matter finally ended it had produced three published United States district court opinions, as well a decision by the Federal Circuit.\(^{142}\) Shurn was a major participant in the Intel matter; the role of Camina was more

\(^{137}\) *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629 (Tex. 1997).

\(^{138}\) *Id.* at 630.

\(^{139}\) *Id.* at 634.

\(^{140}\) *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007) (en banc).

\(^{141}\) The names of the law firms, and other background about the representation of Intel, can be found in the *Positive Software* opinion.

\(^{142}\) *See Cyrix Corp. v. Intel Corp.*, 77 F.3d 1381 (Cir. 1996). Counsel for Cyrix included the highly respected firms of Vinson & Elkins and Fish & Neave.
limited, with the extent of her role in the representation of Intel being a matter in dispute between the parties here.

The AAA Notice of Appointment reminded arbitrators of their “obligation to disclose any circumstances likely to affect impartiality or create an appearance of partiality.” The notice went on to specify that the arbitrator must disclose “any past or present relationship with the parties, their counsel, or witnesses, direct or indirect. . . .” To aid arbitrators with making disclosures, the AAA further specified the disclosure of “any professional or social relationship with counsel for any party to this proceeding or with the firms for which they work.” Although disclosure by Shurn of his relationship with Firm B was expressly required under the AAA Rules, and also by the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Shurn never disclosed that Firm A and Firm B were co-counsel in the Intel matter.

The Fifth Circuit refused to vacate the arbitration award, despite Shurn’s failure to make the disclosures required under the AAA Rules. Clearly, the leaders in the field of arbitration have concluded that requiring extensive disclosures is beneficial to arbitration rather than harmful, and important to its credibility. As for finding senior lawyers and other experienced professionals willing to serve as arbitrators, such work is ideal for quasi-retired and senior experts. The AAA turns away hundreds of applicants each year who want to become members of its roster of arbitrators. In short, there is no risk that rigorous disclosure requirements, which are the norm and not the exception, will keep the most qualified and experienced professionals from seeking to serve as arbitrators.

Recently, both the Second and Ninth Circuits have vacated arbitration awards where the arbitrator lacked actual knowledge of a conflict of interest but failed to investigate the matter.143 Two cases do not make a trend, but the increased sensitivity of two such important courts to disclosure concerns certainly is suggestive.

The appropriate scope of arbitrator disclosures is not just some technical issue of interest only to insiders; nothing less than the integrity of arbitral decisions hangs in the balance. Fortunately, an easy solution is at hand for prospective arbitrators: dis-

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143 New Regency Prod. Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101 (9th Cir. 2007) (vacating award—arbitrator has duty to investigate possible conflicts arising from new employment during arbitration; also duty to disclose the new employment to parties); Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007) (vacating award—duty to investigate, or notify parties of potential conflict and fact that he is avoiding any knowledge).
close, disclose, disclose. For those who lack the intelligence or the imagination to determine what should be disclosed, a ready answer is found in the rules of provider organizations such as the AAA (Commercial Arbitration Rule R-16) or the CPR Institute for Dispute Resolution (Rule 7). Given the economic incentives for non-disclosure, the responsible solution for potential arbitrators is to go the extra mile in making disclosures. This is the best solution to evident partiality concerns.

5. Structural Arbitrator Bias as a Form of Evident Partiality

A structural conflict of interest is one based on the nature of the underlying dispute, and the background of the arbitrator, that might lead to disqualification, even in the absence of any bias for or against any of the parties or persons associated with an arbitration. For example, an agreement between a home builder and a purchaser that the arbitrator must have executive experience within the housing industry might be regarded as unacceptable bias, even though the arbitrator knows nothing about the dissatisfied purchaser. A state could decide to adopt a binding rule that governed structural conflicts of interest, perhaps with a materiality limitation, with the sanction that failure to comply with the rule would provide a basis for vacating the arbitration award. This approach fits comfortably within the statutory category of “evident partiality.”

Arbitrator bias determinations are difficult enough in the ordinary course of things because of the expertise and industry background that arbitrators possess. In the courtroom context, parties have no input in the selection of persons who judge their disputes, and they certainly are not permitted to specify the qualifications of judges by contract. While arbitrator expertise often is an important feature of the arbitration process, neutrality also is expected. Suppose, however, that the qualification of the arbitrator appears to favor one of the parties—how far can the contract be used to specify the background of an arbitrator? In general, resort to expert deciders favors commercial entities over individual consumers and employees, particularly when compared to a jury trial.

A limitation on structural conflicts could take the form of mandatory (non-waivable) or default rules, or some combination thereof. If the default rules approach is selected, it might be subject to conditions such as a written waiver, separately initialed. A state might also key its rules to monetary limits of the state Deceptive Trade Practices Act (“DTPA”) or small claims courts. The
AAA Consumer Due Process protocol requires that arbitration agreements administered by the AAA permit a party to select a small claims court action in lieu of arbitration. Unfortunately, this approach has only provided an opening for other providers, notably the National Arbitration Forum (“NAF”), to promulgate, administer, and form agreements that are more favorable to merchants. Legislation is the only realistic route for change, due to the almost universal judicial refusal to recognize structural bias as a basis for vacating an arbitration award. However, one should not casually suppose that legislation will produce a system favorable to consumers or employees. Let us now turn to a few examples of structural arbitrator bias.

a. Patient-Provider Disputes

Cases involving injured tort claimants provide a good example of structural bias, notably in the context of medical malpractice and informed consent. Suppose that a contract calls for arbitration by a mutually agreeable person, but that the arbitrator must be a licensed physician. Should courts enforce a term that requires the arbitrator to be a physician? May a contract specify that the physician must be a specialist in the same field as the doctor against whom the patient has a claim? For example, an orthopedic surgeon might specify that patients’ disputes will be heard by a panel of three arbitrators, all of whom must be board certified orthopedic surgeons.144 In addition, the agreement might require that the patient pay the arbitrator she appointed, and one-half of the cost of the third arbitrator. A state clearly has the power to refuse to confirm an award rendered in favor of a physician by such a panel.

b. Westinghouse

The ultimate version of structural bias is where the arbitrator is an employee of one of the parties. The most commonly discussed instance of a party being the decider of its own dispute is the Westinghouse case, in which the New York City Transit Authority (“NYCTA”) contracted for the delivery of heavy equipment.145 All disputes were to be decided by the NYCTA Superintendent, a NYCTA employee, with that decision being “conclusive, final and binding on the parties.”146 The New York Court of Appeals unanimously approved of this arrangement. Contrary to the assumption

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146 Id. at 51.
of most discussions of *Westinghouse*, the underlying agreement “did not provide for arbitration.”147 Rather, the contract included what the court characterized as an “alternate dispute resolution” provision.148 Plaintiff Westinghouse argued that the arbitration provision was contrary to public policy. The New York Court of Appeals rejected this argument precisely because the ADR process was subject to a more expansive standard of review than that used for reviewing arbitration awards.149 Had this been an arbitration award, it would not have been confirmed by the Court.

The *Westinghouse* court also noted that similar ADR provisions are standard fare in government contracts, and that billions of dollars of such contracts would be undermined by a contrary decision.150 There is really nothing surprising about the *Westinghouse* decision; the situation seems difficult only because arbitration offers an inappropriate analogy. Instead, think of the Superintendent as an administrative law judge (“ALJ”), and suddenly the situation is clarified. ALJs are employees of the Government, which is also one of the parties in administrative proceedings, but review of administrative decisions are more extensive than of arbitration awards. Government is different from other disputants, and government contracts are subject to different standards and far greater control by the government than those between private parties.151

c. The BDO Seidman Cases

Many agreements between service providers and their partners or associates call for arbitration of disputes, with the arbitrators being persons employed by the firm. In nearly all instances, the complaining employee has departed from the firm or is about to, so the arbitrator employees are likely to favor the firm over their former fellow-employee. For example, some contracts between RE/MAX, the national real estate firm, and its sales agents

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148 *See Westinghouse*, 623 N.E.2d at 532.

149 *Id.* at 535 (reviewing pursuant to CLPR, Chapter 78 rather than CLPR, Chapter 75 (arbitration)).

150 *Id.* at 535–36.

151 Interestingly, the *Westinghouse* decision was considered in three of the Seidman cases—albeit without recognition that *Westinghouse* was not an arbitration case at all.
provided that disputes would be settled by three RE/MAX brokers selected by management. An Oklahoma court refused to uphold this arbitration arrangement, analogizing it to having foxes assigned to guard the rabbits. Similar provisions are found in contracts between law firms and their partners (sometimes non-partners as well) throughout the country.

The leading example is the arbitration provision used by BDO Seidman, the national accounting firm, in contracts between the firm and its partners. The form contract between BDO Seidman and its partners—all educated, experienced, conversant with contracts, licensed, and highly compensated—calls for arbitration of disputes by a panel composed of five BDO Seidman partners.

Any dispute or controversy shall be . . . decided by an arbitration panel consisting of two (2) members of the Board of Directors (other than the Chairman and the Chief Executive Partner) selected by the Board of Directors and three (3) partners . . . who are not members of the Board of Directors. The members of the arbitration panel shall be mutually agreed to by the Board of Directors and the parties to the controversy or dispute, provided that no member of the panel shall be from an office in which any complaining Partner was located at the time of the filing of the complaint, nor be otherwise involved in the controversy or dispute.

At last count, this approach has been upheld by eleven courts and rejected by three courts. This is a great deal of litigation for a firm with about 250 partners (out of 3,800 employees). Thus, a $10 million claim by a partner, if successful (often a big “if”),

would amount to a charge of $40,000 per partner. Surely, this interest is sufficient to require disqualification of partners from adjudicating the claims of a former partner—or, at least, a state might reasonably make such a determination.

6. Manifest Disregard of the Law as Basis for Vacating Arbitration Awards

What is a court to do when asked to confirm or vacate an arbitration award when the substantive award is significantly different from what would happen had the dispute been decided initially by a court? This statement sounds vague because it is vague, and because it omits more solid-sounding words like “manifest disregard” and “law.” American law has traditionally dealt with the difficulty of arbitration awards significantly at variance with the law by assuming the problem away.\footnote{155 See discussion infra Part 2(A)(1).} In this section of this Article, we consider manifest disregard, generally, as well as awards whose apparent defects are based on common law principles—a situation far more common in state law than federal law. In the next section, we examine awards that apparently, and without proper explanation, fail to protect mandatory statutory rights.

Whatever manifest disregard of the law means, the “manifest” modifier requires something more than “mere” disregard of the law. The standard approach to manifest disregard is quite restrictive, requiring a showing that the arbitrator knowingly failed to apply clearly applicable law. This standard requires the party challenging an award to affirmatively demonstrate that the arbitrator:

1. knew about the existence of relevant law;
2. knew that the law was controlling; and
3. intentionally refused to apply that law.

In the absence of a reasoned award, manifest disregard of the law is effectively impossible to prove. Apparently, ignorance of the law is acceptable for arbitrators, even though the rule for the rest of us is that “ignorance of the law is no excuse.”

The international roots of arbitration is a factor in understanding the limited application of accepted legal principles in the review of arbitration awards by national courts. In a dispute between parties from different countries, each wants to avoid being subject to the law and the courts of the other party’s nation—the home court advantage problem. The absence of the ability to resort to
the law of a particular nation did not leave parties in some lawless state of nature; rather, the *lex mercantoria* (the law of merchants) was available, as well as expert arbitrators. In this context, rejection of an arbitration award by a court—usually in the home country of the losing party—on the basis of national law is rightly regarded with suspicion.

As with many other arbitration issues, the consumerization of arbitration gives rise to difficulties that otherwise would not exist, or would be of far less consequence. In a world where arbitration was limited to sophisticated commercial parties, courts could more comfortably tell a complaining party that they made a knowing choice to opt out of the (subsidized) legal system provided by society and, thus, should not complain about a purported injustice done to them. In the context of form contracts, standardized transactions, and non-expert parties, this answer in much less defensible.

a. The Supreme Court on Manifest Disregard:
   From Dicta to Dicta

The lineage of manifest disregard is suspect, being based on dicta in *Wilko v. Swan*,156 a decision that was subsequently repudiated by the Supreme Court.157 Nevertheless, some variant of manifest disregard has been widely adopted by the federal and most state courts.158 Now, dicta in the *Hall Street* decision has questioned the validity of manifest disregard as a basis for vacating an arbitration award.159 A central argument for permitting contractual expansion of the scope of review of an arbitration award was that the Supreme Court had done so by recognizing manifest disregard as a non-statutory basis for review. This argument was easily turned away by the Court: judicial interpretation that expands the scope of review does not provide a basis for private parties to alter review by private agreement. Besides, *Wilko* “expressly rejects just what *Hall Street* asks for here, general review for an arbitrator’s legal errors.”160

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157 *Rodriguez de Quijas*, 490 U.S. at 484.
158 See, e.g., *McCarthy v. Citigroup Global Mkts Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoeft v. MVI Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395–96 (5th Cir. 2003); *Scott v. Prudential Sec. Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998).
159 *Hall Street*, 128 S.Ct. at 1396.
160 *Id.* at 1404.
Instead of stopping here, however, the Court proceeded to question the viability, and perhaps even the existence, of manifest disregard—at least in the federal courts:

Then there is the vagueness of Wilko’s phrasing. Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them . . . . Or, as some courts have thought, ‘manifest disregard’ may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers.’ We, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment, see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.161

Where the federal courts, in general, and the Supreme Court, in particular, will go from here is not apparent to this observer. The next time manifest disregard is considered by the Supreme Court, it could treat this ambiguous dicta as inconclusive, and reaffirm manifest disregard as an independent ground for vacating an arbitration award. Alternatively, the Court could bury manifest disregard, starting its discussion by observing: “As we clearly signaled in Hall Street . . . .”

The elimination of manifest disregard as a federal court ground for vacatur, were this to occur, would not address the underlying issue of what to do about arbitration awards that appear seriously at variance with recognized law (a number of states, including California, do not recognize manifest disregard as a basis for vacating an arbitration award). Resort to the statutory standards of “guilty of misconduct” and/or “exceeded their powers” in lieu of manifest disregard does little more than shift the basis for a decision from one conclusory label to another. The problem remains of what to do about instances where arbitrators render an award that apparently fails to apply the applicable law. The fact that the Supreme Court, as well as other federal and state courts, keep the discussion at the level of abstract doctrine, rather than the resolution of specific problems, suggests the absence of a serious answer to this important issue.

161 Id.
b. An Assortment of Alternative Approaches to Manifest Disregard

Manifest disregard of the law, upon reflection, turns out to be an incoherent standard for the review of arbitration awards. The problem is not that this category is bereft of meaning, but rather that manifest disregard can be defined in multiple ways. We turn now to canvassing the major options, aligned roughly from the least to the most intrusive standard of review.

1. Complete Rejection of Manifest Disregard.

Some state courts do not recognize manifest disregard of the law, or any other non-statutory grounds for vacating an arbitration award. Public policy can still be recognized as a general limitation on enforcement of contracts. An alternative is to address the situations covered by manifest disregard of the law under the statutory grounds of arbitrator misconduct, or exceeds powers because arbitrators are not authorized to knowingly ignore clearly binding law. If so, we have done nothing more than change the labels used to justify the same results.

2. Effective Rejection of Manifest Disregard: The Seventh Circuit Approach

The Seventh Circuit has effectively rejected manifest disregard by allowing it as a basis for vacating an arbitration award only where the arbitrator “directed the parties to violate the law.”\textsuperscript{162} Subsequently, another Seventh Circuit panel explained that this definition is “so narrow that it fits comfortably” as a case in which the arbitrators have exceeded their authority.\textsuperscript{163} No other federal circuit or state court has adopted the Seventh Circuit’s approach.

3. Effective Rejection of Manifest Disregard: The Drahozal Approach

Professor Drahozal would codify manifest disregard, but in a manner that would all but do away with the concept. As a matter of strategy, the goal appears to be to recognize manifest disregard to ensure its demise, and to avoid a mere substitution of labels for the same doctrine. Drahozal would apply manifest disregard only where an arbitrator was shown to have engaged in “intentional dis-

\textsuperscript{162} George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir. 2001).
\textsuperscript{163} Wise v. Wachovia Sec., LLC, 450 F.3d 265, 268 (7th Cir. 2006).
regard of a well-established mandatory (not default) rule.” Furthermore, a court could not examine the record of the arbitration proceeding. An award could be vacated only when manifest disregard appears on the face of a written award. In short, absent a smoking gun, no vacatur will be allowed. In the absence of a written award, an approach preferred by the AAA and other provider organizations, establishing manifest disregard is impossible (Drahozal would also permit vacatur where the prevailing party urged disregard of the law on the arbitrators).

Drahozal is indifferent to promoting the integrity of arbitration awards. Rather, his goal is to protect the courts from being forced to enforce clearly illegitimate awards:

The justification for codifying manifest disregard is not to ensure that arbitrators follow mandatory rules of law in their awards. Instead, the justification is to protect the integrity of the judicial process—by enabling courts to avoid putting their power and authority behind arbitral awards that openly flaunt the law.165

Drahozal does have the good grace to admit the consequence of his proposal: courts will “only rarely (if ever) actually vacate an award” for manifest disregard of the law.166 The end result of the Drahozal approach reminds one of the Cheshire Cat in *Alice in Wonderland*: the cat disappears and only the smile remains.


To even begin to determine whether an arbitrator has manifestly disregarded the law, one must know what law applies. Parties have considerable latitude in choosing the regime of rules that governs their arbitration. One common approach is to specify the arbitration rules of a named provider organization or trade association. With respect to state law, often a choice of law provision will determine what law governs a dispute. With respect to default (as opposed to mandatory) legal rules, parties can pretermit otherwise applicable law. To the extent that parties may, and in fact do, agree about applicable law, they effectively vary what constitutes manifest disregard of the law.

165 Id. at 250.
166 Id. at 235.
5. Policing Outlier Awards.

Manifest disregard provides courts with a basis for vacating arbitration awards that are egregiously wrong, producing a result that is seriously at variance with the result that would be reached by a court. Policing against “outlier” decisions is a commonly accepted function for courts in reviewing arbitral awards and trial court decisions. Only seriously erroneous arbitration awards are vacated. In social science terms, these awards are at least two standard deviations from the norm.

6. General Standard of Review

This is the most conclusory approach. It allows a court to vacate arbitration awards that the court believes should not be confirmed. This approach provides a more intrusive level of review than the policing outlier awards standard. The disregard of the law must be manifest, in contrast to “mere” disregard, but any judge can easily justify the conclusion that disregard is “manifest.” Bear in mind that at both state and federal levels, the first (and usually last) review of an arbitration award is by a single judge who otherwise operates as a trial judge.

7. Any Material Variance from Judicial Result

This is the strictest version of manifest disregard. It requires arbitrators to follow substantive law. No one suggests that arbitrators must follow procedural law, because a standard feature of arbitration is that the rules of civil procedure employed by courts are inapplicable and all evidence is admitted (with any doubts going to the weight rather than the admissibility of evidence).

8. Too Much, Too Little Approach

Manifest disregard of the law might be regarded as a compromise between full review—viewing arbitration awards as analogous to trial court decisions—or no review at all of legal claims when the arbitration agreement so provides. Applying a single standard of legal review to all arbitration awards seems to provide too much review in some instances, but too little review in others instances. Where mandatory legal rules are at issue, the Supreme Court has stated that these rights should receive as much protection in arbitration as they would in a court (this subject is the topic of the next section of this Article). Where default rules are involved, and parties clearly opt out of these rules, review for manifest disregard is
too intrusive.\textsuperscript{167} Rather than admitting that different situations re-
quire different rules, the courts have fudged—aided and abetted by
the absence of reasoned awards in most American arbitration pro-
cedings (reasoned awards are standard practice in nearly all other
countries).

9. Consumer and Merchant Transactions

Arbitration law might hold merchants and consumers (non-
merchants, to be precise) to different standards. Such an approach
is already in use in every state through the enactment of the Uni-
form Commercial Code (“UCC”). This difference would be re-
lected in the standards for manifest disregard of the law, including
waiver of legal protections that varied to reflect the different trans-
actional sophistication of the parties.

c. What is to be Done?

To succeed at a task presupposes that one can define ahead of
time, at least roughly, the process that is to be undertaken or the
goal to be achieved. One of the reasons that sporting events are so
satisfying is that the rules of the game, and how the winner is deter-
mined, are specified with considerable precision. Codification can
provide clarity, but adopting legislation or implementing regula-
tions requires a reasonable understanding of what ends are sought.
In the absence of agreement about what is desired from the con-
cept of manifest disregard of the law, whether under that name or
an alternative rubric, no good answer is available. This is a situa-
tion tailor-made for state law experimentation.

7. Serious Protection of Statutory Rights—
As Mandated by the Supreme Court

Over the centuries, the scope of arbitrable claims was limited
to those over which the parties had contractual power, which in-
cludes statutory provisions subject to waiver (default rules), but
not mandatory rules. Until 1985, the scope of even international
arbitration excluded mandatory (not waivable) statutory claims. In

\textsuperscript{167} The implications of this approach are examined at length in Stephen J. Ware, \textit{Default Rules From Mandatory Rules: Privatizing Law Through Arbitration}, 83 Minn. L. Rev. 703, 704 (1999).
the *Mitsubishi* decision, however, the Supreme Court changed the law (in the context of an international dispute). 168

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration . . . . Nothing . . . prevents a party from excluding statutory claims from the scope of an agreement to arbitrate. 169

This language has since been quoted innumerable times by both state and federal court, notably in the Supreme Court’s *Gilmer* decision which applied the *Mitsubishi* approach in the context of a securities industry employment claim. 170

A requirement that statutory claims must be initially decided in arbitration need not constitute an abdication of judicial responsibility over the dispute. The courts can take a “second look” at the enforcement stage to ensure that the arbitrator considered and properly dealt with any applicable statutory claims. In *Mitsubishi*, the Supreme Court contemplated just such subsequent judicial review. Noting that the Japanese arbitration panel might apply Swiss law—as required by the arbitration agreement—rather than the Sherman Act, the Court responded, “in the event that the choice-of-forum and the choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreements [and vacating the award].” 171 An arbitrator may get the first word in determining a question of law, but the arbitrator does not get the last word—that belongs to the courts. The power of arbitrators in fashioning remedies is extremely broad, absent a contrary agreement between the parties. In most instances, provisions of law are ignored by failure of the arbitrator to take into account applicable law, rather than purporting to exercise excessive remedial powers. That is, the most common form of

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168 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). This contract called for arbitration in Japan, American plaintiff sought a court (jury) trial on a variety of theories including an antitrust claim. *Id.*

169 *Id.* at 628.


171 *Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19. Because this was an international arbitration, and manifest disregard of the law is not a recognized ground for denying recognition to an arbitration under the New York Convention, the basis for “condemning” the award would be public policy. *Id.*
manifest disregard of the law is that the arbitrator underutilized her authority by failing to award the relief required by a statute.

Supreme Court decisions mandating that many issues must be decided initially by an arbitrator result in the arbitration of more issues, and yield more complex awards. If closer and more law-oriented judicial review is to take place, arbitrators—many of whom are not lawyers—need to specify what statutes they considered, and their conclusions about the application of those statutes. This, in turn, would necessitate the creation of an arbitration “record,” and a reasoned written opinion sufficient for a court to ensure that the arbitrator did not deprive a party of substantive legal rights. This approach, if taken seriously, would fundamentally alter the nature and practice of arbitration as we know it.

a. Application of Substantive Law

While the FAA preempts anti-arbitration state laws, the FAA does not change the substantive law to be applied by the arbitrator. Attempts to limit damages (or other relief) in an arbitration agreement, when such relief is mandated by statute, places the arbitrator in a quandary. Failure to apply the agreement threatens subsequent vacatur of the award for exceeding authority, while following the agreement threatens vacatur for manifest disregard of the law. The Eleventh Circuit in Paladino refused to compel arbitration of an employment discrimination claim because the agreement allowed only contract damages, while Title VII required the awarding of back pay, reinstatement, and other relief not permitted under the agreement. Other courts have struck an illegal provision, and then sent the dispute to arbitration. In most instances the parties proceed directly to arbitration, and the failure of the arbitrator to honor statutory rights is raised in court for the first time during post-arbitration review of the award. The party seeking to rely on a statutory right should bring this claim to the attention of the arbitrator (and the other party) in a record (written or electronic) in order to protect against an assertion that the right was waived through inaction.

172 See, e.g., Cole v. Burns Int'l Security Servives., 105 F.3d 1465, 1477 (D.C. Cir. 1997) (“[T]he competence of arbitrators to analyze and decide purely legal issues in connection with statutory claims had been questioned. Many arbitrators are not lawyers, and they have not traditionally engaged in the same kind of legal analysis performed by judges.”); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 n.18 (1974) (“Significantly, a substantial proportion of labor arbitrators are not lawyers.”).

Many federal and state statutes make specific provisions regarding minimum damages, as well as providing for the recovery of attorney’s fees by the prevailing party. In Texas, the awarding of attorney’s fees is specified for a variety of cases, including the breach of “an oral or written contract.”

b. Texas Deceptive Trade Practices Act (DTPA)

A brief overview of the Texas DTPA provides an indication of the broad rights that may be available under state law for contract and related claims. The DTPA sweeps far more broadly than suggested by the phrase “consumer protection” legislation. A “consumer” is anyone who “seeks or acquires, by purchase or lease, any goods and services.” The import of “seeks” is that a transaction need not be consummated for the DTPA to apply.

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174 See, e.g., 20 U.S.C. § 1095a(a)(8) (“The court shall award attorneys fees to a prevailing employee and, in its discretion, may order reinstatement of the individual, award punitive damages and back pay to the employee, or order such other remedy as may be reasonably necessary.”); 46 U.S.C. § 31304(b)

A civil action may be brought to recover for losses referred to in subsection (a) of this section. The district courts have original jurisdiction of the action, regardless of the amount in controversy or the citizenship of the parties. If the plaintiff prevails, the court shall award costs and attorney fees to the plaintiff.

Id.; 49 U.S.C. § 11704(d)(3) (“The district court shall award a reasonable attorney’s fee as a part of the damages for which a rail carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.”); Cal. Civ. Code § 1811.1 (“Reasonable attorney’s fees and costs shall be awarded to the prevailing party in any action on a contract or installment account subject to the provisions of this chapter regardless of whether such action is instituted by the seller, holder or buyer.”); N.Y. U.C.C. Law § 2-A-108 (“In an action in which the lessee claims unconscionability with respect to a consumer lease: (a) if the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney’s fees to the lessee.”); Tex. Bus. & Com. Code Ann. § 2A.108(d) (providing that there are two different situations a court may award attorney’s fees in actions “in which the lessee claims unconscionability with respect to a consumer lease.”) First, “if the court finds unconscionability under Subsection (a) or (b), the court shall award reasonable attorney’s fees to the lessee.” Second, “if the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he or she knew to be groundless, the court shall award reasonable attorney’s fees to the party against whom the claim is made.” However, in “determining attorney’s fees, the amount of the recovery on behalf of the claimant under Subsections (a) and (b) is not controlling.”).

175 Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8) (Vernon 1997) (entitling a prevailing party in a contract dispute to seek recovery of attorney’s fees); Kona Tech. Corp. v. S. Pac. Transp. Co., 225 F.3d 595, 614 (9th Cir. 2000) (noting that “when a claim [under § 38.001] is successful, and reasonable fees are proven, a trial court has no discretion to deny the fees.”).

176 Tex. Bus. & Com. Code Ann. § 1741. See generally, Richard M. Alderman, The Lawyer’s Guide to the Deceptive Trade Practices Act (LexisNexis 2007). The DTPA has been amended in every legislative session (the Texas legislature still only meets bi-annually) since its original enactment in 1973, and, as such, is a moving target. Id.

“Goods” includes “real property purchased or leased for use.”

There is no end user requirement for a consumer transaction.

Still, one might think, the expansive sweep of the DTPA must be limited to transactions of a modest size by individuals. Wrong on both counts! The DTPA applies any and all individuals, partnerships, corporations, and government entities—with the sole exception of business consumers with assets of at least $25 million (that’s right, $25 million). Furthermore, the burden of proof is on the party seeking to invoke the exemption.

To establish a claim under the DTPA, the consumer need only show that the violation complained of was a “producing cause” of an injury. This is a lower standard of causation than proximate cause. There may be multiple producing causes of the injury, and reliance on a representation by a merchant is not an element of a cause of action under the DTPA. In addition to economic damages, recovery of damages for mental anguish is permitted where the action of the defendant was “knowingly committed.” Treble damages are authorized for intentional conduct that violates the DTPA, and the definition of “intentional” is generous to consumers.

Perhaps most important for the purposes of this Article, and the arbitration of DTPA claims is the fact that “[e]ach consumer who prevails shall be awarded . . . reasonable and necessary attorney’s fees.” A consumer can be the prevailing party even if the amount recovered is fully offset by a successful counterclaim by the defendant. Purported waivers of the DTPA are “void and unenforceable,” because they are “contrary to public policy.” DTPA claims are subject to arbitration, where called for by contract, and such transactions are subject to the FAA because the “involving commerce” test is met.

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181 Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975).
182 Weitzel v. Barnes, 691 S.W.2d 598 (Tex. 1985).
184 Tex. Bus. & Com. Code Ann. § 1745(13). “Intention may be inferred . . . from facts showing that a defendant acted with flagrant disregard of prudent and fair business practices, to the extent that the defendant should be treated as having acted intentionally.” Id.
185 Tex. Bus. & Com. Code Ann. § 1750(d) (2007). Provision is also made for recovery of court costs, which could easily be extended to the costs associated with arbitration. Id.
186 McKinley v. Drozd, 685 S.W.2d 7 (Tex. 1985).
188 Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266 (Tex. 1992).
ply the provisions of the DTPA to consumer disputes, the courts should not hesitate to follow the urging of the U.S. Supreme Court, and vacate the resulting arbitral award.

c. DiRussa

The tension between honoring the twin goals of ensuring that statutory remedies are in fact awarded to prevailing parties, and the limited judicial review of arbitration awards mandated by the FAA, is nicely illustrated through the Second Circuit’s DiRussa decision.189 DiRussa brought a successful claim under the Age Discrimination in Employment Act (“ADEA”). The ADEA provides for the recovery of attorney’s fees by a prevailing party, but the arbitrators did not award such fees to DiRussa.190

The arbitration award specified that the claimant sought attorney’s fees pursuant to the ADEA. Nevertheless, the Second Circuit confirmed the arbitration award. The Court observed that knowing the law is a “daunting task” even for judges, and that while DiRussa admittedly sought attorney’s fees under the ADEA, she (more precisely, her attorney) failed to inform the arbitrators that the ADEA required the award of attorney’s fees.191 Accordingly, the decision of the arbitrators was not in manifest disregard of the law, and did not violate public policy, so the court confirmed the arbitration award. “However innocent DiRussa’s argument seems on its face, it could allow a court to vacate an arbitration award any time it disagreed with the arbitrator’s interpretation of federal statutory law.”192 The Second Circuit adopted this approach because it recognized that a decision in favor of DiRussa risked creating a dangerous slippery slope toward considerably expanded judicial review of statutory claims. In so doing, the court engaged in the clearest form of manifest disregard for the law—the court had actual knowledge of the law as established by the Supreme Court and intentionally refused to apply that law. Of course, many state and federal courts are guilty of the same sin.

Even if the Second Circuit overstated the danger of a decision on behalf of DiRussa, the court was nonetheless correct in recognizing the fundamental tension between enforcement of full statu-

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189 DiRussa v. Dean Witter Reynolds, 121 F.3d 818 (2d Cir. 1997).


191 See DiRussa, 121 F.3d at 823.

192 Id. at 822. One might respond that the arbitrators did not “interpret” the ADEA, but simply failed to award the attorney’s fees required by the statute.
tory rights and limited judicial review of arbitration awards. It is safe to say that both state and federal courts will have many more opportunities to address this dilemma.

8. Public Policy As Basis For Vacating Arbitration Awards

The term “public policy” tends to be used loosely and often reflects wishful thinking. Here, the usage is quite specific: an independent basis for vacating an arbitration award that does not fit within the other established categories. Under Supreme Court decisions, the availability of “public policy” as a ground for vacating an arbitration award is quite limited, and is applied mainly in the context of arbitrator orders to reinstate terminated employees in labor-management cases. The potential scope of public policy as a state law limitation on arbitration awards is considerably broader.

In *Eastern Coal* the Supreme Court upheld the order of a labor arbitrator that reinstated a fired employee who engaged in safety sensitive work, despite two drug use violations. Only a public policy that is explicit, well-defined, and dominant can qualify as a basis for vacating an arbitration award. Justice Scalia, writing also for Justice Thomas, would have gone further and limited the scope of public policy to arbitration awards that violated positive law—an approach that reflects actual practice. Justice Scalia articulated this conclusion with his usual panache,

> [t]here is not a single decision, since this Court washed its hand of general common-lawmaking authority, see *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1935), in which we have refused to enforce on ‘public policy’ grounds an agreement that did not violate, or provide for a violation of, some positive law.

While this statement is accurate with respect to the Supreme Court, prior to *Eastern Coal* the lower federal courts applied the public policy limitation more broadly, almost always to overturn pro-union arbitration awards.

The scope of “public policy” under state law has the potential to be considerably broader than under federal law, and not only because a state has the power to adopt public policies at substantial

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195 E. Assoc. Coal, 531 U.S. at 68.
196 The decisions of the Fifth Circuit provide a notable example. See, e.g., Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union, 77 F.3d 850 (1996).
variance with those of the federal government or other states. The scope of state law is considerably broader than federal law, and centrally important areas of state law are not governed by statute—e.g., contracts and torts. In addition, there seems to be far greater concern at the state level than at the federal level about issues associated with the consumerization of arbitration. A few illustrations will suffice to indicate the potential breadth of public policy as a basis for reviewing arbitration awards.

a. Punitive Damages

Strikingly, public policy was the basis for decision in the single best known state arbitration case, Garrity v. Stuart.\(^{197}\) In Garrity, the New York Court of Appeals, by a vote of four to three, ruled that arbitrators were prohibited from awarding punitive damages.\(^{198}\) This determination reflected the fundamental public policy that punishment is limited to the state. The contract in Garrity was silent about punitive damages, but the court stated that this rationale applied equally to contract provisions that authorized the award of punitive damages, because “freedom of contract” does not encompass the freedom to punish.\(^{199}\)

At a time when the usual “public policy” concern about punitive damages awards is that a few awards appear far too high, whether measured in absolute terms or relative to actual damages, it is useful to quickly recall the quite different scenario in Garrity.\(^{200}\) A publisher behaved badly, even maliciously, in refusing to pay $45,000 of royalties due an author. The arbitrator ruled for the author and added punitive damages of $7,500—a mere 16.7% of the actual damages award. The real problem in Garrity might be seen as the absence of an award for costs and attorneys’ fees. Such recovery is far more common in arbitration than in judicial proceedings, usually under standard arbitration rules.


\(^{198}\) See also Fahnestock & Co. v. Waltman, 935 F.2d 512, 517 (2d Cir. 1991) (stating that the FAA does not preempt New York common law rule prohibiting punitive damages in arbitration award.), cert. denied, 502 U.S. 1120 (1992).


\(^{200}\) The leading Supreme Court decisions regarding “grossly excessive” exemplary damages are BMW of North America v. Gore, 517 U.S. 559 (1996), and State Farm Mutual Auto Insurance Co. v. Campbell, 538 U.S. 408 (2003).
Garrity is the minority rule among the states. Even Oregon, whose arbitration legislation was modeled on the New York statute, has rejected Garrity.\textsuperscript{201} The usual default provision under state law is that an arbitrator may award punitive damages unless limited by the underlying agreement, and the rules of arbitration organizations typically make the same provision. Contract provisions that require, permit, or prohibit punitive damage awards are policed (inadequately) through state contract law—notably unconscionability, which is itself a form of public policy.

In New Mexico a practice arose whereby an arbitrator could make a recommended award of punitive damages, which recommendation was then considered by a court in the context of an action to confirm or vacate the award. The court could accept the punitive damages recommendation in whole or in part, whereupon the punitive damages award would become that of the court rather than the arbitrator.\textsuperscript{202} This approach provides an interesting example of state law innovation, and the ability of states to try out approaches that might be regarded as unduly risky if offered, without field testing, for imposition on the entire country.\textsuperscript{203}

The 2000 UAA permits the recovery of costs and fees where authorized by state law for a similar civil action.\textsuperscript{204} Many states do not hew to the “American rule” that each party bears its own costs and fees. In Texas, for example, recovery of attorney’s fees by the prevailing party is authorized in several types of cases, notably breach of contract claims.\textsuperscript{205} Section 21 of the 2000 UAA authorizes arbitrators to award punitive damages or other exemplary relief, unless otherwise limited by state law.\textsuperscript{206} In awarding exemplary relief, the arbitrator must follow applicable state law. To avoid overuse of the power to allow punitive damages, and to facilitate judicial review of such award, the amount of punitive damages and the basis for awarding them must be set forth in the arbitral award (unless waived by the parties).\textsuperscript{207}

\textsuperscript{202} See Aguillera v. Palm Harbor Homes, Inc., 54 P.3d 993 (N.M. 2002).
\textsuperscript{203} New Mexico has enacted the 2000 UAA, so there is now a statutory basis for arbitrators to award punitive damages.
\textsuperscript{204} U.A.A. § 21(b) (2000).
\textsuperscript{205} TEX. CIV. PRAC. & REM. CODE § 38.001.
\textsuperscript{206} U.A.A. § 21(a) (2000).
\textsuperscript{207} U.A.A. § 21(e) (2000).
b. Family Law

State courts regularly exercise a supervisory role in the context of family law matters where children are involved, in order to safeguard the best interests of the child. An arbitration award regarding any aspect of child custody, visitation, or finances is potentially subject to judicial review. Where a state has specialized family courts, it may be unclear whether jurisdiction to review an arbitration award regarding a child should be heard by the family court or the court of general jurisdiction specified in the state arbitration statute.

The reported case law in this area is sparse, but the increasing use of arbitration in family dissolution matters suggests that more litigation should be expected. In determining the appropriate standard of review, courts will then have to resolve the tension between two public policies, one calling for limited review and the other calling for intrusive review. An in-between standard involving some deference to a (written) arbitration award that materially affects a child is a plausible option. Clearer rules might increase resort to arbitration in family cases—particularly where mediation has failed.


Unlike the federal courts, Montana state courts do not enforce distant forum provisions in arbitration agreements. The practical effect of this position is to permit a Montana party to obtain in-state arbitration, provided it prevails in the arbitration equivalent of the “race to the courthouse.” If the other party files first for arbitration in the state specified in the contract, then arbitration will be ordered at the place specified in the agreement. Let us suppose that arbitration occurs in the distant (to the Montana resident) forum, the Montana party loses, and a local court confirms the award. If the Montana party has no out-of-state assets, the prevailing party will need to seek the aid of the Montana courts in collecting on the award. May the Montana courts refuse to enforce the out-of-state award based on the public policy against the enforcement of distant forum clauses? The question is one of power,

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209 Keystone, Inc. v. Triad Systems, Inc., 971 P.2d 1240 (Mont. 1998). This dispute related to the sale of a computer system for about $250,000, so it appears that the Keystone principle extends to transactions between merchants.
and the answer is yes. So long as the Montana courts refuse to enforce distant forum provisions in judicial as well as arbitration proceedings, while mandating local arbitration, the state law approach is neither discriminatory against nor hostile to arbitration.

d. Competition Concerns: Covenants Not to Compete

State government and state courts are fully supportive of the American commitment to competition—often more so than their federal counterparts. The body of competition law is found in some combination of legislation, administrative rules, and common law. An area of particular concern that regularly arises under state law is non-compete covenants, notably in employment agreements. When an arbitrator enforces a non-compete provision in a contract, a conflict arises between the public policies of upholding arbitral awards and protection of competition, particularly avoiding limitations on the ability of an individual to obtain meaningful employment. The discussion is limited to a single example in which the highest courts of New York and New Jersey reached different conclusions. This should be of particular interest to a largely attorney audience.

Law firm retirement agreements commonly place limitations on departing partners, people who might be thought to be naturally disposed to disputing about the financial consequences of departure. To avoid public disclosure of law firm dealings, and to prevent departing partners from using the threat of court proceedings as leverage in settlement negotiations, these agreements normally call for arbitration of disputes (and mandate confidentiality).

In the Hackett case, the New York Court of Appeals unanimously ordered the confirmation of an arbitration award upholding law firm plan, although the lower courts had vacated the award as contrary to public policy. In a less than ringing endorsement of the arbitrator’s decision, the court upheld the award due to the strong public policy in favor of arbitration combined with the fact that “the award does not on its face clearly violate public policy.” If arbitration awards will pass muster whenever they do not clearly violate public policy on their face, the pro-arbitration public policy will nearly always trump other public policies.

In the Weiss case, by contrast, the New Jersey Supreme Court unanimously vacated an arbitral award upholding a law firm plan,

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211 Id. at 158.
notwithstanding the strong pro-arbitration public policy. The court established the following test for public policy review of arbitration awards:

if the arbitrator’s resolution of the public-policy question is not reasonably debatable, and plainly would violate a clear mandate of public policy, a court must intervene to prevent enforcement of the award. In such circumstances, judicial intervention is necessary because arbitrators cannot be permitted to authorize litigants to violate either the law or those public-policy principles that government has established by statute, regulation or otherwise for the protection of the public.

The New Jersey court discussed Hackett, and concluded that the rule it adopted was consistent with Hackett, with the different outcome reflecting factual differences between the two situations.

The court explained the result in Hackett as premised on the arbitrator’s finding that the supplemental payment was primarily an economic safety net for departing partners, whereas the payment in Weiss reflected undistributed firm income. Some will be persuaded by this effort to reconcile Hackett and Weiss, while others will remain unconvinced. Of course, there is no need to reconcile these decisions, since states are free to weigh public policy considerations differently.

9. Information Technology and Minimum Arbitration Standards

States can use the power to review arbitration proceedings, and to deny confirmation of an arbitration award (or recognition of confirmation by another jurisdiction) to establish minimum process standards. Modern information technology, still in its infancy, allows dispute resolution to occur in an untraditional manner, in that parties, counselors and deciders all converge on a particular physical space at a single point in time and then proceed to address the dispute. Your author does not claim expertise on present information technology, let alone what improvements can be expected in the near future, but the fact that there will be remarkable new developments is a certainty.

213 Id. at 1144–45.
214 Id. at 1145.
The arbitrator selection process could be dramatically improved by enhanced disclosure standards, with information maintained in a database that is publicly available, or that is made available to persons considering an individual as an arbitrator. How difficult is it for an arbitrator to maintain a list of every arbitration in which she participated, listed from the earliest to the latest? Nothing more is required than continuing a list with the latest entries placed at the end of each section—and at hand with only a few strokes on a computer. Academics, not the most organized of people, manage to maintain resumes listing every publication, all group memberships, and often every professional presentation. This approach would be particularly appropriate in the context of securities arbitration, where individuals are at a severe disadvantage in the arbitrator selection process.

Enforcement of distant forum clauses in consumer contracts ought to be avoided; on-line participation offers an increasingly sensible substitute. Courts are public forums, and location at a known place is an important value; arbitration, by contrast, is private and ad hoc, so resort to virtual meetings is far easier. Arbitration providers should set about offering dispute resolution services that are less tied to a particular location. This is particularly true for consumer disputes. Effective notice can be provided to consumers (while merchants obtain the electronic equivalent of a paper trail, and default judgments are reduced). Discovery can be minimized, and the arbitration process facilitated by requiring merchants to maintain, and to disclose to customers upon request, standard transactional data. Here, mandatory transactional disclosure in securities arbitration offers a sound example. Let it be noted that the securities industry does not use distant forum provisions, and arbitrations are conducted around the country at a location that is reasonably convenient for the customer.

One consequence of wider resort to electronic technology would be that much of the work of arbitrators could be done from home, even in their pajamas.216 This should be attractive for arbitrators, many of whom are retired or self-employed. Working from home is not a novel suggestion, but a description of how many arbitrators and attorneys already work.

216 See Susan R. Raines, Mediating in Your Pajamas: The Benefits and Challenges for ODR Practitioners, 23 CONFLICT RESOL. Q. 359 (2006). Indeed, your author wrote most of this article at home—upon occasion, in pajamas.
10. Appeal of Vacated Arbitration Awards Prior to Rearbitration

Suppose that a federal district court vacates an arbitration award and directs a rehearing of the matter (whether before the same or different arbitrators), and the party that just lost its arbitration award seeks to appeal the district court decision. Under the FAA, an immediate appeal is expressly permitted in federal court proceedings. Prior to the enactment of section 16 in 1988, however, an immediate appeal was not available under federal law.

Could a state reject the current federal policy, and require re-arbitration as ordered by the district court, with an appeal of the initial order awaiting completion of the arbitration process? Not only may states do so, most states have in fact adopted precisely this approach. Both the 1955 and 2000 versions of the UAA prohibit appeals from orders vacating an award and ordering a new arbitration. Where the district court does not order a new arbitration, the court’s order is final rather than interlocutory and an appeal is permitted. The authors of the 1955 UAA stated that the


objective was “to limit appeals prior to judgment to those instances where the element of finality is present.”

No special treatment for arbitration appeals is envisioned; indeed, the UAA specifies that an appeal is to be treated in the same manner as an appeal of an order or judgment of a civil action. Courts commonly note that remands to trial courts or administrative tribunals are similarly treated as interlocutory and not subject to immediate review. Neither the Supreme Court nor any federal court of appeals have seriously suggested, let alone decided, that FAA § 16 supplants different state law in state courts.

V. CONCLUSION

One of the glories of American federalism is that individual states can try different and original approaches to problems deemed worthy of attention. By contrast, changes at the national level involve greater risk and therefore inhibit innovation. The state law approach reduces the costs of failures, while allowing successes to be adopted by other jurisdictions. This does not mean that states will agree on a single best approach. In some instances, different jurisdictions may be satisfied with multiple approaches to a particular matter—whether due to different perceptions of appropriate public policy, or simply because no problem has arisen that warrants changing the status quo. And, even if a particular approach to a problem is widely viewed as seriously flawed, it may be impossible to find consensus in favor of any one of several better alternatives. Policies in different states will not remain static, because adjustment to changing circumstances is an iterative process, and those who are subject to rules commonly adjust their behavior to best suit their perceived interests.

A few state law experiments which employ the threat that an arbitration award will be vacated have been tried, but these have been quite modest. There is room for a considerable variety of new approaches to the arbitration process and the review of arbitral awards state law. The states are the appropriate level of government to take the lead with this task. There is much room in

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221 U.A.A. (1955), Prefatory n.7.
222 U.A.A. § 19(b) (1955); U.A.A. § 28(b) (2000).
223 See, e.g., Maine Dept. of Transp. v. Maine State Employees Ass’n, 581 A.2d 813 (Me. 1990).
arbitration for innovation and improvement—the glory of America, except in the legal system.

Following in the footsteps of Arthur Corbin and Grant Gilmore, I have regularly read out the following statement by Judge (later Justice) Benjamin Cardozo during my last Contracts class each year.224 I cannot think of a better way to close an article for a journal published by the Cardozo School of Law than by quoting its great namesake:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.225

I do not purport to know where the process of change will lead, but I am excited about the prospect. Let the experimentation proceed vigorously.

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224 Grant Gilmore, The Assignee of Contract Rights and His Precarious Security, 74 Yale L.J. 217 (1964). Gilmore observes that the scholar faces the same issues as the judge. Id. at 217.