

## ARTICLES

# THE RISE IN JUDICIAL HOSTILITY TO ARBITRATION: REVISITING *HALL STREET ASSOCIATES*

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### I. INTRODUCTION

When the United States Supreme Court granted *certiorari* in *Hall Street Associates, LLC v. Mattel, Inc.*,<sup>1</sup> commentators expected the Court to resolve the split among the federal circuits regarding the validity and enforceability of ‘opt-in’ agreements.<sup>2</sup> Since the late 1990s, these agreements had become a means through which contracting parties could obtain enhanced judicial supervision of arbitral awards by providing for judicial review of the merits of arbitrator rulings.<sup>3</sup> While commentators got a resolution to the split, they received a great deal more than they had been promised.<sup>4</sup> In effect, the Court concluded that the statutory framework for enforcement applied as a matter of law and, therefore, was solely controlling in all circumstances of enforcement.<sup>5</sup>

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<sup>1</sup> *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008).

<sup>2</sup> See, e.g., *Hughes Training, Inc. v. Cook*, 254 F.3d 588 (5th Cir. 2001), *cert. denied*, 534 U.S. 1172 (2002); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003); *Hoelt v. MVL Grp., Inc.*, 343 F.3d 57 (2d Cir. 2003); *Schoch v. Info USA, Inc.*, 341 F.3d 785 (8th Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004); *Puerto Rico Tel. Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005). See generally Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?* 61(4) DISP. RESOL. J. 16 (2006).

<sup>3</sup> See THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 302 (4th ed. 2012).

<sup>4</sup> See text at notes 135–47 *infra*, then up to conclusion section (no footnote numbers available apart from those referred to).

<sup>5</sup> *Hall Street Associates*, 552 U.S. at 579, 586, 589–90.

The framework was not merely a regulatory alternative to provide rules for enforcement when the contract was silent.<sup>6</sup> The statutory framework provided the governing law and could not be modified by contract.<sup>7</sup>

In *Hall Street Associates*, six justices determined that Federal Arbitration Act (FAA) §§ 9-11 were “exclusive.”<sup>8</sup> According to the majority opinion, the governing statute provided “expedited judicial review to confirm, vacate, or modify arbitration awards”<sup>9</sup> and could not be “supplemented by contract.”<sup>10</sup> The Court’s determination appeared to favor arbitration in its prioritization of the alacrity of judicial supervision. The Court effectively thwarted contract freedom when its exercise transformed arbitration into protracted adjudication that involved intrusive judicial scrutiny. The full impact of the *Hall Street Associates* holding upon the U.S. law of arbitration, however, would become clearer in light of the later rulings in *Rent-A-Center*<sup>11</sup> and *Stolt-Nielsen*.<sup>12</sup> The restraints placed upon contract freedom by the *Hall Street* Court could be more properly assessed once the brief for greater judicial supervision in arbitration had been expressly articulated.<sup>13</sup> In fact, the Court’s description and explanation of its ruling in *Hall Street Associates* belied the true import of the holding. The goal was not to foster expeditious enforcement actions, but to clarify which actor had the authority to make the rules and impose them.

Ironically, the concern for remedial efficiency had the consequence of entrenching the courts in the final phase of the arbitral process. Public jurisdictional authority dictated enforcement procedures and would be exercised whenever voluntary compliance proved elusive.<sup>14</sup> Neither the parties nor the arbitrators were exempt from the fundamental juridical requirements for adjudication. Only the courts could perform an oracular function; they were the guardians of the governing standards. Parties had the

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<sup>6</sup> For a statement of the fallback position, see *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir) *cert. denied*, 534 U.S. 1020 (2001).

<sup>7</sup> *Hall Street Associates*, 552 U.S. at 579, 586, 589–90.

<sup>8</sup> *Id.* at 579, 586, 590.

<sup>9</sup> *Id.* at 578.

<sup>10</sup> *Id.*

<sup>11</sup> *Rent-A-Center v. Jackson*, 130 S.Ct. 2772, 177 L. Ed. 2d 403 (2010).

<sup>12</sup> *Stolt-Nielsen v. AnimalFeeds Int’l*, 130 S.Ct. 1758, 176 L. Ed. 2d 605 (2010).

<sup>13</sup> See text *infra* note 147 and accompanying text.

<sup>14</sup> The only way to avoid the reach of the law at this stage of the process was to accept the arbitrator’s ruling as rendered and eliminate any possibility of controversy. Of course, the losing party with sufficient means or nothing to lose was unlikely to ignore law that could favor its interest.

right to agree to arbitrate disputes in a customized manner, but neither they nor their private judges could escape the gravitational force of the law. All forms of adjudication eventually had to revolve around, and conform to, core legal values. In the end, despite its initial and intermediary autonomy, private justice was held accountable to public law imperatives. The day of unchecked arbitral authority, completely unrestricted in its exercise, seemed to be at an end. In the final analysis, extensive judicial supervision would generate more litigation about arbitration<sup>15</sup> and afford courts an opportunity to assume a contrarian position on arbitral autonomy.<sup>16</sup>

Stylistic opacity made the opinion in *Hall Street* somewhat inaccessible. In fact, as rendered, the opinion may be more significant for what it omits than for what it actually says.<sup>17</sup> The indirection of the holding could be explained by the difficulty of reaching a consensus among the justices. As Justice Ginsburg has made clear in televised remarks,<sup>18</sup> majority opinions are a patchwork of compromise. Coherence and clarity are often sacrificed to reach a suitable common denominator. Adjustments are made to the language of the opinion; these adjustments generate consensus but affect the conceptual quality of the reasoning. The members of Court majorities are no less gifted than the justices who express dissenting views. Each justice in the majority must be convinced to vote for a single, unified opinion. Dissenting opinions are not compelled by the need for accommodation. They advocate for a single position, resulting in a more linear and well-crafted text (e.g., Justice Souter as the author of the majority decision in *Hall Street Associates* and as a dissenter in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 [2009]). The majority opinion in *Hall Street Associates* is fully within the ambit of this practice.

Furthermore, although the Court is preoccupied with arbitration,<sup>19</sup> the justices are not students of arbitration law.<sup>20</sup> While they

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<sup>15</sup> “[F]ull-bore legal and evidentiary appeals” will erode arbitration’s efficiency and finality. See *Hall Street Associates*, 552 U.S. at 588.

<sup>16</sup> The Ninth Circuit has most often assumed a contrarian position on arbitration. See THOMAS E. CARBONNEAU, *supra* note 3, at 209, 226.

<sup>17</sup> See *id.* at 318.

<sup>18</sup> Interview by Brian Lamb, CSPAN, with Justice Ruth Bader Ginsburg, U.S. Supreme Court, Justice’s Chambers, Washington, D.C. (July 1, 2009), transcript available at: <http://supremecourt.c-span.org/assets/pdf/RBGinsburg.pdf> (last visited Jan. 21, 2013).

<sup>19</sup> For a list of cases on arbitration decided by the Court, see THOMAS E. CARBONNEAU, *supra* note 3, at 281 n.2.

<sup>20</sup> The policy objective in the doctrine is clear and steadfast, but many of the distinctions are facile and somewhat unpersuasive. Some opinions lack comprehensiveness as well as analytical

have created a body of doctrine, their interest in arbitration is neither principled nor analytical. The Court has rarely, if ever, expressed a serious interest in the intellectual content of arbitration law;<sup>21</sup> instead, the Court plays the role of craftsman, fixated on elaborating workable rules that promote recourse to arbitration. It wants doctrine to maintain the objectives of the policy on arbitration, which, in turn, guarantees that U.S. citizens have access to an efficient and effective form of adjudication.<sup>22</sup> The justices envisage arbitration as an instrument of practical policy, and they alter, repair, and modify the doctrine to maintain the efficacy of its application. Arbitration is not a basis upon which to conduct lofty juridical debates.

The opinion has other interesting, albeit less problematic, aspects. It is the first majority opinion on arbitration authored by Justice Souter.<sup>23</sup> Moreover, Justices Scalia and Thomas assume an uncharacteristic role.<sup>24</sup> In prior rulings, they both expressed strong objections to the extension of the federal arbitration policy and doctrine to state courts and legislatures.<sup>25</sup> Notwithstanding the majority's references to the hegemony of the federal arbitral law, neither of them dissents and both join in the majority. In addition,

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verve. There have been conversions to arbitration among members of the Court, most notably, Justice Stevens and Scalia. A number of opinions display analytical rigor and sophistication—for example, *Vaden v. Discover Bank*, 556 U.S. 49, 129 S.Ct. 1262, 173 L. Ed. 2d 206 (2009) (the exchange between Justice Ginsberg for the majority and Chief Justice Roberts in dissent). Too many of them, however, have a limited scope and generate baffling concepts unknown in other regulatory frameworks on arbitration (e.g., the would-be second separability doctrine in *Rent-A-Center*). Separability is a traditional concept in the law of arbitration. It was instituted to protect arbitration agreements from dilatory attacks by parties who attempted to establish the 'piggy-back' invalidity of the arbitral clause by alleging that the main contract was null and void. The Court recognized separability in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967), and reaffirmed its application in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L. Ed. 2d 1038 (2006). Justice Scalia's 'discovery' of a second separability doctrine in *Rent-A-Center* applying to threshold jurisdictional matters is a peculiar application of the concept. Its effect is to invite judicial intrusion at the beginning of the proceedings. Nonetheless, there are substantially creative moments in the decisional law on arbitration. The movement from, and interplay between, *Kaplan, Howsam, Bazzle*, and—finally—*Stolt-Nielsen* first reflect ingenious analysis and then engender a nearly overwhelming push in the opposite direction. Nonetheless, I still believe that arbitration is, first and foremost, an instrument of practical policy for the Court, with the integrity of doctrine standing as a distant secondary factor. See THOMAS E. CARBONNEAU, *supra* note 3, at xiii-xxxii, 36-43.

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

<sup>22</sup> See, e.g., THOMAS E. CARBONNEAU, *CARBONNEAU ON ARBITRATION: COLLECTED ESSAYS* 403 (2010).

<sup>23</sup> See *id.* at 495.

<sup>24</sup> See *id.* at n. 11.

<sup>25</sup> *Id.*

Justices Breyer and Ginsburg have written a number of significant majority opinions on arbitration.<sup>26</sup> Even though they share a liberal political ideology, they deviate on the result in *Hall Street Associates* and appear on different sides of the Court. Their disagreement confirms that the Court's arbitration doctrine is not embedded in shared ideological convictions. It is firmly grounded in policy and legal analysis, with the former dwarfing the latter in most cases.

Also, Justice Stevens, joined by Justice Kennedy, becomes the proponent-in-chief of the contract freedom idea, a consideration almost completely ignored by the majority opinion.<sup>27</sup> Justice Stevens becomes the leading spokesman for arbitral self-governance and autonomy—a far cry from his dissent in *Mitsubishi v. Soler*.<sup>28</sup> In fact, Justice Stevens' dissent is the most intellectually engaging part of the opinion. Furthermore, Justice Scalia adheres to the majority opinion but objects without explanation to the content of footnote seven, in which the majority draws a parallel between the FAA at the time of its enactment and New York State arbitration law.<sup>29</sup>

Finally, it should be emphasized that the greater judicial aggression that *Hall Street Associates* seems to harbor against arbitration could herald the dismantling of the edifice of law surrounding arbitration. Judicial acquiescence and even favorable judicial advocacy are necessary to maintain the ascendancy and establishment of arbitration.<sup>30</sup> Prior to the line of cases beginning with *Hall Street*

<sup>26</sup> *Id.* at n. 13.

<sup>27</sup> *Hall Street Associates*, 552 U.S. at 592.

<sup>28</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640, 105 S.Ct. 3346, 87 L. Ed. 2d 444 (1985).

<sup>29</sup> Justice Scalia joined the majority but refused to embrace footnote seven of the majority opinion. The note discusses the interface between the FAA and state laws on arbitration, especially the New York law that allegedly served as the model for the federal statute. The commentary and sources indicate a clear link between the federal statute and state law. Justice Scalia provides no explanation for his objection. It must relate to his formerly staunch opposition to the imposition of the federal legislation on state courts. He has dissented on this basis in previous cases, but declared in *Allied-Bruce Terminix v. Dobson* that he would no longer voice his objections until a majority on the Court supported them. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 297 (1995) (Scalia, J., dissenting).

<sup>30</sup> See Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, in *BUILDING THE CIVILIZATION OF ARBITRATION* 333, 356–57 (T. Carbonneau & A. Sinopole, eds.) (Wildly, Simmonds & Hill Publishing 2010). (“The shaping and systemic stature of arbitration depend upon the judicial response to the process . . . The endorsement of arbitration . . . implies recognition of the limitations of the methodology of judicial litigation, that the pursuit of the national interest or justice can require a commitment to the non-sectarian and enlightened policy, and the alterations in human civilization demand an adjustment by local systems . . .

*Associates*<sup>31</sup> and continuing to *Rent-A-Center*<sup>32</sup> and *Stolt-Nielsen*,<sup>33</sup> the true danger to arbitration law in America had come in the form of proposed congressional legislation to ban the use of arbitration in a civil rights context and adhesive circumstances.<sup>34</sup> Several decades ago, the Civil Rights Procedures Protection Act<sup>35</sup> began a limited congressional campaign against arbitration; the Arbitration Fairness Act<sup>36</sup> is the most recent expression of congressional opposition. These efforts have been unavailing and never reached the floor of the U.S. Congress. A ‘scorched-earth’ policy against arbitration in select areas could cause significant damage to the institu-

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It is one thing to have courts correct salient, exceptional abuses of the process; it is quite another matter to distrust the decisional capabilities of the arbitrators by continuing to incorporate safeguards against arbitral decisions in the statutory law. The retention of a would-be judicial safety valve is not a practice that will advance the interests of arbitration, society, or global commerce. Admitting to the failures of judicial litigation and recognizing the need to transcend parochial views of legality constitute a better practice and policy. If arbitration is to remain successful, the shadow of vestigial doubts must be extinguished through the light of unconditional acceptance. Law is but a lifeless platitude when it cannot be applied effectively to the resolution of disputes.”).

<sup>31</sup> See note 1 *supra*.

<sup>32</sup> See note 8 *supra*.

<sup>33</sup> See note 9 *supra*.

<sup>34</sup> See THOMAS E. CARBONNEAU, *supra* note 22, at 403.

<sup>35</sup> See THOMAS E. CARBONNEAU, *supra* note 3, at 396. Introduction of the legislation was an annual event. The latest measure was introduced on January 24, 2001 and referred to committee and died there. See [www.govtrack.us/congress/bills/107/5163](http://www.govtrack.us/congress/bills/107/5163). (“The proposed legislation was intended primarily, it seems, to thwart arbitration’s infringement upon the public law jurisdiction of courts and its perceived unfairness to traditional political constituencies . . . Such bills have been introduced annually in the U.S. Congress for more than two decades. They generally constituted a symbolic protest against the growing impact of arbitration. The bills never came out of committee. They generally banned the use of arbitration in disputes involving statutory rights. They exemplified a singular and exclusive commitment to a most imperfect judicial process and an unrealistic view of public judicial and legislative jurisdiction as sacrosanct.”)

<sup>36</sup> *Id.* at 396–97. “The stated purpose of the [Arbitration Fairness Act of 2007] is to dismantle the process of coerced arbitration in disparate-party transactional circumstances: ‘[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.’ It also eliminates, apparently in all arbitration circumstances, the jurisdictional or *Kompetenz-Kompetenz* powers of the arbitrator: ‘[T]he validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.’ . . . In effect, if the bill is enacted into law, the U.S. Congress will discriminate against arbitration as a form of contract by placing disabling requirements upon it in certain transactions. By so doing, the Congress will be engaging in conduct that the U.S. Supreme Court forbade to the states for years through the federal preemption doctrine.” See S. 1782 and H.R. 3010, 110th Cong. 1st Sess. (July 12, 2007).

tion of arbitration.<sup>37</sup> The debt crisis at both the state and federal levels may immunize arbitration from effective legislative attacks. Government budgets are not only depleted, but they also are crippled by deficits. Funding for new courts is simply not a priority in these circumstances.<sup>38</sup> The arbitral solution resolves the predicament at little or no cost.<sup>39</sup> Practicality thus far has triumphed, but there are serious reasons why both the right and the left would want to oppose the process. For the right, arbitration usurps the legitimate authority of the courts and law; for the left, arbitration exacerbates existing inequalities and reinforces corporate positions.

## II. THE AGREEMENT TO ARBITRATE IN *HALL STREET ASSOCIATES*

The litigating parties agreed to arbitration during a court proceeding after they were unable to mediate Hall Street Associates' claim for indemnification of environmental clean-up costs.<sup>40</sup> The parties entered into a submission agreement with the approval of the district court. The agreement provided that the arbitrator must rule pursuant to a standard of judicial correctness concerning evidentiary matters and the application of law. Although judicial litigation and structured negotiations were unsuccessful, the parties did not want to stray too far from the judicial mold in reaching a solution.<sup>41</sup> Therefore, they judicialized the arbitral proceeding. Moreover, they gave the court substantial authority to supervise the arbitral procedure and determination:

The court shall vacate, modify or correct any award (i) where the arbitrator's findings of facts (sic) are not supported by sub-

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<sup>37</sup> See THOMAS E. CARBONNEAU, *supra* note 22, at 403.

<sup>38</sup> See David A. Larson, *The End of Arbitration As We Know It? Arbitration Under Attack*, 3 YB. ARB. & MED. 93, 96 (2011). The Minnesota court system currently costs more than \$300 million per budget term to finance, and a recent biannual budget proposal included statewide cuts of just under \$1 billion; See also Thomas J. Stipanowich, *Revelation And Reaction: The Struggle To Shape American Arbitration*, 3 YB. ARB. & MED. 125 (2011).

<sup>39</sup> See David A. Larson, *supra* note 38, at 96–7. “State budgets are in turmoil and legislators must make significant cuts. Underfunded court systems that already were carefully rationing resources will have to find additional ways to reduce expenditures, which probably will require further reduction in services. As a result and as a simple, practical matter, the Judiciary needs healthy arbitral institutions and smoothly functioning arbitral processes.”

<sup>40</sup> *Hall Street Associates*, 552 U.S. at 579.

<sup>41</sup> *Id.* at 579–80.

stantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.<sup>42</sup>

The intent underlying the parties' reference to arbitration was unmistakable. The parties wanted the court to assume an activist role and scrutinize the arbitrators' final disposition and the basis for it. They trusted the arbitrators as long as the court monitored them and maintained the ability to reject the foundation for or reverse their decision. For these parties, arbitration was only a 'bootstrap' measure; the arbitrators' jurisdiction was not conclusive. The parties, it appears, were wary of everyone, including themselves. Neither they nor the judge were able to decide; the arbitrator could rule with finality only if the court thought the findings of fact and conclusions of law were correct. The parties were obdurate, the issues complex, and the potential liability enormous. The parties wanted an arbitral outcome, but would accept it only if it were justified at law—a paradigmatic contradiction in terms.<sup>43</sup>

### III. THE *HALL STREET* COURT'S PERCEPTION OF ARBITRAL DOCTRINE UNDER THE FAA

The Court begins the opinion with its customary recital of the basic tenets of the U.S. law of arbitration. The declarations reflect the Court's substantial reconfiguration of the FAA's content. For example, referring to its decision in *Buckeye Check Cashing, Inc.*,<sup>44</sup> the Court asserts that "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'" <sup>45</sup> By making the statement, the Court implicitly acknowledges its 'make-over' of the FAA. Its rulings in the area were never based on the enacting Congress' intent and objectives. In 1925, the FAA was special interest legislation for the mercantile community meant to fill a *Swift v. Tyson* gap in federal law by validating arbitration agreements in commercial transactions subject to federal jurisdiction.<sup>46</sup> The decisional law now expresses the Court's

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<sup>42</sup> *Id.* at 579.

<sup>43</sup> *Id.* at 580–83.

<sup>44</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L. Ed. 2d 1038 (2006).

<sup>45</sup> *Hall Street Associates*, 552 U.S. 581.

<sup>46</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 17, 104 S.Ct. 852, 861, 79 L. Ed. 2d 1, 16 (1984) (Justice O'Connor's dissent, sect. IV).



assessment of the adjudicatory needs of American citizens. The cases have become the repository of a national arbitration policy resulting from the Court's increasingly result-oriented interpretation of statutory language.<sup>47</sup>

Furthermore, the *Hall Street* Court recognized the lack of federal question jurisdiction<sup>48</sup> in the FAA, but maintained that the omission had been remedied by the mandatory application of the statute in both state and federal court.<sup>49</sup> The statement is an admission that the Court adapted the federal preemption doctrine to arbitration and integrated its effects into the governing law.<sup>50</sup> The Court thereafter described the relevant provisions of the statute, emphasizing §§9-11 that address the vacatur, confirmation, or correction of arbitral awards.<sup>51</sup> It underscored the presumptive judicial duty to enforce awards unless the court discovers a statutorily enumerated flaw in the award or the process. The Court also contended that enforcement under the Act was "streamlined,"<sup>52</sup> "expedited,"<sup>53</sup> and a "shortcut to confirm, vacate, or modify an award."<sup>54</sup> The Court's view of the procedure's rapidity arose in part from the absence in FAA §10 of a basis for challenging an award on the ground of non-existent or contractually defective agreement to arbitrate.<sup>55</sup> Most statutory frameworks regulating arbitration provide a means for challenging awards on the basis of flawed contract formation or the lack of party agreement.<sup>56</sup> Whether the lack of such a ground in FAA §10 implied speedy enforcement actions, however, is subject to debate.

<sup>47</sup> See THOMAS E. CARBONNEAU, *supra* note 3, at xvi-xxii, 36-43, 124-47.

<sup>48</sup> See, e.g., *Vaden v. Discover Bank*, 556 U.S. 49, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009).

<sup>49</sup> See, e.g., *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 26, 103 S.Ct. 927, 944, 74 L. Ed. 2d 765, 789 (1983).

<sup>50</sup> See THOMAS E. CARBONNEAU, *supra* note 3, ch. 5, p. 247 *et seq.*

<sup>51</sup> *Hall Street Associates*, 552 U.S. at 586-87.

<sup>52</sup> *Id.* at 582.

<sup>53</sup> *Id.* at 584.

<sup>54</sup> *Id.* at 583.

<sup>55</sup> The contract validity of the agreement would be determined by reference to the applicable state law of contract because there is no federal law on the subject. See *generally Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001).

<sup>56</sup> See, e.g., United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, *opened for signature*, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (codified in 9 U.S.C.A. §§ 201-208 (1970)); UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, *available at* [www.uncitral.org](http://www.uncitral.org). On these instruments, see A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981); H. HOLTZMAN & J. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY* (1989).

It is well-settled that the basis for court scrutiny under the FAA<sup>57</sup> was restricted to exceptional circumstances that involve flagrantly unprofessional arbitrator adjudicatory conduct. The grounds describe significant procedural failings and thereby, albeit implicitly, exclude a judicial reassessment of the substance of arbitral determinations.<sup>58</sup> By containing the scope of judicial scrutiny, the FAA created a difficult-to-rebut presumption of enforceability. The statute, therefore, narrowed the scope and limited the intensity of judicial supervision. It did not necessarily require that the judicial examination take place quickly—only that the action for confirmation or vacatur occur in a timely manner, within a year of rendition of the award.<sup>59</sup> Accordingly, challenges to the existence or validity of the arbitration agreement are brought at the head of the process, rather than at the award-enforcement stage. The parties' failure to exercise their rights within the designated time or at the contemplated phase of the process extinguishes the right to challenge.<sup>60</sup> The FAA's explicit objective was to contain and ultimately reduce judicial authority and the role of courts in the enforcement stage of the process.

#### IV. THE CIRCUIT SPLIT ON 'OPT-IN' AGREEMENTS

It is quite extraordinary that, given the issue for which *certiorari* was granted, the majority opinion never expressly referred to 'opt-in' agreements. Instead, it framed its holding in terms of the exclusivity of the FAA grounds for confirmation and vacatur. As Judge Cardozo demonstrated in his characterization of the plaintiff in *Adams v. Bullock*<sup>61</sup> as “a mischievous and thoughtless little boy,”<sup>62</sup> the way in which a legal issue is framed or characterized often announces its resolution. In other words, the phrasing of a legal question betokens the analysis that answers it. By ignoring 'opt-in' contracts that modify the statute, the Court focuses mainly—indeed, nearly exclusively—on the statute itself. Moreover, the Court never explicitly addresses the contract freedom idea,

<sup>57</sup> See generally THOMAS E. CARBONNEAU, *supra* note 3, at 491.

<sup>58</sup> See, e.g., THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL* 250–61 (3d ed. 2012).

<sup>59</sup> FAA§ 9. See *Photopaint Tech., LLC v. Smartlens Corp.*, 335 F.3d 152 (2d Cir. 2003) (one-year period is mandatory not permissive and, therefore, applies in all circumstances).

<sup>60</sup> See CARBONNEAU, *supra* note 3, at 80–86.

<sup>61</sup> *Adams v. Bullock*, 125 N.E. 93 (N.Y. Ct. App. 1919), cited in MARC A. FRANKLIN, ROBERT L. RABIN, & MICHAEL D. GREEN, eds., *TORT LAW AND ALTERNATIVES* 40 (8th ed. 2006).

<sup>62</sup> *Adams*, 125 N.E. at 95.

previously, a staple of the judicial doctrine on arbitration. Only the dissenters, especially Justice Stevens, discuss the contracting parties' right to set the terms of, and protocol for, all aspects of their arbitration. The majority's unitary consideration of the statutory language implies that contract freedom is not a factor in the arbitral process' final stage. It applies primarily, perhaps only, to the initial engagement in and first steps of the process. Once the tribunal renders the award, the process eludes private contract and re-enters the domain of law.

Furthermore, the majority's assessment of the circuit split on 'opt-in' agreements is approximative. The decisional history indicates that the Fifth and, eventually, the Ninth Circuits established the opposing doctrinal positions on the issue.<sup>63</sup> In its opinions,<sup>64</sup> the Fifth Circuit held that contracting parties were free to establish the modalities of their arbitrations, including the ways in which courts would assess resulting awards. The Third Circuit reinforced this position when it ruled that the FAA amounted to a default regime for regulating arbitration, consisting of mere "off-the-rack" rules that applied when the contract was silent.<sup>65</sup> After an *en banc* reconsideration, the Ninth Circuit abandoned its initial position<sup>66</sup> and essentially endorsed the earlier reasoning of the Seventh Circuit,<sup>67</sup> holding that contracting parties could not act as a private legislature and dictate court supervision of awards rendered pursuant to their agreement to arbitrate. Private contract authority, it was asserted, ended with the rendition of the award and the inability to secure voluntary compliance. Over time, other federal circuits assumed a middle position,<sup>68</sup> holding that the FAA grounds governed unless the parties 'clearly' and 'unmistakably' provided for a private regime. The discussion of the topic in the *Hall Street* majority opinion contained a number of significant lacunae: it did not refer to the earlier Seventh Circuit opinion,<sup>69</sup> overstated the conclusiveness of the Tenth Circuit decision in *Bowen*,<sup>70</sup> failed to

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<sup>63</sup> See *Gateway Tech., Inc., v. MCI*, 64 F.3d 993 (5th Cir. 1995); *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003).

<sup>64</sup> See, e.g., *Hughes Training Inc. v. Cook*, 254 F.3d 588 (5th Cir. 2001).

<sup>65</sup> See *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001), *cert. denied*, 534 U.S. 1020 (2001).

<sup>66</sup> See *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003).

<sup>67</sup> See *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.3d 1501 (7th Cir. 1991).

<sup>68</sup> See, e.g., *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 789 (8th Cir. 2003).

<sup>69</sup> *Hall Street Associates*, 552 U.S. 576.

<sup>70</sup> See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

mention the Second Circuit pro-*Kyocera* holding in *Hoefl v. MVL Group, Inc.*<sup>71</sup> and placed insufficient importance upon many circuits' "grave skepticism"<sup>72</sup> concerning the existence of a contractual right to modify the FAA.

## V. MANIFEST DISREGARD IN THE MAJORITY OPINION

Although Justice Souter justifiably criticizes Hall Street Associates' strained arguments in favor of 'opt-in' provisions,<sup>73</sup> his discussion of manifest disregard is perplexing. It is commonly asserted that manifest disregard first arose in *Wilko v. Swan*<sup>74</sup> and functions as one of three common law grounds<sup>75</sup> for the supervision of arbitral awards. Different federal circuits, however, have made different assessments of the common law grounds. Some circuits recognize all three grounds, while others apply only one or two of them.<sup>76</sup> Most courts agree that manifest disregard applies only in exceptional circumstances; it does not refer to mere error by arbitrators on the law or questionable arbitrator interpretations of the contract.<sup>77</sup> The classical formulation is that it pertains to a situation in which the arbitrators describe the applicable law cogently and knowledgeably and then deliberately ignore it in reaching their determination.<sup>78</sup>

Manifest disregard, like the other two common law grounds, actually has little to do with *Wilko*. The opinion makes only an incidental reference to the phrase, possibly by pure happenstance. The concept is more likely to arise from the special circumstances

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<sup>71</sup> 343 F.3d 57 (2d Cir. 2003).

<sup>72</sup> See *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998).

<sup>73</sup> *Hall Street Associates*, 552 U.S. 584-87.

<sup>74</sup> 346 U.S. 427 (1953).

<sup>75</sup> See *CARBONNEAU*, *supra* note 3, at 377.

<sup>76</sup> *Id.* at 378.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* In effect, manifest disregard is roughly equivalent to a finding that the arbitrator engaged in amiable composition without the disputing parties' authorization. Amiable composition is a civil law concept that originated in French arbitration law, allowing arbitrators to rule in equity when the application of the governing law would yield an unjust or inappropriate outcome given the circumstances of the case. An arbitrator may rule as an amiable compositor only if the parties specifically grant the arbitrator such authority. Granting the arbitrators the power to rule as amiable compositors can act as a 'safety valve' for commercial parties seeking to avoid legal conclusions that are antagonistic to their business interests. An arbitral award that recognizes the governing law but deliberately ignores it can be vacated for manifest disregard of the law.

of the collective bargaining agreement.<sup>79</sup> The common law grounds are intended to prevent labor arbitrators from dispensing a personal brand of industrial justice instead of the version agreed to by labor and management.<sup>80</sup> It is difficult to reconcile manifest disregard's antagonism toward the autonomy of arbitral determinations with FAA §10's implied elimination of merits review.<sup>81</sup>

Nonetheless, Justice Souter's representations seem intended to depreciate the significance of manifest disregard. Providing limited authority for his assertions,<sup>82</sup> Justice Souter declares that manifest disregard—regardless of its true origins—may have been intended as a “shorthand” description<sup>83</sup> for all the grounds expressly enumerated in FAA §10 or, yet again, only for those grounds specifically targeting arbitrator misconduct or excess of authority. Such an intent, however, cannot be deduced either from the legislative history or the statutory language. It has some support here and there in a few court opinions. Furthermore, the majority opinion strongly implies that manifest disregard is not a substantive-law basis for vacatur.<sup>84</sup>

This assessment generated an avalanche of case law from lower courts at both the federal and state levels.<sup>85</sup> These courts took various positions on the standing of manifest disregard. Some concluded that it had been eradicated by *Hall Street Associates*; others that it retained a role only in very limited circumstances; and yet others that it remained active as an independent substantive basis for vacatur, although it summarized all of the statutory grounds under FAA §10.<sup>86</sup> Courts more skeptical of arbitration wanted to retain leverage over arbitral awards, while those that supported arbitration were willing to confine enforcement litigation to the enacted law.<sup>87</sup>

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<sup>79</sup> See CARBONNEAU, *supra* note 3, at 509.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 360–61.

<sup>82</sup> *Hall Street Associates*, 552 U.S. at 584–85.

<sup>83</sup> *Id.* at 585.

<sup>84</sup> *Id.* at 586.

<sup>85</sup> See THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* 276–77 n. 8 (6th ed. 2012).

<sup>86</sup> *See id.*

<sup>87</sup> *Improv West Associates v. Comedy Club*, 129 S.Ct. 45 (2008); *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 145 (2009) (holding that manifest disregard is a judicial gloss on FAA§(a)(4)).

## VI. THE IMMUTABLE JURISDICTION OF THE STATUTORY TEXT

The majority rejects Hall Street Associates' justifications for 'opt-in' agreements by using understated language. The Court slaps away Hall Street Associates' contentions like annoying gnats. The discussion is replete with litotes—for example, “no more than arguable,”<sup>88</sup> “arguable is as far as it goes,”<sup>89</sup> “too much to bear,”<sup>90</sup> “comes up short,”<sup>91</sup> and “beg[s] the question.”<sup>92</sup> The backhanded criticisms are stinging rejections of Hall Street Associates' make-weight arguments. The arguments, in fact, test the Court's patience.

As it dismisses Hall Street Associates' core contentions, the majority makes its only reference to contract freedom and its role in the elaboration of U.S. arbitration law.<sup>93</sup> The Court concedes that the statute sustains the application of the following principle: The FAA lets parties tailor some, even many, features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law.<sup>94</sup> Nonetheless, in the Court's view, contract freedom does not overwhelm the statute. The legislative will provides bedrock answers, supreme and unassailable expressions of the people's will. Statutory law is religion freed of the empiricism of science; its provisions are final and absolute. In a conflict between contract and law, therefore, the latter unquestionably prevails.

The Court concludes that FAA §§10 and 11 establish an unambiguous substantive standard for judicial supervision of arbitral awards. The standard is intolerant of individual modifications by contract.<sup>95</sup> The judicial vacatur of awards is based on “egregious departures”<sup>96</sup> and “extreme arbitral conduct”;<sup>97</sup> the statute lists specific instances of abhorrent arbitrator behavior that invalidate arbitral awards. Because of the specificity of enumeration, and given that the FAA provisions do not contain a “textual hook for

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<sup>88</sup> *Hall Street Associates*, 552 U.S. at 586.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Hall Street Associates*, 552 U.S. at 586.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

expansion”<sup>98</sup> of their content, the “contracting parties . . . cannot [be] authorize[d] to supplement review for specific instances of outrageous conduct with review for just any legal error.”<sup>99</sup> The Court adds pointedly that “[f]raud”<sup>100</sup> and a mistake of law are not cut from the same cloth.”<sup>101</sup>

The statute dictates the applicable rule. When the statutory provisions contain “no hint of flexibility,”<sup>102</sup> they are not default legal rules meant to remedy the absence of party provision. The majority asserts that “fighting the text”<sup>103</sup> is not a sensible means of establishing governing legal rules. The gravamen of FAA §§ 9, 10, and 11 cannot be mistaken: these sections substantiate “a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straight-away.”<sup>104</sup> Studied understatement has evaporated. While the formulations remain ‘Souteresque,’ the message is embedded in absolute clarity: the federal judicial policy favoring arbitration is fully intact and the statutory law and its imperative provisions do not tolerate private individual alterations. Permitting parties to introduce *de novo* review into the process by agreement would “bring arbitration theory to grief in post arbitration process.”<sup>105</sup>

The Court has emphasized the negative character of vacatur litigation since at least its 1995 ruling in *First Options of Chicago, Inc. v. Kaplan*.<sup>106</sup> In its view, “full-bore legal and evidentiary appeals”<sup>107</sup> will erode arbitration’s finality, flexibility, and frugality. Judicialization will transform the remedy into the pathology it endeavors to cure. That interpretation was plausible and believable until the rulings in *Rent-A-Center*<sup>108</sup> and *Stolt-Nielsen*.<sup>109</sup> The holdings in these cases appeared not only to limit the federal policy favoring arbitration, but also to modify it by transforming judicial deference into an overt and unyielding judicial superiority with respect to law application and the protection of legal rights.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Hall Street Associates*, 552 U.S. at 586.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 588.

<sup>105</sup> *Id.*

<sup>106</sup> 514 U.S. 938 (1995).

<sup>107</sup> *Hall Street Associates*, 552 U.S. at 588.

<sup>108</sup> *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010).

<sup>109</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758 (2010).

## VII. THE AMICI

The majority opinion makes evident that the determinations were unaffected by *amici* submissions. Their bluster was inconsequential. The issue before the Court was of critical significance to the law and practice of arbitration and the service industries born of the favorable federal policy concerning arbitration. Each party generated its own group of supporters who reasoned that the Court's failure to adopt the stance they espoused would lead to a cataclysmic event. The Court relied on its own lights and appeared intent on discouraging the growth of "interested" participation in the litigation before it:

We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds.<sup>110</sup>

## VIII. MYSTIFYING DICTA

In dicta, the Court tries to temper the effect of its exclusivity holding by contending that the supervision of arbitral awards is available outside the framework of the FAA.<sup>111</sup> In other words, although the statutory grounds are "exclusive"<sup>112</sup> (otherwise stated, not modifiable by contract), the parties could obtain "more searching review"<sup>113</sup> of awards (i.e., review of the merits) under other frameworks for judicial supervision. The assertion is mesmerizing. By way of illustration, the Court explains that parties "may contemplate enforcement under state statutory or common law. . . where judicial review of different scope is arguable."<sup>114</sup> It is difficult to divine what Justice Souter means by "arguable" in this statement; the word is another fastidious understatement that makes understanding difficult. More importantly, the contention does not

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<sup>110</sup> *Hall Street Associates*, 552 U.S. at 589.

<sup>111</sup> *Id.* at 590.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* On the wording of the Court's statement, see *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 655 (9th Cir. 2012), cited and discussed comprehensively in Anthony Rallo, *The Veil of Acquiescence: Between the Lines of an Intuitive Decision*. . . , submission to 2 YB. ARB. L. & DOC. 333 (2013).



seem to account for the impact of the federal preemption doctrine.<sup>115</sup> If a form of review is unacceptable under federal law because it is overly intrusive, it should be similarly illegal under state statutory regimes on arbitration. If a state arbitration law would permit parties to contract out of the statutory basis for judicial supervision of awards, a provision for *de novo* merits review or for examining the arbitrator's evidentiary determinations would dangerously compromise arbitral autonomy and could damage the institution of private adjudication. Undercutting the national policy on arbitration by enforcing the provisions of a non-conforming state law is precisely the result that the federal preemption doctrine was intended to prevent.<sup>116</sup>

State law cannot serve as a parallel regulatory mechanism under which significant provisions of federal arbitration law can be avoided or ignored. A state law of arbitration might even tolerate the contractual elimination of all bases for judicial supervision—a situation that even more aggressively infringes on the Court's exclusivity holding in *Hall Street Associates*. The federal doctrine on arbitration has never been receptive to state-law-based intrusions upon the autonomy of the arbitral process.<sup>117</sup> To the extent it fails to conform to the preemption standard, the observation in dicta should be seen as an ill-considered remark that confuses even further an already convoluted discussion.

The Court's other illustration—its reference (presumably) to the common law grounds<sup>118</sup>—fails to acknowledge that common law grounds have long been part of the FAA framework for the enforcement of awards. They make possible the judicial review of

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<sup>115</sup> See CARBONNEAU, *supra* note 3, at 127–28. The federal preemption doctrine protects the FAA from deviant state laws. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), the U.S. Supreme Court ruled that the FAA was binding on all federal courts regardless of the basis for their assertion of jurisdiction. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995), the Supreme Court expanded this rule to apply to state courts ruling on state law cases that implicate interstate commerce. Finally, in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), the Supreme Court endorsed a broad definition of “interstate commerce,” effectively mandating that state courts apply the FAA when ruling on matters pertaining to arbitration. By 2003, the FAA had become the sole source of law, preempting state laws that deviated from its commands on the regulation of arbitration. See also *Nitro-Lift Tech., LLC v. Howard*, 568 U.S. \_\_ (2012, *per curiam* opinion) (“The FAA. . . is ‘the supreme Law of the Land. . .’ It is this Court’s responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.”). *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Hall Street Associates*, 552 U.S. at 590.

the merits of arbitrator determinations.<sup>119</sup> A more helpful statement would have accounted for the conflict between the common law grounds and the statutory basis for vacatur, and addressed the incongruity of prohibiting merits review by contract when the same approach is available through the common law grounds integrated into the statute. The majority's characterization of manifest disregard as a metaphor for statutory grounds<sup>120</sup> does not account for the two other common law grounds or explain how manifest disregard differs from *de novo* review. Because manifest disregard yields a review of the merits, there is no need to provide for such review in the contract for arbitration unless the parties seek to include a more rigorous and specific form of review. The majority's reference to the common law grounds, therefore, raises a host of problems that are not even remotely resolved by the Court's retort, "[b]ut 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."<sup>121</sup>

#### IX. THE DISSENTS

The dissents focus on the language of the statute and the concept of contract freedom.<sup>122</sup> Justice Breyer's dissent echoes, to some extent, his interpretative approach in *First Opinions of Chicago, Inc. v. Kaplan*;<sup>123</sup> he concludes that the FAA "does not preclude enforcement of such an agreement."<sup>124</sup> There is no language in the statute that provides for statutory exclusivity or that prohibits parties from agreeing to a different vacatur regime. Justice Stevens' dissenting opinion<sup>125</sup> articulates the core opposition to the majority opinion. He maintains that the FAA's statutory regime can readily coexist with the exercise of contract freedom and special provisions for judicial supervision agreed to by the parties.<sup>126</sup> The common law, historically, has given contract freedom a substantial impact upon the regulation of arbitration<sup>127</sup> and the statute

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<sup>119</sup> See CARBONNEAU, *supra* note 58, at 261-73.

<sup>120</sup> *Hall Street Associates*, 552 U.S. at 576, 585.

<sup>121</sup> See *id.* at 590.

<sup>122</sup> *Id.*

<sup>123</sup> *First Option of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

<sup>124</sup> *Hall Street Associates*, 552 U.S. at 596.

<sup>125</sup> *Id.* at 592-96.

<sup>126</sup> *Id.* at 592-93, 595.

<sup>127</sup> *Id.*

easily tolerates “agreements fairly negotiated by the parties.”<sup>128</sup> “An unnecessary refusal to enforce a perfectly reasonable category of arbitration agreements defeats the primary purpose of the statute.”<sup>129</sup> The actual text of the statute “does not compel . . . a reading that is flatly inconsistent with the overriding interest in effectuating the clearly expressed intent of the contracting parties.”<sup>130</sup> Contract freedom—the expression of party choice—has always been, and continues to be, instrumental to the law and practice of arbitration. The law aims to protect the exercise of that choice. Artificial limitations, even if introduced to protect the efficiency of the process, will generate confusion and conflict in the law. Parties can choose to arbitrate on their own terms and judicial paternalism should not restrain their free exercise of choice.

The Justice Stevens of this dissent is not the Justice Stevens of the dissent in *Mitsubishi*<sup>131</sup> or *Vimar Seguros v. Reasegueros*,<sup>132</sup> or even the author of the majority opinion in *Mastrobuono v. Shearson Lehman Hutton, Inc.*<sup>133</sup> In *Hall Street Associates*, Justice Stevens touts an ideology that is more characteristic of the Fifth Circuit’s rulings on contract freedom in arbitration and the validity of ‘opt-in’ agreements.<sup>134</sup> It suggests that the legislative will expressed in the statutory framework can coexist with contract freedom even when the latter supplements or alters the statutory text. The parties have a legal right to choose, and the law’s core mission is to protect that right from infringement. Once exercised, the freedom to choose extends to all the aspects of the chosen process, including how awards are to be assessed. The parties can pick their brand of judicial surveillance, including the general decision to augment or eliminate it. The choice to arbitrate can be fully extrajudicial or lead to a complete, albeit peculiar, convergence of judicial and arbitral adjudication. The courts need not protect the parties from themselves, especially when they are in essential parity.

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Hall Street Associates*, 552 U.S. at 592–93, 595.

<sup>131</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Stevens, J., dissenting).

<sup>132</sup> *Vimar Seguros y. Reasegueros, S.A. v. M/V Sky Reefer, Her Engines*, 515 U.S. 528 (1995).

<sup>133</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

<sup>134</sup> See e.g., *Gateway Tech., Inc., v. MCI*, 64 F.3d 993 (5th Cir. 1995); *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003), *Hughes Training Inc. v. Cook*, 254 F.3d 588 (5th Cir. 2001).

## X. THE NEW APPRAISAL

*Hall Street Associates* does not have much, if any, impact upon international arbitration. The circumstances of *LaPine Tech. Corp. v. Kyocera Corp.*<sup>135</sup> were international and that decision launched the ‘opt-in wave.’ The issue, however, was quickly and completely embedded in the culture of local law. Moreover, the Court merged the domestic and international aspects of U.S. arbitration law into a unitary doctrine<sup>136</sup> in *McMahon*<sup>137</sup> and *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*<sup>138</sup> when it removed *Mitsubishi*<sup>139</sup> from its trans-border circumstances and gave its holding a widened berth in U.S. arbitration doctrine.<sup>140</sup> *Hall Street Associates* does not implicate either Article V of the New York Arbitration Convention<sup>141</sup> or its setting-aside procedure.<sup>142</sup> It simply interprets FAA §§ 9-11, provisions that regulate domestic matters on arbitration. To the extent that it restrains contract freedom in arbitration (allegedly for the benefit of arbitral efficiency), the holding in *Hall Street Associates* might prevent international parties from choosing a process for judicial supervision, but the opinion does not address that issue either expressly or implicitly. It may serve as a precedent in the evolving global law on arbitration, and it clearly alerts foreign parties to the shifting sands of the American law of arbitration.

From a purely domestic vantage point, *Hall Street Associates* may be useful and instructive in its prioritization of enacted law over contract. In regulatory matters, as elsewhere, clarity is always a virtue. A hierarchy of principles is necessary to any epistemology. The prohibition of parties from treating the statute as a mere default mechanism has a number of benefits. The institutional standing and stature of the enacted law is reinforced, and arbitration is less likely to be subject to the chaos of individual prescription. Uneven playing fields will be more leveled. Practical

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<sup>135</sup> *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997).

<sup>136</sup> See CARBONNEAU, *supra* note 3, at 409–15.

<sup>137</sup> *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

<sup>138</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); see also *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010).

<sup>139</sup> *Rodriguez de Quijas*, 490 U.S. 477; *Granite Rock Co.*, 130 S. Ct. 2847. See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

<sup>140</sup> *McMahon*, 482 U.S. at 229.

<sup>141</sup> See *supra* note 56 and accompanying text.

<sup>142</sup> See *id.* Giving the setting aside provision in Article V of the New York Arbitration Convention special significance is warranted because the setting aside procedure applies on the basis of domestic law of the requested State. It represents a reference to local law in a trans-border framework for the enforcement of international arbitral agreements and awards.

legitimacy is added to the theoretical idea that law and courts have a significant social function in their service as vehicles for proclaiming and instituting the will of the community in matters of fairness and justice. The anarchy of contract could make it difficult to achieve an effective rule of law. Society acquires legal civilization by tempering individual liberty with the necessary discipline of constraints. Circumstantial determinations must contribute in some measure to general guidance—at least, so goes the theory of social and political organization.

In this sense, *Hall Street Associates* reintroduces balance and stability to the U.S. law of arbitration. By emphasizing the importance of expedited enforcement proceedings, the *Hall Street* Court solidifies judicial support for the operation of the arbitration process and its outcomes. It thereby—at least, arguably—fosters the autonomy of the arbitration process. One of the unstated or understated propositions of the current U.S. law of arbitration, however, is that the contractual choice to arbitrate has consequences. Contracting parties not only explicitly bargain for economy, expertise, expedition, and enforceability in adjudication, but they also subscribe to the existing law and legal policy on arbitration and the courts' ongoing supervision of the arbitral process on this basis. Their bargain for arbitration implies acquiescence to the arbitrators and their use of authority and the legal doctrine that governs arbitration and seeks to keep it fair, functional, and final.

As in *Mastrobuono*, the parties in *Hall Street Associates* were free to choose, but were obligated to choose responsibly. The bargain for arbitration implies a further commitment to uphold the effectiveness of private adjudication. In *Mastrobuono*, the parties could not select state law provisions that would disable their reference to arbitration unless they did so deliberately and knowingly. The Court's determination in *Mastrobuono* was benevolent; it sought to protect the right to arbitrate from ill-considered references to state law. In *Hall Street Associates*, the parties were told by the Court that they could not choose to judicialize the final phase of arbitration by authorizing *de novo* judicial review because such a practice would undermine the expedition of court supervision of awards and, by extension, the speed of the arbitral process itself. Both cases demonstrate that parties can choose freely as long as their choices do not lead to an oxymoronic or pathological reference to arbitration.

The protection proffered in *Hall Street Associates*, however, was more ominous than in *Mastrobuono*—protective benevolence

in *Hall Street Associates* had been transformed into a less deferential form of paternalism. By eliminating party provision at this stage of the process, the Court removed the parties and their arbitrators from decision-making on the matter of enforcement. Accordingly, the ruling in favor of arbitration in *Hall Street Associates* was a double-edged sword. The decision privileged expedited enforcement but left the Court and its sense of juridical principles as the all-powerful standard-bearer in the final, conclusive phase of the process. In *Hall Street Associates*, the Court concluded that the parties' amalgamation of trial formats at the enforcement stage lessened arbitration's functionality and effectiveness. Party provision, therefore, unacceptably diminished arbitration's remedial efficacy, contradicted the law and its objectives, and was unlawful.

Having no guide other than its own sense of legality, practicality, and necessity, the *Hall Street* Court held that only the enacted law could determine how arbitral rulings were to be evaluated. The exclusion of contract freedom in enforcement rendered the arbitral process less malleable and adaptive—two characteristics that have contributed considerably to its social utility and adjudicatory success. As a result, practical experience and the needs of the parties were less significant to the regulation of arbitration. Through the Court, the law gave itself absolute jurisdiction to regulate the confirmation and vacatur of arbitral awards. The judiciary would decide which principles applied, when they applied, and what they meant both generally and specifically. The Court became the grand fiduciary of the public and private interest in arbitral adjudication. It protected arbitration from wayward arbitrators and idiosyncratic contract provisions. Parties could not 'opt in'<sup>143</sup>—let alone 'opt out.' The enforcement process was impervious to contract. The statutory regime was the exclusive protocol for the judicial assessment of an arbitrator's determinations and the trial that engendered them.<sup>144</sup>

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<sup>143</sup> *Hall Street Associates*, 552 U.S. at 586. (By declaring FAA §§ 9, 10, and 11 to be the "exclusive" means or basis for regulating the enforcement of arbitral awards, the Court restricted the use of contract freedom in arbitration.)

<sup>144</sup> Parties have a contractual right to choose arbitration and customize their recourse to the process—in terms of the submission of disputes, the selection of arbitrators, the procedural features of the proceedings, and the basis for reaching a determination. Once the arbitrator rules and gives effect to their bargain, the parties' authority to mold the process ceases. *Functus officio* disables both the arbitrators and the parties in terms of the process. The rendition of the award repositions the arbitral process under the provisions of the enacted law and subjects it to the judicial construction of the norms for adjudicatory validity. Parties can bargain to forgo courts and entrust private judges with the resolution of their disputes, but their right to choose ends when a result is rendered.

By administering a ‘haircut’ to contract freedom, the *Hall Street* Court reinvigorated the regulatory privilege of the law over arbitration. Only public institutions could validate private adjudicatory determinations. Although parties could assume the risk of arbitrating in whatever manner they chose, the State would not allow them to take the same risk in terms of the final result. The deal for private adjudication was somehow different at its conclusion than its inception. Despite the failures of judicial litigation, the requirements of public adjudication became dominant at this stage of the process. Arbitrators could not be trusted (or empowered by private parties) to reach legally valid determinations on their own.

The Court’s holding did not respond to the issue that opened the litigation: whether ‘opt-in’ agreements were enforceable contracts. The Court held more generally that the FAA’s enforcement provisions were “exclusive.”<sup>145</sup> By voiding all contract stipulations regarding the enforcement of awards, it established the exclusive authority of courts to decide the validity of arbitral awards. Only courts could identify and apply the standards of lawfulness. The decisional objective in *Hall Street Associates* was much larger than what was stated in the petition for *certiorari*. The purpose was to establish the controlling authority of actors at different stages of the arbitral process. The case was an exercise in demarcating boundaries and allocating territory. With the ruling in *Hall Street Associates*, it was clear that the law and the courts had exclusive jurisdiction to regulate the enforcement of awards. Even internal arbitral appeal,<sup>146</sup> seemingly, could not alter the statutory regime and process of enforcement.

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“Functus Officio is a Latin term meaning ‘having performed his or her office.’ With regard to an officer of an official body, it means without further authority or legal competence because the duties and functions of the original commission have been fully accomplished. . . . For example, the *functus officio* doctrine dictates that, once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, ‘their authority over those questions is ended,’ and ‘the arbitrators have no further authority, absent agreement by the parties, to redetermine th[ose] issue[s].’ [T.Co. Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329 (2d Cir. Jan. 14, 2010) . . .]” See <http://thelawdictionary.org/functus-officio/> (last visited March 13, 2013).

<sup>145</sup> *Hall Street Associates*, 552 U.S. 586.

<sup>146</sup> Internal arbitral appeal involves the review of the initial arbitral award by a second panel of arbitrators for errors of law, serious procedural flaws, or on any other basis chosen by the parties. Like arbitration itself, internal arbitral appeal is a product of contract. Parties to an arbitration agreement may establish a non-judicial appellate process for the award. Internal arbitral appeal is attractive in that it keeps arbitration private and efficient. Even if courts enforce the parties’ agreement for internal arbitral appeal, they are unlikely to hold that such procedures foreclose any judicial role in terms of the confirmation and vacatur of awards. See, e.g., Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitra-*

In keeping with its principal holding, the Court also attempted to confine the governing statutory law to its enacted content by eliminating the so-called common law grounds for vacatur—in particular, manifest disregard of the law. The majority opinion makes abundantly clear its position that manifest disregard should cease having a separate, autonomous function and rather be absorbed into the existing statutory language and become part of the excess of authority ground. The consequence would be the enacted statutory text's increased exclusivity. Excising manifest disregard from vacatur proceedings would eliminate a popular means of engaging in the judicial review of arbitral awards' merits, thereby strengthening the independence of arbitral determinations. By the same token, incorporating the ground into the express language of the statute would enhance the circumference and range of the statutory grounds and have them accomplish what had been available only through the common law grounds. As a result, the singularity (and growing elasticity) of the statutory regime would be affirmed, as would the enhanced power of the courts at this stage of the arbitral process.

The holding and dicta, therefore, were all of a piece. Both determinations empowered the courts to exercise their supervisory powers over the arbitrators and the arbitral process, and made it impossible to achieve any contractual exemption from the use of that power. No insurance was available against the risk of judicial reversal of arbitral awards. The parties were helpless against the exercise of judicial authority. They could not protect themselves against a judicial finding of evident arbitrator partiality (because of would-be nondisclosure) or the conclusion that the arbitrators exceeded their authority by agreeing at the outset of the transaction to forgo those possibilities. The parties had to tolerate uncertainty in their bargain for arbitration because courts were entitled to apply the law, and the law was entitled to set standards—no matter their impact on individual bargains and the bargaining parties' intent. A judicial conviction that adjudicatory power had been misused would thwart an arbitration regardless of the parties' intent to have awards stand as rendered. An anonymous collective interest demanded that courts and public regulation have a firm and irrevocable hand in the operation of the arbitral process. The need to have the judiciary protect arbitration and the law's exclusive man-

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*tion Awards: Using An Appellate Arbitrator*, in *AAA HANDBOOK ON COMMERCIAL ARBITRATION* 485 (Thomas Carbonneau and Jeanette A. Jaeggi eds., 2010).



date to provide this type of protection are the less evident and more fundamental contributions of *Hall Street Associates*.

The insidious character of *Hall Street Associates* did not become fully evident until the decisions in *Rent-A-Center* and *Stolt-Nielsen*. The latter decisions, especially *Stolt-Nielsen*, are notorious for their expansion of the supervisory role of courts in the arbitral process. *Rent-A-Center* addressed the governance of the threshold part of the process, asserting—through the fabrication of a second separability clause—that the courts had adopted the new mission of validating the enforceability of a *Kaplan* jurisdictional delegation clause. While the specific result in *Rent-A-Center* favored arbitration and arbitrability, the reasoning also attributed a decisive function to the courts in the initial jurisdictional stage of the process, despite the parties' agreement to have the arbitrator decide all jurisdictional matters. *Stolt-Nielsen* was an even stronger assault on arbitral autonomy, representing a more vigorous challenge to the authority of the arbitrating parties and the ruling arbitrators. There, the parties disagreed about whether their contract permitted or tolerated the submission of disputes to class action arbitration. They submitted the matter to a specially-designated panel of AAA arbitrators. The arbitrators held hearings and listened to expert opinion; they concluded that the parties' arbitral clause did not prohibit litigating disputes on a class action basis. That determination caused considerable consternation among a majority of the justices of the U.S. Supreme Court. The majority opinion complained mightily about the arbitrators' construction of the contract, especially the significance they attached to the silence of the agreement on the issue of class action. Silence was silence; logically, meaning could not be discovered in a contractual void.

By concluding that the absence of reference implied a presumptive permissibility, the arbitrators had not construed the contract entered into by the parties, but rather imposed their own policy choices on them and their agreement. This *post facto* rewriting of the terms of the agreement was an egregious departure from permissible contract construction and constituted an 'excess of authority.' By concluding that the contract was hospitable to class action arbitration, the arbitrators had reformulated the contract's terms and made it reflect values that the arbitrators thought the parties should have possessed had they been prescient at the time of contract formation.

In many respects, *Hall Street Associates* presaged both *Rent-A-Center* and *Stolt-Nielsen*. All three opinions address the courts'

role in the regulation of the arbitral process, allowing courts to usurp the authority of parties and arbitrators to make conclusive choices about the manner and extent of arbitrability. Speaking in the name of governing legal norms, the Court decided what behaviors and determinations were permissible in arbitration. Although the parties bargained for arbitrator rulings, the Court decided what was lawful in arbitration. Despite the agreement's exclusion of courts, a judge decided whether a *Kaplan* jurisdictional delegation clause was an enforceable contract and courts decided whether an arbitrator's interpretation of the arbitral clause stood (regardless of any reference to either *Kaplan* or *Green Tree Financial Corpproration v. Bazzle*<sup>147</sup>). Judicial supervision was no longer deferential but was instead decisive. It promoted traditional legal values and positions, not arbitral autonomy and arbitrability. It introduced fundamental deviations from the prior practice and policy, thereby redefining both of them.

The federal policy favoring arbitration was no longer so emphatic; it could be made to bow to would-be legal imperatives (regarding contract construction, validity, and enforceability) no matter the parties' agreement or how the arbitrators may have decided. It represented a judicial approach that diminished and depreciated arbitration and subordinated it to the overwhelming force of judicial disagreement and disapprobation. It depicted a re-emergence of judicial hostility to, and competition with, arbitration. It may well announce a return to the *status quo ante*, in which arbitration is seen as renegade adjudicatory relief. To some degree, in these cases, the oracle of contemporary U.S. arbitration law abandoned its bastard offspring, surrendered its parental rights and responsibilities, and returned to its former position in the plantation house.

## XI. CONCLUSION

The existence of these developments in the decisional law is incontrovertible. The rulings and their consequences are, in major part, unmistakable. The cases clearly bear a unifying affinity with one another that celebrates, in a like-minded fashion, the superiority of legal values over arbitration. It is difficult to argue they are 'one-off' events. These cases could announce a reversal of fortune

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<sup>147</sup> 539 U.S. 444 (2003).

for arbitration and the end of its golden age. Believing that a relationship of ‘cooperative dominance’ is in the offing explains nothing and is simply wrong-headed. The law either allows arbitration to flourish on its own terms or crushes the process with its conventional law agenda. The power to authorize or prohibit resides with the Court. The current indeterminacy of arbitration’s legal standing is further complicated by the more recent ground-breaking decision in *AT&T Mobility LLC v. Concepcion*,<sup>148</sup> in which the Court upheld unequivocally the autonomous operation of arbitration. In *AT&T Mobility*, the Court declared that class action waivers were a legitimate part of the bargain for the arbitration and that adhesive arbitral clauses were lawful, enforceable contracts. The *AT&T Mobility* decision stands in marked contrast to the Court’s disposition in *Hall Street Associates, Rent-A-Center*, and *Stolt-Nielsen*. *AT&T Mobility* is a judicial pronouncement that embodies categorical judicial deference to arbitration. Despite their suspect legal character, the Court validates contract practices vital to arbitrability.

In terms of arbitration, the Court seems to be of two minds, delivering contradistinctive messages about the applicable policy. It has become difficult to proffer guidance on the law of arbitration in light of the bifurcation in approach. The type or usage of arbitration (commercial or adhesive) does not explain the dichotomy in doctrine. The struggle appears to reside between the hegemony of law and the necessity of recourse to arbitration. On the one hand, the Court does not want to forgo its role as the purveyor of governing standards or its ability to rectify what it perceives to be disturbing arbitrator error. On the other hand, it does not want to cripple the arbitral process with ill-suited, misfit acts of legal regulation. At the very least, provided an overarching systemic perspective is justified and consistent with the reality of the Court’s deliberations, the Court is undecided about the future direction of U.S. arbitration law. It is not sure whether to trust the arbitrators, the parties, and their legal counsel, or to protect society and the parties themselves from the choice of arbitrating disputes.

*Stolt-Nielsen* reveals that the Court, despite its protestations to the contrary,<sup>149</sup> wants to jettison manifest disregard from the U.S.

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<sup>148</sup> *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

<sup>149</sup> *Stolt-Nielsen v. AnimalFeeds Int’l*, 130 S. Ct. 1768 n.3 (2010) (“We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.* . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10. *AnimalFeeds* characterizes that standard as requiring a showing that

law of arbitration and transfer its previous function into the statutory ground relating to excess of authority. The role of internal arbitration appeal of awards remains truly undecided, especially as to its impact upon the grounds for the judicial supervision of awards. Eliminating the latter could circumvent the judiciary completely and bestow unfettered authority upon appellate arbitrators. Such an outcome, however, would void the impact of the holdings in *Hall Street Associates*, *Rent-A-Center*, and *Stolt-Nielsen*. These cases appear to signal a desire to return to the public process of litigation and end the privatization of adjudication. They exemplify judicial distrust of the legitimacy of adjudication through arbitration and the Court's lack of confidence in arbitration's adjudicatory capabilities. If these assessments are confirmed by future practice, it will place even greater stress on public resources and diminish—perhaps imperil—the rights of American citizens.

To argue that such consequences are untenable and unrealistic makes it difficult to explain the result and reasoning in the 'new trilogy' of anti-arbitration cases.<sup>150</sup> The best defense to alleged judicial distrust of arbitration is to argue that the outcomes in the cases are stand-alone events that result from the justices' internal discussion of the legal issues that pertain to individual cases or reflect the eventual congealing of contradistinctive opinions within the Court. In this sense, the three cases are akin to *Volt Information Sciences*,<sup>151</sup> an aberrant decision, the non-conforming doctrinal aspects of which were gradually buried in decisional oblivion. Nonetheless, the rulings introduce a sliver of distrust in the wall of arbitration doctrine. The possible breach in the edifice of law is ominous and portends an undecided future and an unresolved destiny for arbitral adjudication. Let's hope that judicial distrust, hostility, and envy are figments of an intemperate legal imagination.

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the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." Brief for Respondent 25 (internal quotation marks omitted). Assuming, *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow.").

<sup>150</sup> In the forty-five or so cases on arbitration decided by the Court, there is a not insignificant handful that ruled against arbitration and refused to promote the autonomy of the process. *Wilko v. Swan*, 346 U.S. 427 (1953) was the first such decision, followed a decade later by *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Also part of this group are: *Volt Information Sciences* (note 152 *infra*), *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), and the three principal cases discussed in the text.

<sup>151</sup> *Volt Info. Sci., Inc. v. Bd. Trs. Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).