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Stephen J. Ware

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VACATING LEGALLY-ERRONEOUS ARBITRATION AWARDS

By
Stephen J. Ware*

Abstract: In the United States, arbitrators' decisions are legally binding. Courts generally confirm and enforce, rather than vacate, arbitration awards. Suppose, however, that the arbitration award is very different from the judgment a court would have rendered had the dispute been litigated, rather than arbitrated. And suppose this is because the arbitrator did not correctly apply the law. If the party that lost in arbitration (the party that would have done better with a correct application of law) asks a court to vacate the award because it is legally erroneous, will the court vacate or confirm the award? And does the answer depend on:

- Whether the parties formed their agreement to arbitrate before or after the dispute arose?
- Whether the agreement's terms ask courts to vacate or confirm legally-erroneous arbitration awards?
- Whether the arbitrator did not try to apply the law or tried to apply it but did so incorrectly?
- Whether the law the arbitrator did not correctly apply is well-established or in doubt? Simple or complex?
- Whether the law the arbitrator did not correctly apply is *mandatory* law (binding on the parties despite a contract term to the contrary) or *default* law the parties may contract around?

These questions are the subject of this article. I suggest that arbitration law in the United States has answered these questions differently over time and that these changes in legal doctrine roughly divide into four eras. Unfortunately, recent Supreme Court cases have left much uncertainty on the fundamental question whether arbitration awards must apply the law correctly to avoid vacatur.

* Professor of Law, University of Kansas School of Law. Thanks to Chris Drahozal and David Horton for knowledgeable comments and to Tim Bogner, Mark Wilkins, Nicole Smith, Tyler Manson, and Angela Fitle for helpful research assistance.

I. INTRODUCTION

In the United States, arbitrators' decisions are legally binding. Courts generally confirm and enforce arbitration awards. However, a party disappointed with an arbitrator's decision may ask a court to vacate the arbitration award. In some ways, a court considering whether to vacate an arbitration award is like an appellate court considering whether to reverse the decision of a trial court. But "the grounds on which courts review arbitration awards are much narrower than the grounds on which appeals courts review decisions of trial courts."¹ In particular, when appellate courts reverse trial courts they generally do so on the ground that the trial court has erred in its findings of fact or conclusions of law. Appellate courts usually give some deference to trial courts' factual findings—reversing only those that are "clearly erroneous"—but give no deference to trial courts' legal rulings, reviewing them *de novo*. So the typical appeal of a trial court's decision centers on the appellant's argument that the trial court made an error of law.

By contrast, arbitrators' legal rulings are rarely given *de novo* review by courts considering a motion to vacate an arbitration award.² In fact, the Federal Arbitration Act may not allow courts to review arbitrators' legal rulings at all because "error of law" by the arbitrator is not expressly listed among the grounds for vacating an arbitration award. Suppose, however, that the arbitration award is very different from the judgment a court would have rendered had the dispute been litigated, rather than arbitrated. And suppose this is because the arbitrator did not correctly apply the law.³ If the party that lost in arbitration (the party that would have done better with a correct application of law) asks a court to vacate the award because it is legally erroneous, will the court vacate or confirm the award? And does the answer depend on:

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- Whether the law the arbitrator did not correctly apply is well-established or in doubt? Simple or complex?
- Whether the law the arbitrator did not correctly apply is *mandatory* law (binding on the parties despite a contract term to the contrary) or *default* law the parties may contract around?

¹ CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* 494 (2d. ed. 2006).

² See Maureen A. Weston, *The Accidental Preemption Statute: The Federal Arbitration Act and Displacement of Agency Regulation*, 6 *Y.B. ON ARB. & MEDIATION* 59, 62-63 (2013) ("Arbitration awards are virtually unreviewable on the merits and are rarely vacated.").

³ "The law" in this context means the substantive law (governing the merits of the parties' dispute) a court would have applied had the dispute been litigated, rather than arbitration law governing the formation, terms and enforcement of agreements to arbitrate.

These questions are the subject of this article. I suggest that arbitration law in the United States has answered these questions differently over time and that these changes in legal doctrine roughly divide into four eras.

The first era, predating the 1920's, was when courts did not enforce executory arbitration agreements. During this period, arbitration awards arose out of post-dispute arbitration agreements, rather than pre-dispute arbitration agreements, and this fact made it relatively easy and uncontroversial for courts to enforce, rather than vacate legally-erroneous arbitration awards.

The second era, from the 1920's to the 1980's, was when courts enforced pre-dispute arbitration agreements but only with respect to claims arising under default rules of law, such as breach of contract claims, as opposed to claims arising under mandatory rules of law, such as antitrust, securities and employment discrimination claims. The fact that mandatory law claims were excluded from enforcement of pre-dispute arbitration agreements allowed courts to continue enforcing legally-erroneous awards while avoiding significant controversy and remaining consistent with non-arbitration law.

That consistency ended and the third era began when, from 1985-1991, the Supreme Court began enforcing pre-dispute agreements to arbitrate mandatory law claims. This raised fears that claims in areas such as employment discrimination and investor and consumer protection would be sent to "lawless" arbitration—privatizing areas of law that non-arbitration law excludes from the privatizing effects of pre-dispute contracts. Perhaps to calm such fears, when the Supreme Court began enforcing pre-dispute agreements to arbitrate mandatory law claims, it began saying that "judicial scrutiny of arbitration awards...is sufficient to ensure that arbitrators comply with the requirements of the statute"⁴ giving rise to the mandatory-law claim asserted in arbitration, e.g., the Securities Exchange Act or the Age Discrimination in Employment Act. In other words, the Court perhaps hinted that its 1985-1991 change to enforcing executory agreements to arbitrate mandatory law claims required a change to the longstanding rule against judicially-reviewing arbitrators' rulings on questions of law. Following this hint, by the late 1990's, some courts pushed case law toward vacating legally-erroneous awards arising out of mandatory law claims. The doctrinal hook for doing this was usually the "manifest disregard of law" ground for vacatur. However, other courts disagreed and interpreted the manifest-disregard doctrine more narrowly. So by 2008 the law on this question was ripe for clarification from the Supreme Court or Congress.

Also during this era leading up to 2008, a circuit split arose over whether courts should vacate legally-erroneous awards on the ground that the arbitration agreement asks them to do so. While these agreements may have been enforced before the 1920's, their enforceability did not generate many reported cases from then until around the turn of the twenty-first century, at which point the issue was actively litigated and divided the courts. So by 2008, two important issues on legally-erroneous arbitration awards divided the courts. The Supreme Court's 2008 *Hall Street Associates v. Mattel*,⁵ case addressed both of them.

⁴ Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987). *Accord* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, n.10 (2009); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 n.4 (1991).

The fourth era began with *Hall Street* and continues to the present. During this era, most courts follow *Hall Street* by declining to vacate legally-erroneous awards just because the arbitration agreement asks them to do so. However, *Hall Street* and later Supreme Court cases did not resolve whether the manifest-disregard doctrine continues and, more broadly, when arbitration awards must apply the law correctly to avoid vacatur.

II. FOUR ERAS

A. Pre-1920's: Before Enforcement of Executory Arbitration Agreements

1. Deference to Parties' Submission on Vacating Legally-Erroneous Awards

Arbitration, like litigation, is a form of binding adjudication. Litigation is adjudication in a public (government) forum and arbitration is adjudication in a private forum. Litigation is the default process of dispute resolution; that is, parties can contract into alternative processes of dispute resolution, but if they do not, then each party retains the right to have the dispute resolved in litigation. By contrast, a dispute does not go to arbitration unless the parties have contracted to have an arbitrator resolve that dispute.⁶ In other words, arbitration binds only those who contracted for it.

Sometimes parties with an existing dispute contract to send that dispute to arbitration. Such post-dispute arbitration agreements are now relatively rare and non-controversial. More common in recent decades,⁷ and more controversial, are pre-dispute arbitration agreements. These are contracts containing a clause providing that, if a dispute arises, the parties will resolve that dispute in arbitration, rather than litigation. These arbitration clauses typically are written broadly to cover any dispute the parties' transaction might produce, but also can be written more narrowly to cover just some potential disputes.⁸

⁵ *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

⁶ *See, e.g.*, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (“arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”) (quoting *United Steelworkers v. Warrior & Gulf Naval Co.*, 363 US 574, 582 (1960)); *Local 21 v. Ill. Bell Tel. Co.*, 491 F.3d 685, 687 (7th Cir.2007); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“arbitration is simply a matter of contract between the parties.”).

⁷ *See* Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 346 (2012) (noting 96.3% of cases arose out of pre-dispute agreements, while only 3.7% arose out of post-dispute agreements to arbitrate); Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 319 (2003) (analyzing the American Arbitration Association data on the infrequency of post-dispute arbitration clauses in employment cases); Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 209 (2006) (“[T]he use of post-dispute arbitration agreements is rare relative to the use of pre-dispute arbitration agreements.”).

⁸ *See* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 2.3(a) (2007).

While pre-dispute arbitration agreements are now more common than post-dispute arbitration agreements, that was not likely true at all times in the past. Before the 1920's, courts in the United States generally did not enforce *executory* agreements to arbitrate, that is, arbitration agreements not yet performed by either party.⁹ Consequently, pre-dispute arbitration agreements were unenforceable.¹⁰

While some parties may nevertheless have formed pre-dispute arbitration agreements, any such agreements were insufficient in and of themselves to produce arbitration proceedings and awards—in the important sense that if a party, after a dispute arose, chose not to keep its promise to arbitrate then that party would be under no legal compulsion to do so.¹¹ As a result, arbitration proceedings and awards only occurred when both parties made the post-dispute decision to arbitrate that dispute. Such parties often used post-dispute arbitration agreements to specify the procedures of their arbitration.

Arbitration agreements can be divided into two types: those that require the arbitrator to apply the law correctly (“restricted” or “special” submissions to arbitration) and those that do not (“unrestricted” or “general” submissions).¹² Unrestricted

⁹ See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNALIZATION* 34-47 (1992) (summarizing that in 1920, New York became the first state to enact a statute, 1920 N.Y. LAWS CH. 275, § 2, providing specific enforcement for arbitration agreements); see also James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 L. & HIST. REV. 241 (2013) (discussing very early American arbitration cases).

¹⁰ Parties could breach their arbitration agreements without fear of any court-ordered sanction beyond nominal damages. See I. MACNEIL, R. SPEIDEL, & T. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 4.3.2.2 (1994) (noting that during the period 1800-1920, agreements to arbitrate future disputes were not specifically enforceable in the United States); see also WESLEY STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* 262 (1930); see also *Munson v. Straits of Dover S.S. Co.*, 102 F. 926 (2d Cir. 1900) (holding that plaintiff who sought damages-in the form of lawyer's fees and costs incurred in defending a lawsuit-for breach of an agreement to arbitrate was entitled to nominal damages only).

¹¹ Of course parties may have non-legal reasons to keep promises, including promises to arbitrate. See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 116 (1992) (diamond industry relies on “reputation-bond-based extralegal contractual regimes” including arbitration); Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479 (1995) (“arbitration backed by nonlegal sanctions was well established long before the passage of arbitration statutes”); W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 70 (2014) (“lenders may feel that they can rely on dispute resolution terms even when those terms are formally unenforceable. For example, a borrower concerned with its reputation for promise-keeping might honor a promise to arbitrate even if the doctrine of absolute immunity would prevent a court from compelling it to participate in the arbitration or from enforcing an arbitration award”).

¹² See, e.g., *U.S. Fid. & Guar. Co. v. Hutchinson*, 710 A.2d 1343, 1346 (1998) (“The submission tells the arbitrators what they are obligated to decide. The determination by a court of whether the submission was restricted or unrestricted tells the court what its scope of review is regarding the arbitrators' decision.”); *Metro. Waste Control Comm'n v. City of Minnetonka*, 242 N.W.2d 830, 832 (Minn.1976) (“The scope of the arbitrators' power is controlled by the language of the submission. Where the arbitrators are not restricted by the submission to decide according to principles of law, they may make an award according to their own notion of justice without regard to the law. Where the arbitrators are restricted, however, they

submissions give the arbitrator discretion whether to decide the case according to law or according to some other source of norms, such as the customs in the parties' industry¹³ or the arbitrator's own sense of equity.¹⁴

With respect to legally-erroneous arbitration awards, pre-1920's courts generally stated legal rules that turned on whether a submission to arbitration was restricted or unrestricted.¹⁵ Typical was the United States Supreme Court's 1855 statement of the following legal rule: "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 of equity will not set it aside for error, either in law or fact."¹⁶ With this rule prevailing, pre-1920's

have no authority to disregard the law." (citations omitted)); *Muldrow v. Norris*, 2 Cal. 74, 77-78 (1852) ("It is true, under a general submission, arbitrators have power to decide upon the law and facts; and a mere mistake of law cannot be taken advantage of. . . . A distinction seems to have been taken in the books between general and special awards. In the case of a general finding, it appears to be well settled that courts will not inquire into mistakes by evidence aliunde; but where the arbitrators have made any point a matter of judicial inquiry by spreading it upon the record, and they mistake the law in a palpable and material point, their award will be set aside... These special awards are not to be commended, as arbitrators may often decide with perfect equity between the parties, and not give good reasons for their decision; but when a special award is once before the Court, it must stand or fall by its own intrinsic correctness, tested by legal principles." (quotations omitted)); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1149-50 (2009) (referring to "general submissions in which the arbitrator has no constraints on her judgment," and stating "With restricted submissions, the arbitrator may make an initial decision on the law, but the parties reserve for the court the power to make a final decision, thus allowing for judicial review for questions of law."); see generally C.J.S. Arbitration, Matters Which May Be Ordered, Awarded, or Decided Under Submission--General, Special or Restricted Submission § 161 (2005) (outlining and defining the difference between general and specific submission in the case of arbitration disputes).

As Professor Drahozal points out, "submissions can be restricted in any number of ways. But in this context, the most relevant restriction is one that requires the arbitrators to follow the law." Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 905, 914 n.50 (2010).

¹³ Some industries have developed their own bodies of law applied by their own arbitrators, who are often merchants rather than lawyers. See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (discussing the grain industry); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (discussing the diamond industry); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) (discussing the cotton industry); see also Lisa Bernstein, *Private Commercial Law*, in PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 108, 108 (Peter Newman ed., 1998) ("Private commercial law exists in over fifty industries including diamonds, grain, feed, independent films, printing, binding, peanuts, rice, cotton, burlap, rubber, hay and tea.").

¹⁴ A small number of arbitration agreements call for application of the arbitrator's own sense of equity. Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 538-39 (2005); Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 206-07 (2006).

¹⁵ James M. Gaitis, *Unraveling the Mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 PEPP. DISP. RESOL. L.J. 1, 17 (2007) ("From its earliest beginnings, the foundation of American arbitration law always has been the fundamental principle that it is the parties' 'submission' that determines the scope of the arbitrators' authority and, in consequence, the power of courts to vacate arbitral awards.").

courts rarely vacated legally-erroneous arbitration awards arising out of unrestricted submissions.¹⁷ In contrast, pre-1920's courts acknowledged the possibility of vacating legally-erroneous awards arising out of restricted submissions, although they generally did so in dicta,¹⁸ and persuading a court to vacate a legally-erroneous award on the

¹⁶ *Burchell v. Marsh*, 58 U.S. 344, 345 (1854); *see also* *Sherfy v. Graham*, 72 Ill. 158, 159 (1874) (stating arbitrators, “by the submission, become judges, by the choice of the parties, both of the law and the facts, and there is no appeal or review from or of any decision made by them within the scope of their powers, except for fraud, partiality or misconduct.”); *Pulliam v. Pensoneau*, 33 Ill. 374, 378 (1864) (“The conclusion at which arbitrators arrive is the judgment of the court of the parties' own choosing. And in most respects it is similar to other judgments. It is conclusive upon the parties, both as to the law and facts. A mistake in either is not usually corrected by the courts[.]”); *In re Curtis et al.*, 30 A. 769, 772 (Conn. 1894) (“The uniform rule of decision has been in this State that in such cases a court of equity will not set aside an award except for partiality and corruption in the arbitrators, mistakes on their own principles, or fraud or misbehavior in the parties.”).

James Gaitis emphasizes that the quote from *Burchell* continues “to induce the court to interfere [with the 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; but in the case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award.” Gaitis, *supra* note 15, at 25 (quoting *Burchell*, 58 U.S. at 349-50). Gaitis argues that *Burchell* distinguishes between “the arbitrator's intended decision” not to correctly apply the law (which courts should enforce) and mistakes that “if properly understood by the arbitrator, would have been correctly applied by the arbitrator”, which courts should vacate. Gaitis, *supra* note 15, at 26.

¹⁷ The US Supreme Court and other pre-1920's courts sometimes said courts could vacate legally-erroneous awards. *See* *United States v. Farragut*, 89 U.S. 406, 420 (1874) (“The award was also liable ... to be set aside ... [f]or exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all the reasons on which awards are set aside in courts of law or chancery.”) However, they rarely did so. *See* Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 151 (2011) (emphasizing that 19th Century law distinguished statutory arbitration from common law arbitration: While statutes varied from state to state, statutory arbitration generally treated arbitrators as adjuncts to the court, while common law arbitration “allowed parties to fashion their own dispute resolution rules and procedures” and “courts treated awards with more deference.”). Perhaps 19th Century statutory arbitration was the predecessor of today's non-binding court-annexed arbitration while 19th Century common law arbitration was the predecessor to today's binding contractual arbitration. *See* WARE, *supra* note 8, at §4.32 (contrasting non-binding court-annexed arbitration with binding contractual arbitration).

¹⁸ In all of the following cases, the courts' statements about vacating legally-erroneous awards were merely dicta because the courts did not in fact vacate awards. *See, e.g.*, *White Mountains R.R. v. Beane*, 39 N. H. 107, 108 (1859) (“[I]f the parties agree that the arbitrators shall make their award agreeably to legal principles, and if they mistake the law the award will be set aside.”); *Sanborn v. Murphy*, 50 N. H. 65, 67 (1870) (“Parties may, and often do, limit a reference by providing that the award shall be made in accordance with legal principles, in which case the referees will be bound by the limitation; and if in such case they disregard or mistake the law, their award will be set aside.”); *Kleine v. Catara*, 14 F. Cas. 732, 734 (C.C.D.Mass. 1814) (In recommitting the award, the court said, “If the parties wish to reserve the law for the decision of the court they may stipulate to that effect in the submission. . . . If no such reservation is made in the submission, the parties are presumed to agree that everything, both as to law and fact, which is necessary to the ultimate decision, is included in the authority of the referees.”); *Boston Water Power Co. v. Gray*, 6 Mass. 166 (1843) (“If the submission be of a certain controversy, expressing that it is to be decided conformably to the principles of law . . . then, if it appears by the award, to a court of competent jurisdiction, that the arbitrators have decided contrary to law . . . the decision is not within the scope of their authority as determined by the submission, and is for that reason void.”); *Gray*, 6 Mass. at 168 (“Another case, somewhat analogous, is where it is manifest, upon the award itself, that the arbitrator intended to

ground that the submission required a legally-correct award apparently took “very strong language” in the submission.¹⁹ Overall then, it appears that pre-1920’s courts deferred to the parties’ submission agreement on whether to enforce legally-erroneous awards but used a very strong interpretive presumption in favor of enforcement and opposed to vacatur.

2. *The Case for Deferring to the Submission—At Least if it is Formed Post-Dispute*

Deferring to the parties’ submission agreement on whether to enforce legally-erroneous awards appeals to me. To the extent pre-1920’s courts enforced restricted submissions by vacating legally-erroneous awards, these courts helped parties who, when forming their arbitration agreement, wanted both arbitration (instead of a court trial) and confidence that courts would meaningfully police the arbitrator’s rulings of law. So I praise pre-1920’s courts to the extent they actually enforced restricted submissions with vacatur of legally-erroneous awards.

In addition, I praise the deference pre-1920’s courts showed to party autonomy in the context of unrestricted submissions. That is, I praise courts’ willingness to enforce legally-erroneous awards arising out of arbitration agreements that do not ask courts to vacate legally-erroneous awards. This deference to parties who contracted for courts to enforce arbitration awards that do not correctly apply the law appeals to my libertarianism, which generally holds that if parties do not want to be governed by a particular set of laws then they should be free to make enforceable contracts opting out of those laws and into whatever alternatives they choose. So instead of always wanting arbitration awards to correctly apply the law, I generally want arbitration awards to depart from the law if that is what the parties have agreed the arbitrator should do.

While this view may intrigue libertarians, it troubles some other people, especially when applied to arbitration arising out of *pre*-dispute arbitration agreements.²⁰ A *pre*-dispute arbitration agreement nearly always consists of an arbitration clause among many non-arbitration clauses in a contract. For example, a form contract prepared by

decide according to law but has mistaken the law. Then it is set aside because it is manifest that the result does not conform to the real judgment of the arbitrator[.]”); *Greenough v. Rolfe*, 4 N.H. 357, 365 (“As the referees were bound by the agreement of the parties to decide according to law, they must be presumed to have intended so to decide, and as they have mistaken the law of the case, their report is not what they intended it to be, and cannot be accepted.”).

¹⁹ See Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 603-04 (1934); see also STURGES, *supra* note 10, at 793-94 (stating the argument that a legally erroneous award should be vacated “has rarely been made effective to set aside any award, and, further, that the courts will not readily construe the terms of a submission agreement as requiring the arbitrators to decide according to law”); *White Star Mining Co. v. Hultberg*, 220 Ill. 578, 606 (1906) (stating “even where the articles of submission clearly and unqualifiedly require the decision of the arbitrators to be according to law or in conformity with the principles of the law, the language is not to be construed as a limitation upon the power of the arbitrators, but as merely directory”).

²⁰ See, e.g., David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723 (2012).

Seller’s lawyer for all of Seller’s sales of goods might include among its thirty clauses, stretching over five pages, a clause requiring Seller and Buyer to arbitrate, rather than litigate, any dispute arising out of or relating to the transaction. When Buyer signs the form or otherwise manifests assent to it, Buyer might not read the arbitration clause, let alone understand it and reflect on it, much less discuss it with counsel or negotiate it with Seller. In addition, a pre-dispute arbitration agreement is typically a broad agreement about how to resolve any dispute that may arise between the parties, so it is generally difficult—even for parties thinking about arbitration while forming the contract—to anticipate all the possible disputes that might arise and assess how a duty to arbitrate, rather than litigate, will affect each of them.

Under such contracting circumstances, some people may be leery of holding that Buyer’s arbitration agreement contracts out of otherwise applicable law. Under pre-dispute contracting circumstances like these, some people may believe that party autonomy (at least Buyer’s autonomy) is more likely furthered by careful judicial review of awards—to ensure they correctly apply the law—than by enforcing legally-erroneous awards. However, the contracting circumstances of this Seller-Buyer example are very different from the contracting circumstances from which pre-1920’s awards arose. As noted above, pre-1920’s awards arose out of post-dispute, not pre-dispute, arbitration agreements. Because pre-1920’s awards arose out of post-dispute agreements to arbitrate, courts of that era could enforce awards that did not correctly apply the law for the same reasons courts enforce settlement agreements that do not correctly apply the law.

3. *Post-Dispute Arbitration Agreements as a Type of Settlement Agreement*

“[C]ourts are generally happy to bless the parties’ settlement without inquiring about its terms.”²¹ In other words, courts enforce settlement agreements without asking whether their results match, or even remotely approximate, the results a court would have reached after litigation. This, I believe, is largely because the level of consent to settlement agreements tends to be high; and that is because settlement agreements are formed post-dispute. Compared with pre-dispute arbitration agreements, settlement agreements tend to be formed at a time when parties are more likely to be advised by a

²¹ WARE, *supra* note 8, at § 2.47 (citing *Mars Steel Corp. v. Cont’l Ill. Nat’l Bank & Trust Co.*, 834 F.2d 677, 681 (7th Cir. 1987) (“The fairness of a settlement of a legal dispute is like the adequacy of the consideration supporting a contractual promise: a matter best left to negotiation between the parties.”) *See generally* 15A C.J.S. COMPROMISE & SETTLEMENT § 33 (2014) (“As a general rule, a settlement agreement is considered valid and enforceable if it is entered into in good faith, and courts will not invalidate settlement agreements absent a strong showing that they violate good morals or the public interest because of error, bad faith, or fraud.”); *Russell v. U. S.*, 320 F.2d 920, 928 (Ct. Cl. 1963) (“Because it is not normally concerned with the soundness of a compromise, the court customarily accepts stipulated settlements calling for judgments against the United States, without any inquiry into the correctness of the legal principles or factual assumptions on which the compromise may be founded.”); *Trenton St. Ry. Co. v. Lawlor*, 71 A. 234, 236 (N.J. 1908) (The court will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made); *Baptist v. City of Kankakee*, 481 F.3d 485, 492 (7th Cir. 2007) (holding that plaintiffs received value in exchange for the settlement of their claim, so the Court will not inquire to the adequacy of the settlement terms).

lawyer. In addition, while a pre-dispute arbitration agreement is typically a broad agreement about how to resolve any dispute that may arise between the parties, a post-dispute agreement to settle is usually only an agreement about how to resolve one dispute and that one dispute already exists and is known to all the parties agreeing to settle it.²² For these reasons, parties to (post-dispute) settlement agreements are more likely than parties to pre-dispute arbitration agreements to appreciate the rights they lose by forming the agreement.

These contrasts between settlement agreements and pre-dispute arbitration agreements are also contrasts between post-dispute arbitration agreements and pre-dispute arbitration agreements. A post-dispute arbitration agreement is essentially a settlement agreement that leaves some of its important terms unspecified until the arbitrator specifies them.²³ For instance, an ordinary settlement agreement specifies terms such as the amount of money Defendant will pay Plaintiff to dismiss the claim, while a post-dispute arbitration agreement asks the arbitrator to specify this term in an award ordering Defendant to pay money to Plaintiff. One may think of a post-dispute arbitration agreement as a settlement agreement with large gaps in its terms; and the parties, by forming the agreement, delegate to the arbitrator their power to fill those gaps. Seen this way, post-dispute arbitration agreements and the awards they produce deserve the same judicial deference long afforded to ordinary settlement agreements, that is, settlements without large gaps.

Whether settling parties choose to leave large gaps, the filling of which they delegate to an arbitrator, seems not to be a big enough distinction to arouse courts' concerns, given the high levels of consent parties generally give to post-dispute agreements to settle or arbitrate. So it makes sense that pre-1920's courts readily

²² Compare Stephen J. Ware, *Consumer Arbitration As Exceptional Consumer Law (with A Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 198 (1998) (noting post-dispute arbitration agreements are about a particular dispute that has already arisen between parties); Elizabeth Varner, *Arbitrating Cultural Property Disputes*, 13 CARDOZO J. CONFLICT RESOL. 477, 491 (2012) ("The post-dispute arbitration agreement can be more tailored to the dispute than a pre-dispute arbitration agreement as the parties know the specific issues in post-dispute arbitration agreements"), with David S. Schwartz, *If You Love Arbitration, Set It Free: How "Mandatory" Undermines "Arbitration"*, 8 NEV. L.J. 400, 402 (2007) (Stating "broad form" pre-dispute arbitration agreements require 'all disputes' to be submitted to arbitration); Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997) (Noting that courts liberally compel arbitration of all nature of claims within the scope of a pre-dispute arbitration agreement); Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 764 (2001) (noting that broad pre-dispute arbitration agreements are more common after the passage of the FAA).

²³ Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 288 (2000) ("Because of the similarity in economic terms between post-dispute arbitration agreements and settlement agreements, they should be considered on the same terms in policy discussions. Arguments against post-dispute arbitration agreements are economically indistinguishable from arguments against settlement."); Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 CONN. L. REV. 521, 561 (1994) ("A post-dispute arbitration agreement is tantamount to an agreement to allow a neutral to play a role in settling the dispute."); C. Edward Fletcher, III, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 422 (1987) ("Agreements to arbitrate existing disputes are closely akin to settlement agreements").

enforced arbitration awards arising out of unrestricted submissions and thus allowed parties to depart from correct applications of the law by post-dispute agreements to arbitrate, much as courts have always allowed parties to depart from correct applications of the law by post-dispute agreements to settle.

B. 1920's-1980's: Enforceable Pre-Dispute Arbitration Agreements

1. Pre-Dispute Privatization, Despite Lower Levels of Consent

As discussed above, pre-1920's arbitration awards only occurred when both parties agreed, *post-dispute*, to arbitrate.²⁴ In contrast, the Federal Arbitration Act ("FAA"), enacted in 1925, required courts to enforce *pre-dispute* arbitration agreements with the remedy of specific performance, that is, court orders compelling parties to arbitrate, rather than litigate, their dispute.²⁵ The impact of this change was initially limited because the FAA was for many years only applied in federal court and very few states had law similarly enforcing pre-dispute arbitration agreements.²⁶ However, in the decades following 1925, nearly every state changed its arbitration law to follow the FAA's basic rule of specifically enforcing pre-dispute arbitration agreements.²⁷ A big part of this change among the states was the Uniform Arbitration Act of 1955.²⁸ Two years later, the Supreme Court case of *Textile Workers Union v. Lincoln Mills*²⁹ held that arbitration clauses in collective bargaining agreements are also specifically enforceable. *Lincoln Mills* rested its holding on the Labor Management Relations Act of 1947, rather than FAA, which was not cited in a Supreme Court labor arbitration case until 1987.³⁰ In sum, the three major bodies of arbitration law in the United States (the FAA, state arbitration law, and labor arbitration law) all shifted during the 1920's-1980's period to enforcing pre-dispute arbitration agreements with the remedy of specific performance.

In doing so, these bodies of arbitration law broke sharply with the past. No longer were arbitration awards just arbitrators exercising gap-filling powers delegated to them by parties' post-dispute settlement agreements. Under the FAA and its state and labor

²⁴ With the exception of New York and New Jersey which slightly preceded the FAA in enforcing pre-dispute agreements to arbitrate. See MACNEIL, *supra* note 9, at 34-47.

²⁵ 9 U.S.C. §§ 2-4; see, e.g., WARE, *supra* note 8, at §2.4.

²⁶ WARE, *supra* note 8, §§ 2.5-2.8.

²⁷ *Id.*

²⁸ WARE, *supra* note 8, § 2.5(a).

²⁹ *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

³⁰ See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) ("The Arbitration Act does not apply to 'contracts of employment of ... workers engaged in foreign or interstate commerce,' 9 U.S.C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases, especially in the wake of [*Lincoln Mills*].").

parallels, arbitrators were increasingly resolving disputes that one of the parties had always, and especially post-dispute, wanted resolved in court instead of arbitration.

An example might arise out of the aforementioned form contract prepared by Seller's lawyer for all Seller's sales of goods. Among the form's thirty clauses stretching over five pages is a clause requiring Seller and Buyer to arbitrate, rather than litigate, any dispute arising out of or relating to the transaction. When Buyer signs the form or otherwise manifests assent to it, Buyer might not read the arbitration clause, let alone understand it and reflect on it, much less discuss it with counsel or negotiate it with Seller. Had Buyer been well-informed about arbitration and been given the choice whether to form the exact same contract without an arbitration clause, Buyer might well have chosen the no-arbitration option, rather than manifest assent to arbitration along with the other twenty nine clauses on Seller's form.

If Buyer pays for the goods and then determines the goods are defective, Buyer might sue Seller for breach of warranty rather than pursue the warranty claim in arbitration, (perhaps because Buyer's lawyer believes Buyer will win more money in litigation than arbitration). If Seller moves to stay or dismiss Buyer's suit, a court applying the FAA or similar state statute will grant that motion and thus compel Buyer to bring its claim, if at all, in arbitration.³¹ The arbitrator might rule against Buyer even though a correct application of warranty law would result in an award for Buyer. Buyer may then ask a court to vacate the legally-erroneous award on the ground that the arbitrator did not correctly apply warranty law.

A court applying the FAA or similar state statute is very likely to confirm and enforce this award without much inquiry into whether the arbitrator correctly applied warranty law or, as Buyer argues, issued a legally-erroneous award. Countless courts from the 1920's to the 1980's continued the pre-FAA practice of confirming arbitration awards without determining if the awards correctly applied the law. Although a few cases during this time period vacated legally-erroneous awards,³² several of these cases may be read as finding that the awards resolved issues not submitted to the arbitrators,³³ or as cases involving restricted submissions.³⁴ Generally, post-1920's courts (like pre-

³¹ WARE, *supra* note 8, § 2.4(b).

³² Detroit Auto. Inter-Ins. Exch. v. Gavin, 331 N.W.2d 418, 435 (Mich. 1982) (arbitrators "exceed their powers" when they commit "errors of law so substantial that, but for such errors, the awards must have been substantially different."); *id.* at 418 ("a reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record.").

³³ Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1133 (3d Cir. 1972) ("Whatever [the agreement's grant of arbitral] authority may be, it is clear to us that it does not include the authority to award a six million dollar cash bond to cover a liability which contrary to the requirements of the applicable breach of warranty clause, has not yet been (and may not be) 'incurred or suffered,' in a situation where the parties did not provide for such security in their agreement, although they might have done so."); J. P. Greathouse Steel Erectors, Inc. v. Blount Bros. Const. Co., 374 F.2d 324, 325 (D.C. Cir. 1967) ("As we understand the subcontract, its arbitration clause covers only questions of fact. . . . If the unexplained award of the arbitrators had any rational basis, they must have decided questions of law. They thereby exceeded their authority."); Sammi Line Co., Ltd. v. Altamar Navegacion S.A., 605 F. Supp. 72 (S.D.N.Y. 1985) (vacating award of attorneys' fees).

1920's courts) stated vacatur rules that turned on whether a submission to arbitration was restricted or unrestricted. The usual rule from the 1920's to the 1980's continued to be that "unless restricted by the agreement of submission, arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside for mistake in either."³⁵

³⁴ "Sometimes the parties either stipulate that the arbitrator should decide the matter according to a specific standard, or provide that the law of the jurisdiction shall govern. The courts generally-- even in those jurisdictions which otherwise strictly limit review on the merits--are quick to upset an award which does not conform to the stipulation." Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681, 688 (1950).

³⁵ The arbitration awards in all the following cases arose out of pre-dispute agreements to arbitrate. *Pierce Steel Pile Corp. v. Flannery*, 179 A. 558, 561 (Pa. 1935) ("The general rule undoubtedly is that, unless restricted by the agreement of submission, arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside for mistake in either."); *Shirley Silk Co. v. Am. Silk Mills*, 257 A.D. 375, 377 (N.Y. App. Div. 1939) ("Where the merits of a controversy are referred to an arbitrator selected by the parties, his determination, either as to the law or the facts, is final and conclusive; and a court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established, or there is some provision in the agreement of submission authorizing it."); *Mut. Ben. Health & Acc. Ass'n v. United Cas. Co.*, 142 F.2d 390, 393 (1st Cir. 1944) ("It is well established in Massachusetts that an arbitration award may not be set aside either for an error of fact or law, so long as the arbitrator acted in good faith and did not exceed his authority under the terms of the submission. If the parties submit to an arbitrator for final decision a dispute the settlement of which requires the construction of a contract or the determination of some other question of law, his decision is binding notwithstanding that the award may have been based upon an error of law." (citations omitted)); *Campe Corp. v. Pac. Mills*, 275 A.D. 634, 635 (N.Y. App. Div. 1949) ("In this record no 'perverse misconstruction or positive misconduct' is established plainly or otherwise; nor was there in the submission any express provision of reservation or restriction. No claim of fraud or corruption is made; nor does it appear that in making the award the arbitrators exceeded their powers by going outside of or acting contrary to the contract or the submission. Accordingly, the award is conclusive and may not be reviewed or set aside for alleged errors of law and fact."); *United Fuel Gas Co. v. Columbian Fuel Corp.*, 165 F.2d 746, 751 (4th Cir. 1948) ("Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. 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 of equity will not set it aside for error, either in law or fact." (quoting *Burchell v. Marsh*, 58 U.S. 344,349 (1854))); *Griffith Co. v. San Diego Coll. for Women*, 289 P.2d 476, 484 (Cal. 1955) ("Even if the arbitrator decided this point incorrectly, he did decide it. . . . Right or wrong the parties have contracted that such a decision should be conclusive. At most, it is an error of law, not reviewable by the courts."); *Gaddis Min. Co. v. Cont'l Materials Corp.*, 196 F.Supp. 860, 864 (D. Wyo. 1961) ("In Colorado, an arbitration award is not subject to review in the courts merely because one of the parties is dissatisfied with it, or solely for mistake in either the law or fact....The arbitrators are the final judges of the law and fact, and the court will not substitute its judgment for that of the arbitrators."); *Mars Constructors, Inc. v. Tropical Enters., Ltd.*, 460 P.2d 317, 319 (Haw. 1969) ("assuming that the arbitrators here erred in construing the construction contract, a mistake in the application of law and in their findings of fact, this mistake is not one of the three grounds specified [in the state statute for vacatur of the award], and the circuit court correctly ruled that it was powerless to modify or correct the award."); *Aerojet-Gen. Corp. v. Am. Arb. Ass'n*, 478 F.2d 248, 252 (9th Cir. 1973) ("The 'correctness' of the arbitrator's rulings is not a proper concern of the reviewing court. . . .An arbitration award must be upheld unless it be shown that there was partiality on the part of an arbitrator, or that the arbitrator exceeded his authority, or that the award was rendered in 'manifest disregard of the law.'" (citations omitted)); *Gallagher v. Educator & Exec. Insurers, Inc.*, 381 A.2d 986 (Pa. Super 1977) ("In arbitration governed by common-law principles, arbitrators are final judges of both fact and law and award is not subject to judicial review for mistakes of either."); *MCT Shipping Corp. v. Sabet*, 497 F. Supp. 1078, 1082-83 (S.D.N.Y. 1980) ("Where an arbitration award has a basis which can be rationally inferred, the award

In other words, post-1920's courts have generally been quite willing to enforce legally-erroneous awards arising out of pre-dispute agreements to arbitrate. This willingness effectively treats the pre-dispute agreement as the parties' contracting out of otherwise-applicable law (warranty law in Buyer's case,) and substituting in its place whatever law, (including trade custom or the arbitrator's own sense of equity), the arbitrator uses.³⁶ This can be called "pre-dispute privatization"—opting out of otherwise-applicable law through enforceable pre-dispute agreements to comply with the arbitrator's decision regardless of whether it correctly applies that law.

This pre-dispute privatization cannot be justified on the ground that justified pre-FAA courts enforcing legally-erroneous awards. As discussed above, pre-FAA courts could enforce legally-erroneous awards on the ground that doing so was merely enforcing post-dispute settlement agreements that delegated to arbitrators the task of filling gaps in their settlement terms; and courts have always enforced settlement agreements without asking whether their results match, or even remotely approximate, the results a court would have reached after litigation.³⁷

This eagerness to enforce settlements, as noted above, seems due to the high level of consent generally attendant to agreements formed post-dispute, because parties to post-dispute agreements tend to be advised by counsel and focused on a specific already-arisen dispute. In contrast, Buyer in this 1920's to 1980's example did not agree to arbitrate post-dispute. Buyer agreed to arbitrate pre-dispute by manifesting assent to a form contract and probably did so without the benefit of counsel and without much

must be upheld unless a statutory ground for vacating the award under 9 U.S.C. § 10 (1970) exists. . . . Absent a showing of 'manifest disregard of the law,' an award must be upheld even if the arbitrator misinterpreted the law or the facts." (citations omitted)); *Dundas Shipping & Trading Co., Ltd. v. Stravelakis Bros., Ltd.*, 508 F. Supp. 1000, 1003-04 (S.D.N.Y. 1981) ("It is not the function of a district court to review the record of an arbitration proceeding for mere errors of law or fact." (citations omitted)); *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301, 306 (2d Cir. 1982) ("An arbitrator's paramount responsibility is to reach an equitable result, and the courts will not assume the role of overseers to mold the award to conform to their sense of justice. Thus, an arbitrator's award will not be vacated for errors of law and fact committed by the arbitrator." (quoting *Sprinzen v. Nomberg*, 389 N.E.2d 456, 458 (N.Y. 1979))).

³⁶ Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 711-12 (1999).

While an arbitration agreement contracts out of all the law that would have been applied by a court, that law may still be applied by the arbitrator. The arbitrator may even apply that law more aggressively than a court would have. Contracting out of law through arbitration agreements does not necessarily mean that such law will be under-enforced in the sense that plaintiffs "do worse" in arbitration than they would have done in court. In some cases, arbitrators reach a more "pro-plaintiff" result than a court would have reached; in others, arbitrators reach a more "pro-defendant" result than a court would have reached. We cannot know which of these deviations occurs more often.

Id. at 711-12.

³⁷ *Id.* at 711.

attention, if any, to the arbitration clause.³⁸ In short, the high levels of consent typically justifying post-dispute privatization do not justify pre-dispute privatization, which arises out of agreements typically formed with much lower levels of consent.³⁹

Nevertheless, courts applying the FAA and similar state statutes are right to enforce pre-dispute privatization—that is, right to treat Buyer’s agreement to arbitrate as contracting out of warranty law and substituting instead whatever law, custom, or sense of equity, the arbitrator chooses. That is because the FAA’s list of grounds for vacatur does not include error of law by the arbitrator.⁴⁰ The FAA permits courts to vacate:

- (1) Where the award was procured by corruption, fraud, or undue means;
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁴¹

These grounds for vacatur do not include arbitral error of law so courts applying the FAA and similar state statutes are right, with exceptions noted below,⁴² to confirm and enforce awards without considering whether the awards are legally-correct or legally-erroneous. For example, a court applying the FAA or similar state statute would be right to treat Buyer’s agreement to arbitrate (unless that agreement says otherwise⁴³) as contracting out of warranty law and substituting instead whatever law, custom, or sense of equity, the arbitrator chooses.

³⁸ See *supra* text accompanying notes 20-21.

³⁹ This is a generalization about pre-dispute arbitration agreements. In some particular pre-dispute agreements, the arbitration clause may be the subject of negotiation between the parties and a high-level of consent.

⁴⁰ See generally Gaitis, *supra* note 15, at 5 (“under ‘unrestricted’ arbitration submissions, arbitrators should be deemed to be authorized to intentionally disregard applicable law should they so choose”).

⁴¹ 9 U.S.C. § 10(a).

⁴² See discussion *infra* Part IV.D.1-2.

⁴³ See discussion *infra* Part IV.D.1.

2. Claims Arising out of Default Rules Contrasted with Claims Arising out of Mandatory Rules of Law

The previous subsection concluded that courts applying the FAA and similar state statutes are right to treat Buyer's agreement to arbitrate as contracting out of warranty law and substituting instead whatever law, custom, or sense of equity, the arbitrator chooses. However, this conclusion fits comfortably into our broader legal system only insofar as the relevant warranty law consists of *default* rules.⁴⁴ A default rule is one that governs unless the parties contract out of it. In contrast, a *mandatory* rule is one that governs despite a contract term to the contrary, that is, a rule that cannot be avoided by contract.⁴⁵ Enforcing arbitration agreements to effectuate pre-dispute privatization of otherwise-mandatory law is troubling because it enables parties using pre-dispute arbitration agreements to avoid law that non-arbitration law says is not avoidable by pre-

⁴⁴ I proposed this distinction between claims arising out of mandatory and default law in a 1999 law review article, Ware, *supra* note 36, which focused on domestic arbitration. In the same year, Phillip McConnaughay published an excellent article which, although focused on international arbitration, made similar arguments based on this distinction. See Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 514–15 (1999) ("Achieving the compliance objectives of mandatory U.S. law – at least to the extent those objectives remain achievable in a private arbitral context – would require courts to refuse recognition or enforcement of a mandatory law award unless the award was both (1) rendered pursuant to arbitral procedures and rules of discovery and evidence closely approximating those that would have applied had the mandatory law claim been resolved in U.S. court, and (2) demonstrably correct.")

Others, often writing on international arbitration, have also used the distinction between claims arising out of mandatory and default law in recommending different approaches to judicial review of arbitration awards. See Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1281 (2000) ("existing rules governing judicial review of arbitral decisions are not only inadequate to ensure that mandatory rules are applied, but they actually encourage arbitrators to ignore such rules"; recommending that the losing party in an arbitration be able to sue the arbitrator on the ground that a mandatory rule was ignored); Eric A. Posner, *Arbitration and Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 VA. J. INT'L L. 647, 651 (1999) ("The dilemma can be stated succinctly. If domestic courts enforce arbitration awards, rather than subjecting them to de novo review, arbitrators will ignore local mandatory rules. However, if courts subject arbitration awards to de novo review in order to ensure that mandatory rules are respected, the benefits of arbitration – predictability, neutrality, and minimization of litigation cost – are lost." "The main contribution of the paper is a proof that the optimal strategy of courts, under plausible conditions, is to engage in random de novo review of arbitration decisions"). Catherine Rogers says "anxiety over arbitrators applying mandatory law has become something of a mania, often producing extreme proposals." Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 53 n.282 (2003) (citing Guzman, *supra* note 44, at 1316).

On the more general topic of mandatory rules in international arbitration, see GUIDETTA CORDERO MOSS, *INTERNATIONAL COMMERCIAL ARBITRATION: PARTY AUTONOMY AND MANDATORY RULES* (1999).

⁴⁵ One can identify which laws are default and which are mandatory by examining the sorts of contract terms that are, and are not, enforceable. For example, the legal rule that the place for delivery in a sale of goods is the seller's place of business is a default rule because parties can make an enforceable contract requiring delivery at some other location. U.C.C. § 2-308 (2012). In contrast, the legal rule giving a consumer the right that goods purchased not be "in a defective condition unreasonably dangerous to the user" is mandatory because it applies no matter what the contract terms say. Restatement (Second) of Torts § 402A, comment m. (1975). See generally Richard C. Ausness, "Waive" Goodbye to Tort Liability: A Proposal to Remove Paternalism from Product Sales Transactions, 37 SAN DIEGO L. REV. 293 (2000).

dispute agreement.⁴⁶ This is troubling even to my libertarianism which, as noted above, generally holds that if parties do not want to be governed by a particular set of laws then they should be free to make enforceable contracts opting out of those laws and into whatever alternatives they choose. “I believe candor and logical consistency require those of us who oppose mandatory law to seek to repeal it outright, not to use arbitration to make an end run around it.”⁴⁷

While enforcing arbitration agreements to effectuate pre-dispute privatization of otherwise-mandatory law is troubling because it enables parties using pre-dispute arbitration agreements to avoid law that non-arbitration law says is not avoidable by pre-dispute agreement, that is not true of pre-dispute agreements to arbitrate claims arising under default rules of law. Enforcing arbitration agreements to effectuate pre-dispute privatization of default law is entirely consistent with the pre-dispute privatization long allowed by non-arbitration law because the arbitrator is merely resolving questions that the parties could have resolved when they formed the (pre-dispute) contract. In resolving claims under default law, the arbitrator is resolving questions that arise because the parties chose to draft their contract in broad, general terms, rather than detailed, specific terms.

For example, a warranty in a sale of wood might say only that the goods are “hardwood” and a dispute may require the arbitrator to decide whether particular pieces of oak qualify as sufficiently hard. The parties could have resolved this question themselves by, for instance, requiring the wood meet a minimum score on the Janka hardness test.⁴⁸ Either type of contract effectuates pre-dispute privatization of warranty law. The latter contract (e.g., “Janka score over 10,000 Newtons”) involves specific lawmaking by the parties, while the former contract involves general lawmaking by the parties (“hardwood”) and then specific lawmaking by the parties’ agent, the arbitrator.⁴⁹ So long as enforcement of pre-dispute arbitration agreements and legally-erroneous arbitration awards arising out of them was confined to default law, then pre-dispute arbitration agreements were privatizing within the same bounds that other more-specific contracts privatize.

From the 1920’s until the 1980’s, enforcement of pre-dispute arbitration agreements and legally-erroneous awards arising out of them was limited almost

⁴⁶ This point has both empirical and jurisprudential dimensions. *See infra* note 91.

⁴⁷ “As an aside, I feel compelled to add that I oppose much of the mandatory law enacted since the FAA so I am sort of pleased that arbitration now allows parties to opt out such law. But I believe candor and logical consistency require those of us who oppose mandatory law to seek to repeal it outright, not to use arbitration to make an end run around it.” Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, in EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 117 n.93 (2006).

⁴⁸ Or even to specify in the agreement “the amount of pounds-force (lbf) or newtons (N) required to imbed a .444” (11.28 mm) diameter steel ball into the wood to half the ball’s diameter.” Eric Meier, *Top Ten Hardest Woods*, WOOD DATABASE, <http://www.wood-database.com/wood-articles/top-ten-hardest-woods/>.

⁴⁹ As Judge Easterbrook wrote for the Seventh Circuit, “In the main, an arbitrator acts as the parties’ agent and as their delegate may do anything the parties may do directly.” *George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 580 (7th Cir. 2001).

completely to claims arising under default rules,⁵⁰ particularly breach-of-contract claims—in which I include breach-of-warranty claims. As late as 1985, a United States Supreme Court Justice (Stevens) could refer to “the undisputed historical fact that arbitration has functioned almost entirely in either the area of labor disputes or in ‘ordinary disputes between merchants as to questions of fact.’”⁵¹ Arbitrators in these two contexts hear almost nothing but breach-of-contract claims. In the labor context, a union or employee asserts breach of a collective bargaining agreement.⁵² In the commercial context, merchants allege breach of contracts for the sale of goods and raise “questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like.”⁵³ Buyer’s warranty claim in the example above is perhaps the classic example of disputes arbitrated before the 1980’s: a business-to-business sale of goods in which the law resolving the dispute matters little as precedent for other parties because each dispute turns on narrow, fact-specific questions about whether the particular goods Buyer received conformed to the particular warranties Seller made.⁵⁴

By excluding mandatory law claims from enforcement of pre-dispute arbitration agreements, 1920’s – 1980’s arbitration law kept the privatizing effects of pre-dispute arbitration agreements within the law’s bounds restricting the extent to which other pre-dispute contracts could privatize. Under this coherent view of arbitration law’s place in our broader legal system, a court enforcing an arbitration award is a court enforcing a contract. The parties agreed to comply with the arbitrator’s decision and if a party refuses to do so (even before the court confirms the award) then that party is in breach of contract. Just as courts routinely enforce most other sorts of contracts without assessing the wisdom of the contract’s terms, so courts routinely enforce arbitration awards without assessing the wisdom of the award’s terms.

However, not all contracts are enforceable and, similarly, not all arbitration awards are enforceable. Just as contract law has long recognized defenses to contract enforcement, arbitration law has long recognized defenses to the enforcement of an arbitration award. Contract law’s defenses include fraud, mistake, duress, undue influence, unconscionability, and illegality. These generally resemble the FAA’s grounds for vacating an arbitration award. FAA § 10(a)(1)’s “corruption, fraud, or undue means” resembles contract law’s defenses of illegality, fraud, undue influence and duress. FAA § 10(a)(2)’s “partiality or corruption” and § 10(a)(3)’s “misconduct” or “misbehavior” resemble contract law’s defenses of unconscionability, illegality and undue influence.

⁵⁰ Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards By State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 563 (2009) (“Over the centuries, the scope of arbitrable claims was limited to those over which the parties had contractual power, which includes statutory provisions subject to waiver (default rules), but not mandatory rules.”).

⁵¹ See *Mitsubishi Motors Corp.*, 473 U.S. at 646 n.11 (Stevens, J., dissenting) (quotation omitted).

⁵² See *WARE*, *supra* note 8, at § 2.53(b).

⁵³ See *Mitsubishi Motors Corp.*, 473 U.S. at 646 n.11 (Stevens, J., dissenting) (quotation omitted).

⁵⁴ Other transactions involve other goods and warranties vary from case to case as parties in business-to-business sales generally have the freedom to choose what warranties, if any, to put in their contract terms.

Subsection 4's "exceeded ... powers" or "imperfectly executed them" resembles contract law's defenses of illegality and mistake.

In sum, the 1920's-1980s distinction between pre-dispute agreements to arbitrate claims arising under default law (enforceable) and mandatory law (not enforceable) fit the FAA's vacatur provisions which generally aim to ensure that arbitral awards conform to the arbitration agreement, as opposed to ensuring that they conform to law "external" to that agreement. As Judge Richard Posner later wrote for the Seventh Circuit:

It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, . . . conduct to which the parties did not consent when they included an arbitration clause in their contract.⁵⁵

In other words, the FAA does not make "error of law" a ground for vacatur because it was written for a world in which arbitrators are not necessarily supposed to apply the law. The FAA's grounds for vacatur were apparently written for a world in which arbitrators are supposed to apply the contract. In short, the dominant understanding of arbitrators from the 1920's to the 1980's seems to be that they were bound by contract, rather than by law "external" to the contract.

3. Similarities and Differences between Commercial Arbitration and Labor Arbitration

As the previous section explained, the fact that from the 1920's until the 1980's enforcement of pre-dispute arbitration agreements was limited almost completely to breach-of-contract claims helped justify courts of the era in confirming and enforcing arbitration awards without asking whether the award correctly applied the law—that is, helped justify enforcing legally-erroneous awards. Courts' justification for enforcing legally-erroneous awards was, however, more explicit and insightful in labor arbitration law than in the commercial arbitration law of the FAA and its state counterparts. In justifying their enforcement of legally-erroneous awards, commercial cases tended to cite only the efficiency justifications of saving time and money. For example, the Pennsylvania Supreme Court justified confirming an award without determining its legal correctness by noting that "a contrary holding would mean that arbitration proceedings, instead of being a quick and easy mode of obtaining justice, would be merely an unnecessary step in the course of litigation, causing delay and expense, but settling nothing finally."⁵⁶

⁵⁵ *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir. 2006).

⁵⁶ *Pierce Steel Pile Corp. v. Flannery*, 179 A. 558, 561 (Pa. 1935). A later Supreme Court commercial arbitration case also emphasized saving time and money as the benefits of confirming legally-erroneous

While it is true that arbitration's ability to save time and money is furthered by courts confirming legally-erroneous awards,⁵⁷ exclusive focus on these cost-savings omits the deeper justification for enforcing legally-erroneous awards. That deeper justification is the libertarian argument mentioned above—parties should be free to make enforceable contracts opting out of governmentally-enacted laws and into law created by their own private legal systems.⁵⁸ As I wrote many years ago, arbitration

allows parties to privatize law. This has important benefits. Consider, for example, a hypothetical trade association—the Widget Dealers Association. The Widget Dealers Association could require, as a condition of membership in the Association, that all members agree to arbitrate all their disputes with each other. The arbitrators would be widget dealers, themselves. These arbitrators, unlike judges or jurors, would know and respect the norms and customs of the widget industry. The arbitrators would be inclined to decide cases in accord with these norms and customs and could even be contractually required to do so. Alternatively the Widget Dealers Association might choose to codify some of its norms and customs by creating written rules that would amount to

awards. *See* Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 588 (2008) (reading the FAA “as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process and bring arbitration theory to grief in post-arbitration process.”).

⁵⁷ Confirming legally-erroneous awards increases the finality of the arbitrator’s decision and thus reduces costs to the parties and to the court system. *See* Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 592 (2007) (“[L]imited appellate review encourages finality and discourages parties from pursuing dubious, costly appeals.”); Jackson Williams & Morgan Lynn, *Public Citizen Releases the Costs of Arbitration*, 9 PIABA B.J. 49, 52 (2002) (“Public Citizen agrees that proponents of arbitration are undoubtedly correct that the limited, narrow grounds upon which an arbitration award can be appealed will reduce litigation costs. Parties will avoid paying court reporters to record or transcribe hearings or appellate attorneys to write briefs.”). In contrast, if courts reviewed awards for errors of law, more parties disappointed with their arbitration awards could be expected to challenge those awards in court. *See* Abbott v. Mulligan, 647 F.Supp.2d 1286,1291-92 (D. Utah 2009) (“If a misinterpretation or misapplication of the law was a sufficient basis upon which a district court could overturn an arbitration panel’s ruling, district courts would become routine avenues for appeal every time a plausible argument could be made that the arbitration panel got the law wrong. An appeal to the district court would be virtually guaranteed if one of the parties felt they had grounds to argue that the arbitrators got the law *really* wrong. Such review would defeat the rationale and purposes behind the FAA.”)

In addition to the costs of those challenges themselves, attempts to vacate awards on that basis might also make the underlying arbitration process more expensive. Currently, arbitrators in many cases do not write reasoned opinions explaining their decisions, nor is there typically a transcript or other record of the arbitration hearing. These cost-saving aspects of arbitration might have to change if courts vacated awards lacking a basis on which the court could assure itself that the arbitrator correctly applied the law.

⁵⁸ *See supra* notes 19-20 and accompanying text

privately-created statutes. The arbitrators could then be contractually required to decide cases in accord with these written rules.

Not only can agreements require arbitrators to apply rules, agreements can require arbitrators to write reasoned opinions. As the Widget Dealers Association arbitrators build a supply of precedents, they can be contractually required to follow precedents in future cases. So the privately-created law consists of not only unwritten norms and/or written rules, but also decisional law. In short, arbitration can produce a sophisticated, comprehensive legal system. Even better, it can produce many such systems. The law—unwritten norms, written rules and decisional law—of the Widget Dealers Association may differ from the law of the Gadget Dealers Association. Both may differ from the laws of the Sierra Club, the Alabama Baptist Convention, the American Association of Retired People, the Rotary Club, or the Saab Owners Association. Thus emerges privatized law in the fullest sense. There is diversity because what is best for some is not best for others. But there is also a process of experimentation in which lawmakers learn from each other and copy laws which seem better. There may even be open competition among different lawmakers to earn money by producing better laws. A market for law develops. This privatized system produces better law than does a system in which government monopolizes lawmaking. The principles animating privatization around the world apply to lawmaking just as they apply to coal mining or mail delivery.

This vision, or even anything approximating it, is not to be found in commercial arbitration cases. Leading commercial arbitration cases do not acknowledge, let alone bless, arbitration's central role in privately-created law as a justification for courts enforcing arbitration awards without determining if the arbitrator correctly applied governmentally-created law.

In contrast, the Supreme Court's labor arbitration cases come close to doing just that. The Supreme Court's labor cases expressly cite arbitration's central role in private legal systems as the main justification for courts enforcing arbitration awards without determining if the arbitrator correctly applied the law. This is especially prominent in the Supreme Court's 1960 "Steelworkers Trilogy." As the Supreme Court said in one of the *Steelworkers* cases,

A collective bargaining agreement is an effort to erect a system of industrial self government.... Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators ... [The arbitration] grievance

machinery under a collective bargaining agreement is at the very heart of the system of industrial self government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.⁵⁹

On this view, contract terms are privately-created law and the lawmakers (the parties) have delegated to their agent (the arbitrator) the power to interpret and apply their law, the contract's terms.⁶⁰ Adopting this view, Supreme Court labor cases repeatedly emphasized that courts should not substitute their own judgment for that of the arbitrators on the legal question in most labor arbitration, which is contract interpretation. "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."⁶¹ "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."⁶²

In sum, the Supreme Court's *Steelworkers* cases extolled the virtues of pre-dispute privatization through arbitration. These cases celebrated parties' ability, through arbitration, to create a "system of private law," a "self-government," if courts enforce both pre-dispute arbitration agreements and resulting awards even if the awards are legally-erroneous. This celebration of pre-dispute privatization-by-arbitration, it should be emphasized, occurred in the context of claims arising under default law, contract interpretation.

4. No Pre-Dispute-Privatization of Claims Arising Under Mandatory Law

In contrast, the Supreme Court of the 1920's to 1980's era did not support pre-dispute privatization of claims arising under mandatory law. While commercial and

⁵⁹ *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580-81 (1960).

⁶⁰ As a later Supreme Court case said, "we must treat the arbitrator's award as if it represented an agreement between Eastern and the union as to the proper meaning of the contract's words 'just cause.' For present purposes, the award is not distinguishable from the contractual agreement." *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000). *See also* *George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 580 (7th Cir. 2001) ("In the main, an arbitrator acts as the parties' agent and as their delegate may do anything the parties may do directly.").

⁶¹ *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

⁶² *Enterprise Wheel & Car Corp.*, 363 U.S. at 596.

labor disputes are largely governed by default rules that is not true of other areas of law.⁶³ For example, statutes designed to protect consumers, investors, and employees often consist of rules parties cannot alter or avoid by pre-dispute contract.⁶⁴ Indeed, an important purpose of these statutes is often to protect consumers, investors, and employees from contract terms unfavorable to them.⁶⁵ Before the 1980's, pre-dispute agreements to arbitrate such mandatory law claims were unenforceable. In other words, such claims were not *arbitrable*. Examples of non-arbitrable claims included securities,⁶⁶ employment discrimination,⁶⁷ antitrust,⁶⁸ RICO,⁶⁹ patent,⁷⁰ copyright,⁷¹ “non-core” bankruptcy proceedings,⁷² and ERISA.⁷³

⁶³ See Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449 (2005).

Finally, in thinking about judicial review [of arbitration] on matters of “law” we must of course distinguish between mere rules of construction --which come into play in the absence of a contrary agreement -- and mandatory rules. After all, most “rules” of contract or commercial law are nothing more than “gap-fillers,” Supplying a term where the parties have not expressly supplied one themselves. These “general rules of law” “hold” only when there is no “common understanding” that is directly furnished by the parties themselves – or which can be found in the background, of usage and prior conduct, against which they have dealt with each other. Where, however, the parties have bargained for dispute resolution through arbitration, the particular method they have chosen to fill any gaps – to determine their “common understanding” – is the arbitrator’s interpretation. His construction is their bargain. In contrast, legal “rules” in other areas may reflect stronger and overriding governmental or societal interests. In such cases, obviously, some greater degree of arbitral deference should be expected.

Id. at 521.

⁶⁴ Horton, *supra* note 20, at 747 (citing Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 207-09 (1998) (collecting examples)) (“consumer, employment, and landlord-tenant law is littered with non-disclaimable rights and duties, from usury laws to warranties of habitability.”).

⁶⁵ David S. Schwartz, *Claim Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 252 (2012) (“these statutes all arose to regulate the overreaching party in a one-sided transaction [so it would be] perverse to allow that regulated party to choose dispute resolution rules that it deemed advantageous”).

⁶⁶ See *Wilko v. Swan*, 346 U.S. 427, 438 (1953).

⁶⁷ *Utlely v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989) (holding Title VII claims inarbitrable); *Nicholson v. CPC Int’l Inc.*, 877 F.2d 221, 231 (3rd Cir. 1989) (holding ADEA claims inarbitrable). In addition, a Supreme Court labor arbitration case of this era, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), did not even support post-dispute privatization of a mandatory law claim. In *Gardner-Denver* an employee brought his Title VII race discrimination in arbitration and the arbitrator ruled against the employee. The Supreme Court denied enforcement to the award by allowing the employee to bring the same Title VII claim in court. *Gardner-Denver* was based on the rationale that an employee’s rights under Title VII are not “susceptible of prospective waiver” and that an arbitration agreement is such a waiver. *Id.* at 52. In other words, Title VII is mandatory law and *Gardner-Denver* refused to enforce a pre-dispute agreement to contract around mandatory law.

The 1953 Supreme Court case holding securities claims inarbitrable, *Wilko v. Swan*, specifically connected this holding to the challenges facing a party seeking vacatur of an award that did not correctly apply the Securities Act.

While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would ‘constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act,’ that failure would need to be made clearly to appear. In unrestricted submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act [FAA] contains no provision for judicial determination of legal issues such as is found in the English law. As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended [the Securities Act’s non-waiver provision] to apply [and bar] waiver of judicial trial and review.⁷⁴

While various courts and scholars have read *Wilko* differently,⁷⁵ the Court clearly stated its view that substituting arbitration for litigation requires parties “to accept less certainty

⁶⁸ See, e.g., *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968) (declaring antitrust claims “inappropriate for arbitration”); *but see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 640 (1985) (holding an agreement to arbitrate a claim arising under the Sherman Antitrust Act enforceable).

⁶⁹ See *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 298-300 (1st Cir. 1986). “RICO” is an abbreviation for “Racketeer Influenced and Corrupt Organizations.” 18 U.S.C. §§ 1961-68 (2006).

⁷⁰ See *Beckman Instruments, Inc. v. Technical Dev. Corp.*, 433 F.2d 55, 63 (7th Cir. 1970).

⁷¹ See *Kamakazi Music Corp. v. Robbins Music Corp.*, 522 F.Supp. 125, 137 (S.D.N.Y. 1981), *aff’d*, 684 F.2d 228 (2d Cir. 1982).

⁷² See *Zimmerman v. Continental Airlines*, 712 F.2d 55, 59 (3rd Cir. 1983). *But see Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1155 (3d Cir. 1989) (overruling and holding that non-core bankruptcy proceedings are arbitrable). A core proceeding involves “the administration of the estate; the allowance of claims against the estate; the voidance of preferences or fraudulent transfers; determinations as to dischargeability of debts; priorities of liens; or the confirmation of a plan. . . .” *Id.* at 1156 n.9. Core proceedings are generally not arbitrable. See generally *In re U.S. Lines, Inc.*, 197 F.3d 631 (2d Cir. 1999).

⁷³ See *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 941 (3d Cir. 1985).

⁷⁴ *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

of legally correct” decisions.⁷⁶ A pre-dispute agreement to arbitrate—and thus to reduce the certainty of a legally correct decision—conflicted, the 1953 Court held, with the mandatory law provision of the Securities Act.⁷⁷ *Wilko* rejected pre-dispute privatization of claims arising under mandatory law.

In addition, a Supreme Court labor arbitration case of this era, *Alexander v. Gardner-Denver Co.*,⁷⁸ prohibited even post-dispute privatization of a mandatory law claim. In *Gardner-Denver* an employee brought his Title VII race discrimination claim in arbitration and the arbitrator ruled against the employee.⁷⁹ The Supreme Court denied enforcement to the award as the Court allowed the employee to bring the same Title VII claim in court.⁸⁰ *Gardner-Denver* was based on the rationale that “an employee’s rights under Title VII are not susceptible of prospective waiver” and that an arbitration agreement is such a waiver.⁸¹ In other words, Title VII is mandatory law and *Gardner Denver* refused to enforce a pre-dispute agreement to contract around mandatory law.

To recap, arbitration law from the 1920’s into the 1980’s largely conformed to the distinction between default law and mandatory law. While courts did not enforce pre-dispute agreements to arbitrate claims arising out of mandatory law, courts enforced pre-dispute agreements to arbitrate claims arising out of default law and enforced awards on such claims without determining whether the arbitrator correctly applied the default law. In short, between the 1920’s and 1980’s arbitration law moved to allowing pre-dispute privatization of claims arising out of default law but did not allow pre-dispute privatization of claims arising out of mandatory law.

C. Late-1980’s-2008: Enforceable Pre-Dispute Agreements to Arbitrate Claims Arising out of Mandatory Law and Resulting Movement toward Vacating Legally-Erroneous Awards

1. Enforcing Pre-Dispute Agreements to Arbitrate Claims Arising Under Mandatory Law

While pre-1980’s courts did not enforce agreements to arbitrate claims arising under mandatory law, from 1985 to 1991 the Supreme Court decided cases in which it held that several important mandatory law claims (securities, antitrust and employment

⁷⁵ See Gaitis, *supra* note 15.

⁷⁶ *Wilko*, 346 U.S. at 438.

⁷⁷ In contrast, “if courts generally maintained authority to review the legal reasoning underlying an arbitral award, the arbitration of securities claims arguably would not result in a waiver of the legal protections guaranteed by the Securities Act.” Gaitis, *supra* note 15, at 8.

⁷⁸ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

⁷⁹ *Id.* at 43.

⁸⁰ *Alexander*, 415 U.S. at 59-60.

⁸¹ *Id.* at 51-52.

discrimination) were arbitrable.⁸² Since that time, the Court has consistently held that the FAA

mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the [FAA]’s mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be deducible from [the statute’s] text or legislative history, ... or from an inherent conflict between arbitration and the statute’s underlying purposes.⁸³

Since first making a statement to this effect in 1985,⁸⁴ the Supreme Court has yet to discover a single instance in which “Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.” In other words, the Supreme Court has (for almost 30 years) consistently found that statutory claims are arbitrable.⁸⁵

The 1985-1991 expansion of arbitrability to mandatory law claims was, I believe, a proper interpretation of the FAA.⁸⁶ However, this expansion of arbitrability to mandatory law claims created a problem because it expanded arbitration’s pre-dispute privatization beyond the bounds permitted of other pre-dispute contracts.

An example might arise out of a form contract prepared by Employer’s lawyer for all of Employer’s new employees. Among the form’s thirty clauses stretching over five pages is a clause requiring Employer and Employee to arbitrate, rather than litigate, any dispute arising out of or relating to the employment relationship. When Employee signs

⁸² See MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 10. The important cases were *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)(antitrust); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987)(Securities Exchange Act and RICO); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)(Securities Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)(employment discrimination). Their predecessor was *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), but it stood alone for over a decade and seemed narrowly confined to the special concerns of international cases.

⁸³ *McMahon*, 482 U.S. at 226-27.

⁸⁴ *Mitsubishi Motors Corp.*, 473 U.S. at 628 (“Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”).

⁸⁵ *Mitsubishi Motors Corp.*, 473 U.S. 614 (antitrust); *McMahon*, 482 U.S. 220 (Securities Exchange Act and RICO); *Rodriguez de Quijas*, 490 U.S. 477 (Securities Act); *Gilmer*, 500 U.S. 20 (employment discrimination); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (Credit Repair Organization Act),

⁸⁶ FAA section 2 requires courts to enforce, not merely agreements to arbitrate breach-of-contract claims, but agreements to arbitrate any “controversy” “arising out of [the parties’] contract or transaction.” 9 U.S.C. § 2.

the form or otherwise manifests assent to it, Employee might not read the arbitration clause, let alone understand it and reflect on it, much less discuss it with counsel or negotiate it with Employer. Had Employee been well-informed about arbitration and been given the choice whether to form the exact same contract without an arbitration clause, Employee might well have chosen the no-arbitration option, rather than manifest assent to arbitration along with the other twenty nine clauses on Employer's form.

If Employee is denied a promotion due to her race or sex, Employee might sue Employer for discrimination rather than pursue the discrimination claim in arbitration, (perhaps because Employee's lawyer believes Employee will win more money in litigation than arbitration). If Employer moves to stay or dismiss Employee's suit, a court applying the Supreme Court's 1985-1991 arbitrability cases (particularly *Gilmer*⁸⁷) will grant that motion and thus compel Employee to bring her claim, if at all, in arbitration. The arbitrator might rule against Employee even though a correct application of employment-discrimination law would result in an award for Employee. Employee may then ask a court to vacate the legally-erroneous award on the ground that the arbitrator did not correctly apply discrimination law.

The facts of this post-1980's employment example are identical to the facts of the 1920's-1980's Buyer-Seller example except that this is an employment discrimination claim while the earlier example was a warranty claim. The distinction between employment-discrimination claims and warranty claims is important because employees' rights to be free of discrimination are protected by mandatory rules. In other words, pre-dispute agreements to waive rights under the employment discrimination statutes are not enforceable.⁸⁸ Similarly, a pre-dispute agreement to waive one's rights under the antitrust⁸⁹ or securities⁹⁰ statutes would not be enforceable. But a pre-dispute agreement to arbitrate these claims *is* effectively a waiver of one's rights under these statutes if arbitration awards including errors of law that fail to vindicate such rights are confirmed

⁸⁷ Richard C. Reuben, *FAA Law, Without the Activism: What If the Bellwether Cases Were Decided by a Truly Conservative Court?*, 60 U. KAN. L. REV. 883, 910 (2012) ("In *Gilmer*, the Supreme Court effectively upheld the validity of mandatory arbitration clauses in standard form contracts. It was the coda on a remarkable about-face by the Court on the issue of whether arbitration could be used to deny parties access to the public courts for statutory claims.").

⁸⁸ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 42, 51 (1974) ("it [is] clear that there can be no prospective waiver of an employee's rights under Title VII."); MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 499 (1988).

⁸⁹ David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 499 (2014) ("a venerable line of authority holds that parties cannot prospectively relinquish their ability to sue under the Sherman and Clayton Acts." (citing *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975); *Redel's Inc. v. Gen. Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974); *Gaines v. Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967); *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 250 (7th Cir. 1995); *Fox Midwest Theatres v. Means*, 221 F.2d 173, 180 (8th Cir. 1955))).

⁹⁰ See 15 U.S.C. §77n (2006) (Securities Act anti-waiver provision); *id.* §77cc(a) (Securities Exchange Act anti-waiver provision: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.").

and enforced by courts.⁹¹ In other words, the longstanding rule that “arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside for mistake in either”⁹² is in much tension with the Supreme Court’s 1985-1991 assertion that “the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights.”⁹³

Perhaps to resolve this tension, when the Supreme Court began enforcing pre-dispute agreements to arbitrate mandatory law claims, it began saying that “judicial scrutiny of arbitration awards...is sufficient to ensure that arbitrators comply with the requirements of the statute”⁹⁴ giving rise to the mandatory-law claim asserted in arbitration, e.g., the Securities Exchange Act or the Age Discrimination in Employment Act. In other words, the Court perhaps hinted that its 1985-1991 change to enforcing executory agreements to arbitrate mandatory law claims required a change to the longstanding rule against judicially-reviewing arbitrators’ rulings on questions of law.

⁹¹ An alternative view is that only “An arbitration process with a biased decision maker - at the extreme, an arbitrator who will always rule in favor of one of the parties without regard to the merits of the case - is indistinguishable from a provision waiving the substantive claim at issue.” Christopher R. Drahozal, *Why Arbitrate? Substantive Versus Procedural Theories of Private Judging*, 22 AM. REV. INT’L ARB. 163, 177 (2011). I do not believe any inquiry into the likelihood of an arbitrator ruling against the substantive claim at issue is needed to conclude that an arbitration agreement is “indistinguishable from a provision waiving” that claim. As noted above,

While an arbitration agreement contracts out of all the law that would have been applied by a court, that law may still be applied by the arbitrator. The arbitrator may even apply that law more aggressively than a court would have. Contracting out of law through arbitration agreements does not necessarily mean that such law will be under-enforced in the sense that plaintiffs “do worse” in arbitration than they would have done in court. In some cases, arbitrators reach a more “pro-plaintiff” result than a court would have reached; in others, arbitrators reach a more “pro-defendant” result than a court would have reached. We cannot know which of these deviations occurs more often.

See Ware supra note 36, at 711-12. If with respect to some particular mandatory law right, arbitrators are more likely than courts to rule for plaintiffs then from an empirical perspective it might seem strange to characterize an arbitration agreement as a waiver of that right. But from a jurisprudential perspective, a waiver it is. That is because in those rare cases arbitration awards make errors of law depriving the claimant of her right then a rights-violation has occurred. In contrast, when a court makes an error of law depriving a claimant of her right then she can appeal to a higher court which will correct the law and thus vindicate the right. And if the highest available court does not correct the error then it was not an error because, ultimately, the law is whatever the highest available court says it is.

⁹² *Pierce Steel Pile Corp. v. Flannery*, 179 A. 558, 561 (Pa. 1935).

⁹³ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987).

⁹⁴ *Id. Accord* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 n.10 (2009) (quotation omitted); *Accord* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991) (quotation omitted).

2. Post-1991 Movement toward Vacating Legally-Erroneous Awards

I believe the Supreme Court's 1985-1991 decisions enforcing pre-dispute agreements to arbitrate mandatory law claims led some courts toward vacating legally-erroneous awards. To put it another way, I believe the Supreme Court's 1985-1991 decisions enforcing pre-dispute agreements to arbitrate mandatory law claims reduced judicial comfort with the longstanding rule that courts should not review arbitration awards for errors of law.⁹⁵ As enforcement of pre-dispute arbitration agreements expanded from breach-of-contract claims to mandatory law claims like antitrust, securities, and especially employment discrimination, the FAA's contractually-oriented grounds for vacatur did not fit an increasing number of awards.⁹⁶

As I wrote previously, a "crucial step in the reasoning of the Court's decisions expanding arbitrability [to mandatory law claims] is that 'the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights.'"⁹⁷

⁹⁵ As noted above, a typical statement of the law was "unless restricted by the agreement of submission, arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside for mistake in either." *See supra* note 35 and accompanying text.

⁹⁶ Similarly, several scholars argue that broader enforcement of pre-dispute arbitration agreements warrants tighter judicial review of arbitral awards, but these arguments typically emphasize the distinction between business v. business disputes on the one hand and consumer/employee v. business disputes on the other. As Nancy Welsh points out, several scholars have "begun to urge more rigorous judicial review in the disparate party context," that is, the context in which one party is a "more powerful repeat player," typically a business, and the other is a "one-time player," typically a consumer or employee of the business. *See* Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 207 (2012) (citing Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007); Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 81 ST. JOHN'S L. REV. 99 (2007); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251 (2007-2008); Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929 (2010)); *see also* Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 339 (2011) ("Because of the Court's consistent penchant for enforcing arbitration agreements, increasing attention has been paid to the degree of scrutiny given by courts to arbitration awards in the course of ruling on motions to vacate."); Nancy A. Welsh, *Introduction*, 5 Y.B. ON ARB. & MEDIATION v, vi (2013) ("[a]t this point in the evolution of mandatory predispute arbitration, judicial review is the slender reed that remains to ensure that the procedure is sufficiently accountable to merit access to the enforcement power of the state. Consistent with this new reality, Professor Jeffrey Stempel urges that the Supreme Court's expansive enforcement of arbitration agreements must be matched by an equally-expansive jurisprudence regarding the grounds for judicial review. He urges, in particular, that if arbitral awards reflect clear errors of factual determination or application of law, they should be ... vacated." (citing Jeffrey W. Stempel, *Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards*, 5 PENN ST. Y.B ARB. & MEDIATION 1 (2013))).

⁹⁷ Ware, *supra* note 36, at 715-16 (quoting McMahon, 482 U.S. at 232); *see also* Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1146-47 (2011) ("With the demise of the non-arbitrability doctrine (or, rather, as part of that demise), the Supreme Court moved to what might be called a 'legal' model of the arbitration process. Under this model, arbitration is an appropriate setting for the resolution of statutory claims because '[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' The Court presumes that outcomes in arbitration and litigation will not necessarily

This point is essential to the Court's conclusion that claims such as antitrust, securities, and employment discrimination are arbitrable. If an agreement to arbitrate one of these claims did entail a "restriction on substantive rights," the Court would not enforce the agreement because the statutes conferring the rights are indisputably mandatory, not default, rules. For example, in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.*, the Court held that antitrust claims were arbitrable. The Court explicitly rested its holding on the premise that the arbitrators would apply federal antitrust statutes to the dispute and that a court would grant a motion to vacate the arbitration award if the arbitrators did not apply them.⁹⁸

In short, the Supreme Court's opinions in its 1985-1991 expansion of arbitrability to mandatory law claims suggested in dicta that courts could review awards for errors of law.

Perhaps the Court was trying to make its expansion of enforceable pre-dispute arbitration agreements from default to mandatory law less controversial by calming fears that claims in areas such as employment discrimination and investor protection would be sent to "lawless" arbitration. However, the Supreme Court's statement that "judicial scrutiny of arbitration awards...is sufficient to ensure that arbitrators comply with the requirements of the statute" clashed with the longstanding rule that "arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside for mistake in either."⁹⁹ And the Supreme Court's representations of sufficient judicial

differ, and refuses to question whether the resolution of statutory claims by arbitrators inherently differs from the resolution of such claims by judges.").

⁹⁸ *Ware*, *supra* note 36, at 715-16. In holding the antitrust claim arbitrable, *Mitsubishi* considered the possibility that "the arbitrators could consider [it] to fall within the purview of th[e] choice-of-law provision, with the result that it would be decided under Swiss law rather than the U.S. Sherman Act." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 637 n. 19 (1985). The Court said this was unlikely to occur because "counsel for Mitsubishi conceded that American law applied to the antitrust claims." *Id.* Thus the Court believed there was little risk the arbitrators would interpret the arbitration clause, in combination with the Swiss choice-of-law clause, as contracting out of the Sherman Act. *See id.* As guidance for future cases, however, the Court cautioned that "in the event the choice-of-forum [arbitration] and 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 agreement as against public policy." *Id.* Finally, "courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.* at 638. *See also* LeRoy, *supra* note 17, at 176 ("the 1991 U.S. Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.* articulated a broad theory of forum substitution, leading employers and workers to bypass court as they arbitrate their legal claims. *Gilmer* fortified its forum substitution theory by stating that 'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue.'").

⁹⁹ *See supra* note 35 (citing cases from 1920's to 1980's); *see also supra* note 16 (citing cases pre-1920's)

review of awards' rulings of law were mere dicta in cases about enforcement of executory pre-dispute arbitration agreements.¹⁰⁰ The Supreme Court's representations of meaningful judicial review were not made in the context of actually deciding whether to confirm or vacate an award.

The confirm-or-vacate cases the Court did take from the 1980's to 2008 continued to be labor cases involving, not mandatory law claims, but default law claims about contract interpretation. In that default-law context, the Court continued its longstanding practice of enforcing awards without asking whether they are legally erroneous. The Court in 1987 reaffirmed its rule that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."¹⁰¹ In a 2000 labor case, *Eastern Associated Coal Corp. v. United Mine Workers*,¹⁰² the Supreme Court reiterated its support for pre-dispute privatization through arbitration and its recognition that (in the context of contract claims) arbitrators are merely filling gaps in contracts, that is, doing what the parties could have done themselves in an enforceable pre-dispute contract:

Eastern does not claim here that the arbitrator acted outside the scope of his contractually delegated authority. Hence we must treat the arbitrator's award as if it represented an agreement between Eastern and the union as to the proper meaning of the contract's words "just cause." For present purposes, the award is not distinguishable from the contractual agreement.¹⁰³

Because the confirm-or-vacate cases the Supreme Court took from the 1980's to 2008 did not involve mandatory law claims, the Court never gave itself an opportunity to vacate an award on the ground that the arbitrator did not "comply with the requirements of the statute" giving rise to the claim. In other words, the Court never gave itself an opportunity to conform the law to its representation that "judicial scrutiny of arbitration awards...is sufficient to ensure that arbitrators comply with the requirements of the statute" giving rise to a mandatory law claim.

However, several lower courts pushed case law toward the Supreme Court's representation of it, that is, toward vacating legally-erroneous awards arising out of mandatory law claims. While many courts had held out the possibility that they could

¹⁰⁰ Paul Kirgis describes the Court as "Paying lip service to the need for accurate determinations of statutory rights." Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 534 (2009).

¹⁰¹ *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

¹⁰² *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000);

¹⁰³ *Id.* at 62; *see also* *George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 580 (7th Cir. 2001) ("In the main, an arbitrator acts as the parties' agent and as their delegate may do anything the parties may do directly.").

vacate awards in cases of “manifest disregard of the law” by the arbitrator,¹⁰⁴ this doctrine was very narrow¹⁰⁵ so it was nearly impossible, until about 1997, to find a case vacating an arbitration award in reliance on it.¹⁰⁶ But then some courts began expanding the “manifest disregard” doctrine to more closely conform to the Supreme Court’s repeated statement that “judicial scrutiny of arbitration awards ... is sufficient to ensure that arbitrators comply with the requirements of the statute” giving rise to the claim.¹⁰⁷

Perhaps the leading case was *Cole v. Burns International Security Services*,¹⁰⁸ a 1997 D.C. Circuit opinion written by Judge Harry Edwards, a former law professor and labor arbitrator. *Cole* held that agreements to arbitrate statutory employment discrimination claims were enforceable “only if judicial review under the ‘manifest disregard of the law’ standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.”¹⁰⁹ The opinion went on to assert that “the courts are empowered to review an arbitrator’s award to ensure that its resolution of public law issues is correct.”¹¹⁰ *Cole*, in essence, called for the “manifest disregard of law” standard to become a *de novo* “error of law” standard, at least with respect to claims under statutory or public law.

Along these lines, the following year the Second Circuit in *Halligan v. Piper Jaffray, Inc.*,¹¹¹ reversed a district court’s denial of a motion to vacate for manifest disregard of employment discrimination law. *Halligan* said that “when a reviewing court

¹⁰⁴ Every United States Court of Appeals and many state appellate courts adopted some version of the “manifest disregard” doctrine. *Birmingham News Co. v. Horn*, 901 So.2d 27, 48-50 (Ala. 2004) (citing cases). The Supreme Court apparently endorsed it in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953)); see also Ga. Code Ann. § 9-9-13(b)(5) (2006) (“The award shall be vacated * * * if the court finds that the rights of that party were prejudiced by: *** The arbitrator’s manifest disregard of the law.”).

¹⁰⁵ An oft-cited Second Circuit opinion said that an error of law should lead to vacatur for “manifest disregard” only if the error is “obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term ‘disregard’ implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.” *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).

¹⁰⁶ See MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 10, at § 40.7.1, 40:84 - 40:85; *Cole v. Burns Int’l Security Services*, 105 F. 3d 1465 (D.C. Cir. 1997).

¹⁰⁷ Professor LeRoy “argues that courts embraced the manifest disregard standard in response to the rapid upsurge in mandatory arbitrations in the 1990s that involved statutory issues. Bowing to the *Gilmer* Court’s strong pronouncement in favor of enforcing arbitration agreements, these courts ensured that arbitrators did not intentionally ignore the laws they were supposed to apply.” LeRoy, *supra* note 17 at 171 (citing *Porzig v. Dresdner, Kleinwort, Benson, N.A., Inc.*, 497 F.3d 133, 139 (2d Cir. 2007); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 201-02; *Mantes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461-62)).

¹⁰⁸ *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). This case is also discussed in § 4.7.

¹⁰⁹ *Id.* at 1487.

¹¹⁰ *Id.*

¹¹¹ See *Halligan*, 148 F.3d at 204.

is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account.”¹¹² The *Halligan* opinion seemed to challenge the longstanding practice (in many sorts of cases) of arbitrators not to write reasoned opinions justifying their decisions. That practice (which may be fading) largely ensured that parties challenging arbitration awards have little to point to and, consequently, little chance of persuading a court to vacate the award.¹¹³ If the law had continued moving in the direction exemplified by *Cole* and *Halligan*, arbitrators might have been required to write reasoned opinions, giving parties more opportunity to identify manifest disregard of the law by arbitrators.

3. *Disarray in 1991-2007 Law of Vacating Legally-Erroneous Awards*

While tightening the “manifest disregard of law” doctrine along the lines suggested by *Cole* and *Halligan* might have conformed the law to the Supreme Court’s representation of “judicial scrutiny of arbitration awards...sufficient to ensure that arbitrators comply with the requirements of the statute” giving rise to a mandatory law claim,¹¹⁴ such tightening did not occur. Instead, many courts continued to adhere to the longstanding rule that they should confirm awards without reviewing them for errors of law. This traditional approach was perhaps especially pervasive in state courts, some of which did not adopt the “manifest disregard of law” doctrine at all.¹¹⁵ For instance, a 1992 California Supreme Court decision said:

As early as 1852, this court recognized that, ‘The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award ex aequo et bono [according to what is just and good].’ As a consequence, arbitration awards are generally immune from judicial review.¹¹⁶

¹¹² *Id.*

¹¹³ *Trivisonno v. Metropolitan Life Ins. Co.*, 39 Fed. App’x 236, 241 (6th Cir. 2002) (“The Sixth Circuit has continued to hold that arbitrators are not required to explain their decisions. That remains the law in this circuit, however desirable it might be, despite the recognition that should arbitrators choose not to explain their decisions it becomes all but impossible to determine whether they acted with manifest disregard for the law.” (quotations omitted)).

¹¹⁴ *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987). *Accord* *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, n.10 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991).

¹¹⁵ “While 27 jurisdictions that have adopted the Uniform or Federal Arbitration Acts do not allow a court to review arbitrators’ interpretations of law, 18 jurisdictions that have adopted these statutes allow a court to conduct a review for arbitrators’ ‘manifest disregard of the law.’” Stephen Wills Murphy, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 911 (2010).

¹¹⁶ *Moncharsh v. Heily & Blase*, 832 P.2d 899, 904 (Cal. 1992) (citations omitted)

In 2001, the Connecticut Supreme Court reaffirmed that “[u]nder an unrestricted submission, the arbitrators’ decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact.”¹¹⁷ A 2002 New York appellate court said “Unless the arbitration agreement provides otherwise, an arbitrator is not bound by principles of substantive law or by rules of evidence but may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and his award will not be vacated unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power.”¹¹⁸

While all the federal circuit courts eventually adopted some version of the “manifest disregard of law” doctrine,¹¹⁹ their difficult task was deciding which arbitral errors of law it covered. Here is a sampling of their statements:

- “a mere mistake of law by an arbitrator cannot serve as the basis for judicial review.”¹²⁰
- “A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law.”¹²¹
- “Only a manifest disregard for the law, in contrast to a misinterpretation, misstatement, or misapplication of the law, can constitute grounds to vacate an arbitration decision.”¹²²
- “confirmation is required even in the face of erroneous... misinterpretations of law... It is not enough that the [arbitral] Panel may have failed to understand or apply the law... An arbitrator’s decision must be upheld unless it is completely irrational, or it constitutes a manifest disregard for the law.”¹²³
- “we have defined ‘manifest disregard of the law’ so narrowly that ... we have confined it to cases in which arbitrators ‘direct the parties to violate the law.’”¹²⁴

¹¹⁷ *Indus. Risk Insurers v. Hartford Steam Boiler Inspection & Ins. Co.*, 779 A.2d 737, 744 (Conn. 2001) (citations omitted).

¹¹⁸ *Azrielant v. Azrielant*, 752 N.Y.S.2d 19, 24 (N.Y. App. Div. 2002) (quotations omitted).

¹¹⁹ Every United States Court of Appeals and many state appellate courts adopted some version of the “manifest disregard” doctrine. *Birmingham News Co. v. Horn*, 901 So. 2d 27, 48-50 (Ala. 2004) (citations omitted).

¹²⁰ *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 32 (1st Cir. 2005); *see also T.Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) (vacating an award requires more than error or misunderstanding of the law).

¹²¹ *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004).

¹²² *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1337 (11th Cir. 2002).

¹²³ *Todd Shipyards Corp. v. Cunard Line*, 943 F.2d 1056, 1060 (9th Cir. 1991) (citations omitted).

¹²⁴ *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 268-69 (7th Cir. 2006) (citation omitted) (quotations omitted).

The previous paragraphs show that, around the turn of the millennium, courts immediately below the Supreme Court (state high courts and federal circuit courts of appeal) could be found making almost diametrically opposed statements. They said everything from the Connecticut Supreme Court’s statement that courts “will not review the award for errors of law,” to the D.C. Circuit’s statement (in *Cole*) that judicial review “is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.” Many intermediate positions also had adherents among the courts.

Most of the manifest-disregard cases discussed above arose out of arbitration agreements that did not ask courts to vacate legally erroneous awards—“unrestricted submissions”—so the law governing unrestricted submissions was clearly ripe for clarification.

Similarly, the law on vacating legally-erroneous awards arising out of restricted submissions was also ripe for clarification because a circuit split had arisen on whether to enforce agreements asking courts to vacate legally-erroneous awards.¹²⁵ So by the first few years of the 2000’s courts were split on legally-erroneous awards arising out of both unrestricted and restricted submissions. The Supreme Court’s 2008 decision in *Hall Street Associates v. Mattel*,¹²⁶ strongly impacted both splits, but did not fully resolve either of them.

D. 2008-Present: Continued Doubt about Vacating Legally-Erroneous Awards

1. Restricted Submissions in and after Hall Street

Hall Street had odd facts for a contemporary arbitration case. While most contemporary arbitration agreements are unrestricted submissions formed pre-dispute,¹²⁷ *Hall Street* involved a restricted submission formed post-dispute—indeed post-trial.¹²⁸ The case involved a manufacturing site Mattel leased from Hall Street under lease terms requiring Mattel to indemnify Hall Street “for any costs resulting from the failure of [Mattel] or its predecessor lessees to follow environmental laws while using the premises.”¹²⁹ After Mattel gave notice of intent to end the lease, Hall Street sued in federal district court “contesting Mattel’s right to vacate on the date Mattel gave, and claiming that the lease obliged Mattel to indemnify Hall Street for costs of cleaning up”

¹²⁵ WARE, *supra* note 8, at § 2.45(c).

¹²⁶ *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

¹²⁷ *See supra* note 7.

¹²⁸ Professor LeRoy argues that the historical and normative case for vacating legally-erroneous awards strengthens in cases (like *Hall Street*) in which arbitration is used to resolve a dispute that has already been in court. “[T]he historical distinction between civil code and common law arbitrations ... shows that when a dispute is already in court, and arbitration is used as an auxiliary process, courts may review rulings for legal errors. Otherwise, not only is the legitimacy of arbitration open to question, but so is the court’s ability to provide justice. No court can be above the law, and therefore, judges must ensure that no arbitrator intentionally puts an award above the law.” LeRoy, *supra* note 17, at 151.

¹²⁹ *Hall St. Assocs.*, 552 U.S. at 579.

trichloroethylene in the property's water.¹³⁰ Following a bench trial in which Mattel won on the termination issue, the parties proposed to arbitrate Hall Street's claim for indemnification.¹³¹ "The District Court was amenable, and the parties drafted an arbitration agreement, which the court approved and entered as an order."¹³² One paragraph of the agreement provided that

[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.¹³³

The arbitrator ruled for Mattel but the district court vacated the award for legal error.¹³⁴ The district court's decision to enforce the parties' restricted submission (asking the court to vacate any award "where the arbitrator's conclusions of law are erroneous"¹³⁵) followed a Ninth Circuit decision, *LaPine Technology Corp. v. Kyocera Corp.*,¹³⁶ which similarly enforced a restricted submission providing that "The Court shall vacate, modify or correct any award ... where the arbitrators' conclusions of law are erroneous."¹³⁷

In *Hall Street*, on remand from the district court to arbitration, the arbitrator ruled for Hall Street, and the district court largely upheld the award.¹³⁸ However, the Ninth Circuit reversed because it had since overruled *LaPine* and decided, en banc, not to enforce agreements asking the court to vacate legally-erroneous awards.¹³⁹ Similarly, in *Hall Street*, the Supreme Court decided against enforcing such agreements, which the

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 580.

¹³⁵ While some might use the phrase "restricted submission" to include agreements requiring arbitrators to apply the law correctly but not agreements asking courts to vacate legally-erroneous awards, I think these are substantively the same and use "restricted submission" to encompass them both.

¹³⁶ 130 F.3d 884, 889 (9th Cir. 1997).

¹³⁷ *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997) (the full passage reads "The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous.").

¹³⁸ *Hall St. Assocs.*, 552 U.S. 576 (*see* syllabus).

¹³⁹ *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (2003).

Court characterized as attempts to expand the grounds for vacatur beyond those listed in the FAA.¹⁴⁰ The *Hall Street* Court stated that the FAA’s four grounds for vacatur are “exclusive” so courts should not enforce contractually-created grounds for vacatur.¹⁴¹ The Court viewed the FAA’s provisions on confirmation and vacatur of arbitration awards

as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process and bring arbitration theory to grief in post-arbitration process.¹⁴²

I disagree with *Hall Street* on several levels. First, and most fundamentally, I disagree with *Hall Street* about arbitration’s “essential virtue.” Unlike *Hall Street*, I do not see speed or finality (“resolving disputes straightaway”¹⁴³) as arbitration’s essential virtue because I believe both speed and finality are subsumed by party autonomy, which is my vote for “arbitration’s essential virtue.” As I wrote in a 2006 book:

I do not see secrecy, arbitrator expertise, adjudication efficiency or finality as necessary values of arbitration. I see autonomy as the value that transcends these other values. Because arbitration law gives the parties autonomy, they can choose to have their arbitration be secret or not. Because arbitration law gives the parties autonomy, they can choose to have their arbitrator be an expert or not. Because arbitration law gives the parties autonomy, they can choose to have their arbitration use quick and efficient procedures or not. Because arbitration law gives the parties autonomy, they can choose to make their arbitration final or – by having an appellate arbitration panel or expanding the grounds for vacatur – not.

It is certainly true that most parties to arbitration agreements choose to use their autonomy to advance the values of secrecy, arbitrator expertise, adjudication efficiency and finality. But, in my

¹⁴⁰ “[T]o rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.” *Hall St. Assoc.*, 552 U.S. at 586; “[The Ninth Circuit] found the expanded-review provision unenforceable under *Kyocera*.” *Id.* at 591.

¹⁴¹ *Id.* at 584.

¹⁴² *Id.* at 588 (quotation omitted).

¹⁴³ *Id.*

view, that does not show that these are core values of arbitration; it shows that these are core values of most of the parties who agree to arbitrate. If the values of those people changed, arbitration would change accordingly; but it would do so because of its core value, autonomy, not because it was abandoning other core values.¹⁴⁴

Accordingly, I have proposed language to amend the FAA to enforce restricted submissions by vacating legally-erroneous awards arising out of agreements calling for such vacatur.¹⁴⁵

My second disagreement with *Hall Street* is one of statutory interpretation.¹⁴⁶ Specifically, FAA § 10(a)(4), which permits courts to vacate an arbitration award where “the arbitrators exceeded their powers,”¹⁴⁷ can fairly be interpreted to authorize vacatur of legally-erroneous awards arising out of restricted submissions, that is, agreements requiring arbitrators to apply the law correctly.¹⁴⁸ Whether the agreement is written as a

¹⁴⁴ WARE, in BRUNET, ET AL., *supra* note 47, at 107-08, 349 (proposing pre-*Hall Street* circuit split be resolved with statute instructing courts to vacate an arbitration award when doing so “would enforce the agreement submitting the controversy to arbitration.”); *see also* Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT’L ARB. 469, 479 (2006) (criticizing *Hall Street*: “Since arbitration has no virtues other than what the parties themselves happen to find in it, ‘public policy’ cannot lie in imposing a particular image of arbitration on them against their will.”); *id.* at 490 (“It does seem extraordinarily officious--indeed, perverse--to insist on imposing the putative ‘benefits’ of finality and economy on parties who, in their contract, have done everything they possibly could to wriggle out from under them.”); *see also* Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 143 (2012) (“The clearest declaration of the death of contract in federal arbitration jurisprudence is *Hall Street*.”).

¹⁴⁵ WARE, in BRUNET, ET AL., *supra* note 47, at 107-08, 349; *see also* Cole, *supra* note 96, at 218 (“FAA section 10 should be revised to explicitly permit parties to expand judicial review of arbitral awards. The review should not be unlimited however. Expansion of judicial review should only be permissible if the parties’ proposed alterations of the standard of review do not threaten the institutional integrity of the courts.”).

¹⁴⁶ *Hall Street Assocs.*, 552 U.S. at 595 (Stevens, J., dissenting) (“in light of the historical context and the broader purpose of the FAA, §§ 10 and 11 are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties’ ‘valid, irrevocable and enforceable’ agreements to arbitrate their disputes subject to judicial review for errors of law.”).

¹⁴⁷ 9 U.S.C. § 10(a)(4).

¹⁴⁸ Several leading arbitration scholars have been making this point for decades. *See* Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT’L ARB. 225, 239 (1997) (“A contract that withdraws errors of law from the authority conferred on the arbitrator - that, in other words, places issues of law ‘beyond the scope of the submission’ to binding arbitration- should, then, allow an aggrieved party on ‘review’ to invoke § 10(a)(4).”); *see also* Edward Brunet, *Replacing Folklore Arbitration With a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 73 (1999) (“[Rau’s] approach makes eminent sense and is supported by the abundantly clear text of section 10(a)(4) that expressly permits parties to curtail arbitral power. If the parties require the arbitrators to apply substantive law of a particular state, section 10(a)(4) requires a court to respect such a bargain by providing meaningful review. Such review should not be viewed as an expansion of the FAA. Rather, it merely represents review of the parties’ arbitration bargain itself.”); Drahozal, *supra* note 12, at 916 (in favor of “...allowing parties to contract for expanded review by restricting the authority of the arbitrators...”); Thomas J. Stipanowich, *Rethinking American Arbitration*,

restriction on the arbitrator (depriving the arbitrator of the power to issue an award that includes error of law) or an authorization for courts to vacate legally-erroneous awards should not matter as they are substantively the same. Unfortunately, since *Hall Street*, most courts have refused to enforce both types of agreements requiring arbitrators to apply the law correctly.¹⁴⁹ I believe courts should enforce both agreements requiring arbitrators to apply the law correctly and agreements asking courts to vacate legally-erroneous awards for reasons of both autonomy and efficiency.¹⁵⁰

My third disagreement with *Hall Street* is with its dicta that, as Tom Carbonneau says, “makes understanding difficult.”¹⁵¹ *Hall Street* said:

63 IND. L.J. 425, 486 n.339 (1988) (“While it is presumably not within the power of parties to contract to expand the statutorily-conferred scope of review . . . the parties may accomplish the same goal indirectly” by relying on the “excess of authority” statutory ground); MACNEIL, SPEIDEL & STIPANOWICH *supra* note 10 at §36.6 (“With respect to matters of law, it is frequently said that, if arbitrators are required by the terms of a given submission to decide ‘according to law,’ an award may be vacated as for mistake of law if the arbitrators decide contrary to law. . . . Their award may fall even though they have misjudged the law, for they depart, it is said, from their authority under the submission.”); *but see* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 456 (1998) (“Attempts to seek vacatur based on a claim that the arbitrator committed an error of law are not proper under the ‘exceeded powers’ clause of section 10(a)(4).”).

¹⁴⁹ See *Rent-a-Ctr, Inc. v. Barker*, 633 F. Supp. 2d 245, 256-57 (W.D. La. 2009) (citing *Hall Street* in refusing to enforce agreement giving each party the right to “bring a separate action in any court of competent jurisdiction to set aside the award, where the standard of review will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.”); see also *Francis v. Landstar Sys. Holdings, Inc.*, No. 3:09-cv-238-J-32JRK, 2009 WL 4350250, at *7 (M.D. Fla. Nov. 25, 2009) (citing *Hall Street* in refusing to enforce agreement that the “Arbitrator’s authority is strictly limited to resolving the Dispute on the basis of such applicable state or federal law”); *Wood v. Penntex Res. LP*, Civil Action No. H-06-2198, 2008 WL 2609319, at *2 (S.D. Tex. June 27, 2008) (citing *Hall Street* in refusing to enforce agreement providing that “this Agreement confers no power or authority upon the arbitrators to render any decision that is based on clearly erroneously findings of fact, that manifestly disregards the law, or exceeds of the powers of the arbitrator, and no such decision will be eligible for confirmation.”); *In re Raymond Prof'l Group, Inc.*, 397 B.R. 414, 431 (Bankr. N.D. Ill. 2008) (“Until *Hall Street* was decided, the Seventh Circuit panel opinion in *Edstrom Indus.* could have been read to expand the standard of review for vacating an arbitration award. However, after *Hall Street*, the *Edstrom Indus.* opinion must be read more narrowly.”); *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 696 S.E.2d 663 (Ga. 2010); *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725 (Me. 2011); *Pugh’s Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252 (Tenn. 2010).

¹⁵⁰ See *Rau, supra* note 144, at 507-08 (“Even partial recourse to the arbitration process [under an agreement calling for judicial review of arbitrators’ legal rulings] is calculated to produce economies in judicial resources” compared to not agreeing to arbitrate at all).

¹⁵¹ Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates*, 14 CARDOZO J. CONFLICT RESOL. 593, 608 (2013).

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. In other words, although the statutory grounds are “exclusive” (otherwise stated, not modifiable by contract), the parties could obtain “more searching review” of awards (i.e., review of the merits) under

In holding that [FAA] §§ 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, for example, 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.¹⁵²

If parties want “more searching [judicial] review” of arbitration awards “under state statutory or common law,” what do they have to do to get it? Put a clause to that effect in their arbitration agreement? Or is judicial review under state, rather than federal, law something that can only be chosen post-award by the party who asks a court to review an award—and perhaps engages in forum-shopping in choosing which court to ask?¹⁵³

Hall Street’s difficult-to-understand dicta may suggest that the FAA does not preempt state law adding at least some grounds for vacatur beyond those in the FAA. In contrast, some federal courts before *Hall Street* held that the FAA preempts state grounds for vacatur not found in federal law.¹⁵⁴ On the other hand, a few post-*Hall Street* state

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.” 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 seem to account for the impact of the federal preemption doctrine.

Id. at 608-09.

¹⁵² *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008).

¹⁵³ An action to vacate an arbitration award may be brought in any state court of competent jurisdiction or, if there is diversity or federal question jurisdiction, in federal court. *See Smith v. Rush Retail Centers, Inc.*, 360 F.3d 504, 505 (5th Cir. 2004) (“The Second, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits have held that § 10 of the FAA does not confer federal jurisdiction and that there must be an independent basis for federal jurisdiction before a district court may entertain a petition to vacate an arbitration award.”).

¹⁵⁴ *See Alston v. UBS Fin. Servs., Inc.*, No. Civ.A. 04-01798(HHK), 2006 WL 20516, at *1 n.3 (D.D.C. 2006) (“The Alstons attempt to rely on Virginia law as a basis for vacatur as well [as the FAA]. The court, however, need not analyze the Alstons’ motion under Virginia law because, to the extent that the FAA and Virginia law conflict, state law is preempted”); *see also In re Arbitration between Lemoine Skinner III v. Donaldson, Lufkin & Jenrette Secs. Corp.*, No. C 03-2625 VRW, 2003 WL 23174478, at *8 (N.D. Cal. Dec. 29, 2003) (“the [FAA] sets out the exclusive grounds upon which an arbitration award may be vacated. . . . Any state law that allows for additional grounds for dismissal of an arbitration award would be preempted by the FAA.”); *Jacada (Europe) Ltd. v. Int’l Mktg. Strategies, Inc.*, 255 F.Supp. 2d 744, 750-51 (W.D. Mich. 2003); *M & L Power Servs., Inc. v. Am. Networks Int’l*, 44 F. Supp. 2d 134, 141-42 (D.R.I.

supreme court decisions have relied on state law to reach the opposite result from *Hall Street*, that is, to enforce agreements requiring arbitrators to apply the law correctly.¹⁵⁵ The United States Supreme Court has not yet ruled on whether these decisions will survive challenges based on FAA preemption of state law. So the enforceability of restricted submissions (agreements requiring arbitrators to apply the law correctly or agreements asking courts to vacate legally-erroneous awards) remains uncertain in some state courts, even after *Hall Street*.¹⁵⁶

1999) (“the FAA only preempts state law to the extent that said state law provides lesser protection for arbitration agreements and awards than does federal law. . . . In this case, the ‘complete irrationality’ ground for vacating an arbitration award violates Congress’ policy as set forth in the FAA. As such, it is preempted and may not be applied to any case to which the FAA applies”); *Collins v. Blue Cross Blue Shield of Mich.*, 916 F.Supp. 638, 640-42 (E.D. Mich. 1995) (as between Michigan’s standard and federal “manifest disregard of law” standard, “the federal standard of review must prevail”), *vacated on other grounds*, 103 F.2d 35 (6th Cir. 1996) (no federal jurisdiction); MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 10, at § 40.1 (“the FAA preempts any state grounds for vacation unless the parties have clearly agreed to be bound by them.”).

On the other hand, the Washington Supreme Court apparently does not believe the FAA preempts state grounds for vacatur not in the FAA. In the 2010 case of *Broom v. Morgan Stanley DW Inc.*, 236 P.3d 182 (Wash. 2010), it affirmed a lower court order vacating an award on the ground that the award contained facial legal error. “[T]he arbitration panel ruled that all of the Brooms’ claims except for the CPA claim were barred by state and federal statutes of limitations.” *Id.* at 183-84. “The Brooms filed a complaint in superior court and moved to vacate the arbitration award. They argued that the award contained facial legal error because state statutes of limitations do not apply to arbitration. The trial court agreed and vacated the award.” *Id.* at 184. The dissent argued that this is not a ground for vacatur under the FAA and that the FAA preempts Washington law to the extent it has this ground. *Id.* at 192 (Madsen, C.J., dissenting). The majority did not respond to this argument or otherwise mention the FAA.

¹⁵⁵ See *Raymond James Fin. Servs., Inc. v. Honea*, 55 So.3d 1161, 1169 (Ala.2010) (“Under the Alabama common law, courts must rigorously enforce contracts, including arbitration agreements, according to their terms in order to give effect to the contractual rights and expectations of the parties. Applying that principle in this case requires us to give effect to the provision in the arbitration agreement authorizing a court having jurisdiction to conduct a de novo review of the award entered as a result of arbitration proceedings conducted pursuant to that same agreement.”); see also *Cable Connection, Inc. v. DirectTV, Inc.*, 190 P.3d 586, 589 (Cal. 2008) (discussing *Hall Street* and concluding that FAA does not preempt state law enforcing arbitration agreement providing that “The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.”); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 88 (Tex.2011) (enforcing an arbitration agreement that said “[t]he arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.”).

In contrast, several states’ courts hold that their state law does not enforce contractually-created grounds for vacatur. See *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 696 S.E.2d 663, 667 (Ga. 2010); see also *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725 (Me. 2011); *Brucker v. McKinlay Transp., Inc.*, 557 N.W.2d 536, 540 (Mich. 1997); *John T. Jones Constr. Co. v. City of Grand Forks*, 665 N.W.2d 698, 704 (N.D. 2003); *Pugh’s Lawn Landscape Co., Inc. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 260 (Tenn. 2010).

¹⁵⁶ Carbonneau, *supra* note 151, at 602-03 (“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.”).

2. Unrestricted Submissions After *Hall Street*, *Stolt* and *Sutter*

a. *Hall Street*

As noted above, *Hall Street* viewed the FAA’s provisions on confirmation and vacatur of arbitration awards

as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process and bring arbitration theory to grief in post-arbitration process.¹⁵⁷

This push to limit judicial review of arbitration awards, along with *Hall Street*’s statement that the FAA’s four grounds for vacatur are “exclusive,” led some courts to conclude that *Hall Street* prohibits not only contractually-created grounds for vacatur, but also judicially-created grounds for vacatur, including “manifest disregard of law.”¹⁵⁸ By contrast, other courts continued after *Hall Street* to recognize “manifest disregard of law” as a ground to vacate awards.¹⁵⁹ Some of these courts reason that judicially-created grounds, such as “manifest disregard of law,” are better characterized as *statutory* grounds because they are shorthand to define what constitutes arbitrators’ “exceed[ing]

¹⁵⁷ *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1405 (2008) (quotation omitted).

¹⁵⁸ *Medicine Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (citing *Hall Street* and stating that the claim that an arbitrator disregarded the law is not enumerated in § 10 and is therefore not cognizable); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1322-4 (11th Cir. 2010) (“Although our prior precedents have recognized these three non-statutory grounds for vacatur [arbitrary and capricious, public policy, and manifest disregard]... We hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street*.”); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008) (due to *Hall Street*, “[M]anifest disregard of the law standard is no longer good law.”); *Carey Rodriguez Greenberg & Paul, LLP v. Arminak*, 583 F. Supp. 2d 1288, 1290 (S.D. Fla. 2008) (citing *Hall Street* and stating that “An allegation that the Award violates public policy is not one of the four exclusive statutory grounds upon which the Award may be vacated.”); *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 382 (Ala. 2009) (“[W]e hereby overrule our earlier statement ... that manifest disregard of the law is a ground for vacating ... an arbitrator’s award.”); *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App. 2009) (“[M]anifest disregard of the law and gross mistake are not grounds for vacating an arbitration award under the FAA.”); see also Sarah Rudolph Cole, *The Federalization of Consumer Arbitration; Possible Solutions* 2013, U. CHI. LEGAL F. 271, 311 (2013) (“Following *Hall Street*, parties may no longer be able to challenge an arbitration award on the extra-statutory ground that the arbitrator manifestly disregarded the law.”).

¹⁵⁹ *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1283 (9th Cir. 2009) (vacating an award on manifest disregard grounds post-*Hall Street*); *Stolt-Nielsen SA v. AnimalFeeds*, 548 F. 3d 85, 93-95 (2d Cir. 2008), *rev’d on other grounds*, 130 S.Ct. 1758 (2010); *Sharp v. Downey*, 13 A. 3d 1, 21 (Md. Ct. Spec. App. 2010) (vacating award due to manifest disregard of law, which continues to be a ground for vacatur under Maryland Arbitration Act).

their powers” under FAA § 10(a)(4).¹⁶⁰ This split of authority on manifest disregard shows that *Hall Street* left much uncertainty on a very fundamental question of arbitration law, whether arbitration awards must apply the law correctly to avoid vacatur. *Hall Street* left much uncertainty about whether courts would:

- 1) conform the law to the Supreme Court’s 1985-1991 representation of “judicial scrutiny of arbitration awards...sufficient to ensure that arbitrators comply with the requirements of the statute” giving rise to a mandatory law claim,¹⁶¹ by vacating legally-erroneous awards denying rights under such law, or
- 2) disprove the Court’s 1985-1991 representation by abolishing the manifest disregard ground for vacatur and solidifying the longstanding rule that courts should confirm awards without determining whether they are legally-correct, or
- 3) find an intermediate position on vacating legally-erroneous awards.

The Supreme Court had a chance to reduce this uncertainty only two years after *Hall Street* in the 2010 case of *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*¹⁶² Unfortunately, *Stolt* left this uncertainty in place and aggravated it with new uncertainty.

b. Stolt

In *Stolt*, AnimalFeeds brought an antitrust class action in federal court against a group of ocean carriers (which the Court’s majority calls “shipping companies”).¹⁶³ The Second Circuit ordered AnimalFeeds to arbitrate its claim because its contract with the defendants contained the following clause:

¹⁶⁰ *Comedy Club*, 553 F. 3d at 1290; *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S. 2d 342, 349 (N.Y. Sup. Ct.) (“[T]his court will view ‘manifest disregard of law’ as judicial interpretation of the section 10 requirement, rather than a separate standard of review.”); *id.* at 351 (stating that the public policy ground for vacatur is an interpretation of § 10(a)(4)); *see* MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 10, at § 40.5.1.3; *see also* *Sands v. Menard, Inc.*, 787 N.W.2d 384, 397 (Wis. 2010) (“[A] court must overturn an arbitrator’s award when the panel exceeds its powers . . . An arbitration panel exceeds its powers when it engages in perverse misconstruction or positive misconduct, when the panel manifestly disregards the law, or where the award itself is illegal or violates strong public policy.”); *Broom v. Morgan Stanley DW Inc.*, 236 P. 3d 182, 184 (Wash. 2010) (“[I]n *Boyd v. Davis* . . . we approved of facial legal error as an accepted basis for vacating an arbitral award. In *Boyd*, we suggested that such error indicates that the arbitrators exceeded their powers.”).

¹⁶¹ *See Hall Street Assocs.*, 552 U.S. 576; *see also* Ronald G. Arnovsky, *The Supreme Court and the Future of Arbitration Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131, 161-62 (2012) (*Hall Street* and other “[P]ost-Gilmer decisions have called into question the continuing validity of the Court’s underlying assumptions for its general conclusion that arbitration can be a reasonable substitute for a judicial forum for the vindication of statutory rights. First, notwithstanding the role of a reviewing court contemplated in *Gilmer* and *Cole*, after *Hall Street* a court may lack the authority under the FAA to vacate a statutory claim arbitration award for failing to comply with the requirements of the statute at issue.”).

¹⁶² *See Stolt-Nielsen SA*, 130 S.Ct. 1758.

¹⁶³ *See id.*

Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [i.e., the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.¹⁶⁴

AnimalFeeds then served on the defendants a demand for class arbitration.¹⁶⁵

While classwide arbitration was rare before 2000, it had become much more common in the few years leading up to *Stolt*.¹⁶⁶ This increase in class arbitration was likely caused by, among other things, the Supreme Court’s 2003 decision in *Green Tree Financial Corp. v. Bazzle*.¹⁶⁷ The *Bazzle* case involved an arbitration agreement that neither permitted nor prohibited class arbitration, but rather was silent on that question. A plurality of the Court in *Bazzle* decided that it was for the arbitrator, rather than a court, to interpret this silence,¹⁶⁸ and many arbitrators after *Bazzle* interpreted “silent” contracts

¹⁶⁴ See *id.* at 1765.

¹⁶⁵ See *id.*

¹⁶⁶ See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets Class Action, Will the Class Action Survive?* 42 WM. & MARY L. REV. 1, 38 n. 135 (2000); see also S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 206-07 (2012).

¹⁶⁷ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). *Bazzle* involved Green Tree’s form consumer loan contract, which contained an arbitration clause. *Id.* at 447. Plaintiffs sued Green Tree in South Carolina state court and asked the court to certify a class action. *Id.* at 449. Green Tree sought to stay the court proceedings and compel arbitration. *Id.* The trial court both (1) certified a class action and (2) entered an order compelling arbitration. *Id.* Green Tree then selected an arbitrator with the plaintiffs’ consent and the arbitrator, administering the proceeding as a class arbitration, awarded the class \$10,935,000 in statutory damages, along with attorney’s fees. *Id.* The trial court confirmed the award, and Green Tree appealed claiming, among other things, that class arbitration was legally impermissible. *Id.* On appeal, the South Carolina Supreme Court held that the contracts were silent with respect to class arbitration, that they consequently authorized class arbitration, and that arbitration had properly taken that form. *Id.* at 450. The Supreme Court granted certiorari to consider whether that holding is consistent with the FAA. *Id.*

While three dissenting justices thought the arbitration clause prohibited class arbitration, *id.* at 458-59, the Court agreed with the South Carolina Supreme Court that the clause was silent on whether class arbitration was permitted. *Id.* at 450-51. Rather than affirming the South Carolina Supreme Court, however, the Court held that the arbitrator, rather than a court, should decide whether this silent contract should be interpreted to permit or prohibit class arbitration. *Id.* at 451-52. Therefore, the Court remanded for further proceedings. *Id.* at 454.

¹⁶⁸ See *supra* note 167 (summarizing *Bazzle*).

to permit class arbitration.¹⁶⁹ Some of the major arbitration organizations developed special rules for handling the growing number of demands for class arbitration.¹⁷⁰

Just as the *Bazzle* contract was silent on whether class arbitration was permitted, so too was the *Stolt* contract silent on whether class arbitration was permitted. Accordingly, the parties in *Stolt* (following *Bazzle*'s instructions) prepared for arbitrators to decide whether their arbitration clause permitted class arbitration. "The parties selected a panel of arbitrators and stipulated that the arbitration clause was 'silent' with respect to class arbitration."¹⁷¹ The arbitrators issued a clause-construction award concluding that the arbitration clause allowed for class arbitration, despite the defendants' argument that the arbitration clause is "part of standard contract forms developed by charterers and widely used by them and their brokers for 30 years" without ever being "the basis of a class action."¹⁷² While this argument did not persuade the arbitrators, it did persuade the district court, which vacated the arbitrators' clause-construction award permitting class arbitration. The district court concluded that "the arbitrators manifestly disregarded a well defined rule of governing maritime law that precluded class arbitration under the clauses here in issue."¹⁷³ The Second Circuit reversed. Although the Second Circuit concluded that the manifest disregard doctrine survived *Hall Street*,¹⁷⁴ the Second Circuit held that the "errors" the district court "identified" in the clause-construction award did not "rise to the level of manifest disregard of the law."¹⁷⁵

While the manifest disregard doctrine was central in the courts below, it was not central to the Supreme Court's decision in *Stolt*, which said:

¹⁶⁹ P. Christine Deruelle & Robert Clayton Roesch, *Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now - Part I*, THE METROPOLITAN CORPORATE COUNSEL, August 2007, at 9 ("As of June 15, 2007, AAA arbitrators have rendered 51 Clause Construction Awards concerning otherwise silent arbitration agreements, and in all but two of those decisions, the arbitrators have allowed class wide proceedings."), available at <http://www.metrocorpounsel.com/pdf/2007/August/09.pdf>.

¹⁷⁰ AAA POLICY ON CLASS ARBITRATION, AMERICAN ARBITRATION ASSOCIATION (2005), available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003840); JAMS CLASS ACTION PROCEDURES (2009), available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf; Christopher R. Drahozal, *Error Correction and the Supreme Court's Arbitration Docket*, 29 OHIO ST. J. ON DISPUTE RESOL., 1, 17-18 (2014) ("In response to *Bazzle*, the American Arbitration Association adopted rules for administering class arbitrations, and proceeded to administer over 350 class arbitrations under standards based in part on *Bazzle*. But in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, the Court criticized such reliance on *Bazzle*, and in *Oxford Health Plans LLC v. Sutter* the Court made clear that who decides whether an arbitration clause authorizes class arbitration remains an open question. *Bazzle* has been left with essentially no remaining effect.").

¹⁷¹ *Stolt-Nielsen S.A. v. AnimalFeeds*, 130 S.Ct. 1758, 1766 (2010).

¹⁷² *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, 435 F.Supp.2d 382, 385 (S.D.N.Y. 2006).

¹⁷³ *Id.* at 386.

¹⁷⁴ *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, 548 F.3d 85, 95 (2d Cir. 2008).

¹⁷⁵ *Id.* at 96.

We do not decide whether “manifest disregard” survives our decision in *Hall Street* [], 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 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.” Assuming, *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow.¹⁷⁶

Rather than cure long-festering uncertainty over the manifest disregard doctrine for vacating legally-erroneous arbitration awards, *Stolt* added new uncertainty by vacating the award on different reasoning. The Court said

Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error—or even a serious error. See *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). “It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be unenforceable.” *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509, 1015, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) (per curiam) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator ‘exceeded [his] powers,’ for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration.¹⁷⁷

Here the Supreme Court used its labor arbitration precedents to interpret the FAA. This is problematic. First, the labor arbitration cases (*Eastern Associated*, *Misco*, and *Garvey*) were not governed by the FAA, but rather by the federal common law of labor arbitration under (the very skeletal) Labor Management Relations Act.¹⁷⁸ While FAA

¹⁷⁶ *Id.* (citations omitted).

¹⁷⁷ *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1767-68 (2010).

¹⁷⁸ *Id.*

section 10 specifies grounds for vacatur, the LMRA “is much less specific. It simply provides federal jurisdiction to enforce collective bargaining agreements, including arbitration clauses in these contracts. Addressing this statutory void, the U.S. Supreme Court has [in labor cases] provided standards for enforcing arbitration agreements and arbitrator awards.”¹⁷⁹ This case law for enforcing or vacating labor awards, developed the dichotomy—embodied in the above quote from *Garvey*—that “the task of an arbitrator is to interpret and enforce a contract, not to make public policy.”

This dichotomy may fit the breach-of-contract cases that have always been the bulk of labor arbitration cases under the LMRA and were perhaps the bulk of arbitration cases under the FAA before the 1980’s. However, as Section II.C of this Article explained, since the 1980’s many arbitration cases under the FAA have involved—in addition to or instead of contract claims—a wide variety of claims in areas such as antitrust, securities, and employment discrimination. These cases require the arbitrator to make legal rulings not described by either half of the *Garvey* dichotomy between interpreting a contract and making public policy. The antitrust, securities, and employment discrimination cases going to arbitration require arbitrators to apply antitrust, securities, and employment discrimination law. That is neither interpreting a contract nor making public policy. It is applying statutes and the case law interpreting those statutes.

For example, consider the merits of *Stolt*, an antitrust case. Suppose a court had been asked to review, not the arbitrators’ clause-construction award deciding whether arbitration would proceed on a class basis, but rather a final award on the merits containing the arbitrators’ decision that the defendants did or did not violate the antitrust laws. Would it help a court reviewing that award to know that “the task of an arbitrator is to interpret and enforce a contract, not to make public policy”? No. What that court needs from the Supreme Court is guidance on how, if at all, to review the arbitrators’ applications of antitrust law. Similarly, countless courts since the 1980’s have needed from the Supreme Court guidance on whether legally-erroneous awards (in antitrust, securities, employment discrimination, and other areas of law) should be vacated.

So one might say that, in *Stolt*, the Supreme Court picked a case ill-suited to curing long-festering uncertainty over judicial review of legally-erroneous arbitration awards. To cure this uncertainty, the Court could have taken a case in which the arbitrators erroneously ruled for defendants on the merits of an antitrust claim. The Supreme Court may instead have granted certiorari in *Stolt* to reverse the spread of class arbitration furthered by *Bazzle*.¹⁸⁰ A cynical reading of *Stolt* is that the five conservative

¹⁷⁹ Michael H. LeRoy, *Irreconcilable Deferences? The Troubled Marriage of Judicial Review Standards under the Steelworkers Trilogy and Federal Arbitration Act*, 30 J. DISP. RESOL. 89, 91 (2010).

¹⁸⁰ “Marginalizing *Bazzle* as a mere plurality opinion, the Court proceeded to critique class arbitrations and described “just some of the fundamental” differences between bilateral and class arbitrations as “too great for arbitrators to presume.” Maureen A. Weston, *The Death of Class Arbitration After Concepcion?* 60 U. KAN. L. REV. 767, 775-76 (2012); see also *Stolt-Nielsen, S.A.*, 548 F.3d at 685-86.

In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators

justices who comprised the *Stolt* majority do not like class actions (in arbitration or litigation) and *Stolt* was just one of many cases in which those justices are restricting class actions.¹⁸¹

Whatever one's view of class actions though, in the realm of arbitration law *Stolt* aggravated uncertainty over which legally-erroneous awards should be vacated under the

to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration.

Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure, no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties.. Under the Class Rules, “the presumption of privacy and confidentiality” that applies in many bilateral arbitrations “shall not apply in class arbitrations,” thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited. We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.

Id. (citations omitted).

¹⁸¹ See, e.g., Alan Scott Rau, *Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 484-86 (2011) (in explaining *Stolt*, “the more vulgar forms of Legal Realism ... might in fact have some legitimate purchase here. One would have to invest a good deal of time and effort before being able to identify cases -- which in the end amount only to a trivial number -- in which the Supreme Court has been willing to mandate or approve the annulment of an arbitral award. ... But then we come to *Stolt-Nielsen*: It can hardly be accidental that the specter of class relief in arbitration is just about the only feature of the arbitration process that has been anathema to the business community -- or that this rare decision restrictive of arbitral power happens, wonder of wonders, to be one in which a business-oriented court manages more or less to relieve it of any such anxiety.”); see *Civil Procedure-Rule 68 of the Federal Rules of Civil Procedure – Ninth Circuit Holds that Unaccepted Rule 68 Offer Does Not Moot Plaintiff's Individual Claims. – Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013), 127 Harv. L. Rev. 1260, 1267 n.65 (2014) (referring to “the Supreme Court's string of recent decisions weakening much of the class action mechanism. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).”). The five conservative justices (Scalia, Thomas, Roberts, Alito and Kennedy) comprised the majority in each of those cases and in *Stolt*; see also Horton, *supra* note 20, at 500 (referring to “the pro-business Justices' desire to stamp out the class action entirely.”). See generally William W. Park, *The Politics of Class Action Arbitration: Jurisdictional Legitimacy and Vindication of Contract Rights*, 27 AM. U. INT'L L. REV. 837 (2012) (“The ideological overtones of [*Stolt* and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)] will not escape careful observers, aware of how class arbitration in the United States tends to implicate passions associated with ‘business vs. consumer’ conflicts.”); Reuben, *supra* note 87, at 917; Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U. CHI. L. REV. 623 (2012); Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 799-800 (2012); Jay Tidmarsh, *Living in CAFA's World*, 32 REV. LITIG. 691 (2013).

manifest disregard doctrine by adding new uncertainty over which legally-erroneous awards should be vacated as exceeding the arbitrators' powers.¹⁸² Thus *Stolt* compounded the uncertainty left by *Hall Street* over the fundamental question of whether arbitration awards must apply the law correctly to avoid vacatur.

c. Sutter

While *Stolt* might have been read broadly to result in courts vacating many legally-erroneous awards under FAA § 10(a)(4), this did not occur. In its 2013 decision in *Oxford Health Plans LLC v. Sutter*,¹⁸³ a unanimous Court read *Stolt* so narrowly that a distinguished arbitration scholar opines that “[a]fter *Sutter*, *Stolt-Nielsen* has largely been limited to its facts.”¹⁸⁴

In *Sutter*, a doctor brought a class action in a New Jersey court, despite a pre-dispute arbitration clause in his contract with the defendant, Oxford.¹⁸⁵ The trial court granted Oxford's motion to compel arbitration.¹⁸⁶ “The parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he determined that it did.”¹⁸⁷ “Oxford filed a motion in federal court to vacate the arbitrator's decision on the ground that he had ‘exceeded [his] powers’ under FAA § 10(a)(4).”¹⁸⁸ The district court denied the motion to vacate, and both the Third Circuit and Supreme Court affirmed.¹⁸⁹

Sutter cited *Hall Street* for the proposition “[t]hat limited judicial review . . . ‘maintains arbitration's essential virtue of resolving disputes straightaway.’”¹⁹⁰ *Sutter* distinguished *Stolt* on the ground that the parties in *Stolt* “had entered into an unusual stipulation that they had never reached an agreement on class arbitration” so the arbitrators’ “decision was not—indeed, could not have been—‘based on a determination

¹⁸² Rau, *supra* note 181, at 485-86 (*Stolt-Nielsen* “seems quite likely to create new uncertainty as to just what is encompassed by the mysterious prohibition of ‘excess of power,’ it is also quite unlikely to force open very far the ‘door of vacatur.’”).

¹⁸³ *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068 (2013).

¹⁸⁴ Drahozal, *supra* note 170, at 16 (“the key fact” in *Stolt* was “that the parties had stipulated that the agreement was silent on class arbitration. . . . Certainly a stipulation that a court construes as conceding away the entire case is unusual. And the Court emphasized in *Stolt-Nielsen* that the arbitrators had not made any attempt to construe the language of the contract itself, suggesting that if they had done so the award might be upheld. After *Stolt-Nielsen*, not surprisingly, arbitrators made sure to focus on the contract language in making their awards, and the Court subsequently upheld such an award in *Oxford Health Plans LLC v. Sutter*. After *Sutter*, *Stolt-Nielsen* has largely been limited to its facts.”).

¹⁸⁵ *Sutter*, 133 S. Ct. at 2067.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 2068.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (quotations omitted).

regarding the parties' intent.”¹⁹¹ In short, the *Stolt* arbitrators (according to *Sutter*) “did not construe the parties' contract, and did not identify any agreement authorizing class proceedings.”¹⁹² In contrast, in *Sutter*

the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But § 10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.¹⁹³

For its view that the arbitrator's task is “interpreting a contract,” *Sutter* (like *Stolt*) cited labor arbitration cases.

Because the parties “bargained for the arbitrator's construction of their agreement,” an arbitral decision “even arguably construing or applying the contract” must stand, regardless of a court's view of its (de)merits. *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); internal quotation marks omitted). Only if “the arbitrator act[s] outside the scope of his contractually delegated authority”—issuing an award that “simply reflect[s] [his] own notions of [economic] justice” rather than “draw[ing] its essence from the contract”—may a court overturn his determination. *Eastern Associated Coal*, 531 U.S., at 62, 121 S.Ct. 462 (quoting *Misco*, 484 U.S., at 38, 108 S.Ct. 364). So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.¹⁹⁴

So *Sutter* is a second recent Supreme Court case emphasizing the dichotomy between good arbitrators who interpret contracts and bad arbitrators who do something else instead. In *Stolt*, that bad something else is “make public policy.” In *Sutter*, that bad something else is “the arbitrator act[ing] outside the scope of his contractually delegated authority—issuing an award that simply reflects his own notions of economic justice.” While either formulation of the dichotomy may fit contract cases, neither helps courts

¹⁹¹ *Id.* at 2069 (citing *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758 (2009)).

¹⁹² *Id.* at 2070 (citing *Stolt-Nielsen S.A.*, 130 S.Ct. at 1758).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 2068.

reviewing arbitration awards on non-contract claims such as antitrust, securities, and employment discrimination. Thus, after *Sutter*—as after *Stolt* and after *Hall Street*—courts, arbitrators, and parties still sorely lack Supreme Court guidance on the fundamental question whether arbitration awards must apply the law correctly to avoid vacatur.

III. CONCLUSION

To resolve the fundamental question whether arbitration awards must apply the law correctly to avoid vacatur, the Supreme Court can take a case in which a legally-erroneous arbitration award clearly deprives a party of rights conferred by federal antitrust, securities or employment discrimination statutes. An ideal case would perhaps look like the example given in section II.C.1 above, that is, a Title VII claim that the employee initially brought in court but then had to arbitrate due to the employer’s successful motion to compel arbitration. Issues will be sharpened if the arbitrator rules for the employer in a legally-erroneous award supported by factual findings leaving no doubt that a correct application of Title VII would have resulted in a ruling for the employee.

That is the sort of case that will clarify the law by asking the Supreme Court if it will:

- depart from, or conform the law to, its representation of “judicial scrutiny of arbitration awards...sufficient to ensure that arbitrators comply with the requirements of the statute” giving rise to a mandatory law claim;¹⁹⁵
- retain or cut back the longstanding rule that courts should confirm awards without determining whether they are legally-correct;
- retain the manifest disregard doctrine and if so, specify its scope; and
- decide whether arbitrators exceed their powers when they make errors of law in non-contract cases.¹⁹⁶

Until the Supreme Court takes such a case, the law on vacating legally-erroneous arbitration awards will remain sorely deficient. Parties, arbitrators, and lower courts deserve much more clarity than the Supreme Court has thus far provided.

¹⁹⁵ See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987). *Accord* *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, n.10 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991).

¹⁹⁶ See, e.g., *Garlyn, Inc. v. Auto-Owners Ins. Co.*, 814 N.W. 2d 709 (Minn. Ct. App. 2012) (arbitrator’s award would be partially vacated where the arbitrator exceeded his authority by including pre-award interest on claims of less than \$7,500 in violation of a Minnesota statute); see generally Lawrence R. Mills & Thomas J. Brewer, ‘*Exceeding Powers*’: *Exploring Recent Trends in Cases Challenging Tribunal Authority*, 31 INT’L INST. FOR CONFLICT PREVENTION & RESOL., Sept. 2013 at 113.