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Is Less Really More? *Hall Street Associates*, Private Procedural Ordering and Expanded Review of Arbitral Awards in State Courts

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IS LESS REALLY MORE? *HALL STREET ASSOCIATES*, PRIVATE PROCEDURAL ORDERING AND EXPANDED REVIEW OF ARBITRAL AWARDS IN STATE COURTS

Allen Blair*

You're flying on a trapeze without a safety net.[1]

I. INTRODUCTION

Arbitration can be a risky business. The lack of judicial oversight combined with wide-sweeping arbitrator power to grant relief sometimes leaves parties feeling vulnerable to excessive or flatly wrong judgments. In "bet the farm" cases, parties, or one of them, might crave the safety of a second set of eyes reviewing their awards.[2] Accordingly, parties occasionally incorporate provisions for expanded judicial review into their arbitral agreements.

But a fear of finality chafes, in the Supreme Court's view, against an important feature of arbitration, the ease of judicial enforcement paired with highly constrained grounds for the vacatur of awards.[3] Indeed, according to the Court in *Hall Street*

* I would like to thank Tom Carbonneau, Nancy Welsh, my co-contributors, and all of the students and staff at Penn State University for their support and warm hospitality at the Symposium where the first draft of this article was first presented.

[1] Joanna Lin, *$4 Billion Award May Be Record in Arbitration Case*, L.A. DAILY J., June 5, 2009 (Verdicts and Settlements), at 2 (quoting Jay McCauley, a corporate lawyer, who went on to add that "[w]e still like the benefits of arbitration . . . but boy, maybe we should think twice about having no safety net at all, no chance when things go wayward").

[2] *See, e.g.*, Brief for the Petitioner at 40, Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008) (No. 06-989) (arguing that the concern is that many business managers may lose their appetite for arbitration by requiring them to "bet the company" on a process with no prospect of meaningful review); s*ee also, e.g.*, Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241 (1999) (recognizing "a growing concern over the 'Russian Roulette' nature of arbitration"); Carroll E. Neesemann, *Contracting for Judicial Review: Party-chosen Arbitral Review Standards Can Inspire Confidence in the Process, and is Good for Arbitration*, 5 DISP. RESOL. MAG. 18, 18 (1998) (expressing concern over "knucklehead awards"). In Part IV, I discuss some recent evidence that suggests that many commercial parties are growing more hesitant about using arbitration to resolve at least their biggest disputes precisely because they are concerned about limited review. *See infra* Part IV(B).

[3] As the Tenth Circuit said in *Bowen v. Amoco Pipeline Co.*,

> We would reach an illogical result if we concluded that the FAA's policy of ensuring judicial enforcement of arbitration agreements is well served by allowing for expansive judicial review after the matter is arbitrated. The FAA's limited review ensures judicial respect for the arbitration process and prevents courts from enforcing parties' agreements to arbitrate only to refuse to respect the results of the arbitration. These limited standards manifest a legislative intent to further the federal policy favoring arbitration by preserving the independence of the arbitration process.

254 F.3d 925, 935 (10th Cir. 2001); *see also, e.g.*, Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DEPAUL BUS. & COM. L.J. 383, 425 (2009) (describing the "spare legal

Associates, L.L.C. v. Mattel, Inc., the efficiency of finality trumps even contractual freedom. Parties cannot choose in their contracts to expand review of arbitral awards under the Federal Arbitration Act (FAA).[4]

The oddity of *Hall Street*'s holding might not be evident if the case is examined only in the context of arbitration law. Although the Court paternalistically substituted its own view of what was best for the parties in the face of clearly expressed language to the contrary,[5] thereby tacking away from the course set by its previous cases,[6] the decision purported to be strongly pro-arbitration. It recited much the same supportive language of other Supreme Court cases and proclaimed itself to be "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[7] Moreover, using wholesome doctrines like *ejusdem generis* and the Whole Act Rule, the Court's conclusions rested on straightforward statutory analysis of the FAA.[8] Accordingly, although courts and commentators debated the propriety of contractually expanding judicial review of arbitral awards prior to *Hall Street*,[9] comparatively little critical attention has been paid to the issue in the four years since the case was decided.[10]

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framework" for the judicial enforcement of arbitral awards as resting on a "keystone" of "rigorously restrained . . . judicial confirmation, modification, or vacatur of arbitration awards") (citing Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis*, 37 GA. L. REV. 123, 189-90 (2002)).

[4] *Hall St. Assocs.*, 552 U.S. at 592.

[5] At issue in the case was a contract provision providing that:

> The 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. *Hall Street Assocs.*, 552 U.S. at 579.

[6] *See infra* Part II(E).

[7] *Hall St. Assocs.*, 552 U.S. at 577.

[8] *See* Richard C. Reuben, *Personal Autonomy and Vacatur After* Hall Street, 113 PENN ST. L. REV. 1103, 1120-21 (2010). It is worth pointing out that the Court's strong focus on simple statutory construction might itself seem odd. Over the past twenty-five years, the Court has effectively rewritten the FAA, very often paying almost no heed to the statute's language or history. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation...."); Thomas Carbonneau, *Symposium Introduction: Building the Civilization of Arbitration*, 113 PENN. ST. L. REV. 983, 986 (2009) ("In its decisional law, the Court systematically rewrote the U.S. or Federal Arbitration Act (FAA)."); Margaret L. Moses, *ArbitrationLaw: Who's in Charge?,* 40 SETON HALL L. REV. 147, 147 (2010) ("The Supreme Court's construction of the statute, especially in the last twenty-five years, amounts to a judicially created legislative program, imposed without congressional input, that has vastly expanded the reach and focus of the original statute.").

[9] *Hall Street* resolved a Circuit split. The Ninth and Tenth Circuits had found that parties could not, through a private agreement, either expand or contract the powers of a court presiding over their dispute. *See* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (en banc), *cert. dism'd,* 540 U.S. 1098 (2004) (finding that any contractual provision purporting to expand grounds on which court can vacate arbitral award is ineffectual, regardless of its wording; FAA defines judicial scope of review by statute, which private parties have "no power to alter or expand"); Bowen v. Amoco Pipeline

Hall Street, however, is part of a bigger story and its place in that story is puzzling. In addition to countering the principle of party choice in the context of arbitration,[11] *Hall Street* also bucked a more general precedential trend embracing private procedural ordering.[12] In recent decades, the Court has permitted parties to customize

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Co., 254 F.3d 925, 934-37 (10th Cir. 2001) (same). The First, Third, and Fifth Circuits, in contrast, had found that parties had the power to define, through their contract, the underlying arbitral award itself and thus could contract for expanded judicial review. *See* Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996-97 (5th Cir. 1995) (holding that "a contractual modification [of judicial review] is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract and the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties"); Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 30-31 (1st Cir. 2005) (adopting the *Gateway* rule); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 292-97 (3d Cir. 2001) (same); *see also* Prescott v. Northlake Christian Sch., 369 F.3d 491, 494-498 (5th Cir. 2004) (reaffirming the *Gateway* rule).

Not surprisingly, given this clear divide in the case law, a number of commentators weighed in as well. For several particularly good scholarly treatments of the subject, *see, e.g.*, Eric Chafetz, *The Propriety of Expanded Judicial Review Under the FAA: Achieving a Balance Between Enforcing Parties' Agreements According to Their Terms and Maintaining Arbitral Efficiency*, 8 CARDOZO J. CONFLICT RESOL. 1 (2006); Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007); Ilya Enkishev, *Above the Law: Practical and Philosophical Implications of Contracting for Expanded Judicial Review*, 3 J. AM. ARB. 61 (2004); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171 (2003); Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91 (2000); Paul F. Kirgis, *Judicial Review and the Limits of Arbitration Authority: Lessons from the Law of Contract*, 81 ST. JOHN'S L. REV. 99 (2007); Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 OHIO ST. J. ON DISP. RESOL. 151 (2002); Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429 (2004); Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. REV. 759 (1992); Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123 (2002); Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509 (2002); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241 (1999).

[10] For excellent post-*Hall Street* commentary, however, *see, e.g.*, Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 905, 914 (2010); Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929 (2010); Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 535-36 (2009); David K. Kessler, *Why Arbitrate? The Questionable Quest for Efficiency in Arbitration After Hall Street Associates*, 8 FLA. ST. U. BUS. REV. 77 (2009); Stanley A. Leasure, *Arbitration After Hall Street v. Mattel: What Happens Next?*, 31 U. ARK. LITTLE ROCK L. REV. 273 (2009); Alan Scott Rau, Hall Street Associates v. Mattel, Inc.*: Fear of Freedom*, 17 AM. REV. INT'L ARB. 469 (2006); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103 (2009); Timothy Tyler & Archis A. Parasharami, *Finality over Choice: Hall Street Associates, L.L.C. v. Mattel, Inc. (U.S. Supreme Court)*, 25 J. INT'L ARB. 613 (2008).

[11] *See, e.g.*, Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1105 (2010) (recognizing that *Hall Street* "constitutes arguably the most significant constraint on party autonomy in arbitration that the Court has imposed").

[12] Private procedural ordering allows parties to bargain over the procedural rules that will govern the resolution of any disputes that might arise between them in the future. *See, e.g.*, Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 724-25 (2011) (describing the process of modifying by contract the "spectrum of procedure" as private procedural ordering). Following the lead of other commentators who have described this form of private ordering, I will use the terms "private procedural ordering" and "procedural contracting" interchangeably. *See, e.g.*, Judith Resnik, *Procedure as Contract*,

more and more dispute resolution procedures and processes. The Court has, in short, recognized the advantages of seeing procedures and processes as defaults rather than immutable or mandatory rules.[13] The expanding regime of private procedural ordering offers parties additional means of calibrating accuracy and efficiency to meet their *ex ante* preferences.[14] The extreme outlying character of *Hall Street* becomes clear when one considers that it is one of the only decisions in the last thirty years by the Supreme Court invalidating a procedural contract.[15]

Seen in this light, *Hall Street* represents a distinct break in the Court's otherwise relatively unfettered march to internalize contract norms and abandon its historic skepticism over the devolution of judicial authority.[16] It might be tempting to read the case as a cautionary break, halting the march in order to consider some of the many and concerning repercussions of converting public and standardized procedure into private and individualized procedure.[17] But such a reading does not fit. The holding strives to limit rather than expand a judicial role in an otherwise private proceeding. Besides, the case does not even hint that its rejection of private procedural ordering springs from any concerns over party control of judicial processes.

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80 NOTRE DAME L. REV. 593, 598 (2005) (recognizing a movement from "Due Process Procedure to Contract Procedure"). Unlike some commentators, however, I am using these terms in the broadest possible sense, to include all party agreements regarding resolution of their disputes, including procedures that may be used in courts and extra-judicial procedures and processes such as arbitration, mediation, med-arb and settlement. *Compare* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 511 (2011) (describing contract procedure as "the practice of setting out procedures in contracts to govern disputes . . . that will be adjudicated in the public courts").

[13] The "rules versus standards" debate has occupied the attentions of scholars for many years. *See, e.g.*, David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 830 (1993) ("The amount of ink spilled over debating the virtues of rules versus standards would lead the reasonable observer to believe that something momentous was at stake."). For good contemporary discussions of the distinction, *see* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557-68 (1992) (viewing rules and standards for their economic efficiency); Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256, 258 (1995) (examining relative efficiency of two-party bargaining under rules and standards); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25 (2000) ("Rules establish legal boundaries based on the presence or absence of well-specified triggering facts."); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) ("Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere."); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1124-42 (1999); FREDERICK SCHAUER, THINKING LIKE A LAWYER 13-29 (2009) (discussing the relative advantages and disadvantages of legal norms being articulated as rules or standards).

[14] *See, e.g.*, Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUDIES 307, 314 (1994) (arguing that heightened accuracy in adjudication can only be obtained at higher costs so an efficient balance has to be struck on a case-by-case basis).

[15] *See* Jamie Dodge, *supra* note 12, at 738 (describing *Hall Street* as "[t]he Court's sole invalidation of a procedural term").

[16] *See* Judith Resnik, *supra* note 12, at 598--99 (describing how changes in adjudicatory practice are shifting the focus of civil procedure from "due process procedure" to "contract procedure").

[17] *See infra* Part II(D).

The better explanation, I contend, is that the Court was not rejecting private procedural ordering at all.[19] Rather, its somewhat tepid reference to alternative means of enforcing contracts for expanded judicial review of arbitral awards – "[t]he 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"[20] – suggests that the Court was instead trying to funnel innovation, at least with respect to arbitral award enforcement and review, back to the states. Less judicial review under the FAA could result in more use of state arbitration laws, which might allow for greater party autonomy.

In this Article, I examine the implications of this reading. I argue that barring expanded judicial review under the FAA but inviting parties to turn to state law to achieve their objectives erodes the value of arbitration and threatens its continued relevance, at least to domestic commercial disputes.[21] *Hall Street* is the worst of all possible worlds: it undermines party autonomy while simultaneously threatening the very virtue – finality – that it was crafted to protect.

This Article proceeds in three Parts. Part II begins by tracing the evolution and current status of private procedural ordering. Additionally, it evaluates some of the ways in which private procedural ordering generally, and expanded judicial review of arbitral awards in particular, offers the potential for significant efficiency gains. Set against the potential gains from customized procedure and process, however, are several possible externalities, which Part II also surveys. Part II concludes that *Hall Street* is best

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[19] Professor Jamie Dodge, in her seminal article on private procedural ordering makes this point as well. In her view,

> [A]lthough the Court narrowly held in *Hall Street Associates v. Mattel, Inc.* that the Federal Arbitration Act specifically preempted the modification of the standard of review in the courts, the Court expressly noted that under state law or common law parties may be able to modify the standard of judicial review.

Jamie Dodge, *supra* note 12, at 738. This "express notation" suggests, in her view, that the Court does not fundamentally think parties should be barred from contracting for expanded judicial review or similar procedural modifications. *See id.*

[20] Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 590 (2008).

[21] Of course, arbitration is also under attack in the consumer and, to a somewhat lesser degree, the employment context. Although the 2009 Arbitration Fairness Act has, to date, failed to pass in Congress, the Act's spirit has persisted and shows signs that it might erode at least some of the Supreme Court's pro-arbitration precedent. Congress has, in fact, enacted several "mini" versions of the Act applying to parties with weaker bargaining power. *See, e.g.*, Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454 (2009) (banning in certain defense contractors' employment agreements pre-dispute provisions to arbitrate sexual harassment claims); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 748(n)(2), 124 Stat. 1376, 1739 (2010) (to be codified at 7 U.S.C. § 26(n)(2)); *id.* §§ 922(b), (c), 124 Stat. at 1841 (to be codified at 18 U.S.C. §§ 1514A(e)(1), (2)) (prohibiting pre-dispute agreements to arbitrate claims under whistleblower provisions of the Dodd-Frank Consumer Protection Act). Perhaps more significantly, in April 2012, the Consumer Financial Protection Bureau began soliciting comments relevant to its upcoming investigation of mandatory arbitration provisions in agreements for financial products and services. *See, e.g.*, Ann Carrns, *Consumer Agency Looking Into Mandatory Arbitration*, NEW YORK TIMES (April 25, 2012), *available at* http://bucks.blogs.nytimes.com/2012/04/25/consumer-agency-looking-into-mandatory-arbitration/. Congress specifically required such an investigation in Section 1028(a) of the Dodd-Frank Act.

understood not as a decision opposing private procedural ordering but rather as pressing for state court innovations, at least with respect to agreements for expanded judicial review of arbitral awards.

Part III turns to a survey of state law. It observes that, although a majority of jurisdictions have arbitration laws providing for essentially identical enforcement and review as the FAA, there are signs that states have started to accept *Hall Street*'s invitation. Five states allow parties to contract for expanded judicial review. A handful of additional states have laws allowing for more searching judicial review of arbitral awards.

Part IV considers the problems with *Hall Street*'s holding paired with its invitation for more reliance on state laws. It argues that a greater role for state arbitration laws in the enforcement and review of awards sits awkwardly with extant Supreme Court cases that have, with very few exceptions, federalized and standardized arbitration law. Indeed, the prospect of a greater role for state law opens the back door for states to thwart the purposes of the FAA by enacting more intrusive and disparate review standards, which, as Part III suggests, seems already to be happening. Given current state law, it is not clear that the Supreme Court, when pushed, will actually stick by its dicta in *Hall Street.* Even if it does, parties will be faced with an increasingly confusing and overlapping matrix of competing state laws as well as the FAA. Accordingly, parties who could benefit most from arbitration will be stymied by legal uncertainty and high transaction costs, which potentially reduce or eliminate any efficiency gains. Given that arbitration is no longer the only game around for commercial parties who wish to contain costs and exercise control over the course of their disputes with one another – they can, instead, use other procedural contracting options to shape the course of future litigation – *Hall Street* threatens the continued relevance of arbitration, at least to domestic commercial disputes.

II. THE RISE OF PRIVATE PROCEDURAL ORDERING

I know no safe depository of the ultimate powers of the society but the people themselves.[22]

Historically, courts were skeptical of any private procedural choices, seeing such party-driven rulemaking as supplanting the public function of courts.[23] In the nineteenth and much of the early twentieth centuries, courts were not only reluctant to enforce non-judicial modes of dispute resolution like arbitration, but they also effectively prevented

[22] PHILLIP G. HENERSON, THE PRESIDENCY THEN AND NOW 25 (2000) (quoting Thomas Jefferson writing to William Charles Jarvis, 28 September 1820).

[23] Several scholars have suggested that at least some of this hostility towards private procedural ordering might have been less high-minded. Professor Alan Scott Rau, for instance, has suggested that courts' traditional hostility to arbitration may have "originated in considerations of competition for business, at a time when judges' salaries still depended on fees paid by litigants." ALAN SCOTT RAU, ARBITRATION 57 (2d ed. 2002); *see also* JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 83 (1918) (recognizing the judicial competition with private tribunals and the fear that arbitration threatened a significant source of judicial business, as well as judicial jobs linked to the courts' caseloads).

private parties from altering or opting out of almost all procedural rules in judicial proceedings.[24] As one commentator has colorfully suggested, courts followed Henry Ford's view of choice: "Any customer can have a car painted any colour that he wants so long as it is black."[25]

Eventually, however, starting with a somewhat grudging acceptance of arbitration and the passage of the FAA but really gaining momentum under Chief Justices Warren and Burger, judicial tides began to shift. Through an expanding menu of private procedural ordering options, courts have allowed parties the freedom to tailor process and procedure in order to increase certainty while efficiently adjusting accuracy to fit with their *ex ante* preferences.[26]

The following sections briefly trace the evolution of the current law governing private procedural ordering and discuss the potential gains from such ordering. This Part then highlights some of the normative implications of party choice over procedural rules. The last section in this Part concludes that whatever legitimate concerns may exist with respect to private procedural ordering, the trend of precedent has been clear: the Supreme Court favors parties' ability to structure their own procedural rules. *Hall Street* is then best understood not as a departure from this trend but rather as an effort to direct a particular type of innovation in private procedural ordering back to state courts.

A. Procedure as Public Law: Historic Skepticism of Private Procedural Ordering

Until the early twentieth century, courts protected their turf. They tended to see efforts by parties to provide for private procedural rules or most non-court dispute resolution processes as infringements on the proper public role of the court system.[27] There existed "a taboo against party autonomy in procedural matters."[28] Courts

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[24] *See, e.g.*, Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 139 n.17 (1982) (citing Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874)) (discussing how the ouster doctrine resulted in courts refusing to enforce forum selection clauses).

[25] Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007) (arguing that "[o]ur judiciary has unfortunately embraced Henry Ford's sense of consumer choice" with respect to litigation procedural rules).

[26] *See, e.g.*, Louis Kaplow, *supra* note 14, at 310 (arguing that heightened accuracy in adjudication can only be obtained at higher costs so an efficient balance has to be struck on a case-by-case basis).

[27] *See, e.g.*, Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947 (1996) (recognizing that prior to the early twentieth century, the traditional view was that if courts were to function as the national source of justice, there was no room for "makeshift, party-confected modes of dispute resolution"); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 599–600 (1997) (noting that judges were either wary of quality of justice available in arbitration or—because they were paid on per case basis—protective of their own pocketbooks); *but see* Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 20 (2009) (surveying treatises and concluding that "English and American colonial courts were neither hostile nor blindly deferential to arbitration").

[28] Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 294 (1988).

primarily relied on two interlacing doctrines – the revocability and ouster doctrines – to prevent procedural contracting. Perhaps not surprisingly, both doctrines arose out of a judicial skepticism of arbitration, though at least the ouster doctrine expanded to bar other forms of private procedural ordering as well.

The revocability doctrine sprung into existence, near full gown, from dicta in Lord Edward Coke's 1609 opinion in *Vynior's Case*.[29] There, the parties had entered into a contract for repair work on several buildings.[30] They agreed to submit any disputes about the work to arbitration, and, as was customary at the time, a performance bond secured this agreement.[31] The plaintiff brought a court action, seeking to recover on the bond as well as to recover damages. The plaintiff claimed that the defendant had failed to comply with the arbitration agreement.[32] Lord Coke ruled that when there was a suit on a bond given for a submission to arbitration, the submission itself was revocable although the price of revoking was forfeiture of the bond:

> Although . . . the defendant, was bound in a bond to stand to, abide, observe, etc., the rule, etc., of arbitration, etc., yet he might countermand it, *for one cannot by his act make such authority, power, or warrant not countermandable which is by the law or of its own nature countermandable*.[33]

Whatever Lord Coke's original intent,[34] *Vynoir's* became a leading case "establishing the revocability doctrine."[35] Pursuant to this doctrine, a party to an arbitration agreement could revoke an arbitrator's authority at any time before the arbitrator rendered an award, even if the parties had agreed the delegation was irrevocable.[36] Although U.S. courts would usually enforce arbitration awards once

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[29] Vynior v. Wilde, [1609] 77 Eng. Rep. 595, 598-600 (K.B.).

[30] *See id.*

[31] *See id.* The common law of contract was just beginning to form at the time, so bonds often secured contractual promises. *See, e.g.*, Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 208 (2004) (noting that "the common law of contract was in its infancy" at the time that *Vynior v. Wilde* was decided).

[32] *See Vynior*, 77 Eng. Rep. at 597.

[33] *Id.* at 601-02 (emphasis added).

[34] Some commentators have suggested that Lord Coke was effectively relying on agency principles. *See, e.g.*, Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 598-99 (1928). Professors Paul Carrington and Paul Castle have compellingly, pointed out, however, that the concept of agency had not developed at the time that *Vynoir's* was decided. *See* Carrington & Castle, *supra* note 31, at 210. They contend, instead, that Lord Coke was likely motivated by a desire to "insure the disinterest of arbitrators" at a time when there were no real substantive constraints on arbitrator authority. *Id.*

[35] Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. REV. 238, 240 (1930); *see also, e.g.*, Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 602 (1928).

[36] *See, e.g.*, Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (citing *Vynior* as authority for the proposition that arbitration submissions are revocable regardless of a stipulation to the contrary because one "cannot alter the judgment of law, to make that irrevocable, which is of its own nature revocable.").

issued,[37] following the practice of their English counterparts, they would not generally enforce executory contracts to arbitrate.[38] Practically, this meant that a party to an arbitration agreement faced continual risk that her counterparty would renege on his promise and exercise his right to demand that a court hear any disputes.

Still, the revocability doctrine alone did not necessarily create an insuperable barrier to arbitration or other forms of procedural contracting. The doctrine mutated, however, over time into the so-called ouster doctrine. The mutation can be traced to an eighteenth century English decision, *Kill v. Hollister*.[39] There, while interpreting the revocability doctrine, the court allowed a judicial action over an insurance policy to proceed despite an arbitration clause on the grounds that "the agreement of the parties cannot oust this court [of jurisdiction]."[40] As with the dicta giving rise to the revocability doctrine itself, no authority was given for this "ouster" rule.[41] Nevertheless, by 1856, the rule had become justified as legitimate "judicial jealousy" over jurisdiction, and this explanation for it stuck.[42]

Although the ouster doctrine began as anti-arbitration rule, it quickly expanded into a more general principle precluding courts from enforcing various contractual provisions limiting redress in courts. In *Home Insurance Co. v. Morse*, for instance, the U.S. Supreme Court held that an agreement by which an insurance company waived its right to remove state cases to federal courts was not enforceable.[43] The Court analogized the matter to a jury trial waiver and an arbitration agreement, concluding that:

> A man may not barter away his life or his freedom, [sic] or his substantial rights . . . . He cannot . . . bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.[44]

In the Court's view, privately negotiated contract provisions could not trump the role of the public adjudicatory system. If such contract provisions were enforced, the "regular

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[37] *See, e.g,* Burchell v. Marsh, 58 U.S. 344, 349 (1854).

[38] *See, e.g.,* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 121-22 (1924) ("The federal courts--like those of the states and of England--have, both in equity and at law, denied in large measure, the aid of their processes to those seeking to en force (sic) executory agreements to arbitrate disputes."); Jeffery W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 272 (1990). This rule was incorporated in the First Restatement of Contracts as well. RESTATEMENT (FIRST) OF CONTRACTS § 550, cmt. A (1932) ("A bargain to arbitrate, though it is not illegal, is practically unenforceable. . . ."). Of course, even at the height of its power, the revocability doctrine had exceptions. *See, e.g., Red Cross Line*, 264 U.S. at 122-25 (finding that New York courts could equitably enforce arbitration agreements in their own courts under New York's arbitration statute).

[39] Kill v. Hollister, [1746] 95 Eng. Rep. 532 (K.B.).

[40] *Id.*

[41] *See id.*

[42] *See* Scott v. Avery, [1856] 10 Eng. Rep. 1121, 1138 (H.L.) (speculating that judicial hostility to arbitration "probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would deprive one of them of jurisdiction"); Home Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) (citing *Scott v. Avery* as one of "numerous cases" showing that parties cannot by contract oust a court of jurisdiction).

[43] *Home Ins. Co.*, 87 U.S. at 451-52.

[44] *Id.* at 451.

administration of justice might be greatly impeded . . . ."[45] Soon, courts went on to find that anti-suit covenants, pre-dispute waivers of liability, and forum selection clauses were similarly barred by the ouster doctrine.[46] Only courts, the prevailing opinion went, possessed the ability to "protect rights and to redress wrongs" because private tribunals or other private customizations of procedure were prone to "become . . . instrument[s] of injustice, or to deprive parties of rights which they are otherwise fairly entitled to have protected."[47]

B. More than Mere Contract Law: Autonomy and Private Procedural Ordering

By the late Eighteen-century, although both the revocability and ouster doctrines were still in use in American courts, notions of party autonomy were starting to play a greater role in not only the public conscience but also in the judicial mind.[48] At the height of the revocability and ouster doctrines, contract law was in its infancy, and most contracts were discrete and simple.[49] That began to change with rapid economic

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[45] *Id.* at 451-52.

[46] *See, e.g.*, Mut. Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 F. 508, 510 (6th Cir. 1897) (finding that a contract stipulating that suits could only be brought in federal court was void because it "intended to oust the jurisdiction of all state courts"); Knorr v. Bates, 35 N.Y.S. 1060, 1062 (N.Y. Gen. Term. 1895) (holding that a contractual limitation on the right to sue underwriters on an insurance policy was unenforceable because "a provision in a contract that the party breaking it shall not be answerable in an action is a stipulation for ousting the courts of jurisdiction, and as such, is void, upon grounds of public policy"); Meacham v. Jamestown Franklin & Clearfield R.R. Co., 105 N.E. 653, 656 (N.Y. 1914) (Cardozo, J. concurring) (finding that an arbitration contract is an invalid attempt to oust the jurisdiction of the courts because its purpose is the same as agreements requiring litigants to submit their case to a foreign court, but noting that there may be exceptional circumstances warranting enforcement of such forum selection clauses).

[47] Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1320-21 (C.C.D. Mass. 1845). Thus, it is fair to say that the ouster doctrine was justified both based on concerns over individual rights, such as those set out in *Morse*, and concerns about extra-individual matters such as "administrative efficiency, separation of powers, and public faith in the legitimacy of the judiciary." David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 995 (2008) (citing and discussing Nute v. Hamilton Mutual Ins. Co., 72 Mass. 174 (1856) as articulating this extrajudicial concern).

[48] *See, e.g.*, Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 415 (1988) ("During the past century, contract law, along with most of American society, has undergone a 'major transformation.'"); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 630 (1995) ("Contract has become the dominant doctrinal current in modern American law.").

[49] In his article on the history of commercial law in the United States, Professor Walter F. Pratt, Jr. explains that:

> Contracting, like conversation, had in earlier times been rooted in the past. People who knew one another and who knew the local market, insulated as it was from dramatic shifts in the economy, faced little likelihood of changes in circumstances that would require elaborate agreements or provoke complex disputes. Railroads and cities, however, seemed to disrupt that past by bringing economic uncertainty into the local markets. Parties thus faced the tiring prospect of writing detail upon detail into each agreement if they were to account for every potential event.

transformations in the American economy. As American courts routinely decided increasingly complex contract disputes based on the intentions of the parties,[50] the same principles of autonomy began gaining traction in the context of private procedural ordering.[51] The trend towards acceptance of procedural contracts, in fact, follows the path charted by G. Richard Shell twenty years ago in his study of contracts and the Supreme Court: the steady demise of the public policy exception to contract enforcement and, in particular, of an exception to contractual autonomy that draws from the special attributes of judicial process.[52]

Arguably, the first steps towards unlocking the potential of private procedural ordering started with increasing demand for arbitration.[53] Businesses saw the potential efficiency gains from arbitration, but they were frustrated with court refusal to enforce arbitration agreements.[54] Responding to the interests of the business community, in 1920, New York broke from traditional English arbitration law by enacting a statute that enforced pre-dispute agreements to arbitrate, ended the practice of courts hearing questions of law during the course of arbitration, and provided for only limited judicial review of the final award.[55] In 1925, the U.S. Congress followed New York's lead by enacting the United States Arbitration Act, later renamed the Federal Arbitration Act. Accordingly, as the Supreme Court explained, the FAA was a "response to the refusal of

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Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 428-29 (1988); *see also* Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 489 (1995) (explaining that the doctrine of revocability set forth by Lord Coke in *Vynior* occurred before the common law of contracts was fully formed).

[50] Instead of being localized and discrete as they had been prior to the turn of the century, commercial transactions tended to be more complex and regional as well as national. *See* Allen Blair, *"You Don't Have to be Ludwig Wittgenstein": How Llwellyn's Concept of Agreement Should Change the Law of Open-Quantity Contracts*, 37 SETON HALL L. REV. 67, 77 (2006).

[51] *Contra* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 1014 (2008) (arguing that, although "[i]ncreased appreciation for freedom of contract and individual autonomy and consent may have influenced the development of [forum selection clauses,] . . . these considerations played a small part, at best, especially when compared to the degree to which extraindividual concerns shaped the design of clause enforcement doctrine").

[52] G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 452-56 (1993) (detailing Supreme Court treatment of judicial access clauses and documenting judicial acceptance of *ex ante* forum selection clauses).

[53] *See, e.g.*, William C. Jones, *An Inquiry Into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 461-62 (1958) ("Statistics are not available and it is doubtful that they ever will be, but it is probable that in the nineteenth century arbitration in one form or another became the most important form of mercantile dispute settlement ... in the United States ... although courts continued, of course, to be used."); Jeffery W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 275 (1990) ("Despite an essentially unchanging judicial hostility toward arbitration, it grew in popularity as the commercial affairs of the United States became increasingly far flung and complex.").

[54] *See, e.g.*, Atlantic Fruit Co. v. Red Cross Line, 276 F. 319, 322 (S.D.N.Y. 1921) (recognizing the general displeasure in the business community with courts' unwillingness to enforce arbitration agreements in the early twentieth century).

[55] Michael A. Scodro, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1941 (1996).

courts to enforce commercial arbitration agreements,"[56] but it also represented a more general step towards recognizing the value of autonomy in procedural choices.

That progression continued and, as due process became recognized as a waivable right, the Warren and Burger Courts tentatively embraced more and more forms of procedural private ordering.[57] The current era customizable procedure, however, was not ushered in until 1972 in *The Bremen v. Zapata Off-Shore Co.*,[58] when the Supreme Court addressed enforcement of a forum selection clause for the first time since it had endorsed the ouster doctrine in *Morse* almost one hundred years earlier.[59] *Bremen* revolutionized private procedural ordering by doing two things. First, it boldly and decisively discarded the ouster doctrine, relegating it to mere anachronism: "[the ouster doctrine] is hardly more than a vestigial legal fiction."[60] Perhaps more significantly, it shifted focus to party autonomy, making the touchstone for enforcement of forum selection clauses the quality of the bargaining process.[61]

Following *Bremen*, the Court broke down one of the few remaining barriers standing in the way of contract procedure by abandoning any effort to distinguish between commercial and consumer contracts in *Carnival Cruise Lines v. Shute*.[62] There,

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[56] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 125 (2001); Southland Corp. v. Keating, 465 U.S. 1, 13-14 (1984) ("[T]he need for the law arises from ... the jealousy of the English courts for their own jurisdiction . . . This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.") (quoting H.R. Rep. No. 68-96 (1924)). The statute's purpose was to ensure that "written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations" would be "valid and enforceable." 9 U.S.C. §1 (2006). For excellent accounts of the FAA's legislative history, *see* James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745 (2009); Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN ST. L. REV. 1343, 1348 (2009) (providing a brief history of the passage of the FAA).

[57] Dodge, *supra* note 12, at 735 (citing Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971); Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 315–16 (1964); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187–88 (1972)).

[58] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972).

[59] *See, e.g.*, David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1095 (2002) (describing the case as "a sea-change in the way private agreement is viewed in relation to procedure"); William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 15 (2006) (observing that the law "changed dramatically" in The Bremen); Linda S. Mullenix, *supra* note 28, at 307 ("The current doctrine of consensual adjudicatory procedure . . . is based on Supreme Court pronouncements in *The Bremen*.").

[60] *Bremen*, 407 U.S. at 12.

[61] *See id.* at 15 (finding that forum selection clauses should be enforced unless the resisting party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid"); *see also, e.g.*, 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, 597 (2007) (describing the Court as elevating the concept of freedom of contract, thereby allowing parties to bargain about how a dispute will be decided); Linda S. Mullenix et al., *Case One: Choice of Forum Clauses*, 29 NEW ENG. L. REV. 541, 543 (1995) (arguing that the Court in The Bremen adopted a "strongly stated federal policy favoring enforceability, subject to usual contract principles"); KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 85 n.60 (1999) (stating that The Bremen "shift[ed] from a jurisdictional to a contractual paradigm").

[62] Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 587–88 (1991).

extending its pro-autonomy decision in *Bremen*, the Court brushed past a common law rule that forum-selection clauses in "form contracts" were presumptively unenforceable and reasoned that such clauses should, instead, be enforced because consumers "benefit in the form of reduced [prices] reflecting the savings that the [firm] enjoys by limiting the fora in which it may be sued."[63]

Since *Bremen* and *Shute*, party autonomy regarding pre-dispute procedural determinations flourishes in an increasingly wider range of commercial and non-commercial settings.[64] To the extent that parties want to customize procedural rules, "almost limitless" methods of modification are available to them.[65] For instance, in addition to entering into arbitration agreements, of course, parties can (and regularly do) include forum selection clauses,[66] choice of law clauses,[67] clauses dealing with appointment of service agents or waiver of notice,[68] and limitation period clauses[69] in their contracts. Parties can even waive the right to notice and a hearing by using cognovits notes.[70] Additionally, parties commonly waive the right to a trial by jury,[71]

[63] *Id.* at 594 ("[I]t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.").

[64] Mullenix, *supra* note 28, at 302-03.

[65] Moffitt, *supra* note 25, at 465.

[66] *See, e.g.*, Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 118 (2009) (observing that parties "commonly" contract over choice of forum "in merger agreements and other highly negotiated corporate and commercial contracts"); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1987 tbl.2 (2006) (finding that about 53-percent of a sample of mergers clauses included forum selection provisions).

[67] *See, e.g.*, Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 403 (2003) (discussing why most such clauses are enforced by courts).

[68] Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964) ("[I]t is settled . . . that parties to a contract may agree in advance . . . to waive notice altogether.").

[69] *See, e.g.*, 7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 15:12, at 264-67 (4th ed. 1997) (discussing the enforceability of such clauses); Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 990 (2008) (discussing the frequency of use of such clauses in consumer contracts).

[70] *See, e.g.*, Swarb v. Lennox, 405 U.S. 191 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). The enforcement of contractual confession of judgments does not violate the defendant's right to due process provided that there is clear and convincing evidence that the waiver of notice and hearing was voluntary, knowing, and intelligently made. *Id.* at 185-87.

[71] Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1595 (2005) ("Most courts will enforce contractual jury waivers."); Theodore Eisenberg & Geoffrey P. Miller, Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts, 4 J. EMPIRICAL LEGAL STUD. 539, 539 (2007) (finding that about 20-percent of a sample of merger and acquisition agreements contained a jury trial waiver provision). Significantly, even though the Court has said that the standard for evaluating jury trial waivers is constitutional rather than contractual, *see D.H. Overmyer*, 405 U.S. at 185, lower courts seem to focus on the propriety of the bargaining process to the exclusion of any other concerns, *see, e.g.*, IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 993 (7th Cir. 2008) (reversing the district court's refusal to enforce a jury waiver embedded in a sales contract on the view that "[a]s long as the price is negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention").

they modify the rules of discovery,[72] enter into provisions modifying burdens of proof,[73] and waive class action rights.[74] Even procedural requirements that might seem "immutable," such as jurisdictional requirements, have, in recent years been subject to some contractual modification.[75]

Although the Supreme Court has not specifically endorsed the use of all of these – and the many other potential – forms of private procedural ordering, with almost no exceptions other than *Hall Street*, the Court's precedent "treats procedural contracts as a method for generating procedural efficiencies and increased certainty of process, resulting in broad enforcement of procedural terms."[76] The trend of precedent, in short, seems unequivocally to favor party autonomy and private procedural ordering.

C. The Case for Party Control: Efficiency Gains From Customized Procedure

The doctrinal reality, as the previous section shows, is that public procedure is primarily comprised of default rather than mandatory rules. Even though most courts do not bother to articulate them, there are sound normative reasons rooted primarily in efficiency, to accept this reality. The potential benefits from private procedural ordering[77] are really just extensions of the benefits conferred by existing public procedural rules. In adversarial systems of adjudication, public procedural rules are designed to strike a balance between the interests of the plaintiff and the defendant in order to provide efficiency and fairness in the resolution of disputes.[78] Indeed, the

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[72] *See, e.g.*, Noyes, *supra* note 61, at 607 ("It is generally acknowledged that ex ante contracts to alter the rules of evidence are enforceable."); Taylor & Cliffe, *supra* note 59, at 1086 (discussing pre-litigation agreements, in which parties to a contract "designate what evidence may or may not be presented as proof").

[73] *See, e.g.*, Robert E. Scott & George E. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814, 857-58 (2006) (noting that it is likely that courts would enforce reasonable allocations of burdens of proof and that good empirical evidence exists that parties contract for such allocations).

[74] *See, e.g.*, Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Non- consumer Contracts*, 41 U. MICH. J.L. REFORM 871, 884–86 (2008) (finding that eighty percent of consumer contracts with arbitration provisions included a class-action waiver while no consumer contract subject to litigation included such a term).

[75] Davis & Hershkoff, *supra* note 12, at 514 (noting that recent cases arguably allow for parties to enlarge the subject matter jurisdiction of federal courts and contract around some constitutional standing barriers).

[76] Jamie Dodge, *supra* note 12, at 739. In fact, since the Supreme Court's decision in *Shute*, the Court has not found that "a procedural contract violates fundamental fairness." *Id.* at 735-36.

[77] Contracting parties, I assume, are rational in the sense that they only enter into contracts that they believe will make them better off. *See, e.g.*, Robert E. Scott, *The Law and Economics of Incomplete Contracts*, 2 ANNU. REV. L. & SOC. 279, 281 (2006) (assuming that contracting parties "act rationally, within the constraints of their environment, in the sense that they wish to contract if they believe the arrangement will make them better off and not otherwise"); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 602 (1990) ("If we assume rationality, then it follows that, regardless of the risk attitudes of particular parties, the dominant strategy for contractual risk allocation is to maximize the expected value of the contract for both parties. Only by allocating risks in order to maximize the joint expected benefits from their contractual relationship can the parties hope to maximize their individual utility.").

[78] 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 1.21[1][a] (3d ed. 2008) ("The application of orderly rules of procedure does not require the sacrifice of fundamental justice, but rather the

Federal Rules of Civil Procedure, and similar state rules of procedure, were crafted to meet both needs.[79]

To that end, public procedural rules provide uniformity and so-called transsubstantivity – the rules are applied and interpreted in the same manner in all cases, irrespective of the subject matter in dispute.[80] Uniformity and transsubstantivity aim to standardize procedure and achieve, in the aggregate, that compromise between efficiency and fairness in the widest swathe of cases possible.

Like all pre-fabricated solutions, however, the rules cannot account for the individual nuances of every actual case. In fact, the rules themselves suggest as much, recognizing that their one-size-fits-all template may not be optimal in all situations. Procedural rules, at least in the United States, leave litigants with broad discretion to conduct their affairs throughout the litigation process.[81] Litigants have the responsibility and freedom, for instance, to discover, gather, and present facts to an essentially passive court.[82] In so doing, parties can and do make a variety of strategic choices. There is a simple justification for the almost self-evidently obvious fact that parties exercise control over many of their litigation decisions: the twin goals of efficiency and justice can be best realized by giving them control over the development of their case.[83] Of course, parties enjoy tremendous flexibility in tailoring discovery processes to meet their needs, including deciding how much to invest in evidence production.[84] But parties can control

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Rules must be construed to promote justice for both parties, not to defeat it. This mandate is met if substantial justice is accomplished between the parties."); FED. R. CIV. P. 1 ("[The Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

[79] *See* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 318-19 (1938). Professor and later judge Clark was perhaps the "dominant intellectual and operational force" behind the Federal Rules of Civil Procedure. Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 356 (1987). In Clark's view, there were "two basic principles behind" the procedural reform: "all cases should be decided on their merits rather than on procedural maneuverings and that a basic goal in litigation should be economy of time and resources." *Id.*

[80] *See* FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81."); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079 (1989) ("[P]rocedural rules should have general applicability."); *but see, e.g.*, Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1018 (2008) (arguing that many procedural rules do not seem to be transsubstantive but are "driven by particular substantive concerns").

[81] Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1330 (2012) ("In the American adversary system, litigants enjoy broad freedom to make their own litigation choices."); *see also* STEPHEN C. YEAZELL, CIVIL PROCEDURE 138 (7th ed. 2008) ("One of the hallmarks of the U.S. law is the extent to which the rules of procedure are 'default' rules, rules that govern if the parties have not agreed to something else.").

[82] *See, e.g.*, Scott & Triantis, *supra* note 73, at 826 ("In the adversarial litigation system, the court chooses between the self-interested evidence presented by the parties.").

[83] *See, e.g.*, Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L. J. 301, 316-19 (1989) (discussing the two justifications for the adversarial system: truth-finding and preservation of individual dignity).

[84] *See* FED. R. CIV. P. 29 (providing that "[u]nless the court orders otherwise, the parties may stipulate" that certain aspects of depositions will be conducted in particular ways and that "other procedures governing or limiting discovery be modified"); Patrick E. Higginbotham, *Duty to Disclose; General Provisions Governing Discovery*, *in* 6 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 26.04[1], at 26-

the post-dispute contours of procedure in a variety of other ways as well.[85] For example, litigants may enter stipulations,[86] consent to waiver of service of process,[87] amend pleadings,[88] waive the right to a jury trial,[89] substitute a magistrate judge for an Article III district judge,[90] or even waive their right to appeal.[91] By making such post-dispute procedural choices, litigants can calibrate their litigation expenditures to their individual tolerances for accuracy and risk and thus maximize efficiency as well as fairness.

But as the last section demonstrated, party control of litigation is not limited to post-dispute modifications. Rather, parties regularly enter into, and courts seem very willing to enforce, *ex ante* procedural contracts.[92] The justification for such *ex ante* procedural ordering rests on the same underlying premise that parties are in the best position to maximize the "incentive bang for the enforcement buck."[93] *Ex ante* procedural contracting simply extends the logic and the range of potential efficiency gains from customizable procedure.

To see how, it is worth recapping the path-breaking article *Anticipating Litigation in Contract Design* in which Professors Scott and Triantis suggest that contracting parties can structure procedural rules in ways that will increase their joint surplus.[94] According to Professors Scott and Triantis, parties vary the precision of contract provisions in order to shift costs between the time of contracting and the time of dispute in order to enhance their overall welfare.[95] When parties choose a relatively precise or specific rule, they are increasing their *ex ante* investment.[96] In other words, parties spend more money at the front end of the contracting process contemplating future contingencies and negotiating

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35 (3d ed. 2008) ("Parties may mutually stipulate to use procedures for discovery that vary from the rules...."); 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §§ 2091-2092 (3d ed. 2012) (delineating the parameters of the ability of litigants to stipulate discovery procedure).

[85] For a thorough discussion of post-dispute procedural stipulations, *see generally* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007).

[86] *See, e.g.*, 73 AM. JUR. 2d *Stipulations* §15.

[87] *See* FED. R. CIV. P. 4(d) (allowing parties to waive service of process in order to save money and effort); 4A CHARLES ALLEN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE §1092.1 (3d. ed. 2012) (discussing the process for procuring waiver).

[88] *See* FED. R. CIV. P. 15 (both before and during trial).

[89] *See* FED. R. CIV. P. 39(a)(1).

[90] *See* FED. R. CIV. P. 73.

[91] *See e.g.*, Acton v. Merle Norman Cosmetics, Inc., 163 F.3d 605 (9th Cir. 1998) (unpublished table decision) (dismissing appeal base don a post-dispute agreement); *see also* 15A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS §3901 (noting that "the most likely occasion for waiver arises from a settlement agreement that calls for resolution of some disputed matter by the district court, coupled with an explicit agreement that the district court decision shall be final and that all rights of appeal are waived").

[92] *See supra* at Part II(B).

[93] Robert E. Scott & George E. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814, 856 (2006).

[94] *Id.* at 856-60.

[95] *See* Allen Blair, *Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretive Challenges*, 21 DUKE J. COMP. & INT'L L. 269, 301-02 (2011).

[96] *See* Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1071 (2009).

over terms specifying precise obligations in light of those contingencies. By investing more at the front end of the process, parties are hoping to leverage the information that they have about their shared contracting goals and incentives to maximize gains from trade in order to reduce *ex post* enforcement costs.[97] On the other hand, when parties choose a relatively open-textured standard, they are decreasing their *ex ante* investment and increasing their expected *ex post* enforcement costs.[98] Rather than spending time and money worrying about future contingencies and terms specifying precise obligations in light of those contingencies at the front end of the contracting process, parties are choosing to delegate to a future tribunal the task of specifying precise obligations. Such *ex post* or back-end specification is efficient, Professors Scott and Triantis argue, where the value to the parties of a decision maker's hindsight outweighs the value that the parties would gain by specifying *ex ante* a more precise rule to govern their contract.[99] In short:

> By reaching the optimal combination of front-end and back-end costs, parties can minimize the aggregate contracting costs of achieving a particular gain in contractual incentives. Conversely, for any given expenditure of contracting costs, the parties can reach the highest possible incentive gains by optimizing the allocation of their investment between the front and back ends.[100]

This insight reveals the potential of procedural contracting.[101] In fact, Professors Scott and Triantis point out that parties often choose to opt out of the public adjudicatory system entirely in favor of arbitration because "the parties' ex ante agreement as to procedure improves the cost-effectiveness of their prospective enforcement mechanism."[102] They proceed to identify other possible procedural contracting mechanisms and apply their insights to one example, *ex ante* modifications of burdens of proof.[103]

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[97] *Id.* at 1071 (noting that parties "are exploiting their informational advantage (they know their contractual ends and have the right incentives to choose the best means to achieve them), but they are sacrificing the hindsight advantage that a court might have").

[98] *See id.*

[99] Scott & Triantis, *supra* note 73 at 819, 842 ("The parties choose between front- and back-end proxy determination by comparing the informational advantage the parties may have at the time of contracting against the hindsight advantage of determining proxies in later litigation") ("The parties may view the court's hindsight as an advantage or disadvantage depending on how much uncertainty has been resolved by the time contract performance is due").

[100] *Id.* at 817.

[101] *See also, e.g.,* Albert Choi and George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. LEGAL STUD. 503 (2008) (demonstrating that increasing litigation costs may induce better incentives to perform contractual obligations); Alan Schwartz, *Contracting About Bankruptcy*, 13 J. L. ECON. & ORG. 127 (1997) (discussing the advantages of contracting over preferred Bankruptcy procedures).

[102] Scott & Triantis, *supra* note 73, at 856, n. 123 (citing Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 558 (2003) (Part of the reason that arbitration might be desirable is because it permits vague contractual terms to be interpreted and enforced by industry experts rather than generalist judges).

[103] Scott & Triantis, *supra* note 73, at 857-71.

With respect to burdens of proof, as Professors Scott and Triantis argue, even if the default allocation can be rationalized,[104] "it is highly unlikely that it yields the efficient . . . allocation for every contract."[105] They also show how these different customized allocations might benefit parties.[106] The same, certainly, can be said of most procedural rules. Even to the extent that existing public procedural rules can be rationalized,[107] it is unlikely that they optimally balance efficiency and accuracy in all cases. Fine-tuning procedure can benefit parties in at least two significant ways: by curbing post-dispute opportunism and by reinforcing substantive obligations and optimizing pre-dispute behavior.

1. Curbing Post-Dispute Opportunism

Private procedural ordering can help maximize the joint surplus from contracting by reducing the expected costs of future disputes. Customized procedural rules might achieve this gain by limiting or eliminating certain kinds of costly post-dispute behavior, such as escalating the costs of discovery or engaging in abusive motion practice.[108]

Pre-dispute private procedural ordering, in fact, is far more effective than post-dispute ordering in this regard for at least three reasons. First, before a dispute, parties cannot accurately predict what side of what issues they will each take. This uncertainly affords the parties a degree of objectivity that they lack by the time that a dispute foments, allowing them to make less emotionally charged choices about procedures and processes that will maximize their joint welfare.[109] Second, pre-dispute, and particularly

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[104] They argue that they are "hard pressed," along with most other commentators, to rationalize the default allocation. *Id.* at 866.

[105] *Id.*

[106] *See id.* at 867-78.

[107] I presume that most such rules are soundly underpinned by a desire to replicate what parties would have chosen for themselves if they had thought about them – they are, in other words, so-called "majoritarian" defaults – or they exist in order to protect vulnerable parties or non-parties. *See, e.g.*, Ian Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 596 (2003) ("The justification for a default rule is that it does for parties what they would have done for themselves had their contracting costs been lower."); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (explaining penalty defaults).

[108] *See generally, e.g.*, David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985). Parties face a collective-action problem during discovery. In a highly simplified model, each party could choose to be abusive or reasonable with its discovery requests. Jointly, the parties would be best served by both employing reasonable discovery requests. Individually, however, each party would do better if it employed abusive discovery techniques while the other was reasonable. Because both parties know this, they face a Prisoner's Dilemma, which results in an equilibrium where both parties are worse off than if they had been reasonable. The same basic model applies to abusive motion practice. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 514-15 (1994); John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 584-86 (1989).

[109] *See, e.g.*, Bruce L. Hay, *Procedural Justice--Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1828-31 (1997) (describing the difference between *ex ante* and *ex post* perspectives when information differs); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 743 (2001) (noting that

at the outset of contracting, transfer payments are much more feasible. Accordingly, even asymmetric procedural advantages can be considered so long as the benefited party can purchase such advantages from the other at an agreed upon price.[110] Finally, before a dispute arises, and again especially during contract negotiations, parties enjoy the cooperative benefits of a deal-making ethos. Thus, they are less likely to succumb to various cognitive biases that might impede negotiating mutually beneficial procedural terms.[111]

By delimiting through contract the range of strategic procedural choices available before a dispute arises, the parties can enhance the overall value of their agreements. This sort of customization offers nearly limitless scope and potential for value-maximization.

2. Reinforcing Substantive Obligations and Optimizing Pre-Dispute Behavior

Pre-dispute procedural contracting also provides parties with additional means of reinforcing or defining their substantive obligations to and behavior towards one another.[112] Parties already regularly negotiate over substantive terms that might be difficult to verify in subsequent litigation.[113] For instance, parties often include terms

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"because no dispute has yet arisen, the parties can consider the range of possible disputes that might arise in agreeing on a dispute resolution forum"). *But see* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 526-29 (2003) (criticizing some of the assumptions about information access that underlie typical *ex ante* arguments).

[110] *See* Drahozal, *supra* note 109, at 746 ("[P]redispute arbitration agreements provide greater opportunities for making transfer payments than do postdispute arbitration agreements.").

[111] *See generally, e.g.*, Russel Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281 (2006) (discussing a range of cognitive biases that can prevent successful post-dispute negotiations).

[112] The divergence between *ex ante* and *ex post* optimal litigation decisions has been extensively analyzed in the law and economics literature. *See generally, e.g.*, Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 392-401 (2004). Suffice it to say here that procedural rules impact how parties evaluate their post-dispute payoffs and thus impact when (or if) parties assert their claims and how they make strategic choices during litigation.

[113] Information may be said to be unobservable if the other contracting party cannot perceive it. Information may be observable but not verifiable if the other party can perceive it but cannot, at a reasonable case, prove that information to a court or other third party. *See, e.g.*, Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1642 n.2 (2003); *see also* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1791-95 (1996) (discussing the distinction between observable information, which is information that it is both possible and worthwhile for transactors to obtain, and verifiable information, which is information that it is worthwhile for transactors to prove to a designated third-party neutral in the event of a dispute). Parties often include in their contracts terms that might be cheap to observe but costly to verify. *See* Albert Choi & George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. LEGAL STUD. 503 (2008); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848 (2010); s*ee also, e.g.*, Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 150–63 (1995); Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 1–15 (1994).

that are conditioned on vague or difficult to prove states like "best efforts." The high costs of proving (or disproving) these states in court can function as a disincentive for parties to bring a claim and, at the very least, negatively impact the expected value of any claim. Parties might conversely contract for very precise obligations that are easily verifiable in court. Such terms can function to dissuade opportunistic shirking or holdups during performance of the contract. Alternatively, they can deter parties from filing nuisance claims or claims that have only marginal factual support. Such gains can be realized by reducing the likelihood of future litigation altogether or by narrowing the range of disputes in any future litigation.

But procedural contracting offers parties even more options for calibrating their substantive obligations to one another and optimizing behavior prior to a dispute arising. Aware of the rules that will govern any future disputes at the time of contracting, and knowing that these rules will affect their litigation behavior and the outcome of litigation, parties can tailor their respective pre-dispute actions.[114] For instance, agreeing that expert testimony will be given by a third-party-appointed neutral rather than through party appointed advocates might incentivize greater compliance with performance standards pre-dispute.[115] Or, opting into expanded review of arbitral awards could be seen as a means of increasing accuracy (and costs) and thus deterring more questionable claims.[116]

These simple examples do not exhaust the numerous possibilities.[117] The fundamental point, however, is that parties can use customized procedural devices in combination with carefully tailored substantive obligations to reduce opportunities for *ex post* opportunism and to incentivize pre-dispute behaviors that increase their joint surplus. In addition to benefiting the parties directly, customized procedure might also reduce the public costs associated with the court system, at least to the degree that private and public costs are correlated.[118] Finally, there are potential spillover benefits to the public adjudication system, at least with some forms of procedural contracting, such as expanded judicial review of arbitral awards.[119]

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[114] Procedural contracting can help overcome the "acoustic separation" between the *ex ante* understanding that parties have about how their future disputes will be adjudicated and their *ex post* understanding. *See, e.g.*, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); *see also, generally*, Bruce Hay, *Procedural Justice: Ex Ante Vs. Ex Post* , 44 UCLA L. REV. 1803 (1997).

[115] *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1356 (2012) (offering a similar example).

[116] *See, e.g.*, Steven Shavell, *The Appeals Process as a Means of Correction*, 24 J. LEGAL STUD. 379 (1995).

[117] *See generally, e.g.*, Daphna Kapeliuk & Alon Klement, *Contracting Around Twombly*, 60 DEPAUL L. REV. 1 (2010) (discussing possible advantages of modifying the *Twombly* pleading standard by contract).

[118] *See, e.g.*, Bone, *supra* note 115, at 1356; Cable Connection, Inc. v. DirectTV, Inc., 190 P.3d 586, 606 (Cal. 2008) (discussing among the advantages of allowing parties to contract for expanded judicial review of arbitral awards the reduced burdens on the court system).

[119] *See Cable Connection*, 190 P.3d at 606 ("This procedure better advances the state of the law and facilitates the necessary beneficial input from experts in the field.") (quoting Dan C. Hulea, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 BROOK. J. INT'L L. 313, 355 (2003)).

D. The Line between Mockery and Efficiency: Limits to Customized Procedure

Set against the potential benefits of private procedural ordering are very real concerns, of course, about the implications of subverting public process to personal autonomy. Espousing one aspect of this concern in his customary charismatic style, Judge Kozinski said that he would have qualms about enforcing a procedural contract opting into expanded judicial review of arbitral awards "if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl."[120] Provocative as such *reductio ad absurdum* thought experiments can be, the hard work of actually finding the line between mockery and the potential efficiency gains discussed in the previous section, however, can be daunting. [121]

In a nutshell, most concerns over private procedural ordering fall into one of four categories, the first two of which focus on the immediate parties and the second two of which are societal: (1) doubts about consent in the context of consumer or weaker party transactions;[122] (2) worries that procedural machinations will be used to gain covert substantive advantages, particularly in the context of consumer or weaker party transactions;[123] (3) concerns that private procedural ordering will hinder the structural role of private enforcement in our governmental system;[124] and (4) worries that private procedural ordering will impede dissemination of information that can be used to public benefit.[125]

Though all four concerns pose legitimate challenges to private procedural ordering and warrant careful consideration, a full analysis of how they fare against the potential benefits discussed in the previous section is beyond the scope of this Article.

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[120] Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring).

[121] *See* David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1090 (2002) ("So where is the line between mockery and efficiency? Or, should there be any line at all? That is, should a public dispute resolution system be altered by private agreement?").

[122] *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 642–43 (1996) ("[I]t is critical to distinguish between commercial arbitration voluntarily agreed to by parties of approximately equal bargaining power, and commercial arbitration forced upon unknowing consumers, franchisees, employees or others through the use of form contracts."); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 S.M.U. L. REV. 819, 822 (2003) (arbitration "has the capacity to reduce, if not altogether eliminate access to the courts and to the law.").

[123] *See* Dodge, *supra* note 12 at 734 (expressing the concern that parties might use procedural contracts to inappropriately modify substantive rights and incentives to exercise those rights).

[124] *See e.g.,* Nebraska v. Nebraska Ass'n of Pub. Emps., 477 N.W.2d 577, 581-83 (Neb. 1991) (basing refusal to enforce pre-dispute arbitration agreements on Nebraska cases decided in the 1800s, and relying on pre-FAA cases in warning that arbitration will "open a leak in the dyke of constitutional guarantees which might some day carry all away") (quoting Phoenix Ins. Co. v. Zlotky, 92 N.W. 736 (Neb. 1902)); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1167-70 (2012) (noting how procedural contracting can negatively impact the role of private enforcement by changing "stakes of litigation and therefore discourage suit in the first place").

[125] 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 7a, at 605 (Peter Tillers ed. 1983) ("It is arguable that the proceedings in courts are not there solely for the convenience of the parties and that it is important for social reasons to maintain the solemnity and dignity of judicial proceedings regardless of the wishes of the parties.").

Whatever the merits of these challenges, as the next section explains, *Hall Street* was not relying on them. Nothing in the Court's analysis suggests that it was troubled in the slightest by the principles of autonomy underlying private procedural ordering.

E. A Rolling Stop: Understanding Hall Street in Light of the Trend Favoring Private Procedural Ordering

The trend of precedent is clear: courts, and the Supreme Court in particular, strongly favor private procedural ordering. Although there was initial reluctance to the notion of party control over procedure and processes, that reluctance ultimately gave way to more modern notions of party autonomy and contract. Since *Bremen*, the Court has, with really only one notable exception, continued to advance party autonomy as the new touchstone of process and procedure.[126]

The notable exception, of course, is *Hall Street.* With little hesitation, the *Hall Street* Court narrowly construed the FAA to limit party freedom and autonomy. Given that one could fairly view arbitration as the apotheosis of private procedural ordering – as it allows parties the freedom to opt out of the public set of procedural rules and protections altogether – a closer consideration of the case in the context of private procedural ordering is warranted.

On one level, *Hall Street* surprisingly countered Supreme Court arbitration precedent, which had been at the avant-garde of private procedural ordering.[127] The case elevated an advantage – finality – to the status of an "essential virtue" while dislodging the cornerstone of the arbitral process – freedom of contract.[128] Up until *Hall Street*, the mantra that "arbitration is a creature of contract,"[129] reflected the decisional history of the

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[126] *See supra* at Part II(B).

[127] *See* Rachel S. Portnoy, Comment, *Embracing the Alternative:* Cable Connection, Inc. v. DIRECTV, Inc. *Puts the Alternative Back into Alternative Dispute Resolution*, 44 NEW ENG. L. REV. 991, 998 (2010) ("The *Hall Street* ruling came as a surprise to many.").

[128] *See* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 588 (2008) (stating that the ruling was "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's *essential virtue* of resolving disputes straightaway") (emphasis added).

[129] Courts and commentators have recognized the fundamental contractual nature of arbitration, often employing this phrase. *See, e.g.,* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 570-71 (1960) (Brennan, J., concurring) ("To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute."); Puleo v. Chase Bank USA, N.A., 605 F.3d 172, 194 (3d Cir. 2010) ("As we have stressed, '[a]rbitration is fundamentally a creature of contract, and an arbitrator's authority is derived from an agreement to arbitrate."' (quoting Allstate Settlement Corp. v. Rapid Settlements, Ltd., 559 F.3d 164, 169 (3d Cir. 2009))); Edstrom Indus., Inc. v. Companion Life Ins. Co., 516 F.3d 546, 552 (7th Cir. 2008) ("But precisely because arbitration is a creature of contract, the arbitrator cannot disregard the lawful directions the parties have given them. If they tell him to apply Wisconsin law, he cannot apply New York law."), *abrogated by* Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc., 660 F.3d 281 (7th Cir. 2011); MyLinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S.C. L. REV. 407, 410 (2010) ("[Section 2] also establishes that arbitration is a creature of contract law and that arbitrational provisions should be viewed in this light."); Scott D. Marrs & Sean P. Milligan, *What You Always Wanted to Know About Arbitration: Five Arbitration Issues Recently Decided by the Courts*, 73 TEX. B. J. 634, 634 (2010)

Court, which, consistent with other procedural contracting cases, had recognized the primacy of party autonomy.[130]

Though the speed and finality of arbitration can frequently be an important – perhaps even decisive – advantage for parties, arbitration offers a number of other advantages as well.[131] Prizing one advantage as "essential" while undercutting the premise at the core of procedural contracting, that parties are in the best position to gauge what combination of processes and procedures will best maximize their joint surplus, was shortsighted. Just because parties might reasonably be willing to trade off some speed and finality in exchange for opportunities to correct legal (or factual) errors through expanded judicial review, they are not necessarily opting out of the other advantages that arbitration can offer. For instance, parties might well believe that arbitration can be a superior way to manage the presentation of complex and industry-specific facts through a process that allows for the selection of decision makers with expertise and mature judgment in the subject area. Especially in large transactions, however, in which enormous sums may be tied up for many years, legal accuracy might be of paramount concern to contracting parties.

Read expansively, then, *Hall Street*'s refusal to allow parties the freedom to make these sorts of trade-off choices – the same sorts of trade-off choices that parties make with respect to other forms of procedural contracting – could signal the Court's interest in halting the advance of private procedural ordering. I argue, however, that this reading does not make sense for at least two reasons.

First, the *Hall Street* Court makes virtually no reference to policy rationales at all, and it most certainly does not implicate, in any sense, any of the four categories of concerns over procedural contracting referenced in the previous section. The Court makes no mention of disparities in party bargaining power – indeed, it would have been hard pressed to do so given that the parties in *Hall Street* were both sophisticated businesses. Similarly, the Court does not even hint that expanded judicial review would somehow sneak substantive advantages in through the procedural back door. And,

("Because arbitration is a creature of contract, the rights and obligations of the parties and the arbitrators are, to an important extent, borne out of the arbitration clause itself.").

[130] *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 7 (1984) ("[N]egotiation by experienced and sophisticated businessmen . . . absent some compelling and countervailing reason . . . should be honored by the parties and enforced by the courts.") (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("[T]he overriding goal of the Arbitration Act was [not] to promote the expeditious resolution of claims . . . but merely the enforcement . . . of privately negotiated arbitration agreements."); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (1995) (internal quotation marks omitted) ("[T]he basic objective [of the FAA is] not to resolve disputes in the quickest manner possible, no matter what the parties' wishes . . . but to ensure that commercial arbitration agreements . . . are enforced according to their terms."); *see also, e.g.*, Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 444 (2004) ("[The] position that the FAA permits expanded judicial review appears . . . consistent with both legislative intent and Supreme Court decisions emphasizing the importance of enforcing arbitral agreements in accordance with their terms."); Richard C. Reuben, *Personal Autonomy and Vacatur After* Hall Street, 113 PENN ST. L. REV. 1103, 1106 (2010) ("The Court's ruling was surprising to some, especially because the Court had previously held that party autonomy, not efficiency, was the touchstone of arbitration under the FAA.").

[131] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 11-13 (5th ed. 2009) (discussing some of these advantages).

perhaps more tellingly, the Court makes no reference to expanded judicial review somehow undermining the proper functioning of the public adjudicatory system. Significantly, the opportunity for the Court to suggest that contractually expanded review constituted an improper commandeering of the judicial process existed. Judge Richard Posner, for instance, had argued, albeit in dicta, that parties could not contract for expanded judicial review of their arbitral awards because "federal jurisdiction cannot be created by contract."[132] Variants of this argument gained traction in the debates over expanded judicial review prior to the Court's ruling in *Hall Street*.[133] Nevertheless, the Court did not engage the argument at all.

Second, and far more significantly, the Court left open "other avenues" by which parties could seek expanded judicial review of their awards.[135] Although this portion of the case was merely dicta, and arguably included only because of the clumsy presentation of the case on appeal,[136] the Court's invitation for a greater state law role is capacious. In holding that Section 10 provides the "exclusive regime[]" for review of awards under the FAA, the Court made clear that it did "not purport to say that [Section 10] exclude[s] more searching review based on authority outside the statute as well."[137] Such an invitation does not indicate that the Court was shying away from procedural contracting or party autonomy at all. Instead, this language suggests only that the Court believed that this autonomy should be fostered and developed under state rather than federal law. As the next section goes on to discuss, the evidence indicates that, for better or worse, states are beginning to embrace the freedom that *Hall Street* offers to them.

III. THE STATUS OF STATE LAWS GOVERNING JUDICIAL REVIEW OF ARBITRAL AWARDS

Pay attention to where you are going because without meaning you might get nowhere.[138]

As the last Part concluded, the U.S. Supreme Court in *Hall Street* "left the door ajar for alternate routes to an expanded scope of review."[139] Although *Hall Street* did so only in dicta, the Court's invitation for a greater state law role in the enforcement and review of arbitral awards has to be taken seriously in order to square *Hall Street*'s holding with the broader trend of precedent favoring private procedural ordering.

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[132] Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991).

[133] *See, e.g.*, Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 227-30 (1997) (describing the extent to which this argument had been wielded in the debate to date and famously calling it "the very reddest of red herrings").

[135] Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 590 (2008)

[136] The parties never raised the application of the FAA to the agreement as an issue until the case was presented to the Supreme Court. Moreover, save for a fairly spare reference at the Court of Appeals, the parties had not addressed the possibility review should be governed not by the FAA but instead by the district court's Rule 16 case management powers. *See id.*

[137] *Id.*

[138] A. A. Milne, Winnie-The-Pooh: Unbouncing of Tigger 5 (1928).

[139] Cable Connection, Inc. v. DirectTV, Inc., 190 P.3d 586, 596 (Cal. 2008).

Accordingly, this Part briefly surveys the current status of state laws governing judicial review. It observes that, although most states' arbitration laws closely parallel the FAA and many courts thus expressly follow *Hall Street* or decline to allow contractually expanded judicial review for reasons similar to those offered in *Hall Street*, there are signs that states are starting to experiment with more intrusive and different standards for judicial review of arbitral awards. Five states have parted ways with *Hall Street* and allow for parties to contract into expanded judicial review. A handful of additional states have laws allowing courts to review arbitral awards for at least some errors of law or facts or both.

A. The Status Quo: States Following Federal Law and Hall Street

The history of the development of state laws governing arbitration follows a somewhat convoluted path.[140] After a failed attempt by the National Conference of Commissioners on State Laws ("NCCUSL") to forward a workable Uniform Arbitration Act ("UAA") in 1926, the uniform drafters took another stab in 1956.[141] For the purposes of this Article, the key point is that the 1956 UAA and the 2000 UAA track the provisions of the FAA, particularly with respect to judicial enforcement and review, very closely.[142] At present, 39 states have enacted either the 1956 or the 2000 UAA, and three

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[140] *See* Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 520 (2009) (discussing this development and observing that "[t]he adoption of state statutory standards for judicial review of arbitration awards [was] more complex" than the adoption of the FAA).

[141] *See id.*; REV. UNIF. ARB. ACT § 12 (1956) (In 2000, the UAA was revised, though the relevant language regarding judicial enforcement and review remained virtually unchanged.).

[142] *See* Huber, *supra* note 140 at 520. Section 10 of the FAA, dealing with vacatur of awards, provides in pertinent part:

> (a) [T]he United States court . . . may make an order vacating the [arbitration] award upon the application of any party to the arbitration --
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a) (2006).
>
> In comparison, the Section 12 of the 1956 UAA provides in pertinent part:
>
> (a) Upon application of a party, the court shall vacate an award where:
>
> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so

more states have introduced the 2000 UAA in 2013.[143] Of the remaining states, only three have arbitration laws that are not either patterned after the UAA or the FAA: Alabama, New Hampshire, and West Virginia.[144]

Many of these states either expressly follow *Hall Street* or rely on similar reasoning to prevent parties from contracting for expanded judicial review.[145] Others have held that the statutory grounds for vacatur are exclusive without specifically holding that the grounds may not be expanded by contract.[146] In short, most states construe their arbitration laws in much the same manner as the FAA.[147] As the next two sections

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> conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or
>
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

UNIF. ARB. ACT § 12 (1956); *see also* REV. UNIF. ARB. ACT § 23 (2000) (adopting substantially similar grounds for vacatur).

[143] *See* UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20%282000%29 (last visited Apr. 10, 2013).

[144] *See* ALA. CODE § 6-6-14 (2013) (providing that an award "cannot be inquired into or impeached for want of form or for irregularity . . . unless the arbitrators are guilty of fraud, partiality, or corruption in making it"); N.H. REV. STAT. ANN. § 542:8 (2013) (allowing vacatur for "fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers," but also allowing review for "plain mistake"); W.VA. CODE § 55-10-4 (2012) (dictating that award may not be set aside "except for errors apparent on its face, unless it appears to have been procured by corruption or other undue means, or by mistake, or that there was partiality or misbehavior in the arbitrators, or any of them, or that the arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made").

[145] *See, e.g.*, HL 1, LLC v. Riverwalk, LLC, 15 A.3d 725, 735 (Me. 2011) (following *Hall Street*); Brookfield Country Club, Inc. v. St. James-Brookfield, LLC, 696 S.E.2d 663, 666 (Ga. 2010) (same); Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp., 320 S.W.3d 252, 259–60, 261 (Tenn. 2010) (same); John T. Jones Constr. Co. v. City of Grand Forks, 665 N.W.2d 698, 704 (N.D. 2003) (holding that "parties to an arbitration agreement cannot contractually expand the scope of judicial review beyond that provided by [the Uniform Arbitration Act as adopted by North Dakota]"); Chicago SouthShore & S. Bend R.R. v. N. Ind. Commuter Transp. Dist., 682 N.E.2d 156, 159 (Ill. App. Ct. 1997), *rev'd on other grounds*, 703 N.E.2d 7 (Ill. 1998) ("The subject matter jurisdiction of the trial court to review an arbitration award is limited and circumscribed by statute. The parties may not, by agreement or otherwise, expand that limited jurisdiction."); Brucker v. McKinlay Transp., Inc., 557 N.W.2d 536, 540 (Mich. 1997) (holding that an arbitration agreement that provides for judicial confirmation must conform to the statute because parties may not privately create a role for public institutions).

[146] *See, e.g.*, Sch. Comm. of Pittsfield v. United Educators of Pittsfield, 784 N.E.2d 11, 16 (Mass. 2003) (stating that unless a statutorily enumerated ground for vacatur is established, courts are "strictly bound by the arbitrator's factual findings and conclusions of law, even if they are in error," and that "[a]rbitration would have little value it if were merely an intermediate step between a grievance and litigation in the courts"); Schnurmacher Holding, Inc. v. Noriega, 542 So.2d 1327, 1329-30 (Fla. 1989) (stating that the grounds for judicial review of an arbitration award are extremely limited by statute and do not include error of law).

[147] *See* Stephen Willis Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 891 (2010) (surveying state laws and finding a "majority rule" whereby at least 38 states restrictively read their arbitration laws effectively consistent with the FAA).

demonstrate, however, there is reason to believe that, in the wake of *Hall Street*, states are beginning to experiment with different and potentially more intrusive review standards.

B. A Nod to Autonomy: States Allowing for Contractually Expanded Judicial Review of Arbitral Awards

Currently, California, Connecticut, Alabama, Texas and New Jersey part ways with *Hall Street*. These five states offer parties the freedom to contractually expand the grounds for judicial review of arbitral awards. The following subsections briefly recap the law in these jurisdictions and the justifications they have given for separating themselves from *Hall Street*.

1. California

Shortly after *Hall Street*, California seized on the invitation for states to provide an alternative to the FAA's exclusive grounds for vacatur. In *Cable Connection, Inc. v. DIRECTV, Inc.*, the California Supreme Court (California Court) concluded that parties were free, under California's arbitration statute, to contract for expanded judicial review of arbitral awards. In reaching this conclusion, the California Court rejected *Hall Street*'s reasoning and concluded that *Hall Street*'s invitation was consistent with its view that the FAA did not preempt state procedural laws in state court proceedings. Both findings are worth a closer examination, as they provide a model for how other states might justify departures from the FAA.

The California Court was presented with an arbitration agreement governed by state law.[148] According to this agreement, the arbitrators did not have "the power to commit errors of law or legal reasoning, and the award [could] be vacated or corrected on appeal to a court of competent jurisdiction for any such error."[149] Plaintiffs argued, before the arbitrators, that they were entitled to class-wide arbitration under the agreement, and the arbitrators agreed.[150] Defendant, DIRECTV, then filed a motion to vacate in state court on several grounds, including most significantly that the award was the product of errors of law and thus subject to judicial review.[151]

The trial court agreed with DIRECTV and vacated the award, but the Court of Appeals reversed, finding that the trial court had exceeded its authority by engaging in a

[148] Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334, 1340-41 (Cal. 2008). Interestingly, the agreement actually provided that "[t]he arbitrators shall apply California substantive law to the proceeding, except to the extent Federal substantive law would apply to any claim," and it directed that the arbitration proceedings were to be governed by federal law and the rules of the American Arbitration Association. *Id.* at 1340. The Court, however, concluded, in a footnote, that "[b]ecause the parties proceeded in state court under the CAA, . . . judicial review of the award is governed by state law, though the arbitration proceedings are governed by federal procedural law and AAA rules under the terms of the contract." *Id* at 1341 n. 2.

[149] *Id.* at 1341 n.3

[150] *See id.* at 1342.

[151] *See id.*

merits review of the arbitrator's decision.[152] In reaching its conclusion, the Court of Appeals relied on two previous cases that had determined that expanded judicial review provisions were unenforceable.[153] Essentially, these cases advanced the contention that expanded review was impermissible because: (1) like the Court in *Hall Street*, they believed that expanded review "would undermine the benefits of arbitration and the goals of the Act to reduce expense and delay in resolving disputes";[154] and (2) they believed that judicial review would either be meaningless to or would improperly interfere with the arbitral process because arbitrators are not "ordinarily constrained to decide according to the rule of law."[155]

Confronted with these lower courts' decisions and the U.S. Supreme Court's then-fresh ruling in *Hall Street*, the California Court first clarified that under state law parties can contractually agree to judicial review of an arbitration award.[156] While admitting the similarities between the statutory schemes for enforcement of arbitral awards in the CAA and the FAA,[157] the California Court cited its 1992 decision in *Moncharsh v. Heily & Blasé* to bolster the proposition that, in drafting the CAA, the legislature "adopt[ed] the position taken in case law . . . '*that in the absence of some limiting clause* in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute.'"[158] According to the California Court, *Moncharsh* established a California rule "that the parties may obtain judicial review of the merits by express agreement" under the CAA.[159] Because the language used by the parties in the pending case evidenced their unequivocal intent to exclude legal errors from the scope of the arbitrators' powers, such errors fell within the scope of judicial review under California law.[160]

The California Court then turned to the pressing question of whether *Hall Street* preempted this construction of the CAA.[161] The California Court acknowledged U.S. Supreme Court precedent finding that "state laws invalidating arbitration agreements on grounds applicable only to arbitration provisions contravene the policy established by Section 2 of the FAA."[162] Nevertheless, it found that "the United States Supreme Court does not read the FAA's procedural provisions to apply to state court proceedings."[163] To reach this conclusion, it relied on its previous holding that "[t]he language used in [S]ections 3 and 4 and the legislative history of the FAA suggest that the sections were

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[152] *See id.* at 1343.

[153] *See id.* (citing Oakland–Alameda Cnty. Coliseum Auth. v. CC Partners, 101 Cal. App. 4th 635, 645 (2002); Crowell v. Downey Cmty. Hosp. Found., 115 Cal. Rptr. 2d 810 (2002)).

[154] *Crowell*, 115 Cal. Rptr. 2d at 815.

[155] *Id.* at 814.

[156] *See Cable Connection Inc.*, 44 Cal. 4th at 1340.

[157] *See id.* at 1344 (explaining that both "the CAA and the FAA provide only limited grounds for judicial review of an arbitration award," and noting the similarities between the grounds for vacatur or modification in §§ 1286.2 (a) and 1286.6 of the CAA and those listed in §§ 10-11 of the FAA).

[158] *Id.* at 1356 (citing Moncharsh v. Heily & Blasé, 3 Cal. 4th 1, 23 (1992)) (emphasis added).

[159] *Id.* at 1340.

[160] *See id.* at 1350.

[161] *See id.*

[162] *Id.* at 1351 (citing Cronus Invs., Inc. v. Concierge Servs., 35 Cal.4th 376, 389 (2005), among other cases).

[163] *Id.*

intended to apply only in federal court proceedings."[164] Because the same language limiting applicability of those sections to a "United States district court" with jurisdiction under Title 28 of the United States Code exists in Sections 9 through 11, the California Court similarly characterized the FAA's enforcement and review provisions as "procedural" and thus only applicable to the federal courts.[165]

2. Alabama

In a very brief 2010 ruling, the Alabama Supreme Court (Alabama Court) in *Raymond James Fin. Servs., Inc. v. Honea* expressed solidarity with California and found that the FAA's review provisions were "procedural" and thus not necessarily applicable in state court proceedings.[166] In reaching this conclusion, the Alabama Court had to reevaluate its earlier position that "a party desiring judicial review of an arbitration award in a proceeding subject to the [FAA] is limited to arguments based on those grounds enumerated in 9 U.S.C. § 10."[167] Finding "good and sufficient reasons 'to retreat from that position,'" the Alabama Court concluded that "[u]nder 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."[168]

Perhaps the most interesting feature of the decision, however, relates to the fact that the parties had expressly agreed that "any unsettled dispute or controversy will be resolved by arbitration in accordance with the FAA."[169] Moreover, unlike the situation facing the California Court in *Cable Connections*, there was "no evidence indicating that either [of the parties] ever contemplated review under the common law [of Alabama] as opposed to the FAA."[170] Accordingly, the Alabama Court's determination that the FAA did not govern the review of the award is unusual, to put it mildly. While claiming to be bound by parties' intentions, the Alabama Court seemed to side step them, at least with respect to what law governed.

3. Connecticut

Although the matter is not free from doubt, it appears that courts in Connecticut also disagree with *Hall Street.* In a decision released only two months after *Hall Street*, the Connecticut Supreme Court (Connecticut Court) said in a footnote that "[p]arties to

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[164] *Id.*

[165] *Id.* at 1352.

[166] Raymond James Fin. Servs. Inc. v. Honea, 55 So.3d 1161, 1168-69 (Ala. 2010) ("§10 represents procedural as opposed to substantive law. We are accordingly at liberty to decide whether to apply §10 in state court proceedings on motions to vacate or to confirm an arbitration award.") (citing to *Cable Connection* in a footnote).

[167] Horton Homes, Inc. v. Shaner, 999 So.2d 462, 467 n. 2 (Ala. 2008) (reiterating Birmingham News Co. v. Horn, 901 So.2d 27, 46 (2004)).

[168] Hornea, 55 So.3d at 1169 (quoting Birmingham News Co. v. Horn, 901 So.2d at 46-47).

[169] *Hornea,* 55 So.3d at 1167.

[170] *Id.* at 1168. Although this was the argument of one of the parties, the Court never disagreed with it.

agreements remain, however, free to contract for expanded judicial review of an arbitrator's findings."[171] This dicta seemed to reaffirm a position taken earlier by the Connecticut Court in its 2006 *Stutz v. Shepard* decision.[172] In *Stutz*, the Connecticut Court unceremoniously upheld a contractual provision that invested a court with the power to review an arbitral award under a "clearly erroneous" standard.[173] Although it provided virtually no analysis, the context suggests that the Connecticut Court simply viewed the provision as within the permissible scope of freedom of contract.[174] In an unpublished case, the Connecticut Superior Court relied on these two decisions to conclude that a provision providing for expanded judicial review of an arbitral award for de novo review of law (but not facts) was enforceable.[175] Again, the court did not engage in any searching analysis but it simply concluded that *Hall Street* limited its holding to the FAA and thus was not applicable to the Connecticut arbitration statute.[176]

4. Texas

The most recent departure from *Hall Street* happened in 2011 when the Texas Supreme Court (Texas Court) decided *Nafta Traders, Inc. v. Quinn.*[177] In many respects, the Texas Court's decision parallels the decisions of the California and Alabama Supreme Courts. There are, however, two notable differences in the analysis.

First, although the Texas Court recognized that the statutory grounds for vacating an award under the Texas Arbitration Act (TAA) and FAA are virtually identical, it hooked its conclusion that the TAA permits parties to contract for expanded review on "excess of authority."[178] According to the Texas Court, the U.S. Supreme Court mistakenly overlooked this ground for review in the FAA, which can encompass situations where the "parties have agreed that an arbitrator should not have authority to reach a decision based on reversible error – in other words, that an arbitrator should have no more power than a judge."[179] In the Texas Court's view, this express statutory ground for review coupled with the underlying purposes of the federal and Texas acts – "'to ensur[e] that private agreements are enforced according to their terms" – rendered *Hall Street*'s analysis and conclusion flawed.[180]

The second notable feature of *Nafta* has to do with its handling of the preemption question. Unlike the agreements at issue in *Cable Connections* and *Raymond James*, the agreement in *Nafta* was silent about whether it was to be governed by state or federal law.[181] Accordingly, the Texas Court had to figure out how and why to apply Texas law

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[171] HH East Parcel, LLC v. Handy & Harman, Inc., 947 A.2d 916, 926 n.16 (Conn. 2008).
[172] *See* Stutz v. Shepard, 901 A.2d 33 (Conn. 2006).
[173] *See id.* at 39.
[174] *See id.*
[175] *See* East Greyrock, LLC v. OBC Assocs., Inc., No. X08CV044002173S, 2010 WL 3448075, at *4 n.9 (Conn. Super. Ct. Aug. 2, 2010).
[176] *See id.*
[177] *See* Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84 (Tex. 2011).
[178] *See id.* at 92, 95.
[179] *Id.* at 92.
[180] *Id.* at 94 (citations omitted).
[181] *See id.* at 101.

to it. The Texas Court's solution was to say that, effectively, both the FAA and the TAA applied, concurrently.[182] Because, in the Texas Court's analysis, the FAA did not preempt the TAA, and because the TAA allowed for parties to contract into expanded judicial review, it did not matter if the parties chose Texas or federal law to apply to the agreement.[183]

5. New Jersey

New Jersey is the only state that validates party freedom to contract for expanded judicial review by statute: "nothing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record."[184] This statutory provision was passed before *Hall Street* and was included "to make it clear that parties may expand the scope of judicial review by providing for such expansion in a record, following the ruling of *Tretina Printing, Inc. v. Fitzpatrick Associates, Inc.*, 135 N.J. 349 (1994)."[185]

Interestingly, however, the court in *Tretina* did not actually hold that parties could contract for expanded judicial review, but instead, in a rather convoluted decision, elevated a prior concurring opinion to the status of the "current standard" for judicial review of arbitral awards in New Jersey.[186] That concurrence had stated in a rather off-handed way that:

> For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, I would hold that the parties are free to expand the scope of judicial review by providing for such expansion in their contract.[187]

Making it clear just how much of a "side" comment this was, the Chief Justice went on to quip that he doubted that many would include such expanded review provisions and, if they did, "they should abandon arbitration and go directly to the law courts."[188]

Because its origins are so murky, it is difficult to discern what policies underlie the rule. Nonetheless, regardless of its questionable genesis, the statute is clear: parties may contract for expanded judicial review of their arbitral awards under New Jersey law.

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[182] *See id.*

[183] *See id.*

[184] *See* N.J. STAT. ANN. § 2A:23B-4c (West Supp. 2013).

[185] N.J. S. Comm. Statement, S.B. 514, 210th Leg. (2002).

[186] *See* Tretina Printing, Inc. v. Fitzpatrick Assocs. Inc., 640 A.2d 788, 792-93 (N.J. 1994) (finding that the correct standard of judicial review of arbitral awards in New Jersey was stated by the Chief Justice's concurring opinion in Perini Corp. v. Greate Bay Hotel & Casino, Inc., 610 A.2d 364 (N.J. 1992)).

[187] *Id.* at 793.

[188] *Id.*

C. A Back Door Sneak Attack?: States with More Intrusive Judicial Standards of Review of Arbitral Awards

While most states continue to interpret their arbitration laws essentially the same as the FAA, as the previous section shows, there are signs that this might be changing. In addition to the five states that have parted ways with *Hall Street* in terms of the permissibility of contractual expansions of judicial review, a handful of states have interpreted their arbitration laws in ways that provide for more intrusive judicial review than is allowed under the FAA.

Some states, for instance, have embraced a manifest disregard of the law and fact standard of review.[189] Others allow for review of either law[190] or fact[191] but not both. Accordingly, at least a handful of states seem to have embraced the freedom that *Hall Street* suggests they have to construct standards of judicial review that are different from and in many cases more intrusive than the exclusive standards of the FAA.

IV. THE PROBLEMS WITH *HALL STREET*'S RELIANCE ON STATES TO ADVANCE PRIVATE PROCEDURAL ORDERING IN THE CONTEXT OF EXPANDED JUDICIAL REVIEW

There must have been a moment, at the beginning, were we could have said – no. But somehow we missed it.[192]

As it stands, parties who wish to contract for expanded judicial review of their arbitral awards must do so against a backdrop of interlocking statutory frameworks, state-versus-federal conflicts, and a constant deluge of confusing and often confused state and federal court decisions. While *Hall Street* might have opened "other avenues" for parties who want the security of appellate review of their arbitral awards, those avenues look an awful lot like a nearly incomprehensible maze of winding side streets, dead ends, and one ways.

This Part considers the problems posed by *Hall Street*'s invitation for more state law involvement in the enforcement and review of arbitral awards. It begins by surveying some of the most significant doctrinal doubts posed by such involvement. It then considers how parties are likely to respond to the doctrinal uncertainty, particularly

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[189] *See, e.g.*, Welty v. Brady, 123 P.3d 920, 926-28 (Wyo. 2005) (noting that under Wyoming law, "manifest mistake of fact or law" is a permissible ground for vacating arbitral award); *see also* Stephen Willis Murphy, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 893-94 (2010) (surveying state law and finding that seven states allow for review of law and fact).

[190] *See, e.g.*, Sherman v. Graciano, 872 A.2d 1045, 1046 (N.H. 2005) ("An award may be vacated for plain mistake when it is determined that an arbitrator misapplied the law to the facts."); *see also* Murphy, *supra* note 189, at 893-94 (surveying state law and finding that 11 states allow for review law).

[191] *See, e.g.*, Spiska Eng'g v. SPM Thermo-Shield, 730 N.W.2d 638, 643, 647 (S.D. 2007) (concluding that the South Dakota arbitration statue allowed for limited factual review in addition to legal review in order to ensure that the arbitrator was "arguably construing or applying the contract"); IOWA CODE § 679A.12(f) (2013) (allowing for vacatur if "[s]ubstantial evidence on the record as a whole does not support the award").

[192] TOM STOPPARD, ROSENCRANTZ AND GUILDENSTERN ARE DEAD 125 (1994).

in light of the fact that many of the benefits that used to be available only in arbitration are now obtainable in litigation through other forms of procedural contracting. Ultimately, this Part concludes that the trend of commercial parties leaning away from arbitration to resolve their domestic disputes with one another is likely to continue and even accelerate so long as *Hall Street*'s invitation for greater state law remains good law.[193] *Hall Street* neither meaningfully fosters party autonomy nor provides the efficiency of clear-cut finality.

A. Doctrinal Problems

"The idea of states serving as laboratories for testing alternative approaches to perceived problems is too well known to require amplification here."[194] But whatever benefits attached to federalism generally, Supreme Court precedent in the context of arbitration law has been decidedly anti-federalist.[195] At least since *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, it has been established that the provisions of the FAA preempt inconsistent state laws in cases in federal court.[196] Eighteen years later, the Court went further, in *Southland Corp. v. Keating*, and held that Section 2 of the FAA also applies in state court and preempts any conflicting state laws.[197] But the Court has also stated that the FAA does not occupy the field of arbitration law.[198] Moreover, it has

[193] Importantly, I am not suggesting that arbitration will decrease with respect to trans-border disputes. To the contrary, the ease of enforcement of awards pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which obligates each nation to enforce arbitral awards regardless of where they are rendered, will likely continue to make international arbitration relevant to commercial parties, even in the wake of *Hall Street. See* United Nations Convention on the Recognition & Enforcement of Foreign Arbitral Awards art. 1, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, *available at* http:// treaties.un.org/doc/publication/UNTS/Volume%20330/v330.pdf; *see also* United Nations, Status of Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations Treaty Collection, http:// treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last visited Aug. 17, 2012) (listing the countries that are participants to the agreement).

[194] Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 512 (2009) (arguing "that potential improvements in the arbitration process are better tried initially at the state rather than the federal level, due to lower degree of risk if a change is deemed not to be successful"); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (coining the phrase).

[195] Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. U. L. REV. 131, 131 (2012) ("The United States Supreme Court in recent years has embraced an increasingly robust view of the FAA's preemptive power in a series of often controversial arbitration law decisions reflecting the Court's evolving view about the meaning of the federal "pro-arbitration policy."); Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 102 (2002) ("In Southland, the Court effectively 'federalized' United States arbitration law, 'restrict[ing] state legislative rights' so as 'to guarantee the unobstructed enforcement of arbitration agreements.'") (quoting THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 162 (2d ed. 2000)) (internal quotation marks omitted)).

[196] Prima Paint Corp v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405-06 (1967).

[197] Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

[198] Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 477 (1989) ("The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.").

at least suggested that other provisions of the FAA, including Sections 3 and 4, which deal with stays pending arbitration and actions to compel arbitration, might not apply in state court.[199]

The rather confused state of preemption outside of Section 2 renders *Hall Street*'s invitation somewhat questionable. It seems beyond cavil that in any federal court proceeding, all of the terms of the FAA apply, unless, perhaps, the parties have specified that state law will govern.[200] It is not at all clear, however, that parties can specify that state law will govern if that law permits parties to contract for expanded judicial review.

As Professor Christopher Drahozal has compellingly pointed out, the authority for such opting into state law draws most of its force from *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*.[201] But the Court in *Volt* did not say that parties could opt out of the FAA; instead, it said only that parties could incorporate state law as a term in their arbitral contracts.[202] By so doing, parties can transmute state laws that would otherwise be preempted into an enforceable term of their arbitration contract. If this "incorporation-by-reference" reading of *Volt* is correct, then parties that chose a state law allowing for contractually expanded judicial review are really just incorporating such expanded review into their contracts, which *Hall Street* expressly says that they cannot do.[203] The only way that the Supreme Court could allow parties to successfully resort to state law, at least in federal court, in order to effectuate their preference for expanded review would be for it to hold that *Volt* permits parties to opt out of FAA Sections 9 and 10. Such an extreme reading of *Volt*, notwithstanding the dicta in *Hall Street*, seems a stretch.

Of course, many arbitral enforcement proceedings occur in state rather than federal court, so perhaps the problems with realizing *Hall Street*'s invitation in federal courts do not matter all that much. Indeed, at least according to the courts in *Cable Connections*, *Raymond James*, and *Nafta*, FAA Section 10 is merely procedural and does not, therefore, preempt state arbitral review laws.[204] The proposition that Section 10 is a procedural provision that should not apply in state court rests on the premise that the law

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[199] *Id.* at 477 n. 6 ("[W]e have never held that §§ 3 and 4 . . . are nonetheless applicable in state court."); *Southland Corp.*, 465 U.S. at 6 n. 10 ("[W]e do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts."); *see also, e.g.,* Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 530 (2009) (arguing that the Court's treatment of FAA preemption is "limited" and that "[o]nly sections 1 and 2 of the FAA preempt state law").

[200] *See* 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 10.8.2.2, at 10:80 (1995 & Supp. 1999) ("In federal courts, all the sections of the comprehensive FAA will govern.").

[201] *Volt*, 489 U.S. at 477; *see* Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 905, 919 (2010).

[202] *See* Drahozal, *supra* note 201, at 919; *see Volt*, 489 U.S. at 475 ("[B]y incorporating the California rules of arbitration into their agreement, the parties had agreed that arbitration would not proceed in situations which fell within the scope of CALIF.CODE CIV.PROC.ANN. § 1281.2(c) (West 1982).").

[203] *See* Drahozal, *supra* note 201, at 919.

[204] *See supra* Part III(B)(1); *see also, e.g.,* S. Cal. Edison Co. v. Peabody W. Coal Co., 977 P.2d 769, 773-74 (Ariz. 1999) ("Each state is free to apply its own procedural requirements so long as those procedures do not defeat the purposes of the act."); Wells v. Chevy Chase Bank, F.S.B., 768 A.2d 620, 627 (Md. 2001) (noting that state "procedural rules govern appeals, unless those rules undermine the goals and principles of the FAA").

of review and vacatur "does not challenge the determination that the parties had an enforceable arbitration agreement."[205]

This argument, however, overlooks the fact that review and vacatur rules could easily undermine the very goal of finality that the Court in *Hall Street* held to be the "essential virtue" of arbitration.[206] Although the current status of state laws, as Part III demonstrated, might not pose a significant threat to the finality of arbitral awards, the potential for such a threat exists and some states already seem to be moving towards review standards that are much more intrusive than those provided by federal law.[207] Accordingly, it is far from certain that, if pushed, the Supreme Court will stick by its dicta in *Hall Street* and back away from the *sine qua non* of the decision: limited judicial review ensures the sanctity of the arbitral process.

In short, even though *Hall Street* comprehends a greater role for state law in the enforcement and review of arbitral awards, and it does so with the goal, I have argued, of furthering private procedural ordering, doctrinal complications might well pose an insuperable barrier to such a role. At the very least, these doctrinal complications have to raise the suspicions of any parties wanting to take advantage of *Hall Street*'s invitation.

B. Legal Uncertainty and High Transaction Costs

There are a number of reasons, of course, why parties choose to arbitrate. At bottom, however, arbitration purports to be the ultimate form of representativeness: both the process and the content of the dispute are based on negotiation between the parties. The flexibility of arbitration enables parties to define the scope of the dispute and to specify the form and substance of the proceedings that will resolve it. Contracting parties may, thus, construct a dispute resolution mechanism that optimally aligns their incentives with their preferred contractual norms. In this sense, as I have already suggested, arbitration can be seen as the apotheosis of private procedural ordering.[208]

Given the significant potential benefits of arbitration, the fact that commercial parties are leaning away from using it to resolve their domestic disputes with one another might, on first glance, be puzzling.[209] Recent empirical evidence confirms, however, the trend.[210] This evidence suggests that the principle reason for the trend has to do, in fact,

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[205] Jill I. Gross, *Over-Preemption of State Vacatur Law: State Courts and the FAA*, 3 J. AM. ARB. 1, 32 (2004).

[206] *See supra* Part III(C); *see also, e.g.,* Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act,* 2001 J. DISP. RESOL. 67, 75 (arguing that vacatur laws should be narrow enough to avoid providing parties with "a vehicle for easily escaping the arbitration bargain").

[207] *See also generally* Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509 (2009) (arguing that state law could provide a mechanism for broadening the scope of judicial review).

[208] *See supra* Part II(E)..

[209] *See, e.g.*, Theodore Eisenberg & Geoffrey Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 335 (2007) (concluding from their findings that "sophisticated actors prefer litigation to arbitration").

[210] *See generally* David B. Lipsky, *How Corporate America Uses Conflict Management: The Evidence From a New Survey of the Fortune 1000*, 30 ALTERNATIVES TO HIGH COST LITIG. 139 (2012) (summarizing the results of a Cornell University survey and noting a decline of 25% in the use of commercial arbitration

with limited appeal rights.[211] Indeed, when *Hall Street* was decided, several amici argued that parties would "flee from arbitration if expanded review" was not open to them.[212] The Court was not sympathetic, saying that it could not tell the future,[213] but it seems that, four years on, the amici were right.

Of course, some of the decline in the use of arbitration might stem from more general economic factors. After all, "because the litigation process receives government subsidies, sophisticated parties can be expected to agree to arbitrate only when arbitration has a large cost (or other) advantage over litigation."[214] In the wake of the financial crisis, businesses might be more sensitive to costs, which are not necessarily lower in arbitration.[215]

I suggest, however, that, consistent with the arguments in Part II, parties desire the freedom to tailor their dispute resolution processes in ways that optimize their joint welfare. For a period of time, arbitration was the only game in town. Parties faced a binary choice between accepting the public court system and its attendant procedural rules or they could opt out and resolve their disputes in arbitration. Private process, however, "has migrated in surprising ways into the public courts: despite public rules of procedure, judicial decisions increasingly are based on private rules of procedure drafted by the parties before a dispute has arisen." [216] Procedural contracting offers commercial parties many of the advantages that once seemed the exclusive prerogative of arbitration while still providing them with the right to appeal, a right that the empirical evidence strongly suggests many commercial parties highly value.

While arbitration has arguably become more like litigation,[217] litigation has become more flexible like arbitration. The comparative advantages that arbitration once offered have become smaller, and, at the margins, commercial parties are accordingly not seeing the "large cost (or other)" advantages that they once might have.[218]

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since a previous survey 14 years earlier); Raymond G. Bender Jr., *Just and Accurate: Confronting Limited Appeal Rights in Arbitration*, 30 ALTERNATIVES TO HIGH COST LITIG. 146 (2012) (discussing the same survey as well as a different but similar survey conducted by the Rand Institute).

[211] *See* Bender, *supra* note 210 (noting that in both surveys corporate counsel highlight limited appeal rights as the biggest reason for shying away from arbitration).

[212] *See* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 588-89 (2008).

[213] *See id.*

[214] Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 435 (2010).

[215] *See id.*

[216] Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 510-11 (2011).

[217] *See, e.g.*, Stephen L. Hayford & Carroll E. Neesemann, *A Response to RUAA Critics: Codifying Modern Arbitration Law, Without Preemption*, 8 NO. 4 DISP. RESOL. MAG. 15, 17 (Summer 2002) ("Modern arbitration has, to a degree, become judicialized, that is, it has come somewhat to resemble litigation in court."); Thomas E. Carbonneau, *National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? THE 12TH SOKOL COLLOQUIUM 115, 130 (Richard Lillich and Charles N. Brower eds. 1994) (suggesting that arbitration might be becoming "an engine of adjudication indistinguishable from its judicial counterpart).

[218] *See, e.g.*, Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, SOCIAL SCIENCE RESEARCH NETWORK at 14, (2013) *available at* http://ssrn.com/abstract=2221471 (noting that respondents

Hall Street's invitation for parties to turn to state law to give them the flexibility that they crave does not help. In fact, it makes matters much worse. It does not help because, as the previous section argued, a high degree of legal uncertainty shrouds the ultimate enforceability of contractually expanded review provisions under state law. Moreover, the inconsistent and differing constructions of state laws – with different limitations and scopes – makes uncovering the right state law to apply to an agreement difficult and expensive. Legal search costs coupled with uncertainty mean that parties cannot rely on *Hall Street*'s dicta to give them the private procedural ordering advantages that they want.

Worse, the possibility that state laws, with differing and potentially more intrusive judicial review standards might haunt arbitral awards that parties would prefer to leave settled could well chase away commercial parties who would have otherwise stuck with arbitration. After all, as the Court in *Hall Street* quite rightly recognized, one of the great advantages of arbitration can be its finality. Even in the absence of a right to contract for expanded judicial review, many parties might have preferred arbitration, but *Hall Street*'s inelegant effort to provide for procedural contracting through state laws has the unintended consequence of casting a pall over finality as well as practically undermining party autonomy.

V. CONCLUSION

Contrary to the holding of the Supreme Court in *Hall Street*, I have argued that less party freedom to contract for expanded review of arbitral awards under the FAA does not equal more stability for arbitration. Although *Hall Street* is best understood not as a break from but rather a continuation of the Court's strong support for private procedural ordering, the case manages to undermine party autonomy while simultaneously threatening its goal of valuing finality. By pushing for greater state involvement in procedural contracting, at least with respect to judicial review of arbitral awards, the Court further unsettled an already fraught area of law – federal preemption in the context of arbitration. Accordingly, even if some states allow for contractually expanded judicial review of arbitral awards, parties who want to take advantage of such provisions are hampered by uncertainty and high legal search costs. Perhaps more significantly, if states take on a greater role in establishing standards of judicial review for arbitral awards, the possibility exists that such standards will actually undermine the finality of awards.

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to a survey in 1997 cited cost savings as a primary driver in the increased use of arbitration while respondents to a survey in 2011 cited rising costs as a primary reason for the decline in the use of arbitration).