May 28, 2008

Why Arbitrate? The Questionable Quest for Efficiency in Hallstreet Street Associates, LLC v. Mattel, Inc.

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The Federal Arbitration Act (“FAA”)¹ makes arbitration agreements between private parties legally enforceable.² The policy favoring arbitration underlying the FAA has been justified as serving two ends: it protects freedom of contract, and it creates an efficient alternative dispute resolution system.³ Previous decisions by the Court have indicated a belief that, when those two goals come into conflict, the result that preserves freedom of contract should prevail.⁴ In *Hallstreet Associates, L.L.C. v. Mattel, Inc.*, ⁵ however, a recent case involving the Federal Arbitration Act, the Court’s decision preserved perceived efficiency at the expense of freedom of contract. The Court held that the parties could not contract to expand judicial review beyond the grounds provided in the FAA §§ 9–11 because such contracting would undermine the speedy resolution of disputes in arbitration. This Comment will argue that the Court’s decision may not actually produce the most efficient outcomes. Instead, the decision may force parties to seek other, likely less efficient, ways of securing review of arbitration decisions.

† Harvard Law School, J.D. 2009. The author would like to thank Professors Jennifer Brown, Sarah Rudolph Cole, Michael Moffitt, and Todd Rakoff, as well as Sarah Bertozzi, for their guidance and comments.

² See 9 U.S.C. § 2. The Act’s other provisions allow, *inter alia*, a court to stay a trial in order to allow an arbitration to proceed, 9 U.S.C. § 3, and to compel a witness to attend arbitration, 9 U.S.C. § 7. Parties may ask a court to enter an award made pursuant to arbitration, 9 U.S.C. § 9. The FAA allows the court to vacate an arbitrator’s award if that award is based on corruption, fraud, or an exceeding of the arbitrators powers. 9 U.S.C. § 10. A court may modify an arbitrator’s award where there was “material miscalculation [or] mistake,” where the award was based on a matter “not submitted” to the arbitrator, or “[w]here the award is imperfect in matter of form not affecting the merits of the controversy.” 9 U.S.C. § 11.
³ See infra notes __ – __.
⁴ See infra notes __ – __.
In 1981, Mattel, Inc. leased property in Oregon from Hallstreet Associates, LLC, to use as a manufacturing site.\(^6\) In 1998, the Oregon Department of Environmental Quality (“DEQ”) reported that well water on the property contained high level of trichloroethylene (“TCE”), and the DEQ later found other pollutants.\(^7\) Mattel gave notice to terminate its lease in 2001, and Hallstreet sued, claiming both that Mattel did not have the right to vacate and that Mattel was required to indemnify Hallstreet for cleaning up the pollutants.\(^8\) Mattel won the first issue at trial in the District Court for the District of Oregon, and the two parties agreed to arbitrate the indemnity claim.\(^9\) They drew up an arbitration agreement, providing that the District Court could confirm, modify, or vacate the arbitrator’s award where “(i) the arbitrators finding of fact are not supported by substantial evidence [sic], or (ii) where the arbitrator’s conclusions of law are erroneous.”\(^10\) The District Court entered the agreement as a Court order.\(^11\)

The arbitrator found for Mattel, explaining that the lease required Mattel to reimburse Hallstreet for compliance with environmental laws but not human health laws, which the arbitrator believed governed the TCE cleanup.\(^12\) Hallstreet filed a motion to vacate on the grounds that the arbitrator’s interpretation of the relevant law was legal error,\(^13\) and the District Court, using the power granted to it by the arbitration agreement, reversed and remanded to the arbitrator.\(^14\) The arbitrator then found for Hallstreet, and both parties sought modification from the District Court, which, in large part upheld the award for Hallstreet.\(^15\) Both parties appealed to

\(^{6}\) Hallstreet Associates, L.L.C. v. Mattel, Inc., No. 06–989, Petr.’s Br. 3.
\(^{8}\) Id. According to petitioner’s brief, these events occurred in 2000, not 2002. Hallstreet Associates, L.L.C. v. Mattel, Inc., No. 06–989, Petr.’s Br. 4.
\(^{9}\) Hallstreet, slip op. at 2.
\(^{11}\) Hallstreet, slip op. at 2.
\(^{12}\) Id.
\(^{13}\) Id.
\(^{14}\) Id.
\(^{15}\) Id.
the Ninth Circuit, where Mattel argued that, under that court’s recent en-banc decision in *Kyocera*, the arbitration agreement’s provision for judicial review was unenforceable. The Ninth Circuit agreed, reversing in favor of Mattel and instructing the district Court to uphold the original arbitration award for Mattel. Instead, the District Court again found for Hallstreet, this time advancing the argument that § 10 of the FAA allowed a court to reverse an arbitrator’s award when the result was “implausible.” The Ninth Circuit reversed again, holding that §§ 10–11 of the FAA did not allow review based on “implausibility.”

The Supreme Court upheld the Ninth Circuit’s ruling on the expansion of judicial review under the FAA, but remanded for further consideration on the issue of whether the District Court’s order in this case created an alternative ground for judicial review. Writing for the Court, Justice Souter explained that the grounds for judicial review of arbitration awards described in §§ 10–11 of the FAA are the exclusive sources of judicial review under the FAA. Justice Souter rejected both of Hallstreet’s arguments that the grounds are not exclusive. First, Justice Souter called inconclusive the Court’s statement in Wilko v. Swan that an arbitrator’s “interpretations of the law . . . in contrast to manifest disregard [of the law] are not subject . . . to judicial review for error in interpretation.” Hallstreet had argued that the statement created or acknowledged a ground for judicial review of arbitration awards made in “manifest disregard” of

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16 *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (2003) (en banc). The Ninth Circuit held that “private parties have no power to determine the rules by which federal courts proceed, especially when Congress has explicitly prescribed those standards.” *Id.* at 1000.

17 *Hallstreet*, slip op. at 3.

18 *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 113 Fed. Appx. 272, 272–273 (9th Cir. 2004) (“the terms of the arbitration agreement controlling the mode of judicial review are unenforceable”).


20 *Id.* One judge dissented, arguing that the arbitrator’s decision was not merely “implausible” but rather “completely irrational.” *Id.* at 478 (Graber, J., dissenting).

21 Justice Souter was joined by Chief Justice Roberts and Justices Scalia, Thomas, Ginsburg, and Alito.


23 *Id.* at 7 (citing Wilko v. Swan, 346 U. S. 427, 436–37 (1953)).
the law. Justice Souter explained that Wilko could not “bear” Hallstreet’s interpretation, either because the actual result in Wilko was rejection of a contract allowing general review of legal error or because the “vague” phrasing may have simply used “manifest disregard” to refer to all the valid grounds for review in § 10.

Second, Justice Souter rejected Hallstreet’s argument that contracts for expanded judicial review are valid because the FAA was motivated by Congress’s desire to ensure freedom of contract. Justice Souter found that the grounds for review listed in the FAA represented only “egregious departures” from an arbitration agreement. Applying the ejusdem generis canon of statutory interpretation, Justice Souter argued that the extreme nature of the listed grounds precluded review for other less egregious grounds such as plain “legal error.” This interpretation limiting the grounds for review seemed particularly correct since any other interpretation would undermine what Justice Souter recognized as the national policy to maintain “arbitration’s essential virtue of resolving disputes straightaway.” Furthermore, the language in Dean Witter rejecting the suggestion that main goal of the FAA was to promote speedy dispute

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24 Id.
25 Id. at 8.
26 Id. at 8–9.
27 Hallstreet Associates, slip op. at 9. Thos grounds were: “corruption, fraud, evident material mistake, award[s] upon a matter not submitted,” and imperfections whose correction would be a “matter of form not affecting the merits.” Id. (international quotation marks omitted).
28 Id. at 9. Justice Souter’s use of the ejusdem generis to trump what had previously been identified as the intent of the FAA is particularly puzzling in light of one of his prior opinion in an FAA. Writing in dissent in Circuit City, Justice Souter had argued that “ejudem generis is a fallback” that “is triggered only by uncertain statutory text” which “can be overcome by, inter alia, contrary legislative history.” Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 138 (2001); see Keith A. Becker & Dianne R. LaRocca, Comment, Divided Court Crosses Wires over Circuit City Decision: Holding Casts Doubt on Ninth Circuit’s Duffield Decision, 7 HARV. NEGOTIATION L. REV. 403, 409 (2002). He criticized the Court for turning that “practice upside down, using ejusdem generis to establish that the text is so clear that legislative history is irrelevant.” Circuit City, 532 U.S. at 138 n.2. It is odd that Justice Souter used an ejusdem generis argument in Hallstreet since he identified, very early in the opinion, clear Congressional intent regarding the FAA: “Congress enacted the FAA to replace judicial indisposition to arbitration with a ‘national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.’” Hallstreet Associates, slip op. at 4 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U. S. 440, 443 (2006)). That intent is in conflict with his interpretation of the text.
resolution was not to the contrary because the Court was merely saying that conducting simultaneous arbitration and litigation was not a “good enough reason to defer the arbitration.”

Though neither of Hallstreet’s arguments were convincing, Justice Souter left open the possibility that there were other grounds for judicial review outside the FAA. In fact, he recognized that, because the arbitration agreement in this case was entered as a court order, the District judge might have power to review the award under his case management authority. Justice Souter therefore remanded the case to the Court of Appeals to consider that issue further.

Justice Stevens dissented. He argued that the Court’s holding against contractual expansion of judicial review “conflict[ed] with the primary purpose of the FAA,” which he identified as the specific enforcement of arbitration agreements. Justice Stevens also maintained that Justice Souter’s literal interpretation of the FAA’s text was “wooden” and “flatly inconsistent” with the purpose of the FAA. Justice Breyer also dissented. He argued that, since all nine Justices agreed that the FAA did not preclude the parties from contracting for judicial review, the Court should simply have remanded the case with instructions to enforce the arbitrator’s final (second) award.

The Court’s decision in Hallstreet, a departure from its prior decisions, may not produce the results which the Court predicts. In its previous cases on the FAA, the Court has expressed a belief that the main purpose of the Act was to promote freedom of contract and the enforcement

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32 Hallstreet Associates, slip op at 15.
33 Id.
34 Hallstreet Associates, L.L.C. v. Mattel, Inc., No. 06–989, slip op. at 1 (Stevens, J., dissenting). Justice Stevens was joined by Justice Kennedy.
35 Id.
36 See id. at 2.
37 Id. at 3.
of arbitration agreements like any other contracts. But the Hallstreet decision embodies a choice to preserve the perceived efficiency of arbitration at the expense of the desire of the parties. This comment argues that the Court’s decision will not actually produce efficient outcomes, at least for some parties, because it forces parties to accept an option for which they would not freely contract. As a result, the Court’s decision will spur parties to seek other ways of hedging against the risk of an erroneous and damaging decision by an arbitrator.

As early as 1985, the Court recognized that there are two potentially conflicting goals underlying the Federal Arbitration Act: freedom of contract and efficient resolution of disputes.\(^{39}\) The FAA helps further freedom of contract by favoring the enforcement of arbitration agreements because those agreements represent the consensual will of private parties. The FAA also embodies the assumption that arbitration increases efficiency because it is cheaper and faster than litigation, and so there is a savings to the judicial system, the parties, and the public by enforcing such agreements. Of course, these two possible rationales need not conflict,\(^ {40}\) and promoting freedom of contract sometimes increases the efficiency of arbitration.\(^ {41}\) There is no scholarly consensus about which of the two goals should prevail when they clash: some


\(^{41}\) See Elizabeth Thornburg, Designer Trials, 2006 J. DISP. RESOL. 181, 183 (2006) ("In the context of arbitration clauses, courts have enthusiastically endorsed freedom of contract particularly when those contracts result in a perceived efficiency gain for the courts themselves.").
commentators have argued that the Court should act to ensure freedom of contract, while others have argued that the Court should ensure efficiency.

The goals of freedom of contract and efficiency have come into conflict in the area of expanded judicial review under the FAA. Parties often contract to expand the scope of judicial review of their arbitration proceedings and awards. Such expanded review, however, may cause the entire dispute resolution process, from start to finish, to last longer (because of the extra time required for judicial review and appeals from those decisions) and cost more (because the parties will incur attorneys’ fees and other expenses during the review period). Upholding expanded judicial review, therefore, may promote freedom of contract over efficiency. Prior to Hallstreet, some commentators predicted that the Court would support expanded judicial review based on its previous support for the “freedom of contract” rationale. Under this view, “Supreme Court interpretation of the FAA, and its emphasis on freedom of contract, overrides any concerns about the effects of expanded review on arbitral efficiency.” Other commentators argued that, based on the “efficiency” rationale, the Court would likely not allow parties to contract for expanded judicial review. As one commentator wrote, “the inevitable costs of enhanced review are


44 See Sarah Rudolph Cole, Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards, 8 NEV. L.J. 214, 214 (2008) (“I suspect that the current United States Supreme Court will decide this issue in favor of permitting parties to expand judicial review of arbitration awards on the principle that the FAA is pro-party autonomy.”); see also Margaret Moses, Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards, 52 U. KAN. L. REV. 429, 444 (2004) (“[t]he 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.”).

45 Norton, supra note __, at 185.

46 Kevin A. Sullivan, Comment, The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act, 46 ST. LOUIS U.L.J. 509, 511 (2002) (“[E]xpansion of judicial review will threaten the integrity of the arbitration process because the additional costs and delays inherent in the court system will lead to
almost certain to outweigh the occasional benefits of overturning erroneous conclusions of law.”

The Circuit courts are split on the issue of whether the FAA allows parties to contract for expanded judicial review.

The Court’s prior decisions have suggested that freedom of contract arguments would prevail over efficiency when those two goals clash. More than twenty years ago, in *Dean Witter Reynolds, Inc. v. Byrd*, the Court explicitly chose the freedom-of-contract rationale over that of efficiency: “the overriding goal of the Arbitration Act was [not] to promote the expeditious resolution of claims . . . but merely the enforcement . . . of privately negotiated arbitration agreements.”

In *Southland Corp. v. Keating*, a year earlier, the Court had noted that arbitration agreements created through negotiation "by experienced and sophisticated businessmen, ... absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." A decade later, in *First Options of Chicago, Inc. v. Kaplan*, the Court again preferred the freedom-of-contract argument, explaining that “the 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

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48 *Compare, e.g.*, Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 998 (9th Cir. 2003) (“Broad judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 n.7 (10th Cir. 2001) (permitting expansion of judicial review would sacrifice the “simplicity, expediency, and cost-effectiveness of arbitration. Rather than providing a single instance of dispute resolution with limited review, arbitration would become yet another step on the ladder of litigation.”), with, *e.g.*, Puerto Rico Tel. Co. v. U. S. Phone Mfg. Corp., 427 F. 3d 21, 31 (1st Cir. 2005); Jacada (Europe), Ltd. v. International Marketing Strategies, Inc., 401 F. 3d 701, 710 (6th Cir. 2005); Roadway Package System, Inc. v. Kayser, 257 F. 3d 287, 288 (3rd Cir. 2001).
The Court has also, however, expressed the belief that arbitration is more efficient than litigation, explaining that the arbitration process is an “efficient, inexpensive, and expeditious means for dispute resolution” that is characterized by “simplicity, informality, and expedition.”

But the Court’s decision in *Hallstreet*, a case about expanded judicial review, represents a clear choice in favor of efficiency, not freedom of contract. The Court argued that §§ 9–11 should be read in a way that furthered the “national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.” Any other interpretation of the text would reduce arbitration’s efficiency, “rende[ring] . . . arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”

The Court’s holding, designed to preserve arbitration’s efficiency, may actually undermine the efficient resolution of disputes. Consider why a national policy in favor of the efficient resolution of dispute via arbitration would exist? Presumably, the policy exists because the speedy resolution of disputes saves time and money for the parties and the court. Arbitration is, therefore, a more efficient means of resolving at least some disputes. But if the Court’s holding in *Hallstreet* does not actually preserve that efficiency—the resolution of disputes in less time and with less cost—the Court’s holding may actually undermine the policy it attempts to further.

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51 514 U.S. 938, 947 (1995) internal quotation marks omitted). Though the First Options Court did decide that Courts could review an arbitrator’s decision about the arbitrability of a contract, it held that such review would occur only if the parties had not explicitly contracted out of such judicial review. Id. at 943–944. Thus the Court can again be seen as recognizing the paramount importance of the parties’ own agreement.
55 Id. (internal quotation marks omitted).
56 Id. (emphasis added).
First, it is worth noting that the arbitration process may not actually be faster or cheaper than the litigation process. Commentators have questioned whether arbitration really is more efficient than litigation. Some arbitrations may be so slow or so expensive that the arbitration becomes as costly, if not more so, than trials. It is also worth noting that arbitration must almost always be cheaper for the court system, however, and saving resources for that system may have been the Court’s unstated goal. Of course, the Hallstreet Court did not necessarily say that arbitration is more efficient than litigation—rather, it said that Congress, in drafting the FAA, believed arbitration to be more efficient. But if arbitration never was, or no longer is, more efficient, does promoting arbitration really further the desire to resolve disputes cheaply and quickly?

Second, even if the actual process of arbitration is more efficient than that of litigation, it is unclear whether the Court’s restriction on expanded judicial review will actually be efficient, that is, will actually save time and money. To understand why the Court’s decision might not be efficient, consider for which stakeholders arbitration without expanded judicial review is efficient. Arbitration without contractually expanded judicial review is undoubtedly efficient for the courts themselves, at least in the short term, because those courts avoid spending time or resources on the resolution of the dispute. Arbitration without expanded judicial review is also likely to be efficient for contracting parties who would choose not to contract for expanded review if given the option to do so: either both parties will be happy to avoid the expanded

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review, or the party who does not want expanded review will be able to compensate, in other parts of the contract, the party who does want the review.\textsuperscript{60}

But there is a large group of parties for whom arbitration without expanded judicial review is unlikely to be efficient: the group of parties who would contract for expanded judicial review if it were available. For those parties, the increased cost, in terms of time and money, of expanded judicial review would be outweighed by the benefit of having a check on the arbitrator’s decision.\textsuperscript{61} By denying them expanded judicial review, the Court’s decision imposes new inefficiencies. First, parties who want expanded judicial review but cannot have it will seek to hedge against the risk of a “bad” arbitrator decision in other ways: taking out greater insurance, contracting out of the risk, or perhaps even choosing not to arbitrate if they fear that the result could be worse than the status quo. All these hedging measures increase costs. Second, coping with a “bad” decision by an arbitrator—a decision that would have been corrected had expanded judicial review been available—also creates additional costs for the parties. For instance, the unhappy party (or parties) may seek to litigate other claims, or correct in other ways the result of the arbitration. That extra litigation raises costs for the courts. Third, the “bad” decision may also create costs for society: assuming that the laws are in general efficiency-promoting, an arbitrator’s decision that is inconsistent with a law that is efficiency-promoting is also per se less efficient. Thus the Court’s decision to preserve the efficiency inherent in arbitration may not actually further the ultimate goal of resolving disputes as quickly, and with as little cost, as possible.

\textsuperscript{60} This sort of Coasian bargaining is a widely recognized phenomenon. See, e.g., Lee Anne Fennell, \textit{Revealing Options}, 118 Harv. L. Rev. 1399, 1403 n.9 (2005) (“[T]he Coase Theorem holds that if parties could costlessly bargain with each other, an efficient result would be reached regardless of who was assigned the entitlement initially.”); see also R.H. Coase, \textit{The Problem of Social Cost}, 3 J.L. & ECON. 1, 2-15 (1960).

\textsuperscript{61} Parties who opt for expanded judicial review have concerns such as “maverick arbitrators,” arbitrators who make “egregious award[s] . . . wrong on the facts and the law.” Moses, supra note __, at 429. Awards by such arbitrators have been referred to as “knucklehead” awards. Younger, supra note __, at 248.
What, then, will be the effects of the Hallstreet decision on the parties for whom arbitration with expanded judicial review represents the efficient way to resolve disputes? One effect may be to increase lobbying in Congress. If the Court’s decision inefficiently places more costs on the users of the arbitration system, those users might try to remove the costs by lobbying for amendments to the FAA. Academics have already suggested that the FAA be amended to allow for some form of expanded judicial review. Proposed amendments range from allowing the parties to expand judicial review by contract to allowing generally for “appellate review [of arbitration decisions] similar to that accorded trial court decisions.” It is possible, in fact, that the Hallstreet Court’s holding was intended to encourage Congressional amendment of the FAA.65

Another effect of the Hallstreet decision may be to spur users of arbitration to explore other avenues, either inside or outside the FAA framework, for securing review of their arbitration agreements. Inside the FAA framework, one potential solution would be creative “disempowerment” of arbitrators. Even under Hallstreet, § 10(a)(4) of the FAA allows a court to review an arbitration decision in a case “where the arbitrators exceeded their powers.” Parties who want expanded judicial review over certain subjects, therefore, could make explicit in their arbitration agreement that the arbitrators do not have power to make errors over those subjects. For instance, after Hallstreet, it seems as if parties cannot contract for expanded judicial review

63 See Cole, supra note __, at 230 (“parties should be able to agree to what they wish”); Lee Goldman, Contractually Expanded Review of Arbitration Awards, 8 Harv. Negot. L. Rev. 171, 199 (2003) (arguing for contractually expanded review so long as the agreement is not a standard form contract).
64 Jeffrey W. Stempel, Keeping Arbitrations from Becoming Kangaroo Courts, 8 Nev. L.J. 251, 251 (2007).
65 But see Note, New Evidence on the Presumption against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions, 120 Harv. L. Rev. 1604, 1619 (2007) (explaining that Congress “has not responded to any” of the Court’s “enormously important and controversial” holdings interpreting the FAA).
of an arbitration decision on the basis that the arbitrator inaccurately applied or interpreted a law because nothing in the FAA §§ 9–11 explicitly allows for review on those grounds. To address this problem, the parties could create an agreement that explicitly states that the “arbitrators should follow the law.”\textsuperscript{67} A court would then be able to review the arbitrator’s decision for incorrect interpretations of a law under § 10(a)(4). The Court has already eliminated other possible options such as relying on review of arbitration awards created by state law\textsuperscript{68} or state agencies.\textsuperscript{69}

Parties may also seek to realize expanded judicial review outside the FAA framework. The Court itself noted that the FAA does not preclude other avenues of expanding judicial review,\textsuperscript{70} and the dissent expressed a similar view.\textsuperscript{71} One option suggested by Judge Posner is for the parties to contract for an “appellate arbitration panel” to review the arbitration decision.\textsuperscript{72} A second option might be to seek review from the trial judge under Rule 16\textsuperscript{73} where, as in \textit{Hallstreet}, the arbitration agreement was reached during the course of judicial proceedings.\textsuperscript{74} The Court left open the possibility that parties could contract for that sort of review.\textsuperscript{75}

A third option is review for “manifest disregard” of the law. In \textit{Wilko}, the Court suggested that a court could review an arbitration decision that was in “manifest disregard” of

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\item See Cole, supra note __, at 225 n.48; see also Philip G. Phillips, Rules of Law or Laissez-Faire in Commercial Arbitration, 47 Harv. L. Rev. 590, 603–04 (1934).
\item See, e.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995) (explaining that the FAA’s displacement of state law is “now well-established”).
\item See Preston v. Ferrer, 550 U.S. __ (2008) (holding that the FAA pre-empts arbitration-related actions by state agencies).
\item See \textit{Hallstreet Associates}, slip op. at 13 (Majority opinion) (“The Act” is not the only way into court for parties wanting review of arbitration awards”).
\item See \textit{id.}, slip op. at 1 (Breyer, J., dissenting) (“I believe that the Act does not preclude enforcement of such an agreement.”).
\item Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991); see Younger, supra note __, at 262 (“If there is a serious concern about an out-of-control arbitrator, providing for appellate review may help put this concern to rest, albeit by adding another layer to the arbitration process.”).
\item See F.R.C.P. 16.
\item See \textit{Hallstreet Associates}, slip op. at 14–15 (majority opinion).
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the law. Some commentators viewed this language as creating an avenue for judicial review outside the FAA framework. The Hallstreet Court rejected the argument that Wilko allowed the parties to contract for expanded judicial review. But the Court’s holding may still leave open a recourse to “manifest disregard” review when the parties have not specifically contracted for it. If that opening were to exist, however, it would be narrow: parties almost never win a challenge based on manifest disregard because the standard for proving manifest disregard is extremely difficult to meet.

The most drastic result of the Hallstreet decision could be a flight from arbitration in the United States. The Court itself acknowledged that such flight was a possibility, and both Hallstreet and its amici believed flight was likely. One possibility is that parties will stop using arbitration at all. Another possibility is that, if international entities dislike the current level of available review in one country, they will simply move their arbitrations to another country.

Whether or not a flight from arbitration will take place is essentially a question of whether the

77 See, e.g., Michael A. Scodro, Deterrence and Implied Limits on Arbitral Power, 55 DUKE L.J. 547, 566 (2005)
78 See Hallstreet Associates, slip op. at 8; see also 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, 41–44 (2006) (criticizing the argument that “manifest disregard” provides another grounds for review).
81 The Supreme Court has not defined what manifest disregard might mean, but most Circuit Courts acknowledge that an arbitrator acts in manifest disregard of the law only when he “knowingly refuses to apply clearly applicable law. Courts cannot vacate an award simply because the arbitrator makes an error of law, even if the error is obvious on the face of the award.” Id. at 242; see, e.g., Christopher D. Kratovil, Judicial Review of Arbitration Awards in the Fifth Circuit, 38 St. Mary's L.J. 471, 487 (2007) (“[J]udicially assaulting an arbitration award on the grounds that it is in manifest disregard of the law is an exceptionally difficult undertaking.”).
82 See Hallstreet Associates, slip op. at 12 (“We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts.”). The Court also argued, however, that the potential for flight from arbitration should not influence its statutory interpretation. Id.
83 See, e.g., Hallstreet Associates, Brief for Petitioner 39; Brief for New England Legal Foundation et al. as Amici Curiae 15.
84 Cf. Christopher Drahozal, Enforcing Vacated International Arbitration Awards: An Economic Approach, 11 AM. REV. INT’L ARB. 451, 458 (2000) (“International arbitration proceedings are sufficiently mobile that if a national arbitration law is seen as unfavorable, parties can choose a different situs in future agreements to arbitrate.”).
extra costs of arbitration without expanded judicial review outweigh the cost of moving away from arbitration altogether.

The Court’s decision in Hallstreet may not further the efficiency goals the Court claims to champion. In previous cases, the Court had recognized the main purpose of the FAA to be protecting and promoting the freedom to contract for arbitration agreements; in Hallstreet, the Court sought to “protect” arbitration’s efficiency from contractually expanded judicial review. But where parties would prefer to contract for judicial review, denying them that ability is likely to produce inefficient results at least some of the time. Parties will seek alternative, and likely more costly, routes to protecting themselves from the risk of an unwanted arbitration decision. In the end, the costs of getting around the Hallstreet may be greater than the costs saved by the Court.