PEPPERDINE UNIVERSITY

Pepperdine Dispute Resolution Law Journal

Volume 22 | Issue 1 Article 4

5-15-2022

You Be the Judge: Analyzing When the Federal Arbitration Act's Judicial Review Standards Apply in State Court

Max Birmingham

You Be the Judge: Analyzing When the Federal Arbitration Act's Judicial Review Standards Apply in State Court

Max Birmingham*

I. Introduction

This article addresses whether, when the Federal Arbitration Act ("FAA") governs an arbitration, the FAA's judicial review standards apply in state court and preempt application of different state law judicial review standards.

There is a 5–5 split between states on this issue because one state has flipflopped.[1] Two states have explicitly held the FAA's judicial review standards apply in state court, two have indicated they will rule this way if the issue were presented to them, and five states have taken the opposite view.[2] The remaining state, Alabama, switched sides.[3] In *Birmingham News Co. v. Horn*, the Supreme Court of Alabama initially held that the FAA's judicial

* B.S., State University of New York at Empire State College; M.B.A., Northeastern University D'Amore-McKim School of Business; J.D./M.J., Michigan State University College of Law. The Author would like to thank Maria Filipakis; Taylor O'Neil Connor, Public Defenders Office 18th Circuit, Florida; and last but certainly not least, the editors, staff, & faculty advisor of the *Pepperdine Dispute Resolution Law Journal*.

[1] *See* discussion *infra* Part V (states that have held that the FAA does govern judicial review standards in state court are: Georgia, Idaho, Nebraska, New York, and South Carolina; states that have held that the FAA does not govern judicial review standards in state court are: Alabama, California, Kentucky, South Carolina, and Texas).

[2] *Id*.

[3] Raymond James Fin. Servs., Inc. v. Honea, 55 So. 3d 1161, 1168–69 (Ala. 2010) (overruling Birmingham News Co. v. Horn, 901 So. 2d 27, 46 (Ala. 2004)).

review standards apply in the aforementioned instances.[4] The court backtracked on this in *Raymond James Financial Services, Inc. v. Honea*, where it was persuaded by the Supreme Court of the United States (hereinafter "SCOTUS" or "the U.S. Supreme Court" or "the Court") in *Hall Street Associates, L.L.C. v. Mattel, Inc.* to rethink its stance.[5] The Supreme Court of Alabama described that the ruling in *Hall Street Associates, L.L.C.* held that the FAA's judicial review standards are "procedural" rules, not substantive rules.[6] The other courts that held that state law preempts the FAA judicial review standards have also done so under the notion that the FAA's judicial review standards are procedural rules,

---

[4] 901 So. 2d at 46, *overruled by* Horton Homes, Inc. v. Shaner, 999 So. 2d 462 (Ala. 2008), *and* Hereford v. D.R. Horton, Inc., 13 So. 3d 375 (Ala. 2009).

[5] *Honea*, 55 So. 3d at 1168–69 (citing Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008)). "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. We have heretofore done so; however, this case presents us with the situation we implicitly recognized in *Horn* in *which there are good and sufficient reason*s '*to retreat from that position*.'" *Id*. (emphasis added) (citations omitted).

[6] *Honea*, 55 So. 3d at 1168.

> In *Horn*, we made clear that Alabama courts should apply § 10 of the FAA when moved to vacate or to confirm arbitration awards, even though § 10 was facially applicable only to federal district courts. 901 So.2d at 46. However, we refrained from holding that § 10 constituted substantive law that we were required by the FAA to apply in state court proceedings, stating that it was unnecessary to "stumble over the distinction between substantive law and procedural law" because we had already adopted § 10 "as applicable to an appeal of an arbitration award in this state, *and we see no need to retreat from that position*." 901 So.2d at 46–47. However, in *Hall Street*, the Supreme Court of the United States acknowledged that state statutory or common law might permit arbitration awards to be reviewed under standards different from those enumerated in § 10, *thus effectively stating that § 10 represents procedural as opposed to substantive law*.

Id. (emphasis added).

not substantive rules, and that they do not apply in state court or preempt the application in state court of different state law judicial review standards.[7] These courts concluded that the FAA's substantive objective is to ensure the enforcement of the arbitration agreement, and the courts asserted that this objective purportedly is not frustrated by applying different state law judicial review standards to the arbitration award.[8] Notwithstanding, it is not clear where in the *Hall Street Associates, L.L.C.* opinion the Court delineates that the FAA judicial review standards are procedural rules, not substantive rules.[9]

States that are hostile to arbitration undermine FAA governed arbitration agreements by mandating more stringent judicial review of arbitration awards than the FAA authorizes, which is problematic.[10] State courts are more frequently called upon to apply the FAA.[11] Thus, an arbitration may have wildly different outcomes based upon the state in which it is adjudicated. The FAA's substantive goal is to prevent hostile states from undercutting enforcement of arbitration agreements.[12] As matters currently stand, this goal is frustrated.

This argument proceeds as follows: Part I provides an introduction. Part II analyzes the procedural reform intent of the FAA and why the statute seeks to standardize the arbitration process. Part III reviews the judicial review of arbitration awards as promulgated in *Hall Street Associates, L.L.C. v. Mattel, Inc.* Part IV reviews the generations of FAA cases which have been held to be preempted by

[7] *See* discussion *infra* Part V.C.ii (discussing the Supreme Court of California's decision in Cable Connection, Inc. v. DirecTV, Inc., 190 P.3d 586 (2008)).
[8] *See, e.g.*, Henderson v. Summerville Ford-Mercury, 405 S.C. 440, 450 (2013).
[9] *See Hall St. Assocs., L.L.C.*, 552 U.S. 576; *see also* Matthew J. Brown, *Final Awards Reconceptualized: A Proposal to Resolve the* Hall Street *Circuit Split*, 13 PEPP. DISP. RESOL. L.J. 325, 326 (2013) ("The FAA does not grant courts the authority to review the merits of an arbitrator's decision.").
[10] *Id*. at 593 (Stevens, J., dissenting).
[11] Nitro-Lift Techs., LLC v. Howard, 568 U.S. 17, 17–18 (2012) (per curiam).
[12] *Hall St. Assocs., L.L.C.*, 552 U.S. at 593 (Stevens, J., dissenting).

SCOTUS. Part V examines the caselaw and explores the reasoning behind the decisions. Part VI states public policy purposes as to why the FAA's judicial review standards apply in state court when the FAA governs an arbitration. Part VII identifies why not applying FAA judicial review standards to an arbitration when the FAA governs is subject to *reductio ab absurdum*. Part VIII concludes.

II. "Procedural Reform" Intent of the Federal Arbitration Act

History indicates that the FAA is part of a push for procedural reform.[13] Before the Federal Rules of Civil Procedure were adopted in 1938, federal courts would employ state court procedures.[14] However, this was a disheveled endeavor, which led to widespread discrepancies in the law.[15] The Conformity Act of 1872 attempted to create uniform standards for procedure amongst the federal courts.[16] Woefully, it did not achieve its objective, as procedures in federal courts varied greatly amongst the states.[17] Some states employed common law pleadings but varied as with or without statutory modifications.[18] Other states utilized code systems of procedures.[19] This led to a sundry of federal procedures, which all differed according to state.[20]

---

[13] Imre S. Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 119 (2016).
[14] 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE 15 n.19 (3rd ed. 1998).
[15] *Id*. at 16.
[16] Conformity Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 (1872) (repealed by the adoption of the Fed. R. Civ. P. 28 U.S.C.A.).
[17] CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 382–83 (8th ed. 2017); *see also* Nudd v. Burrows, 91 U.S. 426, 441 (1875) (The Conformity Act failed to "bring about uniformity in the law of procedure in the Federal and State courts of the same locality.").
[18] WRIGHT & MILLER, *supra* note 14, at 16.
[19] *Id.*
[20] *Id.*

There were further numerous issues that muddled what was appropriate and what was not.[21] If there were a federal statute on point, state practice would not be adhered to.[22] Moreover, state practice did not control certain matters, such as jurisdiction and validity of service of process.[23] Furthermore, federal judges were not bound by state practice in their administration of trial and appellate procedure.[24] Even more broadly, federal judges did not have to follow state practice, causing major discontent with procedure.[25] A report from the Committee on Uniformity of Procedure and Comparative Law of the American Bar Association ("ABA") poignantly stated that "a lawyer practicing in the Federal courts, even in his own state, feels no more certainty as to the proper procedure than if he were before a tribunal of a foreign country."[26]

Lawyer Thomas W. Shelton promoted "well-organized propaganda" for the U.S. Supreme Court to regulate judicial procedure in federal courts.[27] Shelton elaborated that procedural uniformity was paramount to achieving equal application of the law.[28] At the 1911 ABA annual meeting, Shelton formally introduced a resolution for the U.S. Supreme Court to create a uniform system of procedure for lower federal courts.[29] In 1912, the ABA's

[21] WRIGHT & KANE, *supra* note 17, at 382.
[22] *Id.*
[23] WRIGHT & MILLER, *supra* note 14, at 16 n.22.
[24] *Id.*
[25] WRIGHT & KANE, *supra* note 17, at 382.
[26] American Bar Association, *Report of Committee on Uniformity of Procedure and Comparative Law*, 19 ANN. REP. A.B.A. 411, 420 (1896).
[27] Thomas Wall Shelton, *Uniform Judicial Procedure–Let Congress Set the Supreme Court Free*, 73 CENT. L.J. 319, 319 (1911) [hereinafter *Uniform Judicial Procedure*].
[28] Thomas Wall Shelton, *The Relation of Judicial Procedure to Uniformity of Law*, 72 CENT. L.J. 114, 114 (1911); *Uniform Judicial Procedure*, *supra* note 27, at 319–20; *see also* Thomas Wall Shelton, *Simplification of Legal Procedure-Expediency Must Not Sacrifice Principle*, 71 CENT. L.J. 330 (1910).
[29] *See* 36 A.B.A. REP. 50 (1911). The resolution provided:

Committee on Judicial Administration and Remedial Procedure recommended the adoption of Shelton's resolution.[30] The motion passed, and the ABA Committee on Uniform Judicial Procedure was created and led by Shelton along with four other individuals.[31] The Committee collaborated with the U.S. Congress and presented the bill in both houses.[32]

In 1923 and 1924, there were congressional hearings regarding the bills, which would become the FAA.[33] In 1925, the U.S. Congress enacted the United

> WHEREAS, Section 914 of the Revised Statutes [the Conformity Act of 1872] has utterly failed to bring about a general uniformity in federal and state proceedings in civil cases; and
> WHEREAS, It is believed that the advantages of state remedies can be better obtained by a permanent uniform system, with the necessary rules of practice prepared by the United States Supreme Court;
> *Now*, *therefore*, *be it, and*, *it is Hereby resolved*:
> *First*: That a complete uniform system of law pleading should prevail in the federal and state courts;
> *Second*: That a system for use in the federal courts, and as a model, with all necessary rules of practice or provisions therefor, should be prepared and put into effect by the Supreme Court of the United States;
> *Third*: That to this end, See. 914 and all other conflicting provisions of the Revised Statutes should be repealed and appropriate statutes enacted;
> *Fourth*: That for the purpose of presenting these resolutions to Congress and otherwise advocating the same in every legitimate manner, there shall be appointed a committee of five members to be selected by the President to be known as "The Committee on Uniform Judicial Procedure."

37 A.B.A. REP. 434–35 (1912).

[30] Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 UNIV. PA. L. REV. 1015, 1049–50 (1982).

[31] *Id.* at 1050. *See* 37 A.B.A. REP. 35–36 (1912). The five individuals first appointed to the committee were Shelton, Louis D. Brandeis, J.M. Dickinson, Williams B. Hornblower, and Joseph N. Teal.

[32] Burbank, *supra* note 30, at 1050; H.R. 26,462, 62d Cong. (1912); S. 8454, 62d Cong. (1912), *reprinted in* 38 A.B.A. REP. 542 (1913).

[33] IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 88, 92 (1992) (citing *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal*

States Arbitration Act, which would become known as the FAA.[34] The bills were enacted into law with minor amendments.[35] This was a watershed moment—before it was enacted, "agreements to arbitrate future disputes were almost always unenforceable in the United States."[36] The main crux of the statute is § 2, which declares that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[37]

In a dissenting opinion, Justice O'Connor posited that Congress enacted the FAA "specifically to rectify forum-shopping problems created by this Court's decision in *Swift v. Tyson*."[38] In another case, Justice Thomas issued a dissenting opinion and took a different view and held that *Swift* was not influencing the federal courts.[39] Rather, Justice Thomas took the perspective that federal courts did not apply state arbitration statutes because they were not considered to be substantive law.[40] Hence, the forum's laws, for example, federal laws in district courts, governed.[41] This created a conundrum because federal courts did not consistently apply state arbitration laws.[42] This remained an

Commercial Arbitration: Hearing on S. 4213 and 4214 Before the Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. (1923) [hereinafter 1923 Hearings]; *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 7 (1924) [hereinafter 1924 Hearings]).

[34] Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012). The federal statute was first called the "United States Arbitration Act." 43 Stat. 883, ch. 213, § 14.

[35] MACNEIL, *supra* note 33, at 84–91.

[36] 1 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 4.1.2 (Supp. 1999).

[37] 9 U.S.C. § 2 (2006).

[38] Southland Corp. v. Keating, 465 U.S. 1, 34 (1984).

[39] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 288 (1995) (Thomas, J., dissenting) (citations omitted).

[40] *Id*.

[41] Swift v. Tyson, 41 U.S. 1, 1–2 (1842).

[42] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 288 (1995) (Thomas, J., dissenting) ("Their refusal was not the outgrowth of this Court's

issue until 1956 when SCOTUS ruled that rules regarding enforcing arbitration agreements are substantive law.[43]

In 1924, Alexander Rose of the Arbitration Society of America also provided Congressional testimony advocating for uniformity.[44] Rose stated that enacting the FAA would allow disputes to be heard on the merits by a subject matter expert and be "free from technicalities."[45] This was a major issue at the time.[46] Rose explained:

[T]he need of the hour is what? It is to simplify legal matters. They have become too burdensome in many respects. People are dissatisfied with the courts. I mean no disrespect to the courts, because what I may say has been very much more forcibly expressed by Chief Justice Taft, who expressed much more vigorously the same sentiment.[47]

During debate about enacting the FAA, there was vibrant discussion about an amount in controversy requirement to bring forth a claim.[48] Those who favored a controversy amount requirement suggested $3,000, which matched the applicable threshold in other federal suits.[49]

---

decision in *Swift v. Tyson*, 16 Pet. 1 (1842), which held that certain categories of state judicial decisions were not 'laws' for purposes of the Rules of Decisions Act and hence were not binding in federal courts; even under Swift, state statutes unambiguously constituted 'laws.' Rather, federal courts did not apply the state arbitration statutes because the statutes were not considered *substantive* laws.").

[43] *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 201 (holding that a stay in proceedings applies to arbitration agreements covered by Sections 1 and 2 of the Act.).

[44] MACNEIL, *supra* note 33, at 96.

[45] 1924 Hearings, *supra* note 33, at 27.

[46] S. REP. NO. 1174, 1–2 (1926); *see also* H. H. Nordlinger, *Law and Arbitration*, 30 COM. L. LEAGUE J. 621, 624 (1925) ("When justice can best be done by a judge who appeals to counsel not to insist too rigorously on the undisputed rules of evidence, it is certainly time to think of changing these rules."); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 UNIV. PA. L. REV. 909, 945 (1987) ("[L]awyers took advantage of procedural technicalities, that stood in the way of justice.").

[47] 1924 Hearings, *supra* note 33, at 13.

[48] *See generally id.*

[49] Szalai, *supra* note 13, at 120.

Julius H. Cohen articulated his concern about the amount in controversy requirement gaining momentum in Congress in a letter to Charles L. Bernheimer.[50] Cohen was concerned with the prospect of federal courts being flooded with FAA cases.[51] Cohen and Bernheimer strategized to argue that it would be too arduous to ascertain the appropriate threshold amount.[52] Nonetheless, they agreed that if politicians insisted on an amount, they would recommend $3,000 as the threshold.[53]

During testimony, Cohen articulated that the arbitration laws are part of a broader procedural reform movement meant to create uniformity.[54] As part of the broader procedural reform movement, a Senate report stressed the importance of uniformity:

First, to make uniform throughout the United States the forms of process, writs, pleadings, and motions and the practice and procedure in the district courts in actions at law. It is believed that if this were its only advantage that [sic] lawyers and litigants would find, in uniformity alone, a tremendous advance over the present system.

Second, these general rules, if wisely made, would be a long step toward simplicity, a most desirable step in view of the chaotic and complicated condition which now exists.

Third, it would tend toward the speedier and more intelligent disposition of the issues presented in law actions and toward a reduction in the expense of litigation.

Fourth, it would make it more certain that if a plaintiff has a cause of action he would not be turned out of court upon a technicality and without a trial upon the very merits of the case; and, likewise, if the defendant had a just

[50] *Id.*
[51] *Id.*
[52] *Id.* at 120–21.
[53] *Id.*
[54] 1923 Hearings, *supra* note 33, at 8.

defense he would not be denied by any artifice of [sic] the opportunity to present it.[55]

Judicial standards of review are a cornerstone of law. Judge Harry Pregerson proclaimed that ignoring standards of review is one of the seven sins of appellate brief writing.[56] In federal courts, it is an indispensable part of every appellate decision.[57] Standard of review is based on and defines how much deference will be granted to the lower court or tribunal's decision.[58] Moreover, there are varying levels within each of the standards of review.[59] The American Bar Association stated that "standards of review constitute the most important factor in a preliminary assessment of prospects for a reversal."[60]

If part of the intent of the FAA is to provide uniformity,[61] then it follows that the FAA's judicial review standards apply in state court and preempt application of different state law judicial review standards. If states are free to enact laws that set their own standards for judicial review of claims brought under the FAA, it would lead to chaos as uneven application of the law will undoubtedly ensue.[62] The application of such disparity in the law would

---

[55] S. REP. NO. 1174, at 1–2 (1926).
[56] Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 437 (1986).
[57] Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. L.J. 377 (1984), *reprinted in* DANIEL J. MEADOR, MAURICE ROSENBURG, & PAUL D. CARRINGTON, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 196 (1994).
[58] DANIEL SOLOMON, MARY CALKINS, & MATT HICKS, IDENTIFYING AND UNDERSTANDING STANDARDS OF REVIEW 1-2 (Julia Rugg ed., Writing Ctr. Geo. Univ. L. Ctr., 2019); *see* The Writing Center, *Identifying and Understanding Standards of Review,* GEO. U. L. CENTER, 1, 1–2 (2019), https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf.
[59] STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 4.01, at 4–5 (3d ed. 1999).
[60] BRENDON ISHIKAWA & DANA L. CURTIS, APPELLATE MEDIATION: A GUIDEBOOK FOR ATTORNEYS AND MEDIATORS (A.B.A. 2016).
[61] *See* 1923 Hearings, *supra* note 33, at 8.
[62] *See* WRIGHT & MILLER, *supra* note 14, at 16 n.22.

be impacted by state's views on arbitration. For instance, "states that are hostile to arbitration [may] undermine FAA-governed arbitration agreements by mandating more stringent judicial review of arbitration awards" than the FAA authorizes.[63]

III. Judicial Review of Arbitration Awards

In *Hall Street Associates, L.L.C. v. Mattel Inc.*, the U.S. Supreme Court decided whether a federal court can enforce a clause in an arbitration agreement that provides for more expansive review of an arbitration award than is otherwise provided in §§ 10 and 11 of the FAA.[64] This case resolved a split amongst the Federal Courts of Appeal.[65] Some courts interpreted the decision in *Wilko v. Swan*[66] as adding "manifest disregard of the law" as another ground for vacating an arbitrator's award.[67]

The arbitration agreement in *Hall Street Associates, L.L.C.* permitted the federal court to vacate, modify, or correct the arbitrator's 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

[63] Petition for a Writ of Certiorari at 2, R.J. Reynolds Tobacco Co. v. Maryland, 123 A.3d 660 (Ct. Spec. App. 2014) (No. 15-1537), 2016 WL 3476557, at *2.
[64] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 590–91 (2008).
[65] *Id.* at 583.
[66] Wilko v. Swan, 346 U.S. 427 (1953).
[67] Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 235 n. 11 (2008); *see also* James M. Gaitis, "*Unraveling the Mystery of* Wilko v. Swan: *American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 PEPP. DISP. RESOL. L.J. 1, 2–3 (2007) ("Interestingly, the errors in legal analysis respectively committed first by the Supreme Court and then by the federal courts not only differ in highly significant ways but also came about for entirely different reasons. The only material error in the Supreme Court's analysis was occasioned by a seemingly inadvertent mischaracterization of a single aspect of traditional American arbitration vacatur law, whereas the errors in the reasoning of subsequent federal appellate court decisions, and in the rationale for the "doctrine" of manifest disregard of the law as we know it, result from an unduly dogmatic analysis in which the normal investigative tools of historical inquiry and case law consideration were neglected in favor of the peremptory application of a nonexistent policy.").

erroneous."[68] Hall Street argued that if courts could add to the statutory reasons for vacating an award, parties could provide for additional reasons in an arbitration contract.[69]

SCOTUS rejected this argument and held that parties may not alter the scope of review provided for by the statute.[70] The Court proclaimed that the statutory grounds for vacatur and modification of an arbitrator's award, as set forth in §§ 10 and 11 of the FAA, are exclusive and may not be expanded by contract.[71] The Court cited three main textual bases for limiting judicial review of arbitration awards under the FAA.[72]

First, the court cited the *ejusdem generis* ("of the same kinds, class, or nature") canon of construction.[73] The Court misapplies the canon. Scalia & Garner elucidate when *ejusdem generis* applies:

The *ejusdem generis* canon applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs*, *cats*, *horses*, *cattle*, *and other animals*. Does the phrase and other animals refer to wild animals as well as domesticated ones? What about a horsefly? What about protozoa? Are we to read *other animals* here as meaning *other similar animals*? The principle of ejusdem generis says just that: It implies the addition of *similar* after the word *other*.[74]

---

[68] *Hall St. Assocs., L.L.C.,* 552 U.S. at 579.
[69] *Id.* at 585–86 ("Second, Hall Street says that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is 'motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered.' But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.") (citations omitted).
[70] *Id.* at 590.
[71] *Id.* at 590–92.
[72] *Id.* at 586–88.
[73] *Id.* at 586.
[74] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012).

The Court does not cite a catchall phrase.[75] Rather, it combines terms from two sections and tries to infer meaning, which is the *noscitur a sociis* canon of construction.[76] While the Court does come to the correct conclusion that fraud and a mistake of law are not of the same nature,[77] the analysis is off point.

Second, the Court explained that § 9 does not provide flexibility with regard to judicial confirmation.[78] Thus, when a party applies for a court order seeking affirmation of an arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in §§ 10 and 11" of the FAA.[79] The Court emphasized that the term "must grant" is unequivocal, and it is not open for expansion when parties have an agreement that is silent on the matter.[80]

[75] *Id.* (citing 9 U.S.C. §§ 9, 10)
[76] Max Birmingham, *Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act*, 13 FLA. A&M UNIV. L. REV. 1, 17 (2017) ("*Noscitur a sociis* is an associated-words canon that means that a word is defined by the words surrounding it.").
[77] *Hall St. Assocs., L.L.C.*, 552 U.S. at 586.
[78] *Id.* at 577, 587.
[79] *Id.* at 587 (quoting 9 U.S.C. § 9).
[80] *Id.* at 587, n.6.

Third, the Court pointed to § 5 of the FAA,[81] articulating that it epitomizes a default provision.[82] The Court contrasts "if no method be provided" from § 5 with "must grant . . . unless" in § 9.[83] This analogy is off base. With regard to § 5, the statute goes on to lay out next steps after "provided."[84] With regard to § 9, the Court states "[t]here is nothing malleable about 'must grant,'" but it leaves out the "unless" part.[85] Notwithstanding, while "[t]here is nothing malleable about 'must grant,'"[86] there is also nothing malleable about "*shall be* submitted to binding arbitration before a panel of three neutral arbitrators."

The relevant part of § 9 states "unless the award is vacated, modified, or corrected as prescribed in §§ 10 and 11 of this title."[87] Admittedly, the Court provided contradictory reasoning after rejecting Hall Street's contentions that §§ 10 and 11 are not the exclusive grounds for judicial review, and then conceded that it was "deciding nothing about other possible avenues for judicial

---

[81] 9 U.S.C. § 5:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Id.
[82] *Hall St. Assocs., L.L.C.*, 552 U.S. at 587–88.
[83] *Id.* at 588.
[84] 9 U.S.C. § 5.
[85] *Hall St. Assocs., L.L.C.*, 552 U.S. at 587.
[86] *Id.*
[87] 9 U.S.C. § 9.

enforcement of arbitration awards."[88] In a terse dissent, Justice Breyer pointed to the same reasoning as the majority and trumpeted that the FAA does not "preclude" parties from contracting alternative grounds for judicial review of an arbitration award.[89]

In *Hall Street Associates*, *L.L.C.*, SCOTUS did not decide whether the FAA preempts state laws that permit state courts to subject arbitration awards to different standards of judicial review.[90] As the Court has squarely held, the FAA establishes "*a national policy favoring arbitration* with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.[91] The FAA's policy of limited review is an indispensable aspect of the FAA's "policy . . . to ensure the enforceability [of] . . . agreements to arbitrate."[92] Therefore, when the FAA governs an arbitration, the FAA's judicial review standards apply in state court and preempt application of different state law judicial review standards.

---

[88] *Hall St. Assocs., L.L.C.*, 552 U.S. at 590 ("In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. *The FAA is not the only way into court for parties wanting review of arbitration awards*: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.") (emphasis added).

[89] *Id.* at 596 (Breyer, J., dissenting) ("Like the majority and Justice STEVENS, and primarily for the reasons they set forth, I believe that the Act does not preclude enforcement of such an agreement.").

[90] *Id.* at 590 (majority opinion) ("In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well.").

[91] *Id.* at 588 (emphasis added); *see also* Oxford Health Plans, LLC v. Sutter, 569 U.S. 564, 568 (2013).

[92] Volt Info. Scis., Inc. v. Bd. Trs. Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989).

IV. Preemption

A. First Generation

When SCOTUS was first confronted with FAA preemption cases, the issues centered on state laws that invalidated agreements to arbitrate. In *Southland Corp. v. Keating,*[93] SCOTUS held that state courts are bound by the FAA, which preempts conflicting state law.[94] *Southland Corp.* involved a dispute over an arbitration clause in a franchise agreement.[95] This case was delivered to the Court via 28 U.S.C. § 1257, which provides for review of state court decisions that implicate the validity of federal statutes.[96] The Court held that § 2 of the FAA "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[97]

Chief Justice Burger's majority opinion relied extensively on the FAA's legislative history.[98] This is peculiar because there is scarce legislative history regarding the FAA given that it was heavily developed outside of the U.S. Congress, namely by the American Bar Association and the New York Chamber of Commerce.[99] While the Chief Justice acknowledged that the legislative history was "not without ambiguities," he nevertheless arrived at the conclusion that it provided "strong indications" that the FAA applied in state court.[100]

---

[93] Southland Corp. v. Keating, 465 U.S. 1 (1984).
[94] *Id.* at 15–16.
[95] *Id.* at 1.
[96] *Id.* at 6.
[97] *Id.* at 10 (emphasis added).
[98] *Id.* at 25.
[99] *See generally* IMRE S. SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (Carolina Academic Press, 2013); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (New York: Oxford University Press, 1st ed. 1992).
[100] *Southland Corp.*, 465 U.S. at 12.

In a dissenting opinion, Justice O'Connor opined that the majority decision was an "exercise in judicial revisionism" that disregarded the "unambiguous" legislative history of the FAA as a procedural statute applicable only in federal court.[101] Justice O'Connor stated that:

The foregoing cannot be dismissed as "ambiguities" in the legislative history. It is accurate to say that the entire history contains only one ambiguity, and that appears in the single sentence of the House Report cited by the Court . . . . That ambiguity, however, is definitively resolved elsewhere in the same House Report . . . and throughout the rest of the legislative history.[102]

It is beguiling that both the majority and the dissent in *Southland Corp.* based their opinions on legislative history.[103] It is well-established that when statutory interpretation begins with "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole,"[104] even textualists can reach different conclusions when interpreting the same text.[105]

Regardless of what the opinion is of the decision in *Southland Corp.*, it is still good law. Following the decision, several courts tried to evade the ruling in *Southland Corp.* by reading the term "involving commerce" in § 2 of the FAA as requiring the parties to a contract with an arbitration clause to have agreed to an interstate arrangement.[106] In *Allied-Bruce Terminix Companies v. Dobson*, the Court

[101] *Id.* at 36 (O'Connor, J., dissenting).
[102] *Id.* at 29 (O'Connor, J., dissenting).
[103] *Southland Corp.*, 465 U.S. at 12.
[104] Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).
[105] JCB, Inc. v. Horsburgh & Scott Co., 912 F.3d 238, 242 (5th Cir. 2018) (Ho, J., concurring) ("Judge Duncan and I emphatically agree that the proper function of the judiciary is to construe statutory texts faithfully . . . . We nevertheless reach different conclusions as to the particular text before us, as textualists sometimes do.").
[106] Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 269–70 (1995) (collecting cases).

rejected this argument and explicitly stated that *Southland Corp.* is the correct interpretation of § 2.[107]

SCOTUS would go on to reinforce an extremely broad interpretation of § 2, specifically the term "involving commerce". In *Selma Medical Center, Inc. v. Fontenot*, the Court reversed the Supreme Court of Alabama and held that an arbitration agreement between an Alabama lender and an Alabama construction company did involve interstate commerce.[108]

B. Second Generation

The second generation of FAA preemption cases that came before the Supreme Court are those involving state laws that regulate the arbitration itself.[109] Perhaps the most notable second-generation case is *AT & T Mobility LLC v. Concepcion*.[110] This case was about a consumer agreement that mandated arbitration but prohibited class action claims. While Concepcion acknowledges that they signed the agreement, they pointed to the *Discover Bank* Rule.[111] The *Discover Bank* Rule, created by the Supreme Court of California, refuses to enforce class action waivers on unconscionability grounds when (1) the waiver is in a "take it or leave it" consumer contract; (2) the waiver involves a dispute with a predictably small amount of damages; and (3) it is alleged that the party with superior bargaining power engaged in a scheme to deliberately cheat consumers.[112]

Again, invoking the broad powers of § 2 of the FAA, SCOTUS held that it preempted the *Discover Bank* Rule.[113] Speaking through Justice Scalia, the Court cited obstacle

[107] *Id.* at 265.
[108] Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 53–54, 58 (2003) (per curium).
[109] *See generally* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004).
[110] *See generally* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
[111] *Concepcion*, 563 U.S. at 333–35.
[112] Discover Bank v. Superior Court, 113 P.3d 1100, 160–63 (Cal. 2005).
[113] *See generally* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

preemption[114] as the reason why the *McGill* Rule should be preempted because class actions obstruct the purpose of the FAA.[115] Second, the opinion reasoned that the "principal advantage" of arbitration is a robust process and informal procedure.[116] If class actions are now introduced in arbitration, this advantage would be lost. Another reason cited is that because arbitration awards are hard to appeal, "[a]rbitration . . . [is] poorly suited to the higher stakes of class litigation."[117] Third, SCOTUS elaborated that the FAA permits parties to agree to class-wide arbitration and that the FAA "requires courts to honor parties' expectations."[118] However, when the parties have not contracted for class-wide arbitration, state law may not require it.[119]

In *Green Tree Financial Corp. v. Bazzle*, SCOTUS was confronted with the issue as to whether a South Carolina court rule permitting arbitration on a class-wide, rather than individual, basis is preempted by the FAA.[120] The majority ended up avoiding the issue of preemption.[121] The Court ended up vacating the lower court's decision that allowed the arbitrator to consider whether the contract precluded class-

[114] Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (Under obstacle preemption, a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").
[115] *Concepcion*, 563 U.S. at 344 ("[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."); *see also* Edward P. Boyle & David N. Cinotti, *Beyond Nondiscrimination: AT&T Mobility LLC v. Concepcion and the Further Federalization of U.S. Arbitration Law*, 12 PEPP. DISP. RESOL. L.J. 373, 374 (2012) ("Of equal importance, *Concepcion* also expands the implicit purposes of the FAA—by preempting the application of general state contract defenses when those defenses conflict with fundamental attributes of arbitration as envisioned in the FAA.").
[116] *Id.* at 348.
[117] *Id.* at 350.
[118] *Id.* at 351.
[119] *Id.*
[120] *See generally* Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003).
[121] *Id.*

wide arbitration.[122] Three Justices dissented, stating that the South Carolina rule is preempted because it is in conflict with the FAA.[123] In *American Express Co. v. Italian Colors Restaurant*, SCOTUS vacated a state court decision applying a novel theory to an arbitration agreement.[124] In this case, the parties entered into an agreement prohibiting class-wide arbitration.[125] Italian Colors opposed a motion to compel arbitration because of the "effective vindication theory" because the cost of litigating the claim would exceed individual recovery.[126] SCOTUS rejected this argument, cited *Concepcion*, and highlighted the informal procedure of arbitration.[127] Again, SCOTUS reinforced the enormous reach of § 2.

C. Next Generation

At this time, it remains to be seen what the next generation of arbitration cases decided by SCOTUS will center on. There is a good chance that at some point, SCOTUS will be faced with determining whether the FAA's judicial review standards apply in state court and preempt application of different state law judicial review standards when the FAA governs an arbitration. Based upon precedent from the first generation and second-generation cases, and the broad preemption powers given to § 2 of the FAA, it is likely that SCOTUS will rule that states are not free to determine their own judicial-review standards when handling FAA cases.

V. Current State of the Law

[122] *Id.* at 454.
[123] *Green Tree Financial Corp.*, 539 U.S. at 455–60 (Rehnquist, C.J., dissenting).
[124] American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 231–39 (2013).
[125] *Id.* at 231.
[126] *Id.* at 235.
[127] *Id.* at 238 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)).

A. State Courts That Have Held That the FAA Does Govern the Judicial Review Standard in State Court

1. Georgia

In *Hilton Constr. Co. v. Martin Mech. Contractors, Inc.*, the Supreme Court of Georgia stated that one of the questions presented is "whether the Superior Court of Clarke County had jurisdiction to vacate an arbitration award made under the Federal Arbitration Act, 9 USCA § 1, et seq.; if so, *whether state or federal law should govern the vacation of the award*; and whether the failure of the arbitrator to add a party to the arbitration was a ground for vacating the award."[128]

A dispute arose between the parties over the scope of work included in a contract for heating, ventilating and air conditioning services.[129] Hilton initially entered into a contract with Hospital Authority of Clarke County for renovations and additions to Athens General Hospital.[130] Subsequently, Hilton subcontracted out to various vendors, including Martin Mechanical Contracts, Inc. ("Martin").[131] The dispute centered over who was responsible for steam connection work.[132] Martin ended up doing the work, albeit under protest, and filed for arbitration for compensation pursuant to the contract.[133] It is not stated whether the contract had specified which arbitration rules applied.[134] Rather, the court noted that Martin obtained an arbitration award pursuant to the FAA.[135] The Supreme Court of

[128] Hilton Constr. Co. v. Martin Mech. Contractors, Inc., 308 S.E.2d 830, 831 (Ga. 1983) (emphasis added).
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*

Georgia upheld the lower court's decision that the FAA was applicable because state law must yield to federal law.[136]

The court narrowed the judicial review to apply federal law in state court, and explicitly cited § 10 of the FAA.[137] It is not definitive whether the court would have held the same if § 11 of the FAA or an interpretation of the *Wilko v. Swan* decision of "manifest disregard of the law" were cited as the grounds for appealing the arbitration award.

2. Idaho

In *Hecla Mining. Co. v. Bunker Hill Co.*, the parties entered into a contractual agreement which stipulated that if a dispute should arise, it shall be arbitrated under the rules of the American Arbitration Association.[138]

While the court acknowledged that parties can relinquish their rights to bring forth their claims in court, it is arguable in this instance whether it was correct to use the FAA instead of the AAA since the contract specified that "any disagreement . . . shall be submitted to and determined and settled by arbitration conducted by and under the rules of the American Arbitration Association."[139] In *Hall Street Associates, L.L.C.*, SCOTUS left unresolved the question of whether an agreement expressly providing for the application of state law to the enforcement of the arbitration agreement could override or displace the FAA.[140] Rather, in *Hall Street Associates*, SCOTUS called it "arguable" that

[136] *Id.* at 832 ("The transaction out of which the arbitration arose involved commerce within the meaning of 9 USCA § 1. 'Where such a transaction involves commerce, within the meaning of the Federal Arbitration Statute, the state law and policy with respect thereto must yield to the paramount federal law.'") (citations omitted).
[137] *Id.* ("Since the Federal Arbitration Act created a body of substantive federal law, if a state court has jurisdiction to vacate an award, federal law rather than state law governs the vacation of the award.").
[138] Hecla Min. Co. v. Bunker Hill Co., 617 P.2d 861, 863 (Idaho 1980).
[139] *Id.* at 863–65.
[140] *See generally* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

parties could rely on state law as a basis to expand judicial review.[141]

In *Bunker Hill Co.*, the court decided that interstate commerce was involved in the transaction, and thus the FAA was the controlling authority.[142] The court emphasized that even if it personally did not agree with the arbitrator's decision or if it was sympathetic to the position of a party, it was nevertheless bound by exceptionally narrow grounds for review.[143] The Supreme Court of Idaho articulated an even more narrow interpretation of judicial review standards under the FAA than other courts by stating that they are essentially foreclosed from reviewing the merits.[144] The court decided that when the FAA governs an arbitration in state court, the FAA's judicial review standards are applicable.[145]

3. Nebraska (Dowd v. First Omaha Secs. Corp., 495 N.W.2d 36, 41–42 (Neb. 1993))

In *Dowd v. First Omaha Sec. Corp.*, the Supreme Court of Nebraska held that a contract between the parties directly involved interstate commerce which allowed the FAA to apply.[146] Plaintiffs Thomas F. Dowd and Barbara A. Dowd brought suit against their stockbroker, First Omaha

---

[141] *Id*. at 590.
[142] *Bunker Hill Co.*, 617 P.2d at 865 ("At the outset, we note that federal law concerning the review of arbitrator's awards applies since the underlying factual situation here clearly concerns interstate commerce. 9 U.S.C. § 1. Therefore, we utilize the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and the cases thereunder instead of Idaho's enactment of the Uniform Arbitration Act, I.C. § 7-901 et seq.") (citations omitted).
[143] *Id.* at 863–68.
[144] *Id.* at 866–67 ("This expression by the Supreme Court has been seen as essentially foreclosing judicial review of the merits of arbitration awards. As later stated in *Hines v. Anchor Motor Freight, Inc.*, . . . '[Courts] should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes. Otherwise, 'plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final.'") (citations omitted).
[145] *Id.* at 865.
[146] Dowd v. First Omaha Sec. Corp., 495 N.W.2d 36, 39 (Neb. 1993).

Securities, over liquidation of their margin accounts.[147] The contract cited by the court specifically held that Nebraska law would govern.[148] The court provided no analysis of the interstate commerce holding. Rather, it is only mentioned once: "As such, as required by §§ 1 and 2 of the FAA, it directly involved interstate commerce."[149] The contract did require that "any disputes arising from the agreement would be submitted to arbitration."[150] While the dispute could have been sent to arbitration, Nebraska could have governed the dispute.[151] But the Supreme Court of Nebraska rejected this. Here, the court read "arbitration" and automatically held that the FAA applied. Moreover, the court's broad reading could be interpreted to preempt all state arbitration law, as it cites the Supremacy Clause.[152] Notwithstanding the court's analysis as to how it got to the FAA, it still held that when the FAA governs an arbitration, all of its rules, including the judicial review standards, apply.

4. New York

In *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, the New York Court of Appeals gave a rather short opinion in which it blazoned "[a]s this matter affects interstate commerce, the vacatur of the arbitration award is governed

[147] *Id.* at 37.
[148] *Id.*
[149] *Id.* at 39.
[150] *Id.* at 37.
[151] *Id.* at 40 (quoting MAPCO Ammonia Pipeline v. State Bd. of Equal., 238 Neb. 565 (1991)).
[152] *Id.* at 38 ("In this case, the district court had no alternative but to grant a stay pending arbitration. The FOS-Dowd contract is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 through 15 (1988) (FAA). The Supremacy Clause of the U.S. Constitution dictates that state law, including constitutional law, is superseded to the extent it conflicts with federal law. U.S. Const. art. VI, cl. 2; *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). Therefore, this court's holdings that a predispute agreement to compel arbitration is void are preempted to the extent they conflicted with the FAA.").

by the Federal Arbitration Act."[153] Nevertheless, the court's syllogism is fatally flawed. The New York Court of Appeals, a state court, freely admits that it is following the Second Circuit's interpretation of "evident partiality" under § 9, which notes is in direct contradiction with that of a SCOTUS opinion.[154] The court explained that "the Second Circuit declined to follow the opinion of *Commonwealth*, concluding that it did not have binding effect."[155] Here, the Second Circuit is violating stare decisis.[156] More specifically, under *vertical* stare decisis, the Second Circuit is bound by SCOTUS decisions.[157]

The court did not state whether the agreement at issue explicitly stated whether the FAA or state arbitration rules applied.[158] Rather, the court deferred to interstate

---

[153] U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc., 958 N.E.2d 891, 892 (N.Y. 2011).

[154] *Id.* at 892–93; *see* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S. Ct. 337, 21 L.Ed.2d 301 (1968); Morelite Constr. Corp (Div. of Morelite Elec. Serv., Inc.) v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984).

[155] *U.S. Elecs., Inc.*, 958 N.E.2d at 893.

[156] *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "stare decisis" as "the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation"); *Id.* at 1366 (defining "precedent" as "a decided case that furnishes a basis for determining later cases involving similar facts or issues"). This report does not examine the Supreme Court's reliance on state court or foreign tribunal precedents. Nor does it examine how the Court determines whether a particular sentence in an opinion is a binding holding necessary to the decision for purposes of stare decisis or, rather, non-binding obiter dictum. *See generally* BLACK'S LAW DICTIONARY 1177 (9th ed. 2009) (defining "obiter dictum" as a "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).").

[157] *Id.* at 1537 (defining "vertical stare decisis" as "the doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction").

[158] *U.S. Elecs., Inc.*, 958 N.E.2d at 892 ("Petitioner U.S. Electronics, Inc. (USE) seeks to vacate a unanimous arbitration award in favor of Sirius Satellite Radio, Inc. (Sirius) arising out of a breach of contract dispute. USE, which had a nonexclusive agreement with Sirius to distribute radio receivers . . .").

commerce to invoke the FAA.[159] Whether the court misinterpreted "evident partiality" under § 9 of the FAA, and whether the FAA is even applicable in this case are valid inquiries. But they are beyond the scope of this Article. The court did come to the proper conclusion that if the FAA does govern an arbitration in state court, the FAA's judicial review standards apply in state court and preempt application of different state law judicial review standards.[160]

5. South Dakota

In *Vold v. Broin & Assocs., Inc.*, the Supreme Court of South Dakota cited the Commerce Clause as a reason for holding that the FAA controlled the arbitration over the dispute.[161] Elaborating further, the dispute arose between residents of South Dakota and Minnesota, which falls within the purview of interstate commerce and allows federal law to control.[162] The contract between the parties did not call for the FAA to apply, but rather the contract stipulated any dispute should be decided in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA").[163] The AAA specifies that "[t]he parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by AAA without specifying particular rules."[164] The FAA grants contracting parties the

[159] *Id.* at 892.
[160] *Id*. at 892.
[161] Vold v. Broin & Assocs., Inc., 699 N.W.2d 482, 487 (S.D. 2005).
[162] *Id.* at 487.
[163] Id. at 484.
[164] *Id.* at 486 ("In addressing Vold's arguments, we first turn to the Construction Industry Arbitration Rules provided by the AAA. Rule R-1(a) states: The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the [AAA] under its Construction Industry Arbitration Rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. *The parties, by written agreement, may vary the procedures set forth in the rules. After the appointment of the arbitrator, such modifications may be*

freedom "to authorize arbitrators to resolve such questions."[165] Moreover, SCOTUS declared that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure enforceability, according to the terms, or private agreements to arbitrate" and that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[166] Notwithstanding, this did not factor into the court's analysis.[167]

The Supreme Court of South Dakota characterized the lower court's ruling as "spurious" and held that the parties agreed to a "reasoned award."[168] The court disregarded the agreement between the parties and looked at the FAA even though it was not expressly invoked in the contract.[169] The court then looked to the FAA, citing the Commerce Clause, and held that it was limited in judicial review to the grounds specified in § 10.[170]

B. State Courts That Have Held That the FAA Does Not Govern the Judicial Review Standard in State Court.

1. Kentucky

In *Atlantic Painting & Constructing Inc. v. Nashville Bridge Co.*, the court openly defied the plain meaning of the FAA by ruling that "[a]n arbitrator's decision

made only with the consent of the arbitrator. In accord with R-21(b), "the parties and the arbitrator," during the preliminary hearing, "should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.").

[165] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417 (2019).

[166] Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 476–78 (1989); *see also* Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) (opting to uphold applying the arbitration law of the state to a contractual provision normally not covered by the FAA).

[167] *Volt*, 489 U.S. at 477–78.

[168] *Volt*, 699 N.W.2d at 486–88.

[169] *Id.*

[170] *Id.*

on a matter not submitted to him for his decision is void and not binding on the courts or anybody else."[171] The court maintained that because the contract stipulates that Tennessee law governs, then Tennessee judicial review standards apply.[172] However, the court carved out judicial review standards only, and left the possibility for the rest of the FAA to be applicable open.[173]

On July 1, 1969, Nashville Bridge Company entered into a contract with the Commonwealth of Kentucky.[174] On September 10, 1969, Nashville Bridge subcontracted with Atlantic Painting & Contracting Inc. and Buckeye Painting & Sheeting Co., Inc., a Joint Venture, for part of the work.[175] There was a delay in the completion date, and Atlantic/Buckeye calculated damages arising from this delay.[176] Atlantic/Buckeye's attorney notified Nashville Bridge that it intended to submit its claim to arbitration.[177] Nashville Bridge maintained that Atlantic/Buckeye's claims are outside the scope of arbitration outlined in their contract.[178]

An interesting aspect of this case is that the court held that interstate commerce does not preempt state law, but rather gives the state concurrent jurisdiction.[179] It is not clear where the court came to this, because it flies in the face of the Interstate Commerce Clause.[180] In *Gibbons v. Ogden*,

---

[171] Atlantic Painting & Constructing Inc. v. Nashville Bridge Co., 670 S.W.2d 841, 845 (Ky. 1984).
[172] *Id.*
[173] *Id.* at 842–43.
[174] *Id.* at 842.
[175] *Id.*
[176] *Id.*
[177] *Id.* at 842–43.
[178] *Id.* at 843.
[179] *Id.* at 846–47 ("The procedural aspects are confined to federal cases. Nashville Bridge conceded that nothing in the Act divests state courts of concurrent jurisdiction in cases involving contracts in interstate commerce.").
[180] U.S. CONST. art. I, § 8, cl. 3 (The Congress shall have the power "To regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes.").

Chief Justice John Marshall held that Congress may control all local activities that significantly affect interstate commerce.[181] This reasoning has been reinforced by the Court.[182]

The court then noted that the FAA has both a procedural and substantive law for federal courts but remained silent as to state courts.[183] This is because the court is giving itself the judicial running room it needs to implement its own policy on the law. The Supreme Court of Kentucky completed a statutory somersault when it held that vacatur under the FAA only applies to motions in federal court.[184] The court reasoned that the FAA only preempts substantive law, and that judicial review standards are procedural.[185] There is a dearth of analysis in the opinion because the court is simply trying to hide its judicial activism. The court seems to be making some sort of *Erie* doctrine[186]

[181] Gibbons v. Ogden, 22 U.S. 1 (1824).
[182] United States v. Darby, 312 U.S. 100, 116–17 (1941) ("[The Commerce Clause] extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it.").
[183] *Atlantic Painting and Construction Inc.*, 670 S.W.2d at 846 ("The federal Arbitration Act covers both substantive law and a procedure for federal courts to follow where a party to arbitration seeks to enforce or vacate an arbitration award in federal court.").
[184] *Id.* at 846–47 ("But there is nothing in the federal Arbitration Act preempting state jurisdiction of the contract action filed by Atlantic/Buckeye and *nothing in the Act remotely suggesting that the "motion to vacate" procedure, including the three months' time limitation set up for federal proceedings, has any application at all to such state action.* The federal Arbitration Act covers both substantive law and a procedure for federal courts to follow *where a party to arbitration seeks to enforce or vacate an arbitration award in federal court. The procedural aspects are confined to federal cases.* Nashville Bridge conceded that nothing in the Act divests state courts of concurrent jurisdiction in cases involving contracts in interstate commerce.") (emphasis added).
[185] *Id.* at 846–47 ("There is a legion of cases before Southland Corp. all holding that the substantive policy expressed in the provisions of the federal Arbitration Act are preemptive.").
[186] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.").

argument, but purposefully does not mention it by name in order to avoid unwanted attention to their baffling logic. First, the *Erie* doctrine applies to federal courts—not state courts. Second, there is no "'motion to vacate' procedure" under the FAA, despite what the court says.[187] A party or parties may challenge an arbitration award under the FAA, and the court may vacate the award under the grounds enumerated in the statute.[188] The Supreme Court of Kentucky is simply trying to impose their own views of what the law should be, rather than what the law is.

2. South Carolina

In *Henderson v. Summerville Ford-Mercury*, the Supreme Court of South Carolina makes some bold statements about judicial review standards concerning arbitration awards.[189] The basis of the court's analysis is muddled, as it alleges that there is no difference between the judicial review standards in state arbitration law and the FAA.[190] The court then goes on to explain that "[t]he FAA's substantive provisions apply to arbitration in federal or state courts, but a state's procedural rules apply in state court unless they conflict with or undermine the purpose of the FAA."[191] However, the court surreptitiously noted that Summerville Ford-Mercury ("Dealer") did not specify whether the FAA or state arbitration law applied, and that the lower court impliedly rejected the FAA because of state arbitration law.[192]

---

[187] *Atlantic Painting and Construction Inc.*, 670 S.W.2d at 846.
[188] 9 U.S.C. § 10.
[189] Henderson v. Summerville Ford-Mercury, Inc., 405 S.C. 440 (2013).
[190] *Id.* at 447 ("For reasons discussed below, we conclude that it does not matter which act is applied as the result would be the same.").
[191] *Id.* at 450.
[192] *Id.* at 447–48 ("Initially, we note Dealer generally asserted at the hearing that the FAA applied rather than the UAA, but it did not specifically discuss the confirmation statutes of either act. Assuming the circuit court impliedly rejected the application of the FAA based on its utilization of the UAA, we question the sufficiency of Dealer's briefed argument, as it does not address the confirmation procedure under the FAA, 9 U.S.C.A. § 9, or how it has been prejudiced by the

The court makes an illogical inference that because §§ 3 and 4 of the FAA apply only in federal court, the FAA does not preempt state procedural arbitration law.[193] Section 4 of the FAA explicitly states it applies in federal court, and § 3 references ". . . any of the courts of the United States. . . ."[194] First, it is not definitive that judicial review standards are procedural.[195] Second, the court is engaging in a preemption discussion with no analysis.[196] The title of § 4 states, in part: "[P]etition to United States court having jurisdiction for order to compel arbitration . . . ."[197] Thus, there is no preemption as the statute is providing rules for how to bring arbitration claims in federal court.[198] Furthermore, following the court's non-preemption claims, it only looks at express preemption.[199] The court conveniently forgets implied preemption.[200]

The court blatantly admits their defiance of the FAA noting that the parties agreed to apply it to the arbitration, but that the statute does not apply after an award is made.[201] This is subject to *reductio ad absurdum*. If §§ 9 and 10 do

application of the UAA instead of the FAA.") (citing Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869 (2011) (holding an appellant must show both an erroneous ruling and prejudice to warrant reversal)).

[193] *See Henderson*, 405 S.C. at 448 (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 477 (1989)); *see generally* 9 U.S.C. §§ 3, 4.

[194] 9 U.S.C. § 3.

[195] *Henderson*, 405 S.C. at 450.

[196] *Id*.

[197] 9 U.S.C. § 4.

[198] *Id*.

[199] *Henderson*, 405 S.C. at 447–50.

[200] *See generally* Max Birmingham, *Up in the Air: Analyzing Whether the Clean Air Act Preempts State Law Common Claims*, 14 LIBERTY U. L. REV. 55, 58 (discussing express preemption and implied preemption); *Henderson*, 405 S.C. at 447–50.

[201] *Henderson*, 405 S.C. at 450 ("In the current appeal, although the arbitration agreement stated the FAA would apply to the arbitration, it did not expressly state the FAA would apply to the subsequent procedure for confirmation once a final award was made.").

not apply, then they are rendered meaningless.[202] A court cannot review an arbitration award before an arbitrator makes it.[203] The Supreme Court of South Carolina does not refer to any agreements by the parties that they would only apply the FAA to the arbitration, but not the review of the award.[204] Rather, this rationale was made to justify the holding.

C. State Courts That Have Issued Decisions That Contain Broad Language Suggesting That the FAA Does Not Govern the Judicial-Review Standard in State Court

1. Alabama

a) Birmingham News Co. v. Horn

In *Birmingham News Co. v. Horn*, the Supreme Court of Alabama noted that "[A] number of other state appellate courts . . . recogniz[e] the applicability of the [FAA] § 10 standards in appeals in state courts from arbitration awards" where the arbitration itself was governed by the FAA.[205] In *Birmingham*, challenges were brought to arbitration agreements between Birmingham News Co. and six plaintiffs over claims of wrongful and illegal termination of "dealer agreements."[206] The plaintiffs initially sought review by the Supreme Court of Alabama but were denied relief because it was determined that the transactions met the

[202] 9 U.S.C. §§ 9, 10.
[203] *See* 9 U.S.C. §§ 9, 10, 11.
[204] *Henderson*, 405 S.C. at 450.
[205] Birmingham News Co. v. Horn, 901 So. 2d 27, 46 (Ala. 2004); *e.g.,* Hecla Mining Co. v. Bunker Hill Co., 617 P.2d 861 (Idaho 1980) (quotations omitted); Edward D. Jones & Co. v. Schwartz, 969 S.W.2d 788 (Mo. Ct. App.1998); Dowd v. First Omaha Sec. Corp., 495 N.W.2d 36 (Neb. 1993); Allen & Co. v. Shearson Loeb Rhoades, Inc., 489 N.Y.S.2d 500 (N.Y. App. Div. 1985), *aff'd*, 490 N.E.2d 850 (N.Y. 1986).").
[206] *See Horn*, 901 So. 2d at 30, 36–39 ("The plaintiffs are individuals who at one time had 'dealer agreements' (hereinafter the 'agreement') with the News to sell and distribute its newspapers to the public.").

threshold of interstate commerce.[207] The court ultimately held that the state law judicial review standards under state law are replicated in § 9 of the FAA.[208]

It is noteworthy that the *Birmingham* court avoids confronting the preemption issue.[209] Observing that the FAA preempts substantive state law or policy,[210] it is implied that the door is slightly ajar to arguments if there is a procedural question about which judicial review standards govern.[211]

b) Raymond James Fin. Servs., Inc. v. Honea, 55 So. 3d 1161, 1166–69 (Ala. 2010)

In *Raymond James Financial Services, Inc. v. Honea*, the Supreme Court of Alabama "retreated from [its] position" in *Birmingham* and held that § 10 of the FAA is a procedural rule, not a substantive rule.[212] The court cites the decision in *Hall Street Associates, L.L.C.*, but it is not clear

[207] *Id.* at 30 ("This Court denied relief because the agreements affected interstate commerce sufficiently to invoke the provisions of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ('FAA'), to preempt state law barring the enforcement of predispute arbitration agreements.") (citing *ex parte* Stewart, 786 So.2d 464 (Ala.2000); Birmingham News v. Horn, 790 So.2d 939 (Ala. 2000)).
[208] *See Horn*, 901 So. 2d at 46–47 ("This Court has adopted 9 U.S.C. § 10 as applicable to an appeal of an arbitration award in this state, and we see no need to retreat from that position. (It is to be noted that the three grounds listed in § 6-6-14 for vacating an arbitration award—fraud, partiality, or corruption in making the award—are replicated in 9 U.S.C. § 10(a)(1) and (2).)").
[209] *See generally Horn*, 901 So. 2d 27.
[210] *Id.* at 44 ("In cases governed by the FAA, the federal substantive law of arbitration governs, despite contrary state law or policy.") (quoting Maxus, Inc. v. Sciacca, 598 So.2d 1376, 1379 (Ala.1992) (citations and quotations omitted)).
[211] *Horn*, 901 So. 2d at 46 ("Arguably, a similar approach is implicit in *Fuller Construction*, *Maxus*, and *Mason* . . . but we need not stumble over the distinction between substantive law and procedural law in this particular context.") (citing H.L. Fuller Constr. Co. v. Indus. Dev. Bd of Town of Vincent, 590 So.2d 218 (Ala.1991); Maxus, Inc. v. Sciacca, 598 So.2d 1376, 1379 (Ala. 1992); Mason & Dixon Lines, Inc. v. Byrd, 601 So.2d 68 (Ala.1992)).
[212] *See supra* notes 5 and 6 and accompanying text. *Contra Horn*, 901 So. 2d at 46.

how they came to this determination.[213] Citing *Hall Street Associates, L.L.C.*, the *Honea* court has a footnote that cites to an interpretation of the case by the Supreme Court of California.[214] As noted *infra*, California does what it wants when it comes to arbitration.[215] And after SCOTUS overturned the Supreme Court of California in *Concepcion*, it is not necessary to follow their decision with regard to the FAA.[216] Moreover, the *Honea* court then speaks out of both sides of their mouth with regard to their reliance on *Hall Street Associates, L.L.C.*[217] In the next footnote of the opinion, the court furtively admits that SCOTUS did not agree that an arbitration agreement automatically trumps § 10 of the FAA.[218] It is also not clear why the Supreme Court

[213] *See* Raymond James Fin. Servs., Inc. v. Honea, 55 So. 3d 1161, 1164–66 (Ala. 2010) (citing Hall St. Assocs., L.L.C. v. Mattel, Inc. 552 U.S. 576, 579–88 (2008)).
[214] *Honea*, 55 So. 3d at 1171 n.4 ("In Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 597–99, (2008), the Supreme Court of California likewise concluded that § 10 was a procedural provision and that it accordingly did not preempt California law governing the review of arbitration awards. That court further held that parties in California may alter the usual scope of review applied to arbitration awards by contract pursuant to California statutory and common law, notwithstanding *Hall Street*., 190 P.3d at 589 ('The California rule is that the parties may obtain judicial review of the merits by express agreement. There is a statutory as well as a contractual basis for this rule; one of the grounds for review of an arbitration award is that "[t]he arbitrators exceeded their powers." ([Cal.Code Civ. Proc.,] §§ 1286.2, subd. (a)(4), 1286.6, subd. (b).') Here, the parties agreed that '[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.'").
[215] *See infra* Section V.C.2.
[216] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333 (2011); *see e.g.*, Max Birmingham, *California Dreamin': Exploring the Golden State's McGill Rule*, 4 WAYNE ST. U.J. BUS. L. 42 (discussing how the Supreme Court of California has distorted its interpretation of the law to circumvent the Supreme Court of the United States decision in *AT & T Mobility LLC v. Concepcion*.).
[217] *See Honea*, 55 So. 3d at 1171 n.5; *see generally Hall Street Assocs., L.L.C.*, 552 U.S. 576.
[218] *Honea*, 55 So. 3d at 1171 n.5 ("Although, in *Hall Street* the Supreme Court of the United States did not agree with the appellant that the general policy requiring that arbitration agreements be enforced as they are written should trump the plain language of the FAA indicating that the grounds enumerated in

of Alabama even decided to discuss this subject in *dicta* since it was not at issue before the court.[219] While this language seems to indicate a willingness to break from the precedent set forth in *Birmingham*, the wishy-washy nature of why they should may be inclination that they may not overturn if they hear persuasive arguments.

2. California

Yet again, California has conjured up its own rules regarding arbitration.[220] In *Cable Connection, Inc. v. DirecTV, Inc.*, the Supreme Court of California held that § 10 of the FAA is a procedural rule and that it does not preempt California state law governing arbitrations.[221] In a bewildering statement, the court asserts that "we do not believe the *Hall Street Associates, L.L.C.* majority intended to declare a policy with preemptive effect in all cases involving interstate commerce."[222] In a footnote, the court doubles down and maintains that "such an effect would be sweeping indeed in the commercial setting."[223] Notwithstanding, the court completely contradicts itself when it freely admits that "[t]he FAA governs agreements in contracts involving interstate commerce, like those in this case."[224] The question before the Supreme Court of California arose out of a substantial dispute between DIRECTV and its dealers in four states who claimed that the

§ 10 are the exclusive grounds upon which an arbitration award may be vacated, 552 U.S. at 585–86, it has, even post-*Hall Street*, reiterated that courts and arbitrators must "'give effect to the contractual rights and expectations of the parties.'") (citing Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 682 (2010) (quoting Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989))).

[219] *See Honea*, 55 So. 3d at 1168–70.

[220] *See generally* Birmingham, *supra* note 216.

[221] Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal. 2008).

[222] *Id.* at 599.

[223] *Id.* at 599; *contra* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 269–70 (1995) (describing how SCOTUS held that a commercial transaction between two parties based in Alabama rose to the level of interstate commerce).

[224] *Cable Connection, Inc.*, 190 P.3d at 597 n.14.

company had wrongfully withheld commissions and assessed improper charges.[225]

In *Cable Connection, Inc.*, the court paid due deference to a previous case, *Moncharsh v. Heily & Blase, Inc.*, which held that if the agreement between the parties limits the arbitrator's authority by requiring that the award follow the law, judicial review of the merits is possible.[226] Notwithstanding, nothing in the agreement between the parties in *Cable Connection, Inc.* contained language which the court says was necessary for merits review.[227]

The agreement was poorly drafted. It stated, in part, "The arbitrators shall apply California substantive law to the proceeding, except to the extent Federal substantive law would apply to any claim."[228] The arbitration clause further specified: "This Section and any arbitration conducted hereunder shall be governed by the United States Arbitration Act (9 U.S.C. § 1, et seq.)."[229] The part of California substantive law seems to serve no purpose other than to provide fodder for litigation. Nonetheless, the *Cable Connection, Inc.* court does not illustrate where in the agreement the parties agreed to judicial review of the merits.[230] In fact, the judicial review section of the agreement between the parties replicates that of the FAA, even citing §§ 10 and 11 of the statute.[231] California has done whatever it wants when it comes to arbitration and will continue to do so.

3. Texas

The Supreme Court of Texas does not explicitly hold that state arbitration law concerning judicial review standards preempts the FAA, but it stops just short of doing

[225] *Id.* at 590.
[226] *Id.* at 600; Moncharsh v. Heily & Blase, 832 P.2d 899 (Cal. 1992).
[227] *Cable Connection, Inc.*, 190 P.3d at 592 nn.3–7.
[228] *Id.* at 590 n.3.
[229] *Id.* at 1377 n.3.
[230] *Id.* at 592 nn.3–7.
[231] *Id.* at 592 nn.4–7.

so.[232] In *Nafta Traders, Inc. v. Quinn*, the court discerned that even if interstate commerce is involved, thereby implicating the FAA, it does not mean that state arbitration law is preempted.[233] For bye, the court went so far as to say that state arbitration law has to expressly exempt itself from the matter or have an enforceability requirement not found in the FAA.[234] First, it is highly doubtful that Texas, or any state, will pass arbitration law that expressly states that their judicial review standards are preempted by the FAA. "Express preemption occurs when Congress explicitly states that federal law is the exclusive law and state law is to be disregarded."[235] There is no precedent where a state has preempted itself to federal law. Second, the court seems to imply that there is only express preemption with regard to the FAA and ignores implied preemption as the Supreme Court of South Carolina did.[236]

---

[232] Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 97–98 (Tex. 2011) ("We have explained it this way: The FAA only preempts the TAA if: (1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses under state law, and (4) state law affects the enforceability of the agreement. . . . The mere fact that a contract affects interstate commerce, thus triggering the FAA, does not preclude enforcement under the TAA as well. For the FAA to preempt the TAA, state law must refuse to enforce an arbitration agreement that the FAA would enforce, either because (1) the TAA has expressly exempted the agreement from coverage, or (2) the TAA has imposed an enforceability requirement not found in the FAA.") (citing *In re* D. Wilson Constr. Co., 196 S.W.3d 774, 780 (Tex. 2006) (citations, brackets, emphasis, and internal quotation marks omitted)).

[233] *Nafta Traders, Inc.*, 339 S.W.3d at 97–98 ("When, as in this case, an arbitration agreement is covered by both state and federal law, state law is preempted "to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Having concluded that the TAA permits parties to agree to expanded judicial review of arbitration awards, we must determine whether the FAA, which under *Hall Street* precludes such agreements, preempts Texas law. That is, do such agreements thwart Congress's purposes and objectives in the FAA?").

[234] *Id*.

[235] Max Birmingham, *Up in the Air: Analyzing Whether the Clean Air Act Preempts State Law Common Claims*, 14 LIBERTY U. L. REV. 55, 58 (2019).

[236] *See generally Nafta Traders, Inc.*, 339 S.W.3d at 97–98.

VI. Public Policy

A. Standing

In *Hall Street Associates, L.L.C.*, there is a significant standing issue that SCOTUS somehow overlooked.[237] The agreement incorporated § 7 of the FAA regarding the power of the arbitrator to compel the attendance of witnesses but it did not otherwise "expressly invoke [the] FAA."[238] The FAA itself does not provide for federal subject matter jurisdiction.[239] Thus, there needed to be an independent basis for proceeding in federal court.

In a footnote, SCOTUS states that "[b]ecause the FAA is not jurisdictional, there is no merit in the argument that enforcing the arbitration agreement's judicial review provision would create federal jurisdiction by private contract."[240] Rather, "[t]he issue is entirely about the scope of judicial review permissible under the FAA."[241] SCOTUS cannot address the scope of judicial review if there is no standing.[242] Addressing the footnote itself, this is an illogical reason as to why standing is not an issue. If there

[237] Hall St. Assocs., L.L.C. v. Mattel, Inc. 552 U.S. 576, 590 (2008).
[238] *Id.* ("While it is true that the agreement does not expressly invoke FAA § 9, § 10, or § 11, and none of the various motions to vacate or modify the award expressly said that the parties were relying on the FAA. . ."; We are, however, in no position to address the question now, beyond noting the claim of relevant case management authority independent of the FAA.").
[239] *Id.* at 582 n.2 ("Because the FAA is not jurisdictional, there is no merit in the argument that enforcing the arbitration agreement's judicial review provision would create federal jurisdiction by private contract. The issue is entirely about the scope of judicial review permissible under the FAA.").
[240] *Id*. at 590.
[241] *Id*.
[242] Under Article III of the U.S. Constitution, standing doctrine requires that a court must be presented with a "case" or "controversy" before it exercises jurisdiction. U.S. CONST. art. III, § 2, cl. 1. As set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992), a plaintiff must show: (1) he has "suffered an 'injury in fact'" that is "(a) concrete and particularized . . . and (b) 'actual or imminent, not "conjectural" or "hypothetical"'; (2) the injury is "'fairly . . . trace[able] to the challenged action of the defendant'"; and (3) it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

is no merit in the argument that enforcing the arbitration agreement would create federal jurisdiction, and the judicial review provision does not create federal jurisdiction, then it is not clear how one may bring a case in federal court.

State courts have invoked the FAA when it was not expressly invoked in the agreement at dispute by citing interstate commerce.[243] When state courts do this, they essentially confess that they do not have jurisdiction to hear the case in question. Interstate commerce enables federal courts to exercise jurisdiction over disputes that center on the FAA given that the FAA "bestow[s] no federal jurisdiction but rather requir[es] an independent jurisdictional basis" to file in federal court.[244] In *Hall Street Associates, L.L.C.*, the Court seemingly admits that jurisdiction may have been in state court, yet it does not matter which court enforced the arbitration.[245] Needless to say, just because an arbitration can be enforced in state court does not mean that a federal court has jurisdiction over that arbitration. Moreover, SCOTUS' previously mentioned stance is antithetical to this Article. SCOTUS emphasizes that contracts to arbitrate are "'valid, irrevocable, and enforceable,'" so long as they involve commerce, but fails to appreciate the drastic ramifications if a party seeks enforcement in state court versus federal court.[246] Until SCOTUS decides whether, when the FAA governs an arbitration, the FAA's judicial review standards apply in state court and preempt application of different state law judicial review standards,

---

[243] *See, e.g.*, Forged Components, Inc. v. Guzman, 409 S.W.3d 91, 98 (Tex. App. 2013); N.J.R. Associates v. Tausend, 973 N.E.2d 730, 732–33 (N.Y. 2012); Zabinski v. Bright Acres Associates, 553 S.E.2d 110, 594–96 (S.C. 2001).
[244] *Hall St. Assocs., L.L.C.*, 552 U.S. at 582.
[245] *Id.* ("But in cases falling within a court's jurisdiction, the Act makes contracts to arbitrate 'valid, irrevocable, and enforceable,' so long as their subject involves 'commerce.' § 2. And this is so whether an agreement has a broad reach or goes just to one dispute, *and whether enforcement be sought in state court or federal.*") (emphasis added).
[246] *Id.*

then the forum battle of state court versus federal court will be of the utmost importance in these actions.

B. Floodgates/Hostility Towards Arbitration

Justice Scalia, who authored the majority opinion in *Concepcion*, determined that states cannot create arbitration procedures that are inconsistent with the FAA.[247] Justice Scalia observed that the floodgates would open if states were allowed to enforce arbitration agreements on the availability of class proceedings because states would also demand the ability to enforce other arbitration procedures such as discovery.[248]

Historically, American courts greeted arbitration with hostility.[249] This hostility was inherited from English courts.[250] It originated at least in part because English judges' fees reflected the number of cases they decided.[251] Arbitration threatened to reduce their workload.[252] English courts were also reluctant to concede their jurisdiction over various disputes.[253] In America, the hostility towards arbitration abated as there was an exponential increase in business disputes.[254] Business leaders called for

[247] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011).
[248] *Id.* at 341–42.
[249] Preston D. Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1502 (1995); *see, e.g.*, H.R. REP. NO. 96, 68th Cong., 1st Sess., 2 (1924).
[250] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) ("[The Federal Arbitration Act's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts . . . .").
[251] Wigner, *supra* note 249, at 1502.
[252] *Id*.
[253] H.R. REP. NO. 96, *supra* note 249 at 1–2; David P. Pierce, *The Federal Arbitration Act: Conflicting Interpretations of Its Scope*, 61 U. CIN. L. REV. 623, 625 (1992).
[254] *See Gilmer*, 500 U.S. at 24 ("[The Federal Arbitration Act's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts . . . .").

standardized procedures to address these disputes.[255] Before the Federal Rules of Civil Procedure were adopted in 1938, federal courts would apply, to some degree, the state court procedures of the state where the federal court sat pursuant to the Conformity Act of 1872.[256] A judge in New York discerned that businesspeople "were willing to do almost anything" to avoid the chaotic procedures in the court system.[257]

Recently, one state court discerned that state standards for judicial review of arbitration awards are procedural rules that do not frustrate the FAA's substantive goal of enforcing the underlying arbitration agreements.[258] Sections 9–11 of the FAA require courts to confirm arbitration awards, subject to certain narrow grounds for vacatur or modification, upon request by a party to the arbitration so long as the parties agreed for a court judgment on the award, specified the court, and applied within one year.[259]

States hostile to arbitration may undermine FAA-governed arbitration agreements by applying their own, or different, law judicial review standards. If states are hostile to arbitration, or are pushed to enact legislation, such as what occurred in New York,[260] informal arbitration would be rendered "merely a prelude to a more cumbersome and time-consuming judicial review process," thereby "bring[ing]

---

[255] *Id.*; William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L. REV. 186, 199 (1917).
[256] 4 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1002 n.19 (3rd ed. 1998) (quoting Conformity Act of June 1, 1872, ch. 255, § 5, 17 Stat. 1970 (1872)).
[257] William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L. REV. 186, 199 (1917).
[258] State v. Philip Morris, Inc., 225 Md. App. 214, 237–39 (Md. Ct. Spec. App. 2015).
[259] 9 U.S.C. §§ 9–11.
[260] See *Gilmer*, 500 U.S. at 24 ("[The Federal Arbitration Act's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts[.]").

arbitration theory to grief in post-arbitration process."[261] Indeed, "[a]ny other reading [would] open[ ] the door to . . . full-bore legal and evidentiary appeals," including even *de novo* review.[262] If the FCC allows states to implement their own judicial review standards when the FAA governs an arbitration, the FAA would be toothless as states could nullify the arbitration awards through their own standards.[263]

VII. *Reductio Ad Absurdum*

Some state courts have developed their own interpretation as to what constitutes interstate commerce, and thus disallowed the FAA from being the controlling statute.[264] This is frightening. As discussed *infra*, SCOTUS has held an extremely broad interpretation of interstate commerce.[265] Furthermore, state courts have also held extremely broad interpretations of interstate commerce in order to apply the FAA.[266]

In a complete contrast from the New York Court of Appeals' decision in *US Elecs., Inc.*,[267] a lower New York state court held the FAA is inapplicable because the contract did not affect interstate commerce, despite the fact the alarm company operated in nine states.[268] The use of mandatory arbitration clauses in consumer contracts is prohibited under

[261] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008); LaPine Technology Corp. v. Kyocera, 341 F.3d 884, 998 (9th Cir. 1997).
[262] *Hall St. Assocs., L.L.C.*, 552 U.S. 576; 9 U.S.C. §§ 9–11.
[263] Circuit City Stores, Inc. v. Adams, 532 US 105, 118–19 ("And the fact that the provision is contained in a statute that "seeks broadly to overcome judicial hostility to arbitration agreements," *Allied-Bruce*, 513 U. S., at 272–273, which the Court concluded in *Allied-Bruce* counseled in favor of an expansive reading of § 2, gives no reason to abandon the precise reading of a provision that exempts contracts from the FAA's coverage.").
[264] *See supra* Parts V.A–B.
[265] *See* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995); American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003).
[266] *See generally Allied-Bruce Terminix Cos., Inc.*, 513 U.S. 265.
[267] *See supra* Part V.A.4.
[268] Schiffer v. Slomin's, Inc., 970 N.Y.S.2d 856, 864 (N.Y. 2013).

New York General Business Law § 399-c.[269] In stunningly brazen judicial activism, the New York state court openly defied SCOTUS.[270] The *Schiffer* court conceded "the holdings in more recent United States Supreme Court cases (*AT&T Mobility*, *Marmet* and *Nitro-Lift*) are conceptually inconsistent" with New York arbitration law, yet vowed to continue to apply New York common law until the Supreme Court "expressly overrule[d]" that law.[271] What is intriguing is the New York state court did not attempt to hide its judicial activism.[272] Rather, it laid down a challenge and dared SCOTUS to take up the case and explicitly rule on this issue.[273]

Similar to the *Schiffer* court resisting SCOTUS, we have seen a similar instance in California.[274]

After SCOTUS struck down the *Discover Bank* Rule, the Supreme Court of California created the *McGill* Rule.[275] The *McGill* Rule holds provisions in pre-dispute arbitration agreements waiving the parties' right to seek "public injunctive relief" in any forum are contrary to public policy and are thus unenforceable.[276] The reasoning displayed by New York and California is subject to *reductio ad absurdum* ("reduction to absurdity").[277] If SCOTUS has to "expressly overrule" every state law regarding arbitration, then states would be able to enact a slew of laws and realize the chance of them being taken up by the High Court is

[269] N.Y. GEN. BUS. LAW § 399-c (McKinney 2014).
[270] *Judicial Activism*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.").
[271] *Schiffer*, 970 N.Y.S.2d at 864.
[272] *Id*.
[273] *Id*.
[274] *See* McGill v. Citibank, 393 P.3d 85 (Cal. 2017).
[275] *Id.*
[276] *Id.* at 97.
[277] *Reductio Ad Absurdum*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("In logic, disproof of an argument by showing that it leads to a ridiculous conclusion.").

rare.[278] As it relates specifically to judicial review standards, states would then be able to enact whatever standards they decide upon—creating a patchwork quilt of state laws.[279]

VIII. Conclusion

As we see, courts are now interpreting the FAA as they see fit in order to dispense their own brand of justice. The FAA was originally enacted to repel "widespread judicial hostility to arbitration agreements."[280] States that are hostile to arbitration are able to undermine FAA governed arbitration agreements by mandating more judicial review standards of arbitration awards than the FAA authorizes. Aside from flouting SCOTUS' decisions concerning FAA objectives, it can have deleterious effects from a pragmatic perspective. There may be an increase in the cost of arbitration if awards are allowed to easily be challenged in court, thus eliminating one of the unique selling points of arbitration: "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[281]

SCOTUS has reinforced the legal principle that the FAA judicial review standards are stringent, and there is a high burden to set aside an arbitration award.[282] In *Oxford Health*, the Court held that so long as a dispute was within the arbitrators' jurisdiction, a decision "'even arguably

[278] Adam Feldman, *Empiracle SCOTUS: Follow the experts in framing petitions for cert*, SCOTUS BLOG (Nov. 19, 2018, 1:53 PM), *https*://www.scotusblog.com/2018/11/empirical-scotus-follow-the-experts-in-framing-petitions-for-cert ("With well over 7,000 annual petitions for certiorari, the justices and their clerks must wade through what may seem like an infinite number of pages in order to pare down to the 70 or so cases they hear in a term.").
[279] *Id*.
[280] AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 339 (2011); *see also* Birmingham, *supra* note 200.
[281] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U. S. 576, 588 (2008); *see also* Oxford Health Plans v. Sutter, 569 U.S. 564, 568 (2013).
[282] *Oxford Health Plans*, 569 U.S. at 569.

construing or applying the contract' must stand, regardless of a court's view of its (de)merits."[283]

Following the Court's jurisprudence, for an arbitration award to be set aside it must fall within one of the narrow exceptions in §§ 9–11 of the FAA.[284] In other words, the arbitrators must have willfully "abandoned their interpretive role," not just merely "misinterpreted the contract."[285] Thus, a state cannot impose its own judicial review standards. SCOTUS has remarked that an error, even a serious error, is not sufficient to set aside an arbitration award.[286] While this may be a harsh light, parties know what the circumstances are and "[t]he potential for . . . mistakes is the price of agreeing to arbitration."[287] Even the Second Circuit offered a stark warning to those who seek arbitration instead of pursuing their claims in court:

"Arbitration may or may not be a desirable substitute for trial in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery."[288]

SCOTUS reinforced this by remarking "[i]t is [their] construction of the contract which was bargained for," and thus "the courts have no business overruling [them]" because

[283] *Id*.
[284] 9 U.S.C. §§ 9–11.
[285] *Oxford Health Plans*, 569 U.S. at 571.
[286] *Id*. at 564.
[287] *Id*. at 572–573.
[288] Hecla Mining Co. v. Bunker Hill Co., 617 P.2d 861, 866 (Idaho 1980) (citing American Almond Prods. Co. v. Consol. Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944)).

"[t]he potential for . . . mistakes is the price of agreeing to arbitration."[289]

Some may argue as to whether some of the state courts made the proper analysis as to whether the FAA should have governed the arbitration, or if the interstate commerce clause is being interpreted too broadly in this context. Nonetheless, this is beyond the scope of this article. If the FAA governs an arbitration, the FAA's judicial review standards apply. The courts that have held otherwise are legislating from the bench in order to impose their own public policy. The FAA has extremely specific language about judicial review standards.[290] It is wholly disingenuous to take the position that the FAA does not preempt state judicial review standards when it governs an arbitration. SCOTUS has not yet ruled as to whether the FAA preempts state laws that permit state courts to subject arbitration awards to different standards of judicial review.[291] If this issue does come before the Court, it will hopefully affirm this Article.

[289] *Oxford Health Plans*, 569 U.S. at 572–573.
[290] *See* 9 U.S.C. §§ 9–11.
[291] *See* Nitro-Lift Techs. v. Howard, 568 U. S. 17, 21 (2012); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U. S. 576, 581–82 (2008).