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# Why 'Manifest Disregard' Survives as an Independent Standard for Vacatur of Arbitral Awards, Even After Hall Street

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# WHY ‘MANIFEST DISREGARD’ SURVIVES AS AN INDEPENDENT STANDARD FOR VACATUR OF ARBITRAL AWARDS, EVEN *AFTER HALL STREET*

By *Carolina Rizzo*<sup>1</sup>

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## INTRODUCTION

Since the birth of the Federal Arbitration Act<sup>2</sup> (“FAA”) in 1925, the United States has maintained a national policy favoring arbitration.<sup>3</sup> The FAA empowered courts to modify, correct, and even vacate arbitral awards<sup>4</sup> to promote the efficiency and fidelity of the parties in the arbitral process. However, because arbitration is a favored litigation mechanism, the vacatur of arbitral awards demands a very high standard. Specifically, courts can only vacate arbitral awards in four situations: (1) where an award is obtained through fraud, corruption, or “undue means;” (2) where the arbitrators showed partiality and/or corruption; (3) where the arbitrators “were guilty of misconduct;” or, (4) where the arbitrators “exceeded their powers or so imperfectly executed them that

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<sup>2</sup> 9 U.S.C. § 1, *et seq.* (1925).

<sup>3</sup> The FAA granted state and federal courts the power to enforce arbitral decisions in cases that involve any “maritime transaction or . . . contract evidencing a transaction involving commerce.” *Id.* at § 2.

<sup>4</sup> 9 U.S.C. §§ 10–11.

a mutual, final, and definite award upon the subject matter submitted was not made.”<sup>5</sup>

In addition to the statutory reasons enunciated in the FAA, federal and state courts have vacated arbitral awards upon a finding that the arbitrator’s decision displayed “manifest disregard of the law.” However, this “manifest disregard” standard, which first appeared in *Wilko v. Swan*,<sup>6</sup> requires a finding of “willful defiance of clearly applicable law, not just garden-variety legal error.”<sup>7</sup> Additionally, because it had only mentioned manifest disregard in dicta, the U.S. Supreme Court in *Wilko* did not clearly define manifest disregard, thus leaving lower courts to deal with its application.<sup>8</sup>

While *Wilko* was eventually overturned, manifest disregard has become a doctrine. After considerable struggle over how to construe manifest disregard, most federal circuit courts ruled that finding that an arbitrator has manifestly disregarded the law “requires more than an error of law and more than a failure by the arbitrator to understand or apply the law.”<sup>9</sup> In 2007, the Supreme Court decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.* split the circuit courts and added additional criteria.<sup>10</sup> Previously where parties to an arbitration agreement were able to contractually expand vacatur of arbitral awards, *Hall Street* decided that parties to an arbitration agreement were not allowed to expand the grounds for vacatur or modify arbitral awards. The Court ultimately held that arbitral awards could only be vacated or modified pursuant to sections §§ 10 and 11 of the FAA. However, the Court did not specify whether the reason manifest disregard did not constitute a free-standing ground for vacatur was that the doctrine was already included in section 10(a)(4) of the FAA. Consequently, some courts and legal scholars have interpreted *Hall Street* as the demise of manifest disregard. Other courts, including the Second and Ninth Circuits, have

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<sup>5</sup> *Id.* at § 10(a)(1)-(4).

<sup>6</sup> 346 U.S. 427 (1956).

<sup>7</sup> See Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1 (2009), <http://yalelawjournal.org/2009/09/29/aragaki.html> (last visited September 1, 2013).

<sup>8</sup> Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where does the Buck Stop?* 61 DIS. RES. J. 4 (2007); see also *Wilko v. Swan*, 346 U.S. 427.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 5786 (2008).

determined that 'manifest disregard' was already included in the FAA and have continued to apply the doctrine.

This article will explore the history and evolution of the manifest disregard doctrine as a means of judicial arbitral vacatur. The seminal decision of *Hall Street*, which has divided circuit courts, will also be unpacked and clarified. While many courts have chosen to view *Hall Street* as killing manifest disregard, and others have tried to apply it through §§ 10 and 11 of the FAA, this paper will urge that a third route be considered: the exclusionary theory. This theory asserts that *Hall Street's* narrow decision was limited only to contractual and private agreements to expand arbitral vacatur—not to judicial review of manifest disregard. Ultimately, this article seeks to show that manifest disregard is not dead and should remain a valued part of arbitration law.

## I. Background of the FAA

### A. A National Policy Favoring Arbitration

The purpose behind enacting the FAA in 1925 was to ensure the validity and enforcement of arbitration agreements.<sup>11</sup> In broad terms, the FAA represented the establishment of a national policy favoring arbitration.<sup>12</sup> Congress considered it necessary to establish this policy

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<sup>11</sup> JON O. SHIMABUKURO, CONG. RESEARCH SERV., THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 1, 1–9 (2002). See also Karly A. Kauf, 'Manifest' Destiny: The Fate Of The 'Manifest Disregard Of The Law' Doctrine After *Hall Street v. Mattel*, 3 J. BUS. ENTREPRENEURSHIP & L. 309, 309–10 (2010) (stating that the FAA was enacted as "a reaction to widespread judicial resistance to arbitration" and that its intent was to "ensure that contracts to arbitrate would be enforced"). See, e.g., Preston Douglas Wigner, Comment, *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, 1501–03 (1995) (describing the background and history of the FAA).

<sup>12</sup> See CONG. RESEARCH SERV. at 1.

because American judges were resistant to enforcing arbitral awards<sup>13</sup> and agreements to arbitrate were revocable until an award was rendered.<sup>14</sup> This reluctance of American judges to enforce arbitral awards was rooted in English common law traditions,<sup>15</sup> holding that agreements to arbitrate wrongly “ousted” courts of their jurisdiction.<sup>16</sup> This English common law holding originates from two historical rationales: (1) pre-twentieth century British judges worried that arbitration would result in injustice,<sup>17</sup> and (2) arbitration was perceived by many pre-twentieth century judges as an economic threat.<sup>18</sup> It was not until 1889 that the British Parliament passed a law to protect arbitration as a means of prioritizing

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<sup>13</sup> See *id.* (explaining how American judges inherited a certain hostility towards arbitration from English judges, who were paid fees based on the number of cases they decided). See also James E. Berger, Practitioner Note, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 NYU J.L. & BUS. 745, 746 (2009) (“prior to the passage of the FAA, American courts were hostile to arbitration.”) (citing *Hall Street Assocs. v. Mattel*, 128 S. Ct. 1396, 1408); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (recognizing that the FAA seeks to broadly overcome judicial hostility towards arbitration); Brian T. Burns, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street*, 78 FORDHAM L. REV. 1814, 1817 (2011) (“judiciary’s long-standing refusal to enforce executory agreements to arbitrate.”).

<sup>14</sup> See *id.* (explaining that the ouster doctrine was the rationale for this approach.). See also Tom Cullinan, Note, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 408–12 (1998); *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 625 n.14 (1985); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270–71 (1926).

<sup>15</sup> See, e.g., Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 599–600 (1997) (describing the historical reluctance to enforce arbitration agreements). See also Tom Cullinan, Note, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 408–09 (1998) (“[B]y adopting the English law, American courts were infected with a hostility toward arbitration not normally found in other cultures . . . . The ultimate effect of this hostility was the courts’ refusal . . . to force parties to fulfill executory agreements to arbitrate.”).

<sup>16</sup> *Kill v. Hollister*, 95 Eng. Rep. 532 (K.B. 1746) (from this case emerged the ‘ouster doctrine.’).

<sup>17</sup> William M. Howard, *The Evolution of Contractually Mandated Arbitration*, 48-3 ARB. J., Sept. 1993, at 27 (explaining that because there were no procedural safeguards for arbitration prior to 1855, courts feared a “miscarriage of justice”).

<sup>18</sup> *Id.* at 28 (noting that British judges in 1800’s England collected fees from the litigants).

commercial interests.<sup>19</sup> However, this hostility towards arbitration, so endemic to English courts, traveled with the British colonies and was later enveloped into the mindset of the new legal system adopted by the post-revolution United States.

As in England, hostility towards arbitration in the United States began to disperse with the advent of industrialization.<sup>20</sup> Industrialization fueled an increase in business disputes, which in turn began to burden the courts.<sup>21</sup> For the sake of efficiency, the practice of arbitration had to be legitimized and protected. Therefore, deciding that the common law rule allowing agreements to be revoked prior to the rendering of an award should no longer apply, courts called for legislative action.<sup>22</sup> In response, Congress passed the FAA, modeled after a New York statute enacted in 1920.<sup>23</sup>

Congress' authority to enact the FAA derives from the Commerce Clause<sup>24</sup> as well as from congressional powers to control procedure in the federal courts.<sup>25</sup> Through the FAA, Congress intended to give arbitration agreements the same weight as any other type of contract.<sup>26</sup> The goal of the FAA was not to create an alternative judicial mechanism that would 'oust' the court's authority, but rather, to provide a procedure for federal courts to enforce arbitral awards and address the concerns of the business community over cost and timeliness.<sup>27</sup>

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<sup>19</sup> See Arbitration Act, 1698, 9 & 10 Will. 3, ch. 15 (Eng.).

<sup>20</sup> See, e.g., 5 NYU. J.L. & BUS. at 746–54 (2009) (detailing the history of arbitration law in the United States).

<sup>21</sup> See Helm, *supra* note 8.

<sup>22</sup> See 78 FORDHAM L. REV. at 1817.

<sup>23</sup> S. REP. NO. 68-536, at 3 (noting that the FAA follows the 1920 New York statute).

<sup>24</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) (“The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause.”); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (“[T]he federal arbitration statute is based upon and confined to the incontestable federal foundations of ‘control over interstate commerce and over admiralty.’”) (citing H.R. REP. NO. 96, 1 (1924); S. REP. NO. 536, 3 (1924)).

<sup>25</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (“[T]he question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative.”).

<sup>26</sup> See 78 FORDHAM L. REV. at 1817–18 (citing H.R. REP. NO. 68-96, at 1).

<sup>27</sup> *Id.* at 1818; Howard, *supra* note 17, at 28.

## II. Grounds for Vacatur of Arbitral Awards

### A. Vacatur, Modification, and Correction of Awards under Sections 10 and 11 of the FAA

The FAA, a legislation that applies to all contracts affecting interstate commerce,<sup>28</sup> provides expedited state and federal judicial review to confirm, vacate, or modify arbitral awards.<sup>29</sup> Under § 10(a), parties can seek vacatur of an arbitral award for the following four reasons:<sup>30</sup>

- (1) the award was procured by corruption, fraud, or undue means;
- (2) the arbitrators were evidently biased or corrupt;
- (3) the arbitrators were guilty of misconduct, such as the refusal to postpone a hearing when sufficient cause for the postponement was shown, refusing to hear evidence pertinent and material to the controversy, or any other misbehavior that resulted in prejudice to the parties; or,
- (4) the arbitrators exceeded their powers, or executed those powers so imperfectly, that their decision cannot be deemed to be final.

While the first three reasons address fairness, impartiality and procedural issues,<sup>31</sup> the last one focuses on the correctness of the award. These grounds—especially the first three—are very narrow and extremely difficult to invoke.<sup>32</sup> The final, and most popular, ground allows the courts more power to make revisions.

Pursuant to § 10(a)(4), courts will examine the reasoning that produced the award within the arbitrators' limitations.<sup>33</sup> Ultimately, the same spirit found behind the enactment of the FAA guides a presumption among courts in favor of confirming arbitral awards.<sup>34</sup>

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<sup>28</sup> See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 278–81 (holding that the term ‘involving commerce’ in section 2 of the FAA was consistent with Congressional exercise of its powers under the commerce clause).

<sup>29</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

<sup>30</sup> 9 U.S.C. §10(a).

<sup>31</sup> Helm, *supra* note 8, at 2.

<sup>32</sup> *Id.* at 1822 (explaining that the grounds for vacatur under §10 address ‘egregious departures’ from the role of arbitrators and ‘serious procedural irregularities’) (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008); *Amalgamated Meat Cutters v. Cross Bros. Meat Packers, Inc.*, 518 F.2d 1113, 1121 (3d Cir. 1975)).

<sup>33</sup> Helm, *supra* note 8, at 4–5.

<sup>34</sup> *Id.*

## B. Non-Statutory Grounds for Vacatur and “Manifest Disregard”

In addition to the grounds specified in the FAA, courts have also carved out a series of non-statutory grounds for reviewing arbitral awards.<sup>35</sup> Nationwide, courts have historically used these judicially-fashioned grounds to correct and vacate improper arbitral awards and further the interests of justice without hindering the arbitral process.<sup>36</sup> The most commonly invoked non-statutory ground for review is without a doubt the “manifest disregard” doctrine; despite recent and exciting changes in the law,<sup>37</sup> the manifest disregard doctrine remains the most popular non-statutory basis for vacatur of arbitral awards in the United States.<sup>38</sup>

Before 1953, federal courts followed strict standards for vacatur of arbitral awards by adhering closely to the FAA.<sup>39</sup> *Wilko v. Swan*, a case involving a buyer who sought to recover damages from a broker for misrepresentation under the Securities Act,<sup>40</sup> overruled previous case law. In *Wilko*, the U.S. Court of Appeals for the Second Circuit disagreed with the trial court over whether to grant the broker’s motion to stay the proceedings until arbitration concluded, and the Supreme Court granted certiorari.<sup>41</sup> Specifically, the Court was troubled by the fact that, to resolve this dispute, the arbitrator had to make “subjective findings on the purpose and knowledge of an alleged violator of the Act.”<sup>42</sup> These subjective findings were a problem for the court because the findings were not guided by any legal instruction.<sup>43</sup> In other words,

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<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103 (2009) (explaining the different kinds of non-statutory grounds for reviewing arbitral awards).

<sup>37</sup> See 78 FORDHAM L. REV. at 1823.

<sup>38</sup> See *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 355 (5th Cir. 2004) (explaining that manifest disregard “means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.”).

<sup>39</sup> See 5 NYU J.L. & BUS. at 761 (explaining how *Wilko* was the first time the Court “opened the door to possibly recognizing non-statutory grounds for vacating an arbitration award.”).

<sup>40</sup> 346 U.S. 427, 427 (1953).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 435–36.

<sup>43</sup> *Id.* at 436.

the arbitral award could be made without any explanation of the reasons for reaching it, and the arbitral award could be reached without a complete record of the proceedings.<sup>44</sup> While the Supreme Court's decision in favor of the claimant was ultimately overturned on other grounds, the dicta remains influential.<sup>45</sup>

The Court also pointed out the general difficulty in vacating arbitral awards. Pursuant to the incredibly high standards of § 10(a), it was very challenging to show that the arbitrators had failed to correctly interpret and apply the Securities Act.<sup>46</sup> Because the protective provisions found in the Securities Act demanded judicial discretion to ensure their own effectiveness, the Supreme Court reasoned that Congress must have intended for the possibility of courts to review arbitral decisions that display manifest disregard in "interpretations of the law by the arbitrators."<sup>47</sup>

After *Wilko*, circuit courts adopted manifest disregard—albeit only in rare instances—as an instrument to vacate arbitral awards.<sup>48</sup> A large number of states also followed the federal circuits in recognizing manifest disregard as a legitimate way to vacate arbitral awards.<sup>49</sup> Not all courts or states, however, applied the doctrine in the same way.<sup>50</sup> Manifest disregard was invoked as an emergency measure, and was

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<sup>44</sup> Courts, therefore, could not review the arbitrator's conception of the legal meaning of certain statutory requirements, such as 'burden of proof,' 'reasonable care,' and 'material fact.' *Id.*

<sup>45</sup> *Id.* (finding that (1) the right to choose a judicial forum cannot be validly waived; (2) an agreement to arbitrate future controversies between securities brokers and buyers constitutes a 'stipulation' binding the buyer to waive compliance with such Securities Act provision; and (3) such agreement is invalidated by the act's express prohibitions against waiver) (overruled by *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See 5 NYU J.L. & Bus. at 762 (citing *Collins v. D. R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007)); *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 234 (4th Cir. 2006); *Cytec Corp. v. Deka Prods. Ltd. P'ship*, 439 F.3d 27, 33 (1st Cir. 2006).

<sup>49</sup> *Id.* at 767–68 (some states also construed manifest disregard as one of the grounds for vacatur written in their own state arbitration laws).

<sup>50</sup> See *id.* at 763–64 (describing the different ways that circuits applied the manifest disregard standard).

limited to “rare occurrences of apparent egregious impropriety,” where § 10(a)(1)–(4) did not apply, or where the law had been disregarded.<sup>51</sup>

### III. Unpacking the *Hall Street* Decision

In 2007, the U.S. Supreme Court heard *Hall Street v. Mattel*<sup>52</sup> to address a split in the circuit courts regarding the grounds for judicial review of arbitral awards under the FAA.<sup>53</sup> Specifically, the United States Courts of Appeal for the Ninth and Tenth Circuits found that parties could not contractually expand the grounds for judicial review beyond those explicit in the FAA.<sup>54</sup> On the contrary, the First, Third, Fifth and Sixth Circuits argued that, under very limited circumstances, the FAA could be displaced.<sup>55</sup>

*Hall Street* involved a dispute between the plaintiff landlord and the defendant tenant over a manufacturing site.<sup>56</sup> The lease agreement required the tenant to indemnify the landlord for any expenses resulting from a failure to follow environmental laws, but also applied to cases where the tenant’s predecessors had failed to follow environmental laws.<sup>57</sup> When subsequent environmental tests showed that defendant Mattel’s predecessors had been contaminating the water for almost thirty years, they signed a consent order for cleanup of the water with one of the former tenants of the manufacturing site.<sup>58</sup> In 2001, Mattel

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<sup>51</sup> Helm, *supra* note 8, at 9–10; *see also Kergosien*, 390 F.3d at 353 (“the term ‘disregard’ implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it.”). Different courts have also set out guidance on how to interpret this standard, such as the 2nd Circuit, which has found that there are three main components of the doctrine that may guide the courts when applying it: (1) the law allegedly ignored was clear and explicitly applicable to the matter before the arbitrators; (2) the law was in fact improperly applied, leading to an erroneous outcome; and (3) the arbitrators must have known of the existence of this law and of its applicability to the matter at hand. *See T.Co. Metals, L.L.C. v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010).

<sup>52</sup> 552 U.S. 576 (2008).

<sup>53</sup> *See Hall St. Assocs.*, 550 U.S. 968 (2007) (granting certiorari).

<sup>54</sup> *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001).

<sup>55</sup> *See P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005); *Jacada (Eur.) Ltd. v. Intl. Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005).

<sup>56</sup> *Hall Street Ass., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

<sup>57</sup> *Id.* at 579.

<sup>58</sup> *Id.*

gave notice of intent to terminate the lease, prompting Hall Street to file a lawsuit contesting, among other issues, Mattel's right to vacate without covering the ongoing costs of cleanup.<sup>59</sup> Mattel won on the issue of the termination of the lease at the district court level and the parties agreed to submit to arbitration to resolve the remaining issues after mediation proved ineffective.<sup>60</sup> The arbitration agreement provided, *inter alia*, that the United States District Court for the District of Oregon had the power to "enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award." Specifically, the agreement provided that the court would vacate, modify or correct the award "(i) where the arbitrator's findings or facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."<sup>61</sup>

The arbitration also resulted in Mattel's victory. The arbitrator found that the obligations in the lease did not require Mattel to comply with the testing requirements of the Oregon Drinking Water Quality Act ("the Act") because the arbitrators considered this Act to cover matters of human health and not environmental contamination.<sup>62</sup> Therefore, the arbitrator reasoned, Mattel did not have to indemnify Hall Street under their lease agreement. In response, Hall Street filed a motion to vacate, modify or correct the award at the District Court, based on the theory that failing to consider the Act as an applicable environmental law under the lease constituted a legal error.<sup>63</sup> The District Court agreed with Hall Street and vacated the award, remanding the issue to the arbitrator for further consideration. The arbitrator ruled for Hall Street this time and the District Court affirmed. On appeal, the Ninth Circuit ruled in favor of Mattel and Hall Street sought, and was granted, certiorari by the Supreme Court.

The *Hall Street* Court held that under the FAA, parties to an arbitration agreement are not allowed to contractually expand the grounds for judicial review of an arbitral award beyond those already articulated in

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<sup>59</sup> There were other issues in dispute which are not important to the current discussion. *see Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 579.

<sup>62</sup> *Id.* at 580.

<sup>63</sup> *Id.*

§§ 10 and 11 of the FAA.<sup>64</sup> In reaching this decision, the Court rejected petitioner Hall Street's theories supporting the right to contractual expansion of grounds for vacatur or modification. Namely, that (1) the Court had accepted the expansion of arbitral awards since *Wilko v. Swan*<sup>65</sup> and (2) because arbitration is a "creature of contract" and the FAA symbolizes congressional intent to protect contracts, contractual agreements permitting judicial review for legal error should be valid. In rejecting these arguments, the Court clarified that § 9 of the FAA, which rigidly states that courts *must* (emphasis added) confirm an award unless it is modified or vacated according to §§ 10 and 11,<sup>66</sup> is not a default provision.<sup>67</sup> Even if §§ 10 and 11 of the FAA could be expanded, the court felt such expansion would create glaring inconsistencies with § 9 of the FAA.<sup>68</sup> The Court went on to concede the existence of a national policy favoring arbitration<sup>69</sup> but emphasized the FAA's high threshold for modification, correction and vacatur of arbitral awards,

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<sup>64</sup> See Brian B. Burns, Note, *Freedom, finality, and federal preemption: Seeking expanded judicial review of arbitration awards under state law after hall street*, 78 *FORDHAM L. REV.* 1814, 1843 (2010).

<sup>65</sup> Specifically, Hall Street argued that because the Court recognized Manifest Disregard as a valid ground for reviewing arbitral awards outside of §10, it should also allow contractual expansion of those grounds. See *Hall St.*, 552 U.S. at 586.

<sup>66</sup> 9 U.S.C. § 9 (2005) ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must grant* such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.") (emphasis added).

<sup>67</sup> See *Hall St.*, 552 U.S. at 586 (the Court read §5 of the FAA (a section the Court considered Congress intended to be read as a default provision) and compared it to §9). See also 9 U.S.C. §5 (2006) ("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 . . . the court shall designate and appoint an arbitrator or arbitrators . . .").

<sup>68</sup> *Id.* at 577 (explaining that supplementing §§ 10 and 11 "would stretch basic interpretive principles to expand their uniformly narrow stated grounds to the point of legal review generally . . .").

<sup>69</sup> See *Hall St.*, 552 U.S. at 586 ("a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.").

which prioritized finality over the parties' autonomy in shaping the arbitration process.<sup>70</sup>

In interpreting the FAA, the Court applied *ejusdem generis*,<sup>71</sup> arguing that because § 10 lacks a textual basis for expansion, there can be no authorization for contracting parties to “supplement review for specific instances of outrageous conduct with review for just any legal error.”<sup>72</sup> The Court then emphasized the stark contrast between reviewing for legal error—what the parties in this case sought to do in their arbitration agreement—and egregious conduct—what the FAA requires as grounds for vacatur.<sup>73</sup> In the end, *Hall Street* established that while autonomy of the parties trumps efficiency,<sup>74</sup> preserving finality in the arbitral process is still the most important.<sup>75</sup> Some scholars have even argued that, had the Court prioritized autonomy over finality, the institution of arbitration itself would have been undermined, making *Hall Street* a pivotal moment in the evolution of modern arbitration.<sup>76</sup>

### A. Did *Hall Street* Eliminate Manifest Disregard?

Post-*Hall Street*, courts,<sup>77</sup> legal scholars,<sup>78</sup> and practitioners<sup>79</sup> have developed theories about the fate of manifest disregard.<sup>80</sup> Some argue that *Hall Street* effectively eliminated manifest disregard, while oth-

<sup>70</sup> See Burns, *supra* note 26.

<sup>71</sup> *Hall St.*, 552 U.S. at 586 (explaining that *ejusdem generis* means that “when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.”).

<sup>72</sup> *Id.* at 586–87.

<sup>73</sup> *Id.* at 586 (“‘Fraud’ and a mistake of law are not cut from the same cloth.”).

<sup>74</sup> See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) (holding that when the values of efficiency and autonomy conflict, the result should favor autonomy).

<sup>75</sup> See *Hall St.*, 552 U.S. at 586 (noting that otherwise, the result would be a flood of “full-bore legal and evidentiary appeals” and “bring arbitration theory to grief in post-arbitration process.”).

<sup>76</sup> THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL* 58–59 (2d ed. 2009) (arguing that expanded review “would deprive the arbitral process of its autonomy and injure the institution of private adjudication”).

<sup>77</sup> See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008).

<sup>78</sup> See 5 NYU J.L. & BUS. at 773.

<sup>79</sup> See Thomas E.L. Dewey & Kara Siegel, *Room for Error: ‘Hall Street’ and the Shrinking Scope of Judicial Review of Arbitral Awards*, N.Y.L.J., May 15, 2008, at 23 (explaining that *Hall Street* apparently undermined the validity of manifest disregard).

<sup>80</sup> See 32 HARV. J.L. & PUB. POL’Y at 1191 (“arguing that the narrow holding in *Hall Street* created new questions, including the current validity of the manifest disregard doctrine.”).

ers maintain that the doctrine has survived either because it fits within § 10(a)(4) or for other reasons.<sup>81</sup> The *Hall Street* Court explained in dicta that it decided “nothing about other possible avenues for judicial enforcement of awards,”<sup>82</sup> thereby limiting the Court’s decision in regards to the FAA and retaining the possibility of expansion of judicial review under other circumstances.<sup>83</sup> The Court also named a few ways for parties to obtain expanded review, including through common law,<sup>84</sup> state statutory law,<sup>85</sup> and a court’s discretion to manage its docket under Federal Rules of Civil Procedure.<sup>86</sup> However, the Court chose not to discuss how those alternatives would play out, leaving a glaring question as to the continued existence of manifest disregard.<sup>87</sup> At this time, it is still unclear whether manifest disregard was eliminated by the *Hall Street* decision, and lower courts have decided differently on the issue.<sup>88</sup>

### 1. Two Schools of Thought and the Exclusivity Theory

The *Hall Street* Court acknowledged that its holding would cause confusion as to the fate of manifest disregard, but did not clarify how lower courts should interpret this doctrine in future decisions.<sup>89</sup> Since

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<sup>81</sup> See supra n. 85–87. Also judicially-crafted vacatur standards that most circuits have recognized; including “completely irrational” or “against public policy.”

<sup>82</sup> See *Hall St.*, 552 U.S. at 577; see Robert Ellis, *Imperfect Minimalism: Unanswered Questions in Hall Street Associates, L.L.C. v. Mattel, Inc.*, 32 HARV. J.L. & PUB. POL’Y 1187, 1188 (2009) (explaining that the holding in *Hall Street* was so narrow that it avoided deciding “potentially divisive issues” but at the same time that the issue that the Court did resolve “raised many new questions.”).

<sup>83</sup> See *Hall St.*, 552 U.S. at 590 (“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.”).

<sup>84</sup> See *Hall St.* at 1406 (“[T]hey may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.”).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1407 (“[S]hould the agreement be treated as an exercise of the District Court’s authority to manage its cases under Federal Rule of Civil Procedure 16?”).

<sup>87</sup> *Id.* at 1406–07 (“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.”).

<sup>88</sup> See, e.g., Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929, 938 (2010); 5 NYU J.L. & BUS. at 774–80 (describing how courts were split after *Hall Street* as to whether manifest disregard still applied).

<sup>89</sup> See *id.* at 1192.

its origins over fifty years ago, manifest disregard has been interpreted in many different ways including: as a separate ground for review outside of § 10;<sup>90</sup> as a reference to the group of § 10 grounds;<sup>91</sup> and as a shorthand for §§ 10(a)(3) and 10(a)(4).<sup>92</sup> Some courts argue that *Hall Street* abolished manifest disregard while others have urged that manifest disregard survives as part of § 10 of the FAA. A third, perhaps most persuasive, theory is that manifest disregard, along with other common law standards of vacatur, is left intact by the Court's exclusivity theory.<sup>93</sup>

### a. Manifest Disregard Post-*Hall Street*

Both state and federal courts, including the First, Fifth, Eleventh, and Eighth Circuits, have reached the conclusion that *Hall Street* marked the end of manifest disregard as an independent ground for vacatur.<sup>94</sup> This conclusion has been applied by district courts in the First,<sup>95</sup> Fifth,<sup>96</sup>

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<sup>90</sup> See, e.g., *McCarthy v. Citigroup Global Mkts. Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395–96 (5th Cir. 2003); *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998).

<sup>91</sup> See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting); *In re I/S Stavborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 431 (2d Cir. 1974). See also 14 LEWIS & CLARK L. REV. at 929.

<sup>92</sup> See *Kyocera*, 341 F.3d at 997.

<sup>93</sup> The theory that the FAA grounds for vacatur and modification of arbitral awards are exclusive.

<sup>94</sup> See *Hicks v. Cadle Co.*, 355 Fed. App'x 186, 196 (10th Cir. 2009) (“Some courts have decided that manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA.”).

<sup>95</sup> See *ALS & Assocs., Inc. v. AGM Marine Constructors, Inc.*, 557 F. Supp. 2d 180, 184 n.5, 185 (D. Mass. 2008).

<sup>96</sup> See *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 357-58 (5th Cir. 2009) (“[T]he statutory grounds [for vacatur within the FAA] are exclusive,” therefore, “manifest disregard of the law as an independent, non-statutory ground for setting aside an award must be abandoned and rejected.”).

Eighth,<sup>97</sup> and Third Circuits,<sup>98</sup> as well as some Texas courts of appeals,<sup>99</sup> and the Supreme Court of Alabama.<sup>100</sup> District courts in Massachusetts and Minnesota also follow this approach.<sup>101</sup> However, this characterization of *Hall Street*'s exclusivity theory is beyond the scope of the *Hall Street* decision.

Similarly, several courts have re-conceptualized manifest disregard as within § 10 of the FAA.<sup>102</sup> The Second,<sup>103</sup> Seventh<sup>104</sup> and Ninth Circuits<sup>105</sup> follow this approach. Other courts, including district courts in the Third Circuit,<sup>106</sup> the Delaware Court of Chancery,<sup>107</sup> and a New York trial court,<sup>108</sup> also believe that manifest disregard can be

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<sup>97</sup> See *Med. Shoppe Int'l, Inc. v. Simmonds*, No 4:08CV90 FRB, 2009 WL 367703, at \*3 (E.D. Mo. Feb. 11, 2009); *Prime Therapeutics*, 555 F. Supp. 2d at 999.

<sup>98</sup> See *Martik Bros., Inc. v. Kiebler Slippery Rock, L.L.C.*, No. 08CV1756, 2009 WL 1065893, at \*2 n.2 (W.D. Pa. Apr. 20, 2009); *Southco, Inc. v. Reell Precision Mfg. Corp.*, 556 F. Supp. 2d 505, 509–10 (E.D. Pa. 2008).

<sup>99</sup> See *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W. 3d, 818, 829 (Tex. Ct. App. (Dallas) Aug. 25, 2009); *Allsteyle Coil Co. v. Carreon*, No. 01-07-00790-CV, 2009 WL 1270411, at \*2 (Tex. App. 2009); *Chandler v. Ford Motor Credit Co., L.L.C.*, No. 04-08-00100-CV, 2009 WL 538401, at \*3 (Tex. App. Mar. 4, 2009).

<sup>100</sup> See *Hereford v. D.R. Horton, Inc.*, No. 1070396, 2009 WL 104666, at \*5, \*5 n.1 (Ala. Jan. 9, 2009).

<sup>101</sup> See, e.g., *ALS & Assocs. Inc. v. AGM Marine Constructors Inc.*, 557 F. Supp. 2d 180, 185 (D. Mass. 2008) (applying Ramos-Santiago); *Prime Therapeutics*, 555 F. Supp. 2d at 999.

<sup>102</sup> See *Stolt-Nielsen*, 548 F.3d at 94 (noting that manifest disregard can survive *Hall Street* when “reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA”). See also *Mastec N. Am., Inc. v. MSE Power Sys., Inc.*, 581 F. Supp. 2d 321, 325 (N.D.N.Y. 2008); *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 349 (2008).

<sup>103</sup> See *Stolt-Nielsen*, 548 F.3d at 94–95.

<sup>104</sup> See *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 581 (7th Cir. 2001) (even before *Hall Street*, the Seventh Circuit considered manifest disregard as a statutory doctrine).

<sup>105</sup> See *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1283 (9th Cir. 2009) (in which the court held that manifest disregard was a shorthand for § 10(a)(4) of the FAA and decided that *Hall Street* did not preclude federal courts from reviewing an arbitral award for the arbitrator's manifest disregard of the law).

<sup>106</sup> See *Vitarroz Corp. v. G. Willi Food Int'l Ltd.*, No. 05-5363, 2009 WL 1844293, at \*5 (D.N.J. June 26, 2009).

<sup>107</sup> See *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc.*, 953 A.2d 726, 732 (Del. Ch. 2008).

<sup>108</sup> See *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 348–49 (N.Y. Sup. Ct. 2008).

re-conceptualized within the FAA. However, this characterization is not necessarily the only way in which to maintain manifest disregard while adhering to *Hall Street*.

*Hall Street* ultimately decided that the grounds for vacatur listed in §§ 10 and 11 of the FAA are “exclusive.” This so-called “exclusivity theory” holds that the standards for vacatur enumerated in the FAA cannot be expanded by *private contract*, but could be expanded in other ways. This narrow reading resolves the conflict between the common interpretation of *Hall Street* and the manifest disregard doctrine (as well as other similar common law doctrines).<sup>109</sup> The Sixth Circuit has already applied the exclusivity theory in *Coffee Beanery*,<sup>110</sup> reversing the lower court’s confirmation of an arbitral award due to manifest disregard.<sup>111</sup> In this decision, the court stated that while *Hall Street* precludes parties from expanding grounds for vacatur, it does not disturb judicially-invoked manifest disregard as an independent ground.<sup>112</sup> The fact that parties are no longer allowed to contractually expand grounds for vacatur does not preclude judges from doing so during a proceeding. Through judicial action, rather than private contract, it can be reasoned that expanding these grounds can further important policy goals or prevent unfair arbitral results.<sup>113</sup>

## CONCLUSION

In deciding whether parties can contractually expand the grounds for vacatur of arbitral awards, *Hall Street* has opened a new set of questions. Chief among them is whether manifest disregard still stands as a valid or permissible mechanism of judicial review. However, the Court’s decision only addressed what private parties—and not judges—are enabled to do contractually to expand vacatur grounds. This supports a

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<sup>109</sup> See 119 YALE L.J. ONLINE at 5.

<sup>110</sup> 300 F. App’x 415, 415–16 (6th Cir. 2008), cert. denied 130 S. Ct. 81 (2009).

<sup>111</sup> See *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. App’x. 415 (6th Cir. Mich. 2008).

<sup>112</sup> See *id.* at 418–19 (explaining that it would be imprudent to cease to apply manifest disregard because the doctrine had been ‘universally recognized’ for a long time).

<sup>113</sup> The Court itself noted that “private expansion by contract” and “judicial expansion by interpretation” are analytically different. See *Hall St.*, 555 U.S. 576, 585.

belief that the Court did not intend to do away with manifest disregard altogether.

The survival of manifest disregard does not undermine the value and effectiveness of arbitration as a method for resolving disputes. While ensuring finality is paramount to restoring faith in the arbitral process, so is ensuring justice (or at least ensuring that there are means to prevent injustice). Manifest disregard is an important tool that allows judges some flexibility to protect the public interest and prevent unfair binding results. Manifest disregard also balances out the impossibly high standards for modification and vacatur of arbitral awards made available in the FAA. Some courts have continued to use this half-century old doctrine. It has proven to be an effective method for judges to exercise their ability to preserve fairness and further important policy goals. Because this country has maintained a national policy favoring arbitration, and because the grounds for vacatur and modification of arbitral awards are extremely narrow, the manifest disregard doctrine should survive *Hall Street*.