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# Much Ado About Nothing: The Future of Manifest Disregard After Hall Street

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# MUCH ADO ABOUT NOTHING: THE FUTURE OF MANIFEST DISREGARD AFTER *HALL STREET*

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## I. INTRODUCTION

Human errors can have significant effects. Take, for example, game two of the 2009 American League Division Series between the Minnesota Twins and

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the New York Yankees.[1] Umpire Phil Cuzzi called "a fly ball [hit] down the left-field line" as foul.[2] However, the ball hit off the fielder's glove, landed fair, and then "bounc[ed] into the stands for what should have been a ground-rule double."[3] The press labeled Cuzzi's call "[a] truly awful call that might have cost the Twins a victory on the road in their series with the Yankees."[4] Decisions such as this have fueled a debate regarding instant replay in Major League Baseball.[5]

While individuals press for expanded review on the baseball diamond in the major leagues,[6] the arbitration community also wrestles with the issue of expanded review. In particular the arbitration community struggles with whether the Federal Arbitration Act (FAA) contains exclusive standards of review or if nonstatutory standards remain viable after the Supreme Court's 2008 decision in *Hall Street Associates v. Mattel, Inc.*[7]

Section 10 of the FAA contains a list of bases on which a court can vacate an arbitrational award.[8] Lower courts have long stated but seldom have held that these bases are nonexclusive.[9] Courts have found that they may vacate an award on nonstatutory grounds in narrow circumstances, such as manifest disregard of the law.[10] In *Hall Street*, the Supreme Court created doubt as to whether nonstatutory standards are still applicable when it stated that the grounds for vacatur are "exclusive" to those stated in the FAA.[11] Some courts have interpreted this language to eliminate all nonstatutory grounds for vacatur.[12] In contrast, other courts have interpreted it merely to limit the use of nonstatutory grounds.[13] Thus, the circuit courts are split as to whether nonstatutory standards of review such as manifest disregard of the law survive the Supreme Court's decision in *Hall Street*.[14]

This Article argues that the FAA standards are not exclusive, and that while the standard of manifest disregard of the *law* survives, it should be replaced with

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1. Billy Witz, *Umpiring Stumbles to the Fore*, N.Y. TIMES, Oct. 21, 2009, at B17.
2. Christine Brennan, *Umpires' Postseason Errors Show MLB Needs Replay*, USA TODAY, Oct. 14, 2009, at 3C.
3. *Id.*
4. *Id.*
5. *See id.*
6. *Id.*
7. 128 S. Ct. 1396 (2008). For a full discussion of the effect of *Hall Street* on the arbitration community, see *infra* Parts III & IV.
8. 9 U.S.C. § 10(a) (2006).
9. *See* Richard C. Reuben, *Personal Autonomy and Vacatur After* Hall Street, 113 PENN. ST. L. REV. 1103, 1110 (2009). For a full discussion of nonstatutory bases used to vacate an arbitrational award, see *id.* at 1110–16.
10. *See, e.g.*, Coffee Beanery, Ltd., v. WW, L.L.C., 300 F. App'x 415, 419 (6th Cir. 2008) ("It is worth noting that since [1953], every federal appellate court has allowed for the vacatur of an award based on an arbitrator's manifest disregard of the law.").
11. *See Hall Street*, 128 S. Ct. at 1404. For a full discussion of *Hall Street*, see *infra* Part III.
12. *See infra* Part IV.A.
13. *See infra* Part IV.B.
14. *See infra* Part IV.

the standard of manifest disregard of the *agreement*. Under the doctrine of manifest disregard of the agreement, a court may vacate an arbitration award only if the award fails to "draw[] its essence" from the construction of the contract.[15] By contrast, under manifest disregard of the law, a court may base vacatur on an arbitrator's acknowledgment and disregard of a legal principle.[16] Part II.A will provide an overview of arbitration and of the standards of review established through the FAA and the judicially-created nonstatutory grounds for review. Part II.B will discuss the doctrine of manifest disregard of the *law*. Part II.C will discuss the doctrine of manifest disregard of the *agreement*. Part III will provide an overview of the United States Supreme Court decision in *Hall Street* regarding the doctrine of manifest disregard of the law and recent Supreme Court developments. Part IV will provide an overview of the circuit court split resulting after *Hall Street*. Part V.A will discuss whether manifest disregard of the law survives *Hall Street* and will present possible solutions to resolve the circuit split. Part V.B will propose an exchange of manifest disregard of the *law* for manifest disregard of the *agreement*.

## II. BACKGROUND

### *A. Overview of Arbitration*

Arbitration is a process, "governed by contract," in which the parties agree to submit disputes to an impartial third party for decision.[17] The resulting decision is deemed to be final and binding.[18] However, in the early years of arbitration, courts were not willing to compel arbitration.[19] Courts' unwillingness stemmed from two reasons: (1) their aversion to allowing unskilled parties to "oust the court of jurisdiction,"[20] and (2) their inability to guarantee a process that was "fair and equitable."[21] To combat courts' refusal to enforce arbitration agreements, Congress enacted the FAA in 1925.[22] The Supreme Court has since acknowledged that the purpose of this legislation was "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate."[23]

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15. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).
16. *See infra* Part IV.A.
17. KATHERINE V.W. STONE & RICHARD A. BALES, ARBITRATION LAW 15 (2d ed. 2010).
18. *See* 9 U.S.C. § 9 (2006).
19. STONE & BALES, *supra* note 17, at 22.
20. *Id.* at 22 (internal quotation marks omitted).
21. *Id.* at 23 (citing Tobey v. Cnty. of Bristol, 23 F. Cas. 1313 (D. Mass. 1845) (No. 14, 065)).
22. Reuben, *supra* note 9, at 1107.
23. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219–20 (1985); *see also* Jill Gross, Hall Street *Blues: The Uncertain Future of Manifest Disregard*, 37 SEC. REG. L.J. 232, 232 (2009) ("The scope of permissible judicial review of arbitration awards poses the fundamental policy

The FAA contains sixteen sections.[24] Section 2 establishes that any agreement to resolve disputes by arbitration arising out of transactions involving maritime or commerce "shall be valid, irrevocable, and enforceable" on the same basis as other contractual provisions.[25] This establishes that arbitration is enforceable. It also establishes that arbitration is a creature of contract law and that arbitrational provisions should be viewed in this light.[26] The other sections of the FAA address procedural matters, such as (1) compelling arbitration against an unwilling party,[27] (2) appointing arbitrators,[28] (3) calling and hearing witnesses,[29] and (4) issuing awards.[30] Section 9 specifically permits an arbitrator to issue an award that can be confirmed by court order.[31]

According to the FAA, a court "must" enforce an arbitration award "unless [it] is vacated, modified, or corrected as prescribed in [s]ections 10 and 11."[32] Sections 10 and 11 provide standards of review available to the judiciary for vacatur, modification, or correction of an arbitrational award.[33] The grounds for judicial review provided under §§ 10 and 11 are extremely narrow and limited.[34] While review is limited, it is still permitted, and it is vital to ensuring that contractual agreements of parties are honored.[35] Professor Michael LeRoy outlines thirteen different ways in which a court may vacate an arbitration award.[36] These methods fall into two general categories—statutory and nonstatutory.[37]

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question of whether and to what degree courts should intervene in the finality of the arbitration process to ensure its integrity.").

24. 9 U.S.C. §§ 1–16 (2006).

25. 9 U.S.C. § 2 (2006).

26. Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration,* 52 U. KAN. L. REV. 583, 584 (2004) (citing 9 U.S.C. §§ 1–16 (2000)).

27. 9 U.S.C. § 4 (2006).

28. *Id.* § 5.

29. *Id.* § 7.

30. *Id.* § 9.

31. *Id.*

32. *Id.*

33. *Id.* §§ 10–11.

34. STONE & BALES, *supra* note 17, at 22; *see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Clemente, 272 F. App'x 174, 176 (3d Cir. 2008) (quoting Metromedia Energy, Inc. v. Enserch Energy Servs., 409 F.3d 574, 578 (3d Cir.2005)).

35. *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985); Gross, *supra* note 23, at 233.

36. STONE & BALES, *supra* note 17, at 626–27 (quoting Michael H. LeRoy, *Do Courts Create Moral Hazard?: When Judges Nullify Employer Liability in Arbitrations*, 93 MINN. L. REV. 998, 1032 n.209 (2009)).

37. *See id.*

*1. Statutory Standards of Review*

FAA § 10(a) outlines the only four statutory grounds for vacating an arbitration award.[38] First, it allows a court to vacate an award "where the award was procured by corruption, fraud, or undue means."[39] Courts have used a three-part test to determine if they should vacate an arbitration award for fraud under this section.[40] They determine (1) if there is "clear and convincing evidence" of fraud,[41] (2) if due diligence would have resulted in the discovery of the fraud,[42] and (3) if the fraud is materially related to the issue arbitrated.[43]

Second, the FAA allows a court to vacate an award "where there was evident partiality or corruption in the arbitrators, or either of them."[44] To vacate an award on this ground, the party seeking vacatur must establish either that the arbitrator was biased for or against a particular party, or that extenuating circumstances gave rise to lack of impartiality.[45]

Third, the FAA allows a court to vacate an award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."[46] This provision permits a party to challenge the issuance of an arbitration award when the arbitrator denies a party's fundamental rights, such as a fair hearing, right to counsel, or issuance of a discovery request.[47] Courts have used language such as "grossly and totally blocked" to demonstrate the height of the standard that a party must reach to vacate an award based on prejudice.[48]

The final statutory ground for vacatur is "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[49] Courts are currently debating the definition and scope of this provision of the FAA, which this Article

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38. 9 U.S.C. § 10(a) (2006).

39. *Id.* § 10(a)(1).

40. *See, e.g.*, Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988); Coffee Beanery, Ltd. v. WW L.L.C., 501 F. Supp. 2d 955, 962 (E.D. Mich. 2007) (quoting Int'l Bd. of Teamsters, Local 519 v. United Parcel Ser., 335 F.3d 497, 503 (6th Cir. 2003)).

41. *Bonar*, 835 F.2d at 1383 (citing LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1339 (9th Cir. 1986); Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir. 1982)).

42. *Id.* (citing Karppinen v. Karl Kiefer Mach. Co., 187 F.2d 32, 35 (2d Cir. 1951)).

43. *Id.* (citing *Kaiser Cement*, 791 F.2d at 1339; *Dogherra*, 679 F.2d at 1297).

44. 9 U.S.C. § 10(a)(2) (2006).

45. *See* Reuben, *supra* note 9, at 1108.

46. 9 U.S.C. § 10(a)(3) (2006).

47. *See* Reuben, *supra* note 9, at 1109.

48. Cofinco, Inc. v. Bakrie & Bros., N.V., 395 F. Supp. 613, 615 (S.D.N.Y. 1975); *see also* Reuben, *supra* note 9, at 1109 (quoting Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089, 1094 (3d Cir. 1987); *Cofinco*, 395 F. Supp. at 615).

49. 9 U.S.C. § 10(a)(4) (2006).

will discuss in more detail in Part IV.[50] The focus of these standards is on the arbitration process and the arbitrator's impartiality rather than on the substantive merits of an award.[51]

### 2. *Nonstatutory Standards of Review*

Courts have recognized standards for review that are not set forth in the text of the FAA.[52] These judicially-created standards exist at common law, but their viability is currently under debate.[53] A few of the more notable standards include: (1) vacatur based on "violation of public policy,"[54] (2) vacatur based on "arbitrary and capricious" award,[55] and (3) vacatur based on an "irrational" award.[56] Although the majority of these standards are beyond the scope of this Article, the standard of public policy warrants a brief explanation.

Although courts historically have had the power to review an arbitration award if the award violated public policy,[57] they seldom use this power.[58] Courts have held that an award violated public policy if it required a party to violate an established law.[59] Additionally, courts have focused on the award's legality rather than its correctness,[60] and have refused to uphold an award that is illegal in application.[61] The analysis to vacate an award based on public policy is twofold: courts must first determine that a clear public policy exists and then assess if the award in question violates the policy.[62] This standard is high, and courts rarely vacate an arbitrational award on grounds of public policy.[63]

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50. *See infra* Part VI.

51. STONE & BALES, *supra* note 17, at 577–78.

52. Reuben, *supra* note 9, at 1110–16 (discussing several judicially-created standards and cases in which their application is evident); *see also* LeRoy *supra* note 36, at 1032 n.209 (discussing the various methods courts have used to vacate arbitration awards, including nonstatutory methods); Darren K. Sharp & Laurence R. Tucker, *Traversing Legal Labyrinths in Arbitration*, 66 J. MO. B. 24, 29 (2010) ("In addition to the statutory bases for vacating an arbitration award, many federal courts developed other reasons for vacating an arbitration award under common law.").

53. *See infra* Part IV.

54. Reuben, *supra* note 9, at 1113.

55. *Id.* at 1114.

56. *Id.* at 1115.

57. *See, e.g.*, United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987) (citing W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983); Hurd v. Hodge, 334 U.S. 24, 34–35 (1948)) ("A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.").

58. Reuben, *supra* note 9, at 1114.

59. *Misco*, 484 U.S. at 43 (quoting *W.R. Grace & Co.*, 461 U.S. at 766).

60. *See* Reuben, *supra* note 9, at 1114.

61. *See Misco*, 484 U.S. at 44 (quoting *W.R. Grace & Co.*, 461 U.S. at 766).

62. Reuben, *supra* note 9, at 1114; *see also Misco*, 484 U.S. at 43.

63. Reuben, *supra* note 9, at 1114.

### *B. Doctrine of Manifest Disregard of the Law*

The doctrine of manifest disregard of the law is also a judicially-created ground for courts to review and vacate an arbitration award.[64] Courts have generally defined the doctrine "as a refusal to apply a clearly defined legal principle known to the arbitrator to be controlling."[65] The standard of manifest disregard "means more than error or misunderstanding with respect to the law."[66] An arbitration award must meet a three-step analysis for a court to vacate it under the doctrine of manifest disregard of the law.[67] First, the court must determine if a law exists that clearly governs the dispute between the parties.[68] Second, the court must determine if the presiding arbitrator knew of the controlling law and improperly applied it.[69] Finally, the court must determine if the arbitrator consciously disregarded or ignored the applicable law.[70]

The doctrine of manifest disregard of the law first appeared in the Supreme Court's opinion in *Wilko v. Swan*.[71] The respondents, partners in a brokerage firm, moved to stay court proceedings and compel arbitration, and the district court denied the motion.[72] The Second Circuit reversed and ordered the parties to arbitration.[73] The Second Circuit concluded that the Securities Act of 1933 bound the arbitrator to decide the case in accordance with its provisions, and that failure to do so would be a viable ground for vacating an arbitration award.[74]

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64. *Id.* at 1110.

65. Jeffery W. Sarles, *US Courts Wrestle with "Manifest Disregard" After* Hall Street, MAYER BROWN (Aug. 10, 2009), http://www.mayerbrown.com/internationalarbitration/article.asp?id=7380&nid=235; *see also* Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 217 (2d Cir. 2002) ("A party seeking vacatur must therefore demonstrate that the arbitrator knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.").

66. COMM. ON ADR IN LABOR & EMP'T LAW, AM. BAR ASS'N, HOW ARBITRATION WORKS 34 (Alan Miles Ruben et al. eds., 6th ed. 2003) [hereinafter HOW ARBITRATION WORKS] (quoting Carte Blanche (Singapore) PTE., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 265 (2d Cir. 1989)).

67. Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d. 85, 93 (2d Cir. 2008).

68. *Id.* at 93 (quoting Duferco Int'l Steel Trading v. T. Klaveness Shipping, 333 F.3d 383, 389–90 (2d Cir. 2003)); *see also Westerbeke Corp.*, 304 F.3d at 211.

69. *Stolt-Nielsen*, 548 F.3d at 93 (quoting *Duferco*, 333 F.3d at 390); *see also Westerbeke Corp.*, 304 F.3d at 217.

70. HOW ARBITRATION WORKS, *supra* note 66, at 77 (quoting M & C Corp. v. Erwin Behr & Co., 87 F.3d 844, 851 n.3 (6th Cir. 1996)); *see also Stolt-Nielsen*, 548 F.3d at 93 ("[O]nce the first two inquiries are satisfied, we look to a subjective element, that is, the knowledge actually possessed by the arbitrators." (quoting *Duferco*, 333 F.3d at 390)); *Westerbeke Corp.*, 304 F.3d at 217 ("It is not enough that . . . the arbitrator was aware of the governing legal principle; there must also be a showing of intent.").

71. 346 U.S. 427, 435–38 (1953); *see also* Lucy Reed & Phillip Riblett, *Expansion of Defenses to Enforcement of International Arbitral Awards in U.S. Courts?*, 13 SW. J.L. & TRADE AMERICAS 121, 123 (2006) (discussing the *Wilko* decision).

72. Wilko v. Swan, 107 F. Supp. 75, 76, 79 (S.D.N.Y. 1952).

73. Wilko v. Swan, 201 F.2d 439, 445 (2d Cir. 1953).

74. *Id.* at 444–45.

The Supreme Court granted certiorari[75] and reversed,[76] stating that "[w]hile it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would 'constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act,' that failure would need to be made clearly to appear."[77] In dissent, Justice Frankfurter, joined by Justice Minton, stated, "Arbitrators may not disregard the law. . . . On this we are all agreed."[78] Some lower courts latched on to the *Wilko* language and adopted the doctrine of manifest disregard of law as a nonstatutory standard for review and vacatur, but other courts were reluctant.[79]

Widespread adoption of the doctrine did not occur until after the Court's decision in *First Options of Chicago, Inc. v. Kaplan*.[80] The dispute in *First Options* involved an agreement for debt repayment between a clearinghouse and an investment company.[81] The clearinghouse, First Options, compelled arbitration against the investment company and its owners, Manuel and Carol Kaplan, and the arbitrators ruled in favor of First Options.[82] The Kaplans contested the arbitration award in federal district court because they had never personally signed the document containing the arbitration clause.[83] The district court confirmed the award,[84] but the Third Circuit Court of Appeals reversed and ruled that the claim was not arbitrable.[85] The Supreme Court granted certiorari[86] and affirmed the Third Circuit's ruling.[87] The Supreme Court stated that "only in very unusual circumstances" will a court set aside an arbitrator's award.[88] The Court listed the narrow grounds upon which a court could vacate an award as (1)

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75. Wilko v. Swan, 345 U.S. 969 (1953).

76. *Wilko*, 346 U.S. at 438.

77. *Id.* at 436 (footnote omitted) (quoting *Wilko*, 201 F.2d at 445).

78. *Id.* at 440 (Frankfurter, J., dissenting).

79. *Compare* Patten v. Signator Ins. Agency, 441 F.3d 230, 231 (4th Cir. 2006) ("[T]he arbitrator's ruling constituted a manifest disregard of the law and was not drawn from the essence of the governing arbitration agreement. As a result, we vacate the district court's refusal to vacate the arbitration award . . . ."), *with* Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 354 (5th Cir. 2009) ("Indeed, manifest disregard of the law does not have a compelling origin as a ground for vacatur."). For a discussion of the divide among lower courts after *Wilko*, see Kevin Patrick Murphy, Note, *Alive but Not Well: Manifest Disregard After* Hall Street, 44 GA. L. REV. 285, 296–98 (2009).

80. 514 U.S. 938 (1995); *see also* Reuben, *supra* note 9, at 1110 ("*Wilko* was overruled on other grounds, but this particular dictum lives on, in part because it was cited approvingly in a 1995 Supreme Court case, *First Options of Chicago v. Kaplan*." (footnote omitted)); Murphy, *supra* note 79, at 297 ("By listing manifest disregard separately from the section 10 grounds, the Court [in *First Options*] gave scholars and lower courts reason to believe that it approved of the meaning some circuits had already given to the *Wilko* dicta.").

81. *First Options*, 514 U.S. at 940.

82. *Id.* at 940–41.

83. *Id.* at 941.

84. *Id.*

85. *Id.* (citing Kaplan v. First Options of Chi., Inc., 19 F.3d 1503, 1523 (1994)).

86. First Options of Chi., Inc., v. Kaplan, 513 U.S. 1040 (1994).

87. *First Options*, 514 U.S. at 941.

88. *Id.* at 942.

manifest disregard of the law and (2) § 10 of the FAA.[89] Thus, manifest disregard of the law became widely recognized as a standard for review of an arbitration award until the Supreme Court's decision in *Hall Street*.[90]

### C. *Manifest Disregard of the Agreement*

Manifest disregard of the agreement, a doctrine found in labor law, allows a court to vacate an award for failure to "draw[] its essence from the collective bargaining agreement."[91] This standard applies when an arbitrator "deliberately or recklessly disregard[s] indisputably controlling contract terms [and] issue[s] an award that is not even arguably derived from the contract."[92]

The phrase "draws its essence" originated in the Supreme Court's decision in *United Steelworkers v. Enterprise Wheel & Car Corp.*[93] Respondent Enterprise Wheel terminated a number of workers when they chose not to return to work in protest of the discharge of another employee.[94] The employees sought specific enforcement of a collective bargaining agreement's arbitration provisions in district court, and the court ordered arbitration.[95] The arbitrator found that the employees were improperly terminated and "awarded reinstatement with back pay."[96] When the district court enforced the arbitrator's award, the company appealed.[97] The Fourth Circuit Court of Appeals agreed with the lower court that it had jurisdiction to enforce the arbitration award;[98] however, it held that the arbitrator's finding of improper termination and award of back pay were unenforceable.[99] The Supreme Court granted certiorari to determine whether the arbitrator had exceeded his authority by awarding back pay and reinstatement.[100]

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89. *Id.* (citing 9 U.S.C. § 10 (1995); Wilko v. Swan, 346 U.S. 427, 436–37 (1953)).

90. Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396 (2008).

91. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960); *see also* HOW ARBITRATION WORKS, *supra* note 66, at 112 ("Beginning with its *Enterprise Wheel* decision, the Supreme Court limited the arbitrator's role in rights disputes to interpretation and application of the collective bargaining agreement." (footnote omitted) (citing *Enterprise Wheel*, 363 U.S. at 597)); Philip J. Loree, Jr., Hall Street *Meets Pearl Street:* Stolt-Nielson *and the Federal Arbitration Act's New Section 10(a)(4)*, LOREE REINSURANCE & ARB. L.F. para. 9 (May 29, 2009), http://loreelawfirm.com/blog/hall-street-meets-pearl-street-stolt-nielsen-and-the-federal-arbitration-act's-new-section-10a4 (discussing "manifest disregard of the agreement" as a ground for vacatur where the arbitration award did not meet the essence standard).

92. Loree, *supra* note 91, para. 3.

93. 363 U.S. at 597.

94. *Id.* at 595.

95. *Id.* at 594–95.

96. *Id.* at 595.

97. *Id.* (citing United Steelworkers v. Enter. Wheel & Car Corp., 168 F. Supp. 308, 313 (S.D.W.V. 1958)).

98. Enter. Wheel & Car Corp. v. United Steelworkers, 269 F.2d 327, 332 (4th Cir. 1959).

99. *See id.*

100. *See Enter. Wheel*, 363 U.S. at 596.

The Court refused to review the merits of the arbitration award.[101] Such review would only serve to undermine the finality of arbitration.[102] The Court held that the parties had "bargained for" the "arbitrator's construction" of the agreement;[103] therefore, as long as the award "concern[ed] construction of the contract, the courts [had] no business overruling [the arbitrator] because their interpretation of the contract [was] different from his."[104] Additionally, the Court held that an agreement between two parties binds the arbitrator to the interpretation and application of that agreement, and that an arbitrator is not empowered by the parties "to dispense his own brand of industrial justice."[105] While the arbitrator brings to the process an understanding and "knowledge of the custom and practices . . . of a particular industry,"[106] an "award is legitimate only so long as it draws its essence from the collective bargaining agreement."[107] Furthermore, "[w]hen the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."[108] Thus, the Supreme Court reversed the Fourth Circuit and found the arbitrator's award enforcable.[109]

Judicial review of labor arbitration cases is premised on § 301 of the Labor–Management Relations Act (LMRA).[110] While the LMRA is empty on its face regarding arbitration, the Supreme Court has fashioned § 301 into a general statute governing arbitration claims arising under collective bargaining disputes.[111] As such, although a difference source of authority than the FAA, it provides a comparison for arbitration under the FAA.[112]

Since *Enterprise Wheel*, other courts have also used the "draws its essence" test when determining whether to enforce or vacate an arbitration award under the doctrine of manifest disregard of the agreement.[113] In particular, the Third

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101. *Id.*

102. *Id.* at 596, 598–99 ("The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.").

103. *Id.* at 599.

104. *Id.*

105. *Id.* at 597.

106. *Id.* at 596.

107. *Id.* at 597.

108. *Id.*

109. *Id.* at 598–99.

110. 29 U.S.C. § 185(a) (2006) (allowing suits concerning violations of labor agreement contracts to be brought in United States district courts).

111. *See* Bales, *supra* note 26, at 590 (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455–57 (1957); Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 CATH. U. L. REV. 919, 922–23 (1998); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years,* 35 U. FLA. L. REV. 557, 583 (1983)).

112. *See* Edwin S. Hopson & Mitzi D. Wyrick, *The Impact (Influence) of the Federal Arbitration Act on Litigation over Arbitration*, 13 LAB. LAW. 359, 361 (1997) ("[C]ourts have interchangeably relied upon the FAA and § 301 of the LMRA.").

113. *See e.g.*, Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752, 989 F.2d 1077, 1082 (9th Cir. 1993) ("A remedy, however, must still draw its essence from, and is therefore limited by, the collective bargaining agreement."); Desert Palace, Inc. v. Local Joint Exec. Bd. of Las

Circuit has been instrumental in establishing the parameters of the doctrine of manifest disregard of the agreement. In *United States Steel & Carnegie Pension Fund v. McSkimming*,[114] the Third Circuit discussed the doctrine and stated, "If an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on the [contract], the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced."[115] The court determined that a party could successfully challenge an award only if it was "totally unsupported" by the parties' contract.[116] In another case, *Dauphin Precision Tool v. United Steelworkers*,[117] the Third Circuit said, "When parties to a [collective bargaining agreement] elect to have their disputes settled through arbitration, our review of a resulting arbitration decision is extraordinarily limited. . . . We do not review the merits of the decision or correct factual or legal errors."[118] Thus, it held that a court may vacate an arbitrator's award only if it fails to reflect the agreement between the parties.[119]

The doctrine of manifest disregard of the agreement recognizes that an arbitration award is not reviewable based on "errors of law."[120] The agreement is only reviewable based on the bargained-for terms of the agreement.[121] The arbitrator has authority to review only issues that fall within the scope of the terms negotiated by the parties.[122] Going beyond this scope results in arbitrators "exceed[ing] their power"[123] and provides a court with grounds to vacate the award under the provisions of § 301 of the LRMA.[124]

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Vegas, 679 F.2d 789, 791 (9th Cir. 1982) ("The scope of review of an arbitration award is limited to whether the award 'draws its essence from the collective bargaining agreement' . . . ." (quoting United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960))).

114. 759 F.2d 269 (3d Cir. 1985).

115. *McSkimming*, 759 F.2d at 271 (alteration in original) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974)) (internal quotation marks omitted). *See generally* Pedro J. Martinez-Fraga, *The Future of 28 U.S.C. § 1782: The Continued Advance of American-Style Discovery in International Commercial Arbitration*, 64 U. MIAMI L. REV. 89, 120–22 (2009) (discussing the Third Circuit's decision in *McSkimming*).

116. *McSkimming*, 759 F.2d at 270–71 (quoting Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969)) (internal quotation marks omitted).

117. 338 F. App'x 219 (3d Cir. 2009).

118. *Id.* at 222 (citing Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001); Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs, 357 F.3d 272, 279 (3d Cir. 2004)).

119. *See id.* (quoting Exxon Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287, 1291 (3d Cir. 1996)).

120. United Indus. Workers v. Gov't of V.I., 987 F.2d 162, 170 (3d Cir. 1993) (citing United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960)).

121. *See Major League Umpires Ass'n*, 357 F.3d at 279 (quoting Matteson v. Ryder Sys., Inc., 99 F.3d 108, 113 (3d Cir. 1996)).

122. *See id.* (quoting *Matteson*, 99 F.3d at 113).

123. 9 U.S.C. § 10(a)(4) (2006).

124. *See Major League Umpires Ass'n*, 357 F.3d at 279–80.

## III. *HALL STREET*

### *A. The Decision*

The Supreme Court's decision in *Hall Street Associates v. Mattel, Inc.*[125] has resulted in a circuit split among lower courts.[126] Because the Supreme Court addressed the doctrine of manifest disregard only in dicta and without clear direction on its future application,[127] lower courts have interpreted the decision differently.

In *Hall Street*, the Supreme Court held that §§ 10 and 11 of the FAA provide the exclusive grounds for vacatur.[128] The dispute in *Hall Street* resulted from a landlord–tenant relationship.[129] Mattel, the tenant, signed a multiyear lease agreement with Hall Street, the landlord, for manufacturing space;[130] as part of the lease, Mattel agreed that Hall Street would not be liable for any environmental violations or cleanup costs.[131] In 1998, an environmental inspection found chemical levels in the water that violated Department of Environmental Quality (DEQ) standards.[132] After these findings, Mattel terminated use of the polluted water well, "signed a consent order with the DEQ providing for cleanup of the site," and notified Hall Street that it was ending the lease agreement.[133]

Hall Street sued in the United States District Court for the District of Oregon to contest Mattel's termination of the lease agreement and to ensure that the lease protected Hall Street from the environmental cleanup cost.[134] The district court ruled in favor of Mattel regarding termination of the lease, but the parties proceeded to mediation over the indemnification issue.[135] The mediation failed, and as a result, the parties proposed arbitration.[136] The parties' agreement to arbitrate included a clause allowing the district court to "vacate, modify or correct any award: (i) where the arbitrator's findings of facts [were] not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law [were] erroneous."[137] The arbitrator found in favor of Mattel, and Hall Street filed a motion to vacate the award, which the court granted.[138] The district court reviewed the award based on the standard that the parties had agreed upon,

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125. 128 S. Ct. 1396 (2008).
126. *See infra* Part IV.
127. *See Hall St.*, 128 S. Ct. at 1404.
128. *Id.* at 1403.
129. *Id.* at 1400.
130. *See id.*
131. *See id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 1400–01.
138. *Id.* at 1401.

and vacated and remanded it for further consideration.[139] After another round of arbitration, orders by both parties to vacate the award, and the district court's decision to affirm the award, both parties appealed to the Ninth Circuit Court of Appeals.[140]

On appeal, Mattel argued that the contractual provision permitting judicial review of legal error was unenforceable.[141] The Ninth Circuit ruled for Mattel and found that the clause was unenforceable.[142] In its instructions to the district court on remand, the Ninth Circuit implied that the FAA provides the only mechanisms for vacatur.[143] On remand, the district court again refused to uphold the original findings of the arbitrator, Mattel appealed, and the court of appeals reversed.[144] Finally, the Supreme Court granted certiorari to determine whether the FAA provided exclusive grounds for vacatur and modification.[145]

The question before the Court was "whether statutory grounds for prompt vacatur and modification may be supplemented by contract."[146] At the time of the decision, the issue had divided lower courts.[147]

The Court, however, strayed from its analysis of the core issue and, in responding to an argument presented by Hall Street, addressed the doctrine of manifest disregard.[148] Hall Street suggested that the language in *Wilko v. Swan*[149] demonstrated that the grounds for vacatur were not exclusive.[150] The Supreme Court responded by explaining that neither the issue nor the holding in *Wilko* directly addressed expanded review; thus, the case was inapplicable to deciding the issue in *Hall Street*.[151] Rather than stopping the analysis at this

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139. *Id.*

140. *See id.*

141. *Id.* Specifically, Mattel argued that the Ninth Circuit's decision in *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc), overruled the court's previous decision in *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 888–90 (9th Cir. 1997), which had interpreted the FAA as permitting parties the freedom to contract, even in the area of judicial review. *See Hall St.*, 128 S. Ct. at 1401.

142. *Hall St.*, 128 S. Ct. at 1401 (quoting Hall St. Assocs. v. Mattel, Inc., 113 F. App'x 272, 272–73 (9th Cir. 2004)).

143. *Id.* (quoting *Hall St. Assocs.*, 113 F. App'x at 273).

144. *Hall St.*, 128 S. Ct. at 1401 n.1 (citing Hall St. Assocs. v. Mattel, Inc. 196 F. App'x 476, 477–78 (9th Cir. 2006)).

145. *Id.* at 1401 (citing Hall St. Assocs. v. Mattel, Inc., 550 U.S. 968 (2007)).

146. *Id.* at 1400.

147. *Id.* at 1403 n.5 (outlining the circuit split regarding contractual expansion of judicial review); *see also* Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1, 3 (2009), http://www.yalelawjournal.org/images/pdfs/817.pdf ("At the time [of *Hall Street*], there had been an unresolved circuit split regarding whether private parties were in fact entitled to alter the vacatur and modification grounds set forth in FAA sections 10 and 11, respectively.").

148. *See Hall St.*, 128 S. Ct. at 1404.

149. 346 U.S. 427, 436–37 (1953).

150. *Hall St.*, 128 S. Ct. at 1403.

151. *Id.* at 1403–04.

point, however, the Court went further into the decision of *Wilko* and the possible interpretations of the doctrine of manifest disregard.[152]

The Court offered three ways in which courts could view the doctrine of manifest disregard.[153] First, "[m]aybe the term 'manifest disregard' was meant to name a new ground for review . . . ."[154] Second, "maybe it merely referred to the § 10 grounds collectively, rather adding to them."[155] Finally, "'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4) . . . ."[156] Unfortunately, the Court did not adopt any of these views or reject the use of manifest disregard.[157] Instead, the Court left the doctrine just as it "found it."[158]

Additionally, the Supreme Court cited to its decision in *First Options* rather than to its decision in *Wilko*.[159] The *First Options* Court had specifically listed the doctrine of manifest disregard separately from standards provided in the FAA statute,[160] and the *Hall Street* Court stated:

> Hall Street overlooks the fact that the statement [from *Wilko* that] it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. . . . We, when speaking as a Court, have merely taken the *Wilko* language as we found it, . . . and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.[161]

The *Hall Street* Court was not concerned with judicially-created standards, but rather with private parties expanding the standards.[162] Hall Street argued that "if judges can add grounds to vacate (or modify), so can contracting parties[,]"[163] but according to the Court, this argument was quite a leap and "too much for *Wilko* to bear."[164] Thus, in the Court's opinion, allowing private parties to expand judicial review would in effect make arbitration "merely a prelude to a more cumbersome and time-consuming judicial review process."[165]

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152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *See id.*
158. *Id.*
159. *Id.* (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995)).
160. *See supra* notes 80–90 and accompanying text.
161. *Hall St.*, 128 S. Ct. at 1404 (citing *First Options*, 514 U.S. at 942).
162. *See id.* at 1403–04. In his article, Professor Aragaki argues, "The High Court's holding [in *Hall Street*] that the FAA's vacatur standards are 'exclusive' should be interpreted to mean only that such standards cannot be expanded by private contract." Aragaki, *supra* note 147, at 5.
163. *Hall St.*, 128 S. Ct. at 1403.
164. *Id.* at 1404.
165. *Id.* at 1405 (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003)) (internal quotation marks omitted).

Although the Court stated that the grounds for vacatur were exclusive,[166] it suggested three examples beyond § 10 of the FAA that could give parties access to the courts: (1) a court's authority to manage its case load under Federal Rule of Civil Procedure 16,[167] (2) a state statute, or (3) the common law.[168] Ultimately, however, the Court left these ideas hanging in dicta.[169]

The explicit holding of *Hall Street* was confined to the limited issue of whether private parties could contractually expand the judicial review of arbitration beyond the statutory grounds provided for by the FAA.[170] In *Coffee Beanery, Ltd. v. WW, L.L.C.*,[171] the Sixth Circuit described *Hall Street* as pertaining only to private parties.[172] Commentator Hiro N. Aragaki agrees with this assessment of the *Hall Street* decision and contends that

> [t]he clearest support for this argument is the Court's discussion of the circuit split that formed the basis of Hall Street's petition for certiorari. The Court described this split as a disagreement over whether FAA sections 10 and 11 "are exclusive . . . [or] mere threshold provisions open to expansion by agreement [of the parties]." . . .
>
> Significantly, these courts were *not* split on the question of whether the FAA precluded judge-made vacatur doctrines. Except the Seventh and Ninth Circuits, all of these circuits had recognized manifest disregard as a bona fide, common law vacatur standard. They were split—and understood themselves to be split—solely on the question of whether federal courts can be bound by private agreements to alter the FAA's standards for vacatur and modification. The Court's use of the term "exclusive" on the heels of this discussion must be understood in this light.[173]

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166. *Id.* at 1403.

167. *See id.* at 1407.

168. *Id.* at 1406.

169. *See id.* ("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. . . . [H]ere 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.").

170. *Id.* at 1400. *But cf.* Aragaki, *supra* note 147, at 5 ("[A]lmost all courts and commentators make one common assumption: *Hall Street*'s holding that the FAA grounds are 'exclusive' means that henceforth, courts may refer only to those grounds when vacating arbitral awards in cases governed by the FAA.").

171. 300 F. App'x 415 (6th Cir. 2008).

172. *Id.* at 418–19 ("The Court [in *Hall Street*] held that the FAA does not allow *private parties* to supplement by contract the FAA's statutory grounds for vacatur of an arbitration award.").

173. Aragaki, *supra* note 147, at 5–6 (alterations in original) (footnotes omitted) (quoting *Hall Street*, 128 S. Ct. at 1403).

The Supreme Court in *Hall Street* expressly stated, "We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."[174] While the Court's holding "significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in § 10,"[175] the holding applied the FAA as it relates to agreements among private parties.[176]

*B. Developments Post*-Hall Street.

Three significant events have occurred post-*Hall Street* that warrant a brief discussion. First, the dynamics of the Supreme Court have changed with the addition of Justice Sonia Sotomayor in August of 2009.[177] Justice Sotomayor's presence on the Court could sway its opinion in arbitration cases concerning applicable standards of review.[178] In the Second Circuit, Sotomayor drafted at least eight opinions relating to arbitration.[179] In *Westerbeke Corp. v. Daihatsu Motor Co.*,[180] writing for the court, Justice Sotomayor analyzed the possibility of vacating an arbitrational award on the basis of manifest disregard of contract.[181] In dicta, the court stated that courts could use manifest disregard to vacate an award that offended the express terms of a contract or severely departed from a contract in such a way that there was not even a "colorable justification" for the arbitrator's award.[182] This decision validated the standard of manifest disregard of the law and considered the viability of a different standard of review, manifest disregard of the agreement.[183] In the Second Circuit, Sotomoyor's opinions consistently demonstrated "respect for the finality of arbitration awards."[184] Therefore, she is likely to "continue to enforce the strong federal policy favoring arbitration"[185] by vacating arbitrational awards only in rare and extreme cases, such as manifest disregard of the agreement.

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174. *Hall St.*, 128 S. Ct. at 1403.

175. *Coffee Beanery, Ltd.*, 300 F. App'x at 418.

176. *Id.* at 418–19; *see also Hall St.*, 128 S. Ct. at 1403; Aragaki, *supra* note 147, at 5.

177. *See* Charlie Savage, *Sotomayor Sworn in as Supreme Court Justice*, N.Y. TIMES, Aug. 8, 2009, at A12.

178. *Cf.* Loree, *supra* note 91, at para. 10 (discussing an opinion written by Justice Sotomayor which did not decide "an open question in the Second Circuit whether 'manifest disregard of the agreement' was a ground for vacating an arbitral award" (citing Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 221–22 (2d Cir. 2002))). *But see* Jill Gross, *Judge Sotomayor and Arbitration Law*, ADR PROF BLOG para. 5 (May 28, 2009), http://www.indisputably.org/?p=287 ("[Sotomayor's] confirmation is not likely to alter the current landscape of arbitration law.").

179. Gross, *supra* note 23 at para. 1.

180. 304 F.3d 200 (2d Cir. 2002).

181. *Id.* at 220–23. For another perspective on Justice Sotomayor's *Westerbeke* opinion, see Loree, *supra* note 91, at paras. 10–13.

182. *Westerbeke*, 304 F.3d at 222.

183. *See* Loree, *supra* note 91, at para. 10–14.

184. Gross, *supra* note 23, at para. 4.

185. *Id.* at para. 5.

Second, in October 2009, the Supreme Court denied certiorari in three manifest disregard of the law cases[186]: *Coffee Beanery, Ltd. v. WW, L.L.C.*[187] and *Grain v. Trinity Health*,[188] both from the Sixth Circuit, and *Improv West Associates v. Comedy Club, Inc.*[189] from the Ninth Circuit. In all three cases, the party petitioning the Court for certiorari asked it to clarify the validity of the doctrine of manifest disregard,[190] but the Supreme Court declined.

The final significant event since *Hall Street* occurred when the Supreme Court issued its decision in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*[191] The issue before the Court was "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act."[192] The Second Circuit Court of Appeals had reversed the district court, holding that "[b]ecause the parties specifically agreed that the arbitration panel would decide whether the arbitration clauses permitted class arbitration, the arbitration panel did not exceed its authority in deciding that issue—irrespective of whether it decided the issue correctly."[193] The Second Circuit discussed the effects of the Supreme Court's decision in *Hall Street* regarding the doctrine of manifest disregard[194] and concluded that the doctrine was still a valid ground for vacatur.[195] In support of its conclusion, the Second Circuit cited to Justice Sotomayor's opinion in *Westerbeke*[196] and to the Seventh Circuit's decision in *Wise v. Wachovia Securities, LLC.*[197]

In *Stolt-Nielsen*, the Supreme Court did not directly address whether the doctrine of manifest disregard of the law continues to be a viable ground for vacatur post-*Hall Street*.[198] It did, however, discuss an arbitration panel's power and authority under the FAA,[199] which in turn provides insights as to the viability of the doctrine of manifest disregard of the law. The Court interpreted vacatur under § 10(a)(4), "on the ground that the arbitrator 'exceeded [his] powers,'"[200] to exist "only when [an] arbitrator strays from interpretation and

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186. Victoria VanBuren, *2009 Developments in Arbitration: Manifest Disregard of the Law*, DISPUTING (Dec. 24, 2009), http://www.karlbayer.com/blog/?p=6992.

187. 300 F. App'x 415 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 81 (2009).

188. 551 F.3d 374 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 96 (2009).

189. 553 F.3d 1277 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 145 (2009).

190. Petition for Writ of Certiorari at *i, *Comedy Club, Inc.*, No. 08-1525 (U.S. June 8, 2009), 2009 WL 1640367; Petition for Writ of Certiorari at *i, *Trinity Health*, No. 08-1446 (U.S. May 19, 2009), 2009 WL 1430034; Petition for Writ of Certiorari at *i, *Coffee Beanery, Ltd.*, No. 08-1396 (U.S. May 11, 2009), 2009 WL 1354410.

191. 130 S. Ct. 1758 (2010).

192. *Id.* at 1764 (citing 9 U.S.C. §§ 1–16 (2006)).

193. Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 101 (2d Cir. 2008).

194. *Id.* at 94–95 (citing Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1403–04 (2008)).

195. *Id.* at 95.

196. *Id.* (quoting Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 217 (2d Cir. 2002)).

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

198. *See* Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1768 n.3.

199. *See id.* at 1767 (quoting Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001)).

200. *Id.* (alteration in original).

application of the agreement and effectively 'dispense[s] his own brand of industrial justice' . . . ."[201] An arbitration agreement is entered into by consent of the parties; therefore, the Court's analysis focused on whether the parties had agreed to class arbitration.[202] The inquiry under § 10(a)(4) is "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue."[203] If the arbitrator did not confine the decision to the contract, then the arbitrator strayed from the contract, and thus exceeded his powers under §10(a)(4) of the FAA.[204] Because there was no agreement by the parties to consent to class action arbitration, the contract was silent.[205] Therefore, the Court found that the arbitration panel had exceeded its power.[206]

## IV. CIRCUIT SPLIT OVER MANIFEST DISREGARD OF THE LAW

The Court's unsettling language from *Hall Street* has resulted in a split among the circuit courts.[207] The major divide exists between those that consider the doctrine nullified and those that consider it still viable.[208] Within those circuits that consider the standard still viable, there is a split as to whether it survives as a statutory or nonstatutory ground for review and vacatur.[209] Part IV will survey the current status of manifest disregard by outlining the split among the circuit courts.

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201. *Id.* (alteration in original) (quoting *Major League Baseball Ass'n*, 532 U.S. at 509) (internal quotation marks omitted).

202. *See id.* at 1776 ("Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration.").

203. *Id.* at 1780 (Ginsburg, J., dissenting) (quoting DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 824 (2d Cir. 1997)) (internal quotation marks omitted).

204. *See id.* at 1776.

205. *Id.*

206. *See id.* at 1775 ("The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.").

207. *See, e.g.*, Aragaki, *supra* note 147, at 1 ("Just eighteen months after the U.S. Supreme Court's March 25, 2008 decision in the controversial case of *Hall Street Associates v. Mattel, Inc.*, three circuits are already in ripe disagreement as to whether *Hall Street* abrogates the half-century old, judicially-created doctrine of 'manifest disregard.'" (footnote omitted) (citing Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396 (2008))); Gross, *supra* note 23, at 233 ("In the short time since *Hall Street*, a new circuit split has emerged on the question of whether manifest disregard of the law survives *Hall Street* as a valid ground to vacate an award under the FAA."); Griffin Toronjo Pivateau, *Reconsidering Arbitration: Evaluating the Future of the Manifest Disregard Doctrine*, 21 S. L.J. (forthcoming 2011) ("Lower courts have been left to struggle with the aftermath [of *Hall Street*]."); Christopher Walsh, Stolt-Nielsen*'s Comfort for the 'Average Arbitrator': An Analysis of the Post-*Hall Street *'Manifest Disregard' Award Review Standard*, ALTERNATIVES TO HIGH COST LITIG., Feb. 2009, at 19, 20 ("Despite *Hall Street*'s apparent clarity, lower courts have disagreed concerning the continued viability of the manifest disregard standard of review.").

208. *See* Reuben, *supra* note 9, at 1145–46; Walsh, *supra* note 207, at 19.

209. *See infra* Part IV.B.

### *A. Manifest Disregard is Nullified*

The First and Fifth Circuits have rejected the doctrine of manifest disregard as a grounds for vacatur, holding that the grounds listed in the FAA are exclusive.[210]

In *Citigroup Global Markets, Inc. v. Bacon*,[211] the Fifth Circuit Court of Appeals held that "manifest disregard of the law as an independent, nonstatutory ground . . . must be abandoned and rejected."[212] The case involved a dispute between a bank, Citigroup, and an accountholder, Bacon, whose husband withdrew money from her account without her permission.[213] Bacon, seeking reimbursement from Citigroup for the total amount of the unauthorized withdrawals, submitted her claim to arbitration, and the arbitration panel ruled in her favor, granting damages and attorneys' fees of $256,000.[214] Citigroup moved to vacate the award, and the district court granted the motion.[215] The district court held that "the award was made in manifest disregard of the law."[216] In light of the Supreme Court's decision in *Hall Street*, the Fifth Circuit vacated the district court's decision and remanded the case.[217] On remand, the district court could only consider the exclusive provisions of § 10 of the FAA.[218]

In addition to the Fifth Circuit, the First Circuit in *Ramos-Santiago v. United Parcel Service*,[219] adopted the view that manifest disregard of the law was no longer available.[220] The court stated that *Hall Street* rendered the standard of manifest disregard no longer a valid ground for review, even though it resolved the case on other grounds.[221]

### *B. Manifest Disregard Remains Viable*

On the other hand, several circuits have concluded that manifest disregard of the law remains a viable standard of review after *Hall Street*.[222] These circuits

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210. *See* Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 354 (5th Cir. 2009); Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008) (citing *Hall St.*, 128 S. Ct. at 1401–04); Aragaki, *supra* note 147, at 3–4 ("There are currently two broad schools of thought on the issue. The first is that *Hall Street* spells the end of manifest disregard and, by implication, any other non-statutory vacatur ground." (footnote omitted)).

211. 562 F.3d 349 (5th Cir. 2009).

212. *Id.* at 358.

213. *Id.* at 350.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 358.

218. *Id.*

219. 524 F.3d 120 (1st Cir. 2008).

220. *Id.* at 124 n.3.

221. *Id.*

222. Reuben, *supra* note 9, at 1145–46.

are split, however, as to whether the standard of review is a statutory or nonstatutory standard.

*1. Nonstatutory View*

The Sixth Circuit, in its unpublished opinion, *Coffee Beanery, Ltd., v. WW, L.L.C.*,[223] has been alone in holding that manifest disregard still exists as a nonstatutory standard of review for vacatur.[224] The underlying dispute stemmed from a failed franchise agreement.[225] The shop owners petitioned the district court to vacate an arbitrational award, but the court denied the motion.[226] On appeal, the Sixth Circuit noted that *Hall Street* "significantly reduced," but "did not foreclose," the issue of whether federal courts could review an arbitrational award for manifest disregard of the law.[227] The Sixth Circuit also interpreted *Hall Street*'s holding to be confined to attempts by "*private parties*" to expand judicial review by contract.[228] The court reasoned that *Hall Street* did not directly abrogate manifest disregard, and because every circuit had previously recognized the standard, there was no reason to depart from its use as a nonstatutory ground for review.[229] Thus, the court reversed the judgment of the district court and vacated the arbitrator's award based on manifest disregard of the law.[230]

Since this initial decision, the Sixth Circuit has decided two additional cases using a slightly different rationale. The first of these was *Martin Marietta Materials, Inc. v. Bank of Oklahoma*,[231] which involved a disputed lease agreement.[232] The court stated that manifest disregard was questionable post-*Hall Street*;[233] it declined to address the issue, however, because the parties did not dispute it.[234] The second case was *Grain v. Trinity Health*,[235] which involved an arbitration between physicians and a former hospital employer.[236] The petitioners requested a modification of the arbitral award rather than vacatur;[237] thus, the Sixth Circuit found that the doctrine of manifest disregard was not

223. 300 F. App'x 415 (6th Cir. 2008).
224. *See id.* at 419; Pivateau, *supra* note 207, at 2 (citing Hall St. Assocs. v. Mattel, Inc. 128 S. Ct. 1396, 1404 (2008)).
225. *Coffee Beanery, Ltd.*, 300 F. App'x at 416.
226. *Id.* at 417–18 (citing Coffee Beanery, Ltd. v. WW L.L.C., 501 F. Supp. 2d 955, 964 (E.D. Mich. 2007)).
227. *Id.*
228. *Id.* at 418–19 (citing *Hall St.*, 128 S. Ct. at 1400).
229. *Id.* at 419.
230. *Id.* at 420–21.
231. 304 F. App'x 360 (6th Cir. 2008).
232. *Id.* at 361.
233. *Id.* at 362 (quoting *Hall St.*, 128 S. Ct. at 1404).
234. *Id.* at 362–63.
235. 551 F.3d 374 (6th Cir. 2008).
236. *Id.* at 376.
237. *Id.* at 377–78.

applicable.[238] However, the court acknowledged in dicta that manifest disregard may "supplement . . . the enumerated forms of FAA relief."[239] Consistent with the *Coffee Beanery* decision, at least one district court in the Sixth Circuit has continued to state that manifest disregard of the law remains a valid nonstatutory ground for vacatur.[240]

*2. Statutory View*

Even prior to the decision in *Hall Street*, the Seventh Circuit Court of Appeals adopted "a more expansive reading of § 10(a)(4)"[241] by holding that manifest disregard "fits comfortably under the first clause of the fourth statutory ground."[242] The Seventh Circuit is the only circuit that did not view manifest disregard as a nonstatutory ground for review prior to *Hall Street*.[243] Judge Posner demonstrated a unique view of the court's role in reviewing arbitrational awards, which he outlined best in *Wise v. Wachovia Securities, LLC*:

> It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, . . . conduct to which the parties did not consent when they included an arbitration clause in their contract . . . . [T]he issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract's arbitration clause.[244]

In Judge Posner's view, arbitrators' authority stems from the contract; thus, arbitrators must confine their decisions to the scope of the contract.[245] If arbitrators stray from the contract, then they have exceeded their authority and violated the agreement between the parties.[246]

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238. *Id.* at 380.

239. *Id.*

240. *See* Ozormoor v. T-Mobile USA, Inc., No. 08-11717, 2010 WL 3272620, at *2 (E.D. Mich. Aug. 19, 2010) (citing Jacada Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 712 (6th Cir. 2005)).

241. *See* Loree, *supra* note 91, at para. 6 (quoting Wise v. Wachovia Sec., LLC, 450 F.3d 265, 269 (7th Cir. 2006)).

242. *Wise*, 450 F.3d at 268.

243. *See* Aragaki, *supra* note 147, at 4 n.25.

244. *Wise*, 450 F.3d at 269 (citations omitted) (citing Baravati v. Joshephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994)).

245. *See id.*

246. *See id.*

The Second Circuit, in the case of *Stolt-Nielsen SA v. AnimalFeeds International Corp.*,[247] adopted a view of manifest disregard of the law similar to that of Judge Posner's.[248] The case involved a class action dispute regarding violations of antitrust laws.[249] Stolt-Nielsen moved to vacate an arbitration award,[250] and the court granted the motion, stating that the "award was made in manifest disregard of the law."[251] On appeal, the Second Circuit considered the standard of manifest disregard of the law and viewed the doctrine "as a mechanism to enforce the parties' agreements to arbitrate rather than as judicial review of the arbitrators' decision."[252] The court stated that one could consider manifest disregard to be a "judicial gloss" on § 10(a)(4).[253] The court recognized the power to vacate an award based on manifest disregard of the law under the rare circumstance where an arbitrator is aware of clear controlling law, understands the law to affect the outcome of the dispute, and then intentionally chooses to ignore the law.[254] This amounts to the arbitrators' "fail[ure] to interpret the contract at all,"[255] and, in effect, means they have 'exceeded their powers . . . .'"[256] *Stolt* perhaps not only preserved manifest disregard of the law, but also gave life to manifest disregard of the agreement.[257]

Since the decision in *Stolt*, the Second Circuit has reviewed at least three additional cases regarding manifest disregard of the law. The most recently decided case, *T.Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*,[258] involved arbitration in the context of a commercial dispute over sales contracts.[259] The court concluded that although manifest disregard was still a valid ground on which to vacate,[260] it was inapplicable in that case.[261] Earlier in *E.E. Cruz, NAB*

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247. 548 F.3d 85 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010); *see supra* notes 191–206.

248. *See id.* at 94.

249. *Id.* at 87.

250. *Id.* at 90.

251. *Id.* (citing Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 435 F. Supp. 2d 382, 387 (S.D.N.Y. 2006)).

252. *Id.* at 95.

253. *Id.* at 94.

254. *Id.* at 95 (quoting Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 217 (2d Cir. 2002)).

255. *Id.* at 95 (quoting Wise v. Wachovia Sec., LLC, 450 F.3d 265, 269 (7th Cir. 2006)) (internal quotation marks omitted).

256. *Id.* (quoting 9 U.S.C. § 10(a)(4) (2006)).

257. *See* Loree, *supra* note 91, at para. 14; *supra* notes 192–96 and accompanying text.

258. 592 F.3d 329 (2d Cir. 2010).

259. *Id.* at 334–37.

260. *Id.* at 340 (quoting *Stolt-Nielsen*, 548 F.3d at 94–95).

261. *Id.* ("Even if the Court were to address and confirm our interpretation of the manifest disregard doctrine, . . . such a decision would provide no solace to T.Co. We agree with the district court that '[e]ven if "manifest disregard of the law" [is] still a viable theory, it would be inapplicable here . . . .'" (quoting T.Co. Metals LLC v. Dempsey Pipe & Supply, Inc., No. 07-civ-7747, 2008 U.S. Dist. LEXIS 112087, at *10 (S.D.N.Y. July 8, 2008))).

*v. Coastal Caisson, Corp.*,[262] the court cited to *Stolt* as judicial precedent in the context of a dispute regarding a construction subcontract.[263] The court expressly stated, "In light of intervening precedent, it has become clear that the district court erred in vacating the first award for 'manifest disregard' of New York law."[264] Another case where the Second Circuit Court of Appeals cited to *Stolt* as precedent was *Telenor Mobile Communications v. Storm LLC*.[265] There, the court noted that "[f]ederal courts with jurisdiction to enforce an arbitral award may also consider whether the award was in 'manifest disregard' of the law."[266]

The Ninth Circuit has followed a similar approach to that of the Seventh and Second Circuits. In *Comedy Club, Inc. v. Improv West Associates*,[267] the court found that manifest disregard of the law was "shorthand" for § 10(a)(4).[268] The case involved a dispute regarding a trademark license infringement and agreement.[269] The Ninth Circuit held that the award was in manifest disregard of the law and that the arbitrator had exceeded the scope of his authority under § 10(a)(4).[270] In addition, *United States Life Insurance Co. v. Superior National Insurance Co.*[271] perpetuated this view by finding that the doctrine of manifest disregard fits under § 10(a)(4) of the FAA.[272]

### *C. Other Responses to Manifest Disregard of the Law*

Two circuits have sidestepped manifest disregard and two circuits have not yet addressed the issue of whether manifest disregard remains a viable ground for review after *Hall Street*. The Fourth and Tenth Circuits have acknowledged the quagmire of manifest disregard and have chosen to decide cases presenting the issue on different grounds, thus addressing manifest disregard only in dicta or footnotes.[273] The Eleventh and D.C. Circuits have yet to decide this issue.

In *Raymond James Financial Services, Inc. v. Bishop*,[274] a recent opinion from the Fourth Circuit, the court recognized the "uncertainty" surrounding the Supreme Court's decision in *Hall Street*.[275] However, the court found it

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262. 346 F. App'x 717 (2d Cir. 2009).
263. *Id.* at 718–19.
264. *Id.* at 719 (citation omitted) (quoting *Stolt-Nielsen*, 548 F.3d at 95).
265. 584 F.3d 396 (2d Cir. 2009).
266. *Id.* at 407.
267. 553 F.3d 1277 (9th Cir. 2009).
268. *Id.* at 1290 (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 997 (9th Cir. 2003) (en banc)).
269. *Id.* at 1280–81.
270. *See id.* at 1288.
271. 591 F.3d 1167 (9th Cir. 2010).
272. *See id.* at 1177 (quoting 9 U.S.C. § 10(a)(4) (2006); Schoenduve Corp. v. Lucent Techs., Inc., 442 F.3d 727, 731 (9th Cir. 2006)).
273. *See* Raymond James Fin. Servs., Inc. v. Bishop, 596 F.3d 183, 193 n.13 (4th Cir. 2010); Hicks v. Cadle Co., 355 F. App'x 186, 197 (10th Cir. 2009).
274. 596 F.3d 183 (4th Cir. 2010).
275. *Id.* at 193 n.13.

"unnecessary to consider the effect of *Hall Street*" because it could vacate the award under § 10(a)(4).[276]

In three cases, litigants have presented the Tenth Circuit with the issue of whether manifest disregard remains a viable source of review post-*Hall Street*.[277] Each time the court has decided the case on grounds other than manifest disregard of the law.[278] Prior to *Hall Street*, the Tenth Circuit recognized nonstatutory standards of review.[279] However, in *Hicks v. Cadle Co.*,[280] the court stated that "the FAA 'compels a reading' that the statute sets forth exclusive grounds for review."[281] This language indicates that the Tenth Circuit will no longer recognize manifest disregard as an independent, nonstatutory standard of review.[282]

The Eleventh and D.C. Circuits have yet to address or be presented with the issue of manifest disregard post-*Hall Street*. Therefore, it is unclear which of the various positions these two circuits will take.

## V. ANALYSIS

Circuit courts are split as to whether manifest disregard of the law survives the Supreme Court's decision in *Hall Street*.[283] The doctrine of manifest disregard of the law is thus not uniformly applied across arbitration cases, which results in inequitable availability of standards of review. A party's ability to appeal arbitrational awards depends on which circuit has jurisdiction and which standard of review that circuit applies. This Article argues first, that manifest disregard of the law survives *Hall Street*,[284] and second, that even though the doctrine survives, the standard is unworkable and should be replaced by the new standard of manifest disregard of the agreement.[285]

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276. *Id.*

277. *See* Legacy Trading Co. v. Hoffman, 363 F. App'x 633, 635–36 (10th Cir. 2010) (quoting Hollern v. Wachovia Sec., Inc. 458 F.3d 1169, 1176 (10th Cir. 2006)); *Hicks*, 355 F. App'x at 197; DMA Int'l, Inc. v. Qwest Commc'ns Int'l, Inc., 585 F.3d 1341, 1344 n.2 (10th Cir. 2009).

278. *See Hoffman*, 363 F. App'x at 636; *Hicks*, 355 F. App'x at 197; *Qwest*, 585 F.3d at 1344 n.2.

279. *See, e.g.*, Lewis v. Circuit City Stores, Inc., 500 F.3d 1140, 1150 (10th Cir. 2007) ("[A] court may grant a motion to vacate an arbitration award only in the limited circumstances provided in § 10 of the FAA, or in accordance with a few judicially created exceptions." (quoting Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001) (internal quotation marks omitted)); Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001) ("We have also recognized [in addition to § 10 of the FAA] 'a handful of judicially created reasons' that a district may rely upon to vacate an arbitration award, and these include violations of public policy, manifest disregard of the law, and denial of a fundamentally fair hearing." (quoting Denver & Rio Grande W. R.R. v. Union Pac. R.R., 119 F.3d 847, 849 (10th Cir. 1997))).

280. 355 F. App'x 186 (10th Cir. 2009).

281. *Id.* at 196 (quoting Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1404 (2008)).

282. *See id.*

283. *See supra* Part IV.

284. *See infra* Part V.A.

285. *See infra* Part V.B.

### *A. Manifest Disregard of the Law Survives* Hall Street

The first proposition that this Article argues is that manifest disregard survives *Hall Street*. There are five reasons to support this interpretation of the Supreme Court's decision. First, the holding in *Hall Street* applies only to private-party expansion of judicial review. Second, manifest disregard surfaces in the Court's opinion only as a response to Hall Street's argument regarding *Wilko*. Third, the Court did not expressly eliminate manifest disregard. Fourth, the Court opened up additional avenues of review to parties seeking judicial review. Finally, the Court's use of the term "exclusive" must be read in the context of the its holding to avoid unintended consequences.

First, the holding in *Hall Street* applies only to private-party expansion of judicial review.[286] As originally suggested in *Coffee Beanery, Ltd. v. WW, L.L.C.*,[287] and further developed by Hiro Aragaki,[288] the Court in *Hall Street* was concerned with expansion of judicial review by *private parties*. The issue presented to the Court was whether the standards in the FAA for vacatur and modification "may be supplemented by contract."[289] The concern was with expansion through contract and not with expansion by the judiciary. The Court in *Hall Street* stated that it was a "leap from a supposed judicial expansion by interpretation to a private expansion by contract."[290]

One of the original barriers to enforcement of arbitration awards was courts' aversion to allowing unskilled parties to "oust the court."[291] The *Hall Street* Court was protecting courts against ouster by parties' private contracts. Allowing parties to control by contract what has been left to the courts by statute would undermine the key goals of arbitration—finality and efficiency.[292] Arbitration would become nothing more than a mere prelude to more complex litigation rather than a process of forum selection in which parties can opt out of litigation.[293] The proper conclusion based on the holding in *Hall Street* is that the Court was concerned with *private-party* expansion and not with the established standard of review of arbitration awards.

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286. *See supra* Part III.A.

287. 300 F. App'x 415, 418–19 (6th Cir. 2008) ("The Court [in *Hall Street*] held that the FAA does now allow *private parties* to supplement by contract the FAA's statutory grounds for vacatur of an arbitration award." (citing *Hall St.*, 128 S. Ct. at 1400)).

288. For example, Aragaki suggests that the Court limited *Hall Street* to private parties based on the Court's discussion of the circuit split regarding manifest disregard. *See* Aragaki, *supra* note 147, at 5. Specifically, he references the fact that the Court emphasized that the split is based on whether or not the circuit allows parties to contract for expanded judicial review of arbitration awards. *See id.* at 6 (quoting *Hall St.*, 128 S. Ct. at 1403 & n.5).

289. *Hall St.*, 128 S. Ct. at 1400.

290. *Id.* at 1404.

291. *See supra* notes 19–23 and accompanying text.

292. *See Hall St.*, 128 S. Ct. at 1405 (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003)).

293. *See id.*

Second, manifest disregard surfaced in the Court's opinion only as a response to Hall Street's argument that the *Wilko* holding demonstrated that the FAA grounds are not exclusive.[294] The Court responded by stating that Hall Street's attempt to jump from nonstatutory judicially-created standards to an expansion by contracting parties was "too much for *Wilko* to bear."[295] When responding to Hall Street's argument in defense of the doctrine of manifest disregard of the law, the Court cited to *First Options of Chicago, Inc. v. Kaplan* rather than *Wilko*.[296] The Court in *First Options* listed the doctrine of manifest disregard of the law separately from the statutory grounds enunciated in the FAA.[297] The Court admonished the use of manifest disregard of the law as justification for expansion of the statutory grounds by private parties, but did not advocate elimination of the standard.[298]

Third, the Court did not expressly eliminate manifest disregard. While the Court speculated on the proper interpretation of the doctrine of manifest disregard of the law, it did not overrule or abolish its use.[299] The Court decided to leave the doctrine of manifest disregard "as [it] found it, without embellishment . . . ."[300] Thus, the Court indicated that the doctrine of manifest disregard of the law should be applied as it was prior to *Hall Street*.

Fourth, the Court in *Hall Street* noted additional avenues of review available to parties.[301] If the Court intended to limit standards of review only to the four enumerated in the statute, then it should not have addressed the other means of judicial review. The Court stated that its holding did not "exclude more searching review based on authority outside the statute . . . ."[302] The Court suggested that lower courts could use the Federal Rules of Civil Procedure as a method for review in cases such as *Hall Street* where the lower court had ordered arbitration.[303] The Court also suggested that the avenues of state statute or common law were available.[304] These are doors that the Court willingly opened to parties seeking judicial review. The Court's suggestion thus confirms that grounds for review beyond the FAA still remain viable.

Finally, the term "exclusive" should be read in context of the Court's holding to avoid unintended consequences. In *Hall Street*, the Court held that the grounds for vacatur are "exclusive" to § 10(a).[305] The Court used the term "exclusive" in the context of private-party contractual expansion of judicial

294. *Id.* at 1403.
295. *Id.* at 1404.
296. *Id.*
297. *See supra* notes 80–90 and accompanying text.
298. *See Hall St.*, 128 S. Ct. at 1404.
299. *See Hall St.*, 128 S. Ct. at 1404.
300. *Id.*
301. *See id.* at 1406.
302. *Id.* at 1403.
303. *See id.* at 1407.
304. *See id.* at 1406.
305. *Id.*

review. The Court addressed the circuit split regarding whether the FAA standards were exclusive or "open to expansion by agreement,"[306] and determined that the standards are exclusive and, as such, are not open to expansion by contracting parties. In that context, the term "exclusive" is appropriate and does not warrant the elimination of the standard of manifest disregard of the law.

However, some have interpreted the "exclusive" language broadly and well beyond the Court's usage by stating that the Court intended to eliminate all nonstatutory grounds for review.[307] If one gave the language the broad interpretation, then "exclusive" would mean complete elimination of all nonstatutory standards of review. This elimination would include such nonstatutory grounds based on "arbitrary and capricious" and "irrationality."[308] This interpretation would ultimately work against the courts.

For example, the use of public policy as a means to vacate an award requires a party to perform an illegal act.[309] If the Court eliminated this ground, then courts would face the dilemma of enforcing an illegal award.[310] Richard Reuben suggests that public policy might be the only nonstatutory ground to survive *Hall Street.*[311] This argument in itself defeats the view of broad interpretation of the "exclusive" language. If one nonstatutory standard survives, then the Court's decision by definition is not "exclusive." It is illogical to "cherry pick" the grounds that should survive post-*Hall Street.* One should read the Court's decision as "exclusive" in a particular context (the context of private parties contracting for expanded review standards) rather than as a complete bar.

### *B. Exchange the "Law" for the "Agreement"*

The second proposition this Article argues is that the Supreme Court should resolve the circuit court split by eliminating the standard of manifest disregard of the *law* and replacing it with the standard of manifest disregard of the *agreement.* This section will discuss: (1) why courts should utilize manifest disregard of the agreement, (2) how courts should apply the standard of manifest disregard of the agreement, and (3) the policies that favor the establishment of a new standard.

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306. *Hall St.*, 128 S. Ct. at 1403.

307. *See* Aragaki, *supra* note 147, at 5; Reuben, *supra* note 9, at 1162.

308. Reuben, *supra* note 9, at 1162.

309. *See supra* notes 57–63 and accompanying text.

310. *See* Reuben, *supra* note 9, at 1142 (citing RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981); J. Calamari & J. Perillo, The Law of Contracts 781 (2d ed. 1977); E. ALLAN FARNSWORTH, CONTRACTS § 5.2 (1982)).

311. *See id.* at 1162.

*1. Definition*

Manifest disregard of the agreement stems from labor law.[312] Failure by an arbitrator to issue an award that "draws it[s] essence" from the contract[313] or "to interpret the contract at all" is manifest disregard of the agreement.[314] Manifest disregard of the agreement fits comfortably within the statutory provisions of § 10 of the FAA. It fits under this doctrine because the arbitrator's power centers around the contract, which is the bargained-for agreement between the parties. When an arbitrator's award is beyond the contemplated agreement of the parties, the arbitrator has exceeded the power given to him by the parties and the award is unenforceable. *Stolt-Nielsen* stated that in these circumstances, arbitrators had "'exceeded their powers, or so imperfectly executed them'" by "'fail[ing] to interpret the contract at all.'"[315] Arbitration is a choice made voluntarily by the parties where they opt out of the court system.[316] Standards of vacatur should reflect this agreement between the parties and the value of finality central to arbitration. Manifest disregard of the agreement, unlike manifest disregard of the law, honors the contract between the parties while complying with the statutory construction of the FAA, thus upholding the value of finality. Therefore, the Supreme Court should look to cases under the LMRA to resolve the current circuit split and apply manifest disregard of the agreement to cases under the FAA.

*2. Application*

Courts should apply the standard of manifest disregard of the agreement using the following framework. One can break down manifest disregard of the agreement into three elements: (1) an arbitrator's authority—which is derived from and limited by the contract—creates a contractual duty to the parties;[317] (2) an arbitrator breaches his or her contractual duty by "fail[ing] to interpret the contract at all";[318] and (3) an arbitrator's award that breaches this duty shall be vacated under § 10(a)(4) of the FAA.[319] These elements provide a step-by-step

312. *See* HOW ARBITRATION WORKS, *supra* note 66, at 112 (quoting United Steelworkers v. Enter. Wheel & Car Corp., 396 U.S. 593, 597 (1960)). For a full discussion of manifest disregard of the agreement, see *supra* Part II.C.

313. *See id.* (quoting *Enter. Wheel*, 396 U.S. at 597).

314. Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 95 (2nd Cir. 2008) (quoting Wise v. Wachovia Sec., LLC, 450 F.3d 265, 269 (7th Cir. 2006)).

315. *Stolt-Nielsen*, 548 F.3d. at 95 (quoting 9 U.S.C. § 10(a)(4) (2006); *Wise*, 450 F.3d at 269).

316. *See* STONE & BALES, *supra* note 17, at 15.

317. *See* HOW ARBITRATION WORKS, *supra* note 66, at 113 (quoting Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 744 (1981)).

318. *Stolt-Nielsen*, 548 F.3d at 95 (quoting *Wise*, 450 F.3d at 269).

319. *Id.* (quoting 9 U.S.C. § 10(a)(4) (2006)).

analysis that courts should apply to determine if an award should be vacated based on manifest disregard of the agreement.

In step one, the courts should consider the contract between the parties. The contract establishes and limits the arbitrator's authority, which in turn creates a contractual duty owed to the parties. The courts should evaluate the bargained-for agreement between the parties following applicable standards of contract interpretation. Because an arbitrator's authority stems from the arbitration clause within the contract, his or her authority to resolve a dispute is directly linked to the contract. This direct link establishes the contractual duty owed by the arbitrator to the parties, and the contractual agreement of the parties binds the arbitrator. When an arbitrator abandons the contractual agreement between the parties, the arbitrator loses his or her basis of decisional power.[320] Therefore, the courts should first consider the contract, which defines and limits the arbitrator's authority and creates the contractual duty owed to the parties.

In step two, courts should determine if the arbitrator has breached the contractual duty owed to the parties. To make this determination, courts should compare the arbitration award against the interpretation of the contract and decide if the arbitrator's award derives from or "draws its essence" from the contract.[321] When the parties enter into a contract, they have reasonable expectations that stem from that contract.[322] If the arbitrator fails to interpret the contract, then the arbitrator moved beyond the scope of the contract, thus defying the reasonable expectations of the parties. If the arbitrational award is beyond the scope of the contract, then the arbitrator has breached his or her contractual responsibility to the parties. An arbitrator's job is to "interpret the contract."[323]

In step three, courts should consider the appropriate remedy. As long as there is at least a "colorable justification" for the arbitrator's decision, "the award must stand."[324] If, however, courts find that the arbitrator has breached the contractual responsibility to the parties by failing to interpret the contract, then courts should vacate the arbitrational award pursuant to the "exceeding power" clause of § 10(a)(4) of the FAA.[325]

The doctrine of manifest disregard of the agreement is a "mechanism" by which courts can protect parties when arbitrators exceed their powers.[326] Arbitrators' authority is based in the contract, and when arbitrators ignore the

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320. *See Stolt-Nielsen*, 548 F.3d at 95 (quoting *Wise*, 450 F.3d at 269).

321. For a full discussion of the "essence" test, see *supra* Part II.C.

322. Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 142 (2008) ("It has been well stated that the main underlying purpose of the law of contracts is the realization of reasonable expectations that have been induced by the making of a promise.").

323. *See supra* notes 119–24, 200–06 and accompanying text.

324. Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 222 (2d Cir. 2002).

325. *See* Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d. 85, 95 (2d Cir. 2008) (quoting 9 U.S.C. § 10(a)(4) (2006); Wise v. Wachovia Sec., LLC, 450 F.3d 265, 269 (7th Cir. 2006)).

326. *Stolt-Nielsen*, 548 F.3d at 95.

contract between the parties, they have exceeded their powers. Thus, when an arbitrator manifestly disregards the agreement of the parties, courts should vacate the award under § 10(a)(4) of the FAA.

*3. Policy Support*

There are three policy reasons to favor the establishment of the new standard of manifest disregard of the agreement. First, arbitration is a creature of contract law. Second, manifest disregard of the agreement supports the national policy favoring arbitration. Third, this new standard reconciles the Supreme Court's cases under the FAA with the Court's LMRA § 301 labor arbitration cases.

First, arbitration is a creature of contract law. The opinion of the Seventh Circuit—written by Judge Posner—in *Wise* provides a framework for this view.[327] Judge Posner asserts that the judiciary does not review an arbitration award for correctness, but rather for whether the parties upheld the agreement.[328] When parties choose arbitration, "they opt out of the court system" through an arbitration clause,[329] which is a contractual agreement between the parties.[330] This agreement contains terms and conditions, which the parties have agreed upon,[331] and these terms and conditions will control the relationship between the parties.[332] When an arbitrator resolves a dispute by violating the express agreed-upon terms of the parties, the arbitrator has manifestly disregarded the agreement, and thus violated the basic underlying assumption of the parties. As such, the parties will have been robbed of the benefit they reasonably expected to receive when they entered into the contract. When acting outside the scope of the contract, arbitrators have stepped beyond the authority given to them by the contract.

If arbitrators were free to make decisions outside the scope of the contract, then arbitration would become an unstable means of dispute resolution. Parties would have little assurance that arbitrators would recognize sound legal principles or controlling industry standards. Such a situation could be akin to Russian roulette, with parties never knowing what the end result would be.

Second, manifest disregard of the agreement supports the national policy favoring arbitration.[333] Arbitration awards are to be final and binding, and thus

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

328. *See id.*

329. *Id.*

330. *See id.*

331. *See* RESTATEMENT (SECOND) OF CONTRACTS § 5 (1981).

332. *See id.* § 1.

333. For example, the Court in *Hall Street* stated the following: "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'" Hall St. Assocs.v. Mattel, Inc., 128 S. Ct. 1396, 1402 (2008) (alterations in original) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)); *see also* STONE & BALES, *supra* note 17, at 2 ("In addition to

unreviewable except under the grounds articulated in § 10 of the FAA.[334] Manifest disregard of the *law* implies that a court can review an award for legal error. However, the FAA sets forth four standards under which a court can review an arbitrational award, none of which have to do with legal error.[335] The initial three provisions are strictly procedural.[336] The fourth provision addresses an arbitrator's power but still does not authorize review based on the merits of the award.[337] In contrast, manifest disregard of the agreement fits within the FAA provisions and supports the overall values of finality and efficiency.

Third, this new standard reconciles the Supreme Court's cases under the FAA with the Court's LMRA § 301 labor arbitration cases. As discussed in Part II.C of this Article, manifest disregard of the *agreement* is a doctrine firmly rooted in § 301 labor law. It is a doctrine that the Supreme Court created when it interpreted that statute as creating an arbitration regime for resolving labor disputes. Recognizing the same doctrine under the FAA would reconcile judicial interpretation of these two statutory schemes.

## VI. CONCLUSION

The status of expanded judicial review has been the center of debate since the Supreme Court's decision in *Hall Street.* The Court held that the standards of review within § 10 of the FAA are "exclusive." As a result, circuit courts are currently split as to whether the judicially-created standard of review of manifest disregard of the law survives. Those circuits that continue to recognize manifest disregard of the law are split as to whether it is a statutory or nonstatutory standard of review.

This Article argues two propositions. First, it argues that the doctrine of manifest disregard of the law survives the Supreme Court's decision in *Hall Street.* Second, it argues that even though the standard of manifest disregard of the *law* survives, it should be replaced with the standard of manifest disregard of the *agreement.* The Supreme Court should resolve this split by eliminating the former in favor of the latter. Manifest disregard of the agreement recognizes that arbitration is a creature of contract law and affirms the national policy favoring arbitration. This standard fits securely within the provisions of § 10. Manifest disregard of the agreement is the appropriate standard by which to evaluate whether arbitrators have exceeded their powers, and therefore, it should be the standard in the future.

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the growing use of arbitration by private parties, the state and federal courts have embraced arbitration as a means of conserving judicial resources.").

334. *See Hall St.*, 128 S. Ct. at 1403.

335. *See* 9 U.S.C. § 10(a) (2006).

336. *See* 9 U.S.C. § 10(a)(1)–(3) (2006); STONE & BALES, *supra* note 17, at 577.

337. *See* 9 U.S.C. § 10(a)(4) (2006).

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