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THE CRUMBLLED DIFFERENCE BETWEEN LEGAL
AND ILLEGAL ARBITRATION AWARDS:
HALL STREET ASSOCIATES AND THE WANING
PUBLIC POLICY EXCEPTION

*Jonathan A. Marcantel**

I. INTRODUCTION

Imagine that *A*, the governor, and *B*, an individual, entered into an agreement whereby *B* paid *A* \$2,000,000 in exchange for *A* exercising his governmental power to appoint *B* to a top government position.¹ Imagine further that *A* and *B* then reduced the agreement to a writing that contains an arbitration provision. Subsequently, *A* breaches the agreement by failing to appoint *B*. Thereafter, an arbitrator awards *B* damages for the breach.

Consider, perhaps, a more likely scenario. Imagine that two individuals *A* and *B* get a divorce and a family court orders *A* to pay *B* \$2,000 per month in alimony. Subsequently, *A* and *B* agree that *A* will pay *B* \$100 in alimony per month, in contravention of the court order, in exchange for *A*'s not informing the court of *B*'s criminal activity. Imagine further that the agreement contains an arbitration clause, *B* seeks arbitration of the agreement, and an arbitrator finds that the agreement is binding, thus reducing the amount of alimony ordered by the court.

As a matter of ordinary contract law, neither of these contracts is enforceable in any court, as both are illegal and thus violate what is

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1. This scenario is loosely based on *Meguire v. Corwine*, 101 U.S. 108, 108-09 (1879). Furthermore, while the concept of litigating illegal contracts seems to be chimerical, illegal contracts are litigated. *See, e.g., Hammes v. AAMCO Transmission, Inc.*, 33 F.3d 774, 783 (7th Cir. 1994) (reviewing the enforceability of an agreement alleged to be in violation of the Sherman Act, 15 U.S.C. § 1 (2006)).

commonly known as the public policy exception, a judicial construct prohibiting courts from enforcing illegal contracts or contracts that, while not illegal per se, are against public interests.² Furthermore, at least until recently, neither arbitration award would be enforceable either, as courts would apply the same principle to invalidate the awards.³

Last year, the United States Supreme Court decided *Hall Street Associates*.⁴ In this case, the parties entered into a commercial lease that included an arbitration provision. The arbitration provision permitted a reviewing court⁵ to vacate the decision of the arbitrator on grounds not included within the Federal Arbitration Act (“FAA”⁶).⁷ Applying a strict plain meaning analysis, the Court held the review provisions of the FAA were “exclusive,” and the phrase “must grant” within section 9 “unequivocally tells courts to grant confirmation in all cases, except when” the FAA explicitly provides a method for vacatur in section 10.⁸ Thus, the Court held that vacatur is permitted only on the basis of procedural irregularities such as fraud, corruption, bias, and exceeding contractual powers.⁹

2. See, e.g., *Hurd v. Hodge*, 334 U.S. 24, 35 (1948). Public policy is considered “a policy the objective of which is the common good; it is a policy which its maker believes will serve the people well.” Richard H.W. Maloy, *Public Policy – Who Should Make it in America’s Oligarchy?*, 1998 DET. C.L. REV. 1143, 1154 (1998).

3. See, e.g., *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1150 (10th Cir. 2007); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007); *B.L. Harbert Int’l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006); *Mercy Hosp., Inc. v. Mass. Nurses Ass’n*, 429 F.3d 338, 343 (1st Cir. 2005); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir. 2000); Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759, 769 (1992).

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

5. Notwithstanding whatever intention the parties might have, the parties cannot vest an arbitrator with the color of a judicial officer. Thus, for an arbitration award to be enforceable, the parties must either voluntarily comply with the award or move a court to confirm the award. In the alternative, an aggrieved party can move to vacate or modify the award. Thereafter, of course, either party can appeal to a higher court, arguing the lower court erred by either confirming or denying the award. See Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 470 (2006).

6. Federal Arbitration Act, 9 U.S.C. § 1-16 (2006).

7. *Hall St. Assocs.*, 128 S. Ct. at 1404-05.

8. *Id.* at 1405.

9. *Id.*; see 9 U.S.C. § 10(a).

While the *Hall Street Associates* holding did not specifically mention the public policy exception, the Court's reasoning invariably questions its continued existence in the context of arbitration awards, as the FAA does not include a "void against public policy" standard.¹⁰ Furthermore, because the public policy exception is a creature of the common law,¹¹ the FAA's provisions are in derogation of it.

This Article argues that the *Hall Street Associates* opinion has displaced the public policy exception in the context of enforcing arbitration awards, and that displacement offends traditional notions of Lockean social contract theory.¹² This Article further argues that the courts – as a corollary of their duties under the social contract – should adopt the public policy exception as an additional ground for vacatur under the FAA deriving from their inherent social contract powers. Part II of this Article discusses the historical roots of arbitration and the courts' traditional aversion to enforcement of arbitration awards. It further discusses the advent of the FAA as a means to counter the former judicial aversion to arbitration and provides a brief discussion of the FAA's component parts, specifically discussing the statutory bases for vacatur under the FAA. Part III then discusses the creation of the public policy exception,

10. Professor Cole has also questioned the exception's continued existence after *Hall St.* Posting of Sarah Rudolph Cole to ADR Prof Blog, Additional Thoughts on *Hall Street v. Mattel – Whither Manifest Disregard?*, <http://www.indisputably.org/?p=93> (Mar. 26, 2008) ("Moreover, I believe the decision raises questions about the viability of other judicially-created standards of review such as . . . 'public policy' . . ."). Additionally, several lawyers have questioned its continued existence. See, e.g., Texas Appellate Law Blog, U.S. Supreme Court Invalidates Custom Standards of Judicial Review Under the FAA, <http://www.texasappellatelawblog.com/2008/03/articles/final-judgments/us-supreme-court-invalidates-custom-standards-of-judicial-review-under-faa/> (March 25, 2008) ("*Hall Street* muddies the waters with respect to whether judicially created vacatur grounds such as . . . 'violation of public policy' remain valid."). But see LawMemo Arbitration Blog, *Hall Street: Non-statutory Grounds for Review*, http://www.lawmemo.com/arbitrationblog/2008/03/hall_street_non.html (Mar. 27, 2008) (stating, without analysis, that the public policy exception has survived the opinion). However, none of these authors, as of yet, have provided more than a summary statement of the issue.

11. See, e.g., *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1150 (10th Cir. 2007); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007); *B.L. Harbert Int'l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006); *Mercy Hosp., Inc. v. Mass. Nurses Ass'n*, 429 F.3d 338, 343 (1st Cir. 2005); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir. 2000).

12. See *infra* Part III.A.

first examining its roots in Lockean social contract theory and then discussing its subsequent development in the arbitration context by the Supreme Court's decisions in *Hurd*¹³ and *Grace*.¹⁴ Part IV discusses *Hall Street Associates*, providing a brief historical background of the case and outlining the Court's strict plain-meaning reasoning. Part V discusses the impossibility of harmonizing the FAA with the public policy exception through the use of statutory construction principles, ultimately concluding that *Hall Street Associates* has displaced the public policy exception. This Part also discusses the negative effects such a displacement has on the fabric of the law as well as courts' social contract duties. Finally, Part VI discusses three proposals to preserve the public policy exception. The first proposal argues that Congress could remedy the problem by simply amending the FAA to include a public policy vacatur prong. This proposal, however, carries two significant drawbacks. Congress, through inaction, has demonstrated a reluctance to amend the FAA. In addition, Congressional action is slow, leaving considerable time for significant damage to the fabric of the law – a consequence already occurring in lower courts. The second proposal argues courts could interpret existing vacatur provisions within the FAA as including a public policy exception. This proposal, however, suffers from a consistency problem. That is, courts have universally held the public policy exception to be a creature of common law. Moreover, changing course in such a dramatic manner gives the appearance of judicial caprice, undermining the public's confidence in the legal system. The last proposal, and the one the author urges courts to adopt, argues the courts should view the public policy exception as an inherent power of the courts, existing irrespective of express Congressional mandate.

II. BACKGROUND OF THE FAA

While arbitration is presently a hot topic in the legal community,¹⁵ arbitration has existed for centuries¹⁶ and has been used as a means of

13. *Hurd v. Hodge*, 334 U.S. 24 (1948) (reaffirming the public policy exception in the context of a restrictive covenant that was racially discriminatory).

14. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983) (extending the public policy exception to arbitration awards in labor disputes).

15. Much of the current debate centers around whether courts can enforce heightened-standard-of-review clauses. *See, e.g.*, Burton, *supra* note 5; Eric Chafetz, *The Propriety of Expanded Judicial Review Under the FAA: Achieving a Balance Between Enforcing Parties' Agreements According to Their Terms and Maintaining*

alternative dispute resolution in the United States since the country's inception.¹⁷ Nevertheless, the United States' legal system has only fully embraced the practice in the last eighty years.

Throughout most of this country's existence, the United States judiciary has expressed open hostility to arbitration as a means of conflict resolution. That is, American judges initially reasoned that private parties could not through contract do that which they could not otherwise do: "oust" judicial jurisdiction.¹⁸ In 1926, Congress tackled this hostility to arbitration with the enactment of the FAA.¹⁹

Arbitral Efficiency, 8 CARDOZO J. CONFLICT RESOL. 1 (2006); Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007); Ilya Enkischev, *Above the Law: Practical and Philosophical Implications of Contracting for Expanded Judicial Review*, 3 J. AM. ARB. 61 (2004); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, HARV. NEGOT. L. REV. 171 (2003); Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91 (2000); Paul F. Kirgis, *Judicial Review and the Limits of Arbitration Authority: Lessons from the Law of Contract*, 81 ST. JOHN'S L. REV. 99 (2007); Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 OHIO ST. J. ON DISP. RESOL. 151 (2002); Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429 (2004); Brett F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. REV. 759 (1992); Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GS. L. REV. 123 (2002); Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509 (2002); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 214 (1999).

16. See Kirgis, *supra* note 15, at 99; Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926) (stating arbitration has been used as a means of conflict resolution since ancient times); see also Jeffery W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 270 (1990) (stating arbitration has been used in England since at least the eleventh century).

17. Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 144 (2002) ("The use of arbitration began in the United States during the colonial period."); Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861, 865 (2004) (stating arbitration has been used in the United States "almost from the nation's founding").

18. For the most part, this reluctance was limited. That is, courts would generally enforce arbitration awards once issued. See *Burchell v. Marsh*, 58 U.S. 344, 349

A. The Essentials of the FAA

The FAA is a comprehensive statutory structure intended to turn the tide of judicial hostility toward arbitration and place valid arbitration agreements “on the same footing as other contracts.”²⁰ To achieve that end, the FAA informally has three main parts:²¹ sections intended to

(1854). However, courts generally would not enforce executory contracts to arbitrate. *See* *Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874) (stating a party “may submit his . . . suit . . . to an arbitration . . . [However,] . . . agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void”); David J. Efron, *Muddied Waters: Awards of Punitive Damages in Disputed Arbitration Pursuant to Brokerage Firm Customer Agreements*, 7 DEPAUL BUS. L.J. 333, 335 (1995); *see also* *Southland v. Keating*, 465 U.S. 1, 13-14 (1984) (“[T]he need for the law arises from . . . the jealousy of the English courts for their own jurisdiction. . . . This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.”) (quoting H.R. REP. NO. 96, 68th Cong., Sess. 1 (1924)); Maggio & Bales, *supra* note 15, at 160; Schmitz, *supra* note 15, 137 (stating American courts viewed arbitration as threatening their power); Stempel, *supra* note 16, at 273-74. The reservations of American jurists were largely a construct of British courts’ reluctance. Although English courts were not initially hostile to arbitration, scholars believe English courts began to disfavor executory arbitration agreements following Lord Coke’s discussion of the revocability doctrine in *Vynior’s Case*. Burton, *supra* note 5, at 473-74; Schmitz, *supra* note 15, at 137; Sullivan, *supra* note 15, at 520; *see* Maggio & Bales, *supra* note 12, at 160 (stating English jurists believed the arbitration process would undermine judicial power); *see also* Stempel, *supra* note 12, at 70 (stating English courts were unwilling to enforce executory arbitration contracts, holding the contracts were void as against public policy). The revocability doctrine presumed that parties could always preserve their right to refuse arbitration and invoke the authority of the courts. Thus, while the courts were willing to enforce arbitration agreements once an arbitrator reached a decision, the courts were unwilling to enforce agreements to arbitrate when one party decided to renege on the arbitration agreement. Schmitz, *supra* note 15, at 137. Eventually, the revocability doctrine mutated into the ouster doctrine, a doctrine providing that parties cannot, through contract, refuse the jurisdiction of the courts. *Id.*

19. The FAA was originally named the United States Arbitration Act, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 2 (2006)). For further information on the history of the FAA, *see* Haydock & Henderon, *supra* note 17, at 148 n.35.

20. *Hall St. Assocs., v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008); *see also* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).

21. Other scholars have used tripartite classification systems for large-scale organization of the FAA. Their structures, however, are slightly different from the one stated herein. *See, e.g.*, Maggio & Bales, *supra* note 15, at 162 (creating a tripartite system consisting of front-end issues, procedural issues, and back-end issues); Stephen L.

define the scope of the FAA,²² sections designed to govern the dynamics of arbitration,²³ and sections designed to govern the enforcement of arbitration decisions.²⁴

Unlike the latter two parts, the scope sections do not appear in one bundle within the statutory framework. Instead, the sections are somewhat scattered throughout the scheme. The scope sections, Sections 1,²⁵ 2, and 14, generally provide that written arbitration agreements for maritime transactions and transactions affecting commerce made after January 1, 1926,²⁶ are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁷

The dynamics part is comprised of five sections – 3,²⁸ 4,²⁹ 5,³⁰ 6,³¹ 7,³² and 8³³ – and generally provides procedures for the initiation of arbitration, compelling arbitration, and service of process.

Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 74 (2001).

22. 9 U.S.C. §§ 1, 2, 14.

23. *Id.* §§ 3-8.

24. *Id.* §§ 9-13, 15, 16.

25. Section 1 provides definitions for both “maritime transaction” and “commerce.” Of the two, obviously, the more commonly used to invoke the Act is the commerce provision. The Act defines “commerce” as:

[C]ommerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Id. § 1.

26. Section 14 of the Act limits its application to contracts occurring after that date. *Id.* § 14.

27. *Id.* § 2. While this provision would initially seem to permit general court review of contracts pursuant to common law contractual principles, the United States Supreme Court has held that this provision does not permit judicial review unless the allegation of a common law basis for avoidance inheres to the arbitration clause itself, as opposed to the general provisions of the contract. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-46 (2006). Rather, issues of illegality, fraud, and other methods of common law avoidance must be argued to the arbitrator, unless they inhere to the formation of the contract (e.g. incapacity and authority). *Id.* Of course, once the arbitrator issues an award, the courts are then only able to review the decision in accordance with 9 U.S.C. sections 10 and 11. *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 (2008) (“We hold that §§ 10 and 11 respectively provide the FAA’s exclusive grounds for vacatur.”).

28. Section 3 is a stay provision, providing that a court must stay litigation upon a

The enforcement part – the part most relevant to this discussion – includes sections 9, 10, 11, 12,³⁴ 13,³⁵ 15,³⁶ and 16³⁷, which provide for the confirmation and vacatur of arbitration awards.

B. Statutory Vacatur Standards Under the FAA

Because arbitrators are not clothed with judicial power, arbitration awards under the FAA are only viable if enforced by a court.³⁸ Thus, arbitration awards are only enforceable to the extent the winning party files a motion for confirmation of the award and a court indeed confirms the award.³⁹

Section 9, which introduces the enforcement provisions, is the restricting section that limits judicial discretion. Specifically, section 9 states, “[C]ourt[s] must grant [confirmation] order[s] unless the [arbitration] award is vacated, modified, or corrected.”⁴⁰ Sections 10 and 11 then provide the exclusive bases for vacatur and modification, providing a court may vacate a decision:

- (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the

motion demonstrating that the matters contained within the litigation are subject to arbitration. 9 U.S.C. § 3.

29. Section 4 is the compulsory provision, providing that courts must compel arbitration pursuant to a valid arbitration agreement. *Id.* § 4.

30. Section 5 governs appointment of an arbitrator when the parties cannot or have not been able to name one. *Id.* § 5.

31. Section 6 provides, “Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.” *Id.* § 6.

32. Section 7 governs subpoenaing witnesses. *Id.* § 7.

33. Section 8 governs initiation of proceedings in admiralty. *Id.* § 8.

34. Section 12 governs service of motions to vacate. *Id.* § 12.

35. Section 13 governs docket management for the courts and pleadings requirements. *Id.* § 13.

36. Section 15 states the “Act of State” doctrine is inapplicable when a court is reviewing a motion for confirmation. *Id.* § 15. The Act of State doctrine is a judicially created doctrine intended “to effectuate general notions of comity among nations and among the respective branches of the federal government.” *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972).

37. Section 16 governs appeals. 9 U.S.C. § 16 (2008).

38. *Id.* § 9.

39. *Id.*

40. *Id.*

arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁴¹

Courts have narrowly defined each of these statutory grounds to preserve Congressional intent; courts typically only vacate decisions bearing some procedural abnormality.⁴² Thus, for instance, courts have

41. *Id.* § 10. The modification provisions permit modification:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Id. § 11. As the explicit language indicates, none of these sections permit substantive review of the arbitrator's decision. See Kristen M. Blankley, *Be More Specific! Can Writing a Detailed Arbitration Agreement Expand Judicial Review Under the Federal Arbitration Act?*, 2 SETON HALL CIR. REV. 391, 399 (2006).

42. See *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404-05 (2008) ("Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration"); *Porzig v. Dresdner, Kleinwort, Benson, N. Am., L.L.C.*, 497 F.3d 133, 139 (2d Cir. 2007) ("The FAA provides four statutory grounds for vacatur in situations that involve, generally, impropriety on the part of the arbitrators."); *Haw. Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1181 (9th Cir. 2001) ("Our task is, in essence, to review the procedural soundness of the arbitral decision, not its substantive merit."); *Younger*, *supra* note 15, at 243 ("The first three of these [statutory vacatur] grounds are essentially procedural in nature: their concern is not with the content or merit of the award, but with the means used by the arbitrators (and, in the case of Section 10(a)(1), the parties) in reaching the award. . . . [As to the fourth prong,] courts may strike down awards where the arbitrators decide issues not submitted to them or grant relief not authorized by the parties."); see also *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (*per curiam*) ("[I]f an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.") (internal quotations omitted); *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (holding a court may not vacate the decision of an arbitrator based upon solely legal or factual error); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) ("[S]o as far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.");

interpreted the fraud ground as creating a means for vacatur only for misrepresentations to the arbitrator or omissions of material fact.⁴³ The bias ground only permits vacatur upon a showing of either non-disclosure of a potential or actual bias on the part of the arbitrator.⁴⁴ The misconduct ground only permits vacatur for procedural irregularities that deprive a party of a fair hearing.⁴⁵ Finally, the contractual powers

Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 357-58 (5th Cir. 2004) (“Courts are not authorized to review the arbitrator’s decision on the merits despite allegations that the decisions rests on factual error and misinterprets the party’s agreement.”). Other scholars like Kratovil, Sullivan, and Hayford have reached similar conclusions about the meaning, purpose, and interpretation of the statutory grounds. See, e.g., Christopher D. Kratovil, *Judicial Review of Arbitration Awards in the Fifth Circuit*, 38 ST. MARY’S L.J. 471, 480-85 (2007); Sullivan, *supra* note 15, at 516-18; Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards*, 51 J. DISP. RESOL. 22, 23 (Oct. 1996).

43. See, e.g., Int’l Bhd. of Teamsters, Local 519 v. United Parcel Serv., Inc., 335 F.3d 497, 503 (6th Cir. 2003); Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 820 (8th Cir. 2001); A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992) (*per curiam*); Forsythe Int’l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1022 (5th Cir. 1990); LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1338 (9th Cir. 1986); Foster v. Turley, 808 F.2d 38, 42 (10th Cir. 1986).

44. See, e.g., Commonwealth Coatings Corp. v. Cont’l Cas. Co., 393 U.S. 145, 149 (1968) (holding non-disclosure of an arbitrator’s relationship with one of the parties constitutes a sufficient basis for vacatur pursuant to the second prong); Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007) (“[E]vident partiality’ within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”) (citing *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79 (2d Cir. 1984)); *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 501 (5th Cir. 2006); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (“[E]vident partiality will only be found where a reasonable person would have to conclude that an arbitrator was to one party to the arbitration”); *JCI Commc’ns., Inc. v. Int’l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003) (“Evident partiality [under the FAA] is more than just the appearance of possible bias. . . . [It refers to] a situation in which ‘a reasonable person would have to conclude that an arbitrator was partial to one party to an arbitration.’”); *Delta Mine*, 280 F.3d at 820-22 (holding an arbitrator’s concealment of a significant relationship indicates that a sufficient basis exists for vacatur, unless the parties have expressly agreed to select partial party arbitrators).

45. E.g., *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816-18 (D.C. Cir. 2007) (“The arbitrator ‘need only grant the parties a fundamentally fair hearing’ [A] federal court may vacate an award only if the panel’s ‘refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration

ground permits vacatur only when the arbitrator has exceeded the powers provided by the parties in the contract.⁴⁶ Most importantly for purposes of this Article, neither the contractual powers ground nor any other of the statutory grounds have been interpreted to encompass violations of public policy.⁴⁷ Rather, commentators have routinely stated that the public policy exception is a creature of the common law and is not encompassed by the statutory vacatur mechanisms.⁴⁸

proceedings.”); *Nat’l Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 497 (1st Cir. 2005) (holding to vacate on the basis of exclusion of evidence, the moving party must demonstrate the party was deprived of a fair hearing); *see also El Dorado Sch. Dist. # 15 v. Cont’l Cas. Co.*, 247 F.3d 843, 848 (8th Cir. 2001) (“Courts will not intervene in an arbitrator’s decision not to postpone a hearing if any reasonable basis for it exists.”).

46. *See, e.g., Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C.*, 487 F.3d 255, 259 (5th Cir. 2007) (“The test is ‘whether the award, however arrived at, is rationally inferable from the contract.’”); *Solvay Pharms., Inc. v. Duramed Pharms., Inc.*, 442 F.3d 471, 476 (6th Cir. 2006) (holding the scope of an arbitrator’s authority is provided by the agreement for arbitration); *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 526-27 (2d Cir. 2005) (same); *Mo. River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 855 (8th Cir. 2001) (holding an arbitrator’s authority is governed by the agreement to arbitrate); *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 330 (1st Cir. 2000) (same); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1255–56 (7th Cir. 1993) (stating section 10(a)(4) permits vacatur only if “the arbitrator exceeded the powers delegated to him by the parties.”); *W. Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 262 (9th Cir. 1992) (holding the scope of authority is determined by the contract); Younger, *supra* note 15, at 243 (stating courts refuse to vacate an award under the fourth prong, unless the “disputed subject matter or remedy is explicitly excluded by the arbitration agreement”).

47. *See, e.g., Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1150-51 (10th Cir. 2007); *Lessin*, 481 F.3d at 816; *B.L. Harbert Int’l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006); *Mercy Hosp., Inc. v. Mass. Nurses Ass’n*, 429 F.3d 338, 343 (1st Cir. 2005); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir. 2000); *Gallus Invs., L.P. v. Pudgie’s Famous Chicken, Ltd.*, 134 F.3d 231, 233 (4th Cir. 1998); *Painewebber, Inc. v. Argon*, 49 F.3d 347, 350 (8th Cir. 1995); *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993).

48. *See, e.g., Kratovil, supra* note 42, at 488-89; Brian T. McCartney, *Contracting for Judicial Review of Arbitration Awards: Can an “Errors of Law” Clause Provide Two Bites at the Apple?*, 1997 J. DISP. RESOL. 151, 154 (1997); Maggio & Bales, *supra* note 15, at 165-66; Karon A. Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337, 343 (2001) (referring to the public policy exception as a non-statutory ground); Amanda Spears, *Bowen v. Amoco Pipeline Co.: The Tenth Circuit Holds that Parties May Not Contractually Expand FAA Standards of Judicial Review*, 1 J. AM. ARB. 273, 277 (2002); Stempel, *supra* note 16, at 281; Sullivan, *supra* note 15, at 520; NAT’L CONFERENCE OF COMM’RS ON UNIF.

III. THE PUBLIC POLICY EXCEPTION

The ability to contract has always been subject to limitation.⁴⁹ Perhaps the most important of these limitations is the public policy exception, which prohibits courts from enforcing contracts or awards where the contract or award violates the positive law or is more generally against the interest of the public at large.

A. Lockean Social Contract Theory

At least in the United States,⁵⁰ the public policy exception ultimately stems from Lockean principles of social contract theory.⁵¹

John Locke has had a significant influence on the government of the United States.⁵² His theories are present within the Declaration of

STATE LAWS, UNIFORM ARBITRATION ACT (2000), available at <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm>.

49. In fact, even the Constitutional prohibition against state infringement of contracts has bounds. See *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 21 (1977) (“Although the Contract Clause appears literally to proscribe ‘any’ impairment, . . . the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.”) (internal quotations omitted); *Anonymous Taxpayer v. S.C. Dep’t of Revenue*, 661 S.E.2d 73, 77 (S.C. 2008) (“To establish a contract clause violation, Appellant must show: (1) the existence of a contract; (2) the law changed actually impaired the contract and the impairment was substantial; and (3) the law was not reasonable and necessary to carry out a legitimate government purpose.”); see also U.S. CONST. art. I, § 10 (“No state shall . . . pass any . . . [l]aw impairing the [o]bligations of [c]ontracts.”).

50. The public policy exception has existed in other systems of jurisprudence for much longer. See *Trist v. Child*, 88 U.S. 441, 448 (1874) (“In the Roman law it was declared that ‘a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding.’”) (quoting *Institutes of Justinian*, lib. 3, tit. 19, par. 24)).

51. See *Seymour*, 988 F.2d at 1023 (stating the exception derives from the public’s interest in having its views represented in the adjudication of private contracts); Randall, *supra* note 15, at 781 (“[T]he underlying policy for the exception is that federal courts ultimately represent the interests of the public, who would otherwise be unrepresented in the private action before the court.”); see also Richard H.W. Maloy, *Public Policy – Who Should Make it in America’s Oligarchy?*, 1998 DET. C.L. REV. 1143, 1158 (1998) (“[T]he Supreme Court has said that the people, through their constitutions and legislative bodies make public policy.”).

52. One could make the same claim about Jean Jacques Rousseau and Thomas Paine, as they also espoused the social contract theory. See J.J. Rousseau, *On the Social Contract, or Principles of Political Right*, in CLASSICS OF MORAL AND POLITICAL THEORY 913 (Michael L. Morgan ed., 1992); Thomas Paine, *Common Sense*, in

Independence⁵³ and the United States Constitution,⁵⁴ and they appear in opinions from nearly every jurisdiction within the country.⁵⁵ The

THOMAS PAINE: COLLECTED WRITINGS (Eric Foner ed., 1995); *see also* Donald L. Doernberg, “*We the People*”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 58 (1985) (“But as a general matter, the framers established their government in frank Lockean style upon the consent of the governed.”) (internal quotations omitted); Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. PA. J. CONST. L. 609, 616 (2000). Furthermore, while the philosophers diverge somewhat on aspects of their theories, none of those divergences are relevant here.

53. Doernberg, *supra* note 52, at 64-65; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

54. Doernberg, *supra* note 52, at 66-67.

55. *See, e.g.*, *Calder v. Bull*, 3 U.S. 386, 388 (1798); *Hardie-Tynes Mfg. Co. v. Cruse*, 66 So. 657, 661 (Ala. 1914); *Bush v. Reid*, 516 P.2d 1215, 1219 (Alaska 1973); *Harwood v. Perrin*, 60 P. 891, 892 (Ariz. Terr. 1900); *E. Poinsett County Sch. Dist. No. 14 v. Massey*, 866 S.W.2d 369, 371 (Ark. 1993); *Ex Parte Smith*, 38 Cal. 702, 704 (1869); *People v. District Court*, 834 P.2d 181, 219 (Colo. 1992); *Moore v. Ganim*, 660 A.2d 742, 750 n.29 (Conn. 1995); *Bailey v. Philadelphia, W. & B.R. Co.*, 4 Harr. 389 (Del. 1846); *United States ex rel. Miles Planting & Mfg. Co. v. Carlisle*, 5 App. D.C. 138 (D.C. 1895); *Sandarac Ass’n, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1353 n.4 (Fla. Ct. App. 1992); *Wilder v. Lumpkin*, 4 Ga. 208 (1848); *In re Chow Bick Git*, 4 Haw. 385 (1881); *Newland v. Child*, 254 P.2d 1066, 1069 (Idaho 1953); *Union County Reg. Bd. of Sch. Trustees for Use and Benefit of Anna*, 367 N.E.2d 541, 542 (Ill. Ct. App. 1977); *Bayh v. Sonnenburg*, 573 N.E.2d 398, 415 (Ind. 1991); *City of Des Moines v. Manhattan Oil Co.*, 184 N.W. 823, 827 (Iowa 1921); *State v. Myers*, 923 P.2d 1024, 1030 (Kan. 1996); *Barbour v. Louisville Bd. of Trade*, 6 Ky. L. Rptr. 769 (Ct. App. 1885); *Bd. of Barber Exam’rs of La. v. Parker*, 182 So. 485, 491 (La. 1938); *In re Opinion of the Justices*, 107 A. 673, 674 (Me. 1919); *Birmingham v. Bd. of Pub. Works*, 239 A.2d 923, 926 (Md. 1968); *In re the Opinion of the Justices*, 115 N.E. 921, 922 (Mass. 1917); *People v. Collins*, 3 Mich. 343 (1854); *Johnson v. Gustafson*, 277 N.W. 252, 255 (Minn. 1938); *Urban Renewal Agency of City of Aberdeen v. Tackett*, 255 So.2d 904, 905 (Miss. 1971); *Kansas City v. Holmes*, 202 S.W. 392, 393 (Mo. 1918); *Billings Sugar Co. v. Fish*, 106 P. 565, 566 (Mont. 1910); *Lindburg v. Bennett*, 219 N.W. 851, 855 (Neb. 1928); *Piland v. Clark County Juvenile Court Servs.*, 457 P.2d 523, 524 (Nev. 1969); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1380 (N.H. 1993); *Behnke v. N.J. Highway Auth.*, 97 A.2d 647, 652 (N.J. 1953); *Williams v. Village of Port Chester*, 89 N.Y.S. 671, 674 (N.Y. App. Div. 1904); *Briggs v. City of Raleigh*, 141 S.E. 597, 601 (N.C. 1928); *State v. Burr*, 598 N.W.2d 147, 159 (N.D. 1999); *Uricich v. Kolesar*, 7 N.E.2d 413, 415 (Ohio Ct. App. 1936); *Thomas v. Reid*, 285 P. 92, 97 (Okla. 1930); *State v. Ciancanelli*, 121 P.3d 613, 625 (Or. 2005); *William Goldman Theaters Inc. v. Dana*, 173 A.2d 59, 75 (Pa. 1961); *Bailey v. Baronian*, 394 A.2d 1338, 1343 (R.I. 1978); *Owens v. Lucas*, 1 Brev. 519 (S.C. 1805); *In re Opinion of the Judges*, 162 N.W. 536, 538 (S.D. 1917); *Arutanoff v. Metro. Gov. of Nashville &*

central premise of Lockean governmental theory revolves around a concept called the “social contract” or “social compact.”⁵⁶ According to this “social contract” theory, people were originally born within a state of nature, in which every person initially constituted his or her own individual government – choosing his or her own laws of morality, conduct, and punishment.⁵⁷ When these individuals began to organize in groups – entered into social contracts – each individual government delegated some of its powers to the organization or the new government.⁵⁸ That new government then became a trustee or steward, acting on behalf of the component individuals for their safety and protection.⁵⁹ Of course, the new government cannot act for itself and thus found it necessary to democratically appoint officers or servants to act on its behalf, creating

Davidson County, 448 S.W.2d 408, 410 (Tenn. 1969); Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 91 (Tex. 1997); State ex. rel. Jugler v. Grover, 125 P.2d 807, 814 (Utah 1942); Benning v. State, 641 A.2d 757, 760 (Vt. 1994); Council of Town of Farmville v. Walker, 43 S.E. 558, 561 (Va. 1903); Weber v. Doust, 146 P. 623, 625 (Wash. 1915); State ex. rel. K.M. v. W. Va. Dep’t of Health and Human Res., 575 S.E.2d 393, 403 (W. Va. 2002); State ex. rel. City of New Richmond v. Davidson, 90 N.W. 1067, 1069 (Wis. 1902); Atchison v. Career Serv. Council of State of Wyo., 664 P.2d 18, 26 (Wyo. 1983).

56. John Locke, *Second Treatise of Government*, in CLASSICS OF MORAL AND POLITICAL THEORY 768-69 (Michael L. Morgan ed., 1992).

57. *Id.* at 738-39 (“To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is, a *state of perfect freedom* to order their actions, and dispose of their possessions and persons, as they think fit”); King, *supra* note 52, at 617.

58. Locke, *supra* note 56, at 764 (“But because no *political* society can be, nor subsist, without having in itself the power to preserve the property, and, in order thereunto, punish the offences of all those of that society; there and there only is *political society*, where every one of the members hath quitted his natural power, resigned it up into the hands of the community”). Absolute sovereignty, of course, remains with the people. See King, *supra* note 52, at 617. These principles have been expressly adopted by the Supreme Court. See, e.g., Kennett v. Chambers, 55 U.S. 38, 11 (1852) (“For as the sovereignty resides in the people, every citizen is a portion of [the government], and is himself personally bound by the laws The compact is made by the department of the government upon which he himself has agreed to confer the power.”).

59. See Locke, *supra* note 56, at 780 (“The great end of men’s entering into society being the enjoyment of their properties in peace and safety”); Trist v. Child, 88 U.S. 441, 450 (1874) (“The theory of our government is, that all public stations are trusts No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.”).

laws for the public's protection and then enforcing them. Those laws became the public policy.⁶⁰

The public policy exception is thus simply an extension of the government's absolute duty as trustee to act only with the consent of the majority for their individual and collective protection. At its fundamental base, the exception provides that individual parties cannot force the peoples' governmental representatives to exercise social-contract power to enforce agreements prohibited by the majority.⁶¹ Any other action by the government, other than invalidation, would create a paradox: the people would be creating the public policy and simultaneously violating it through governmental representatives. Such an action by the government would necessarily violate the social contract⁶² – the great trust the public has placed in the hands of its government and representatives.

B. The Supreme Court's Historical Use of the Public Policy Exception

The Supreme Court has used the public policy exception to invalidate contracts in a variety of contexts, dating back to at least the nineteenth century. For instance, the Court has held that the exception applies where the contract requires an illegal act,⁶³ compensates a party for procuring a government contract,⁶⁴ compensates a party for using personal influence to secure legislation,⁶⁵ compensates a party for exercising the power of government appointments,⁶⁶ is the vehicle for bribery

60. See Locke, *supra* note 56, at 781 (stating every person within society is bound by the act of the majority, as that is law, which is necessarily for the public good and the preservation of mankind); see also Hurd v. Hodge, 334 U.S. 24, 34-35 (1948) (“[T]he public policy of the United States [is] . . . manifested in the Constitution, treaties, federal statutes, and applicable legal precedents.”); United States v. Trans-Mo. Freight Ass’n, 166 U.S. 290, 340 (1897) (“[W]hen the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.”).

61. Cf. Enkishev, *supra* note 15, at 107 (stating private parties cannot alter judicial review standards through contract, as such an action would violate principles discussed in both Marbury v. Madison, 5 U.S. 137 (1803) and McCulloch v. Maryland, 17 U.S. 316 (1819)).

62. See Locke, *supra* note 56, at 780 (stating the government is bound by the social contract to dispense justice consistent with the laws of the majority, and no one can “discharge any member of the society from his *obedience*” to the majority).

63. Sage v. Hampe, 235 U.S. 99, 105 (1914).

64. Tool Co. v. Norris, 69 U.S. 45, 52 (1864).

65. Trist v. Child, 88 U.S. 441, 450 (1874).

66. Meguire v. Corwine, 101 U.S. 108 (1879).

of a public official,⁶⁷ requires fictitious bids for a government contract,⁶⁸ or requires a treasonous offense,⁶⁹ among others.

Modern public policy jurisprudence derives from the Court's 1948 decision in *Hurd v. Hodge*.⁷⁰ In *Hurd*, the plaintiffs lived in a community governed by restrictive covenants that prohibited the sale of property to African Americans. Despite these restrictions several owners sold properties to Hurd, an African American.⁷¹ The plaintiffs then sued Hurd in the United States District Court for the District of Columbia, seeking injunctive relief on the basis of the covenants.⁷² The district court granted the injunction, holding that the deed to Hurd was void because it violated the covenants.⁷³ The court further enjoined any transfer of covenanted property to African Americans and ordered Hurd to remove himself from the property within sixty days.⁷⁴ The United States Supreme Court granted certiorari to determine whether enforcement of the restrictive covenant by a federal court violated the Due Process Clause of the Fifth Amendment.⁷⁵ Avoiding the constitutional issue, however, the Court held that the restrictive covenant conflicted with the Civil Rights Act⁷⁶ and was thus unenforceable.⁷⁷ As an additional

67. *Oscanyan v. Arms Co.*, 103 U.S. 261, 277 (1880).

68. *McMullen v. Hoffman*, 174 U.S. 639, 651-54 (1899).

69. *Sprott v. Supreme Court of U.S.*, 87 U.S. 459, 463 (1874).

70. 334 U.S. 24 (1948). The Court invalidated similar conduct at the state level in *Shelley v. Kraemer*, 334 U.S. 1 (1948). Nevertheless, *Hurd* is almost exclusively cited as the impetus for modern public policy jurisprudence.

71. *Hurd* was a consolidated case. For simplicity, however, I will only refer to *Hurd*.

72. *See Hurd*, 334 U.S. at 27.

73. *Id.*

74. *Id.*

75. *Id.* at 28.

76. 8 U.S.C. § 42 (1950) (“[A]ll persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, . . . shall have the same right, in every state and Territory in the United States, to make and enforce contracts, to sue, to be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws . . .”) amended by 42 U.S.C. § 1981 (2006) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.”).

ground for reversal, the Court summarily held, as a general matter, that courts are obligated to deny enforcement of private agreements when enforcement would violate public policy.⁷⁸

While the ruling in *Hurd* was nothing new and, in fact, simply reaffirmed well-worn principles, the opinion quickly became a watermark because of the manner in which the Court subsequently applied those principles. Following *Hurd*, the federal courts began using the public policy exception on a much more frequent basis.⁷⁹

C. Grace and the Development of the Public Policy Exception
in the Context of Labor Arbitrations

The frequent use of the public policy exception eventually expanded jurisprudentially when, in *W.R. Grace & Company*,⁸⁰ the Supreme Court began using the exception in the context of arbitrations. In *Grace*, the Grace Company entered into a collective bargaining agreement with a local union (the “Union”).⁸¹ Then, in response to a lawsuit for violation of Title VII of the Civil Rights Act of 1964,⁸² Grace entered into a conciliation agreement⁸³ with the Equal Employment Opportunity Commission (“the EEOC”),⁸⁴ the substantive provisions of which were inconsistent with the collective bargaining agreement.

In a subsequent lawsuit brought by the Union, the district court ultimately granted summary judgment in favor of Grace, holding that the conciliation agreement was superior to the collective bargaining agreement, and thus, the collective bargaining agreement could be modified so as to comply with the Civil Rights Act.⁸⁵ The Union then appealed to

77. *Hurd*, 334 U.S. at 34-35.

78. *Id.*

79. James Michael Magee, *The Public Policy Exception to Judicial Deferral of Labor Arbitration Awards – How Far Should Expansion Go?*, 39 S.C. L. REV. 465, 468-76 (1988).

80. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983).

81. *Id.* at 759.

82. 42 U.S.C. § 2000e (2006).

83. Pursuant to the Statute, the EEOC may enter such an agreement as a manner of eliminating discrimination after a finding of such by the EEOC. 42 U.S.C. § 2000e-5(b).

84. The Equal Employment Opportunity Commission is a federal agency which handles employment discrimination complaints.

85. *Grace*, 461 U.S. at 761.

the fifth circuit.⁸⁶ While the appeal was pending, Grace laid off employees consistent with the district court order but in violation of the collective bargaining agreement.⁸⁷

The fifth circuit reversed,⁸⁸ and the grievances proceeded to arbitration.⁸⁹ Throughout the arbitration proceedings, Grace admitted it had terminated employees during the pending appeal.⁹⁰ Nevertheless, Grace argued the arbitrators could not find a breach of the collective bargaining agreement because Grace was acting consistently with the district court's order.⁹¹ The arbitrator disagreed with Grace, finding Grace's conduct, while consistent with the district court's order, was nonetheless in breach of the collective bargaining agreement.⁹² Grace then moved to prevent enforcement of the collective bargaining agreement for the period of time when the original appeal was pending before the fifth circuit.⁹³ The district court agreed and issued an order to that effect.⁹⁴

Ultimately, the Supreme Court held that courts are obligated not to enforce agreements conflicting with public policy.⁹⁵ Further, the Court created the framework for evaluating contracts under the public policy exception. Specifically, to be unenforceable by a court, the public policy must be "well defined and dominant, and . . . [must be] ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."⁹⁶ Nevertheless, the Court held that no such prohibition existed in *Grace*, as Grace created its own impossible predicament.⁹⁷ That is, Grace generated the situation wherein it had to choose between the court's order and the collective bargaining agreement. Thus, Grace could not then use that conflict as a basis to avoid its contractual duties.⁹⁸

86. *Southbridge Plastics Div. v. Local 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers*, 565 F.2d 913 (5th Cir. 1978).

87. *Grace*, 461 U.S. at 761.

88. *Southbridge Plastics*, 565 F.2d at 913.

89. *Grace*, 461 U.S. at 762.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 764.

94. *Id.*

95. *Id.* at 766.

96. *Id.* at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

97. *Id.* at 767.

98. *Id.*

D. The Public Policy Exception in the Context of Arbitrations
Under the FAA

Significant differences undeniably exist between arbitrations of collective bargaining agreements and arbitrations conducted pursuant to the FAA.⁹⁹ Nevertheless, the federal courts began using the public policy exception as an extra-statutory basis for vacatur under the FAA,¹⁰⁰ reasoning the public policy exception was inherent in all contracts, and arbitrations were essentially dispute mechanisms generated by contract. Specifically, the circuits generated essentially three different forms of public policy exceptions: illegality, award, and pure policy.¹⁰¹

Under the illegality public policy form,¹⁰² the contract itself seeks a result that violates a statutory or constitutional provision. For example, an agreement to move prostitutes across state lines would fall within the illegality public policy exception because the object of the contract violates positive law.¹⁰³ Before *Hall Street Associates*, nearly all of the

99. Most notable, of course, is that arbitrations of collective bargaining agreements are judicially reviewed pursuant to the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (2006), which permits the federal courts, using the federal common law, to develop standards of vacatur. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957).

100. *See supra* note 47.

101. *Cf. Randall, supra* note 3, at 770 (stating the three categories are: “cases in which the arbitrator has applied an incorrect legal standard . . . cases in which the underlying contract was made in violation of the law; and . . . awards that compel a violation of the law”).

102. Professor Randall treats illegality as a separate exception. *See id.* However, to the extent the two are separate exceptions, that distinction has been applied by neither the Supreme Court nor its inferior federal courts.

103. *See* 18 U.S.C.S. § 2421 (2006):

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

Id. *See also* 18 U.S.C.S. § 371 (2006):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years or both.

Id.

federal courts permitted illegality as a non-statutory basis for vacatur under the FAA.¹⁰⁴

The award public policy form arises where the contract itself does not have an illegal object or purpose, but the arbitrator's award nevertheless violates constitutional or statutory prohibitions.¹⁰⁵ Thus, for example, imagine that *A* owns a large hotel that serves multi-state and multi-national clientele, and *B* rents a room¹⁰⁶ through an online travel service. Imagine further that the contract between *A* and *B* includes an arbitration clause. Several weeks later, *B* attempts to check-in to the hotel. However, *A* denies *B* entry into the hotel on the basis that *B* is an African American. *B* then seeks arbitration of the dispute. During the arbitration, the arbitrator finds that *A* did not breach the agreement by denying *B* admission on the basis of *B*'s racial status. The arbitrator further enjoins *B* from entering the premises. While the contract itself is legal (as it is simply a contract between a hotel and a customer), the award is not, because it violates the Civil Rights Act,¹⁰⁷ the principles established in *Hurd*,¹⁰⁸ and the social contract.¹⁰⁹

Finally, the pure policy form¹¹⁰ exists where neither the contract nor the award violates constitutional or statutory law, but the award does violate public policy.¹¹¹ These situations usually arise in the labor con-

104. See *supra* note 47.

105. See Randall, *supra* note 3, at 769-70.

106. A similar situation was held to be "commerce" under the Commerce Clause, and thus, arbitration clauses of this nature should hypothetically suffice to invoke the provisions of the FAA. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

107. 42 U.S.C. § 1981 (2006).

108. *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

109. See Locke, *supra* note 56, at 781 (stating the government is bound to dispense justice consistent with the positive law).

110. Notwithstanding open criticism from scholars and judges alike, the Supreme Court has explicitly authorized this form. See *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 63 (2000) (stating that courts may refuse to enforce an agreement on the basis of the public policy exception, even absent a violation of positive law). Furthermore, this form has been used regularly as a method for vacatur by the federal circuits. See, e.g., *PaineWebber, Inc. v. Agron*, 49 F.3d 347, 350 (8th Cir. 1995); *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 257 (5th Cir. 1993); *Delta Airlines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665, 674-75 (11th Cir. 1988).

111. This form has two "sub-forms": (1) occasions when the award itself violates public policy, and (2) occasions when the underlying conduct violates public policy. See Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash*

text,¹¹² but can also surface in other contexts as well. Furthermore, these almost always arise in situations where the contract or award endangers the safety of the public. For example, imagine *A* owns a company that generates dangerous chemicals, and *B* owns a company that ships those chemicals across the country. Imagine further that *A* and *B* reach an agreement whereby *B* will ship *A*'s chemicals, but *A* must relieve *B* of all future liability, including liability arising from intentional torts.¹¹³ Of course, the agreement contains an arbitration provision. Several months after the execution of the agreement, *A* and *B* have a disagreement over payment provisions of the contract and, as revenge, *B* intentionally dumps a container of chemicals on *A*'s property. *B* then terminates the contract and *A* seeks arbitration. At the arbitration hearing, the arbitrator finds that *B* breached the contract by terminating it. Nevertheless, the arbitrator finds that *B* was not liable for intentionally dumping the chemicals, as the contract specifically limited *B*'s liability for intentional torts.

This situation is different from the prostitution ring example¹¹⁴ in that neither the contract nor the award affirmatively violates the positive law. But the award violates the social contract or the public policy of protecting the public.¹¹⁵

Between the Public Policy Exception and the Duty to Bargain, 64 CHI.-KENT L. REV. 3, 8-21 (1988). Allegations that the underlying conduct violates public policy, without more, are insufficient to justify vacatur. *E. Associated Coal Corp.*, 531 U.S. at 63.

112. Arbitrations of labor-related issues are not properly governed by the FAA. Rather, labor-related arbitrations are governed by the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (2006). Nevertheless, the federal courts rule regularly on the vacatur provisions of the FAA within the labor-law context. *See, e.g.*, *UMass Mem'l Med. Ctr., Inc. v. United Food & Commercial Workers Union, Local 1445*, 527 F.3d 1, 5-6 (1st Cir. 2008); *Howard Univ. v. Metro. Campus Police Officer's Union*, 512 F.3d 716, 721-22 (D.C. Cir. 2008); *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 241 (3d Cir. 2005); *Int'l Bhd of Teamsters, Local 519 v. United Parcel Serv., Inc.*, 335 F.3d 497, 503 n.2 (6th Cir. 2003); *Smart v. Int'l Bhd of Elec. Workers, Local 702*, 315 F.3d 721, 724-26 (7th Cir. 2002).

113. Such a provision would violate traditional notions of the common law. *See* RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981). However, the positive law does not include the common law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 722 (2004) (differentiating positive law from the common law).

114. *See supra* note 103 and accompanying text.

115. *See Locke, supra* note 56, at 780 ("The great end of men's entering into society being the enjoyment of their properties in peace and safety . . .").

IV. *HALL STREET ASSOCIATES* AND THE SHIFT TOWARDS EXCLUSIVITY UNDER THE FAA

While the above forms were certainly the norm prior to *Hall Street Associates*, the Supreme Court – either intentionally or negligently – has compromised their continued existence.

As the number of arbitrations under the FAA grew, parties began altering its substantive provisions through contract. Specifically, parties began contracting for vacatur standards that did not exist within section 10 of the Act. This movement eventually percolated into the court system through the confirmation procedures outlined in section 9. After conducting the arbitration in accordance with the contract, parties began seeking judicial review under the heightened review standards. The circuit courts then split on whether such provisions were enforceable.¹¹⁶ All this created the backdrop for *Hall Street Associates*.

In this case, Hall Street Associates, L.L.C. (“Hall Street”) entered into a contract with Mattel, Inc. (“Mattel”), whereby Hall Street agreed to lease a manufacturing site to Mattel.¹¹⁷ The lease included a predecessor indemnification clause, requiring that Mattel indemnify Hall Street for fines, fees, or costs associated with violation of environmental laws by Mattel’s predecessors.¹¹⁸

Mattel terminated the lease, however, when it learned that the property was contaminated.¹¹⁹ Hall Street then sued Mattel, alleging Mattel breached the lease by terminating it and by refusing to pay the

116. Compare *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005) (holding the FAA permits parties to contract for a heightened standard of review), *Jacada (Europe), Ltd. v. Int’l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005) (same), *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001) (same), *Syncor Int’l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997) (same in an unpublished opinion), and *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995) (same), with *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (holding the FAA prohibits parties from contracting for a heightened standard of review), *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001) (same), *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997-98 (8th Cir. 1998) (indicating, in dicta, parties cannot contract for heightened review under the FAA), *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996), and *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (stating in dicta that parties may not create jurisdiction by contract).

117. *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400 (2008).

118. *Id.*

119. *Id.*

cleanup costs of the environmental contamination.¹²⁰ The parties subsequently agreed to submit the cleanup issue to arbitration, which was approved and incorporated into a court order.¹²¹ The resulting arbitration agreement contained a provision regarding expanded judicial review. Specifically, the agreement provided: “The Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.”¹²²

The arbitrator ultimately concluded no indemnification was due under the lease “because the lease obligation to follow all applicable federal, state, and local environmental laws did not require compliance with the testing requirements of the Oregon Drinking Water Quality Act”¹²³ Hall Street then moved to vacate the arbitration award, arguing that the arbitrator committed legal error by ignoring the Oregon Drinking Water Quality Act.¹²⁴ The district court granted the motion, holding the arbitrator committed legal error and the court could grant vacatur on that ground because the parties had so contracted. The district court then remanded the matter to the arbitrator.¹²⁵ On remand, the arbitrator found in favor of Hall Street.¹²⁶ On further appeal, the Ninth Circuit reversed, holding the FAA does not permit parties to contract for standards of review divergent from those included within 9 U.S.C. § 10.¹²⁷

The United States Supreme Court thereafter granted certiorari to determine whether the FAA permits parties to contract for standards of re-

120. *Id.* at 1400.

121. *Id.* at 1400-01.

122. *Id.*

123. *Id.* at 1401.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* Between the ninth circuit’s initial review and the Supreme Court’s ultimate review, the case took additional procedural turns. After the ninth circuit reversed the district court here, it remanded the case to reconsider the motion for confirmation using only the standards within the FAA. *Hall St. Assocs. v. Mattel, Inc.*, 113 Fed. Appx. 272, 273 (9th Cir. 2004). Subsequently, on remand, the district court again granted the motion to vacate, holding the arbitrator’s award was an “implausible” interpretation of the contract, and thus, the arbitrator exceeded his power’s under 9 U.S.C. § 10(4). On appeal, the ninth circuit again reversed, holding that implausibility is not a ground for vacatur pursuant to the FAA. *Hall St. Assocs. v. Mattel, Inc.*, 196 Fed. Appx. 476, 477 (9th Cir. 2006).

view beyond those provided within section 10. The Court agreed with the Ninth Circuit that the FAA does not permit heightened vacatur standards, explaining that the plain meaning of the text compelled the Court to view the provisions of sections 10 and 11 as exclusive.¹²⁸

In its decision, the Court focused on the words “must grant” found in section 9, which provides that upon application by any party to confirm an arbitration award, a court “must grant such an [award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”¹²⁹ Thus, in the Court’s view, this language was compulsory and indicated Congress’ intent that the provisions therein be completely exclusive.¹³⁰

In addition, the Court refuted two arguments presented by Hall Street. First, Hall Street argued parties were able to expand judicial review because the Court in *Wilko v. Swan*¹³¹ permitted a common law, extra-statutory method of review: the manifest disregard of the law test.¹³² Hall Street maintained that if the Court is free to expand the stat-

128. *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

129. 9 U.S.C. § 9 (2006).

130. *Hall St. Assocs.*, 128 S. Ct. at 140-05.

131. 346 U.S. 427 (1953). In *Wilko*, the Court stated, “Power [under the FAA] to vacate an award is limited. . . . In unrestricted submission, such as the present . . . agreements envisage, the interpretations of the law by the arbitrators *in contrast to the manifest disregard* are not subject . . . to judicial review for error in interpretation.” *Id.* at 436-38 (internal citations omitted) (emphasis added).

132. The “manifest disregard” standard is a judicially created exception intended to prevent knowing and/or intentional violations of the law. *See, e.g.*, *Westerbecke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 217 (2d Cir. 2002) (holding that an arbitrator manifestly disregards the law when “the arbitrator kn[ows] of the relevant principle, appreciate[s] that this principle controlled the outcome of the disputed issue, and nonetheless willfully flout[s] the governing law by refusing to apply it”). While public policy violations and manifest disregard violations could certainly overlap where an arbitrator knowingly and/or intentionally violated positive law, the two are not the same. For instance, a public policy violation can exist even when the arbitrator is unaware of positive law, whereas a manifest disregard violation cannot exist unless the arbitrator is aware of the positive law but nonetheless ignores it. *Id.* Furthermore, the two are nearly universally treated as separate doctrines. *See, e.g.*, *B.L. Harbert Int’l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 263-64 (2d Cir. 2003); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 706 (D.C. Cir. 2001); Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 870-73 (2000); Kratovil, *supra* note 42, at 486-91. *But see* *Joseph Stevens & Co. v. Cikanek*, 2008 WL 2705445, at *4 (N.D. Ill. 2008) (“[A]n

utory bases of review, then parties are also free to do so. The Court disagreed, reasoning the language within *Wilko* did not sanction an additional ground for vacatur.¹³³ Specifically, the Court stated:

Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.”¹³⁴

Second, Hall Street argued parties should be able to expand judicial review because the FAA explicitly favors the freedom to contract. The Court again disagreed, referring to its plain meaning analysis.¹³⁵

arbitration award may be vacated if the arbitrators ‘manifestly disregarded’ the law by directing the parties to violate the law . . .”). Before *Hall Street Associates*, at least seven circuits accepted the manifest disregard of the law standard as a basis for vacatur under the FAA. See, e.g., *McCarthy v. Citigroup Global Mkts., Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395-96 (5th Cir. 2003); *Westerbecke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 217 (2d Cir. 2002); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 759 (5th Cir. 1999); *Scott v. Prudential Secs., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998); *Barnes v. Logan*, 122 F.3d 820, 821 (9th Cir. 1997); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1486 (D.C. Cir. 1997); *M & C Corp. v. Erwin Behr GmbH & Co.*, KG, 87 F.3d 844, 850-51 (6th Cir. 1996); see *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 387 (5th Cir. 2004) (*per curiam*); *Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C.*, 487 F.3d 255, 259 (5th Cir. 2007) (“Vacatur based on an arbitrator’s manifest disregard of the law . . . [requires] more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.”).

133. *Hall St. Assocs.*, 128 S. Ct. at 1403.

134. *Id.* at 1404 (internal citations omitted).

135. Justice Scalia joined in the opinion of the Court with the exception of one footnote regarding legislative history. *Id.* at 1400 n.1. Both Justice Stevens and Justice Breyer dissented. *Id.* at 1408-10. Justice Stevens’s dissent argues that the majority’s decision conflicts with the primary purpose of the FAA, as the intent of Congress in creating the FAA was to place agreements to arbitrate on the same footing as other contracts. Thus, Justice Stevens argues that Congressional intent is best served by permitting parties to alter the vacatur provisions through contract. *Id.* Justice Breyer’s dissent also revolves around the principal purpose of the FAA, which he contends was to shield arbitration agreements from judicial pens rather than to prevent the creative pens

In sum, *Hall Street Associates* is perhaps best characterized as a silent bang, as few courts have analyzed the decision because it relates to non-statutory review mechanisms. Those courts that have examined the decision, however, have reached inconsistent conclusions regarding its effect on the public policy exception. For instance, at least one court is cautiously optimistic that the public policy exception was untouched by the Court in *Hall Street Associates*, explaining that if one assumes the public policy exception is an outgrowth of the contractual powers ground,¹³⁶ then the exception survived.¹³⁷ Other courts have discussed the public policy exception, but have not mentioned whether *Hall Street Associates* would have any effect on the exception.¹³⁸

Notwithstanding the judicial discussions above, none of the courts that reviewed this issue have evaluated the exception's continued vitality – or lack thereof – using anything other than conclusory analysis. More importantly, no other court has used what the Supreme Court would presumably use: statutory construction principles.¹³⁹

of parties. Consequently, Justice Breyer opines, parties' alteration of the vacatur provisions by contract does not offend the legislative intent of Congress. *Id.* at 1410.

136. 9 U.S.C. § 10(a)(4) (2006).

137. *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 351 (N.Y. Sup. Ct. 2008) (stating that, assuming the public policy exception is an interpretation of 10(a)(4) and not a common law means for vacatur, the exception would survive the *Hall Street* opinion). *But see* *Prime Therapeutics, L.L.C. v. Omnicare, Inc.*, 555 F. Supp. 2d 993, 998 (D. Minn. 2008) (“[T]he Supreme Court held that Sections 10 and 11 of the FAA provide the exclusive grounds for vacating and modifying an arbitration award.”); *Ascension Orthopedics, Inc. v. Curasan, AG*, 2008 WL 2074058, at *2 (S.D. Tex. May 14, 2008) (“*Hall Street* is unequivocal that the grounds upon which vacatur may be based as listed in § 10 are exclusive.”); *Chase Bank USA*, 859 N.Y.S.2d at 348 (“The Supreme Court has now announced, however, that section 10 of the FAA provides the exclusive route for expedited judicial vacatur of an arbitral award under the federal statutory scheme.”); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 566 F. Supp. 2d 228, 232 (S.D.N.Y. 2008) (“[T]he Supreme Court has recently held that the FAA’s narrow statutory grounds for vacatur are exclusive.”).

138. *Saturn Telecomms. Servs., Inc. v. Covad Commc’ns. Co.*, 560 F. Supp. 2d 1278, 1281 n.1 (S.D. Fla. 2008) (stating, without citing to *Hall St. Assocs.*, that public policy is a non-statutory ground for vacatur); *Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union*, 2008 WL 2415525, at *4 (S.D. Tex. June 4, 2008) (stating, without reference to *Hall St. Assocs.*, that the public policy exception is a non-statutory basis for granting vacatur under the FAA).

139. *See* *Rodriquez De Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481-83 (1989) (harmonizing the FAA with provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 77 (2006 & Supp. 2008)); *Shearson/Am. Express, Inc. v. McMahon*, 482

V. CONFLICTING PRINCIPLES: THE FAA VERSUS
THE PUBLIC POLICY EXCEPTION

As stated earlier, the Court in *Hall Street Associates* explicitly stated that the four grounds found within section 10 are the exclusive bases for vacatur under the FAA.¹⁴⁰ While none of the courts discussing *Hall Street Associates* have specifically ruled on whether the public policy exception has survived the opinion, application of basic statutory construction principles indicates the public policy exception has not survived post-*Hall*.

The provisions of the FAA aside, a statute cannot abrogate a constitutional provision.¹⁴¹ Rather, only a constitutional amendment can abrogate or modify constitutional provisions.¹⁴² Consequently, if the FAA, as a result of an arbitrator's award, invites a court to engage in an unconstitutional act, the court must decline.¹⁴³

In the absence of a constitutional conflict, the situation becomes more complicated. Pursuant to basic statutory construction principles, when two statutes are inconsistent, typically the courts will initially attempt to harmonize them.¹⁴⁴ For instance, imagine two parties, *A* and *B*,

U.S. 220, 227-31, 238-42 (1987) (harmonizing the FAA with provisions of both the Securities Exchange Act of 1934, 15 U.S.C. § 78 (2006 & Supp. 2008) and the Racketeer Influences and Corrupt Organizations Act, 18 U.S.C. § 1961 (2006 & Supp. 2008)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-31 (1985) (harmonizing the FAA with provisions of the Sherman Act, 15 U.S.C. § 1 (2006 & Supp. 2008)); *see also* *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 (2008) (using plain meaning analysis to construe the FAA's meaning).

140. *Hall St. Assocs.*, 128 S. Ct. at 1402-03.

141. *See* *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

142. *See, e.g.*, U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1 (changing the method of election of senators). Thus, if a statute and a constitutional provision conflict, the constitutional provision will prevail. *Marbury*, 5 U.S. at 178, 180.

143. For instance, if the *Hurd* circumstances were repeated and the case was arbitrated, courts could avoid enforcement of the award – not on the basis of the public policy exception, but rather on the basis that the FAA could not force a court to engage in an unconstitutional act.

144. *See, e.g.*, *Smith v. Robinson*, 468 U.S. 992, 1024 (1984) (“[C]onflicting statutes should be interpreted so as to give effect to each”); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“It is a cardinal principle of construction that . . . [w]hen there are two acts upon the same subject, the rule is to give effect to both if possible.”); *Wilderness Soc’y v. Morton*, 479 F.2d 842, 881 (D.C. Cir. 1973) (“Courts should make every effort to reconcile allegedly conflicting statutes and to give effect to the language

conspire to fix the price of widgets in the geographical area spanning Washington, Idaho, and Oregon.¹⁴⁵ Imagine further that *A* and *B* execute a written agreement to that effect, which contains an arbitration agreement invoking the FAA. Subsequently, *A* breaches the agreement and, pursuant to the arbitration provision, *A* and *B* arbitrate the dispute. Thereafter, the arbitrator issues an award in favor of *B* and *A* moves to vacate the award. Should a court confirm the award?

First, the agreement itself is illegal because it violates federal statutory law.¹⁴⁶ The only remaining analysis, therefore, is whether the FAA nonetheless requires confirmation. Initially, illegality is not a ground contained within sections 10 and 11 as the courts have thus far interpreted those sections.¹⁴⁷ Furthermore, the example does not indicate any statutory basis for vacatur under the FAA. Thus, the court must decide two things: do the FAA and the criminal prohibition conflict with each other and, if so, can the two be harmonized?

Even assuming these statutes conflict, they can indeed be harmonized. When two statutes allegedly conflict, the court should always construe them so as to give each the fullest possible effect.¹⁴⁸ In this light, the two statutes appear compatible: one merely requires arbitration in certain circumstances, while the other prohibits price fixing. Consequently, the statutes can co-exist. The law criminally punishes those who either engage in price fixing or conspire to do so, but if a party does engage in such conduct under an agreement that includes an arbitration clause, the dispute will be handled by arbitration, at least for its civil component.¹⁴⁹

and intent of both, so long as doing so does not deprive one or the other of its essential meaning.”).

145. This example is loosely based on *United States v. U.S. Gypsum Co.*, 340 U.S. 76 (1950), and *Hammes v. AAMCO Transmission, Inc.*, 33 F.3d 774, 783 (7th Cir. 1994).

146. See 15 U.S.C. § 1 (2006) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is hereby declared to be illegal.”); *U.S. Gypsum Co.*, 340 U.S. at 85 (holding that price fixing is prohibited by the Sherman Act).

147. See *supra* note 47.

148. See *supra* note 144.

149. Some could argue the courts would apply a different statutory construction principle requiring that statutes relating to a specific matter trump statutes relating to a general matter. See, e.g., *United States v. Estate of Romani*, 523 U.S. 517, 530-32 (1998). This principle provides no relief, however, as the vacatur provisions of the FAA are the more specific principles in this instance. For this argument to prevail in

Of course, that construction creates a conflict with the Court's ruling in *Hurd*:¹⁵⁰ a court will not enforce a contract that is against public policy or, in this circumstance, illegal.¹⁵¹ While reason would dictate that *Hurd*'s directives must survive after *Hall Street Associates*, that view misses a crucial point. *Hurd*'s premise – at least insofar as the Court stated it in that case and has since permitted it to evolve in the context of arbitration jurisprudence – derives from a common law rule. As between a statute and a common law rule, the statute prevails.¹⁵² Consequently, *Hall Street Associates*' exclusivity language demonstrates that the public policy exception has withered on the vine.¹⁵³

VI. THE COURT'S ELIMINATION OF THE PUBLIC POLICY EXCEPTION CREATES UNDESIRABLE RESULTS

The Court's elimination of the public policy exception creates undesirable results, as it undermines both: (a) the judiciary's social contract duties, thereby endangering the public, and (b) the public's faith in the judiciary.

A. Undermining of the Judiciary's Social Contract Duties

The heart of the social contract is that the government exists for and at the will of the majority. Designed as a protector, the government is essentially a large, resourceful guardian, capable of protecting its individual parts and laws.¹⁵⁴ If this were not so, government would cease to

the example above, the price-fixing prohibition would need a provision specifically prohibiting the enforcement of such an agreement in an arbitration setting.

150. *Hurd v. Hodge*, 334 U.S. 24 (1948)

151. *See id.* at 34-35.

152. *See United States v. Texas*, 507 U.S. 529, 534 (1993) (“Congress need not affirmatively proscribe the common-law [C]ourts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident.”) (internal quotations omitted); *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-14 (1981) (stating that when Congress enacts a statute on a subject matter previously governed by the common law, the statute controls).

153. While this discussion only specifically referenced the first form, analysis of the second form would follow the same path. Furthermore, analysis of the third form would not even survive initial scrutiny, as statutory construction principles are unnecessary when statutes conflict with the common law.

154. *See Locke, supra* note 56, at 780 (“The great end of men's entering into society being the enjoyment of their properties in peace and safety . . .”).

serve a function.¹⁵⁵ Thus, the elimination of the public policy exception, in any of its various forms, is troubling as it would require the judiciary, at least in some circumstances, to violate its duties under the social contract.

1. *Illegality and Award Forms*

Removing the illegality¹⁵⁶ and award forms¹⁵⁷ undermines the judiciary's social contract duty to enforce the laws of the majority as written; without these forms, the judiciary must permit maverick arbitration awards despite their illegality.

As stated earlier, the public policy exception is an outgrowth of Lockean social contract doctrines. Locke's central theme was that the government should serve as an unbiased umpire to carry out the will of the majority and to resolve disputes in a fair manner.¹⁵⁸ Inherent in and integral to that duty are the notions that every person is bound by the will of the majority,¹⁵⁹ that no one can "discharge any member of the society from his obedience" to the majority,¹⁶⁰ and that the government is bound to dispense justice consistent with the positive law.¹⁶¹

In this context, the judiciary's enforcement of illegal arbitration awards violates the founding principles, because a contract or award that violates positive law (a criminal prohibition) is by definition against the will of the majority. Thus, the judiciary is duty-bound to avoid the ratification and enforcement of such an award.

Arguably, the will of the majority is served by strictly following the mandates of the FAA's vacatur provisions.¹⁶² Congress, the body acting on behalf of the majority, explicitly stated its will by narrowly defining the circumstances under which it believed vacatur would be reasonable.

155. *See id.*

156. The illegality form exists where the contract itself violates positive law. *See* discussion *supra* Part III.D.

157. The award form exists where the contract is legal, but the arbitrator's award nonetheless violates positive law. *See* discussion *supra* Part III.D.

158. Locke, *supra* note 56, at 764-65 ("And thus all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules . . .").

159. *Id.* at 781.

160. *Id.* at 780 (emphasis omitted).

161. *Id.* at 781.

162. *See* FAA vacatur provisions and accompanying text cited *supra* note 41.

Consequently, vacating an award on any ground not found within the FAA would contravene the majority's will and violate a social contract.

This position, however, overlooks the fact that Congress also prohibited the criminal conduct – also a statement of the majority's will – and a court's enforcement of such a provision assists the parties to engage in behavior that the public has decided is, at best, undesirable. The question, therefore, becomes one of choice. Which violation is more sinister to the principles of the social contract – violating the provisions of the FAA by vacating an award on a ground not permitted therein or assisting the parties in conduct the majority has prohibited as criminal? Given that the chief goal of government is to protect persons and property, coupled with the fact that criminally prohibited actions are more dangerous than violations of the FAA,¹⁶³ this seems to be an easy choice.

2. Pure Policy Form

Removing the pure policy form¹⁶⁴ forces the judiciary to violate its inherent social-contract duty to protect the public.¹⁶⁵ As stated earlier, the ultimate duty of government is to protect its individual members.¹⁶⁶ The waning of the pure policy form substantially undermines this principle, as its absence requires the judiciary to ratify arbitration awards that are potentially dangerous to the public.

Critics of the pure policy form have three main objections. First, critics argue that no award could simultaneously violate public policy and fall short of violating positive law.¹⁶⁷ Second, even assuming such an award could exist, critics believe that preserving the court's ability to fashion a remedy for such an event would lead to confusion and un-

163. See Locke, *supra* note 56, at 778, 780, 782.

164. The pure policy form exists where neither the contract nor the arbitration award violates positive law, but where the award violates public policy. See discussion *supra* Part III.D.

165. As stated earlier, examples of the pure policy form almost always arise in circumstances where the contract or award endangers the safety of the public. See discussion *supra* Part III.D.

166. See Locke, *supra* note 56, at 778, 780, 782.

167. See *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 68-69 (2000) (Scalia, J., concurring). *But see* *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1218-19 (9th Cir. 1989) (*en banc*) (Trott, J., dissenting); Randall, *supra* note 3, at 782-83.

certainty.¹⁶⁸ Finally, critics hold that the public policy form permits courts a “fast and loose” method of vacating awards with which a court simply disagrees.¹⁶⁹

None of these objections, however, withstands scrutiny. Technology and society are always changing and with those changes come concomitant modifications in the positive law. But the evolution of the positive law is inherently much slower than the change that drives it. Thus, a significant time lag exists between the entrance of innovations into the mainstream and the development of the respective positive law.

While plenty of examples are certainly available, this premise is so basic that it does not warrant extended discussion. Indeed, the concept that positive law, including the Constitution itself, is living and breathing has become a common feature of jurisprudence.¹⁷⁰ Moreover, to the extent maverick arbitrators would be the exception and not the rule, that premise is unsettling; presumably, the entire appellate court structure exists, at least in part, to control unruly or simply incorrect decisions by the inferior courts. More importantly, assuming maverick arbitrators are indeed rare, even one lone arbitrator could still seriously endanger the safety and welfare of the public.¹⁷¹

As to the second criticism, the question is whether the confusion and uncertainty is a price worth paying. The answer is inevitably yes, particularly when the alternative is to leave the courts unable to protect the public against danger; such a position is irresponsible and violates the court’s social-contract duty, as stewards of the government, to protect the public.¹⁷² Finally, while many critics believe that the exception opens the door to judicial review of awards on the merits, the numbers

168. See Scott Barbakoff, *Application of the Public Policy Exception for the Enforcement of Arbitral Awards: There is No Place like “the Home” in Saint Mary Home, Inc. v. Service Employees International Union, District 1199*, 43 VILL. L. REV. 829, 865-66 (1998); Laurie A. Tribble, *Vacating Arbitrators’ Awards Under the Public Policy Exception: Are Courts Second-Guessing Arbitrators’ Decisions?*, 38 VILL. L. REV. 1051, 1081-82 (1993); *E. Associated Coal Corp.*, 531 U.S. at 68-69 (Scalia, J., concurring).

169. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 800-01 (1996).

170. See Eric R. Claeys, *The Limits of Empirical Political Science and the Possibilities of Living-Constitution Theory for a Retrospective on the Rehnquist Court*, 47 ST. LOUIS U. L.J. 737, 742 (2003).

171. See *supra* text accompanying notes 105-13.

172. See Locke, *supra* note 56, at 780.

simply do not pan out. Rather, as Professors Hodges and Goldman have noted, the exception is rarely used and is rarely successful.¹⁷³

B. Undermining Public Confidence

Removal of the public policy exception will also undermine the public's confidence in the judiciary. The judiciary is considered the ultimate arbiter of justice – blind to emotion, above reproach, and completely unbiased.¹⁷⁴ Forcing the courts to ignore their social-contract duties is bound to tarnish their image.

For example, imagine that the public learns that a court was aware of an arbitration award endangering the public but nonetheless refused to exercise its social contract power to deny it. The reputations of that court and of the broader legal system are likely to suffer.

The same can be said of the court's enforcement of an illegal contract. Referring again to the price-fixing example,¹⁷⁵ imagine the public learns of the court's enforcement of that contract. Aiding and abetting criminal behavior is illegal, but it is unlikely that the courts would be charged with violating the law for confirming the award, notwithstanding the social-contract inconsistency.¹⁷⁶ Thus, the perception becomes, "the law applies to everyone except the courts."

While courts frequently make unpopular decisions that evoke the public ire, the potential for severe criticism here is even more damaging.

173. Hodges, *supra* note 15, at 95 ("A study of cases challenging arbitration awards between 1960 and 1988 found 73 cases in which the public policy argument was the primary claim.") (citing Peter Feuille & Michael LeRoy, *Grievance Arbitration Appeals in the Federal Courts: Facts and Figures*, 45 ARB. J. 35, 44 (1990)); Goldman, *supra* note 15, at 181 (stating challenges to awards on this ground are rarely successful); see also Burton, *supra* note 5, at 482 ("In practice, courts vacate few arbitral awards.").

174. See Martha J. Dragich, *Justice Blackmun, Franz Kafka, and Capital Punishment*, 63 MO. L. REV. 853, 905 (1998) ("We expect that many decisions are difficult – even agonizing – but in order to maintain our confidence in the courts, we expect judges to carry out dispassionately the duties we have entrusted to them. . . . We do not expect to read in opinions the judge's personal views – in fact, we expect judges, as unbiased arbiters, to set personal beliefs aside."); see also Ellis Sandoz, *Religion and the American Founding*, 20 REGENT U. L. REV. 17, 25 n.55 (2007-2008) ("The law is reason unaffected by desire." (quoting Aristotle, POLITICS 1287a:28-32 (Benjamin Jowett trans.), reprinted in 2 THE WORKS OF ARISTOTLE 445, 485 (W.D. Ross, ed., Encyclopedia Britannica, Inc. 1952))).

175. See discussion *supra* Part V.

176. See Locke, *supra* note 56, at 781 (stating that the government is bound to dispense justice consistent with the laws of the majority).

Unpopular decisions on the basis of substantive merit quite often have survived within the system, with the judiciary ultimately maintaining some modicum of respect based on the presumption that, while the particular result is not perhaps agreeable to the public, the court was attempting to protect the fabric of the law. In this case, however, the court would not be protecting the public or the fabric of the law. Rather, the court would be deciding to simply protect private parties to a contract, perhaps even at the majority's expense.

VII. PROPOSALS

There are three potential remedies that may resolve this problem. Congress could amend the FAA to include the public policy exception. Alternatively, courts could construe the public policy exception as being part and parcel to the contractual powers prong¹⁷⁷ of the vacatur provisions. Lastly, courts could construe the public policy exception as an inherent power of the judiciary, existing beyond the reach of Congressional limitation. This Part will discuss each of these potential remedies in turn below.

A. Congress could amend the FAA to include the Public Policy Exception

While it is certainly true that most state statutes do not include a public policy exception,¹⁷⁸ the notion of a statutory exception is not a

177. 9 U.S.C. § 10(a)(4) (2006).

178. See, e.g., ALA. CODE § 6-6-14 (2005); ALASKA STAT. § 09.43.500 (2006); ARIZ. REV. STAT. § 12-1512 (2003); ARK. CODE ANN. § 16-108-212 (2006); CAL. CIVIL PROCEDURE CODE § 1286.4 (2007); COLO. REV. STAT. § 13-22-223 (2006); DEL. CODE ANN. tit. 10, § 5714 (1999); D.C. CODE ANN. § 16-4311 (2005); FLA. STAT. ch. 682.13 (2003); GA. CODE ANN. § 9-9-13 (2007); HAW. REV. STAT. § 658A-23 (2007); IDAHO CODE § 7-912 (2004); 710 ILL. COMP. STAT. 5/12 (2008); IND. CODE § 34-57-2-13 (1998); IOWA CODE § 679A.12 (1998); KAN. STAT. ANN. § 5-412 (2001); KY. REV. STAT. ANN. § 417.160 (2005); LA. REV. STAT. ANN. § 9:4210 (1997); ME. REV. STAT. ANN. tit. 14, § 5938 (1993); MD. CODE ANN., CTS. & JUD. PROC. § 3-224 (Supp. 2008); MASS. GEN. LAWS ch. 251, § 12 (2004); MICH. COMP. LAWS § 600.5081 (Supp. 2008); MINN. STAT. § 572.19 (Supp. 2008); MISS. CODE ANN. § 11-15-23 (2004); MO. REV. STAT. § 435.405 (Supp. 2008); MONT. CODE ANN. § 27-5-312 (2007); NEB. REV. STAT. § 25-1613 (1996); NEV. REV. STAT. 38.241 (2006); N.H. REV. STAT. § 542:8 (2006); N.J. STAT. ANN. § 2A:24-8 (2000); N.M. STAT. ANN. § 44-7A-24 (2004); N.Y. C.P.L.R. 7511 (1998 & Supp. 2007); N.C. GEN. STAT. § 50-54 (2007); N.D. LAWS 32-29.3-23 (Supp. 2007); OHIO REV. CODE ANN. § 2711.10 (2000); OKLA. STAT. tit. 12, § 1874

novel one. For example, the exception exists within the New York Convention,¹⁷⁹ the French New Code of Civil Procedure,¹⁸⁰ and was considered during the drafting of the Uniform Arbitration Act (“UAA”).¹⁸¹

Furthermore, the mere absence of such statutory mechanisms in the state systems does not alone support a strong argument that such a provision should not exist; after all, state statutes are premised upon the UAA – a uniform act that declines to adopt the exception. Alternatively, an equally likely reason that such provisions are absent is that most state courts believe the exception applies as a common law mechanism.¹⁸²

In addition to maintaining the status quo in terms of the FAA’s goals,¹⁸³ this proposal carries the added benefit of not requiring the judiciary to “turn tail” on its former interpretations of contractual powers jurisprudence, potentially undermining the perception of integrity.

(2007); OR. REV. STAT. § 36.705 (2007); 42 PA. CONS. STAT. § 7314 (2007); R.I. GEN. LAWS § 10-3-12 (1997); S.C. CODE ANN. § 15-48-130 (2005); S.D. CODIFIED LAWS § 21-25A-24 (2004); TENN. CODE ANN. § 29-5-313 (2000); TEX CODE ANN. § 171.088 (2005); UTAH CODE ANN. § 78-31a-124 (2002); VT. STAT. ANN. tit. 12, § 5677 (2002); VA. CODE ANN. § 8.01-581.010 (2007); WASH. REV. CODE § 7.04A. 230 (2007); W. VA. CODE § 55-10-4 (2000); WIS. STAT. § 788.10 (2001); WYO. STAT. ANN. § 1-36-114 (2007). *But see* CONN. GEN. STAT. § 50a-136 (2006).

179. The Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38 (June 10, 1958) (providing enforcement mechanisms where parties from different countries agree to arbitrate). *See* Moses, *supra* note 15, at 457 (citing The Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38 (June 10, 1958)).

180. N.C.P.C. art. 1502 (Fr.); *see* Moses *supra* note 15, at 461 (citing Article 1502 of the French New Code of Civil Procedure) (permitting an appeal on the basis that “the recognition of enforcement shall be contrary to public international order).

181. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, *supra* note 48. (stating the Commission did not ultimately adopt a public policy exception provision because the Commission: (1) feared it would preempted by a negative ruling from the Supreme Court; and (2) feared drafting a bright-line rule would be too difficult). For a history of the Uniform Arbitration Act, see John M. McCabe, *Uniformity in ADR: Thoughts on the Uniform Arbitration Act and Uniform Mediation Act*, 3 PEPPERDINE DIS. RESOL. L.J. 317 (2003).

182. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 214 (2008).

183. In fact, notwithstanding the existence of such a provision within the New York Convention, enforcement of awards under that provision “is considered one of the major advantages of international commercial arbitration.” Moses, *supra* note 15, at 457 n.149 (citing JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 303-06 (1997)).

The disadvantage of this proposal, of course, is that even assuming Congress was inclined to adopt such a provision,¹⁸⁴ Congressional action is “slow and irresolute,”¹⁸⁵ leaving a substantial amount of time for significant damage to the fabric of the law. Indeed, damage is already beginning to occur in the lower courts.¹⁸⁶ An additional criticism worth noting exists within the comments of the UAA itself. As stated earlier, the National Conference of Commissioners on Uniform State Laws ultimately rejected a public policy exception within the UAA, reasoning that, among other things, drafting a bright-line rule would be difficult.¹⁸⁷ Nevertheless, Congress could state the exception summarily. For instance, the exception could be simply added to section 10, and could read: “(5) where the underlying contract or the award violated public policy.” This would leave the courts free to interpret what precisely constitutes a violation of public policy, a feat the Supreme Court has already accomplished with some certainty in *Grace*.¹⁸⁸ Furthermore, to the extent critics would argue that an express exception would open the floodgates to merit-based-searching review of arbitration awards, such concerns have remained *in utero* for the past half century, as public policy violations are rarely litigated and even more rarely successful.¹⁸⁹

184. Congress, through inaction, has demonstrated a reluctance to amend the FAA. See Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1367 (2002) (“Despite expressions of concern about the problems of arbitration, Congress has yet to reassess the FAA.”). Thus, perhaps the greatest criticism of this proposal is that amendment is politically infeasible.

185. Matt Collins, *Congress Fails Science*, SCIENTIFIC AMERICAN MAGAZINE (Dec. 2007); see Lee Hamilton, *What I Wish Political Scientists Would Teach About Congress*, CONGRESSLINK (Dec. 2000), http://www.congresslink.org/print_expert_politeach.htm (stating Congress is “painfully slow”); see also Mike Allen, *Bush Presses Congress on FISA*, POLITICO (Jan. 26, 2008), <http://www.politico.com/news/stories/0108/8117.html>.

186. See cases cited *supra* note 132.

187. See NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, *supra* note 48.

188. See discussion *supra* Part III.B.

189. Critics argue that such a move would open the floodgates to litigation, as parties would actively seek vacatur on the basis of the exception. This criticism, while widespread, is confusing. The exception has already existed, albeit in a common law form, for quite a while, and no one is rolling up his pants. Rather, as some scholars have noted, the exception is rarely used. See Hodges, *supra* note 15, at 95 (“A study of cases challenging arbitration awards between 1960 and 1988 found 73 cases in which the public policy argument was the primary claim.”) (citing Feuille & LeRoy, *supra*

B. Courts Could Construe the Public Policy Exception as Being
Part and Parcel to Section 10(a)(4)

As stated earlier, courts and scholars have almost universally construed the public policy exception as being separate from those included within the FAA.¹⁹⁰ Nevertheless, depending on the interpretation of the Supreme Court's opinion in *Hall Street Associates*, the Court may have left a slight crack in their otherwise statutorily closed door. When discussing the manifest disregard of the law exception, the Court did not explicitly foreclose the possibility that sections 10(a)(3) and 10(a)(4) could include extreme errors of law.¹⁹¹ Instead, the Court stated:

note 17, at 44). Challenges to awards on this ground are rarely successful. See Goldman, *supra* note 15, at 181; 1 DOMKE ON COM. ARB. § 38:10 (2008).

190. See cases cited *supra* note 47. Scholars like Professor Hayford, however, have discussed the possible link between the statutory grounds and the public policy exception. Hayford, *supra* note 169, at 756-63.

191. Some courts have held that the “manifest disregard of law standard” survived based on this analysis. See, e.g., UMass Mem'l Med. Ctr., Inc. v. United Food & Commercial Workers Union, Local 1445, 527 F.3d 1, 6 (1st Cir. 2008) (holding, without citing to *Hall St. Assocs.*, that courts maintain the inherent power to vacate awards for manifest disregard of the law); Joseph Stevens & Co., Inc. v. Cikaneck, 2008 WL 2705445, at *4 (N.D. Ill. July 9, 2008) (“[A]n arbitration award may be vacated if the arbitrators ‘manifestly disregarded’ the law by directing the parties to violate the law of by failing to adhere to the legal principles specified by the contract.”); Reeves v. Chase Bank, N.A., 2008 WL 2783231 (E.D. Mo. July 15, 2008) (holding the courts may vacate using the manifest disregard of the law standard); Mastec N. Am., Inc. v. MSE Power Sys., Inc., 2008 WL 2704912 (N.D.N.Y. 2008) (holding the manifest disregard for the law standard is an outgrowth of section 10 of the FAA); Prime Therapeutics, L.L.C. v. Omnicare, 2008 WL 2152207 (D. Minn. 2008); Houston Refining, L.P. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Worker's Int'l Union, 2008 WL 2415525 (S.D. Tex. 2008) (stating, without reference to *Hall Street Associates*, that manifest disregard of the law is a non-statutory basis for granting vacatur under the FAA); Chase Bank USA, N.A. v. Hale, 2008 WL 1746984 (N.Y. Sup. Ct. 2008) (“[T]he Hall Street Court appears to have done nothing to jettison the ‘manifest disregard of law’ standard of *Wilko*.”). But see Rogers v. KBR Technical Servs. Inc., 2008 WL 2337184 (5th Cir. June 9, 2008) (calling into question whether manifest disregard for the law is still a viable method of vacatur post-*Hall*); Wood v. Pennetex Res., L.P., 2008 WL 2609319 (S.D. Tex. June 27, 2008) (stating *Hall St. Assocs.* overruled fifth circuit precedent establishing manifest disregard of the law as a non-statutory means of vacatur); Robert Lewis Rosen Assocs., Ltd. v. Webb, 566 F. Supp. 2d 228 (S.D.N.Y. 2008) (holding that *Hall St. Assocs.* overruled the second circuit's manifest disregard of the law jurisprudence); BNY Inv. Ctr., Inc. v. Bacchus, 2008 WL 2490062 (N.Y. Sup. Ct. 2008) (citing *Hall Street Associates* and stating “the viability of the manifest disregard for the law basis for vacatur is now in

Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.”¹⁹²

While no one seems to be completely clear as to what this means, it is reasonable to believe that the Court was leaving some basis for a more searching review of arbitration awards. Furthermore, while section 10(a)(4) has not been interpreted as including the public policy exception in the past, nothing would preclude the courts from simply expanding their interpretation of section 10(a)(4) to include the public policy exception.¹⁹³

If viewed broadly, the contractual powers ground¹⁹⁴ could be construed to encompass the public policy exception without substantially debasing the plain language of the statute. Courts could interpret the section as encompassing two prongs: (1) the traditional contractual powers prong, and (2) the public policy prong. Thus, an arbitrator’s powers would stem not only from the contract, but also from the law itself. Consequently, under the “powers prong,” an arbitrator would lack authority to enforce a contract or issue an award that the parties could not otherwise present in courts in a breach of contract action – one that violates the social contract.

This approach would not undermine the goals of the FAA. As stated earlier, the twin goals of the FAA are to eliminate judicial hostility to arbitration and provide a speedy dispute resolution system.¹⁹⁵ The proposal would neither enhance nor diminish those goals. At most, it would continue the status quo prior to *Hall Street Associates*, albeit using a slightly different path to reach the same result.¹⁹⁶

doubt”); Robert O. Sheridan, *All Almost Quiet on the Expanded Review Front: Supreme Court Rejects Expansion of Judicial Review of Arbitration Awards*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 93, 93 (2008) (stating, without analysis, that *Hall St. Assocs.* eliminated the manifest disregard for the law standard of review).

192. *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) (internal citations omitted).

193. See cases cited *supra* notes 137 & 138.

194. 9 U.S.C. § 10(a)(4) (2006).

195. *Hall St. Assocs.*, 128 S. Ct. at 1404.

196. To the extent critics could argue that this proposal could open the proverbial floodgates to merit-based-searching review of arbitration awards, see cases cited *supra*

The problem with this proposal, however, is that it requires the courts to derive a basis for public policy vacatur that is substantially different from the basis that they have nearly universally used thus far. The courts have been absolutely clear that they perceive the public policy exception as derived from common law. To turn tail now and claim a statutory basis would create the perception that courts generate rules from mere caprice.¹⁹⁷

C. Courts Could Permit the Public Policy Exception as an Inherent Power of the Courts That Exists Beyond Congressional Abrogation

Notwithstanding the Supreme Court's reluctance to look outside a strict reading of the FAA for vacatur grounds, courts could vacate arbitration awards on public policy grounds under Lockean theories of inherent, general powers.

As discussed earlier, courts have long taken the position that some powers are simply inherent to the judiciary. For instance, courts have universally concluded that the power to hold parties in contempt is inherent.¹⁹⁸ The courts could view the FAA in the same light, simply refusing to confirm judgments that would violate the social contract. Thus, even though Congress has not expressly permitted the courts to vacate, the courts would do so on the basis that, absent express authority from the majority (i.e., constitutional amendment), one branch of government cannot force another to commit or assist in committing an act otherwise violative of the social contract.¹⁹⁹

note 138.

197. As stated earlier, some courts have in fact done this with the manifest disregard of the law standard even in the short time since *Hall*. See cases cited *supra* note 137.

198. See, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (“[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders”); *In re Michael G.*, 747 P.2d 1152, 1166 (Cal. 1988) (stating that a court has the inherent power to punish contempt); *State v. Howell*, 69 A. 1057, 1058 (Conn. 1908) (“The proceeding in contempt is for an offense against the court as an organ of public justice The power to punish such offenses is inherent in courts of record, to enable them to preserve their own dignity and to duly administer justice in the causes pending before them.”).

199. At first blush, this proposal may appear inconsistent with the holding in *Grace*. However, *Grace* did not consider whether a court could be compelled to enforce an illegal arbitration agreement on the basis of a statutory provision. Rather, the Supreme Court examined in *Grace* whether courts were required to enforce a collective bargaining agreement under the federal common law, where one party manufactured a conflict between its obligation to abide by a court order and its obligations under the collective

While the Court did not explicitly leave this option open in *Hall Street Associates*, some of the Court's reasoning arguably could lead to this end. As stated earlier, Hall Street argued that the Court's use of the "manifest disregard of the law" standard in *Wilko* indicated that extra-statutory mechanisms of vacatur existed and, based on this precedent, that parties were also free to contract for heightened review. The Court disagreed, stating that Hall Street's reading of this phrase was "too much for *Wilko* to bear," as Hall Street was attempting to "leap from a supposed judicial expansion by interpretation to a private expansion by contract"²⁰⁰ This indicates that the Court views judicial expansion differently from private expansion, although the Court's emphatic use of the word "exclusive" in reference to the vacatur provisions may belie such a notion.

This final proposal is the best of the three, as it bears the same benefits of the first two but preserves the Court's ability to exercise its social contract power to protect the public, even in the absence of Congressional permission. Indeed, this is certainly the position the courts have taken with regard to the contempt power,²⁰¹ reasoning the power

bargaining agreement. See *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). Furthermore, while violation of a court order is certainly serious, it pales in comparison to public safety issues.

200. *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

201. See, e.g., *Michaelson v. United States ex. rel. Chicago St. P., M & O Ry. Co.*, 266 U.S. 42, 45 (1924) ("[T]he power to punish for contempts is inherent in all courts. . . . The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior courts are concerned, however, it is not beyond the authority of Congress . . . ; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."); *Walker v. Bentley*, 678 So. 2d 1265, 1267 (1996) ("[T]he power of a court to punish for contempt is an inherent one that exists independent of any statutory grant of authority and is essential to the execution, maintenance, and integrity of the judiciary. . . . [Thus,] the legislature may not . . . eliminate the ability of circuit courts to apply the inherent power . . ."); *In re Doe*, 26 P.3d 562, 569 (Haw. 2001) (stating that legislative enactments permitting contempt are merely a restatement of the court's inherent power, as the legislature is without power to unduly restrict or abrogate the power); *In re Opinions of the Justices*, 49 N.E.2d 252, 257 (Mass. 1943) (stating absent a constitutional provision, the legislature lacked the power to limit or regulate the inherent power of the courts); *City of Cincinnati v. Cincinnati Dist. Council 51, Am. Federation of State, County, and Municipal Employees, AFL-CIO*, 299 N.E.2d 686, 691 (Ohio 1973) ("The power to punish for contempt is said to be inherent in the courts and to exist independently from express constitutional provision or legislative enactment."); *State ex. rel. Or. State Bar v.*

does not derive from legislative enactment, and thus, the legislature is without authority to abrogate it, as one branch cannot remove that which it has not given.²⁰²

While critics may argue this proposal suffers from the same concerns as the second proposal – the courts will be viewed as inconsistent and governed only by whim – this proposal and the Court’s previous rulings can be made consistent. First, as already stated, the Supreme Court may have already permitted a judicial window by differentiating contractually-derived vacatur grounds from judicially-derived vacatur grounds. Furthermore, even assuming no such window was created, the Court’s previous position, while admittedly based in the common law, said nothing further of the root of the public policy exception, other than that the root was simply an inherent one. Thus, courts could hold that the core of the public policy exception is the inherent, social-contract power of the courts (a power not given by Congress and thus not one subject to its discretion).²⁰³ This would achieve the ultimate goals of the public policy exception, preserve the vacatur goals of the FAA, and ensure the place of the judiciary as an equal branch of the government.²⁰⁴

VII. CONCLUSION

The Court’s holding in *Hall Street Associates* is nothing short of a legal shockwave for both the fabric of the law and its social contract roots. The prospect of court-enforced public policy violations com-

Lenske, 407 P.2d 250, 254 (Or. 1965) (“[T]he legislature cannot unreasonably abridge or destroy the judicial power to punish for contempt because the legislature cannot take away a power which it does not give.”); *In the Interest of D.L.D.*, 327 N.W.2d 682, 687 (Wis. 1982) (stating a court’s contempt power exists independent of statutory permission); *see also* *Gray v. Comm’r of Revenue*, 665 N.E.2d 17, 22 (Mass. 1996) (“The executive and legislative departments impermissibly interfere with judicial functions when they purport to restrict or abolish the court’s inherent powers.”).

202. *See* cases cited *supra* note 201.

203. *Id.*

204. This claim leads to a further criticism. By disavowing the desires of Congress, the courts are ignoring their social-contract duties – to carry out the will of the majority. That criticism recalls the initial question: what is the will of the majority? Assuming Locke is correct, the will of the majority, as represented by the government, will (or at least should) always be the protection and safety of its constituents. Thus, when in doubt, and absent an explicit expression from the majority through constitutional law, the courts should exercise their social-contract power to fulfill those duties.

promises the delicate social contract that the government shares with the people by undermining the very thing government was created to do: protect the public. Furthermore, the criticism that violations of this nature would be so rare as to make this solely an academic discussion provides little relief, as one single maverick arbitrator is sufficient to seriously damage the fabric of the law both in concrete terms and in the eyes of the public.

In addition to the above, the danger exists that courts, when faced with this problem, will invalidate awards based on the exception without attempting to conduct a rational legal analysis, ironically leading to the same uncertainty and confusion that preoccupy critics' concerns. Indeed, this is a scenario that has occurred already in the short time since the Court's decision.²⁰⁵

All is not yet lost. The Court's rather opaque distinction between party-driven and court-driven alterations to the vacatur provisions perhaps signals that at least the public policy exception could survive the otherwise exclusive provisions of the Act. Additionally, of course, Congress is always free to amend the Act and add the exception.

It seems clear, however, that the Court should create some manner, ideally in line with this article's final proposal, of preserving its authority to invalidate contracts and awards based on the public policy exception, even absent explicit permission from Congress. Otherwise, these problems will persist – to the detriment of the people, the judiciary, and perhaps even the social contract.

205. See cases cited *supra* notes 137 & 138.