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Abstract

This Note examines the doctrine of manifest disregard, its impact on international arbitration, and its future after Hall Street. The focus of the discussion is U.S. law. Part I sets out the legal framework for arbitration in the United States and the statutory and extrastatutory grounds for vacatur of awards. It discusses the development and application of the doctrine of manifest disregard of the law in U.S. common law and the tension this has created with the FAA. Part II analyzes the Hall Street decision and the subsequent developing circuit split, including the case's impact on viability of manifest disregard. It also discusses different approaches to reconciling manifest disregard with the FAA both through the judiciary and legislature. Finally Part III argues that Hall Street has not eliminated manifest disregard and that the Second and Ninth Circuits' approach to reading the doctrine into the FAA is the best method of resolving the tension between the FAA and the doctrine. By adopting this approach, the Supreme Court would clarify its stance on the viability of manifest disregard and take a significant step in addressing the underlying tension between the FAA and the manifest disregard doctrine. This Note further argues that, on policy grounds-especially with regard to promoting international arbitration in the United States and as consistent with legislative intent-manifest disregard as a doctrine should only survive as a part of the FAA.

NOTE

THE DOCTRINE OF MANIFEST DISREGARD OF THE LAW AFTER *HALL STREET*: IMPLICATIONS FOR JUDICIAL REVIEW OF INTERNATIONAL ARBITRATIONS IN U.S. COURTS

*Annie Chen**

INTRODUCTION

International arbitration has grown rapidly as a method of commercial dispute resolution in the past few decades.[1] Along with this overall growth, international arbitrations involving the United States, as a party or as a forum, have grown,[2] making U.S. law on arbitration enforcement relevant to international parties.

International arbitration is governed by the New York Convention,[3] an international treaty that fosters the recognition

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1. *See, e.g.*, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 59 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (estimating that ninety percent of international contracts include arbitration clauses); *see also* Gilles Cuniberti, *Beyond Contract–The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L.J. 417, 417 (2009) (stating that there is anecdotal evidence of the rapid growth of international arbitration in the last forty years).

2. *See, e.g.*, Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 233 (2006) (stating that, from 1993 to 2003, the international arbitration caseload of the American Arbitration Association more than tripled, and that, in 2002, it announced that it had become the largest international commercial arbitral institution in the world); *see also* Kate Kennedy, Note, *Manifest Disregard in Arbitration Awards: A Manifestation of Appeals Versus a Disregard for Just Resolutions*, 16 J.L. & POL'Y 417, 424 (2007) (stating that the United States' involvement in international arbitration has grown since the early 1990s).

3. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; *see also* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 342 (2004) (describing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")). The convention requires courts of contracting states to give effect to private agreements

and enforcement of nondomestic arbitral awards.[4] Arbitration in the United States is governed generally by the Federal Arbitration Act ("FAA"),[5] which also incorporates the New York Convention.[6]

In U.S. domestic arbitrations under the FAA, once an arbitrator or arbitral tribunal renders an award, a party can petition for judicial intervention on very limited grounds: a party can file an action to modify or correct the award in order to rectify clerical mistakes, or the parties can also lodge an action to confirm or vacate the award.[7] In addition to these enumerated FAA grounds, there are several implied or extrastatutory grounds for vacatur: an award can be vacated of it is in "manifest disregard of the law," "arbitrary and capricious," "completely irrational," or violates "public policy" that can be raised in arbitrations governed by the FAA.[8] Of these, perhaps the most used is the doctrine of manifest disregard of the law ("manifest disregard" or "the "doctrine").[9]

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to arbitrate and to recognize and enforce arbitration awards made in other contracting states. It applies to arbitrations that are not considered as domestic awards in the state in which recognition and enforcement is sought. *Id.* at 342.

4. *See infra* Part I.A (detailing the legal framework of international commercial arbitration).

5. *See* Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-208, 301-307 (2006); *see also infra* Part I.A (detailing the framework of the Federal Arbitration Act ("FAA")).

6. *See* 9 U.S.C. §§ 201-208 (2006) (incorporating the New York Convention).

7. *See* 9 U.S.C. § 10 (2006) (authorizing parties to confirm or vacate an award); 9 U.S.C. § 11 (2006) (authorizing parties to correct an award based on clerical mistakes); s*ee also* CARBONNEAU, *supra* note 3, at 297 (explaining the process after an award is rendered). For the language of § 10, see *infra* note 29 and accompanying text. For the language of § 11, see *infra* note 30 and accompanying text.

8. *See, e.g.*, CARBONNEAU, *supra* note 3, at 297 (listing the extrastatutory grounds for vacatur under the FAA); Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards,* 51 DISPUTE RES. J. 22, 23 (1996) (same).

9. *See, e.g.*, Andrew P. Tuck, *The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas,* 14 LAW & BUS. REV. AM. 569, 577 (2008) (stating that manifest disregard is perhaps the most widely recognized and frequently argued ground for vacatur); *see also* Michael P. O'Mullan, Note, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the law Standard,* 64 FORDHAM L. REV. 1121, 1124 (1995) (stating that chief among the judicially created grounds for vacatur is manifest disregard of the law).

The FAA states that for a nondomestic[10] award under the New York Convention, a court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified by the New York Convention."[11] Although the U.S. federal courts of appeals ("circuit courts") are divided on whether the FAA or the New York Convention grounds apply in an action to vacate a nondomestic award made in the United States,[12] the manifest disregard standard has never been applied to international arbitrations arbitrated in a foreign state. Circuit courts have ruled, however, that all grounds for vacatur available for domestic arbitrations can be applied to international parties.[13] This means that the extrastatutory, common-law grounds for vacatur in the United States—namely manifest disregard—can be applied to international arbitrations arbitrated in the United States. International parties thus need to understand U.S. law on arbitration enforcement and consider the availability of manifest disregard when balancing the pros and cons of the United States as a forum for arbitration.[14]

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10. Under Article I(1) of the New York Convention, "foreign" awards are awards made outside of where enforcement of the award is sought, whereas "non-domestic" awards are awards "not considered as domestic awards." GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY & MATERIALS 726 (2d.ed 2001). Foreign awards can only use the New York Convention for vacatur, whereas there is debate about whether a nondomestic award can be vacated under domestic law. *Id.*

11. 9 U.S.C § 207 (2006).

12. *See, e.g.*, Drahozal, *supra* note 2, at 241-42 (citing circuit split); *see also* BORN, supra note 10, at 726 (2d.ed 2001) (same).

13. *See, e.g.*, Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2nd Cir. 1997) ("The Convention specifically contemplates that the state in which or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief."); *see also* Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 709, 712 (6th Cir. 2005), *overruled on other grounds by* Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396 (2008) ("Because this award was made in the United States, we can apply domestic law, found in the FAA, to vacate the award. . . . The arbitration award is to be reviewed according to the federal standard for vacatur."); William Park et al., *International Commercial Dispute Resolution*, 37 INT'L L. 445, 445 (2003) (stating that the FAA has been interpreted to permit vacatur in an international arbitration on the same grounds available in domestic cases).

14. *See, e.g.*, Kennedy, *supra* note 2, at 425 (stating that parties should consider whether they want to expose themselves to manifest disregard before arbitrating in the United States); *see also* Lawrence W. Newman & David Zaslowksy, *'Manifest Disregard' in International Arbitration*, N.Y.L.J., July 31, 2006, at 3 (suggesting that because U.S. courts use manifest disregard and therefore evaluate arbitral awards on their merits,

A 2008 U.S. Supreme Court decision, *Hall Street Associates v. Mattel, Inc.*, has called the existence of manifest disregard into question and has already had an impact on the viability of the doctrine outside of the FAA.[15] *Hall Street* held that the FAA did not permit parties contractually to expand the grounds for vacating or modifying an arbitral award.[16] As a result of this holding, the Court adopted a reading of the FAA that raised questions on other issues, including the viability of the manifest disregard as a ground for vacatur of arbitral awards. *Hall Street* left open the issue of whether manifest disregard of the law remains as an independent basis for vacatur of arbitral awards despite the fact that that it is not one of the enumerated grounds of the FAA.[17] Since *Hall Street*, U.S. circuit courts have disagreed on the status of manifest disregard, leaving the doctrine highly unsettled.[18] The Supreme Court recently denied the petition for a writ of certiorari of one of the leading cases, and granted the petition for a writ of certiorari in second leading case on another issue.[19]

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international parties to arbitration will be hesitant to enter into arbitrations in the United States).

15. *See* 128 S. Ct. at 1404-06; *see also infra* Part II.A (detailing the *Hall Street* opinion) and Part II.B (detailing how circuit courts have interpreted *Hall Street*).

16. 128 S. Ct. at 1400 ("The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive."); *see also infra* Part II.A (detailing the *Hall Street* opinion).

17. *See* John Fellas & Hagit Elul, *Supreme Court Says "No" to Contractual Expansion of FAA Judicial Review*, 63 DISPUTE RES. J. 5, 12 (2008) (stating that *Hall Street* will likely have an impact on the viability of manifest disregard as a separate ground of judicial review); *see also* Arthur D. Felsenfeld & Antonette Ruocco, *'Manifest Disregard' After 'Hall Street': The Early Returns*, N.Y.L.J, Sept. 19, 2009, at 24 (questioning the status of manifest disregard after *Hall Street*); *infra* Part II.A for a detailed analysis of *Hall Street*

18. *See infra* Part II.B (detailing how circuit courts have interpreted *Hall Street* as affecting the viability of manifest disregard).

19. The Supreme Court recently granted the petition for a writ of certiorari in the leading Second Circuit case but not on the issue of whether or not manifest disregard survives *Hall Street*. *See* Stolt-Neilsen SA v. Animal Feeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 2793 (2009); *see also* Petition for Writ of Certiorari, *Stolt-Neilsen*, No. 08-1198, 2009 WL 797583 (U.S. Mar. 26, 2009) [hereinafter Petition for Writ of Certiorari, *Stolt-Neilsen*]. The Supreme Court recently denied the petition for a writ of certiorari that challenged a Sixth Circuit decision that vacated an arbitration award on the ground of manifest disregard of the law. *See* Coffee Beanery, Ltd. v. WW, LLC, 300 F. App'x 415, 419 (6th Cir. 2008), *cert. denied*, 2009 WL 1342336; *see also* Petition for Writ of Certiorari, *Coffee Beanery*, No. 08-1396, (U.S. May 11, 2009) [hereinafter Petition for Writ of Certiorari, *Coffee Beanery*]; *infra* Part II.B.1.

This Note examines the doctrine of manifest disregard, its impact on international arbitration, and its future after *Hall Street*. The focus of the discussion is U.S. law. Part I sets out the legal framework for arbitration in the United States and the statutory and extrastatutory grounds for vacatur of awards. It discusses the development and application of the doctrine of manifest disregard of the law in U.S. common law and the tension this has created with the FAA. Part II analyzes the *Hall Street* decision and the subsequent developing circuit split, including the case's impact on viability of manifest disregard. It also discusses different approaches to reconciling manifest disregard with the FAA both through the judiciary and legislature. Finally Part III argues that *Hall Street* has not eliminated manifest disregard and that the Second and Ninth Circuits' approach to reading the doctrine into the FAA is the best method of resolving the tension between the FAA and the doctrine. By adopting this approach, the Supreme Court would clarify its stance on the viability of manifest disregard and take a significant step in addressing the underlying tension between the FAA and the manifest disregard doctrine. This Note further argues that, on policy grounds—especially with regard to promoting international arbitration in the United States and as consistent with legislative intent—manifest disregard as a doctrine should only survive as a part of the FAA.

I. *THE DOCTRINE OF MANIFEST DISREGARD OF THE LAW*

The common law doctrine of manifest disregard is an extrastatutory ground for vacatur of arbitral awards that exists outside of the FAA—therefore its existence creates tensions within the basic legal framework for arbitration in the United States. This Part sets forth the legal background for the doctrine of manifest disregard. It first outlines the statutory framework centered on the FAA and the FAA's grounds for vacatur. It then discusses the origin and development of manifest disregard of the law and how it is applied in U.S. courts. The discussion here is limited to chapter 1 of the FAA, which deals with domestic

arbitrations, and how the FAA and extrastatutory grounds for vacatur may affect international arbitration.[20]

A. *The FAA: The Statutory Framework for Vacatur in the United States*

The central statutory framework for arbitration in the United States is the FAA—enacted in 1925 and amended in 1970 to incorporate the New York Convention into U.S. law.[21] Chapter 1 lays out the provisions of the Act that make arbitration agreements and awards enforceable; it applies to domestic arbitrations and international arbitrations for which the seat of arbitration is in the United States.[22] Chapter 2 implements the New York Convention, and governs international arbitral awards for which the arbitration took place in a foreign state.[23] Chapter 3 implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the Panama Convention.[24]

The FAA encourages confirmation of arbitral awards. The presumption is that awards will be enforced for certain exceptions. Pursuant to section 9 of the FAA, a court must confirm an arbitral award unless it is "vacated, modified, or corrected as prescribed" in sections 10 and 11.[25] The grounds for vacating an arbitral award are set out in section 10 of the FAA, and the grounds for modifying an award are set out in section 11 of the FAA.[26]

In addition to the FAA's policy in favor of confirmation of awards, the U.S. Supreme Court has stated that the United States

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20. *See supra* note 12-14 and accompanying text (describing how U.S. courts have applied its domestic law of vacatur to international parties).

21. *See, e.g.*, Drahozal, *supra* note 2, at 235 (discussing the FAA); *see also* CARBONNEAU, *supra* note 3, at 80 (stating when the FAA was enacted and when Chapter 2, the New York Convention, was incorporated).

22. *See* Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006) (entitled "Arbitration," defining the FAA's scope of application); *see also* CARBONNEAU, *supra* note 3, at 80 (describing Chapter 1 of the FAA).

23. *See* 9 U.S.C. §§ 201-208 (2006) (entitled "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," incorporating the New York Convention); *see also* CARBONNEAU, *supra* note 3, at 80 (describing Chapter 2 of the FAA).

24. *See* 9 U.S.C. §§ 301-307 (2006) (entitled "The Inter-American Convention on International Commercial Arbitration"); *see also* CARBONNEAU, *supra* note 3, at 80 (describing Chapter 3 of the FAA).

25. 9 U.S.C. § 9 (2006).

26. 9 U.S.C. §§ 10-11 (2006).

has an "emphatic federal policy in favor of arbitral dispute resolution,"[27] and "a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes . . . ."[28] Because of the strong federal policy favoring arbitration, judicial review of arbitration, and specifically judicial vacatur of an arbitral award, is very limited.[29]

The grounds for vacatur under section 10(a) of the FAA only include situations in which the award was procured by corruption, fraud, or undue means, and where the arbitrators are guilty of misconduct or exceeded their powers. Section 10(a) of the FAA states that vacatur will only be ordered:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the 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.[30]

Section 11 of the FAA identifies additional grounds for modifying or correcting an award, which include evident material miscalculation, evident material mistake, and imperfections in a matter of form not affecting the merits. It provides that the award may be modified or corrected:

> (a) [w]here 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[;]

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27. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

28. *Id.*

29. *See, e.g.*, CARBONNEAU, *supra* note 3, at 297 (stating that the pro-enforcement presumption is so strong that it can only be defeated in exceptional circumstances of "extreme adjudicatory unfairness or profound arbitrator incompetence"); *see also* Hayford & Kerrigan, *supra* note 8, at 22 (stating that the FAA articulates narrow grounds for vacatur).

30. 9 U.S.C. § 10(a).

> (b) [w]here 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[; or]
>
> (c) [w]here the award is imperfect in matter of form not affecting the merits of the controversy.[31]

While under the FAA, sections 10 and 11 provide the only enumerated bases for vacatur of an arbitral award, these statutory grounds for vacatur are not the only grounds for vacatur under U.S. law.

B. *Manifest Disregard of the Law: An Extrastatutory Ground for Vacatur*

In addition to statutory grounds for vacatur contained in FAA section 10, there are also several extrastatutory, judicially-created, grounds for vacatur.[32] Of these, perhaps the most used is manifest disregard of the law.[33] The doctrine of manifest disregard of law traces its origins to 1953, when the U.S. Supreme Court stated in *Wilko v. Swan* that "the interpretations of the law by . . . arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."[34] The entire doctrine of manifest disregard of the law has developed out of this dictum from *Wilko*, a case that has been since overruled on its principal ruling.[35]

Prior to *Hall Street*, manifest disregard as an independent ground for vacatur was well accepted by all the circuit courts except for the Seventh Circuit.[36] Courts, however, have not been

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31. 9 U.S.C. § 11.

32. *See supra* note 8 and accompanying text (listing the implied extrastatutory grounds for vacatur).

33. *See supra* note 9 and accompanying text (stating that manifest disregard is perhaps the mostly widely recognized and frequently argued grounds for vacatur); *see also* CARBONNEAU, *supra* note 3, at 315 (stating that manifest disregard is perhaps the best known of the common law grounds for vacatur).

34. 346 U.S. 427, 436-37 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/AmExpress, Inc., 490 U.S. 477 (1989).

35. *See Rodriguez de Quijas*, 490 U.S. at 479-84 (overruling Wilko on other grounds).

36. *See, e.g.*, McCarthy v. Citigroup Global Mkts, Inc., 463 F.3d 87, 91 (1st Cir. 2006) ("Courts do, however, retain a very limited power to review arbitral awards outside of section 10. . . . [W]e have referred to this non-statutory standard of review as manifest disregard of the law." (internal quotation marks omitted) (citations omitted)); Rich v. Spartis, 516 F.3d 75, 82 (2d Cir. 2008) ("Although 'manifest disregard' is not included in § 10(a) of the FAA as a ground for vacating an arbitral award . . . 'if the arbitrators

able to form a clear and uniform standard for the doctrine. Generally, the manifest disregard exception is conservatively construed and it is not often used by courts as a basis to vacate awards.[37]

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simply ignore the applicable law, the literal application of a 'manifest disregard' standard should presumably compel vacation of the award.'" (quoting Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972))); Sherrock Bros. v. DaimlerChrysler Motors Co., 260 F. App'x 497, 499 (3d Cir. 2008) ("A court's ability to vacate an arbitral award is almost exclusively limited to [FAA] grounds, although an award found to be in manifest disregard of the law can also be vacated . . . ." (citations omitted)); Choice Hotels Int'l, Inc. v. SM Property Mgmt., LLC, 519 F.3d 200, 207 (4th Cir. 2008) ("'The permissible common law grounds for vacating such an award . . . include those circumstances where . . . the award evidences a manifest disregard of the law." (quoting Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 234 (4th Cir. 2006))); Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 353 (5th Cir. 2004) ("Besides the four statutory grounds, manifest disregard of the law and contrary to public policy are the only non-statutory bases recognized by this circuit for vacatur . . . ." (citations omitted)), *abrogated by* Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349 (5th Cir. 2009); Solvay Pharmaceuticals, Inc. v. Duramed Pharmaceuticals, Inc. 442 F.3d 471, 476 (6th Cir. 2006) ("In addition [to the FAA], courts have held that judicial intervention is appropriate where arbitrators act with 'manifest disregard of the law.'" (quoting Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 712 (6th Cir. 2005))); Hudson v. ConAgra Poultry Co. 484 F.3d 496, 504 (8th Cir. 2007) ("Our court has also recognized grounds for vacating an arbitral award that are not expressed in the [FAA] itself . . . . We have said that a district court 'can vacate an arbitral award if [the award] evidences a manifest disregard for the law.'" (alteration in original) (quoting McGrann v. First Albany Corp., 424 F.3d 743, 749 (8th Cir. 2005))); Sanford v. Memberworks Inc., 483 F.3d 956, 960 (9th Cir. 2007) ("[W]e will vacate the award only if the arbitrator violated the [FAA] . . . or exhibits 'manifest disregard of the law.' (quoting Coutee v. Barington Capital Group, L.P., 336 F.3d 1128, 1132 (9th Cir. 2003))); Lewis v. Circuit City Stores, Inc., 500 F.3d 1140, 1150 (10th Cir. 2007) ("Those 'judicially created exceptions' apply to awards that . . . derive from a manifest disregard of the law . . . ." (quoting Denver & Rio Grande W. R.R. v. Union Pac. R.R., 119 F.3d 847, 849 (10th Cir. 1997))); B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 910 (11th Cir. 2006) ("In addition to those four statutory ground for vacatur [in the FAA], we have said that there are three non-statutory grounds. An award may be vacated if . . . the award was made in manifest disregard for the law." (citing Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1464 (11th Cir. 1997))); Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813, 816 (D.C. Cir. 2007) ("In addition to the grounds under the [FAA] on which an arbitral award may be vacated, an award may be vacated only if it is in 'manifest disregard of the law' . . . ." (quoting LaPrade v. Kidder, Peabody & Co., 246 F.3d 702, 706 (D.C. Cir. 2001))). *But see* Halim v. Great Gatsby's Auction Gallery, Inc., 516 F.3d 557, 563 (7th Cir. 2008) ("This Court has limited the 'manifest disregard of the law' standard for purposes of 9 U.S.C. § 10(a)(4) . . . ." (citation omitted)).

37. *See* Kenneth M. Curtin, *Contractual Expansion & Limitation of Judicial Review of Arbitral Awards*, 56 DISP. RESOL. J. 56, 60 (2001) (stating that the standard is that an arbitrator must "appreciate the existence of a clearly governing and understandable legal principle" and also "decide to ignore it" to be in manifest disregard of the law). Curtin further states that while courts cite and consider the manifest disregard

The manifest disregard standard has been articulated and applied in many different ways by the circuit courts. In the First, Fourth, Eight, Tenth, and Eleventh Circuits, it is described as a "conscious disregard" standard.[38] In the Second, Sixth, Ninth, and District of Columbia Circuits it has been articulated as a more stringent test applied where the "conscious disregard" standard has to be met and the law has to be well defined, explicit, and clearly applicable to the case at hand.[39] Aside from these two main articulations of the doctrine, the Fifth Circuit's approach has been to vacate under manifest disregard if the arbitrator acted contrary to applicable law and if enforcing the award would result in significant injustice after taking into

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exception to award enforcement, the exception is "little more than a historical oddity that is rarely, if ever, successfully asserted." *Id.*

38. *See* Hicks v. Bank of America, 218 F. App'x 739, 745 (10th Cir. 2007) (stating that there must be "willful inattentiveness to the governing law"); Aldred v. AVIS Rent-a-Car, 247 F. App'x 167, 169 (11th Cir. 2007) (stating that the arbitrator was "conscious of the law and deliberately ignored it"); Cytyc Corp. v. DEKA Prods. Ltd., 439 F.3d 27, 35 (1st Cir. 2006) (stating that it requires "some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it"); *Patten*, 441 F.3d at 235 ("[M]anifest disregard of the law is established only where the 'arbitrator[] understands and correctly states the law, but proceeds to disregard the same.'" (second alteration in original) (quoting Upshur Coals Corp. v. United Mine Workers, Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991))); Lincoln Nat'l Life Ins. Co. v. Payne, 374 F.3d 672, 674 (8th Cir. 2004) ("Any disregard must 'be made clearly to appear' and may be found 'when arbitrators understand and correctly state the law, but proceed to disregard the same.'" (quoting Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 750 (8th Cir. 1986))).

39. *See* Collins v. D.R. Horton, Inc., 505 F.3d 874, 879-80 (9th Cir. 2007) ("'It must be clear from the record that the arbitrators recognized the applicable law and then ignored it. . . . [T]he governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable.'" (citation omitted) (emphasis omitted) (quoting Carter v. Health Net of Cal., Inc., 374 F.3d 830, 838 (9th Cir. 2004))); Bear Stearns & Co. v. 1109580 Ontario, Inc., 409 F.3d 87, 90-91 (2d Cir. 2005) ("To vacate an arbitral award, a reviewing court must find 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it all together, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" (quoting DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997))); *LaPrade*, 246 F.3d at 706 ("[A] court must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case."); Dawahare v. Spencer, 210 F.3d 666, 669 (6th Cir. 2000) ("An arbitration panel acts with manifest disregard if '(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.'" (quoting Merrill Lynch, Pierce, Fenner & Smith v. Jaros, 70 F.3d 418, 420 (6th Cir. 1995))).

account all circumstances of the case.[40] Finally the Third Circuit has said that the error must "fly in the face of established legal precedent."[41] Since the Seventh Circuit never recognized manifest disregard as an extrastatutory ground for vacatur, its standard is defined within the FAA.[42]

Even prior to *Hall Street*, there was no uniform standard of the doctrine.[43] From the various circuit formulations, it is clear that the doctrine is very limited and most circuits require at least a "conscious disregard" of the law on the part of the arbitrator.

The doctrine's standard can be very difficult for a party to meet. For example, judicial review that determines that the arbitral panel misapplied the law does not constitute manifest disregard of the law.[44] To determine if there was a "conscious disregard," the application of the standard is tied to the existence of a reasoned award because that is the easiest way a court can determine whether the arbitrator understood the law and disregarded it.[45] Since it has to be apparent that the arbitral

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40. *See, e.g.*, Sarofim v. Trust Co. of the W., 440 F.3d 213, 217 (5th Cir. 2006) ("First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld. Second, where on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case . . . .").

41. Sherrock Bros., Inc. v. DaimlerChrysler Motors Co., LLC, 260 F. App'x 497, 499 (3d Cir. 2008) (stating that the error must "fly in the face of established legal precedent").

42. Halim v. Great Gatsby's Auction Gallery, Inc., 516 F.3d 557, 563 (7th Cir. 2008) ("This Court has limited the 'manifest disregard of the law' standard for purposes of 9 U.S.C. § 10(a)(4) to encompass only two scenarios: (1) an order requiring the parties to violate the law; or (2) an order that does not adhere to the legal principles specified by the contract.").

43. *See* Nicholas Weiskopf, *Arbitral Injustice—Rethinking the Manifest Disregard Standard for Judicial Review of Award*, 46 U. LOUISVILLE L. REV. 283, 287 (describing how courts cannot agree on what a showing of manifest disregard requires); *see also* Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 242, 262 (1993) (stating that courts are forced to review many motions that border on being frivolous because the standard is not clear).

44. *See, e.g.*, Hicks v. Bank of America, 218 F. App'x 739, 741, 746 (10th Cir. 2007) (stating that there must be "willful inattentiveness to the governing law").

45. *See* Stephen L. Hayford, *Reining in the "Manifest Disregard of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 135-36 (1998) (describing the difficulty of finding the arbitrator's understanding and application of the law without a reasoned opinion); *see also* Weiskopf, *supra* note 43, at 287-88 (stating

panel was aware of binding law on the issue, the absence of either a record or a reasoned opinion can make it impossible to prove manifest disregard.[46] The application of the standard can also depend on the existence of clear legal precedent on the issue, or it is possible that there is no law that the arbitrator can manifestly disregard.[47]

C. *The Tension Between Manifest Disregard and the FAA: Weighing Judicial Review Against Deference to Arbitration*

The debate on manifest disregard and the law of vacatur goes to the heart of what arbitration is supposed to achieve in contrast to litigation. Judicial review of arbitral awards arguably creates a fundamental tension between the parties' choice of settlement through arbitration and traditional reliance on the courts to root out possible errors of law.[48]

Legally the debate centers on the tension between the FAA—a congressionally mandated framework of arbitration that discourages judicial review of arbitral awards—and a long history of case law that encourages judicial review of awards.[49] As a judicially-created doctrine, manifest disregard is arguably inconsistent with section 10(a) of the FAA, which enumerates the statutory grounds for vacatur but does not contemplate judicial

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that, without a reasoned opinion, a party challenging the award must establish intent to disregard the law by inference from the absence of any conceivable justification for it).

46. *See, e.g.*, OneBeacon America Ins. Co. v. Turner, 204 F. App'x 383, 386 (5th Cir. 2006) (stating that, without a record, it was impossible to establish that the arbitrators were aware of binding law on the issue); *see also* Noah Rubins, *"Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT'L ARB. 363, 384 ("A rule that allows extra-statutory vacatur only where arbitrators explicitly acknowledge the proper law to be applied and proceed to ignore it simply encourages silence on the part of the arbitrators.").

47. *See* Collins v. D.R. Horton, Inc., 505 F.3d 874, 884 (9th Cir. 2007) (finding that, without clear precedential law, a court cannot find manifest disregard of the law).

48. *See* O'Mullan, *supra* note 9, at 1155 (discussing the conflict between arbitration and the use of courts to review errors of law).

49. *See, e.g.*, Hayford, *supra* note 45, at 119 (arguing that this tension between the congressional scheme and the judge-made law must be resolved); *see also* ALAN SCOTT RAU ET AL., ARBITRATION 134 (2d ed. 1996) (stating that there is a need to prevent a "judicialization" of the arbitral process, but "public" supervision in the form of judicial review may be necessary to protect wider social interests.); Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 61 DISP. RESOL. J. 16, 17 (stating there is an unresolved tension between the limited grounds for review in the FAA and common law grounds for review).

review of the merits of arbitral awards.[50] On the other hand, according to Nicholas R. Weiskopf, Professor of Law at St. John's University School of Law, although much of arbitration law is justified by looking at legislative intent, the key arbitration statutes were enacted long before the growth of arbitration, presumably making intent difficult to gauge.[51]

1. Benefits of the Doctrine

The justification behind manifest disregard is that a party should not have to live with an "egregious result on the merits in an arbitration, especially one that results from deliberate failure to apply law."[52] The doctrine of manifest disregard is meant to allow a measure of review for egregious mistakes of law.

Although arbitration is created by contract, commentators and judges raised a concern for contractual adhesion translating into uneven playing fields that are best corrected by judicial review.[53] This is especially relevant because mandatory arbitration clauses are becoming an increasingly important part of commercial contracts in a variety of industries, such as securities, employment, health care, and insurance, thus making manifest disregard more important as a doctrine to protect parties.[54] In this context, arbitration is not the result of a

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50. *See supra* Part I.A (providing the language of the FAA); *see also* Hayford, *supra* note 45, at 133 (arguing that manifest disregard of the law is in conflict with section 10(a) of the FAA and that section 10(a) does not permit the type of judicial scrutiny of awards for which the current approach to manifest disregard calls).

51. Weiskopf, *supra* note 43, at 311 (stating that much of the law of arbitration is based on speculative judicial perceptions of legislative intent but that the key arbitration statutes were enacted long before the current arbitration boom).

52. Donald Francis Donovan, *Current Developments in the United States, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2008 at 83, 93 (Arthur W. Rovine ed., 2009) (further stating that "at first glance, the doctrine appears prudent and reasonable").

53. *See, e.g.*, Weiskopf, *supra* note 43, at 290 (stating that judges are concerned about contractual adhesion that translates to uneven playing field, and that courts and juries are the best equalizers); *see also* Marcus Mungioli, Note, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 ST. MARY'S L.J. 1079, 1111 (2000) (stating that manifest disregard can protect individuals who find themselves in mandatory arbitration).

54. *See, e.g.*, Mungioli, *supra* note 53, at 1110-11 (stating that, at an ever increasing rate, mandatory arbitration clauses are "slipping into" commercial contracts in variety of fields); *see also Developments in the Law–Access to Courts*, 122 HARV. L. REV. 1151, 1170 (stating that mandatory arbitration agreements have proliferated in consumer contracts and become more common in a wide range of fields).

negotiated contract and instead it can impose a disadvantage on a less sophisticated party.[55] Parties forced into arbitration lose their right to trial, a negative impact that would be exacerbated by a further limitation on judicial review.[56] For individuals in mandatory arbitration, the manifest disregard doctrine protects them from what could possibly be an unfair forum unconcerned with legal principles.[57]

Weiskopf suggests that there could be different review standards for different types of cases—a more liberal standard of judicial review for cases involving public statutory rights such as those provided by Title VII where there is more risk of contractual adhesion (as opposed to business claims).[58] While these arbitrations are not likely to be the subject of international arbitrations, all arbitrations are governed by the same law of vacatur in the United States.

2. Critiques of the Doctrine

There is much criticism of manifest disregard, both of its existence as a doctrine and of its applicability as a legal standard. Commentators argue that this judicial approach is not authorized by section 10(a) of the FAA and is inconsistent with the public policy underlying the FAA.[59] They describe these attempts as a "usurpation by the courts of the decisional authority delegated to

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55. *See, e.g., Developments in the Law–Access to Courts*, *supra* note 54, at 1175 (stating that procedural deviations from civil litigation and the minimal role of judicial oversight of arbitration disadvantage the less sophisticated); *see also* Mungioli, *supra* note 53, at 1111 ("[I]ndividuals who find themselves in the throws of mandatory arbitration without the protection of the manifest disregard standard are vulnerable to a 'capricious forum that, at its worst is barely governed by the rule of law.'" (quoting Daniel Blonsky, *The 11th Circuit Puts a Major New Dent in the Armor Surrounding Arbitration Awards*, 72 Fla. B.J., Apr. 1998, at 74, 74)).

56. *See, e.g.*, Mungioli, *supra* note 53, at 1111 (identifying loss of due process to the parties as a problem in mandatory arbitration).

57. *See id.* (stating that manifest disregard would help individuals in mandatory arbitration).

58. Weiskopf, *supra* note 43, at 305 (proposing the removal of some of the limitations on the standard but limiting the application to cases implicating public statutory rights).

59. *See, e.g.*, Hayford and Kerrigan, *supra* note 8, at 83 (stating that judges' efforts to expand the review of the merits of an arbitral award is inconsistent with the FAA); *see also* Galbraith, *supra* note 43, at 259 (stating that the policies underlying the FAA are not served by expanding on the Act's grounds for vacatur).

commercial arbitrators by the parties . . . ."[60] Arbitration is not meant to be litigation, and when parties agree to arbitrate, they inevitably gain the benefits of arbitration but sacrifice some of the benefits of litigation, including a full appellate process.[61]

The extrastatutory grounds for vacatur are seen by some as a serious obstacle to the institutionalization and acceptance of commercial arbitration as an alternative to litigation.[62] The manifest disregard doctrine, along with all the non-FAA grounds for vacatur, arguably erodes two of the defining features of arbitration as compared to litigation: finality and efficiency. Finality and efficiency are eroded because non-FAA grounds for vacatur give a losing party disappointed with an arbitral award means to challenge the award in court.[63] Because judges perceive their role in reviewing arbitral awards as important, they are unlikely to limit their ability to overturn awards that they perceive to be grossly wrong.[64]

A potential problem caused by the existence of the doctrine is the "poor loser syndrome"—parties dissatisfied with arbitration may appeal weak or even meritless claims on the assumption that they have nothing to lose.[65] These parties could potentially even win their appeals since the legal standard is not applied by courts

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60. Hayford and Kerrigan, *supra* note 8, at 83.

61. *See, e.g.*, RAU ET AL., *supra* note 50, at 134 (stating that, in order to realize the benefits of arbitration–expert decision making with reduced cost and time–litigation challenging the process or the award must be kept to a minimum); *see also* Galbraith, *supra* note 43, at 262 (arguing that agreeing to arbitrate brings both costs and benefits and that arbitration is not the same as litigation).

62. *See, e.g.*, Hayford, *supra* note 45, at 118 (stating that the extrastatutory grounds for vacatur such as manifest disregard are a "significant impediment to the maturation and institutionalization of commercial arbitration as an effective alternative to traditional litigation").

63. *See, e.g., id.* (stating that extrastatutory grounds for vacatur rob the process of its most essential feature of finality).

64. *See, e.g.*, Weiskopf, *supra* note 43, at 290 (stating that judges perceive themselves having ultimate responsibility to ensure that arbitral power complies to standards, and as caretakers of arbitration); *see also* Hayford and Kerrigan, *supra* note 8, at 83 (stating that many judges on the federal judiciary are unwilling to foreclose all possibility of overturning arbitral awards that they think are grossly in error).

65. *See, e.g.*, Kennedy, *supra* note 2, at 443 (explaining the "poor loser" problem); *see also* Galbraith, *supra* note 43, at 262 (stating that, because parties do not know what will justify vacatur, many motions to vacate that should not be brought are heard by the courts).

consistently.[66] Thus, the manifest disregard doctrine inevitably takes away from the finality of arbitration, which is supposed to be one of the reasons arbitration is apart from litigation.[67]

Extrastatutory grounds for vacatur, such as manifest disregard, also take away from the efficiency and cost-effectiveness that is meant to be an advantage of arbitration.[68] In addition, they indirectly discourage arbitrators from issuing reasoned awards and instead encourage arbitral decision making with less transparency. This happens because, in the absence of reasoned awards that reveal how the arbitrator reached her decision, courts are unable to evaluate whether the arbitrator has manifestly disregarded the law.[69] Noah Rubins has pointed out that where a standard of vacatur is based on the arbitrator acknowledging the proper law to be applied and then ignores it,

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66. *See, e.g.*, Nicholas Weiskopf, *supra* note 43, at 287 (stating that the unclear standard has done little to predict which awards are ripe for vacatur, resulting in a "roulette-like waste of judicial and party resources."); *see also* Kennedy, *supra* note 2, at 443 (stating that the poorly articulated standard encourages losing parties to seek judicial review and may allow them to win).

67. *See, e.g.*, Donovan, *supra* note 52, at 93 (stating that the doctrine "launches a thousand petitions to vacate, even though those petitions rarely lead to the *vacatur* of an award" and giving the example of an arbitral award that can be litigated through the federal court system so that a choice to arbitrate "risks at least three, or even four, levels of merits decisionmaking"); *see also* Galbraith, *supra* note 43, at 259 (stating that the virtues of arbitration quickly disappear when the disappointed party is able to resort to judicial review).

68. *See, e.g.*, Hayford, *supra* note 45, at 118 (stating that extrastatutory grounds for vacatur "increase the expense, time to resolution and consternation associated with commercial arbitration"); *see also* Hans Smit, *Manifest Disregard of the Law in the New York Supreme Court, Appellate Division, First Department*, 15 AM. REV. INT'L ARB. 111, 122 (2004) (stating that "[b]y this process, the very foundations of the institution of arbitration are eaten away"); Kevin A. Sullivan, Note, *The Problems of Permitting Expanded Judicial Review of Arbitral Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 554 (2002) (describing the danger that expanded judicial review of arbitration will make arbitration just another rung in the ladder of federal court adjudication).

69. *See, e.g.*, Hayford, *supra* note 45, at 118-19 (stating that the extrastatutory grounds for vacatur are an "overwhelming disincentive" to reasoned awards that reveal how the arbitrator decided the questions of fact and law because such awards would "facilitate judicial review of . . . challenged arbitral results," leaving arbitral decision making "off the record" and causing some to question the reliability of arbitration as an alternative to litigation); *see also* Noah Rubins, *"Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT'L ARB. 363, 384 (2001) ("A rule that allows extra-statutory vacatur only where arbitrators explicitly acknowledge the proper law to be applied and proceed to ignore it simply encourages silence on the part of the arbitrators."); *supra* note 46 and accompanying text (describing how courts cannot find manifest disregard unless there is a record or award that shows the arbitrator's reasoning).

the vactur of an award could turn on whether the arbitrator is "stupid, or could feign to be so."[70]

Courts have not vacated many awards under manifest disregard.[71] As the manifest disregard doctrine can only succeed under very narrow circumstances and rarely prevails,[72] it arguably does not undermine arbitral awards. Donald Francis Donovan argues, however, that even if the standard is articulated deferentially, it remains a merits review of the underlying award and it is thereby a tool for any unhappy party wanting to attack an award.[73] Stephen L. Hayford, Professor of Business Law in the Kelley School of Business at Indiana University–Bloomington, and his coauthor Scott B. Kerrigan, assert, for example, that the manifest disregard standard is defensible only if it is applied in a way that effectively insulates the merits of the arbitral award from judicial review.[74] The limited standard for manifest disregard could potentially limit much of the litigation concerning what grounds are sufficient to vacate an award.[75]

Given this debate on the legal standard and also the utility of the manifest disregard doctrine itself, an important policy question is: should manifest disregard exist and, if so, how can it be reconciled with the statutory framework of the FAA? Part II.C

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70. Rubins, *supra* note 46, at 384. Rubins is an attorney at Jones Day LLP.

71. *See, e.g.*, Weiskopf, *supra* note 43, at 287 (stating that manifest disregard has actually rarely been applied to reject an award on its merits); *see also* Galbraith, *supra* note 43, at 252 (stating that, although manifest disregard is often discussed, no securities cases in which vacatur was based on manifest disregard were clearly upheld on appeal).

72. *See, e.g.*, Tuck, *supra* note 9, at 577 (stating that, although manifest disregard is perhaps the most often argued grounds for vacatur, the argument rarely prevails because under the legal standard mere errors of law or mistakes of facts are not grounds for vacatur).

73. *See* Donovan, *supra* note 52, at 93 (stating that manifest disregard allows parties to attack an award, even if the standard is very deferential to the arbitrator). Donovan is partner at Debevoise & Plimpton, LLP.

74. *See, e.g.*, Hayford and Kerrigan, *supra* note 8, at 80 (arguing that manifest disregard is acceptable only if when applied the merits of the award are not subject to "judicial interference").

75. *See, e.g.*, Galbraith, *supra* note 43, at 263 (stating that a narrowly and clearly defined standard by the Supreme Court would eliminate much of "needless litigation," but that the best solution would be for the Supreme Court to find the FAA grounds exclusive); *see also* Adam Milam, Comment, *A House Built on Sand: Vacating Arbitration Awards for Manifest Disregard of the Law*, 29 CUMB. L. REV. 705, 731 (1999) (stating that the inconsistent circuit standards for the doctrine hinders the efficiency of the arbitration process because attorneys and courts are not clear on what is reviewable legal error).

of this Note presents potential solutions and Part III argues for the doctrine to remain but to be harmonized with the FAA. In the next Part, this Note discusses the Supreme Court's recent *Hall Street* decision that has called the very existence of manifest disregard into question and the recent case law developments that have followed.

II. *THE* HALL STREET *DECISION AND SUBSEQUENT CIRCUIT SPLIT*

In *Hall Street*, the Supreme Court held that the FAA does not permit parties to contractually expand the grounds for vacating or modifying an arbitral award.[76] In doing so, the Court raised uncertainties about several issues under the FAA, including the viability of manifest disregard as a ground for vacating arbitral awards and the authority of parties to contractually reduce the grounds for vacating arbitral awards. This Part examines the *Hall Street* decision and then dissects the post–*Hall Street* circuit split on the viability of manifest disregard. It also presents potential solutions to the conflict between manifest disregard and the FAA that could be instructive in resolving the issues raised by *Hall Street*.

A. *The* Hall Street *Decision*

In *Hall Street*, the Supreme Court addressed whether the parties to an arbitration agreement may expand the grounds for vacating an award beyond those set forth in sections 10 and 11 of the FAA.[77] The Court held that parties could not expand vacatur by agreement and agreed with the Ninth Circuit's approach in *Kyocera Corp. v. Prudential-Bache Trade Services*, which had emphasized that sections 10 and 11 were the exclusive grounds for challenging an arbitral award, even if the arbitration agreement provided otherwise.[78]

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76. *See* Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1398, 1403 (2008). For a detailed discussion of the opinion, see *infra* Part II.A.

77. *Hall Street*, 128 S. Ct. at 1400 ("The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract.").

78. *Id.* at 1404 (citing Kyocera Corp. v. Prudential-Bache Trade Servs., 341 F.3d 987, 1000 (9th Cir. 2003)); *see also infra* notes 152-53 and accompanying text (describing further the *Kyocera* opinion).

In *Hall Street*, the Court decided between two conflicting approaches to the FAA. In one approach, the FAA provides an exclusive regime that reflects a policy emphasizing "finality and efficiency" and limited judicial review.[79] The second approach emphasizes that parties should be free to agree to expand judicial review by contract, and the FAA provides the procedure by which a court can enforce the agreement because arbitration is a "creature of contract."[80] The Court decided that the language of section 9 of the FAA made it clear as a textual matter that the grounds for review in sections 10 and 11 were exclusive; therefore, the parties did not have authority to expand the bases for review under the statute.[81]

In the case, Hall Street had argued for the second approach—that *Wilko v. Swan*[82] had created a extrastatutory ground for vacatur through manifest disregard, and that parties should be allowed to also contractually expand the grounds for review. The Court rejected this argument, finding that there is "nothing malleable about 'must grant' [in section 9 of the FAA,] which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies."[83] The Court stated that, in the context of whether parties could expand the grounds for vacatur and modification, the statutory bases for vacatur under the FAA are exclusive.[84]

While the Court did not extend manifest disregard in *Wilko* to permit parties to contract for greater judicial review, it did not expressly decide whether the doctrine remains an extrastatutory

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79. *Hall Street*, 128 S. Ct. at 1403 ("[Sections] 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification . . . ."); *see also supra* notes 25-31 and accompanying text (describing the FAA's limited judicial review of awards).

80. *Hall Street*, 128 S. Ct. at 1404 ("Hall Street says that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is 'motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered.'" (alteration in original) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985))).

81. *Hall Street*, 128 S. Ct. at 1404 ("To that particular question [of contractually expanding for increased judicial review] we think the answer is yes, that the text compels a reading of the §§ 10 and 11 categories as exclusive.").

82. *See supra* notes 34-35 and accompanying text (describing how the dictum in *Wilko v. Swan* is the legal justification for the existence of the manifest disregard doctrine).

83. *Hall Street*, 128 S. Ct. at 1405.

84. *Id.* at 1400 ("We hold that the statutory grounds are exclusive.").

basis for judicial review of arbitration decisions. The Court stated several possible justifications for the manifest disregard of law doctrine, including one that ties the doctrine back to the FAA:

> 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.'[85]

This language is not a definitive decision on the doctrine, and only casts doubt on whether the manifest disregard of the law is an appropriate basis for judicial review.[86] The Court stated:

> In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.[87]

This discussion in *Hall Street* on manifest disregard has caused lower courts to struggle with whether the doctrine still exists and what the legal standard is.[88] Commentators have already stated that the Court may need to resolve this uncertainty by taking up the issue again.[89]

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85. *Id.* at 1404.

86. Hans Smit, *Hall Street Associates v. Mattel: A Critical Comment*, 17 AM. REV. INT'L ARB. 513, 519 (2008) (arguing that *Hall Street* has not actually decided whether manifest disregard still exists outside of the FAA); *see also* Felsenfeld and Ruocco, *supra* note 17, at 24 (stating that the Supreme Court's opinion on whether manifest disregard could be considered within the FAA is not clear).

87. *Hall Street*, 128 S. Ct. at 1406.

88. *See infra* Part II.B (describing the way lower courts have interpreted *Hall Street*).

89. See, *e.g.*, Smit, *supra* note 86, at 519 (stating that the Court needs to resolve the issue head-on instead of just speculating on it); *see also* Donovan, *supra* note 52, at 95 (stating that the Court "may have to decide the issue"); Felsenfeld & Ruocco, *supra* note 17, at 24 (stating that the confusion will exist until the circuit courts arrive at a consistent conclusion or until the Supreme Court revisits the issue).

B. *What Does* Hall Street *Mean for Manifest Disregard?: The Circuit Split*

Circuit courts, as well as numerous district courts and state courts across the country, have tried their hand at interpreting *Hall Street*.[90] This Note is limited to discussing *Hall Street*'s impact on circuit court decisions on manifest disregard. At the time of writing, the circuit courts that have grappled with the issue of manifest disregard by *Hall Street* are the Second, Fifth, Sixth, and Ninth Circuits. Additionally, the First Circuit stated in dicta in one opinion that *Hall Street* abolished manifest disregard as a ground for vacatur, but in a subsequent opinion vacated an award based on manifest disregard standard without discussing the impact of *Hall Street*.[91] The remaining circuits have not addressed the issue. The deepening split is between the approaches of the Sixth, Second, and Ninth; and Fifth Circuits.

The Sixth, Second, and Ninth Circuits have continued to review arbitral awards for manifest disregard of the law, although they have adopted somewhat different approaches to the *Hall Street* decision and the doctrine. The Sixth Circuit's interpretation has left the doctrine untouched. The Second and Ninth Circuits conclude that manifest disregard still exists, but that it should be read into the FAA—effectively reaching the result that manifest disregard is not an independent ground of vacatur. The Fifth Circuit held that *Hall Street* had conclusively rejected manifest disregard as an independent, extrastatutory ground for disturbing an arbitral award, thereby compounding the uncertainties produced by *Hall Street* and its interpretational approach to the FAA. These opinions not only grapple with whether the doctrine continues to exist, but with how to resolve

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90. *See, e.g.*, Robert Lewis Rosen Assocs. v. Webb, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008) (discussing effect of *Hall Street* on the existence of extrastatutory grounds for vacatur outside of the FAA's enumerated grounds); *see also* Prime Therapeutics LLC v. Omnicare, Inc., 555 F. Supp. 2d 993, 997 (D. Minn. 2008) (same); DMA Int'l, Inc. v. Qwest Communications Int'l., No. 08-CV-00358-WDM-BNB, 2008 WL 4216261, at *3, *4 (D. Colo. Sep. 12, 2008); Chase Bank USA., N.A. v. Hale, 859 N.Y.S.2d 342, 348 (N.Y. Sup. Ct. 2008) (same); Felsenfeld & Ruocco, *supra* note 17, at 24 (discussing some early post-*Hall Street* cases).

91. *See* Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008) ("[W]e decline to reach the question of whether *Hall Street* precludes a manifest disregard inquiry in this setting. Whether or nor *Hall Street* applies, Ramos's claim fails."). *But see* Kashner Davidson Sec. Corp. v. Mscisz, 531 F.3d 68, 74 (1st Cir. 2008) (no mention of *Hall Street*).

the conflict between the doctrine and the FAA. Thus, the circuit court approaches post–*Hall Street* also present possible solutions to reconciling the exclusivity of the FAA and the existence of extrastatutory vacatur.

1. The Sixth Circuit: Manifest Disregard Still Exists

The Sixth Circuit recently concluded in *Coffee Beanery, Ltd. v. WW, L.L.C.* that it would follow its established precedent and continue to vacate awards based on manifest disregard.[92] By so deciding, the Sixth Circuit left the doctrine untouched. The court issued two opinions. The amended opinion discusses *Hall Street,* finding that it did not clearly eliminate the manifest disregard of the law doctrine. It states that "[i]n light of the Supreme Court's hesitation to reject the manifest disregard doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle."[93] The Sixth Circuit's opinion thus leaves the doctrine untouched and declares that the manifest disregard doctrine continues to exist as it did before *Hall Street.*

In *Coffee Beanery,* the Sixth Circuit grapples with the issue of whether the doctrine exists, but does not address *Hall Street*'s speculation that manifest disregard might be part of the FAA. Subsequent to *Coffee Beanery,* the Sixth Circuit also referred to the *Hall Street* discussion on manifest disregard in *Grain v. Trinity Health,* but did not further interpret the *Hall Street* opinion.[94] Therefore, the Sixth Circuit does not offer a clear solution to the issue raised by the Supreme Court in *Hall Street,* but only concludes that manifest disregard still exists. The Supreme Court recently denied a petition for a writ of certiorari in *Coffee Beanery* on the issue of whether manifest disregard survives *Hall Street.*[95]

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92. 300 F. App'x 415, 419 (6th Cir. 2008) ("[T]his Court will follow its well-established precedent and continue to employ the 'manifest disregard' standard.").

93. *Id.* at 419.

94. Grain v. Trinity Health, Mercy Health Services Inc., 551 F.3d 374, 379-80 (6th Cir. 2008) ("To the extent that 'manifest disregard' is 'shorthand' for the grounds enumerated in § 11, as the Supreme Court suggested might be the case for some of the grounds listed in § 10 . . . that does [the party] no good.").

95. *See* Coffee Beanery, Ltd. v. WW, LLC, 300 F. App'x 415, 419 (6th Cir. 2008), *cert. denied,* 2009 WL 1342336 (U.S. Oct. 5, 2009); *see also* Petition for Writ of Certiorari, *Coffee Beanery, supra* note 19.

2. The Second and Ninth Circuits—Manifest Disregard Survives and Is Within the FAA

The Second and Ninth Circuits form the second approach of the post–*Hall Street* circuit split. They have said that manifest disregard survives but have reconceptualized the standard as part of section 10(a)(4) of the FAA.

a. Second Circuit

In *Stolt-Nielsen SA v. Animal Feeds Int'l Corp*, the Second Circuit ruled that courts may continue to review arbitral awards to determine whether an arbitrator manifestly disregarded the law.[96] Acknowledging that some courts have held that manifest disregard did not survive the *Hall Street* decision, the Second Circuit held that the manifest disregard standard continues to exist as a ground for reviewing an arbitral award but that it should be "reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA . . . ."[97] The Second Circuit stated that it agreed with the Seventh Circuit's view prior to *Hall Street*:

> Like the Seventh Circuit, we view the 'manifest disregard' doctrine, and the FAA itself, as a mechanism to enforce the parties' agreements to arbitrate rather than as judicial review of the arbitrators' decision.[98]

It went on to state:

> We must therefore continue to bear the responsibility to vacate arbitral awards in rare instances in which 'the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed

96. 548 F.3d 85, 94 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 2793 (2009) (concluding that courts may continue to review arbitral awards to determine whether the arbitrator manifestly disregarded the law). The case is currently before the Supreme Court on the separate issue of whether imposing class arbitration on parties whose arbitration clauses are silent on the issue is consistent with the FAA. *See* Petition for Writ of Certiorari, *Stolt-Neilsen*, *supra* note 19; *see also Stolt-Neilsen*, 548 F.3d 85, *cert. granted*, 129 S. Ct. 2793 (2009); *supra* note 19.

97. *Stolt-Neilsen*, 548 F.3d at 94.

98. *Id.* at 95.

> issue, and nonetheless willfully flouted the governing law by refusing to apply it.'[99]

By ruling this way, the Second Circuit, as did the Seventh Circuit before *Hall Street*, read manifest disregard of the law as an error in which the arbitrator exceeds his powers, within the meaning of section 10(a)(4) of the FAA, rather than as an independent ground for vacatur.[100] This reading places the manifest disregard doctrine within the analysis of *Hall Street*. By reading the doctrine into the statute, the Second Circuit ensures that the doctrine survives. However, by saying that the doctrine exists within the statute, it also, ironically, essentially eliminates manifest disregard as an independent ground for vacatur. This Second Circuit opinion explicitly overturned[101] a district court's interpretation of *Hall Street* as having invalidated manifest disregard of the law, making it clear that in its view the doctrine still survives, albeit in another form within the FAA.[102]

b. Ninth Circuit

The Ninth Circuit has taken the same approach as the Second Circuit on the viability of manifest disregard. It issued an opinion stating that "in this circuit, an arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitral award under § 10(a)(4) of the Federal Arbitration Act."[103] This holding was based upon the Ninth Circuit's

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

100. *Id.* (stating that section 10(a)(4) of the FAA, which allows vacatur if arbitrators "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made," encompasses the current manifest disregard standard because arbitrators "fail to interpret the contract at all" if they manifestly disregard the law because parties do not agree to arbitrations that are in manifest disregard of the law).

101. *Id.* at 94 (stating that the court does not agree with the courts that have concluded the doctrine no longer exists, such as the court in *Robert Lewis Rosen Associates v. Webb*, 566 F. Supp. 2d 228 (S.D.N.Y. 2008)).

102. In *Robert Lewis Rosen*, the district court had stated that:

> [T]he Second Circuit's traditional understanding of *Wilko* and § 10–that *Wilko* endorsed manifest disregard and that § 10's grounds are not exclusive–is inconsistent with the basis for the holding in *Hall Street*, the Court finds that the manifest disregard of the law standard is no longer good law.

Robert Lewis Rosen, 566 F. Supp. 2d at 233.

103. Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1281 (9th Cir. 2009).

characterization of the manifest disregard doctrine as an example of section 10(a)(4) of the FAA, which applies if an arbitrator exceeds the arbitrator's authority.

This case was decided on remand from the Supreme Court.[104] The Ninth Circuit originally found that the arbitrator's decision was in manifest disregard of the law, but on appeal, the Supreme Court vacated and remanded it for reconsideration in light of *Hall Street.*[105] On remand, the Ninth Circuit found that the circuit's view of the manifest disregard of the law ground for vacatur is still permitted under *Hall Street.*[106]

The opinion reinforces the circuit's pre–*Hall Street* rule that manifest disregard "is shorthand for a statutory ground under the [FAA], specifically 9 U.S.C. § 10(a)(4), which states that the court many vacate 'where the arbitrators exceeded their powers.'"[107] Thus, the Second and Ninth Circuits take the position that manifest disregard exists, but only within the framework of section 10(a)(4) of the FAA.

3. The Fifth Circuit: No Manifest Disregard Outside of the FAA

Citigroup Global Markets, Inc. v. Bacon,[108] a Fifth Circuit decision, deepens the split among the circuit courts regarding the interpretation of the *Hall Street* and the viability of manifest disregard. The Fifth Circuit is the first circuit court to directly interpret *Hall Street.* It found that "*Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA."[109] The court decided that the manifest disregard of law doctrine is no longer a valid basis for vacating an

104. *See id.* ("In a prior opinion, published at 514 F.3d 833, we determined that we lacked jurisdiction to review the district court's order compelling arbitration . . . . The Supreme Court vacated that opinion and remanded this case to us for reconsideration in light of *Hall Street* . . . .").

105. *Id.*

106. *Id.* ("We determine that *Hall Street Associates* does not undermine our prior precedent, *Kyocera Corp. v. Prudential-Bache T. Servs.*, 341 F.3d 987 (9th Cir. 2003) (en banc).").

107. *Id.* at 1290 (citation omitted).

108. 562 F.3d 349 (5th Cir. 2009).

109. *Id.* at 355.

arbitral award under the FAA and held that sections 10 and 11 of the FAA are the exclusive grounds for vacatur.[110]

The Fifth Circuit rejected the established line of circuit court decisions which recognized an extrastatutory basis for vacating arbitral awards based on *Wilko v. Swan.*[111] It also explicitly overruled the Fifth Circuit's prior case law that recognized manifest disregard of the law as an independent ground for vacatur.[112]

The Fifth Circuit directly grappled with and interpreted the *Hall Street* decision.[113] The court concluded that the Supreme Court had reached its decision in *Hall Street* by looking at the language of the FAA, which provides that an order "must" be confirmed unless one of section 10 or 11 grounds applies.[114] The Fifth Circuit then concluded that only enumerated statutory grounds can be used as grounds for challenging an arbitral award brought under the FAA.[115] The court interpreted *Hall Street* as having rejected manifest disregard of the law as an independent ground for challenging an arbitral award: "*Hall Street* rejected manifest disregard as an independent ground for vacatur, and stood by its clearly and repeatedly stated holding . . . that §§ 10 and 11 provide the exclusive bases for vacatur and modification of an arbitration award under the FAA."[116]

In its opinion, the Fifth Circuit also discussed the other circuits' decisions dealing with *Hall Street.* It characterized the Sixth Circuit's decision in *Coffee Beanery* as having "narrowly

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110. *See id.* ("[T]o the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA.").

111. 346 U.S. 427, 436-37 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/AmExpress, Inc., 490 U.S. 477, 484 (1989); *see supra* notes 34-36 and accompanying text (explaining *Wilko* and surveying circuit court opinions that recognize manifest disregard as an independent ground for vacatur).

112. *Citigroup,* 562 F.3d at 355 ("To the extent that our previous precedent holds that non-statutory grounds may support the vacatur of an arbitral award, it is hereby overruled.").

113. *See id.* at 351 (analyzing the language of *Hall Street*).

114. *See id.* (stating that the Supreme Court had said there is "nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies" (quoting *Hall Street,* 128 S. Ct. at 1405)).

115. *Citigroup,* 562 F.3d at 358 ("Thus from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in § 10.").

116. *Id.* at 353.

construed the holding in *Hall Street* as applying only to contractual expansions of the grounds for vacatur."[117] It also made note of the Second and Ninth Circuit's reading of the doctrine as part of section 10(a)(4) of the FAA, but did not comment on or criticize the opinions.[118]

The Fifth Circuit explicitly disagreed with the Sixth Circuit's decision by finding that *Hall Street* held that section 10 grounds are exclusive.[119] It did not, however, reject the Second and Ninth Circuit's formulation of the standard as part of section 10(a)(4) of the FAA. Although it seems that the Fifth Circuit has ruled that manifest disregard no longer exists at all because it has specifically said that the doctrine does not exist outside the FAA, the Fifth Circuit's reading actually leaves room for manifest disregard to exist within the FAA. If manifest disregard is not extrastatutory, it could continue to exist under the Fifth Circuit's approach. This approach would also be consistent with the Second and Ninth Circuit's statutory approaches to manifest disregard.

C. *Other Approaches to Resolving Manifest Disregard's Conflict with the FAA*

Since *Hall Street*, the Fifth Circuit has advanced a clear position that that the FAA provides exclusive grounds for vacatur.[120] The Sixth Circuit has left the doctrine unchanged.[121] The Second and Ninth Circuits have advanced the approach that manifest disregard should be incorporated into section 10(a)(4) of the FAA, which does not conflict with the Fifth Circuit.[122] In addition to these approaches, scholars have also suggested other ways of dealing with the conflict between the statutory framework of the FAA and the manifest disregard doctrine.

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117. *Id.* at 355 (construing the holding in *Coffee Beanery*).

118. *Id.* (summarizing the Second and Ninth Circuit's decisions on manifest disregard).

119. *Id.* at 356 ("[W]e believe that *Coffee Beanery* misread *Hall Street*'s discussion of *Wilko*. We do not see hesitation by *Hall Street* to reject manifest disregard of the law as an independent ground for vacating an award under the FAA.").

120. *See supra* Part II.B.3 (discussing the Fifth Circuit approach).

121. *See supra* Part II.B.1 (describing the Sixth Circuit opinion).

122. *See supra* Part II.B.2 (discussing the Second and Ninth Circuit approaches).

Scholarly opinion prior to *Hall Street* had suggested that manifest disregard should be reconciled with the FAA. The approaches can be broadly categorized as legislative or judicial action.

1. Legislative Solutions

Some commentators have suggested that the U.S. Congress should act to expand the FAA to incorporate the doctrine.[123] Weiskopf notes that much of the law of arbitration is based on speculative judicial perceptions of legislative intent, but that the key arbitration statutes were enacted long before the current arbitration boom.[124] Perhaps legislative action would provide a clearer picture of legislative intent and lead to a body of case law under a single standard for manifest disregard of the law.[125]

Christopher Drahozal, Professor of Law at University of Kansas School of Law, argues that codifying manifest disregard and giving it a clear standard would protect the integrity of the judicial process.[126] He believes that this would enable courts to avoid putting their power and authority behind arbitral awards that "openly flaunt the law."[127] Rubins argues that the FAA should be amended to either reinforce the effectiveness of section 10(a)(4)'s "excess of powers" language, or by incorporating manifest disregard of the law into the statute.[128]

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123. *See, e.g.*, Milam, *supra* note 75, at 731 (arguing that Congress should incorporate manifest disregard into the FAA and create a uniform standard); *see also* Rubins, *supra* note 46, at 386 (arguing that the FAA should be amended to either reinforce the effectiveness of section 10(a)(4)'s "excess of powers" language, or by incorporating manifest disregard of the law into the statute); Mungioli, *supra* note 53 at 1117 (suggesting that the legislative branch should enact a narrowly tailored expansion of judicial review within the FAA).

124. *See supra* note 51 and accompanying text (stating Weiskopf's view that much of the law of arbitration is based on speculative judicial perceptions of legislative intent).

125. Milam, *supra* note 75, at 731 (arguing that incorporation would facilitate "uniformity and predictability among the circuits, increase individual confidence in the arbitration process, and encourage arbitrators to be accurate and fair in their decision"); Rubins, *supra* note 46, at 386 (stating that the FAA needs to be reformed because of the constant "evolution and devolution of judicially crafted grounds" and that Congress is more likely than the Supreme Court to do so).

126. Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 250 (2007) (proposing that manifest disregard should be codified).

127. *Id.*

128. Rubins, *supra* note 46, at 386 (arguing that the FAA should be amended and that, since the Supreme Court is unlikely to do so, Congress should).

Some suggest that Congress should do more than just harmonize manifest disregard with the FAA. For example, Congress might require arbitrators to record the rationale for their decision, or that, if arbitrators do not record a rationale, to make sure that this does not impede a court's inference that the arbitrators' decision was in manifest disregard of the law.[129] This would presumably work against the disincentive for arbitrators to create reasoned awards caused by the manifest disregard standing being one of intentional disregard.[130]

2. Judicial Solutions

Commentators have also tried several ways of providing a "statutory hook" for manifest disregard of the law in contemplation of judicial action. The Supreme Court in *Hall Street* also speculated that perhaps manifest disregard could be located within sections 10(a)(3) or 10(a)(4) of the FAA.[131] Some commentators have tried to read manifest disregard of the law as an application of the excess of authority ground in section 10(a)(4) of the FAA[132] if arbitrators "exceed their powers."[133] This is the same approach advanced by the Second and Ninth Circuits post–*Hall Street*.[134] They argue that, if there is no express agreement between parties, the scope of the arbitrator's authority is defined by implied arbitral powers.[135] This approach is based on the assumption that the parties did not agree to allow the arbitrators manifestly to disregard the law, so that if the arbitrators did so, they exceeded their authority.[136]

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129. Milam, *supra* note 75, at 731 (suggesting that Congress further act to require reasoned awards or ensure that the lack of a reasoned award does not impede application of manifest disregard).

130. *See supra* note 69 and accompanying text (describing the incentive that the intentional disregard standard creates for arbitrators to not issue reasoned awards).

131. *See supra* notes 85-86 and accompanying text (describing the Supreme Court's discussion of manifest disregard and the FAA in *Hall Street*).

132. FAA, 9 U.S.C. § 10(a)(4)(2007).

133. Drahozal, *supra* note 126, at 239 (stating that some commentators treat manifest disregard as an application of the excess authority ground in 10(a)(4) of the FAA).

134. *See id.* (stating the position of those who read the doctrine into section 10(a)(4) of the FAA).

135. *See id.* (explaining the reasoning of those who read the doctrine into section 10(a)(4) of the FAA).

136. *Id.* at 239 (describing the viewpoint of IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW (1994), §§ 40.1.3.2, 40.5.2.4).

Other commentators have argued that manifest disregard could be contained within the meaning of section 10(a)(3) as a form of arbitrator misconduct.[137] Hayford argues that manifest disregard should be recognized as "emanating from section 10(a)(3) of the FAA," which covers arbitrator "misconduct and misbehavior."[138] Hayford explains that a party seeking vacatur under section 10(a)(3) of the FAA would have to prove objectively that the arbitrator's refusal or failure to apply the correct law is directly prejudicial to the arbitral award.[139] He argues that, because judicial review of an alleged error of law would not occur unless there is clear evidence that the arbitrator correctly understood the law, this approach to manifest disregard creates a positive barrier to judicial review of an arbitrator's decision on the merits of a dispute.[140] An advantage of this model is that it only requires minor adjustment of the case law in circuits that recognize manifest disregard.[141]

Hans Smit, Professor of Law at Columbia Law School, argues that only disregard of mandatory law provides a basis for vacatur under the doctrine because an award disregarding mandatory laws may be regarded as violating public policy, and would therefore be covered by existing statutory grounds for judicial review.[142] His logic is that such review would be based on the mandatory nature of the relevant law disregarded rather than on any of the grounds specified in section 10.[143]

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137. *See id.* at 239 (describing the viewpoint of Stephen Hayford in his article *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitral Awards*, 30 GA. L. REV. 731, 816-17 (1996)).

138. Hayford, *supra* note 45, at 137 (arguing that a narrow definition of manifest disregard, in which the arbitrator correctly interpreted the law and then ignored it, describes arbitral behavior that would fit under arbitrator "misconduct" and "misbehavior" in section 10(a)(3) of the FAA).

139. *Id.* (stating that the party must show with objective proof a nexus between the arbitrator's manifest disregard of the law and the result of the arbitration).

140. *Id.* (stating that the misconduct/misbehavior approach within the FAA creates a substantial barrier to judicial evaluation of the merits). The current approach to manifest disregard also prevents a court from vacating an award because it disagrees with an arbitrator's interpretation of the law or findings of fact, because it is focused on an arbitrator's misapplication of clear law. *Id.* at 140.

141. *Id.* (stating that this model would require only a "sharpening" of the case law).

142. *See* Smit, *supra* note 86, at 519 (describing his view that only disregard of mandatory law should be subject to vacatur under manifest disregard); *see also* Smit, *supra* note 68, at 129 (describing his view on mandatory law and manifest disregard).

143. Smit, *supra* note 86, at 519 n.31 (describing the logic behind his argument).

This Section has presented several potential judicial and legislative solutions to harmonizing manifest disregard with the FAA. Part III of this Note explores the future of the doctrine in light of *Hall Street*, the circuit split, and policy considerations.

III. *THE FUTURE OF THE MANIFEST DISREGARD DOCTRINE*

This Note has discussed the developing circuit split on the viability of the doctrine of manifest disregard of the law after the Supreme Court's decision in *Hall Street*. It argues that *Hall Street* should be interpreted as allowing manifest disregard to survive and that the doctrine should continue to exist, but only within the FAA's statutory framework. The status of the doctrine can be resolved through two main approaches: (1) the Supreme Court can resolve the circuit split and adopt the Second and Ninth Circuits' viewpoints that manifest disregard exists within the confines of the FAA, or (2) Congress can act to expand the language of the FAA to include manifest disregard of the law. The petition for a writ of certiorari in the Sixth Circuit's *Coffee Beanery* case offered the Supreme Court an opportunity, which it denied. The Court may revisit the issue if Circuit case law continues unresolved and decide the lingering issue of whether manifest disregard still survives after *Hall Street* and how it can be reconciled with the FAA.

A. *Interpreting* Hall Street

The Supreme Court in *Hall Street* ruled that parties cannot contractually alter the FAA's exclusive grounds for vacating or modifying an arbitral award.[144] *Hall Street* did not, however, expressly decide whether manifest disregard is a ground for vacatur separate from the statutory grounds under the FAA, or a way of summarizing multiple statutory grounds.[145]

It seems inconsistent for the Supreme Court to rule that parties cannot alter the exclusive grounds by contract,[146] but then allow the lower courts to alter the exclusive grounds by creating

144. *See supra* notes 77-84 and accompanying text (describing *Hall Street* ruling).

145. *See supra* notes 85-87 and accompanying text (further describing *Hall Street* opinion).

146. *See supra* note 82-84 and accompanying text (describing decision to not allow additional grounds for vacatur by contract).

extrastatutory bases for vacating or modifying an award, and extrastatutory manifest disregard. In *Hall Street*, the Court rejected the argument that parties should be able to expand sections 10 and 11 of the FAA because the Congress intended the FAA to encourage the policy of enforcement of arbitration agreements.[147] Instead of examining this policy argument, the Court looked to the text of the FAA and found it to be at odds with enforcing a contract to expand judicial review.[148]

Based on this interpretation that the Supreme Court gives to the language of the FAA, it seems that, if manifest disregard of the law doctrine is to survive, it must be found somewhere in the FAA. The Supreme Court's statement that the grounds for vacating an arbitral award stated in the FAA are the "exclusive" grounds for vacating an award appears unambiguous and would seem to exclude all judicially created grounds for vacating an arbitral award.[149] It seems clear after *Hall Street* that arbitration clauses providing additional grounds for vacatur are unenforceable and that the doctrine must be contained in the FAA.[150] This would ensure the survival of the doctrine, but essentially eliminate it as an independent ground for vacatur.

The *Hall Street* Court stated the possible readings of manifest disregard of the law doctrine and suggested that manifest disregard perhaps may have been shorthand for section 10(a)(3) or section 10(a)(4) of the FAA, the sections authorizing vacatur if arbitrators are "guilty of misconduct" or "exceeded their powers," respectively.[151] In this part of the opinion, the Court cited the Ninth Circuit case, *Kyocera*, which emphasized that sections 10 and 11 were the exclusive grounds for challenging an arbitral award, even if the arbitration agreement provided for

147. *See supra* notes 82-83 and accompanying text (describing Hall Street's arguments and the Court's response).

148. *See supra* note 83 and accompanying text (describing the Court's examination of the FAA's language).

149. See *supra* note 84 and accompanying text (describing Court's language on the FAA ground as "exclusive").

150. *See supra* note 81-83 and accompanying text (describing decision to not allow additional grounds for vacatur by contract).

151. *See supra* notes 84 and accompanying text (describing the Court's examination of the FAA's language).

expanded judicial review.[152] Perhaps this citation signals that the Court also endorses *Kyocera*'s interpretation of manifest disregard. In *Kyocera* the Ninth Circuit stated that "it is clear that the 'exceeded their powers' clause of § 10(a)(4) . . . provides for vacatur only when arbitrators purport to exercise powers that the parties did not intend them to possess or otherwise display a manifest disregard for the law."[153] This supports a reading of the manifest disregard into the FAA, the same approach taken by the Second and Ninth Circuits, and consistent with the Fifth Circuit's opinion. *Kyocera* would also especially support the Second and Ninth Circuits' approach of reading the doctrine into section 10(a)(4).

B. *Should Manifest Disregard Exist as a Doctrine?*

The manifest disregard doctrine in theory can be a useful tool to ensure that arbitrators do not act in a manner that is clearly and fundamentally contrary to the law, which should be beyond the powers of any arbitrator.[154] The doctrine is especially important when mandatory arbitration clauses pull individuals who are less sophisticated about commercial arbitration into binding proceedings without judicial review.[155]

Despite the theoretical benefits of manifest disregard, there are many drawbacks to the current form of the doctrine.[156] The FAA already provides statutory bases for vacatur of arbitral

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152. *See supra* note 78 and accompanying text (describing Hall Street's reference to *Kyocera Corp v. Prudential T Servs.*); *see also* Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 997-98 (9th Cir. 2003). There, the court stated,

> [The FAA] allows a federal court to correct a technical error, to strike all or a portion of an award pertaining to an issue not at all subject to arbitration, and to vacate an award that evidences affirmative misconduct in the arbitral process or the final result or that is completely irrational or exhibits a manifest disregard for the law.

Id.

153. 341 F.3d at 1002-03.

154. *See supra* notes 52-53 and accompanying text (describing the doctrine as a check on egregious arbitral errors).

155. *See supra* notes 53-57 and accompanying text (describing the growth of mandatory arbitrations and how such arbitration is no longer a negotiated contract, and also how less-sophisticated parties suffer as a result).

156. *See supra* notes 59-75 and accompanying text (describing the critiques of the doctrine).

awards.[157] Manifest disregard exists in addition to these statutory protections already within the FAA, thus calling into question the utility of such an extrastatutory vacatur. Furthermore, the legal standard for applying manifest disregard is far from uniform.[158] Although not many awards are actually overturned under the doctrine, the uncertainty of the legal standard makes it more likely for a challenging party to appeal to the doctrine as a last resort because they have nothing to lose.[159] The doctrine allows losing parties another means by which to challenge an arbitral award, which can lead to more time and money at the expense of finality for the parties, and also an expenditure of judicial resources.[160] If manifest disregard is clearly limited and the standard is consistently articulated—either through clearer language in the FAA or through Supreme Court interpretation—the doctrine would gain its theoretical utility.

In addition, the doctrine potentially makes the United States a less competitive forum for international arbitration, as it subjects parties to an extra common law ground for vacatur outside of the New York Convention.[161] Manifest disregard has been held to be applicable to international parties when the arbitration is in the United States.[162] This makes the United States unique as an arbitration forum because it has an enforcement exception subject to vacatur based on an additional ground, causing enforcement to be relatively more costly than in other forums.[163]

The United States has a strong public policy of supporting arbitration.[164] Arbitration is not intended to be litigation, so

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157. *See supra* notes 30-31 and accompanying text (listing the FAA grounds for vacatur).

158. *See supra* notes 37-47 and accompanying text (describing the various legal standards for the doctrine).

159. *See supra* notes 65-66 (describing the "poor loser syndrome" where dissatisfied parties may appeal weak or meritless claims).

160. *See supra* notes 67-68 (stating that manifest disregard can also take away from the finality, efficiency, and cost-effectiveness of arbitration).

161. *Id.*

162. *See supra* note 13 and accompanying text (describing how U.S. courts have ruled that manifest disregard is applicable to international parties).

163. *See supra* note 14 and accompanying text (describing how the existence of the doctrine affects international parties' choice of the United States as a forum for arbitration).

164. *See supra* notes 27-29 and accompanying text (describing the U.S. commitment to arbitration).

judicial review should not be readily accessible to parties.[165] However, parties should not be forced to tolerate a fundamentally flawed award with no resort to judicial review, especially in the case of mandatory arbitration.[166] Given the benefits that the doctrine can provide to unsophisticated parties in arbitrations, for arbitrations between parties in the United States, the doctrine should exist to protect consumers and other individuals who find themselves in mandatory arbitration.[167]

In the context of arbitrations between sophisticated business parties, which are most likely the parties in international arbitrations, manifest disregard is not needed as an extrastatutory judicial protection outside the FAA. Presumably the parties have entered into a contract requiring arbitration after negotiations. Such sophisticated parties do not need the additional protection of manifest disregard and they would still have the means to vacate the award under the FAA. In this context of lessened need for manifest disregard in international arbitrations between sophisticated parties, the uncertainty in the legal doctrine and inconsistent application further detract from the doctrine's utility.

C. *How Should Manifest Disregard Be Reconciled with* Hall Street *and the FAA?*

After *Hall Street*, it seems that manifest disregard should be incorporated into sections 10(a)(3) or 10(a)(4) of the FAA. This can be done either by the Supreme Court or by Congress. Either way, it should be done by using language that explicates what manifest disregard means and sets a clear standard for the doctrine's application.

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165. *See supra* note 61 and accompanying text (stating that the benefits of arbitration come at the price of some benefits of litigation).

166. *See supra* notes 53-57 and accompanying text (describing the growth of mandatory arbitrations and how arbitration in that case is no longer a negotiated contract, and also how less sophisticated parties can be disadvantaged when they go to arbitration).

167. *See supra* notes 53-56 and accompanying text (describing the phenomenon of mandatory arbitration and how manifest disregard helps less sophisticated parties).

1. Action by the Supreme Court

The Supreme Court should revisit this issue and resolve the circuit split on whether manifest disregard can exist outside of the FAA. It is best positioned to quickly resolve the issue created by *Hall Street.* If the Court considers the issue, a helpful solution would be for the Court to follow the FAA and the strong U.S. public policies favoring arbitration by endorsing the analysis of the Second, Fifth, and Ninth Circuits—that the statutory grounds in the FAA are the exclusive grounds for vacating arbitral awards and that manifest disregard of the law does not exist as an independent, extrastatutory basis for vacating arbitral awards.[168] The Sixth Circuit approach, which leaves the current doctrine untouched, neither provides a solution to the issues surrounding the doctrine, nor addresses the tension between the doctrine and the FAA.

The Supreme Court recently denied the petition for a writ of certiorari in the Sixth Circuit case *Coffee Beanery,* which had presented an opportunity to resolve the issue left open by *Hall Street.*[169] If the circuit court split continues to deepen, the Court may finally revisit manifest disregard. If so, it would also be helpful for the Court to adopt an approach in which the manifest disregard of the law doctrine can be read into the FAA. The Second and Ninth Circuits' approaches to integrating manifest disregard into the FAA post–*Hall Street* point to a relatively simple and straightforward means for the Court to resolve the issue.[170] The Court could follow those circuits by ruling that an arbitrator's disregard of the law can be a basis for vacating an arbitral award under section 10(a)(4) of the FAA for excess of the arbitrator's authority only if "the arbitrator is fully aware of the controlling principle of law and yet does not apply it."

The Court could also choose to employ other statutory hooks, such as reading the doctrine into section 10(a)(3) of the FAA, which covers arbitrator misconduct and misbehavior. The *Hall Street* Court already contemplated the possibility that

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168. See *supra* Parts II.B.2 and II.B.3 for a discussion of the approaches of the Second and Ninth Circuits, and Fifth Circuit, respectively.

169. *See supra* notes 19, 95, and accompanying text (describing the status of *Coffee Beanery*).

170. See *supra* Parts II.B.2 for a discussion of the Second and Ninth Circuits' approaches.

manifest disregard could be read into either of these sections of the FAA.[171] It seems that a straightforward solution would be for the Court to adopt the approach already explicitly taken by the Second and Ninth Circuits—to read the doctrine into the FAA.[172] This approach can also be consistent with the Fifth Circuit's holding that manifest disregard no longer exists outside of the FAA because, by reading the doctrine as existing only within the FAA, the doctrine no longer exists independently as an extrastatutory ground for vacatur.[173] Thus the Court could also adopt the explicit ruling of the Fifth Circuit that manifest disregard no longer exists outside of the FAA and still use the approaches of the Second and Ninth Circuits and read the doctrine to be within the FAA. This would reconcile the post–*Hall Street* circuit split and resolve the larger conflict between the FAA and manifest disregard.

2. Action by Congress

Another approach would be for Congress to amend the FAA to explicitly encompass the doctrine of manifest disregard. This approach arguably would be more democratically legitimate as an expression of U.S. public policy, as much of the current law of arbitration is based on judicial perception of legislative intent.[174] Congressional action could be an advantage because it is more democratic and statutory enactments would be less vulnerable to challenge. The FAA was passed in 1925, long before the explosion in arbitration, so by acting on this issue, or more generally to reform the FAA, congressional action would clarify legislative intent.[175]

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171. *See supra* note 85, 153 and accompanying text (stating that *Hall Street* considered the possibility that manifest disregard of the law could be read into section 10(a)(3) or 10(a)(4) of the FAA).

172. See *supra* Part II.B.2 for a discussion of the Second and Ninth Circuits' approaches.

173. See *supra* Part II.B.3 for a discussion of Fifth Circuit approach.

174. *See supra* note 124 and accompanying text (stating that much of arbitration law is based on judicial interpretations of legislative intent).

175. *See supra* notes 124-125 and accompanying text (stating that congressional intent is difficult to read since the relevant statutes on arbitration were passed decades before the growth of modern arbitration and that clear congressional intent could clarify the law).

If the Supreme Court were to act on creating a uniform standard, it could force consistent action by all the lower courts, whereas congressional action would surely require more litigation to flesh out a legal standard for the statutory language. It arguably would be easier for the Supreme Court to act, and more desirable because it can dispose of the issue more swiftly. This would be an advantage because of the amount of arbitration and persistent uncertainty in the area of the doctrine. It makes sense for the Court to act to resolve an issue left open by *Hall Street*—a Supreme Court decision—and to resolve the existing circuit split.

Currently international arbitrations with the seat of arbitration in the United States can be subject to manifest disregard.[176] To increase consistency, the Supreme Court should resolve the circuit split on whether the New York Convention or FAA applies in petitions for vacatur by international parties.[177] If manifest disregard were clearly read to be within the FAA by the Supreme Court, or codified by Congress, international parties would no longer be subject to vacatur on an additional extrastatutory and potentially subjective ground. Further consistency in the doctrine would be a positive development for international arbitrations in the United States.

CONCLUSION

Hall Street has questioned the viability of the manifest disregard doctrine and challenged lower courts to harmonize it with the FAA. Whether manifest disregard is judicially read into the FAA or legislatively amended into the FAA, the effect would be to standardize the doctrine. The easiest and most likely solution would be for the Supreme Court to resolve the deepening circuit split on whether manifest disregard is viable after *Hall Street* and then endorse an approach that reconciles the doctrine with the FAA. This would add to the doctrine's' utility as a form of judicial review and add to predictability and consistency in enforcing awards in the United States, and further

176. *See supra* notes 13-14 and accompanying text (stating that international arbitrations can be subject to the U.S. manifest disregard doctrine).

177. *See supra* note 12 and accompanying text (describing the circuit split on whether the FAA or the New York Convention applies to vacatur by international parties).

realize the benefits of arbitration. Furthermore, in the context of international arbitration, the Supreme Court could also address whether the New York Convention or FAA applies in petitions for vacatur by international parties. Clarity on which law applies for international parties in arbitrations would also further institutionalize international arbitration, add to the predictability of the process, and make the United States a more competitive forum for future arbitrations.