

NOTES & COMMENTS

MANIFEST DISREGARD AFTER *HALL STREET*: BACK FROM THE DEAD—THE SURPRISING RESILIENCE OF A NON-STATUTORY GROUND FOR VACATUR

by
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This Note intends to survey decisions since Hall Street and identify the likely consequences for manifest disregard in light of seeming disfavor at the Supreme Court. I conclude that varied interpretation of Hall Street's impact has not only started a circuit split—with some courts doing away with manifest disregard, others reframing it, and still others affirming it—it has also set the stage for distrust of arbitration as a method of dispute resolution. Ultimately this may be a consequence of the FAA: unchanged for nearly nine decades, it is not robust enough to provide uniformity, and uniformity is critical to the success of arbitration.

I.	INTRODUCTION	266
II.	WHAT IS MANIFEST DISREGARD (AND WHY YOU SHOULD CARE)	268
III.	THE FEDERAL COURTS	271
	A. <i>No Longer Applicable: The Fifth Circuit</i>	272
	B. A “Judicial Gloss”: <i>The Second and the Ninth Circuits</i>	273
	C. <i>Sitting on the Fence: The First, Sixth, and Tenth Circuits</i>	275
	1. <i>The First Circuit</i>	275
	2. <i>The Sixth Circuit</i>	277
	3. <i>The Tenth Circuit</i>	278
	D. <i>The Wall-Flowers: The Third, Fourth, Seventh, Eighth, Eleventh, and D.C. Circuits</i>	280

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IV.	THE STATE COURTS	280
A.	<i>No Longer Available: Alabama and California</i>	281
B.	<i>Affirmatively Still Available: South Carolina and Wisconsin</i>	283
C.	<i>Potpourri: Vermont and Selected States</i>	284
V.	CONCLUSION	285

I. INTRODUCTION

A childhood toy, the View-Master, seems an unlikely place to start for a story of death and rebirth. But it was manufacture of the View-Master that resulted in environmental contamination which, in turn, lead to a dispute between landlord and tenant on who was responsible for clean-up. That dispute was arbitrated and eventually reached the Supreme Court with broad consequences for arbitration. As one commentator put it, “[t]he world of arbitration changed on March 25, 2008”¹ with the decision of *Hall Street Associates, L.L.C. v. Mattel, Inc.*² The moral of *Hall Street* is one of exclusivity of statutory grounds, and non-statutory grounds should fall away after the decision.³ Manifest disregard of the law, one of the non-statutory grounds, has risen from the dead, however, and is showing surprising vigor.

The modern history of arbitration in the United States has two parallel courses that run headlong into each other: on one track is the growing acceptance of arbitration as an expedient and cost-effective solution by industries, on the other track is an entrenched opposition to non-judicial processes by state and lower courts. Between these two parties sit Congress, enactor of the Federal Arbitration Act (FAA),⁴ and the Supreme Court, interpreter thereof.⁵ As the FAA was passed in 1925 and is fundamentally unchanged since, this burden falls increasingly to the Court. In general the result of Supreme Court jurisprudence has been a gradual erosion of resistance to arbitration through the last century. Indeed, acceptance of arbitration for disputes has extended so far in the last three decades that many consumers, employees, and other would-be litigants feel that their constitutional rights to a trial are being

¹ Michael M. Mitzner, Note, *Snatching Arbitral Freedom from Hall Street’s Clenched Fist*, 29 REV. LITIG. 179, 180 (2009).

² 128 S. Ct. 1396 (2008).

³ See Timothy M. O’Shea, *Arbitration’s Appeal: The Grounds Have Narrowed*, BENCH & BAR OF MINN., July 2009, at 31, 31 (“The United States Supreme Court decision in *Hall Street Associates v. Mattel* appears to sound the death knell for challenges to arbitral awards on ground of ‘manifest disregard for the law.’”).

⁴ Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

⁵ David Schwartz has written that the Supreme Court has done more than interpret the FAA: it has, in effect, rewritten it from a narrow statute supporting arbitration as equal to any contract to a preemptive broad federal imposition upon states. See David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 16–27 (2004).

violated.⁶ In 2008, the Supreme Court decided *Hall Street v. Mattel*; at issue was the ability of parties to arbitration agreements to contract for enhanced review—that is, for the parties to agree to ask a judge to confirm the arbitrator’s “interpretation of law.”⁷ The Court quite clearly rejected the parties’ ability to expand the grounds of review by agreement: “§§ 10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.”⁸ Less clear was the language used to address what “manifest disregard of the law”⁹ is and whether it survives the *Hall Street* decision. On first glance it seems it should not. In this Note, I conclude that manifest disregard will likely survive and strengthen from its current low ebb. In a survey of more than 50 court cases, I find that most continue to employ manifest disregard analysis. Only one federal circuit and only two states’ highest courts have held that manifest disregard is demised.

In the Supreme Court’s 1953 decision in *Wilko v. Swan*,¹⁰ the ability of courts to examine an arbitration award was limited, and the stature of arbitration as a method of dispute resolution was enhanced. Limited review is fundamental to effective use of arbitration, as expansive review would turn arbitration into a stepping-stone to court review. *Wilko* set forth the proposition that mistakes of law by the arbitrator were not reviewable.¹¹ The *Wilko* Court left a crack in the door, however: “Power to vacate an award is limited. . . . [T]he interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject . . . to judicial review for error in interpretation.”¹² Seemingly a simple statement and yet courts could now review, if not for interpretation of law, then for *manifest disregard* of law. *Hall Street*, a half-century later, addressed manifest disregard only in passing, but did hold quite clearly on the issue

⁶ See, e.g., Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 96–101 (1992) (analyzing the interpretation of the FAA and concluding that pro-arbitration decisions by the Supreme Court may effectively prevent assertion of Constitutional rights violations, including due process); see also Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1074–82 (1998) (using arbitration agreements in employment contracts as an example to show the imbalance of power between arbitral parties); Ellie Winninghoff, *In Arbitration, Pitfalls for Consumers*, N.Y. TIMES, Oct. 22, 1994, at 37.

⁷ *Hall Street Assocs., L.L.C.*, 128 S. Ct. at 1400–01.

⁸ *Id.* at 1403.

⁹ Manifest disregard, the subject of this survey, is a recognized ground on which judicial review of an arbitration award can result in vacating the award. Not found in the FAA, it has been recognized, along with vacating an award in violation of public policy, as a common law grounds for review. As noted in the discussion of *Hall Street*, *infra* note 24 and accompanying text, the precise foundation of manifest disregard review is not clear. Nonetheless, both state and federal courts have utilized it in reviewing awards for half a century.

¹⁰ 346 U.S. 427 (1953), *rev’d on other grounds by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

¹¹ *Id.* at 436–37.

¹² *Id.* (emphasis added).

of enhanced review that in terms of the parties' contract, the FAA is drafted to be the exclusive grounds for vacatur. Although not explicit, perhaps it should be obvious that manifest disregard of the law was renounced by the 2008 Court in *Hall Street*. After all, such renunciation furthers two purposes of the FAA: it overcomes resistance to arbitration and it provides finality to parties who choose to arbitrate.

There are two parallel courses in American arbitration, however, and every once in a while the state and lower federal courts fight back and seem to make a mountain out of a molehill. Justice Souter's opinion for the majority in *Hall Street* closed the door a bit to manifest disregard, but didn't slam it shut. This Note intends to survey decisions since *Hall Street* and identify the likely consequences for manifest disregard in light of seeming disfavor at the highest Court. I conclude that varied interpretation of *Hall Street's* impact has not only started a circuit split¹³—with some courts doing away with manifest disregard, others reframing it, and still others affirming it—it has also set the stage for distrust of arbitration as a method of dispute resolution. Ultimately, this may be a consequence of the FAA: Unchanged for nearly nine decades, it is not robust enough to provide uniformity, and uniformity is critical to the success of arbitration.

II. WHAT IS MANIFEST DISREGARD (AND WHY YOU SHOULD CARE)

Arbitration is a creature of contract,¹⁴ and as such, there must always be mutuality and assent to the terms of the agreement. Commentators have argued that, by contract, enhanced judicial review above and beyond the FAA grounds should be possible.¹⁵ In *Hall Street*, Justice Souter addressed this possibility first by setting a stage: "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and [placing] arbitration agreements on equal footing with all other contracts.'"¹⁶ The FAA, in other words, makes it possible for parties to contract their disputes out of the courts. What doesn't follow, in Souter's opinion, is that any contractual provision the parties can dream up should drag the dispute back before the court. The FAA in § 10 provides for an exclusive regime, after *Hall Street*, whereby

¹³ See *infra* Parts III, IV; see also Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1 (2009), <http://yalelawjournal.org/2009/09/29/aragaki.html> ("A circuit split is in the making, and it could signal a shift with significant implications for federal arbitration law.").

¹⁴ *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960).

¹⁵ See Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 OHIO ST. J. ON DISP. RESOL. 151, 167 (2002).

¹⁶ *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)) (alterations in original).

courts may review arbitral awards and may, only under the five enumerated grounds, vacate an award.¹⁷ This conclusion is in keeping with the belief that if parties intend to forgo courts, and assent to an arbitration proceeding, the resulting award “must” be enforced.¹⁸

In *Hall Street*, Hall Street Associates had argued that the grounds of the FAA for review and vacatur provided a framework for the parties but were not intended to force aside the traditional power of parties to contract for bargained-for provisions. By analogy, Hall Street Associates referred to the “judge made” (in its own opinion) additional grounds for vacatur: manifest disregard.¹⁹ This argument seems reasonable: Before passage of the FAA, courts often rejected enforcement of arbitration agreements because they held private parties could not between themselves make agreement to deny jurisdiction to a court.²⁰ The FAA was enacted to “place arbitration agreements on equal footing with all other contracts,” and yet here, again, private parties are not allowed to intrude upon the jurisdiction of the court. In Justice Souter’s opinion, this argument is built on shaky foundations; he concludes, “this [argument] is too much for *Wilko* to bear.”²¹ Part III of the *Hall Street* opinion refers to the big picture and, although the argument is perhaps a bit difficult to follow—jumping between statutory interpretation and the policy underlying the FAA—it suggests that two broad trends should dominate: first, finality and second, exclusiveness.²² Those broad trends

¹⁷ *Id.* at 1403. FAA § 10(a) provides the following:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (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.

9 U.S.C. § 10(a) (2006).

¹⁸ 9 U.S.C. § 9.

¹⁹ *Hall Street Assocs., L.L.C.*, 128 S. Ct. at 1403.

²⁰ *See, e.g., Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874) (stating that “agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void”).

²¹ *Hall Street Assocs., L.L.C.*, 128 S. Ct. at 1404.

²² *Id.* at 1404–05; *see also* Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 191–92 (“Finality is part of the package that . . . gives arbitration an advantage over litigation. It is a core ingredient in the concept of arbitration.”).

should spell the end of manifest disregard as an independent ground for vacatur.²³

Manifest disregard has not consistently or exclusively been viewed as a common-law expansion of the FAA. In *Hall Street* there was some speculation as to whether *Wilko* had intended to break new ground or not.²⁴ There seem to be three possible sources for manifest disregard: (1) it is an independent, judicially created grounds for review of arbitration awards; (2) it is a turn of phrase used in interpreting the § 10 grounds for vacating an award; or (3) it is a synonym for § 10(a)(4), allowing vacation where an arbitrator “exceeded their powers.” Based on these three possible sources of authority, it could be straightforward to interpret *Hall Street*’s effect on manifest disregard: (1) where independent judicially created grounds exist, *Hall Street* would overturn precedent involving non-statutory grounds (the Fifth Circuit seems to have taken this approach); (2) where describing § 10 enumerated grounds generally, existing precedent could be incorporated, as long as not extending the reasons for vacatur (the Second Circuit seems to have taken this approach); (3) where synonymous with § 10(a)(4), precedent would easily evolve to elicit statutory grounds (the Ninth Circuit seems to have taken this approach).²⁵

If the opinion in *Hall Street* were more direct, perhaps the straightforward analysis of the preceding paragraph might have resulted in a coalescence towards uniformity—although I tend to doubt it. Instead the opinion, somewhat nebulously, backtracks from the strong language of Part III, and in Part IV offers some ways out of the FAA exclusivity. “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.”²⁶ As

²³ Alternately, it might be argued that Justice Souter’s opinion should never have addressed manifest disregard’s status. The petition for certiorari did not refer to manifest disregard of the law—it addressed the narrow issue of whether enhanced review could be contracted for. Petition for a Writ of Certiorari at 11, *Hall Street Associates L.L.C.*, 128 S. Ct. 1396 (No. 06-989). The agreement of two parties in a contractual arrangement does not invoke the arbitrator’s duty under common law *or* FAA grounds, except insofar as the arbitrator exceeds his or her authority.

²⁴ *Hall Street Assocs., L.L.C.*, 128 S. Ct. at 1404 (“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.”).

²⁵ See *infra* Part III for detailed discussion on the current positions of the circuits.

²⁶ *Hall Street Assocs., L.L.C.*, 128 S. Ct. at 1406 (emphasis added). Some exploration of what it means to look outside the statute has begun. See Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 905, 906 (2010) (“The *Hall Street* Court explicitly left open, however, the possibility that parties might be able to rely on some authority other than the FAA to enforce an agreement providing for expanded court review of awards.”). See also Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929, 932 (2010) (examining what “other avenues” are available after *Hall Street*, including whether contract drafting is an applicable tool to substitute for enhanced review).

examples, Souter suggests common-law and state-law grounds exist.²⁷ Souter also suggests the Court might entertain the notion that judicial grounds for enhanced review may exist within the Federal Rules of Civil Procedure and the inherent powers of courts to manage their cases, although he reserved judgment on that possibility for another day.²⁸ In all, it was a narrow opinion designed to address a narrow question, and it left many cracks through which manifest disregard might yet slip.

It might seem that the question of whether manifest disregard as an independent ground for vacatur is dead is a nullity: either it scrapes by, appearing occasionally, or it slips off to the sunset.²⁹ But the vitality of manifest disregard is important for several reasons: first, it is the most common ground upon which parties seek vacatur.³⁰ Parties seeking to vindicate their rights through binding arbitration need to know that the award of the arbitrator will be enforced. Second, as noted above, finality is a key and critical element of arbitration, and one of the reasons why the FAA was enacted. Third, it matters to the parties, who have seen their freedom of contract narrowed by the decision of *Hall Street*. Does the availability of non-statutory grounds for vacatur further harm their freedom to contract for the arbitration that they choose?³¹ Fourth, it matters to the courts themselves. Was the FAA designed simply to overcome judicial reservations about arbitration generally, or was it designed to create a world apart from the judicial system? If it is the latter, judges will largely rubberstamp awards.³² If it is the former, perhaps judges have a role to play in the ongoing development of arbitral law.

III. THE FEDERAL COURTS

The federal courts have long taken a narrow view of manifest disregard and are unlikely to grant motions to vacate on those grounds—though, of course, that is true of the enumerated grounds of § 10(a) as

²⁷ *Hall Street Assocs., L.L.C.*, 128 S. Ct. at 1406. Justice Souter excluded such possible grounds from his analysis of *Hall Street*'s agreement, something he felt Justice Stevens, in dissent, wanted to provide the parties as a lifeline. *Id.* at 1403 n.3.

²⁸ *Id.* at 1407.

²⁹ As a recent Note put it, manifest disregard is "alive but not well." Kevin Patrick Murphy, Note, *Alive but Not Well: Manifest Disregard After Hall Street*, 44 GA. L. REV. 285, 287 (2009).

³⁰ *Id.*

³¹ The availability of manifest disregard, and how well-developed a concept it is legally, may affect determination of whether a party's appeal in "frivolous," thereby exposing a party to potential penalties; see *T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 341–42 (2d Cir. 2010).

³² Judges will likely rubberstamp awards in any event, as the deference given to an arbitrator's conclusions of law means in practice that very, very few arbitrators show manifest disregard for the law.

well.³³ One would expect that the circuits, to reach this issue, would shave off some rough edges and whittle away at the manifest disregard grounds, and that has been the case. No circuit has, since *Hall Street*, held that manifest disregard represents a judicially-created ground for vacating an arbitral award. This is in keeping with the spirit of *Hall Street*. Nonetheless, only one circuit, the Fifth, has clearly held what is perhaps the obvious conclusion: that manifest disregard is no longer viable.³⁴ Appellate courts in five circuits have issued opinions since *Hall Street* that explicitly or impliedly retained some form of manifest disregard, however limited it may now be.

A. *No Longer Applicable: The Fifth Circuit*

The Fifth Circuit was the first—and at the time of this writing, only—circuit to unreservedly reject manifest disregard following *Hall Street* in a case decided March, 2009: *Citigroup Global Markets, Inc. v. Bacon*.³⁵ At issue was an arbitration award to a Citibank account holder who alleged her husband had withdrawn funds without her permission; the arbitrator awarded Ms. Bacon \$256,000.³⁶ Citibank had challenged the award on the grounds that the arbitrator had manifestly disregarded the Texas law that was applicable and, in a decision issued the year before *Hall Street*, the district court agreed and vacated the award.³⁷ A three-judge panel of the appellate court now had opportunity to review that ruling in light of *Hall Street*.³⁸

The court noted the history of the FAA and, importantly, relied on the premise that “strictly confining the perimeter of federal court review of arbitration awards is a widely accepted practice that runs throughout arbitration jurisprudence—from its early common law and equity days to the present.”³⁹ The court then considered the *Hall Street* decision and the repeated insistence, in that opinion, that the FAA grounds were “exclusive.”⁴⁰ Noting the possible interpretations that Justice Souter had given for *Wilko v. Swan*’s use of the phrase “manifest disregard of the law,” the Fifth Circuit concluded that “*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

³³ See 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. 241, 250–51 (1993).

³⁴ See *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009) (rejecting manifest disregard as an independent ground and reversing precedent due to *Hall Street*).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 351.

⁴⁰ *Id.* at 352–53.

bases for vacatur and modification of an arbitration award under the FAA.”⁴¹ The court noted that its conclusion was compelled because of its caselaw that had previously supported manifest disregard as a ground independent of the FAA grounds and, although they had not done so as clearly, it read a similar result from the four circuits that had to that point addressed the issue of manifest disregard’s mortality.⁴² In all, the Fifth Circuit read what seems to be the most obvious reading of *Hall Street*:

The question before us now is whether, under the FAA, manifest disregard of the law remains valid, as an independent ground for vacatur, after *Hall Street*. The answer seems clear. *Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a *nonstatutory* ground for vacatur. Thus, to 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.⁴³

B. A “Judicial Gloss”: The Second and the Ninth Circuits

The Second Circuit had the opportunity to review manifest disregard following *Hall Street* in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,⁴⁴ a case that had a similar procedural posture to *Bacon* in the Fifth Circuit: the court below had vacated an arbitral award on the grounds that the arbitrator acted in “manifest disregard of the law.”⁴⁵ The dispute centered on allegations that several shippers (collectively referred to as Stolt-Nielsen) had engaged in a “global conspiracy to restrain competition in the world market for parcel tanker shipping services in violation of federal antitrust laws.”⁴⁶ The plaintiff sought to represent a class and to bring their claims in arbitration, but the relevant contracts between the parties were silent on the availability of class action arbitration.⁴⁷ On this preliminary matter, an arbitration panel was formed and held hearings; they concluded that arbitration could proceed on a class action basis, and

⁴¹ *Id.* at 353.

⁴² *Id.* at 355–58.

⁴³ *Id.* at 355 (emphasis in original) (citations omitted).

⁴⁴ *Stolt-Nielsen SA v. Animalfeeds Int’l Corp.*, 548 F.3d 85, 87 (2d Cir. 2008), *rev’d on other grounds by* *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 130 S. Ct. 1758 (2010). The Supreme Court took cert. on the issue of class arbitration and had the opportunity to address Manifest Disregard of the Law’s status in light of *Hall Street* but chose not to. *Stolt-Nielsen S.A.*, 130 S. Ct. at 1768 n.3 (“We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.* as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.”).

⁴⁵ *Stolt-Nielsen SA*, 548 F.3d at 87.

⁴⁶ *Id.*

⁴⁷ *Id.* at 87, 89.

they issued a Clause Construction Award to that effect in 2005.⁴⁸ Stolt-Nielsen petitioned the district court to vacate the award and the district court complied, holding that the arbitrator acted in manifest disregard of the law, having “failed to make any meaningful choice-of-laws analysis.”⁴⁹ This decision then reached the circuit court on appeal.

The circuit court, sitting in a three-judge panel, approached the question of manifest disregard by first noting that precedent allowed for that ground to vacate an award in the Second Circuit, just as precedent had in the Fifth Circuit.⁵⁰ Without much ado, the court reviewed the legal standard for manifest disregard, emphasizing how narrow this ground was and how much difference there is between mere “mistakes of law” and “manifest disregard.”⁵¹ It was only after the existing precedent was established that the court paused to consider the effect of *Hall Street*. The court reviewed some scholarship and recent decisions and found two possible interpretations when considering the post-*Hall Street* availability of manifest disregard: “the doctrine simply does not survive” or it can be “reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA” and “remain[] a valid ground for vacating arbitration awards.”⁵² Between these choices the court chose the latter.⁵³ This kept alive the possibility of appeal for manifest disregard by arbitrators, and, although parties who choose to appeal on such grounds must now anticipate being able to color their arguments in terms of the FAA, caselaw interpreting manifest disregard will continue to develop. In subsequent cases, the Second Circuit has reiterated that manifest disregard exists only as a “judicial gloss” on the FAA § 10 exclusive grounds.⁵⁴

The Ninth Circuit had perhaps the easier task in examining their precedent than did the Second or Fifth Circuits because *Hall Street* had been decided first in the Ninth Circuit, and it was upon their change of

⁴⁸ *Id.* at 89.

⁴⁹ *Id.* at 90 (quoting *Stolt-Nielsen SA v. Animalfeeds Int’l Corp.*, 435 F. Supp. 2d 382, 385, 387 (S.D.N.Y. 2006)).

⁵⁰ *Id.* at 87, 91 (“We have also recognized that the district court may vacate an arbitral award that exhibits a ‘manifest disregard’ of the law.” (citations omitted)). The Supreme Court would later reverse the circuit court’s decision. *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 130 S. Ct. 1758, 1777 (2010). The Court’s decision in *Stolt-Nielsen*, while purporting not to decide the question of manifest disregard (and they didn’t need to because they found support to reverse in the FAA), at least implicitly supports the Second Circuit’s position. *Id.* at 1768–69. As identified in the discussion of the Tenth Circuit’s decision of *DMA International, Inc. v. Qwest Communications International, Inc.*, *infra* Part II.C.3, this non-decision gives effect to manifest disregard grounds.

⁵¹ *Stolt-Nielsen SA*, 548 F.3d at 92–93.

⁵² *Id.* at 93–94.

⁵³ *Id.* at 94.

⁵⁴ See *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010); *Telenor Mobile Commc’ns v. Storm, LLC*, 584 F.3d 396, 407 (2d Cir. 2009).

interpreting the FAA grounds from non-exclusive to exclusive in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*⁵⁵ that *Hall Street* had been re-examined.⁵⁶ In the 2007 decision of *Comedy Club, Inc. v. Improv West Associates*,⁵⁷ revisiting a case with a long procedural history, the Ninth Circuit had an opportunity to follow the approach of either the Fifth or the Second Circuit. The court essentially took the middle ground: “We have already determined that the manifest disregard ground for vacatur is shorthand for a statutory ground under the FAA, specifically [FAA] § 10(a)(4), which states that the court may vacate ‘where the arbitrator exceeds their powers.’”⁵⁸ Seeing nothing in *Hall Street* that forced them to upset the *Kyocera* holding, the three-judge panel in *Comedy Club* concluded “that, after *Hall Street Associates*, manifest disregard of the law remains a valid ground for vacatur because it is a part of § 10(a)(4).”⁵⁹ This was a little narrower than the Second Circuit—§ 10(a)(4) specifically, and not “the specific grounds for vacatur enumerated in section 10 of the FAA” generally—but gave manifest disregard some remaining vitality.

C. *Sitting on the Fence: The First, Sixth, and Tenth Circuits*

1. *The First Circuit*

The First Circuit has not addressed *Hall Street* head-on in this context, but it was the first to weigh in on manifest disregard in a case widely cited by other circuits for the proposition that *Hall Street* obviated manifest disregard: *Ramos-Santiago v. United Parcel Service*.⁶⁰ That case regarded an employee grievance (the employee was terminated for his failure to deliver 37 packages over two business days) and an arbitration hearing under the controlling collective bargaining agreement.⁶¹ In dicta, the three-judge panel (with one district judge sitting by designation) noted that, were the FAA controlling—this case was heard under Puerto Rican law—manifest disregard grounds would not be

⁵⁵ *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 994 (9th Cir. 2003) (en banc).

⁵⁶ See *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1401 (2008) (“The Ninth Circuit reversed in favor of Mattel in holding that, ‘[u]nder *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable.’” (citation omitted)).

⁵⁷ *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277 (9th Cir. 2009).

⁵⁸ *Id.* at 1290 (quoting *Kyocera Corp.*, 341 F.3d at 997).

⁵⁹ *Id.* at 1280, 1290.

⁶⁰ *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120 (1st Cir. 2008). Many cases previously or subsequently discussed in this Note cited *Ramos-Santiago* as an early interpretation of *Hall Street*, including *Kashner Davidson Securities Corp. v. Mscisz, Citigroup Global Markets, Inc. v. Bacon, Comedy Club, Inc. v. Improv West Associates, Hicks v. Cadle*, and *Martin Marietta Materials, Inc. v. Bank of Oklahoma*.

⁶¹ *Ramos-Santiago*, 524 F.3d at 122.

cognizable.⁶² Unlike the Ninth Circuit, and like the Fifth Circuit, case law in the First Circuit defined manifest disregard grounds as independent of the FAA:

[W]e [have previously] stated that “[u]nder the FAA, an award may be vacated for legal error only when in ‘manifest disregard of the law.’” Insofar as this statement means that the FAA does not foreclose extra-statutory judicial review of arbitration awards on a limited basis . . . this statement is correct. However, insofar as this statement means that the “manifest disregard of the law standard” is part of the FAA itself, it would be mistaken.⁶³

Thus, the dicta in *Ramos-Santiago* seems likely to be invoked by the First Circuit when it addresses the question of manifest disregard’s vitality directly. *Ramos-Santiago*, however, does not stand by itself in the First Circuit.

The First Circuit has had other opportunities to examine the question and has concluded, at least impliedly, contrary to *Ramos-Santiago*. In the 2008 case of *Kashner Davidson Securities Corp. v. Mscisz*,⁶⁴ decided a few short months (as was *Ramos-Santiago*) after *Hall Street*, a First Circuit panel reviewed an arbitral decision and the subsequent district court decision on manifest disregard. The First Circuit did not examine *Hall Street*, or even recognize it, but simply described the review of arbitral awards: “we must ensure that arbitration decisions comply with section 10 of the Federal Arbitration Act (‘FAA’) and certain common law principles. . . . We have subsumed these common law grounds into a general evaluation of whether a panel has acted in ‘manifest disregard of the law.’”⁶⁵ *Mscisz* impliedly maintains manifest disregard grounds after *Hall Street*. So, is *Ramos-Santiago* (dicta) or *Mscisz* more controlling in the First Circuit? Although *Mscisz* seems less well-reasoned, or less observant of contemporary law, there is nothing in *Hall Street* that explicitly rejects the conclusion that both common law and FAA grounds must be satisfied.⁶⁶ It seems most likely that *Ramos-Santos* is the direction the First Circuit is headed,⁶⁷ but until a First Circuit decision eliminates manifest disregard, parties may still challenge arbitral awards on that basis.

⁶² *Id.* at 122, 124 n.3 (“We acknowledge the Supreme Court’s recent holding in *Hall Street* that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act.” (citations omitted)).

⁶³ *McCarthy v. Citigroup Global Mkts. Inc.*, 463 F.3d 87, 91 n.6 (1st Cir. 2006) (quoting *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 25 (1st Cir. 2005)).

⁶⁴ *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 70 (1st Cir. 2008).

⁶⁵ *Id.* at 74 (citations omitted).

⁶⁶ An interesting possibility to consider, however unlikely, is that retired Justice Souter may have opportunity to address this very question sitting, as he does occasionally, with the First Circuit.

⁶⁷ *See, e.g., Horizon Lines of P.R., Inc. v. Local 1575, Int’l Longshoremen’s Ass’n*, No. 08-1611 (RLA), 2009 WL 613778, at *3–4 (D.P.R. 2009) (recognizing *Hall Street* as

2. *The Sixth Circuit*

The Sixth Circuit, in an unpublished opinion, first examined the continued vitality—or lack thereof—of manifest disregard eight months after *Hall Street*. In that case, *Coffee Beanery, Ltd. v. WW, L.L.C.*,⁶⁸ a dispute arose from a franchise agreement and a failed business. The owners of the failed business initially demanded arbitration, alleging misrepresentation and fraud, as well as violations of applicable state franchise laws, but then decided to pursue action in the District Court for the District of Maryland on state law grounds.⁶⁹ After some procedural wrangling, arbitration began in earnest, and the arbitrator issued an award finding for the franchisor on all issues; the franchisees sought review in district court and the district court refused to vacate.⁷⁰ The Sixth Circuit, sitting in a three-judge panel (with one district judge sitting by designation), examined the proceedings and concluded that the district court had incorrectly affirmed the arbitral award: a finding of the arbitrator in contradiction to the applicable Maryland franchise law was in manifest disregard of the law.⁷¹

The Sixth Circuit, in *Coffee Beanery*, cited *Hall Street* and in particular noted that “the Supreme Court significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in [FAA] § 10, but it did not foreclose federal courts’ review of an arbitrator’s manifest disregard of the law.”⁷² The decision in *Hall Street* had addressed the ability of *private parties* to expand the scope of review but had not addressed the ability of *courts themselves* to do so. While *Hall Street* had not endorsed manifest disregard as an independent ground, apart from § 10’s enumerated grounds, the *Coffee Beanery* court thought *Hall Street* could be read to say it was equally plausible manifest disregard was independent or a “judicial gloss.” Of importance to determine which was applicable law in the Sixth Circuit was precedent:

[S]ince *Wilko*, every federal appellate court has allowed for the vacatur of an award based on an arbitrator’s manifest disregard of the law. In 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.⁷³

On first pass the Sixth Circuit, faced with the same question and similar precedent as the Fifth Circuit, reached a different conclusion.

ending manifest disregard, but leaving it as a possibility in cases removed from state court).

⁶⁸ *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 416 (6th Cir. 2008).

⁶⁹ *Id.* at 416–17.

⁷⁰ *Id.* at 418.

⁷¹ *Id.* at 415.

⁷² *Id.* at 418.

⁷³ *Id.* at 419 (citations omitted).

Shortly thereafter, in another unpublished opinion, the Sixth Circuit noted the different approaches between the circuits regarding manifest disregard but, without deciding the issue in the Sixth Circuit, allowed the parties to proceed as if “manifest disregard of the law” was still viable.⁷⁴ Likewise, in an opinion issued later that month—this one published in the Federal Reporter—a three-judge panel of the Sixth Circuit noted that *Hall Street* cast some doubt on the “continuing vitality” of manifest disregard as an independent ground for vacatur, but did not decide the issue, it not being necessary to the case—the case focused on modification of awards (that is, FAA § 11), and existing Sixth Circuit case law “prohibits modifying an award based on alleged ‘manifest disregard’ of law.”⁷⁵ In the Sixth Circuit, like the First Circuit, there are decisions since *Hall Street* going each direction, although it seems plausible that the Sixth Circuit will eventually arrive at a different conclusion and uphold manifest disregard as an independent judicial ground for review and vacatur of arbitral awards.

3. The Tenth Circuit

The Tenth Circuit first addressed *Hall Street*’s effect upon manifest disregard last year, and it is informative as the court’s approach in *DMA International, Inc. v. Qwest Communications International, Inc.*⁷⁶ seems likely to be replicated for some time by lower courts. A three-judge panel of the Tenth Circuit noted that one party in *DMA International* contended that *Hall Street* foreclosed manifest disregard as a ground for vacatur but went no further: “Whether manifest disregard for the law remains a valid ground for vacatur is an interesting issue, but . . . not central to the resolution of this case. As described below, the arbitrator did not act with manifest disregard of the law *or in any other way that would justify vacatur.*”⁷⁷ The court in this case could summarily conclude that the award need not be vacated. Because the grounds, including manifest disregard, for which a court will vacate an award are so narrow, in most cases it is no great effort for a court to conclude that the manifest disregard standard of that circuit was not violated. It is the rare case that is close: one in which the

⁷⁴ *Martin Marietta Materials, Inc. v. Bank of Okla.*, 304 F. App’x 360, 362–63 (6th Cir. 2008). The court noted:

For present purposes, we will resolve the dispute as the parties have presented it to us—namely, with the assumptions that the framework of the labor-arbitration cases applies here, that the “manifest disregard” standard continues to apply to cases under the Federal Arbitration Act and that the two standards are roughly the same. We simply acknowledge each assumption in order to allow future panels and litigants to choose for themselves whether to challenge these premises or to continue to walk down the same calf-path as we have.

Id. (citing a nineteenth century poem, “The Calf-Path”).

⁷⁵ *Grain v. Trinity Health, Mercy Health Servs., Inc.*, 551 F.3d 374, 380 (6th Cir. 2008).

⁷⁶ *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341, 1344 n.2 (10th Cir. 2009).

⁷⁷ *Id.* at 1344 n.2 (emphasis added).

FAA § 10(a) grounds are not satisfied, but a party can legitimately claim they were wronged by the arbitrator's "manifest disregard for the law." In the face of uncertain law, courts will continue to complete the analysis without much risk of getting the answer wrong.

In an unpublished opinion shortly thereafter, another three-judge panel of the Tenth Circuit employed a similar analysis to conclude that the award neither violated statutory grounds nor satisfied the manifest disregard of the law standard.⁷⁸ In *Hicks v. Cadle Co.*, the Tenth Circuit spent a bit more time reviewing *Hall Street* and detailing the developing circuit split.⁷⁹ In particular detail, the court referred to the Second Circuit decision in *Stolt-Nielsen*⁸⁰ and the Ninth Circuit decision in *Comedy Club*,⁸¹ perhaps suggesting what direction this court was leaning. But the court declined the invitation to proceed today: "We need not decide whether § 10 provides the exclusive grounds for vacating an arbitrator's decision, because defendants demonstrate neither manifest disregard of the law nor violation of public policy."⁸² The court then went on to analyze the claimed misconduct of the arbitrator and found it was lacking to satisfy the manifest disregard standard.⁸³ As with the court in *DMA International*, the court in *Hicks*, by deferring the decision on manifest disregard, gives it de facto force.

In a more recent case, the same three-judge panel in *DMA International* issued an unpublished opinion in *Legacy Trading Co. v. Hoffman* that continued to review the manifest disregard allegation, apply the circuit's standard, and defer to another day the availability of manifest disregard grounds.⁸⁴ The issue in *Legacy Trading* was an arbitrator's award of damages for non-payment of wages to an employee against his former employer.⁸⁵ The court briefly noted *Hall Street*'s existence before concluding that, under statutory or non-statutory

⁷⁸ *Hicks v. Cadle Co.*, 355 F. App'x 186, 188, 195–97 (10th Cir. 2009).

⁷⁹ *Id.* at 195–97.

⁸⁰ *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), *rev'd on other grounds by Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). The court noted, in discussing *Stolt-Nielsen*, that

[i]n reaching [its] conclusion, the Second Circuit realized that this holding conflicted with dicta in its prior cases treating manifest disregard as a ground for vacatur separate from the grounds listed in the FAA. Further, the Second Circuit decided that the Supreme Court did not entirely abrogate the manifest-disregard doctrine, since the Court "speculated" that manifest disregard referred to the § 10 grounds.

Hicks, 355 F. App'x at 197 (citation omitted).

⁸¹ *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277 (9th Cir. 2009).

⁸² *Hicks*, 355 F. App'x at 197.

⁸³ *Id.* at 198–99.

⁸⁴ *Legacy Trading Co. v. Hoffman*, 363 F. App'x 633 (10th Cir. 2010). Circuit Judges Lucero, Baldock and Murphy heard each case, with Lucero writing the opinion in *DMA International* and Murphy writing the opinion in *Legacy Trading*.

⁸⁵ *Id.* at 634.

grounds, no vacatur was justified: this allowed the court to proceed as if *Hall Street* left unchanged manifest disregard.⁸⁶

D. The Wall-Flowers: The Third, Fourth, Seventh, Eighth, Eleventh, and D.C. Circuits

In *Hicks*, the Tenth Circuit noted that the Eleventh Circuit in *AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc.* had recognized that the “FAA offer[s] the exclusive grounds for expedited vacatur . . . of an award *under the statute*.”⁸⁷ That is, indeed, the holding of *Hall Street* but, as we have seen, knowing that does not decide if *non-statutory grounds* exist. The Eleventh Circuit has gone no further at the appellate level to decide if manifest disregard is a viable ground to challenge an arbitral award. It therefore joins the remaining four numbered circuits and the D.C. Circuit as those yet to weigh in at the appellate level on the issue following the decision in *Hall Street*.⁸⁸

IV. THE STATE COURTS

The FAA is somewhat of an oddity as it establishes a federal law but does not independently grant federal question jurisdiction.⁸⁹ The FAA is

⁸⁶ *Id.* at 635 n.2 (“But we need not decide what, if any, judicially-created grounds for vacatur survive in the wake of *Hall Street Associates*, because neither Legacy Trading nor Mr. Uselton has established the right to vacatur under any judicially-created exceptions.”).

⁸⁷ *Hicks*, 355 F. App’x at 196 (emphasis added) (quoting *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268, 1271 (11th Cir. 2009)). *AIG Baker Sterling Heights* was decided on the basis of a court using powers outside the FAA, but that was FRCP 60(b)(5), relating to relief from a judgment properly enforced, which the court distinguished from the review of awards before enforcement. *AIG Baker Sterling Heights, LLC*, 579 F.3d at 1271–72.

⁸⁸ The Third and Fourth Circuits have noted a circuit split in unpublished opinions: *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 193 n.3 (4th Cir. 2010); *Andorra Servs. Inc. v. Venfleet, Ltd.*, 355 F. App’x 622, 627 n.5 (3d Cir. 2009). Several lower court decisions have noted the differences between the circuits and, in some cases, reached conclusions regarding the availability of “manifest disregard.” See, e.g., *In re Arbitration Between Wells Fargo Bank, N.A. & WMR e-PIN, LLC*, No. 08-5472, 2009 WL 2461518, at *1 (D. Min. Aug. 10, 2009) (“‘[M]anifest disregard,’ an extra-statutory ground to vacate an arbitral award, [is] no longer a viable basis for vacatur.”); *Williams v. RI/WFI Acquisition Corp.*, No. 06 C 2103, 2009 WL 383420, at *2 (N.D. Ill., Feb. 11, 2009) (noting that *Hall Street* determined manifest disregard was “permissible shorthand for the statutory grounds”); *Regnery Publ’g, Inc. v. Minter*, 601 F. Supp. 2d 192, 195 (D.D.C. 2009) (recognizing that some courts have done away with manifest disregard but not deciding, as “Minter’s allegations do not rise to the level of a manifest disregard for the law”); see also *Bolton v. Bernabei & Katz, PLLC*, 954 A.2d 953, 959 (D.C. Cir. 2008) (noting that there may not be “authority that is independent of . . . statutory authority,” but declining to decide the issue).

⁸⁹ *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (“As for jurisdiction over controversies touching arbitration, the Act does nothing, being ‘something of an anomaly in the field of federal court jurisdiction’ in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.”)

equally applicable in state and federal courts.⁹⁰ Further, the FAA applies frequently because, although Congress did not intend the FAA to make arbitration the exclusive providence of federal law, the Court has held that—while not preempting independent state law—it reaches all transactions that are not exclusively intrastate.⁹¹ With so much arbitration happening under the watch of the state courts, it is important that we examine—although more briefly than we have the federal circuits—some state court decisions interpreting *Hall Street's* effect upon “manifest disregard.” Five states have seen their highest court weigh in on the issue and the results are mixed: two have held that manifest disregard is no longer viable in cases decided under the FAA, one has signaled in dicta that manifest disregard is no longer available, and two have continued to apply manifest disregard as a viable, independent ground for seeking vacatur.

A. *No Longer Available: Alabama and California*

The Supreme Court of Alabama was presented with the question in *Hereford v. D.R. Horton, Inc.*, when an appellant sought reversal of a trial court judgment affirming an award in a dispute arising from a house-sale contract.⁹² The homeowner had suffered damage as a result of mold caused by an unattached HVAC pipe and sought reimbursement from the home-builder.⁹³ The arbitrator, in hearing the dispute, granted summary judgment to the builder on the theory that, even if the builder had breached the limited warranty, the homeowner was unharmed because her home insurance provider had already reimbursed her for the damage.⁹⁴ Instead of examining the merits of the homeowner’s claim, the Court went directly to the question: “whether manifest disregard of the law is a valid ground for obtaining relief from an arbitrator’s decision under the Federal Arbitration Act.”⁹⁵ If yes, the Court could proceed with examination of the claim; if no, there would be no ground for appeal.⁹⁶

The court began its examination by noting that state legal precedent made the FAA § 10(a) grounds applicable, alongside the independent

(quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)).

⁹⁰ See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006).

⁹¹ See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁹² *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375 (Ala. 2009).

⁹³ *Id.* at 377–78.

⁹⁴ *Id.*

⁹⁵ *Id.* at 379.

⁹⁶ This, in part, illustrates the risk to parties due to inconsistency in interpretation. If a complaint alleges manifest disregard, and the jurisdiction rejects that as an independent ground, the complaint may be dismissed and no decision on its merits applied. The FAA applies in both federal and state court, so forum shopping is a concern if there is a difference in interpretation.

“manifest disregard of the law.”⁹⁷ Like many of the federal circuits, including the Fifth and the Sixth, Alabama had interpreted *Wilko* as opening the possibility of non-statutory grounds to seek vacatur.⁹⁸ Unlike the Sixth Circuit and like the Fifth Circuit, the Alabama Supreme Court concluded that the intention of *Hall Street* was to make exclusive the FAA grounds and to obviate manifest disregard: “Under the Supreme Court’s decision in *Hall Street Associates*, therefore, manifest disregard of the law is no longer an independent and proper basis under the Federal Arbitration Act for vacating, modifying, or correcting an arbitrator’s award.”⁹⁹ The court did not do too much analysis but simply concluded that *Hall Street* had spoken clearly.¹⁰⁰

The California Supreme Court addressed the issue in quite a different context: In *Cable Connection, Inc. v. DirecTV, Inc.*,¹⁰¹ the court had to decide if contractual agreements for enhanced review (the very issue in *Hall Street*) could be given effect under state law, and whether class arbitration when an agreement was silent on that issue was appropriate under state law (the issue, invoking federal law, on which certiorari was granted in *Stolt-Nielsen*). The parties in the dispute had entered into a contractual agreement that included a very broad arbitration clause, addressing “[a]ny dispute or claim arising out of the interpretation, performance, or breach of this Agreement, including without limitation claims alleging fraud in the inducement, shall be resolved *only* by binding arbitration”¹⁰² The arbitration clause further specified that California law would apply and that “[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.”¹⁰³ In that context, the court began by stating that *Hall Street* spoke clearly when a decision fell under Federal law (the FAA), but opened the door for “authority outside the [federal] statute.”¹⁰⁴ The court cited California precedent for the proposition that challenges to enforcement of an award could come only on statutory grounds or as provided for by contract, which excluded manifest disregard grounds, as further supported by *Hall Street*.¹⁰⁵ Because the court went on to conclude that this agreement was governed by the California Arbitration Act (CAA), not the FAA, this apparent holding may be dictum.¹⁰⁶ It nonetheless

⁹⁷ *Hereford*, 13 So. 3d at 380.

⁹⁸ *Id.*

⁹⁹ *Id.* at 380–81.

¹⁰⁰ *Id.*

¹⁰¹ *Cable Connection, Inc. v. DirecTV, Inc.*, 190 P.3d 586, 589 (Cal. 2008).

¹⁰² *Id.* at 590 n.3 (emphasis added).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 589 (alteration in original) (quoting *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008)).

¹⁰⁵ *Id.* at 599–600 (citing *Moncharsh v. Heily & Blase*, 832 P.2d 899, 905 (Cal. 1993)).

¹⁰⁶ *Id.* at 599.

appears manifest disregard is not a valid ground in California. Interestingly, this came in the context of a decision that clearly held that *Hall Street* allowed state law grounds for vacatur, even on the very issue that *Hall Street* had decided: enhanced judicial review by contract.¹⁰⁷ *Hall Street* giveth and *Hall Street* taketh away.¹⁰⁸

B. Affirmatively Still Available: South Carolina and Wisconsin

Like the arbitration at issue in the Alabama Supreme Court's decision, the opportunity to examine manifest disregard reached the South Carolina Supreme Court in the consumer arbitration context: In *Gissel v. Hart*, home buyers alleged fraud, negligence and breach of contract against a commercial home-seller.¹⁰⁹ The arbitrator had awarded both compensatory and punitive damages to the homebuyers and the losing party appealed in state court.¹¹⁰ The trial court denied their motion, but the Court of Appeals vacated the award for manifest disregard of the law.¹¹¹ The South Carolina Supreme Court, having taken the case by certiorari, began where one would expect: by laying out the legal standard for establishing manifest disregard of the law as grounds for vacatur.¹¹² The Court concluded that the arbitrator did not satisfy the standard either for manifest disregard or the enumerated grounds of FAA § 10(a).¹¹³ Although this affirmatively applied manifest disregard following *Hall Street*, two things are notable and raise a question of the precedential value of the holding: first, the Court did not cite *Hall Street*, so it is possible they were unaware of the holding; second, the Court did not explicitly say this agreement was controlled by federal, not state, arbitration law, although they cited the FAA.

The Wisconsin Supreme Court has continued to apply manifest disregard analysis, much as the South Carolina Supreme Court has done, in the aftermath of *Hall Street*. Further, like South Carolina, Wisconsin has not cited *Hall Street* or identified the basis for manifest disregard but has merely gone about its business in continuing to apply precedent. In *Racine County v. International Ass'n of Machinists & Aerospace Workers District 10*, the court upheld a lower court, and reversed a circuit court in finding

¹⁰⁷ *Id.* at 599 ("We conclude that the *Hall Street* holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations.").

¹⁰⁸ For more on whether state law may provide for arbitration review grounds seemingly in opposition to *Hall Street*, please see Drahozal, *supra* note 26 and Weston, *supra* note 26.

¹⁰⁹ *Gissel v. Hart*, 676 S.E.2d 320, 322 (S.C. 2009).

¹¹⁰ *Id.* at 322–23.

¹¹¹ *Id.* at 323–24.

¹¹² *Id.*

¹¹³ *Id.* at 324.

an arbitrator had failed to apply controlling substantive law.¹¹⁴ The case was decided on the basis of the enumerated grounds of § 10(a)(4)—or Wisconsin state law substantially equivalent in effect to the FAA—as the arbitrator exceeded their authority, but the court analyzed manifest disregard as well.¹¹⁵ Subsequent Wisconsin appellate court decisions have concluded that the decision in *Racine* was to maintain manifest disregard as an independent ground.¹¹⁶

C. Potpourri: Vermont and Selected States

A survey of other states, too, finds mixed results. Vermont is the remaining state in which the highest court has touched on the issue of manifest disregard after *Hall Street*: in *Vermont Built, Inc. v. Krolick*, the court issued dicta that *Hall Street* had held “a court has no authority to review an arbitrator’s legal errors.”¹¹⁷ Texas, at least at a lower court level, seems to also have read from *Hall Street* that common law manifest disregard is no longer viable.¹¹⁸ Colorado agrees.¹¹⁹

A few courts have decided that manifest disregard continues as an independent ground, particularly in light of the caution with which *Hall Street* addressed state law and common law as distinct from the FAA.¹²⁰

Most frequently, lower courts have given de facto continued life to manifest disregard grounds. While this approach does not further develop the common law, it does affect parties who will continue to seek

¹¹⁴ *Racine County v. Int’l Ass’n of Machinists & Aerospace Workers Dist. 10*, 751 N.W.2d 312, 323 (Wis. 2008).

¹¹⁵ *Id.* at 323.

¹¹⁶ *See, e.g., Sands v. Menard, Inc.*, 767 N.W.2d 332, 335 (Wis. Ct. App. 2009).

¹¹⁷ *Vt. Built, Inc. v. Krolick*, 969 A.2d 80, 86 n.2 (Vt. 2008). Note that Vermont caselaw had, like California, already rejected independent review for manifest disregard. *See, e.g., Springfield Teachers Ass’n v. Springfield School Directors*, 705 A.2d 541, 544 (1997) (“Under the VAA [Vermont Arbitration Act], a court shall confirm an arbitration award unless grounds are established to vacate or modify it. The grounds for vacating or modifying arbitration awards are limited by statute.”).

¹¹⁸ *See, e.g., Royce Homes, L.P. v. Bates*, 315 S.W.3d 77, 90 (Tex. App. 2010) (“We conclude that *Hall Street* forecloses any common-law grounds for vacatur of an arbitration award such as manifest disregard of the law and gross mistake.”).

¹¹⁹ *See, e.g., Treadwell v. Village Homes of Colo., Inc.*, 222 P.3d 398, 402 (Colo. App. 2009) (conveying, in dicta, the belief that *Hall Street* held manifest disregard was not an independent basis for vacatur).

¹²⁰ *See, e.g., TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc.*, 953 A.2d 726, 732 (Del. Ch. 2008) (in dicta, declaring that *Hall Street* did not intend to deny the court its equitable power to “enforce, modify or vacate arbitration awards.” (quoting *SBC Interactive, Inc. v. Corporate Media Partners*, No. 16397, 1998 WL 749446, at *1 (Del. Ch. Oct. 7, 1998)); *see also Brookfield Country Club, Inc. v. St. James-Brookfield, LLC.*, 683 S.E.2d 40 (Ga. Ct. App. 2009). Note that Georgia has uniquely included manifest disregard in their state arbitration statute, so there it is not a common law ground. *See Murphy, supra* note 29, at 292.

vacatur of arbitral awards not for reasons enumerated in the FAA but for the common law reasons.¹²¹

V. CONCLUSION

Having surveyed over 50 cases since *Hall Street* addressing the continued vitality of manifest disregard, what can we conclude? First, the obvious: despite the statement of one court that “[t]he answer seems clear,”¹²² it’s not. Courts can reach quite different conclusions on whether extra-statutory grounds for vacatur exist in the aftermath of *Hall Street*. Second, there is no clear answer to be found in the purposes of the FAA, as those purposes may be better served at times by making the FAA grounds exclusive, while at other times they may be best served by holding the arbitrator to the minimal standard of acting without manifest disregard of the law. Third, while the number of decisions finding the arbitrator had acted in manifest disregard of the law and vacating awards is so small that it is unlikely to be harmful in the short-term, inconsistency between jurisdictions is likely to continue to grow. Ultimately this inconsistency is harmful to all parties to arbitration.

Decisions in the Fifth and Sixth Circuits stand for the principle that *Hall Street* does not make obvious the continuing vitality of manifest disregard as an independent ground for vacatur apart from the FAA § 10(a) grounds. In each circuit there was precedent allowing vacatur for manifest disregard in an extra-statutory fashion. Each Circuit had an opportunity to re-examine their precedent in light of *Hall Street* and each identified reasons for their conclusion in the purposes of the FAA. For the Fifth Circuit, in overturning precedent, the purpose of “exclusivity” was critical: this was repeated throughout the opinion in *Hall Street* and seems inhospitable to extra-statutory review of any kind.¹²³ As *Hall Street* said, the party seeking to vacate an award might see manifest disregard as “the camel’s nose But this is too much for *Wilko* to bear.”¹²⁴ For the Sixth Circuit, the critical issue was party autonomy and contract principles: the FAA was designed to raise arbitration agreements to a

¹²¹ See, e.g., *McLaughlin, Piven, Vogel Sec., Inc. v. Ferruci*, 889 N.Y.S.2d 134, 134–35 (N.Y. App. Div. 2009); see also, e.g., *Transmontaigne Prod. Servs., Inc. v. Americas Ins. Co.*, No. 49A05-0810-CV-604, 2009 WL 2461209, at *5–6, *11 (Ind. Ct. App. Aug.12, 2009).

¹²² *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009).

¹²³ However, some commentators have read the exclusivity repeated in the *Hall Street* opinion to refer only to *the parties* to an agreement, and not to *the court* itself. [T]he Court’s pronouncements about the exclusiveness of section 10 cannot be read in isolation; instead, they must be understood in the context of the opinion as a whole and the lower court opinions to which it was responding. When the Court’s position is properly situated in those contexts, it becomes evident that the Court did not intend to unravel settled jurisprudence in this area in one fell swoop.

Aragaki, *supra* note 13, at 5.

¹²⁴ *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403–04 (2008).

level equal to other contracts.¹²⁵ Courts review contracts for reasons, including public policy (a narrow ground), which are not found in the text of the contract nor in statutory law. Likewise with manifest disregard, which is a very narrow extra-statutory ground.

The FAA was enacted to overcome long-felt judicial hostility to arbitration agreements and, as noted in the preceding paragraph, to make arbitration agreements as enforceable as any contract. Among the purposes of FAA is therefore freedom of contract. As noted in Part II, finality is part of the *sine qua non* of arbitration and must also be recognized as a purpose of the FAA. Finality is a second purpose. And the reason judges were skeptical of arbitration agreements before the FAA was in part because they did not see it as likely to result in a fundamentally fair hearing. A third purpose of the FAA is therefore ensuring that private arbitration is still subject to the minimal oversight of courts necessary to ensure something like due process exists. In light of these three purposes, no clear result emerges on extra-judicial grounds for vacatur. Freedom of contract was certainly impinged upon by the *Hall Street* decision, but in terms of manifest disregard, the courts, and not the parties, are the instigators. This purpose is not impacted by the availability of manifest disregard. The issue of finality favors the exclusivity of the FAA grounds and a repudiation of manifest disregard—except perhaps in the limited fashion that the Second and Ninth Circuits maintain it as a “judicial gloss.” In contrast, the purpose of a fundamentally fair hearing is enhanced by review for an arbitrator’s “manifest disregard of the law.” Where, contractually, parties have agreed that the arbitrator should apply the law, mistakes of law are not actionable but something more—where the arbitrator knows the controlling law and refuses to apply it—perhaps should be.

Finally, the inconsistency of arbitral review on different grounds depending on the forum is ultimately harmful to all parties. The FAA was passed in 1925 and was based on a New York law half-a-decade older. From that distance in time the FAA could not anticipate the contemporary uses of arbitration and cannot support nationwide consistency of arbitral review. It is possible that judges, with the wisdom born of thousands of cases, will adequately apply the current law to protect parties to arbitration. Manifest disregard is extremely narrow. Where no longer available, the FAA grounds can probably accommodate claims that would satisfy manifest disregard—for example, in the category of arbitrators exceeding their authority. Nonetheless, it is to the detriment of the parties and to the federal system of arbitration to have appeals with unknown standards.

¹²⁵ *Id.* at 1402 (“Congress enacted the FAA to replace judicial indisposition to arbitration with a ‘national policy favoring [it] and plac[ing] *arbitration agreements on equal footing with all other contracts.*’” (alteration in original) (emphasis added) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006))).

Ultimately, arbitration is now well established in the United States as a favored form of dispute resolution, but it is not iron-clad. As arbitration's use continues to expand, reaching disputes whose nature was unforeseen by the drafters of the FAA, there are increasing concerns about its fairness. These concerns are most keenly felt at the lower-court level, where disputes resulting in arbitral awards initially fall for recognition and enforcement. With the continued vitality of manifest disregard uncertain, courts may increasingly look to non-statutory grounds to vacate perceived improprieties, particularly where arbitrators should have enforced consumer protection statutes and failed to do so. Although we live in an age of perhaps too many statutes, I can only conclude that the FAA is not robust enough for the task it has been asked to accomplish. No Supreme Court decision is likely to provide clear guidance on all of the outcomes of arbitration award review by state and federal courts—particularly not a rambling opinion like *Hall Street*. We, as a society, and through the voice of Congress, should have a say in the level of review appropriate for arbitral awards. At the lower court level, judges are sensitive to the concerns about finality and are willing to invoke manifest disregard to describe some procedural unfairness or arbitrariness by the arbitrator. But this is in balance with the settled expectations of finality for parties entering arbitration agreements. That balance is best expressed uniformly, and not circuit by circuit, state by state.