

ARE ARBITRATORS ABOVE THE LAW? THE “MANIFEST DISREGARD OF THE LAW” STANDARD

MICHAEL H. LEROY*

Abstract: Arbitration is supposed to be final and binding, but federal and state laws, and judicial doctrines, allow courts to vacate arbitrator awards. This study contemplates the role of courts when they review awards that “manifestly disregard the law”—a term that means the arbitrator knew the law but chose to ignore it. In 2008 in *Hall Street Associates v. Mattel, Inc.*, the U.S. Supreme Court ruled that courts cannot review awards beyond the Federal Arbitration Act’s (FAA) express terms and stated: “Maybe the term ‘manifest disregard’ [in the Court’s 1953 decision in *Wilko v. Swan*] was meant to name a new ground for review, but maybe it merely referred to the [FAA’s] § 10 grounds collectively, rather than adding to them.” This Article analyzes “manifest disregard” through historical and empirical methods and contends that Congress inadvertently omitted “manifest disregard” from the FAA. Unfortunately, the Court’s muddled analysis in *Hall Street* as to “manifest disregard” has split federal circuits. The Court should affirm this standard as it does not erode finality, and judicial review must be allowed to correct an arbitrator’s intentional flouting of the law. If “manifest disregard” is eliminated, arbitral finality will rise above the crowning principle of the American constitutional system: “No man in this country is so high that he is above the law.”

INTRODUCTION

As an alternative to litigation, arbitration is supposed to be final and binding.¹ Federal and state laws, however, define standards for

* © 2011, Michael H. LeRoy, Professor, School of Labor and Employment Relations and College of Law, University of Illinois at Urbana-Champaign. I received helpful comments on this study from participants at the Quinnipiac-Yale Dispute Resolution Workshop at Yale Law School and the seminar on “Creeping Legalism” at the University of Missouri School of Law Center for Dispute Resolution. I thank Jennifer Brown, Rafael Gely, Richard Ruben, Dennis Nolan, Martin Malin, Ann Hodges, Mark Johnson, Janet LeRoy, Samuel LeRoy, and Peter Feuille. I am solely responsible for any errors of commission and omission.

¹ See *Burchell v. Marsh*, 58 U.S. 344, 349 (1854) (“Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal.”); see also *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341, 1344 (10th Cir. 2009) (“Once an

courts to review and vacate arbitral awards.² Common law doctrines provide non-statutory avenues to prevent awards from becoming binding.³ This Article contemplates the role of courts when they review awards that “manifestly disregard the law”—a term that means the arbitrator knew the law but deliberately ignored it. When judges review awards too closely, they undermine finality.⁴ But when a judge confirms an award in which the arbitrator flouts the law, does the finality rule put the arbitrator above the law?

The Federal Arbitration Act (FAA)⁵ requires award finality,⁶ except for egregious problems.⁷ Courts have said the following to depict the appropriate judicial posture:

arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances.”) (citing *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1146–47 (10th Cir. 1982)); *St. John’s Mercy Med. Ctr. v. Delfino*, 414 F.3d 882, 884 (8th Cir. 2005) (noting the “strong federal policy” that favors “certainty and finality in arbitration”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 F. App’x 243, 246 (6th Cir. 2004) (“It is clear that the FAA reflects Congressional approval of the speed and finality of arbitration”); *United Food & Commercial Workers Union v. Pilgrim’s Pride Corp.*, 193 F.3d 328, 332 (5th Cir. 1999) (“Intrusive review of arbitration awards by the courts would . . . destroy the bargained-for finality of arbitration”); *Westvaco Corp. v. United Paperworkers Int’l Union*, 171 F.3d 971, 975 (4th Cir. 1999) (“Because judicial interference with an arbitrator’s interpretation threatens both the efficacy and finality of arbitration, judicial review of that interpretation is highly constrained.”); *Kar Nut Prods. Co. v. Int’l Bhd. of Teamsters, Local 337*, No. 92-2084, 1993 WL 304467, at *2 (6th Cir. Aug. 10, 1993) (“Our deference to the judgments of arbitrators is to promote the finality of arbitration.”); *Bakers Union Factory No. 326 v. IIT Cont’l Baking Co., Inc.*, 749 F.2d 350, 353 (6th Cir. 1984) (“The policy in favor of the finality of arbitration is but one part of a broader goal of encouraging informal, i.e., non-judicial, resolution of labor disputes.”).

² See Arbitration Act, 9 U.S.C. § 10 (2006).

³ See *infra* notes 130–137 and accompanying text.

⁴ See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (“Broad judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”); see also Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 181 (2002) (stating that when arbitration procedures leave significant issues for judicial resolution, “costly and time-consuming two-tiered proceedings that begin with private procedures but give way to public ‘do-overs’” are created); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT’L ARB. 147, 149 (1997) (stating that expansion of judicial review of arbitral awards “would easily degenerate into a device for adding still another instance to the usual three instances of litigation in the ordinary courts”); Bradley T. King, Note, *“Through Fault of Their Own”—Applying Bonner Mall’s Extraordinary Circumstances Test to Heightened Standard of Review Clauses*, 45 B.C. L. REV. 943, 945 (“[F]inality [is] the crux of the arbitral bargain because if awards were precatory, then arbitration would be a mere prelude to, and not a substitute for, litigation.”).

⁵ 9 U.S.C §§ 1–14 (2006).

⁶ See *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008).

⁷ See *id.* at 586.

- “The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.”⁸
- “[A]rbitration does not provide a system of ‘junior varsity trial courts.’”⁹
- “Judicial review of arbitration awards is tightly limited; perhaps it ought not be called ‘review’ at all.”¹⁰
- “The arbitrator’s decision should be the end, not the beginning, of the dispute.”¹¹

Courts usually give credence to these expressions. But ongoing research discussed in this Article exposes deviations from arbitral finality. For instance, certain federal courts of appeals overturn a high percentage of labor arbitration awards.¹² State courts confirm fewer awards than federal courts in employment disputes.¹³

This Article examines whether the 2008 U.S. Supreme Court case, *Hall Street Associates v. Mattel, Inc.*,¹⁴ caused courts to confirm more arbitrator rulings, thereby promoting finality. In *Hall Street*, the Supreme Court’s most extensive opinion on reviewing awards under the FAA, the Court ruled that parties cannot agree to have a court expand the grounds for vacating an award beyond the FAA’s express terms.¹⁵ The parties had asked a district court to review the award for erroneous

⁸ *Safeway Stores, Inc. v. Am. Bakery Confectionery Workers Int’l Union, Local 111*, 390 F.2d 79, 84 (5th Cir. 1968).

⁹ *Williams v. Katten, Muchen & Zavis*, 1996 WL 717447, at * 6 (N.D. Ill. Dec. 9, 1996) (quoting *Eljer Mfg., Inc., v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994)).

¹⁰ *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

¹¹ *Moncharsh v. Heily & Blase*, 832 P.2d 899, 903 (Cal. 1992).

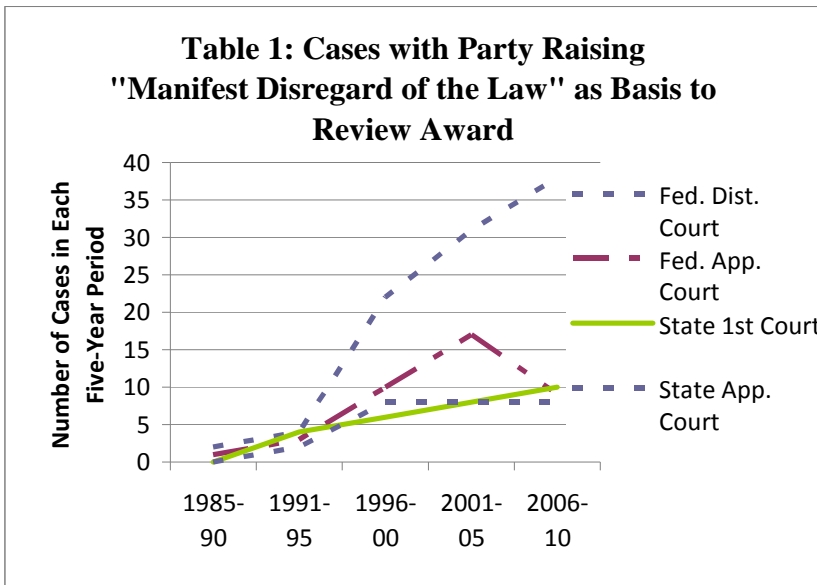
¹² See Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RESOL. 19, 85–86 (2001). Professor Peter Feuille and the author examined confirmations of labor arbitration awards from July 1991 to March 2001. *Id.* In five federal circuit courts of appeals (the U.S. Courts of Appeals for the Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits), district courts confirmed 63 awards in 112 cases for an enforcement rate of 56%, compared to district courts in the rest of the nation that confirmed 100 awards in 120 cases for an enforcement rate of 83%. *Id.* The same comparison at the appellate level showed that the above-listed circuit courts confirmed 43 awards in 73 cases for an enforcement rate of 59%, while courts in the rest of the nation confirmed 34 awards in 43 cases for an enforcement rate of 79%. *Id.*

¹³ See Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551, 589 (2008), finding a statistically significant difference in award enforcement rates in federal and state courts between 1975 and 2007. First district courts confirmed 92.7% of awards compared to 78.8% of their first-level state counterparts. *Id.* Federal appellate courts confirmed 87.7% of awards compared to 71.4% of state appellate courts. *Id.*

¹⁴ 552 U.S. at 578–92.

¹⁵ See *id.* at 584.

conclusions of law.¹⁶ This non-statutory standard prompted the *Hall Street* Court to ask if the manifest disregard standard—which had surfaced in a 1953 decision of the Court, *Wilko v. Swan*—is still available, even though it is not stated in the FAA.¹⁷ The Court mysteriously answered: “Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the [FAA’s] § 10 grounds collectively, rather than adding to them.”¹⁸ Using research to measure how often courts confirm employment arbitration awards, this Article explores whether the *Hall Street* Court’s unclear articulation of the manifest disregard standard has affected award finality.



Derived from cases in this study, Table 1 shows that courts increasingly review employment arbitration awards under the manifest disregard standard.¹⁹ This trend coincides with four interrelated events in the 1990s: (a) a precedent that equated arbitrators to judges in adjudi-

¹⁶ *Id.* at 579–81. In *Hall Street*, two businesses entered into the following arbitration agreement: “[T]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: . . . (ii) where the arbitrator’s conclusions of law are erroneous.” *Id.* at 579.

¹⁷ *See id.* at 581–92; *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953).

¹⁸ *Hall Street*, 552 U.S. at 585.

¹⁹ The methodology used to select the cases in the study is described *infra* notes 331–334 and accompanying text. The list of cases is on file with the author.

cating statutory claims,²⁰ (b) employer adoption of mandatory arbitration,²¹ (c) federal discrimination laws that increased employer liability and damages,²² and (d) a near tripling in employment discrimination court filings.²³ The role of arbitrators grew from resolving contract disputes to adjudicating statutory claims. Thus, losers in arbitration have been able to argue that the arbitrator made a legal error—or, in more extreme cases, that the arbitrator manifestly disregarded the law. To briefly elaborate:

- In 1991, the U.S. Supreme Court enforced a mandatory employment arbitration agreement in *Gilmer v. Interstate/Johnson Lane Corp.*²⁴ A securities broker, Gilmer, sued his employer in federal court, claiming that he was fired due to age discrimination.²⁵ The Court ruled that Gilmer was required to forgo court and submit his claim to arbitration.²⁶ This was because he signed a mandatory arbitration agreement.²⁷ Although the Court had extensive experience adjudicating employment disputes,²⁸ securities industry arbitrators rarely dealt with these claims.²⁹ Still, *Gilmer* dismissed arguments that Congress never intended to substitute arbitrators for courts in these disputes.³⁰

²⁰ See *infra* notes 24–30 and accompanying text.

²¹ See *infra* notes 31–35 and accompanying text.

²² See *infra* notes 36–39 and accompanying text.

²³ See *infra* notes 40–42 and accompanying text.

²⁴ 500 U.S. 20, 33 (1991).

²⁵ *Id.* at 23–24.

²⁶ *Id.* at 35.

²⁷ *Id.* at 23.

²⁸ The Court has regulated evidentiary procedures in employment discrimination disputes. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 854 (2001) (ruling that front pay for a successful Title VII plaintiff did not count against the \$300,000 cap on damages under the 1991 Civil Rights Act); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 (1989) (requiring a discrimination plaintiff to prove pretext by isolating a specific factor that caused the adverse impact); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989) (shifting the burden of proof to employers after a sex discrimination plaintiff showed that gender stereotyping played a motivating role in a disputed employment practice); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337 (1977) (validating the use of statistics as evidence of discrimination); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973) (requiring a three-stage burden of proof allocation in employment discrimination).

²⁹ See U.S. GEN. ACCOUNTING OFFICE, GAO-94-17, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 7–8 (1994). The GAO study reported that only eighteen employment discrimination arbitrations occurred in the securities industry between August 1990 and December 1992. *Id.* at 7.

³⁰ See *Gilmer*, 500 U.S. at 27. Also, the Court dismissed Gilmer’s arguments that mandatory arbitration would deprive him and other employees of a judicial forum, thwart the

- Mandatory arbitration grew rapidly in its early years. For example, in the late 1990s most Fortune 1000 companies reported using employment arbitration.³¹ By 2001, six million employees were covered by agreements administered by the American Arbitration Association (AAA).³² Employers turned to arbitration to limit litigation risks and costs.³³ They designed procedures to “eliminate the jury trial, class actions, and large attorney’s fees.”³⁴ Mandatory employment arbitration remains widely prevalent.³⁵
- When *Gilmer* was decided, Congress enacted two sweeping employment discrimination laws—the Civil Rights Act of 1991,³⁶ and the Americans with Disabilities Act of 1990.³⁷ The 1991 Civil Rights Act allowed plaintiffs to recover up to \$300,000 in punitive dam-

Age Discrimination Employment Act’s policy of eradicating age discrimination, and undermine the role of the Equal Employment Opportunity Commission. *See id.* at 27–28.

³¹ *See Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, Daily Lab. Rep. (BNA) No. 93, at A-4 (May 14, 1997) (seventy-nine percent of the 530 responding firms said that they use employment arbitration); *see also Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk Management*, Daily Lab. Rep. (BNA) No. 93, at A-5 (May, 14, 2001) (reporting an employment lawyer’s view that mandatory arbitration helps employers limit damages and eliminate class action lawsuits).

³² Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44. More recently, *see Workplace Fairness: Has the Supreme Court Been Misinterpreting Law Designed to Protect Workers from Employment Discrimination?, Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 35 (2009) (statement of Michael W. Fox, Shareholder, Ogletree, Deakins, Nash, Smoak & Steward, P.C.), which found that, in 2007, 15–25% of employers used mandatory arbitration, yielding an estimated thirty million employees subject to these procedures.

³³ *See* David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, 54 DISP. RESOL. J. 66, 66–71 (1999); Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 3 (1997) (“For many employers, managing this risk of liability is a vital part of their human resources mission and an important part of their general corporate cost-control program.”); Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1301 (1998).

³⁴ Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 862 (2004); *see also* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 53–74 (2003) (discussing employers’ use of arbitration as a risk-management device).

³⁵ *See, e.g., Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772, 2775 (2010) (ruling that the enforceability of an arbitration agreement signed as a condition of employment can be determined by the arbitrator). For current examples in this database, *see* *Dezego v. A.G. Edwards & Sons, Inc.*, No. 8:07-CV-1387-T-27TGW, 2008 WL 215979, at *1–5 (M.D. Fla. Jan. 23, 2008); *Mead v. Moloney Sec., Inc.*, 274 S.W.3d 537, 540–45 (Mo. Ct. App. 2008).

³⁶ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 and 42 U.S.C.).

³⁷ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C §§ 12101–12213 (2006)).

ages,³⁸ supplementing the strong remedial provisions in Title VII of the 1964 Civil Rights Act.³⁹

- Employment discrimination lawsuits in federal courts nearly tripled in five years, as filings soared from 8413 in 1990 to 23,796 in 1996.⁴⁰ Employment claims, including those under Title VII, comprised about half of all civil rights filings in federal courts from 1990–2006.⁴¹ In federal civil trials from 2000–2006, employment discrimination cases resulted in a median award of \$158,460.⁴²

The confluence of these factors caused courts to experience more “manifest disregard” challenges to employment arbitration awards.⁴³ This occurred, for example, when arbitrators ordered punitive damages,⁴⁴ used a *de novo* standard to review a pension plan denial of retirement benefits,⁴⁵ or misapplied a precedent.⁴⁶

This Article examines the role of courts in reviewing arbitration awards in five parts. Part I explores the enigmatic origins of the manifest disregard standard.⁴⁷ Part I.A examines nineteenth century opinions that allowed courts to review awards for legal mistakes. Common law courts vacated awards for “fraud,” “corruption,” “partiality,” or where arbitrators “exceeded powers”—terms that later appeared in the FAA as grounds to vacate awards.⁴⁸ In the grammatical sequence that used these terms, nineteenth century opinions also allowed courts to vacate awards for a “manifest mistake” or “palpable mistake” of the law. Part I.B⁴⁹ explores statutory sources for the manifest disregard standard in England,⁵⁰ and in the United States at federal⁵¹ and state⁵² levels. This

³⁸ See 42 U.S.C. § 1981a(a)(1), (b)(3) (specifying the compensatory and punitive damages available under Title VII).

³⁹ See *Pollard*, 532 U.S. at 852–854 (explaining the expansion of Title VII remedies).

⁴⁰ TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NO. NCJ 222989, SPECIAL REPORT: CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990–2006, at 7 (2008).

⁴¹ *Id.*

⁴² *Id.* at 2.

⁴³ See *supra* Table 1.

⁴⁴ See *Barclays Capital Inv. v. Shen*, 857 N.Y.S.2d 873, 880 (Sup. Ct. 2008).

⁴⁵ See *Norton v. Flowserve Corp. Pension Plan*, No. 02-CV-0763-CVE-FHM, 2008 WL 376355, at *4–10 (N.D. Okla. Feb. 11, 2008).

⁴⁶ See *Broaddus v. Rivergate Acquisitions, Inc.*, No. 3:08-0805, 2010 WL 200798, at *2 (M.D. Tenn. Jan. 14, 2010).

⁴⁷ See *infra* notes 64–152 and accompanying text.

⁴⁸ See *infra* notes 72–115 and accompanying text.

⁴⁹ See *infra* notes 116–152 and accompanying text.

⁵⁰ See *infra* notes 121–126 and accompanying text.

⁵¹ See *infra* notes 127–141 and accompanying text.

⁵² See *infra* notes 145–152 and accompanying text.

Part concludes that Congress inadvertently omitted “manifest disregard” when it enacted the FAA.

Part II explores the modern derivation of manifest disregard.⁵³ Part II.A examines the Supreme Court’s ambiguous discussion of the standard in *Wilko*.⁵⁴ Parts II.B⁵⁵ and II.C⁵⁶ analyze federal and state appellate court adoption of the standard. Every federal circuit court of appeals has adopted the manifest disregard standard—an indication of the standard’s natural fit with the express elements for reviewing awards in section 10 of the FAA.

Part III discusses the *Hall Street* decision and its manifest disregard analysis.⁵⁷ *Hall Street* strictly limited judicial review of awards to FAA standards. Thus, Part III.B analyzes the questions and implications arising from *Hall Street* and concludes that, although the decision clearly limited FAA review of awards to the statutory elements in section 10, the Court provided little clarity as to whether “manifest disregard” is a statutory standard.⁵⁸

Part IV presents empirical research findings and explores whether courts confirm more awards after *Hall Street*.⁵⁹ Part IV also describes the sampling method and data,⁶⁰ presents key findings,⁶¹ and shows that courts are confirming a higher percentage of awards following *Hall Street*. Part IV then discusses leading manifest disregard cases following *Hall Street*.⁶² This Part shows a disquieting pattern of conflicts among appellate courts, demonstrating that the Supreme Court will need to resolve this confusion.

Part V presents conclusions and implications from the study.⁶³ The uncertainty of *Hall Street* is addressed by the suggestion that the manifest disregard of the law standard remains viable under the FAA. This Part also concludes that without this safeguard, arbitrators are free to put themselves above the law.

⁵³ See *infra* notes 153–265 and accompanying text.

⁵⁴ See *infra* notes 155–169 and accompanying text.

⁵⁵ See *infra* notes 170–246 and accompanying text.

⁵⁶ See *infra* notes 247–265 and accompanying text.

⁵⁷ See *infra* notes 266–330 and accompanying text.

⁵⁸ See *infra* notes 298–330 and accompanying text.

⁵⁹ See *infra* notes 331–352 and accompanying text.

⁶⁰ See *infra* notes 331–334 and accompanying text.

⁶¹ See *infra* Tables 3-A, 3-B.

⁶² See *infra* notes 337–352 and accompanying text.

⁶³ See *infra* notes 353–374 and accompanying text.

I. THE ENIGMATIC ORIGINS OF THE “MANIFEST DISREGARD OF THE LAW” STANDARD

The origin of the manifest disregard standard is more than an academic question. The U.S. Supreme Court’s 2008 decision in *Hall Street Associates v. Mattel, Inc.*, signaled the importance of the standard’s origin when the Court stated that “maybe” manifest disregard is implied in section 10 of the FAA—or “maybe” it is a non-statutory basis for reviewing awards and therefore no longer available to review awards.⁶⁴ Although the *Hall Street* Court cited the dictum in the Court’s 1953 decision in *Wilko v. Swan*⁶⁵ as a source for the standard,⁶⁶ the majority opinion could only guess whether the standard is non-statutory or part of the FAA.⁶⁷ This Part addresses that question.

If manifest disregard evolved as “shorthand for § 10(a)(3) or § 10(a)(4)” —using *Hall Street’s* terminology—this means that the standard remains intact.⁶⁸ If, however, the standard was purely a judicial creation, this means that *Hall Street* not only eliminated expansive review of awards, but also the manifest disregard standard—again because this criterion is not explicitly part of the FAA’s statutory standards. The following discussion explores the evolution of the manifest disregard standard by asking: Did this standard originate with the FAA or another law? If courts developed the standard, did Congress intend to codify it? Or did Congress’s silence on the standard mean that lawmakers rejected it?

Although there is no definitive answer, this Part shows that the FAA’s reviewing standards codified common law principles.⁶⁹ Congress did not independently generate these tests; rather, they came from courts.⁷⁰ But research shows that a 1698 English arbitration statute influenced American and English common law courts.⁷¹ The courts that provided the foundation for specific elements in the FAA also mentioned disregard for the law (or similar terms) in the same sequence as the pre-FAA criteria. Conclusively, the Congress that passed the FAA

⁶⁴ 552 U.S. 576, 585 (2008).

⁶⁵ 346 U.S. 427, 436–37 (1953).

⁶⁶ See *Hall Street*, 552 U.S. at 584–85.

⁶⁷ *Id.* at 585.

⁶⁸ *Id.*

⁶⁹ Compare *infra* note 120 and accompanying text, with notes 132–137 and accompanying text.

⁷⁰ See *infra* notes 79–89, 94–101 and accompanying text.

⁷¹ See An Act for Determining Differences by Arbitration, 1697–98, 9 & 10 Will. 3, c. 15 (Eng.) (authorizing English courts to enforce arbitration agreements, to confirm disputed awards, and to deny enforcement to an award in limited circumstances); *infra* notes 122–125 and accompanying text.

meant to adopt the standard but, due to inattention or inadvertence, the main brief and testimony that the Congress relied on omitted the manifest disregard element. Given that manifest disregard was part-and-parcel of the sequence of other elements that appear in the FAA—and considering, too, that Congress never debated any of these standards, but accepted them wholesale—this Article argues that lawmakers would have approved manifest disregard as part of this framework for reviewing awards.

A. *Judicial Precursors to the Manifest Disregard Standard*

The manifest disregard standard has an obscure origin. English law allowed courts limited review of arbitration awards for legal errors. Courts could not interfere with an award even if the arbitrator mistakenly decided a legal issue.⁷² The 1839 English case of *Symes v. Goodfellow*, where an arbitrator overruled an objection and admitted questionable testimony, elegantly stated this idea: “Put it as you please, it is only that an inadmissible witness has been called. His admissibility was a question of law, which has been decided by the arbitrator; *you must take his law for better and for worse.*”⁷³

Judges intervened sparingly—for example, when the award had a clear legal defect. *Jones v. Corry*, an 1836 English case where the arbitrator erroneously applied the law, explained: “We are slow to interfere against an award; but it is an exception to the general rule [of confirming awards], where the arbitrator, upon being told his judgment will be reviewed, and in furtherance of an appeal, assigns an erroneous ground for the decision he pronounces.”⁷⁴ Using similar reasoning, the 1857 English case of *Hodgkinson v. Fernie* held that courts may interfere with an arbitrator’s ruling “only where . . . some obvious mistake of law appears on the face of the award”⁷⁵

⁷² *Campbell v. Twemlow*, (1814) 145 Eng. Rep. 1337 (L.R. Exch.) 1337 (“If an arbitrator, a barrister, reject a witness as inadmissible in point of law, the court will not interfere to set aside his award . . .”).

⁷³ *Symes v. Goodfellow*, (1836) 132 Eng. Rep. 208 (L.R.C.P.) 208 (emphasis added). A husband was sued by an establishment that provided room and board to his wife. *Id.* The husband argued that he was not legally responsible for the bill because his wife was an adulterer. *Id.* The arbitrator’s decision to admit evidence of the wife’s adultery led to dismissal of the complaint for damages from the husband. *Id.* The establishment brought an unsuccessful action in an English Court of Common Pleas to vacate the award. *Id.*

⁷⁴ *Jones v. Corry*, (1839) 132 Eng. Rep. 1076 (L.R.C.P.) 1078.

⁷⁵ *Hodgkinson v. Fernie*, (1857) 140 Eng. Rep. 712 (L.R.C.P.) 713–714. The court noted that “[t]his is simply the case of a reference to an arbitrator before whom has arisen a question of law which he has decided . . . ill.” *Id.* at 717. Although the court had “no right

The requirement of intent to disregard the law as grounds to vacate an award appeared in another English case in 1846, *Fuller v. Fenwick*.⁷⁶ The court inquired into an arbitrator’s state of mind in creating a legally defective award.⁷⁷ Remitting the award to the arbitrator, the court explained this was “a case in which the arbitrator has clearly and *palpably mistaken* a firmly-settled rule of law”⁷⁸

The idea of “palpable mistake” found its way into American law. Applying a statutory standard for reviewing awards, in 1857 the Georgia Supreme Court explained in *Anderson v. Taylor* that “arbitrators are the judges of the law and the facts in the case submitted to them”⁷⁹ The award could be overturned for extreme defects such as “fraud, accident, mistake, or illegality”⁸⁰ It is noteworthy that illegality was stated in the same sequence as fraud, because the FAA’s award-reviewing standards include “fraud.”⁸¹ Thus, *Anderson* equated fraud and illegality as exceptional grounds to vacate an award.

Anderson’s definition of illegality was similar to modern expressions of manifest disregard because it required more than the arbitrator’s error in deciding a question of law. The “mistake must be gross and palpable, and of a character which controlled their decision, or the award will not, on that account, be set aside.”⁸² The court also equated illegality to other terms that appear in the FAA:

Nor do we understand by illegality, that an award may be set aside because the arbitrators erred in deciding a question of law which arose in the case. If they have been guilty of *partiality or corruption*, or have referred any matter to chance or lot, or have made a <palpable mistake of law,> as for instance, if

to interfere” in this award, an exception to judicial enforcement could be made where “the question of the law necessarily arises on the face of the award.” *Id.*

⁷⁶ *Fuller v. Fenwick*, (1846) 136 Eng. Rep. 282 (L.R.C.P) 282–85.

⁷⁷ *See id.* *Fuller* suggests that if the arbitrator tried to decide the legal issue, and only through some error on his part misapplied the law, the court would effectuate his intent by correcting the award. *Id.* at 285 (“[T]he courts have said, . . . they would not inquire whether his conclusion was right or not, unless they could, upon the face of the award, come to the conclusion that the arbitrator, professing and intending to decide in accordance with law, had unintentionally and mistakenly decided contrary to the law.”).

⁷⁸ *Id.* (emphasis added).

⁷⁹ 41 Ga. 10, 21 (1870).

⁸⁰ *Id.*

⁸¹ *See* Arbitration Act, 9 U.S.C. § 10 (2006); *Anderson*, 41 Ga. at 21.

⁸² *Anderson*, 41 Ga. at 21. *Compare id.*, with *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997) (“An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it.”).

they hold that the oldest son is the sole heir, to the exclusion of the younger children, or make other like gross and palpable mistake, it will vitiate the award.⁸³

The text in angle brackets closely corresponds to the expression “manifest disregard of the law,” and the italicized clause contains two terms in section 10 of the FAA—arbitrator “partiality” and “corruption.”⁸⁴ Eight years later, the Georgia Supreme Court decided *Brand v. Sorrells*, where it held that judges must abide by the decision of an arbitrator unless the award was procured by “fraud” or there was a palpable mistake of law.⁸⁵ Here again a court used an FAA term in the same grammatical sequence as a parallel expression for manifest disregard of the law.⁸⁶

In the 1852 case of *Wesson v. Newton*, the Massachusetts Supreme Judicial Court linked terms later found in section 10 of the FAA with a variant of the manifest disregard standard.⁸⁷ The court stated: “The parties, having selected, in the mode provided by law, their own tribunal, must abide by its decisions, subject only to such revision by the court as shall prevent *fraud and corruption*, and <duly guard the legal rights of both parties>.”⁸⁸ The italicized terms appear in section 10 of the FAA and are grammatically linked to the text in angle brackets—a precursor of the manifest disregard standard.⁸⁹

The trend to review awards for gross procedural or substantive problems took root in spite of the U.S. Supreme Court’s attempt to discourage it in the 1854 case of *Burchell v. Marsh*.⁹⁰ The party challenging an award contended that the arbitrator’s ruling was “in ignorance of the rights of the parties”⁹¹ The *Burchell* Court dismissed this idea,

⁸³ *Anderson*, 41 Ga. at 21 (emphasis added). Throughout this Article, angle brackets are supplied to indicate similarity to the “manifest disregard” standard, and italics are supplied to indicate correspondence to section 10 of the FAA.

⁸⁴ See 9 U.S.C. § 10.

⁸⁵ See 61 Ga. 163, 164 (1878). The “palpable mistake of law” standard remained part of Georgia’s arbitration code until it was repealed in 1988. See *Ralston v. City of Dahlonega*, 512 S.E.2d 300, 302 n.2 (Ga. Ct. App. 1999).

⁸⁶ See *Brand*, 61 Ga. at 164.

⁸⁷ See 64 Mass. (10 Cush.) 114, 115–17 (1852).

⁸⁸ *Wesson*, 64 Mass. at 115 (emphasis added).

⁸⁹ See 9 U.S.C. § 10; *Wesson*, 64 Mass. at 115.

⁹⁰ 58 U.S. 344, 350 (1854).

⁹¹ *Id.* at 347. Two wholesalers in New York shipped merchandise to an Illinois retailer named Peter Burchell. See *id.* at 345. The wholesalers thought that Burchell failed to pay his debts on time—and then had him arrested and sued him. *Id.* The lawsuit was referred to arbitration, where the arbitrators found in favor of Burchell. See *id.* at 345–46. After the award ordered the wholesalers to pay him, the wholesalers sued again and won a court order to set aside the award. See *id.* at 345–47.

saying: “Courts should be careful to avoid a wrong use of the word ‘mistake,’ and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards.”⁹² The Court emphasized that “[a]rbitrators are judges chosen by the parties to decide matters submitted to them, finally and without appeal.”⁹³

Twenty years later in 1874, the U.S. Supreme Court coined the “manifest disregard” phrase in *United States v. Farragut*.⁹⁴ In this review of a maritime arbitration, the *Farragut* Court said that legal mistakes by the arbitrators “could have been corrected in the court below, and can be corrected here.”⁹⁵ The Court added: “The award was also liable . . . to be set aside . . . [f]or *exceeding the power conferred by the submission*, <for manifest mistake of law,> for *fraud*, and for all the reasons on which awards are set aside in courts of law or chancery.”⁹⁶ The italicized text corresponds to two terms in section 10 of the FAA,⁹⁷ and the clause in angle brackets is similar to the current manifest disregard term.

This view seemed to contradict the *Burchell* Court’s idea that courts could not set aside an award “for error, either in law or fact.”⁹⁸ As with *Anderson*, *Farragut* specified a sequence of award-reviewing standards that included the idea of manifest disregard for the law.⁹⁹ This term was used in the same sequence with two FAA standards—the arbitrators exceeded their powers, and the award was a fraud.¹⁰⁰ In sum, *Farragut* equated “fraud,” “exceeded powers,” and “manifest mistake of the law” as grounds to vacate an award.¹⁰¹

States that provided for statutory arbitration also ignored *Burchell*’s award-finality message. The particular provisions of these state civil codes, however, show why courts exercised broader review in these arbitrations.¹⁰² Some civil procedure codes granted arbitrators the same

⁹² *Id.* at 350.

⁹³ *Id.* Compare *Burchell* to this expansive view of the arbitrator’s authority in *Muldrow v. Norris*, 2 Cal. 74, 77 (Cal. 1852) (“[A]rbitrators are not bound to award, on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].”).

⁹⁴ 89 U.S. 406, 420 (1874).

⁹⁵ *Id.*

⁹⁶ *Id.* (emphasis added).

⁹⁷ See Arbitration Act, 9 U.S.C. § 10 (2006).

⁹⁸ *Burchell*, 58 U.S. at 349.

⁹⁹ See *Farragut*, 89 U.S. at 420; *Anderson*, 41 Ga. at 21.

¹⁰⁰ See *Farragut*, 89 U.S. at 407.

¹⁰¹ *Id.* at 420.

¹⁰² See *infra* notes 103–116 and accompanying text.

powers as judges.¹⁰³ The Nebraska civil code, for example, made arbitrators auxiliaries to courts by imbuing them with judicial powers.¹⁰⁴ Moreover, courts were authorized to enter judgments on their awards. For example, when an arbitrator failed to state the facts and the law upon which he based the award, the state supreme court rejected the award.¹⁰⁵ Iowa's civil procedure code allowed courts to order a new arbitration, thus nullifying an award, for a legal reason.¹⁰⁶ Minnesota had a similar law that permitted courts to review awards as though they were civil judgments—and thereby allowed courts to vacate an award if it was “contrary to law and evidence.”¹⁰⁷ Likewise, Massachusetts allowed courts to enter judgments on awards or set aside these rulings for a legal reason.¹⁰⁸

In addition to regulating arbitration in civil procedure codes, some states permitted common law arbitrations.¹⁰⁹ These allowed parties to fashion their own dispute resolution rules and procedures. States referred to this as “arbitration by agreement.”¹¹⁰ Because parties had con-

¹⁰³ See Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681, 683 n.21 (1950) (citing IOWA CODE §§ 679.12–13 (1946) (amended 2005); NEB. REV. STAT. §§ 25-2115 to -2116 (1943) (repealed 1987) (permitting award to be rejected for “any legal and sufficient” reason and the award has the “same force and effect as the verdict of a jury”); and MINN. STAT. § 572.05(5) (repealed 1957) (permitting award to be vacated if contrary to “law and evidence”)).

¹⁰⁴ See *Murry v. Mills*, 1 Neb. 456, 458–59 (1871). Nebraska's Code of Civil Procedure equated the powers of arbitrators to referees. See *id.* The latter were authorized to summon and enforce the attendance of witnesses, administer oaths, and grant adjournments. See *id.* Referees and arbitrators were likewise required to “state the facts found and the conclusions of law . . .” *Id.* at 459. Thus, arbitration awards were treated like special verdicts. See *id.*

¹⁰⁵ See *Graves v. Scoville*, 24 N.W. 222, 223–24 (Neb. 1885).

¹⁰⁶ See *Brown v. Harper*, 6 N.W. 747, 749 (Iowa 1880) (ordering a new hearing because an arbitrator's signature was improperly obtained at his sick bed). The court noted that “Section 3427 of the Code provides: ‘The award may be rejected by the court for any legal and sufficient reasons, or it may be recommitted for a rehearing to the same arbitrators, or any others agreed upon by the parties.’” *Id.* at 748. The court also observed: “This does not confer upon the court the right to reject or recommit the award at mere discretion. It can be done only for legal and sufficient reasons.” *Id.* at 748–49.

¹⁰⁷ *Johnston v. Paul*, 23 Minn. 46, 48 (1876). A state law regulated submissions to arbitrators. See *id.* Their awards were to be returned to court to be accepted, or recommitted, or set aside for any legal and sufficient reason. *Id.* at 47.

¹⁰⁸ See *Wesson*, 64 Mass. at 116 (referencing what is now MASS. GEN. LAWS ch. 251, §§ 1–19 (2008), regulating arbitration submissions).

¹⁰⁹ See, e.g., *Thornton v. McCormick*, 39 N.W. 502, 503–05 (Iowa 1888). For an explanation of arbitrations by agreement, see *First Nat'l Bank in Cedar Falls v. Clay*, 2 N.W.2d 85, 90–91 (1942).

¹¹⁰ *First Nat'l Bank*, 2 N.W.2d at 90–91.

tractual freedom, courts treated awards with more deference,¹¹¹ and judges could not correct an error in judgment by the arbitrator.¹¹²

In short, nineteenth century arbitration served two distinct purposes—to provide courts with adjuncts and to allow parties to make their own arrangements for resolving disputes. Because the former purpose brought arbitrators into closer union with judges, arbitrator rulings were subject to review for legal errors. In contrast, common law arbitrations were treated as inventions of the disputing parties. Therefore, courts only reviewed these awards for gross procedural defects, such as arbitrator corruption.

The connections between these nineteenth century developments and the present state of the manifest disregard standard are noteworthy. The arbitration in *Hall Street* functioned like the statutory arbitrations in Nebraska and Iowa.¹¹³ Courts were involved with disputants before arbitration commenced and were authorized to review the legality of the arbitrator’s award. *Hall Street* expressed concern about adding delay and cost in this type of arrangement.¹¹⁴ This concern overlooked the historical distinction between civil code and common law arbitrations. History shows that when a dispute is already in court, and arbitration is used as an auxiliary process, courts may review rulings for legal errors. Otherwise, not only is the legitimacy of arbitration open to question, but so is the court’s ability to provide justice. No court can be above the law, and therefore, judges must ensure that no arbitrator intentionally puts an award above the law.¹¹⁵

¹¹¹ See *Sadler v. Olmstead*, 44 N.W. 292, 293 (Iowa 1890) (“[S]uch a submission is always construed most liberally, and with a view to compelling parties to submit to the adjustment of their differences made by an arbitrator fairly chosen.”); *Thompson v. Blanchard*, 2 Iowa 44, 49 (1855) (“The whole burden of proof, in this respect, is on the party who attacks the award. It is for him to clearly satisfy the jury, of any mistake, as also that he was prejudiced thereby.”); see also *Thornton*, 39 N.W. at 503 (“The award in question was not made in accordance with the provisions of the statute relating to arbitration, and is not, therefore, governed by them, but its legality and effect must be determined by the rules relating to awards at common law.”). To justify the interference of a court, a party had to prove fraud, corruption, partiality, or misconduct on the part of the arbitrators. See *Thornton*, 39 N.W. at 503.

¹¹² See *Thornton*, 39 N.W. at 503. The *Thornton* court continued: “We understand the rule to be that an award of this kind will not be set aside for error in the judgment of the arbitrators, nor for a mistake which would not have had any material influence on the arbitrators in reaching their conclusions.” *Id.*

¹¹³ Compare *Hall Street*, 552 U.S. at 579 (involving parties who agreed to arbitration in the midst of a lawsuit, and while they were subject to a court’s jurisdiction), with *supra* notes 103–104 and accompanying text.

¹¹⁴ See *Hall Street*, 552 U.S. at 588.

¹¹⁵ See *United States v. Lee*, 106 U.S. 196, 220 (1882).

B. *Legislative Standards for Judicial Review of Awards*

Throughout the twentieth century, federal and state legislatures encouraged the use of arbitration.¹¹⁶ To this end, they enacted laws to guide courts. At the federal level, Congress passed the FAA in 1925 to end judicial hostility to arbitration.¹¹⁷ Lawmakers wanted to stop courts from meddling in private disputes before or during the arbitration.¹¹⁸ Congress also enacted judicial standards to review awards but said little about their intent on this subject.¹¹⁹

Section 10 of the FAA states very narrow criteria for court review:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption by the arbitrators;
- (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.¹²⁰

¹¹⁶ See *infra* notes 117–151 and accompanying text.

¹¹⁷ U.S. Arbitration Act, ch. 213, 43 Stat. 885 (1925) (amended 2002) (codified as amended at 9 U.S.C. § 10 (2006)). This Article uses “U.S. Arbitration Act” and “Federal Arbitration Act (FAA)” interchangeably. The Senate Report to the proposed Act said that the bill would abolish the judicial reluctance to enforce arbitration agreements. S. REP. NO. 68-536, at 2–3 (1924). During the Senate debate on the FAA, Senator Thomas J. Walsh explained: “In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced.” 66 CONG. REC. 984 (1924) (statement of Sen. Thomas J. Walsh).

¹¹⁸ *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the Subcomm. of the Comms. on the Judiciary*, 68th Cong. 14 (1924) [hereinafter *Hearing*] (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce)

The difficulty is that men do enter into such [arbitration] agreements and then afterwards repudiate the agreement. . . . You go in and watch the expression of the face of your arbitrator and you have a “hunch” that he is against you, and you withdraw and say, “I do not believe in arbitration anymore.”

Id.

¹¹⁹ H.R. REP. NO. 68-96, at 2 (1924). The FAA’s brief legislative history said: “The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form.” *Id.*

¹²⁰ 9 U.S.C. § 10.

Ostensibly, these standards emanated from one source only: Congress. This history is misleading, however. English courts—the main source of American arbitration statutes—had centuries of experience in developing common law standards to review awards.¹²¹ These courts, in turn, derived their principles from England’s Arbitration Act of 1698.¹²² Believing that litigation hindered England’s economy, King William III and Parliament enacted the law to authorize courts to enforce arbitration agreements and also to confirm disputed awards.¹²³ The 1698 law granted courts limited grounds to deny enforcement of an award, as when “the Arbitrators or Umpire *misbehaved themselves* and that such Award Arbitration or Umpirage was *procured by Corruption or other undue Means*.”¹²⁴ The law also allowed courts to void awards that were “*unduly procured*.”¹²⁵ The italicized terms correspond to elements in the FAA’s section 10; Congress incorporated verbatim several standards from the 1698 law.¹²⁶

Although the FAA Congress did not knowingly rely on King William III and Parliament for guidance, the Senate derived section 10 standards from a brief submitted by W.W. Nichols, president of the American Manufacturers Export Association of New York.¹²⁷ In the following summary of his testimony, the italicized text corresponds to sec-

¹²¹ Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 7–47.

¹²² An Act for Determining Differences by Arbitration, 1697–98, 9 & 10 Will. 3, c. 15 (Eng.).

¹²³ *See id.*

¹²⁴ *Id.* (emphasis added) (allowing for enforcement of the agreement or award to be stopped if “it shall be made appear on Oath to such Court that the Arbitrators or Umpire misbehaved themselves and that such Award Arbitration or Umpirage was procured by Corruption or other undue Means”).

¹²⁵ *Id.* (emphasis added). Section II was entitled “Arbitration unduly procured, void” and stated:

And be it further enacted by the Authority aforesaid That any Arbitration or Umpirage *procured by Corruption or undue Means* shall be judged and esteemed void and of none Effect and accordingly be sett aside by any Court of Law or Equity so as Complaint of such Corruption or undue Practise be made in the Court where the Rule is made for Submission to such Arbitration or Umpirage before the last Day of the next Terme after such Arbitration or Umpirage made and published to the Parties Any thing in this Act contained to the contrary notwithstanding.

Id. (emphasis added).

¹²⁶ *See* Arbitration Act, 9 U.S.C. § 10 (2006).

¹²⁷ *Hearing, supra* note 118, at 32–41 (statement of W.W. Nichols, President, American Manufacturers’ Export Association of New York).

tion 10 of the FAA,¹²⁸ and the clause in angle brackets is similar to the current manifest disregard term:

The courts are bound to accept and enforce the award of the arbitrators unless there is in it a <defect so inherently vicious that, as a matter of common morality,> it ought not to be enforced. This exists only when *corruption, partiality, fraud or misconduct* are present or *when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means*—cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.¹²⁹

The unanswerable question is whether Nichols meant “manifest disregard for the law” when he spoke of an award defect that was so inherently vicious that it conflicted with common morality. One can reasonably infer, however, that an award made with knowing and deliberate disregard for the law exemplifies an inherently vicious award.

Reinforcing this point, Nichols or learned members of Congress in 1924 may have used Joseph Chitty’s seminal arbitration volume, *A Treatise on the Law of Commerce and Manufactures*,¹³⁰ as a source for section 10. Published a century before Congress took testimony on the FAA, Chitty’s work was a more accessible authority for Congress than the 1698 law. This connection is suggested by the fact that nearly all of the FAA’s award-review elements appear in Chitty’s treatise.¹³¹ Chitty explained that courts denied enforcement to awards when “arbitration or umpirage [was] procured by *corruption, or undue means*,”¹³² or the award did “not follow the submission, or [was] too extensive or too limited,”¹³³ or the arbitrator “*exceeded his authority, or had no authority to make the award, or that his authority was revoked*.”¹³⁴ Courts did not confirm awards that suffered from procedural “*irregularity, as want of*

¹²⁸ 9 U.S.C. § 10.

¹²⁹ *Hearing, supra* note 118, at 36 (statement of W.W. Nichols, President, American Manufacturers’ Export Association of New York) (emphasis added).

¹³⁰ See 3 JOSEPH CHITTY, A TREATISE ON THE LAWS OF COMMERCE AND MANUFACTURES, AND THE CONTRACTS RELATING THERETO 637–68 (1824).

¹³¹ See 9 U.S.C. § 10.

¹³² CHITTY, *supra* note 130, at 665 (emphasis added).

¹³³ *Id.* at 665–66.

¹³⁴ *Id.* at 666 (emphasis added).

notice of the meeting,”¹³⁵ or were produced by “collusion or *misbehaviour of the arbitrators . . .*”¹³⁶ In the same passage, Chitty observed that courts did not confirm awards where arbitrators were “*partial and unjust, <or had mistaken the law> . . .*”¹³⁷

Again, the text is emphasized to show the clear connection between Chitty’s terms and the words in section 10 of the FAA.¹³⁸ The text in angle brackets shows that Chitty also used the manifest disregard concept in the same grammatical sequence as FAA standards. Chitty placed all these standards on the same footing.

Moreover, recall common law rulings that articulated these grammatical links to manifest disregard. Comparing *Farragut* with *Hall Street*, one sees that the opinions both discuss the manifest disregard standard with other grounds for reviewing awards.¹³⁹ The Court in *Farragut* stated that an award could be set aside “[f]or *exceeding the power conferred by the submission, <for manifest mistake of law,> for fraud, and for all the reasons on which awards are set aside in courts of law or chancery.*”¹⁴⁰ The Court retraced these steps 134 years later in *Hall Street*, speculating that manifest disregard was “shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers.’”¹⁴¹

Why did Congress not mention “manifest mistake of the law?” No one knows. Congress likely did not intend to omit this standard, but lawmakers focused on making arbitration agreements enforceable. The evidence suggests Congress would have included the manifest disregard standard but did not because Nichols’s brief omitted the term.¹⁴² Nichols supplied Congress with the list that appears in section 10.¹⁴³ He also said that awards could not be confirmed if they had a viciously inherent defect that offended common morality.¹⁴⁴ Manifest disregard for the law fits naturally in this expression.

¹³⁵ *Id.* (emphasis added). Compare *id.*, with 9 U.S.C. § 10(3) (“[W]here the arbitrators were guilty of misconduct in refusing to postpone the hearing . . .”).

¹³⁶ CHITTY, *supra* note 130 at 666 (emphasis added).

¹³⁷ *Id.* at 665.

¹³⁸ Compare CHITTY, *supra* note 130, at 665–66, with 9 U.S.C. § 10.

¹³⁹ See *Hall Street*, 552 U.S. at 585; *Farragut*, 89 U.S. at 420.

¹⁴⁰ *Farragut*, 89 U.S. at 420 (emphasis added).

¹⁴¹ *Hall Street*, 552 U.S. at 585.

¹⁴² See *Hearing*, *supra* note 118, at 32–41 (statement of W.W. Nichols, President, American Manufacturers’ Export Association of New York).

¹⁴³ See *id.* at 36.

¹⁴⁴ See *id.*

States replicated the FAA. They enacted legislation to replace common law regulation of arbitration agreements.¹⁴⁵ Patterned after the FAA, the Uniform Arbitration Act (UAA) was adopted in 1955 by thirty-five states, and similar laws were passed by fourteen others.¹⁴⁶ These laws mirror the FAA's four statutory standards for judicial review of awards.¹⁴⁷ Recently, this pattern began to fragment. After a national panel of experts approved the Revised Uniform Arbitration Act (RUAA) in 2000,¹⁴⁸ twelve states adopted this new law.¹⁴⁹ The RUAA broadened statutory vacatur standards.¹⁵⁰

To summarize, legislatures and courts cross-fertilized one another's award-reviewing standards. The *Hall Street* Court did not demonstrate awareness of this history but intuited this reality when it said that manifest disregard may have been judicial "shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'"¹⁵¹ *Hall Street* did not resolve this doctrinal confusion. Until the Supreme Court addresses this issue, courts will take inconsistent approaches in

¹⁴⁵ *Litchsinn v. Am. Interinsurance Exch.*, 287 N.W.2d 156, 159 (Iowa 1980) ("This century has seen a marked trend away from the common law bar to judicial enforcement of agreements to arbitrate future disputes.").

¹⁴⁶ See UNIF. ARBITRATION ACT prefatory note (2000), 7 U.L.A. 2 (2009).

¹⁴⁷ UAA vacatur standards appear in eighteen states. ALASKA STAT. § 09.43.120 (2008) (vacating an award); ARIZ. REV. STAT. ANN. § 12-1512 (Supp. 2009) (opposing an award); ARK. CODE ANN. § 16-108-212 (West 2006) (vacating an award); IDAHO CODE ANN. § 7-912 (2010) (vacating an award); 710 ILL. COMP. STAT. ANN. § 5/12 (2007 & Supp. 2010) (vacating an award); IND. CODE ANN. § 34-57-2-13 (LexisNexis 2008) (vacating an award), IND. CODE ANN. § 34-57-1-17 (LexisNexis 2008) (grounds against rendition of award on judgment); KAN. STAT. ANN. § 5-412 (2001 & Supp. 2009) (vacating an award); KY. REV. STAT. ANN. § 417.160 (LexisNexis 2005) (vacating an award); ME. REV. STAT. ANN. tit. 14, § 5938 (2003) (vacating an award); MASS. GEN. LAWS ch. 150C, § 12 (2008) (modifying or correcting an award); MINN. STAT. ANN. § 572.19 (West 2010) (vacating an award); MO. ANN. STAT. § 435.405 (West 2010) (vacating an award); MONT. CODE ANN. § 27-5-312 (2009) (vacating an award); NEB. REV. STAT. ANN. § 25-2613 (LexisNexis 2004) (vacating an award); S.C. CODE ANN. § 15-48-130 (2005) (vacating an award); S.D. CODIFIED LAWS § 21-25A-24 (2004) (grounds for vacation of an award); TENN. CODE ANN. § 29-5-213 (2000) (vacating an award); VA. CODE ANN. § 8.01-581.010 (2007) (vacating an award)). Alaska and Colorado retain the UAA structure but also adopted the Revised Uniform Arbitration Act. See UNIF. ARBITRATION ACT prefatory note (2000); ALASKA STAT. §§ 09.43.300–.595 (2005); COLO. REV. STAT. ANN. §§ 13-22-201 to -230 (West 2004).

¹⁴⁸ UNIF. ARBITRATION ACT prefatory note (2000).

¹⁴⁹ See RUAA and UMA Legislation from Coast to Coast, DISPUTE RESOLUTION TIMES, Aug. 31, 2005, at 1, <http://www.adr.org/sp.asp?id=26600>. The states are Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. See *id.*

¹⁵⁰ See UNIF. ARBITRATION ACT (2000) § 12 (disclosure by arbitrator), § 35 (vacating award).

¹⁵¹ *Hall Street*, 552 U.S. at 585.

reviewing awards. The following historical analysis provides essential perspective for the task of clarifying the law.¹⁵²

II. THE MODERN DERIVATION OF THE MANIFEST DISREGARD STANDARD

The manifest disregard standard has evolved over time. The standard was discussed in the 1953 U.S. Supreme Court case of *Wilko v. Swan*, though the Court never officially adopted the standard.¹⁵³ Subsequently, federal and state appellate courts have adopted the standard and, in so doing, have indicated the standard’s natural fit with the express elements for reviewing awards in section 10 of the FAA.¹⁵⁴

A. *The Supreme Court’s Ambiguous Adoption of the Manifest Disregard Standard*

Dictum in *Wilko*¹⁵⁵ is mistakenly cited as a source of the manifest disregard standard.¹⁵⁶ The Court in *Wilko* did not adopt this standard but simply discussed it as a hypothetical.¹⁵⁷ The case involved an allegation by a customer that he was misled by his broker.¹⁵⁸ The customer sued under the Securities Act of 1933 (“Securities Act”), but the brokerage sought arbitration.¹⁵⁹ The judge ordered a trial because the arbitration agreement deprived the investor of a court remedy under the Securities Act.¹⁶⁰ The appeals court reversed, ruling that the law did not prohibit agreements to arbitrate these disputes.¹⁶¹ The Supreme Court noted that arbitrators were able to adjudicate business issues such as the quality of a commodity.¹⁶² But securities misrepresentation presented a difficult legal issue: “[F]indings on the purpose and knowledge of an

¹⁵² See *infra* notes 153–265 and accompanying text.

¹⁵³ See 346 U.S. 427, 436–37 (1953).

¹⁵⁴ See *infra* notes 170–265 and accompanying text.

¹⁵⁵ See *Wilko*, 346 U.S. at 436–37.

¹⁵⁶ See *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008). Recall that the Supreme Court discussed the standard in a much earlier decision. See *United States v. Farragut*, 89 U.S. 406, 421 (1874); *supra* notes 94–101 and accompanying text.

¹⁵⁷ See *Wilko*, 346 U.S. at 436–37.

¹⁵⁸ See *id.* at 428–30.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at 430.

¹⁶² *Id.* at 435.

alleged violator of the Act.”¹⁶³ The *Wilko* Court doubted that lay arbitrators could apply the Securities Act without judicial instruction.¹⁶⁴

In mentioning the “manifest disregard” language, the *Wilko* Court needlessly addressed a side issue. While enforcing the arbitration clause, the appellate court explained that the FAA’s review standards protected a party from an award based on a legal error under the Securities Act.¹⁶⁵ The *Wilko* majority disagreed, stating: “In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard, are not subject, in the federal courts, to judicial review for error in interpretation.”¹⁶⁶ In this advisory statement, *Wilko* said that a judge may review the award if it manifestly disregards the law, but not if the judge disagrees with its legal interpretation.¹⁶⁷ Eventually the Supreme Court overruled *Wilko* by allowing arbitration of statutory claims.¹⁶⁸ The U.S. Supreme Court never explicitly adopted manifest disregard as a standard; its 1995 decision in *First Options of Chicago, Inc. v. Kaplan*¹⁶⁹ was its closest pronouncement on this test.

B. *Birth of the Manifest Disregard Standard in the Federal Courts of Appeals*

In the immediate years after *Wilko*, federal courts did not review awards for legal errors.¹⁷⁰ In time, this changed—Table 2 shows that by 1999 every circuit court of appeals had adopted the manifest disregard

¹⁶³ *Wilko*, 346 U.S. at 435–36.

¹⁶⁴ *Id.* at 436 (“[T]he arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact’ . . . cannot be examined.”).

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 436–37.

¹⁶⁷ *Id.*

¹⁶⁸ *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231–32 (1987) (questioning *Wilko*’s mistrust of arbitration). Justice Blackmun believed this mistrust would encourage losing parties to argue that arbitrators misapplied or ignored the law. *Id.* at 267–68 (“[I]t is likely that investors will be inclined, more than ever, to bring complaints to federal courts that arbitrators were partial or acted in ‘manifest disregard’ of the securities laws.”). He also believed that parties would not only invoke the manifest disregard standard, but this would undermine award finality. *See id.* at 268. The data in Tables 3-A and 3-B do not substantiate his prediction. *See infra* Tables 3-A, 3-B.

¹⁶⁹ 514 U.S. 938, 942 (1995) (“[P]arties [are] bound by [an] arbitrator’s decision not in ‘manifest disregard’ of the law.”).

¹⁷⁰ *See, e.g., Saxis S.S. Co. v. Multifacs Int’l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967) (“[I]t is the function neither of this court nor of the district courts to review the record of the arbitration proceeding for errors of law.”).

standard.¹⁷¹ The next discussion traces the doctrinal evolution of the manifest disregard standard from *Wilko* in 1955 to *Hall Street* in 2008.¹⁷²

(Year of Decision)								
	1968	1982	1986	1988	1991	1992	1997	1999
1st Cir.					<i>Advest</i> , 914 F.2d 6			
2nd Cir.	<i>Trafalgar</i> , 401 F.2d 568							
3rd Cir.	<i>Ludwig</i> , 405 F.2d 1123							
4th Cir.					<i>Upshur</i> , 933 F.2d 225			
5th Cir.								<i>Williams</i> , 197 F.3d 752
6th Cir.		<i>Anaconda</i> , 693 F.2d 35						
7th Cir.						<i>Health Services</i> , 975 F.2d 1253		
8th Cir.			<i>Stroh</i> , 983 F.2d 743					
9th Cir.			<i>French</i> , 784 F.2d 902					
10th Cir.				<i>Jenkins</i> , 847 F.2d 631				
11th Cir.							<i>Montes</i> , 128 F.3d 1456	
D.C. Cir.					<i>Kanuth</i> , 949 F.2d 1175			

¹⁷¹ See *infra* Table 2.

¹⁷² See *infra* notes 173–265 and accompanying text.

1. U.S. Court of Appeals for the First Circuit

Adopting the manifest disregard standard, the U.S. Court of Appeals for the First Circuit in the 1991 case *Advest, Inc. v. McCarthy* provided reasons for going beyond the FAA's express elements.¹⁷³ Noting that non-statutory standards have "taken on various hues and colorations in [their] formulations," the *Advest* court concluded that "these various formulations [are] identical, no matter how pleochroic their shadings"¹⁷⁴ Manifest disregard applies when "the governing law may have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug."¹⁷⁵ Since then, this court has applied the standard.¹⁷⁶ Recently, in 2006 in *McCarthy v. Citigroup Global Markets, Inc.*, the First Circuit explained that manifest disregard is not part of the FAA but is judicially created.¹⁷⁷

2. U.S. Court of Appeals for the Second Circuit

The U.S. Court of Appeals for the Second Circuit has flip-flopped on the manifest disregard standard. In the 1960s and early 1970s, the court said the test is "severely limited."¹⁷⁸ This view broadened in the 1972 case of *Sobel v. Hertz, Warner & Co.*,¹⁷⁹ where an investor's fraud claim was decided in a tersely worded award. The investor's appeal

¹⁷³ 914 F.2d 6, 8–9 (1st Cir. 1991) ("Courts do, however, retain a very limited power to review arbitration awards outside of section 10. The considerable deference due an arbitrator's decision does not grant carte blanche approval to any decision that the arbitrator might make." (internal quotation marks and citations omitted)).

¹⁷⁴ *Id.* at 9 (noting that other circuits vacated awards for being arbitrary and capricious, made in manifest disregard of the law, or completely irrational). The *Advest* court observed: "Although the differences in phraseology have caused a modicum of confusion, we deem them insignificant. . . . However natively wrapped, the packages are fungible." *Id.*

¹⁷⁵ *Id.* at 10. Applying the manifest disregard standard, the court concluded that the "case at bar, however, is not cut to so rare a pattern: appellant has utterly failed to show that the arbitrators inevitably must have recognized that the measure of damages" set forth in a particular precedent "was the controlling rule of law." *Id.*

¹⁷⁶ See *P.R. Tel. Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 25 (1st Cir. 2005) ("Under the FAA, an award may be vacated for legal error only when in 'manifest disregard of the law.'"); *Wonderland Greyhound Park, Inc. v. Autotote Sys., Inc.*, 274 F.3d 34, 35 (1st Cir. 2001) ("A court may only vacate an arbitrator's award in very rare circumstances, such as where there was misconduct by the arbitrator, where the arbitrator exceeded the scope of his arbitral authority, or when the award was made in manifest disregard of the law.").

¹⁷⁷ See 463 F.3d 87, 91–92 & n.6 (1st Cir. 2006).

¹⁷⁸ See *Saxis*, 375 F.2d at 582; see also *Office of Supply, Gov't of Rep. of Korea v. N.Y. Navigation Co.*, 469 F.2d 377, 379–80 (2d Cir. 1972).

¹⁷⁹ 469 F.2d 1211, 1211–16 (2d Cir. 1972).

noted that his two brokers were found guilty of stock fraud,¹⁸⁰ but the award itself did not explain if the arbitrators considered this information. Therefore, there was no proof that the award was made in manifest disregard of the securities law. Declining to require that awards state the arbitrator’s reasoning, the court said that “the primary consideration for the courts must be that the [arbitration] system operate expeditiously as well as fairly.”¹⁸¹ The *Sobel* court added that it “is a truism that an arbitration award will not be vacated for a mistaken interpretation of law”¹⁸²—but “if the arbitrators simply ignore the applicable law, the literal application of a ‘manifest disregard’ standard should presumably compel vacation of the award.”¹⁸³ The 1974 case of *I/S Stavborg v. National Metal Converters, Inc.*¹⁸⁴ questioned the manifest disregard standard:

How courts are to distinguish in the Supreme Court’s phrase between “erroneous interpretation” of a statute, or for that matter, a clause in a contract, and “manifest disregard” of it, we do not know: one man’s “interpretation” may be another’s “disregard.” Is an “irrational” misinterpretation a “manifest disregard”?¹⁸⁵

In time, the court reaffirmed this non-statutory standard. In 1978, the *Drayer v. Krasner* opinion explained that manifest disregard of law

¹⁸⁰ *See id.* at 1212–13. The district judge who reviewed Sobel’s motion to vacate the award suspected that the arbitrators ignored applicable securities laws. *See id.* at 1213. Sobel’s brokers, it turned out, were indicted shortly after Sobel filed his arbitration case for conspiring to create market activity in shares of Hercules Galion Products, Inc., and to induce the purchase of the security by others. *See id.* at 1212. On appeal, the Second Circuit considered whether a judge who suspects that an award conflicts with the law can ever order arbitrators to explain their reasoning. *See id.* at 1213–16. The appellate court concluded that there is no such judicial power. *Id.* Clearly,

a requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement.

Id. at 1214. The court upheld the public policy of award-finality over a judicial review standard that could protect arbitration litigants from miscarriages of justice. *Id.* at 1214–16.

¹⁸¹ *Id.* at 1214.

¹⁸² *Id.*

¹⁸³ *Id.* *Sobel* clarified that “manifest disregard” is not to be given independent significance but rather is to be interpreted only in the context of the specific narrow provisions of sections 10 and 11 of the FAA. *See id.*

¹⁸⁴ 500 F.2d 424, 429–33 (2d Cir. 1974).

¹⁸⁵ *Id.* at 430 n.12.

requires “something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.”¹⁸⁶ In the 1985 case of *Siegel v. Titan Industrial Corp.*¹⁸⁷ the court applied the standard and found no reason to vacate the award. The court explained that the standard applies when the “arbitrator understood and correctly stated the law but proceeded to ignore it.”¹⁸⁸ The 1986 case of *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*¹⁸⁹ also continued the standard. In 1998, the court decided *Halligan v. Piper Jaffray, Inc.*,¹⁹⁰ a rare ruling that an award manifestly disregarded a law—here, the Age Discrimination in Employment Act.¹⁹¹ More recently in 2000 and 2003, respectively, the court in *Greenberg v. Bear, Stearns & Co.* and *Hoelt v. MVL Group, Inc.*¹⁹² applied the manifest disregard standard.

3. U.S. Court of Appeals for the Third Circuit

In 1968 the U.S. Court of Appeals for the Third Circuit recognized the manifest disregard standard in *Trafalgar Shipping Co. v. International Mill Co.*¹⁹³ One year later, in *Ludwig Honold Manufacturing Co. v. Fletcher*, the court stated that arbitrators’ awards “may not be disturbed so long as they are not in ‘manifest disregard’ of the law”¹⁹⁴ In the 1985 case of *Local 863 International Brotherhood of Teamsters v. Jersey Coast Egg Producers, Inc.*, an arbitrator ordered the reinstatement of an employee

¹⁸⁶ 572 F.2d 348, 352 (2d Cir. 1978) (quoting *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals, Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961)) (internal quotation marks omitted).

¹⁸⁷ 779 F.2d 891, 892 (2d Cir. 1985).

¹⁸⁸ *Id.* at 893 (quoting *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516*, 356 F. Supp. 354, 356 (W.D.N.Y. 1973)).

¹⁸⁹ 808 F.2d 930, 933 (2d Cir. 1986) (emphasizing the narrowness of the court’s review standard); *see infra* note 310.

¹⁹⁰ 148 F.3d 197, 204 (2d Cir. 1998).

¹⁹¹ *See id.* at 198. The court reasoned: “In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both.” *Id.* at 204. In order to modify or vacate an award for manifest disregard, a court “must find both 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.” *Id.* at 202.

¹⁹² *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 59–61 (2d Cir. 2003); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir. 2000) (“We hold that where, as here, the petitioner complains principally and in good faith that the award was rendered in manifest disregard of federal law, a substantial federal question is presented and the federal courts have jurisdiction to entertain the petition.”).

¹⁹³ *See* 401 F.2d 568, 573 (3d Cir. 1968).

¹⁹⁴ *See* 405 F.2d 1123, 1128 (3d Cir. 1969).

who stole a thirty-five dollar case of eggs from his employer—even though the worker was convicted for this misdemeanor.¹⁹⁵ A district court ruled that the award manifestly disregarded the law, but the Third Circuit reversed on other grounds.¹⁹⁶ In the 1980s and 1990s, several decisions ruled on manifest disregard challenges.¹⁹⁷ More recently, in 2004 in *Major League Umpires Ass’n v. American League of Professional Baseball Clubs*, the court found that an arbitrator’s ruling did “not constitute a manifest disregard for either the [collective bargaining agreement] or the applicable law.”¹⁹⁸

4. U.S. Court of Appeals for the Fourth Circuit

The U.S. Court of Appeals for the Fourth Circuit has occasionally applied the manifest disregard standard, but without explaining it. In a brief passage in the 1991 case of *Upshur Coals Corp. v. United Mine Workers of America, District 31*, the court recognized that an arbitrator’s legal determination “may only be overturned where it is in manifest disregard of the law.”¹⁹⁹ Later, the court applied the standard in a cursory manner.²⁰⁰ In 2006, Judge J. Michael Luttig’s dissenting opinion in *Patten v. Signator Insurance Agency, Inc.* discussed the standard more thoughtfully.²⁰¹

¹⁹⁵ 773 F.2d 530, 532 (3d Cir. 1985).

¹⁹⁶ See *id.* at 534–35 (“[The] district court impermissibly imposed its own interpretation of the collective bargaining agreement by essentially holding that the misdemeanor conviction for theft was *per se* support for the discharge.”). The district court ignored “the possibility that an arbitrator may interpret the contract in a different manner and find a lack of ‘just and sufficient cause’ for a discharge for theft despite the misdemeanor conviction.” *Id.* at 535.

¹⁹⁷ See *Exxon Shipping Co. v. Exxon Seamen’s Union*, 993 F.2d 357, 360 (3d Cir. 1993); *News Am. Publ’ns, Inc. v. Newark Typographical Union, Local 103*, 918 F.2d 21, 24 (3d Cir. 1990); *Tanoma Mining Co., Inc. v. Local Union No. 1269, United Mine Workers*, 896 F.2d 745, 749 (3d Cir. 1990); *Newark Morning Ledger Co. v. Newark Typographical Union Local 103*, 797 F.2d 162, 165 (3d Cir. 1986); *Graphic Arts Int’l Union Local 97B v. Haddon Craftsmen, Inc.*, 796 F.2d 692, 695 (3d Cir. 1986); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1130–31 (3d Cir. 1972).

¹⁹⁸ 357 F.3d 272, 286 (3d Cir. 2004).

¹⁹⁹ 933 F.2d 225, 229, 230 (4th Cir. 1991) (“Upshur next argues that the arbitrators relied on an inapposite NLRB decision, in manifest disregard for the law. Again, we disagree.”) (citation omitted).

²⁰⁰ See *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007); *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998); *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994).

²⁰¹ 441 F.3d 230, 237–38 (4th Cir. 2006).

5. U.S. Court of Appeals for the Fifth Circuit

On two occasions in the early 1990s, the U.S. Court of Appeals for the Fifth Circuit refused to adopt the manifest disregard standard.²⁰² This view changed with the 1999 case of *Williams v. Cigna Financial Advisors, Inc.*,²⁰³ when the Fifth Circuit became the last appellate court to adopt “manifest disregard.” The court went on to apply this standard in subsequent cases.²⁰⁴

6. U.S. Court of Appeals for the Sixth Circuit

The U.S. Court of Appeals for the Sixth Circuit applied the manifest disregard standard in the 1982 case of *Anaconda Co. v. District Lodge No. 27 of International Ass’n of Machinists & Aerospace Workers*,²⁰⁵ ruling that the award did not conflict with the law.²⁰⁶ More generally, *Anaconda* reasoned that “[t]he parties bargained for final and binding arbitration and, in the vast majority of cases, will be bound by the arbitrator’s decision, right or wrong.”²⁰⁷ In a 1995 decision, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*,²⁰⁸ the court explained that the standard means “the [arbitrator’s] decision must fly in the face of clearly established legal precedent.”²⁰⁹ More recently, this circuit reaffirmed the “manifest disregard” standard.²¹⁰

²⁰² *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 n.2 (5th Cir. 1993) (refusing “to adopt ‘manifest disregard,’ or any other standard, as an addendum to section 10” of the FAA); *R.M. Perez & Assocs., Inc. v. Welch*, 960 F.2d 534, 539 (5th Cir. 1992) (“[T]his circuit never has employed a ‘manifest disregard of the law’ standard in reviewing arbitration awards.”).

²⁰³ 197 F.3d 752, 759 (5th Cir. 1999) (“In our opinion, clear approval of the ‘manifest disregard’ of the law standard in the review of arbitration awards under the FAA was signaled by the Supreme Court’s statement in *First Options* that ‘parties [are] bound by [an] arbitrator’s decision not in “manifest disregard” of the law.’”).

²⁰⁴ See *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004) (ruling that the arbitrator did not render an award in manifest disregard of ERISA); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395–96 (5th Cir. 2003).

²⁰⁵ 693 F.2d 35, 37–38 (6th Cir. 1982).

²⁰⁶ *Id.* (“‘Manifest disregard of the law’ means more than a mere error in interpretation or application of the law. While the arbitrator may or may not have applied *Weingarten* correctly under the facts of this case, we cannot say that his decision showed a ‘manifest disregard of the law.’”).

²⁰⁷ *Id.* at 38.

²⁰⁸ 70 F.3d 418, 420–21 (6th Cir. 1995).

²⁰⁹ *Id.* at 421.

²¹⁰ See *Visconsi v. Lehman Bros.*, 244 F. App’x 708, 711 (6th Cir. 2007); *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000); *Buchignani v. Vining-Sparks IBG, No. 98-6692*, 2000 WL 263344, at *1–2 (6th Cir. Mar. 2, 2000).

7. U.S. Court of Appeals for the Seventh Circuit

The U.S. Court of Appeals for the Seventh Circuit has thoughtfully addressed this standard and at first was reluctant to adopt it.²¹¹ In the early 1990s, however, the Seventh Circuit held that awards can be set aside if arbitrators disregard the law.²¹² In 1999, this view changed again in Judge Posner’s caustic critique in *Baravati v. Josephthal*.²¹³ But the court again seemed to change back with the 2006 case of *Wise v. Wachovia Securities, LLC*.²¹⁴ The *Wise* court determined that manifest disregard of the law fits within the FAA’s section 10(a)(4).²¹⁵ The court stated an exceedingly narrow definition of the standard—when awards “direct the parties to violate the law.”²¹⁶ Recently, the court reaffirmed the standard.²¹⁷

8. U.S. Court of Appeals for the Eighth Circuit

The U.S. Court of Appeals for the Eighth Circuit has a long history of applying the manifest disregard standard. The 1986 case of *Stroh Container Co. v. Delphi Industries, Inc.*²¹⁸ stated that an “arbitrator’s conclusions on substantive matters may be vacated only when the award demonstrates a manifest disregard of the law where the arbitrators correctly state the law and then proceed to disregard it”²¹⁹ Moreover, the 1998 case of *Val-U Construction Co. of South Dakota v. Rosebud Sioux Tribe*²²⁰ noted that “[b]eyond the grounds for vacation provided in the FAA, an award will only be set aside where ‘it is completely irrational or

²¹¹ See *Nat’l R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 143 n.9 (7th Cir. 1977) (“[S]ince arbitrators have no obligation to state the rationale underlying their award, there may be no basis whatsoever for a court to determine whether they have manifestly disregarded the law or simply misinterpreted it.”).

²¹² See *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992).

²¹³ 28 F.3d 704, 706 (7th Cir. 1994) (“There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that *Wilko* is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation.”).

²¹⁴ See 450 F.3d 265, 268–69 (7th Cir. 2006).

²¹⁵ *Id.* at 268 (“[W]e have defined ‘manifest disregard of the law’ so narrowly that it fits comfortably under the first clause of the fourth statutory ground—‘where the arbitrators exceeded their powers.’”).

²¹⁶ *Id.* at 269 (quoting *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001)); see also *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 650 (7th Cir. 2001).

²¹⁷ See *Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 563 (7th Cir. 2008).

²¹⁸ 783 F.2d 743, 748–51 (8th Cir. 1986).

²¹⁹ *Id.* at 749.

²²⁰ 146 F.3d 573, 576–78 (8th Cir. 1998).

evidences a manifest disregard for the law.”²²¹ The court reaffirmed this view in 2004 in *Manion v. Nagin*, and in 2001 in *Hoffman v. Cargill, Inc.*,²²² noting in the latter case that “extra-statutory standards are extremely narrow”²²³ The 2004 case of *Stark v. Sandberg, Phoenix & von Gontard, P.C.* also ruled that a punitive award of \$6 million did not manifestly disregard a debt collection law.²²⁴

9. U.S. Court of Appeals for the Ninth Circuit

In its first consideration of manifest disregard, the U.S. Court of Appeals for the Ninth Circuit criticized *Wilko* decision’s vague and problematic formulation in the 1961 case of *San Martine Compania de Navigacio, S.A. v. Saguenay Terminals Ltd.*²²⁵ This resistance eased in two decisions in the 1980s: the 1986 decision in *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,²²⁶ and the 1985 decision in *Sheet Metal Workers International Ass’n Local Union 420 v. Kinney Air Conditioning Co.*, where the court held that “[i]ndependent of section 10 of the [Federal Arbitration] Act, a district court may vacate an arbitral award which exhibits manifest disregard of the law.”²²⁷ The 1991 case of *Todd Shipyards Corp. v. Cunard Line, Ltd.* viewed this standard as a non-statutory escape valve that allows for vacatur.²²⁸ More recently, the court reaffirmed its acceptance of the standard.²²⁹

²²¹ *Id.* at 578 (quoting *Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 594 (8th Cir. 1998)).

²²² *Manion v. Nagin*, 392 F.3d 294, 298 (8th Cir. 2004); *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 461–62 (8th Cir. 2001).

²²³ *Hoffman*, 236 F.3d at 461–62 (“An arbitration decision . . . only manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.”).

²²⁴ 381 F.3d 793, 799–800 (8th Cir. 2004).

²²⁵ See *San Martine*, 293 F.2d at 801.

²²⁶ See 784 F.2d 902, 905–07 (9th Cir. 1986). The court observed:

We review the Panel’s award mindful that confirmation is required even in the face of “erroneous . . . misinterpretations of law.” It is not even enough that the Panel may have failed to understand or apply the law. An arbitrator’s decision must be upheld unless it is “completely irrational,” or it constitutes a “manifest disregard of law.”

Id. at 906 (citations omitted).

²²⁷ 756 F.2d 742, 746 (9th Cir. 1985).

²²⁸ See 943 F.2d 1056, 1060 (9th Cir. 1991); see also *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992).

²²⁹ See *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007); *Poweragent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1193 (9th Cir. 2004); *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 838 (9th Cir. 2004).

10. U.S. Court of Appeals for the Tenth Circuit

When the U.S. Court of Appeals for the Tenth Circuit applied the manifest disregard standard in the 1988 case of *Jenkins v. Prudential-Bache Securities, Inc.*,²³⁰ it noted that “federal courts have never limited their scope of review to a strict reading” of the FAA.²³¹ On two occasions, the court defined the standard as “willful inattentiveness to the governing law.”²³² The 2001 case of *Sheldon v. Vermonty* included manifest disregard among several extra-statutory grounds.²³³ Recently, in 2006 in *Hollern v. Wachovia Securities, Inc.*, the court held that manifest disregard is a judicially created exception to the general rule that courts do not reverse awards for “[e]rrors in an arbitration panel’s interpretation or application of the law”²³⁴

11. U.S. Court of Appeals for the Eleventh Circuit

In a 1988 case, *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit rejected manifest disregard,²³⁵ as did two opinions in the early 1990s.²³⁶ This view changed in a 1997 opinion, *Montes v. Shearson Lehman Bros., Inc.*,²³⁷ where the court said: “An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the

²³⁰ 847 F.2d 631, 633–35 (10th Cir. 1988).

²³¹ *Id.* at 633. Explaining that the standard is “more than error or misunderstanding with respect to the law,” the court justified this expansion of statutory elements as “either as an inherent appurtenance to the right of judicial review or as a broad interpretation of subsection (d) prohibiting arbitrators from exceeding their powers” *Id.* at 633–34.

²³² *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001); *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995).

²³³ *See* 269 F.3d 1202, 1206 (10th Cir. 2001) (noting that this “handful of judicially created reasons” includes: the award violates public policy, is in manifest disregard of the law, or denies a fundamentally fair hearing).

²³⁴ 458 F.3d 1169, 1176 (10th Cir. 2006).

²³⁵ 857 F.2d 742, 747 (11th Cir. 1988) (declining to adopt the manifest disregard of the law standard, the court stated that the standard could only be satisfied when “arbitrators understand and correctly state the law, but proceed to disregard the same.”).

²³⁶ *See Robbins v. Day*, 954 F.2d 679, 684 (11th Cir. 1992) (“[T]he statute does not allow an arbitration award to be vacated solely on the basis of error of law or interpretation but requires something more”); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990) (“This court has never adopted the manifest-disregard-of-the-law standard; indeed, we have expressed some doubt as to whether it should be adopted since the standard would likely never be met when the arbitrator provides no reasons for its award (which is typically the case).”).

²³⁷ 128 F.3d 1456, 1459–64 (11th Cir. 1997).

law and deliberately ignore it.”²³⁸ This is a rare instance where an award was vacated for manifestly disregarding the law. The court reaffirmed the standard in 2005 in *Scott v. Prudential Securities, Inc.*²³⁹ and has applied this test more recently as well.²⁴⁰

12. U.S. Court of Appeals for the D.C. Circuit

The U.S. Court of Appeals for the D.C. Circuit applied the test in a 1991 case, *Kanuth v. Prescott, Ball & Turban, Inc.*²⁴¹ In the 1997 case of *Cole v. Burns International Security Services*, this court cited the 1991 U.S. Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.* as a reason to apply this standard.²⁴² The *Gilmer* Court’s theory that mandatory arbitration substitutes the arbitral forum for court meant that the law could not be ignored in either venue.²⁴³ Recalling the *Gilmer* Court’s statement that “judicial scrutiny of arbitration awards necessarily . . . is sufficient to ensure that arbitrators comply with the requirements of [any] statute,”²⁴⁴ the D.C. Circuit in *Cole* concluded that “[t]hese twin assumptions regarding the arbitration of statutory claims are valid only if judicial review under the ‘manifest disregard of the law’ standard is sufficiently rigorous to ensure that arbitrators have properly inter-

²³⁸ *Id.* at 1461. Using a dictionary to define “manifest” and “disregard,” the court defined the former as “open, clear, visible, unmistakable, undubitable, indisputable, evident, and self-evident,” and the latter as “unworthy of regard or notice; to take no notice of; to leave out of consideration; to ignore; to overlook; to fail to observe . . .” *Id.* (citing BLACK’S LAW DICTIONARY 472, 962 (6th ed. 1990); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 381, 794 (New College ed. 1981)). Applying this test, the court determined that the arbitrators “recognized that they were told to disregard the law (which the record reflects they knew) in a case in which the evidence to support the award was marginal. Thus, there is nothing in the record to refute the suggestion that the law was disregarded.” *Id.* at 1462.

²³⁹ See 141 F.3d 1007, 1017 (11th Cir. 1998).

²⁴⁰ *B.L. Harbert Int’l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006) (“[T]he *Montes* case . . . remains the only case in which we have ever found the exceptional circumstances that satisfy the exacting requirements of this exception.”); see also *Univ. Commons-Urbana, LTD. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002); *Brown v. IIT Consumer Fin. Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000).

²⁴¹ See 949 F.2d 1175, 1178–82 (D.C. Cir. 1991) (holding that an award was not in manifest disregard of the law).

²⁴² See 105 F.3d 1465, 1468–87 (D.C. Cir. 1997).

²⁴³ See *id.* at 1487 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

²⁴⁴ *Id.* (quoting *Gilmer*, 500 U.S. at 26).

preted and applied statutory law.”²⁴⁵ In more recent cases, the circuit continued to utilize the standard.²⁴⁶

C. Some State Courts Adopt the Manifest Disregard Standard

Before the *Hall Street* decision, many states adopted the manifest disregard doctrine as a non-statutory ground to review arbitration awards under their state statutes.²⁴⁷ For instance, Georgia adopted it in a statute.²⁴⁸ A few states, however, resisted the trend. In the 1996 case of *Arnold v. Morgan Keegan & Co.*, the Tennessee Supreme Court said the standard would undermine the effectiveness of arbitration.²⁴⁹ Furthermore, in 2003, the Virginia Supreme Court refused to adopt the standard in *SIGNAL Corp. v. Keane Federal Systems* because the state’s arbitration statute did not include it.²⁵⁰ The California Court of Appeal, Second District reached the same conclusion in the 2002 case of *Crowell v. Downey Community Hospital Foundation*,²⁵¹ as did appellate courts in

²⁴⁵ *Id.*

²⁴⁶ See *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 (D.C. Cir. 2006); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 704 (D.C. Cir. 2001).

²⁴⁷ See *H & S Homes, L.L.C. v. McDonald*, 910 So. 2d 79, 83–84 (Ala. 2004); *Garrity v. McCaskey*, 612 A.2d 742, 744–45 (Conn. 1992); *Travelers Ins. Co. v. Nationwide Mut. Ins. Co.*, 886 A.2d 46, 48 (Del. Ch. 2005); *Lopata v. Coyne*, 735 A.2d 931, 940 (D.C. 1999); *Griffith v. McGovern*, 141 P.3d 516, 520–21 (Kan. Ct. App. 2006); *Colchoneria Jiron, S.A. v. Blumenthal Print Works, Inc.*, 629 So. 2d 1288, 1290 (La. Ct. App. 1993); *Bd. of Educ. v. Prince George’s Cnty. Educator’s Ass’n*, 522 A.2d 931, 937–41 (Md. 1987); *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 794 (Mo. Ct. App. 1998); *Geissler v. Sanem*, 949 P.2d 234, 237–38 (Mont. 1997); *Graber v. Comstock Bank*, 905 P.2d 1112, 1116 (Nev. 1995); *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 610 A.2d 364, 372 (N.J. 1992); *Spear, Leeds & Kellogg v. Bullseye Sec., Inc.*, 738 N.Y.S.2d 27, 28–29 (App. Div. 2002); *Prudential Prop. & Cas. Ins. Co. v. Flynn*, 687 A.2d 440, 442 (R.I. 1996); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 105 S.W.3d 244, 252–53 (Tex. App. 2003); *Buzas Baseball Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 950–51 (Utah 1996); *Shahi v. Ascend Fin. Servs., Inc.*, 898 A.2d 116, 122 (Vt. 2006); *Madison Landfills, Inc. v. Libby Landfill Negotiating Comm.*, 524 N.W.2d 883, 892 (Wis. 1994).

²⁴⁸ GA. CODE ANN. § 9-9-13(b)(5) (2007) (“The award shall be vacated. . . if the court finds that the rights of [the appealing] party were prejudiced by . . . [t]he arbitrator’s manifest disregard of the law.”).

²⁴⁹ 914 S.W.2d 445, 452 (Tenn. 1996); see also *Warbinger Constr., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 859 (Tenn. Ct. App. 2001) (“[W]e decline to adopt the nonstatutory grounds of ‘manifest disregard’ and public policy for reviewing arbitration awards.”).

²⁵⁰ *SIGNAL Corp. v. Keane Fed. Sys., Inc.*, 574 S.E.2d 253, 257 (Va. 2003).

²⁵¹ *Crowell v. Downey Cmty. Hosp. Found.*, 115 Cal. Rptr. 2d 810, 816–17 (Ct. App. 2002).

Missouri²⁵² and Minnesota.²⁵³ Moreover, seeing no state statute for this test, the Colorado Supreme Court ruled that the standard was not available in Colorado in the 2005 case of *Coors Brewing Co. v. Cabo*.²⁵⁴ In 2005, Idaho's highest court declined to consider the standard in *Moore v. Omnicare, Inc.*²⁵⁵

In sum, when the similarities between the FAA and common law reasoning are read together with the language of varying court opinions, there is little doubt that courts created the manifest disregard standard.²⁵⁶ The more interesting question is whether the FAA Congress *meant* to incorporate this test. This Article's research provides evidence to support the "shorthand" theory—the *Hall Street* Court's way of stating that the FAA incorporated manifest disregard of the law.²⁵⁷ As discussed in Part II, nineteenth century courts used a verbal formulation much like manifest disregard in the same grammatical sequence as "fraud," "corruption," and "exceeded powers"—current grounds in section 10 of the FAA to vacate an award.²⁵⁸ It is also possible that Joseph Chitty was a source for the FAA²⁵⁹ because most of the FAA subsections quoted from his work and because he observed that courts vacated awards with legal mistakes.

Congress's decision to omit this element is inexplicable but was not likely intentional. The FAA Congress was mostly concerned with ensuring that courts enforce arbitration agreements²⁶⁰ and did not think much about the award-confirmation process. Instead, lawmakers relied on a solitary brief for the elements of section 10.²⁶¹ Thus, the omission of a "manifest disregard" standard was probably caused by this brief's inadvertence.²⁶²

²⁵² See *Stifel, Nicolaus & Co. v. Francis*, 872 S.W.2d 484, 486 (Mo. Ct. App. 1994) ("The judiciary is limited to vacating an arbitration award only on those grounds set forth in the statute. . . . Manifest disregard for the law is not a statutory basis for vacating an award.").

²⁵³ See *Hunter, Keith Indus., Inc. v. Piper Capital Mgmt., Inc.*, 575 N.W.2d 850, 855 (Minn. Ct. App. 1998).

²⁵⁴ See 114 P.3d 60, 63 (Colo. App. 2004).

²⁵⁵ See 118 P.3d 141, 151–52 (Idaho 2005).

²⁵⁶ See *supra* notes 64–152, 155–255 and accompanying text.

²⁵⁷ See *Hall Street*, 552 U.S. at 585.

²⁵⁸ See, e.g., *Farragut*, 89 U.S. at 420.

²⁵⁹ See CHITTY, *supra* note 130, at 637–68.

²⁶⁰ H.R. REP. NO. 68-96, at 1 (1924) ("The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of [f] admiralty, or which may be the subject of litigation in the Federal courts.").

²⁶¹ See *Hearing*, *supra* note 118, at 32–41 (statement of W.W. Nichols, President, American Manufacturers' Export Association of New York).

²⁶² See *id.*

Research also refutes the misleading idea that the Court created the standard in *Wilko*. The *Wilko* Court never ruled on the matter and gave nothing more than an advisory opinion on this doctrine. *Wilko* did, however, prompt a few federal appeals courts in the 1960s and 1970s to define, adopt, and apply the standard as the steady accumulation of precedent led to a trend. As Table 2 above shows, half of the circuit courts adopted the manifest disregard standard in the 1990s.²⁶³

This Article argues that courts embraced the manifest disregard standard in response to the rapid upsurge in mandatory arbitrations in the 1990s that involved statutory issues. Bowing to the *Gilmer* Court's strong pronouncement in favor of enforcing arbitration agreements, these courts ensured that arbitrators did not intentionally ignore the laws they were supposed to apply.²⁶⁴ Although arbitrators regularly applied the manifest disregard standard, they rarely used it to vacate awards.²⁶⁵

III. HALL STREET AND THE MANIFEST DISREGARD STANDARD

In 2008, the U.S. Supreme Court decision in *Hall Street Associates v. Mattel, Inc.*, analyzed the manifest disregard standard and strictly limited judicial review of awards to FAA standards.²⁶⁶ The ambiguity in the Court's decision, however, raised just as many questions as it answered.²⁶⁷

A. Hall Street *Limits Judicial Review of Awards to FAA Standards*

The *Hall Street* decision placed significant limitations on judicial review of awards to FAA standards.²⁶⁸ In *Hall Street*, the Court dealt with a commercial landlord-tenant dispute.²⁶⁹ As a manufacturer, Mattel, was ending its lease, the property owner wanted the company to pay for environmental cleanup.²⁷⁰ Mattel said it had no obligation to pay or indemnify the owner.²⁷¹ After Hall Street Associates filed a lawsuit, both parties agreed to arbitrate this dispute.²⁷² Their contract allowed a federal district court in Oregon to enter judgment on the award by con-

²⁶³ See *supra* Table 2.

²⁶⁴ See *Porzig v. Dresdner, Kleinwort, Benson, N.A., Inc.*, 497 F.3d 133, 139 (2d Cir. 2007); *Halligan*, 148 F.3d at 201-02; *Montes*, 128 F.3d at 1461-62.

²⁶⁵ See *Porzig*, 497 F.3d at 139; *Halligan*, 148 F.3d at 201-02; *Montes*, 128 F.3d at 1461-62.

²⁶⁶ See 552 U.S. 576, 584-89 (2008).

²⁶⁷ See *infra* notes 298-330 and accompanying text.

²⁶⁸ See *Hall Street*, 552 U.S. at 584-89.

²⁶⁹ See *id.* at 579.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

firming, correcting, modifying, or vacating the arbitrator's ruling.²⁷³ It also authorized the court to vacate the award if the "arbitrator's conclusions of law are erroneous."²⁷⁴

The resulting process showed how arbitration can fail to provide a quick, cost-saving ADR process.²⁷⁵ The award ruled that the manufacturer owed nothing.²⁷⁶ Regardless, Hall Street Associates successfully sued to vacate this ruling, arguing that the arbitrator ignored the state's environmental law.²⁷⁷ On remand, the arbitrator ruled for the landowner, only to have his award appealed to the district court again.²⁷⁸ The district court confirmed most of the award.²⁷⁹ The Ninth Circuit Court of Appeals subsequently reversed, reasoning that the parties could not agree to expand the grounds for reviewing awards.²⁸⁰ On remand, the district court found another reason to vacate the award, prompting one more reversal by the appeals court.²⁸¹

The *Hall Street* Court had no reason to devote so much attention to the manifest disregard standard.²⁸² In the midst of litigating a lease termination, the parties agreed to arbitrate the matter—provided that the district court would be allowed to review the award for erroneous conclusions of law.²⁸³ This, in itself, was unusual. With the prevalence of pre-dispute arbitration agreements,²⁸⁴ most parties do not enter into arbitration agreements in the midst of a lawsuit. It is important to note that neither party in *Hall Street* raised "manifest disregard" as an issue in

²⁷³ *Id.*

²⁷⁴ *Hall Street*, 552 U.S. at 579.

²⁷⁵ *See id.* at 580–81. The parties initially litigated the lease termination issue in 2001. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 145 F. Supp. 2d 1211, 1212 (D. Or. 2001). In 2004, they litigated the arbitration award. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 113 F. App'x 272, 272–73 (9th Cir. 2004). After the Supreme Court ruled on the arbitration issue in 2008, the Ninth Circuit remanded the matter to the district court. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 531 F.3d 1019, 1019–20 (9th Cir. 2008). It is interesting to note that the circuit court's opinion in *Hall Street* preserved state law grounds as an independent basis for conducting a review of the award—thus opening the door to more litigation over the award. *See id.*

²⁷⁶ *Hall Street*, 552 U.S. at 580.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *See id.*

²⁸⁰ *Id.* at 581.

²⁸¹ *Id.*

²⁸² *See* 552 U.S. at 584–89.

²⁸³ *Id.* at 579.

²⁸⁴ *See* Meredith R. Miller, *Contracting out of Process, Contracting out of Corporate Accountability: An Argument Against Enforcement on Pre-Dispute Limits on Process*, 75 TENN. L. REV. 365, 370 (2008) ("[A]cross varying industries, the pre-dispute arbitration regime endures unheedingly.").

the first appeal to the Ninth Circuit.²⁸⁵ The issue was whether the parties could contract for a court to use expanded standards of judicial review. In the second round before the Ninth Circuit, the court reviewed the award to determine if it was irrational.²⁸⁶ Furthermore, the Supreme Court did not identify manifest disregard as the issue. The issue was “the scope of judicial review permissible under the FAA.”²⁸⁷

The Court, with its holding in *Hall Street* that the FAA’s section 10 provides the exclusive grounds for vacating an award, did not reject the manifest disregard standard.²⁸⁸ The majority reasoned that the Court’s view of judicial review in 1953 in *Wilko v. Swan* was too vague to be a coherent doctrine: “Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the [FAA’s] § 10 grounds collectively, rather than adding to them.”²⁸⁹ The majority allowed for the possibility that manifest disregard was “shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers.’”²⁹⁰

The landlord also contended that parties are permitted to enter into contracts that expand judicial review standards.²⁹¹ The Court agreed that parties may structure much of their arbitration procedures by contract but the FAA’s mandatory language left no room to expand or modify the grounds for court review of awards.²⁹² Delving into the specific terms of section 10—“‘corruption,’ ‘fraud,’ ‘evident partiality,’ ‘misconduct,’ ‘misbehavior,’ ‘exceed[ing] . . . powers,’ ‘evident material miscalculation,’ ‘evident material mistake,’ ‘award[s] upon a matter not submitted’”²⁹³—the majority opinion reasoned that Congress wanted awards reviewed only for “egregious departures” from the arbitration

²⁸⁵ See Brief of Defendant-Appellant at 1, *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 196 F. App’x 476 (9th Cir. 2006) (No. 07-30114), 2005 WL 4864617, at *1; Response Brief of Plaintiff-Appellee at 1, *Hall Street*, 196 F. App’x 476 (No. 07-30114), 2006 WL 2952411, at *1.

²⁸⁶ See *Hall Street*, 196 F. App’x at 478 (“The arbitrator’s conclusion that the statute was not ‘applicable’ is completely irrational . . .”).

²⁸⁷ *Hall Street*, 552 U.S. at 582 n.2.

²⁸⁸ See *id.* at 584–85.

²⁸⁹ *Id.* at 585; see *Wilko v. Swan*, 346 U.S. 427, 435–37 (1953).

²⁹⁰ *Hall Street*, 552 U.S. at 585 (quoting 9 U.S.C. § 10(a)(3)–(4) (2006)).

²⁹¹ *Id.*

²⁹² *Id.* at 586–87.

²⁹³ *Id.* at 586 (quoting 9 U.S.C. § 10).

contract.²⁹⁴ Thus, section 10 did not allow broader grounds of review.²⁹⁵

More generally, the majority opinion concluded that the FAA embodies “a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”²⁹⁶ Ruling otherwise would “render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”²⁹⁷

B. *The End of Non-Statutory Review of Awards Under the FAA: Questions and Implications*

The *Hall Street* Court’s holding that courts cannot apply any non-statutory standards when they review awards under the FAA was overly simplistic.²⁹⁸ Meanwhile, the majority opinion took a muddled approach in treating manifest disregard of the law, stating that it might be a shorthand expression for all non-statutory standards.²⁹⁹ Did the *Hall Street* Court realize its broadly intended effect of bringing more clarity to judicial review of arbitration awards? To put this question in perspective, consider that employers or employees in the present study asked FAA courts to vacate awards that: (1) manifestly disregarded the law,³⁰⁰ (2) violated a public policy,³⁰¹ (3) contained a fact-finding error,³⁰² (4)

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 590. The decision in *Hall Street* left the door open, however, for broader review to parties who challenge an award in state courts. *See id.* The Court explained that its holding applied only to FAA actions and did “exclude more searching review based on authority outside the statute.” *Id.* The majority opinion also noted that parties may use state statutory or common law avenues to seek review awards—and also acknowledged that a “different scope of review” is allowable under those legal regimes. *Id.*

²⁹⁶ *Hall Street*, 552 U.S. at 588.

²⁹⁷ *Id.* Although Justice Stevens’s dissenting opinion did not directly touch on manifest disregard, it raised points that pertain to this standard. *See id.* at 592–96 (Stevens, J., dissenting). The opinion emphasized that these parties voluntarily entered into an arbitration agreement. *Id.* at 592–93. Congress wanted to promote and facilitate the use of arbitration agreements. *Id.* at 593–94. Thus, the majority’s “wooden” or strict reading of section 10 of the FAA did not reflect congressional intent. *Id.* at 594.

²⁹⁸ *See id.* at 584–89.

²⁹⁹ *See id.*

³⁰⁰ *Halligan v. Piper-Jaffray, Inc.*, 148 F.3d 197, 201–02 (2d Cir. 1998).

³⁰¹ *Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795, 799 (Tex. App. 2008).

³⁰² *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So. 2d 143, 150 (Fla. Dist. Ct. App. 2000) (“A reviewing court may not comb the record of an arbitration hearing for errors of fact . . . inherent in the decision-making process. . . . No provision in the Florida Arbitration Code authorizes trial judges to act as reviewing courts in the same way that a court of appeals reviews trial judges’ legal decisions.”).

were arbitrary and capricious or irrational,³⁰³ (5) did not draw their essence from the agreement,³⁰⁴ (6) had a punitive, excessive, or unauthorized remedy,³⁰⁵ (7) were unconstitutional,³⁰⁶ (8) were invalid because there was no arbitration agreement,³⁰⁷ and (9) resulted from an agreement to allow parties to expand and define their own standards of court review.³⁰⁸ These arguments fall outside the FAA, but courts applied them in this database. Does the Court’s holding in *Hall Street* preclude these standards?

In the database used for this Article, parties raised a “manifest disregard” issue in 46.4% of federal and 21.8% of state cases. Assuming for the sake of argument that this standard is part of the FAA, what does the *Hall Street* decision mean for other non-statutory reviewing standards? Consider the public policy exception to award enforcement, a common non-statutory standard. Parties raised this argument in 10% of federal and 24% of state cases in the database. This non-FAA standard, from the 1987 U.S. Supreme Court case of *United Paperworkers International Union v. Misco, Inc.*,³⁰⁹ says that awards may be set aside if they “violate ‘some explicit public policy’ that is ‘well defined and dominant, and is to be ascertained “by reference to laws and legal precedents and not from general considerations of supposed public interests.””³¹⁰ The

³⁰³ Banc of Am. Sec. v. Knight, No. 118889/03, 2004 WL 1236914 (N.Y. Sup. Ct. Mar. 19, 2004) (involving an employer petitioning a court to vacate the \$680,000 award on grounds that it was irrational).

³⁰⁴ Qorvis Commc’ns, L.L.C. v. Wilson, 549 F.3d 303, 305 (4th Cir. 2008).

³⁰⁵ Belko v. AVX Corp., 251 Cal. Rptr. 557, 563 (Ct. App. 1988) (“We find no public policy significant enough to restrict the right of contracting parties to vesting agreed upon arbitrators with the authority to consider and resolve claims for punitive damages.”).

³⁰⁶ Acciaro v. Millenium Sec. Corp., 83 F. Supp. 2d 413, 422 (S.D.N.Y. 2000) (“[The employer’s] principal argument is that the award violates due process because the ratio between punitive and compensatory damages renders it excessive.”).

³⁰⁷ Morrow v. Hallmark Cards, Inc., 273 S.W.3d 15, 29 (Mo. Ct. App. 2008).

³⁰⁸ McQueen-Starling v. UnitedHealth Grp., Inc., 654 F. Supp. 2d 154, 160 (S.D.N.Y. 2009) (noting that the arbitration agreement provided that “the standard of review to be applied . . . will be the same as that applied by an appellate court reviewing the decision of a trial court sitting without a jury”).

³⁰⁹ *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

³¹⁰ *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). The case did not arise under the FAA. *See id.* at 31–35. It involved a union and employer who arbitrated the termination of a paper mill worker under the auspices of section 301 the Labor-Management Relations Act. *See id.* The worker was fired after he was arrested in the company parking lot on a drug charge. *Id.* at 33. After the arbitrator sided with the union, a lower court vacated the award. *Id.* at 34–35. The court believed that the award violated a public policy prohibiting the operation of dangerous machinery by drug-users. *Id.* The Supreme Court disagreed, reasoning that drug laws did not preclude reinstatement of an offender. *See id.* at 43–45.

Misco case did not arise under the FAA.³¹¹ It involved a union and employer who arbitrated the firing of a paper mill worker under section 301 the Labor Management Relations Act (LMRA).³¹² Although *Misco* involved a different federal law, the cases studied here show that courts acting under the FAA have occasionally applied its test. By precluding all non-statutory standards in FAA cases, did the *Hall Street* Court eliminate the public policy test?

For example, consider the 2008 decision by the U.S. District Court for the Middle District of Florida in *Dezego v. A.G. Edwards & Sons, Inc.*³¹³ Sandra Dezego sued her employer for sex discrimination, but she was ordered by the court to arbitrate her claim.³¹⁴ After twenty-eight hearing days, she won \$1.8 million in damages.³¹⁵ Petitioning a federal court to vacate the award, the employer argued that the amount of the award violated Title VII's public policy of capping employer damages.³¹⁶ After determining that the Eleventh Circuit uses the public policy test, the lower court confirmed the award.³¹⁷

Dezego shows the relevance of maintaining a non-statutory reviewing standard that ensures an award complies with the law.³¹⁸ Recall that the 1991 U.S. Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.* articulated a broad theory of forum substitution, leading employers and workers to bypass court as they arbitrate their legal

³¹¹ See *id.* at 31–35.

³¹² Labor-Management Relations Act § 301(b), 29 U.S.C. § 185(b) (2006). By 1947, when the LMRA was enacted, and in the following years, most unions agreed to no-strike clauses in exchange for employer assurances to submit contract disputes to arbitration. See R.W. FLEMING, *THE LABOR ARBITRATION PROCESS* 31–32 (1965) (“Indeed, it is apparent that the decisions of the Supreme Court which have so greatly enhanced labor arbitration . . . are in large part based on the theory that the arbitration clause is the *quid pro quo* for the no-strike clause.”). Section 301 provided a legal process to enforce this bargain. See 29 U.S.C. § 185(b). In a landmark decision, *Textile Workers Union v. Lincoln Mills*, the U.S. Supreme Court in 1957 ruled that federal jurisdiction to enforce collective bargaining agreements, including arbitration provisions, arises under section 301 of the Labor Management Relations Act of 1947, and not the Federal Arbitration Act. 353 U.S. 448, 456–57 (1957). Whether courts act under the FAA or LMRA, they apply federal common law standards derived from the Steelworkers Trilogy—three companion cases that articulated these criteria. See generally *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

³¹³ No. 8:07-CV-1387-T-27TGW, 2008 WL 215979, at *3–5 (M.D. Fla. Jan. 23, 2008).

³¹⁴ *Id.* at *1.

³¹⁵ *Id.* at *2 & n.3.

³¹⁶ *Id.* at *2.

³¹⁷ *Id.* at *5.

³¹⁸ See *id.* at *2–5.

claims.³¹⁹ *Gilmer* fortified its forum substitution theory by stating that “although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue.”³²⁰ Thus, the *Dezego* case raises the question: What FAA standard would a court use to perform its *Gilmer*-function of reviewing an award to ensure it complies with the law? The statutory elements do not list manifest disregard or the public policy test.

Now consider how the 2008 Missouri Supreme Court case of *Morrow v. Hallmark Cards, Inc.*³²¹ would be decided if the court could not apply a non-statutory test. After an employee was fired, she sued for age discrimination.³²² She was ordered to arbitrate her claim, but tried two more times to have the court hear her lawsuit.³²³ Reluctantly, she invoked the mandatory arbitration process and argued to the arbitrator that the arbitration agreement was unenforceable because it was illusory.³²⁴ She lost the award, but an appeals court vacated it on grounds that the arbitration agreement was one-sided and therefore unenforceable.³²⁵ If *Morrow*’s appeal was strictly limited to the FAA’s standards, this legal argument could not be raised.³²⁶

The *Hall Street* decision raised as many questions as it answered.³²⁷ It clearly limited FAA review of awards to the statutory elements in section 10, and it barred parties from contracting for expanded award-review.³²⁸ But the *Hall Street* court had no reason to discuss manifest disregard because the parties did not argue this issue in their lengthy litigation. Its historical analysis of the standard was flawed and shallow. Worse, the *Hall Street* court meandered to an indecisive conclusion: maybe manifest disregard is a non-statutory standard and maybe it is not.³²⁹ In Part IV, this Article explores how courts deal with this poor guidance.³³⁰

³¹⁹ See 500 U.S. 20, 27–35 (1991).

³²⁰ *Id.* at 32 n.4 (quoting *Shearson/Am. Express Inc., v. McMahon*, 482 U.S. 220, 232 (1987) (emphasis added)).

³²¹ 273 S.W.3d at 18–19.

³²² *Id.* at 19.

³²³ *Id.* at 20–21.

³²⁴ *Id.* at 21.

³²⁵ See *id.* at 22–27.

³²⁶ *Id.*

³²⁷ See 552 U.S. at 584–89.

³²⁸ See *id.* at 585.

³²⁹ See *id.*

³³⁰ See *infra* notes 331–352 and accompanying text.

IV. DO COURTS CONFIRM MORE AWARDS FOLLOWING *HALL STREET*?

Research methods from earlier studies are used here,³³¹ and the sample was derived from Westlaw's online service. Because federal and state arbitration statutes regulate the process to challenge an award, this Article addresses federal and state cases that reviewed an arbitrator's ruling. The sample was limited to employment arbitrations³³² and cases decided from 1975 to March 2010.³³³ A consistent approach was applied to build the sample.³³⁴ The crosstabs program in Statistical Package for the Social Sciences (SPSS) produced data for federal and state courts. As Table 3-A and Table 3-B, below, show, cases were divided by first-level court and appellate court rulings. The tables show results before and after the U.S. Supreme Court ruled in *Hall Street Associates v. Mattel, Inc.* in 2007.³³⁵

³³¹ *E.g.*, Michael H. LeRoy & Peter Feuille, *As the Enterprise Wheel Turns: New Evidence on the Finality of Labor Arbitration Awards*, 18 STAN. L. & POL'Y REV. 191, 202–03 (2007); *see also* Michael H. LeRoy & Peter Feuille, *Reinventing the Enterprise Wheel: Court Review of Punitive Awards in Labor and Employment Arbitrations*, 11 HARV. NEGOT. L. REV. 199, 230–34 (2006); LeRoy & Feuille, *supra* note 12, at 45–48.

³³² The sample consisted only of cases involving a post-award dispute between an individual employee and the employer in which an arbitrator's ruling was challenged by either party. Arbitration cases involving a union and employer were not included because these adjudications are no longer regulated under the FAA.

³³³ *E.g.*, *McClure v. Montgomery Cnty. Cmty. Action Agency*, No. 4798, 1975 WL 181652, at *1–6 (Ohio Ct. App. Nov. 7, 1975).

³³⁴ After a potential case was identified, it was read to see if it met the inclusion criteria. Pre-arbitration disputes over enforcement of an arbitration clause were excluded. Cases were included, on the other hand, where employees resisted arbitration, were compelled to arbitrate their claims, and were later involved in a post-award lawsuit. Once a case met the criteria, it was checked against a roster of previously read and coded cases to avoid duplication. All cases are on file with the author. Next, relevant data were taken from each case. Variables included (1) state or federal court, (2) first court ruling on motion to confirm or vacate an award, and (3) appellate ruling on motion to confirm or vacate an award.

³³⁵ *See* 552 U.S. 576, 584–89 (2007).

Table 3-A: First-Level Court Review of Arbitration Awards, Federal and State Award Confirmation Rates Before and After <i>Hall Street</i>	
	Award Confirmed
FEDERAL COURT	
Federal District Court Rulings Pre- <i>Hall Street</i>	164/175 93.7%
Federal District Court Rulings Post- <i>Hall Street</i>	30/33 90.9%
STATE COURT	
State First-Level Court Rulings Pre- <i>Hall Street</i>	96/122 78.7%
State First-Level Court Rulings Post- <i>Hall Street</i>	20/24 83.3%

Table 3-B: Appellate Court Review of Arbitration Awards, Federal and State Award Confirmation Rates Before and After <i>Hall Street</i>	
	Award Confirmed
FEDERAL COURT	
Federal Appeals Court Rulings Pre- <i>Hall Street</i>	79/90 87.8%
Federal Appeals Court Rulings Post- <i>Hall Street</i>	6/7 85.7%
STATE COURT	
State Appeals Court Rulings Pre- <i>Hall Street</i>	73/103 70.9%
State Appeals Court Rulings Post- <i>Hall Street</i>	16/18 88.9%

- *Finding No. 1:* Federal district courts confirmed awards at a high and steady rate before and after *Hall Street* [Table 3-A]. They confirmed 164 out of 175 (93.7%) awards from 1975 until March 25, 2008. After *Hall Street*, they confirmed 30 out of 33 awards (90.9%).
- *Finding No. 2:* After *Hall Street*, first-level state courts confirmed slightly more awards—83.3% (20 out of 24 awards) compared to 78.7% (96 out of 122 awards) [Table 3-A].
- *Finding No. 3:* The difference between federal and state award confirmation rates narrowed after *Hall Street*, from 15 percentage points before this decision to about 8 after this decision [Table 3-A]. This means that federal and state courts reviewed awards more uniformly.
- *Finding No. 4:* Federal appeals courts confirmed awards at a high and steady rate before and after *Hall Street*, respectively 87.8% and 85.7% [Table 3-B].

- *Finding No. 5:* After *Hall Street*, state appellate courts confirmed more awards—88.9% (16 out of 18) compared to 70.9% (73 out of 103) [Table 3-B]. Due to the small sample size for the post-*Hall Street* cases, the large percentage increase was not statistically significant.
- *Finding No. 6:* Federal and state appellate courts had virtually identical confirmation rates after *Hall Street*, with states registering a slightly higher level [Table 3-B]. The difference was 3.2 percentage points.

The *Hall Street* ruling caused federal circuit courts of appeals to split in their treatment of the manifest disregard standard.³³⁶ For instance, appellate courts in the Fifth Circuit³³⁷ and Eleventh Circuit³³⁸ recently ruled that *Hall Street* ended the use of this test to review awards under the FAA. In contrast, the Second, Sixth, and Ninth Circuits treated “manifest disregard” as part of a court’s reviewing power under the FAA.³³⁹ The Second Circuit said that manifest disregard is “reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA.”³⁴⁰ The Sixth Circuit stated that *Hall Street* precluded review under this standard.³⁴¹ The Ninth Circuit con-

³³⁶ See *infra* notes 337–339 and accompanying text.

³³⁷ See *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (overruling the Fifth Circuit’s prior holdings recognizing manifest disregard of the law). The court reasoned that the *Hall Street* decision

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.

Id. (citations omitted).

³³⁸ *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010) (“[T]he categorical language of *Hall Street* compels such a conclusion.”).

³³⁹ See *infra* notes 340–342 and accompanying text.

³⁴⁰ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 94, 95 (2d Cir. 2008) (“[W]e 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.”). Recently, in 2010, the U.S. Supreme Court commented on this approach by stating: “We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street* . . . 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.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1768 n.3 (2010).

³⁴¹ See *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 418–19 (6th Cir. 2008). The court said that *Hall Street* “significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10, but it did not foreclose federal courts’ review for an arbitrator’s manifest disregard of the law.” *Id.* at 418.

cluded that manifest disregard survived as a “shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4)”³⁴² The First,³⁴³ Third,³⁴⁴ Fourth,³⁴⁵ and Tenth Circuits³⁴⁶ did not rule directly on this standard.

Likewise, state courts have had differing reactions to *Hall Street*.³⁴⁷ The California Supreme Court said that federal and state judicial review standards “do not move in lockstep” and also noted that manifest disregard survives as an exception to the narrow reviewing standards for awards under California’s arbitration law.³⁴⁸ An Indiana court assumed, without deciding, that the standard still applies.³⁴⁹ The Wisconsin Supreme Court ruled that “manifest disregard of the law is still a basis for vacating awards.”³⁵⁰ Taking an opposing view, Alabama’s highest court ruled that manifest disregard does not supplement the statutory criteria

The Sixth Circuit concluded: “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. Accordingly, this Court will follow its well-established precedent here and continue to employ the ‘manifest disregard’ standard.” *Id.* at 419.

³⁴² See *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009). The Ninth Circuit noted that *Hall Street* “listed several possible readings of the doctrine, including our own.” *Id.*

³⁴³ See *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (acknowledging that *Hall Street* stated 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”). The court observed, however, that this case was not brought under the FAA. *Id.* Thus, the First Circuit concluded: “[W]e decline to reach the question of whether *Hall Street* precludes a manifest disregard inquiry in this setting.” *Id.*

³⁴⁴ See *Bapu Corp. v. Choice Hotels Int’l, Inc.*, 371 F. App’x 306, 309 (3d Cir. 2010) (observing that *Hall Street* “did not, however, expressly decide whether the judicially created doctrine allowing vacatur of an arbitration award for manifest disregard of the law by an arbitrator would continue to exist as an independent basis for vacatur.”). The court concluded: “[W]e see no need to decide the issue here because this case does not present one of those ‘exceedingly narrow’ circumstances supporting a vacatur based on manifest disregard of the law.” *Id.*

³⁴⁵ See *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 193 n.13 (4th Cir. 2010) (finding it “unnecessary to consider the effect of *Hall Street*” on the manifest disregard standard).

³⁴⁶ See *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341, 1344 n.2 (10th Cir. 2009).

³⁴⁷ See *infra* notes 348–352 and accompanying text.

³⁴⁸ *Pearson Dental Supplies, Inc. v. Super. Ct.*, 229 P.3d 83, 91 n.3 (Cal. 2010).

³⁴⁹ See *Transmontaigne Prod. Servs., Inc. v. Ams. Ins. Co.*, No. 49A05-0810-CV-604, 2009 WL 2461209, at *5 (Ind. Ct. App. Aug. 12, 2009).

³⁵⁰ See *Sands v. Menard, Inc.*, 767 N.W.2d 332, 335 (Wis. 2010).

for reviewing awards.³⁵¹ Moreover, an appeals court in Colorado questioned whether the manifest disregard standard remains viable.³⁵²

V. INFERENCES AND IMPLICATIONS OF THE *HALL STREET* DECISION

Arbitration is a vital dispute resolution process. It provides low-cost, prompt, and final resolution. The process has been criticized, however, for failing to provide justice.³⁵³ Mandatory arbitration has spurred these concerns as employers and businesses have required workers and consumers to agree to arbitrate disputes in lieu of seeking redress in court.³⁵⁴ Critics also believe that the quality of justice available in arbitration differs from litigation.³⁵⁵ This Part assesses the early impact of the U.S. Supreme Court's 2008 decision, *Hall Street Associates v. Mattel, Inc.*, focusing on three dispute resolution criteria—finality, justice, and consistency—and referring back to the study addressed in Part IV.³⁵⁶

A. *Finality After Hall Street*

The preliminary data show that the *Hall Street* decision promotes finality.³⁵⁷ State courts are confirming more awards after *Hall Street*. This is a salutary trend that fulfills a key benefit of arbitration—composure of disputes with minimal court interference. Award confir-

³⁵¹ See *Volvo Trucks N.A., Inc. v. Dolphin Line, Inc.*, No. 1081277, 2010 WL 1641017, at *3 (Ala. Apr. 23, 2010).

³⁵² See *Barnett v. Elite Props.*, No. 09CA0693, 2010 WL 2105940, at *6 (Colo. App. May 27, 2010).

³⁵³ *Mandatory Binding Arbitration: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 29 (2009) (statement of Stuart T. Rossman, Director, National Consumer Law Center) (“Hundreds of millions of [consumer] contracts now contain these clauses. Hundreds of thousands of consumers forced into arbitration every year discover that they have inadvertently signed away their legal rights.”). See generally Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857; Geraldine Szott Moolr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999).

³⁵⁴ See Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1072–74 (1998) (describing the “consumerization” of arbitration).

³⁵⁵ See generally Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029 (2004) (noting that, by enforcing mandatory arbitration agreements, courts avoid dealing with a considerable volume of employment litigation); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521 (2006).

³⁵⁶ See *supra* notes 331–335 and accompanying text.

³⁵⁷ See *supra* notes 331–335 and accompanying text.

mation also effectuates legislative intent to minimize court interference in this process.³⁵⁸ The nearly twenty percentage point increase in state appellate court award confirmations has positive implications for finality: it shows that courts are holding parties to their promises to abide by the award. The trend should also discourage litigation to vacate awards.

The present research is not designed to determine causation, but the methodology, which compares court rulings before and after March 25, 2008, shows a possible association between *Hall Street* and higher rates of award enforcement in state courts—as well as continuity of high enforcement rates in federal courts. The data suggest that courts are heeding *Hall Street*'s signals to promote award finality.³⁵⁹

B. Justice After Hall Street

Unfortunately, the Court's decision in *Hall Street* has created conditions for undermining justice. Without legislation to prohibit mandatory arbitration,³⁶⁰ millions of employees need a judicial review standard to ensure that arbitrators do not intentionally disregard their legal rights. The Fifth and Eleventh Circuits have lost sight of the fact that *Hall Street* involved two businesses that reached an arm's length bargain for arbitration as an alternative to litigation.³⁶¹ The fact that these companies made their contract while they were embroiled in a lawsuit means that both parties were represented by counsel when they agreed to arbitration. Nonetheless, they had enough concern about an award based on legal error to ask the court to review the ruling for this problem.

Employees who are required to arbitrate their legal claims do not have the bargaining safeguards enjoyed by the businesses in *Hall Street*. No attorney helps them frame the terms of the arbitration agreement, and courts are rarely involved at this point. Thus, unlike the situation in *Hall Street*, where a judge approved the arbitration procedure, no judicial authority is present at this critical time. Furthermore, the holding in the 1991 U.S. Supreme Court case *Gilmer v. Interstate/Johnson Lane Corp.* means that most of these arbitration agreements will be en-

³⁵⁸ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1990) (observing that the purpose of the FAA was “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts”).

³⁵⁹ See *supra* Tables 3-A, 3-B.

³⁶⁰ See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (proposing a curbing of mandatory arbitration).

³⁶¹ See *supra* notes 337–338 and accompanying text.

forced,³⁶² and experience shows that arbitrators increasingly decide complex employment law issues.³⁶³ The *Gilmer* Court's theory of forum substitution cannot be fulfilled without a limited doctrine to ensure that the arbitrator does not deliberately disregard the law.

Additionally, one must consider *Hall Street's* reasoning that Congress meant to exclude all non-statutory standards to review awards. If this interpretation is so obvious, why did the Court not adopt it in *Wilko v. Swan* in 1955? The *Wilko* justices were only thirty years removed from enactment of the Federal Arbitration Act. Could the Supreme Court's vision improve by being more than eighty years removed from this legislation? Or is this a case where a textual interpretation of a law is plausible but blind to the context in which Congress passed that law?

The context at issue here is related to justice in arbitrations. The FAA was not passed with employment contracts in mind.³⁶⁴ Businesses wanted Congress to end the "ruinous litigation"³⁶⁵ that affected trade. This has implications for court review of FAA awards—where many arbitration agreements embody unequal bargaining power. To read the FAA so narrowly as to preclude even the most reserved form of judicial review for intentional legal errors puts courts in the absurd role of enforcing rulings that flout the law.³⁶⁶ Courts should not place arbitrators above the law. Preserving this extremely narrow safeguard does not conflict with the FAA's intent to end judicial hostility to arbitration.

C. Consistency After Hall Street

Even though *Hall Street* has promoted finality in terms of showing that courts confirm arbitration awards, the *Hall Street* decision fails to promote judicial consistency, and its equivocal approach to the mani-

³⁶² See 500 U.S. at 35.

³⁶³ *E.g.*, Porzig v. Dresdner, Kleinwort, Benson, N.A., 497 F.3d 133, 139 (2d Cir. 2007) (noting that the arbitration panel was asked to decide whether employee's lawyer was required to return contingency fee to employee).

³⁶⁴ See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 126–27 n.5 (2001) (Stevens, J., dissenting) (recounting the objections of labor unions to coverage under the FAA, expressed by the President of the Seamen's Union of America when he addressed the matter at the 1926 annual convention of his union). As a result, section 1 of the FAA exempted certain employment contracts.

³⁶⁵ See *Hearing*, *supra* note 118, at 6 (statement of Charles L. Bernheimer, Chairman, Committee on Arbitration).

³⁶⁶ *E.g.*, *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) ("In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both.").

fest disregard standard is fracturing federal appellate courts.³⁶⁷ Three circuits have ruled that the standard survived *Hall Street*,³⁶⁸ whereas two others have taken the opposite view.³⁶⁹ Meanwhile, four circuits evaded the issue by finding other grounds to decide award challenges.³⁷⁰ Three other circuits have not confronted “manifest disregard” since *Hall Street*.

The U.S. Supreme Court needs to resolve this developing split in authority and to decide the issue with clarity. This study’s historical research offers helpful insights. The Court has never decided the issue directly but has used other arbitration issues to discuss the standard. This undisciplined approach leads to muddled doctrine. In 1961, the Ninth Circuit identified this problem in *San Martine Compania de Navegacion, S.A. v. Saguenay Terminal Ltd.*:

Frankly, the Supreme Court’s use of the words “manifest disregard,” has caused us trouble here. Conceivably the words may have been used to indicate that whether an award may be set aside for errors of law would be a question of degree. . . . Such a “degree of error” test would, we think, be most difficult to apply. Results would likely vary from judge to judge.³⁷¹

Judge Posner made a similar point:

We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles—whether the arbitrators “exceeded their powers”—it is superfluous and confusing. There is enough confusion in the law.³⁷²

³⁶⁷ See *infra* notes 368–370 and accompanying text.

³⁶⁸ See *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Stolt-Nielsen N.A. v. Animalfeeds Int’l Corp.*, 548 F.3d 85, 94–95 (2d Cir. 2008); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 418–19 (6th Cir. 2008).

³⁶⁹ See *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009).

³⁷⁰ See *Bapu Corp. v. Choice Hotels Int’l, Inc.*, 371 F. App’x 306, 309 (3d Cir. 2010); *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 193 n.13 (4th Cir. 2010); *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341, 1344 n.2. (10th Cir. 2009); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008).

³⁷¹ *San Martine Compania de Navegacion v. Saguenay Terminals Ltd.*, 293 F.2d 796, 802 n.4 (9th Cir. 1961).

³⁷² *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

These strong arguments for eliminating the manifest disregard standard are less convincing than Justice Frankfurter's straightforward conclusion in his *Wilko* dissent: "Arbitrators may not disregard the law."³⁷³ This Article's research adds to Justice Frankfurter's rule by showing that courts, for more than a century, equated the FAA's fraud, corruption, and exceeded powers elements with the manifest disregard standard. The reasoning in nineteenth century decisions, such as *Wesson v. Newton* and *Anderson v. Taylor*, resonated in a recent 2005 decision from the Tenth Circuit, *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, where the court recognized the "well-established rule that a district court may vacate an arbitration award only in the narrowest of circumstances—such as *fraud, corruption, and manifest disregard of controlling law.*"³⁷⁴

CONCLUSION

This Article's analysis of the history of the Federal Arbitration Act (FAA) and of a sample of arbitration cases, leads to new conclusions about the 2008 U.S. Supreme Court case *Hall Street Associates v. Mattel, Inc.* and the "manifest disregard" standard. Namely: (1) the FAA drew from common law sources that included manifest disregard of the law as limited grounds to vacate an award, but Congress inadvertently omitted this standard from the FAA, and (2) quantitative research shows that state courts are headed toward, and federal courts are maintaining, high levels of award finality in apparent response to *Hall Street*. The historical research shows that *Hall Street* correctly guessed that "manifest disregard" is a shorthand part of the FAA. The empirical findings dispel *Hall Street's* concern that the continued use of this standard will erode award finality.

The split among federal circuit courts is creating inconsistency in the law of arbitration. The U.S. Supreme Court should address this problem. Meanwhile, the federal and state courts that have not ruled on "manifest disregard" after *Hall Street* should reconsider whether this standard is sufficiently deferential to preserve the finality of awards that is envisioned under the FAA. To illustrate:

³⁷³ *Wilko v. Swan*, 346 U.S. 427, 440 (1953) (Frankfurter, J., dissenting) ("[An] appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award.")

³⁷⁴ *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1274 (10th Cir. 2005) (emphasis added); see *Anderson v. Taylor*, 41 Ga. 10, 21 (Ga. 1870); *Wesson v. Newton*, 64 Mass. (10 Cush.) 114, 115–17 (1852).

- “There is . . . a way to understand ‘manifest disregard of the law’ that preserves the established relation between court and arbitrator. . . . It is this: an arbitrator may not direct the parties to violate the law.”³⁷⁵
- “[W]e emphasized that the ‘appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision.’”³⁷⁶
- “When faced with questions of law, an arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.”³⁷⁷
- Manifest disregard “clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.”³⁷⁸

These definitions translate to nanoscale limits on judicial review of awards, and courts do not use the standard to relitigate the merits of a dispute. This study shows that courts have recognized this doctrine for at least two centuries;³⁷⁹ it did not develop as judicial hostility to arbitration, but to ensure that these private tribunals conform to the prevailing laws.³⁸⁰ Such rationale is relevant in the modern era of arbitration where much of arbitration is no longer voluntary but is mandatory. Although arbitration is supposed to be a final and binding process, judicial review must be available to correct an arbitrator’s intentional flouting of the law. If the standard is eliminated, arbitral finality will rise above the crowning principle of the American constitutional system: “No man in this country is so high that he is above the law.”³⁸¹

³⁷⁵ *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001).

³⁷⁶ *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 237 (4th Cir. 2006) (quoting *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994)).

³⁷⁷ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995).

³⁷⁸ *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).

³⁷⁹ See *Fuller v. Fenwick*, (1846) 136 Eng. Rep. 282 (L.R.C.P) 282–85.

³⁸⁰ See, e.g., *United States v. Farragut*, 89 U.S. 406, 420 (1874).

³⁸¹ See *United States v. Lee*, 106 U.S. 196, 220 (1882).

