THE EVOLUTION OF JUDICIAL REVIEW UNDER THE FEDERAL ARBITRATION ACT

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I.
INTRODUCTION

On March 25, 2008, the Supreme Court issued its ruling in *Hall Street Associates LLC v. Mattel, Inc.*,[1] a key decision that resolved an existing disagreement among the federal Courts of Appeals concerning whether parties who had entered into an agreement to arbitrate could, in their agreement, provide for a heightened degree of judicial review. In a six-to-three decision, the Supreme Court, ruled that parties could not do so.

While the Court's grant of certiorari in *Hall Street* was limited to single issue—whether, in their agreement to arbitrate, parties may expand the scope of judicial review of an arbitral award—the Court's ruling is likely to have wide-ranging ramifications. In particular, the ruling calls into question any ground for non-recognition that is not specifically set forth in that statute based on the Court's finding that the standards for judicial review (and non-recognition) of an arbitral award set forth in Sections 10 and 11 of the Federal Arbitration Act[2] ("FAA") are exclusive and may not be expanded by contract. Not surprisingly, in the wake of *Hall Street*, some lower courts have already found that the best-recognized judicially-created ground for non-recognition—permitting a court to refuse to confirm an arbitration award on the ground that it was made in "manifest disregard of law"—is no longer good law.

This Article analyzes *Hall Street*'s impact on the judicial review of arbitral awards, focusing on the potential narrowing of that scope of review. Part II briefly discusses the history of arbitration law in the United States, with an emphasis on the adoption of the FAA and parallel state statutes. Part III discusses the

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1. Hall Street Assoc. LLC v. Mattel, Inc.,128 S. Ct. 1396 (2008).

2. 9 U.S.C. §§ 1-16 (2000).

evolution of judicial review standards, specifically the manifest disregard doctrine that currently represents the only non-statutory annulment doctrine. Part IV discusses the impact of the *Hall Street* ruling on related judicial review systems, such as those included in state arbitration statutes and common law.

II.
THE HISTORY OF ARBITRATION LAW IN THE UNITED STATES

A. *Historical Judicial Animosity Toward Arbitration in the United States*

According to the Supreme Court of the United States, "[p]rior to the passage of the FAA, American courts were generally hostile to arbitration."[3] U.S. courts routinely refused to enforce executory agreements to arbitrate,[4] and as in England, arbitration clauses that allowed an arbitrator to determine the issue of liability were particularly susceptible to judicial invalidation.[5] Early Supreme Court decisions affirmed the well-settled English policy that "parties cannot by contract oust the ordinary courts of their jurisdiction,"[6] motivated by a judicial concern that "[t]he regular administration of justice might be greatly impeded or interfered with by [agreements to arbitrate

3. Hall Street Assocs.,128 S. Ct. at 1408.

4. *See* Rederiaktiebolaget Atlanten v. Aktieselskabetkorn-og Foderstof Kompagniet, 252 U.S. 313 (1920) (affirming the trial court's award of full damages after concluding that even though the parties agreed to arbitrate disputes arising under the contract, the non-performing party's repudiation of the contract did not constitute such a "dispute" triggering the contract's arbitration clause); *see also* Hobart v. Drogan, 35 U.S. 108, 119 (1836) ("[I]ndeed, [an arbitration] being to a mere amicable tribunal . . . could not, in a case of this sort, be now insisted upon to bar the jurisdiction of the court.").

5. *See* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 121 (1924) (noting that both English and American courts had generally not given effect to executory agreements to arbitrate the general question of liability, as opposed to the narrow issue of damages or to "[furnish] essential evidence of specific facts . . . [as] a condition precedent to the cause of action"); *see also* Hamilton v. Liverpool, London & Globe Ins. Co., 136 U.S. 242, 255 (1890) (finding that a stipulation to arbitrate was generally valid so long as it merely estimated damages but "[left] the general question of liability to be judicially determined").

6. Home Ins. Co. v. Morse, 87 U.S. 445, 451 (1874).

disputes] if they were specifically enforced."[7] Throughout much of its early jurisprudence, the Court adhered to the principle that at any time prior to the arbitrator's final adjudication a party to an arbitration agreement could freely revoke its submission on the rationale that each party had a right to know all of the facts of the dispute before enforceably agreeing to submit the dispute to arbitration.[8]

The doctrines of ouster and revocability reflected the contours of the English arbitration process brought to the American colonies in the Seventeenth Century. Early English common law did not take the modern view of arbitration as a legitimate form of trial, nor as a means of avoiding trial through negotiations by the parties' agents. Instead, arbitration was treated as a partial substitute for trial, secured through a formal, but revocable, grant of power to arbitrators via submission to the process.[9] Moreover, arbitral awards could only be enforced by common law actions accompanied by so many procedural limitations that it was often simpler to litigate the underlying dispute in court.[10] A separate body of law, the Law Merchant, developed in England to address the particular needs of merchants that the common law did not serve.[11] For example, it provided for the adjudication of mercantile disputes by other merchants.[12] However, the special courts and

7. *Id.* at 452; *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974) ("English courts traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act.").

8. *See* Nicholas R. Weiskopf, *Arbitral Injustice—Rethinking the Manifest Disregard Standard for Judicial Review of Awards*, 46 U. LOUISVILLE L. REV. 283, 292 (2007) (describing the revocability doctrine as a reaction to judicial concerns about arbitral competence).

9. *See* Vynior's Case, 77 Eng. Rep. 597, 598 n.3 (K.B. 1609); *see generally* Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L. J. 595 (1928) (explaining the doctrine of revocability under early English common law).

10. Sayre, *supra* note 9, at 601 (March 1928); *see also* Bruce H. Mann, *The Formalization of Informal Law Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 445-47 (1984) (describing the English arbitration process in the 17th century).

11. *See* WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 569-70 (1922) (distinguishing the law merchant from the common law).

12. Mann, *supra* note 10, at 470.

other institutions that supported the Law Merchant in England did not cross the Atlantic, and colonial merchants were left to find their own ways to deal with trade disputes.[13]

Hostility toward enforcing arbitration was eventually abandoned in America for several reasons. First, commerce began to flourish. By the mid-Eighteenth Century, many of the American colonies had undergone an economic transformation from primarily subsistence farming to commercial production.[14] A growing number of American businessmen chose to engage in arbitration in order to avoid lengthy and expensive proceedings in courts already crowded with commercial disputes. However, gains in efficiency through the arbitral process were counteracted by the frustrations of subsequent judicial intervention when an award was challenged. The private practice of arbitration was of little practical use without the authority of court enforcement, and frustrated merchants began to organize and lobby for a legislative solution.

A second reason for colonial divergence from early English common law notions of arbitration was that contract law was a better defined area of jurisprudence than it had been in England during the height of the doctrines of revocability and ouster.[15] As American courts routinely adjudicated contract disputes based on the intent of the parties to be bound by the terms of their agreement, the same principle gained greater prominence in the context of reviewing arbitration agreements. Thus, even prior to the enactment of the first modern arbitration statute, the courts showed a willingness to reconsider their traditional role in the context of private arbitration based on the principle of party autonomy. Perhaps avoiding the unnecessary re-adjudication of disputes also helped to ease the burden on the courts.

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13. *Id.*

14. For a detailed study of Connecticut's transformation, *see* Mann, *supra* note 10, at 472 (describing the consequences of the "commercialization of the economy" in Connecticut in the mid-18th century).

15. *See* Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 489 (Oct. 1995) (explaining that the doctrine of revocability set forth by Lord Coke in Vynior's case occurred before the common law doctrine of binding contracts was fully formed and persisted even as common law courts were enforcing all other contracts to which parties intended to bind themselves).

As early as 1842, the Supreme Court began to diverge from the English tradition by emphasizing the importance of the parties' intent when evaluating an agreement to arbitrate or an arbitral award.[16] In *Hobson v. McArthur* (1842), the Court upheld an arbitral award, endorsed by only two of three arbitrators, after having determined that the parties' clear intention was simply that a valuation be made.[17] In *Burchell v. Marsh* (1854), the Court acknowledged that arbitration awards should "receive every encouragement from courts of equity," noting that "[a] contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation."[18] In the year leading up to the enactment of the FAA, the Court unambiguously articulated a policy for upholding arbitration agreements and awards in *Red Cross Line v. Atlantic Fruit Co.* (1924), declaring that "an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages . . . [I]f the award has been made, effect will be given to the award in any appropriate proceeding at law, or in equity."[19]

B. *First Modern Arbitration Statute*

As early as the Eighteenth Century, several states had adopted legislation in an attempt to legitimize and regularize arbitration as a dispute resolution mechanism. However, these statutes were not entirely successful. The Massachusetts Referee Act of 1768 was met with judicial hostility and became vir-

16. The law in England had also been moving in a similar direction. In 1698, Parliament enacted the English Arbitration Act to calm merchant outrage over a previous statute that barred recovery of the face value of conditioned bonds unless justified by the actual damages. The purpose of the English act was "for promoting trade, and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters." It enabled parties to have their submission to arbitration made a rule of court, and failures to abide by the award could be punished for contempt of court. *See* J. S. COCKBURN, A HISTORY OF ENGLISH ASSIZES 1558-1714, at 135-36 (1972).

17. Hobson v. McArthur, 41 U.S. 182, 192-93 (1842).

18. Burchell v. Marsh, 58 U.S. 344, 349 (1854); *see also* Cockburn, supra note 16, at 349.

19. Red Cross Line, 264 U.S. at 121.

tually useless as the scope of its application was carved away by the courts case by case.[20] The Pennsylvania arbitration statute of 1836 was similarly ineffectual as it expressly allowed for judicial review of arbitrators' awards for any "plain mistake" in fact or law.[21] The previous New York arbitration statute was enacted in 1741 and modeled after the English statute, providing for the use of "merchant juries" to resolve commercial disputes. In 1801, the statute was revised to grant courts the discretion to use merchant juries when deemed necessary.[22] Thus, while state arbitration statutes existed long before 1920, none made executory agreements to arbitrate irrevocable—a defining characteristic of the "modern arbitration statute."

The first modern state arbitration statute was enacted in New York in 1920.[23] Colonial merchants in the state had long exercised their preference for the private arbitration process in dealing with trade disputes. The New York Chamber of Commerce provided arbitration services to its members during the late Eighteenth Century, and considerable demand for such services continued throughout the revolutionary period.[24] According to one New York merchant, he, among others, found that the courts dispensed "expensive, endless Law" and were more inclined to place the fairness of each transaction above the intent of the contracting parties.[25] Furthermore, until the enactment of the 1920 arbitration statute, New York courts followed the common law doctrine of revocability.[26] Finally, without reliable support from the courts, ad-

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20. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, at 151 (1977).

21. *Id.* at 153.

22. *Id.* at 155.

23. N.Y.C.P.L.R. §§ 7501-7514 (LEXIS 2009) (originally enacted as Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803).

24. *See* Benson, *supra* note 15, at 482-83 (stating that "[t]he most complete record of an arbitration tribunal during the late eighteenth Century is that of the New York Chamber of Commerce" and citing evidence of the popularity of the Chamber's arbitration services).

25. *See* JERALD S. AUERBACH, JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS 32-33 (1984) (explaining that in the mid-18th century arbitration of disputes was favored by merchants because the courts were slow to develop legal doctrine that facilitated commercial development).

26. *See e.g.*, Thomas W. Finucane Co. v. Board of Education, 82 N.E. 737, 739 (N.Y. 1907) ("An agreement that arbitrators shall be appointed in case a controversy arises between the parties to the agreement or an agreement to arbitrate a pending controversy is subject to revocation at any time before a

herence to an arbitration award was often privately enforced by extra-judicial means, such as threats to a merchant's reciprocal arrangements or reputation.[27]

In 1914, the Bar Association of New York created the Committee on the Prevention of Unnecessary Litigation to negotiate with the Chamber of Commerce for the adoption of a set of rules to prevent litigation and to guide contracting parties to arbitration when the facts of a dispute had become fixed.[28] The next year, the Committee—renamed the Committee on Arbitration of the New York Chamber of Commerce—submitted a proposed bill for the recognition and enforcement of arbitration agreements. The bill was drafted as a statute with the assistance of the New York State Bar Association.[29] Section 2 of the New York Arbitration Law provided:

> a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.[30]

Section 2 was given teeth by Section 3, which gave parties a right to petition the court for an order directing arbitration

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final submission to the arbitrators for their decision."); People ex rel. Union Ins. Co. v. Nash, 111 N.Y. 310, 315 (N.Y. 1888) ("[Appellants] do not dispute the common-law rule that submissions to arbitration are revocable in their nature, and, indeed, that such was the rule is too well established and recognized by early and late English cases, and by the New York statutes and decisions to admit of dispute."); Allen v. Watson, 16 Johns. 205, 205 (N.Y. Sup. Ct. 1819) ("A party to an arbitration bond may, before award made, revoke the power granted to the arbitrators, and they cannot proceed to make an award.").

27. *See* Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L. J. 141, 145 (2002) (explaining that arbitrators' decisions were generally honored because a merchant's failure to comply often caused his business to suffer).

28. Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L. J. 147, 147 (1921).

29. *Id.* at 148.

30. N.Y. Arbitration Law, ch. 275, §2 (1920).

when specified in the contract.[31] The new Arbitration Law also provided tools to the courts for enforcing a valid agreement to arbitrate. Section 4 gave courts the authority to appoint an arbitrator where the parties had not,[32] while Section 5 authorized courts to stay litigation proceedings in the existence of an enforceable arbitration agreement.[33]

The first occasion that required the Court of Appeals to assess the validity and application of the newly-enacted Arbitration Law involved protracted litigation begun in 1916 by parties to a contract containing an arbitration clause. Upon the enactment of the Arbitration Law in 1920, the defendants moved to stay the litigation proceedings for arbitration pursuant to Section 5 of the statute.[34] After the Special Term denied the motion and the Appellate Division affirmed, the defendants appealed to the Court of Appeals for enforcement of the arbitration agreement. Judge Cardozo declared that "Section 2 of the statute . . . declares a new public policy and abrogates an ancient rule."[35] In response to the plaintiff's challenge that the newly-enacted statute abridged the general jurisdiction of the State Supreme Court in violation of the State Constitution, Judge Cardozo addressed the concern that arbitration would encroach on the role of the courts. "The Supreme Court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. For the right to nullify is substituted the duty to enforce."[36] Recognizing that "[t]he ancient rule [of refusing to grant specific performance to pre-dispute arbitration agreements], with its exceptions and refinements, was criticized by many judges as anomalous and unjust" and admitting that "judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do," the Court upheld New York's Arbitra-

31. *Id.* §3. *See also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 35-37 (1992) (discussing the impact of New York's Arbitration Law of 1920 on the irrevocability of arbitration agreements).

32. N.Y. Arbitration Law, Ch. 275, § 3 (1920).

33. *Id.* §5.

34. Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288 (N.Y. 1921).

35. *Id.* at 289.

36. *Id.* at 291.

tion Law as a legitimate "legislative declaration of the public policy of the state."[37] The Court then reversed the order of the Appellate Division and remitted the proceeding to the Special Term for the appointment of an arbitrator.

C. *The Adoption of the Federal Arbitration Act*

By 1924, in an era of thriving commerce, a national consensus had evolved regarding arbitration as a quicker, less expensive process for adjudicating trade disputes than a civil suit and recognizing the need to mandate enforcement of arbitration agreements and awards in the courts. The legislative history of the FAA reveals that the Sixty-Eighth Congress, like New York legislators a few years before, understood judicial animosity toward arbitration as an "anachronistic" import from English jurisprudence.[38] During the Congressional debates, Representative Graham of Pennsylvania characterized such judicial refusal to enforce agreements to arbitrate as a "jealous" reaction of English courts that feared encroachment upon judicial territory.[39] Senator Walsh of Montana explained that the "business interests of the country find so much delay attending the trial of lawsuits in courts that there is a very general demand for a revision of [arbitration] law in this regard."[40] Congress also expressed its awareness of the "widespread unwillingness of state courts to enforce arbitration agreements," noting that state courts were bound by inadequate state arbitration statutes, which did nothing to validate arbitration agreements or awards.[41] In response, the FAA was

37. *Id.* at 292.

38. 65 CONG. REC. 1931 (1924).

39. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) ("The origins of those refusals apparently lie in 'ancient times,' when the English courts fought 'for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'") (quoting Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 211, n. 5 (1956)); *see also* Benson, *supra* note 15, at 483 (speculating that "[c]oncern over jurisdiction probably was motivated at least partially by revenue considerations" as "[English] judges' income came largely from court fees").

40. 66 CONG. REC. 984 (1924).

41. *See* Southland Corp. v. Keating, 465 U.S. 1 (1984) ("The problems Congress faced were therefore twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements.").

passed merely "to ensure judicial enforcement of privately made agreements to arbitrate"[42] by providing a remedy in federal courts.[43]

The American Bar Association, through its Committee on Commerce, Trade and Commercial Law, drafted the federal bill that Congress enacted as the United States Arbitration Act in 1925,[44] later renamed the Federal Arbitration Act in 1947 ("FAA").[45] The Act was modeled largely after the New York Arbitration Law of 1920[46] and created a "supportive yet passive role"[47] for federal courts dealing with arbitration disputes. Its scope was expansive, applying to all "maritime transactions" and "commerce."[48] The Act's reach over "commercial" disputes was defined by the Supreme Court as "coinciding with that of the Commerce Clause."[49]

The most forceful provision of the Act was Section 2, which—like the same section of the New York Arbitration Law—mandated that the agreement to arbitrate be enforced as any other legal contract and set forth a policy for specific performance of pre-dispute agreements to arbitrate, absent grounds for revoking the entire contract.[50] The Act empow-

42. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (US 1985).

43. The characterization of the law as procedural in nature became much more important 14 years later when the Supreme Court decided Erie R. R. Co. v. Tompkins, 304 U.S. 64 (1938) and held that Congress could not create substantive federal law to apply in diversity cases based solely on its Article III power over federal court jurisdiction.

44. 43 Stat. 883, ch. 213 (1925).

45. *See* Act of July 30, 1947, ch. 392 § 14, 61 Stat. 669, 674. Only Section 14 of Title 9 of the Code enacted on Feb. 12, 1925, providing that the Act be referred to as the "United States Arbitration Act," was repealed in 1945 and not replaced with a materially identical provision in the 1947 Act. The revised Act was thereafter referred to as the Federal Arbitration Act.

46. *See* Weiskopf, *supra* note 8, at 293; Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551, 562 (2008); Bruce L. Benson, *supra* note 15, at 495.

47. Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 249 (2008).

48. 9 U.S.C. § 1.

49. *See* Allied-Bruce Terminix Cos., 513 U.S. at 274-75 (citing cases supporting the FAA's expansive scope); Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (holding that "involving commerce" was equivalent to "affecting commerce," placing the FAA within the ambit of the broadest possible exercise of Commerce Clause power).

50. 9 U.S.C. § 2 (2006).

ered federal courts to move the parties quickly out of court and into arbitration according to the terms of the contract by either granting a stay of litigation proceedings[51] or compelling arbitration in certain circumstances.[52] Moreover, it provided courts with additional tools to facilitate arbitration between the parties, such as the powers to appoint an arbitrator or arbitrators[53] and to enforce an arbitrator's power to summon witnesses[54] upon application of either party.

Section 9 set forth a general mandate for the enforcement of valid arbitration awards brought to the courts for confirmation, unless the award required vacatur pursuant to Section 10. Collectively, these provisions—together with Section 4's conferral of authority on the courts to compel arbitration—ensured that agreements to arbitrate would be consistently enforced and courts' supervisory powers limited to examining the arbitral proceeding (or the underlying agreement) for fundamental defects. Section 10 included only four grounds upon which an award could be vacated:

> (a) where the award was procured by corruption, fraud, or undue means;
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> (b) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (c) 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
>
> (d) 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.[55]

Section 11 provided for modification or correction of the award in the event of a material miscalculation of figures or a description of any person, thing, or property involved in the

51. 9 U.S.C. § 3 (2006).
52. 9 U.S.C. § 4 (2006).
53. 9 U.S.C. § 5 (2006).
54. 9 U.S.C. § 7 (2006).
55. 9 U.S.C. § 10(a)-(d) (2006).

award or other procedural defects.[56] The record of the Senate Hearings on the proposed 1925 Act included a statement by an attorney advocate of the bill explaining the scope of the courts' discretion to vacate an award:

> 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.[57]

Compared to the days of revocability, the FAA greatly narrowed the scope of judicial review for an arbitration award. Many praised the FAA's modern policy as a triumph of party autonomy over the traditional (but intrusive) role of the courts as the sole arbiters of justice. Although Congress did not seem to view the FAA as a radical enactment,[58] its consequences for the law of commercial contracts were vast. Only after the FAA's enactment did most states revise their arbitration statutes to reflect a national arbitration policy in favor of enforcement and finality.[59]

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56. 9 U.S.C. § 11 (2006).

57. Siegel v. Prudential Ins. Co., 67 Cal. App. 4th 1270, 1289 (Cal. App. 2d Dist. 1998) (citing the statement of W. W. Nichols, Jan. 9, 1924, Hearings on the Subject of Interstate Commercial Disputes Before the Subcommittees on the Judiciary, 68th Cong., 1st Sess., p. 36).

58. *See* Senator Graham's comment that the bill "simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to." 65 Cong. Rec. 1931 (1924).

59. Many states did not wait for the declaration of a federal policy before following immediately in the trail blazed by New York's Arbitration Law. *See* Moses H. Grossman, *Trade Security Under Arbitration Laws*, 35 YALE L. J. 308, 312 (January 1926) (listing New Jersey, Oregon and Massachusetts as the

D. *The FAA Influences State Arbitration Policy*

At the time Congress declared federal arbitration policy through the FAA, the arbitration statutes in most states did not reflect the same proclivity for promoting and enforcing arbitration. In Maine and New Hampshire, arbitrators were appointed by the courts and an arbitrator's report was to be filed in court for acceptance, rejection, or recommittal.[60] In Connecticut, Maryland. and Vermont, the law provided for arbitration only in specific circumstances.[61] In Illinois, the aggrieved party could appeal to the courts on matters of law.[62] North Carolina, Oklahoma, Rhode Island, South Carolina, and South Dakota made no statutory provisions for arbitration whatsoever.[63]

However, in the decades following the FAA's enactment, most state legislatures reformed their arbitration laws to reflect federal policy, often choosing to adopt all or substantially all of the Uniform Arbitration Act (the "UAA"), which mirrored several of the FAA's provisions. Today, all state arbitration statutes reflect a modern policy in favor of the enforcement of arbitration agreements and awards, although many state arbitration laws are more prescriptive than the FAA and set forth and contain highly detailed procedures to flesh out the skeletal provisions of the UAA.[64]

E. *Summary*

Despite early judicial and statutory aversion to arbitration as an enforceable alternative to litigation, federal and state arbitration laws now encourage self-regulation of commercial disputes by upholding agreements to arbitrate, as well as prop-

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most recent states to enact arbitration statutes with the same fundamental policy of irrevocability found in the 1920 New York Arbitration Law).

60. *Id.* at 324 (describing the arbitration statutes in 34 states in 1926).

61. *See id.* ("In Connecticut, executive guardians, etc. may be authorized by the probate courts to settle 'any doubtful or disputed claims.' In Maryland, controversies between corporations 'in which the State may be interested as stockholder or creditor' may be submitted to arbitration before the Board of Public Works. In Vermont, the law provides for arbitration of a controversy over an order of a building inspector, where the question involved cannot be the subject of a civil suit.").

62. *Id.* at 325.

63. *Id.* at 324.

64. *See* discussion on the UAA *infra* Part III, Section D.

erly obtained arbitration awards. The FAA synchronized the federal and state systems with regard to enforcing arbitration. Prior to its enactment, even parties from jurisdictions with progressive arbitration statutes, such as New York, had difficulty enforcing arbitral awards in federal courts, where many commercial disputes were brought based on diversity.[65] While the legislative history of the Act shows that its primary purpose was to create a federal remedy for enforcing legitimate arbitration agreements in federal courts, the Act accomplished two other notable things. First, it advocated a national policy in support of arbitration as an example for state legislation. Second, it limited the grounds upon which an award could be vacated in an attempt to transform the attitudes of federal courts toward arbitration from skepticism to support. As illustrated by a wealth of subsequent U.S. Supreme Court decisions, the FAA marked a turning point for federal common law in staunch favor of arbitration.

III.
EVOLUTION OF JUDICIAL REVIEW

A. *Early Judicial Interpretations of the* FAA

In the years following its adoption, the FAA was the subject of countless challenges. The first constitutional challenge to the Act was presented to the Supreme Court in *Marine Transit Corp. v. Dreyfus* (1932), in which the petitioner challenged the federal courts' power to compel specific performance of arbitration as incompatible with their admiralty and maritime jurisdiction. The Court classified the FAA as an exercise of Congress's undisputed power to "provide remedies" and "regulate procedure" in matters falling within the admiralty jurisdiction of the federal courts.[66] It then upheld the

65. *See* Atlantic Fruit Co. v. Red Cross Line, 276 Fed. 319, 323 (S.D.N.Y. 1921) ("It is . . . evident that the New York Legislature sought to create no new substantive right, but only to provide in its own courts a new method of procedure for enforcing existing obligations . . . [I]t is not within the power of the state to regulate the procedure and practice of a federal court of admiralty."); Lappe v. Wilcox, 14 F.2d 861, 862 (N.D.N.Y. 1926) ("[S]tatutes of the state of New York cannot affect nonresidents of the state, who have the right, denied to inhabitants of the state, to invoke the [diversity] jurisdiction of the federal court.").

66. Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 278 (1932).

constitutionality of the FAA provision on the basis that Congress had the power to "modify the practice of the court in any other respect that it deems . . . conducive to the administration of justice."[67]

Early judicial constructions of the Act's provisions reflected a strong desire to vindicate the legislative embrace of arbitration exhibited in the FAA. Interpreting the scope of judicial review granted by the FAA, the Second Circuit acknowledged that "the purpose of arbitration is essentially an escape from judicial trial; the court takes a hand only so far as some sanction is necessary to compel performance of the agreement to adopt the means provided."[68] In *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.* (1935), the Supreme Court was asked to determine whether an arbitration agreement that granted state courts the power to compel arbitration could prevent a federal court from issuing a stay of federal court proceedings pursuant to Section 3 of the FAA. The Court held that Section 3 of the FAA conferred broad discretion on federal courts to stay litigation proceedings in light of an arbitration agreement, regardless of whether that court had jurisdiction to compel the arbitration pursuant to Section 4.[69] Mindful of the FAA's purpose to provide a federal remedy for enforcing arbitration, the Court broadly construed Section 3's power to stay proceedings because otherwise "it would be impossible to secure a stay of an action in the federal courts when the arbitration agreement provides for compulsory proceedings exclusively in the state courts, since only in exceptional circumstances may a state court enjoin proceedings begun in federal court."[70]

Federal courts were also soon faced with another question regarding the authority they had been given under the FAA: When was it appropriate to vacate an arbitration award? Many of the earliest decisions to discuss this issue came from the district and circuit courts in New York and adhered to a strict

67. *Id.* at 279.

68. Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc., 62 F.2d 1004, 1005 (2d Cir. 1933).

69. *See* Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 453 (1935) ("[T]here is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with section 4 of the act.").

70. *Id.*

textualist view of the statute, vacating an award only in the instances enumerated in Sections 10 and 11 of the Act. In *The Hartbridge* (1932), the Second Circuit refused to vacate an award based on appellant's claim that arbitrators made mistakes of law and fact that amounted to an excess of power.[71] In *James Richardson & Sons, Ltd. v. W. E. Hedger Transp. Corp.* (1938), the Second Circuit found that "[t]he arbitrators, for reasons deemed sufficient to them, made the awards as indicated. This court is without power to amend or overrule merely because of disagreement with matters of law or facts determined by the arbitrators."[72]

B. Wilko *and "Manifest Disregard of the Law"*

In *Wilkins v. Allen* (1902), the Court of Appeals found that vacatur would be appropriate where the award was based on a "perverse misconstruction or positive misconduct upon the part of the arbitrator."[73] Although the case pre-dated the enactment of the New York Arbitration Law in 1920, provisions of the Code of Civil Procedure regarding arbitration at that time were strikingly similar to the vacatur provisions included in the 1920 statute, as well as the FAA.[74] The *Wilkins* Court understood the enumerated grounds to require vacatur, but still acknowledged that an award should be opened when it resulted from a "perverse misconstruction or positive miscon-

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71. *See* The Hartbridge, 62 F.2d 72, 73 (2d Cir. 1932) ("There is no claim of fraud, corruption, or misconduct affecting this award. The finality of the arbitrator's award is subject to the provisions of section 10 of the Arbitration Act . . . ").

72. James Richardson & Sons, Ltd. v. W. E. Hedger Transp. Corp., 98 F.2d 55, 57 (2d Cir. 1938).

73. Wilkins v. Allen, 169 N.Y. 494, 496 (1902).

74. *See id.* ("Section 2374 provides that 'the court must make an order vacating an award, where it is procured by corruption, fraud or undue means, where the arbitrators are partial or corrupt, or guilty of misconduct or other misbehavior which prejudiced the rights of any party, or where they have exceeded their powers or imperfectly executed them . . . Section 2375 declares that the court must make an order modifying or correcting the award, where there has been an evident miscalculation of figures, or mistake in the description of any person, thing or property, where they have awarded upon a matter not submitted and not affecting the merits of the decision, or where the award is imperfect in form."); *see also* Hall Street Assocs., 128 S. Ct. at 1406 n.7 (discussing the similarities between the vacatur provisions of the New York Arbitration Law of 1920 and those of the FAA).

duct upon the part of the arbitrator." The same proposition was cited by the Second Circuit in *The Hartbridge*[75] and by the Supreme Court in *Wilko*.[76]

Federal courts continued to follow the strict standards for vacatur until the Supreme Court of the United States opened the door to possibly recognizing non-statutory grounds for vacating an arbitration award in *Wilko v. Swan* (1953). The *Wilko* case concerned whether an agreement to arbitrate future controversies should be specifically enforced in a case involving the allegedly fraudulent sale of securities, for which the Securities Act of 1933[77] provided suit in federal court.[78] After construing the congressional intent behind each Act, the district court held that while arbitration is to be encouraged, "it ought not to prevail where it would clearly defeat the urgent policy considerations as expressed by Congress in the Securities Act,"[79] and accordingly denied defendants' motion to stay litigation proceedings in favor of arbitration.

The Court of Appeals for the Second Circuit reversed. In contrast to the district court, it did not perceive any conflict between the two Acts. Instead, it found that "[t]he stipulation to arbitrate is not one waiving compliance with the [Securities Act] unless the statute be construed to forbid arbitration—a construction [the Court] believed to be untenable . . . "[80] The Court also determined that the Securities Act's provision for suit in any court of competent jurisdiction was an option, not a requirement.[81] It reasoned that "[i]f [S]ection 14 [of the Securities Act] does not forbid a voluntary settlement without suit[,] we do not see why it should be construed to forbid settlement by arbitration."[82] In response to the argument that arbitration would deny the protections intended by Congress in the Securities Act, the Court of Appeals noted that "[f]ailure to [decide in accordance with the provisions of the Securities Act] would, in our opinion, constitute grounds for vacating

75. The Hartbridge, 62 F.2d at 72.
76. Wilko v. Swan, 346 U.S. 427, 437 n.24 (1953).
77. 15 U.S.C. § 77(n) (2008).
78. Wilko v. Swan, 107 F.Supp. 75 (S.D.N.Y. 1952).
79. *Id.* at 78-79.
80. Wilko v. Swan, 201 F.2d 439, 443 (2d Cir. 1953).
81. *Id.* at 444.
82. *Id.*

the award pursuant to [S]ection 10 of the Federal Arbitration Act."[83]

The Supreme Court of the United States granted certiorari to resolve the narrow question of whether an agreement to arbitrate a future controversy could survive under Section 14 of the Securities Act, which voided any "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Securities Act. The Court held that "the right to select the judicial forum is the kind of 'provision' that cannot be waived under [Section] 14 of the Securities Act,"[84] because "in so far as the award in arbitration may be affected by legal requirements, statutes, or common law, rather than by considerations of fairness, the provisions of the Securities Act control."[85] Indirectly implicated by the waiver issue was when a federal court may properly vacate an arbitration award. If the Court found, as the Second Circuit implied, that federal courts generally possessed the discretion to review the legal analysis underlying an arbitration award, then arbitration of the securities claims should not result in waiver of the protections afforded by the Securities Act.[86] However, the Court understood the federal courts' power to vacate arbitration awards under the FAA to be extremely limited. "[T]he arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact'" could not be examined.[87] Thus, allowing an arbitration agreement to subvert federal court jurisdiction over claims arising under the Securities Act would greatly impair the petitioner's rights in contravention of the Act's purpose. The Court explained:

> While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would 'constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act,' that failure would need to be made clearly to appear.

83. *Id.* at 445.

84. Wilko v. Swan, 346 U.S. at 435.

85. *Id.* at 433-34.

86. James M. Gaitis, *Unraveling the Mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 PEPP. DISP. RESOL. L.J. 1 (2007).

87. Wilko v. Swan, 346 U.S. at 436.

> In unrestricted submissions . . . 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.[88]

From this statement the concept of "manifest disregard of the law" eventually evolved as an additional ground for judicial vacatur of an arbitration award.

C. *Circuit Interpretations of Manifest Disregard*

Following *Wilko,* every circuit ultimately adopted manifest disregard of the law as a separate ground for vacatur of an award,[89] although each circuit developed its own legal standard therefor.[90] In all but the Sixth and Seventh Circuits, to vacate an award on the ground that the arbitrators manifestly disregarded the law, it must be clear from the record that: (i) the arbitrators actually knew about the law that they disregarded and (ii) the arbitrators deliberately ignored the law.[91] The Second, Fifth, and District of Columbia Circuits require that the disregarded law be "well defined, explicit, and clearly applicable to the case."[92] In addition, the Fifth Circuit has required both that (i) the arbitrator's error must be "obvious and capable of being readily and instantly perceived by the av-

88. *Id.* at 436.

89. *See, e.g.,* Collins v. D. R. Horton, Inc., 505 F.3d 874, 879 (9th Cir. 2007) (noting that procedurally proper arbitration awards may be vacated due to manifest disregard of the law); Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 234 (4th Cir. 2006) (referencing manifest disregard of the law as one of the limited grounds for vacating an arbitration award); Cytyc Corp. v. Deka Prods. Ltd. P'ship, 439 F.3d 27, 33 (1st Cir. 2006) (listing disregard of applicable law as a reason for vacating an arbitration award).

90. *See* Bradford D. Kaufman & Jon A. Jacobson, Practicing Law Institute, *What Happens in Arbitration, Stays in Arbitration,* PLI Order No. 11419 (Aug. 8, 2007) (listing the varying standards of vacatur for each Circuit).

91. *See, e.g.,* Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813, 821 (D.C. Cir. 2007) (explaining that manifest disregard of the law consists of the arbitrators ignoring an applicable law of which they were aware); D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 110-11 (2d Cir. 2006) (noting that manifest disregard of the law requires proof that the arbitrator knew of an applicable legal principle and ignored it); Carter v. Health Net of Calif., Inc., 374 F.3d 830, 838 (9th Cir. 2004) (stating that manifest disregard of the law means that the arbitrators recognized and ignored an applicable law).

92. D.H. Blair & Co., 462 F.3d at 110-11.

erage person qualified to serve as an arbitrator"[93]; and (ii) the award also result in "significant injustice."[94] The Sixth Circuit combined these various elements to require that: (i) the disregarded law was clearly defined and not subject to reasonable debate; and (ii) the arbitrators refused to heed that law.[95] The Seventh Circuit chose to avoid this analytical framework, simply holding that an arbitrator's manifest disregard of the law will be grounds for vacatur only when: (i) the arbitrator directs the parties to violate the law; or (ii) the arbitrator fails to adhere to the principles specified by the parties' contract.[9697] Regardless of the standard that applied, every circuit agreed that an arbitrator's mere misinterpretation or misapplication of the law, without more, is insufficient to warrant vacatur.

The various circuits also recognized additional non-statutory grounds for vacatur. The Eleventh Circuit explicitly recognized arbitrariness and capriciousness as grounds for vacatur.[98] The Third, Eighth, and Ninth Circuits recognized irrationality as grounds for vacatur.[99] The Tenth Circuit recognized denial of a fundamentally fair hearing as a distinct, stand-alone ground for vacating an arbitration award.[100] And every circuit recognized a violation of public policy as grounds to vacate an arbitration award,[101] originating from the well-set-

93. American Laser Vision, P.A. v. Laser Vision Institute, L.L.C., 487 F.3d 255, 259 (5th Cir. 2007); *see also International Telepassport Corp. v. USFI, Inc.*, 83 F.3d 82, 85 (2d Cir. 1996).

94. American Laser Vision, P.A., 487 F.3d at 259.

95. *See* Jacada (Europe), Ltd. v. Int'l Marketing Strategies, Inc., 401 F.3d 701, 713 (6th Cir. 2005).

96. George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 581 (7th Cir. 2001).

97. Wise v. Wachovia Sec., LLC, 450 F.3d 265, 268 (7th Cir. Ill. 2006).

98. *See* Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992); United States Postal Serv. v. National Assn. of Letter Carriers, AFL-CIO, 847 F.2d 775, (11th Cir. 1988).

99. *See* McGrann v. First Albany Corp., 424 F.3d 743, 749 (8th Cir. 2005); GC and KB Invs., Inc. v Wilson, 326 F.3d 1096, 1105 (9th Cir. 2003); Roadway Package Sys. v. Kayser, 257 F.3d 287, 292 n.2 (3d Cir. 2001).

100. Hicks v. Bank of America, N.A., 218 Fed.Appx. 739, 745 (10th Cir. 2007).

101. *See* Lessin, 481 F.3d at 813; Hicks, 218 Fed.Appx. at 745; Twin Cities Galleries, LLC v. Media Arts Group, Inc., 476 F.3d 598, 600 (8th Cir. 2007); B.L. Harbert Intern., LLC v. Hercules Steel Co., 441 F.3d 905, 910 (11th Cir. 2006); OneBeacon Am. Ins. Co. v. Turner, 2006 WL 3102578 at 2 (5th Cir. 2006); Mercy Hosp., Inc. v. Mass. Nurses Ass'n, 429 F.3d 338, 343 (1st Cir.

tled idea that courts cannot enforce contracts contrary to public policy.[102]

D. *Development of State Statutory and Common Law Grounds For Vacatur*

Today, all 50 states, the District of Columbia and Puerto Rico have arbitration statutes.[103] As noted previously most

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2005); Arco Enters., Inc. v. Operative Plasterers' and Cement Masons' Int'l Ass'n of the U.S. and Canada, Local No. 31, 2005 WL 256342 at 2 (3d Cir. 2005); Int'l Chem. Works Union Council of the United Food and Commercial Works v. PPG Indus., Inc., 2004 WL 829716 at 4 (4th Cir. 2004); Way Bakery v. Truck Drivers Local No. 164, 363 F.3d 590, 594 (6th Cir. 2004); Sprewell v. Golden State Warriors, 266 F.3d 979, 987 (9th Cir. 2001); Greenberg v. Bear Stearns & Co., 220 F.3d 22, 27 (2d Cir. 2000); Local No. P-1236, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jones Dairy Farm, 680 F.2d 1142, 1144 (7th Cir. 1982).

102. *See* W.R. Grace and Co. v. Local Union 759, Int'l Union of United Rubber, 461 U.S. 757, 766 (1983).

103. Ala. Code Section 6-6-1 *et seq.* (Alabama); Alaska Stat. Section 09.43.010 *et seq.* (Alaska); Ariz. Rev. Stat. Ann. Section 12-1501 *et seq.* (Arizona); Ark. Stat. Ann. Section 16-108-101 *et seq.* (Arkansas); Cal. Civ. Proc. Code Section 1280 *et seq.* (California); Col. Rev. Stat. Section 13-22-201 *et seq.* (Colorado); Conn. Gen. Stat. Ann. Section 52-408 *et seq.* (Connecticut); Del. Code Ann. tit. 10, Section 5701 *et seq.* (Delaware); D.C. Code Ann. Section 16-4301 *et seq.* (District of Columbia); Fla. Stat. Ann. Section 682.01 *et seq.* (Florida); Ga. Code Section 9-9-1 *et seq.* (Georgia); Haw. Rev. Stat. Section 658-1 *et seq.* (Hawaii); Idaho Code Section 7-901 *et seq.* (Idaho); 710 Ill. Comp. Stat. 5/1 *et seq.* (formerly Ill. Rev. Stat. ch. 10, Section 101 *et seq.*) (Illinois); Ind. Code Ann. Section 34-4-2-1 *et seq.* (Indiana); Iowa Code Section 679A.1 *et seq.* (Iowa); Kan. Stat. Ann. Section 5-401 *et seq.* (Kansas); Ky. Rev. Stat. Ann. Section 417.045 *et seq.* (Kentucky); La. Rev. Stat. Ann. Section 9:4201 *et seq.* (Louisiana); Me. Rev. Stat. Ann. tit. 14, Section 5927 *et seq.* (Maine); Md. Cts. & Jud. Proc. Code Ann. Sec 3-201 *et seq.*seq. (Maryland); Mass. Ann. Laws ch. 251, Section 1 *et seq.* (Massachusetts); Mich. Stat. Ann. Section 27A.5001 *et seq.*, Mich. Comp. Laws Section 600.5001 *et seq.* (Michigan); Minn. Stat. Ann. Section 572.08 *et seq.* (Minnesota); Miss. Code Ann. Section 11-15-1 *et seq.* (Mississippi); Mo. Ann. Stat. Section 435.350 *et seq.* (Missouri); Mont. Code Ann. Section 27-5-111 *et seq.* (Montana); Neb. Rev. Stat. Section 25-2601 *et seq.* (Nebraska); Nev. Rev. Stat. Section 38.015 *et seq.* (Nevada); N.H. Rev. Stat. Ann. Section 542:1 *et seq.* (New Hampshire); N.J. Stat. Ann. Section 2A:24-1 *et seq.* (New Jersey); N.M. Stat. Ann. Section 44-7-1 *et seq.* (New Mexico); N.Y. Civ. Prac. Law Section 7501 *et seq.* (New York); N.C. Gen. Stat. Section 1-567.1 *et seq.* (North Carolina); N.D. Cent. Code Section 32-29.2-01 *et seq.* (North Dakota); Ohio Rev. Code Ann. Section 2711.01 *et seq.* (Ohio); Okla. Stat. Ann. tit. 15, Section 801 *et seq.* (Oklahoma); Or. Rev. Stat. Section 36.300 *et seq.* (Oregon); Pa. Stat. Ann. tit. 42, Section 7301 *et seq.* (Pennsylvania); P.R. Laws Ann., tit. 32, Section 3201 *et*

state arbitration statutes are modeled on the Uniform Arbitration Act (UAA) proposed in 1955 by the Commissioners on Uniform State Laws.[104] The 1956 UAA closely tracked the provisions of the FAA and was intended as a model for state legislation, which was often hostile toward the enforcement of agreements to arbitrate.[105] It authorized a court to stay an arbitration proceeding "on a showing that there is no agreement to arbitrate," and allowed vacatur for each of the four grounds enumerated in Section 10 of the FAA.[106] In addition, however, the UAA provides a fifth ground where "[t]here was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection."[107]

In 2000, the Revised Uniform Arbitration Act ("RUAA") was passed with input from the American Arbitration Associa-

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seq. (Puerto Rico); R.I. Gen. Laws Section 10-3-1 *et seq.* (Rhode Island); S.C. Code Ann. Section 15-48-10 *et seq.* (South Carolina); S.D. Codified Laws Ann. Section 21-25A-1 *et seq.* (South Dakota); Tenn. Code Ann. Section 29-5-301 *et seq.* (Tennessee); Tex. Rev. Civ. Stat. Ann. art. 224 *et seq.* (Texas); Utah Code Ann. Section 78-31a-1 *et seq.* (Utah); Vt. Stat. Ann. tit. 12, Section 5651 *et seq.* (Vermont); Va. Code Section 8.01-577 *et seq.* (Virginia); Wash. Rev. Code Ann. Section 7.04.010 *et seq.* (Washington); W. Va. Code Section 55-10-1 *et seq.* (West Virginia); Wis. Stat. Ann. Section 788.01 *et seq.* (Wisconsin); Wyo. Stat. Section 1-36-101 *et seq.* (Wyoming).

104. *See* Michael H. LeRoy, *supra* note 46, at 577 ("Before 2000, thirty-five states adopted the Uniform Arbitration Act (UAA), while fourteen adopted similar legislation.").

105. *Id.*

106. UAA § 12(a)(1)-(4) (1956).

107. UAA § 12(a)(5) (1956). The 1956 UAA vacatur standards appear in Alaska (Alaska Stat. § 09.43.120 (2006)); Arizona (Ariz. Rev. Stat. Ann. § 12-1512 (2003 & Supp. 2006)); Arkansas (Ark. Code Ann. § 16-108-212 (2006)); Idaho (Idaho Code Ann. § 7-912 (2004)); Illinois (710 Ill. Comp. Stat. Ann. 5/12 (West 2007)); Indiana (Ind. Code § 34-57-2-13 (1999)); Kansas (Kan. Stat. Ann. § 5-412 (2001)); Kentucky (Ky. Rev. Stat. Ann. § 417.160 (West 2006)); Maine (Me. Rev. Stat. Ann. tit. 14, § 5938 (2003)); Massachusetts (Mass. Gen. Laws ch. 150C, § 12 (1999)); Minnesota (Minn. Stat. Ann. § 572.19 (West 2000 & Supp. 2007)); Missouri (Mo. Ann. Stat. § 435.405 (West 1992 & Supp. 2007)); Montana (Mont. Code Ann. § 27-5-312 (2007)); Nebraska (Neb. Rev. Stat. § 25-2613 (1995 & Supp. 2006)); South Carolina (S.C. Code. Ann. § 15-48-130 (2005)); South Dakota (S.D. Codified Laws § 21-25A-24 (2004)); Tennessee (Tenn. Code Ann. § 29-5-213 (2007)); Virginia (Va. Code Ann. § 8.01-581 (2007)). Alaska and Colorado retain the UAA structure but also adopted the Revised Uniform Arbitration Act.

tion, the American Bar Association, the National Academy of Arbitrators, and various sectors that utilize arbitration.[108] The drafters of the RUAA recognized that an increasing number of disputes are being submitted to arbitration involving issues of greater complexity, with greater sums of money at stake.[109] Thus, the revised Act expands the powers of arbitrators to conduct discovery, issue protective orders, rule on motions for summary judgment, and conduct pre-hearing conferences.[110] The law also addresses the emergence of electronic technology, treating agreements made by electronic media as enforceable,[111] and allowing arbitrators to consider electronic documents as evidence.[112] Moreover, the RUAA includes all five grounds for vacatur provided by the 1956 UAA and adds a sixth where "the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding."[113] Twelve states and the District of Columbia have now adopted some version of the RUAA,[114] reflecting a statutory trend toward broadening the scope of judicial review for arbitration awards.

A significant number of states followed the federal circuits in recognizing manifest disregard as a legitimate additional non-statutory ground for vacatur in their own state arbitration laws.[115] Among them, many simply adopted the standards em-

108. *See RUAA and UMA Legislation from Coast to Coast*, DISP. RESOL. TIMES (August 31, 2005) *at* http://www.adr.org/sp.asp?id=26600.

109. *See* UAA prefatory note (2005) (listing fourteen important issues not addressed by the 1956 Act).

110. UAA § 17(a)-(g) (2000).

111. UAA § 30 (2000).

112. UAA § 1(6) (2000).

113. UAA § 23(a)(6) (2000).

114. Alaska Stat. §§ 09.43.300 to 09.43.595 (Alaska); West's C.R.S.A. §§ 13-22-201 to 13-22-230 (Colorado); D.C.Code §§ 16-4401 to 16-4432 (District of Columbia); HRS §§ 658A-1 to 658A-29 (Hawaii); N.R.S 38.206 to 38.248 (Nevada); N.J.S.A. §§ 2A:23B-1 to 2A:23B-32 (New Jersey); NMSA 1978 §§ 44-7A-1 to 44-7A-32 (New Mexico); G.S. §§ 1-569.1 to 1-569.31 (North Carolina); NDCC 32-29.3-01 to 32-29.3-29 (North Dakota); 12 Okl.St.Ann. §§ 1851 to 1881 (Oklahoma); Or. Rev. Stat. §§ 36.600 to 36.740 (Oregon); Utah Code Ann. 78-31a-101 to 78-31a-131 (Utah); West's RCWA 7.04A.010 to 7.04A.903 (Washington).

115. *See, e.g.*, Birmingham News Co. v. Horn, 901 So. 2d 27, 50 (Ala. 2004) (subsequently overruled by Horton Homes, Inc. v. Shaner 999 So.2d 462, 2008 WL 2469364 (Ala. 2008)); Doe v. Central Ark. Transit, 50 Ark. App.

ployed by the federal circuit courts. Arkansas, for example, adopted the standard set forth by the Third Circuit, providing that an award may be vacated for manifest disregard of the agreement where it is "totally unsupported by principles of contract construction and the law,"[116] while New York adopted the Second Circuit's interpretation, recognizing manifest disregard when the arbitrator "knew of a governing legal principle yet refused to apply it or ignored it altogether" and where the ignored governing law was "well-defined, explicit, and clearly applicable."[117] Nevada and Alabama, whose arbitration statutes are modeled from the UAA, adopted the same standard.[118]

Somewhat heralding recent developments in federal law, states derived manifest disregard from one of the enumerated grounds for vacatur found in their own state arbitration statute. In Connecticut, for example, manifest disregard of the law is considered an excess of the arbitrator's authority under Section 52-418(a)(4) of the state arbitration statute, one of the

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132, 142 (Ark. Ct. App. 1995); Saturn Constr. Co. v. Premier Roofing Co., 238 Conn. 293, 680 A.2d 1274 (1996); Amerispec Franchise v. Cross, 215 Ga. App. 669, 452 S.E.2d 188 (1994); Hecla Mining Co. v. Bunker Hill Co., 101 Idaho 557, 617 P.2d 861 (1980); Welch v. A.G. Edwards & Sons, Inc., 677 So. 2d 520, 524 (La. Ct. App. 4th Cir. 1996); Edward D. Jones & Co. v. Schwartz, 969 S.W.2d 788 (Mo. Ct. App. 1998); Geissler v. Sanem, 285 Mont. 411, 949 P.2d 234 (1997); Graber v. Comstock Bank, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995); Sawtelle v. Waddell & Reed, *Inc.*, 304 A.D.2d 103, 754 N.Y.S.2d 264 (2003); Altieri v. Liberty Mut. Ins. Co., 697 A.2d 1104 (R.I. 1997); Pacific Development, L.C. v. Orton, 23 P.3d 1035, 1038, n.3 (Utah 2001); Employers Ins. of Wausau v. Certain Underwriters at Lloyd's London, 202 Wis. 2d 673, 689 (Wis. Ct. App. 1996).

116. *See* Doe, 50 Ark.App. at 141-42 (citing Super Tire Eng'g Co. v. Teamsters Local Union No. 676, 721 F.2d 121 (3d Cir. 1983)).

117. Sawtelle, 304 A.D.2d at 108.

118. *See* Graber, 111 Nev. at 1428 ("[W]hen searching for a manifest disregard for the law, a court should attempt to locate arbitrators who appreciate the significance of clearly governing legal principles but decide to ignore or pay no attention to those principles . . . The governing law alleged to have been ignored must be well-defined, explicit, and clearly applicable."); Birmingham News Co. v. Horn, 901 at 52 ("[A] party seeking to vacate an arbitration award on the basis of manifest disregard of the law must establish 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.").

statutorily-enumerated grounds for vacatur.[119] The Wisconsin Supreme Court employed a similar interpretation, noting "that [the Wisconsin statutory counterpart to Section 10 of the FAA] echoes the common law standards, implying that if an arbitrator manifestly disregarded the law, the arbitrator exceeded the scope of his powers, requiring vacatur under [that counterpart]."[120] Likewise, in Utah, "manifest disregard constitutes an abuse of the authority conferred upon the arbitrator by the parties," reviewable under the Utah Code Ann. § 78-31a-14(1).[121]

Other states have tailored the contours of the doctrine by emphasizing certain elements. For example, the Idaho Supreme Court imposed an obligation of "honesty." It found that "[m]anifest disregard . . . seems necessarily tied into the knowing or unexplainable abuse by the arbitrator of his position of responsibility and his authority as granted and limited by the agreement of the parties" and held that "the arbitrator must have manifested an infidelity to his obligation to honestly interpret the contract within the context of the issues submitted to him."[122]

The foregoing examples illustrate the widespread acceptance of the federal common law concept of manifest disregard. Since most state arbitration statutes include the same grounds for vacatur found in the FAA, it is not surprising that most states have read their own arbitration statutes to incorporate manifest disregard just as the federal courts interpreted the FAA.

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119. *See* Saturn Const. Co., 238 Conn. at 304 ("[A]n award that manifests an egregious or patently irrational application of the law is an award that should be set aside pursuant to § 52-418(a)(4) because the arbitrator has 'exceeded [his] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.'").

120. Employers Ins. of Wausau v. Certain Underwriters at Lloyd's London, 202 Wis. 2d 673, 689 (Wis. Ct. App. 1996) (citing Madison Police Ass'n, 144 Wis.2d at 586, 425 N.W.2d at 11).

121. Pacific Development, 23 P.3d at 1038, n.3).

122. Hecla, 101 Idaho at 577.

IV.
HALL STREET AND THE CURRENT LANDSCAPE

A. *Manifest Disregard Questioned in* Hall Street

After roughly fifty years of continuous use by the federal courts, manifest disregard was called into question by the United States Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[123] The dispute began when Mattel, the tenant under a commercial lease, gave notice of its intent to vacate the premises leased to it by Hall Street. Hall Street then filed suit both to contest Mattel's right to terminate the lease and to seek indemnification for the costs of environmental cleanup resulting from Mattel's use of the property as a manufacturing site. The district court ruled in favor of Mattel on the issue of its right to terminate the lease, and the parties voluntarily submitted to arbitration of the indemnification claim. At this point, the dispute digressed into a long series of appeals, reversals, and remands over a judicial review provision in the arbitration agreement. The agreement provided that a district court could "vacate, modify, or correct any award . . . where the arbitrator's conclusions of law are erroneous." The arbitrator found that no indemnification was owed to Hall Street because it determined that the Oregon Drinking Water Quality Act ("Oregon Act"), under which Hall Street's damages accrued, was not an applicable "environmental law" under the terms of the lease. Hall Street sought to vacate the award in an Oregon district court on the ground that the arbitrator failed to treat the Oregon Act as an "applicable environmental law" according to the terms of the lease. The district court found legal error on this basis and vacated the award and remanded the dispute to the arbitrator. On remand, the arbitrator accordingly considered the Oregon Act an "applicable environmental law" under the terms of the lease and found for Hall Street. Not surprisingly, Mattel then brought a motion to vacate, but the district court affirmed the award after correcting a calculation error in the indemnification amount. Both parties appealed to the Ninth Circuit. Hall Street argued for enforcement of the judicial review provision, while Mattel argued that the provision was unenforceable according to *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.* (2003), a recent *en*

123. Hall Street Assocs., 128 S. Ct. at 1396.

banc overruling of a previous Ninth Circuit decision, which previously held that federal courts were required to comply with contract provisions for expanded judicial review of an arbitration award.[124] The Ninth Circuit agreed with Mattel and reversed the district court's confirmation of the award on the basis that the *en banc* decision in *Kyocera*[125] left the judicial review provision unenforceable.[126] On remand, the district court again held for Hall Street, and the Ninth Circuit again reversed.

After this complicated procedural history, the Supreme Court finally granted certiorari on the heavily-debated issue of whether the statutory grounds for vacatur and modification in the FAA could be supplemented by contract. Noting the Courts of Appeals' disagreement on this question, the Court stated conclusively that Sections 10 and 11 of the FAA were the exclusive grounds on which courts could vacate an award under federal arbitration law. Hall Street argued that judicial review of arbitral awards outside the grounds enumerated in Sections 10 and 11 had been accepted as precedent—specifically with respect to the widespread use of manifest disregard as a ground for vacatur—through fifty years of federal case law, beginning with the Supreme Court's decision in *Wilko*. Indeed, every Circuit had established manifest disregard as a ground for vacatur under federal arbitration law[127] according to the oft-cited dicta that "interpretations of the law by the arbitrators in contrast to manifest disregard of the law are not subject, in the federal courts, to judicial error in interpretation."[128] However, the Court commented that such a construction was premised upon a weak foundation—the vaguely-phrased remark simply required too great a leap to support the contractual expansion of judicial review under the FAA. The Court opined that "[m]aybe [the term 'manifest disregard'] merely referred to the [Section] 10 grounds collec-

124. LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884, 889 (9th Cir. 1997).

125. *See* Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 1001 (9th Cir. 2003) ("Here, as in Little, we find that the unlawful expanded scope-of-review terms should be severed from the remainder of the arbitration clause.").

126. Hall Street Assocs., 128 S. Ct. at 1401.

127. *See, e.g., supra* note 81.

128. Wilko v. Swan, 346 U.S. at 436-37.

tively, rather than adding to them," or "[the phrase] may have been shorthand for [Section] 10(a)(3) or [Section] 10(a)(4), the subsections authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'"[129] Nevertheless, the Court reiterated that it had consistently taken the *Wilko* language "without embellishment" and that the case could not stand for the general proposition that parties could contractually create additional grounds for vacatur independent from those enumerated in the FAA.[130]

In response to Hall Street's argument that federal arbitration policy requires courts to comply with contractually expanded judicial review provisions because "arbitration is a creature of contract,"[131] the Court responded that such a policy was at odds with a textual interpretation of the FAA.[132] The Court cited the *ejusdem generis* rule in determining that Section 9 of the FAA created no textual hook for expanding judicial review and did not authorize contracting parties to supplement the grounds for vacatur detailed in Sections 10 and 11 with an additional ground for legal error.[133] Rather, those sections provided exclusive regimes for judicial review under the FAA. However, the Court did not intend to eliminate all other possibilities for expanded judicial review of arbitral awards:

> In holding that [Sections] 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under

129. Hall Street Assocs., 128 S. Ct. at 1404.

130. *Id.*

131. *Id.*

132. *See id.* ("Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.").

133. *See id.* ("Under [the rule of ejusdem generis], when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.").

> [Sections] 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.[134]

Although the Court of Appeals had properly held that the FAA confined its expedited judicial review to the grounds listed in Sections 10 and 11, the Supreme Court remanded for further consideration as to whether the arbitration agreement should have been treated as an exercise of the district court's authority to manage its cases under F.R.Civ.P. 16.[135]

B. *Manifest Disregard Under Federal Law After* Hall Street

In the months following the *Hall Street* decision, federal district courts reached differing conclusions as to the viability of manifest disregard as a valid ground for vacatur. The initial cases were in disarray: some courts have cited the *Hall Street* decision but continued to presume the validity of manifest disregard without mention of *Hall Street*'s impact,[136] while others acknowledged *Hall Street* but expressly declined to decide whether the decision affected the viability of the manifest disregard doctrine.[137] Yet, several courts chose to directly address the consequences of *Hall Street*'s holding on manifest disregard, though they have reached different conclusions. In *Halli-*

134. *Id.*

135. *Id.*

136. *See, e.g.*, Reeves v. Chase Bank USA, NA, No. 07-CV-1101, 2008 WL 2783231, at 3 (E.D.Mo. 2008) (finding that the federal courts "may also vacate arbitral awards . . . which 'evidence [ ]a manifest disregard of the law," citing *Hall Street* for the proposition that "[u]nder the FAA, a district court may 'modify or vacate' an arbitration award on grounds principally relating to egregious conduct by the arbitrator but unrelated to the merits" but failing to discuss whether *Hall Street*'s holding affected the court's authority to review an award for manifest disregard); Fitzgerald v. H&R Block Financial Advisors Inc., No. 08-10784, 2008 WL 2397636, at 3 (E.D. Mich. June 11, 2008) (citing *Hall Street* for the proposition that the vacatur grounds set forth in §§ 10-11 of the FAA are exclusive, then continuing to its manifest disregard analysis without attempting to reconcile the *Hall Street* decision).

137. *See, e.g.*, Rogers v. KBR Tech. Servs., 2008 U.S. App. LEXIS 12320,5-6 (5th Cir. Tex. June 9, 2008) (deciding that it was unnecessary to address whether non-statutory grounds for vacatur remained valid after the *Hall Street* decision because the award was upheld); Supreme Oil v. Abondolo, No. 07-CV-6479 & 6537, 2008 WL 2925300, at 2-3 (S.D.N.Y. July 31, 2008) ("While *Hall Street*'s effect (if any) on review of arbitration awards under the LMRA is unclear; the Court need not reach that question as Plaintiff does not claim, and the Court does not find any manifest disregard of the law.").

burton Energy Servs. v. NL Indus. (2008), after carefully considering the Supreme Court's analysis in *Hall Street,*[138] a Texas district court emphasized that Fifth Circuit courts "have repeatedly admonished that 'extraordinarily narrow' judicial review is an essential, and inherent, feature of contractually agreed binding arbitration, necessary to avoid undermining the 'twin goals of arbitration . . . settling disputes efficiently and avoiding long and expensive litigation.'"[139] The district court resolved that the Fifth Circuit's extremely deferential standard for review of arbitrators' decisions was not inconsistent with the *Hall Street* decision, concluding that

> [b]ecause the Supreme Court did not expressly decide whether the "manifest disregard" standard remains a separate basis for federal court review of arbitration decisions in at least some circumstances; because the Fifth Circuit has often approved of reviewing arbitration awards for "manifest disregard" . . . and because Halliburton sought vacatur on the basis of the Fifth Circuit's "manifest disregard" standard, out of an abundance of caution this court analyzes the parties' arguments using "manifest disregard" as both a summary of some of the statutory grounds and as an additional ground for vacatur.[140]

In *LaPine v. Kyocera Corp.* (2008), a California district court similarly found that the Ninth Circuit's interpretation of manifest disregard was consistent with *Hall Street*'s holding that Sections 10 and 11 of the FAA provided the exclusive grounds for vacatur under federal law. This district court interpreted Ninth Circuit precedents to treat arbitrators' "manifest disregard of the law [as] co-extensive with 'exceed[ing] their powers' [under Section 10(a)(4)] other than for decisions that are completely irrational," thus preserving manifest disregard as a valid basis of review. It also reiterated that "[t]hese grounds afford an extremely limited review authority, a limitation that

138. Halliburton Energy Servs. v. NL Indus., 553 F. Supp. 2d 733, 751 (S.D. Tex. 2008).

139. *Id.* at 752.

140. *Id.*

is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures."[141]

Other lower courts reached the opposite conclusion. In *Prime Therapeutics LLC v. Omnicare, Inc.* (2008), a Minnesota district court, after a lengthy review of the *Hall Street* decision, found itself without authority to review arbitration awards under a manifest disregard standard.[142] After the Supreme Court "made clear that Sections 10 and 11 of the FAA provide the exclusive grounds for vacating and modifying an arbitration award" and that "parties cannot contractually alter the FAA's grounds for vacating or modifying arbitration awards," the district court concluded "that courts can no longer vacate an arbitration award based on judicially-created grounds such as 'manifest disregard of the law[.]'"

New York district courts disagreed on *Hall Street*'s meaning. In *Robert Lewis Rosen Associates, Ltd. v. Webb* (2008), a New York district court determined that the Second Circuit's interpretation of *Wilko* construed manifest disregard as an additional basis for vacatur, in direct contravention to *Hall Street*'s holding, finding that

> [n]ecessary to *Hall Street*'s holding are two related propositions: first, that the FAA's statutory grounds are exclusive, and second, that the Supreme Court has never endorsed manifest disregard as an independent basis for vacatur. Together, these propositions undercut the rationale for the Second Circuit's prior adherence to the manifest disregard standard . . . as the Second Circuit's traditional understanding of *Wilko* and § 10 . . . is inconsistent with the basis for the holding in *Hall Street*, the Court finds that the manifest disregard of the law standard is no longer good law.[143]

Another New York district court reached the opposite conclusion. In *Mastec North America Inc. v. MSE Power Systems Inc.* (2008), the district court held that *Hall Street* merely "limits

141. LaPine v. Kyocera Corp., 2008 U.S. Dist. LEXIS 41172, 17-19 (N.D. Cal. May 22, 2008).

142. Prime Therapeutics LLC v. Omnicare, Inc., 555 F. Supp. 2d 993, 999 (D. Minn. 2008)

143. Robert Lewis Rosen Assocs., Ltd. v. Webb, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008)

the application of manifest disregard to the § 10 bases."[144] Accordingly, the court viewed manifest disregard "as judicial interpretation of the Section 10 requirements, rather than as a separate standard of review," and "resort[ed] to existing case law to determine its contours."[145]

The Courts of Appeals have begun to address these cases, but inconsistency remains. To date, the Courts of Appeal for the First, Second, Fifth, Sixth, and Ninth Circuits have decided claims for vacatur based on manifest disregard since *Hall Street*.[146] In *Ramos-Santiago v. UPS* (2008), the First Circuit acknowledged that the *Hall Street* decision denied manifest disregard of the law as a valid ground for vacating or modifying an arbitral award in cases brought under the FAA.[147] However, the Court found it unnecessary to analyze whether the *Hall Street* holding should apply in this case because "neither party ha[d] invoked the FAA's expedited review provisions, and the original complaint was filed in Puerto Rico state court under a mechanism provided by state law."[148]

The Second Circuit avoided deciding the issue,[149] *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.* (2008), in which the Second Circuit "pause[d] to consider" the effect of *Hall Street* on the scope or validity of the manifest disregard doctrine, and

144. Mastec North America Inc. v. MSE Power Systems Inc., No. 08-CV-168, 2008 WL 2704912, at 3 (N.D.N.Y. July 8, 2008).

145. *Id.*

146. ESSO Exploration & Prod. Chad, Inc. v. Taylors Int'l Servs., 2008 U.S. App. LEXIS 20042; Rogers, 2008 U.S. App. LEXIS at 12320; Ramos-Santiago v. UPS, 524 F.3d 120, 124 (1st Cir. P.R. 2008).

147. Ramos-Santiago, 524 F.3d at 124, n. 3.

148. *Id.*

149. *See, e.g.*, Sole Resort, S.A. DE C.V. v. Allure Resort Mgmt., LLC, 2008 U.S. App. LEXIS 22507 at 2-3 (2d Cir. Oct. 20, 2008) ("The continued viability of a manifest-disregard standard distinct from the grounds identified in 9 U.S.C. § 10(a) has been called into question by the Supreme Court's recent decision *in* Hall Street Street Associates, 128 S. Ct. 1396 at 1404, 1406, . . . While that issue is presently under consideration in another case pending before this court . . . we need not await its resolution to decide this appeal because Sole has, in any event, failed to demonstrate manifest disregard of the law."); ESSO Exploration & Prod. Chad, 2008 U.S. App. LEXIS 20042 at 3, n. 1 ("[I]n light of the fact that the manifest disregard standard has so clearly been satisfied in this case, and that confirmation of the arbitral award is so plainly warranted, we see no useful purpose to be served here by a discussion of the standard's continued validity.").

found that *Hall Street* did not "abrogate the 'manifest disregard' doctrine altogether."[150] The Court explained that

> [l]ike the Seventh Circuit, we view the "manifest disregard" doctrine, and the FAA itself, as a mechanism to enforce the parties' agreements to arbitrate rather than as judicial review of the arbitrators' decision. We must therefore continue to bear the responsibility to vacate arbitration awards in the rare instances in which 'the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.' . . . At that point the arbitrators have "failed to interpret the contract at all" . . . for parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law. Put another way, the arbitrators have thereby "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[151] 9 U.S.C. § 10 (a)(4).

Prior to *Stolt-Nielson*, the Second Circuit had made reference to the *Rosen Associates* holding—that, in light of *Hall Street*, manifest disregard was no longer good law—but chose to "express no opinion as to the correctness of [that] decision,"[152] perhaps an early signal of reluctance to renounce a nearly fifty-year-old element of arbitration practice in the Second Circuit.

Likewise, in *Comedy Club, Inc. v. Improv West Associates* (2009), the Ninth Circuit held that manifest disregard of the law was simply shorthand for Section 10(a)(4) of the FAA and that *Hall Street* did not preclude federal courts from reviewing an arbitral award for the arbitrator's manifest disregard of the law.[153]

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150. Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85 at 24 (2d Cir. N.Y. Nov. 4, 2008).

151. *Id.* at 95.

152. ESSO Exploration & Prod. Chad, 2008 U.S. App. LEXIS 20042 at 3, n. 1.

153. Comedy Club, Inc. v. Improv West Associates, 553 F.3d 1277, 1290 (9th Cir. 2009) ("[W]e conclude that, after Hall Street Associates, manifest disregard of the law remains a valid ground for vacatur because it is a part of § 10(a)(4).").

The Sixth Circuit, in an unpublished decision, found it "imprudent to cease employing such a universally recognized principle [as manifest disregard]" even after the *Hall Street*.[154] In *Coffee Beanery, Ltd. v. WW, L.L.C.* (2008), the Sixth Circuit noted that "since *Wilko*, every federal appellate court has allowed for the vacatur of an award based on an arbitrator's manifest disregard of the law" and "the Supreme Court's hesitation [in *Hall Street*] to reject the 'manifest disregard' doctrine in all circumstances." The Court, interpreting the decision narrowly, held that "the FAA does not allow private parties to supplement by contract the FAA's statutory grounds for vacatur of an arbitration award," but "[does] not foreclose federal courts' review for an arbitrator's manifest disregard of the law."[155]

Finally, the Fifth Circuit had been similarly reluctant to rule on manifest disregard in the immediate aftermath of *Hall Street*. In *Rogers v. KBR Tech. Servs.* (2008), the Court of Appeals affirmed the district court's denial of the plaintiff employee's motion to vacate the arbitration award based on the arbitrator's manifest disregard of the appropriate arbitration rules to apply to the proceedings. The Court then conceded that "[t]he Supreme Court has recently held that the provisions of the FAA are the exclusive grounds for expedited vacatur and modification of an arbitration award, which calls into doubt the non-statutory grounds which have been recognized by this Circuit."[156] However, because the arbitration award was ultimately confirmed, the court chose not to address whether or not manifest disregard remained a valid ground for vacatur under federal law. The issue quickly found its way back on the Court of Appeals' docket in *Citigroup Global Markets, Inc. v. Bacon* (2009). In that case, the district court granted Citigroup's motion to vacate an arbitral award due to the arbitrator's manifest disregard of the law, and the appellant, Bacon, appealed the decision. Faced, yet again, with the question of whether manifest disregard is a proper basis for vacatur under the FAA, the Court of Appeals began its analysis with the history of arbi-

154. Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed. Appx. 415 (6th Cir. Mich. 2008), petition for cert. filed, (U.S. May 11, 2009) (No. 08-1396).

155. *Id.* at 10.

156. Rogers, 2008 U.S. App. LEXIS 12320 at 6 (5th Cir. Tex. June 9, 2008).

tration in the United States. The Court noted that even prior to the FAA, "courts of equity would set aside an arbitration award only in narrowly defined circumstances" because an agreement to arbitrate is a valid and enforceable contract[157] and because long-established Supreme Court precedent took a cautious stance on reviewing an arbitrator's application of the law.[158] The court further observed that the policy of "strictly confining the perimeter of federal court review of arbitration awards" was widely embraced early on, as exemplified by the FAA.[159] Considered together with "*Hall Street*'s repeated statements that 'We hold that the statutory grounds are exclusive,'"[160] the Court of Appeals determined that "manifest disregard of the law as an independent, nonstatutory ground for setting aside an awards must be abandoned and rejected."[161] Finally, the court justified the Fifth Circuit's prior embrace of manifest disregard as a non-statutory ground for vacatur under the Supreme Court's ruling in *First Options of Chicago, Inc. v. Kaplan*, "which cited 9 U.S.C. [Section] 10 and *Wilko* for the proposition that courts will set arbitration awards aside 'only in very unusual circumstances.'"[162] Yet, the Court of Appeals acknowledged that the unequivocal language of the *Hall Street* decision now left no doubt that manifest disregard "is no longer a basis for vacating awards under the FAA."[163]

Despite so holding, the Fifth Circuit embraced the Second Circuit's analysis in *Stolt-Nielson*, though it noted that vacatur would only be appropriate where the "arbitrator is fully aware of the controlling principle of law and yet does not apply it."[164] Thus, while announcing that the manifest disregard standard was no longer available as a ground for vacatur, the Fifth Circuit's decision substantively held that it does indeed constitute a valid ground that is rooted in Section 10(a)(4).

157. Citigroup Global Markets, Inc. v. Bacon, No. 07-20670. 2009 WL 542780 at *1 (5th Cir. Mar. 5, 2009).

158. *Id.* at *2 ("We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion.") (citing Burchell v. Marsh, 58 U.S. 344, 349-50 (1854)).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

The court ultimately determined that the narrow standard was not satisfied on the record before it, vacated the district court's order, and remanded the case for further consideration as to whether the grounds asserted by Citigroup might support vacatur under one of the enumerated statutory grounds of the FAA.

While early district court decisions evince a lack of clarity concerning the manifest disregard standard's continued vitality, the Courts of Appeals, while analyzing the issue somewhat differently, appear to be reaching the same conclusion: that manifest disregard is not, as previously thought, a "non-statutory" ground for vacatur; rather an arbitrator's deliberate decision to disregard a well-established rule of which he is aware constitutes an act in excess of the arbitrator's authority, and therefore, a violation of Section 10(a)(4) of the FAA.

C. *States Demonstrate Independence*

Since *Hall Street*, some state courts have also abandoned the concept of manifest disregard.[165] However, many have continued to recognize it as a legitimate ground for vacatur. For example, the Delaware Chancery Court recently justified its continued use of the manifest disregard standard by construing it as part of the court's "inherent equity jurisdiction," unaffected by the requirements of either the FAA or Delaware arbitration law.[166] New York state courts applying federal arbitration law have continued to recognize manifest disregard as a valid ground for vacatur despite *Hall Street*. One New York court read the opinion as only a rejection of manifest disregard as a separate, non-statutory ground for vacatur under the FAA, but doing nothing "to jettison the 'manifest disregard' standard of *Wilko*." The court found it appropriate "to view 'manifest disregard of law' as judicial interpretation of the

165. *See, e.g.*, Hereford v. D.R. Horton, Inc., 2008 Ala. LEXIS 186 (Ala. 2008) ("In light of the fact that the Federal Arbitration Act is federal law, and in light of the Supremacy Clause of the Constitution of the United States, Art. VI, we hereby overrule our earlier statement in Birmingham News that manifest disregard of the law is a ground for vacating, modifying, or correcting an arbitrator's award under the Federal Arbitration Act, and we also overrule any such language in our other cases construing federal arbitration law.").

166. TD Ameritrade, Inc. v. McLaughlin, 953 A.2d 726, 732 (Del. Ch. 2008).

[S]ection 10 requirement, rather than as a separate standard of review."[167] Some state courts have acknowledged the *Hall Street* decision but simply chosen not to address the tension between *Hall Street*'s holding and the state's continued use of manifest disregard, perhaps implying that the former has no practical consequences for the latter. For example, in *Barrett v. Investment Management Consultants* (2008), the court cited *Hall Street* for a different point of law yet continued to acknowledge the availability of manifest disregard as a ground for reviewing a panel's interpretation or application of the law.[168]

In a groundbreaking decision, the California Supreme Court recently held that the type of judicial review provision found unenforceable under the FAA in *Hall Street* could be valid under the California Arbitration Act.[169] In *Cable Connection, Inc. v. DIRECTV, Inc.* (2008), the parties' arbitration agreement provided that "[t]he arbitrators shall apply California substantive law to the proceeding, except to the extent Federal substantive law would apply to any claim," and the contract included a judicial review provision specifying that "the arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error."[170] After the arbitrators found for the plaintiffs on the issue of whether the contract provided for classwide arbitration, DIRECTTV brought a motion to vacate in state court on several grounds, including that the award reflected errors

167. Chase Bank USA, N.A. v. Hale, 2008 NY Slip Op 28141, 7 (N.Y. Sup. Ct. 2008); *see also* Matter of Johnson (Summit Equities, Inc., 2008 NY Slip Op 28372, 13-14 (N.Y. Sup. Ct. Oct. 2, 2008) ("Recently, however, the Supreme Court has rejected the notion that the "manifest disregard" standard constitutes a separate, non-statutory ground of judicial review . . . Still, the Court appears to endorse continued use of the concept, albeit as an interpretative standard of FAA § 10. Therefore, it appears to this court that existing case law will continue to define the scope of the manifest disregard standard as an interpretation of FAA section 10(a)(4)."); Bear Stearns & Co., Inc. v. Fulco, 2008 NY Slip Op 28379, 5 (N.Y. Sup. Ct. 2008) (acknowledging the Hall Street decision but proceeding to apply manifest disregard analysis to an arbitration award governed by the FAA).

168. Barrett v. Inv. Mgmt. Consultants, 190 P.3d 800, 802 (Colo. Ct. App. 2008)

169. Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334, 1341, n.3 (Cal. 2008).

170. *Id.*

of law, which it argued were beyond the scope of the arbitrators' powers and thus subject to judicial review.[171] The trial court agreed with DIRECTTV and vacated the award. The Court of Appeals reversed, holding that the trial court exceeded its authority by reviewing the merits of the arbitrators' decision based on previous Court of Appeals decisions, which held expanded judicial review provisions to be unenforceable. DIRECTTV then appealed to the California Supreme Court presenting two questions: (1) whether the parties could structure their agreement to allow for judicial review of legal error in the arbitration award; and (2) whether classwide arbitration was available under an agreement that was silent on the matter.

On the first issue, the California Supreme Court noted that the U.S. Supreme Court's decision in *Hall Street* did not preclude "more searching review [of arbitral awards] based on authority outside the [FAA]," including "state statutory or common law."[172] Then, the court found both a statutory and a common law basis under state law to hold that parties can contractually agree to judicial review of an arbitration award for legal error in California.[173] While admitting the similarities between the statutory schemes for enforcement of arbitral awards in the CAA and the FAA,[174] the Court cited its decision in *Moncharsh v. Heily & Blasé* (1992) to support the proposition that in drafting the California Arbitration Act[175] ("CAA"), the California Legislature "adopt[ed] the position taken in case law . . . 'that *in the absence of some limiting clause in the arbitration agreement,* the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute.'"[176] Thus, *Moncharsh* established a California rule "that the parties may obtain judicial review of the merits by express

171. *Id.* at 1342.

172. *Id.* at 1340.

173. *Id.*

174. *See id.* at 1344 (explaining that both "the CAA and the FAA provide only limited grounds for judicial review of an arbitration award," and noting the similarities between the grounds for vacatur or modification in §§ 1286.2 (a) and 1286.6 of the CAA and those listed in §§ 10-11 of the FAA).

175. Code Civ. Proc., § 1280 *et seq.*

176. Moncharsh v. Heily & Blasé, 3 Cal.4th 1, 23 (1992) (emphasis added).

agreement" under the CAA.[177] The Court noted that no Court of Appeals had yet upheld a provision for judicial review for legal error since the *Moncharsh* decision and agreed that many of the provisions involved in prior cases were not "specifically tailored for [the] purpose [of expanding the scope of judicial review]." However, in this case, "the parties agreed that 'the arbitrators *shall not have the power* to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.'"[178] The language used by the parties here evidenced their intent to exclude legal errors from the scope of the arbitrators' powers, thereby properly bringing such errors within the scope of judicial review pursuant to Section 1286.2 (a)(4).

The plaintiffs argued that the FAA preempted this construction of the CAA, or in the alternative, that *Hall Street* provided "a persuasive analysis of the FAA that should be applied to the similar CAA provisions."[179] On the issue of preemption, the California court held that the requirement in Section 9 of the FAA that arbitration awards be confirmed unless grounds for vacatur and modification existed under Sections 10 or 11 did not preempt state law allowing parties to contract for an expanded scope of judicial review. While the court acknowledged U.S. Supreme Court precedent that "state laws invalidating arbitration agreements on grounds applicable only to arbitration provisions contravene the policy established by Section 2 of the FAA," it recognized that "the United States Supreme Court does not read the FAA's procedural provisions to apply to state court proceedings."[180] The California Supreme Court had previously held that "[t]he language used in [S]ections 3 and 4 and the legislative history of the FAA suggest that the sections were intended to apply only in federal court proceedings," specifically identifying the phrasing in those sections limiting their applicability to a "United States district court" with jurisdiction under Title 28 of the United States Code. Finding the same language in Sections 9 through 11, the court in *Cable Connection Inc.* similarly characterized those FAA provi-

177. *Id.* at 1340.

178. *Id.*

179. *Id.* at 1350.

180. *Id.* at 1361 (citing Cronus Investments, Inc. v. Concierge Svcs., 35 Cal.4th 376, 389 (2005)).

sions as "procedural provisions" whose applicability was limited only to the federal courts.[181] Thus, it found that "the FAA's procedural provisions are not controlling, and the determinative question is whether CAA procedures conflict with the FAA policy favoring the enforcement of arbitration agreements."[182]

The California court then considered the applicability of *Hall Street*'s holding to the enforcement provisions of the CAA. It noted that "*Hall Street* was a federal case governed by federal law" in which the United States Supreme Court "considered no question of competing state law" and "unanimously left open other avenues for judicial review, including those provided by state statutory or common law."[183] On this basis, the court concluded that "*Hall Street*['s] holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations,"[184] going on to cite a string of its own precedents stating that "the terms of the parties' agreement are controlling over considerations of expediency in the dispute resolution process." The court also found that "a reading of the CAA that permits the enforcement of private contractual agreements for merits review is fully consistent with the FAA 'policy guaranteeing the enforcement of private contractual agreements.'"[185]

To the extent that they conflicted with the Court's present reasoning, prior California Court of Appeals opinions refusing to enforce specific provisions for judicial review of the merits were to be considered overruled. "The objections raised in these cases are outweighed by the freedom of contract that is fundamental to arbitration . . . and by the considerable public and private benefits that such review can provide."[186] Among such benefits were "the advancement of law," since expanded judicial review "gives the courts of first instance the opportunity to establish a record, and to include the reasoning of expert arbitrators into the body of the law in the form of written decisions."[187] Unquestionably, the parties would bene-

181. *Id.* at 1351.
182. *Id.* at 1352.
183. *Id.* at 1353-54.
184. *Id.* at 1354.
185. *Id.*
186. *Id.* at 1361.
187. *Id.* at 1363.

fit significantly from being able to "protect themselves from perhaps the weakest aspect of the arbitral process, its handling of disputed rules of law."[188]

In conclusion, the California Supreme Court found that the Court of Appeals erred by refusing to enforce the parties' clearly expressed agreement for judicial review of legal error. . In the instant case, the majority arbitrators committed a legal error in ordering classwide arbitration after incorrectly concluding that it was a substantive right independent of the arbitration agreement. Thus, it was appropriate for the arbitration panel to reconsider the availability of classwide arbitration as a matter of contract interpretation and commercial arbitration procedure.

Another interesting case from a New York state court has recently addressed *Hall Street*'s impact on the manifest disregard doctrine under New York law. In *In the Matter of the Arbitration Between Johnston and Summit Equities* (2008), the New York Supreme Court read the *Hall Street* opinion to "endorse continued use of [manifest disregard], albeit as an interpretive standard of FAA [Section] 10. Therefore, it appears . . . that existing case law will continue to define the scope of the manifest disregard standard as an interpretation of FAA section 10(a)(4)."[189]

V.
CONCLUSION

The Supreme Court's decision in *Hall Street* resolved the issue of whether parties could contractually customize the legal standard of review for an arbitration award under federal law but left open the possibility of "other possible avenues for judicial enforcement of arbitral awards," including the "manifest disregard of the law" standard.[190] Nonetheless, parties to arbitration agreements have an increased degree of certainty regarding the scope and nature of post-arbitral award judicial review under the FAA. However, *Hall Street* also eliminates a

188. *Id.*

189. In the Matter of the Arbitration Between Johnston and Summit Equities, No. 104034-07, 2008 WL 4456935, at 9 (N.Y. Sup. Ct. 2008).

190. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 656 (1985) (Stevens, J., dissenting); Wallace v. Buttar, 378 F.3d 182, 193 (2d Cir. 2004).

significant measure of contractual flexibility, which many parties have incorporated into their arbitration agreements and which the majority of federal appellate courts had previously recognized. Consequently, parties that have included an expanded or narrowed provision for judicial review of arbitral awards in agreements subject to the FAA should be aware that those provisions will likely be considered null and void under federal law. Additionally, several fundamental questions remain regarding the scope of judicial review under both the FAA and state law.

A. *The State of Manifest Disregard Review Under the FAA*

While early decisions following *Hall Street* were largely inconsistent, the three federal circuits to directly confront the question of manifest disregard's fate in the wake of that decision have demonstrated a trend toward the continued use of manifest disregard. The Second, Fifth, and Ninth Circuits (like the Seventh Circuit before them) have characterized manifest disregard of the law as an error within the meaning of Section 10(a)(4) of the FAA, rather than as an independent ground for non-recognition. This analysis permits the manifest disregard doctrine to comfortably coexist with the Supreme Court's analysis in *Hall Street* and appears to solidify the doctrine's vitality in these jurisdictions. However, because so many agreements fix New York as an arbitral venue, the Second Circuit's ruling in *Stolt-Nielsen* constitutes a particularly important clarification about judicial review, specifically regarding the potential scope of any post-arbitral litigation in Second Circuit courts. In *Coffee Beanery*, the Sixth Circuit, held similarly that manifest disregard survived after *Hall Street* as a ground for vacatur under federal law, emphasizing the Supreme Court's apparent hesitation to unambiguously reject manifest disregard in *Hall Street*, although without the same degree of analysis as its sister courts and in an unpublished decision.[191]

B. *Manifest Disregard Review Under State Law*

Notably, provisions for expanded judicial review of arbitral awards may still be enforceable under state arbitration stat-

191. *See* discussion on manifest disregard under federal law post-*Hall Street*, *supra* at part IV, section B.

utes, as illustrated in *Cable Connection, Inc. v. DIRECTV.* Given the lack of any definitive holding that the FAA is preemptive, states are still entitled to employ their own standards for vacatur under state arbitration statutes. Thus, while most state arbitration statutes provide standards for vacatur that are substantially similar to Section 10 of the FAA, state courts remain free to interpret their own state statutes independently and without reference to the FAA or the decisions construing it.

The breadth of the FAA's preemptive sweep, however, remains unsettled. Because the FAA was enacted "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate,"[192] the statutory language in Section 2 of the FAA invokes the broadest possible application of the Commerce Clause, covering cases involving commerce even absent the parties' contemplation of such scope.[193] Even essentially local matters—such as a debt restructuring agreement between an Alabama bank and an Alabama construction company—are governed by the FAA, since they involve the type of economic activity traditionally within federal control.[194] Where the FAA applies, it will preempt conflicting state arbitration laws by virtue of the Supremacy Clause.[195] However, the FAA contains no express provision, nor does it reflect a congressional intent to control the entire field of arbitration.[196] Yet, as the Supreme Court stated, "when Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal

192. Dean Witter Reynolds Inc., 470 U.S. at 219-20.

193. Allied-Bruce Terminix Cos., 513 U.S. at 273-74.

194. *See* Citizens Bank, 539 U.S. at 56-57 (finding the Alabama Supreme Court "misguided in its search for evidence that a 'portion of the restructured debt was actually attributable to interstate transactions' or that the loans 'originated out-of-state' or that 'the restructured debt was inseparable from any out-of-state projects'" since the transaction "involved commerce" and was thus governed by the FAA).

195. *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (holding that state regulation specifically limiting arbitration was preempted by the FAA); Perry v. Thomas, 482 U.S. 483 (1987) (FAA preempted provision of California Labor Law which made agreement to arbitrate wage actions unenforceable); Southland Corp. v. Keating, 465 U.S. at 1 (finding that the FAA preempted state law provision requiring judicial consideration of claims brought under California Franchise Investment Law).

196. *See* Bernhardt, 350 U.S. at 198 (upholding application of state arbitration law to arbitration provision in contract not covered by the FAA).

law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[197]

Thus far, two Supreme Court cases have addressed FAA preemption in cases where the arbitration agreement contained a choice-of-law clause—one upholding the conflicting state law,[198] and another preempting it.[199] In *Volt Information Sciences v. Board of Trustees* (1989), the Supreme Court considered the question of "whether application of Cal. Civ. Proc. Code Ann. [Section] 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA."[200] The California Court of Appeals concluded that the issue of the parties' intention to incorporate the California arbitration rules into their arbitration agreement through the choice-of-law clause was a question of state law and applied California's procedural rules governing a stay of litigation proceedings for arbitration. The appellants argued that the state court's construction of the choice-of-law clause must be set aside because it violated a settled federal rule that questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration. The Supreme Court rejected this argument, noting that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms,"[201] but found no federal policy favoring arbitration under a certain set of procedural rules. The federal policy simply ensured the enforceability, according to their terms, of private agreements to arbitrate.[202] Interpreting a choice-of-law clause in favor of the California arbitration rules—which are manifestly designed to encourage arbitration over trial—does not offend the general rule that "questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal

197. *See* Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 477 (1989) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

198. *Id.* at 468.

199. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

200. Volt Info. Scis., 489 U.S. at 477-478.

201. *Id.* at 478.

202. *Id.*

policy favoring arbitration."[203] Thus, the Court affirmed the California Court of Appeal's decision to apply the California procedural statute invoked by the University in its motion to stay arbitration and its holding that the statute was not preempted by the Federal Arbitration Act.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995), a party to an arbitration agreement containing a New York choice-of-law clause challenged an arbitral award of punitive damages in federal court as violative of New York's *Garrity* rule,[204] which prohibits arbitrators from awarding punitive damages. The district court granted the motion to vacate the award, and the Seventh Circuit affirmed; however, the Supreme Court reversed after finding the *Garrity* rule preempted by the FAA. Since it "might include only New York's substantive rights and obligations, and not the State's allocation of power between alternative tribunals," the Court determined that the New York rule deemed the provision ambiguous and not clearly incorporated.[205] After reasoning that "due regard must be given to the federal policy favoring arbitration," it upheld the award of punitive damages.[206] In a footnote, the majority responded to the dissent's emphasis on the similarity between the choice-of-law clause in the instant case and that at issue in *Volt* by noting that *Volt* was not decided *de novo*; rather, the Court had "deferred to the California court's construction of its own State's law."[207] However, in this case, the Court was called upon to review a federal court's interpretation of the contract, "and our interpretation accords with that of the only decision-maker arguably entitled to deference-the arbitrator," as mandated by the FAA.[208]

The different outcomes of these two cases might appear to turn on whether the decision under review came from a

203. *See id.* at 475 (citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983)).

204. See Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 356, 353 N.E.2d 793, 794 (N.Y. 1976) ("Since enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, an arbitrator's award which imposes punitive damages should be vacated.") (superseded by statute as stated in Mastrobuono, 514 U.S. 52, 59.

205. Mastrobuono, 514 U.S. at 60.

206. *Id.* at 62.

207. *Id.* at 60, n.4.

208. *Id.*

state court or a federal court. As discussed in the *Mastrobuono* footnote, the Supreme Court will defer to a state court's interpretation as to whether a choice of law clause includes the proper standards for vacatur of an arbitral award under the state's own contract law. Another, more plausible reason for the distinction between the two cases posits that *Volt* involved the preemption of a state procedural rule under California law, while *Mastrobuono* involved the preemption of a substantive principle of New York law, which reflected "the ancient judicial hostility to arbitration" and stood in direct contravention to the purpose of the FAA's substantive provisions.[209]

It is important to note that courts have inconsistently applied the preemption doctrine with regard to the FAA. When a prevailing party to an arbitration award brings the award to state court for confirmation, the court must enforce the award pursuant to substantive federal arbitration law.[210] Traditionally, Sections 1 and 2 of the FAA—providing that agreements to arbitrate shall be valid, irrevocable, and enforceable—have been deemed "substantive," while Sections 3 and 4—referring to "proceedings in any of the courts of the United States"—are considered "procedural."[211] Accordingly, a threshold question for a state court in a confirmation or vacatur proceeding involving an arbitration award covered by the FAA is whether the federal vacatur standards are viewed as procedural or substantive under that state's laws.[212] Some state courts consider themselves bound to applying the procedures of federal vacatur law in state court proceedings concerning the confirma-

209. Jill I. Gross, Over-Preemption of State Vacatur Law, 3 J. AM. ARB. 1, 15 (2004).

210. *Id.*

211. Volt Info. Scis. v. Bd. of Trs., 489 U.S. at 477, n. 6.

212. Allied-Bruce Terminix Cos., 513 U.S. at 271-72; *see* Volt Info. Scis., 489 U.S. at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward."); *see generally* Jill I. Gross, Practicing Law Institute, *Procedural Mechanics of Motions to Vacate Arbitration Awards*, PLI Order No. 14310 (Aug. 6, 2008) (addressing complex procedural choices to be made when making motions to vacate arbitration awards).

tion or vacatur of an arbitration award covered by the FAA,[213] but others do not.[214] Courts are also divided about what law applies to the merits of a motion to vacate. Some courts hold that only federal substantive law governs a motion to vacate, regardless of whether the motion is filed in federal or state court.[215] Other courts have held that state law governs a motion to vacate in state court even if the arbitration agreement is governed by the FAA.[216]

As discussed above, while many federal district courts have reached their own conclusions as to the impact of *Hall Street* on manifest disregard, only three circuits have ruled definitively, and there is no nationwide consensus among federal courts on the issue. The developing splits among the circuits and between federal and state courts concerning the manifest

213. *See, e.g.*, Bank of America, N.A. (USA) v. Dahlquist, 152 P.3d 718, 720 (Mont. 2007) (applying FAA's 90-day time limit to motion to vacate arising out of arbitration agreement that stated it "shall be governed by" the FAA).

214. *See, e.g.*, McGrath v. FSI Holdings, Inc. 216 S.W.3d 796, 804 (Tex. App. 2008) (stating that "[p]rocedural (emphasis added) matters relating to the confirmation of arbitration Awards in Texas courts are governed by Texas law even if the FAA supplies the substantive rules of decision"); Citigroup Global Markets, Inc. v. Masek, 2007 WL 1395360 (Ohio Ct. App. May 11, 2007) (applying Ohio arbitration law's time limits to motion to vacate securities arbitration Award); Joseph v. Advest, Inc., 906 A.2d 1205 (Pa. Super. 2006) (applying Pennsylvania's time limit to motion to vacate); *see also* Volt Info. Scis., 489 U.S. at 476 ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration-rules which are manifestly designed to encourage resort to the arbitral process-simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.").

215. *See* Wise v. Wachovia Secs., 450 F.3d at 265 (refusing to vacate Award where arbitrators granted motion for summary judgment and dismissed claim on papers); Bank of America Investment Services, Inc. v. Lancaster, 2007 WL 2460277 (Tex. App. Aug. 31, 2007) (applying FAA grounds to motion to vacate in Texas state court).

216. *See* Strausbaugh v. H&R Block Financial Advisors, 2007 WL 3122257 (Ky. App. 2007) (applying Kentucky law and holding that state law grounds govern state court's review of an FAA-governed arbitration); Swab Financial v. E*TRADE Securities, 150 Cal.App.4th 1181 (Cal. Ct. App. 2007) (reversing trial court's grant of motion to vacate under California arbitration law); Trombetta v. Raymond James Financial Services, Inc., 907 A.2d 550 (Pa. Super. 2006) (holding that the FAA does not preempt state law motion to vacate standards and applying Pennsylvania grounds for vacatur).

disregard doctrine's consistency with *Hall Street* suggests that the Supreme Court will ultimately need to resolve the issue. In the meantime, parties to arbitration may be advised that they will generally enjoy more flexibility in state courts with regard to enhanced judicial review of arbitration awards, as illustrated by *Cable Connection*. Parties intent on preserving manifest disregard as a standard of review should carefully consider the various applicable state arbitration laws in drafting the choice-of-law provision in their agreement.