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The Mess of Manifest Disregard

A circuit split is in the making, and it could signal a shift with significant implications for federal arbitration law. Just eighteen months after the U.S. Supreme Court’s March 25, 2008 decision in the controversial case of Hall Street Associates v. Mattel, Inc., three circuits are already in ripe disagreement as to whether Hall Street abrogates the half-century old, judicially-created doctrine of “manifest disregard.”

Manifest disregard is a common-law exception to the limited grounds for vacatur of arbitral awards enumerated in the Federal Arbitration Act (FAA). This doctrine empowers courts to refuse to enforce awards that evince a “manifest disregard of the law,” understood to mean a willful defiance of clearly applicable law, not just garden-variety legal error. It has always been controversial for at least two reasons. First, it appears nowhere in the text of the FAA, owing its existence instead to dictum from the Supreme Court case of Wilko v. Swan, which has since been overturned on other grounds. Second, it opens the door to judicial review of the legal merits of arbitral awards, which modern arbitration law has long viewed as inimical to core process values such as efficiency and finality.

Is manifest disregard dead after Hall Street? In the past year, a state or federal court somewhere in the United States faced this question an average of

once a week. Commentators, too, have weighed in with gusto, helping to turn Hall Street into one of the most closely watched developments in arbitration circles today.

I wish to add a new perspective to this debate. I argue that Hall Street bears no implication whatsoever for manifest disregard (or, indeed, for any other judicially-crafted vacatur standard). To courts, practitioners, and scholars grappling with these issues in real time, I offer this Essay as an invitation to rethink the conventional wisdom about Hall Street.

THE HALL STREET BACKGROUND

The dispute in Hall Street involved a commercial lease between Mattel and its predecessors, as lessees, and Hall Street and its predecessors, as lessors. Hall Street filed suit, claiming that Mattel had (i) improperly terminated the lease and (ii) failed to comply with applicable environmental laws during the lease term. While the litigation was still pending in federal court, the parties entered into an agreement to arbitrate the second issue.

The arbitration agreement was noteworthy because it included a clause allowing the parties to seek judicial review of the arbitral award for plain legal errors. By contrast, the FAA’s vacatur standards bar courts from second-guessing the substantive correctness of arbitral awards, permitting review only for procedural irregularities that evince extreme or outrageous conduct, such as corruption or fraud by one of the parties or the arbitrators. By vesting the district court with the power to review the arbitrator’s award for ordinary mistakes of law, the arbitration agreement in Hall Street represented an attempt by the parties to contract around this clear mandate of the FAA.

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6. This estimate is based on a review of all state and federal court opinions (published and unpublished) in the WESTLAW database that (a) contained the terms “Hall Street” and “Manifest Disregard” and (b) considered—without necessarily deciding—the question.


9. Id. at 1400.

10. Id. at 1400–01.

At the time, there had been an unresolved circuit split regarding whether private parties were in fact entitled to alter the vacatur and modification grounds set forth in FAA sections 10 and 11, respectively. The Supreme Court granted certiorari in *Hall Street* in order to resolve this split, not to consider the manifest disregard doctrine.

The precise question presented by *Hall Street*’s petition for certiorari was whether “the Federal Arbitration Act (‘FAA’) precludes a federal court from enforcing the parties’ clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA.”

The Court answered this question in the affirmative: The FAA prohibits expanded judicial review through private ordering. In so doing, it concluded that FAA sections 10 and 11 set forth the “exclusive” standards for vacatur and modification of arbitral awards—a conclusion whose meaning is more complex than at first appears.

**Implications for Manifest Disregard**

The Court’s repeated and unequivocal declaration in *Hall Street* that sections 10 and 11 are “exclusive” raises a separate question that the Court did not squarely address but that now begs to be answered: If the FAA standards are “exclusive,” are judicially-crafted vacatur standards—which almost all circuits have recognized in the guise of “manifest disregard,” “completely irrational,” “against public policy,” or some other equivalent—no longer viable? Petitions for certiorari seeking review of this question with respect to manifest disregard have already been filed in four cases.

There are currently two broad schools of thought on the issue. The first is that *Hall Street* spells the end of manifest disregard and, by implication, any

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16. I exclude a third group of decisions that, curiously, apply the manifest disregard doctrine with little or no discussion of its continuing status as a common law or statutory standard after *Hall Street*. See, e.g., Qorvis Commun’ns, L.L.C. v. Wilson, 549 F.3d 303, 311–12 (4th Cir. 2008).
other non-statutory vacatur ground. This is the approach of the Fifth Circuit,\textsuperscript{17} district courts in the First\textsuperscript{18} and Eighth Circuits,\textsuperscript{19} some district courts in the Third Circuit,\textsuperscript{20} the Supreme Court of Alabama,\textsuperscript{21} and the Texas courts of appeal.\textsuperscript{22} The second is that manifest disregard survives \textit{Hall Street} but only when re-conceptualized as a figment of statute—a form of arbitral “misbehavior” or “exce[ss of] . . . power” within the meaning of section 10.\textsuperscript{23} This is the approach of the Second,\textsuperscript{24} Seventh,\textsuperscript{25} and Ninth Circuits,\textsuperscript{26} a district court in the Tenth Circuit,\textsuperscript{27} other district courts in the Third Circuit,\textsuperscript{28} the Delaware Court of Chancery,\textsuperscript{29} and a New York trial court.\textsuperscript{30}

\textsuperscript{17} See Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 357–58 (5th Cir. 2009).

\textsuperscript{18} See ALS & Assocs., Inc. v. AGM Marine Constructors, Inc., 557 F. Supp. 2d 180, 184 n.5, 185 (D. Mass. 2008). It is still unclear whether the First Circuit as a whole has embraced this position. Compare Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 (1st Cir. 2008) (stating in dictum that, after \textit{Hall Street}, “manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award”) with Kasher Davidson Sec. Corp. v. Mscisz, 531 F.3d 68, 74 (1st Cir. 2008) (describing manifest disregard as a valid, “common law” standard without any discussion of \textit{Hall Street}).

\textsuperscript{19} See Med. Shoppe Int’l, Inc. v. Simmonds, No. 4:08CV90 FRB, 2009 WL 367703, at *3 (E.D. Mo. Feb. 11, 2009); Prime Therapeutics, L.L.C. v. Omnicare, Inc., 555 F. Supp. 2d 993, 999 (D. Minn. 2008). The Eighth Circuit’s position on the issue remains unclear. See Crawford Group, Inc. v. Holekamp, 543 F.3d 971, 976 (8th Cir. 2008) (stating, in a case that did not involve manifest disregard, that vacatur is available “only for the reasons enumerated in the FAA”).


\textsuperscript{25} Even prior to \textit{Hall Street}, the Seventh Circuit had reinterpreted manifest disregard as a statutory, rather than a common law, doctrine. See George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 581 (7th Cir. 2001) (Easterbrook, J.).

\textsuperscript{26} See Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1283 (9th Cir. 2009).

Regardless of which interpretation they adopt, however, almost all courts and commentators make one common assumption: *Hall Street*’s holding that the FAA grounds are “exclusive” means that henceforth, courts may refer only to those grounds when vacating arbitral awards in cases governed by the FAA. I shall refer to this as the “exclusivity thesis.” The exclusivity thesis, as one court put it, is “undeniably inconsistent” with the continued viability of independent, judicially-created vacatur standards. But the thesis is also mistaken.

I propose a third way to interpret *Hall Street*, one that rejects the exclusivity thesis and leaves manifest disregard and other common-law vacatur standards fully intact. I start with the proposition that the Court’s pronouncements about the exclusiveness of section 10 cannot be read in isolation; instead, they must be understood in the context of the opinion as a whole and the lower court opinions to which it was responding. When the Court’s position is properly situated in those contexts, it becomes evident that the Court did not intend to unravel settled jurisprudence in this area in one fell swoop.

**CLEANING UP THE MESS: WHAT THE COURT REALLY MEANT BY SAYING THAT THE FAA VACATUR GROUNDS WERE “EXCLUSIVE”**

In its unpublished decision in *Coffee Beanery, Ltd. v. WW, L.L.C.*, the Sixth Circuit staked out the beginnings of the argument I develop here: The High Court’s holding that the FAA’s vacatur standards are “exclusive” should be interpreted to mean only that such standards cannot be expanded by private contract.

The clearest support for this argument is the Court’s discussion of the circuit split that formed the basis of Hall Street’s petition for certiorari. The Court described this split as a disagreement over whether FAA sections 10 and 11 “are exclusive . . . [or] mere threshold provisions open to expansion by

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31. 548 F.3d at 94.
32. 300 F. App’x. at 418–19.
agreement [of the parties].”

Dubbing it (again) a “split over the exclusiveness of these statutory grounds,” the Court elaborated as follows: “The Ninth and Tenth Circuits have held that parties may not contract for expanded judicial review. The First, Third, Fifth, and Sixth Circuits, meanwhile, have held that parties may so contract.”

Significantly, these circuit courts were not split on the question of whether the FAA precluded judge-made vacatur doctrines. Except the Seventh and Ninth Circuits, all of these circuits had recognized manifest disregard as a bona fide, common law vacatur standard. They were split—and understood themselves to be split—solely on the question of whether federal courts can be bound by private agreements to alter the FAA’s standards for vacatur and modification. The Court’s use of the term “exclusive” on the heels of this discussion must be understood in this light.

But if parties are no longer allowed to tinker with section 10 after Hall Street, why should judges continue to enjoy that privilege? Although the answer to this question was notably absent from the Court’s opinion, it runs through all of the anti-expansion opinions cited by the Court. The explanation goes something like this: It is one thing for courts to fashion their own vacatur standards as a safety-valve on the integrity of their enforcement powers. It is quite another for litigants to decide through private ordering how Article III judges should review arbitral awards. As the Court noted, “private expansion by contract” and “judicial expansion by interpretation” are analytically distinct. This is why, in Bowen v. Amoco Pipeline Company (cited approvingly by the Court), the Tenth Circuit found no problem reviewing an arbitral award under what it referred to as the “judicially crafted” manifest disregard

35. Id. at 1403 & n.5 (citations omitted).
36. Prior to Hall Street, the Ninth Circuit appears to have joined the Seventh Circuit in concluding that “arbitrators ‘exceed their powers’ [under section 10(a)(4)] . . . when the award . . . exhibits a ‘manifest disregard of law.’” Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 997 (9th Cir. 2003) (en banc) (citing Todd Shipyards Corp. v. Cunard Line Ltd., 943 F.2d 1056, 1059–60 (9th Cir. 1991)).
38. See 128 S. Ct. at 1403.
40. See 128 S. Ct. at 1404.
standard even while concluding, like *Hall Street*, that the FAA prohibits parties from contracting around section 10.\textsuperscript{42} My interpretation of *Hall Street* is buttressed by the fact that in every other instance where the Court refers to the FAA vacatur standards as “exclusive,” it is in the context of considering whether private parties can expand those standards, not whether those standards may be supplemented by the courts. Let’s consider each instance in turn:

In the very first paragraph of the opinion, the Court stated: “The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive.”\textsuperscript{43} Next, the Court stated: “[W]e granted certiorari to decide whether the [FAA] grounds for vacatur and modification . . . are exclusive. We agree with the Ninth Circuit that they are.”\textsuperscript{44} The question on certiorari, however, was not whether those grounds were “exclusive” in the abstract but “[whether] the Federal Arbitration Act (“FAA”) precludes . . . the parties’ clearly expressed agreement providing for more expansive judicial review.”\textsuperscript{45} Indeed, the Ninth Circuit opinion with which the Court expressed “agree[ment]” held only that “federal jurisdiction [to review arbitral awards for plain legal errors] cannot be created by contract,”\textsuperscript{46} not that sections 10 and 11 were “exclusive” in the broad sense.

Third, in response to the narrow question of “whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration,”\textsuperscript{47} the Court held: “To that particular question, we think the answer is yes, that the text compels a reading of the §§10 and 11 categories as exclusive.”\textsuperscript{48} Finally, in what is perhaps the clearest statement in support of this interpretation, the Court declared: “In holding that §§10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well.”\textsuperscript{49}

\begin{itemize}
  \item \textsuperscript{42} *Id.* at 932, 936.
  \item \textsuperscript{43} 128 S. Ct. at 1400.
  \item \textsuperscript{44} *Id.* at 1401.
  \item \textsuperscript{46} 341 F.3d at 999.
  \item \textsuperscript{47} 128 S. Ct. at 1404.
  \item \textsuperscript{48} *Id.* (emphasis added).
  \item \textsuperscript{49} *Id.* at 1406.
\end{itemize}
ADDRESSING THE COUNTERARGUMENTS

Lower courts and commentators who buy into the exclusivity thesis find comfort in the Court’s observation that the FAA vacatur scheme shows “no hint of flexibility”: Judges “must grant” an order to confirm an arbitral award unless one of the section 10 or 11 grounds applies. “There is nothing malleable about ‘must grant,’” the justices reasoned.\textsuperscript{50} For it “unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies.”\textsuperscript{51}

But the key to understanding these remarks lies in the often overlooked next sentence: “This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.”\textsuperscript{52} In other words, the Court’s comments about the FAA’s textual intransigence were all directed toward explaining that sections 10 and 11 are not default rules around which private parties are free to contract. An example of a default rule is FAA section 5, which provides rules for choosing arbitrators “if no method be provided [by the parties’ agreement].”\textsuperscript{53} But as the Court noted, “[i]f no method be provided’ is a far cry from ‘must grant . . . unless.”\textsuperscript{54} So understood, the Court’s remarks bear no necessary implication for judge-made doctrines.

Similarly, the Court’s observation that there is “no textual hook for expansion” of the section 10 standards and that it would “stretch basic interpretive principles”\textsuperscript{55} to do so must also be read in context. Instead of proving the exclusivity thesis, these comments merely establish that section 10 prohibits the sort of “general review for an arbitrator’s legal errors” contemplated by the arbitration agreement between Hall Street and Mattel.\textsuperscript{56} By “open[ing] the door to . . . full-bore legal and evidentiary appeals,” such review would undermine the FAA’s fundamental purpose of providing only the “limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”\textsuperscript{57}

By contrast, none of the existing, judicially-created doctrines allows a court to vacate arbitral awards simply because the arbitrators make ordinary mistakes

\textsuperscript{50} See id. at 1405.
\textsuperscript{51} Id.
\textsuperscript{52} Id. (emphasis added).
\textsuperscript{54} Id.; see also Transcript of Oral Argument at 29–31, Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396 (No. 06–989) (Nov. 7, 2007) [hereinafter Transcript].
\textsuperscript{55} 128 S. Ct. at 1404.
\textsuperscript{56} Id.; see also Transcript at 32–33, 37, 43–44, 54.
\textsuperscript{57} 128 S. Ct. at 1405.
of law. Instead, each is directed to what the Court referred to as “egregious
departures” or “extreme arbitral conduct.”58 This is a further reason why, I
argue, they are completely untouched by the Court’s holding.

If the Court had truly intended to abrogate judicially created vacatur
doctrines, it could easily have done so at numerous points in its opinion. For
example, it could have held that parties are not entitled to contract for legal
error review because not even judges are entitled to look beyond the statute for
additional vacatur grounds. It could have clarified the true meaning of the
notoriously oblique dictum in Wilko, from which the manifest disregard
doctrine was derived.59 And it could have repudiated the manifest disregard
standard outright. But it did none of those things. Instead, it displayed a
studied agnosticism about manifest disregard: “Maybe [Wilko’s use of] the
term ‘manifest disregard’ was meant to name a new ground for review, but
maybe it merely referred to the § 10 grounds collectively. . . . [W]e have merely
taken the Wilko language as we found it, without embellishment.”60 The
thrust of these passages is that even if Wilko provides authority for the manifest
disregard standard, it certainly does not do so for ordinary legal error review or
private agreements for expanded review.61

Simply put, the Court did not need to take a position on the exclusivity
thesis in order to dispose of Hall Street’s appeal. The exclusivity thesis was not
even properly before the Court, as there was no circuit split or any other reason
for the Justices to consider it.62 All the Court needed to do in order to reach its
conclusion was to find that the FAA vacatur grounds are “exclusive” in the

58. Id. at 1404 (2008); see also Bear, Stearns & Co. v. 1109580 Ontario, Inc., 409 F.3d 87, 91 (2d
Cir. 2005).
60. 128 S. Ct. at 1404.
61. See 128 S. Ct. at 1404; 346 U.S. at 436–37 (“[T]he erroneous interpretations of the law by
the arbitrators . . . are not subject . . . to judicial review for error.”).
62. Prior to Hall Street, manifest disregard was an established common law doctrine in almost
every circuit. Compare Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 353 n.3 (3rd Cir.
2009) (collecting manifest disregard cases from every circuit except the Seventh) with supra
note 36.

In 2006, the Court rejected a petition for certiorari seeking review of whether the “text,
structure, and history of the FAA . . . foreclose the possibility of judicially created,
nonstatutory merits-based grounds for vacating arbitration awards.” Petition for Writ of
(No. 06–49). The petition was denied without dissent, suggesting that just two years
before Hall Street, the viability of manifest disregard was not compelling enough for the
in the law of manifest disregard had changed between 2006 and the Court’s Hall Street
opinion.
sense that they exclude private parties from altering them by contract. And that, according to my interpretation, is exactly what it did.

**WHY DOES IT MATTER IF MANIFEST DISREGARD IS A CREATURE OF STATUTE OR COMMON LAW?**

If the exclusivity thesis is flawed, it raises serious doubts about decisions of the Fifth Circuit and other lower courts that manifest disregard is now defunct.\(^{63}\) It also calls into question the other side of the debate led by the Second and Ninth Circuits,\(^ {64}\) which unnecessarily reinvents manifest disregard as a creature of statute.

Unlike the former, the latter approach keeps manifest disregard alive and therefore does not appear to change the *status quo*. If this “statutory manifest disregard” approach results in the same basic outcome as my interpretation of *Hall Street*, why bother with my interpretation at all? There are at least four reasons.

First, the statutory manifest disregard solution is implausible. With one or two exceptions, courts have always understood manifest disregard to be a creature of case law\(^ {65}\) and, moreover, as analytically distinct from any of the FAA vacatur grounds.\(^ {66}\) In 1995, the Supreme Court lent support to these understandings by citing to *Wilko* rather than section 10 as authority for the manifest disregard standard (even though *Wilko* had already been overruled on other grounds by that time).\(^ {67}\) If the doctrine had always been staring back at us from within the four corners of the statute, it is difficult to appreciate why courts should have found it necessary to rely on the flimsy reed of *Wilko* to justify its existence.

Second, manifest disregard as we know it does not work as a statutory doctrine. In the vast majority of circuits, arbitrators manifestly disregard the law when they correctly apprehend clearly-governing law yet willfully disobey it.\(^ {68}\) Courts adopting the statutory approach in the wake of *Hall Street* have most often sought to shoehorn this standard into FAA section 10(a)(3) or 10(a)(4). Neither section, however, proves a plausible fit.

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63. *See supra* notes 17–22 and accompanying text.
64. *See supra* notes 24–30 and accompanying text.
To some, manifest disregard is essentially a species of “untoward arbitral behavior” rather than an instance of erroneous legal reasoning. So viewed, the doctrine arguably falls within section 10(a)(3)’s prohibition on arbitral “misconduct” or “misbehavior.” Although there is certainly an overlap between 10(a)(3) and manifest disregard, the problem is that not all instances of the latter can be reduced to the former. Section 10(a)(3) penalizes not just any type of misconduct but rather misconduct that is specifically procedural in nature, such as failing to grant a fair hearing or to consider relevant evidence. It has accordingly been described as safeguarding a sort of arbitral “due process.” By contrast, the scope of manifest disregard is broader, encompassing both procedural and substantive misconduct.

A more likely home for manifest disregard may be section 10(a)(4), which provides for vacatur where the arbitrators “exceeded their powers.” The theory here is that, all things equal, no reasonable party can be assumed to grant arbitrators the power to ignore clearly applicable law. But this, too, confuses a mere overlap with a logical implication. Arbitrators are not bound by the law or rules of evidence and may rely on other grounds for decision, such as industry custom. Moreover, parties often agree to arbitrate precisely because they desire a streamlined process that emphasizes efficiency and the preservation of business relationships over technical fidelity to the law. Unless the arbitration agreement specifically requires the tribunal to follow the law, therefore, it is difficult to perceive how manifest disregard is always or necessarily a transgression of arbitral authority.

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69. See id. at 137.
70. See id.
74. See Stephen J. Ware, Default Rules From Mandatory Rules: Privatizing Law Through Arbitration, 83 MINN. L. REV. 703, 721 (1999). In fact, the term “manifest disregard” originally may have been understood not to police situations where the arbitrators purposefully choose a pragmatic or equitable solution over the correct legal result. See Drahozal, supra note 66, at 242.
Third, the statutory approach invites doctrinal complications. One such complication may arise because courts have largely continued to use pre-\textit{Hall Street} manifest disregard precedents without questioning whether they are appropriate in a statutory manifest disregard regime.\textsuperscript{76} By contrast, when it adopted the statutory approach well before \textit{Hall Street}, the Seventh Circuit found it had to first “narrow[]” the common law doctrine in order to “fit[] comfortably under [section 10(a)(4)].”\textsuperscript{77} In formulating a manifest disregard test faithful to the statutory language, Judge Frank Easterbrook reasoned that arbitrators betray a manifest disregard of the law only when they exceed the bounds of their legal (and not just their party-given) authority—that is, when their award “requir[es] the parties to violate the law” or “does not adhere to the legal principles specified by [the parties’] contract.”\textsuperscript{78} Thus, quite unlike the rule in other circuits, in the Seventh Circuit willful indifference to clearly applicable law, without more, does not establish manifest disregard.

In the past, this discrepancy could be tolerated on the ground that the Seventh Circuit’s statutory approach was idiosyncratic.\textsuperscript{79} But now that other courts are adopting this very same approach in the wake of \textit{Hall Street}, it will force a consideration of whether the majority’s test should be changed to conform with that of the Seventh Circuit (or vice versa) and, if so, how.

Another complication has to do with international law. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention)\textsuperscript{80} sets forth seven exclusive grounds for refusing to enforce international arbitration awards. Manifest disregard is not one of them, and the weight of authority holds that the doctrine cannot be read into those grounds.\textsuperscript{81} But a different result might obtain if manifest disregard comes to

\textsuperscript{76} See, e.g., Cockerham v. Sound Ford, Inc., No. 08–35567, 2009 WL 1975426, at *2 (9th Cir. Jun. 4, 2009) (continuing to apply the common law test after adoption of the statutory manifest disregard approach); \textit{Stolt-Nielsen SA}, 548 F.3d at 95.

\textsuperscript{77} Wise v. Wachovia Securities, Inc., 450 F.3d 265, 268 (7th Cir. 2006).

\textsuperscript{78} 248 F.3d at 581; \textit{accord Halim v. Great Gatsby’s Auction Gallery, Inc.}, 516 F.3d 557, 563 (7th Cir. 2008).

\textsuperscript{79} At the time that test was first articulated, Judge Ann Claire Williams described it as effecting a “significant change” in Seventh Circuit law and as “conflict[ing] with th[e] precedent[s]” of every other circuit. 248 F.3d at 582 (Williams, J. concurring). Much of what counts as manifest disregard in other circuits does not appear to satisfy the Seventh Circuit test. Cf. 450 F.3d at 269 (noting that an award based on the complete absence of evidence “does not fit our narrow concept of ‘manifest disregard,’ though it may that of other courts”).


\textsuperscript{81} See, e.g., Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997). But see id. at 21 (noting that, pursuant to Article V(1)(e), U.S. courts may apply FAA vacatur standards, including manifest disregard, when reviewing nondomestic awards).
be seen as just another term for the excess of arbitral power proscribed by section 10(a)(4). Like section 10(a)(4), Article V(1)(c) of the Convention allows courts to refuse enforcement of awards that go “beyond the scope of the submission to arbitration.” Indeed, the two provisions have been interpreted as interchangeable. If the statutory manifest disregard approach gains traction, it will become increasingly difficult for U.S. courts to justify their traditional refusal to apply the manifest disregard standard to awards rendered in, or under the law of, a foreign jurisdiction. This, in turn, will risk putting the United States in tension with other signatories to the Convention, none of whom has recognized manifest disregard as a ground for refusing to enforce foreign Convention awards.

Finally, and perhaps most importantly, by endorsing the exclusivity thesis, the statutory approach does not just signal a change for manifest disregard. It also calls into question the continued viability of other judicially created grounds for vacatur, such as the “completely erroneous,” “arbitrary and capricious,” and perhaps even the “violation of public policy” standards. As many other scholars have already argued, these standards are not adequately captured by section 10. Together they provide courts with important breathing space to refuse enforcement of grossly unconscionable and repugnant awards, the likes of which were not (or could not have been) presaged in the statute. When properly limited, they serve as an important check on the legitimacy of the arbitration process. My interpretation leaves all of these checks intact.

**Conclusion: Like it or Hate it, Leave it Alone (For Now)**

On the narrow reading of *Hall Street* that I propose, the FAA section 10 standards are “exclusive” in the sense that private parties may not change or expand them by contract. Such a holding is fully consistent with the continued vitality of judicially-created vacatur doctrines. Whether they conclude that manifest disregard has been left for dead or born again in the flesh of section 10, the vast majority of courts and commentators have managed to overlook this crucial point by lifting passages from *Hall Street* out of context.

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82. New York Convention, art. V, § (1), cl. c.
84. See supra note 14 and accompanying text.
My purpose in this Essay was not to take a normative position on manifest disregard. Like Judge Richard Posner and many others, I happen to believe that manifest disregard rests on a highly dubious doctrinal footing. But despite its shaky origins, the doctrine has come to assume a settled place among the furniture of U.S. arbitration law and the expectations of arbitration practitioners.

All of this may change if the Court grants certiorari in one of the four cases that have asked it to clarify the meaning of Hall Street and the status of manifest disregard. At the merits stage, of course, the Court would not be limited to choosing sides in the binary debate about Hall Street that is beginning to ossify within the circuits. I hope this Essay will help the Court chart a sensible third course, one that does not treat the exclusivity thesis as a foregone conclusion but rather interrogates the thesis before accepting it. In the meantime, I urge judges facing these questions to reconsider Hall Street in its proper context before jumping headlong into the fray.

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