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HIRO N. ARAGAKI

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.*,[1] 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).[2] 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.[3] 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*,[4] 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.[5]

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

1. Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396 (2008).

2. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16, 201–208 (2006)).

3. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933–34 (2d Cir. 1986).

4. Wilko v. Swan, 346 U.S. 427 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

5. *See, e.g.*, IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 16 (1992).

once a week.[6] Commentators, too, have weighed in with gusto, helping to turn *Hall Street* into one of the most closely watched developments in arbitration circles today.[7]

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.[8] While the litigation was still pending in federal court, the parties entered into an agreement to arbitrate the second issue.[9]

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.[10] 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.[11] 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.

7. *See, e.g.*, Russ Bleemer, *The Calm and the Storm: Arbitration Experts Speak Out on* Hall Street Associates, 26 ALTERNATIVES TO HIGH COST LITIG. 104 (2008) [hereinafter *The Calm and the Storm*] (excerpting the views of leading practitioners, ADR providers, and academics on *Hall Street*). The *American Review of International Arbitration* devoted a special section to the *Hall Street* decision that included commentary from prominent academics and practitioners in the ADR field. *See Special Section*, *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 17 AM. REV. INT'L ARB. 469 (2008) (featuring commentary by Mark Beckett, Alan Scott Rau, David W. Rivkin, Hans Smit, and Eric P. Tuchmann).

8. Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1400–01 (2008).

9. *Id.* at 1400.

10. *Id.* at 1400–01.

11. *See* 9 U.S.C. § 10(a)(1)–(2) (2006).

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."[12]

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"[13] 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[14]—no longer viable? Petitions for certiorari seeking review of this question with respect to manifest disregard have already been filed in four cases.[15]

There are currently two broad schools of thought on the issue.[16] The first is that *Hall Street* spells the end of manifest disregard and, by implication, any

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12. Petition for Writ of Certiorari at i, Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396 (2008) (Jan. 12, 2007) (No. 06–989).

13. *See* 128 S. Ct. 1396, 1400, 1401, 1403, 1404, 1406.

14. *See, e.g.*, B.L. Harbert Int'l, L.L.C. v. Hercules Steel Co., 441 F.3d 905, 910 (11th Cir. 2006); Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752, 757 (5th Cir. 1999).

15. *See* Petition for Writ of Certiorari, Hoffman v. Jonesfilm, 2009 WL 1806225 (June 23, 2009) (No. 08–1572); Petition for Writ of Certiorari, Comedy Club v. Improv W. Assocs., Inc., 553 F.3d 1277 (June 8, 2009); Petition for Writ of Certiorari, Grain v. Trinity Health, 551 F.3d 374 (2008) (May 19, 2009) (No. 08–1446); Petition for Writ of Certiorari, Coffee Beanery, Ltd. v. WW, L.L.C., 300 F. App'x 415 (2008) (May 11, 2009) (No. 08–1396).

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 Comm'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,[17] district courts in the First[18] and Eighth Circuits,[19] some district courts in the Third Circuit,[20] the Supreme Court of Alabama,[21] and the Texas courts of appeal.[22] The second is that manifest disregard survives *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.[23] This is the approach of the Second,[24] Seventh,[25] and Ninth Circuits,[26] a district court in the Tenth Circuit,[27] other district courts in the Third Circuit,[28] the Delaware Court of Chancery,[29] and a New York trial court.[30]

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

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 *Hall Street*, "manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award") *with* Kashner 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 *Hall Street*).

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").

20. *See* Martik Bros., Inc. v. Kiebler Slippery Rock, L.L.C., No. 08CV1756, 2009 WL 1065893, at *2 n.2 (W.D. Pa. Apr. 20, 2009); Southco, Inc. v. Reell Precision Mfg. Corp., 556 F. Supp. 2d 505, 509–10 (E.D. Pa. 2008). *But see infra* note 28 and accompanying text.

21. Hereford v. D.R. Horton, Inc., No. 1070396, 2009 WL 104666, at *5, *5 n.1 (Ala. Jan. 9, 2009) (applying federal arbitration law).

22. *See* Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc., No. 05–08–00739, 2009 WL 2596120, at *5 (Tex. App. (Dallas) Aug. 25, 2009); Allstyle Coil Co. v. Carreon, No. 01–07–00790–CV, 2009 WL 1270411, at *2 (Tex. App. (Houston) May 7, 2009) (applying federal arbitration law); Chandler v. Ford Motor Credit Co., L.L.C., No. 04–08–00100–CV, 2009 WL 538401, at *3 (Tex. App. (San Antonio) Mar. 4, 2009) (applying federal arbitration law). *But see* Xtria L.L.C. v. Int'l Ins. Alliance Inc., 286 S.W.3d 583, 594 (Tex. App. (Texarkana) 2009) (applying federal arbitration law).

23. *See, e.g.*, 9 U.S.C. § 10(a)(3)–(a)(4) (2006).

24. *See* Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94–95 (2d Cir. 2008). *But see* Vaughn v. Leeds, Morelli & Brown, P.C., 315 F. App'x. 327, 330 (2d. Cir. 2009) (describing manifest disregard as a "common law" doctrine even after *Hall Street*).

25. Even prior to *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.).

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

27. *See* Abbott v. Mulligan, No. 2:06–CV–593, 2009 WL 2497386, at *4 (D. Utah Aug. 13, 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.[31] 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.*,[32] 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.[33]

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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28. *See, e.g.*, Vitarroz Corp. v. G. Willi Food Int'l Ltd., No. 05–5363, 2009 WL 1844293, at*5 (D.N.J. June 26, 2009). *But see supra* note 20 and accompanying text.

29. *See* TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc., 953 A.2d 726, 732 (Del. Ch. 2008) (applying federal arbitration law).

30. *See* Chase Bank USA, N.A. v. Hale, 859 N.Y.S.2d 342, 348–49 (N.Y. Sup. Ct. 2008) (applying federal arbitration law).

31. 548 F.3d at 94.

32. 300 F. App'x. at 418–19.

33. *Accord* DMA Int'l, Inc. v. Qwest Commc'ns Int'l, No. 08–CV–00358–WDM–BND, 2008 WL 4216261, at *4 (D. Colo. Sept. 12, 2008). In a subsequent decision, however, the Sixth Circuit appears to have retreated from its conclusion in *Coffee Beanery*. *See* Grain v. Trinity Health, Mercy Health Servs. Inc., 551 F.3d 374, 380 (6th Cir. 2008).

agreement [of the parties]."[34] 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."[35]

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,[36] 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.[37] The Court's use of the term "exclusive" on the heels of this discussion must be understood in this light.[38]

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.[39] As the Court noted, "private expansion by contract" and "judicial expansion by interpretation" are analytically distinct.[40] This is why, in *Bowen v. Amoco Pipeline Company* (cited approvingly by the Court),[41] the Tenth Circuit found no problem reviewing an arbitral award under what it referred to as the "judicially crafted" manifest disregard

34. Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1403 (2008).

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)).

37. *Compare Kyocera*, 341 F.3d at 1000 *with* Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 31 (1st Cir. 2005).

38. *See* 128 S. Ct. at 1403.

39. 341 F.3d at 1000; UCH Mgmt. Co. v. Computer Sci. Corp., 148 F.3d 992, 997–98 (8th Cir. 1998).

40. *See* 128 S. Ct. at 1404.

41. Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001).

standard even while concluding, like *Hall Street*, that the FAA prohibits parties from contracting around section 10.[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."[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."[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."[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,"[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,"[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."[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."[49]

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42. *Id.* at 932, 936.

43. 128 S. Ct. at 1400.

44. *Id.* at 1401.

45. Petition for Writ of Certiorari at i, Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396 (2008) (Jan. 12, 2007) (No. 06–989).

46. 341 F.3d at 999.

47. 128 S. Ct. at 1404.

48. *Id.* (emphasis added).

49. *Id.* at 1406.

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.[50] For it "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies."[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."[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]."[53] But as the Court noted, "'[i]f no method be provided' is a far cry from 'must grant . . . unless.'"[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"[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.[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."[57]

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

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50. *See id.* at 1405.

51. *Id.*

52. *Id.* (emphasis added).

53. 9 U.S.C. § 5 (2006).

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].

55. 128 S. Ct. at 1404.

56. *Id.*; *see also* Transcript at 32–33, 37, 43–44, 54.

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. . . . [We] 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

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58. *Id.* at 1404 (2008); *see also* Bear, Stearns & Co. v. 1109580 Ontario, Inc., 409 F.3d 87, 91 (2d Cir. 2005).

59. *See, e.g.*, 346 U.S. at 436–37.

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 (5th 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 Certiorari at 22, John Hancock Life Ins. Co. v. Patten, 2006 WL 1910198 (July 10, 2006) (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 Court to review. *See* Signator Ins. Agency, Inc. v. Patten, 549 U.S. 975, 975 (2006). Nothing 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.

65. *See supra* note 62; Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 239–40 (2007).

66. *See* Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003).

67. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

68. *See, e.g.*, Stephen L. Hayford, *Reining In the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 124–25.

To some, manifest disregard is essentially a species of "untoward arbitral behavior"[69] 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."[70] 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."[71] 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.[72] 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.[73] 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.[74] 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.[75]

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69. *See id.* at 137.

70. *See id.*

71. *See* Joel H. Samuels & Jan Kleinheisterkamp, *The Impact of Uniform Law on National Law: Limits and Possibilities*, National Report for the United States for the 1st Intermediate Congress of the International Academy of Comparative Law on Commercial Arbitration (Mexico 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1394223.

72. *See* Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 95 (2d Cir. 2008); 4 IAN R. MACNEIL ET AL, FEDERAL ARBITRATION LAW § 40.1.3.2 (3d ed. 1999).

73. *See, e.g.*, Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 59 & n.39 (1997).

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.

75. *See* Coors Brewing Co. v. Cabo, 114 P.3d 60, 64 (Colo. Ct. App. 2004) (interpreting the Colorado equivalent of section 10(a)(4)); Progressive Data Sys., Inc. v. Jefferson Randolph Corp., 568 S.E.2d 474, 475 (Ga. 2002) (interpreting the Georgia equivalent of section 10(a)(4)).

Third, the statutory approach invites doctrinal complications. One such complication may arise because courts have largely continued to use pre-*Hall Street* manifest disregard precedents without questioning whether they are appropriate in a statutory manifest disregard regime.[76] By contrast, when it adopted the statutory approach well before *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)]."[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."[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.[79] But now that other courts are adopting this very same approach in the wake of *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)[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.[81] But a different result might obtain if manifest disregard comes to

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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); *Stolt-Nielsen SA*, 548 F.3d at 95.

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

78. 248 F.3d at 581; *accord* Halim v. Great Gatsby's Auction Gallery, Inc., 516 F.3d 557, 563 (7th Cir. 2008).

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").

80. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3, *reprinted at* 9 U.S.C. §§ 201–08 (2006) [hereinafter New York Convention].

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."[82] Indeed, the two provisions have been interpreted as interchangeable.[83] 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.[84] As many other scholars have already argued, these standards are not adequately captured by section 10.[85] 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.

83. *See, e.g.*, Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 481 (7th Cir. 1997). *But see* Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 92 (2d Cir. 2005).

84. *See supra* note 14 and accompanying text.

85. *See, e.g.*, statement of Sarah Rudolph Cole, in *The Calm and the Storm*, *supra* note 7, at 108; Richard C. Reuben, *Personal Autonomy and Vacatur After* Hall Street, 113 PENN ST. L. REV. 1103, 1141 (2009).

My purpose in this Essay was not to take a normative position on manifest disregard. Like Judge Richard Posner and many others,[86] 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.[87]

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.

Hiro N. Aragaki is Assistant Professor of Legal & Ethical Studies, Fordham University Graduate School of Business. *Thanks to Bob Bailey, Kenneth Davis, James Madison, Frank E.A. Sander, and Jason Yackee for very helpful comments.*

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86. *See* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994) (Posner, J.); Drahozal, *supra* note 66, at 238; Stephen L. Hayford, *Reining In the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 815.

87. Empirical studies suggest that, more than most other grounds, manifest disregard is consistently and frequently (albeit rarely successfully) asserted as a basis for vacatur. *See, e.g*, Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 189–90 (2008); Lawrence R. Mills, et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23.