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# Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard

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

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### Summary

Arbitration is supposed to be final and binding. But federal and state laws, and judicial doctrines, allow courts to vacate arbitrator awards. This study contemplates the role of courts when they review awards that “manifestly disregard the law”—a term that means the arbitrator knew the law but chose to ignore it. Given the norm of arbitral finality, should courts vacate these rulings?

*Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008), failed to answer this question. The parties asked a court to review their award for errors of law. This standard is not in the Federal Arbitration Act (FAA). *Hall Street* ruled that courts cannot review awards beyond the FAA’s express terms. The parties’ standard prompted *Hall Street* to ask whether courts may apply “manifest disregard of the law,” even though it is not in the FAA. Inscrutably, *Hall Street* answered: “Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the [FAA’s] § 10 grounds collectively, rather than adding to them.”

I analyze “manifest disregard” by using historical and empirical methods. Common law courts vacated awards for “fraud,” “corruption,” “partiality,” or if arbitrators “exceeded powers.” The FAA enumerates these as grounds to vacate awards. In the same sequence with these terms, nineteenth century courts vacated awards for “manifest mistake” or “palpable mistake” of the law. I contend that Congress inadvertently omitted “manifest disregard” from the FAA. To answer *Hall Street*’s equivocation: “Manifest disregard of the law” is part of the FAA.

This sets the stage for my empirical question: Has *Hall Street* led courts to confirm more awards, thus promoting finality? The answer is yes. In 46.4% of federal cases and 21.8% of state cases, parties in my database argued that an award manifestly disregarded the law. Still, state appellate courts confirmed more employment awards after *Hall Street* was decided on March 3, 2008—88.9% (16/18), compared to 70.9% (73/103) from 1975 until *Hall Street*. Federal district courts confirmed 93.7% of awards (164/175) before *Hall Street*, and 90.9% (30/33) after. Federal appeals courts confirmed awards at a high rate before and after *Hall Street* (87.8% and 85.7%).

Unfortunately, *Hall Street*’s muddled analysis has split federal circuits. The Fifth and Eleventh Circuits ruled that *Hall Street* ended “manifest disregard,” but the Second, Sixth, and Ninth Circuits still treat it as part of the FAA. The First, Third, Fourth, and Tenth Circuits avoided ruling on the standard. In addition, state courts have differed in their reactions to *Hall Street*.

This fractured approach implies that the Supreme Court may reconsider its vague treatment of “manifest disregard.” The Court should affirm this standard. My findings show that review for “manifest disregard” does not erode finality. The standard translates to nanoscale review of awards. As one court put it: “There is . . . a way to understand ‘manifest disregard of the law’ that preserves the established relation between court and arbitrator. . . . It is this: an arbitrator may not direct the parties to violate the law.” Judges have applied this concept for two centuries to ensure that private tribunals conform to the laws. This rationale is particularly relevant because so much arbitration has changed from a voluntary to mandatory process. Judicial review must be allowed to correct an arbitrator’s intentional flouting of the law. If “manifest disregard” is eliminated, arbitral finality will rise above the crowning principle of the American constitutional system: “No man in this country is so high that he is above the law.” (*U.S. v. Lee*, 106 U.S. 196, 220 (1882)).

TABLE OF CONTENTS

I. INTRODUCTION . . . . . 1

*A. Empirical Research Question: Has Hall Street Improved Finality in Awards? . . . . . 1*

*B. Background: The Growing Intersection of Statutory Law and Employment Arbitration. . . . . 4*

*C. Organization of this Article . . . . . 6*

II. THE ENIGMATIC ORIGINS OF THE “MANIFEST DISREGARD OF THE LAW” STANDARD . . . . . 8

*A. Judicial Precursors to the Manifest Disregard Standard . . . . . 9*

*B. Legislative Standards for Judicial Review of Awards. . . . . 16*

III. THE MODERN DERIVATION OF THE MANIFEST DISREGARD STANDARD . . . . . 21

*A. The Supreme Court’s Ambiguous Adoption of the Manifest Disregard Standard. . . . . 21*

*B. Birth of the Manifest Disregard Standard in the Federal Courts of Appeals. . . . . 23*

*C. Some States Adopt the Manifest Disregard Standard. . . . . 33*

IV. *HALL STREET* AND THE MANIFEST DISREGARD STANDARD. . . . . 36

*A. Hall Street Limits Judicial Review of Awards to FAA Standards . . . . . 36*

*B. The End of Non-Statutory Review of Awards under the FAA: Questions and Implications. . . . . 39*

V. DO COURTS CONFIRM MORE AWARDS FOLLOWING *HALL STREET*? . . . . . 43

*A. Sampling Method . . . . . 43*

*B. Empirical Research Findings. . . . . 44*

*C. Cases After Hall Street. . . . . 46*

VI. CONCLUSIONS AND IMPLICATIONS . . . . . 48

## I. INTRODUCTION

A. Empirical Research Question: Has Hall Street Improved Finality in Arbitration?

As an alternative to litigation, arbitration is final and binding.<sup>1</sup> But this is misleading. Federal and state laws define standards for courts to review and vacate awards.<sup>2</sup> Common law doctrines provide non-statutory avenues to prevent awards from becoming binding.<sup>3</sup> This study contemplates the role of courts when they review awards that “manifestly disregard the law”— a term that means the arbitrator knew the law but deliberately ignored it. When judges review awards too closely, they undermine finality.<sup>4</sup> But when a judge confirms an award in which the arbitrator flouts the law, does the finality rule put the arbitrator above the law?

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<sup>1</sup> See the Supreme Court’s pronouncement in 1854 in *Burchell*, *infra* note 77, at 349 (“Arbitrators are judges chosen by the parties to decide matters submitted to them, finally and without appeal.”). Current authority includes *DMA Int’l, Inc. v. Qwest Communications Intern., Inc.*, 585 F.3d 1341, 1344 (10<sup>th</sup> Cir. 2009) (“Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances.”); *St. John’s Mercy Medical Center v. Delfino*, 414 F.3d 882, 884 (8<sup>th</sup> Cir. 2005) (there is a “strong federal policy favoring certainty and finality in arbitration”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 Fed.Appx. 243, \*3 (6<sup>th</sup> Cir. 2004) (“It is clear that the FAA reflects Congressional approval of the speed and finality of arbitration.”); *United Food & Commercial Workers Union, AFL-CIO v. Pilgrim’s Pride Corp.*, 193 F.3d 328, 332 (5<sup>th</sup> Cir. 1999) (“Intrusive review of arbitration awards by the courts would . . . destroy the bargained-for finality of arbitration.”); *Westvaco Corp. v. United Paperworkers Intern. Union*, 171 F.3d 971, 975 (4<sup>th</sup> Cir. 1999) (“Because judicial interference with an arbitrator’s interpretation threatens both the efficacy and finality of arbitration, judicial review of that interpretation is highly constrained.”); *Kar Nut Products Co. v. Int’l B’hd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 337*, 1 F.3d 1241, \*2 (6<sup>th</sup> Cir. 1993) (“Our deference to the judgments of arbitrators is to promote the finality of arbitration.”); *Bakers Union Factory No. 326 v. ITT Continental Baking Co., Inc.*, 749 F.2d 350, 353 (6<sup>th</sup> Cir. 1984) (“The policy in favor of the finality of arbitration is but one part of a broader goal of encouraging informal, i.e., non-judicial, resolution of labor disputes.”)

<sup>2</sup> *Infra* note 102.

<sup>3</sup> See Chitty on common law principles of award-review, *infra* notes 110-116.

<sup>4</sup> See *Kyocera Corp. v. Prudential-Bache Trade Services*, 341 F.3d 987, 998 (9<sup>th</sup> Cir. 2003), reasoning that “[b]road judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.” Also see Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality through Functional Analysis*, 37 GA. L. REV. 13, 181-82 (2002) (when arbitration procedures leave significant issues for judicial resolution this creates “costly and time-consuming two-tiered proceedings that begin with private procedures but give way to public ‘do-overs.’”); and Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT’L ARB. 147, 151 (expansion of judicial review of arbitral awards “would easily degenerate into a device for adding still another instance to the usual three instances of litigation in the ordinary courts”).

The Federal Arbitration Act (FAA) requires award finality,<sup>5</sup> except for egregious problems.<sup>6</sup> Listen to courts as they depict the appropriate judicial posture:

- “The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.”<sup>7</sup>
- “[A]rbitration does not provide a system of ‘junior varsity trial courts.’”<sup>8</sup>
- “Judicial review of arbitration awards is tightly limited; perhaps it ought not to be called ‘review’ at all.”<sup>9</sup>
- “The arbitrator’s decision should be the end, not the beginning, of the dispute.”<sup>10</sup>

Courts usually give credence to these expressions. But my ongoing research exposes deviations from arbitral finality. Southern courts overturn a high percentage of labor arbitration awards.<sup>11</sup> State courts confirm fewer awards than federal courts in employment disputes.<sup>12</sup>

This background frames my research question: Has *Hall Street Associates v.*

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<sup>5</sup> *Infra* note 243.

<sup>6</sup> *Infra* note 241.

<sup>7</sup> *Safeway Stores, Inc. v. American Bakery Confectionery Workers, Local 111*, 390 F.2d 79, 82 (5<sup>th</sup> Cir. 1968).

<sup>8</sup> *Williams v. Katten, Muchen & Zavis*, 1996 WL 717447 (N.D. Ill. 1996), at \*6, quoting *Eljer Mfg., Inc., v. Kowin Development Corp.*, 14 F.3d 1250, 1254 (7<sup>th</sup> Cir. 1994).

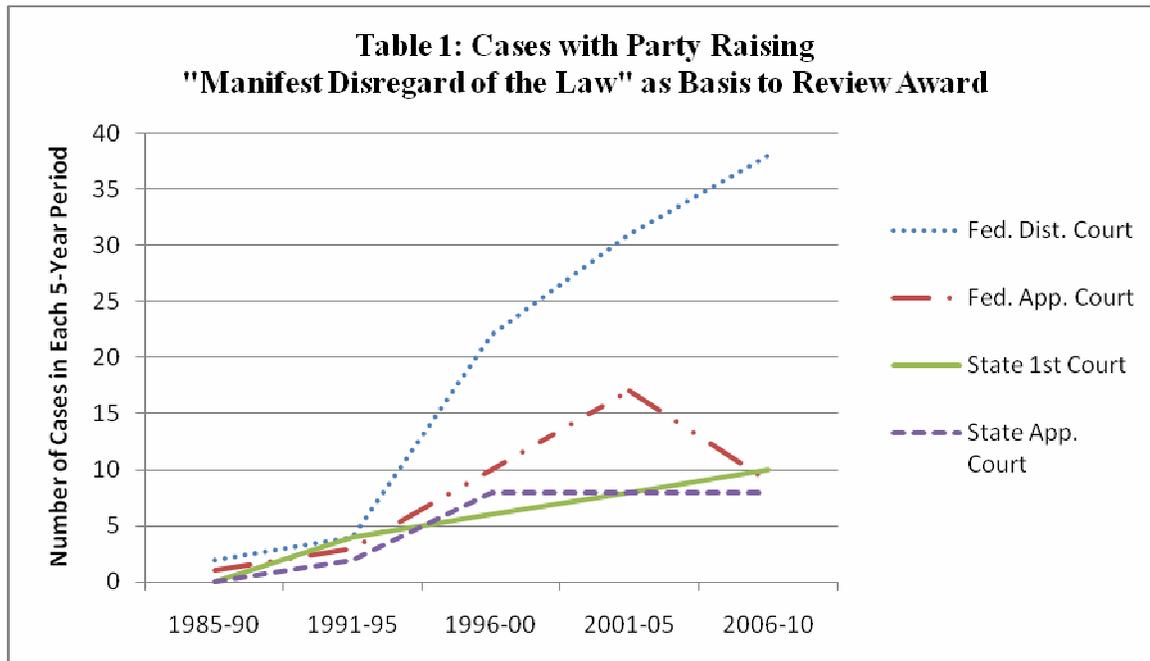
<sup>9</sup> *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7<sup>th</sup> Cir. 1997).

<sup>10</sup> *Moncharsh v. Heily & Base*, 832 P.2d 889, 903 (Cal. App. 1992).

<sup>11</sup> Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration*, 17 OHIO ST. J. DISP. RESOL. 19 (2001), at 85-86, finding that in five southern U.S. Circuit Courts of Appeals (Fourth, Fifth, Sixth, Eighth, and Eleventh), district courts confirmed 63 awards in 112 twelve cases for an enforcement rate of 56%, compared to district courts in the rest of the nation that confirmed 100 awards in 120 cases for an enforcement rate of 83%. The same comparison at the appellate level showed that Southern Circuits confirmed 43 awards in 73 cases for an enforcement rate of 59%, while courts in the rest of the nation confirmed 34 awards in 43 cases for an enforcement rate of 79%.

<sup>12</sup> Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 515, 589 (2008), finding a statistically significant difference in award enforcement rates in federal and state courts. First-level state courts confirmed 92.7% of awards compared to 78.8% for state counterparts. Appellate courts confirmed 87.7% of awards compared to 71.4% of state courts.

*Mattel, Inc.*<sup>13</sup> caused courts to confirm more arbitrator rulings, thus promoting finality? As the Supreme Court's most extensive opinion on reviewing awards under the FAA, *Hall Street* ruled that parties cannot agree to have a court expand the grounds for vacating an award beyond the FAA's express terms. The parties asked a district court to review the award for erroneous conclusions of law.<sup>14</sup> This non-statutory standard prompted *Hall Street* to ask if the manifest disregard standard is still available, even though it is not stated in the FAA. *Hall Street* mysteriously answered: "Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the [FAA's] § 10 grounds collectively, rather than adding to them."<sup>15</sup> Using research to measure how often courts confirm employment arbitration awards, I explore whether *Hall Street*'s unclear view of the manifest disregard standard has affected award finality.



<sup>13</sup> 552 U.S. 576 (2008).

<sup>14</sup> In *Hall Street*, two businesses entered into the following arbitration agreement: "The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: . . . (ii) where the arbitrator's conclusions of law are erroneous." *Id.* at 579.

<sup>15</sup> *Id.* at 585.

*B. Background: The Growing Intersection of Statutory Law and Employment Arbitration*

Derived from cases in this study, Table 1 shows that courts increasingly review employment arbitration awards under the manifest disregard standard. This trend coincides with four inter-related events in the 1990s: (a) a precedent that equated arbitrators to judges in adjudicating statutory claims, (b) employer adoption of mandatory arbitration, (c) federal discrimination laws that increased employer liability and damages, and (d) a near-tripling in employment discrimination court filings. The role of arbitrators grew from resolving contract disputes to adjudicating statutory claims. Thus, losers in arbitration have been able to argue that the arbitrator made a legal error— or in a more extreme case, that the arbitrator manifestly disregarded the law. I briefly elaborate:

1. The Supreme Court enforced a mandatory employment arbitration agreement in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>16</sup> A securities broker sued his employer in federal court, claiming that he was fired due to age discrimination.<sup>17</sup> The Court ruled that Gilmer was required to forgo court and submit his claim to arbitration.<sup>18</sup> This was because he signed a mandatory arbitration agreement.<sup>19</sup> While the Court had extensive experience adjudicating employment disputes,<sup>20</sup> securities industry arbitrators rarely dealt

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<sup>16</sup> 500 U.S. 20, 33 (1991).

<sup>17</sup> *Id.* at 23-24.

<sup>18</sup> *Id.* at 35.

<sup>19</sup> *Id.* at 23.

<sup>20</sup> The Court has regulated evidentiary procedures in employment discrimination disputes in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (requiring a three-stage burden of proof allocation in employment discrimination); *Int'l B'hd of Teamsters v. U.S.*, 431 U.S. 324 (1977) (validating the use of statistics as evidence of discrimination); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (shifting the burden of proof to employers after a sex discrimination plaintiff shows that gender stereotyping played a motivating role in a disputed employment practice); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (requiring a discrimination plaintiff prove pretext by isolating a specific factor that caused the adverse impact); and *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (ruling that front pay for a successful Title VII plaintiff does not count against the \$300,000 cap on damages under

with these claims.<sup>21</sup> Still, *Gilmer* dismissed arguments that Congress never intended to substitute arbitrators for courts in these disputes.<sup>22</sup>

2. Mandatory arbitration grew rapidly in its early years. In the late-1990s most Fortune 1000 companies said they use employment arbitration.<sup>23</sup> By 2001, six million employees were covered by agreements administered by the American Arbitration Association (AAA).<sup>24</sup> Employers turned to arbitration to limit litigation risks and costs.<sup>25</sup> They designed procedures to eliminate jury trials, class actions, and large attorney's fees.<sup>26</sup> Mandatory employment arbitration remains widely prevalent.<sup>27</sup>

### 3. When *Gilmer* was decided, Congress enacted two sweeping employment

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the 1991 Civil Rights Act).

<sup>21</sup> See EMPLOYMENT DISCRIMINATION—HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES (March 30, 1994, GAO/HEHS 94-17). The GAO study reported that only eighteen employment discrimination arbitrations occurred in the securities industry between August 1990 and December 1992. *Id.* at 7.

<sup>22</sup> *Gilmer*, *supra* note 16, at 27. Also, the Court dismissed *Gilmer*'s arguments that mandatory arbitration would deprive him and other employees of a judicial forum, thwart the ADEA's policy of eradicating age discrimination, and undermine the role of the EEOC. *Id.* at 27-28.

<sup>23</sup> See Bureau of National Affairs, *Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation*, Survey Says, DAILY LABOR REPORT (May 14, 1997), at A-4 (79% of the 530 responding firms said that they use employment arbitration). Also see *Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk-Management*, DAILY LAB. REP'T, (No. 93) May 14, 2001, reporting an employment lawyer's view that mandatory arbitration helps employers limit damages and eliminate class action lawsuits.

<sup>24</sup> Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003-Jan. 2004, at 44. More recently, see Michael W. Fox, *Workplace Discrimination and the Supreme Court*, 2009 WLNR 19766561 (Oct. 7, 2009) (in 2007, 15% to 25% of employers used mandatory arbitration, yielding an estimate of 30 million employees subject to this procedures).

<sup>25</sup> Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1301 (1998); David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, 54 DISP. RESOL. J. 66, 66-71 (1999); and Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 2 (1997) ("For many employers, managing this risk of liability is a vital part of their human resources mission and an important part of their general corporate cost-control program.").

<sup>26</sup> Scott Baker, *A Risk-Based Approach To Mandatory Arbitration*, 83 OR. L. REV. 861, 862 (2005). Also see David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49 (2003) (employers use arbitration as a risk-management device).

<sup>27</sup> E.g., the Supreme Court's recent decision in *Rent-A-Center West, Inc. v. Jackson*, \_\_\_ U.S. \_\_\_, 2010 WL 2471058 (2010) (worker was required to sign arbitration agreement as a condition of employment), at \*2. For current examples in this database, see *Mead v. Moloney Securities, Inc.*, 274 S.W.3d 537 (Mo. App. 2008), and *Dezego*, *infra* note 257.

discrimination laws— the 1991 Civil Rights Act,<sup>28</sup> and Americans with Disabilities Act in 1992.<sup>29</sup> The 1991 amendments allowed plaintiffs to recover up to \$300,000 in punitive damages.<sup>30</sup> This supplemented the strong remedial provisions in Title VII.<sup>31</sup>

4. Employment discrimination lawsuits in federal courts nearly tripled in five years, as filings soared from 8,413 in 1990 to 23,796 in 1996.<sup>32</sup> Employment claims, including those under Title VII of the 1964 Civil Rights Act, comprised about half of all civil rights filings in federal courts from 1990-2006.<sup>33</sup> In federal civil trials from 2000-2006, employment discrimination cases received a median award of \$158,460.<sup>34</sup>

The confluence of these factors caused courts to experience more “manifest disregard” challenges to employment arbitration awards [*supra*, Table 1]. This occurred, for example, when arbitrators ordered punitive damages,<sup>35</sup> used a *de novo* standard to review a pension plan denial of retirement benefits,<sup>36</sup> or misapplied a precedent.<sup>37</sup>

### C. Organization of this Article

Part II explores the enigmatic origins of the manifest disregard standard.<sup>38</sup> Part II.A examines nineteenth century opinions that allowed courts to review awards for legal

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<sup>28</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>29</sup> American with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

<sup>30</sup> See 42 U.S.C. § 1981(a)(a)(1), (b)(3) (specifying the compensatory and punitive damages available under Title VII).

<sup>31</sup> The Supreme Court explained the expansion of Title VII remedies in *Pollard v. E.I. du Pont de Nemours & Co*, *supra* note 20, at 852-854.

<sup>32</sup> Tracey Kyckelhahn & Thomas H. Cohen, *Civil Rights Complaints in U.S. District Courts, 1990-2006*, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT, <http://bjs.ojp.usdoj.gov/content/pub/pdf/crcusdc06.pdf>, at 7.

<sup>33</sup> *Id.*

<sup>34</sup> Kyckelhahn & Cohen, *supra* note 32, at 2

<sup>35</sup> *Barclays Capital Inv. v. Shen*, 857 N.Y.S.2d 873 (N.Y. Sup. 2008).

<sup>36</sup> *Norton v. Flowserve Corp. Pension Plan*, 2008 WL 376355 (N.D.Ok. 2008).

<sup>37</sup> *Broaddus v. Rivergate Acquisitions, Inc.*, 2010 WL 2000798 (M.D. Tenn. 2010).

<sup>38</sup> *Infra* notes 56-126.

mistakes.<sup>39</sup> Common law courts vacated awards for “fraud,” “corruption,” “partiality,” or where arbitrators “exceeded powers”— terms that later appeared in the FAA as grounds to vacate awards. In the grammatical sequence that used these terms, nineteenth century opinions also allowed courts to vacate awards for “manifest mistake” or “palpable mistake” of the law. Part II.B<sup>40</sup> explores statutory sources for the manifest disregard standard in England,<sup>41</sup> and the U.S. at federal<sup>42</sup> and state<sup>43</sup> levels. I conclude that Congress inadvertently omitted “manifest disregard” when it enacted the FAA.

Part III explores the modern derivation of manifest disregard.<sup>44</sup> Part III.A examines the Supreme Court’s ambiguous discussion of the standard in *Wilko*.<sup>45</sup> Parts III.B<sup>46</sup> and C<sup>47</sup> analyze federal and state appellate court adoption of the standard. Every federal circuit court of appeals adopted the manifest disregard standard— an indication of the standard’s natural fit with the express elements for reviewing awards in section 10 of the FAA.

Part IV discusses *Hall Street* and its manifest disregard analysis.<sup>48</sup> *Hall Street* strictly limited judicial review of awards to FAA standards (Part IV.A<sup>49</sup>). Part IV.B analyzes questions and implications from *Hall Street*.<sup>50</sup>

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<sup>39</sup> *Infra* notes 62-98.

<sup>40</sup> *Infra* notes 99-126.

<sup>41</sup> *Infra* notes 103-106.

<sup>42</sup> *Infra* notes 107-119.

<sup>43</sup> *Infra* notes 120-126.

<sup>44</sup> *Infra* notes 127-229.

<sup>45</sup> *Infra* notes 127-135.

<sup>46</sup> *Infra* notes 136-213.

<sup>47</sup> *Infra* notes 214-222.

<sup>48</sup> *Infra* notes 230-267.

<sup>49</sup> *Infra* notes 230-244.

<sup>50</sup> *Infra* notes 245-267.

Part V presents empirical research findings, and explores whether courts confirm more awards after *Hall Street*.<sup>51</sup> Part V.A describes the sampling method and data.<sup>52</sup> Part V.B presents key findings,<sup>53</sup> and shows that courts are confirming a higher percentage of awards following *Hall Street*. Part V.C discusses leading manifest disregard cases following *Hall Street*.<sup>54</sup> This part shows a disquieting pattern of conflicts among appellate courts, implying that the Supreme Court will need to resolve this confusion.

Part VI presents conclusions and implications from the study.<sup>55</sup> I address *Hall Street*'s uncertainty by suggesting that the manifest disregard of the law standard remains viable under the FAA. I also conclude that without this safeguard, arbitrators are free to put themselves above the law.

## II. THE ENIGMATIC ORIGINS OF THE “MANIFEST DISREGARD OF THE LAW” STANDARD

The origin of the manifest disregard standard is more than an academic question. *Hall Street* signified the importance of the standard's origin when it wondered aloud that “maybe” manifest disregard is implied in section 10 of the FAA—or “maybe” it is a non-statutory basis for reviewing awards, and therefore no longer available to review awards.<sup>56</sup> While *Hall Street* cited *Wilko v. Swan*'s dictum as a source for the standard,<sup>57</sup> the majority opinion could only guess whether the standard is non-statutory or part of the FAA.<sup>58</sup> Part II provides an answer to this question.

If manifest disregard evolved as “shorthand for §10(a)(3) or §10(a)(4)”— using

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<sup>51</sup> *Infra* notes 268-285.

<sup>52</sup> *Infra* notes 268-271.

<sup>53</sup> *Infra* Tables 4-A and 4-B.

<sup>54</sup> *Infra* notes 272-285.

<sup>55</sup> *Infra* notes 286-307.

<sup>56</sup> *Infra* note 238.

<sup>57</sup> *Infra* note 133.

<sup>58</sup> *Infra* note 238.

*Hall Street*'s terminology— this means that the standard remains intact. If, however, the standard was purely a judicial creation, this means that *Hall Street* not only eliminated expanded review of awards but also the manifest disregard standard—again, because this criterion is not explicitly part of the FAA's statutory standards. The following discussion explores the evolution of the manifest disregard standard by asking: Did it originate with the FAA or another law? If courts developed the standard, did Congress intend to codify it? Or did Congress's silence on the standard mean that lawmakers rejected it?

While there is no definitive answer, Part II shows that the FAA's reviewing standards codified common law principles.<sup>59</sup> Congress did not independently generate these tests. They came from courts.<sup>60</sup> But my research shows that an English arbitration statute from 1698 influenced American and English common law courts.<sup>61</sup> The courts that provided the foundation for specific elements in the FAA also mentioned disregard for the law (or similar terms) in the same sequence as the pre-FAA criteria. I conclude that the FAA Congress meant to adopt the standard, but due to inattention or inadvertence, the manifest disregard element was not presented to lawmakers for their consideration. Given that manifest disregard was part-and-parcel of the sequence of other elements that appear in the FAA—and considering, too, that Congress never debated any of these standards, but accepted them wholesale— I believe that lawmakers would have approved manifest disregard as part of this framework for reviewing awards.

#### *A. Judicial Precursors to the Manifest Disregard Standard*

The manifest disregard standard has an obscure origin. English law allowed courts limited review of arbitration awards for legal errors. Courts could not interfere with an

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<sup>59</sup> Compare *infra* note 102 [FAA standards], and 111-116 [non-statutory, common law standards].

<sup>60</sup> E.g., *infra* notes 70-76, and 83-86.

<sup>61</sup> *Infra* notes 104-106.

award even if the arbitrator mistakenly decided a legal issue.<sup>62</sup> *Symes v. Goodfellow* elegantly stated this idea, after an arbitrator overruled an objection and admitted questionable testimony: “Put it as you please, it is only when an inadmissible witness has been called. His admissibility was a question of law, which has been decided by the arbitrator: *you must take his law for better and for worse* [emphasis added].”<sup>63</sup>

Judges intervened sparingly—for example, when the award had a clear legal defect. *Jones v. Corry*, an 1836 case where the arbitrator mistakenly applied the law, explained: “We are slow to interfere against an award; but it is an exception to the general rule [of confirming awards], where the arbitrator, upon being told his judgment will be reviewed, and in furtherance of an appeal, assigns an erroneous ground for the decision he pronounces.”<sup>64</sup> Using similar reasoning, *Hodgkinson v. Fernie* said that courts may interfere with an arbitrator’s ruling “only where . . . some obvious mistake of law appears on the face of the award.”<sup>65</sup>

The requirement of intent to disregard the law as grounds to vacate an award appeared in an 1846 case, *Fuller v. Fenwick*. The court inquired into an arbitrator’s state of mind in creating a legally defective award.<sup>66</sup> Remitting the award to the arbitrator, the

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<sup>62</sup> *Campbell v. Twemlow*, 145 Eng. Rep. 1337 (1814) (“If an arbitrator, a barrister, reject a witness as inadmissible in point of law, the court will not interfere to set aside the award. . .”).

<sup>63</sup> *Symes v. Goodfellow*, 132 Eng. Rep. 208, 208 (1836) (C.J. Tindal). A husband was sued by an establishment that provided room and board to his wife. The husband argued that he was not legally responsible for the bill because his wife was an adulterer. The arbitrator’s decision to admit evidence of the wife’s adultery led to dismissal of the complaint for damages from the husband. The establishment brought an unsuccessful action in an English Court of Common Pleas to vacate the award.

<sup>64</sup> 132 Eng. Rep. 1076, 1078 (1836).

<sup>65</sup> 140 Eng. Rep. 712, 713-714 (C.P. 1857) (Williams, J.). The court noted that “[t]his is simply a case of a reference to an arbitrator before whom has arisen a question of law which he has decided . . . ill.” *Id.* at 717. While the court had “no right to interfere” in this award, an exception to judicial enforcement could be made where “the question of the law necessarily arises on the face of the award.” *Id.*

<sup>66</sup> 136 Eng. Rep. 282 (1846), suggesting that if the arbitrator tried to decide the legal issue, and only through some error on his part he misapplied the law, the court would effectuate his intent by correcting the award. *Id.* at 285, stating “the courts have said they would not inquire whether this

court explained this was “a case in which the arbitrator has clearly and *palpably mistaken* a firmly-settled rule of law [emphasis added].”<sup>67</sup>

The idea of “palpable mistake” found its way into American law. Applying a statutory standard for reviewing awards, the Georgia supreme court explained in *Anderson v. Taylor* that “arbitrators are the judges of the law and the facts in the case submitted to them.”<sup>68</sup> The award could be overturned for extreme defects such as “fraud, accident, mistake, or illegality.”<sup>69</sup> Notice that illegality was stated in the same sequence as fraud. This is relevant because the FAA’s award-reviewing standards include “fraud.”<sup>70</sup> The point is that *Anderson* equated fraud and illegality as exceptional grounds to vacate an award.

*Anderson*’s definition of illegality was similar to modern expressions of manifest disregard because it required more than the arbitrators erred in deciding a question of law. The “mistake must be gross and palpable, and of a character which controlled their decision, or the award will not, on that account, be set aside.”<sup>71</sup> In the following italicized text, the court also equated illegality to other terms that appear in the FAA:

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

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conclusion was right or not, unless they could, upon the face of the face of the award, distinctly see that the arbitrator, professing and intending to decide in accordance with law, had unintentionally and mistakenly decided contrary to the law.”

<sup>67</sup> *Id.*

<sup>68</sup> 41 Ga. 10 (Ga. 1870), at \*7.

<sup>69</sup> *Id.*

<sup>70</sup> *Infra* note 102 (text of FAA section 10).

<sup>71</sup> *Anderson*, *supra* note 68, at \*7. Compare “mistake must be gross and palpable, and of a character which controlled their decision, or the award will not, on that account, be set aside,” with Montes’s definition of manifest disregard, *infra* note 204, at 1461, stating: “An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it.”

exclusion of the younger children, or make other like gross and palpable mistake, it will vitiate the award [emphasis added].<sup>72</sup>

The bold text closely corresponds to the expression “manifest disregard of the law.” The italicized clause contains two terms in section 10 of the FAA— arbitrator “partiality” and “corruption.”<sup>73</sup> Elsewhere, *Anderson* said that judges must abide the decision of an arbitrator unless the award was procured by “fraud” or there is a palpable mistake of law.<sup>74</sup> Here again, a court used an FAA term in the same grammatical sequence as a parallel expression for manifest disregard of the law.

In 1852, *Wesson v. Newton* linked terms later found in section 10 of the FAA with a variant of the manifest disregard standard. The Massachusetts supreme court said: “The parties, having selected, in the mode provided by law, their own tribunal, must abide by its decisions, subject only to such revision by the court as shall prevent *fraud and corruption*, and **duly guard the legal rights of both parties** [emphasis added].”<sup>75</sup> The italicized terms appear in section 10 of the FAA, and are grammatically linked in the bold text to a precursor of the manifest disregard standard.<sup>76</sup>

The trend to review awards for gross procedural or substantive problems took root in spite of the Supreme Court’s attempt to discourage it in *Burchell v. Marsh*.<sup>77</sup> The party challenging an award contended that the arbitrator’s ruling was “in ignorance of the rights of the parties.”<sup>78</sup> *Burchell* dismissed this idea, saying: “Courts should be careful to

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<sup>72</sup> *Id.*

<sup>73</sup> Compare to *infra* note 102, section 10 of the FAA.

<sup>74</sup> *Brand v. Sorrells*, 61 Ga. 162 (Ga. 1878), at \*2. The “palpable mistake of law” standard remained part of Georgia’s arbitration code until it was repealed in 1988. See *Ralston v. City of Dahlonga*, 512 S.E.2d 300, 302, n.2 (Ga. App. 1999).

<sup>75</sup> 64 Mass. 114, 115 (Mass. 1852).

<sup>76</sup> Compare to section 10 of the FAA, *infra* note 102.

<sup>77</sup> 58 U.S. (17 How.) 344 (1854).

<sup>78</sup> *Id.* at 347. Two wholesalers in New York shipped merchandise to an Illinois retailer named

avoid a wrong use of the word ‘mistake,’ and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards.”<sup>79</sup> *Burchell* emphasized that “[a]rbitrators are judges chosen by the parties to decide matters submitted to them, finally and without appeal.”<sup>80</sup>

Twenty years later, the Supreme Court coined the “manifest disregard” phrase in *U.S. v. Farragut*.<sup>81</sup> In this court review of a maritime arbitration, *Farragut* said that legal mistakes by the arbitrators “could have been corrected in the court below, and can be corrected here.”<sup>82</sup> The Court added: “The award was also liable . . . to be set aside . . . for *exceeding the power conferred by the submission, for manifest mistake of law, for fraud*, and for all the reasons on which awards are set aside in courts of law and chancery [emphasis added].”<sup>83</sup> The italicized text corresponds to two terms in section 10 of the FAA,<sup>84</sup> while the bold clause is similar to the current manifest disregard term.

This view seemed to contradict *Burchell*’s idea that courts could not set aside an award “for error, either in law or fact.”<sup>85</sup> As with *Anderson*, notice that *Farragut* specified a sequence of award reviewing standards that included the idea of manifest disregard for the law. This term was used in the same sequence with two FAA

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Peter Burchell. The wholesalers thought that Burchell failed to pay his debts on time— and then had him arrested, and sued him. The lawsuit was referred to arbitration, where the arbitrators found in favor of Burchell. After the award ordered the wholesalers to pay him, the wholesalers sued again, and won a court order to set aside the award. *Id.* at 345-347.

<sup>79</sup> *Id.* at 350.

<sup>80</sup> *Id.* Compare to this expansive view of the arbitrator’s authority in *Muldrow v. Norris*, 2 Cal. 74, 77 (Cal. 1852) (“arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good]).”

<sup>81</sup> 89 U.S. 406 (1874).

<sup>82</sup> *Id.* at 407.

<sup>83</sup> *Id.*

<sup>84</sup> Compare to section 10 of the FAA, *infra* note 102.

<sup>85</sup> *Burchell*, *supra* note 77, at 349.

standards—the arbitrators exceeded their powers, and the award was a fraud.<sup>86</sup> In sum, *Farragut* equated “fraud,” “exceeded powers,” and “manifest mistake of the law” as grounds to vacate an award.

States that provided for statutory arbitration also ignored *Burchell*’s award-finality message. The following analysis shows, however, why courts exercised broader review in these arbitrations. Some civil procedure codes granted arbitrators the same powers as judges.<sup>87</sup> The Nebraska civil code, for example, made arbitrators auxiliaries to courts by imbuing them with judicial powers.<sup>88</sup> Courts were authorized to enter judgments on their awards. For example, when an arbitrator failed to state the facts and the law upon which he based the award, the state supreme court rejected the award.<sup>89</sup> Iowa’s civil procedure code allowed courts to order a new arbitration, thus nullifying an award, for a legal reason.<sup>90</sup> Minnesota had a similar law that permitted courts to review awards as though they were civil judgments—and therefore allowed courts to vacate an award if it was “contrary to law and evidence.”<sup>91</sup> Likewise, Massachusetts allowed courts to enter judgments on awards, or set aside these rulings for a legal reason.<sup>92</sup>

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<sup>86</sup> *Infra* note 83.

<sup>87</sup> Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681, 683, n.21 (1950), citing Iowa Code §§ 679.12-13 (1946); Neb. Rev. Stat. §§ 25-2115, 2116 (1943) (award can be rejected for “any legal and sufficient” reason and has “same force and effect as the verdict of a jury”); and Minn. Stat. § 572.05(5) (award can be vacated if contrary to “law and evidence”).

<sup>88</sup> *Murry v. Mills*, 1 Neb. 456 (1871). Nebraska’s Code of Civil Procedure equated the powers of arbitrators to referees. The latter were authorized to summon and enforce the attendance of witnesses, administer oaths, and grant adjournments. Referees and arbitrators were likewise required to “state the facts found and the conclusions of law.” *Id.* at \*2. Thus, arbitration awards were treated like special verdicts.

<sup>89</sup> *Graves v. Scoville*, 24 N.W. 222 (Neb. 1885).

<sup>90</sup> *Brown v. Harper*, 6 N.W. 747 (Iowa 1880), ordering a new hearing because an arbitrator’s signature was improperly obtained at his sick bed). Section 3427 of the Code provided: “The award may be rejected by the court for any legal and sufficient reasons, or it may be recommitted for a rehearing to the same arbitrators, or any others agreed upon by the parties.” *Id.* at 748-749. The court observed: “This does not confer upon the court the right to reject or recommit the award at mere discretion. It can be done only for legal and sufficient reasons.” *Id.* at 748.

<sup>91</sup> *Johnston v. Paul*, 23 Minn. 46 (Minn. 1876). A state law regulated submissions to arbitrators. Their awards were to be returned to court to be accepted, or recommitted, or set aside for any legal and

In addition to regulating arbitration in civil procedure codes, some states permitted common law arbitrations.<sup>93</sup> These differed by allowing parties to fashion their own dispute resolution rules and procedures. States referred to this as “arbitration by agreement.”<sup>94</sup> Because parties had this contractual freedom, courts treated awards with more deference.<sup>95</sup> Judges could not correct an error in judgment by the arbitrator.<sup>96</sup>

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

Before leaving this discussion, I note connections between these nineteenth century developments and the present state of the manifest disregard standard. The arbitration in *Hall Street* functioned like statutory arbitrations in Nebraska and Iowa.<sup>97</sup>

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sufficient reason. *Id.* at \*1.

<sup>92</sup> *Wesson v. Newton*, supra note 75, at 116 (referencing Rev. Stat. c. 114, regulating arbitration submissions).

<sup>93</sup> *E.g.*, *Thornton v. McCormick*, 39 N.W. 502 (Iowa 1888). For an explanation of arbitrations by agreement, see *First Nat. Bank in Cedar Falls v. Clay*, 231 Iowa 703, 712 (1942).

<sup>94</sup> *Id.* at 712-13.

<sup>95</sup> See *Sadler v. Olmstead*, 44 N.W. 292, 293 (Iowa 1880) (“such a submission is always construed most liberally, and with a view to compelling parties to submit to the adjustment of their differences made by an arbitrator fairly chosen”), and *Thompson v. Blanchard*, 2 Iowa 44, 49 (Iowa 1855) (“The whole burden of proof, in this respect, is on the party who attacks the award. It is for him to clearly satisfy the jury, of any mistake, as also that he was prejudiced thereby.”). Also see *Thornton*, supra note 93, at 503, stating: “The award in question was not made in accordance with the provisions of the statute relating to arbitration, and is not, therefore, governed by them, but its legality and effect must be determined by the rules relating to awards at common law.” To justify the interference of a court, a party had to prove fraud, corruption, partiality, or misconduct on the part of the arbitrators.

<sup>96</sup> The *Thornton* court continued: “We understand the rule to be that an award of this kind will not be set aside for error in the judgment of the arbitrators, nor for a mistake which would not have had any material influence on the arbitrators in reaching their conclusions.” *Id.*

<sup>97</sup> Compare *Hall Street*, supra note 13, at 579 (parties agreed to arbitration in the midst of a lawsuit, and while they were subject to a court’s jurisdiction), and supra notes 87 and 88.

Courts were involved with disputants before arbitration commenced, and were authorized to review the legality of the arbitrator's award. *Hall Street* expressed concern about adding delay and cost in this type of arrangement.<sup>98</sup> This concern overlooked the historical distinction between civil code and common law arbitrations. History shows that when a dispute is already in court, and arbitration is used as an auxiliary process, courts may review rulings for legal errors. Otherwise, not only is the legitimacy of arbitration open to question but so is the court's ability to provide justice. No court can be above the law, and therefore, judges must ensure that no arbitrator intentionally puts her award above the law.

### *B. Legislative Standards for Judicial Review of Awards*

Throughout the twentieth century, federal and state legislatures encouraged the use of arbitration. To make this happen, they enacted laws to guide courts. At the federal level, Congress passed the FAA in 1925 to end judicial hostility to arbitration.<sup>99</sup> Lawmakers wanted to stop courts from meddling in private disputes before or during the arbitration.<sup>100</sup> Congress also enacted judicial standards to review awards but said little about their intent on this subject.<sup>101</sup>

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

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<sup>98</sup> *Hall Street*, *supra* note 13, at 588.

<sup>99</sup> The Senate Report said that the bill would abolish the judicial reluctance to enforce arbitration agreements. S. REP. NO. 68-536, at 2-3 (1924). During Senate debate on the FAA, Senator Thomas J. Walsh, explained: "In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced." Remarks of Sen. Walsh, 68 Cong. Rec. 984 (1924).

<sup>100</sup> *Joint Hearings before the Subcommittees of the Committees on the Judiciary*, 68<sup>th</sup> Cong. 1<sup>st</sup> Sess, on S. 1005 and H.R. 646, at 6 (1924) (Statement of Julius Henry Cohen, General Counsel of the New York State Chamber of Commerce): "The difficulty is that men do enter into these such (arbitration) agreements and then afterwards repudiate the agreement. . . . You go in and watch the expression of the face of your arbitrator and you have a 'hunch' that he is against you, and you withdraw and say, 'I do not believe in arbitration anymore.'"

<sup>101</sup> H.R. REP. NO. 68-96, at 2. The FAA's brief legislative history said: "The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form."

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption by the arbitrators;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>102</sup>

Ostensibly, these standards emanated from one source, the Congress. This history is misleading, however. English courts—the main source of American arbitration statutes—had centuries of experience in developing common law standards to review awards.<sup>103</sup> These courts, in turn, derived their principles from the Arbitration Act of 1698.<sup>104</sup> Believing that litigation hindered England’s economy, King William III and Parliament enacted this law to authorize courts to enforce arbitration agreements, and also to confirm disputed awards. The 1698 law granted courts limited grounds to deny enforcement to an award, as when “the Arbitrators or Umpire *misbehaved themselves* and that such Award Arbitration or Umpirage was *procured by Corruption or other undue Means* [emphasized text].”<sup>105</sup> The law also allowed courts to void awards that were “*unduly procured*” [emphasized text].<sup>106</sup> Italicized terms correspond to elements in the

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<sup>102</sup> United States Arbitration Act, codified as amended at 9 U.S.C. § 10.

<sup>103</sup> Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 29 J. DISPUTE RESOL. 1 (2009).

<sup>104</sup> William III, 1697-8, An Act for Determining Differences by Arbitration, ch. xv. Rot. Parl. Gul. III n.5, STATUTES OF THE REALM (Vol. VII, John Raithby, ed. 1820), available online at <http://www.british-history.ac.uk/report.aspx?compid=46901&strquery=arbitration>.

<sup>105</sup> *Id.* (allowing for enforcement of the agreement or award to be stopped if “it shall be made appear on Oath to such Court that the Arbitrators or Umpire misbehaved themselves and that such Award Arbitration or Umpirage was procured by Corruption or other undue Means.”).

<sup>106</sup> *Id.* Section II was titled “Arbitration unduly procured, void” and stated:

And be it further enacted by the Authority aforesaid That any Arbitration or Umpirage *procured by Corruption or undue Means* shall be judged and esteemed void and of none Effect and accordingly be sett aside by any Court of Law or Equity so as Complaint of such Corruption or undue Practise be made in the Court where the Rule is made for Submission to such Arbitration or

FAA’s section 10 [*supra*]. Congress re-enacted verbatim several standards from the 1698 law.

While the FAA Congress did not knowingly rely on King William III and Parliament for guidance, the Senate derived section 10 standards from a brief submitted by W.W. Nichols, president of the American Manufacturers Export Association of New York.<sup>107</sup> In the following summary of his testimony, the italicized text corresponds to section 10 of the FAA,<sup>108</sup> while the bold clause is similar to the current manifest disregard term:

The courts are bound to accept and enforce the award of the arbitrators unless there is in it a **defect so inherently vicious that, as a matter of common morality**, it ought not to be enforced. This exists only when *corruption, partiality, fraud or misconduct* are present or *when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means*— cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.<sup>109</sup>

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

Reinforcing this point, consider that Nichols or learned members of Congress in 1924 may have used Joseph Chitty’s seminal arbitration volume, *A Treatise on the Law*

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Umpirage before the last Day of the next Terme after such Arbitration or Umpirage made and published to the Parties Any thing in this Act contained to the contrary notwithstanding [emphasis added to show connection to standards in section 10 of the FAA, *supra* note 102].

<sup>107</sup> *Hearings on the Subject of Interstate Commercial Disputes Before the Subcommittees on the Judiciary*, 68<sup>th</sup> Cong., 1<sup>st</sup> Sess., p. 36 (Statement of W.W. Nichols, January 9, 1924).

<sup>108</sup> Compare to section 10 of the FAA, *infra* note 102.

<sup>109</sup> *Id.*

of Commerce,<sup>110</sup> as a source for section 10. Published a century before the Congress took testimony on the FAA, this was a more accessible authority for Congress than the 1698 law. This connection is suggested by the fact that nearly all of the FAA’s award-review elements appear in Chitty’s treatise. Chitty explained that courts denied enforcement to awards when “arbitration or umpirage was procured by *corruption or undue means*,”<sup>111</sup> or the award did “not follow the submission, or (was) too extensive or too limited,<sup>112</sup> or the arbitrator “*exceeded his authority*, or had no authority to make the award, or that his authority was revoked.”<sup>113</sup> Courts did not confirm awards that suffered from procedural “*irregularity, as want of notice of the meeting*,”<sup>114</sup> or were produced by “*collusion or misbehavior of the arbitrators*.”<sup>115</sup> In the same passage, Chitty observed that courts did not confirm awards where arbitrators were “*partial and unjust, or **had mistaken the law*** [emphasis added].”<sup>116</sup>

Again, I emphasize text to show the clear connection between Chitty’s terms and the words in section 10 of the FAA.<sup>117</sup> The bold text shows that Chitty also used the manifest disregard concept in the same grammatical sequence as FAA standards. Chitty put all these standards on the same footing.

Also recall common law rulings that articulated these grammatical links to manifest disregard. Reading *Farragut* side-by-side with *Hall Street*, one sees that these

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<sup>110</sup> JOSEPH CHITTY, A TREATISE ON THE LAWS OF COMMERCE AND MANUFACTURES (III, 1824), available online at <http://books.google.com/books?id=TJ4yAAAAIAAJ&pg=RA1-PA661&dq=chitty+on+awards+and+attachment#PPR1.M1>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 666.

<sup>114</sup> *Id.* Compare to section 10(3), “where the arbitrators were guilty of misconduct in refusing to postpone the hearing.”

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 665.

<sup>117</sup> Compare to section 10 of the FAA, *supra* note 102.

opinions discussed the manifest disregard standard with other grounds for reviewing awards. *Farragut* said that an award could be set aside “for *exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all the reasons on which awards are set aside in courts of law and chancery [emphasis added].*”<sup>118</sup> *Hall Street* retraced these steps 134 years later, speculating that manifest disregard was “shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers.’”<sup>119</sup>

Why did Congress not mention “manifest mistake of the law?” No one knows. But Congress did not intend to omit this standard. Lawmakers focused on making arbitration agreements enforceable. The evidence suggests they would have included the manifest disregard standard but did not because Nichols’s brief omitted the term. He supplied Congress with the list that appears in section 10. He also said that awards could not be confirmed if they had a viciously inherent defect that offended common morality. Manifest disregard for the law fits naturally in this expression.

States replicated the FAA. They enacted legislation to replace common law regulation of arbitration agreements.<sup>120</sup> Patterned after the FAA, the Uniform Arbitration Act was adopted by thirty-five states, while similar laws were passed by fourteen others.<sup>121</sup> These laws mirror the FAA’s four statutory standards for judicial review of awards.<sup>122</sup> Recently, this pattern began to fragment. After a national panel of experts

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<sup>118</sup> *Id.*

<sup>119</sup> *Hall Street*, *supra* note 13, at 585.

<sup>120</sup> *Litchsinn v. American Interinsurance Exchange*, 287 N.W.2d 156, 159 (Iowa 1980) (“This century has seen a marked trend away from the common law bar to judicial enforcement of agreements to arbitrate future disputes.”).

<sup>121</sup> See The Revised Uniform Arbitration Act (Prefatory Note), <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm>.

<sup>122</sup> UAA vacatur standards appear in Alaska (Ak. St. § 09.43.120, Vacating an Award); Arizona

approved the Revised Uniform Arbitration Act in 2000,<sup>123</sup> twelve states adopted this new law.<sup>124</sup> The RUAA broadened statutory vacatur standards.<sup>125</sup>

To summarize, legislatures and courts cross-fertilized each other's award reviewing standards. *Hall Street* did not demonstrate awareness of this history, but intuited this reality when it said that manifest disregard may have been judicial "shorthand for §10(a)(3) or §10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'"<sup>126</sup> *Hall Street* did not resolve this doctrinal confusion. Until the Supreme Court addresses this issue, courts will take inconsistent approaches in reviewing awards. The following historical analysis gives essential perspective for the task of clarifying the law.

### III. THE MODERN DERIVATION OF THE MANIFEST DISREGARD STANDARD

#### A. The Supreme Court's Ambiguous Adoption of the Manifest Disregard Standard

Dictum in *Wilko v. Swan*<sup>127</sup> is mistakenly cited as a source of the manifest

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(A.R.S. 12-1512, Opposition to an Award); Arkansas (A.C.A. § 16-108-212, Vacating an Award); Idaho (I.C. § 7-912, Vacating an Award); Illinois (710 ILCS 5/12, Vacating an Award); Indiana (I.C. § 34-57-2-13, Vacation of an Award); Kansas (Ks. St. § 5-412, Vacating an Award); Kentucky (K.R.S. § 417.160, Vacating an Award); Maine (14 M.R.S.A. § 5938, Vacating Award); Massachusetts (M.G.L.A. 150C §12, Vacation of an Award); Minnesota (M.S.A. § 572-19, Vacating an Award); Missouri (V.A.M.S. 435.405, Vacating an Award); Montana (Mt. St. 27-5-312, Vacating an Award); Nebraska (Neb. Rev. St. § 25-2613, Vacating an Award); South Carolina (Code 1976, § 15-48-130); South Dakota (S.D.C.L. § 21-25A-24, Grounds for Vacation of an Award); Indiana (I.C. § 34-57-1-17, Grounds Against Rendition of Award on Judgment); Tennessee (T.C.A. § 29-5-213); Virginia (Va. Code Ann. § 8.01-581-010). Alaska and Colorado retain the UAA structure but also adopted the Revised Uniform Arbitration Act. *See id.*, Revised Uniform Arbitration Act.

<sup>123</sup> The Revised Uniform Arbitration Act, *supra* note 121.

<sup>124</sup> *See RUAA and UMA Legislation from Coast to Coast*, DISPUTE RESOLUTION TIMES, in <http://www.adr.org/sp.asp?id=26600>. The states are Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington.

<sup>125</sup> *See* The Revised Uniform Arbitration Act, *supra* note 121, Section 12 (Disclosure by the Arbitrator), and Section 23 (Vacating Award).

<sup>126</sup> *Hall Street*, *supra* note 13, at 585.

<sup>127</sup> 346 U.S. 427, 436-37 (1955). An investor who claimed that his stock broker misled him into buying a company's shares sued under the Securities Act of 1933. Recall that the Supreme Court discussed the standard in the much earlier decision, *Farragut*, *supra* note 81.

disregard standard.<sup>128</sup> *Wilko* did not adopt this standard but simply discussed it as a hypothetical. This came about after a customer alleged that his broker misled him. He sued under the Securities Act of 1933 but the brokerage sought arbitration. The judge ordered a trial because the arbitration agreement deprived the investor a court remedy under the Securities Act. The appeals court reversed, ruling that the law did not prohibit agreements to arbitrate these disputes.<sup>129</sup> *Wilko* said that arbitrators were able to adjudicate business issues such as the quality of a commodity. But securities misrepresentation presented a difficult legal issue— “findings on the purpose and knowledge of an alleged violator of the Act.”<sup>130</sup> *Wilko* doubted that lay arbitrators could apply the Securities Act without judicial instruction.<sup>131</sup>

*Wilko* needlessly addressed a side issue. While enforcing the arbitration clause, the appellate court explained that the FAA’s review standards protected a party from an award that made a legal error under the Securities Act.<sup>132</sup> The *Wilko* majority disagreed, stating: “In unrestricted submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard, are not subject, in the federal courts, to judicial review for error in interpretation.”<sup>133</sup> In this advisory statement, *Wilko* said that a judge may review the award if it manifestly disregards the law, but not if the judge disagrees with its legal interpretation. Eventually

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<sup>128</sup> Hall Street, *supra* note 13, at 585. Compare Part II, discussing the variety of sources for the manifest disregard standard.

<sup>129</sup> *Id.* at 430.

<sup>130</sup> *Id.* at 435-36.

<sup>131</sup> *Id.* at 436 (“the arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact’ . . . cannot be examined by a reviewing court under the FAA”).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 436-7.

the Supreme Court overruled *Wilko* by allowing arbitration of statutory claims.<sup>134</sup>

However, the Supreme Court never explicitly adopted manifest disregard as a standard.

*First Options of Chicago, Inc. v. Kaplan*<sup>135</sup> was its closest pronouncement on this test.

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

In the immediate years after *Wilko*, federal courts did not review awards for legal errors.<sup>136</sup> In time, this changed. Table 2 [*infra*] shows that by 1999 every circuit court of appeals adopted the manifest disregard standard. The next discussion traces the doctrinal evolution of the manifest disregard standard from *Wilko* (1955) to *Hall Street* (2008).

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<sup>134</sup> See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987), questioning *Wilko*'s mistrust of arbitration. Justice Blackmun believed this would encourage losing parties to argue that arbitrators misapplied or ignored the law. *Id.* at 267 ("it is likely that investors will be inclined, more than ever, to bring complaints to federal courts that arbitrators were partial or acted in 'manifest disregard' of the securities laws.") He also believed that parties would not only invoke the manifest disregard standard, but this would undermine award finality. *Id.* at 268. The data in Tables 4-A and 4-B [*infra*] do not substantiate his prediction.

<sup>135</sup> 514 U.S. 938, 942 (1995) ("parties [are] bound by [an] arbitrator's decision not in 'manifest disregard' of the law").

<sup>136</sup> *E.g.*, *Saxis S. S. Co. v. Multifacs Intern. Traders, Inc.*, 375 F.2d 577, 581-82 (2d Cir. 1967) ("it is the function neither of this court nor of the district courts to review the record of the arbitration proceeding for errors of law").

**Table 2**  
**The Federal Circuit Courts of Appeal Adopt the Manifest Disregard Standard (Year of Decision)**

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

First Circuit: Adopting the manifest disregard standard, *Advest, Inc. v. McCarthy* provided reasons for going beyond the FAA’s express elements.<sup>137</sup> Noting that non-statutory standards have “taken on various hues and colorations in its formulations,” *Advest* concluded that “these various formulations [are] identical, no matter how pleochroic their shadings.”<sup>138</sup> Manifest disregard applies when “the governing law may have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug.”<sup>139</sup> Since then, this court has applied the standard.<sup>140</sup> Recently, *McCarthy v. Citigroup Global Markets, Inc.* explained that manifest disregard is not part of the FAA but is judicially created.<sup>141</sup>

Second Circuit: The Second Circuit has flip-flopped on the manifest disregard standard. In the 1960s and early 1970s, it said the test is “severely limited.”<sup>142</sup> This view broadened in *Sobel v. Hertz, Warner & Co.*,<sup>143</sup> where an investor’s fraud claim was decided in a tersely worded award. Sobel’s appeal noted that his two brokers were found

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<sup>137</sup> 914 F.2d 6, 8-9 (1<sup>st</sup> Cir. 1991), noting: “Courts do, however, retain a very limited power to review arbitration awards outside of section 10. The considerable deference due an arbitrator’s decision does not grant carte blanche approval to any decision that the arbitrator might make [citations omitted].”

<sup>138</sup> *Id.* at 9, noting that other circuits vacated awards for being arbitrary and capricious, or made in manifest disregard of the law, or if completely irrational. *Advest* observed: “Although the differences in phraseology have caused a modicum of confusion, we deem them insignificant. . . . However natively wrapped, the packages are fungible.” *Id.*

<sup>139</sup> *Id.* at 10. Applying the manifest disregard standard, the court concluded that the “case at bar, however, is not cut to so rare a pattern: appellant has utterly failed to show that the arbitrators inevitably must have recognized that the measure of damages” set forth in a particular precedent “was the controlling rule of law.” *Id.* at 10.

<sup>140</sup> *Wonderland Greyhound Park, Inc. v. Autotote Sys., Inc.*, 274 F.3d 34, 35 (1<sup>st</sup> Cir. 2001) (“A court may only vacate an arbitrator’s award in very rare circumstances, such as where there was misconduct by the arbitrator, where the arbitrator exceeded the scope of his arbitral authority, or when the award was made in manifest disregard of the law.”); *P.R. Tel. Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 25 (1<sup>st</sup> Cir. 2005) (“Under the FAA, an award may be vacated for legal error only when in ‘manifest disregard of the law.’”).

<sup>141</sup> 463 F.3d 87 (1<sup>st</sup> Cir. 2006), at 91-92, n.6.

<sup>142</sup> *See Saxis Steamship Co.*, *supra* note 136, at 582; and *Office of Supply, Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 379-80 (2d Cir. 1972).

<sup>143</sup> 469 F.2d 1211 (2d Cir. 1972).

guilty of stock fraud.<sup>144</sup> But the award did not explain if the arbitrators considered this information. Therefore, there was no proof that the award was made in manifest disregard of the securities law. Declining to require that awards state the arbitrator’s reasoning, the court said that “the primary consideration for the courts must be that the [arbitration] system operate expeditiously as well as fairly.”<sup>145</sup> *Sobel* added that it “is a truism that an arbitration award will not be vacated for a mistaken interpretation of law”<sup>146</sup>— but “if the arbitrators simply ignore the applicable law, the literal application of a ‘manifest disregard’ standard should presumably compel vacation of the award.”<sup>147</sup>

*I/S Stavborg v. Nat’l Metal Converters, Inc.*<sup>148</sup> questioned the manifest disregard standard: “How courts are to distinguish in the Supreme Court’s phrase between ‘erroneous interpretation’ of a statute, or for that matter, a clause in a contract, and ‘manifest disregard’ of it, we do not know: one man’s ‘interpretation’ may be another’s ‘disregard.’ Is an ‘irrational’ misinterpretation a ‘manifest disregard’?”<sup>149</sup>

In time, the court reaffirmed this non-statutory standard. *Drayer v. Krasner* explained that manifest disregard of law requires “something beyond and different from a

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<sup>144</sup> *Id.* at 1212-13. The district judge who reviewed *Sobel*’s motion to vacate the award suspected that the arbitrators ignored applicable securities laws. *Id.* at 1213. *Sobel*’s brokers, it turned out, were indicted shortly after *Sobel* filed his arbitration case for conspiring to create market activity in the Hercules shares and to induce the purchase of the security by others. *Id.* On appeal, the Second Circuit considered whether a judge who suspects that an award conflicts with the law can ever order arbitrators to explain their reasoning. The appellate court concluded that there is no such judicial power. Clearly, “a requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement.” *Id.* at 1214. The court upheld the public policy of award-finality over a judicial review standard that could protect arbitration litigants from miscarriages of justice. *Id.*

<sup>145</sup> *Id.* (“the primary consideration for the courts must be that the system operate expeditiously as well as fairly”).

<sup>146</sup> *Id.* at 1214.

<sup>147</sup> *Id.* *Sobel* clarified that “‘manifest disregard’ is after all not to be given independent significance [but] rather . . . is to be interpreted only in the context of the specific narrow provisions” of sections 10 and 11 of the FAA. *Id.*

<sup>148</sup> 469 F.2d 1211 (2d Cir. 1972).

<sup>149</sup> 500 F.2d 424 (2d Cir. 1974).

mere error in the law or failure on the part of the arbitrators to understand or apply the law.”<sup>150</sup> In *Siegel v. Titan Indus. Corp.*<sup>151</sup> the court applied the standard and found no reason to vacate the award. *Siegel* explained that the standard applies when the “arbitrator understood and correctly stated the law but proceeded to ignore it.”<sup>152</sup> *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*<sup>153</sup> continued the standard. *Halligan v. Piper Jaffray, Inc.*<sup>154</sup> was a rare ruling that an award manifestly disregarded a law— here, the Age Discrimination in Employment Act.<sup>155</sup> More recently, *Hoelt v. MVL Group, Inc.*<sup>156</sup> and *Greenberg v. Bear, Stearns & Co.*<sup>157</sup> applied the manifest disregard standard.

Third Circuit: In 1968, this court recognized the manifest disregard standard in *Trafalgar Shipping Co. v. Int’l Mill Co.*<sup>158</sup> One year later, *Ludwig Honold Mfg. Co. v. Fletcher* stated that arbitrators’ awards “may not be disturbed so long as they are not in manifest disregard of the law.”<sup>159</sup> In *Jersey Coast Egg Producers*,<sup>160</sup> an arbitrator ordered

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<sup>150</sup> *Id.* at 430, n. 12.

<sup>151</sup> 779 F.2d 891, 892 (2d Cir. 1985).

<sup>152</sup> *Id.* at 893.

<sup>153</sup> 808 F.2d 930, 933 (2d Cir. 1986), where the court emphasized the narrowness of its review standard. *See infra* note 310.

<sup>154</sup> 148 F.3d 197, 204 (2d Cir. 1998).

<sup>155</sup> The court reasoned: “In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both.” *Id.* at 202. In order to modify or vacate an award for manifest disregard, a court “must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.” *Id.*

<sup>156</sup> 343 F.3d 57, 59-61 (2d Cir. 2003).

<sup>157</sup> 220 F.3d 22, 29 (2d Cir. 2000) (“We hold that where, as here, the petitioner complains principally and in good faith that the award was rendered in manifest disregard of federal law, a substantial federal question is presented and the federal courts have jurisdiction to entertain the petition.”).

<sup>158</sup> 401 F.2d 568, 573 (2d Cir. 1968).

<sup>159</sup> 405 F.2d 1123, 1128 (3d Cir. 1969), explaining to lower courts:

We want to make clear that we are not holding that arbitrators should write opinions in every case or even in most cases. We merely observe that where a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court’s confidence that the arbitrators engaged in manifest disregard.

the reinstatement of an employee who stole a \$35 case of eggs from his employer— even though the worker was convicted for this misdemeanor.<sup>161</sup> A district court ruled that the award manifestly disregarded the law, but the Third Circuit reversed on other grounds.<sup>162</sup> In the 1980s and 1990s, several decisions ruled on manifest disregard challenges.<sup>163</sup> More recently, *Major League Umpires Association v. The American League of Professional Baseball Clubs* found that an arbitrator’s ruling did “not constitute a manifest disregard for either the CBA or the applicable law.”<sup>164</sup>

Fourth Circuit: This court has occasionally applied the manifest disregard standard, but without explaining it. In a brief passage, *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31* recognized that an arbitrator’s legal determination “may only be overturned where it is in manifest disregard of the law.”<sup>165</sup> Later, the court applied the standard in a cursory manner.<sup>166</sup> Judge Luttig’s dissenting opinion in *Patten v. Signator Ins. Agency, Inc.* discussed the standard more thoughtfully.<sup>167</sup>

Fifth Circuit: On two occasions, the Fifth Circuit refused to adopt the manifest

<sup>160</sup> *Local 863, Int’l B’hd of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530 (3d Cir. 1985).

<sup>161</sup> *Id.* at 532.

<sup>162</sup> *Id.* at 534-35. The appeals court reasoned that the “district court impermissibly imposed its own interpretation of the collective bargaining agreement by essentially holding that the misdemeanor conviction for theft was *per se* support for the discharge.” The district court ignored “the possibility that an arbitrator may interpret the contract in a different manner and find a lack of ‘just and sufficient cause’ for a discharge for theft despite the misdemeanor conviction.” *Id.* at 535.

<sup>163</sup> See *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125, 1130-31 (3<sup>rd</sup> Cir. 1972); *Tanoma Min. Co., Inc. v. Local Union No. 1269, United Mine Workers of America*, 896 F.2d 745, 749 (3d Cir. 1990); *Graphic Arts Int’l Union Local 97B v. Haddon Craftsmen, Inc.*, 796 F.2d 692, 695 (3d Cir. 1986); *Newark Morning Ledger Co. v. Newark Typographical Union Local*, 797 F.2d 162, 165 (3d Cir. 1986); *Exxon Shipping Co. v. Exxon Seamen’s Union*, 993 F.2d 357, 360 (3d Cir. 1993); and *News Am. Publications v. Newark Typographical Union, Local 103*, 918 F.2d 21, 24 (3d Cir. 1990).

<sup>164</sup> 357 F.3d 272 (3d Cir. 2004).

<sup>165</sup> 933 F.2d 225, 231 (4<sup>th</sup> Cir. 1991) (“Upshur next argues that the arbitrators relied on an inapposite NLRB decision [citation omitted], in manifest disregard for the law. Again, we disagree.”).

<sup>166</sup> *Apex Plumbing Supply, Inc.*, 142 F.3d 188, 193 (4<sup>th</sup> Cir. 1998); and *Three S Delaware Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4<sup>th</sup> Cir. 2007); *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4<sup>th</sup> Cir. 1994).

<sup>167</sup> 441 F.3d 230, 237-238 (4<sup>th</sup> Cir. 2006). See *infra* note 308.

disregard standard.<sup>168</sup> This view changed in *Williams v. Cigna Financial Advisors, Inc.*,<sup>169</sup> when the Fifth Circuit became the last appellate court to adopt “manifest disregard.” The court applied this standard in subsequent cases.<sup>170</sup>

Sixth Circuit: *Anaconda Co. v. Dist. Lodge No. 27 of Int’l Ass’n of Machinists and Aerospace Workers* applied the manifest disregard standard,<sup>171</sup> ruling that the award did not conflict with the law.<sup>172</sup> More generally, *Anaconda* said that the “parties bargained for final and binding arbitration and, in the vast majority of cases, will be bound by the arbitrator’s decision, right or wrong.”<sup>173</sup> In a 1995 decision, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*,<sup>174</sup> the court explained that the standard means “the [arbitrator’s] decision must fly in the face of clearly established legal precedent.”<sup>175</sup> More recently, this circuit reaffirmed the “manifest disregard” standard.<sup>176</sup>

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<sup>168</sup> *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534, 539 (5<sup>th</sup> Cir. 1992) (“this circuit never has employed a ‘manifest disregard of the law’ standard in reviewing arbitration awards”); and *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820, n.2 (5<sup>th</sup> Cir. 1993) (refusing “to adopt ‘manifest disregard,’ or any other standard, as an addendum to section 10” of the FAA).

<sup>169</sup> 197 F.3d 752, 759 (5<sup>th</sup> Cir. 1999), stating: “In our opinion, clear approval of the ‘manifest disregard’ of the law standard in the review of arbitration awards under the FAA was signaled by the Supreme Court’s statement in *First Options* that ‘parties [are] bound by [an] arbitrator’s decision not in ‘manifest disregard’ of the law.’”

<sup>170</sup> *See Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395-96 (5<sup>th</sup> Cir. 2003); and *Kergosian v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5<sup>th</sup> Cir. 2004), ruling that the arbitrator did not render an award in manifest disregard of ERISA.

<sup>171</sup> *Anaconda Co. v. Dist. Lodge No. 27 of Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO*, 693 F.2d 35, 37-38 (6<sup>th</sup> Cir. 1982).

<sup>172</sup> *Id.* at 37-38 (“‘Manifest disregard of the law’ means more than a mere error in interpretation or application of the law. While the arbitrator may or may not have applied *Weingarten* correctly under the facts of this case, we cannot say that his decision showed a ‘manifest disregard of the law.’”).

<sup>173</sup> *Id.* at 38.

<sup>174</sup> 70 F.3d 418, 420-21 (6<sup>th</sup> Cir. 1995).

<sup>175</sup> *Id.* at 421.

<sup>176</sup> *Buchignani v. Vining Sparks IBG, Inc.*, 208 F.3d 212 (6<sup>th</sup> Cir. 2000), at \*1; *Dawahare v. Spencer*, 210 F.3d 666, 669 (6<sup>th</sup> Cir. 2000); and *Visconsi v. Lehman Brothers, Inc.*, 244 Fed.Appx. 708, 711 (6<sup>th</sup> Cir. 2007).

Seventh Circuit: This court has given much thought to this standard. At first, the circuit was reluctant to adopt it.<sup>177</sup> Later, it said that awards can be set aside if arbitrators disregard the law.<sup>178</sup> This view changed again in Judge Posner’s caustic critique in *Baravati v. Josephthal*.<sup>179</sup> But the court seemed to change back in *Wise v. Wachovia Sec., LLC*.<sup>180</sup> *Wise* thought that manifest disregard of the law fits within the FAA’s section 10(a)(4).<sup>181</sup> The court stated an exceedingly narrow definition of the standard— when awards “direct the parties to violate the law.”<sup>182</sup> Recently, the court reaffirmed the standard.<sup>183</sup>

Eighth Circuit: This court has a long history of applying this standard. *Stroh Container Co. v. Delphi Industries*<sup>184</sup> said an “arbitrator’s conclusions on substantive matters may be vacated only when the award demonstrates a manifest disregard of the law where the arbitrators correctly state the law and then proceed to disregard it.”<sup>185</sup> *Val-U Construction Co. v. Rosebud Sioux Tribe*<sup>186</sup> noted that “[b]eyond the grounds for vacation provided in the FAA, an award will only be set aside where it is completely

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<sup>177</sup> Nat’l R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co., 551 F.2d 136, 143, n. 9 (7<sup>th</sup> Cir. 1977), stating: “since arbitrators have no obligation to state the rationale underlying their award, there may be no basis whatsoever for a court to determine whether they have manifestly disregarded the law or simply misinterpreted it.”

<sup>178</sup> Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7<sup>th</sup> Cir. 1992).

<sup>179</sup> *Supra* note 9, at 706, explaining: “There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that Wilko is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation.”

<sup>180</sup> 450 F.3d 265, 268-69 (7<sup>th</sup> Cir. 2006).

<sup>181</sup> *Id.* at 268 (7<sup>th</sup> Cir. 2006) (“we have defined ‘manifest disregard of the law’ so narrowly that it fits comfortably under the first clause of the fourth statutory ground— ‘where the arbitrators exceeded their powers’”).

<sup>182</sup> *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 578-79 (7<sup>th</sup> Cir. 2001); and *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 650 (7<sup>th</sup> Cir. 2001).

<sup>183</sup> *Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 563 (7<sup>th</sup> Cir. 2008).

<sup>184</sup> 783 F.2d 743 (8<sup>th</sup> Cir. 1986).

<sup>185</sup> *Id.* at 749-50.

<sup>186</sup> 146 F.3d 573 (8<sup>th</sup> Cir. 1998).

irrational or evidences a manifest disregard for the law.”<sup>187</sup> *Hoffman v. Cargill, Inc.*<sup>188</sup> reaffirmed this view, noting that “extra-statutory standards are extremely narrow,”<sup>189</sup> as did *Manion v. Nagin*.<sup>190</sup> *Stark v. Sandberg, Phoenix & von Gontard, P.C.* ruled that a punitive award of \$6 million did not manifestly disregard a debt collection law.<sup>191</sup>

Ninth Circuit: In its first consideration of manifest disregard, *San Martine Compania de Navigacio, S.A. v. Sagguenay Terminals Ltd.* criticized *Wilko*’s vague and problematical formulation.<sup>192</sup> This resistance eased in *French v. Merrill Lynch*.<sup>193</sup> In *Sheet Metal Workers Int’l v. Kinney Air Conditioning Co.* the court said that “[i]ndependent of section 10 of the [Federal Arbitration] Act, a district court may vacate an arbitral award which exhibits manifest disregard of the law.”<sup>194</sup> *Todd Shipyards Corp. v. Cunard Line, Ltd.* viewed this standard as a “non-statutory escape valve”<sup>195</sup> that allows for vacatur. More recently, the court reaffirmed its acceptance of the standard.<sup>196</sup>

Tenth Circuit: When this court applied manifest disregard in *Jenkins v. Prudential-Bache Securities, Inc.*,<sup>197</sup> it noted that “federal courts have never limited their

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<sup>187</sup> *Id.* at 577.

<sup>188</sup> 236 F.3d 458 (8<sup>th</sup> Cir. 2001).

<sup>189</sup> *Id.* at 461-62 (“An arbitration decision . . . only manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.”).

<sup>190</sup> 392 F.3d 294, 298 (8<sup>th</sup> Cir. 2004).

<sup>191</sup> 381 F.3d 793, 799 (8<sup>th</sup> Cir. 2004).

<sup>192</sup> 293 F.2d 796, 801 (9<sup>th</sup> Cir. 1961).

<sup>193</sup> 784 F.2d 902, 906 (9<sup>th</sup> Cir. 1986). The court observed: “We review the Panel’s award mindful that confirmation is required even in the face of erroneous . . . misinterpretations of law. It is not even enough that the Panel may have failed to understand or apply the law. . . . An arbitrator’s decision must be upheld unless it is ‘completely irrational,’ or it constitutes a ‘manifest disregard of law.’”

<sup>194</sup> 756 F.2d 742, 746 (9<sup>th</sup> Cir. 1985).

<sup>195</sup> *Id.* at 1060. 943 F.2d 1056, 1060 (9<sup>th</sup> Cir. 1991). *Also see* A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9<sup>th</sup> Cir. 1992).

<sup>196</sup> *Poweragent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1193 (9<sup>th</sup> Cir. 2004); *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 838 (9<sup>th</sup> Cir. 2004); and *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9<sup>th</sup> Cir. 2007).

<sup>197</sup> 847 F.2d 631 (10<sup>th</sup> Cir. 1988).

scope of review to a strict reading”<sup>198</sup> of the FAA. On two occasions, the court defined the standard as “willful inattentiveness to the governing law.”<sup>199</sup> *Sheldon v. Vermonty* included manifest disregard among several extra-statutory grounds.<sup>200</sup> Recently, *Hollern v. Wachovia Securities, Inc.* said that manifest disregard is a judicially created exception to the general rule that courts do not reverse awards for “[e]rrors in an arbitration panel’s interpretation or application of the law.”<sup>201</sup>

Eleventh Circuit: A 1988 case, *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, rejected manifest disregard,<sup>202</sup> as did two opinions in the early 1990s.<sup>203</sup> This view changed in a 1997 opinion, *Montes v. Shearson Lehman Bros., Inc.*,<sup>204</sup> where the court said: “An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it.”<sup>205</sup> This is a rare case that

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<sup>198</sup> *Id.* at 634. Explaining that the standard is “more than error or misunderstanding with respect to the law,” the court justified this expansion of statutory elements as “either as an inherent appurtenance to the right of judicial review or as a broad interpretation of subsection (d) prohibiting arbitrators from exceeding their powers.” *Id.* at 633-34.

<sup>199</sup> *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10<sup>th</sup> Cir. 1995); and *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10<sup>th</sup> Cir. 2001).

<sup>200</sup> 269 F.3d 1202, 1206 (10<sup>th</sup> Cir. 2001) (these “handful of judicially created reasons” include the award violates public policy, is in manifest disregard of the law, or denies a fundamentally fair hearing).

<sup>201</sup> 458 F.3d 1169, 1176 (10<sup>th</sup> Cir. 2006).

<sup>202</sup> *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 746 (11<sup>th</sup> Cir. 1988) (declining to adopt the manifest disregard of the law standard, the court stated that the standard could only be satisfied when “arbitrators understand and correctly state the law, but proceed to disregard the same.”).

<sup>203</sup> *Robbins v. Day*, 954 F.2d 679, 684 (11<sup>th</sup> Cir. 1992), stating that the “statute does not allow an arbitration award to be vacated solely on the basis of error of law or interpretation but requires something more.” *Also see Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11<sup>th</sup> Cir. 1990), declaring: “This court has never adopted the manifest-disregard-of-the-law standard; indeed, we have expressed some doubt as to whether it should be adopted since the standard would likely never be met when the arbitrator provides no reasons for its award (which is typically the case).”

<sup>204</sup> 128 F.3d 1456 (11<sup>th</sup> Cir. 1997).

<sup>205</sup> *Id.* at 1461. Using a dictionary to define “manifest” and “disregard,” the court defined the former as “open, clear, visible, unmistakable, undubitable, indisputable, evident, and self-evident,” and the latter as “unworthy of regard or notice; to take no notice of; to leave out of consideration; to ignore; to overlook; to fail to observe.” Applying this test, the court found that the arbitrators “recognized that they

vacated an award for manifestly disregarding the law. The court reaffirmed the standard in *Scott v. Prudential Securities, Inc.*<sup>206</sup> More recently, it applied this test.<sup>207</sup>

D.C. Circuit: This court applied the test in a 1991 case, *Kanuth v. Prescott, Ball & Turban, Inc.*<sup>208</sup> In *Cole v. Burns Int'l Security Services* this court cited *Gilmer* as a reason to apply this standard.<sup>209</sup> *Gilmer*'s theory that mandatory arbitration substitutes the arbitral forum for court meant that the law could not be ignored in either venue.<sup>210</sup> Recalling that *Gilmer* said that “judicial scrutiny of arbitration awards necessarily . . . is sufficient to ensure that arbitrators comply with the requirements of [any] statute,”<sup>211</sup> *Cole* concluded that “[t]hese twin assumptions regarding the arbitration of statutory claims are valid only if judicial review under the ‘manifest disregard of the law’ standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.”<sup>212</sup> In more recent cases, the circuit continued to the standard.<sup>213</sup>

### C. Some State Courts Adopt the Manifest Disregard Standard

Before *Hall Street*, many states reviewed awards under the manifest disregard doctrine.<sup>214</sup> Georgia recognized it as an explicit statutory standard.<sup>215</sup> A few states

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were told to disregard the law (which the record reflects they knew) in a case in which the evidence to support the award was marginal. Thus, there is nothing in the record to refute the suggestion that the law was disregarded.” *Id.* at 1462.

<sup>206</sup> 141 F.3d 1007, 1017 (11<sup>th</sup> Cir. 1998).

<sup>207</sup> *B.L. Harbert International, LLC v. Hercules Steel Co.*, 441 F.3d 905, 910 (11<sup>th</sup> Cir. 2006), noting that “the *Montes* case [citation omitted] . . . remains the only case in which we have ever found the exceptional circumstances that satisfy the exacting requirements of this exception.” *Also see* *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1223 (11<sup>th</sup> Cir. 2000), and *University Commons-Urbana, LTD. V. Universal Constructors, Inc.*, 304 F.3d 1331, 1338 (11<sup>th</sup> Cir. 2002).

<sup>208</sup> 949 F.2d 1175 (D.C. Cir. 1991) (award was not in manifest disregard of the law).

<sup>209</sup> 128 F.3d 1456 (11<sup>th</sup> Cir. 1997).

<sup>210</sup> *Id.* at 1487 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702 (D.C. Cir. 2001); and *Kurke v. Oscar Gruss and Son, Inc.*, 454 F.3d 350, 354 (D.C. Cir. 2006).

<sup>214</sup> State courts that adopted manifest disregard of the law as a non-statutory ground to review

resisted the trend. In *Arnold v. Morgan Keegan & Co.* the Tennessee supreme court said the standard would undermine the effectiveness of arbitration.<sup>216</sup> The Virginia supreme court refused to adopt it in *SIGNAL Corp. v. Keane Federal Systems*<sup>217</sup> because the state's arbitration statute did not include it. California came to the same conclusion in *Crowell v. Downey Comm. Hosp. Foundation*<sup>218</sup> as did appellate courts in Missouri<sup>219</sup> and Minnesota.<sup>220</sup> Seeing no state statute for this test, *Coors Brewing Co. v. Cabo* ruled that it is not available in Colorado.<sup>221</sup> Idaho's highest court declined to consider the standard in *Moore v. Omnicare, Inc.*<sup>222</sup>

In sum, when Part III is read with Part II, there is little doubt that courts created the manifest disregard standard. The more interesting question is whether the FAA Congress meant to incorporate this test. My research provides evidence to support this

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arbitration awards under their state statutes include: *H & S Homes, L.L.C. v. McDonald*, 910 So.2d 79, 83-84 (Ala. 2004); *Garrity v. McGaskey*, 612 A.2d 742, 744-45 (Conn. 1992); *Travelers Ins. Co. Nationwide Mut. Ins. Co.*, 886 A.2d 46, 48 (Del. 2005); *Lopata v. Coyne*, 735 A.2d 931, 940 (D.C. 1999); *Griffith v. McGovern*, 141 P.3d 516, 520 (Kan. 2006); *Colchoneria Jiron, S.A. v. Blumenthal Print Works, Inc.*, 629 So. 2d 1288, 1290 (La. 1993); *Bd. of Education v. Prince George's County Educator's Ass'n*, 522 A.2d 931, 938 (Md. 1987); *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 794 (Mo. App. 1998); *Geissler v. Sanem*, 949 P.2d 234, 237-238 (Mont. 1997); *Graber v. Comstock Bank*, 905 P.2d 1112, 1116 (Nev. 1995); *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 610 A.2d 364, 372 (N.J. 1992); *Spear, Leeds & Kellogg v. Bullseye Securities, Inc.*, 738 N.Y.S.2d 27, 28-29 (N.Y. 2002); *Prudential Property & Casualty Ins. Co. v. Flynn*, 687 A.2d 440, 442 (R.I. 1996); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 105 S.W.3d 244, 252 (Tex. 2003); *Buzas Baseball Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 950-951 (Utah 1996); *Shahi v. Ascend Financial Services, Inc.*, 898 A.2d 116, 122 (Vt. 2006); *Madison Landfills, Inc. v. Libby Landfill Negotiating Committee*, 524 N.W.2d 883, 892 (Wis. 1994).

<sup>215</sup> Ga. Code. Ann. § 9-9-13 (b)(5) ("award shall be vacated. . . if the court finds that the rights of [the appealing] party were prejudiced by . . . [t]he arbitrator's manifest disregard of the law").

<sup>216</sup> 914 S.W.2d 445, 452 (Tenn.1996). *Also see* *Warbinger Construction, Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 859 (Tenn. 2001) ("we decline to adopt the nonstatutory grounds of 'manifest disregard' and public policy for reviewing arbitration awards").

<sup>217</sup> 574 S.E.2d 253, 257 (2003).

<sup>218</sup> 115 Cal.Rptr.2d 810, 817 (Cal. 2002).

<sup>219</sup> *Stifel, Nicolaus & Co. v. Francis*, 872 S.W.2d 484, 486 (Mo. 1994) ("The judiciary is limited to vacating an arbitration award only on those grounds set forth in the statute. . . Manifest disregard for the law is not a statutory basis for vacating an award.").

<sup>220</sup> *Hunter, Keith Industries, Inc. v. Piper Capital Management, Inc.*, 575 N.W.2d 850, 855 (Minn. 1998).

<sup>221</sup> 114 P.3d 60, 63 (Colo. 2005).

<sup>222</sup> 118 P.3d 141, 151 (Idaho 2005).

“shorthand theory”— *Hall Street*’s way of stating that the FAA incorporated manifest disregard of the law.<sup>223</sup> Recall that in Part II, nineteenth century courts used a verbal formulation much like manifest disregard in the same grammatical sequence as “fraud,” “corruption,” and “exceeded powers”— current grounds in section 10 of the FAA to vacate an award.<sup>224</sup> I also postulated that Chitty was a possible source for the FAA.<sup>225</sup> Most of the FAA sub-sections quoted from Chitty. He observed that courts vacated awards with legal mistakes.

I cannot explain why Congress omitted this element. I doubt, however, that this omission was intentional. The FAA Congress was mostly concerned with ensuring that courts enforce arbitration agreements.<sup>226</sup> Lawmakers did not think much about the award-confirmation process. They relied on a solitary brief for the elements of section 10.<sup>227</sup> The omission of a “manifest disregard” standard was probably caused by this brief’s inadvertence.

My research also refutes the misleading idea that *Wilko* created the standard. The decision never ruled on the matter, and gave nothing more than an advisory opinion on this doctrine. However, *Wilko* prompted a few federal appeals courts in the 1960s and 1970s to define, adopt, and apply the standard. Table 2 [*supra*] shows that half of the circuits adopted the manifest disregard standard in the 1990s. Perhaps the steady accumulation of precedent led to this trend.

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<sup>223</sup> *Hall Street*, *supra* note 13, at 585.

<sup>224</sup> *E.g.*, *Farragut*, *supra* note 86.

<sup>225</sup> *Supra* notes 110-117.

<sup>226</sup> *Hearings on the Subject of Interstate Commercial Disputes Before the Subcommittees on the Judiciary*, 68<sup>th</sup> Cong., 1<sup>st</sup> Sess., p. 6 (Statement of Charles L. Bernheimer, January 9, 1924). The House Report stated: “The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of [f] admiralty, or which may be the subject of litigation in the Federal courts.”

<sup>227</sup> *Joint Hearings*, *supra* note 100, at 36.

But I believe that courts embraced this standard in response to the rapid upsurge in mandatory arbitrations in the 1990s that involved statutory issues. Bowing to *Gilmer*'s strong pronouncement in favor of enforcing arbitration agreements, these courts ensured that arbitrators did not intentionally ignore the laws they were supposed to apply.<sup>228</sup> Although they regularly applied the manifest disregard standard, they rarely used it to vacate awards.<sup>229</sup>

#### IV. HALL STREET AND THE MANIFEST DISREGARD STANDARD

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

*Hall Street* dealt with a commercial landlord-tenant dispute. As a manufacturer was ending its lease, the property owner wanted the company to pay for environmental clean-up. Mattel said it had no obligation to pay or indemnify the owner. After *Hall Street Associates* filed a lawsuit, both parties agreed to arbitrate this dispute. Their contract allowed a federal district court in Oregon to enter judgment on the award by confirming, correcting, modifying, or vacating the arbitrator's ruling. It also authorized the court to vacate the award if the "arbitrator's conclusions of law are erroneous."<sup>230</sup>

The resulting process showed how arbitration can fail to provide a quick, cost-saving ADR process.<sup>231</sup> The award ruled that the manufacturer owed nothing. However, *Hall Street Associates* successfully sued to vacate this ruling, arguing that the arbitrator

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<sup>228</sup> *Porzig v. Dresdner, Kleinwort, Benson, N.A., Inc.*, 497 F.3d 133, 139 (2d Cir. 2007); *Montes*, *supra* note 204, at 1462; and *Halligan*, *supra* note 154, at 202.

<sup>229</sup> *Halligan*, *supra* note 154; *Montes*, *supra* note 204; and *Porzig*, *supra* note 228.

<sup>230</sup> *Hall Street*, *supra* note 13, at 579.

<sup>231</sup> The parties initially litigated the lease termination issue in 2001. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 145 F.Supp.2d 1211 (D.Or. 2001). In 2004, they litigated the arbitration award. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 113 Fed.Appx. 272 (9<sup>th</sup> Cir. 2004). After the Supreme Court ruled on the arbitration issue in 2008, the Ninth Circuit remanded the matter to the district court. Interesting to note, the *Hall Street* opinion preserved state law grounds as an independent basis for conducting a review of the award—thus opening the door to more litigation over the award. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 531 F.3d 1019, 1020-1021 (9<sup>th</sup> Cir. 2008).

ignored the state’s environmental law. On remand, the arbitrator ruled for the landowner, only to have his award appealed to the district court again. The district court confirmed most of the award. The Ninth Circuit reversed, reasoning that the parties could not agree to expand the grounds for reviewing awards. On remand, the district court found another reason to vacate the award, prompting one more reversal by the appeals court.

*Hall Street* had no reason to devote so much attention to the manifest disregard standard. In the midst of litigating a lease termination, the parties agreed to arbitrate the matter— provided that the district court would be allowed to review the award for erroneous conclusions of law.<sup>232</sup> This, in itself, was unusual. With the prevalence of pre-dispute arbitration agreements,<sup>233</sup> most parties do not enter into arbitration agreements in the midst of a lawsuit. Important to note, neither party in *Hall Street* raised “manifest disregard” as an issue in the first appeal to the Ninth Circuit. The issue was whether the parties could contract for a court to use expanded standards of judicial review. In the second round before the Ninth Circuit, the court reviewed the award to see if it was irrational.<sup>234</sup> And the Supreme Court did not identify manifest disregard as the issue. The issue was “the scope of review permissible under the FAA.”<sup>235</sup>

*Hall Street*’s holding that the FAA’s section 10 provides the exclusive grounds for vacating an award did not reject the manifest disregard standard.<sup>236</sup> The majority opinion said that *Wilko*’s view of judicial review was too vague to be a coherent doctrine:

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<sup>232</sup> *Hall Street Associates*, *supra* note 13, at 579.

<sup>233</sup> See Meredith R. Miller, *Contracting Out Process, Contracting Out Corporate Accountability: An Argument Against Enforcement on Pre-Dispute Limits on Process*, 75 TENN.L.REV. 365, 370 (2008) (“across varying industries, the pre-dispute arbitration regime endures unheedingly”).

<sup>234</sup> *Hall Street Associates, L.L.C. v. Mattel Inc.*, 196 Fed.Appx. 476, \*2 (9th Cir. 2006) (“The arbitrator’s conclusion that the statute was not ‘applicable’ is completely irrational.”).

<sup>235</sup> *Hall Street*, *supra* note 13, at 582, n.2.

<sup>236</sup> *Hall Street*, *supra* note 13, at 584-585.

“Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the [FAA’s] §10 grounds collectively, rather than adding to them.”<sup>237</sup> The majority allowed for the possibility that manifest disregard was “shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers.’”<sup>238</sup>

The landlord also contended that parties are permitted to enter into contracts that expand judicial review standards. The Court agreed that parties may structure much of their arbitration procedures by contract. But the FAA’s mandatory language left no room to expand or modify the grounds for court review of awards.<sup>239</sup> Delving into the specific terms of section 10— “‘corruption,’ ‘fraud,’ ‘evident partiality,’ ‘misconduct,’ ‘misbehavior,’ ‘exceed[ing] . . . powers,’ ‘evident material miscalculation,’ ‘evident material mistake,’ ‘award[s] upon a matter not submitted,’”<sup>240</sup> the majority opinion reasoned that Congress wanted awards reviewed only for “egregious departures”<sup>241</sup> from the arbitration contract. Thus, section 10 did not allow broader grounds of review.<sup>242</sup>

More generally, the majority opinion concluded that the FAA embodies “a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”<sup>243</sup> Ruling otherwise

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<sup>237</sup> Hall Street, *supra* note 13, at 585.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 587.

<sup>240</sup> *Id.* at 586.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 590. However, Hall Street left the door open for broader review to parties who challenge an award in state courts. *Id.* at 588. The Court explained that its holding applied only to FAA actions and did “exclude more searching review based on authority outside the statute.” *Id.* The majority opinion also noted that parties may use state statutory or common law avenues to seek review awards—and also acknowledged that a “different scope of review” is allowable under those legal regimes. *Id.*

<sup>243</sup> *Id.* at 588.

would “render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”<sup>244</sup>

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

With oversimplification, *Hall Street* held that courts cannot apply any non-statutory standards when they review awards under the FAA. Meanwhile, the majority opinion took a muddled approach in treating manifest disregard of the law, stating that it might be a shorthand expression for all non-statutory standards. Did *Hall Street* realize its broad effect? To put this question in perspective, consider that employers or employees in the present study asked FAA courts to vacate awards that: (1) manifestly disregarded the law,<sup>245</sup> (2) violated a public policy,<sup>246</sup> (3) contained a fact-finding error,<sup>247</sup> (4) was arbitrary and capricious, or irrational,<sup>248</sup> (5) did not draw its essence from the agreement,<sup>249</sup> (6) had a punitive, excessive, or unauthorized remedy,<sup>250</sup> (7) was unconstitutional,<sup>251</sup> (8) was invalid because there was no arbitration agreement,<sup>252</sup>

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<sup>244</sup> *Id.* While Justice Stevens’ dissenting opinion did not directly touch on manifest disregard, it raised points that pertain to this standard. The opinion emphasized that these parties voluntarily entered into an arbitration agreement. *Id.* at 592-593 (J. Stevens, dissenting). Congress wanted to promote and facilitate the use of arbitration agreements. *Id.* at 593-594. Thus, the majority’s “wooden” or strict reading of section 10 of the FAA did not reflect congressional intent. *Id.* at 594

<sup>245</sup> Halligan, *supra* note 154.

<sup>246</sup> Quinn v. Nafta Traders, Inc., 257 S.W.3d 795, 799 (Tex.App. 2008).

<sup>247</sup> Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, 751 So.2d 143, 150 (Fl.App. 2000), stating: “A reviewing court may not comb the record of an arbitration hearing for errors of fact . . . inherent in the decision-making process. . . . No provision in the Florida Arbitration Code authorizes trial judges to act as reviewing courts in the same way that a court of appeals reviews trial judges’ legal decisions.”

<sup>248</sup> Banc of America Securities v. Knight, 787 N.Y.S.2d 676 (N.Y.Sup. 2004) (employer petitioned a court to vacate the \$680,000 award on grounds that it was irrational).

<sup>249</sup> Qorvis Communications, LLC v. Wilson, 549 F.3d 303, 305 (4<sup>th</sup> Cir. 2008).

<sup>250</sup> Belko v. AVX Corp., 251 Cal.Rptr. 557, 563 (Cal. 1988) (“We find no public policy significant enough to restrict the right of contracting parties to vesting agreed upon arbitrators with the authority to consider and resolve claims for punitive damages.”).

<sup>251</sup> Acciaro v. Millenium Securities Corp., 83 F.Supp.2d 413, 422 (S.D. N.Y. 2000) (employer’s “principal argument is that the award violates due process because the ratio between punitive and compensatory damages renders it excessive.”).

<sup>252</sup> Morrow v. Hallmark Cards, Inc., 273 S.W.3d 15 (Mo. 2008).

and (9) resulted from an agreement to allow parties to expand and define their own standards of court review.<sup>253</sup> These arguments fall outside the FAA, but courts applied them in this database. Does *Hall Street*'s holding preclude these standards?

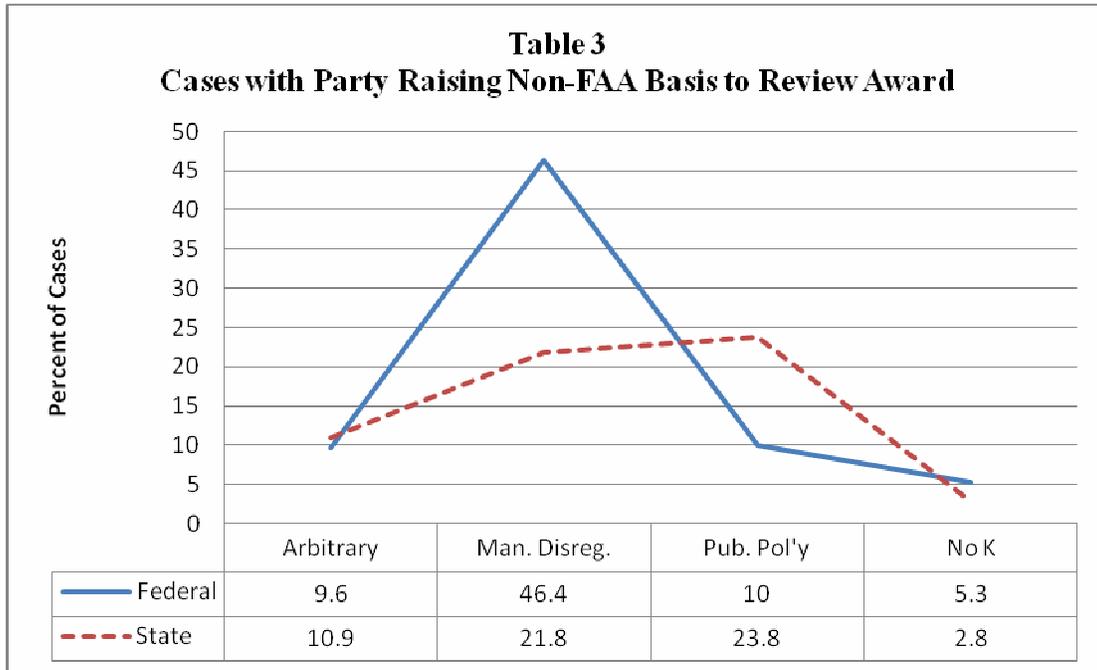


Table 3 shows that parties raised a “manifest disregard” issue in 46.4% of federal and 21.8% of state cases in my database. Assuming for the sake of argument that this standard is part of the FAA, what does *Hall Street* mean for other non-statutory reviewing standards? Consider the public policy exception to award enforcement, a common non-statutory standard. Table 3 shows that parties raised this argument in 10% of federal and 24% of state cases. This non-FAA standard, from *United Paperworkers Int’l Union v. Misco*,<sup>254</sup> says that awards may be set aside if they “violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to laws and legal precedents and not from general considerations of supposed public

<sup>253</sup> *McQueen-Starling v. United Health Group, Inc.*, 654 F.Supp.2d 154, 160 (S.D.N.Y. 2009) (The arbitration agreement provided that “the standard of review to be applied . . . will be the same as that applied by an appellate court reviewing the decision of a trial court sitting without a jury.”).

<sup>254</sup> 484 U.S. 29 (1987).

interests.”<sup>255</sup> *Misco* did not arise under the FAA. It involved a union and employer who arbitrated the firing of a paper mill worker under section 301 the Labor-Management Relations Act (LMRA).<sup>256</sup> While *Misco* involved a different federal law, Table 3 shows that courts acting under the FAA have occasionally applied its test. By precluding all non-statutory standards in FAA cases, did *Hall Street* eliminate the public policy test?

For example, consider *Dezego v. A.G. Edwards & Sons, Inc.*<sup>257</sup> Sandra Dezego sued her employer for sex discrimination, but was ordered by the court to arbitrate her claim.<sup>258</sup> After 28 hearing days, she won \$1.8 million in damages.<sup>259</sup> Petitioning a federal court to vacate the award, the employer argued that the amount of the award violated Title VII’s public policy of capping employer damages.<sup>260</sup> After determining that the Eleventh Circuit uses the public policy test, the lower court confirmed the award.<sup>261</sup>

*Dezego* shows the relevance of maintaining a non-statutory reviewing standard

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<sup>255</sup> *Id.* at 43. The case did not arise under the FAA. It involved a union and employer who arbitrated the termination of a paper mill worker under the auspices of section 301 the Labor-Management Relations Act. The worker was fired after he was arrested in the company parking lot on a drug charge. *Id.* at 35. After the arbitrator sided with the union, a lower court vacated the award. *Id.* The court believed that the award violated a public policy prohibiting the operation of dangerous machinery by drug-users. *Id.* The Supreme Court disagreed, reasoning that drug laws did not preclude reinstatement of an offender. *Id.* at 43.

<sup>256</sup> Labor-Management Relations Act, ch. 120, § 301, 61 Stat. 136, 156-57 (1947), codified as amended at 29 U.S.C. § 185(b). By 1947, when the LMRA was enacted, and in the following years, most unions agreed to no-strike clauses in exchange for employer assurances to submit contract disputes to arbitration. See R.W. FLEMING, THE LABOR ARBITRATION PROCESS 31-32 (1965): “Indeed, it is apparent that the decisions of the Supreme Court which have so greatly enhanced labor arbitration . . . are in large part based on the theory that the arbitration clause is the *quid pro quo* for the no-strike clause.” Section 301 provided a legal process to enforce this bargain. In a landmark decision, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Supreme Court ruled that federal jurisdiction to enforce collective bargaining agreements, including arbitration provisions, arises under Section 301 of the Labor-Management Relations Act of 1947, and not the Federal Arbitration Act. *Id.* at 456-57. Whether courts act under the FAA or LMRA, they apply federal common law standards derived from the *Steelworkers Trilogy*—three companion cases that articulated these criteria. See *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>257</sup> 2008 WL 215979 (M.D. Fl. 2008).

<sup>258</sup> *Id.* at \*1.

<sup>259</sup> *Id.* at \*2, n.3.

<sup>260</sup> *Id.* at \*2.

<sup>261</sup> *Id.* at \*5.

that ensures an award complies with the law. Recall that *Gilmer* articulated a broad theory of forum substitution, leading employers and workers to bypass court as they arbitrate their legal claims. *Gilmer* fortified its forum substitution theory by stating “that although judicial scrutiny of arbitration awards necessarily is limited, *such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue* [emphasis added].”<sup>262</sup> *Dezego* raises the question: What FAA standard would a court use to perform its *Gilmer*-function of reviewing an award to ensure it complies with the law? The statutory elements do not list manifest disregard or the public policy test.

Now consider how *Morrow v. Hallmark Cards, Inc.*<sup>263</sup> would have been decided if the court could not apply a non-statutory test. After an employee was fired, she sued for age discrimination.<sup>264</sup> She was ordered to arbitrate her claim, but tried two more times to have the court hear her lawsuit.<sup>265</sup> Reluctantly, she invoked the mandatory arbitration process and argued to the arbitrator that the agreement was unenforceable because it was illusory.<sup>266</sup> She lost the award, but an appeals court vacated it on grounds that the arbitration agreement was one-sided and therefore unenforceable.<sup>267</sup> If *Morrow*’s appeal had been strictly limited to the FAA’s standards, she could not raise this legal argument.

In sum, *Hall Street* raised as many questions as it answered. It clearly limited FAA review of awards to the statutory elements in section 10, and barred parties from contracting for expanded award-review. But it had no reason to discuss manifest disregard because the parties did not argue this issue in their lengthy litigation. Its

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<sup>262</sup> *Gilmer*, *supra* note 16, at 32.

<sup>263</sup> 273 S.W.3d 15 (Mo. 2008).

<sup>264</sup> *Id.* at 18.

<sup>265</sup> *Id.* at 21.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 22-27.

historical analysis of the standard was flawed and shallow. Worse, *Hall Street* meandered to an indecisive conclusion: maybe manifest disregard is a non-statutory standard and maybe it is not. In Part V, I explore how courts deal with this poor guidance.

## V. DO COURTS CONFIRM MORE AWARDS FOLLOWING *HALL STREET*?

### A. Sample Method and Data

I used research methods from my earlier studies.<sup>268</sup> The sample was derived from Westlaw's online service. Because federal and state arbitration statutes regulate the process to challenge an award, I read federal and state cases that reviewed an arbitrator's ruling. The sample was limited to employment arbitrations.<sup>269</sup> Cases were decided from 1975 to March 2010.<sup>270</sup> I applied a consistent approach to build the sample.<sup>271</sup>

### B. Empirical Research Findings

The crosstabs program in SPSS produced data for federal and state courts. Cases were divided by first-level court [Table 4-A, *infra*] and appellate court rulings [Table 4-B, *infra*]. The table shows results before and after the Supreme Court ruled in *Hall Street*.

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<sup>268</sup> E.g., Michael H. LeRoy & Peter Feuille, *As the Enterprise Wheel Turns: New Evidence on the Finality of Labor Arbitration Awards*, 18 STAN. L. & POL'Y REV. 191, 202-03 (2007). Also see Michael H. LeRoy & Peter Feuille, *Reinventing the Enterprise Wheel: Court Review of Punitive Awards in Labor and Employment Arbitrations*, 10 HARV. NEGOT. L. REV. 199, 230-34 (2006); and Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RES. 19, 45-48 (2001).

<sup>269</sup> To be included, a case involved a post-award dispute between an individual employee and the employer in which an arbitrator's ruling was challenged by either party. Arbitration cases involving a union and employer were not included because these adjudications are no longer regulated under the FAA.

<sup>270</sup> *McClure v. Montgomery County Community Action Agency*, 1975 WL 181652 (Ohio App. 2 Dist. 1975).

<sup>271</sup> After a potential case was identified, I read it to see if it met the inclusion criteria. For example, pre-arbitration disputes over enforcement of an arbitration clause were excluded. Cases were included, on the other hand, where employees resisted arbitration, were compelled to arbitrate their claims, and were later involved in a post-award lawsuit. Once a case met the criteria, it was checked against a roster of previously read and coded cases to avoid duplication. All cases are in the Appendix. Next, relevant data were taken from each case. Variables included (1) state or federal court, (2) first court ruling on motion to confirm or vacate an award, and (3) appellate ruling on motion to confirm or vacate an award.

<b>Table 4-A</b>	
<b>First-Level Court Review of Arbitration Awards:</b>	
<b>Federal and State Award Confirmation Rates Before and After <i>Hall Street</i></b>	
	<b>Confirm Award</b>
<b>FEDERAL COURT</b>	
Federal District Court Rulings Pre- <i>Hall Street</i>	164/175 93.7%
<b>Federal District Court Rulings Post-<i>Hall Street</i></b>	30/33 90.9%
<b>STATE COURT</b>	
State First-Level Court Rulings Pre- <i>Hall Street</i>	96/122 78.7%
<b>State First-Level Court Rulings Post-<i>Hall Street</i></b>	20/24 83.3%

<b>Table 4-B</b>	
<b>Appellate Court Review of Arbitration Awards:</b>	
<b>Federal and State Award Confirmation Rates Before and After <i>Hall Street</i></b>	
	<b>Confirm Award</b>
<b>FEDERAL COURT</b>	
Federal Appeals Court Rulings Pre- <i>Hall Street</i>	79/90 87.8%
<b>Federal Appeals Court Rulings Post-<i>Hall Street</i></b>	6/7 85.7%
<b>STATE COURT</b>	
State Appeals Court Rulings Pre- <i>Hall Street</i>	73/103 70.9%
<b>State Appeals Court Rulings Post-<i>Hall Street</i></b>	16/18 88.9%

**Finding No. 1:** Federal district courts confirmed awards at a high and steady rate before and after *Hall Street* [Table 4-A]. They confirmed 164/175 (93.7%) awards from 1975 until March 3, 2008. After *Hall Street*, they confirmed 30/33 awards (90.9%).

**Finding No. 2:** After *Hall Street*, first-level state courts confirmed slightly more awards— 83.3 % (20/24 awards) compared to 78.7% (96/122 awards) [Table 4-A].

**Finding No. 3:** The difference between federal and state award confirmation rates narrowed after *Hall Street*, from 15 percentage points before this decision to about 8 [Table 4-A]. This means that federal and state courts reviewed awards more uniformly.

**Finding No. 4:** Federal appeals courts confirmed awards at a high and steady rate before and after *Hall Street*, respectively 87.8% and 85.7% [Table 4-B].

**Finding No. 5:** After *Hall Street*, state appellate courts confirmed more awards— 88.9% (16/18) compared to 70.9% (73/103) [Table 4-B]. Due to the small sample size for the post-*Hall Street* cases, the large percentage increase was not statistically significant.

**Finding No. 6:** Federal and state appellate courts had virtually identical confirmation rates after *Hall Street*, with states registering a slightly higher level [Table 4-B]. The difference was 3.2 percentage points.

### *C. Cases After Hall Street*

*Hall Street* has caused federal circuits to split in their treatment of the manifest disregard standard. Appellate courts in the Fifth Circuit<sup>272</sup> and Eleventh Circuit<sup>273</sup>

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<sup>272</sup> Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349 (5<sup>th</sup> Cir. 2009), overruling the Fifth Circuit’s prior holdings recognizing manifest disregard of the law. The court reasoned that *Hall Street* “unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a nonstatutory ground for vacatur [citations omitted]. Thus, to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA.” *Id.* at 354.

<sup>273</sup> Frazier v. CitiFinancial Corp., LLC, 604 F.3d 1313 (11<sup>th</sup> Cir. 2010), reasoning that “the categorical language of *Hall Street* compels such a conclusion.” *Id.* at 1324.

recently ruled that *Hall Street* ended this test to review awards under the FAA. In contrast, the Second, Sixth, and Ninth Circuits treated “manifest disregard” as part of a court’s reviewing power under the FAA. The Second Circuit said that manifest disregard is “reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA.”<sup>274</sup> The Sixth Circuit said that *Hall Street* precluded review under this standard.<sup>275</sup> The Ninth Circuit concluded that manifest disregard survived as a “shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4).”<sup>276</sup> The First,<sup>277</sup> Third,<sup>278</sup> Fourth,<sup>279</sup> and Tenth Circuits<sup>280</sup> did not rule directly on this standard.

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<sup>274</sup> *Stolt-Nielsen SA v. AnimalFeeds Intern. Corp.*, 548 F.3d 85, 94 (2d Cir. 2008), stating: “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.” Recently, the Supreme Court commented on this approach in *Stolt-Nielsen SA v. AnimalFeeds Intern. Corp.*, 130 S.Ct. 1758 (2010), stating: “We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street* . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.” *Id.* at 1768, n.3.

<sup>275</sup> *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed.Appx. 415 (6<sup>th</sup> Cir. 2008). The court said that *Hall Street* “significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. §10, but it did not foreclose federal courts’ review for an arbitrator’s manifest disregard of the law.” *Id.* at 418. The Sixth Circuit concluded: “In light of the Supreme Court’s hesitation to reject the ‘manifest disregard’ doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle. Accordingly, this Court will follow its well-established precedent here and continue to employ the ‘manifest disregard’ standard.” *Id.* at 419.

<sup>276</sup> *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1290 (9<sup>th</sup> Cir. 2009). The Ninth Circuit noted that *Hall Street* “listed several possible readings of the doctrine, including our own.” *Id.* at 1290.

<sup>277</sup> *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120 (1<sup>st</sup> Cir. 2008), acknowledging that *Hall Street* stated that “manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the FAA.” *Id.* at 124. The court observed, however, that this case was not brought under the FAA. Thus, the First Circuit concluded: “we decline to reach the question of whether *Hall Street* precludes a manifest disregard inquiry in this setting.” *Id.*

<sup>278</sup> *Bapu Corp. v. Choice Hotels Intern., Inc.*, Slip Copy, 2010 WL 925985 (3d Cir. 2010), observing that *Hall Street* “did not, however, expressly decide whether the judicially created doctrine allowing vacatur of an arbitration award for manifest disregard of the law by an arbitrator would continue to exist as an independent basis for vacatur.” *Id.* at \*3. The court concluded: “we see no need to decide the issue here because this case does not present one of those ‘exceedingly narrow’ circumstances supporting a vacatur based on manifest disregard of the law.” *Id.*

<sup>279</sup> *Raymond James Financial Services, Inc. v. Bishop*, 596 F.3d 183, 193, n.13 (4<sup>th</sup> Cir. 2010) (“we find it unnecessary to consider the effect of *Hall Street*” on the manifest disregard standard).

<sup>280</sup> *DMA Int’l, Inc. v. Qwest Communications Intern., Inc.*, 585 F.3d 1341, 1345, n.2. (10<sup>th</sup> Cir. 2009).

State courts have had differing reactions to *Hall Street*. A California court said that federal and state judicial review standards “do not move in lockstep,” and also noted that manifest disregard survives as an exception to the narrow reviewing standards for awards under California’s arbitration law.<sup>281</sup> An Indiana court assumed, without deciding, that the standard still applies.<sup>282</sup> The Wisconsin supreme court ruled that “manifest disregard of the law remains a basis for vacating awards.”<sup>283</sup> Taking an opposing view, Alabama’s highest court ruled that manifest disregard does not supplement the statutory criteria for reviewing awards.<sup>284</sup> An appeals court in Colorado questioned whether the manifest disregard standard remains viable.<sup>285</sup>

## VI. CONCLUSIONS AND IMPLICATIONS

Arbitration is a vital dispute resolution process. It provides low-cost, prompt, and final resolution. The process has been criticized, however, for failing to provide justice.<sup>286</sup> Mandatory arbitration has spurred these concerns as employers and businesses have required workers and consumers to agree to arbitrate disputes in lieu of seeking redress in court.<sup>287</sup> Critics also believe that the quality of justice available in arbitration differs from

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<sup>281</sup> Pearson Dental Supplies, Inc. v. Superior Court, 108 Cal.Rptr.3d 171, 182, n.3 (Cal. 2010).

<sup>282</sup> Transmontaigne Product Services, Inc. v. Americas Ins. Co., 2009 WL 2461209 (Ind. 2009), at \*5.

<sup>283</sup> Sands v. Menard, Inc., 318 Wis.2d 206, 213 (Wis. 2010).

<sup>284</sup> Volvo Trucks North America, Inc. v. Dolphin Line, Inc., \_\_\_ So.3d \_\_\_, 2010 WL 1641017, at \*3.

<sup>285</sup> Barnett v. Elite Properties of America, Inc., \_\_\_ P.3d \_\_\_, 2010 WL 2105940 (Colo. 2010), at \*6.

<sup>286</sup> Stuart T. Rossman, *Mandatory Binding Arbitration*, 2009 WLNR 18244651 (Sept. 17, 2009), testifying before Congress: “Hundreds of millions of [consumer] contracts now contain these clauses. Hundreds of thousands of consumers forced into arbitration every year discover that they have inadvertently signed away their legal rights.” Also see Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857 (1999); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999); and Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999).

<sup>287</sup> Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1072-1074 (1998), (describing the

litigation.<sup>288</sup> Focusing on these dispute resolution criteria— finality, justice, and consistency— I now assess *Hall Street*'s early impact.

*Finality:* The preliminary data show that *Hall Street* promotes finality. State courts are confirming more awards after *Hall Street*. This is a salutary trend. It fulfills a key benefit of arbitration — composure of disputes with minimal court interference. Award confirmation also effectuates legislative intent to minimize court interference in this process.<sup>289</sup> The nearly 20 percentage point increase in state appellate court award confirmations has positive implications for finality: it shows that courts are holding parties to their promises to abide by the award. The trend should discourage litigation to vacate awards.

My research is not designed to determine causation. But the methodology, which compares court rulings before and after March 3, 2008, shows a possible association between *Hall Street* and higher rates of award enforcement in state courts—as well as continuity of high enforcement rates in federal courts. The data suggest that courts are heeding *Hall Street*'s signals to promote award finality.<sup>290</sup>

*Justice:* *Hall Street* is creating conditions for undermining justice. Without legislation to prohibit mandatory arbitration,<sup>291</sup> millions of employees need a judicial

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“consumerization” of arbitration).

<sup>288</sup> Judith Resnik, *Uncovering, Disclosing, and Discovering How The Public Dimensions of Court-Based Processes Are At Risk*, 81 CHI-KENT L. REV. 521 (2006); and Miriam A. Cherry, *Whistling In the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029 (2004) (by enforcing mandatory arbitration agreements, courts avoid dealing with a considerable volume of employment litigation).

<sup>289</sup> Gilmer, *supra* note 16, at 24, observing that the purpose of the FAA was “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”

<sup>290</sup> See Tables 4-A and 4-B.

<sup>291</sup> See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (1st Sess. 2009) (a bill to curb mandatory arbitration).

review standard to ensure that arbitrators do not intentionally disregard their legal rights. The Fifth and Eleventh Circuits have lost sight of the fact that *Hall Street* involved two businesses that reached an arm's length bargain for arbitration as an alternative to litigation. The fact that these companies made their contract while they were embroiled in a lawsuit means that both parties were represented by counsel when they agreed to arbitration. Nonetheless, they had enough concern about an award based on legal error to ask the court to review the ruling for this problem.

Employees who are required to arbitrate their legal claims do not have the bargaining safeguards enjoyed by the businesses in *Hall Street*. No attorney helps them frame the terms of the arbitration agreement. Courts are rarely involved at this point. Thus, unlike the situation in *Hall Street*, where a judge approved the arbitration procedure, no judicial authority is present at this critical time. *Gilmer* means that most of these arbitration agreements will be enforced; and experience shows that arbitrators increasingly decide complex employment law issues.<sup>292</sup> *Gilmer*'s theory of forum substitution cannot be fulfilled without a limited doctrine to ensure that the arbitrator does not deliberately disregard the law.

Also, consider *Hall Street*'s reasoning that Congress meant to exclude all non-statutory standards to review awards. If this interpretation is so obvious, why did *Wilko* fail to grasp it in 1955? Those Justices were only 30 years removed from enactment of the FAA. Could the Supreme Court's vision improve by being more than 80 years removed from this legislation? Or is this a case where a textual interpretation of a law is plausible but blind to the context in which Congress passed that law?

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<sup>292</sup> *E.g.*, Porzig, *supra* note 228 (arbitration panel was asked to decide whether employee's lawyer was required to return contingency fee to employee).

That context is related to justice in arbitrations. The FAA was not passed with employment contracts in mind.<sup>293</sup> Businesses wanted Congress to end the “ruinous litigation”<sup>294</sup> that affected trade. This has implications for court review of FAA awards—where many arbitration agreements embody unequal bargaining power. To read the FAA so narrowly as to preclude even the most reserved form of judicial review for intentional legal errors puts courts in the absurd role of enforcing rulings that flout the law.<sup>295</sup> Courts should not place arbitrators above the law. Preserving this extremely narrow safeguard does not conflict with the FAA’s intent to end judicial hostility to arbitration.

*Consistency: Hall Street* fails to promote judicial consistency. Its unequivocal approach to the manifest disregard standard is fracturing federal appellate courts. Three circuits have ruled that the standard survived *Hall Street*,<sup>296</sup> while two others have taken the opposite view.<sup>297</sup> Meanwhile, four circuits have apparently ducked by finding other grounds to decide award challenges.<sup>298</sup> Three other circuits have not confronted “manifest disregard” since *Hall Street*.

The Supreme Court needs to resolve this developing split in authority. It must decide the issue with clarity. This study’s historical research offers helpful insights. The Court has never decided the issue head-on but has used other arbitration issues to discuss

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<sup>293</sup> See the objections of labor unions to coverage under the FAA, expressed by the President of the Seamen’s Union of America when he addressed the matter at the 1926 annual convention of his union, recounted in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 126, n.5. (Stevens, J., dissenting). As a result, section 1 of the FAA exempted certain employment contracts.

<sup>294</sup> *Joint Hearings*, *supra* note 100, at 6 (Statement of Charles I. Bernheimer, Chairman of Committee on Arbitration).

<sup>295</sup> *E.g.*, Halligan, *supra* note 154, at 204 (“In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both.”).

<sup>296</sup> See Stolt-Nielsen, *supra* note 274; Coffee Beanery, *supra* note 275; and Comedy Club, *supra* note 276.

<sup>297</sup> See Citigroup Global Markets, *supra* note 272; and Frazier, *supra* note 273.

<sup>298</sup> See Ramos-Santiago, *supra* note 277; Babu, *supra* note 278; Raymond James Financial Services, *supra* note 279; and DMA Int’l, *supra* note 1.

the standard. This undisciplined approach has led to muddled doctrine. The Ninth Circuit put its finger on this problem when its *San Martine* decision said: “Frankly, the Supreme Court’s use of the words ‘manifest disregard,’ has caused us trouble here. Conceivably the words may have been used to indicate that whether an award may be set aside for errors of law would be a question of degree. . . . Such a ‘degree of error’ test would, we think, be most difficult to apply. Results would likely vary from judge to judge.”<sup>299</sup> Judge Posner made a similar point:

We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles— whether the arbitrators “exceeded their powers”— it is superfluous and confusing. There is enough confusion in the law.<sup>300</sup>

I highlight these strong arguments for eliminating the manifest disregard standard because they are less convincing than Justice Frankfurter’s straight-to-the point conclusion in his *Wilko* dissent: “Arbitrators may not disregard the law.”<sup>301</sup> My research adds to Justice Frankfurter’s rule by showing that courts, for more than a century, have equated the FAA’s fraud, corruption, and exceeded powers elements with the manifest disregard standard. The reasoning in nineteenth decisions, such as *Wesson*<sup>302</sup> and *Anderson*,<sup>303</sup> resonated in a recent case, *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, where the court recognized the “well-established rule that a district court

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<sup>299</sup> *San Martine*, *supra* note 192, at 802, n.4.

<sup>300</sup> *Baravati*, *supra* note 9, at 706.

<sup>301</sup> *Wilko*, *supra* note 127, at 439, contending that an “appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award.” *Id.*

<sup>302</sup> *Supra* note 75.

<sup>303</sup> *Supra* note 68.

may vacate an arbitration award only in the narrowest of circumstances— such as *fraud, corruption, and manifest disregard of controlling law* [emphasis added].”<sup>304</sup>

*Conclusion:* I began this Article by selecting signature quotes from courts to show judicial commitment to award finality.<sup>305</sup> My analysis leads to new conclusions that relate to *Hall Street* and the “manifest disregard” standard: (1) the FAA drew from common law sources that also included manifest disregard of the law as limited grounds to vacate an award, but Congress inadvertently omitted this standard from the FAA, and (2) quantitative research shows that state courts are improving, and federal courts are maintaining, high levels of award finality in apparent response to *Hall Street*. My historical research shows that *Hall Street* correctly guessed that “manifest disregard” is a shorthand part of the FAA. My empirical findings dispel *Hall Street*’s concern that the continued use of this standard will erode award finality.

Looking to the future, the split among federal circuit courts is creating inconsistency in the law of arbitration. The Supreme Court should address this problem. Meanwhile, the federal and state courts who have not ruled on “manifest disregard” after *Hall Street*<sup>306</sup> should reconsider this standard’s extraordinary deference. To illustrate:

- “There is . . . a way to understand ‘manifest disregard of the law’ that preserves the established relation between court and arbitrator. . . . It is this: an arbitrator may not direct the parties to violate the law.”<sup>307</sup>
- “[W]e emphasized that the appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case

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<sup>304</sup> 430 F.3d 1269, 1274 (10<sup>th</sup> Cir. 2005).

<sup>305</sup> *Supra* notes 7-10.

<sup>306</sup> *Supra* note 277-280.

<sup>307</sup> *George Watts & Sons, supra* note 182, at 580.

before them, and yet chose to ignore it in propounding their decision.”<sup>308</sup>

- “When faced with questions of law, an arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.”<sup>309</sup>

- Manifest disregard “clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.”<sup>310</sup>

These definitions translate to nanoscale limits on judicial review of awards.

Courts do not use the standard to relitigate the merits of a dispute. My study shows courts have recognized this doctrine for at least two centuries.<sup>311</sup> It did not develop as judicial hostility to arbitration, but to ensure that these private tribunals conform to the prevailing laws.<sup>312</sup> This rationale is relevant in the modern era of arbitration, where much of arbitration is no longer voluntary but is mandatory. While arbitration is supposed to be a final and binding process, judicial review must be available to correct an arbitrator’s intentional flouting of the law. If the standard is eliminated, arbitral finality will rise above the crowning principle of the American constitutional system: “No man in this country is so high that he is above the law.”<sup>313</sup>

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<sup>308</sup> Patten, *supra* note 167, at 237.

<sup>309</sup> Jaros, *supra* note 174, at 421.

<sup>310</sup> Bobker, *supra* note 153, at 933.

<sup>311</sup> Fuller, *supra* notes 66-67.

<sup>312</sup> *E.g.*, Farragut, *supra* note 83.

<sup>313</sup> *See* U.S. v. Lee, 106 U.S. 196, 220 (1882).

*Law review editors have discretion to publish the roster of cases. The list is provided as a resource for policymakers, judges, scholars, practitioners, and students.*

**Appendix: Table of Cases in the Empirical Database (Optional for Publication)**

Acciardo v. Millenium Securities Corp., 83 F.Supp.2d 413 (S.D. N.Y. 2000)  
 Adcock v. Halliburton Energy Services, Inc., 2007 WL 496729 (S.D. Miss. 2007)  
 Affiliated Pathologists, P.A. v. McKee, 261 S.W.3d 874 (Tex. 2008)  
 A.G. Edwards & Sons, Inc. v. Ferman, 2005 WL 1876153 (E.D. Mo. 2005)  
 Ahing v. Lehman Bros., 2000 WL 460443 (S.D. N.Y. 2000)  
 Ales v. Gabelman, Lower & Whittow, 728 N.W.2d 838 (Iowa 2007)  
 Alexandria Real Estate Equities, Inc. v. Kelley, 2009 WL 1653041 (C.D.Cal. 2009)  
 Allstyle Coil Co. v. Carreon, 2009 WL 1270411 (Tex.App. 2009)  
 Antenna Products Corp. v. Cosenza, 2006 WL 1452102 (Tex. App.- Dallas 2006)  
 Anthony v. Kaplan, 918 S.W.2d 174 (Ark. 1996)  
 Autrey v. Ultramar Diamond Shamrock Corp., 2002 WL 102198 (Tex.App.- Dallas 2002)  
 Azpell v. Old Republic Ins. Co., 584 A.2d 950 (Pa. 1991)  
 Bailey v. American General Life & Acc. Ins. Co., 2005 WL 3557840 (Tenn. Ct. App. 2005)  
 Baize v. Eastridge Companies, 142 Cal.App. 4<sup>th</sup> 293 (2006)  
 Bak v. MCL Financial Group, Inc., 88 Cal.Rptr.3d 800 (Cal. 2009)  
 Ball x. SFX Broadcasting, Inc., 165 F.Supp.2d 230 (N.D.N.Y. 2001)  
 Bank of America Investment Services, Inc. v. Durnin, 2009 WL 3004425 (Cal. 2009)  
 Barahona v. Dillard Dept. Stores, 2009 WL 3712591 (E.D.La. 2009)  
 Baravati v. Josephthal, 28 F.3d 704 (7<sup>th</sup> Cir. 1997)  
 Barclays Capital Inv. v. Shen, 857 N.Y.S.2d 873 (N.Y. Sup. 2008)  
 Barcume v. City of Flint, 132 F.Supp.2d 549 (E.D. Mich. 2001)  
 Bargenquast v. Nakano Food, Inc., 243 F.Supp.2d 772 (N.D. Ill. 2002)  
 Barker v. Burlington Northern Santa Fe, 71 Fed. Appx. 442 (5<sup>th</sup> Cir. 2003)  
 Bauer v. Carty & Co., Inc., 2007 WL 2492415 (6<sup>th</sup> Cir. 2007)  
 Bazzone v. Nationwide Mut., 123 Fed.Appx. 503 (3d Cir. 2003)  
 Bear Stearns & Co. v. Fulco, 2008 WL 4489926 (N.Y. Sup. 2008)  
 Beckman v. H&R Block Financial Advisors, Inc., 2007 WL 1288011 (D. Minn. 2007)  
 Behnen v. A.G. Edwards & Sons, Inc., 285 S.W.3d 777 (Mo. 2009)  
 Bell v. Seabury, 622 N.W.2d 347 (Mich.App. 2000)  
 Bender v. Smith Barney, Harris Upham & Co., Inc., 67 F.3d 291 (3d Cir. 1995)  
 Berlacher v. PaineWebber, Inc., 759 F.Supp. 21 (D.D.C. 1991)  
 Bishop v. Smith Barney, Inc., 1998 WL 50210 (S.D.N.Y. 1998)  
 Bison Bldg. Materials v. Aldrich, 2006 WL 2641280 (Tex. App.— Houston [1 Dist.], 2006)  
 Blake v. Transcommunications, Inc., 2004 WL 955893 (D.Kan. 2004)  
 Booth v. Hume Publishing Inc., 902 F.2d 925 (11<sup>th</sup> Cir. 1990)  
 Boyhan v. Maguire, 693 So.2d 659 (Fla.App. 4 Dist. 1997)  
 Brennan v. CIGNA Corp., 2006 WL 3254529 (E.D. Va. 2006)  
 Briamonte v. Liberty Brokerage, Inc., 2000 WL 666350 (S.D.N.Y. 2000)  
 Broaddus v. Rivergate Acquisitions, Inc., 2010 WL 2000798 (M.D. Tenn. 2010)  
 Brooks v. Cintas Corp., 91 Fed. Appx. 917 (5<sup>th</sup> Cir. 2004)  
 Brook v. Peak Int'l, Ltd., 294 F.3d 668 (5<sup>th</sup> Cir. 2002)  
 Brown v. ITT Consumer Financial Corp., 211 F.3d 1217 (11<sup>th</sup> Cir. 2000)  
 Brown v. Wheat First Securities, Inc., 257 F.3d 821 (D.C. Cir. 2001)  
 Buchignani v. Vining Sparks IBG, Inc., 208 F.3d 212 (6<sup>th</sup> Cir. 2000)  
 Bull NH Information Systems, Inc. v. Hutson, 1998 WL 426047 (D. Mass. 1998)  
 Bunzyl Distribution USA v. Dewberry, 16 Fed. Appx. 519 (8<sup>th</sup> Cir. 2001)  
 Burks Orthopaedic Surgery Associates v. Ruth, 925 A.2d 868 (Pa.Super. 2007)  
 Busch v. Southwest Securities, Inc., 2009 WL 3853208 (W.D. Okla. 2009)  
 Butler v. Munsch, Hardt, Kopf & Harr, P.C., 145 Fed.Appx. 475 (5<sup>th</sup> Cir. 2005)  
 Byerly v. Kirkpatrick Pettis Smith & Polian, Inc., 996 P.2d 771 (Colo.App.2000)  
 CACI Dynamic Systems v. Spicer, 2005 WL 831469 (E.D.Va. 2005)

CACI Premier Technology, Inc. v. Faraci, 2006 WL 3692615 (E.D.Va 2006)  
Caldor, Inc. v. Thornton, 464 A.2d 785 (Conn. 1983)  
Campbell v. Cantor Fitzgerald & Co., Inc., 205 F.3d 1321 (2d Cir. 1999)  
Cappgemini v. Sorenson, 2005 WL 1560482 (S.D.N.Y. 2005)  
Cardiovascular Surgical Specialists Corp. v. Mammana, 61 P.3d 210 (Okla. 2002)  
Carmel v. Circuit City Stores, In., 2000 WL 12089 (E.D. Pa. 2000)  
Carpenter v. Potter, 91 Fed. Appx. 705 (2d Cir. 2003)  
Caron v. Reliance Co., 703 A.2d 63 (Pa.Super. 1997)  
Carson v. PaineWebber, Inc., 62 P.3d 996 (Colo. App. 2002)  
Cascione v. Purciglietti, 2007 WL 1834715 (S.D.N.Y. 2007)  
Cashman v. Sullivan & Donegan, 578 A.2d 167 (Conn.App. 1990)  
Castleman v. AFC Enterprises, Inc., 995 F. Supp. 649 (N.D. Tex. 1997)  
Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, 751 So.2d 143 (Fl.App. 2000)  
Chisholm v. Kidder, Peabody Asset Management, Inc., 164 F.3d 617 (2d Cir. 1998)  
Cigna Ins. Co. v. Squires, 628 A.2d 899 (Pa.Super. 1993)  
City of Hartford v. Casati, 2001 WL 1420512 (Conn.Super. 2001)  
Clark v. First Union Securities, Inc., 64 Cal.Rptr.3d 313 (2007)  
Cockerham v. Sound Ford Inc. 2009 WL 1975426 (9th Cir 2009)  
Cole v. West Side Auto Employees Federal Credit Union, 583 N.W. 2d 226 (Mich. App. 1998)  
Collins v. Blue Cross Blue Shield of Michigan, 103 F.3d 35 (6<sup>th</sup> Cir. 1996)  
Collins v. D.R. Horton, Inc., 505 F.3d 874 (9<sup>th</sup> Cir. 2007)  
Columbia Med. Center of Lewisville v. Heller, 31 Fed. Appx. 839 (5<sup>th</sup> Cir. 2002)  
Community Memorial Hospital v. Mattar, 165 Ohio App. 3d 49 (Ohio App. Dist. 2006)  
Cowle v. Dain Ruascher, Inc., 66 Fed. Appx. 525 (5<sup>th</sup> Cir. 2003)  
Cowle v. PaineWebber, 1999 WL 194900 (S.D. N.Y. 1999)  
Crawford Group, Inc. v. Holekamp, 543 F.3d 971 (8<sup>th</sup> Cir. 2008)  
Cremin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 2006 WL 1517777 (N.D.Ill. 2006)  
Cray v. NationsBank of N.C., N.A., 982 F.Supp. 850 (M.D. Fl. 1997)  
Cuie v. Nordstrom, Inc., 2007 WL 2307842 (3d Cir. 2007)  
Cullen v. Paine, Webber, Jackson & Curtis, Inc., 863 F.2d 851 (11<sup>th</sup> Cir. 1989)  
Daehnke & Cruz v. Fink, 2009 WL 580746 (Cal.App. 2009)  
DaimlerChrysler Corp. v. Carson, 2003 WL 888043 (Mich. App. 2003)  
DaimlerChrysler Corp. v. Porter, 2006 WL 3019682 (Mich. App. 2006)  
Daniels v. Clear Channel Broadcasting Inc., 2002 WL 3193885 (S.D. Fl. 2002)  
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