**THE PAST, PRESENT, AND FUTURE OF THE**

**DOCTRINE OF “MANIFEST DISREGARD”**

**Carl J. Mudd**

1. **Introduction**

Since the Supreme Court’s decision in *Hall Street Assocs. L.L.C. v. Mattel, Inc.*[[1]](#footnote-1) courts, commentators, and practitioners have questioned the continuing viability, and even the existence, of the doctrine of manifest disregard of the law (“manifest disregard,” “doctrine,” or “standard”). Some argue that *Hall Street* effectively abrogated manifest disregard.[[2]](#footnote-2) Others claim that the doctrine survived *Hall Street* as either a judicial gloss or a shorthand for the grounds enumerated in Section 10 of the Federal Arbitration Act.[[3]](#footnote-3) Still others, though a minority, assert that *Hall Street* did not eliminate the traditional, pre-*Hall Street* understanding of manifest disregard as a common-law, non-statutory, ground for vacating arbitral awards.[[4]](#footnote-4) In light of these differing and diverging interpretations, it seems appropriate for the United States Supreme Court to step in and resolve the controversy; however, the Court has yet to explicitly hold what the correct interpretation is, though the opportunity to do so has been presented.[[5]](#footnote-5) The lack of direction regarding the viability of manifest disregard, coupled with confusion surrounding the doctrine’s “correct” interpretation and application (if still viable), has caused many to question the fate of manifest disregard as a ground for vacating arbitral awards.

This paper examines this puzzling predicament, and attempts to provide guidance regarding the future of the manifest disregard standard. Part II briefly reviews the generally understood meaning of “manifest disregard of the law.” Part III investigates the origins and development of the doctrine by examining (a) the Supreme Court’s decision in *Wilko v. Swan*, (b) approaches to applying manifest disregard following *Wilko*, and (c) the Court’s 2008 decision in *Hall Street*. Part IV examines how the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits interpreted *Hall Street*, and how these interpretations have influenced each circuits’ position regarding how the manifest disregard standard should be understood. Part V examines the future of manifest disregard, and takes the position that the doctrine remains viable, if not as common-law, as a shorthand/judicial gloss for the grounds set forth in FAA § 10. Part VI suggests that the most effective way to resolve the circuit split would be for the Supreme Court to issue an opinion explicitly setting forth the “correct” interpretation and application of *Hall Street* and the doctrine of manifest disregard. Part VII contains concluding remarks and recapitulates this papers findings.

1. **What is “Manifest Disregard of The Law”?**

Section 10 of the Federal Arbitration Act[[6]](#footnote-6) (“FAA”) provides the statutory bases for vacating an arbitral award, including “where the award was procured by ‘corruption,’ ‘fraud,’ or ‘undue means,’ and where the arbitrators were ‘guilty of misconduct,’ or ‘exceeded their powers.’”[[7]](#footnote-7) In addition to the statutory grounds contained in FAA § 10, there are also various non-statutory, judicially created, grounds for vacatur.[[8]](#footnote-8) Manifest disregard of the law is generally understood to be one of these judicially created grounds for vacating an award,[[9]](#footnote-9) though it “has not consistently or exclusively been viewed as a common-law expansion of the FAA” (discussed in greater detail below).[[10]](#footnote-10) Although debate exists regarding the origins of the manifest disregard standard and its status as a common-law means for vacating an arbitral award, according to Stephen Huber, the standard approach to manifest disregard requires “a showing that the arbitrator knowingly failed to apply clearly applicable law.”[[11]](#footnote-11) An arbitrators mere ignorance of the law is not enough;[[12]](#footnote-12) rather, the moving party must affirmatively show “that the arbitrator: [1] knew about the existence of relevant law; [2] knew that the law was controlling; and [3] intentionally refused to apply the law.”[[13]](#footnote-13)

1. **Origins & Development of “Manifest Disregard”**

The exact origin of “manifest disregard of the law” is a topic of debate, with no clearly discernable answer. This section examines the origins and development of the doctrine of manifest disregard, starting with the generally accepted view that the doctrine originated from dicta in the United States Supreme Court’s decision in *Wilko v. Swan*. After discussing *Wilko*, this paper examines various approaches to applying the doctrine of manifest disregard following *Wilko* (but before *Hall Street*). With these approaches in mind, this paper then discusses the Supreme Court’s decision in *Hall Street*, and the implications that decision has had on the continuing viability of the doctrine of manifest disregard.

* 1. *Wilko v. Swan*: The Debate Begins

The origin of the doctrine of manifest disregard is a contested issue; however, most commentators agree that the manifest disregard standard originated from dicta in the United States Supreme Court’s 1953 decision in *Wilko v. Swan*,[[14]](#footnote-14) where the Court stated that “the interpretation of the law by … arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”[[15]](#footnote-15) Although *Wilko* was subsequently overruled on other grounds, this statement has been understood to indicate, as Ashley Sundquist and Michael LeRoy suggest, that manifest disregard of the law may be a permissible ground for vacating an arbitral award, but arbitrators mistaken interpretation of the law, or a judge’s disagreement regarding how the law was interpreted, does not provide “a justifiable reason for vacature.” [[16]](#footnote-16) However, the extent of the *Wilko* Court’s discussion on the topic of manifest disregard is limited; no attempt is made to elaborate on the meaning of manifest disregard,[[17]](#footnote-17) making it difficult for courts to determine the meaning of, and the amount of weight that should be afforded to, *Wilko’s* ambiguous statement.[[18]](#footnote-18)

Further complicating the issue is the fact that *Wilko* did not directly concern the scope of judicial review with regards to arbitral awards.[[19]](#footnote-19) Rather, the issue confronted by the Court “was whether anti-fraud claims brought under § 12(2) of the Securities Act of 1933 could be arbitrated, or whether public policy required that such claims be litigated in state or federal court.”[[20]](#footnote-20) The Court’s statement regarding “manifest disregard” was merely a byproduct of this analysis;[[21]](#footnote-21) as Kenneth Davis notes, after addressing the main issue, the Supreme Court “lapsed into muddled dicta, which has cast the issue of the scope of judicial review of arbitration awards into uncertainty for over half a century.”[[22]](#footnote-22) This uncertainty resulted in confusion amongst courts, as acknowledged by Fifth Circuit in *Citigroup Global Mkts. Inc. v. Bacon*, where the court stated that it was unsurprising that “lower courts initially grappled with the uncertain implications” of the *Wilko* Court’s ambiguous statement.[[23]](#footnote-23)

Despite the confusion and lack of direction regarding the meaning and application of the manifest disregard standard following the decision in *Wilko*, all circuit courts[[24]](#footnote-24) eventually adopted/recognized the doctrine (though some courts have since repudiated their acceptance[[25]](#footnote-25)).[[26]](#footnote-26) This was partially due, at least for certain circuits, to the Supreme Court’s opinion in *First Option of Chicago, Inc. v. Kaplen*,where the Court cited *Wilko* with approval and stated that a party can still “ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.”[[27]](#footnote-27) Other than *First Option*, however, the Supreme Court seldom addressed the doctrine of manifest disregard,[[28]](#footnote-28) and as Burch references in relation to *Hall Street*, “only recently did the Court give it any substantive analysis.”[[29]](#footnote-29) As a result, lower courts were left to apply the doctrine absents clear direction or constraint, resulting in differing articulation and application of the standard.[[30]](#footnote-30)

* 1. Approaches to Applying the Doctrine of Manifest Disregard Following *Wilko* (but before *Hall Street*)

Following *Wilko*, various approaches to and applications of the doctrine of manifest disregard surfaced, “some very broad, some extremely narrow, but all attempting to balance arbitration’s competing goals of efficiency and accuracy.”[[31]](#footnote-31) Thomas Burch, referencing Stephan Hayford,[[32]](#footnote-32) divides these varying applications into three possible approaches: (1) the “futility-acknowledge”[[33]](#footnote-33)approach; (2) the “big error”[[34]](#footnote-34) approach; and (3) “presumption-based”[[35]](#footnote-35) approach.[[36]](#footnote-36)

The “futility-acknowledge” approach is the narrowest approach and is “based on the level of difficulty involved in determining whether an arbitrator has consciously decided to ignore known, applicable law, especially if the arbitrator did not issue a reasoned award.”[[37]](#footnote-37) Courts following this approach only apply the doctrine of manifest disregard when “direct evidence exists that the arbitrator consciously disregarded the law.”[[38]](#footnote-38) This approach can be seen in *Advest, Inc. v. McCarthy*. There, the First Circuit stated that, in order for an arbitration award to be vacated for manifest disregard of the law, “‘there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it.’”[[39]](#footnote-39) The court went on to state that “disregard” in this context “implies that the arbitrators appreciated the existence of a governing legal rule but [willfully] decided not to apply it.”[[40]](#footnote-40) As the *Advest* court’s articulation implies,[[41]](#footnote-41) this approach is severely limited. This is because a court utilizing this approach most likely will not overturn an award absent a reasoned award,[[42]](#footnote-42) “or a transcript of the proceedings showing that the arbitrator explicitly refused to follow the law….”[[43]](#footnote-43) This, Burch asserts, essentially renders the doctrine a nullity.[[44]](#footnote-44) Nonetheless, it appears that “[m]ost courts that recognize manifest disregard as a ground for overturning awards … use this approach.”[[45]](#footnote-45)

The broadest approach, the “big error” approach, focuses on “whether the arbitrator made an egregious mistake[,]”[[46]](#footnote-46) and unlike the “futility-acknowledge” approach, does not require direct evidence indicating that the arbitrators consciously disregarded the law.[[47]](#footnote-47) Instead, courts are allowed to “overturn an arbitration award by *assuming* that the arbitrator consciously disregarded known, applicable law based simply on the law’s clarity and the arbitrator’s failure to apply it.” [[48]](#footnote-48) This approach is illustrated by the Second Circuit’s language in *Willemijn Houdstermaatschappij, BV v Std. Microsystems Corp*.[[49]](#footnote-49) There, the court agreed that manifest disregard of the law can be found where an arbitrator “‘understood and correctly stated the law but proceeded to ignore it.’”[[50]](#footnote-50) However, the court determinedthat “a court may infer that [an arbitrator] manifestly disregarded the law if it finds that the error made … is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator.”[[51]](#footnote-51) As this statement indicates, a court applying this approach may infer from the facts of the case that an arbitrator knew applicable law, and assume he/she ignored it based on the law’s clarity. This, Burch asserts, is in contrast to the *Wilko* court’s statement “that awards should not be reviewed for ‘error in interpretation,’”[[52]](#footnote-52) which may indicate why this approach is the least frequently used.[[53]](#footnote-53)

The third approach, the “presumption-based” approach, falls between the first two approaches, and can be understood as somewhat of a middle ground. Under this approach, courts review “the record of the arbitration proceedings and will overturn the award if something in that record creates a presumption that the arbitrator ignored known, applicable law.”[[54]](#footnote-54) For example, in *Montes v. Shearson Lehman Bros., Inc.*,[[55]](#footnote-55) the Eleventh Circuit overturned an arbitral award on the ground that the arbitrator manifestly disregarded the law.[[56]](#footnote-56) In making this determination, the court examined the arbitral award (there was no written opinion), and noted that the panel was “flagrantly and blatantly urged” by the prevailing party to ignore known applicable law.[[57]](#footnote-57) According to Hayford, during arbitration the prevailing party asserted “that the controlling law was ‘not right,’” and repeatedly exhorted “to the arbitration panel that they should do what was right, even if it produced an outcome inconsistent with the pertinent law.”[[58]](#footnote-58) The court found that this, coupled with the fact that “nothing in the award or elsewhere in the record” suggested that the arbitrator “did not heed” the prevailing party’s plea,[[59]](#footnote-59) indicated that the arbitrator knew the law but consciously ignored it. As the Eleventh Circuit’s decision illustrates, the “presumption-based” approach does require a degree proof that the arbitrator knew the law and ignored it, but “direct proof that the arbitrator made a conscious decision to ignore the law” is not a necessary prerequisite for vacatur.[[60]](#footnote-60)

As the above illustrates, the precise standard utilized by Circuit Courts following *Wilko* varied from circuit to circuit.[[61]](#footnote-61) According to Weathers Bolt, however, most circuits generally agreed (with the exception of the Seventh Circuit[[62]](#footnote-62)) that successful use of manifest disregard as a ground for judicial review and vacatur after *Wilko* (but before *Hall Street*) required:[[63]](#footnote-63) “[1] the arbitrator or arbitrators knew the law and [2] deliberately failed to apply the applicable law.”[[64]](#footnote-64) Bolt also notes, and Jill Gross confirms,[[65]](#footnote-65) that many circuits “also required that the law be clearly applicable to the situation at bar.”[[66]](#footnote-66)

* 1. *Hall Street*

After more than fifty years since the Court’s decision in *Wilko*, the Supreme Court decided the case of *Hall Street Assocs. L.L.C. v. Mattel, Inc.*,[[67]](#footnote-67)which has raised many questions and concerns regarding the continuing viability of the doctrine of manifest disregard.[[68]](#footnote-68) In *Hall Street*, the Supreme Court addressed (in dicta) the ambiguities associated with *Wilko’s* comments regarding the scope of judicial review of arbitral awards. The issue before the Court was “whether the parties to an arbitration agreement could validly agree to expand the grounds prescribed in § 10 and § 11 of the FAA for vacating or correcting an arbitration award.”[[69]](#footnote-69) The Court answered this question in the negative, holding that the grounds for vacating and modifying an award under the FAA are exclusive.[[70]](#footnote-70)

In arguing that grounds set forth in FAA §10 and § 11 were not exclusive (*i.e.*, the parties had a right to contractually expand the scope of review of an arbitration award), Hall Street “pointed out that courts have been permitted to expand review beyond section 10 and 11 of the FAA since *Wilko* created manifest disregard.”[[71]](#footnote-71) Hall Street asserted that the Court’s statement in *Wilko* “meant that manifest disregard was a further ground for vacatur in addition to the grounds listed in section 10,” and therefore Supreme Court precedent “allowed for nonstatutory vacatur.”[[72]](#footnote-72) In response, the Court acknowledged that a number of Circuit Courts had recognized manifest disregard as an additional ground for vacating an award beyond § 10 of the FAA,[[73]](#footnote-73) but the Court disagreed with Hall Street’s argument, in part, because *Wilko* expressly rejected what Hall Street was asking for: “general review for an arbitrator’s” legal errors.[[74]](#footnote-74) The Court, however, did not stop there. Instead, the Court attempted to explain the meaning of its earlier statement in *Wilko*, writing:

Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them …. Or, as some courts have thought, ‘manifest disregard’ may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers.’ We, when speaking as a Court, have merely taken the *Wilko* language as we found it, with out embellishment, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.[[75]](#footnote-75)

This statement has caused many courts and scholars to question the viability, and possibly the existence, of the doctrine of manifest disregard (at least in federal courts).[[76]](#footnote-76) Although the Court “did not expressly reject ‘manifest disregard’ as a valid ground for review,” according to Jill Gross, “it did not embrace it either.”[[77]](#footnote-77) This uncertainty has lead a number of Circuit Courts to construct differing interpretations of the Court’s decision in *Hall Street*, prompting divergence among courts and disagreement regarding the future of the doctrine.

1. **Manifest Disregard After *Hall Street***

Sincethe Supreme Court’s decision in *Hall Street*, Federal Circuit Courts have grappled with the issue of whether manifest disregard remains a valid ground for vacating arbitral awards. This has resulted in varying views and responses regarding the current viability and application of the doctrine of manifest disregard. Each Circuits’ view, Jonas Cullemark suggests, relates to the meaning attributed to the word “exclusive” in *Hall Street*,[[78]](#footnote-78) and each Circuits’ response tends to depended, according to Davis, “on whether the circuit viewed the manifest disregard standard as statutory or nonstatutory.”[[79]](#footnote-79) As discussed below, the Circuits that have definitively addressed the issue have taken three positions regarding the doctrine of manifest disregard.[[80]](#footnote-80) The first position, which I have labeled the “abandonment” group, holds that manifest disregard is no longer a viable basis for vacatur. The second position, the “non-statutory” group, believes that manifest disregard as a non-statutory basis for vacatur survived *Hall Street*. The third position, labeled the “shorthand or judicial gloss” group, holds that manifest disregard remains viable as a judicial gloss on the grounds listed in FAA § 10, or as a shorthand for FAA §§ 10(a)(3) and 10(a)(4). In addition to these three positions, some courts have acknowledged the continuing viability of manifest disregard, but have not definitively set forth whether the doctrine remains valid as a non-statutory, common-law, ground or as a shorthand/judicial gloss for the grounds enumerated in FAA § 10.

* 1. Abandonment

The Fifth, Eighth, and Eleventh Circuits have interpreted *Hall Street* as effectively eradicating the doctrine of manifest disregard—*i.e.*, the doctrine no longer remains a viable basis for vacating arbitral awards post-*Hall Street*.[[81]](#footnote-81) This section briefly examines decisions in each circuit denying the continuing validity of the doctrine of manifest disregard.

* + 1. *Fifth Circuit*

The Fifth Circuit in *Citigroup Global Markets, Inc. v. Bacon* addressed the issue of “whether manifest disregard of the law remains a valid ground for vacatur of an arbitration award in light of the Supreme Court’s recent decision in *Hall Street*….”[[82]](#footnote-82) Relying on the history of the law of vacatur and the development of FAA,[[83]](#footnote-83) the court rejected manifest disregard as an independent, non-statutory ground for vacating arbitral awards.[[84]](#footnote-84) In so holding, the court determined that the Supreme Court’s language in *Hall Street* made clear that the grounds for vacatur set forth in Section 10 of the FAA were exclusive.[[85]](#footnote-85) As a result, the court concluded that “manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.”[[86]](#footnote-86)

* + 1. *Eighth* *Circuit*

In *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, the Eighth Circuit confirmed its view that the bases for vacating an arbitral award are limited to the express grounds set forth in the FAA.[[87]](#footnote-87) According to Stanley Leasure, the court further confirmed “its understanding that *Hall Street’s* practical effect was to establish the grounds specifically enumerated in the FAA as the exclusive grounds for vacatur.”[[88]](#footnote-88) Accordingly, the court concluded that appellant’s claim that the arbitrator manifestly disregarded the law was “not cognizable” since such ground was “not included among those specifically enumerated in §10….”[[89]](#footnote-89) The court reaffirmed its position in *Air Line Pilots v. Trans State*, where the court described manifest disregard as a “defunct vacatur standard.”[[90]](#footnote-90) The court’s reasoning, John and Ari Diaconis suggest, was “that manifest disregard is a non-statutory ground for vacatur and thus impermissible under *Hall Street’s* pronouncement that FAA Section 10 is to be read exclusively.”[[91]](#footnote-91)

* + 1. *Eleventh Circuit*

In *Frazier v. CitiFinancial Corp.* the Eleventh Circuit adopted the Fifth Circuit’s position regarding the viability of manifest disregard.[[92]](#footnote-92) The court held that manifest disregard, as a “judicially-created” basis for vacatur, was “no longer valid in light of” the Supreme Court’s decision in *Hall Street*.[[93]](#footnote-93) In so holding, the court agreed with the Fifth Circuit “that the categorical language of [*Hall Street*] compels such a conclusion.”[[94]](#footnote-94) The Eleventh Circuit reconfirmed this position in *Campbell’s Foliage, Inc., v. Federal Corp Insurance Corp.*, where that court determined that “the only viable ground for vacatur in [the Eleventh Circuit] were those enumerated in the FAA.”[[95]](#footnote-95)

* 1. Non-Statutory

The Sixth Circuit is the only circuit to maintain its pre-*Hall Street* position that the doctrine of manifest disregard exists as a non-statutory, common-law, ground for vacating arbitral awards. This section examines Sixth Circuit decisions illustrating the circuit’s view that manifest disregard remains a viable non-statutory means for vacatur.

* + 1. *Sixth Circuit*

In *Grain v. Trinity Health*,the Sixth Circuit determined “that manifest disregard of the law is no longer a ground for modify an award;” [[96]](#footnote-96) however, the court did not determine whether or not the doctrine remains a viable means for vacatur. According to John and Ari Diaconis, “[d]istrict courts within the Sixth Circuit seem to agree that manifest disregard has survived *Hall Street*.”[[97]](#footnote-97) In support of this conclusion, the district courts cite the Sixth Circuit’s unpublished opinion in *Coffee Beanery v. WW*.[[98]](#footnote-98) There, the court held that application of *Hall Street* is limited to circumstances involving contractual expansion of the grounds for review.[[99]](#footnote-99) In so holding, the court acknowledged 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,” however, the court found that “it did not foreclose federal courts’ review for an arbitrator's manifest disregard of the law.”[[100]](#footnote-100) Consistent with this statement, the court found that, although its “ability to vacate an arbitration award is almost exclusively limited to these grounds … it may also vacate an award found to be in manifest disregard of the law.”[[101]](#footnote-101) The court then endorsed the pre-*Hall Street* view that the doctrine of manifest disregard applies if “(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.”[[102]](#footnote-102) This indicates, as John and Ari Diaconis suggest, that the Sixth Circuit “recognizes manifest disregard as an independent ground for vacatur, separate and apart from FAA Section 10.”[[103]](#footnote-103)

* 1. Statutory: Shorthand / Judicial Gloss

Though many circuits no longer advocate for the non-statutory, common-law, understanding of manifest disregard, a number of Circuit Courts still believe the doctrine survived *Hall Street* as a shorthand for, or a judicial gloss on, the grounds enumerated in FAA § 10. As Jack Rephan notes, “[a] number of Federal Circuits … have interpreted [*Hall Street*] as not rejecting *in toto* manifest disregard as basis for seeking to vacate an award, but that it has survived as being merely shorthand for the statutory grounds under §10(a)(3) and § 10(a)(4), or as a judicial gloss on the statutory grounds.”[[104]](#footnote-104) The courts that have definitively maintained this position following *Hall Street* include the Second Circuit and the Ninth Circuit.[[105]](#footnote-105)

* + 1. Second Circuit

In *Stolt-Nielsen SA v. AnimalFeeds International Corp.* (overruled on other grounds), the Second Circuit confirmed its view that *Hall Street* did not “abrogate the ‘manifest disregard’ doctrine.”[[106]](#footnote-106) The court conceded, Jack Jarrret notes, that the Second Circuit “had previously indicated that the judicially named grounds were separate from the grounds specified in the FAA.”[[107]](#footnote-107) However, in *Stolt-Nielsen* the court stated that it “reconceptualized” their understanding of the doctrine of manifest disregard “as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA….”[[108]](#footnote-108) The Second Circuit recently reconfirmed this positionin *Sutherland Global Services v. Adam Technologies*. There, the court first noted that “the specific grounds for vacatur provided in the FAA are generally exclusive,”[[109]](#footnote-109) but then stated that manifest disregard “‘remains a valid ground for vacating arbitration awards’” as “‘judicial gloss on the specific grounds for vacatur…’” set forth in FAA § 10. [[110]](#footnote-110) Thus, it appears that the Second Circuit has adopted the view that manifest disregard remains viable as a judicial gloss.

* + 1. Ninth Circuit

In *Comedy Club, Inc. v. Improv W. Assocs.*, the Ninth Circuit read the Supreme Court’s decision in *Hall Street* as merely identifying several possible interpretations of the doctrine of manifest disregard.[[111]](#footnote-111) These “possible readings of the doctrine”[[112]](#footnote-112) included the understanding that manifest disregard was a shorthand for the statuary grounds enumerated under Section 10 of the FAA,[[113]](#footnote-113) which the court acknowledged was the accepted view in the Ninth Circuit.[[114]](#footnote-114) Thus, the court concluded “*Hall Street Associates* did not undermine the manifest disregard of law ground for vacatur, as understood in the [Ninth Circuit]….”[[115]](#footnote-115) The Ninth Circuits reaffirmed its position in *Wetzel's Pretzels, LLC v. Johnson*, where the court stated that “[i]n order for us to vacate the award on the ground that the arbitrator exceeded his powers under § 10(a)(4),” the moving party must “show that the award was ‘completely irrational, or exhibit[ed] a manifest disregard of law….’”[[116]](#footnote-116) In order to vacate an arbitration award for manifest disregard of the law, the court noted, “‘it must be clear from the record that the arbitrators recognized the applicable law and then ignored it.’”[[117]](#footnote-117) Thus, it is clear that that the Ninth Circuit has adopted the view that manifest disregard remains a viable means for vacatur as a shorthand for the statutory grounds set forth in FAA § 10.

* 1. Surviving, But Unsure

The doctrine of manifest disregard has survived in both the Fourth and Tenth Circuits; however, both circuits have not taken a definitive position on whether or not the doctrine survives as a judicial gloss/shorthand or an independent, non-statutory, ground for vacatur.

* + 1. Fourth & Tenth Circuits

In *Wachovia Securities v. Brand*, the Fourth Circuit determined that its pre-*Hall Street* understanding of manifest disregard[[118]](#footnote-118) remained controlling.[[119]](#footnote-119) However, the court did not affirmatively determine the status of the doctrine; rather, the court found that “manifest disregard continues to exist as either an independent ground for review or as a judicial gloss, we need not decide which of the two….”[[120]](#footnote-120) This position was confirmed in a footnote in *Dewan v. Walia*, where the court noted that the Fourth Circuit has “recognized that ‘manifest disregard continues to exist’ as a basis for vacating an arbitration award, either as ‘an independent ground for review or as a judicial gloss’ on the enumerated grounds for vacatur set forth in the FAA.”[[121]](#footnote-121)

In *Adviser Dealer Servs. v. Icon Advisers, Inc.*, the Tenth Circuit acknowledged that manifest disregard remains a viable means for vacating an arbitral award:

A district court may vacate an arbitration award only “for the reasons enumerated in the Federal Arbitration Act, 9 U.S.C. § 10, or for ‘a handful of judicially created reasons.’” These judicially created reasons ‘include violations of public policy, manifest disregard of the law, and denial of a fundamentally fair hearing.”[[122]](#footnote-122)

However, the court does not elaborated on whether or not the doctrine is seen as a shorthand/judicial gloss or an independent ground for vacatur. Guidance as to the Tenth Circuit’s position in this regard may be found in the unpublished opinion *Abbot v. Law Office of Patrick K. Milligan*.[[123]](#footnote-123) There, the court “expressed the opinion that a willful decision of an arbitrator to apply controlling law might fall within §10 even though the claimed ground for vacatur is expressed in terms of manifest disregard of the law.”[[124]](#footnote-124) Thus, it appears that the Tenth Circuit may be leaning towards the view that manifest disregard remains viable as a judicial gloss/shorthand for FAA § 10.

1. **Future of Manifest Disregard**

The future of manifest disregarded is far from certain. Some speculate that the Supreme Court’s decision in *Hall Street* effectively abrogated the doctrine (at least as a common-law ground for vacatur), while others maintain that the doctrine has survived post-*Hall Street* as common-law or a shorthand/judicial gloss for the grounds listed in FAA § 10. In this author’s opinion, the doctrine survived *Hall Street* and remains a viable and valid means for vacating arbitral awards, possibly as common-law, but more likely as a shorthand/judicial gloss for FAA § 10. Below this section takes the position that the doctrine remains viable for two primary reasons: (1) the Supreme Court’s decision in *Hall Street* did not abandon the doctrine; rather, the Court’s opinion indicates that manifest disregard remains valid, possibly as common-law, but most likely as a judicial gloss or shorthand for the grounds enumerated in FAA § 10, and (2) the majority of Circuit Courts continue to recognize the viability of manifest disregard, in one form or another, despite *Hall Street*.

First of all, it must be noted that the language in *Hall Street* used to support the position that the doctrine of manifest disregard is dead post-*Hall Street* (at least as a non-statutory ground for vacatur) is conclusory dicta[[125]](#footnote-125) with only persuasive value (though some argue that dictum can become binding[[126]](#footnote-126)).[[127]](#footnote-127) In addition, the language in *Hall Street* used to support this position states that it is possible that the Court’s reference to manifest disregard in *Wilko* indicated that “the term … was meant to name a new ground for review….”[[128]](#footnote-128) This suggests that it is possible, though unlikely, that the doctrine can survive *Hall Street* as a common-law, non-statutory, ground for vacatur.

Even if the language in *Hall Street* effectively eradicated manifest disregard as a common-law means for vacatur, it did not preclude or abandon its use in entirety. As Gross asserts, “the strict constructionist majority [in *Hall Street*] merely interpreted the FAA to precluded parties seeking vacatur from asserting grounds other than those identified in FAA section 10, and suggested that lower courts could construe the bases provided by section 10 as including ‘manifest disregard.’”[[129]](#footnote-129) As Gross’ statement suggests, the Court did not abandon the doctrine; rather, the Court delegated to the courts the task of determining how “manifest disregard” fits into one of the four categories set forth in FAA § 10.[[130]](#footnote-130) In accordance with this understanding, parties are not prohibited from asserting manifest disregard; however, in order to successfully challenge an award, the parties will have to expressly articulate (in some circuits, but not all) their manifest disregard claim in a manner so as to incorporate the language and/or grounds set forth in FAA § 10. Gross agrees with this position, and asserts that “parties can continue to challenge arbitration awards on the FAA ground that arbitrators committed misconduct under [FAA § 10(a)(3)] by manifestly disregarding the law or exceeded the scope of its power under [FAA § 10(a)(4)] by manifestly disregarding the law.”[[131]](#footnote-131)

Furthermore, as the preceding section indicates, manifest disregard has survived post-*Hall Street* in many circuits. However, the doctrine no longer maintains the status, or original understandings, set forth by the Circuit Courts following *Wilko*. That is, most circuits that recognize the doctrine despite the Court’s language in *Hall Street* no longer see it as a common-law, non-statutory, ground for vacatur (though some circuits have not affirmatively decided this).[[132]](#footnote-132) This indicates that the doctrine’s foundation has been weakened following *Hall Street*.[[133]](#footnote-133) However, it is this author’s contention that the doctrine *is not* dead. On the contrary, the doctrine remains a viable means for vacating arbitral awards, as evidenced by the various circuits recognizing its continuing viability and applicability.[[134]](#footnote-134) This is not to say that practitioners attempting to use the doctrine, even in the circuits that recognize it, will be successful. Establishing the elements of manifest disregard still remains a difficult task, regardless of whether or not the doctrine is seen as non-statutory or a judicial gloss/shorthand. Still, the Circuit Courts retention and acceptance of the doctrine, though modified, signals that most circuits view manifest disregard as a valid and viable means for challenging an arbitral award, and should the “right” case present itself, these circuits will vacate the award.

As the preceding illustrates, the doctrine of manifest disregard is not dead. *Hall Street* may havecaused a reformulation of the doctrine’s understandings regarding the authority from which the doctrine derives support—*i.e.,* whether the doctrine should be conceptualized as a separate non-statutory ground for vacatur, or as a judicial gloss/shorthand for FAA § 10; however, *Hall Street* did not completely abrogate the doctrine, for the reasons discussed above. Therefore, it is this author contention that the doctrine survived *Hall Street*, and remains a viable means for vacating arbitral awards in many circuits.

1. **Suggestion: Supreme Court Review**

 In order to set forth and/or clarify the “correct” interpretation of *Hall Street* andresolve the split among the Circuit Courts, the Supreme Court ought to lay down an explicit holding accepting or rejecting the doctrine and the prevailing Circuit Court interpretations. Absent such an explicit ruling, lower courts are left to divine their own meanings. The likelihood this will occur, however, is debatable. This is because the Supreme Court has been provided multiple opportunities to decide how “manifest disregard” ought to be interpreted and applied, but has declined to specifically address the issue.[[135]](#footnote-135) Thus, the possibility that the Court will lay down an explicit holding that resolves the split among Circuit Courts is uncertain, and probably unlikely given the Court’s inclination to avoid the issue. Nevertheless, it does appear that the doctrine of manifest disregard did survive *Hall Street*, though modified, and it is this author’s contention that the doctrine will remain viable in the circuits that have accepted it, unless and until the Supreme Court rules otherwise.

1. **Conclusion**

This paper has examined the origin of the doctrine of manifest disregard, the standard’s development following the Supreme Court’s decisions in *Wilko* and *Hall Street*, and its future viability as a means for vacating arbitration awards. It was found that most, if not all, Circuit Courts following *Wilko* accepted manifest disregard as a common-law, non-statutory, means for vacating arbitral awards, though some circuits maintained differing positions regarding the correct articulation and application of the doctrine. Following this, it was determine that the Court’s decision in *Hall Street* caused (almost all) the Circuit Courts to alter their understanding of manifest disregard. However, after surveying decisions in eight different Circuit Courts, it was found that only three circuits (of the eight surveyed) have definitively taken the position that *Hall Street* completely abrogated the doctrine of manifest disregard.With the preceding in mind, it was then argued that manifest disregard remains a valid avenue for challenging arbitral awards (in most circuits), despite *Hall Street*. After discussing the Court’s language in *Hall Street* and the doctrine’s continuing validity in a number of Circuit Courts, it was determine that the doctrine is not dead; but rather still exists, possibly as common-law, but most likely as a judicial gloss/shorthand for the grounds enumerated in FAA § 10. It was then suggested that the most efficient means for resolving the circuit split would be for the Supreme Court to issue an explicit holding that would guide lower courts regarding the correct interpretation and application of manifest disregard. However, the likelihood this will occur in the near future is questionable at best. As a result, the fate of the doctrine of manifest disregard remains uncertain, and will remain uncertain, despite its arguably continuing viability, unless and until an opinion is issued by the Supreme Court resolving the issue.

1. *Hall St. Assocs., L.L.C. v Mattel, Inc.*, 552 U.S. 576 (2008). [↑](#footnote-ref-1)
2. Carolina Rizzo, *Why ‘Manifest Disregard’ Survives As An Independent Standard For Vacatur of Arbitral Awards Even After Hall Street*, 3 Arb. Brief 1, 12-13 (2013). *See* *infra* Part IV(a)(i)-(iii). [↑](#footnote-ref-2)
3. Carolina Rizzo, *Why ‘Manifest Disregard’ Survives As An Independent Standard For Vacatur of Arbitral Awards Even After Hall Street*, 3 Arb. Brief 1, 12-13 (2013). *See* *infra* Part IV(c)(i)-(ii). *See also*, *infra* Part IV(d). [↑](#footnote-ref-3)
4. *See infra* Part IV(b). *See also*, *infra* Part IV(d). [↑](#footnote-ref-4)
5. *See e.g.*, *Stolt-Nielsen S. A. v AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672, n.3 (2010) (“We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 585, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), 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.”); *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App'x 828 (11th Cir. 2014), *cert. denied*, \_\_ U.S. \_\_, 135 S. Ct. 145 (2014); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009). [↑](#footnote-ref-5)
6. Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (1925) [Hereinafter “FAA”]. [↑](#footnote-ref-6)
7. *Hall St. Assocs., L.L.C. v Mattel, Inc.*, 552 U.S. 576, 578 (2008); FAA § 10. [↑](#footnote-ref-7)
8. Annie Chen, *The Doctrine of Manifest Disregard of the Law After Hall Street: Implications for Judicial Review of International Arbitrations in U.S. Courts*, 32 Fordham Int’l L.J. 1872, 1879 (2008-2009); Hiro N. Aragaki, *The Mess of Manifest Disregard*, The Yale Law Journal, at 1 (Sep. 29, 2009), *available at*: http://www.yalelawjournal.org/pdf/817\_hert8o16.pdf (“Manifest disregard is a common-law exception to the limited grounds for vacatur of arbitral award enumerated in the Federal Arbitration Act (FAA).”); *see* Carbonneau, *infra* note 9; Huber, *infra* note 11. [↑](#footnote-ref-8)
9. Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates*, 14 Cardozo J. Conflict Resol. 593, 604-606 (2013); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 Penn St. L. Rev. 1103, 1110 (2008-2009); Lisa J. Banks & Matthew S. Stiff, *The Federal Arbitration Act, ALI-CLE: Advanced Employment Law and Litigations 2013*, Katz, Marshall & Banks, LLP, at 15 (last visited May 6, 2017), http://www.kmblegal.com/wp-content/uploads/ALI-CLE-Arbitration-Feb-2013.pdf; Chen, *supra* note 8, at 1879. [↑](#footnote-ref-9)
10. Jill I. Gross, *Hall Street Blues: The Uncertain Future of Manifest Disregard*, 37 Sec. Reg. L.J. 232, 270 (2009). [↑](#footnote-ref-10)
11. Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 Cardozo J. Conflict Resol. 509, 557 (2008-2009). [↑](#footnote-ref-11)
12. Huber, *supra* note 11, at 557. [↑](#footnote-ref-12)
13. Huber, *supra* note 11, at 557. [↑](#footnote-ref-13)
14. Reuben, *supra* note 9, at 1110 (“The manifest disregard standard is a non-statutory ground that emanates from dicta in the *Wilko v. Swan* case….); Chen, *supra* note 8, at 1879 (“The doctrine of manifest disregard of law traces its origins to 1953…in *Wilko v. Swan*…. The entire doctrine of manifest disregard of the law has developed out of…dictum from *Wilko*, a case that has been since overrule on its principle ruling.”); Matthew Wolper, *“Manifest Disregard” Not Yet Entirely Disregarded*, 86 Fla. B.J. 27, 37 (2012) (“The origin of manifest disregard of the law is found in the Supreme Court’s opinion in *Wilko v. Swan*….);Banks & Stiff, *supra* note 9, at 15 (Manifest disregard for the law “originated in the dictum of [*Wilko v. Swan*]….”); Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 Duck L.J. 547, 566-67 (2005) (“The ‘manifest disregard’ locution originated in the Supreme Court’s decision in *Wilko*….”). Gross, *supra* note 10, at 236 (“The ‘manifest disregard’ standard originated from a statement by the Supreme Court in *Wilko v. Swan*…”); Stephan J. Ware & Marisa V. Maleck, *Authorities Split After the Supreme Court’s Hall Street Decision: What is Left of the Manifest Disregard Doctrine?*, The Federalist Society, at 119 (Mar. 31, 2010), *available at*:http://www.fed-soc.org/publications/detail/authorities-split-after-the-supreme-courts-hall-street-decision-what-is-left-of-the-manifest-disregard-doctrine (“The manifest disregard doctrine is traced to the Supreme Court’s decision in *Wilko v. Swan*…”). *See also*, Adam Miliam, *A House Built on Sand: Vacating Arbitration Awards For Manifest Disregard of the Law*, 29 Cumb. L. Rev. 705, 708 (1998-1999) (“circuits derive the manifest disregard of the law standard either from the dicta in [*Wilko v. Swan*] or as an implied defense arising under section 10(a)(4) of the FAA…”). *But see*, Michael H. LeRoy, *Are Arbitrators Above The Law? The “Manifest Disregard of The Law” Standard*, 52 B.C. L. Rev. 137, 157 (2011) (“Dictum in *Wilko* is mistakenly cited as a souce of the manifest disregard standard. The Court in *Wilko* did not adopt this standard but simply discussed it as a hypothetical.”). [↑](#footnote-ref-14)
15. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (*overruled on other grounds in Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989)). [↑](#footnote-ref-15)
16. Ashley K. Sundquist, *Do Judicially Created Grounds for Vacating Arbitral Awards Still Exist? Why Manifest Disregard of the Law and Public Policy Exceptions Should be Considered under Vacatur*, 2015 J. Disp. Resol. 407, 411 (2015); LeRoy, *supra* note 14, at 158 (“In this advisory statement” the Court “said that a judge may review [a arbitral award] if it manifestly disregards the law, but not if the judge disagrees with its legal interpretation.”). [↑](#footnote-ref-16)
17. Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. Kan. L. Rev. 47, 61 (2010-2011). *See* LeRoy, *supra* note 14, at 158 (the Court did not give any “further details on what manifest disregard of the law meant, and it gave no indication that it ever intended manifest disregard to constitute a new ground for vacating arbitration awards under the FAA.”). [↑](#footnote-ref-17)
18. *See* Milam, *supra* note 14, at 708 (“[N]o secure basis exist upon which courts can apply the standard, thus leading to arbitrary and inconsistent interpretations and application among the circuits.”). *See also,* Scodro, *supra* note 14, at 569 (“Without statutory or other grounding aside from conclusionary dicta in *Wilko*, however, defining ‘manifest disregard’ has been a slippery task.”). [↑](#footnote-ref-18)
19. Kenneth R. Davis, *The End of an Error: Replacing “Manifest Disregard” with a New Framework for Reviewing Arbitration Awards*, 60 Clev. St. L. Rev. 87, 92 (2012-2013). [↑](#footnote-ref-19)
20. Davis, *supra* note 19, at 92. [↑](#footnote-ref-20)
21. *See* Carbonneau, *supra* note 9, at 604 (“The [*Wilko*] opinion makes only an incidental reference to [manifest disregard], possible by pure happenstance.”). [↑](#footnote-ref-21)
22. Davis, *supra* note 19, at 94. *See* Carbonneau, *supra* note 9, at 604 (Manifest disregard…actually has little to do with Wilko.”). [↑](#footnote-ref-22)
23. *Citigroup Global Mkts. Inc. v. Bacon*, 562 F.3d 349, 354 (5th Cir. 2009). *See San Marine Compania De Navegacion v. Saguenay Terminals Ltd*., 293 F.2d 796 (9th Cir. 1961) (“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. Thus if the award was based upon a mistaken view of the law, but in their assumption of what the law was, the arbitrators had not gone too far afield, then, the award would stand; but if the error is an egregious one, such as no sensible layman would be guilty of, then the award could be set aside. Such a ‘degree of error’ test would, we think, be most difficult to apply. Results would likely vary from judge to judge. We believe this is not what the court had in mind when it spoke of ‘manifest disregard.’”). *See also*, Davis, *supra* note 19, at 94. [↑](#footnote-ref-23)
24. *See e.g.*, *Advest, Inc. v McCarthy*, 914 F2d 6 (1st Cir. 1990); *Trafalgar Shipping Co. v Intl. Milling Co.*, 401 F2d 568 (2d Cir 1968); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Bobker*, 808 F2d 930 (2d Cir 1986); *Ludwig Honold Mfg. Co. v Fletcher*, 405 F2d 1123 (3d Cir 1969); *Upshur Coals Corp. v United Mine Workers, Dist. 31*, 933 F2d 225 (4th Cir 1991); *Williams v Cigna Fin. Advisors*, 197 F3d 752 (5th Cir 1999); *Anaconda Co. v Intl. Asso. of Machinists & Aerospace Workers*, 693 F2d 35 (6th Cir 1982); *Health Servs. Management Corp. v Hughes*, 975 F2d 1253 (7th Cir 1992); *Stroh Container Co. v Delphi Indus., Inc.*, 783 F2d 743 (8th Cir 1986); *French v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F2d 902 (9th Cir 1986); *Jenkins v Prudential-Bache Sec., Inc.*, 847 F2d 631 (10th Cir 1988); *Montes v Shearson Lehman Bros.*, 128 F3d 1456 (11th Cir 1997); *Kanuth v Prescott*, 292 US App DC 319, 949 F2d 1175 (1991); John Diaconis & Ari Diaconis, *Six Years After Hall Street: The Continued Viability of Manifest Disregard, Jurisdiction by Jurisdiction*, Bleakley Platt, at 10 (last visited May 6, 2017), http://www.bpslaw.com/files/20150729043546-ARIAS%20Quarterly%202015%20First%20Quarter%20-%20Six%20Years%20After%20Hall%20St.pdf (citing *McCarthy v. Citigroup Global Mkts., Inc.,* 463 F.3d87, 91 (1st Cir. 2006); *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Duluhos v. Stasberg*, 321 F.3d 365, 370 (3d Cir. 2003); *Three S Delaware, Inc., v. DataQuick Info Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007); *Prestige For v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395-96 (5th Cir. 2003); *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Jaros*, 70 F.3d 418, 420-21 (6th Cir. 1995); *Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 563 (7th Cir. 2008); *Manion v. Nagin*, 392 F.3d 294, 298 (8th Cir. 2004); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007); *Dominion Video Satellite, Inc. v. Echostar Satellite LLC*, 430 F.3d 1269, 1275 (10th Cir. 2005); *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 821 (D.C. Cir. 2007)). [↑](#footnote-ref-24)
25. *See infra* Part IV(a)(i)-(iii). [↑](#footnote-ref-25)
26. Davis, *supra* note 19, at 94 (“Despite the vagueness of the *Wilko* dicta, the circuit courts, one by one, recognized the manifest disregard standard.”); Chen, *supra* note 8, at 1879 (“Prior to *Hall Street*, manifest disregard as an independent ground for vacatur was well accepted by all circuit courts except for the Seventh Circuit.”); Burch, *supra* note 17, at 61 (“every federal circuit court of appeals has adopted [the doctrine of manifest disregard] (although the Fifth and Eleventh Circuit have since renounced it), [and] many state courts have adopted it…”); Scodro, *supra* note 14, at 567 (“Despite its humble origins and lack of explication from the Supreme Court, the ‘manifest disregard’ doctrine has taken hold in every federal circuit and in many state courts.”); LeRoy, *supra* note 14, at 158-59. [↑](#footnote-ref-26)
27. *First Options of Chicago, Inc. v Kaplan*, 514 U.S. 938, 942 (1995) (citing 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko* v. *Swan*, 346 U.S. 427, 436-437, 98 L. Ed. 168, 74 S. Ct. 182 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)). [↑](#footnote-ref-27)
28. Burch, *supra* note 17, at 62 (citing *First Options of Chicago, Inc. v Kaplan*, 514 U.S. 938, 942 (1995)(citing *Wilko* and mentioning manifest disregard in a parenthetical following the cite); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231 (1987) (citing *Wilko* and quoting its sentence on manifest disregard); *McMahon*, 482 U.S. at 258-59, 268 (Blackmun, J., concurring in part and dissenting in part)(acknowledging manifest disregard and citing *Wilko*); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) (stating that arbitration awards may be overturned if they are in manifest disregard of the law)); *Stolt-Nielsen S. A. v AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). *See also*, Scodro, *supra* note 14, at 567 (“A majority of the Supreme Court has only even hinted approval of the doctrine on one occasion since *Wilko* was decided in 1953.”). [↑](#footnote-ref-28)
29. Burch, *supra* note 17, at 62. [↑](#footnote-ref-29)
30. For more information regarding the various circuits’ recognition, interpretation, and application of manifest disregard following the Court’s statement in *Wilko*, *see* LeRoy, *supra* note 14, at 160-69; Davis, *supra* note 19, at 94-96; Burch, *supra* note 17, at 62-65; Chen, *supra* note 8, at 1881-1883; Huber, *supra* note 11, at 560-63. [↑](#footnote-ref-30)
31. Burch, *supra* note 17, at 62. [↑](#footnote-ref-31)
32. Stephan Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key To Restoring Order To The Law Of Vacatur*, 1998 J. Disp. Resol. 117. [↑](#footnote-ref-32)
33. *Id.* at 125-24 (citing *Prudential-Bache Secs., Inc., v. Tanner*, 72 F.3d 234, 240 (1st Cir. 1995); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* *v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990)); Burch, *supra* note 17, at 62 (citation omitted). [↑](#footnote-ref-33)
34. Burch, *supra* note 17, at 63. [↑](#footnote-ref-34)
35. *Id.* at 64 (citing Hayford, *supra* note 32, at 128-32 (internal citation omitted)). [↑](#footnote-ref-35)
36. *Id*. at 62-64. *See also*, Hayford, *supra* note 32, at 125-132. [↑](#footnote-ref-36)
37. Burch, *supra* note 17, at 62 (citation omitted). [↑](#footnote-ref-37)
38. *Id.*  [↑](#footnote-ref-38)
39. *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990) (quoting *O.R. Securities, Inc. v. Professional Planning Assoc., Inc.*, 857 F.2d 742, 747 (11th Cir. 1988)). [↑](#footnote-ref-39)
40. *Id.* (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Bobker*, 808 F.2d 930, 933 (2d Cir. 1986)). [↑](#footnote-ref-40)
41. Note, however, that the court in *Advest* did find that, “[i]n certain circumstances, 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.” *Id*.However, the court found that “[t]he case at bar … is not cut to so rare a pattern….” *Id.* [↑](#footnote-ref-41)
42. *See O.R. Sec., Inc. v Prof'l Planning Assocs.*, 857 F.2d 742, 747 (11th Cir 1988) (“In fact, when the arbitrators do not give their reasons, it is nearly impossible for the court to determine whether they acted in disregard of the law.”) [↑](#footnote-ref-42)
43. Burch, *supra* note 17, at 63 (citing Norman S. Posner, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brook. L. Rev. 471, 505-506 (1998)(“given the fact that arbitrators seldom write opinions explaining their decisions, there is little likelihood that a losing party in an arbitration will be able to persuade a reviewing court that the arbitrators manifestly disregarded the law.”)). [↑](#footnote-ref-43)
44. *Id*. [↑](#footnote-ref-44)
45. *Id*. [↑](#footnote-ref-45)
46. *Id*. [↑](#footnote-ref-46)
47. *Id*.; Hayford, *supra* note 32, at 127-128 (“This second model for the ‘manifest disregard’ of the law analysis is the most troublesome of the three…. It raises the prospect of vacatur when a party believes that (i) the controlling law is beyond dispute, and (ii) the award is clearly inconsistent with that law. … Reduced to its essence, this second approach to the ‘manifest disregard’ of the law analysis consists of nothing more than a determination of whether the arbitrator made an error of law that a reviewing court is unwilling to tolerate.”). [↑](#footnote-ref-47)
48. Burch, *supra* note 17, at 63 (citation omitted). [↑](#footnote-ref-48)
49. *Willemijn Houdstermaatschappij, BV v. Std. Microsystems Corp.*, 103 F.3d 9, 12-13 (2d Cir. 1997). [↑](#footnote-ref-49)
50. *Id*. (citing *Siegel v Titan Indus. Corp.*, 779 F.2d 891, 893 (2d Cir. 1985) (quoting *Bell Aerospace Co. Div. of Textron* v. *Local 516*, 356 F. Supp. 354, 356 (W.D.N.Y. 1973), *rev'd on other grounds*, 500 F.2d 921 (2d Cir. 1974))). [↑](#footnote-ref-50)
51. *Id*. (citing *Merrill Lynch*, 808 F.2d at 933). *See also*, *supra* note 40. [↑](#footnote-ref-51)
52. Burch, *supra* note 17, at 63-64 (citing *Wilko*, 346 U.S. at 436-37). [↑](#footnote-ref-52)
53. *Id*. at 63. [↑](#footnote-ref-53)
54. *Id.* at 64; Hayford, *supra* note 32, at 130 (“The framework for analysis under this third model works backwards from an arbitral outcome the reviewing court believes to be flawed as a matter of law, confirmed by an exhaustive evaluation of the factual record made in arbitration. This judicial rethinking of the factual questions and the questions of application of law to facts integral to the resolution of the matter in arbitration is coupled with a search for evidence in the record upon which the court can base a presumption of arbitral knowledge of the correct law. Once that evidence is identified the court is free to ‘bootstrap’ its way to the inference that the arbitrator must have ignored the relevant law in fashioning an award the court believes is contrary to the law.”). [↑](#footnote-ref-54)
55. *Montes v. Shearson Lehman Bros., Inc.,* 128 F.3d 1456 (11th Cir. 1997). *See also*, *Hilligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998). [↑](#footnote-ref-55)
56. The court agreed that a claim of manifest disregard only applies where the arbitrator is “conscious of the law and deliberately ignore[s] it,” *Montes v Shearson Lehman Bros.*, 128 F.3d at 1461, and that incorrect interpretation of the law will not satisfy this standard. *Id*. [↑](#footnote-ref-56)
57. *Montes*, 128 F.3d at 1461. *See* Hayford, *supra* note 32, at 19; Burch, *supra* note 17, at 64. [↑](#footnote-ref-57)
58. Hayford, *supra* note 32, at 129. *See also*, Burch, *supra* note 17, at 64. [↑](#footnote-ref-58)
59. *Montes*,128 F.3d at 1461. [↑](#footnote-ref-59)
60. Bruch, *supra* note 17, at 64; *see* Hayford, *supra* note 32, at 125-32 (comparing all three approaches). [↑](#footnote-ref-60)
61. *See* Gross, *supra* note 10, at 236. [↑](#footnote-ref-61)
62. *See* Weathers P. Bolt, *Much Ado About Nothing: The Effect of Manifest Disregard on Arbitration Agreement Decisions*, 63 Ala. L. Rev. 161, 164 (2011-2012). [↑](#footnote-ref-62)
63. Note, however, that according to John and Ari Diaconis, despite the Circuit Courts’ diverging interpretations and application of manifest disregard, a common theme emerged among the circuits: “courts rarely and only in the most egregious of circumstances vacated [arbitral awards] based on manifest disregard.” John and Ari Diaconis, *supra* note 23, at 10-11. [↑](#footnote-ref-63)
64. Bolt, *supra* note 62, at 164. [↑](#footnote-ref-64)
65. According to Jill Gross, “[w]hile the precise test varied from circuit to circuit, most courts agreed that, to persuade a court to vacate an award on manifest disregard ground, the losing party must show: (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether; and (2) the law that the arbitrator ignored was well defined, explicitly, and clearly applicable to the case.” Gross, *supra* note 10, at 236. [↑](#footnote-ref-65)
66. Bolt, *supra* note 62, at 164 (citing *Duferco Int’l Steel Tracing v. T. Klaveness Shipping A/S*, 333 F.3d 87, 91 (1st Cir. 2006)(“[W]e mean by manifest disregard of the law a situation where it is clear from the record that the arbitrator recognized the applicable law—and ignored it.”)). [↑](#footnote-ref-66)
67. *Hall St. Assocs., L.L.C. v Mattel, Inc.*, 552 U.S. 576 (2008). [↑](#footnote-ref-67)
68. Huber, *supra* note 11, at 558. [↑](#footnote-ref-68)
69. Davis, *supra* note 19, at 99. *See* Kevin Patrick Murphy, *Alive But Not Well: Manifest Disregard After Hall Street*,44 Ga. L. Rev. 285, 300 (2009-2010). [↑](#footnote-ref-69)
70. *Hall Street*,552 U.S. at 578. *See also*, Chen, *supra* note 8, at 1889; Ann C. Gronlund, *The Future of Manifest Disregard As a Valid Ground for Vacating Arbitration Awards in Light of the Supreme Court’s Ruling in Hall Street Associates, L.L.C. v. Mattel, Inc.*, 96 Iowa L. Rev. 1351, 1362 (2010-2011); Murphy, *supra* note 69, at 300; John Diaconis & Ari Diaconis, *supra* note 23, at 13; Huber, *supra* note 11, at 588-60. [↑](#footnote-ref-70)
71. Murphy, *supra* note 69, at 300. [↑](#footnote-ref-71)
72. Gronlund, *supra* note 70, at 1362. [↑](#footnote-ref-72)
73. Murphy, *supra* note 69, at 301. [↑](#footnote-ref-73)
74. *Hall Street*,552 U.S. at 585. *See* Huber, *supra* note 11, at 558 (“This argument was easily turned away by the Court: judicial interpretation that expands the scope of review does not provide a basis for private parties alter review by private agreement. Besides, Wilko ‘expressly reject just what Hall Street asks for here, general review for an arbitrators’ legal error.’”) [↑](#footnote-ref-74)
75. *Hall Street*, 552 U.S. at 585. [↑](#footnote-ref-75)
76. Huber, *supra* note 11, at 559; Murphy, *supra* note 69, at 300 (“The Court’s response to [Hall Street’s assertion that court have been permitted to expanded review since *Wilko* created manifest disregard] has prompted a debate over whether the fifty-five-year-old doctrine is no longer good law, if indeed it ever was.”). [↑](#footnote-ref-76)
77. Gross, *supra* note 10, at 236. [↑](#footnote-ref-77)
78. Jonas Cullemark, *Wachovia Securities, LLC v. Brand (2012): The Fourth Circuit’s Dubious Position in the Ongoing Federal Circuit Split in the Application of “Manifest Disregard of the Law” as a Basis for Vacatur of Arbitration Awards Following the U.S. Supreme Court’s Hall Street Decision (2008)*, 22 U. Miami Bus. L. Rev. 1, 13 (2013-2014). [↑](#footnote-ref-78)
79. Davis, *supra* note 19, at 102-103. [↑](#footnote-ref-79)
80. *See* Davis, *supra* note 19, at 103-107; Stanley A. Leasure, *Arbitration Law in Tension After Hall Street: Accuracy or Finality?*, 39 UALR L. Rev. 74, 84-101 (2016); Cullemark, *supra* note 78, at 13-17; Mylinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S. C. L. Rev. 407, 424-430 (2010-2011). *See also*, Huber, *supra* note 11, at 560-577. [↑](#footnote-ref-80)
81. Leasure, *supra* note 80, at 84. [↑](#footnote-ref-81)
82. *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009). [↑](#footnote-ref-82)
83. *See id.*; Leasure, *supra* note 80, at 85; Leigh F. Gill, *Manifest Disregard After Hall Street: Back from the Dead—The Surprising Resilience of a Non-Statutory Ground for Vacatur*, 15 Lewis & Clark L. Rev. 265, 272 (2011). [↑](#footnote-ref-83)
84. *Citigroup Global Markets*, 562 F.3d at 358 (“In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.”).  [↑](#footnote-ref-84)
85. *See id.*; Cullemark, *supra* note 78, at 15; Gill, *supra* note 83, at 272; Sims & Bales, *supra* note 80, at 425. [↑](#footnote-ref-85)
86. *Citigroup Global Mkts.*, 562 F.3d at 358. Although manifest disregard as a non-statutory, common-law, ground for vacatur may not have survived *Hall Street*, according to John and Ari Diaconis, manifest disregard “did survive *Hall Street* insofar as an arbitrator will ‘exceed its power’ under FAA Section 10(a)(4) when it ‘is fully award of [a] controlling principle of law and yet does not apply it.’” John and Ari Diaconis, *supra* note 23, at 19 (quoting *Citigroup Global Mkts. Inc. v Bacon*, 562 F3d 349, 357-58 (5th Cir 2009)). However, John and Ari note that the Fifth Circuit tends to perceive the phrase “manifest disregard” negatively; as a result, “litigants should refer to only FAA Section 10(a)(4) when arguing on what would otherwise be manifest disregard grounds.” *Id. See also*, *McKool Smith, P.C. v. Curtis Int'l, Ltd.*, 650 F. App'x 208, 213 (5th Cir. 2016) (“Assuming—without deciding—that manifest disregard of the law can be a *statutory* basis for vacatur, Curtis fails to show that the arbitration award was in manifest disregard of Texas law.”). [↑](#footnote-ref-86)
87. *Med. Shoppe Int'l, Inc. v Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (“We have previously recognized the holding in *Hall Street* and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA. *See Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008) (citing *Hall Street*, 552 U.S. at 584).”). [↑](#footnote-ref-87)
88. Leasure, *supra* note 80, at 87. [↑](#footnote-ref-88)
89. *Med. Shoppe Int'l*,614 F.3d at 489 (citing *Hall Street,* 552 U.S. at 586). [↑](#footnote-ref-89)
90. *Air Line Pilots Ass’n Int'l v Trans States Airlines, LLC*, 638 F.3d 572, 579 (8th Cir. 2011). [↑](#footnote-ref-90)
91. John & Ari Draconis, *supra* note 23, at 20-21. [↑](#footnote-ref-91)
92. *Frazier v Citifinancial Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010). [↑](#footnote-ref-92)
93. *Id*. at1324. [↑](#footnote-ref-93)
94. *Id.* (citing *Hall Street*, 552 U.S. at 586 (“the text compels a reading of the §§ 10 and 11 categories as exclusive”); *id*. at 589 (“the statutory text gives us no business to expand the statutory grounds”); *id*. at 590 (“§§ 10 and 11 provide exclusive regimes for the review provided by the statute”)). [↑](#footnote-ref-94)
95. Leasure, *supra* note 80, at 89; *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App'x 828 (11th Cir. 2014), *cert. denied*, \_\_ U.S. \_\_, 135 S. Ct. 145 (2014). [↑](#footnote-ref-95)
96. Jack Rephan, *Is Manifest Disregard of the Law a Ground for Vacating Arbitration Awards*, Pender & Coward (March 2, 2016), *available at*: https://www.pendercoward.com/resources/blog-opinions-and-observations/is-manifest-disregard-of-the-law-still-a-ground-for-vacating-arbitration-awards-march-2016/. [↑](#footnote-ref-96)
97. John & Ari Diaconis, *supra* note 23, at 19. [↑](#footnote-ref-97)
98. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009). [↑](#footnote-ref-98)
99. Rephan, *supra* note 96. [↑](#footnote-ref-99)
100. *Coffee Beanery*,300 F. App'x at 418. [↑](#footnote-ref-100)
101. *Id*. at 418 (citing *Wilko v. Swan,* 346 U.S. 427, 436 (1953) (overruled on other grounds by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)). [↑](#footnote-ref-101)
102. *Coffee Beanery*,300 F. App'x at 418. [↑](#footnote-ref-102)
103. John and Ari Diaconis, *supra* note 23, at 19. According to John and Ari Diconis, the court supported this position by arguing that the Supreme Court’s opinion in *Hall Street* is open to multiple interpretations, and therefore provided insufficient means for overruling “a doctrine which prior to 2009 was ‘universally’ recognized by the Courts of Appeals.” *Id.*  [↑](#footnote-ref-103)
104. Rephan, *supra* note 96. [↑](#footnote-ref-104)
105. Some commentators assert that the Fourth Circuit falls within this group; however, as discussed *infra* Part IV(d)(i), the Fourth Circuit does not appear to have definitively adopted the position that the doctrine of manifest disregard survived *Hall Street* as a judicial gloss/shorthand or as independent, non-statutory, ground for vacatur. [↑](#footnote-ref-105)
106. *Stolt-Nielsen SA v AnimalFeeds Int'l Corp.*, 548 F3d 85, 95 (2d Cir. 2008). [↑](#footnote-ref-106)
107. Jack Jarrett, *What’s in a Name? Why Judically Named Grounds for Vacating Arbitral Awards Should Remain Available In Light of Hall Street*, 20 Geo. Mason L. Rev. 909, 922 (2012-2013) (citing *Duferco Int’l Steel Trading v. T. Kalveness Shipping A/S*, 333 F.3d 383, 289 (2d Cir. 2003)). [↑](#footnote-ref-107)
108. *Stolt-Nielsen*,548 F.3d at 94. [↑](#footnote-ref-108)
109. *Sutherland Global Servs. v Adam Techs. Int'l SA de C.V.*, 639 F App'x 697, 699 (2d Cir. 2016) (citing *Hall Street*, 552 U.S. at 584). [↑](#footnote-ref-109)
110. *Sutherland Global*,639 F App'x at 699 (citing *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451-52 (2d Cir. 2011) (quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010))). [↑](#footnote-ref-110)
111. Leasure, *supra* note 80, at 96; C*omedy Club, Inc. v Improv W. Assocs.*, 553 F.3d 1277 (9th Cir 2009). [↑](#footnote-ref-111)
112. C*omedy Club, Inc. v Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir 2009). [↑](#footnote-ref-112)
113. Rephan, *supra* note 96. [↑](#footnote-ref-113)
114. C*omedy Club*,553 F.3d at 1290, 1283. [↑](#footnote-ref-114)
115. *Id.* at 1283. [↑](#footnote-ref-115)
116. *Wetzel's Pretzels, LLC v Johnson*, 567 F App'x 493, 494 (9th Cir. 2014)(citing *Biller v. Toyota Motor Corp.,* 668 F.3d 655, 665 (9th Cir. 2012) (internal quotation marks and citations omitted)). [↑](#footnote-ref-116)
117. *Id*. [↑](#footnote-ref-117)
118. *See Wachovia Sec., LLC v Brand*, 671 F3d 472, 483 (4th Cir. 2012) (“[W]e adopted a two-part test that a party must meet in order for a reviewing court to vacate for manifest disregard: ‘(1) the applicable legal principle is clearly defined and not  subject to reasonable debate; and (2) the arbitrator[ ] refused to heed that legal principle.’ We do not read *Hall Street* or *Stolt-Nielsen* as loosening the carefully circumscribed standard that we had previously articulated for manifest disregard.” (Citation omitted)). [↑](#footnote-ref-118)
119. John & Ari Diaconis, *supra* note 23, at 18. [↑](#footnote-ref-119)
120. *Wachovia*, 671 F.3d at 483. [↑](#footnote-ref-120)
121. *Dewan v Walia*, 544 F App'x 240, 246, n 5 (4th Cir. 2013) (citing *Wachovia*, 671 F.3d at 483). [↑](#footnote-ref-121)
122. *Adviser Dealer Servs. v Icon Advisers, Inc.*, 557 F. App'x 714, 717 (10th Cir. 2014) (internal citation omitted). [↑](#footnote-ref-122)
123. *Abbott v Law Off. of Patrick J. Mulligan*, 440 F. App'x 612 (10th Cir. 2011). [↑](#footnote-ref-123)
124. Rephan, *supra* note 96. [↑](#footnote-ref-124)
125. Scodro, *supra* note 14, at 569. [↑](#footnote-ref-125)
126. *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 Brook. L. Rev. (2010). [↑](#footnote-ref-126)
127. DICTUM, Black's Law Dictionary (10th ed. 2014) (“judicial dictum (1829) An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight.”). [↑](#footnote-ref-127)
128. *Hall Street*, 552 U.S. at 585. [↑](#footnote-ref-128)
129. Gross, *supra* note 10, at 239. [↑](#footnote-ref-129)
130. *Id*. [↑](#footnote-ref-130)
131. *Id*. [↑](#footnote-ref-131)
132. *See supra* Part IV(d). [↑](#footnote-ref-132)
133. For more information regarding the weakening foundation of the doctrine of manifest disregard following the Supreme Court’s decision in *Wilko*, *see* Murphy, *supra* note 69, at 306. [↑](#footnote-ref-133)
134. *See supra* Part IV(b)-(d). [↑](#footnote-ref-134)
135. *See e.g.*, *Stolt-Nielsen S. A. v AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672, n.3 (2010) (“We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 585, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), 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.”); *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App'x 828 (11th Cir. 2014), *cert. denied*, \_\_ U.S. \_\_, 135 S. Ct. 145 (2014); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009). [↑](#footnote-ref-135)