

WHAT'S IN A NAME? WHY JUDICIALLY NAMED
 GROUNDS FOR VACATING ARBITRAL AWARDS
 SHOULD REMAIN AVAILABLE IN LIGHT OF
HALL STREET

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INTRODUCTION

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.¹

This is the commercial arbitration clause recommended by the American Arbitration Association, the country's largest source of arbitration services.² Many contracts contain this broad provision.³ While it is not always clear what resolution parties agree to when their contract includes a similar boilerplate arbitration clause, it is clear that the courts will almost certainly uphold the clause and the resulting arbitral award.⁴ Contract drafters often envision what one commentator calls "folklore arbitration," where arbitration is a "speedy, informal" proceeding conducted by an industry expert who provides an equitable remedy.⁵ Federal courts cite this folklore theory in decisions that evidence an "emphatic federal policy in favor of arbitral dispute resolution."⁶

While "folklore arbitration" has "taken on almost a mythic nature," this type of arbitration is increasingly less common.⁷ Arbitration is no longer restricted to disputes among businesses within an industry, but instead is prominent in employee-employer agreements, collective bargaining, com-

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¹ AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES 7-8 (2009).

² See Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 102 (1992).

³ *Id.*

⁴ See *id.* at 102, 106.

⁵ Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1461-62 (1996).

⁶ See Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1071 (1998) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

⁷ Brunet, *supra* note 5, at 1461-62.

mercial contracts, and in agreements between sellers and consumers.⁸ Despite the widespread use of arbitration agreements, very few parties understand just how binding is arbitration.⁹

Since Congress passed the Federal Arbitration Act in 1925 (the “FAA”), federal courts have exercised review and vacated arbitral awards only in exceptional circumstances.¹⁰ Courts justify this practice by citing the classic theory of the voluntary nature of the agreements, and the benefits of a customizable process that can be faster, cheaper, more confidential, and better suited to lighten the judicial caseload than traditional litigation.¹¹ In 2008, the U.S. Supreme Court issued its opinion in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,¹² a decision that some commentators argue further restricted the already minimal judicial review.¹³

Part I of this Note discusses the historical relationship between the courts and arbitration, the Supreme Court’s decision in *Hall Street*, as well as the changing nature of arbitration. Part II examines the circuit split that developed following *Hall Street* and asks whether the Supreme Court totally eliminated the judicially named grounds for vacation, a point upon which the federal courts of appeals are divided.¹⁴ Part III argues that the Second and Ninth Circuits’ narrow reading of *Hall Street* is preferable in light of the history and changing nature of arbitration. Part IV argues that all of the judicially named grounds should remain available as they are functionally equivalent and their narrow application fits with the legislative intent be-

⁸ See Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 814-15 (2008) (referencing the use of arbitration in employment, consumer, and franchise contracts).

⁹ See Speidel, *supra* note 6, at 1071-72 (discussing the comparative freedom to contract between sophisticated and unsophisticated parties and the resulting litigation that often ensues due to incomplete understanding of arbitration’s binding nature).

¹⁰ See generally, Ann C. Gronlund, Note, *The Future of Manifest Disregard as a Valid Ground for Vacating Arbitration Awards in Light of the Supreme Court’s Decision in Hall Street Associates, L.L.C. v. Mattel, Inc.*, 96 IOWA L. REV. 1351, 1356-61 (2011) (discussing federal courts’ enforcement practices in light of the Federal Arbitration Act of 1925).

¹¹ See Brunet, *supra* note 2, at 106-07 (discussing reasons for the tendency of courts to enforce arbitration agreements); Nana Japardize, Note, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 36 HOFSTRA L. REV. 1415, 1418-19 (2008).

¹² 552 U.S. 576 (2008).

¹³ Gronlund, *supra* note 10, at 1370.

¹⁴ This Note uses the term “judicially named” to refer to grounds for vacatur of arbitral awards that are not explicitly listed in the FAA at 9 U.S.C. § 10(a)(4). The circuits disagree as to whether these grounds were developed within the § 10(a)(4) framework. Compare Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009) (holding that Section 10 of the FAA did not encompass manifest disregard of the law), with Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009) (holding that manifest disregard of the law was shorthand for § 10(a)(4)).

hind the FAA, eighty years of common law jurisprudence, and the text of FAA Section 10(a)(4).

I. BACKGROUND: FEDERAL COURTS AND ARBITRAL AWARDS

Section A of this Part recounts the historical relationship of American courts and arbitral awards prior to Congress enacting the FAA. Section B of this Part reviews the text of the FAA and several writings indicative of the legislative intent as Congress considered judicial review of arbitral awards. Section C lays out the common law or judicially named grounds for vacatur established by the federal courts as they applied the FAA. Finally, Section D analyzes the changing nature of modern arbitration, while Section E concludes this Part with a description of the Supreme Court's decision in *Hall Street*.

A. Courts and Arbitration Prior to the Federal Arbitration Act

Arbitration is a form of alternative dispute resolution in which two parties agree to forego any remedies available in public courts and resolve their disputes by having a neutral third party make a binding decision on the issue.¹⁵ Arbitration has existed since antiquity, and its use in the United States “pre-dates both the Declaration of Independence and the Constitution.”¹⁶

Despite this long and well-established history, early American common law courts were “hostile”¹⁷ toward arbitration. Courts worried that “[t]he regular administration of justice might be greatly impeded” if arbitration agreements were specifically enforced,¹⁸ and early judges reasoned that parties could not contract themselves out of the jurisdiction of public courts.¹⁹ However, courts gradually became more accepting of arbitration's

¹⁵ See BLACK'S LAW DICTIONARY 191 (9th ed. 2009).

¹⁶ Gronlund, *supra* note 10, at 1355 (quoting 1 BETTE J. ROTH ET AL., THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 1:1, at 1-3 (2010)); see also Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926) (stating that arbitration has been used to resolve conflicts since medieval times).

¹⁷ Gronlund, *supra* note 10, at 1355 (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 593 (2008) (Stevens, J., dissenting)).

¹⁸ *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 452 (1874) (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 670, at 743-44 (4th ed. 1846)); Gronlund, *supra* note 10, at 1355 (quoting *Morse*, 87 U.S. (20 Wall.) at 452)).

¹⁹ Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597, 601 n.18 (2011) (stating that courts were not as reluctant to enforce final arbitral decisions as they were reluctant to specifically enforce an arbitration agreement, thereby forcing a party to forego traditional judicial remedies).

legitimacy throughout the nineteenth century as the national economy began to experience greater commercial production, and arbitration was considered to be a quick and cheap method of contractual dispute resolution between businessmen.²⁰

In 1854, the Supreme Court espoused the need to limit judicial review of arbitral awards with its decision in *Burchell v. Marsh*.²¹ The Court stated that, since the parties chose arbitrators to make a final decision, courts should not exercise arbitrary powers over awards to correct mere errors in judgment.²² In 1874, the Court held that review of awards should be limited, and that awards could only be set aside “[f]or 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 or chancery.”²³ In addition to those grounds, the Supreme Court historically invalidated awards that violated the law or established societal interests under a public policy exception.²⁴

The Supreme Court’s support of judicially enforcing arbitral awards and the nation’s growing commercialism led businessmen to create the Arbitration Society of America in 1922.²⁵ This group pushed Congress to codify the judicial enforcement of arbitration agreements, which it did in 1925.²⁶

B. *The Federal Arbitration Act*

Congress enacted the Federal Arbitration Act²⁷ in 1925, intending to end remaining judicial reluctance to enforce arbitration agreements and to encourage judicial efficiency by “allow[ing] parties to avoid the costliness and delays of litigation.”²⁸ Since arbitral awards are only enforceable when a court confirms the award, Section 9 of the FAA accomplishes the central goals of the FAA by forcing courts to confirm arbitral awards unless the

²⁰ See James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 747-49 (2009).

²¹ 58 U.S. (17 How.) 344, 349-50 (1854).

²² *Id.*

²³ *United States v. Farragut*, 89 U.S. (22 Wall.) 406, 420 (1874).

²⁴ See Marcantel, *supra* note 19, at 608-11 (analyzing the Court’s public policy exception to enforcing contracts and awards from a Lockean social contract perspective).

²⁵ Gronlund, *supra* note 10, at 1355-56.

²⁶ *Id.* at 1356.

²⁷ Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-16 (2006)).

²⁸ Lindsee Blair Gendron & Peter M. Hoffman, *Judicial Review of Arbitration Awards After Cable Connections: Toward a Due Process Model* 11 (June 2009) (unpublished manuscript) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974)), available at http://works.bepress.com/lindsee_gendron/2; see also Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 152 (2011).

award is within the narrow grounds for vacatur or modification listed in Sections 10 and 11.²⁹

Section 11 of the FAA lists the narrow grounds for judicial modification of an award:

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.³⁰

Section 10(a) lays out the exclusive and narrow criteria for judicial vacatur of awards:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (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 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.³¹

Federal courts have consistently stated that each of the four grounds for vacatur are difficult to prove.³² For example, a party seeking vacatur for fraud must prove the fraud by clear and convincing evidence, show that the fraud materially relates to the issue at arbitration, and show that due diligence could not have revealed the fraud prior to the arbitration.³³ To establish corruption or partiality under Section 10(a)(2), a party must show evi-

²⁹ 9 U.S.C. § 9 (2006); *see also* Marcantel, *supra* note 19, at 604 (quoting 9 U.S.C. § 9).

³⁰ 9 U.S.C. § 11.

³¹ *Id.* § 10.

³² *See* Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1108-10 (2009) (discussing each of the four grounds and why they are difficult to prove).

³³ *See id.*; *e.g.*, *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988) (vacating award where arbitrator clearly relied on testimony of expert witness who had falsified his credentials).

dent arbitrator bias.³⁴ The courts only invoke Section 10(a)(3) when the arbitral misconduct “grossly and totally blocked,” the aggrieved party’s right to be heard.³⁵ Courts also set a high bar for determining that an arbitrator exceeded their powers, while a simple mistake of law or fact does not justify vacatur,³⁶ the exact breadth of this fourth ground is not settled amongst the federal courts of appeals.³⁷

There is evidence that the Section 10(a)(4) was intended to encompass grounds for vacatur now considered common law or judicially named grounds.³⁸ The standards listed in Section 10 did not emanate solely from Congress.³⁹ The Senate drafted Section 10 based on a brief by W.W. Nichols, who was the president of the American Manufacturers’ Export Association of New York.⁴⁰ Nichols testified as follows:

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 so influenced by other undue means—cases in which enforcement obviously would 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.⁴¹

The language of Nichols’s testimony is almost identical to the language Congress codified into Section 10(a).⁴² Professor Michael LeRoy believes it reasonable to read “defect so inherently vicious that, as a matter of common morality, it ought not to be enforced,” to include the manifest disregard doctrine mentioned by courts prior to passage of the FAA.⁴³ Professor

³⁴ SAMUEL ESTREICHER & DAVID SHERWYN, *ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA* 53 (2004) (discussing statements or actions that courts consider to demonstrate active partiality and relationships that courts consider to demonstrate passive partiality).

³⁵ *Cofinco, Inc. v. Bakrie & Bros.*, 395 F. Supp. 613, 615 (S.D.N.Y. 1975).

³⁶ *See, e.g., Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1985) (holding that erroneous application of rules of law or mistakes in determining fact are not sufficient to allow for vacatur).

³⁷ *See supra* note 14 (discussing the circuit split).

³⁸ *See generally* LeRoy, *supra* note 28, at 145-57 (discussing the development of 9 U.S.C. § 10(a)(4)).

³⁹ *Id.* at 152-53.

⁴⁰ *Id.* at 153.

⁴¹ *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 14, 36 (1924) (statement of W.W. Nichols, President, American Manufacturers’ Export Association of New York).

⁴² *See* 9 U.S.C. § 10(a) (2006).

⁴³ LeRoy, *supra* note 28, at 154 (quoting congressional statement of W.W. Nichols). Manifest disregard of the law occurs when an arbitration panel consciously ignores applicable law or refuses to interpret the underlying contract. *See, e.g., Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (quoting *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995)); *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 268-69 (7th Cir. 2006). Manifest disregard is the judicially named ground that is most commonly claimed. Michael H. LeRoy & Peter Feuille, *Happily*

LeRoy believes that Congress accidentally omitted the doctrine because Nichols's brief did not explicitly use that language.⁴⁴

More historical evidence supports this theory.⁴⁵ In an essay describing arbitration, Julius Cohen, the initial drafter of the FAA, used the exact same language as Nichols to describe the circumstances where an award could be vacated.⁴⁶ While the "inherently vicious award" and "obviously unjust" language was omitted by FAA Section 10,⁴⁷ it was not omitted by the courts who interpreted the statute.⁴⁸

C. *The Judicially Named, or "Common Law," Grounds for Vacatur*

After the passage of the FAA, federal courts used different names to identify grounds for vacatur than the four explicitly listed in Section 10.⁴⁹ It is not settled whether these names recognized distinct grounds or simply represented judicial naming, or shorthand, for the listed grounds.⁵⁰

The most common judicially named ground for vacatur is manifest disregard of the law.⁵¹ Manifest disregard of the law was first mentioned in Supreme Court dicta in *Wilko v. Swan*,⁵² where the Court indicated that, while mistaken interpretations of law were not judicially reviewable, decisions that manifestly disregarded the law might be vacated by federal courts.⁵³ By the time the Court decided *Hall Street*, every federal court of appeals had claimed the power to vacate arbitral decisions that were in manifest disregard of the law.⁵⁴

Some courts also allowed vacatur of arbitrary and capricious awards.⁵⁵ Courts have found awards to be arbitrary and capricious when a legal

Never After: When Final and Binding Arbitration Has No Fairy Tale Ending, 13 HARV. NEGOT. L. REV. 167, 189 (2008).

⁴⁴ LeRoy, *supra* note 28, at 155.

⁴⁵ See Brunet, *supra* note 2, at 116 (discussing Julius Cohen's belief in the need to maintain a check on the power of arbitrators); see also *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 10 (1924) (statement of W.H.H. Piatt, Chairman, American Bar Association Committee on Commerce, Trade and Commercial Law, indicating that Cohen "had charge of the actual drafting of the work"); *id.* at 15 (testimony of Julius Cohen, indicating that he wrote the first draft of the legislation).

⁴⁶ Cohen & Dayton, *supra* note 16, at 272-73.

⁴⁷ See 9 U.S.C. §10(a).

⁴⁸ See, e.g., *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

⁴⁹ Reuben, *supra* note 32, at 1110.

⁵⁰ See *supra* note 14 (discussing the circuit split).

⁵¹ See LeRoy & Feuille, *supra* note 43, at 189.

⁵² 346 U.S. 427, 436 (1953).

⁵³ *Id.*

⁵⁴ For a list of cases from each circuit, see *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 419 (6th Cir. 2008).

⁵⁵ Reuben, *supra* note 32, at 1114-15.

ground for the decision cannot be inferred from the facts of the case.⁵⁶ Courts also cite this ground for vacatur when the decision is not grounded in the contract or if the reasoning is so poor that no judge could have conceivably made such a ruling.⁵⁷ Again, a party bears a heavy burden in showing that an award was arbitrary and capricious, and such claims are seldom successful.⁵⁸

Irrationality is a third judicially named or common law ground that courts occasionally invoke to vacate an award.⁵⁹ An award is irrational if it fails to draw its essence from the underlying agreement or if it is not logically related to the contract.⁶⁰ While this ground is commonly claimed, courts rarely invoke it as irrationality requires the absence of any proof in support of the award to justify vacatur.⁶¹

Courts also vacate awards that violate public policy.⁶² To vacate an award as a violation of public policy, the court must find that an explicit and dominant public policy exists and that enforcement of the arbitral award would directly violate that policy.⁶³ Like all of the statutory and judicially named grounds for vacatur, use of the public policy ground is rarely successful.⁶⁴

Federal courts, thus, understood that the FAA explicitly restricted them from exercising practically any substantive review and that they were required to give great deference in determining whether the arbitrators drew their award from the essence of the contract.⁶⁵ Courts created heavy burdens to justify each of the grounds for vacatur, whether statutory or judicially named.⁶⁶

Despite the unlikelihood of success of any ground for vacatur, it is telling that courts within each circuit named or created additional grounds for vacatur to void arbitral decisions that were too unconscionable to survive even minimal review.⁶⁷ In each circuit, courts decided that they would not stand idle where an arbitration panel blatantly ignored the law.⁶⁸ In some

⁵⁶ *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992) (per curiam) (quoting *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990)); see also *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 847 F.2d 775, 778 (11th Cir. 1988).

⁵⁷ See *Ainsworth*, 960 F.2d at 941; *U.S. Postal Serv.*, 847 F.2d at 778.

⁵⁸ *Reuben*, *supra* note 32, at 1115.

⁵⁹ *Id.*

⁶⁰ See *Prescott v. Northlake Christian Sch.*, 141 F. App'x 263, 272 (5th Cir. 2005) (per curiam); *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 634-35 (10th Cir. 1988).

⁶¹ *Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 210 (S.D.N.Y. 2002).

⁶² *Reuben*, *supra* note 32, at 1113.

⁶³ See *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993).

⁶⁴ *Reuben*, *supra* note 32, at 1114.

⁶⁵ See *e.g.*, *Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C.*, 487 F.3d 255, 259 (5th Cir. 2007) (per curiam).

⁶⁶ See *Reuben*, *supra* note 32, at 1113-16.

⁶⁷ See *e.g.*, *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992) (per curiam).

⁶⁸ See *e.g.*, *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 111 (2d Cir. 2006).

circuits, courts decided that they could not allow arbitrators to dispense their “own brand of industrial justice,” and allowed for vacatur when the award could not be rationally based on the underlying contract.⁶⁹ Occasionally, some courts found that arbitral awards violated positive law or well-defined policy.⁷⁰ The recognition in every circuit of the need for these additionally named grounds is an important backdrop to analysis of the circuit split following *Hall Street*.⁷¹

D. *The Changing Nature of Arbitration and Its Position in the Eyes of Federal Courts*

The arbitration discussed by many judges, and envisioned by contract drafters, is “folklore arbitration” where business disputes are settled by an industry expert quickly, quietly, and equitably.⁷² In practice, this form of arbitration is increasingly less common, as contracting commercial parties have found that the process is unable to resolve intricate disputes.⁷³ More commonly, commercial parties engage in “judicialized arbitration,”⁷⁴ where the process includes motions practice and discovery, while the award includes a written opinion containing findings of fact and substantive law.⁷⁵ Not only does this “judicialized arbitration” resemble litigation in form, but also in potential costs as lawyers have a greater role than was customary in “folklore arbitration.”⁷⁶ As parties seek more accurate arbitral resolution, commercial arbitration becomes less like the process envisioned by Julius Cohen or Congress when they drafted the FAA in 1925.⁷⁷ As interpreters of the law, the courts must decide to what degree the realities of commercial arbitration have evolved when construing the FAA.

More concerning than changes in commercial arbitration between parties dealing at arm’s length is the growing “consumerization of arbitration.”⁷⁸ Today, “arbitration clauses appear in contracts between brokers and their customers, employers and employees, franchiser and franchisees, HMOs and subscribers, businesses, such as banks, and their customers, insurers and their insured, and law partnerships and associates.”⁷⁹ The Supreme Court has indicated strong support for contracts to arbitrate, and will

⁶⁹ See *Am. Laser Vision*, 487 F.3d at 259-60.

⁷⁰ See Reuben, *supra* note 32, at 1113-14.

⁷¹ *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 419 (6th Cir. 2008).

⁷² Brunet, *supra* note 5, at 1461-62.

⁷³ *Id.* at 1462.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1462-63.

⁷⁶ See *id.*

⁷⁷ See *id.* at 1468-69.

⁷⁸ See Speidel, *supra* note 6, at 1072-73.

⁷⁹ *Id.* at 1072.

rarely find that a clause was the result of an unlawful adhesive contract.⁸⁰ However, critics worry that corporations have a noticeable advantage in arbitration because they are repeat customers, and rational actors who would not choose to include arbitration clauses if they did not perceive an advantage over the consumer.⁸¹

There is also evidence that binding arbitration has received increasing support from federal courts since the 1980s.⁸² The Supreme Court held that the FAA preempts provisions of state law that hinders arbitral agreements and also applied the FAA in areas of federal law originally “thought not to be subject to arbitration.”⁸³ Further, the 1980s saw a contraction of the already modest judicial review, with Judge Richard Posner of the Seventh Circuit stating, “[t]his court has been plagued by groundless lawsuits seeking to overturn arbitration awards [W]e have said repeatedly that we would punish such tactics, and we mean it.”⁸⁴ These pro-arbitration decisions often discuss the classic theory of “folklore arbitration,” which holds that parties to an arbitration expressly opt out of the federal court system.⁸⁵ Given this background, some circuits now regard the Supreme Court’s jurisprudence as drastically restraining the judiciary’s power to overturn arbitral awards.⁸⁶

E. *The Supreme Court’s Decision in Hall Street Associates, L.L.C. v. Mattel, Inc.*

The circuits are split as to the ultimate significance of the Supreme Court’s recent ruling on the exclusivity of the Section 10 grounds for vacatur provided in the FAA.⁸⁷ In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, a dispute arose as to whether a commercial tenant had the right to terminate a lease after environmental violations were discovered and also whether the tenant was required to indemnify the landlord for cleanup costs.⁸⁸ During the course of resolving the indemnification claims, the parties, with the district court’s leave, decided to submit the matter to arbitration.⁸⁹ Their

⁸⁰ *Id.* at 1073.

⁸¹ See *Brunet*, *supra* note 2, at 104; *Speidel*, *supra* note 6, at 1073.

⁸² *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011); *Brunet*, *supra* note 2, at 109.

⁸³ *Brunet*, *supra* note 2, at 109-10 (discussing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227-38 (1987), which mandated federal arbitration for claims under Section 10(b) of the Securities Exchange Act of 1934).

⁸⁴ *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1203 (7th Cir. 1987).

⁸⁵ *Brunet*, *supra* note 2, at 102, 119.

⁸⁶ See, e.g., *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).

⁸⁷ See *supra* note 14.

⁸⁸ *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 579 (2008).

⁸⁹ *Id.*

agreement contained the caveat that the district court was empowered to vacate the award if “the arbitrator’s findings of fact [were] not supported by substantial evidence, or . . . where the arbitrator’s conclusions of law [were] erroneous.”⁹⁰ The question presented to the Supreme Court was whether parties could contractually supplement the statutory grounds for vacatur, an issue upon which the circuits were divided.⁹¹ The Court held that parties could not contractually supplement the grounds for vacatur located in Section 10(a) of the FAA.⁹²

In route to that decision, the Court strayed⁹³ in its analysis and discussed manifest disregard of the law, the most commonly invoked judicially named ground for vacatur.⁹⁴ The Court stated: “[m]aybe the term manifest disregard was meant to name a new ground for review, but maybe it merely referred to the [Section] 10 grounds collectively . . . [o]r, as some courts have thought, ‘manifest disregard’ may have been shorthand for [Section] 10(a)(3) or [Section] 10(a)(4).”⁹⁵ The Court did not clearly indicate that judicially named grounds were outside the exclusive grounds listed in Section 10.⁹⁶ Rather, the Court merely held that, even if they assumed that manifest disregard was an additional ground, the permissibility of judicial expansion of review does not imply the right to contractual expansion of review.⁹⁷

While the discussion of manifest disregard was dictum⁹⁸ and did not explicitly eliminate all of the judicially named grounds for vacatur,⁹⁹ several circuit courts decided that *Hall Street* mandates eliminating all grounds for vacatur not named in Section 10.¹⁰⁰ Other circuits determined that *Hall Street* does not affect their understanding of manifest disregard of the law, and held that the doctrine remains viable.¹⁰¹ Part II of this Note discusses the circuit split, while Part III analyzes the specific readings of *Hall Street*.¹⁰²

⁹⁰ *Id.* (quoting the agreement).

⁹¹ See LeRoy, *supra* note 28, at 172-73.

⁹² *Hall Street*, 552 U.S. at 584.

⁹³ LeRoy, *supra* note 28, at 172-73.

⁹⁴ *Hall Street*, 552 U.S. at 584-85.

⁹⁵ *Id.* at 585.

⁹⁶ See *id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 584-85.

⁹⁹ See *id.*

¹⁰⁰ See e.g., Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009).

¹⁰¹ See e.g., Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009).

¹⁰² See *infra* Part III.

II. CIRCUIT SPLIT FOLLOWING *HALL STREET*

Part II.A describes the Fifth and Eleventh Circuits' elimination of the judicially named grounds for vacatur in the wake of *Hall Street*. Part II.B explains the Second, Sixth, and Ninth Circuits' narrow reading of *Hall Street* and their retention of more than the explicitly listed grounds. Part II.C discusses the findings of the remaining circuits, which are yet to definitively explain their understanding of *Hall Street* and Part II.D discusses two recent Supreme Court arbitration cases that explicitly dodged the issue.

A. *The Fifth and Eleventh Circuits Eliminate the Judicially Named Grounds for Vacatur*

The Fifth Circuit was the first court of appeals to decide whether *Hall Street* eliminated the judicially named grounds for vacatur, in the case of *Citigroup Global Markets, Inc. v. Bacon*,¹⁰³ decided in March 2009.¹⁰⁴ At issue was an arbitral award in favor of a wife who alleged that her bank, Citigroup, had wrongfully allowed her husband to withdraw funds without her permission.¹⁰⁵ Citigroup alleged that the award was made in “manifest disregard of the law,” and in a decision made a year before *Hall Street*, the district court agreed and vacated the award.¹⁰⁶ The Fifth Circuit then reviewed the decision in light of *Hall Street*.¹⁰⁷

Before the Fifth Circuit, Citigroup argued that the language in *Hall Street* did not expressly eliminate manifest disregard of the law as a ground for vacatur and argued that manifest disregard's wide judicial recognition forcefully indicated that Section 10's grounds were not exclusive.¹⁰⁸ The Fifth Circuit rejected this argument, citing the Circuit's historical reluctance to accept and impose manifest disregard, as well as *Hall Street*'s repeated assertion of the exclusivity of the grounds listed in the FAA.¹⁰⁹ The court found that *Hall Street* “clearly and repeatedly” rejected non-statutory grounds for vacatur.¹¹⁰

A year later, the Eleventh Circuit adopted the Fifth Circuit's reading of *Hall Street* in *Frazier v. CitiFinancial Corp.*¹¹¹ In *Frazier*, a couple sued

¹⁰³ 562 F.3d 349 (5th Cir. 2009).

¹⁰⁴ Leigh F. Gill, Note, *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).

¹⁰⁵ *Citigroup*, 562 F.3d at 350.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 352.

¹⁰⁸ *Id.* at 353.

¹⁰⁹ *Id.* at 358.

¹¹⁰ *Id.* at 353.

¹¹¹ 604 F.3d 1313, 1324 (11th Cir. 2010).

CitiFinancial for fraud and misrepresentation after the bank made a loan to the couple.¹¹² CitiFinancial successfully compelled arbitration, where the panel found in favor of the bank and awarded damages, attorneys' fees, and an equitable lien on Frazier's house.¹¹³ Frazier moved to have the award vacated under both Section 10 of the FAA and the manifest disregard theory.¹¹⁴

After denying Frazier's Section 10 claims, the court considered the non-statutory, or judicially named, grounds in light of *Hall Street*.¹¹⁵ The Eleventh Circuit admitted that the Supreme Court did not "explicitly extend its holding in *Hall Street* to judicial expansions of [Sections] 10 and 11."¹¹⁶ However, the court found the Fifth Circuit's reading of the Supreme Court's "categorical language" concerning the exclusivity of the statutory grounds to be persuasive and eliminated all previously recognized non-statutory grounds for vacatur.¹¹⁷

Prior to both *Frazier* and *Bacon*, the First Circuit indicated that it read *Hall Street* to eliminate manifest disregard of the law as a valid ground for vacatur in *Ramos Santiago v. United Parcel Service*.¹¹⁸ In a decision cited by the Fifth and Eleventh Circuits,¹¹⁹ the court stated that *Hall Street*'s holding was that "manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act."¹²⁰ This statement was dictum, however, as the action was brought under state law.¹²¹

B. *The Second, Sixth, and Ninth Circuits Retain Judicially Named Grounds for Vacatur*

The Sixth Circuit stated its reading of *Hall Street* in *Coffee Beanery, Ltd. v. WW, L.L.C.*¹²² After the district court refused to vacate an arbitral award in a franchise agreement, the Sixth Circuit was asked to determine whether *Hall Street* totally eliminated the non-statutory grounds for vacatur.¹²³ The court held that while *Hall Street* "significantly reduced the ability

¹¹² *Id.* at 1317.

¹¹³ *Id.* at 1318-19.

¹¹⁴ *Id.* at 1320.

¹¹⁵ *Id.* at 1322.

¹¹⁶ *Id.* at 1323.

¹¹⁷ *Frazier*, 604 F.3d at 1323-24.

¹¹⁸ 524 F.3d 120 (1st Cir. 2008).

¹¹⁹ *Frazier*, 604 F.3d at 1323; *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009).

¹²⁰ *Ramos-Santiago*, 524 F.3d at 124 n.3.

¹²¹ *Id.* at 123-24.

¹²² 300 F. App'x 415 (6th Cir. 2008).

¹²³ *Id.* at 418-19.

of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10 . . . it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law."¹²⁴ The Sixth Circuit found that *Hall Street* eliminated private parties' right to contract additional review, but stopped short of deciding whether narrow application of the judicially named grounds could continue.¹²⁵ The court held that it would be imprudent to totally eliminate these well-established grounds in light of the Supreme Court's hesitation to reject the manifest disregard theory in *Hall Street*.¹²⁶

The Second Circuit confronted this issue in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*,¹²⁷ holding that *Hall Street* did not abrogate the judicially named grounds altogether.¹²⁸ The court admitted that the Second Circuit had previously indicated that the judicially named grounds were separate from the grounds specified in the FAA.¹²⁹ However, in *Stolt-Nielsen*, the court "reconceptualized" their doctrine and held that manifest disregard now referred to the FAA Section 10 grounds collectively.¹³⁰ The court stated that their prior narrow application of manifest disregard of the law fit with the Seventh Circuit's reading that only when arbitrators totally ignored the contract do they manifestly disregard the law and thereby exceed their powers.¹³¹ Thus, the Circuit's reconceptualization fit within Section 10 of the FAA.¹³² The Second Circuit further stated that it viewed "the 'manifest disregard' doctrine, and the FAA itself, as a mechanism to enforce the parties' agreement to arbitrate rather than as judicial review."¹³³

The Ninth Circuit took a similar approach to *Hall Street* in *Comedy Club, Inc. v. Improv West Associates*.¹³⁴ The court stated that the Supreme Court in *Hall Street* did not decide the question of whether manifest disregard of the law or other judicially named grounds for vacatur were within the FAA's list.¹³⁵ Instead, the Supreme Court merely listed several readings of the manifest disregard doctrine, including the Ninth Circuit's.¹³⁶ The Ninth Circuit holds that "arbitrators exceed their powers . . . when the award is completely irrational, or exhibits a manifest disregard for the

¹²⁴ *Id.* at 418.

¹²⁵ *Id.* at 418-19.

¹²⁶ *Id.* at 419.

¹²⁷ 548 F.3d 85, 95 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010).

¹²⁸ *Id.*

¹²⁹ *See e.g.*, *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003).

¹³⁰ *Stolt-Nielsen*, 548 F.3d at 94-95.

¹³¹ *Id.* at 95.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 553 F.3d 1277, 1290 (9th Cir 2009).

¹³⁵ *Id.*

¹³⁶ *Id.*

law.”¹³⁷ Accordingly, the court concluded that their judicially named grounds remained valid in light of *Hall Street*.¹³⁸

Since *Hall Street* discussed only the most commonly invoked judicially named ground, almost all of the case law considering the ongoing viability of common law grounds not explicitly stated in FAA Section 10 has focused on the manifest disregard doctrine.¹³⁹ However, the ongoing viability of the grounds of “arbitrary and capricious” award and “irrational” award are also in question following *Hall Street*’s extolling of the exclusivity of the Section 10 grounds.¹⁴⁰ In *Comedy Club*, the Ninth Circuit indicated that irrationality continued as a ground for vacatur as part of Section 10(a)(4) and that the arbitrators exceeded their power.¹⁴¹ Additionally, a district court in the Second Circuit continued its use of the “totally irrational” ground for vacatur, finding that it rested within Section 10(a)(4) of the FAA.¹⁴²

C. *Yet to Decide: The Third, Fourth, Seventh, Eighth, Tenth, and D.C. Circuits*

The remaining circuits have yet to announce their readings of *Hall Street*.¹⁴³ The Second Circuit quoted the Seventh Circuit’s understanding of manifest disregard doctrine,¹⁴⁴ but that language was espoused prior to *Hall Street*.¹⁴⁵ It is likely that the Seventh Circuit will retain their narrow application of the manifest disregard as the Circuit’s judicial review under the FAA looks only to see if the arbitrators “failed to interpret the contract at all . . . exceeding the authority granted to them by the contract’s arbitration clause.”¹⁴⁶

The Tenth Circuit addressed the future of the judicially named grounds for vacatur, but has stopped short of deciding whether *Hall Street* eliminated them.¹⁴⁷ In three post-*Hall Street* decisions, the Tenth Circuit reviewed cases for manifest disregard of the law, but did not find cause to vacate an

¹³⁷ *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (internal quotation marks and citations omitted).

¹³⁸ *Comedy Club*, 553 F.3d at 1290.

¹³⁹ See Reuben, *supra* note 32, at 1141-46.

¹⁴⁰ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008).

¹⁴¹ *Comedy Club*, 553 F.3d at 1283.

¹⁴² *MasTec N. Am., Inc. v. MSE Power Sys., Inc.* 581 F. Supp. 2d 321, 329 (N.D.N.Y. 2008).

¹⁴³ Gill, *supra* note 104, at 272.

¹⁴⁴ *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *rev’d on other grounds*, 130 S. Ct. 1758 (2010).

¹⁴⁵ *Wise v. Wachovia Secs., LLC*, 450 F.3d 265, 269 (7th Cir. 2006).

¹⁴⁶ *Id.* (internal citations omitted).

¹⁴⁷ *Hicks v. Cadle Co.*, 355 F. App’x 186, 197 (10th Cir. 2009).

award.¹⁴⁸ The Tenth Circuit seems to be taking a prudent route as it is often possible to leave the issue of what exactly *Hall Street* means alone since it is rare to find an award that merits vacatur on manifest disregard theory, but does not merit vacatur under Section 10 of the FAA.¹⁴⁹

In *Raymond James Financial Services, Inc. v. Bishop*,¹⁵⁰ the Fourth Circuit recognized the “uncertainty” surrounding *Hall Street*, but did not consider the effects of *Hall Street*, since the award could be vacated under Section 10(a)(4).¹⁵¹ The remaining circuits have not indicated their understanding of the effect of *Hall Street*.¹⁵²

D. *The Supreme Court Sidesteps Manifest Disregard and Repeats Hall Street’s Exclusivity Rhetoric*

In the 2010 case of *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,¹⁵³ the Supreme Court had the opportunity to resolve the developing circuit split when it reviewed a decision by the Second Circuit. While the Second Circuit’s decision upheld the survival of manifest disregard as a valid ground for vacatur, it found that the arbitral panel had not manifestly disregarded the law.¹⁵⁴ As in *Hall Street*, the Supreme Court explicitly declined to decide the future of manifest disregard, stating “[w]e 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 Assuming, *arguendo*, that such a standard applies, we find it satisfied.”¹⁵⁵ Ultimately, the Court reversed the Second Circuit and vacated the arbitral decision, finding that the arbitrators exceeded their granted power under FAA Section 10(a)(4) by issuing a decision based on their “own conception of sound policy[,]” rather than abiding by the FAA, maritime, and New York law.¹⁵⁶

The *Stolt-Nielsen* dissenters argued that the arbitrators had not exceeded their powers so as to justify vacatur under Section 10,¹⁵⁷ and criticized the majority’s characterization of the arbitral award as “resting on ‘policy,’ not law.”¹⁵⁸ In fact, the parties had directly asked the arbitrators to deter-

¹⁴⁸ *Legacy Trading Co. v. Hoffman*, 363 F. App’x 633, 635-36 (10th Cir. 2010); *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341, 1344-45 (10th Cir. 2009); *Hicks*, 355 F. App’x at 197.

¹⁴⁹ Gill, *supra* note 104, at 278-79.

¹⁵⁰ 596 F.3d 183 (4th Cir. 2010).

¹⁵¹ *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 193 n.13 (4th Cir. 2010).

¹⁵² Gill, *supra* note 104, at 280.

¹⁵³ 130 S. Ct. 1758 (2010).

¹⁵⁴ *Id.* at 1767.

¹⁵⁵ *Id.* at 1768 n.3 (internal citations omitted).

¹⁵⁶ *Id.* at 1768-69.

¹⁵⁷ *Id.* at 1780 (Ginsburg, J., dissenting).

¹⁵⁸ *Id.*

mine the precise issue of whether their contract was subject to class arbitration.¹⁵⁹ The dissent believed that the Court improperly vacated the award after engaging in “*de novo* review,” and finding errors in the factual and legal determinations of the arbitrators.¹⁶⁰

The dissent correctly asserts that the Court delved deeper than simply asking whether the parties agreed to submit the issue to the arbitrators.¹⁶¹ Essentially, the Court determined that the difference between the actual and correct result, that is, “between bilateral and class-action arbitration,” was so great that the award fell outside of the arbitrators’ “limited powers under the FAA.”¹⁶² *Stolt-Nielsen* cut against the rhetoric extolling the narrowness and exclusivity of the four named grounds for vacatur and seemed to indicate that *Hall Street* did not spell the end of the judicially named grounds for vacatur.

However, in 2011, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*.¹⁶³ In *Concepcion*, the Court determined that the FAA preempted a California common law rule that forbade waivers of class-action arbitration in adhesive consumer contracts under certain circumstances.¹⁶⁴ The Court found the California rule inconsistent with the FAA to the extent that it forced defendants into class arbitration against their consent.¹⁶⁵ While discussing the increased risk to defendants present in class arbitration, the Court discussed the limited judicial review of arbitral awards, stating that courts may only vacate an award based upon the statutory grounds.¹⁶⁶ The Court stated that “review under [Section]10 focuses on misconduct rather than mistake.”¹⁶⁷ While *Stolt-Nielsen* indicated that the judicially named grounds survived, *Concepcion* repeated the same exclusivity rhetoric that convinced the Fifth and Eleventh Circuits to eliminate the judicially named grounds.¹⁶⁸ Since neither portended to decide the future of the judicially named grounds, the question of which Circuits have the better understanding of *Hall Street* remains open.

III. THE BROAD READING OF *HALL STREET* IS INCORRECT

The Second, Sixth, and Ninth Circuits’ narrow reading of *Hall Street* is a more accurate understanding of the Court’s opinion than is the Fifth

¹⁵⁹ *Stolt-Nielsen*, 130 S. Ct. at 1781-82 (Ginsburg, J., dissenting).

¹⁶⁰ *Id.* at 1777.

¹⁶¹ *See id.* at 1768-69 (majority opinion).

¹⁶² *Id.* at 1776.

¹⁶³ 131 S. Ct. 1740 (2011).

¹⁶⁴ *Id.* at 1753.

¹⁶⁵ *Id.* at 1752-53.

¹⁶⁶ *Id.* at 1752.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

and Eleventh Circuits' broader reading.¹⁶⁹ There is a difference between the issues of whether *Hall Street* eliminated the judicially named grounds for vacatur and whether the courts ever had the authority to name or create such grounds under the FAA. Part III.A of this Note analyzes *Hall Street*'s language concerning the exclusivity of the Section 9 grounds; Part III.B discusses the Court's express ambiguity about the future of the manifest disregard doctrine; and Part III.C argues that the Court would not relinquish the public policy exception.

A. *The Court's Use of "Exclusive" Only Referred to the Question Presented in Hall Street*

The Court in *Hall Street* merely held that private parties did not have the right to expand judicial review of arbitral awards by contract.¹⁷⁰ The Court was concerned not with the level of judicial review of arbitral awards, but instead with the proposition that parties would contractually undermine the efficiency and finality of arbitration, thereby making arbitration a "mere prelude to more complex litigation."¹⁷¹ The likelihood of this result explains why the Court was unwilling to "leap" from potentially allowable judicial expansion of review to private expansion by contract.¹⁷²

Manifest disregard of the law and other judicially named grounds for vacatur were only considered by the Court in *Hall Street* in response to Hall Street's contention that *Wilko* signified the non-exclusivity of the FAA Section 10 grounds.¹⁷³ The Court responded to this argument not by condemning the *Wilko* language that created the manifest disregard doctrine, but instead by citing to a case, *First Options of Chicago, Inc. v. Kaplan*,¹⁷⁴ that favorably referenced the doctrine.¹⁷⁵

However, some commentators find the arguments of the Fifth and Eleventh Circuits persuasive.¹⁷⁶ This argument emphasizes the unequivocal language in *Hall Street* stating that the Section 10 grounds are exclusive,¹⁷⁷ and also the inflexibility of the FAA Section 9 language stating that courts "must grant [arbitral awards] unless the award is vacated . . . as prescribed

¹⁶⁹ Compare *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009), with *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 419 (6th Cir. 2008).

¹⁷⁰ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 589 (2008).

¹⁷¹ MyLinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S.C.L. REV. 407, 431 (2010).

¹⁷² *Hall Street*, 552 U.S. at 584-85.

¹⁷³ See *Wilko v. Swan*, 346 U.S. 427, 436 (1953); Sims & Bales, *supra* note 171, at 432.

¹⁷⁴ 514 U.S. 938 (1995).

¹⁷⁵ See *id.* at 942.

¹⁷⁶ Gronlund, *supra* note 10, at 1374-75.

¹⁷⁷ See, e.g., *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010).

in [S]ection 10.”¹⁷⁸ These commentators endorse the reluctance of these circuits to place faith on *Wilko* because of its vague and brief support of the manifest disregard doctrine.¹⁷⁹ The argument is that the most “straightforward” and “logical” reading of *Hall Street* eliminates the judicially named or created grounds for vacatur and that attempts to “reconceptualize” or manipulate these grounds to fit within the FAA should fail if the Supreme Court considers whether these grounds retain their vitality.¹⁸⁰

Supporters of this broad reading of *Hall Street* read too much into the Court’s tea leaves. While the two post-*Hall Street* decisions do not lend support to either reading, it is apparent that the Court in *Hall Street* was simply answering the question presented by the facts of the dispute.¹⁸¹ The Court decided that private parties could not contractually expand judicial review beyond where the courts and Congress had drawn their line. Parties could not oust judicial precedent supporting the finality and efficiency of arbitration. The *Hall Street* opinion did not reach the issue of whether the judicially named grounds were valid and only brought up manifest disregard theory in response to *Hall Street*’s contention that, since judges could expand judicial review, so too could private parties. Since the Court was not asked to determine the validity of judicially named grounds, and it is apparent from the opinion that the majority did not portend to, the status of those grounds should remain unchanged by *Hall Street*.

B. *The Court’s Ambiguity Indicates that It Did Not Intend to Eliminate Judicially Named Grounds Accepted in Each Circuit*

A second convincing argument that *Hall Street* did not eliminate any of the judicially named grounds is the Supreme Court’s ambiguous language concerning the origins of the manifest disregard doctrine.¹⁸² The Court was not concerned with whether manifest disregard was shorthand for Section 10 or whether it was a new ground.¹⁸³ Rather, the Court stated that “maybe” it is either and cited cases that supported both possibilities.¹⁸⁴ Regardless, the Court made no effort to argue that manifest disregard is an illegitimate ground.¹⁸⁵

If the Court was truly making a sweeping proclamation about judicial review of arbitral awards under the FAA, thereby overturning well-established precedent within each circuit, the Court would likely have more

¹⁷⁸ See 9 U.S.C. § 9 (2006).

¹⁷⁹ *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

¹⁸⁰ Gronlund, *supra* note 10, at 1375-76.

¹⁸¹ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590-92 (2008).

¹⁸² *Id.* at 585.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 585-86.

fully elaborated its reasoning and used stronger language than “maybe.”¹⁸⁶ Instead, the Court decided to leave manifest disregard theory “as [it] found it, without embellishment.”¹⁸⁷ While the Court’s two post-*Hall Street* decisions recognize the existence of the circuit split, its refusal to discuss the future of the judicially named grounds further supports the continued vitality of those doctrines.

C. *The Court Did Not Flippantly Relinquish the Public Policy Exception*

A third convincing argument that the narrower reading of *Hall Street* fits better with the actual language and scope of the decision is the notion that the Court would not have relinquished the judicial right to refuse to enforce contracts that are against public policy. That the right to contract is not unlimited is a central tenet of our system of government.¹⁸⁸ “The Supreme Court has used the public policy exception to invalidate contracts” since at “least the nineteenth century” and has applied it specifically in reviewing arbitration awards.¹⁸⁹ As such, courts protect the “delicate social contract.”¹⁹⁰ Accordingly, the Supreme Court would violate its duty and abdicate its position at the head of dispute resolution to potentially “maverick” arbitration panels if *Hall Street* truly eliminated all of the judicially named grounds for vacatur.¹⁹¹

Some supporters of the Fifth and Eleventh Circuits’ reading of *Hall Street* have recognized the potential for this perverse result, and have argued that the public policy exception is the only judicially named ground to survive *Hall Street*.¹⁹² However, this contention renders illogical the broad reading of the Court’s “exclusive” language.¹⁹³ If one judicially named ground survives, then “exclusive” is not exclusive.¹⁹⁴

In *Hall Street*, the Court explicitly mentioned their concern over the future effects of their decision.¹⁹⁵ If it is unlikely that the Court would casually overturn each circuit’s support of judicially named grounds, it is unthinkable that the Court would flippantly relinquish their right to refuse to enforce an illegal award.

¹⁸⁶ See *id.*; *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 419 (6th Cir. 2008).

¹⁸⁷ *Hall Street*, 552 U.S. at 585.

¹⁸⁸ *Marcantel*, *supra* note 19, at 608-11.

¹⁸⁹ *W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983); see also *Marcantel*, *supra* note 19, at 611-14.

¹⁹⁰ *Marcantel*, *supra* note 19, at 638.

¹⁹¹ *Id.*

¹⁹² See *Reuben*, *supra* note 3232, at 1143.

¹⁹³ *Sims & Bales*, *supra* note 171, at 433.

¹⁹⁴ *Id.*

¹⁹⁵ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588-89 (2008).

The broad reading of the opinion adopted by the Fifth and Eleventh Circuits assumes that the Court overturned each circuit's arbitration jurisprudence using the term "maybe" and abdicated its position as protector of public policy. This broad reading is incorrect, and *Hall Street* does not place "arbitrators above the law," as some commentators have feared.¹⁹⁶

IV. THE JUDICIALLY NAMED GROUNDS ARE FUNCTIONALLY EQUIVALENT AND SHOULD BE RETAINED AS THEY PROMOTE THE PURPOSES OF THE FAA

Since the Fifth and Eleventh Circuits read *Hall Street* to uphold the absolute exclusivity of the Section 10 grounds, the Supreme Court will likely have to resolve the circuit split with the Second, Sixth, and Ninth Circuits' narrow reading. FAA Section 9 clearly states that courts must confirm awards unless they fit within the narrow grounds of Sections 10 and 11 that allow for vacatur or modification.¹⁹⁷ It seems that the Fifth and Eleventh Circuits thus have a plausible argument that the grounds listed in Section 10 are the exclusive grounds for vacatur.¹⁹⁸ Yet, prior to *Hall Street*, each circuit had well-established precedent that other named grounds justifying vacatur existed.¹⁹⁹

This Part analyzes how courts could read Section 9 of the FAA to allow their naming of additional grounds, and argues that the judicially named grounds either were developed within FAA Section 10(a)(4) and the "arbitrators exceeded their powers" framework, or should be "reconceptualized" as equivalent with Section 10(a)(4). Additionally, this Part argues that the proposed solution of changing manifest disregard of the law to manifest disregard of the agreement fails because it is in direct opposition to *Hall Street*'s central holding.

A. *The Narrow Application of the Manifest Disregard, Arbitrary and Capricious Award, and Irrationality Doctrines are Functionally Equivalent and Fit with the Legislative Intent Underlying the FAA*

Congress created the FAA to end judicial hostility towards arbitration agreements by promoting arbitration's finality and efficiency.²⁰⁰ In reviewing arbitral awards, the courts gave great deference to Congress's decision

¹⁹⁶ See LeRoy, *supra* note 28, at 152.

¹⁹⁷ 9 U.S.C. § 9 (2006).

¹⁹⁸ *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).

¹⁹⁹ LeRoy, *supra* note 28, at 158-69 (providing a survey of all circuit courts of appeals decisions adopting other-named grounds of vacatur).

²⁰⁰ *Gendron & Hoffman*, *supra* note 28, at 7-8; see also LeRoy, *supra* note 28, at 152.

to promote arbitration as a favored form of dispute resolution, and thus only vacated arbitral awards under very rare circumstances.²⁰¹ These doctrines are functionally equivalent and accord with the legislative intent of the FAA, the jurisprudence of each circuit, and the language of Section 10(a)(4).

1. Manifest Disregard of the Law, Arbitrary and Capricious Award, and Irrationality Are Applied Narrowly and Are Functionally Equivalent

Although manifest disregard of the law is the most commonly claimed, non-statutory ground for vacatur, it is rarely successful.²⁰² One study found that while manifest disregard of the law was invoked in 30.4 percent of federal and state employment arbitration appeals between 1975 and 2006, it was only successful in 7.1 percent of the cases.²⁰³

Courts have held that arbitrators did not manifestly disregard the law in cases where they did not attempt to engage in a required choice-of-law determination and did nothing to explain their failure to choose.²⁰⁴ Courts have held manifest disregard to be limited to cases where the arbitrators knew the law and purposely ignored it.²⁰⁵ A court will confirm an arbitral award if they can possibly find that the arbitrators were attempting to apply the law, regardless of the arbitral panel's accuracy.²⁰⁶

Similarly, some courts also recognize arbitrary and capricious award and irrationality as defenses to arbitral award confirmation.²⁰⁷ Again, these grounds are rarely applied.²⁰⁸ The stringent test a party must meet to establish that an award was arbitrary and capricious or irrational is strikingly similar to the manifest disregard standard the Seventh Circuit articulated in *Wise v. Wachovia Securities, LLC*,²⁰⁹ which Judge Posner found to be within Section 10(a)(4).²¹⁰ According to Judge Posner, arbitrators manifestly disregard the law, and exceed their powers, only when they totally ignore the contract.²¹¹ Likewise, an award is arbitrary and capricious when it is inconceivable that a judge could possibly infer the same award as the arbi-

²⁰¹ See Reuben, *supra* note 32, at 1116.

²⁰² See *id.* at 1113; see also *supra* Part I.C.

²⁰³ See LeRoy & Feuille, *supra* note 43, at 189.

²⁰⁴ *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 96-97 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010).

²⁰⁵ See *e.g.*, *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009).

²⁰⁶ See *Hicks v. Cadle Co.*, 355 F. App'x 186, 197-98 (10th Cir. 2009).

²⁰⁷ Reuben, *supra* note 32, at 1114-15.

²⁰⁸ *Id.*

²⁰⁹ *Wise v. Wachovia Secs., LLC*, 450 F.3d 265, 268-69 (7th Cir. 2006).

²¹⁰ Reuben, *supra* note 32, at 1114-15.

²¹¹ *Wise*, 450 F.3d at 268-69.

trator when inferring a legal basis from the law, the contract, and the facts of the dispute.²¹² Similarly, an award is only irrational when the arbitrators totally fail to draw its essence from the underlying agreement that spawned the arbitration.²¹³

In practice, manifest disregard doctrine, arbitrary and capricious doctrine, and the irrationality ground are applied only when the arbitration panel totally ignores the central contract or purposefully frustrates the parties' contractual intent by disregarding well-established and clearly applicable law.²¹⁴ Since the doctrines are practically equivalent, they should receive the same judicial treatment.

2. The Narrow Application of the Judicially Named Doctrines Accords with the Legislative Intent Behind the FAA, the Common Law of Each Circuit, and the Text of FAA Section 10(a)(4)

The narrow application of manifest disregard, arbitrary and capricious, and irrationality doctrines fit with the FAA's well-settled twin goals to promote the finality and the efficiency of arbitration.²¹⁵ Professor LeRoy makes a strong argument that manifest disregard of the law was inadvertently omitted from the Section 10 grounds.²¹⁶ He argues that the FAA was based on common law development of arbitration law and not solely on the policy making power of Congress.²¹⁷ He demonstrates that the exact language of Section 10 can be found in arbitration cases cited by academics whose writings were used as the foundation for the FAA.²¹⁸ Professor LeRoy believes that Congress accidentally omitted the ground because they relied on a brief that also inadvertently forgot the manifest disregard doctrine, although the brief was drawn from cases that included the doctrine.²¹⁹

Even if one does not assume that Congress inadvertently omitted manifest disregard and its functional equivalents from the Section 10 grounds, it is clear that federal courts did not feel absolutely limited by Section 9.²²⁰ The elimination of the judicially named grounds for vacatur would represent a significant reversal of jurisprudence, overturning well-established interpretations of the FAA in every circuit.²²¹ Each circuit named the addi-

²¹² Reuben, *supra* note 32, at 1115.

²¹³ *Id.*

²¹⁴ *See id.* at 1116.

²¹⁵ Gendron & Hoffman, *supra* note 28, at 11; *see also* Reuben, *supra* note 32, at 1129-30.

²¹⁶ LeRoy, *supra* note 28, at 155-56.

²¹⁷ *Id.* at 153-55.

²¹⁸ *Id.* at 154-55.

²¹⁹ *Id.* at 155.

²²⁰ *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

²²¹ *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 419 (6th Cir. 2008).

tional grounds based on careful balancing of justice and efficiency in cases that presented issues regarding unconscionable awards.²²² Departing from *stare decisis* would disturb this well-established balance.

Finally, even if the legislative intent behind the FAA and the development of the common law in each jurisdiction do not adequately support the retention of the judicially named grounds, the text of FAA 10(a)(4) is broad enough to encompass the narrow application of these grounds. The great justification for arbitration is that the parties made an informed choice to take on arbitration's benefits and shortcomings and to forego recourse in court.²²³ This justification loses its effect though, when the arbitrators totally ignore the underlying contract or so totally flout well-established law that the benefit of the original bargain is destroyed. Rational parties do not agree to have arbitrators make unpredictable and random decisions without reference to the agreement that brought the parties before the panel. Thus, when arbitrators make a determination without any arguable reference to the underlying contract, they exceed their power, and the award should be vacated under Section 10(a)(4).

B. *If the Judicially Named Grounds Are Equivalent to Section 10 Grounds, Why Not Eliminate Them?*

If the grounds truly fit within the statutory framework, what is the advantage of having them known by separate, judicially created names?²²⁴ There are two reasons why the judicially named grounds should be retained and reconceptualized as part of Section 10 (a)(4).

First, for more than eight decades, the courts attempted to strike the appropriate balance between goals of efficiency and justice in arbitration by reference to the FAA. That balance was universally held to include some judicially named grounds. To overturn such broad and weighty precedent is a mistaken departure from *stare decisis* and could indicate a shift away from justice in arbitration.²²⁵ There is fear that *Hall Street*—and the subsequent elimination of the judicially named grounds by the Fifth and Eleventh Circuits—indicate a significant shift in arbitration jurisprudence is on the horizon.²²⁶ Eliminating the judicially named grounds will overturn jurisprudence that stretches back to the nineteenth century and might ultimately place arbitrators above the reach of the law.²²⁷ This drastic result seems

²²² See, e.g., *Prescott v. Northlake Christian Sch.*, 141 F. App'x 263, 272 (5th Cir. 2005); *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 634-35 (10th Cir. 1988); *Thomas V. Burch, Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. KAN. L. REV. 47, 60 (2010).

²²³ *Reuben*, *supra* note 32, at 1141.

²²⁴ See *id.* at 1144.

²²⁵ *LeRoy*, *supra* note 28, at 183-84.

²²⁶ *Id.* at 180, 183-84; *Marcantel*, *supra* note 19, at 608-11; *Sims & Bales*, *supra* note 171, at 431.

²²⁷ *LeRoy*, *supra* note 28, at 183-84; *Marcantel*, *supra* note 19, at 608-11, 625-26.

unnecessary as there is little evidence that the jurisprudence of each circuit was defeating the goals of arbitration by allowing parties to claim judicially named grounds.²²⁸

Secondly, arbitration is increasingly prominent in resolving disputes between consumers and corporations or between employees and employers. Reducing the available grounds for vacatur increases the potential injustice in these often one-sided arbitration agreements.²²⁹ Vacatur of awards was very rare prior to *Hall Street*,²³⁰ and it is difficult to imagine that the Fifth and Eleventh Circuits' broad reading of the opinion will drastically reduce judicial caseloads. As arbitration becomes more prominent, any decrease in judicial review might have vast consequences. Many have speculated that arbitrators are more likely to favor repeat customers—the companies who pick individual arbitrators from available lists in multiple disputes with consumers or employees.²³¹ Without evidence that courts were ignoring the mandates of the FAA, any shift toward decreased review is an unneeded departure from well-established and effective precedent.

C. *The Additional Problem of How to Deal with the Public Policy Exception*

This Section discusses the significant problem the public policy exception poses to advocates of the Fifth and Eleventh Circuits' reading of *Hall Street* as summarily eliminating the judicially named grounds.²³² The public policy exception not only poses a significant problem to such a reading of *Hall Street*, it also casts doubt over any assertion that FAA Section 9 truly restricts the judicial right to refuse confirmation of an arbitral award to the four explicitly listed grounds.²³³

While the judicially named grounds of manifest disregard, arbitrary and capricious award, and irrationality are grounds that deny confirmation of awards that lack reference to the underlying contract or basic rule of law, the public policy ground is outside this framework.²³⁴ The ability of courts to refuse to enforce private agreements that violate positive law or a well-defined public interest is a central tenet of social contract theory and is one of the judiciary's primary roles in society.²³⁵ The contention that Section 9 of the FAA prevents courts from using the public policy exception to vacate

²²⁸ Reuben, *supra* note 32, at 1110, 1116.

²²⁹ LeRoy, *supra* note 28, at 183-84.

²³⁰ Reuben, *supra* note 32, at 1116.

²³¹ See Brunet, *supra* note 2, at 104; Larry J. Pittman, *Mandatory Arbitration: Due Process and Other Constitutional Concerns*, 39 CAP. U. L. REV. 853, 855-59 (2011).

²³² See *supra* Part III.C.

²³³ See Reuben, *supra* note 32, at 1113-16.

²³⁴ See *supra* Part IV.A.

²³⁵ Marcantel, *supra* note 19, at 608-11.

illegal awards has drastic consequences.²³⁶ Forcing courts to enforce illegal awards would undermine public confidence as courts would protect the interest of private contracts over well-defined interests of the public and the fabric of the law.²³⁷ Moreover, it could position arbitrators above the law.²³⁸

Professor Richard Reuben recognized this problem when he argued that *Hall Street* eliminated the judicially named grounds.²³⁹ Professor Reuben contends that the public policy exception must survive, since courts cannot be required to enforce agreements that violate positive law.²⁴⁰ Professor Reuben also argues that the public policy exception is “well-grounded and well established” and that nothing in *Hall Street* showed the Court’s intent to eviscerate it.²⁴¹

It is unclear how Professor Reuben decided the public policy exception was well-grounded while the other judicially named grounds for vacatur were not. A more straightforward understanding of the dilemma posed by the public policy exception requires asking whether Section 9 of the FAA truly excludes all grounds other than the four explicitly listed. According to Professor Reuben, the public policy exception cannot be eliminated,²⁴² so it would be difficult to argue that Section 9 restricts the courts from interpreting and applying the law as greatly as he contends in relation to the other judicially named grounds.

There is no principled differentiation between conceptualizing the public policy exception as part of the “exceeded powers” doctrine and conceptualizing irrationality or manifest disregard of the law as part of that ground. It seems that either courts have the ability to interpret and apply the law or they are confined to the explicitly listed grounds.

D. *Why Changing Manifest Disregard of the Law to Manifest Disregard of the Agreement Does Not Work*

Some commentators suggest that manifest disregard of the law can be justified as a valid ground for vacatur by conceptualizing the doctrine as manifest disregard of the agreement.²⁴³ While this is a tempting solution, it does not work because it is a total abrogation of *Hall Street*.²⁴⁴

²³⁶ *Id.* at 637-38.

²³⁷ *Id.* at 629-30.

²³⁸ *See id.* at 638.

²³⁹ Reuben, *supra* note 32, at 1141-43.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Sims & Bales, *supra* note 171, at 434.

²⁴⁴ Reuben, *supra* note 32, at 1133-34.

Those who advocate the implementation of manifest disregard of the agreement draw their inspiration from labor law.²⁴⁵ They contend that the appropriate test to determine whether arbitrators impermissibly exceeded their powers is to look at what authority the arbitrators were granted by the agreement and whether they breached their contractual duty by failing to interpret the contract.²⁴⁶ If there is no “colorable” justification for the arbitrators’ failure to interpret the contract, the award is reversed under Section 10(a)(4).²⁴⁷ They argue that this principle accords with arbitration’s contractual nature, while still supporting the national policy favoring arbitration.²⁴⁸

While this test seems workable (since the prior manifest disregard test basically only looked at whether the arbitrators refused to evaluate the underlying agreement and the law it was based upon), this new test would directly undermine the Court’s ruling in *Hall Street*.²⁴⁹ The Court held that private parties did not have the authority to contractually expand judicial review of arbitral awards.²⁵⁰ If manifest disregard of the agreement was the prevailing standard, parties could simply agree to extended judicial review.²⁵¹ This theory has already been tested and rejected in *Wood v. Penntex Resources LP*, where the district court recognized that agreements that increase review precisely undermine *Hall Street*.²⁵²

CONCLUSION

Judicial review of arbitration has been in a state of flux since *Hall Street*. The Supreme Court stated that the grounds contained in Section 10 of the FAA are “exclusive” but stopped short of eliminating the judicially named grounds recognized in each circuit. A circuit split developed as to whether these additional grounds were still available, with circuits generally looking at whether their prior definition of those grounds indicated that they were separate from the FAA and part of common law. The Court did not eliminate the judicially named grounds for vacatur in *Hall Street* but merely withheld from private parties the ability to decide their level of judicial review because of the risk that arbitration would become a mere prelude to litigation.

The judicially named grounds manifest disregard of the law, arbitrary and capricious decision, and irrationality are functionally equivalent and

²⁴⁵ Sims & Bales, *supra* note 171, at 434.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 434-35.

²⁴⁸ *Id.* at 436-37.

²⁴⁹ Reuben, *supra* note 32, at 1133-34.

²⁵⁰ *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 589 (2008).

²⁵¹ Reuben, *supra* note 32, at 1133-34.

²⁵² *See Wood v. Penntex Res. LP*, No. H-06-2198, 2008 WL 2609319, at *2 (S.D. Tex. June 27, 2008).

only allow for vacatur when the arbitrator refuses to interpret the contract or law that was central to the parties obtaining the basic benefit of the bargain to which they agreed. Federal courts should continue to recognize these grounds as part of Section 10(a)(4) and not eliminate their judicially created names because these doctrines support the purpose of the FAA and eighty years of jurisprudence from each circuit. Unlike the manifest disregard of the agreement solution, simple continued recognition of the judicially named grounds is the best solution to the *Hall Street* dilemma and is supported by an accurate reading of the majority opinion.