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## Exceeding Their Powers: A Critique of *Stolt-Nielsen* and Manifest Disregard, and a Proposal for Substantive Arbitral Award Review

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# Exceeding Their Powers: A Critique of *Stolt-Nielsen* and Manifest Disregard, and a Proposal for Substantive Arbitral Award Review

Patrick Sweeney\*

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### *I. Introduction*

Arbitration has its roots deep in antiquity<sup>1</sup> and has long enjoyed widespread use in the United States and across the globe.<sup>2</sup> In essence, it is a contractual form of dispute resolution used primarily as an alternative to litigation.<sup>3</sup> The parties to a dispute

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1. See John T. Blackenship, *Isomorphism of Construction Arbitration: The Key to Its Prevention and Reversal*, 65-OCT DISP. RESOL. J. 114, 116 (2010) (tracing the history of arbitration to Ancient Babylon and Greece).

2. See Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1339–40 (2007) (documenting the increasing importance of arbitration in international business relationships).

3. See Paul Bennett IV, Note, “Waiving” Goodbye to Arbitration: A Contractual Approach, 69 WASH. & LEE L. REV. 1609, 1611 (2012) (“[A]rbitration

agree to argue the issue before a neutral third-party arbitrator or panel of arbitrators and to be legally bound to honor the arbitrator's decision.<sup>4</sup> The parties decide how arbitrators are selected,<sup>5</sup> and they control which issues will be resolved and which rules shall be applied to resolve them.<sup>6</sup> Agreements to arbitrate are construed liberally to encompass almost any possible claim arising under them.<sup>7</sup> These agreements, then, can even encompass statutory claims relating to public regulation and civil rights,<sup>8</sup> including discrimination claims.<sup>9</sup> While the prevalence of

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is a private, alternative adjudicatory forum to which one gains access by contract" (citations omitted)); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 425–433 (1988) (noting that arbitration is a "creature of contract" and a popular alternative to litigation).

4. See Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 699 (1952)

The four essential aspects of arbitration are: (1) it is resorted to only by agreement of the parties; (2) it is a method not of compromising disputes but of deciding them; (3) the person making the decision has no formal connection with our system of courts; but (4) before the award is known it is agreed to be "final and binding."

(citation omitted); Stipanowich, *supra* note 3, at 428–30 (explaining the arbitration process).

5. See 9 U.S.C. § 5 (2012) ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . .").

6. See *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("[P]arties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted.")

7. See *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983) ("The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .").

8. See, e.g., *Shearson/Am. Express, Inc., v. McMahon*, 482 U.S. 220, 226 (1987) ("[The] duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights."); *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 625 (1985) ("[W]e find no warrant in the [FAA] for implying in every contract within its ken a presumption against arbitration of statutory claims."). The Supreme Court has also remarked that there is nothing preventing parties from specifying in their agreements that statutory claims are not within the scope of arbitrability. *Mitsubishi Motors Corp.*, 473 U.S. at 628 ("Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.")

9. There is a caveat here: while courts will generally interpret broadly

arbitration agreements varies by context,<sup>10</sup> it cannot be disputed that arbitration itself is an enormously important component in the field of contractual relationships, particularly commercial transactions.<sup>11</sup> Considering the high stakes often involved in contemporary arbitration, any uncertainty regarding the validity of arbitral awards is at best frustrating and at worst disastrous.

Courts have long struggled to develop a stable framework for review and recognition of arbitral awards.<sup>12</sup> Early arbitral review

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worded arbitration agreements to encompass *all* disputes arising under the contract or submission, in order for a discrimination claim to be submitted to arbitration, the agreement must specifically mention that such claims are included. See *14 Penn Plaza v. Pyett*, 556 U.S. 247, 274 (2009) (“We hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.”).

10. Arbitration agreements are commonly found in commercial deals, including both traditional business-to-business transactions as well as consumer transactions. They are also prevalent in employment contracts and the construction industry. For a discussion on arbitration agreements in consumer transactions, see Joseph M. Matthews, *Consumer Arbitration: Is It Working Now and Will It Work in the Future?*, 79-APR FLA. B.J. 22 (2005). For a discussion of employment arbitration, see Erin O’Hara O’Connor et al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133 (2012). For a discussion of construction arbitration, see Greg Harwell, *Arbitration of Construction Claims: Unique Issues and Current Topics*, 25 THE ADVOC. (TEXAS) 72 (2003).

11. See Stephen Hayford & Ralph Peebles, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 348 (1995)

Increasing numbers of more complex commercial disputes, involving larger amounts in controversy, are being routinely submitted to arbitration. A substantial number of commercial contracts contain boilerplate arbitration clauses providing that virtually all controversies arising between the parties to those contracts will be subject to final and binding arbitration. Thus, for example, agreements to arbitrate contractual and related disputes are routinely included in sales contracts, construction contracts, broker-customer contracts, loan agreements, partnership agreements, and employment and employment-related contracts.

(citations omitted).

12. Before the passage of the Federal Arbitration Act (FAA), federal courts lacked any determinative rule governing the enforceability of arbitration agreements. See *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 125 (1924) (“[W]e have no occasion to consider whether the unwillingness of federal courts to give full effect to executory agreements for arbitration can be justified.”). After the FAA guaranteed the enforceability of arbitration agreements, questions arose as to the scope of its provisions for vacatur of awards, as well as the exclusivity of those provisions. *Infra* Part II.

in this country was often characterized by judicial suspicion of the procedural protections and legal competence provided by arbitration proceedings.<sup>13</sup> Many courts were willing to vacate awards for any number of reasons, including the court's belief that the arbitrator had misapplied the applicable law or drawn an incorrect legal conclusion.<sup>14</sup>

The lack of coherency in the enforcement of arbitral awards was a driving force behind the passage of the Federal Arbitration Act (FAA)<sup>15</sup> in 1925. With this statute, Congress sought to provide a nationwide framework for the evaluation and enforcement of arbitral awards.<sup>16</sup> But questions about the nature and scope of judicial vacatur remain unanswered to this day, particularly regarding substantive review and the notion of "manifest disregard of the law" as a ground for vacatur.<sup>17</sup>

Although a universally accepted definition has proven elusive,<sup>18</sup> manifest disregard is colloquially the notion that a court may vacate an arbitral award when a party can show that the arbitrator was aware of the applicable law but ignored it and applied a different standard when making her decision.<sup>19</sup> The use

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13. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (describing the "old judicial hostility to arbitration"); Bennett, *supra* note 3, at 1623 ("Prior to the FAA, opportunities to bargain for arbitral procedures were severely constricted. Considered nothing more than tools of oppression, courts generally nullified arbitration agreements and assumed jurisdiction over the matter in question." (citations omitted)).

14. See *Burchell v. Marsh*, 58 U.S. 344, 349–50 (1854) (stating that an award may be vacated for "gross mistake, either apparent on the face of the award, or to be made out by evidence").

15. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. § 1 (2012)).

16. See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Comm. on the Judiciary, 67th Cong. 2* (1923) (statement of Charles L. Bernheimer, Chairman, Arbitration Comm. of the New York Chamber of Commerce) ("The fundamental conception underlying the law is to make arbitration agreements valid, irrevocable, and enforceable.").

17. See James M. Gaitis, *Unraveling the Mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 PEPP. DISP. RESOL. L.J. 1, 2–6 (2007) [hereinafter *Unraveling*] (describing the creation of the manifest disregard doctrine and its current treatment).

18. See *infra* notes 85–108 and accompanying text (detailing the different formulations of manifest disregard employed by the federal appellate courts).

19. See, e.g., *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418 (6th Cir. 2008) ("[A]n arbitrator acts with manifest disregard if '(1) the applicable

of manifest disregard as a concrete doctrine took hold after the Supreme Court's decision in *Wilko v. Swan*,<sup>20</sup> yet substantive judicial review of arbitral awards is much older.<sup>21</sup> Recent Supreme Court precedent suggests, however, that manifest disregard may no longer provide a valid ground for vacatur under federal law.<sup>22</sup> A circuit split has developed over the continued viability of manifest disregard.<sup>23</sup>

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legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.” (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995)); Matthew Wolper, “*Manifest Disregard: Not Yet Entirely Disregarded*,” 86-OCT FLA. B.J. 36, 37 (2012) (defining manifest disregard as “when an arbitrator is advised of the law, recognizes its applicability, and consciously disregards it” (citing *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1461–62 (11th Cir. 1997))).

20. 346 U.S. 427 (1953), *overruled by* *Rodrigues de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

21. James M. Gaitis traces the concept's history back to Justice Story's opinion in *Klein v. Catara*, 14 F.Cas. 732 (Cir. Ct. D. Mass. 1814). Gaitis, *Unraveling*, *supra* note 17, at 17–23. But this case and its progeny focused on the distinction between restricted and unrestricted submissions to arbitration: restricted submissions somehow limit the arbitrator's authority to resolve the dispute, while unrestricted submissions grant the arbitrator “carte blanche authority” to resolve the dispute however she sees fit, regardless of any applicable legal or equitable principles. *Id.* at 17. An award could be vacated only for a mistake in the application of law if the submission was restricted to that particular body of law, or in an unrestricted submission if the arbitrator chose to apply that particular law and did so incorrectly. *Id.* at 19–20. The current manifest disregard standard has abandoned the restricted–unrestricted distinction and focuses instead on the arbitrator's knowledge of a binding legal principle and subsequent refusal to apply it. *See id.* at 54 (“[C]ourts continually have concluded that in using the word ‘disregard’ in *Wilko*, the Supreme Court could have only meant to describe an intentional act by arbitrators.”); *supra* note 19 (describing the current manifest disregard standard).

22. The Supreme Court has never ruled on the viability of manifest disregard. *See* James M. Gaitis, *Clearing the Air on “Manifest Disregard” and Choice of Law in Commercial Arbitration: A Reconciliation of Wilko*, Hall Street, and Stolt-Nielsen, 22 AM. REV. INT'L ARB. 21, 21–22 (2011) [hereinafter *Clearing the Air*] (noting the Supreme Court's failure to rule on manifest disregard). The Court has, however, called the doctrine into serious question with its ruling in *Hall Street Associates, L.L.C. v. Mattell, Inc.*, 552 U.S. 576 (2008), causing several federal circuits to abandon manifest disregard. *See* Christopher Walsh, Stolt-Nielsen's *Comfort for the ‘Average Arbitrator’: An Analysis of the Post-Hall Street ‘Manifest Disregard’ Award Review Standard*, 27 ALTS. TO HIGH COST LITIG. 19, 19–21 (2009) (explaining *Hall Street's* effect on manifest disregard and lower federal courts' reactions to the case).

23. *Infra* Part III.C.

This Note attempts to ameliorate some of the confusion over manifest disregard by proposing a new framework for evaluating arbitrators' determination and application of rules governing disputes submitted to arbitration. The framework seeks to harmonize the stated goals of arbitration, concerns about arbitrator overreaching and unfairness, and recent confusing Supreme Court precedent. The goal pursued is a compromise between two opposing viewpoints on the courts' role in arbitration: the view that courts must be allowed to monitor arbitration in order to prevent abuse or egregious mistakes,<sup>24</sup> and the view that arbitration must remain separate from litigation and unrestrained by judicial imposition.<sup>25</sup>

The Note begins by providing a brief outline of the history and goals behind both the manifest disregard doctrine and arbitration generally in Part II.<sup>26</sup> Part III analyzes the Supreme Court's opinion in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,<sup>27</sup> which cast serious doubt on manifest disregard's continued

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24. See, e.g., 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, 126 (2012) ("[F]ederal courts [should] apply plenary review for errors of law when either federal statutory rights or federal public policy is at stake."); Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard" Standard*, 52 B.C. L. REV. 137, 187 (2011) ("[J]udicial review must be available to correct an arbitrator's intentional flouting of the law. If the standard is eliminated, arbitral finality will rise above the crowning principle of the American constitutional system: 'No man in this country is so high that he is above the law.'" (citations omitted)); Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 518 (1998) ("Judicial review of arbitration awards must be sufficient at least to require arbitrators to follow the general outlines of the law. An award should be vacated or modified if it shows an extraordinary lack of fidelity to established legal principles or an egregious departure from established law.").

25. See, e.g., Albert G. Besser, *The Arbitrator Blew It! Now What?*, 29-SUM VT. B.J. 39, 45 (2003) [hereinafter *The Arbitrator Blew It!*] (claiming that manifest disregard transforms arbitration into "not an alternative to litigation, but rather the first step of the law suit"); Kevin Patrick Murphy, *Alive But Not Well: Manifest Disregard After Hall Street*, 44 GA. L. REV. 285, 314 (2009) ("Removing manifest disregard as a ground for vacatur makes judicial enforcement more predictable and, thus, less necessary."); Hans Smit, *Hall Street Associates v. Mattel: A Critical Comment*, 17 AM. REV. INT'L ARB. 513, 520 (2008) [hereinafter *Critical Comment*] (arguing against an expanded role for the courts in the arbitration system).

26. See *infra* Part II (discussing the goals and history of arbitration and manifest disregard in the U.S.).

27. 552 U.S. 576 (2008).



viability, as well as the federal circuit split that has formed as a result of that decision.<sup>28</sup> Part III also discusses the more recent Supreme Court case *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>29</sup> which indicated that some manner of substantive arbitral award review must be available to courts.<sup>30</sup> Part IV introduces the Note's solution to the circuit split: a new framework for judicial substantive review of arbitral awards.<sup>31</sup> The framework presents six questions for a judge to ask while reviewing an arbitrator's decision.<sup>32</sup> This Note concludes that very limited substantive review should be available to parties challenging an arbitral award, but only if the strict requirements described in the framework are met.<sup>33</sup> The manifest disregard doctrine is shown to be both overinclusive and underinclusive and must be modified as indicated in the review framework.<sup>34</sup>

## *II. Background: Historic and Contemporary Views of Arbitration and Manifest Disregard*

To understand the controversy over award review and vacatur, one must understand the history and goals of arbitration itself, as well as the roots of manifest disregard. The difficulty in reconciling one with the other stems from the inherent tension between their goals. Arbitration, on the one hand, seeks finality and expediency, while manifest disregard, on the other, seeks accuracy through substantive review.

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28. See *infra* Parts III.A, III.C (discussing *Hall Street* and the current federal circuit split over manifest disregard).

29. 130 S. Ct. 1758 (2010).

30. See *infra* Part III.B (discussing *Stolt-Nielsen*).

31. See *infra* Part IV (describing a new framework for analyzing substantive challenges to arbitral awards).

32. See *infra* Part V.B (introducing the six-question review framework).

33. See *infra* Part VI (concluding that limited substantive review of arbitral awards should be available).

34. See *infra* Part VI (describing the inadequacies of the manifest disregard doctrine).

*A. The Goals and History of Arbitration in the United States*

Throughout the nineteenth and early twentieth century, arbitration enjoyed an important, albeit limited, role in commercial transactions.<sup>35</sup> The enforceability of arbitral awards was not certain, though, in part due to the courts' frequent refusals to honor arbitration agreements or enforce arbitral awards.<sup>36</sup>

During this time period, the finality of arbitration was extremely questionable. The Supreme Court made it clear that arbitral awards could be properly reviewed for any "such reasons as are sufficient in other courts," including "manifest mistake of law."<sup>37</sup>

Congress sought to ameliorate perceived judicial hostility toward arbitration, at the time embodied by the "ouster doctrine,"<sup>38</sup> and to make arbitration a reliable dispute-resolution

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35. See Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 247–48 (1928) (explaining that before the FAA was enacted, state laws on arbitration varied with regard to the enforceability of arbitration agreements, limiting arbitration's desirability).

36. See, e.g., *Mitchell v. Dougherty*, 90 F. 639, 645 (3d Cir. 1898) ("While parties may impose, as condition precedent to applications to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law, and not the contract, prescribes the remedy . . ."); *U.S. Asphalt Ref. Co. v. Trin. Lake Petroleum Co.*, 22 F. 1006, 1012 (S.D.N.Y. 1915) ("[T]he Supreme Court has laid down the rule that such a complete ouster of jurisdiction as is shown by the clause quoted from the charter parties is void in a federal forum."). Judicial hostility toward arbitration was apparent even decades after the FAA's passage. See *Frank J. Rooney, Inc. v. Charles W. Ackerman of Fla., Inc.*, 219 So. 2d 110, 113 (Fla. Ct. App. 1969) ("Traditionally, agreements to arbitrate have been strictly construed because they have the effect of ousting a court of competent jurisdiction of the authority to determine a question initially which will arise in the future.").

37. *United States v. Farragut*, 89 U.S. 406, 420 (1874).

38. H.R. REP. NO. 68-96, at 1–2 (1924). The "ouster doctrine" was a principle used by courts to invalidate forum selection clauses in contracts. See *In re Great Lakes Dredge & Dock Co. L.L.C.*, 251 S.W.3d 68, 74–75 (Tex. App. 2008) (explaining the ouster doctrine and tracing its origin to *Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874)). Arbitration agreements were invalidated alongside forum selection clauses because they removed disputes from *all* courts' jurisdictions. See Patricia Patterson, *In re AIU Insurance Company*, 41-SPG TEX. J. BUS. L. 101, 102–03 (2005) ("[U]nder the 'ouster doctrine,' advance agreements regarding forum selection clauses, arbitration clauses, and venue clauses were considered illegal and void."). The ouster doctrine posited that

mechanism for parties seeking to avoid litigation.<sup>39</sup> The Federal Arbitration Act (FAA) created a federal framework providing for enforcement of arbitration agreements in federal district court.<sup>40</sup> If a federal court finds a valid arbitration agreement between the parties, the FAA requires the court to stay all proceedings and order the parties to arbitration.<sup>41</sup> The FAA preempts any conflicting state laws invalidating agreements to arbitrate or state laws restricting arbitration more than other contracts,<sup>42</sup> and its reach covers all agreements to arbitrate in commercial and maritime contracts<sup>43</sup> and agreements to arbitrate in all employment contracts except those of transportation workers.<sup>44</sup>

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because “every citizen has a right to resort to all courts of the country,” then although a citizen may waive his rights in specific instances, he may not “bind himself by an agreement . . . thus to forfeit his rights at all times and on all occasions.” *Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874).

39. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (“Congress enacted the FAA to replace judicial indisposition to arbitration with a national policy favoring it and placing arbitration agreements on equal footing with all other contracts.” (internal quotes omitted)).

40. See 9 U.S.C. § 2 (2012) (making agreements to arbitrate “valid, irrevocable, and enforceable”); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271 (1995) (explaining that the FAA created both procedural and substantive federal arbitration law).

41. 9 U.S.C. § 3.

42. Under *Erie Railroad Co. v. Thompkins*, 340 U.S. 64 (1938), federal courts exercising diversity jurisdiction must apply state substantive law unless the controversy is governed by the U.S. Constitution or an Act of Congress. State courts and federal courts sitting in diversity cases cannot apply federal procedural law. The FAA is not merely a procedural statute, though. It creates federal substantive arbitration law as well as procedural arbitration law, and both federal and state courts must apply its substantive components. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006).

FAA preemption of state law is an important topic for this Note, and will be discussed more thoroughly *infra* Part IV.D.2–4. It is now settled law that the FAA preempts any state law governing arbitration that singles out arbitration agreements for invalidation. See *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (holding that the FAA preempted a California law vesting primary jurisdiction to resolve disputes between talent agents and artists to the state’s labor commission); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 *IND. L.J.* 393, 394 n.2 (2004) (providing a list of cases in which state laws regulating arbitration agreements were held preempted by the FAA).

43. See 9 U.S.C. § 2 (establishing the Act’s jurisdiction over agreements to arbitrate “in any maritime transaction or contract evidencing a transaction involving commerce”).

44. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (“Section 1 exempts from the FAA only contracts of employment of transportation

Disputes in those contexts can be arbitrated even when they involve statutorily created rights.<sup>45</sup> Thus, the overwhelming majority of arbitrations in the United States fall under its scope.<sup>46</sup> The FAA does not, however, actually confer federal jurisdiction.<sup>47</sup> The FAA also provides the structural and substantive framework for the Uniform Law Commission's Uniform Arbitration Act and the Revised Uniform Arbitration Act,<sup>48</sup> on which forty-nine states have based their own arbitration statutes.<sup>49</sup>

If the FAA was created to increase the use and acceptance of arbitration as an alternative to litigation, it has been a success. Arbitration clauses are found in a large portion of consumer<sup>50</sup> and

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workers.”).

45. See *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 238, 242 (1987) (holding that agreements to arbitrate claims under the Securities Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act are valid).

46. See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (per curiam) (stating that the FAA's jurisdiction extends as far as Congress's Commerce Clause Power under Article I, Section 8 of the U.S. Constitution); *Satomi Owners Ass'n v. Satomi, L.L.C.*, 225 P.3d 213, 219 (Wash. 2009) (en banc) (holding that the FAA preempted a Washington statute invalidating an arbitration clause between a condominium developer and a homeowners' association); Benjamin D. Tievsky, Note, *The Federal Arbitration Act After Alafabco: A Case Analysis*, 11 *CARDOZO J. CONFLICT RESOL.* 675, 706–07 (2010) (analyzing the expansive reach of the FAA's jurisdiction after the *Alafabco* decision).

47. A party seeking federal review of an arbitration agreement or award under the FAA must meet federal subject-matter jurisdiction requirements. See *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) (stating that the FAA does not confer federal jurisdiction).

48. See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 *GA. L. REV.* 123, 124–25 (2002) (“The Federal Arbitration Act (FAA) and Uniform Arbitration Act (UAA) prescribe a nearly identical ‘arbitration law’ . . . .” (citations omitted)).

49. See Nat'l Conference of Comm'rs on Unif. State Laws, *Acts: Arbitration Act (2000)*, UNIFORM L. COMMISSION (2014), [http://uniformlaws.org/Act.aspx?title=Arbitration%20Act%20\(2000\)](http://uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000)) (last visited Feb. 11, 2014) (providing the text of the UAA) (on file with the Washington and Lee Law Review). The Uniform Arbitration Act (UAA) was promulgated in 1956 and adopted by 49 states. *Id.* It was revised in 2000, and the Revised Uniform Arbitration Act (RUAA) has thus far been adopted in sixteen states. *Id.*

50. See Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 *LAW & CONTEMP. PROBS.* 55, 56 (2004) (noting the increased prevalence of arbitration clauses in consumer contracts).

employment contracts,<sup>51</sup> and have been historically common in business transactions.<sup>52</sup> Arbitration proceedings have also become available to resolve disputes involving statutory rights, including civil rights.<sup>53</sup> For better or worse, arbitration is a key component in our domestic dispute-resolution framework, and has expanded beyond its contract origins to hold an indomitable place in dispute resolution.<sup>54</sup>

Throughout arbitration's history in the United States, proponents have lauded its asserted advantages over litigation, including cost-efficiency, finality of the decision, speed, arbitrator expertise, privacy, and greater control over the proceedings.<sup>55</sup> Some judicial suspicion of the relatively unsupervised nature of

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51. See O'Hara O'Connor et al., *supra* note 10, at 137 (documenting an increase in the use of arbitration agreements in Chief Executive Officer employment contracts).

52. See Note, *Predictability of Result in Commercial Arbitration*, 61 HARV. L. REV. 1022, 1025 (1948) [hereinafter *Predictability of Result*] ("By far the largest number of awards studied concerned mercantile questions.").

53. See *14 Penn Plaza v. Pyett*, 556 U.S. 247, 266 (2009) ("This 'Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001))); O'Hara O'Connor et al., *supra* note 10, at 146–47 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) for the proposition that "statutory claims may be the subject of an arbitration agreement"). Very few types of claims are categorically nonarbitrable. Criminal offenses are the most significant exception. See RICHARD A. LORD, 21 WILLISTON ON CONTRACTS § 57:28 (4th ed., 2012) ("Criminal offenses are not arbitrable, as they are matters of public concern." (citations omitted)).

54. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 411 (1967) (Black, J., dissenting) (arguing that the Court has "elevate[d] arbitration provisions above all other contractual provisions").

55. See Bennett, *supra* note 3, at 618–21 (citing expediency, cost efficiency, and freedom to design procedures tailored to the parties' needs as possible benefits of choosing arbitration over litigation); Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, 30 INT'L BUS. LAW 203, 203–04 (2002) (presenting a survey of clients and attorneys engaged in private commercial arbitration ranking the clients' and attorneys' perceived advantages of arbitration in order of importance); *Predictability of Result*, *supra* note 52, at 1022 (describing arbitration to be quicker than litigation if agreed upon before the dispute arose); Philip G. Phillips, *Commercial Arbitration Under the N.R.A.*, 1 U. CHI. L. REV. 424, 425 (1934) (defining arbitration as the "adjudication of disputes by private judges of the parties' own choosing" and the "business man's substitute for trial").

arbitral proceedings persists, however. From time to time, courts may seem unwilling to elevate the stated goals of arbitration over their own perception that a mistake has been made in fashioning the award.<sup>56</sup> Parties left unsatisfied with an arbitrator's decision will often challenge it through litigation, hoping to convince a court that mistake or malfeasance has occurred.

### *B. Arbitral Award Vacatur*

Arbitral awards are generally not reviewable for mistakes of law.<sup>57</sup> The FAA contains four enumerated grounds granting federal courts the authority to vacate an arbitral award.<sup>58</sup> A court may vacate when it finds that the award was “procured by corruption, fraud, or undue means”; when it finds “evident partiality or corruption in the arbitrators”; when the arbitrators misbehave in a way that prejudices a party's rights; or when the arbitrators exceed their powers.<sup>59</sup> These grounds tend to focus on

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56. See, e.g., *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 203–04 (2d Cir. 1998) (overturning an arbitral award because the court found that the arbitrators “ignored the law or the evidence or both”); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1464 (11th Cir. 1997) (vacating an arbitral award because one of the parties had expressly urged the arbitrator to disregard the applicable law and the court believed that the facts did not adequately support the award).

57. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008) (stating that courts cannot provide “general review for an arbitrator's legal errors”).

58. 9 U.S.C. § 10(a) (2012).

59. *Id.* The full text of the provision reads:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(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 of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the

the fairness and impartiality of the arbitration proceeding itself, rather than the reasonableness or propriety of the resulting award.

The general lack of substantive-review allowance in the FAA reflects the broader goal that arbitral awards be final<sup>60</sup> and be governed by the parties' agreement.<sup>61</sup> If arbitral awards can be readily reviewed on substantive grounds, then a de facto appeals process will be built into the system. This would, in turn, frustrate arbitration's goals of expediency and finality.<sup>62</sup> Recent Supreme Court precedent suggests, though, that some limited form of substantive review should be available.<sup>63</sup>

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subject matter submitted was not made.

60. See *St. John's Mercy Med. Ctr. v. Delfino*, 414 F.3d 882, 884 (8th Cir. 2005) (noting that there is a "strong federal policy favoring certainty and finality in arbitration"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 F. App'x 243, 246 (6th Cir. 2004) ("It is clear that the FAA reflects Congressional approval of the speed and finality of arbitration . . ."); *Kar Nut Prods. Co. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local 337*, No. 92-2084, 1993 WL 304467, at \*2 (6th Cir. Aug. 10, 1993) ("Our deference to the judgments of arbitrators is to promote the finality of arbitration." (citing *Bakers Union Factory No. 326 v. ITT Cont'l Baking Co., Inc.*, 749 F.2d 350, 353 (6th Cir. 1984))); *Naimark & Keer*, *supra* note 55, at 204 (noting that 32% of arbitration participants surveyed cited "finality" as one of their top three reasons for arbitrating their dispute).

61. The FAA was enacted specifically to guarantee that agreements to arbitrate were enforced. See *Gaitis, Unraveling*, *supra* note 17, at 42 (quoting Representative Graham during the 1924 Joint Hearings before the Senate and House Subcommittees on the Judiciary). The arbitration agreement necessarily includes the sacrifice of some of the substantive and procedural rights available through litigation in order to achieve the benefits cited in the *Naimark & Keer* article, *supra* note 55, at 204. See *Davis*, *supra* note 24, at 88 (elaborating on the procedural rights commonly forfeited in arbitration proceedings). Finality is also viewed as a common reason for resorting to arbitration. See *United Food & Commercial Workers Union v. Pilgrims Pride Corp.*, 193 F.3d 328, 332 (5th Cir. 1999) ("Intrusive review of arbitration awards by the courts would undermine the federal policy favoring labor arbitration. Such review would destroy the bargained-for finality of arbitration . . .").

62. Once an arbitral award is challenged, not only will the parties have to litigate in a district court, they will likely have to re-arbitrate the dispute if the award is vacated. 9 U.S.C. § 10(b) (2012) ("If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.")

63. See *infra* notes 217–24 and accompanying text (describing the implications of the Supreme Court's holding in *Stolt-Nielsen*).

*C. Summary and History of Manifest Disregard*

Courts have long been adept at finding ways to grant substantive review of arbitral decisions. The most common and perhaps most controversial method of achieving such review has been the manifest disregard doctrine.<sup>64</sup> This doctrine purports to allow judicial vacatur of an award when a party can demonstrate that, when fashioning the award, the arbitrator intentionally ignored the clearly applicable law.<sup>65</sup>

The intent of the arbitrator to ignore law that she perceives to be controlling is often a necessary component in a finding of manifest disregard; most courts attempt to distinguish between a “mere” mistake in law and manifest disregard, and the distinction often requires that the misapplication of law be egregious and with knowledge of how the law should be applied.<sup>66</sup>

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64. See *supra* note 56 (citing cases applying the doctrine); see also *Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P.*, 813 A.2d 621, 633 (N.J. Super. Ct. Law Div. 2002) (vacating for manifest disregard of the law and contravention of public policy an arbitral decision awarding payment for medical services to a then-unlicensed medical facility in clear violation of the applicable New Jersey statute); *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 274 (App. Div. 1st Dept. 2003) (vacating a punitive damages arbitral award because the court found it to be in manifest disregard of the law); Walsh, *supra* note 22, at 19 (“[I]t has been recognized since the 1950s that arbitration awards may be vacated if the award displays a ‘manifest disregard of the law.’”).

65. This statement is a generalization of the manifest disregard doctrine as it appears in most circumstances. See *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389–90 (2d Cir. 2003) (“A party seeking vacatur [for manifest disregard of the law] bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it.”). The court goes on to identify three necessary components of a manifest disregard showing: first, that the law was clear and explicitly applicable to the dispute before the arbitrators; second, that the applicable law was misapplied; and third, that the arbitrator was subjectively aware of the governing law yet did not apply it. *Id.* at 389–90.

In reality, as will be further discussed, there is no universally accepted definition of manifest disregard, and courts have increasingly been using the term to either restate or expand upon the enumerated grounds for vacatur found in § 10 of the FAA, particularly the fourth, which allows vacatur when the arbitrator exceeds his powers. *Infra* notes 197–200 and accompanying text.

66. *Duferco Int’l Steel Trading*, 333 F.3d at 390; see also *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1461 (11th Cir. 1997) (“An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it.”).



The inherent difficulty in distinguishing what sort of misapplications would rise to the level of manifest disregard is apparent, and state<sup>67</sup> and federal courts have been unable to

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67. Although the focus of this Note is federal arbitral award review, it is worth noting that many state courts recognize the manifest disregard doctrine. See *Design Tech, LLC v. Moriniere*, No. CV126006844S, 2012 WL 3870313, at \*2 (Conn. Super. Ct. Aug. 10, 2012) (“Our courts have held that claims of manifest disregard of the law fall within the statutory proscription of [CONN. GEN. STAT.] § 52-418(a)(4).”); *Geissler v. Sanem*, 949 P.2d 234, 238 (Mont. 1997) (holding that “this and future arbitration awards may be reviewed for a manifest disregard of the law”); *Clark Cnty. Educ. Ass’n v. Clark Cnty. Sch. Dist.*, 131 P.3d 5, 7 (Nev. 2006) (“We have previously recognized that a private arbitration award may be reviewed . . . [and vacated when] the arbitrator manifestly disregarded the law.”); *Xtria L.L.C. v. Int’l Ins. Alliance Inc.*, 286 S.W.3d 583, 594 (Tex. App. 2009) (“Under [the manifest disregard] standard, the arbitrator recognizes a clearly governing principle and ignores it.” (citation omitted)). Other states have either expressly rejected manifest disregard, see *Comerica Bank v. Howsam*, 145 Cal. Rptr. 3d 795, 830 (Cal. Ct. App. 2012) (“[I]t is unclear whether the manifest disregard of the law ground remains as basis for vacatur in federal court. . . . But one thing is clear: an arbitrator’s manifest disregard of the law is not a ground for vacatur under California law.”), or have remained ambivalent and refused to take a stance on it. See *Abdelnour v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 29 Mass. L. Rptr. 540, 540 n.5 (Mass. Super. 2012) (“It is unclear whether [manifest disregard] is recognized in Massachusetts as an additional ground for vacating an award.”).

State courts often look to federal precedent when applying the doctrine. See *ABCO Builders, Inc. v. Progressive Plumbing, Inc.*, 647 S.E.2d 574, 575 (Ga. 2007) (“Because our state arbitration code closely tracks federal arbitration law, we look to federal cases for guidance in construing our own statutes.”); *Wein & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 480–81 (N.Y. 2006) (holding that courts may “modify or vacate an award on the ground of manifest disregard of the law” (citing *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003))). The Georgia Supreme Court in *Progressive Plumbing* cited *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997), for the proposition that “[t]o manifestly disregard the law, one must be conscious of the law and deliberately ignore it.” *Id.* As this Note will show, the federal precedent governing substantive review of arbitral awards is confusing and split, so resolving the issue at the federal level may influence state courts applying their own review procedures. The reader should remember that the review structure proposed by this Note is based on substantive review under the FAA, which only applies to federal courts. This is because the FAA grounds for review on which this Note’s framework is based, §§ 10–11, do not preempt state arbitration law. See *Cable Connection, Inc. v. DIRECTV, Inc.*, 82 Cal. Rptr. 3d 229, 244 (Cal. 2008) (stating that only § 2 of the FAA applies in state court proceedings, and that §§ 10 and 11 of the FAA are directed only at federal courts). State courts apply their own arbitration law when reviewing awards, as long as the state law is not preempted by § 2 of the FAA. See, e.g., *Nordstrom v. Russo & Steele, L.L.C.*, No. 1 CA–CV 11–0632, 2012 WL 2477678, at \*3 (Ariz. Ct. App. June 21, 2012) (applying state law mandating that

apply such vague standards consistently.<sup>68</sup> This inconsistency is especially troubling because some courts allow the arbitrator's subjective intent to be inferred from the circumstances.<sup>69</sup> Because the arbitrator's intentional disregard of controlling law tends to be the only clear distinction between a "mere mistake of law" and manifest disregard, inferring this intent from the circumstances hinges the whole review process on the reviewing court's subjective opinion of the mistake's enormity or the arbitrator's actual knowledge of the law.

James M. Gaitis has persuasively argued that the concepts underlying manifest disregard have their roots in early arbitration common law.<sup>70</sup> But the emergence of manifest disregard as a specific doctrine of award vacatur can be traced directly to a small portion of the Supreme Court's decision in *Wilko v. Swan*.<sup>71</sup> That case, which has since been overruled, dealt with the question of whether an arbitration agreement contained

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appellate review of arbitral awards be available, despite a provision in the arbitration agreement waiving the right to such review, and reasoning that the FAA did not preempt state law because no federal decision has held this type of state law unenforceable); *Wright v. City of Gary*, 963 N.E.2d 637, 645 (Ind. Ct. App. 2012) (applying manifest disregard within Indiana's arbitration law).

68. See *infra* notes 85–108 and accompanying text (describing the application of the manifest disregard standard among the federal circuits).

69. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 92–93 (2d Cir. 2008) (stating that a court may infer an arbitrator's knowledge of a controlling principle if the arbitrator's decision "strains credulity or does not rise to the standard of barely colorable" (citing *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 218 (2d Cir. 2002) (internal quotation omitted))), *rev'd on other grounds*, 130 S. Ct. 1758 (2010).

70. See Gaitis, *Clearing the Air*, *supra* note 22, at 27 (claiming that the *Wilko* Court's suggestion of manifest disregard as a ground for vacatur was based on prior American and English case law allowing for vacatur when the arbitrator misapplied the governing law); Gaitis, *Unraveling*, *supra* note 17, at 16–17 (arguing that the *Wilko* Court found the FAA to incorporate traditional American arbitration common law, which allowed substantive review for mistakes in the application of law).

71. 346 U.S. 427 (1953); see also *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 419 (6th Cir. 2008) ("It is worth noting that since *Wilko*, every federal appellate court has allowed the vacatur of an award based on an arbitrator's manifest disregard of the law."); *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1460 (11th Cir. 1997) (citing *Wilko* for the proposition that "although an erroneous interpretation of the law would not subject an arbitration award to reversal, a clear disregard for the law would"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 931 (2d Cir. 1986) (citing *Wilko* as the source of manifest disregard in the Second Circuit).

in a securities brokerage contract was an illegal waiver of a party's right, under the Securities Act of 1933,<sup>72</sup> to recover in state or federal court for misrepresentation.<sup>73</sup> In dicta, the Court stated that "the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation."<sup>74</sup> In support of this statement, the Court referenced several nineteenth-century cases applying substantive review to awards for an arbitrator's mistake in the application of law that rose above a mere mistake in judgment.<sup>75</sup>

As Gaitis points out, the *Wilko* Court's references to older, pre-FAA cases have been largely forgotten, and courts as well as scholars have generally traced the manifest disregard doctrine to the *Wilko* dicta.<sup>76</sup> The first attempt to define what the *Wilko* Court meant by "manifest disregard" arose in the Ninth Circuit's *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*<sup>77</sup> decision, although the court did not officially adopt the standard.<sup>78</sup> Citing *Wilko*, the court concluded that manifest disregard

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72. Securities Act of 1933 § 14, 15 U.S.C. § 77n (2012) ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.").

73. *Wilko v. Swan*, 346 U.S. 427, 430 (1953), *overruled by* *Rodrigues de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

74. *Id.* at 436–37 (emphasis added).

75. *Id.* at 437 n.24 (citing *United States v. Farragut*, 89 U.S. 406, 413, 419–21 (1874); *Burchell v. Marsh*, 58 U.S. 344, 349 (1854); and *Klein v. Catara*, 14 F. Cas. 732, 735 (Cir. Ct. D. Mass. 1814)).

76. See Weathers P. Bolt, *Much Ado About Nothing: The Effect of Manifest Disregard on Arbitration Agreement Decisions*, 63 ALA. L. REV. 161, 164 (2011) ("Courts continued to recognize the strict rules of the FAA regarding vacatur until the Supreme Court opened the door to possibly recognizing non-statutory grounds for vacating an arbitration award in *Wilko*." (internal quotation marks and citation omitted)); Davis, *supra* note 24, at 89 (tracing the creation of the manifest disregard in the federal circuits to the *Wilko* opinion); Gaitis, *Clearing the Air*, *supra* note 22, at 23 ("Prior to the advent of the twenty-first century, arbitration law commentators almost universally and incorrectly surmised that the manifest disregard concept originated in the United States Supreme Court's opinion in *Wilko v. Swan*." (citations omitted)); *supra* note 71 (citing cases that trace the manifest disregard doctrine to *Wilko*).

77. 293 F.2d 796 (9th Cir. 1961).

78. See *id.* at 801 (declining to adopt a standard of review for manifest disregard of the law).

must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law. . . . We apprehend that a manifest disregard of the law in the context of the language used in *Wilko v. Swan* . . . might be present when arbitrators understand and correctly state the law, but proceed to disregard the same.<sup>79</sup>

The Second Circuit was the first federal appellate court to clearly adopt the manifest disregard standard when it decided *Saxis Steamship Co. v. Multifacs International Traders, Inc.* in 1967.<sup>80</sup> The Third Circuit followed suit in 1969 with its ruling in *Ludwig Honold Manufacturing Co. v. Fletcher*.<sup>81</sup> The other federal circuits, one by one, adopted the manifest disregard standard throughout the remaining decades of the twentieth century.<sup>82</sup> The Fifth Circuit was the final holdout, adopting manifest disregard in a 1999 decision, *Williams v. Cigna Financial Advisors Inc.*<sup>83</sup>

By 2008, the year that the Supreme Court decided *Hall Street*,<sup>84</sup> every federal circuit had ostensibly adopted the doctrine. Their use of the manifest disregard doctrine was far from consistent, though. The federal circuit positions can be divided roughly into two distinct camps, with a few outliers.

The first and larger camp consists of the circuits that allowed a reviewing judge to somehow infer the arbitrator's knowledge of the governing law and intent to disregard it. The Second Circuit applied probably the most lenient standard out of any circuit in its *Halligan v. Piper Jaffray, Inc.*<sup>85</sup> opinion. After stating that "we doubt whether even under a strict construction of the meaning of

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79. *Id.*

80. 375 F.2d 577 (2d Cir. 1967). "[T]he Supreme Court has held in *Wilko v. Swan* . . . that an award, based on 'manifest disregard' of the law, will not be enforced . . ." *Id.* at 582 (citing *Saguenay Terminals, Ltd.*, 293 F.2d at 801).

81. 405 F.2d 1123 (3d Cir. 1969). "[I]nterpretations of labor arbitrators must not be disturbed so long as they are not in 'manifest disregard' of the law . . ." *Id.* at 1128 (citing *Wilko v. Swan*, 346 U.S. 427, 436 (1953)).

82. For a complete listing of the cases in which the federal circuits adopted the manifest disregard standard, see LeRoy, *supra* note 24, at 159.

83. 197 F.3d 752 (5th Cir. 1999), *overruled by* Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349 (5th Cir. 2009).

84. See *infra* notes 149–52 and accompanying text (describing the impact of the Supreme Court's *Hall Street* decision).

85. 148 F.3d 197 (2d Cir. 1998).

manifest disregard, it is necessary for arbitrators to state that they are deliberately ignoring the law,” the court went on to find that the arbitrators did manifestly disregard the law based on “strong evidence” supporting a conclusion opposite to the arbitrators’ determination, along with “the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles.”<sup>86</sup> It is striking to note that this court suggested not only manifest disregard of the law, but the evidence as well, could serve as a ground for vacatur.<sup>87</sup> The First Circuit required that, in order for manifest disregard to be shown without an express admission from the arbitrators that they disregarded the law, “the governing law [must] have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug.”<sup>88</sup> The Fourth Circuit initially devoted little effort to explaining what it considered manifest disregard to entail,<sup>89</sup> but finally elucidated a test in 2008 by requiring that the arbitration record show that the applicable legal principle was clearly defined, not subject to reasonable debate, and that the arbitrator refused to apply it.<sup>90</sup> The Sixth Circuit also allowed a court to infer an arbitrator’s subjective knowledge and disregard of applicable legal principles if it determined that “no judge or group of judges could conceivably come to the same determination as the arbitrator.”<sup>91</sup>

The second camp is composed of circuits that adopted a more conservative form of manifest disregard and did not allow courts to infer knowledge of governing law on the part of the arbitrator. In order to show manifest disregard, the party had to conclusively show that the arbitrator identified the governing law and yet failed to apply it. The Eighth Circuit held this consistent,

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86. *Id.* at 204.

87. *Id.* (“In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both.”).

88. *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990).

89. *LeRoy*, *supra* note 24, at 163.

90. *Long John Silver’s Rests., Inc. v. Cole*, 514 F.3d 345, 349–50 (4th Cir. 2008).

91. *Id.*

conservative form of manifest disregard for two decades: “[A]n arbitration decision only manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.”<sup>92</sup> The Tenth Circuit applied a formulation of manifest disregard that closely tracked the Eighth Circuit’s conservative approach. It held manifest disregard to mean “willful inattentiveness to governing law,”<sup>93</sup> and to invoke this standard, the “record [must] show the arbitrators knew the law and explicitly disregarded it.”<sup>94</sup> The Eleventh Circuit initially refused to adopt manifest disregard at all.<sup>95</sup> But by 1997, it too had decided to apply the more conservative form of the doctrine.<sup>96</sup>

Several of the circuits did not fit neatly into those two groups. These circuits took either unclear or singular positions. The Third Circuit initially focused its examination on the arbitration agreement itself, as opposed to governing law identified in the agreement, stating that “only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construct and the law of the shop, may a reviewing court disturb the award.”<sup>97</sup> This circuit later relied on a definition in the negative: that manifest disregard was *not* an “erroneous interpretation” of the law.<sup>98</sup> The relatively few cases addressing manifest disregard in the Third Circuit do not definitively state whether a court could infer the arbitrator’s knowledge. While the Ninth Circuit was the first circuit to articulate a standard for manifest disregard in *Saguenay*

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92. *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 462 (8th Cir. 2001) (quoting *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 751 (8th Cir. 1986)).

93. *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995) (citation omitted).

94. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001).

95. *See Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990) (“This court has never adopted the manifest-disregard-of-the-law standard; indeed, we have expressed some doubt as to whether it should be adopted . . .”).

96. *See Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997) (recognizing manifest disregard as a ground for vacatur, defining it using *Black’s Law Dictionary*, and stating that “[t]o manifestly disregard the law, one must be conscious of the law and deliberately ignore it”).

97. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969).

98. *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003).

*Terminals Ltd.*,<sup>99</sup> it did not actually adopt the doctrine until 1982,<sup>100</sup> and it was not until 1995 that the court attempted to further define standards for applying the doctrine.<sup>101</sup> Although the Ninth Circuit's standard was fairly traditional, it also did not state whether or not an arbitrator's subjective knowledge of the applicable law could be inferred.<sup>102</sup> The Fifth Circuit suggested perhaps the most liberal version of manifest disregard when it stated that "where on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld *unless* it would result in a significant injustice."<sup>103</sup> Notice that this standard does not consider the arbitrator's subjective knowledge of the applicable law, but instead requires the court, upon a finding of manifest disregard, to determine whether upholding the award would "result in [a] significant injustice."<sup>104</sup> The Seventh Circuit has historically been critical of the manifest disregard doctrine.<sup>105</sup> It ostensibly applied the doctrine in its *Wise v. Wachovia Securities, LLC*<sup>106</sup> decision, but defined the doctrine so narrowly as to be

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99. *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796 (9th Cir. 1961).

100. *See Am. Postal Workers Union AFL-CIO v. U.S. Postal Serv.*, 682 F.2d 1280, 1284 (9th Cir. 1982) ("[C]ourts are bound to defer to the conclusions of the arbitrator unless the arbitrator has manifestly disregarded the law.").

101. *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995) ("It must be clear from the record that the arbitrators recognized the applicable law and ignored it." (citations omitted)). Before this case, the Ninth Circuit had only applied the standard suggested in *Saguenay Terminals Ltd.*, which defined manifest disregard largely in the negative. *See, e.g., Thompson v. Tega-Rand Int'l*, 740 F.2d 762, 763 (9th Cir. 1984) (defining manifest disregard as "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law" (quoting *Saguenay Terminals Ltd.*, 293 F.2d at 801)).

102. The Ninth Circuit does not state that an arbitrator's subjective knowledge of applicable law and intent to disregard it can be inferred, but it does cite the Second Circuit, which has allowed such an inference. *See Mich. Mut. Ins. Co.*, 44 F.3d at 832 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986)).

103. *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 762 (5th Cir. 1999) (emphasis added).

104. *Id.* at 762.

105. *See Baravati v. Josephthal, Lyon, & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994) (claiming that the manifest disregard doctrine is either "inconsistent with the entire law of arbitration" or "superfluous and confusing").

106. 450 F.3d 265 (7th Cir. 2006).

superfluous.<sup>107</sup> The D.C. Circuit adopted a rather lenient standard, but one that appeared applicable only to statutory rights. Stating that the “manifest disregard of the law standard must be sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law,” the court seems to have contemplated judicial review for a “mere error in law” when dealing with arbitral awards implicating statutory rights.<sup>108</sup>

So the state of manifest disregard was unclear even before *Hall Street*. In its *Advest, Inc. v. McCarthy*<sup>109</sup> decision, the First Circuit listed several formulations of manifest disregard standards used in other circuits.<sup>110</sup> The court then claimed that the differences were purely superficial: “However nattily wrapped, the packages are fungible.”<sup>111</sup> That claim’s accuracy is questionable; the manifest disregard doctrine appeared confused and inconsistent.<sup>112</sup> Some circuits allowed the arbitrator’s subjective knowledge and intent to be inferred from the circumstances of the case.<sup>113</sup> Others required explicit recognition

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107. *See id.* at 268–69 (“[W]e have defined ‘manifest disregard of the law’ so narrowly that it fits comfortably under the first clause of the fourth statutory ground—‘where the arbitrators exceeded their powers.’ . . . For we have confined it to cases in which the arbitrators ‘direct the parties to violate the law.’” (quoting *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001))).

108. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997); *see also Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) (stating that an arbitrator’s interpretation of the law is not reviewable); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jarros*, 70 F.3d 418, 421 (6th Cir. 1995) (“[M]anifest disregard of the law is a very narrow standard of review. . . . A mere error in interpretation or application of the law is insufficient.”); *Thompson v. Tega-Rand Int’l*, 740 F.2d 762, 763 (9th Cir. 1984) (“Manifest disregard of the law has been defined as ‘something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.’” (quoting *San Martine Compania de Navegacion v. Saguenay Terminal Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961))).

109. 914 F.2d 6 (1st Cir. 1990).

110. *Id.* at 9.

111. *Id.*

112. *See supra* notes 85–108 and accompanying text (detailing the pre-2008 formulations of manifest disregard used in the federal circuits).

113. *See supra* notes 85–88 and accompanying text (examining the First and Second Circuits); *supra* notes 89–90 and accompanying text (examining the Fourth Circuit); *supra* note 103 and accompanying text (examining the Fifth Circuit); *supra* note 91 and accompanying text (examining the Sixth Circuit);



of applicable—yet ignored—legal principles.<sup>114</sup> The Fifth Circuit was apparently willing to vacate awards without even a showing that the arbitrator was aware of the applicable law.<sup>115</sup> The Seventh Circuit refused to apply the substance of the doctrine, yet still claimed to recognize manifest disregard.<sup>116</sup> This confusing situation became even murkier following the Supreme Court’s 2008 decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>117</sup>

### III. Hall Street & The Current State of Manifest Disregard

#### A. The Hall Street Decision

The *Hall Street* case revolved around the validity of a clause in the parties’ arbitration agreement purporting to require a reviewing court to “vacate, modify, or correct any award if the arbitrator’s conclusions of law were erroneous.”<sup>118</sup> The petitioner, Hall Street Associates, owned property that it had leased to the respondent, Mattel.<sup>119</sup> The lease required Mattel to indemnify Hall Street for any damages resulting from either Mattel’s or its predecessors’ failure to follow environmental laws while leasing Hall Street’s property.<sup>120</sup>

The Oregon Drinking Water Quality Act (Water Quality Act)<sup>121</sup> contained testing requirements that Mattel did not follow, and it was eventually discovered that Mattel’s predecessor had contaminated the property.<sup>122</sup> Mattel sought to terminate the lease, while Hall Street sued to enforce the indemnification

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*supra* note 107 and accompanying text (examining the D.C. Circuit).

114. See *supra* note 92 and accompanying text (examining the Eighth Circuit); *supra* notes 93–94 (examining the Tenth Circuit); *supra* notes 95–96 and accompanying text (examining the Eleventh Circuit).

115. *Supra* note 103 and accompanying text.

116. *Supra* notes 105–07 and accompanying text.

117. See *infra* Part III.A (discussing the *Hall Street* case).

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

119. *Id.* at 579.

120. *Id.*

121. Oregon Drinking Water Quality Act, O.R.S. § 448.155 to 448.330 (2012).

122. *Hall St.*, 552 U.S. at 579.

clause.<sup>123</sup> The parties agreed to arbitrate the dispute and drew up an agreement containing the above-mentioned judicial review clause.<sup>124</sup>

The arbitrator found that Mattel was not required to indemnify Hall Street because he did not believe that the Water Quality Act was an environmental statute; he characterized it as a human-health law.<sup>125</sup> Hall Street sought review in federal court pursuant to the judicial review clause. Hall Street claimed that the arbitrator had made an erroneous conclusion of law and the district court agreed, finding that the Water Quality Act was an environmental law. The court vacated the award<sup>126</sup> and on remand, the arbitrator found for Hall Street.<sup>127</sup> Mattel then attacked the validity of the review clause itself, claiming that the statutory grounds for vacatur listed in the FAA were exclusive.<sup>128</sup>

The Ninth Circuit,<sup>129</sup> and then the Supreme Court,<sup>130</sup> agreed with Mattel. The Court held “that §§ 10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.”<sup>131</sup> The clause in the arbitration agreement granting expanded review to the court was invalid.

Writing for the majority, Justice Souter rejected Hall Street’s argument that judicial review beyond the FAA’s statutory grounds has been available since the *Wilko* decision.<sup>132</sup> Hall Street argued that *Wilko* left open the possibility for such review, particularly manifest disregard.<sup>133</sup> If judges could expand review

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123. *Id.*

124. *Id.*

125. *Id.* at 580.

126. *Id.*

127. *Id.*

128. *Id.* at 580–81 (explaining that Mattel relied on the Ninth Circuit’s then-recent ruling in *Kyocera Corp. v. Prudential-Bach Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003)).

129. *See* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 196 F. App’x 476, 477–78 (9th Cir. 2006) (holding that the FAA’s grounds for vacatur are exclusive), *rev’d on other grounds*, 552 U.S. 576, 592 (2008).

130. *See* *Hall St. Assocs., L.L.C. v. Mattel*, 552 U.S. 576, 583 (2008) (holding that the statutory grounds listed under the FAA provide the exclusive grounds for vacatur).

131. *Id.*

132. *Id.* at 584–85.

133. *Id.* at 584 (stating Hall Street took the position “that expandable

beyond the enumerated grounds in the FAA, then, Hall Street posited, parties should be able to expand upon those grounds as well.<sup>134</sup> The Supreme Court made it clear that neither judges nor parties have such authority and questioned the validity of the manifest disregard doctrine.<sup>135</sup> Perhaps, the Court suggested, manifest disregard as used in *Wilko* “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.’”<sup>136</sup>

To some, this case represented both a foray into new FAA territory for the Court as well as a departure from precedent.<sup>137</sup> Stuart M. Widman, an arbitration practitioner and commentator, argued that the FAA can be divided into roughly three parts: §§ 2–4, which cover entering arbitration; §§ 5 and 7, which govern the arbitration proceeding itself; and §§ 9–11, which cover getting out of arbitration.<sup>138</sup> Prior to *Hall Street*, the Supreme Court had primarily addressed the first part—the issues involved in entering arbitration.<sup>139</sup> *Hall Street* represented one of its first rulings on the sections dealing with getting out of arbitration, so it had limited precedent for guidance.<sup>140</sup> The *Hall Street* Court

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judicial review authority has been accepted as the law since *Wilko v. Swan*”).

134. *Id.* at 585 (“Hall Street sees this supposed addition to § 10 as the camel’s nose: if judges can add grounds to vacate (or modify), so can contracting parties.”).

135. *Id.* (stating that *Wilko* cannot be read to create room for extra-statutory grounds of judicial vacatur).

136. *Id.*

137. See, e.g., Stuart M. Widman, *Hall Street v. Mattel: The Supreme Court’s Alternate Arbitration Universes*, 15 NO. 1 DISP. RESOL. MAG. 24, 26 (2008) (analyzing Supreme Court FAA precedent pre-*Hall Street*).

138. See *id.* (parsing the FAA into three main areas of coverage).

139. See *id.* (citing numerous Supreme Court cases applying or interpreting §§ 2, 3, and 4 of the FAA).

140. *Id.* Two exceptions to this general statement are *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), and *Mastrobuono v. Shearson, Lehman Hutton, Inc.*, 514 U.S. 52 (1995), which both dealt with post-arbitration conflicts. Widman, *supra* note 137, at 26 n.5. These cases provided little support for the *Hall Street* decision, though, because they were both resolved by deciding issues presented in the context of entering arbitration: *Kaplan* revolved around who could decide arbitrability, and *Mastrobuono* dealt with choice of law issues. *Id.*

was clear in enunciating the “national policy favoring arbitration”<sup>141</sup> that it had espoused in many prior decisions.<sup>142</sup> The Court also, however, seemed to break from its previous position regarding the parties’ power of contract in controlling the arbitration.<sup>143</sup> Although courts make arbitrability decisions under federal arbitration law,<sup>144</sup> the Supreme Court has held that parties may agree to allow the arbitrator to determine arbitrability himself if the parties’ agreement on this point is “clear and unmistakable.”<sup>145</sup> *Hall Street* seems to retreat from the emphasis on the parties’ agreement inherent in the “clear and unmistakable” standard and instead sets an impressive roadblock against parties seeking expanded judicial review of arbitration awards.<sup>146</sup>

Widman suggests that this disparate treatment of the parties’ power of contract may stem from the distinction between rules governing the arbitration proceeding itself and the rules in federal courts conducting review of arbitral awards.<sup>147</sup> If true, then the Court may have weighed policy rationales to reach the *Hall Street* result: power of contract against finality of arbitration

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141. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).

142. *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (“To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA) . . . . Section 2 embodies the national policy favoring arbitration . . . .”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 625 (1985) (stating that there exists a “liberal federal policy favoring arbitration agreements” (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))).

143. Widman, *supra* note 137, at 26–27.

144. *See AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986) (“[T]he question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination.”).

145. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (“The question whether the parties have submitted a particular dispute to arbitration . . . is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.” (quoting *AT&T Techs., Inc.*, 475 U.S. at 649)).

146. *See* Widman, *supra* note 137, at 26–27 (“The Supreme Court signal is clear, however: *Hall Street* has pulled back from the power-of-contract rationale espoused in *Howsam* and *Bazzle*.”).

147. *See id.* at 26 (“Perhaps the Court did not feel that *Howsam* and *Bazzle* applied because they dealt with ‘getting-in’ issues, whereas *Hall Street* dealt with a ‘getting-out’ issue.”).

(an issue that is of less concern when deciding arbitrability itself); and found finality the more pressing concern.<sup>148</sup> It may also be possible that the Court simply chafed at the idea of private parties exercising control over the federal judiciary. In the Supreme Court's eyes, the FAA's contractual imperative seems to end when parties start telling judges what rules they must or must not apply.

Whatever the Court's motives for its decision, *Hall Street* had an enormous impact on the manifest disregard doctrine.<sup>149</sup> Manifest disregard, which had generally been considered an extra-statutory ground for vacatur,<sup>150</sup> appeared dead to many initial commentators.<sup>151</sup> Yet the Court's equivocal language led some to believe that the doctrine was not entirely foreclosed.<sup>152</sup>

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148. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (“[I]t makes more sense to see the three provisions, §§ 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s *essential virtue of resolving disputes straightaway*.” (emphasis added)).

149. See *supra* notes 135–36 and accompanying text (explaining how the *Hall Street* Court dealt with Hall Street’s manifest disregard argument.)

150. See, e.g., *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001) (stating that manifest disregard is a “judicially crafted exception to the general rule that arbitrators’ erroneous interpretations or applications of law are not reversible” (internal quotes omitted)); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (“Manifest disregard of the law’ by arbitrators is a judicially-created ground for vacating their arbitration award . . . . It is not to be found in the federal arbitration law.”).

151. See, e.g., Albert G. Besser, *Arbitration Vacatur: The Supreme Court Bars One Route and Muddles the Other—Manifest Mistake Is Dead!*, 34 VT. B.J. 67, 68 (2008) [hereinafter *Manifest Mistake Is Dead!*] (“May ‘manifest disregard of the law’ rest in peace!”); Mauricio Gomm-Santos & Quinn Smith, *On Dangerous Footing: the Non-Statutory Standards for Reviewing an Arbitral Award*, 18 AM. REV. INT’L ARB. 353, 367 (2007) (“While proponents of the standard can point to the use of manifest disregard as a standard of review throughout the country, the language of the *Hall Street* decision casts serious doubt on the logical foundation for the standard’s existence.”); Robert O. Sheridan, *All Almost Quiet on the Expanded Review Front: Supreme Court Rejects Expansion of Judicial Review of Arbitration Awards*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 93, 107 (2008) (“In striking down ‘manifest disregard,’ the *Hall Street* Court struck a blow to Pro-Expansionists.”).

152. See, e.g., Smit, *Critical Comment*, *supra* note 25, at 520 (“[T]he prevailing view appears to be that some form of manifest disregard of the law currently exists as a ground for judicial review apart from those statutorily enumerated. Justice Souter’s speculation [in *Hall Street*] may prove inadequate to overcome this prevailing view.”); Widman, *supra* note 137, at 29 (“While it may be tempting to view *Hall Street* as a definitive answer, it reflects only, at

*B. The Stolt-Nielsen Decision*

The Supreme Court had the chance to bury manifest disregard once and for all when it agreed to hear *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* The case involved a direct challenge to an arbitrator's decision; specifically, the petitioner challenged an arbitration panel's determination that class arbitration was allowable under the parties' arbitration agreement, even though both parties stipulated that the agreement was silent on the matter.<sup>153</sup> The case presented a perfect opportunity for the Supreme Court to make a decisive ruling on manifest disregard because the district court had actually found the arbitrator's decision to be in manifest disregard of the law and had vacated it accordingly.<sup>154</sup> But a decisive ruling was not meant to be.<sup>155</sup> Instead, the Court upheld the district court's decision without actually pronouncing anything definitive, or even helpful, about its stance on manifest disregard.

The petitioners in *Stolt-Nielsen* were shipping companies, including Stolt-Nielsen, that had shipped liquids in small quantities for their customers.<sup>156</sup> The petitioners and customers all used similar or identical maritime contracts,<sup>157</sup> which contained standardized arbitration clauses.<sup>158</sup> A Department of

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best, a halftime score, with much more left to play.”).

153. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1765–66 (2010).

154. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 435 F. Supp. 2d 382, 386 (S.D.N.Y. 2006) (“The Court finds, therefore, that the arbitrators manifestly disregarded a well defined rule of governing maritime law that precluded class arbitration under the clauses here in issue and that their decision to the contrary must therefore be reversed.”), *rev'd*, 548 F.3d 85 (2d Cir. 2008), *aff'd*, 130 S. Ct. 1758 (2010).

155. *See infra* notes 179–86 and accompanying text (explaining *Stolt-Nielsen's* holding and treatment of manifest disregard).

156. *Stolt-Nielsen*, 130 S. Ct. at 1764.

157. *See id.* at 1764–65 (describing the maritime contracts, or “charter parties,” used by the parties in this case).

158. *See id.* at 1765 (giving an example of the arbitration clause found in one of the common charter parties, the Vegoilvoy charter party). The agreement stipulated that any dispute would be settled in New York by a panel of three arbitrators “experienced in the shipping business,” and that the arbitration would be conducted according to the provisions of the FAA. *Id.*

Justice investigation discovered that the petitioner shipping companies were engaged in illegal price-fixing, and the petitioners' customers, including AnimalFeeds, brought suit in federal court for antitrust damages.<sup>159</sup> The Second Circuit ruled that these claims were subject to the parties' respective arbitration agreements; AnimalFeeds and petitioners then agreed that they would arbitrate their disputes.<sup>160</sup> AnimalFeeds, however, sought to enter class arbitration against all the petitioners at once.<sup>161</sup> If that were allowed, AnimalFeeds would represent a class of "all direct purchasers of parcel tanker transportation services . . . from petitioners" at any time during the price-fixing conspiracy.<sup>162</sup>

AnimalFeeds and petitioners agreed that their respective arbitration agreements did not address whether class arbitration was allowable.<sup>163</sup> Following the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*,<sup>164</sup> which held that, as an initial matter, the arbitrator decides whether or not an arbitration agreement allows class arbitration, the issue of class action arbitrability for the antitrust claims was submitted to a panel of arbitrators for determination.<sup>165</sup> Noting that arbitrators in post-*Bazzle* arbitrations had "construed a wide variety of clauses in a wide variety of settings as allowing for class arbitration," and concluding that petitioners' expert evidence "did not show an intent to preclude class arbitration,"<sup>166</sup> the panel concluded that class arbitration was permitted under the arbitration clause and allowed the class action against Stolt-Nielson and the other shipping companies to move forward.<sup>167</sup>

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159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 87 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1758 (2010)).

163. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1765 (2010).

164. 539 U.S. 444 (2003) (plurality opinion). The plurality in that case held that as an initial matter, the arbitrator determines whether or not an arbitration agreement allows class arbitration. *Id.* at 452–53.

165. *Stolt-Nielsen*, 130 S. Ct. at 1765–66.

166. *Id.* at 1766.

167. *Id.*

The shipping companies sought review of this determination in federal court.<sup>168</sup> The District Court for the Southern District of New York concluded that the arbitrators had “manifestly disregarded” the clearly applicable law by failing to apply either the federal maritime principle that precluded class arbitration, or New York law, which would have incorporated the aforementioned maritime principle.<sup>169</sup> The court found that the arbitrators had misinterpreted *Bazzle*<sup>170</sup> and failed to do any meaningful choice of law analysis.<sup>171</sup> The contracts at issue were governed by federal maritime law and New York state law.<sup>172</sup> Supreme Court precedent dictates that in admiralty disputes, courts apply state law unless there is an established federal maritime rule, which there was in this case.<sup>173</sup> Because the arbitrator panel had applied neither federal maritime law nor New York law, the court vacated its decision.<sup>174</sup>

On appeal, the Second Circuit reversed and ordered denial of the petition to vacate.<sup>175</sup> The appellate court was clear in

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168. *Id.*

169. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 435 F. Supp. 2d 382, 386–87 (S.D.N.Y. 2006) (finding that the arbitrators disregarded two sources of applicable law), *rev’d*, 548 F.3d 85 (2d Cir. 2008), *aff’d*, 130 S. Ct. 1758 (2010). The court found that the arbitrators disregarded both an established maritime rule forbidding class arbitration as well as New York case law, found in *Evans v. Famous Music Corp.*, 807 N.E.2d 869 (N.Y. 2004), which held that “industry custom and practice” should be used when interpreting ambiguous contracts. *Stolt-Nielsen*, 435 F. Supp. 2d at 386–87. The industry custom in this case would have been, of course, the maritime prohibition on class arbitration. *Id.*

170. *Id.* at 384 (“[The Panel asserts] that resolution of the foregoing issue . . . is controlled by the Supreme Court’s decision in [*Bazzle*] . . . . But, even if, as the Panel suggests, the parties agree that *Bazzle* governs the issue, that underlying assertion is plainly wrong, and no agreement can make it right . . . .”).

171. *Id.* at 384–85

[T]he Panel, proceeding on the mis-assumption that *Bazzle* controlled the issue of whether the clauses here permitted class actions, failed to make any meaningful choice-of-law analysis but simply made vague and passing reference to its belief that its analysis . . . is consistent with New York law . . . and with federal maritime law.

172. *See id.* at 385–86 (explaining that federal maritime law and New York state law govern the contracts between the parties).

173. *See id.* at 385 (citing *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 316–17 (1955)).

174. *Id.* at 386–87.

175. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 102 (2d Cir. 2008), *rev’d*, 130 S. Ct. 1758 (2010).



explaining that manifest disregard was still an appropriate ground for vacatur in the Second Circuit.<sup>176</sup> They took issue, however, with the district court's application of the manifest disregard doctrine.<sup>177</sup> After analyzing the arbitration panel's decision, the court concluded that because "Stolt-Nielsen ha[d] cited no federal maritime law or New York State law establishing a rule of construction prohibiting class arbitration where the arbitration clause is silent on that issue[,] [t]he . . . decision to construe the contract language . . . to permit class arbitration was therefore not in manifest disregard of the law."<sup>178</sup>

The Supreme Court reversed the Second Circuit and upheld the district court's initial determination that allowing class arbitration in this circumstance was improper.<sup>179</sup> The Court's decision was based on the arbitrators' failure to properly consult federal maritime law, New York state law, or the FAA and its rules of decision.<sup>180</sup> The Court chastised the arbitration panel for "imposing its own policy choice," and held that it had "exceeded its powers," one of the enumerated grounds for vacatur under § 10(a) of the FAA.<sup>181</sup>

This holding seemed to raise more questions than it answered—chief among them: what about manifest disregard? The doctrine had been the foundation for both the district court's and Second Circuit's opinions, but it was barely mentioned in Justice Alito's majority opinion<sup>182</sup> and was completely absent from Justice Ginsburg's dissent.<sup>183</sup> The majority noted the Second Circuit's continued use of the doctrine after *Hall Street*, and then cryptically stated in a footnote: "We do not decide whether 'manifest disregard' survives our decision in *Hall Street* as an

176. *See id.* at 93–95 (explaining that the Second Circuit believes manifest disregard survived the *Hall Street* decision and remains a viable ground for vacatur).

177. *See id.* at 95–101 (analyzing the arbitral award under the Circuit's formulation of the manifest disregard standard).

178. *Id.* at 101 (citation omitted).

179. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1777 (2010).

180. *Id.* at 1770.

181. *Id.*

182. *See id.* at 1766 (acknowledging that both the district court and Second Circuit had based their decisions on manifest disregard).

183. *Id.* at 1777–83 (Ginsburg, J., dissenting).

independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.<sup>184</sup> So not only did the Court refuse to make any pronouncement on the doctrine's fate, but also it suggested a possibility completely at odds with its holding in *Hall Street*. How could manifest disregard survive as an "independent ground for review" when *Hall Street* explicitly held that *there are no grounds for review* independent of §§ 10 and 11?<sup>185</sup> To add a final dash of confusion, the Court ended the footnote by musing that "[a]ssuming, *arguendo*, that [manifest disregard] applies, we find it satisfied for the reasons that follow."<sup>186</sup> So if manifest disregard does exist, then implicitly the Second Circuit is applying it incorrectly.

The *Stolt-Nielsen* opinion has been viewed by some courts and commentators as an approval and application of manifest disregard by the Supreme Court.<sup>187</sup> While a convenient interpretation for proponents of manifest disregard, it does not do the opinion justice. The Supreme Court clearly found that the arbitrators had failed to apply the applicable law. But instead of finding that the arbitrators recognized a controlling legal principle and ignored it, the Supreme Court vacated the award based on the arbitrators' failure to apply a legal principle from an appropriate body of law.<sup>188</sup> This is not a manifest disregard standard under any traditional definition.<sup>189</sup>

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184. *Id.* at 1768 n.3 (majority opinion).

185. *See supra* notes 129–36 (explaining the holding in *Hall Street*).

186. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1768 n.3 (2010).

187. *See Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 482 (4th Cir. 2012)

The Supreme Court's reasoning in *Stolt-Nielsen* closely tracked the majority of circuits' approach to manifest disregard before *Hall Street*. It noted that there was law clearly on point, that the panel did not apply the applicable law, and that the panel acknowledged that it was departing from the applicable law.

*See also* *Sotheby's Int'l Realty Inc. v. Relocation Group LLC*, Civil Action No. 12-01322-WGY, 2013 WL 6704876 at \*4 n.4 (D. Conn. Dec. 9, 2013) ("Since the advent of *Hall Street*, however, the Second Circuit has interpreted manifest disregard to be a mere "judicial gloss" on the provisions found within 9 U.S.C. § 10. . . . The Supreme Court has expressly declined to temper the Second Circuit's appraisal.").

188. *See Stolt-Nielsen*, 130 S. Ct. at 1768–69

Rather than inquiring whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is

Both the district and appellate opinions also focused on the parties' agreement that either federal maritime law or New York State law governed the issue.<sup>190</sup> The Supreme Court noted this fact,<sup>191</sup> but instead decided the case based on the FAA itself.<sup>192</sup> Specifically, the Supreme Court cited many of its own decisions for the general proposition that arbitration is a creature of contract between the parties, and that the contract serves to limit the roles of arbitrators and courts.<sup>193</sup> From there, the Court extrapolated the principle that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."<sup>194</sup> The Court had shifted from *Hall Street* and seemed to be operating from a purely contractual viewpoint, pronouncing the

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construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.

The Court found that instead of looking to governing bodies of law, the arbitration panel based its decision on a "consensus among arbitrators that class arbitration is beneficial in a wide variety of settings." *Id.* at 1769. The arbitrators did not intentionally ignore legal principles that they accepted as governing; they simply did not recognize any governing legal principles at all, so instead applied their own policy judgment. *Id.*

189. See *supra* Part II.C (describing the general manifest disregard standard and different formulations applied in the federal circuits).

190. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 435 F. Supp. 2d 382, 386–87 (S.D.N.Y. 2006) (analyzing the dispute under both federal maritime law and New York State law), *rev'd*, 548 F.3d 85 (2d Cir. 2008), *aff'd*, 130 S. Ct. 1758 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 96 (2d Cir. 2008) (quoting *Stolt-Nielsen's* arbitration brief, which stated that even though *Stolt-Nielsen* believed federal maritime law should govern the dispute, and *AnimalFeeds* believed New York law should govern, the disagreement should not make a difference because the result under either law would be the same).

191. See *Stolt-Nielsen*, 130 S. Ct. at 1768 (stating that the arbitrators should have resolved the issue by looking "either to the FAA itself or to one of the two bodies of law that the parties claimed were governing, *i.e.*, either federal maritime law or New York law").

192. *Id.* at 1764 ("We granted certiorari in this case to decide whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*").

193. *Id.* at 1774–75 (quoting numerous Supreme Court cases dealing with arbitration).

194. *Id.* at 1775.

“foundational principle of the FAA that arbitration is a matter of consent.”<sup>195</sup>

*C. The Current Federal Circuit Split Over Manifest Disregard*

So where do *Hall Street* and *Stolt-Nielsen* leave manifest disregard? Given that a universally accepted definition of the doctrine had already proven elusive,<sup>196</sup> it should come as no surprise that these decisions have only exacerbated the problem.

Before *Hall Street*, all of the federal circuits had (at least ostensibly) adopted the manifest disregard doctrine. The Supreme Court’s holding and criticism of the doctrine prompted several circuits to abandon it altogether. The Fifth, Eighth, and Eleventh Circuits concluded that *Hall Street* completely abrogated the doctrine because it had been viewed as an extra-statutory ground for vacatur.<sup>197</sup>

Other circuits held fast to the doctrine, most notably the Second Circuit, as it made clear in its *Stolt-Nielsen* opinion.<sup>198</sup> The Fourth, Sixth, and Ninth Circuits have joined its position, agreeing that manifest disregard can survive *Hall Street*.<sup>199</sup> The

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195. *Id.*

196. *See supra* notes 85–108 and accompanying text (summarizing differences between federal circuits’ applications of manifest disregard).

197. *See* *Medicine Shoppe Int’l, Inc. v. Turner*, 614 F.3d 485, 489 (8th Cir. 2010) (“Appellant’s claims, including the claim that the arbitrator disregarded the law, are not included among those specifically enumerated in § 10 and are therefore not cognizable.”); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010) (“We hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street*.”); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (“*Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a *nonstatutory* ground for vacatur. Thus . . . it is no longer a basis for vacating awards under the FAA.”).

198. *Supra* note 176 and accompanying text.

199. *See* *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) (“[W]e find that manifest disregard continues to exist either as an independent ground for review or as a judicial gloss . . . .”); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (“We have already determined that the manifest disregard ground for vacatur is shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4), which states that the court may vacate “where the arbitrators exceeded their powers.”); *Coffee Beanery Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 419 (6th Cir. 2008) (“[T]his Court will follow its well-established precedent here and continue to employ the ‘manifest disregard’

Seventh Circuit has also continued to apply its own extremely conservative (and probably superfluous)<sup>200</sup> form of the doctrine.<sup>201</sup>

Still other circuits remain understandably perplexed by the Supreme Court's confusing treatment of the doctrine, and so have decided to wait on the sidelines. The First, Third, Tenth, and D.C. Circuits have yet to take a firm stance on whether or not manifest disregard remains viable.<sup>202</sup> This last category of jurisdictions is the most troubling because the lower courts are left without guidance and districts within the same circuit reach opposite conclusions.<sup>203</sup>

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standard.”).

200. See *supra* notes 105–07 (describing the Seventh Circuit's extremely narrow version of manifest disregard).

201. See *Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) (“Except to the extent recognized in *George Watts & Son*, ‘manifest disregard of the law’ is not a ground on which a court may reject an arbitrator’s award under the Federal Arbitration Act.”). The *George Watts & Son* standard is articulated *supra* in note 107.

202. See *Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.) Inc.*, 695 F.3d 181, 187 (1st Cir. 2012) (stating that the First Circuit has merely expressed in dicta that manifest disregard does not appear to survive *Hall Street*); *Affinity Fin. Corp. v. AARP Fin., Inc.*, 468 F. App'x 4, 5 (D.C. Cir. 2012) (refusing to decide whether manifest disregard survives *Hall Street*, because the arbitration award before the court did not rise to the level of manifest disregard); *Abbot v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 619 (10th Cir. 2011) (“[I]n the absence of firm guidance from the Supreme Court, we decline to decide whether the manifest disregard standard should be entirely jettisoned.”); *Paul Green Sch. of Rock Music Franchising, LLC v. Smith*, 389 F. App'x 172, 176–77 (3d Cir. 2010) (“In the wake of *Hall Street*, a circuit split has emerged regarding whether manifest disregard of the law remains a valid ground for vacatur. This Court has not yet entered that debate.”).

203. Compare *Santomeno v. U.S. Mineral Prods. Co.*, Civ. No. 2:12-3782 (KM), 2013 WL 103392, at \*8 n.7 (D.N.J. Jan. 7, 2013) (“Because *Hall Street* did not squarely address the issue [of manifest disregard] and the Third Circuit declined to rule on these common law grounds for review, I will assume that they survive.”), with *Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, Civil Action No. 11-6008, 2012 WL 5232180, at \*5 n.10 (E.D. Pa. Oct. 22, 2012) (“In light of the Supreme Court’s decision in *Hall Street*, which held that §10 of the FAA provides the exclusive grounds for vacatur, it appears that manifest disregard is no longer a viable basis for vacating an award. Accordingly, the Court will not address this argument.”). Other lower courts waffle like the circuits, treating claims of manifest disregard with skepticism but refusing to abrogate the doctrine. See, e.g., *FBR Capital Mkts. & Co. v. Hans*, Civil No. 13-00535 (RCL), 2013 WL 5665015 at \*2 (D.D.C. Oct. 18, 2013) (“Because the case law controlling the Court’s reasoning has refused to revive ‘manifest disregard’ since its apparent death knell in *Hall Street*, this Court evaluates FBR’s contention with considerable suspicion.”).

And what of *Stolt-Nielsen*'s reference to manifest disregard?<sup>204</sup> Did the Court attempt to resurrect the doctrine from the shallow grave of *Hall Street*? Or was the reference merely a nod to the Second Circuit's reliance on manifest disregard in its own *Stolt-Nielsen* decision?<sup>205</sup> Perhaps the Court sought to apply some altered or veiled form of manifest disregard when it vacated the arbitrator's decision.<sup>206</sup> Or perhaps the more likely answer is that the Court applied a different standard of review altogether.<sup>207</sup>

So should one care? Is the confusion surrounding manifest disregard really worth an expenditure of time and effort to correct? Consider this: In 2012 alone, over three years after *Hall Street* supposedly "closed the door" on manifest disregard,<sup>208</sup> the doctrine appeared in 142 federal cases.<sup>209</sup> Not surprisingly, the majority of these cases were in circuits that have expressly held that manifest disregard is still a viable doctrine.<sup>210</sup> Forty-one of the cases, however, arose in circuits that had yet to determine if the doctrine survived *Hall Street*.<sup>211</sup> And six of the cases arose in circuits that have expressly disallowed claims of manifest disregard.<sup>212</sup> The bottom line is that legal and judicial resources are clearly being spent arguing and analyzing a doctrine without concrete principles or clear acceptance.

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204. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1768 n.3 (2010).

205. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 96–101 (analyzing *Stolt-Nielsen*'s claim that the arbitrator manifestly disregarded governing law).

206. See *Stolt-Nielsen*, 130 S. Ct. at 1768 n.3 (“[A]ssuming, *arguendo*, that [manifest disregard] applies, we find it satisfied . . .”).

207. This Note argues that it did. *Infra* Part IV.C.

208. Sheridan, *supra* note 151, at 105.

209. The author conducted a search on Westlaw Next in February of 2013 for all federal cases in which “manifest disregard” appeared by typing: “adv: ‘manifest disregard’” into the search bar and counting all cases decided in 2012.

210. These cases occurred in the Second, Fourth, Sixth, Seventh, and Ninth Circuits in 2012.

211. These cases were found by running a search in Westlaw Next for “adv: ‘manifest disregard’” in the First, Third, Tenth, and D.C. Circuits and counting the cases decided in 2012.

212. These cases were found by running a search in Westlaw Next for “adv: ‘manifest disregard’” in the Fifth, Eighth, and Eleventh Circuits, and counting the cases decided in 2012.

This Note proposes a new framework for federal courts<sup>213</sup> to apply when analyzing challenges to awards or decisions of an arbitrator, when the challenge is based on a claim that the arbitrator incorrectly applied a legal principle or applied an incorrect legal principle. This framework is created in an attempt to harmonize Supreme Court precedent dealing with review of arbitral decisions and to strike a balance between those who favor expanded judicial review of arbitral awards<sup>214</sup> and those who argue for extremely limited judicial oversight.<sup>215</sup> Regardless of the chosen framework, though, there should be a final pronouncement on exactly what manifest disregard means and whether it is a viable ground for vacatur. As the Supreme Court itself has stated, “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”<sup>216</sup>

#### *IV. A New Framework for Analyzing Challenges to Awards Based on Alleged Arbitrator Error*

The critics of manifest disregard rail against the notion that courts can engage in substantive review of arbitrators’ decisions.<sup>217</sup> They point to the “procedural” nature of the FAA itself.<sup>218</sup> Section 10, which provides the exclusive grounds for

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213. See *supra* note 67 (explaining the difference between arbitral award challenges in state and federal court, and how those difference affect the application of manifest disregard).

214. See *supra* note 24 (listing publications in favor of expanded judicial review of arbitration awards).

215. See *supra* note 25 (listing publications opposed to expanded judicial review of arbitration awards).

216. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (citations omitted).

217. See Besser, *The Arbitrator Blew It!*, *supra* note 25, at 45 (“When parties choose arbitration, the role that the judiciary should seek is no role at all.”); Davis, *supra* note 24, at 130 (“[T]he scope of substantive review for arbitration awards has bred uncertainty among the courts and dismay among litigants unable to predict what level of review the courts will apply or how they will apply it.”).

218. See Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1, 2 (2009) (“[T]he FAA’s vacatur standards bar courts from second-guessing the substantive correctness of arbitral awards, permitting review only for *procedural* irregularities that evince extreme or outrageous conduct, such as corruption or fraud by one of the parties or the arbitrators.” (citations omitted)); Davis, *supra* note 24, at 115 (stating the grounds for vacatur in the FAA “limit

vacatur in federal court,<sup>219</sup> does indeed seem to focus its review on problems with the structure and propriety of the arbitration proceeding itself, and sanctions vacatur for things like corruption, fraud, or arbitrator misconduct.<sup>220</sup> Many took this focus on the impartiality and fairness of the proceedings to exclude vacatur based on the substantive inequities of decisions.<sup>221</sup>

The Supreme Court's recent *Stolt-Nielsen* decision guts that proposition. The Court never accused the arbitrators of being corrupt or biased, and no allegations of fraud were made. Nonetheless, the Court vacated the arbitration panel's award under § 10 of the FAA<sup>222</sup> because it had "imposed its own policy choice and thus exceeded its powers."<sup>223</sup> The *Stolt-Nielsen* holding, coupled with the rationale of the federal circuits that decided manifest disregard survives *Hall Street* as a facet of § 10(a)(4) of the FAA,<sup>224</sup> provide firm support for the availability of substantive review for arbitral awards.

The form that this review should take is an open question, though.<sup>225</sup> In *Stolt-Nielsen*, Justice Ginsburg criticized the majority for basing its ruling, in part, on a distinction between law and policy that she found absent from the facts of the case.<sup>226</sup>

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the scope of review to issues of gross procedural unfairness").

219. *Supra* note 131 and accompanying text.

220. 9 U.S.C. § 10(a)(1)–(3) (2012).

221. See Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 147 (1997) (arguing that review under the FAA should be limited to "the bare essentials needed to afford due process and to protect the state's own interests").

222. 9 U.S.C. § 10(a)(4) (allowing vacatur where "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made").

223. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1770 (2010).

224. See *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) ("[W]e conclude that, after *Hall Street Associates*, manifest disregard of the law remains a valid ground for vacatur because it is a part of § 10(a)(4). We note that we join the Second Circuit in this interpretation of *Hall Street Associates*.").

225. The current dissonance among the federal circuits provides ample support that substantive review of arbitral awards is in a very unclear state. See *supra* notes 196–203 and accompanying text (outlining the disagreement over manifest disregard).

226. *Stolt-Nielsen*, 130 S. Ct. at 1780–81 (Ginsburg, J. dissenting).



Substantive review should also not run afoul of the axiom that review is unavailable for arbitrator's mere errors in legal interpretation.<sup>227</sup>

This Note proposes a framework that attempts to walk the line between exhaustive substantive review of arbitrators' application of legal principles and review limited to the procedural propriety of the arbitration proceeding itself. The goal is to reconcile concerns about preserving the finality and expediency of the arbitration process<sup>228</sup> with concerns about potential arbitrator overreaching demonstrated in *Stolt-Nielsen*.<sup>229</sup> It is a series of questions and analyses designed to determine whether or not the arbitrator applied a legal or decisional principle from an appropriate body of law, or whether an extreme form of manifest disregard occurred. If the arbitrator did apply law from an appropriate source, then any error in her application would not be a ground for vacatur. If, however, the arbitrator failed to consult the appropriate set of rules,<sup>230</sup> or exhibited a documented manifest disregard of the controlling law,<sup>231</sup> she would have exceeded her powers under § 10(a)(4) of the FAA.<sup>232</sup>

At the outset, it must be made clear to which sort of petitions for vacatur this framework applies, and to which it does not. This framework is designed for situations in which a party to the arbitration proceedings seeks judicial review of the award for arbitrator error. The claim would involve either intentional conduct or an honest mistake on the part of the arbitrator. The framework requires only that the petitioner seek vacatur because the arbitrator allegedly did not correctly resolve the dispute.<sup>233</sup>

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227. *Supra* note 57 and accompanying text.

228. *See Boyd v. Davis*, 897 P.2d 1239, 1245 (Wash. 1995) ("Parties enter into arbitration agreements for numerous reasons. Among them are to reduce expenses of litigation and to ensure a speedy and final resolution of their disputes. The expectation of finality is at the very heart of any arbitration agreement.").

229. *See supra* notes 178–81 and accompanying text (describing how the arbitration panel exceeded its authority).

230. *Infra* Part IV.C.

231. *Infra* Part IV.E.

232. 9 U.S.C. § 10(a)(4) (2012) (permitting vacatur when a court finds that the arbitrator exceeded her powers when crafting the award).

233. However, the petition needs to have a reasonable basis for believing

Allegations of fraud, partiality, misconduct, or procedural irregularities would not be evaluated under this framework because those claims fall under § 10(a)(1)–(3).<sup>234</sup>

*A. Is There a Record of the Proceeding and a Reasoned Opinion? If not, were a Reasoned Opinion and a Record Required?*

As a general rule, arbitrators are under no obligation to provide a reasoned opinion along with the award.<sup>235</sup> The arbitrator does not need to explain himself; he just needs to communicate his final decision to the parties. There is also no general requirement that a record of the proceedings be kept.<sup>236</sup> In fact, arbitration organizations discourage written opinions to help support the finality of arbitration and discourage review.<sup>237</sup> If there is no reasoned opinion or record to evaluate, there is little upon which a reviewing court can base a decision to vacate.<sup>238</sup>

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that the arbitrator has erred in a manner warranting vacatur. Otherwise, sanctions may be appropriate. *See infra* Part IV.F.

234. 9 U.S.C. § 10(a)(1)–(3).

235. *See Wilko v. Swan*, 346 U.S. 427, 436 (1953) (“[Arbitrators’ awards] may be made without explanation of their reasons and without a complete record of their proceedings . . . .”); *Halligan v Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (“We want to make it clear that we are not holding that arbitrators should write opinions in every case or even in most cases.”). Reasoned opinions contain a determination of governing law and an application of that law to the parties’ evidence and arguments. Awards without such opinions merely state the actual award, perhaps accompanied by a brief statement of facts and the relief requested by the respective parties. *Compare Jamney Montgomery Scott LLC v. Bergdoll*, No. 12-0071, 2013 WL 653362 (FINRA) (Feb. 14, 2013) (Crumley, Arb., La Manna, Arb., Mayer, Arb.) (making an award without a reasoned opinion), *with Algonquin Shipping Corp. v. Archer Daniels Midland Co.*, SMA No. 4198, 2013 WL 685910 (S.M.A.S.S.) (Feb. 13, 2013) (Martowski, Arb., Siciliano, Arb., Arnold, Arb.) (issuing a reasoned opinion for the arbitral award).

236. *See Wilko*, 346 U.S. at 436 (noting that arbitrators need not keep a record of the arbitration proceeding); *Downey v. Sharp*, 51 A.3d 573, 584 (Md. 2012) (noting that there was no transcript of the arbitration proceedings and exhibits submitted during the arbitration were not included in the record).

237. *Advanced Micro Devices, Inc., v. Intel Corp.*, 9 Cal.4th 362, 395 (Cal. 1994).

238. *See Besser, The Arbitrator Blew It!*, *supra* note 25, at 43 (explaining the difficulties in reviewing an award for error when the arbitrator has not given a reasoned opinion).

Some courts have decided to make inferences based on the record available to them.<sup>239</sup> These excursions into the mind of an arbitrator may stem from judicial suspicion of arbitration itself;<sup>240</sup> the sort of suspicion the FAA was created to stop.<sup>241</sup> Any substantive review of arbitral awards must avoid such a sweeping, speculative inquiry into the rationale and justifications for an award. Failure to install such a safeguard does violence to the foundational principle of the FAA: that arbitral awards be respected and enforced by the courts.<sup>242</sup>

The Court of Appeals of Maryland<sup>243</sup> recently offered a fine criticism of such inferences in its *Downey v. Sharp*<sup>244</sup> decision. The lower court had vacated an arbitral award because it found the award to be “completely irrational.”<sup>245</sup> Although the arbitrator issued a written opinion, the opinion did not explain an apparent inconsistency contained in the award.<sup>246</sup> That court, however, did

239. See *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (using the lack of a reasoned arbitral opinion as evidence that the arbitrators manifestly disregarded the law).

240. See *id.*

[W]hen the Supreme Court ruled that an employee could be forced to assert an ADEA claim in an arbitral forum, the Court did so on the assumptions that the claimant would not forgo the substantive rights afforded by the statute, that the arbitration agreement simply changed the forum for enforcement of those rights and that a claimant could effectively vindicate his or her statutory rights in the arbitration. . . . This case puts those assumptions to the test.

(citations omitted).

241. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (“The [FAA] was intended to reverse centuries of judicial hostility to arbitration agreements . . . by placing arbitration agreements upon the same footing as other contracts.” (internal quotes omitted)).

242. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (“The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate . . .”).

243. Although the Maryland Court of Appeals was applying its codified version of the UAA, and not the FAA, the issue remains the same: courts should not infer arbitrator error from a scant record just because they disagree with or are confused by the award. *Downey v. Sharp*, 51 A.3d 573, 575, 583–84 (Md. 2012).

244. 51 A.3d 573 (Md. 2012).

245. *Id.* at 582.

246. *Id.* at 577–78 (explaining the irrationality claim). The arbitrator amended the award to include a phrase implying that the petitioner’s

not have access to any form of transcript from the proceedings; none was created.<sup>247</sup> The Court of Appeals criticized the lower court's determination of irrationality, stating, "without any knowledge of what was said or submitted at the arbitration hearing, [the lower court's determination] might itself be deemed 'irrational.'"<sup>248</sup> The lower court had not only "refused to defer to the arbitrator's findings of fact and conclusions of law," but had "rendered its own findings of fact and conclusions, which were contrary to those of the arbitrator."<sup>249</sup> The lower court had overstepped its bounds.

It should be beyond a court's authority to vacate awards based on mere assumptions; if the parties want substantive judicial review to be available, they need to provide a basis for the court's evaluation.<sup>250</sup> This means inserting into arbitration agreements a requirement that arbitrators provide reasoned opinions for their awards that address both parties' arguments.<sup>251</sup> If a party wants to challenge an award by claiming that the arbitrator applied an inappropriate legal principle, then a reviewing court needs to know exactly which legal principle the arbitrator applied and why she applied it.<sup>252</sup> If an opinion does not exist, then the losing party will just have to live with the

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predecessor in title had an express easement through the other party's land. *Id.* at 578. The petitioner argued that this amendment rendered the award irrational, because in another portion of the award, the arbitrator stated that the predecessor did *not* have a valid express easement. *Id.*

247. *Id.* at 575–76.

248. *Id.* at 585.

249. *Id.*

250. See *Wilko v. Swan*, 346 U.S. 427, 435 (1953) ("[Because the arbitrators'] award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact,' . . . cannot be examined.").

251. In order to facilitate review, the reasoned opinion needs to reflect the arbitrator's conclusions regarding both parties' cases. Otherwise, the arbitrator could make an improper award and simply not address what should have been the winning argument. See *Halligan v. Piper Jaffray*, 148 F.3d 197, 199–200 (2d Cir. 1998) (describing how the correct legal principles were explained to the arbitrators, who then issued an opinion that did not contain any mention of them).

252. See *Besser, The Arbitrator Blew It!*, *supra* note 25, at 43 (positing that substantive review is not possible if a reviewing court does not know how the arbitrator crafted the award).

award and perhaps insist on reasoned opinions in the future. If a reasoned opinion and record were required and yet not generated, then the arbitrator has exceeded her authority under § 10(a)(4).<sup>253</sup>

*B. Which Bodies of Law or Rules Govern the Arbitration?*

The arbitrator must resolve a dispute by applying a rule or principle from a governing body of law.<sup>254</sup> This is because through their submission to arbitration, the parties decide which rules will be used to settle the disagreement.<sup>255</sup> If an arbitrator refuses to apply a principle from a governing body of law, then the arbitrator has exceeded her authority under the submission.<sup>256</sup>

The arbitrator can determine which bodies of law govern the dispute by looking both to the parties' contract and to some default rules.<sup>257</sup> The default rules are derived from case precedent, particularly the Supreme Court's.<sup>258</sup> The key to this analysis, though, is the parties' intent.<sup>259</sup> Because arbitration is a contractual form of dispute resolution, the parties have almost<sup>260</sup>

253. This is because an arbitrator's failure to follow explicit instructions in the agreement is a clear violation of § 10(a)(4). *See* *W. Canada S.S. Co. v. Cia. De Nav. San Leonardo*, 105 F. Supp. 452, 453–54 (S.D.N.Y. 1952) (vacating an arbitral award because the proceedings were not conducted as specified in the agreement).

254. *See* *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1768 (2010) (“Because the parties agreed their agreement was ‘silent’ in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators’ proper task was to identify the rule of law that governs in that situation.”).

255. *See supra* note 6 and accompanying text (explaining that parties to arbitration may agree on the rules governing the arbitration).

256. *See Stolt-Nielsen*, 130 S. Ct. at 1770 (stating that the arbitration panel exceeded its power by “imposing its own policy choice”).

257. *Infra* Part IV.C–D.

258. *Infra* Part IV.C–D.

259. The wrinkle here is that the arbitrator has the authority to determine the parties' intent as expressed in the agreement. *See* *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003) (plurality opinion) (stating that arbitrators are responsible for interpreting the arbitration agreement). This is why the framework incorporates default rules; the arbitrator and any reviewing court will assume that the parties implicitly incorporated the default rules into the contract unless otherwise specified, limiting the arbitrator's discretion when determining the governing law.

260. There are a few things parties cannot do through contract. They cannot

complete control over which issues are arbitrated,<sup>261</sup> how the proceedings are conducted, and which rules are applied.<sup>262</sup> The last point—which rules govern the arbitration—is determined either through the parties’ express direction in the contract itself or inferences regarding the party’s intent made by resorting to default standards.<sup>263</sup>

Broadly speaking, an arbitration proceeding is governed by two separate kinds of law: substantive law and arbitration law.<sup>264</sup> Arbitration law consists of federal arbitration law,<sup>265</sup> applicable state arbitration law,<sup>266</sup> and any private arbitration rules chosen by the parties in their agreement.<sup>267</sup> Substantive law consists of all the rules that may be applied to settle the arbitrable disputes themselves.<sup>268</sup> The distinction is important because the arbitrator will have to interpret provisions in the agreement to refer either to substantive law, arbitration law, or both.<sup>269</sup>

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contract for unconscionable or fraudulent proceedings. *See* 9 U.S.C. § 2 (2012) (allowing arbitration agreements to be voided by generally applicable contract defenses). They cannot submit issues to arbitration that have been held inarbitrable (although there are very few disputes that cannot be arbitrated). *See* RICHARD A. LORD, 21 WILLISTON ON CONTRACTS § 57:28 (4th ed., 2012) (stating that criminal matters cannot be arbitrated). They also cannot alter the scope of judicial review under the FAA. *See supra* notes 129–35 (discussing *Hall Street’s* foreclosure of expanded judicial review).

261. *See* *First Options of Chi. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[T]he arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . .”).

262. *Supra* note 6 and accompanying text.

263. *Infra* Part IV.D.2–4.

264. *See* Gaitis, *Clearing the Air*, *supra* note 22, at 33–34 (discussing the difference between arbitration law and substantive law).

265. 9 U.S.C. §§ 1–307 (2012).

266. This includes both a state’s codification of its arbitration rules, *see, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. §§ 3-201–3-234 (2012), as well as any other state law that impacts arbitration proceedings. *See, e.g.*, *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 56 (1995) (describing the New York case law forbidding arbitrators from awarding punitive damages).

267. *See Mastrobuono*, 514 U.S. at 61 (analyzing the private arbitration rules that the parties incorporated into their arbitration agreement, the National Association of Securities Dealers rules).

268. *See id.* at 59–60 (distinguishing between substantive rights and obligations and allocation of power to arbitral tribunals).

269. *See id.* at 59–60 (positing interpretations of the arbitration agreement that would incorporate either New York’s substantive and arbitration law, or merely New York’s substantive law).

The arbitrator must determine which bodies of substantive law and which bodies of arbitration law govern the dispute. Federal substantive law occupies distinct areas of the legal sphere, and is generally based on statutes.<sup>270</sup> Because statutory rights usually<sup>271</sup> can be arbitrated, the arbitrator must determine if any federal statutes or federal common law govern a dispute. State substantive law will generally be implicated as well, both common law and statutory law.<sup>272</sup> Only states possessing a material connection to the dispute are potential sources of governing rules.<sup>273</sup> Federal arbitration law is grounded in the FAA and is presumed to govern any domestic arbitration dealing with maritime transactions or interstate commerce.<sup>274</sup> This is because §§ 1 and 2 of the FAA preempt conflicting state law and § 2 contains a broad federal pro-arbitration policy.<sup>275</sup> States have their own arbitration law as well, which consists of both state arbitration statutes similar to the FAA, as well as arbitration-related jurisprudence and statutes that affect arbitration agreements and proceedings.<sup>276</sup> Lastly, the parties may choose to

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270. See Thomas E. Baker, *The Eleventh Circuit's First Decade Contribution to the Law of the Nation, 1981-1991*, 19 NOVA L. REV. 323, 368 (1994) ("Federal law is based on statute.").

271. Not all statutory rights are arbitrable; Congress has the authority to specify certain statutory claims that cannot be resolved in arbitration and must be brought in court. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

272. THOMAS A. OEHMKE, 1 COMM. ARB. § 11:2 (2012).

273. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 cmt. b, c (1971) (illustrating the reason for conflict-of-law analysis). Also note that while choice of law provisions make conflict of law analyses easier, state laws are of course presumed to apply to an arbitration agreement not containing such a provision. See *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 59 (1995) ("[I]f a . . . contract . . . had been signed in New York and was to be performed in New York, presumably 'the laws of the State of New York' would apply [to the arbitration], even though the contract did not expressly so state.").

274. See *Sovak v. Chungai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (stating that there is a "presumption that the FAA supplies the rules for arbitration").

275. See *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) (stating that § 2 of the FAA reflects a "liberal federal policy" in favor of arbitration).

276. *Supra* note 266 and accompanying text.

incorporate private arbitration rules, such as the American Arbitration Association's.<sup>277</sup>

Just as the parties may incorporate private arbitration rules into the agreement, they may also incorporate specific state law as well. This is done through a choice of law provision in either the contract or arbitration agreement itself.<sup>278</sup> These provisions dictate which state's body of law will be applied to disputes arising under the agreement.<sup>279</sup> The parties may also modify their chosen governing bodies of law by either including or omitting specific rules.<sup>280</sup> Because arbitration is a matter of consent, the parties are only constrained in their choice of governing rules by generally applicable contract defenses<sup>281</sup> or the inviolability of statutory rights.<sup>282</sup> Notwithstanding those restrictions, the parties may generally agree to be bound by whatever rules they see fit.

Arbitrators are bound to enforce choice of law provisions and apply the law of the chosen state. This may include both the state's substantive law and its arbitration law.<sup>283</sup> Because the

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277. See *Rules & Procedures*, AM. ARBITRATION ASS'N, [www.adr.org/aaa/faces/rules](http://www.adr.org/aaa/faces/rules) (last visited Feb. 24, 2013) (describing the American Arbitration Association's rules) (on file with the Washington and Lee Law Review).

278. See Ross Ball, *FAA Preemption by Choice-of-Law Provisions: Enforceable or Unenforceable?*, 2006 J. DISP. RESOL. 613, 613 (explaining choice of law provisions and their relationship to arbitration). Choice of law provisions are common in arbitration agreements because they remove most of the uncertainty surrounding which state's law will be applied to a dispute. See Stephen K. Huber & E. Wendy Trachte-Huber, *Top Ten Developments in Arbitration in the 1990s*, 55-JAN. DISP. RESOL. J. 24, 30 (2001) ("Choice of law provisions are common in arbitration contracts . . ."); John A. Taylor, *Commercial and Contract Law*, 55 WAYNE L. REV. 85, 99 (2008) (noting the "ever-increasing popularity of forum-selection and choice of law provisions in contracts").

279. See *Volt Info Scis., Inc., v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989) (stating that a choice of law provision in the parties' contract designating California law as governing means that a dispute arising under the contract will be decided under California law).

280. See *W. Can. S.S. Co. v. Cia. De Nav. San Leonardo*, 105 F. Supp. 452, 453 (S.D.N.Y. 1952) (describing the arbitration agreement, which contained a requirement that three arbitrators decide the dispute).

281. 9 U.S.C. § 2 (2012).

282. See *infra* Part IV.D.1 (explaining why statutory rights cannot be defeated through arbitration agreements).

283. See *Volt*, 489 U.S. at 478–79 (applying both state substantive law and state arbitration law to the dispute because the Court found that the parties'



parties have expressly agreed to be bound to that particular state's law, the laws of other states that may have otherwise been implicated are displaced.<sup>284</sup> Between federal substantive and arbitration law, state substantive and arbitration law,<sup>285</sup> and any private arbitration rules or substantive rules the parties have expressly included in the agreement, the arbitrator often has numerous sources of governing law from which to choose.<sup>286</sup>

*C. Did the Arbitrator Apply a Principle or Rule from a Governing Body of Law?*

Under this framework, an arbitral award would be vacated if a petitioning party was able to show that the arbitrator did not apply a rule or principle from a governing body of law. This rule is derived from the Supreme Court's decision in *Stolt-Nielsen*. In that case, the Court vacated an arbitrator's decision under § 10(a)(4) of the FAA, declaring that the arbitrators had exceeded their authority.<sup>287</sup> But the Court did not find an excess of authority under its more traditional formulations,<sup>288</sup> nor did the

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agreement required applying both).

284. See *Mastrobuono v. Shearson Lehman Hutton*, 812 F. Supp. 845, 846–48 (N.D. Ill. 1993) (applying New York law even though the petition was filed in Illinois). Statutory rights, however, cannot be displaced, because these rights cannot be waived through arbitration. See *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 215–16 (2d Cir. 2012) (stating that statutory claims may only be arbitrated if the arbitration proceeding can effectively vindicate the statutory right).

285. Which may or may not be expressly incorporated through a choice of law provision.

286. Trade customs and international law may also be implicated. THOMAS A. OEHMKE, 1 COMM. ARB. § 11:2 (2012).

287. *Supra* notes 179–81 and accompanying text.

288. Courts have commonly found violations of § 10(a)(4) when arbitrators decide a dispute that the parties did not agree to submit to arbitration, see *Madison Hotel v. Hotel & Rest. Employees, Local 25, AFL-CIO*, 128 F.3d 743, 749 (D.D.C. 1997) (finding that the arbitrator exceeded his authority by ordering the reestablishment of an employment position when only individual employee disputes were submitted to arbitration), or when the arbitrator did not follow specific instructions in the arbitration agreement. See *In re Salomon Inc. S'holders' Derivative Litig.* 91 Civ. 5500, 68 F.3d 554, 561 (2d Cir. 1995) (refusing to send a matter to arbitration because the agreement specifically required arbitration to be conducted by the New York Stock Exchange (NYSE) and the NYSE refused to participate).

Court's analysis support a finding of manifest disregard.<sup>289</sup> Under the *Stolt-Nielsen* decision, arbitrators must consult governing law and find a principle applicable to the dispute.<sup>290</sup> If the arbitrator fails to do so, she exceeds her authority by acting "as if [she] had a common-law court's authority to develop what [she] viewed as the best rule."<sup>291</sup>

The federal policy favoring the finality and expediency of arbitration dictates that arbitral awards cannot be reviewed for arbitrator error in applying the law.<sup>292</sup> It is not within the arbitrator's power, though, to decide sua sponte which body of law governs the dispute itself, or to make up her own rule.<sup>293</sup> This power rests solely in the hands of the parties who have agreed to be bound by the arbitrator's decision. Just as the parties decide which disputes will be submitted to arbitration, they also decide which rules will be applied to resolve those disputes.<sup>294</sup> Failing to apply a principle from governing law thus constitutes an impermissible exceeding of arbitrator authority.<sup>295</sup>

To determine if an award should be vacated for failing to be grounded in governing law, an adequate record of the arbitration proceeding is required.<sup>296</sup> This is the only way to determine that the petitioning party actually argued in favor of applying a principle from a governing body of law. Challenging an arbitral award is akin to seeking appellate review of a judgment. The reviewing court does not necessarily decide the appropriate

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289. *Supra* notes 188–89 and accompanying text.

290. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1768–69 (2010) (stating that arbitration panel should have consulted governing bodies of law to see if a "default rule" existed in any of them, which would have resolved the issue).

291. *Id.* at 1769.

292. *See Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) (stating that "mere allegations of error are insufficient" to warrant award vacatur).

293. *Supra* note 291 and accompanying text.

294. *See supra* note 6 and accompanying text (stating that parties control which rules will govern the arbitration proceeding).

295. *See supra* notes 179–81 and accompanying text (explaining the holding of *Stolt-Nielsen*).

296. *See Besser, The Arbitrator Blew It!*, *supra* note 25, at 43 (explaining the difficulties in reviewing an award for error when the arbitrator has not given a reasoned opinion).

resolution of the dispute, but rather determines if the arbitration proceedings were conducted correctly.<sup>297</sup>

A basic tenet of appellate review is the necessity of presentation: in order for an issue to be addressed on appeal, it must have been presented to the lower tribunal.<sup>298</sup> This rule is necessary to ensure that adjudicators have all of the relevant information presented to them and to protect parties from being blindsided by unknown issues on appeal.<sup>299</sup> These same principles should apply with even more fervor to arbitral award challenges, because arbitration strives to attain a level of speed and finality often absent from litigation.<sup>300</sup> If an arbitrator is not at least made aware of the potential applicability of a body of law, then a party should be prevented from later challenging the award because that specific law was never applied.

This *Stolt-Nielsen*-based standard is not particularly high, and it is intentionally so. A more searching review would necessarily implicate an arbitrator's interpretations of the law, which are not subject to challenge.<sup>301</sup> The parties have waived their right to that level of review.<sup>302</sup> In order to successfully vacate an award under this standard, a petitioning party normally must demonstrate that the arbitrator did not resort to *any* body of governing law.<sup>303</sup> But there is one exception.

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297. See 9 U.S.C. § 10(b) (2012) ("If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 435 F. Supp. 2d 382, 387 (S.D.N.Y. 2006) (vacating the arbitration panel's decision and remanding the dispute back to arbitration), *aff'd*, 130 S. Ct. 1758 (2010).

298. See *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below.").

299. *Id.*

300. See *supra* notes 55, 60, 61 and accompanying text (outlining the goals and attractive features of arbitration).

301. See *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418 (6th Cir. 2008) (stating that an arbitrator's "mere error in interpretation or application of the law is insufficient" to justify vacating the award).

302. See Besser, *The Arbitrator Blew It!*, *supra* note 25, at 39 ("[W]hat happens when an arbitrator demonstrably has blown it? Have parties consenting to this forum irrevocably bargained for such a result, without recourse? This writer believes they have . . .").

303. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1770 (2010) ("[I]nstead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own

Sometimes, the arbitrator does not have a completely unfettered choice between bodies of law: If controlling bodies of law conflict over the appropriate solution to a dispute, the arbitrator must perform a conflict-of-laws analysis.

*D. Did Governing Bodies of Law Conflict on the Issue Decided by the Arbitrator? If So, Did the Arbitrator Perform a Conflict of Laws Analysis?*

Suppose now that the arbitrator has encountered a problem: different governing bodies of law offer conflicting dispositions to the issue at hand. The parties disagree about which body of law should control, and they have presented evidence in favor of their respective positions. Because the arbitrator is bound to apply one of the governing bodies of law, he must perform a choice of law analysis.<sup>304</sup>

A choice of law analysis is a method employed by an adjudicator to determine which body of law should control a given dispute. Choice of law is itself a body of law, and each state has its own choice of law principles that its courts use to resolve conflicts of law.<sup>305</sup> In this Note, the term “choice of law” is used broadly to include not only conflicts between different states’ laws but also conflicts between state law and private arbitration law as well as conflicts between state law and federal law. Because a choice of law analysis is itself an interpretation of choice of law principles, an arbitrator’s decision to apply one body of governing law over another should generally not be reviewable.<sup>306</sup>

Federal precedent has identified a few key exceptions to this rule, though, and arbitrators should be keenly aware of them. Under this Note’s framework, failure to abide by these established exceptions would be grounds for vacatur.

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policy choice and thus exceeded its powers.” (emphasis added)).

304. *Supra* note 254 and accompanying text.

305. *Supra* note 273 and accompanying text.

306. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003) (plurality opinion) (stating that arbitrators, not courts, should decide “what kind of arbitration proceeding the parties agreed to” because that question depends on contract interpretation and arbitration procedures).

Allowing vacatur under those circumstances is premised on two claims: First, arbitration cannot frustrate statutory rights, including rights contained in the FAA.<sup>307</sup> This rule can trump even the express provisions in the arbitration agreement.<sup>308</sup> Second, whenever the parties' intent can be found in their agreement, it must be applied. Not doing so would frustrate the contractual nature of arbitration.<sup>309</sup> When a choice of law analysis is clearly settled, then the parties incorporate that resolution into their agreement and the arbitrator is bound to uphold it.

### *1. First Exception: Frustration of Statutory Rights*

The first exception is the most important and trumps any other considerations. This is because it is based on an absolute rule: agreements to arbitrate cannot act as waivers of statutory rights.<sup>310</sup> This means that whenever a party arbitrates a dispute involving a statutory right, the arbitrator is bound to enforce that right and apply the law governing it. This absolute rule stems from the prior prohibition on the arbitration of statutory rights.<sup>311</sup> For most of its history in this country, arbitration was seen as an unsuitable forum for such claims.<sup>312</sup> Now that the federal policy

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307. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”).

308. See *infra* Part IV.D.1 (explaining the importance of protecting statutory rights in arbitration).

309. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (“[W]e have repeatedly referred to the Act’s basic objective as assuring that courts treat arbitration agreements like all other contracts.” (internal quotes omitted)).

310. *Supra* note 307.

311. See *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (“[W]e decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act.”), *overruled by* *Rodrigues de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

312. See *Mitsubishi Motors*, 473 U.S. at 626–27

Some time ago this Court expressed hope for the [FAA’s] usefulness both in controversies based on statutes or on standards otherwise created . . . and we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral

in favor of arbitration has been clearly established to encompass statutory rights, courts must ensure that arbitrators enforce these rights.<sup>313</sup>

This rule is so important that it can trump the express terms of the parties' agreement. The Second Circuit demonstrated this point clearly with its *In re American Express Merchants' Litigation*<sup>314</sup> decision. In that case, the court was asked to consider whether a provision in an arbitration clause that clearly prohibited class arbitration was valid in light of the plaintiffs' statutory right to assert claims under the Sherman Act.<sup>315</sup> American Express argued that the Supreme Court's decision in *Stolt-Nielsen* rendered class action arbitration waivers enforceable per se.<sup>316</sup> The Second Circuit disagreed and instead looked to whether the class action waiver would "deprive the plaintiffs of the statutory protections of the antitrust laws."<sup>317</sup> Relying on economic evidence, the court concluded that, as a matter of law, forcing the plaintiffs to bring their Sherman Act claims individually rather than as a class effectively precluded them from bringing their claims at all.<sup>318</sup> This was because each plaintiff's individual claim was far too small to justify the cost of an arbitration proceeding.<sup>319</sup> The court emphasized that while arbitration can be an "effective vehicle for vindicating statutory rights," arbitration is only appropriate if it allows the claimant to *effectively* vindicate those rights.<sup>320</sup>

## 2. Second Exception: Federal Preemption—State Laws Singling Out Arbitration

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tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

(internal quotes omitted).

313. *See id.* at 628 (recognizing that parties' statutory rights must be protected in arbitration).

314. 667 F.3d 204 (2d Cir. 2012).

315. *Id.* at 212.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at 241.

320. *Id.*

The next two choice of law principles (which are subordinate to the first)<sup>321</sup> involve federal preemption of state arbitration law. Federal law, including federal arbitration law, is the supreme law of the land and preempts conflicting state law.<sup>322</sup> Preemption occurs when either Congress specifically mandates that a piece of legislation preempts state law,<sup>323</sup> or when preemption is implied.<sup>324</sup> A state law is implicitly preempted when it is either impossible to comply with both state and federal law,<sup>325</sup> or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>326</sup>

The FAA has no express preemption language,<sup>327</sup> but the Supreme Court held in *Southland Corp. v. Keating*<sup>328</sup> that §§ 1 and 2 of the FAA<sup>329</sup> preempt conflicting state law.<sup>330</sup> Section 1 defines the scope of the Act,<sup>331</sup> while § 2 contains the chief directive of the FAA, mandating recognition and enforcement of

321. This is because although federal preemption principles can be defeated by the parties’ express agreement, *infra* Part IV.D.4, statutory rights cannot be waived by express agreement. *Supra* Part IV.D.1.

322. See U.S. CONST., art. IV, cl. 2 (stating that federal law is supreme).

323. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) (“Pre-emption fundamentally is a question of Congressional intent . . . and when Congress has made its intent clear through explicit statutory language, the court’s task is an easy one.”).

324. See Drahozal, *supra* note 42, at 397 (discussing implied preemption and its two main forms).

325. See *id.* (finding state law preempted because they were so inconsistent that it would have been impossible to comply with both (citing *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963))).

326. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

327. 9 U.S.C. §§ 1–307 (2012).

328. 465 U.S. 1 (1984).

329. Section 2 makes agreements to arbitrate “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. Section 1 provides the definitions applicable to § 2. *Id.* § 1.

330. See *Southland*, 465 U.S. at 16 (stating that § 2 of the FAA is a “substantive rule applicable in state as well as federal courts,” and that through it, Congress “intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements”); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 n.6 (1989) (“[W]e have held that the FAA’s ‘substantive’ provisions—§§ 1 and 2—are applicable in state as well as federal court . . .”).

331. 9 U.S.C. § 1.

arbitral awards.<sup>332</sup> The “federal policy in favor of arbitration” and the federal substantive case law are derived from § 2.<sup>333</sup> State law holds one powerful trump card over the FAA, though. Because arbitration is a creature of contract, common contract defenses, such as fraud and unconscionability, are not preempted and can invalidate arbitration agreements.<sup>334</sup>

Cases following *Southland* established that the FAA preempts any state law singling out arbitration agreements for categorical special regulation.<sup>335</sup> That preemption principle is exemplified by the Supreme Court’s recent decision in *AT&T Mobility LLC v. Concepcion*.<sup>336</sup> In *Concepcion*, the Court held that a California law invalidating all arbitration agreements containing collective-arbitration waivers was preempted.<sup>337</sup> The California law declared all such waivers unconscionable, and the *Concepcions* argued that the law fit within the saving clause in § 2 encompassing unconscionable contracts.<sup>338</sup> The Supreme

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332. See *id.* § 2; *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) (stating that § 2 of the FAA is the “primary substantive provision of the Act”).

333. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (stating that the FAA “created a body of federal substantive law,” and the principle that an arbitration provision is severable from the main contract is part of that federal substantive law); *Mercury Const. Corp.*, 460 U.S. at 24 (describing § 2 as reflecting a “liberal federal policy favoring arbitration”).

334. See 9 U.S.C. § 2 (2012) (“A written provision . . . to settle by arbitration a controversy . . . shall be valid, irrevocable and enforceable, save upon grounds as exist at law or equity for the revocation of any contract.”); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA].”).

335. See *Casarotto*, 517 U.S. at 687 (“Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (“A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with the text of 9 U.S.C. § 2.”); *Drahozal*, *supra* note 42, at 408–10 (explaining the relationship between how closely a state law singles out arbitration and its likelihood of being found preempted by the FAA); Timothy J. Heinsz, *The Revised Uniform Arbitration Act: An Overview*, 56 DISP. RESOL. J. 28, 29 (2001) (“[A] state may not treat an arbitration contract differently, and particularly less favorably, than other contracts.” (citations omitted)).

336. 131 S. Ct. 1740 (2011).

337. *Id.* at 1753.

338. *Id.* at 1746–47; see also 9 U.S.C. § 2 (2012) (providing that agreements to arbitrate shall be enforceable except “upon such grounds as exist at law or in



Court disagreed, and while acknowledging that unconscionability is a viable ground for a state court to invalidate an arbitration agreement, the Court also stated that nothing in § 2 should be construed to “preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>339</sup> Because this law singled out arbitration agreements and attempted to impose class arbitration on unwilling parties, it conflicted with a basic goal of the FAA and was thus preempted.<sup>340</sup> The state law was not aimed at invalidating specific arbitration agreements as unconscionable under their individual circumstances, but at categorically invalidating all class-arbitration waivers.

### *3. Third Exception: Federal Preemption—State Laws Invalidating Agreements to Arbitrate*

State law is also preempted if, although not singling out arbitration agreements for special regulation, the law still has the effect of invalidating the agreement to arbitrate. The Supreme Court’s most recent foray into this type of arbitration invalidation occurred in 2008 with its *Preston v. Ferrer*<sup>341</sup> decision. The case revolved around a dispute between a television personality and his talent agent.<sup>342</sup> Ferrer and Preston had signed a “personal management” contract, but Ferrer failed to pay Preston his management fees.<sup>343</sup> Preston sought to arbitrate the dispute, but Ferrer lodged a petition with the California Labor Commission.<sup>344</sup> Ferrer claimed that Preston was actually operating as a talent agent, and thus was required to possess a license for such activities under California’s Talent Agencies Act (TAA).<sup>345</sup> He had no license.<sup>346</sup> Their contract contained a choice

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equity for the revocation of any contract”).

339. *Concepcion*, 131 S. Ct. at 1748.

340. *Id.* at 1748–49.

341. 552 U.S. 346 (2008).

342. *Id.* at 350. The personality was Judge Alex Ferrer, the star of a courtroom television show on Fox. *Id.*

343. *Id.* at 350–52.

344. *Id.* at 350.

345. *Id.*

346. *Id.*

of law provision designating California law as governing, as well as a provision declaring that any conflict between the agreement and present or future law should be resolved in favor of applying legal rules over contractual rules.<sup>347</sup>

The crux of the case was whether the FAA preempted the portion of California's TAA vesting initial adjudicative authority over talent agency disputes in the California Labor Commission.<sup>348</sup> The TAA required that the Commission would decide all disputes arising under the Act.<sup>349</sup> It did not single out arbitration agreements for special regulation, but it had the effect of invalidating, or at least temporarily suspending, the arbitration agreement until the Commission had rendered its own decision on the matter.<sup>350</sup> So the question before the Court was not whether the TAA was preempted entirely,<sup>351</sup> but whether the Commission or the arbitrator had the authority to decide whether Preston was acting as an unlicensed talent agent in violation of the TAA.<sup>352</sup>

The Supreme Court held the jurisdictional component of the TAA preempted.<sup>353</sup> Regardless of whether a state law vests primary jurisdiction over a dispute in a court or an administrative agency, the effect is the same: any arbitration agreements covering the dispute are invalidated.<sup>354</sup> Ferrer argued that the jurisdictional grant merely delayed arbitration—that once the Commission exercised its primary jurisdiction, the parties were free to compel arbitration.<sup>355</sup> The Court rejected his argument, stating that allowing the Commission to exercise its jurisdiction would frustrate arbitration's "streamlined proceedings and expeditious results."<sup>356</sup>

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347. *Id.* at 361.

348. *Id.* at 349–50.

349. CAL. LAB. CODE § 1700.44(a) (2012) ("In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner . . .").

350. *Preston v. Ferrer*, 552 U.S. 346, 356–57 (2008).

351. *Id.* at 352.

352. *Id.*

353. *Id.* at 349.

354. *Id.* at 354–55.

355. *Id.* at 356–57.

356. *Id.* at 357–58 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-*

#### 4. *The Exception to the Federal Preemption Exceptions: Party Agreement*

So if a state law singles out arbitration agreements for special regulation not applicable to contracts generally, or if a state law has the effect of invalidating an agreement to arbitrate, the state law is preempted. The arbitrator cannot apply the state law if she determines that it fits in one of those two categories. But because (almost)<sup>357</sup> all rules governing arbitration proceedings must yield to the parties' intent, the terms of the arbitration agreement can overcome federal preemption.

The parties are free to choose to apply state law over the FAA, or even not to apply federal arbitration law at all. The Supreme Court firmly established this principle in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*.<sup>358</sup> That case involved Stanford University's alleged breach of its construction contract with Volt, which contained both a choice of law provision designating California law as governing and an arbitration clause.<sup>359</sup> Volt sought to compel arbitration under the agreement, while Stanford filed suit in state court to stay the arbitration proceedings.<sup>360</sup> Stanford was seeking indemnity from two other contractors, whose contracts with Stanford were not subject to arbitration agreements.<sup>361</sup> California law allowed a court to stay compulsory arbitration proceedings until related litigation between a party to the agreement and a nonparty had been resolved.<sup>362</sup> Volt argued that the California law was preempted by § 2 of the FAA.<sup>363</sup>

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Plymouth, Inc., 473 U.S. 614, 633 (1985)).

357. The parties still cannot contract their way into waivers of statutory rights, *supra* Part IV.D.1, or around common law contract defenses, 9 U.S.C. § 2 (2012).

358. 489 U.S. 468 (1989).

359. *Id.* at 470–71.

360. *Id.*

361. *Id.* at 471.

362. *Id.*

363. 9 U.S.C. § 2 (2012) (establishing a federal policy in favor of arbitration); *Volt*, 489 U.S. at 474–76; *see also* 9 U.S.C. § 4 (giving parties the right to petition a federal district with jurisdiction over the dispute to enforce their arbitration agreement).

The Supreme Court ruled in favor of the university, finding that the choice of law provision contained in the construction contract bound the parties not only to California substantive law but California arbitration law as well.<sup>364</sup> The Court focused on the consensual nature of arbitration.<sup>365</sup> “By permitting the courts to rigorously enforce such agreements according to their terms . . . we give effect to the contractual rights and expectations of the parties, without doing violence to the FAA.”<sup>366</sup>

The crux of *Volt* was the determination that the parties had agreed to incorporate California arbitration law into their arbitration, and not just California substantive law. The core holding, that parties may override federal arbitration law through their agreement, is still good law.<sup>367</sup> The Supreme Court has since called into serious question one of *Volt*'s key premises, though: the *Volt* Court's finding that a standard choice of law provision merely referencing “the law of the place where the Project was/is located”<sup>368</sup> incorporated into the agreement both California substantive law *and* arbitration law.<sup>369</sup> This assumption is probably no longer valid.

The first case to challenge the validity of such an assumption was *Mastrobuono v. Shearson Lehman Hutton, Inc.*<sup>370</sup> In that case, the parties had entered into a contract containing both an arbitration clause and a choice of law provision designating New

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364. *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477–79 (1989).

365. *See id.* at 478 (stating that Congress was motivated in enacting the FAA “first and foremost” by a “desire to enforce agreements into which parties had entered”).

366. *Id.* at 479.

367. *See id.* (holding that because the parties had agreed to apply California arbitration law, the California state law at issue was not preempted); *Foulger-Pratt Residential Contracting, LLC v. Madrigal Condos., LLC*, 779 F. Supp. 2d 100, 107–08 (D.D.C. 2011) (applying the arbitration law of the District of Columbia, and not the FAA, to review an arbitral award because the parties specifically agreed to be governed by the District's arbitration law).

368. *Volt*, 489 U.S. at 470.

369. *See id.* at 475 (“[W]e do not think the Court of Appeals offended the [federal] principle [favoring arbitration] by interpreting the choice-of-law provision to mean that the parties intended the California rules of arbitration, including the § 1281.2(c) stay provision, to apply to their arbitration agreement.”).

370. 514 U.S. 52 (1995).

York state law as governing.<sup>371</sup> A dispute arose, the parties proceeded to arbitration, and the arbitrator's award included punitive damages.<sup>372</sup> Shearson (the losing party) objected to the award. It claimed that because New York law governed the dispute, and New York law allowed only courts, and not arbitrators, to award punitive damages,<sup>373</sup> the arbitrator's award must be vacated.<sup>374</sup>

The Supreme Court held the New York ban on punitive damage awards was not applicable to the arbitration agreement.<sup>375</sup> The Court first acknowledged that its previous holdings had recognized a federal policy in favor of allowing punitive damages in arbitration.<sup>376</sup> It then turned to the question of whether or not the parties intended to apply New York's arbitration law to their agreement, which would incorporate the ban on punitive damages.<sup>377</sup> The Court read the choice of law provision to incorporate only New York substantive law as applied to the contractual relationship itself, and not New York arbitration law.<sup>378</sup> The Court distinguished its dissimilar interpretation in *Volt*, explaining that the *Volt* interpretation arose from the Court's deference to a state court's interpretation of a contract under its own laws.<sup>379</sup> *Mastrobuono*, however, involved only federal courts' interpretations of the contract, so the Court was not bound to any prior interpretations. The Supreme Court opined that in order for the choice of law provision to dictate that state arbitration law applied to the agreement, "New York law" would have to mean "New York decisional law, including the state's allocation of power between the courts and

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371. *Id.* at 54.

372. *Id.*

373. *See* *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 358 (N.Y. 1976) (holding that arbitrators lack the authority to award punitive damages).

374. *Mastrobuono*, 514 U.S. at 56–57.

375. *Id.* at 64.

376. *Id.* at 58 (citing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Perry v. Thomas*, 482 U.S. 483 (1987); and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), for the proposition that federal arbitration law allows punitive damages).

377. *Id.* at 56–57.

378. *Id.* at 59–60.

379. *Id.* at 60 n.4.

arbitrators, notwithstanding otherwise applicable federal law.”<sup>380</sup> The Court was not willing to interpret the provision so broadly.<sup>381</sup>

The Supreme Court continued this interpretive trend in *Preston*. Ferrer, the party seeking application of California arbitration law, relied on the Court’s holding in *Volt* because that case upheld the application of a state law delaying arbitration proceedings pending the outcome of other litigation.<sup>382</sup> The Court rejected his argument and distinguished *Volt* in two ways. First, the state law was applied in *Volt* because third-party proceedings were involved, and the arbitration agreement did not provide any guidance on how to handle such a situation.<sup>383</sup> The Court used the state law as “gap filler.”<sup>384</sup> Here, in contrast, the agreement specifically stated that “any dispute . . . relating to . . . the breach, *validity*, or *legality*” of the contract should be resolved by arbitration in accordance with the rules of the American Arbitration Association (AAA).<sup>385</sup> Second, the Court cited *Mastrobuono* for the rule that when the parties designate both applicable state law and private rules governing arbitration, the choice of state law is presumed to only incorporate the state’s substantive law as applied to the dispute itself, and not the state’s arbitration law.<sup>386</sup> Because the parties had incorporated the AAA’s arbitration rules, they are presumed not to have incorporated California’s.<sup>387</sup>

Two principles can be gleaned from these cases. First, if a party includes private arbitration rules in their agreement, and the arbitration rules conflict with governing state arbitration law, then the private rules control.<sup>388</sup> Second, if the parties want state arbitration to be applied to the *exclusion* of federal arbitration law, federal precedent seems to require them to clearly state that intent in the agreement.<sup>389</sup>

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380. *Id.* at 60.

381. *Id.*

382. *Preston v. Ferrer*, 552 U.S. 346, 360–61 (2008).

383. *Id.* at 361.

384. *Id.*

385. *Id.* (emphasis added).

386. *Id.* at 361–62.

387. *Id.* at 362–63.

388. *Supra* note 387 and accompanying text.

389. *See Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002)

The current condition of federal arbitration law preemption is sadly unpredictable, though, and these two principles are not completely reliable at this point. This is because interpreting choice of law provisions is up to the court in which the petition for confirmation or vacatur is filed,<sup>390</sup> and the petitions are often filed in state court.<sup>391</sup> A state court may determine that a general choice of law provision shows that the parties intended to apply that state's arbitration law instead of the FAA.<sup>392</sup> When confronting a choice of law provision in an arbitration agreement, an arbitrator cannot know with certainty whether a reviewing court would find the provision to override federal arbitration law. The Supreme Court has indicated that a choice of law provision that does not expressly refer to a state's arbitration law should not be construed to trump the FAA.<sup>393</sup> Because choice of law provisions are often fairly standardized in arbitration agreements, sound judicial policy dictates that the provisions be uniformly interpreted.<sup>394</sup> As a matter of federal arbitration law, choice of law provisions in arbitration agreements not mentioning arbitration law should not evidence the parties' intent for state

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("[A] general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration."); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288–89 (3d Cir. 2001) ("[A] generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards."); *Jung v. Am. Assoc. of Med. Colls.*, 300 F. Supp. 2d 119, 152 (D.D.C. 2004) ("The intent of the contracting parties to apply state arbitration rules or law to arbitration proceedings [and not to apply the FAA] must be explicitly stated in the contract and . . . a general choice of law provision does not evidence such intent.").

390. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 n.4 (1995) (stating that the Court in *Volt* adhered to the state court's interpretation of the parties' contract). The Supreme Court in *Mastrobuono* was reviewing a federal court's interpretation of a contract containing a nearly identical choice of law provision to the one found in *Volt*. The Court reached the opposite conclusion in *Mastrobuono* as it did in *Volt* because it did not owe deference to a state court's interpretation of a contract interpreted under its own laws. Drahozal, *supra* note 42, at 413.

391. Drahozal, *supra* note 42, at 413 & n.152.

392. *Id.* at 412.

393. *Supra* note 390.

394. See *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) ("[B]oilerplate must be distinguished from contractual provisions which are peculiar to a particular [agreement] and must be given a consistent, uniform interpretation.").

arbitration law to override federal. Without this key assumption, the federal preemption exceptions described in this Note<sup>395</sup> are on unstable ground, and thus cannot serve as reliable guidance for arbitrators when interpreting agreements, or for courts reviewing arbitral awards under Part D of this framework.<sup>396</sup>

*E. Did the Arbitrator Correctly Identify a Legal Principle as Controlling, and Yet Refuse to Apply It?*

This question preserves the manifest disregard doctrine in a very narrow form. If the arbitrator, in a reasoned opinion, correctly states a governing legal principle but refuses to apply it, then she has exceeded her authority under the parties' submission and the award can be vacated under § 10(a)(4).<sup>397</sup> If vacatur is to be allowed when attacking an award because it was

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395. *Supra* Part IV.D.2–3. The “frustration of statutory rights” exception, explained *supra* Part IV.D.1, is unaffected by interpretation of choice of law provisions, because this exception can defeat even the parties' express agreement.

396. The federal preemption exceptions (to the general rule that arbitrators' conflict-of-law decisions are not reviewable) would be nullified because they are based on the premise that the law in this area is settled, that the parties knew the law was settled when they drafted the arbitration agreement, and that they incorporated the settled law into the agreement. *Supra* note 309 and accompanying text. If the meaning of a generic choice of law provision is not settled in favor of the Supreme Court's approach, then the only exception remaining would be the “frustration of statutory rights” exception, described *supra* Part VI.D.1.

397. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008)

[W]e view the “manifest disregard” doctrine, and the FAA itself, as a mechanism to enforce the parties' agreements to arbitrate rather than as judicial review of the arbitrators' decision. We must therefore continue to bear the responsibility to vacate arbitration awards in the rare instances in which the arbitrator knew of the relevant legal principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it. . . . At that point the arbitrators have failed to interpret the contract at all, . . . for parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law. Put another way, the arbitrators have thereby “exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

(quoting 9 U.S.C. § 10(a)(4) (2012)).



premised on an incorrect body of law, then logically vacatur must also be available when an arbitrator intentionally refuses to apply governing law correctly. Vacatur for failing to apply governing law is based on the premise that arbitrators are constrained by the parties' submission; they *must* apply the bodies of law specified or implied in the agreement.<sup>398</sup> If, however, arbitrators could apply the governing bodies of laws in any way that they wished, including incorrectly, then why bother requiring them to apply those laws at all?

By adopting this restricted form of manifest disregard, the courts can prevent a severe and extremely rare form of arbitrator misconduct.<sup>399</sup> In all likelihood, this rule is a completely preventative measure and may never actually be used to facilitate vacatur. When coupled with the first piece of the framework, the reasoned-opinion requirement, the rule produces a situation highly unlikely to produce actual violations. If a reasoned opinion were a prerequisite for any substantive review,<sup>400</sup> then any arbitrator bound to create such an opinion would probably never openly admit to intentionally ignoring the governing law or draft an opinion that is clearly inconsistent with the requisite legal principles.<sup>401</sup> So the manifest disregard rule

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398. *Supra* note 6 and accompanying text.

399. *See Stolt-Nielsen*, 548 F.3d at 91–92 (“The ‘manifest disregard’ doctrine allows a reviewing court to vacate an arbitral award only in ‘those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent.’”).

400. *Supra* Part IV.A.

401. Finding an actual incident where an arbitrator admitted to ignoring governing law is extremely difficult. A fairly close example can be found in *Liberty Mutual Insurance Company v. Open MRI of Morris & Essex, L.P.*, 813 A.2d 621 (N.J. Super. Ct. Law Div. 2002). In that case, an unlicensed medical diagnostic-testing facility performed a procedure on a patient after getting a letter from the state warning the facility that it could not perform any testing services until it received the license. *Id.* at 622–23. The license was later granted, but the patient's insurance company refused to pay the claim, because under New Jersey law no duty exists to pay for unlicensed medical services. *Id.* at 623–24, 626. The arbitrator recognized this law, but determined that because the license was “in flux” at the time the services were performed, and ultimately granted, the insurance company had to pay up. *Id.* at 623–24. The Superior Court vacated the award for manifest disregard of the law, stating, “If an arbitrator can issue an award to an unlicensed medical practitioner who has been warned by the Department of Health that he could not operate until the license is issued, the arbitration process is a sham!” *Id.* at 633.

here is prophylactic: it aims to keep arbitrators applying the rules chosen by the parties, even if the arbitrator does not agree with the result and would prefer applying different standards.

*F. If the Arbitrator Committed No Legal Error Warranting Vacatur, Did the Petitioning Party Have a Reasonable Basis for Believing Such an Error Existed?*

This final question serves as the floodgate for this framework. Many of the staunchest opponents of manifest disregard and substantive review of awards claim that the ability to seek such review opens arbitration to prolonged, frivolous litigation.<sup>402</sup> A losing party may use the threat of litigation to negotiate a more favorable position and diminish its own losses from an adverse award. An extremely disgruntled party could simply employ substantive challenges to make confirmation difficult and costly for the opposing side. “Finality” needs to have some teeth.

Substantive review of arbitral awards should be reserved only for instances of clear manifest disregard<sup>403</sup> or awards not grounded in governing law.<sup>404</sup> If a party challenging an award has no good faith basis for believing that such a deficiency in the award exists, then that party is abusing both the court system and arbitration as a whole. Measures must be put in place to strongly discourage such behavior.

This Note proposes the aggressive use of sanctions as a means to stem abusive substantive challenges to arbitral awards. The Eleventh Circuit has already proposed this solution. In its *B.L. Harbert International, L.L.C. v. Hercules Steel Co.*<sup>405</sup> decision, the court posited that sanctions should be imposed on parties attacking arbitration awards in court without a legitimate legal basis for doing so.<sup>406</sup> In justifying this position, the court explained that

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402. See Besser, *The Arbitrator Blew It!*, *supra* note 25, at 45 (claiming that the manifest disregard standard is “an open invitation to litigate forever”).

403. *Supra* Part IV.E.

404. *Supra* Part IV.B–D.

405. 441 F.3d 905 (11th Cir. 2006).

406. *Id.* at 913–14.

[t]he laudatory goals of the FAA will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest. If we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less.<sup>407</sup>

Sanctions were not actually imposed in that case, though, because the court did not find that the challenge rose to the requisite level of frivolousness.<sup>408</sup>

Under the proposed framework, a few clear instances of abusive challenges can be readily anticipated. Asserting a substantive challenge to an award<sup>409</sup> when no reasoned opinion or record of the proceedings exists and was not required should be per se abusive.<sup>410</sup> A challenge based on failure to apply governing law also should be conclusively abusive if the arbitrator applied a principle from any body of governing law.<sup>411</sup> If governing bodies of law conflicted, and this conflict was presented to the arbitrator, then a challenge to the resulting award would be abusive if the arbitrator conducted a conflict-of-laws analysis<sup>412</sup> and did not violate one of the three exceptions listed in Part IV.D.<sup>413</sup>

Aggressively enforcing sanctions for abusive filings would compel losing parties to only assert challenges that they believed entertained a reasonable likelihood of success. Because the framework proposed here allows very limited review, the implication is that few challenges would meet that benchmark. Disappointed parties with little ground for substantive review would be forced to simply cut their losses and pay the award, and arbitration would retain its speed and finality.

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407. *Id.* at 907.

408. *Id.* at 914.

409. Either a claim that the arbitrator did not apply a rule from a governing body of law, *supra* Part IV.C–D, or a claim of the restricted manifest disregard standard outlined above, *supra* Part IV.E.

410. *Supra* Part IV.A.

411. *Supra* Part IV.C.

412. *Supra* Part IV.D.

413. *Supra* Part IV.D.1–4.

## VI. Conclusion

Manifest disregard has a turbulent history and is currently in a state of limbo.<sup>414</sup> The Supreme Court's *Hall Street* decision has cast serious doubt on the doctrine's viability as an extra-statutory ground for arbitral award vacatur.<sup>415</sup> Many commentators, invoking the federal policy in favor of arbitration and its stated goals of expediency and finality, have called for the complete abrogation of manifest disregard.<sup>416</sup>

Many federal circuits refuse to let the doctrine die, though. Fueled by the Supreme Court's strange and unprecedented holding in *Stolt-Nielsen*, which clearly endorsed some form of substantive review of arbitrators' decisions,<sup>417</sup> four circuits have concluded that the doctrine survives *Hall Street* as a formulation of one of the enumerated grounds for vacatur listed in the FAA. This inconsistency in federal vacatur law is unsatisfactory, and definitive resolution is required.<sup>418</sup>

Manifest disregard has been tested and found wanting.<sup>419</sup> First of all, the doctrine is overbroad and gives a reviewing court power to vacate awards without a sound basis for doing so. Current formulations of the doctrine allowing a court to infer an arbitrator's knowledge or intent pose an unacceptable risk that substantive challenges will be made available to any losing party in an arbitration proceeding.<sup>420</sup> The solution is to either eliminate

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414. See *supra* notes 85–108 and accompanying text (describing the current state of manifest disregard among the federal circuits).

415. See *supra* notes 196–203 and accompanying text (describing *Hall Street*'s effect on the manifest disregard doctrine).

416. See *supra* note 151 (listing commentators who believed that *Hall Street* signaled the end of manifest disregard).

417. See *supra* notes 287–91 and accompanying text (explaining the substantive arbitral award review granted by the Supreme Court in *Stolt-Nielsen*).

418. See *supra* notes 208–12 and accompanying text (demonstrating the frequency with which manifest disregard is asserted in federal court challenges to arbitral awards, even in courts that have not determined the doctrine's viability).

419. See *supra* notes 240–49 and accompanying text (explaining why allowing courts to divine arbitrators' knowledge and intent without a written opinion is undesirable); *supra* notes 196–212 and accompanying text (describing the current confusing state of manifest disregard).

420. See *supra* notes 85–87, 89–90, 103 and accompanying text (listing the

the ability of courts to make that inference,<sup>421</sup> or to foreclose substantive review entirely.<sup>422</sup> The Supreme Court has rejected the latter contention in its *Stolt-Nielsen* decision,<sup>423</sup> so the logical solution is to allow substantive review only when a complete record of the arbitration proceeding and a reasoned opinion are available.<sup>424</sup>

Manifest disregard is also underinclusive. Despite the Supreme Court's musings,<sup>425</sup> the type of review granted in *Stolt-Nielsen* does not fit within manifest disregard.<sup>426</sup> The *Stolt-Nielsen* court did not find that the arbitrators identified governing legal principles and ignored them.<sup>427</sup> Instead, the Court vacated the arbitrators' award because the arbitrators failed to identify the governing legal principles in the first place.<sup>428</sup> The Second Circuit applied its formulation of manifest disregard, and it correctly concluded that there was no evidence that the arbitrators intentionally ignored governing law.<sup>429</sup>

The framework proposed by this Note attempts to harmonize the *Hall Street* and *Stolt-Nielsen* decisions, and also to provide a new way of looking at substantive judicial review of arbitral awards. It allows vacatur when a party can show that the arbitrator did not apply a legal principle from the governing law designated by the parties, or that the arbitrator intentionally refused to apply clearly governing law.<sup>430</sup> It includes procedural safeguards to prevent abuse and preserve arbitration's speed and finality.<sup>431</sup> The most important purpose of this Note, though, is to

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federal circuits that currently allow courts to infer an arbitrator's knowledge or intent).

421. *Supra* Part IV.A.

422. See Besser, *Manifest Mistake Is Dead!*, *supra* note 151, at 68 ("If the parties really want to preserve a right to appeal an arbitration award on traditional grounds, they might just as well litigate.").

423. See *supra* notes 217–24 and accompanying text (explaining why *Stolt-Nielsen* sanctions limited substantive review of arbitral awards).

424. *Supra* Part IV.A.

425. *Supra* note 186 and accompanying text.

426. *Supra* Part IV.C.

427. *Supra* note 188 and accompanying text.

428. *Supra* notes 290–91 and accompanying text.

429. *Supra* notes 175–78 and accompanying text.

430. *Supra* Part IV.C–E.

431. *Supra* Parts IV.A, IV.F.

suggest a dialogue about how judicial review of arbitral awards should look in the wake of *Hall Street* and *Stolt-Nielsen*. This Note is not the complete solution, but rather a call for a coherent, predictable federal framework for analyzing substantive challenges to arbitrator decisions.