Lost in Dicta: The Curious Case of Nonstatutory Grounds of Vacatur in an Era of Ubiquitous Consumer Arbitration

"Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes . . . ."1

I. INTRODUCTION

Congress passed the Federal Arbitration Act (FAA) in 1925 and it has been construed to liberally endorse and encourage arbitration.2 Congress designed the FAA “to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation.”3 It is critical to the FAA’s goals to afford deferential judicial review to an arbitrator’s findings.4 Arbitration is inherently undermined when the losing party can relitigate the matter in court.5 Those who champion arbitration’s effectiveness maintain that it has fulfilled the promises set forward by the FAA

2. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985) (holding valid agreements to arbitrate enforceable). The Court noted that the language of the FAA does not permit a court to substitute its discretion in choosing to order the parties to arbitration per a valid agreement. Id. at 218; see B.L. Harbert Int’l, LLC v. Hercules Steel Co., 441 F.3d 905, 906 (11th Cir. 2006) (declaring interpretation of FAA worthy alternative to litigation).
5. See Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013) (noting finality key factor in choosing arbitration over traditional judicial process); B.L. Harbert Int’l, LLC, 441 F.3d at 907 (expounding judicial treatment of arbitration agreements must not limit their intended efficiency); Wendy L. Rovira, Is It Time to Revise Your Arbitration Agreements or Rethink Your Alternative Dispute Strategy?, 57 LA. B.J. 168, 169 (2009) (recognizing efficiency critical aspect for why arbitration chosen). Furthermore, contracting parties have the flexibility to limit or expand the scope of the agreement per their desires. See Rovira, supra, at 170. One example of this is permitting the parties to adopt their own standards for discovery through their agreement. See id.; see also Sean T. Carnathan, Discovery in Arbitration? Well, It Depends . . ., BUS. LAW TODAY, Mar.-Apr. 2001, at 22, 22 (recognizing contractual nature of arbitration allows for personally tailored proceedings).
when it was first enacted. Critics, however, often point to forced arbitration clauses in employment and consumer contracts as stifling the interests of justice.

The judicial system was always expected to play some role in reviewing arbitration awards, and the FAA contains enumerated grounds for a court to vacate an award. Still, the policies of speed and efficiency at the heart of the FAA are juxtaposed with the American common law tradition of the opportunity for appeal. Wilko v. Swan was the first case where the Supreme Court acknowledged the narrow scope of review of arbitration awards. In the half century since this decision, debate has raged regarding whether Wilko authorizes a nonstatutory ground for vacating an arbitration award for a "manifest disregard of the law." The Supreme Court’s attempt to clarify this doctrine in Hall Street Associates, LLC v. Mattel, Inc. resulted in a circuit split over the doctrine’s validity as a separate basis to attack an arbitration award.


8. See 9 U.S.C. § 10 (2018) (enumerating grounds under which federal court can vacate arbitration award); Matthew J. Brown, “Final” Awards Reconceived: A Proposal to Resolve the Hall Street Circuit Split, 13 PEPP. DISP. RESOL. L.J. 325, 328 (2013) (noting arbitration provides no internal mechanism for enforcement absent judicial review); see also IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 34-35 (1992) (noting court’s limited review of arbitration awards under early arbitration statutes). The earliest modern arbitration statute, contained within the New York Rules of Civil Procedure, required a showing of corruption on the part of the arbitrator or clear procedural misconduct to allow a court to vacate an award. See MACNEIL, supra, at 35. This misconduct had to be so severe that a judge could determine a final award was not made based on the subject matter of the dispute. See id.


11. See id. at 430 (announcing question on appeal concerns scope of arbitration when intersected with other federal statute); Ashley K. Sundquist, Do Judicially Created Grounds for Vacating Arbitral Awards Still Exist?: Why Manifest Disregard of the Law and Public Policy Exceptions Should Be Considered Under Vacatur, 2015 J. DISP. RESOL. 407, 419 (stating federal courts’ reaction to Wilko dicta initiated nonstatutory grounds for vacatur).


14. See Coffee Beanery, Ltd. v. WW, LLC, 300 F. App’x 415, 418-19 (6th Cir. 2008) (recognizing nonstatutory grounds of vacatur remain unsettled post Hall Street); see also Stanley A. Leasure, Arbitration Law
Two federal appellate courts maintain a strict reading of *Hall Street*, holding that the doctrine of manifest disregard is no longer a valid basis for vacating an arbitration award.\(^\text{15}\) Another four federal appellate courts held the doctrine lives in one form or another.\(^\text{16}\) Curiously, other circuits have opted for a middle ground, acknowledging the doctrine’s status to vacate an award as uncertain.\(^\text{17}\) While the Supreme Court remains silent, the Fifth Circuit sought to reconcile the longstanding equity rulings with the statutory grounds of vacatur outlined in the FAA.\(^\text{18}\)

The Supreme Court has shown no signs of curtailing the rapid expansion of arbitration into consumer and employment contracts.\(^\text{19}\) This resulted in consumer protection groups expressing concern that arbitration has become too far reaching, and potential plaintiffs are being locked out of the courthouse and restricted to a forum where they are at a disadvantage.\(^\text{20}\) The simplicity that defined arbitration at the turn of the 20th century has become an effective tool


\[^{16}\text{See Renard v. Ameriprise Fin. Servs., Inc., 778 F.3d 563, 567-68 (7th Cir. 2015) (rejecting argument alleging manifest disregard in arbitration dispute); A&G Coal Corp. v. Integrity Coal Sales, Inc., 565 F. App’x 41, 43 (2d Cir. 2014) (noting manifest disregard standard remains applicable for vacating arbitration award); Adviser Dealer Servs., Inc. v. Icon Advisers, Inc., 557 Fed. App’x 714, 717 (10th Cir. 2014) (stating judicially created manifest disregard doctrine allows for vacatur); Dewan v. Walia, 544 F. App’x 240, 245 (4th Cir. 2013) (declining to review claim under manifest disregard standard).}\]

\[^{17}\text{See Raymond James Fin. Servs., Inc. v. Fenyk, 780 F.3d 59, 64-65 (1st Cir. 2015) (recognizing manifest disregard’s status uncertain after *Hall Street*); Bellantuono v. ICAP Secs. USA, LLC, 557 F. App’x 168, 173-74 (3d Cir. 2014) (questioning continued validity of manifest disregard standard); Schafer v. Multiband Corp., 551 F. App’x 814, 818-19 (6th Cir. 2014) (noting confusion over manifest disregard’s legal validity); Coffee Beanery, Ltd., 300 F. App’x at 418 (highlighting Supreme Court’s hesitation to fully reject manifest disregard).}\]

\[^{18}\text{See Citigroup Glob. Mkts., Inc., 562 F.3d at 553 (explaining history of judicial review of arbitration clauses).}\]

\[^{19}\text{See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (stating arbitration proper when prospective litigant given opportunity to vindicate its cause of action). The Supreme Court recognized many practical differences between arbitration and litigation, but stated arbitrators have the ability to fashion equitable relief. See id. at 30-32; Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 658 (6th Cir. 2003) (noting statutory rights subject to binding arbitration); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 412-23 (2005) (recognizing prevalence of arbitration clauses in variety of areas in recent years).}\]

used by corporations to limit their exposure to lawsuits, and courts have liberally endorsed this expansion.21

This Note explores the history of arbitration agreements in the United States, the original goals behind the FAA, and the recent proliferation of arbitration clauses in contracts.22 Further, it provides some history of early jurisprudence in this field and key decisions that resulted in the development and confusion over nonstatutory grounds to vacate an arbitration award.23 This Note then examines the Hall Street circuit split and the status of the manifest disregard standard across the federal courts, and how its status mirrors the current situation with judicial challenges to class action arbitration waivers.24 Next, this Note more closely examines the approach taken by the First and Fifth Circuits, illustrating the confusion federal courts face when attempting to apply the manifest disregard standard in the aftermath of Hall Street.25 Neither court has convincingly reconciled how a nonstatutory ground of vacatur may be reconciled with the strict reading of the FAA and a liberal approach to American arbitration law.26

This Note argues that the First and Fifth Circuits’ approaches to the manifest disregard standard demonstrate its relegation from an applicable common law doctrine to a statutory provision stripping any practical ability to overturn an award.27 This Note concludes by recognizing the evolution of arbitration beyond the mercantile-focused intent of the FAA’s drafters, and acknowledging its expanded use through consumer arbitration requires a presumption-based standard to vacate awards through the use of detailed opinions with modifications to the existing statutory framework.28

21. See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (discussing evolving judicial opinions of arbitration through history); Robert Fojo, 12 Reasons Businesses Should Use Arbitration Agreements, LEGAL.IO (May 11, 2015), https://www.legal.io/guide/550f4df77777765ebb80100/12-Reasons-Businesses-Should-Use-Arbitration-Agreements [https://perma.cc/5GF9-2Y7Q] (observing many elements of arbitration highly favorable to businesses in contrast to litigation); see also Consumer Guide, supra note 20, at 3 (criticizing arbitration for permitting business deregulation through lack of record). As written opinions from arbitration proceedings are rare, the businesses themselves are insulated from public scrutiny, and no precedent is established to assist in guiding future claims of a similar nature. See Consumer Guide, supra note 20, at 3.
22. See infra Section II.A.
23. See infra Sections II.B-C.
24. See infra Sections II.D-G.
25. See infra Sections II.E-F.
26. See infra Section II.F.
27. See infra Sections III.A-B.
28. See infra Section III.C.
II. HISTORY

A. The Freedom of Contract and the Accessibility of Judicial Review

Commercial arbitration has been common since the late Middle Ages as a voluntary alternative to litigation.29 The practice is the resolution of a dispute between parties to a contract decided by an impartial third party.30 Arbitration was prevalent in nineteenth century America and was a particularly attractive option for merchants to resolve professional disputes.31 Before 1920, courts tended to enforce awards granted through arbitration, but not agreements to compel arbitration.32 Tension existed on the question of whether citizens could, by contract, preemptively sever their rights to access the courts.33 The Supreme Court made it clear that arbitration awards could be properly reviewed for any “such reasons as are sufficient in other courts,” including “manifest mistake of law.”34

At the turn of the twentieth century, professional societies that sought to greatly expand arbitration’s prevalence in commercial disputes targeted statutory

30. See MACNEIL, supra note 8, at 7 (defining characteristics of arbitration). These characteristics include “a binding award” with arbitrator’s decision “subject to very limited grounds of review, final and enforceable by [s]tate law in the same manner as a judgment.” See id.; see also 9 U.S.C. § 2 (2018) (directing application of FAA agreements to settle disputes arising out of interstate commerce); UNIF. ARBITRATION ACT § 1 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2000) (prescribing act’s application to agreements requiring parties to submit disputes to arbitration); Wesley A. Sturges, Arbitration—What Is It?, 35 N.Y.U. L. REV. 1031, 1032 (1960) (emphasizing arbitration’s conclusive process); What We Do, AM. ARB. ASS’N., https://www.adr.org/Arbitration [https://perma.cc/P66Z-B9SZ] (defining American arbitration).
33. See Ins. Co., 87 U.S. at 451 (declaring advanced agreements to arbitrate void against public policy). The Court noted a right held by all citizens to take their legal disputes before a court of the United States. See id. Under such logic, although a citizen may waive this right in a specific instance, he may not “bind himself in advance by an agreement . . . thus to forfeit his rights at all times and on all occasions.” See id.; see also Tobey v. County of Bristol, 23 F. Cas. 1313, 1321-22 (C.C.D. Mass. 1845) (noting competing policy considerations surrounding agreements to arbitrate). As states began to adopt formal arbitration statutes in the early 19th century, language could be opaque regarding the irrevocability of the arbitrator’s decision. See MACNEIL, supra note 8, at 45-46 (commenting deficiencies in Oregon arbitration rooted in legislative hostility).
34. See United States v. Farragut, 89 U.S. (22 Wall.) 406, 419-420 (1874) (upholding agreement to arbitrate maritime dispute).
The reformers’ critical goal was to eliminate revocability rules regarding existing and future disputes through arbitration. Their efforts culminated in 1920, with New York becoming the first state with an enumerated arbitration statute, making future agreements irrevocable and fully enforceable. New York courts then had the authority to stay a judicial proceeding or compel parties to arbitration, per the terms of the agreement.

The federal government sought to improve perceived judicial hostility toward arbitration, at the time embodied by the ouster doctrine, and to make arbitration a reliable dispute resolution mechanism for parties seeking to avoid litigation. The ouster doctrine provided courts with the ability to strictly construe arbitration agreements as removing valid claims from a court of competent jurisdiction. Reforms reached the federal government upon the FAA’s passage, with judicial deference to valid awards being adopted on the national level.

35. See MacNeil, supra note 8, at 35-36 (detailing early legislative adoption of state arbitration statutes); Julius Henry Cohen, The Law of Commercial Arbitration and the New York Statute, 31 YALE L.J. 147, 148 (1921) (detailing legislative drafting efforts of New York State Bar Association and Chamber of Commerce). Professional and legislative organizations were quick to recognize that expanded commercial arbitration would lessen the burden of expansive technical trade questions being passed to a jury, and therefore save parties the time of recruiting expert witnesses for trial. See Cohen, supra, at 150 (noting practical results of welcoming arbitration).

36. See MacNeil, supra note 8, at 28-29 (observing evidence of early reformers’ goals for enumerated arbitration statutes). Early reformers likely intended for arbitration statutes to reduce the risk of “unnecessary litigation” resulting from the very practice they sought to promote. See id. at 29.


38. See N.Y. C.P.L.R. 7501 (McKinney 2012) (originally enacted as N.Y. Arbitration Act, C.P.A. 1920 § 1448) (granting judicial enforceability to arbitration agreement); Zhaodong Jiang, Note, Federal Arbitration Law and State Court Proceedings, 23 LOY. L.A. L. REV. 473, 479-80 (1990) (generalizing judicial proceedings involving arbitration award in New York). After the adoption of the New York arbitration statute, the party awarded damages was permitted to seek a motion for judgment. Jiang, supra, at 480. The grounds to vacate under these modern arbitration statutes were limited by the statute. See id.


40. See Frank J. Rooney, Inc. v. Charles W. Ackerman of Fla., Inc., 219 So. 2d. 110, 113 (Fla. Dist. Ct. App.) (explaining how arbitration agreements constructed to remove otherwise appropriate jurisdiction), cert dismissed, 230 So. 2d 13 (Fla. 1969). The court only recognized the validity of arbitration clauses that govern future disputes after the passage of an arbitration statute. See id.

41. See Katherine V.W. Stone & Alexander J.S. Colvin, The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights, ECON. POL’Y INST. (Dec. 7, 2015), http://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/RGK6-E4GK] (highlighting key portions of 1920 New York Arbitration Act copied over to federal law). The key portion of the New York statute, which provides for irrevocable and enforceable arbitration agreements, was virtually copied and pasted into the FAA. See id. Additionally, federal courts were now subject to the mandatory stay of judicial proceedings when the disputing parties had a written agreement to arbitrate their claim. See id.
Notably, the federal courts were required to confirm a valid arbitration award unless it met the enumerated requirements to vacate.\textsuperscript{42}

By the end of the 1920s, numerous trade associations required members to submit disputes to arbitration panels instead of the judicial system.\textsuperscript{43} Under these modern arbitration statutes, courts were required to treat the agreements as valid contracts and keep judicial review of awards as narrow as possible.\textsuperscript{44} The FAA also had the far-reaching effect of preempting all inconsistent state law barring arbitration of certain claims.\textsuperscript{45} In \textit{Southland Corp. v. Keating},\textsuperscript{46} the Supreme Court held that the Act preempted conflicting state law, despite the absence of an express preemption clause.\textsuperscript{47} The FAA also provided the structural and substantive framework for the Uniform Law Commission’s Uniform Arbitration

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  \item \textsuperscript{42} See 9 U.S.C. § 10(a) (2018) (enumerating federal statutory grounds by which court could vacate arbitration award). The full text of the portion outlining grounds for vacatur reads:

  (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) when the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in the refusing to hear evidence pertinent and material to the controversy; or of any misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

  \textit{Id.}

  \item \textsuperscript{43} See Philip G. Phillips, \textit{Rules of Law or Laissez-Faire in Commercial Arbitration}, 47 HARV. L. REV. 590, 596-97 (1934) (listing categories of claims arbitrated before passage of FAA); \textit{see also} Harry Baum & Leon Pressman, \textit{The Enforcement of Commercial Arbitration Agreements in the Federal Courts}, 8 N.Y.U. L. Q. Rev. 238, 247 (1930) (noting expansion of arbitration across commercial manufacturing fields). Formalized trade and manufacturing associations began adopting formalized arbitration facilities as part of their structure. See Baum & Pressman, supra, at 247. Professional communities with arbitration mechanisms included the following: dental, rotary, international, legal aid, civil engineers, and the American Institute of Accountants. \textit{See id.} at 247 n.42; \textit{see also} MacNeil, \textit{supra} note 8, at 25 (commenting on trade associations’ influence in expansion of commercial arbitration). Threats of expulsion from a trade association for refusing to submit claims to arbitration were as important to the expansion of arbitration as its practical benefits of speed and efficiency. \textit{See MacNeil, \textit{supra} note 8, at 25.}

  \item \textsuperscript{44} See 9 U.S.C. § 2 (noting contractual protection and common law defenses inherent in arbitration). The FAA makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” \textit{Id.}; Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 682 (2010) (affirming legislative intent to subject arbitration agreements to contractual interpretations and protections).


  \item \textsuperscript{46} 465 U.S. 1 (1984).

  \item \textsuperscript{47} \textit{See id.} (stating § 2 of FAA applicable in state courts when used in preemptive manner). Legislative intent demonstrated to the Court that Congress “intended to foreclose state legislative attempts to undercut the enforceability of the arbitration agreement.” \textit{See id.}; \textit{see also} Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 n.6 (1989) (recognizing substantive portions of FAA bind state and federal courts on preemption argument).
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Act (UAA), upon which forty-nine states have based their own arbitration statutes.\textsuperscript{48}

In the 1980s, the Supreme Court stated with clarity that federal policy favored using arbitration to resolve disputes.\textsuperscript{49} The FAA’s chief directive, supported by the commercial efforts to ensure its adoption, mandates the recognition and enforcement of arbitration awards.\textsuperscript{50} The federal policy favoring arbitration is embodied by § 2 of the FAA.\textsuperscript{51} Applying contractual principles to arbitration agreements permits the raising of state common-law defenses, such as fraud and unconscionability, to invalidate such agreements.\textsuperscript{52}

The use of arbitration clauses has expanded greatly in the past several decades.\textsuperscript{53} Modern society and services—such as credit cards, cellular phones, and social media—all require the user to sign contracts with arbitration clauses.\textsuperscript{54} These clauses often contain language that restricts a user to resolving disputes through individualized arbitration.\textsuperscript{55} These clauses essentially act as waivers on class action lawsuits, forcing individuals to fight against multibillion dollar corporations in arbitration rather than in court.\textsuperscript{56} Corporations adopt an argument

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\item \textsuperscript{50} See Moses H. Cone Mem’l Hosp., 460 U.S. at 24 (stating § 2 of FAA primary substantive provision).
\item \textsuperscript{51} See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006) (stating arbitration provision severable from main contract and substantive federal law); Moses H. Cone Mem’l Hosp., 460 U.S. at 24 (describing § 2 reflecting liberal federal policy favoring arbitration).
\item \textsuperscript{52} See 9 U.S.C. § 2 (2018) (noting written provision to settle controversy by arbitration subject to grounds in equity and contract); see also Doctor’s Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (recognizing general applicability of contractual defenses to arbitration agreements).
\item \textsuperscript{53} See Stone & Colvin, supra note 41, at 3 (noting commonplace inclusion of arbitration clauses in consumer and employee contracts).
similar to the trade associations that championed the FAA—that arbitration allows for the easy resolution of grievances without overburdening the courts.\textsuperscript{57} This argument has received significant traction; current research shows in thirty-five states in 2014 alone, 134 out of 162 cases were resolved in favor of the corporation.\textsuperscript{58}

\textbf{B. A Historical Fight for Finality: Wilko through Hall Street}

With the enforceability of arbitration clauses a settled area of the law, the scope of judicial review became a target for early arbitration critics.\textsuperscript{59} In \textit{Wilko}, the Supreme Court refused to allow for the arbitration of a claim brought under the Securities Act of 1933, labeling arbitration an inferior form of dispute resolution for substantive claims.\textsuperscript{60} While the Court would later overrule itself with regards to this conclusion, the legacy of \textit{Wilko} remains the creation of “manifest disregard of the law” as a nonstatutory ground to vacate an arbitration award.\textsuperscript{61}

The Supreme Court’s opinion in \textit{Wilko} suggested—in dicta—that the narrow scope of review afforded to the courts through the FAA was insufficient for all types of claims.\textsuperscript{62} In the Court’s language: “In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject . . . to judicial review for error in interpretation.”\textsuperscript{63} Despite the Court failing to provide a definition,
jurisdictions across the country adopted their own nonstatutory grounds of vacatur post Wilko.64 While no universal definition of manifest disregard exists, prevailing on a claim often requires a plaintiff to show that the arbitrator knew the applicable law and deliberately failed to apply it.65 An error or misunderstanding of the law is not sufficient to entitle the moving party to vacate an award.66

After Wilko, the federal circuit courts adopted some version of manifest disregard as a ground for judicial review and possible vacatur.67 Courts apply the manifest disregard standard in three distinct approaches: futility acknowledged, big error, and presumption-based.68 In the futility acknowledged approach, the court acknowledges its inability to read the minds of arbitrators to determine if they met the definition of manifest disregard.69 This is compounded by the fact that arbitration awards are rarely supported by written opinions, which in turn causes courts to struggle to find error.70 Under the big error approach,

64. See, e.g., T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc. 592 F.3d 329, 339 (2d Cir. 2010) (outlining three step test for manifest disregard); Dominion Video Satellite, Inc. v. Echostar Satellite, LLC, 430 F.3d 1269, 1275 (10th Cir. 2005) (listing elements of manifest disregard test); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 420-21 (6th Cir. 1995) (applying clearly erroneous standard of error in review for manifest disregard); see also Davis, supra note 12, at 101 (observing Court’s omission in defining manifest disregard).

65. See Davis, supra note 12, at 94-95 (stating primary definition of manifest disregard through comprehensive review of circuit court’s decisions); see also Frazier v. Citifinancial Corp., 604 F.3d 1313, 1322 (11th Cir. 2010) (stating manifest disregard requires arbitrator to deliberately ignore controlling law).

66. See Halim v. Great Gatsby’s Auction Gallery, Inc., 516 F.3d 557, 563 (7th Cir. 2008) (stating factual or legal error insufficient to support overturning arbitration award); Collins v. D.R. Horton, Inc., 505 F.3d 874, 879 (9th Cir. 2007) (determining court may vacate award under manifest disregard only when arbitrator knew and ignored law); McCarthy v. Citigroup Glob. Mkts., Inc., 463 F.3d 87, 93 (1st Cir. 2006) (asserting manifest disregard requires arbitrator “willfully” decided not to apply law), abrogated by Hall Street Assoc., LLC v. Mattel, Inc., 552 U.S. 576 (2008); Dominion Video Satellite, Inc., 430 F.3d at 1275 (defining manifest disregard to mean more than error of law); Manion v. Nagin, 392 F.3d 294, 298 (8th Cir. 2004) (stating to manifestly disregard law, arbitrator must “clearly identify” governing law and ignore it); Prestige Ford v. Ford Dealer Comput. Servs., Inc., 324 F.3d 391, 396 (5th Cir. 2003) (describing manifest disregard standard requires “willful inattentiveness to . . . governing law”), abrogated by Hall Street Assoc. v. Mattel, Inc., 552 U.S. 576 (2008); Dluhos v. Strausberg, 321 F.3d 365, 370 (3d Cir. 2003) (noting result of judicial application of narrow manifest disregard generally to affirm award); Scott v. Prudential Sec., 141 F.3d 1007, 1017 (11th Cir. 1998) (characterizing manifest disregard considered nonstatutory ground for review), abrogated by Hall Street Assoc. v. Mattel, Inc., 552 U.S. 576 (2008); Jaros, 70 F.3d at 421 (holding arbitrator manifestly disregards law where award lacks legally plausible argument).

67. See Coffee Beanery, Ltd. v. WW, LLC, 300 F. App’x 415, 419 (6th Cir. 2008) (noting adoption of manifest disregard standard across circuit courts after Wilko); see also Berger & Sun, supra note 31, at 763-65 (observing circuit court’s interpretation of manifest disregard post Wilko).

68. See Christopher R. Drahozal, Codifying Manifest Disregard, 8 Nev. L.J. 234, 236 (2007) (summarizing definition of approaches to manifest disregard claims). Professor Stephen Hayward of Indiana University identified these approaches, which are not included in dicta decisions of lower courts. See id.

69. See Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 240 (1st Cir. 1995) (noting lack of reasoned awards make it nearly impossible to apply manifest disregard analysis); Jaros, 70 F.3d at 421 (recognizing obstacle when arbitrators decline to explain their resolutions); see also Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990) (recognizing no legal requirement arbitrator explains its award).

the court looks for convincing evidence that the law is so clear in a settled area, that the arbitrator must have been aware of it.71  This model grants the court the discretion to determine if the arbitrator’s error should entitle a party to vacatur.72

The presumption-based approach avoids the problem of attempting to look into the mind of the arbitrator by presuming the arbitrator has the requisite knowledge of the applicable law.73  Under this approach, the award can be vacated when it lacks evidence of proper conduct by the decision-maker.74

The Supreme Court finally gave manifest disregard a proper review fifty years after Wilko in Hall Street.75  While the Court had not granted certiorari on the issue of nonstatutory grounds of vacatur, the opinion addressed the confusing state of manifest disregard.76  A central argument for permitting the contractual expansion of the scope of review beyond the FAA was that the Supreme Court


71. See Jaros, 70 F.3d at 421 (stating standard of vacatur appropriate when applicable legal principle clearly defined and ignored); Merrill Lynch, Pierce, Fenner, & Smith v. Bobker, 808 F.2d 930, 934 (2d Cir. 1986) (stating reviewing court must infer facts regarding arbitrator’s knowledge of governing principals); see also Hayford, supra note 6, at 474 (noting distinguishing characteristics of big error approach to manifest disregard analysis).

72. See Sobel v. Hertz, Warner, & Co., 469 F.2d 1211, 1214 (2d Cir. 1972) (observing manifest disregard used when courts infer grounds for reversal from relevant facts); Hayford, supra note 6, at 474 (noting essence of big error approach involves determination of error on behalf of arbitrators).

73. See Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 223 (1987) (indicating no reason for Court to assume arbitrators will not follow law); Roberson v. Charles Schwab & Co., 339 F. Supp. 2d 1337, 1340 (S.D. Fla. 2003) (articulating party requesting vacatur has burden of refuting rational basis on which arbitrators may rely). An arbitrator’s award does not lack a rational basis solely if founded upon misrepresentation of facts. See Roberson, 339 F. Supp. 2d at 1340. Nonstatutory grounds are not available when the court can determine a rational basis that supports the arbitrator’s decision. Id.

74. See Halligan, 148 F.3d at 204 (observing absence of explanation may reinforce reviewing court’s confidence arbitrators engaged in manifest disregard); see also Hayford, supra note 6, at 470 (recognizing lack of reasoned awards may lead to increased rate of vacatur under manifest disregard).


76. See id. at 578, 584-86 (addressing grounds for vacatur by contract, nonstatutory grounds, and FAA enumerated grounds to vacate). The underlying facts of Hall Street concerned a landlord tenant dispute. Id. at 579. Parties entered an arbitration agreement that granted the district court the authority to modify an award should the arbitrator’s finding of fact be unsupported by substantial evidence or where the conclusion of law was erroneous. Id.
itself had already done so through the creation of the manifest disregard doctrine.\textsuperscript{77}

Justice Souter, writing for the majority, stated the text of the FAA limits the scope of any judicial review of an arbitration award and does not provide a basis for private parties to alter review by agreement.\textsuperscript{78} This opinion marked the upper limit of contractual freedoms afforded to drafters of an arbitration agreement.\textsuperscript{79} Nevertheless, Justice Souter’s opinion failed to abolish the manifest disregard doctrine by stating the term could refer to an additional permitted ground for review, or as shorthand for the vacatur provisions of the FAA.\textsuperscript{80} The Court answered the issue of expanding judicial review per the agreement in the negative, but failed to provide a clear definition of manifest disregard or reconcile the doctrine’s place in the FAA.\textsuperscript{81} The question became even more vexing, with courts questioning whether manifest disregard was a shorthand for all nonstatutory forms of vacatur, a shorthand for vacatur enumerated by the FAA, or an entirely separate legal doctrine.\textsuperscript{82}

C. Stolt-Nielsen S.A. v. Animal Feeds International Corp.: Third Time’s the Charm?

The Supreme Court got another chance to clarify the status of manifest disregard when it agreed to hear \textit{Stolt-Nielsen S.A. v. Animal Feeds International Corp.}.\textsuperscript{83} The petitioners in the case were shipping companies that all used similar or identical maritime contracts containing standardized arbitration clauses.\textsuperscript{84} When the defendant alleged illegal price fixing and brought suit for antitrust damages, the Second Circuit ruled the claims were subject to the arbitration

\textsuperscript{77}. See id. at 584 (discussing petitioner’s argument for expanded judicial review under FAA).
\textsuperscript{78}. See id. at 586 (concluding enumerated sections of FAA are exclusive grounds for vacatur). Justice Souter acknowledged that the FAA has features at odds with enforcing a contract to expand judicial review following arbitration. See id.
\textsuperscript{79}. See Hall St. Assocs., 552 U.S. at 587 (finding relevant portions of FAA contain “no hint of flexibility”); Davis, supra note 12, at 90 (noting Court’s policy rejection of expanded judicial review of arbitration agreements); see also Sims & Bales, supra note 61, at 418 (reviewing exclusive grounds for vacatur provided by Justice Souter’s opinion).
\textsuperscript{80}. See Hall St. Assocs., 552 U.S. at 585 (proffering alternative definitions for manifest disregard beyond Wilko dicta). Justice Souter’s opinion stated that judicial review was restricted when arguing the language of the FAA, but that “the FAA is not the only way into court for parties wanting review of arbitration awards.” See id. at 590.
\textsuperscript{82}. See Sims & Bales, supra note 61, at 422-30 (describing contrary opinions post Hall Street).
\textsuperscript{84}. See id. (describing maritime contracts used by parties in case). The agreement stipulated disputes would be settled in New York by qualified arbitrators who were “experienced in the shipping business.” Id. at 667. The arbitration would be conducted in accordance and subject to the provisions of the FAA. \textit{Id.}
agreements. The defendant, however, sought to enter class arbitration against all the petitioners at once, which was permitted by the arbitrators in accordance with a prior Supreme Court ruling. The petitioners sought a review of this determination in federal court arguing the arbitrators manifestly disregarded federal maritime law, which precluded class arbitration. Unlike Wilko and Hall Street, manifest disregard was central to the lower court’s review of this arbitration award, providing the Supreme Court a perfect opportunity to address the doctrine when it granted certiorari.

Justice Alito’s analysis of manifest disregard was limited to acknowledging the lower courts’ recognition that the doctrine survived Hall Street, and that such recognition was partly the basis of their respective decisions. Additionally, Justice Alito stated in a footnote that the majority expressly did not decide if manifest disregard survived Hall Street as an independent ground of review. The Court made no attempt to reconcile this opinion with Hall Street’s language, which states there are no independent grounds for vacatur independent of the FAA.

The Court’s ultimate decision differed from the manifest disregard standard by holding the arbitrators failed to apply a legal principle from an appropriate area of law. This differed from any traditional definition of manifest disregard, which required the arbitrator to ignore some controlling legal principle. The Supreme Court supported this decision by citing multiple cases that supported

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85. See id. at 688-89.
90. Id. at 672 n.3 (majority opinion) (declining to address survival of manifest disregard post Hall Street).
92. See Patrick Sweeney, Note, Exceeding Their Powers: A Critique of Stolt-Nielsen and Manifest Disregard, and a Proposal for Substantive Arbitral Award Review, 71 WASH. & LEE L. REV. 1571, 1603 (2014) (noting Court’s decision in Stolt-Nielsen not traditional manifest disregard); supra notes 65-66 and accompanying text (listing traditional definitions of manifest disregard from circuit courts’ analyses). The Supreme Court determined that arbitrators applied their own policy judgment that class arbitration was beneficial in a variety of settings and did not intentionally ignore legal principles. See Stolt-Nielsen, S.A., 559 U.S. at 674-75.
93. See supra notes 65-66 and accompanying text (stating traditional definition of manifest disregard).
the assertion that arbitration takes its roots from contract law; a contract that
limits judicial review should be honored.94

D. Current Federal Circuit Split over Manifest Disregard

*Hall Street* concerned the enforceability of agreements that provide for
judicial review of arbitral decisions on grounds that expand the FAA.95 The
Court resolved that issue by declaring such provisions unenforceable.96
However, the resolution of the circuit split regarding these expanded grounds for
vacatur has failed to reconcile the doctrine of manifest disregard with the
competing influences of freedom of contract and finality.97

In response to *Hall Street*’s unclear opinion, a circuit split has formed over
manifest disregard’s viability as a ground for vacatur.98 Before *Hall Street*, all
circuits had adopted the nonstatutory doctrine.99 Subsequently, the unclear
decisions from the Supreme Court prompted three circuits to entirely abandon
it.100

Other circuits continue to view the doctrine as precedent—notably the Second
Circuit, which cites to the doctrine.101 Two additional circuits followed suit.102
The Second Circuit’s application recognized that *Hall Street*’s language is in
direct conflict with applying manifest disregard as a nonstatutory ground for
vacatur, but resolved the divergence by casting the doctrine as shorthand for the

94. See *Stolt-Nielsen, S.A.*, 559 U.S. at 682-83 (quoting numerous Supreme Court cases dealing with
arbitration). The Court invoked these past cases to demonstrate the precedent that “private agreements to arbitrate
are enforced according to their terms.” See id.; see also *Doctor’s Assoc., v. Casarotto*, 517 U.S. 681, 688 (1996)
(noting deference in private agreement to arbitrate); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S.

95. See *Hall St. Assocs.*, 552 U.S. at 585-86.

96. See *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 585-86 (2008) (detailing Court’s reasoning
on enforceability question).

97. See Leasure, *supra* note 14, at 83-84 (recognizing *Hall Street*’s dicta failed to address status of manifest
disregard).

98. See *id.* (organizing circuit split by recognition of nonstatutory grounds of vacatur).

99. See *Sweeny, supra* note 92, at 1589-93 (summarizing varied adoptions of manifest disregard across
federal circuit courts); see also *Drahozal, supra* note 68, 235-36 (recognizing every circuit court reviewed
arbitration awards for manifest disregard in past).

100. See *Med. Shoppe Int’l, Inc. v. Turner Invs.*, Inc., 614 F.3d 485, 489 (8th Cir. 2010) (holding manifest
disregard claims not included in FAA and not actionable); *Frazier v. CitFinancial Corp.*, 604 F.3d 1313, 1324
(11th Cir. 2010) (holding judicially created bases for vacatur not valid); *Citigroup Global Mkts., Inc. v. Bacon,*
562 F.3d 349, 355 (5th Cir. 2009) (recognizing *Hall Street* unequivocally held statutory grounds exclusive means
for vacatur).

101. See, e.g., *A&G Coal Corp. v. Integrity Coal Sales, Inc.*, 565 F. App’x 41, 44 (2d Cir. 2014) (reviewing
arbitrator’s use of applicable law while conducting manifest disregard analysis).

102. See *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) (holding manifest disregard
continues to exist for independent ground of review or judicial gloss); *Comedy Club, Inc. v. Improv W. Assocs.,*
553 F.3d 1277, 1290 (9th Cir. 2009) (determining manifest disregard ground shorthand for statutory grounds of
The Ninth Circuit adopted a similar analysis when it recast manifest disregard as shorthand for the FAA’s enumerated grounds within § 10(a)(4). The Seventh Circuit acknowledges the existence of manifest disregard, but defines it through the court’s own cases without relying on Stolt-Nielsen. The First, Sixth, Third, and Tenth Circuits remain uncertain of the doctrine’s validity as a consequence of the Supreme Court’s confusing dicta. These circuits have yet to take a firm stance on the doctrine’s status to vacate an arbitration award. Without the Court’s direction by way of clear opinions, lower courts lack the guidance to reach consistent conclusions.

**E. The Fifth Circuit’s Reconciliation of Manifest Disregard**

The Supreme Court’s continued failure to resolve the uncertainty around manifest disregard has led to confusion and frustration among lower courts.

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103. See Gould, supra note 88, at 1123-24 (noting judicial trend of recasting manifest disregard shorthand for statutory vacatur).

104. See Comedy Club, 553 F.3d at 1290-91 (describing circuit’s unique approach to manifest disregard).

105. See Renard v. Ameriprise Fin. Servs., Inc. 778 F.3d 563, 568 (7th Cir. 2015) (acknowledging valid doctrine but applicable only in narrow circumstances). The court was clear to declare the general finality of the arbitration process, seeking to avoid a situation where arbitration serves as “junior varsity trial courts where subsequent appellate review is readily available to the losing party.” See id. at 567; see also George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 579-81 (7th Cir. 2001) (explaining manifest disregard of law exists if arbitrator directs parties to violate law); Baravati v. Josephthal, Lyon, & Ross, Inc., 28 F.3d 704, 708 (7th Cir. 1994) (claiming manifest disregard doctrine inconsistent with entire law of arbitration).


107. See, e.g., Raymond James Fin. Servs., Inc. v. Fenzy, 780 F.3d 59, 64-65 (1st Cir. 2015) (leaving open possibility manifest disregard reconcilable with Hall Street and Stolt-Nielsen); Bellantuono v. ICAP Secs. USA, LLC, 557 Fed App’x. 168, 173-74 (3d Cir. 2014) (declining to rule on manifest disregard); 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).


109. See Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditor’s Comm. of Bayou Grp., LLC, 758 F. Supp. 2d 222, 225 (S.D.N.Y. 2010) (commenting Supreme Court’s decision in Stolt-Nielsen failed to address status of manifest disregard), aff’d, 491 Fed. App’x 201 (2d Cir. 2012). In the absence of clear precedent on the issue, the district court elected to follow the Second Circuit, which “concluded that manifest disregard ‘remains a valid ground for vacating arbitration awards.’” See id.; see also T.Co Metals, LLC v.
The Fifth Circuit chose to directly tackle the question of whether manifest disregard remains a valid nonstatutory ground for vacatur post Hall Street and Stolt-Nielsen in Citigroup Global Markets., Inc. v. Bacon. The Fifth Circuit was among the last to adopt a manifest disregard standard, and did so without immediate certainty.

The Fifth Circuit’s decision presented a detailed history of judicial intervention in arbitration awards, noting in some cases awards were affirmed even in the face of clear error. It recognized that the enforceability of arbitration contracts is steeped in the traditions of equity and identified only limited categories where the deference to an arbitrator would be set aside. An analysis of the legislative history surrounding the FAA’s passage showcased a similar level of importance regarding finality in agreements to arbitrate. Congress embraced the notion that arbitration awards should be upheld barring the sort of procedural injustice enumerated within the FAA.

The Fifth Circuit criticized the Second and Sixth Circuits’ holding on the doctrine as a misreading of Hall Street. The Fifth Circuit held that the mandatory language of the FAA left little room for interpretation. Permitting vacatur of awards on more expansive grounds would open the door to a time-consuming judicial process at odds with the purpose of arbitration. Accordingly, the FAA’s adoption, evidenced by its concurrence with the evolution of common law, demonstrates that awards are generally upheld


11. See id. at 355 (recognizing Fifth Circuit among last to adopt manifest disregard). The Fifth Circuit maintained statutory grounds were exclusive for over fifty years after the Wilko opinion. See id.; McElroy v. Painewebber, Inc., 989 F.2d 817, 820 (5th Cir. 1993) (declining to adopt nonstatutory ground for vacatur beyond FAA); R.M. Perez & Assocs., Inc. v. Welch, 960 F.2d 534, 539-40 (5th Cir. 1992) (noting manifest disregard codified in federal arbitration law); Forsythe Int’l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1021-22 (5th Cir. 1990) (holding enumerated grounds of FAA exclusive in reviewing arbitration award).

12. See Burchell v. Marsh, 58 U.S. (17 How.) 344, 352 (1854) (awarding longstanding deference to arbitration decisions); Karthaus v. Yllas y Ferrer, 26 U.S. (1 Pet.) 222, 228 (1828) (requiring every “reasonable intendment” to uphold arbitration award before overturning). The Fifth Circuit noted arbitration awards would be upheld even in the face of error of law or fact. See Citigroup Global Mkts., Inc., 562 F.3d. at 351.

13. See Citigroup Global Mkts., Inc., 562 F.3d. at 351 (noting very limited review applied to FAA awards by courts of equity). These limited grounds are akin to the provisions of § 10 of the FAA. See 9 U.S.C. § 10 (2018).

14. See supra notes 4-5 and accompanying text (discussing need for finality in arbitration proceedings critical to overall goal).
according to the statutory text. Under this reasoning, manifest disregard as a nonstatutory ground for vacatur did not survive. Subsequently, in a later case, the Fifth Circuit declined to decide whether manifest disregard of law and public policy fall within the FAA’s statutory grounds.

F. The Doctrine’s Confusing Status in the First Circuit

The First Circuit is among the courts that have failed to take a definitive stance on the status of manifest disregard post Hall Street. In keeping with all jurisdictions, the First Circuit acknowledges that the authority to vacate an arbitration award is extremely limited. Historically, the court did recognize manifest disregard as a limited common law power to review arbitration awards outside the FAA, provided the award lacked the requisite factual foundation. In the aftermath of Hall Street, the court expressed doubt over the doctrine’s meaning, recasting it as a judicial gloss, or official interpretation, of § 10 of the FAA rather than a separate nonstatutory doctrine. The First Circuit noted it is unclear if its approach to manifest disregard can be reconciled with the Hall Street opinion. Curiously, in a footnote in Ramos-Santiago v. United Parcel Service, the First Circuit adopted the view that manifest disregard was no

119. See Citigroup Global Mkts., Inc., 562 F.3d at 351 (criticizing common law grounds of vacatur in eliminating nonstatutory manifest disregard).
120. See McVay v. Halliburton Energy Servs., Inc., 608 F. App’x 222, 224-25 (5th Cir. 2015) (stating vacatur permitted only under narrow grounds of FAA). The Fifth Circuit cited its prior decision in Citigroup Global Mkts., Inc. as removing manifest disregard as a common law ground for vacatur in affirming the decision of the district court. Id. at 225.
121. See McKool Smith, P.C. v. Curtis Int’l Ltd., 650 F. App’x 208, 212 (5th Cir. 2016) (declining to decide if raised grounds constituted manifest disregard).
124. See Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990) (requiring moving party show arbitrator knew applicable law and disregarded it during proceedings); McCarthy v. Citigroup Glob. Mkts., 463 F.3d 87, 91 (1st Cir. 2006) (setting forth three-step test for nonstatutory vacatur), abrogated by Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008). Under this test, a successful challenge to an arbitration award requires the award be: unfounded in reason and fact; based on faulty and inconceivable reasoning; and be based on a crucial assumption that is nonfactual. See id.
125. See Ortiz-Espinosa v. BBVA Séc., Inc., 852 F.3d 36, 46 (1st Cir. 2017) (concluding Hall Street compels manifest disregard recast into judicial gloss of FAA).
126. See Mountain Valley Prop., Inc. v. Applied Risk Servs., Inc., 863 F.3d 90, 94-95 (1st Cir. 2017) (recognizing confusion over manifest disregard’s status in First Circuit); Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19, 22 (1st Cir. 2010) (noting First Circuit’s judicial gloss approach to manifest disregard may not reconcile with Hall Street).
127. 524 F.3d 120 (1st Cir. 2008).
longer available, even though it resolved the case on other grounds. This opinion was evidently discarded when a later case declined to resolve the existing uncertainty that surrounds the doctrine status.

G. The Floodgates Open on Class Action Waivers: The Effects of Applying a Liberal Endorsement of Arbitration to Corporate America

The initial impact of the Supreme Court’s decision on the prevalence of arbitration clauses remained largely unclear until the late 1990s. Still, the Court’s clear favoritism towards the practice encouraged greater numbers of corporations to begin introducing arbitration clauses into their contracts with the public. Just as courts continually upheld strict readings of FAA’s enumerated clauses of vacatur, arbitration agreements began incorporating provisions such as liquidated damages, recoverability of attorney’s fees, and the applicable statute of limitations. Class action arbitration waivers are an example of a more extreme remedy-stripping provision that has been included in an increasing number of consumer contracts. During the 1990s, the Supreme Court was eager to endorse arbitration and recognized clear limits to any judicial interference. Although arbitration awards are generally enforceable absent a violation of the FAA’s enumerated provisions, a court may invalidate an arbitration agreement based on common law contractual defenses, namely fraud or unconscionability.

128. See id. at 124-25, 124 n.3 (resolving matter on issue of bill of costs rather than manifest disregard).
129. See Raymond James Fin. Servs., Inc. v. Fenyk, 780 F.3d 59, 64-65 (1st Cir. 2015) (holding it unnecessary to rule definitively on status of manifest disregard).
131. See Gilles, supra note 19, at 396-97 (addressing origin of class action arbitration waivers in response to judicial favoritism of arbitration).
135. See Gilles, supra note 19, at 399-400, 406-08 (describing two waves of challenges to class arbitration waivers). The first wave of challenges primarily concerned challenging the class-action waiver on the basis of unconscionability. Id. at 402-06. When such challenges proved ineffective; the second wave attack focused on
Corporations do not enjoy defending class action lawsuits. The procedure permits plaintiffs to aggregate their grievances, as well as resources, and pursue a claim against a defendant that they would not otherwise individually bring. The increased number of claims increases the potential jury verdict, and encourages corporate defendants to engage in settlement negotiations that they would not otherwise. Beginning in the 1990s, corporate attorneys started inserting language within arbitration agreements to prevent consumers from asserting class action claims in the arbitration forum. By agreeing to these provisions, consumers were being legally boxed into a limited remedy—the agreement to arbitrate foreclosed the courtroom, and the class waiver barred class arbitration as an option. It did not take long for consumer advocate groups to view this practice as a step too far.

The problem in challenging class action waivers for arbitration is that the Supreme Court has upheld class action waivers in employment contracts in prior decisions, suggesting the Roberts Court will be eager to endorse the waivers across a wide variety of industries. While the historical roots of arbitration trace back to merchant-versus-merchant disputes in highly technical matters, the large cost of arbitration, which may preclude a litigant from “vindicat[ing] his or her statutory cause of action in the arbitral forum.” See id. at 406-07.

136. E.g., Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357, 1429 (2003) (offering corporate perspective regarding class action litigation). Corporations express concerns that class actions permit the aggregation of hundreds of smaller claims that ordinarily would not require litigation to remedy. See id. The practice is referred to in the corporate realm as “legalized extortion.” Id. at 1360.


138. See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (recognizing pressure of class action litigation encourages settlement of even unmeritorious claims); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-99 (7th Cir. 1995) (expressing concern class actions force defendants to stake future of company on single jury trial); see also Milton Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review, 71 COLUM. L. REV. 1, 8-9 (1971) (noting inherent threat of class action forces companies to handle unmanageable and expensive litigation). When faced with such protracted discovery and high claims of damages, the simplest solution for a company is often to settle. See Handler, supra.

139. See Gilles, supra note 19, at 396-98 (describing origin of class action waiver). A corporate attorney writing in a business journal specifically recommended clients take advantage of the Supreme Court’s favorable track record in arbitration jurisprudence. See id.

140. See, e.g., Dale v. Comcast Corp., 498 F.3d 1216, 1218 (11th Cir. 2007) (analyzing effects of class action waiver on plaintiff’s cause of action). The Court reviewed Comcast’s class arbitration waiver, which provided that “[a]ll parties to the arbitration must be individually named and concluded that there was “no right or authority for any claims to be arbitrated or litigated on a class-action or consolidated basis.” Id.


142. See Epic Sys. Corp., 138 S. Ct. at 1632 (permitting using arbitration in employment contracts to prohibit class action). Justice Gorsuch stated the Court’s conclusion was dictated by federal law favoring arbitration and established precedent. See id. at 1623-25. “[T]he virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.” Id. at 1623.
these modern provisions serve to limit the consumer’s ability to pursue a cause of action against product or service providers. While the effects of these waivers are dramatic, courts routinely return to the view that because arbitration agreements are valid contracts, consent between the parties results in the enforceability of the underlying obligation to arbitrate disputes rather than litigate them. The Supreme Court, doubling down that consenting to arbitration limits access to the courtroom, has effectively been forced to uphold class action waivers as collateral to its liberal interpretation of the FAA.

III. ANALYSIS

A. The Present Fate of Manifest Disregard: Dying if Not Dead

The decisions of both the First and Fifth Circuits showcase the difficulty in applying the manifest disregard standard as a nonstatutory ground for vacatur. The Fifth Circuit conducted a historical analysis of the mercantile roots of arbitration and determined that nonstatutory grounds of vacatur, in the form of manifest disregard, are not compatible with the FAA’s legislative history. The First Circuit is suspicious of the doctrine because the Supreme Court has refused to definitely rule of its status despite numerous opportunities to do so. As the doctrine’s existence is rooted in dicta rather than statute, it is difficult to conceptualize and has confused courts in the decades since Wilko and Hall.

143. See Davis, supra note 12, at 113 (noting original arbitration protection in FAA intended for mercantile, commercial transactions). Congress did not predict the prevalence of arbitration to resolve matters of federal statutory rights when it instated a system of limited judicial review. See id. at 115.


145. See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621(2018) (applying “liberal policy” established in precedent cases to resolve arbitration dispute); supra Sections ILE-D (recognizing continued existence of manifest disregard as judicial gloss on enumerated FAA provision); see also Leasure, supra note 14, at 103-04 (suggesting FAA amendment permitting limited judicial review to combat liberal interpretation of arbitration clauses).

146. See McKool Smith, P.C. v. Curtis Int’l, Ltd., 650 F. App’x 208, 212 (5th Cir. 2016) (commenting recent Court decision casts doubt on reconciling manifest disregard with FAA). The Fifth Circuit’s doubt regarding manifest disregard was directly rooted in the Supreme Court’s skirting of the issue in Stolt-Nielsen. See id. The First Circuit also noted confusion with Hall Street’s dicta but has refused to make a definitive ruling on manifest disregard. See Raymond James Fin. Servs., Inc. v. Fenyk, 780 F.3d 59, 64-65 (1st Cir. 2015) (declining to rule if nonstatutory grounds of vacatur reconcilable with Hall Street opinion).

147. See Citigroup Glob. Mkts., Inc. v. Bacon, 562 F.3d 349, 351-52 (5th Cir. 2009) (recognizing congressional intent for enumerating grounds of vacatur within FAA); see also supra notes 112-115 and accompanying text (describing historical analysis undertaken by Fifth Circuit resulting in abolishing manifest disregard).

148. Ortiz-Espinosa v. BBVA Secs., Inc., 852 F.3d 36, 46 (1st Cir. 2017) (refusing to rule on availability of manifest disregard); see also supra notes 125-126 and accompanying text (recognizing confusion from First Circuit over continued existence of manifest disregard).
The Supreme Court’s opportunity to adequately address or define the doctrine in *Stolt-Nielsen* was squandered, resulting in numerous opinions regarding the doctrine’s continued existence. The Supreme Court failed to clarify how manifest disregard can stand in for any provision in the FAA when it had already ruled that the statute contains the exclusive grounds for vacatur. Manifest disregard’s purpose—as a nonstatutory ground for vacatur—runs contrary to the intent of the FAA’s drafters to enumerate clear arbitration law limiting judicial review to the grounds contained within the statutory text. Should the Supreme Court see fit to ever clarify this juxtaposition, the doctrine’s future appears destined to be permanently relegated as the judicial gloss for the enumerated grounds of vacatur within the FAA.

Nonstatutory grounds for vacatur, such as manifest disregard, possess characteristics that make them incompatible with a strict reading of the FAA. The doctrine robs arbitrators’ decisions of finality by giving disappointed parties the opportunity to bring awards before a court. Additionally, entertaining petitions for vacatur on nonstatutory grounds increases the costs and time for

149. See *Mountain Valley Prop., Inc. v. Applied Risk Servs., Inc.*, 863 F.3d 90, 95 (1st Cir. 2017) (assuming validity of manifest disregard because issue remains undecided); supra notes 62-63 and accompanying text (pointing out *Wilko* dicta source of manifest disregard); supra notes 64, 67 and accompanying text (recognizing adoption of manifest disregard doctrine in all circuits post *Wilko*); supra note 126 and accompanying text (highlighting examples of courts struggling to reconcile manifest disregard post *Hall Street*).

150. See *Gould*, supra note 88, at 1123 (noting issue of manifest disregard not present in *Stolt-Nielsen*’s writ of certiorari); supra Section II.D (discussing circuit split following *Hall Street*); supra note 88 and accompanying text (acknowledging lower court’s reasoning in *Stolt-Nielsen* provided perfect opportunity to address manifest disregard).


153. See *Leasure*, supra note 14, at 75-76 (recognizing *Hall Street* circuit split raises questions regarding finality of arbitration); *Schmitz*, supra note 48, at 145-47 (describing statutory scheme to ensure finality through arbitration process).

154. See *Leasure*, supra note 14, at 102 (noting uncertain status of manifest disregard juxtaposed with judicial favoring of efficient arbitration practices).

155. See *Forsythe Int’l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1021-22 (5th Cir. 1990) (recognizing judiciary’s limited role in reviewing arbitration decisions); supra note 4 and accompanying text (noting judicial deference to arbitrator’s decision); supra note 5 and accompanying text (recognizing appeal of expedited proceedings through arbitration).
arbitration to resolve disputes. Finally, there is no incentive for arbitrators to detail reasoned awards revealing the manner in which they decided the disputed facts and applied their interpretation of the law; this only adds to a chance a court would overturn such award. As a consequence of these three factors, the reasoning behind arbitration decisions remains opaque, causing many courts to dismiss a vacatur argument. Without an adequate record to support an arbitrator’s factual findings, it remains difficult to argue that an award should be vacated for failing to be grounded in applicable law. Challenging an arbitration award is analogous to an appellate court granting review of a lower court’s judgement: The reviewing court is not necessarily deciding the appropriate resolution of the dispute, but is determining whether the proceedings were conducted correctly. Due to the lack of uniformity surrounding reasoned arbitration awards, cases rarely contain the required factual grounds to vacate an award under manifest disregard, regardless of the doctrine’s form.

B. How the Death Knell of Nonstatutory Grounds for Vacatur Spells Disaster for Consumer Protection in Arbitration

As arbitration agreements become more ubiquitous in our daily lives, the lack of recourse—even in the face of clear error—is startling. The FAA was largely the product of professional societies who sought to have their disputes

156. See Rovira, supra note 5, at 169 (recognizing speed and efficiency as key reasons for arbitration).
157. See supra notes 69-70 and accompanying text (describing how more detailed reasoning awards courts with greater opportunity for review). The futility acknowledged approach is most accepting of the limited opportunity for judicial review as a consequence of a lack of reasoned arbitration awards. See Drahozal, supra note 68 (suggesting futility acknowledge approach provides most lenient standard for arbitrators lacking detailed award); see also Prudential-Bache Secs., Inc. v. Tanner, 72 F.3d 234, 240 (1st Cir. 1995) (stating difficulty in reviewing award without detailed reasoning). The big error approach allows court to subject the award to its personal judgement more so than the others, given the court’s ability to infer the prevalence of the law in question. See Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990) (suggesting circumstances where court can assume arbitrators lack sufficient knowledge of law); Hayford, supra note 6, at 499.
159. See Citigroup Glob. Mkts., Inc. v. Bacon, 562 F.3d 349, 350 (5th Cir. 2009) (recognizing limited review of arbitration awards).
160. See 9 U.S.C § 10 (2018) (listing grounds for vacatur); supra notes 8-9 and accompanying text (recognizing judiciary’s limited role in reviewing arbitration awards).
161. See Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (asserting no legal requirement for arbitrators to reveal reasoning behind their decisions), overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); supra notes 65-66 and accompanying text (defining manifest disregard generally and providing notable exception). As manifest disregard requires the moving party affirmatively provide evidence of the arbitrators’ misconduct, the party face a steep challenge without a detailed award. See Kramer, supra note 122 (realizing increased rarity in which manifest disregard may strike down arbitration award).
162. See Silver-Greenberg & Gebeloff, supra note 54 (indicating more courts upholding arbitration clauses and class-action waivers); supra notes 53-54 and accompanying text (observing prevalence of arbitration clauses in numerous aspects of modern society); see also Burchell v. Marsh, 58 U.S. (17 How.) 344, 349-50 (1854) (commenting court of equity will not set aside arbitration award in face of clear error); Citigroup Global Mkts., Inc., 562 F.3d at 351 (noting longstanding deference to arbitrators decision).
moved to a forum where trade language would not confuse a jury and the factfinder would be deeply versed in the subject matter.163 Given how well this intent is documented, an argument for nonstatutory vacatur beyond the statute must clear a high burden.164 Consenting to modern binding arbitration clauses has since become a prerequisite for operating in modern society and taking part in any number of personal or electronic services.165 As the FAA is interpreted broadly and liberally, and because it preempts state law, common law contractual protections are all that is left to fill the gaps left by statute.166 A clear contract containing an arbitration clause and an arbitration award with no discernible reasoning leaves a petitioner with virtually no option for judicial review.167

The judicial hostility towards nonstatutory grounds of vacatur and the zealous adoption of class action waivers to arbitration agreements results in consumers being bound to the remedy of individualized arbitration per the terms of a document to which they were required to assent.168 It was perhaps inevitable that corporations would push arbitration to its limits given the favoritism with which the Supreme Court has endorsed arbitration.169 Mandatory and individualized arbitration undermines the very principles of consumer protection and grants corporations a clear advantage in dealing with consumer litigants.170 The very same factors which led merchants to prefer arbitration over litigation now

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163. See Cohen, supra note 35, at 150 (detailing why trade professionals would prefer arbitration to resolve disputes); see also supra notes 35-36 (acknowledging role of professional societies in passage of arbitration reform).
164. See Roberson v. Charles Schwab & Co. 339 F. Supp. 2d 1337, 1340 (S.D. Fla. 2003) (requiring party refute every rational burden with possibility of forming basis of arbitrators’ award); see also B.L. Harbert Int’l, LLC v. Hercules Steel Co., 441 F.3d 905, 907 (11th Cir. 2006) (cautioning arbitration from becoming protracted layer in judicial process); MacNeil, supra note 8, at 29 (commenting reformers of arbitration sought to prevent litigation resulting from practice).
165. See Class Action Waivers in Terms & Conditions, supra note 55 (demonstrating prevalence of arbitration clauses in modern services); see also supra note 54 and accompanying text (observing prevalence of binding arbitration clauses containing class action waivers).
167. See 9 U.S.C. § 2 (2018) (noting arbitration agreement valid, irrevocable, and enforceable absent grounds for contractual revocation); Silver-Greenberg & Gebeloff, supra note 54 (lamenting contractual protections of arbitration clause bind courts to dismiss lawsuits); supra notes 69-70 and accompanying text (noting how lack of reasoned arbitration awards restricts courts ability to search for arbitrators’ error).
170. See Sterligh, supra note 141, at 32-37 (criticizing class actions and speculating due process concerns).
handicap consumers, notably the inability for arbitration decisions to establish precedent and be written so as to leave open the possibility for appeal. This approach leaves consumers fighting an uphill battle from the start and leaves any possibility of appeal to the judicial system economically unfeasible given the current status of pro-arbitration precedent.

C. Reaching a New Paradigm: How a Back to Basics, Presumption-Based Standard in Arbitration May be a Consumer’s Only Hope for Protection

While the doctrine of manifest disregard appears dead in the water in terms of precedential value, the doctrine’s continued existence provides an avenue to strengthen consumer protection through the use of the presumption-based standard. As this standard explicitly highlights the maxim that courts must assume the arbitrator has the requisite knowledge to hear the matter, it satisfies the differential standard afforded to arbitrators. Still, the nonstatutory nature of the doctrine complicates its applicability, and revisions to the FAA are required to address the difference between consumer arbitration and commercial arbitration. The Supreme Court can no longer paint arbitration with such a broad brush and must acknowledge the difference between sophisticated businesses choosing the practice and consumers being forced to submit to the practice to partake in modern life.

171 See Davis, supra note 12, at 113-15 (noting favorable elements of arbitration intended for mercantile disputes); supra Section II.G (recognizing expansion of arbitration beyond mercantile-focused transactions and judicial protections applied to practice).

172 See Epic Systems Corp., 138 S. Ct. at 1621 (requiring courts to rigorously enforce arbitration agreements according to terms); Consumer Guide, supra note 20, at 2 (recognizing inherent imbalance of power between consumers and corporations forced to engage in arbitration); see also supra note 135 (recognizing difficulty of overturning arbitration award through unconscionability).

173 See Citigroup Glob. Mkts., Inc., 562 F.3d at 358 (rejecting manifest disregard as nonstatutory ground to vacate arbitration award); Hayford, supra note 6, at 444-45 (recognizing arbitrators rarely provide reasons for decisions in written awards); Consumer Guide, supra note 20, at 2 (describing how consumer arbitration places individuals at disadvantage against corporations); supra notes 69-70 (observing how courts have difficulty vacating arbitration awards due to lack of written record). The presumption of the arbitrator’s competence is a distinguishing feature of the presumption-based approach. See supra note 73 and accompanying text (describing presumption-based standard of manifest disregard).

174 See Roberson v. Charles Schwab & Co., 339 F. Supp. 2d 1337, 1340 (S.D. Fla. 2003) (permitting awards to stand rooted in misrepresentation of facts); see also Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998) (recommending arbitrators include some explanation of their findings); supra notes 4-5 and accompanying text (highlighting deferential review of arbitration decisions leads to flexible proceedings); supra notes 73-74 and accompanying text (defining presumption-based standard and viewing its use in appellate review).

175 See Citigroup Glob. Mkts., Inc. v. Bacon, 562 F.3d 349, 353 (5th Cir. 2009) (stating strict reading of FAA and legislative history demonstrate exclusive statutory grounds of vacatur); Carnathan, supra note 5 (examining unique properties of arbitration proceedings compared to traditional litigation); Consumer Guide, supra note 20, at 3 (cautioning arbitration contracts may favor businesses over consumers); supra note 43 and accompanying text (describing early adoption of arbitration in commercial industries); supra notes 65-66 (illustrating breadth of case law on nonstatutory vacatur generated from commercial arbitration).

176 See Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (subjecting class action waiver to liberal federal policy favoring valid arbitration contracts); Gilles supra note 19, at 412-413 (discussing corporate desire for arbitration agreement to limit likelihood of class actions). Compare supra note 36 and accompanying text
For any attempt to modernize consumer arbitration to succeed, the vacatur provision of FAA must be redrafted and differentiated from commercial arbitration. The legislative history and pro-arbitration precedent rooted in the existing FAA demonstrate that the Supreme Court seeks every opportunity to uphold arbitration agreements, regardless of their scope or impact on the individual consumer. A modified FAA, permitting vacatur when an arbitrator knows the applicable law and fails to apply it, adds additional protection when individuals are required to arbitrate their federal statutory rights. The test through the presumption-based standard will require a detailed written award that passes the limited test of whether an arbitrator failed to apply the applicable law. A misrepresentation of facts that leads to the eventual conclusion will not give rise to vacating the award, thus conforming to the traditional definition of manifest disregard. These reasoned awards will additionally provide some protection to consumers who have had the opportunity to engage in class action lawsuits foreclosed to them. Through reviews of written awards, courts will be capable of reviewing the contents to ensure the chosen law was properly applied. Lastly, to preserve the benefits of arbitration in the context of commercial disputes, recording the detailed award may remain optional or confidential.

(noting reduction of “unnecessary litigation” between commercial parties goal of arbitration’s early promoters), with supra note 54 and accompanying text (critiquing ubiquity of arbitration in modern American society). 177. See MACNEIL, supra note 8, at 25 (recognizing trade association’s role in favorable statutory language for arbitration).

178. See Epic Systems Corp., 138 S. Ct. at 1621 (noting historical preference for upholding arbitration clauses); supra Section II.A (recognizing supporters of arbitration successful in attempts to influence legislative policy from beginning of practice).

179. See Leasure, supra note 14, at 103-04 (proffering modified FAA requires amendment for limited judicial review in certain circumstances).

180. See Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998) (noting absence of explanation in award may show manifest disregard); supra note 68 and accompanying text (recognizing presumption-based standard one interpretation of manifest disregard doctrine); supra notes 73-74 (defining presumption-based standard).

181. See supra notes 64-66 and accompanying text (defining manifest disregard). Under the most traditional definition, the error in choosing the law would not be as egregious a violation as the failure to apply the proper law. See supra note 65; see also Roberson v. Charles Schwab & Co., 339 F. Supp. 2d 1337, 1340 (S.D. Fla. 2003) (noting error of interpretation of facts alone not sufficient for vacatur).

182. See Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (recognizing congressional intent for enforcement of original written arbitration agreements); supra notes 132-134 and accompanying text (describing judicial approval of arbitration clauses with class action waivers).

183. See Consumer Guide, supra note 20, at 4 (acknowledging mandatory arbitration waive parties’ right to judicial relief). Parties may access courts on the basis of disputing the clause itself, not the underlying cause of action that would give rise to a lawsuit. See id. at 1; see also supra note 70 (detailing differences between awards containing and lacking reasoned opinion).

184. Cohen, supra note 35, at 150 (acknowledging role of professional societies in development of arbitration law); Arbitral Awards and Court Decisions, supra note 70 (indicating arbitration clauses subject to confidentiality agreements); supra note 31 and accompanying text (describing merchant preference for commercial arbitration due to efficiency and finality).
IV. CONCLUSION

 Arbitration is rapidly becoming the preferred dispute mechanism between contracting parties. The practice, which began as a method for the rapid resolution of mercantile and trade disputes, is now one that must be consented to for basic participation in modern life. Corporations and service providers were quick to recognize the speed, efficiency, and confidentiality of arbitration as ideal compared to the costly and time-consuming process of litigation. Corporate inclusion of these clauses into their contracts, with class action waivers, has forced consumers to adopt a take-it-or-leave-it choice to participate in these services. However, the rationale for this expansion is rooted in the intent of the FAA’s drafters to allow for two equally sophisticated and knowledgeable parties to settle their disputes in a setting defined by contract. Since then, the United States has adopted a liberal approach favoring arbitration and courts have given significant deference to arbitration clauses when they are consented to.

 The doctrine of manifest disregard was born from the Supreme Court’s realization that arbitration was not an ideal dispute resolution mechanism for all types of substantive claims. The result was a blunt instrument that courts could use to review awards for evidence that an arbitrator knew a controlling principle of law and ignored it. Manifest disregard appears now to be on its deathbed as a separate nonstatutory doctrine, and its status will continue to vary by jurisdiction until the Supreme Court sees fit to resolve the matter directly. What has become apparent in the ensuing time is that the FAA requires a sensible framework for reviewing awards, especially now that arbitration can be both binding and individualized. The answer will not come from a nonstatutory doctrine of vacatur beyond the FAA’s text, because no requirement for detailing such awards exists as the Act is currently written.

 Arbitration has evolved and decisions that have displaced class action lawsuits must contain awards that can be reviewed for clear errors in applying the chosen law. Without such protection, the historical fear that arbitration clauses may oust a court of competent jurisdiction may prove prophetic. Supporters of early arbitration knew their greatest opportunity to protect the practice came from influencing the passage of statutory law over common law. Given the Supreme Court’s dogmatic adherence to the text of the FAA, it is time for consumers to advocate change from the same roots.

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