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Sean C. Wagner

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Unchecked: How *Frazier v. CitiFinancial* Eliminated Judicially Created Grounds for Vacatur Under the Federal Arbitration Act*

I. Introduction

Arbitration agreements play a pivotal role in resolving civil disputes. In an effort to avoid the time and expense of litigation, arbitration is often favored over traditional judicial remedies.¹ In 1925, Congress passed the Federal Arbitration Act (FAA) to provide a mechanism for arbitration award enforcement and to end an era of judicial hostility toward arbitration.² Under the FAA, a party may have an arbitration award converted into a court order by a federal court through a confirmation process.³ When a federal court is asked to confirm an arbitration award, the FAA provides for a deferential review of the award and outlines specific statutory grounds for vacating the award.⁴ However, in many situations, the narrow statutory grounds for vacatur fail to remedy unjust arbitration awards.⁵ These situations highlight the tension between deference to arbitration awards and promotion of justice in the enforcement of contracts. To ease this tension, courts have developed common-law grounds for vacating arbitration awards.⁶ While judicially created grounds for vacatur have not been used extensively, they have frequently acted as a safety valve for situations in which the interests of justice demanded vacatur of an arbitration award.

In *Hall Street v. Mattel*, the Supreme Court recently questioned the validity and role of judicially-created grounds for vacatur but did not

* The author dedicates this note to Erin. The author also wishes to thank University of Oklahoma College of Law Associate Dean Emily H. Meazell, Professor Steven Gensler, and Professor Elizabeth Bangs for their advice, support, and encouragement during the writing of this note.

1. Di Jiang-Schuerger, *Perfect Arbitration = Arbitration + Litigation?*, 4 HARV. NEGOT. L. REV. 231, 231 (1999).

2. *See id.* at 245.

3. 9 U.S.C. § 9 (2006).

4. *Id.* § 10(a); Jiang-Schuerger, *supra* note 1, at 232.

5. *See, e.g.,* Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998); Montes v. Shearson Lehman Bros., 128 F.3d 1456 (11th Cir. 1997).

6. *See* Hoeft v. MVL Grp., Inc., 343 F.3d 57, 64 (2d Cir. 2003); Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008) (exploring the contradictions in arbitration law and the non-statutory grounds for vacatur which have been created since the passage of the Federal Arbitration Act).

ultimately resolve the question.⁷ *Hall Street*'s ambiguity has fueled ongoing disagreements among courts as to the extent of the judiciary's authority to vacate awards under the FAA.⁸ One interpretation of *Hall Street*, which would significantly alter current legal norms, permits courts to vacate arbitration awards only when statutory grounds for vacatur are satisfied.⁹ Other courts accept expansively interpret § 10(a)(4) of the FAA to include judicially-created grounds for vacatur.¹⁰ As a result, circuit courts are split as to the viability and application of non-statutory grounds for vacatur under the FAA.

The 2010 Eleventh Circuit decision in *Frazier v. CitiFinancial* illustrates the error of the former interpretation of *Hall Street* and illuminates the dangers of such changes in the law.¹¹ The *Frazier* court interpreted *Hall Street* to mean that "§§ 9-11 represent the *exclusive* grounds for vacatur under the FAA."¹² Although the Eleventh Circuit asserted that it was following relevant precedent, it improperly construed the scope of *Hall Street* and, in so doing, eliminated a valuable safeguard to the integrity of the arbitration system: judicially-created grounds for vacatur. Further, the *Frazier* court's use of unsubstantiated policy justifications in support of the decision highlights judicial misconceptions regarding both the effect of non-statutory grounds for vacatur on judicial efficiency and the existence of a national policy favoring arbitration. This decision, intended to simplify the application of the FAA, ultimately leaves parties in the Eleventh Circuit at the unbridled mercy of sometimes *arbitrary* arbitrators.

This note analyzes the *Frazier* decision in four parts. Part II provides a review of the law surrounding the FAA, including the *Hall Street* decision. Part III discusses the facts, issue, rationale, and decision in *Frazier*. Part IV conducts an in-depth analysis of the *Frazier* decision by (1) outlining the importance of judicially created grounds for vacatur to public confidence in

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

8. *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1323 (11th Cir. 2010).

9. *E.g.*, *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350, 355 (5th Cir. 2009) ("We conclude that *Hall Street* restricts the grounds for vacatur to those set forth in § 10 of the [FAA], and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA.").

10. *See, e.g.*, *Comedy Club, Inc. v. Improv W. Assoc.*, 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.") (internal citations omitted) (internal quotation marks omitted).

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

12. *Id.* at 1324 (emphasis added).

the arbitration system and highlighting the need for judicially created grounds for vacatur as a public policy check on the arbitration system; (2) explaining how congressional intent is best served by the preservation of judicially created grounds for vacatur; (3) demonstrating how contract law can be used to support the utility of judicially created grounds for vacatur; (4) analyzing the narrow scope of the *Hall Street* holding; and (5) critiquing the notion that there is a substantive national policy favoring arbitration. Part V concludes this note by arguing that judicially created grounds for vacatur should be preserved because they are critical to maintaining the vitality of the arbitration system.

II. The Law Preceding the Case

Congress enacted the FAA during a time when the judicial branch consistently refused to enforce arbitration awards.¹³ Courts perceived arbitration as a form of judicial outsourcing that could lead to unjust results.¹⁴ In an attempt to eliminate judicial hostility toward arbitration awards, Congress enacted the FAA as a clear mandate requiring courts to enforce arbitration agreements but included several very narrow statutory grounds for vacatur.¹⁵ While these statutory grounds for vacatur addressed the most obvious procedural concerns, they did not apply to mistakes of fact or law.¹⁶ To make matters worse, courts initially interpreting the FAA created common-law rules discouraging vacatur and requiring that courts make all inferences necessary to confirm arbitration awards.¹⁷ Consequently, an inflexible system of judicial review emerged that left judges helpless to correct awards based on errors of fact or law. Over time, however, the sensitive nature of labor dispute arbitration led to a less deferential review of arbitration awards and the creation of non-statutory grounds for vacatur as mechanisms for vacating unjust arbitration awards.¹⁸ This section outlines

13. See Michael H. LeRoy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 263 (2003) (explaining the sense of early courts that all citizens should have the right to a full adjudication and the ability to withdraw from arbitration and enter litigation at will prior to the FAA).

14. See *id.*

15. 9 U.S.C. §§ 1-16 (2006).

16. *Id.* § 10.

17. See *Firemen's Fund Ins. Co. v. Flint Hosiery Mills, Inc.*, 74 F.2d 533, 536 (4th Cir. 1935); *Fine v. Bear, Stearns & Co.*, 765 F. Supp. 824, 827 (S.D.N.Y. 1991).

18. See *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960); *W. Elec. Co. v. Comm'n Equip. Workers, Inc.*, 409 F. Supp. 161, 167 (D. Md. 1976).

the evolution of the FAA and judicial interpretation thereof, starting with the FAA's enactment and concluding with the current state of the law.

A. Federal Arbitration Act of 1925

1. History and Congressional Intent

Congress adopted the FAA in response to a long period of judicial resistance to enforcing arbitration agreements.¹⁹ The FAA sent a clear message to the judicial branch that judicial hostility toward arbitration must end.²⁰ Congress passed the FAA to “reduc[e] [the] technicality, delay and expense to a minimum and at the same time safeguard[] the rights of the parties.”²¹ At the time, a large portion of the support for the FAA came from trade associations wishing to limit their litigation expenses.²² The parties believed arbitration was more predictable and efficient.²³ Until the enactment of the FAA, courts had allowed either party to avoid arbitration with relative ease.²⁴ Parties could avoid arbitration at any time simply by moving the dispute into formal litigation.²⁵ Thus, Congress enacted the FAA to further validate arbitration agreements by denying a party the ability to unilaterally disregard the arbitration agreement in favor of formal litigation.²⁶

19. THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL* 55 (2007).

20. 9 U.S.C. §§ 1-16; *see* *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 200 (2d Cir. 1998) (“It has been made clear by the Supreme Court, this court and other courts that the ancient judicial hostility to arbitration is a thing of the past.”).

21. Stanley A. Leasure, *Arbitration After Hall Street v. Mattel: What Happens Next*, 31 U. ARK. LITTLE ROCK L. REV. 273, 274 (2009) (alterations in original) (quoting H.R. REP. NO. 68-96, at 2 (1924)).

22. *See* *Prima Paint Corp. v. Flood & Coklin Mfg.*, 388 U.S. 395, 409 n.2 (1967) (Black, J., dissenting) (“The principal support for the Act came from trade associations dealing in groceries and other perishables and from commercial and mercantile groups in the major trading centers.”).

23. *See* Cheryl Aptowitzer, Note, *Arbitration – Judicial Review of Arbitration Awards – Courts May Review and Vacate an Arbitration Award Where an Arbitrator Commits Gross, Unmistakable, or Not Reasonably Debatable Errors of Law or Where the Arbitrator Manifestly Disregards the Law and the Result is Unjust* – *Perini Corp. v. Grete Bay Hotel & Casino, Inc.*, 129 N.J. 479, 610 A.2d 364 (1992), 24 SETON HALL L. REV. 998, 998-1000 (1993).

24. Richard E. Speidel, *Arbitration of Statutory Rights under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 169 n.46 (1989) (citing Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L. J. 595 (1928)) (explaining that before the enactment of the FAA, courts commonly abided by the “ouster” doctrine: “The effect of the ‘ouster’ doctrine was that a party who had agreed to arbitrate a future dispute could withdraw without an effective sanction anytime before the final award.”).

25. *Id.*

26. *See* 9 U.S.C. § 2 (2006).

Congress not only sought to provide a more efficient method for dispute resolution but also hoped to promote freedom of contract. The FAA codifies the freedom of private parties to reach enforceable agreements representing the parties' consensual will.²⁷ Parties often view arbitration as a less burdensome and more predictable means of dispute resolution.²⁸ A core value of arbitration is that parties are the owners of their disputes and should be able to direct the resolution as they see fit.²⁹ This explains why courts have consistently relied on the principle of contractual freedom to justify judicial deference to arbitration awards.

The FAA provides a framework that allows for enforcement of arbitration awards. Many courts and commentators believe the provisions "establish a strong national policy in favor of arbitration."³⁰ Others, however, argue that the text of the FAA—read in combination with the congressional intent—simply elevates arbitration agreements to the same level as other contracts.³¹ Indeed, many courts have found no national policy favoring arbitration in the FAA.³² As discussed below, the debate over whether there is a national policy favoring arbitration proves crucial to understanding the *Frazier* court's holding.³³

2. *The Framework Established by the FAA for Arbitration Enforcement*

The FAA is divided into three chapters, with the first sixteen sections compiled in the first chapter.³⁴ For purposes of this note, the most relevant sections are §§ 9 and 10.³⁵ Section 9 provides that within a year of the

27. David K. Kessler, *Why Arbitrate? The Questionable Quest for Efficiency in Arbitration After Hall Street Associates*, 8 FLA. ST. U. BUS. REV. 77, 82-83 (2009).

28. *Id.*

29. EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 4-5 (2006); see Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) (exploring the notion that each individual dispute has characteristics that make it suitable for a particular method of resolution, including arbitration or litigation, which should ultimately be decided by the parties involved in the dispute).

30. Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929, 933 (2010).

31. See *Arthur Andersen, LLP v. Carlisle*, 129 S. Ct. 1896, 1901 (2009).

32. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 666 (7th Cir. 2009); see also *Arthur Andersen, LLP v. Carlisle*, 129 S. Ct. 1896 (2009).

33. *Infra* Part IV.D.2.

34. 9 U.S.C. §§ 1-16 (2006).

35. The other sections pertain to maritime transactions, validity of the arbitration agreement, the procedure for compelling arbitration under a valid agreement, the appointment

issuance of an arbitration award it may be confirmed by a district court.³⁶ Thus, the arbitration award transforms into a court-ordered judgment.³⁷ The court may refuse to confirm an arbitration award, however, if one of four specifically defined grounds for vacatur in § 10 of the FAA exists.³⁸

The first statutory ground for vacating an arbitration award provides for vacatur “where the award was procured by corruption, fraud, or undue means.”³⁹ The next enumerated ground allows a court to vacate an award where the arbitrator is biased in favor of a party or corrupt.⁴⁰ These two grounds police outright defects in the arbitration process, such as bribes, various forms of intimidation, and threats of violence.⁴¹ The drafters of the FAA appeared to be heavily concerned that corruption could ultimately undermine the legitimacy of arbitration awards.

The third provision providing for vacatur of an arbitration award addresses procedural and evidentiary concerns.⁴² A district court may vacate a judgment if arbitrators “refus[ed] to postpone the hearing, upon sufficient cause shown” or “refus[ed] to hear evidence pertinent and material to the controversy.”⁴³ Moreover, the FAA includes a clause designed to thwart other procedural defects: when “misbehavior by which the rights of any party have been prejudiced [occurs],” vacatur is proper.⁴⁴ Arbitrators are not held to the same procedural standards that apply in judicial proceedings; a court simply reviews the arbitration for violations of minimal fairness safeguards.⁴⁵ On balance, parties in judicial proceedings enjoy far better protections than parties in arbitration.⁴⁶

The fourth ground for vacatur under § 10 of the FAA proves to be the most important because many courts have interpreted it to include judicially-created grounds for vacatur. Section 10(a)(4) provides for vacatur “[w]here

of arbitrators, fees, compelling attendance, and other procedures under the FAA.

36. 9 U.S.C. § 9 (“[A]t any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order . . .”).

37. *Id.*

38. *Id.* § 10.

39. *Id.* § 10(a)(1).

40. *Id.* § 10(a)(2) (providing for vacatur “where there was evident partiality or corruption in the arbitrators...”).

41. CARBONNEAU, *supra* note 19, at 78.

42. 9 U.S.C. § 10(a)(3).

43. *Id.*

44. *Id.*

45. CARBONNEAU, *supra* note 19, at 78.

46. *See* 9 U.S.C. §§ 1-16.

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.”⁴⁷ Courts have often applied this ground where arbitrators ruled on matters not submitted to arbitration.⁴⁸ Section 10(a)(4) has also applied in cases where an arbitrator has not provided a ruling to the parties that would be helpful in resolving the dispute.⁴⁹ As discussed later, the ambiguous language of § 10(a)(4), which allows courts to interpret it to include judicially created grounds for vacatur, is pivotal to the protection of judicially created grounds for vacatur in many jurisdictions.

Judicial interpretation of the four statutory grounds for vacatur has significantly limited when unjust arbitration awards may be vacated pursuant to the FAA. In order to preserve the integrity of arbitration awards and avoid re-litigating disputes, courts have consistently limited the statutory grounds for vacatur. As a result, judicially crafted rules give great deference to arbitration awards, even when the awards are based on inaccurate facts or inapplicable legal authority.

In-depth reviews by courts, while outside of the review permitted by the FAA, appeared to receive the Supreme Court’s endorsement in *Wilko v. Swan*.⁵⁰ In *Wilko*, the Court announced the first judicially-created ground for vacatur: manifest disregard for the law.⁵¹ The *Wilko* Court explained that “the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation.”⁵² The Court reasoned if an arbitrator is simply interpreting the law, then the arbitration award should not be vacated.⁵³ However, where an arbitrator completely disregards the law on which the award should be based, courts have the power to vacate the arbitration award.⁵⁴ The *Wilko* decision could have signaled a significant reduction in judicial deference to unjust arbitration awards. But despite *Wilko*’s apparent recognition of/endorsement of common-law grounds for vacatur, courts largely continued to strictly construe the statutory grounds.

47. 9 U.S.C. § 10(a)(4).

48. CARBONNEAU, *supra* note 19, at 78.

49. *Id.*

50. 346 U.S. 427 (1953).

51. *See, e.g.*, *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 746 (11th Cir. 1988) (citing *Wilko v. Swan*, 346 U.S. 427 (1953)).

52. 346 U.S. at 436-37.

53. *See, e.g.*, *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 746 (11th Cir. 1988) (citing *Wilko v. Swan*, 346 U.S. 427 (1953)).

54. *Brown v. Rauscher Pierce Refsnes, Inc.*, 796 F. Supp. 496, 501 (M.D. Fla. 1992).

B. Limited Application of Statutory Grounds for Vacatur Under the FAA

Hoping to preserve the finality of arbitration awards and fearing that an expansive review might permit frivolous attempts by losing parties to have awards set aside,⁵⁵ courts have narrowly applied the statutory grounds for vacatur.⁵⁶ Consistent with long-standing deference to arbitration awards, courts voluntarily narrowed the scope of judicial review of arbitration awards.⁵⁷ The Supreme Court went so far as to conclude that parties who contracted into arbitration agreements were “willing to accept less certainty.”⁵⁸ Thus, courts interpreted the FAA’s statutory grounds for vacatur very narrowly—even creating judicial rules reflective of this interpretation.

In order to promote finality, courts created rules advancing a deferential approach to judicial review of arbitration awards. In *Fine v. Bear, Stearns & Co.*, the Southern District of New York concluded that “[i]t is well-settled that a court’s power to vacate an arbitration award must be extremely limited because an overly expansive judicial review of arbitration awards would undermine the litigation efficiencies which arbitration seeks to achieve.”⁵⁹ Likewise in *Firemen’s Fund Insurance Co. v. Flint Hosiery Mills*, the Fourth Circuit noted that, in order to avoid substituting its judgment for the judgment of the arbitrator, a court should utilize every reasonable presumption in favor of upholding the outcome of the arbitration.⁶⁰ In short, the courts constructed rules that made it incredibly difficult for parties to vacate arbitration awards under the statutory provisions of the FAA, even where the result was unjust.

Extreme deference to arbitration awards routinely prompted courts to confirm awards even when the arbitrator applied incorrect law or made clearly erroneous findings of fact. Courts concluded that even a clear mistake of law or fact is not sufficient to disturb an arbitration award.⁶¹ As a general policy, “non-reviewability [of the application of the facts to the law] remains the general rule . . . and exceptions are few and far between.”⁶² Thus, judicial

55. *E.g.*, *Gramling v. Food Mach. & Chem. Corp.*, 151 F. Supp. 853, 860-61 (W.D.S.C. 1957).

56. *Id.* at 206.

57. *See* *Burchell v. Marsh*, 58 U.S. 344, 345 (1854).

58. *Wilko v. Swan*, 346 U.S. 427, 438 (1953).

59. *Fine v. Bear, Stearns & Co.*, 765 F. Supp. 824, 827 (S.D.N.Y. 1991).

60. 74 F.2d 533, 536 (4th Cir. 1935) (“It is well established that every reasonable presumption will be indulged to sustain an award . . .”).

61. *Salt Lake Pressmen & Platemakers, Local Union No. 28 v. Newspaper Agency Corp.*, 485 F. Supp. 511, 515 (D. Utah 1980); *see* *Wash.-Balt. Newspaper Guild, Local 35 v. Wash. Post Co.*, 442 F.2d 1234, 1239 (D.C. Cir. 1971).

62. *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990) (citing *Bettencourt v. Bos. Edison Co.*, 560 F.2d 1045, 1049 (1st Cir. 1977)).

interpretations of the FAA not only supported the finality of arbitration awards, but also preserved Congressional intent to provide a highly deferential review.⁶³ Nevertheless, courts occasionally found arbitration awards so erroneous that they refused to confirm them. The courts' refusal to confirm unjust arbitration awards led to the emergence of judicially created grounds for vacatur.

C. The Emergence of Judicially Created Grounds for Vacatur

Judicially created grounds for vacatur originated in the context of labor dispute arbitration between union workers and employers. Eight years after *Wilko*, the sensitive nature of these disputes prompted the Supreme Court to announce a less deferential review of labor arbitration awards.⁶⁴ In *Steelworkers v. Enterprise Wheel & Car Corporation*, the Supreme Court expressed concerns that arbitrators may deviate from collective bargaining agreements and “dispense [their] own brand of industrial justice.”⁶⁵ The *Steelworkers* Court reasoned that an arbitration “award is legitimate only so long as it draws its essence from the collective bargaining agreement.”⁶⁶ As the “essence test” gained momentum, courts explored its exact parameters. In clarifying the “essence test,” courts took language from *Steelworkers* and expanded upon it—attempting to craft a more specific and workable standard of review.⁶⁷ As a result, courts started stepping away from the bright-line rule that arbitration awards would not be vacated because of mistakes of fact or law. Instead, courts began to certify arbitration awards unless they lacked any basis in fact or law or the award was not within the essence of the contract.⁶⁸ The “essence test” became the first step toward judicially created grounds for vacatur.⁶⁹

63. Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 *FORDHAM J. CORP. & FIN. L.* 597, 605-06 (2009).

64. CARBONNEAU, *supra* note 19, at 202.

65. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

66. *Id.*

67. *W. Elec. Co. v. Comm'n Equip. Workers, Inc.*, 409 F. Supp. 161, 167 (D. Md. 1976) (noting that the “‘essence’ test lack[ed] sufficient specificity to provide lower courts with a consistent and workable standard in exercising their function of review”) (quoting *Local 1852 Waterfront Guard Ass'n v. Amstar Corp.*, 363 F. Supp. 1026, 1031 (D. Md. 1973)).

68. *Id.* at 169 (emphasis omitted) (announcing a new test which would support an arbitration agreement “unless it lacks any facts to support it or unless it is not within the essence of the contract”).

69. *Id.*

In the 1970s, courts vigilantly attempted to ensure the merit of arbitration awards, which resulted a less deferential standard of review for arbitration awards.⁷⁰ In *Timken Co. v. Local Union No. 1123, United Steelworkers of America*, the employer sought to vacate an award in favor of an employee who was terminated after incarceration prevented him from attending work.⁷¹ The arbitrator concluded that the employee should be reinstated on the basis of impermissible discrimination: explaining that because the employer freely granted leave in cases of illness or injury, an employee serving jail time should also be granted leave.⁷² Ultimately, the Sixth Circuit vacated the arbitration award.⁷³ It maintained that when arbitrators go “beyond th[e] testimony and the record” to reach a conclusion, arbitration awards lack the force of law.⁷⁴

Steelworkers and *Timken* illustrate a move toward judicial review of the merits of arbitration awards. This approach was diametrically opposed to the long-standing deference given to arbitration agreements by the federal court system. After *Steelworkers*, even where courts recited standards that recognized extreme deference to the arbitration awards, they often conducted a detailed analysis of the arbitrators’ reasoning and of the results.⁷⁵ For example, in *Western Electric Co. v. Communication Equipment Workers, Inc.*, the federal district court in Maryland purported to undertake a highly deferential review.⁷⁶ Yet the court reviewed the arbitrator’s decision with regard to each issue and scrutinized the reasoning behind the results.⁷⁷ This type of merits-based review of the facts and circumstances underlying an award exceeded the limited facial review that courts normally performed on an arbitration award. In other words, while *Western Electric* purported to be very deferential in its recitation of the standard of review, its actual analysis explored the merits of the arbitration award—leaving the court free to vacate the award if it was clearly erroneous. In time, courts allowed this merits-based sentiment to extend beyond labor arbitration awards.⁷⁸

70. See Michael H. Leroy & Peter Feuille, *Reinventing the Enterprise Wheel: Court Review of Punitive Awards in Labor and Employment Arbitrations*, 11 HARV. NEGOT. L. REV. 199, 209-10 (2006).

71. 482 F.2d 1012, 1013 (6th Cir. 1973).

72. *Id.* at 1014.

73. *Id.* at 1014-15.

74. *Id.*

75. See *W. Elec. Co. v. Comm’n Equip. Workers, Inc.*, 409 F. Supp. 161, 167 (D. Md. 1976).

76. *Id.* at 178.

77. See *id.* at 177-78.

78. CARBONNEAU, *supra* note 19, at 202.

D. Acceptance of Manifest Disregard and Public Policy Grounds for Vacatur

In recent years, many circuit courts recognized manifest disregard—first recognized in *Wilko v. Swan*,⁷⁹ as an additional ground for vacatur.⁸⁰ In *McCarthy v. Citigroup Global Markets*, the First Circuit explained that “[c]ourts do . . . retain a very limited power to review arbitration awards outside of section 10.”⁸¹ The *McCarthy* court defined manifest disregard of the law as a situation “where it is clear from the record that the arbitrator recognized the applicable law—and then ignored it.”⁸² In sum, manifest disregard began to function as a judicial safety valve in situations where the arbitration award was clearly erroneous as a matter of law.

The labor cases not only recognized manifest disregard as a ground for vacatur, but also fostered a new attitude regarding enforcement of arbitration awards.⁸³ Between the 1970s and *Hall Street* in 2008?, courts were no longer willing to enforce arbitration awards that were unjust; rather, courts sought to establish “a floor for judicial review of arbitration awards below which parties cannot require courts to go, no matter how clear the parties’ intentions.”⁸⁴ In subsequent decisions, courts began to define the types of arbitration awards that were unjust and consequently unenforceable.

This change in deference was especially evident when enforcement would be contrary to public policy. As with other contracts, courts deemed vacatur proper when enforcement would not promote good public policy.⁸⁵ This public policy sentiment was echoed in a line of lower court cases.⁸⁶ For example, the Fifth Circuit affirmed the district court’s decision to vacate an arbitrator’s reinstatement of an employee in *Misco, Inc. v. United Paperworkers International Union* on public policy grounds.⁸⁷ In *Misco*, an employer terminated an employee, whose job required the operation of

79. Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 234 (2007).

80. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584-85 (2008).

81. 463 F.3d 87, 91 (1st Cir. 2006) (quoting *Advest v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990)) (internal citations omitted).

82. *Id.* (internal citations omitted).

83. See *Wilko*, 346 U.S. at 438 (deciding that a balance between arbitration contract integrity and the rights of individuals to seek redress in the courts should be adjusted to promote justice).

84. *Hoefl v. MVL Grp., Inc.*, 343 F.3d 57, 64 (2d Cir. 2003).

85. In *W.R. Grace & Co. v. Local Union 759, International Union of Rubber Workers of America*, the Supreme Court held that a court must not enforce an arbitration award that is contrary to public policy. 461 U.S. 757, 766 (1983).

86. *E.g.*, *Exxon Shipping Co. v. Exxon Seamen’s Union*, 11 F.3d 1189, 1191 (3d Cir. 1993).

87. See *Misco, Inc. v. United Paperworkers Int’l Union*, 768 F.2d 739, 743 (5th Cir. 1985).

dangerous machinery, after discovering the employee in his car smoking marijuana on his break.⁸⁸ The Fifth Circuit emphasized the public policy “against the operation of dangerous machinery by persons under the influence of drugs or alcohol.”⁸⁹

The Third Circuit also relied on public policy grounds to vacate an arbitration award in *Exxon Shipping Co. v. Exxon Seaman’s Union*.⁹⁰ In *Exxon Shipping Co.*, an arbitrator reinstated an employee after the employee was discharged for being intoxicated while on duty.⁹¹ The Third Circuit reasoned that an owner or operator of dangerous equipment should not be forced to reinstate an employee to a safety-sensitive position when the employee had been dismissed for being under the influence while on duty.⁹² However, even in cases in which public policy compelled a court to vacate an arbitration award, the tension between promoting a national policy favoring arbitration and judicial infringement “upon the arbitrators’ decisional sovereignty” was present.⁹³

While preserving the integrity of the judicial system with judicially created grounds for vacatur seems logical, commentators fear that incorporating judicially created grounds for vacatur into FAA arbitration confirmations “contradicts the gravamen of the legislation and the judicial policy that underpins it.”⁹⁴ These commentators believe that adding further grounds for vacatur will lead to a decrease in arbitration efficiency and predictability—two of the most important attributes of arbitration.⁹⁵ The Supreme Court could have resolved this confusion in *Hall Street* but declined to do so. The Supreme Court granted certiorari in *Hall Street* to resolve the issue of contractually expanding the standard of review for arbitration agreements

88. *Id.* at 741.

89. *Id.* at 743.

90. 11 F.3d at 1191.

91. *Id.*

92. *Id.* at 1194.

93. CARBONNEAU, *supra* note 19, at 203.

94. *See id.*

95. *Fine v. Bear, Stearns & Co.*, 765 F. Supp. 824, 827 (S.D.N.Y. 1991) (“[A] court’s power to vacate an arbitration award must be extremely limited because an overly expansive judicial review of arbitration awards would undermine the litigation efficiencies which arbitration seeks to achieve.”); *see* Martin A. Feigenbaum, Development Bank of Philippines v. Chemtex Fibers, Inc.: A vote in Favor of International Comity and Commercial Predictability, 21 INT’L LAW. 873, 876 (1987) (“Congress, by passing the [Federal Arbitration] Act, intended as its principal goal to give predictability to the legitimate expectations of those who agree to arbitration . . .”).

under the FAA.⁹⁶ The decision in *Hall Street* left lower courts wondering what, if anything, was actually resolved.

E. *Hall Street v. Mattel*

In the wake of uncertainty regarding the availability of judicially created grounds for vacatur under the FAA, the Supreme Court sought to clear up a circuit split over whether the parties could contractually expand judicial review of arbitration awards in *Hall Street v. Mattel*.⁹⁷ *Hall Street* centered around a landlord-tenant dispute over an indemnification clause.⁹⁸ The indemnification clause provided that Mattel, the tenant, would indemnify its landlord, Hall Street, for the cost that resulted from Mattel's failure to follow applicable environmental laws.⁹⁹ In addition, the lease included a provision that required the district court to "vacate, modify, or correct any award [if] the arbitrator's conclusions of law [were] erroneous."¹⁰⁰ Essentially, this provision provided protection for both parties in the event that an arbitrator incorrectly applied the law.

In 1998, after high levels of chemical deposits were discovered in the property's water well, Mattel agreed to clean up the property.¹⁰¹ In 2001, Mattel sought to terminate its lease, but Hall Street resisted because it had not yet been indemnified for the site clean up.¹⁰² The matter proceeded to federal court and, although the court ruled on the issues of lease termination, the parties agreed to arbitrate the indemnification issue.¹⁰³ Subsequently, the arbitrator found in favor of Mattel, reasoning that "no indemnification was

96. *Oberwager v. McKechnie Ltd.*, 351 F. App'x 708, 710 n.4 (3d Cir. 2009) (noting that the Supreme Court granted certiorari in *Hall Street* to resolve "a split of authority among the Circuit Courts of Appeals as to whether parties to agreements subject to the FAA could supplement by contract the standards for vacatur and modification of arbitration awards set forth in §§ 9, 10, and 11 of the FAA").

97. 601 F.3d 19, 22 (1st Cir. 2010) (explaining that "manifest disregard of the law is no longer an 'independent, non-statutory ground' for setting aside an arbitration award") (quoting *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); see *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009) (explaining that "manifest disregard of the law remains a valid ground for vacatur of an arbitration award under § 10(a)(4) of the Federal Arbitration Act"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94-96 (2d Cir. 2008) (manifest disregard doctrine is "a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA").

98. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 579 (2008).

99. *Id.*

100. *Id.* at 579.

101. *Id.*

102. *Id.*

103. *Id.*

due, because the lease obligation to follow all applicable federal, state, and local environmental laws did not require compliance with the testing requirements of the Oregon Drinking Water Quality Act (Oregon Act); that Act the arbitrator characterized as dealing with human health as distinct from environmental contamination.”¹⁰⁴ Believing the arbitrator incorrectly applied Oregon law, Hall Street moved to vacate the award; and the district court vacated the award.¹⁰⁵ Upon remand, the arbitrator ruled in favor of Hall Street, finding that Mattel’s failure to comply with Oregon drinking water protection laws required Mattel to indemnify Hall Street pursuant to the indemnification clause.¹⁰⁶ Mattel then appealed to the district court and cited a recently-decided Ninth Circuit opinion holding that contractually modified grounds for review were unenforceable under the FAA.¹⁰⁷ The Ninth Circuit agreed and ordered the district court to reinstate the original arbitration award.¹⁰⁸ The district court, however, did not reinstate the original award; instead, the district court ruled in favor of Hall Street and held that the arbitrator’s lease interpretation was not plausible and exceeded the arbitrator’s authority under § 10(a)(4) of the FAA.¹⁰⁹ After the Ninth Circuit reversed the decision for a second time, the Supreme Court granted review in the case to decide whether parties are allowed to extend judicial review under the FAA by contract.¹¹⁰

The Supreme Court answered in the negative, holding that §§ 10 and 11 respectively outline the “exclusive grounds for expedited vacatur and modification” under the FAA.¹¹¹ The Court’s reasoning was simple: the FAA cannot be read in a way that allows for judicially created exceptions.¹¹² The Court explained, “Instead of fighting the text, it 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.”¹¹³ Seemingly concerned about maintaining the finality of arbitration agreements, the Court continued,

104. *Id.* at 580.

105. *Id.*

106. *Id.*

107. *Id.* (citing *Kyocera Corp. v. Prudential-Bache Trade Serv.*, 341 F.3d 987, 998 (9th Cir. 2003)).

108. *Id.* at 581.

109. *Id.* at 581 n.1.

110. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 196 F. App’x 476 (9th Cir. 2006), *cert. granted* 550 U.S. 968 (2007).

111. *Hall St. Assocs.*, 552 U.S. at 584.

112. *Id.* at 588.

113. *Id.*

“[a]ny other reading opens the door to the full-bore legal and evidentiary appeals that can rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”¹¹⁴ The *Hall Street* decision created confusion among lower courts with regard to judicially-created exceptions because the scope of the holding was not clearly defined.¹¹⁵

F. The Aftermath: Interpreting Hall Street v. Mattel

While *Hall Street* held that parties may not expand the depth of review in district court by contract, the Court’s rationale also calls into question the existence of judicially created grounds for vacatur. Consequently, a circuit split emerged as to the validity of judicially created grounds for vacatur. Circuit courts confronted with arbitration award confirmation cases have found application of *Hall Street* difficult. In *Kashner Davidson Securities Corp. v. Mscisz*, the First Circuit Court of Appeals aptly concluded that the vitality of non-statutory grounds for vacatur under the FAA presents a difficult issue that courts have only started resolving.¹¹⁶

In one of the first cases following *Hall Street*, *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, the Second Circuit cited *Hall Street* for the proposition that excessive interference with arbitration awards would diminish the utility of arbitration agreements by preventing disputes from being resolved straightaway.¹¹⁷ However, when the same case reached the Supreme Court, the Court declined to address the issue: “We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street* . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.”¹¹⁸ Assuredly, this language only complicates application of judicially created grounds for vacatur.

114. *Id.* (quoting *Kyocera Corp. v. Prudential-Bache Trade Serv.*, 341 F.3d 987, 998 (9th Cir. 2003)) (internal quotation marks omitted).

115.

116. 601 F.3d 19, 22 (1st Cir. 2010) (explaining that “manifest disregard of the law is no longer an ‘independent, non-statutory ground’ for setting aside an arbitration award”) (quoting *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); see *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009) (explaining that “manifest disregard of the law remains a valid ground for vacatur of an arbitration award under § 10(a)(4) of the Federal Arbitration Act”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 94-96 (2d Cir. 2008) (manifest disregard doctrine is “a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA”).

117. See *Stolt-Nielsen S.A.*, 548 F.3d at 92.

118. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1767-68 n.3 (2010).

The Sixth Circuit held that *Hall Street* does not limit the ability of courts to vacate a judgment under the FAA in *Coffee Beanery, Ltd. v. WW, L.L.C.*¹¹⁹ The court interpreted the holding of *Hall Street* to be limited to instances where the parties attempt to contractually expand the grounds for vacatur under the FAA.¹²⁰ The Sixth Circuit concluded that the “Supreme Court significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10, but it did not foreclose federal courts’ review for an arbitrator’s manifest disregard of the law.”¹²¹

In *Comedy Club, Inc. v. Improv West Associates*, the Ninth Circuit reached the same conclusion on alternative grounds. The court incorporated manifest disregard for the law into the statutory scheme under § 10 (a)(4) of the FAA. As explained above, this section gives a district court the power to vacate an award where the arbitrator “exceeded [his] powers” or “so imperfectly executed them that a mutual, final, and definite award . . . was not made.”¹²² The court reasoned that an arbitrator exceeds his powers when he manifestly disregards the law.¹²³ Other circuits, however, have moved away from judicially created grounds for vacatur.

Both the Fifth and Eight Circuits have completely eliminated judicially created grounds for vacatur.¹²⁴ In *Citigroup Global Markets, Inc. v. Bacon*, the Fifth Circuit explained, “*Hall Street* restricts the grounds for vacatur to those set forth in § 10 of the Federal Arbitration Act.”¹²⁵ With this single sentence, the Fifth Circuit eliminated manifest disregard as a valid ground for vacatur under the FAA.¹²⁶ The *Citigroup* court concluded that the practice of affording substantial deference to arbitration awards is not only consistent with the FAA but is also consistent with the practices of courts of equity before the enactment of the FAA.¹²⁷ Providing only a passing reference to the circumstances that led to the adoption of non-statutory grounds for

119. *See Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 418-19 (6th Cir. 2008).

120. *See id.* (explaining that the *Hall Street* court “held that the FAA does not allow *private parties* to supplement by contract the FAA’s statutory grounds for vacatur of an arbitration award”).

121. *Id.* at 418.

122. 9 U.S.C. § 10(a)(4) (2006); *see Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009).

123. *See Comedy Club*, 553 F.3d at 1290.

124. *See Medicine Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009).

125. 562 F.3d at 350.

126. *Id.*

127. *Id.* at 350-51.

vacatur, the *Citigroup* court concluded that the elimination of non-statutory grounds for vacatur was not “revolutionary.”¹²⁸

The Third, Fourth, and Tenth Circuits have yet to address the scope of *Hall Street*.¹²⁹ Because it was not necessary to the disposition of cases, each court has so far declined to address the scope of *Hall Street*. In fact, the Seventh Circuit has not addressed the issue at all. The inconsistencies among courts leave lower courts and practitioners unsure about the state of judicially created grounds for vacatur. In 2010, however, the Eleventh Circuit weighed in on the issue and determined that the Supreme Court’s rationale in *Hall Street* eliminated judicially created grounds for vacatur under the FAA.

III. Frazier v. CitiFinancial

A. Facts

In April 2000, John Frazier received a home equity loan from HomeSense Financial Corporation of Alabama.¹³⁰ During the course of the transaction, Mr. Frazier signed a binding arbitration agreement requiring any dispute arising from the loan to be submitted to arbitration.¹³¹ In addition, Mr. Frazier forged his wife’s signature on the loan agreement.¹³² The arbitration agreement specifically provided that the contract would be “governed by the Federal Arbitration Act.”¹³³ The loan was assigned several times to different financial services companies and eventually landed in the hands of CitiFinancial.¹³⁴ Mr. Frazier used part of the loan to pay existing credit card balances and other unrelated debts.¹³⁵ He did not mention the loan to Mrs. Frazier and had all loan documents sent to his P.O. box in an apparent attempt to conceal the transaction from his wife.¹³⁶ Claiming the loan transaction was fraudulent, Mr. Frazier stopped making loan payments in November of 2006.¹³⁷ Shortly thereafter, the Fraziers sought to have the contract rescinded in state court under the theories of breach of contract,

128. *Id.* at 350.

129. *See* Paul Green Sch. of Rock Music Franchising, L.L.C. v. Smith, 389 F. App’x 172 (3d Cir. 2010); Raymond James Fin. Servs., Inc. v. Bishop, 596 F.3d 183 (4th Cir. 2010); Hicks v. Cadle Co., 355 F. App’x 186, 197 (10th Cir. 2009).

130. Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1314 (11th Cir. 2010).

131. *Id.*

132. *Id.*

133. *Id.* at 1316.

134. *Id.* at 1317.

135. *Id.*

136. *Id.*

137. *Id.*

fraud, and misrepresentation.¹³⁸ The Fraziers contended that they believed the loan given was unsecured.¹³⁹ After the case was filed in state court, CitiFinancial removed the case from state court to federal court and moved to compel arbitration under the agreement.¹⁴⁰ Although the Fraziers attempted to avoid arbitration by contesting the validity of the contract, the district court granted CitiFinancial's Motion to Compel Arbitration.¹⁴¹ After a two-day arbitration, the following decision was reached: (1) "Mrs. Frazier's signature on the mortgage had been forged, but Mr. Frazier voluntarily entered into the secured loan transaction and therefore owed all sums specified in the note"; and (2) the "TILA, fraud, slander to title, and rescission claims were unavailing because the Fraziers failed to prove by a preponderance of the evidence that HomeSense, or the lawyer who conducted the closing, were agents or associates of CitiFinancial."¹⁴² The arbitrator "awarded \$38,706.93 in damages for breach of the promissory note and \$9,250.19 in attorneys' fees."¹⁴³ The arbitrator also attached a lien to the Fraziers' home for the total sum of the award.¹⁴⁴

B. Procedural History

On September 11, 2008, the district court reviewed and confirmed the award.¹⁴⁵ The court held that the Fraziers could not appeal to an arbitration panel because their claim did not involve a sufficient amount in controversy.¹⁴⁶ Moreover, the Court concluded that the Fraziers failed to raise grounds "justifying vacatur and/or modification of the arbitration award under the FAA"¹⁴⁷ Subsequently, the Fraziers asked the court to reconsider its previous ruling on the following grounds:

- 1) the award was subject to vacatur under § 10(a)(4) because the arbitrator exceeded his authority in granting CitiFinancial an equitable lien because CitiFinancial did not request such relief;
- 2) the award was subject to modification and/or correction under § 11(b) because in granting CitiFinancial an equitable lien, the

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1318.

142. *Id.*

143. *Id.* at 1319.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

arbitrator decided a matter not submitted to him; 3) the award was subject to modification and/or correction under § 11(c) because the arbitrator's decision . . . was 'subject to multiple interpretations' and 'thus imperfect'; 4) [the award should be vacated under non-statutory, judicially created grounds]; 5) the Fraziers were entitled to a de novo appeal before a three-arbitrator panel; and 6) Mrs. Frazier was not bound by the arbitration agreement and could not be compelled to arbitrate her claims.¹⁴⁸

The district court refused to vacate the arbitration award and the Fraziers appealed the decision to the Eleventh Circuit.¹⁴⁹

C. Decision of the Case

The Eleventh Circuit's decision hinged on the grounds available for vacatur under the FAA and the assumption that FAA created a national policy favoring arbitration. The court began its analysis by describing the statutory grounds available under §§ 10 and 11 of the FAA.¹⁵⁰ The court then explained that the district court *must* affirm the arbitration award *unless* one of four statutory grounds for vacatur exists.¹⁵¹

After outlining statutory grounds for vacatur, the court added, "[t]here is a presumption under the FAA that arbitration awards will be confirmed, and federal courts should defer to an arbitrator's decision whenever possible."¹⁵² The court then began to analyze the case using the statutory framework, concluding that none of the statutory bases for vacatur under the FAA applied to the Fraziers' case.¹⁵³

After concluding no statutory basis for vacatur applied, the court engaged in a discussion of judicially created grounds for vacatur—specifically focusing on the manifest disregard and arbitrary and capricious standards and public policy grounds for vacatur.¹⁵⁴ Looking first to precedent from the Eleventh Circuit, the court noted that these three grounds had been

148. *Id.* at 1321.

149. *Id.*

150. *Id.*

151. *Id.* (quoting 9 U.S.C. § 10(a) (2006)).

152. *Id.* (citing *B.L. Harbert Int'l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 909 (11th Cir. 2006)) (internal quotation marks omitted).

153. *Id.* at 1321.

154. *Id.* at 1322.

recognized in prior cases.¹⁵⁵ In order to determine whether those precedents had been overruled, however, the court carefully scrutinized *Hall Street*.

The Eleventh Circuit discussed *Hall Street* in several different contexts. First, it acknowledged that *Hall Street* addressed the issue of “whether the statutory bases for vacatur of an arbitrator’s award set forth in § 10 may be supplemented by contract.”¹⁵⁶ The Eleventh Circuit noted that in *Hall Street*, the Supreme Court answered the question in the negative, holding “that §§ 10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.”¹⁵⁷ Up to this point, the court discussed *Hall Street* in the context of contractual expansion of the grounds for review under the FAA. The court then shifted its focus, however, and interpreted the scope of *Hall Street* to encompass a much broader set of circumstances.

The *Frazier* court interpreted *Hall Street* as eliminating all judicially created grounds for vacatur. Quoting *Hall Street*, the *Frazier* court emphasized that the language of the FAA “carries no hint of flexibility” and that the text of the statute instructs a court “to grant confirmation in all cases, except when one of the *prescribed* exceptions applies.”¹⁵⁸ The *Frazier* court read this language to require the expansion of the holding of *Hall Street* beyond contractual expansions of the grounds for vacatur and into the realm of all judicially created grounds for vacatur under the FAA.¹⁵⁹ The *Frazier* court reasoned that permitting common law grounds for vacatur would eventually lead to expansive litigation and defeat the express purpose of the FAA—expediting the resolution of disputes.¹⁶⁰

The *Frazier* court recognized that *Hall Street* does not explicitly apply to judicially created expansions of §§ 10 and 11 of the FAA, but the court cited a number of other circuits’ interpretations as support for concluding that judicially created grounds for vacatur cannot survive.¹⁶¹ Even after citing circuit cases that did not eliminate judicially created grounds for vacatur, the *Frazier* court concluded that the categorical language of *Hall Street* requires courts to eliminate all such grounds.¹⁶²

155. *Id.* (citing *B.L. Harbert Int’l*, 441 F.3d at 909).

156. *Id.* (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008)) (emphasis omitted).

157. *Id.* (citing *Hall St.*, 552 U.S. at 584, 587) (internal quotation marks omitted).

158. *Id.* (quoting *Hall St.*, 552 U.S. at 584, 587) (emphasis added) (internal quotation marks omitted).

159. *Id.* at 1324.

160. *Id.* (citing *Hall St.*, 552 U.S. at 584, 587).

161. *Id.* at 1323.

162. *Id.* at 1324.

The court affirmed the ruling of the district court outright on all of the propositions of error except for the judicially created grounds for vacatur—holding that judicially created grounds for vacatur were eliminated by the Supreme Court in *Hall Street*.¹⁶³

IV. Analysis

The *Frazier* court's holding was incorrect because it improperly construed the scope of the *Hall Street* while ignoring the importance of judicially created grounds for vacatur to the vitality of the arbitration system. As explored in more detail below, the *Frazier* court's holding was incorrect for four main reasons. First, the *Hall Street* decision did not compel the *Frazier* court to eliminate judicially created grounds for vacatur. Second, the *Frazier* court ignored the importance of judicially created grounds for vacatur as a mechanism for instilling confidence in the arbitration system and protecting the public from awards that pose a hazard to public safety. Third, courts may rely on the contract law doctrines of unconscionability and public policy to support judicially created ground for vacatur because arbitration agreements are contracts. Finally, the two policy justifications given by the *Frazier* court are unsubstantiated. Specifically, there is no evidence that judicially created grounds for vacatur significantly affect judicial efficiency. In addition, the FAA did not create a national policy favoring arbitration justifying the elimination of judicially created grounds for vacatur. Thus, a bright-line rule emerged from the *Frazier* decision, which eliminates the judicially-created grounds for vacatur, explicitly placing the importance of parties' freedom of contract at a higher level than Congress intended when it implemented the FAA.

A. Non-Statutory Grounds for Vacatur are Important to the Arbitration System

In order for the FAA to effectively provide an efficient and predictable alternative to judicial adjudication, the judiciary must retain a check on arbitrators to ensure that the rights of individuals are protected. While arbitration remains an effective method for resolving disputes, many cases have shown the necessity of review in order to protect both individual rights and public welfare. As discussed above, non-statutory grounds for vacatur resulted from judicial discomfort with unjust arbitration awards. At the most basic level, the reasons that non-statutory grounds for vacatur were created

163. *Id.*

have not changed: that is, to provide a safety valve in situations where the interest of justice and public safety necessitates vacating an arbitration award.

1. Judicially Created Grounds for Vacatur are Important to Maintaining Confidence in the Arbitration System

In a number of cases, the interest of justice requires vacation of an arbitration award on non-statutory grounds.¹⁶⁴ *Halligan v. Piper Jaffray, Inc.* provides an example where the interest of justice required vacatur of a procedurally valid arbitration award.¹⁶⁵ There, the Second Circuit vacated an arbitration award because the arbitrator refused to recognize that an employee had been discriminated against because of his age—even after an overwhelming amount of evidence pointing to discrimination had been presented.¹⁶⁶ If the court had failed to step in to vacate the unjust award on non-statutory grounds, the employee would have had no recourse for his civil rights violation. Additionally, deferential treatment by the court in such a circumstance would have sent a signal to arbitrators, businesses, and individuals alike that arbitrators are not bound by relevant judicial precedent and may “dispense [their] own brand of industrial justice.”¹⁶⁷

Two logical consequences would result from that signal. First, when arbitration awards are not consistent with established legal norms, predictability is undermined. It is clear that Congress enacted the FAA to respond to judicial hostility to arbitration by promoting predictability and ensuring that arbitration decisions reflect established law.¹⁶⁸ This judicial hostility was based on the idea that arbitrators could not properly apply the law and make credible decisions.¹⁶⁹ If arbitrators can depart from established law without review, the purpose of the FAA is undermined. Of course, an unpredictable adjudication system is also undesirable because parties do not know what to expect and therefore cannot alter their behavior accordingly. Consequently, parties are likely to simply stop using arbitration agreements

164. See, e.g., *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997).

165. 148 F.3d 197 (2d Cir. 1998).

166. *Id.* at 204.

167. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960).

168. See Feigenbaum, *supra* note 92, at 876 (“Congress, by passing the [Federal Arbitration] Act, intended as its principal goal to give predictability to the legitimate expectations of those who agree to arbitration”); see *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 200 (2d Cir. 1998) (“It has been made clear by the Supreme Court, this court and other courts that the ancient judicial hostility to arbitration is a thing of the past.”).

169. See Leroy & Feuille, *supra* note 13.

altogether because the courts, while more expensive, would offer substantially more predictability.

Second, an arbitration system that does not reflect established legal norms will be perceived to be unfair. In general, the law reflects established cumulative norms within our society. Moreover, individuals, even losing parties, are comfortable with the finality of arbitration only when they are confident in the system.¹⁷⁰ Therefore, deference to arbitrators who ignore legal norms and rely upon their own sense of fairness frustrates expectations of society. In addition to the unpredictability of the system, parties will not want to defer to arbitrators whom they believe to be unfair and from whose decisions they cannot appeal. A system designed by Congress to offer a more efficient means of adjudication cannot accomplish its task if it is not used.

Admittedly, most arbitrators will be fair and follow established social and legal norms. If this were not so, then Congress would not have entrusted arbitrators with dispute resolution in the first place. However, even a few examples of unjust arbitration decisions can undermine confidence in the entire system. As discussed above, Congress did not provide statutory grounds to set aside all types of unjust awards. Therefore, courts play a necessary role in maintaining the vitality of the arbitration system by exercising both statutory *and* judicially created grounds for vacatur. As courts universally recognize, this role is rare and deferential; nevertheless, the Eleventh Circuit's elimination of judicially created grounds for vacatur opens the door for an unpredictable and inefficient arbitration system.

2. Judicially Created Grounds for Vacatur are an Important Comprehensive Public Policy Check on Arbitration Awards

Non-statutory grounds for vacatur are also important to public policy—including public safety—because an arbitrator's role is simply to resolve the dispute presented, not to consider the effects of the decision. Public policy grounds for vacatur were initially created in response to several cases where arbitrators reinstated unfit employees to safety-sensitive positions.¹⁷¹ The most notable of these cases is *Exxon Shipping Co. v. Exxon Seamen's Union*.¹⁷² In that case, an arbitrator reinstated an Exxon Shipping employee after he was discharged for being intoxicated during his regularly scheduled shift.¹⁷³ On appeal, the Third Circuit vacated the award in order to advance

170. See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 180 (2002).

171. See *supra* Part II.D.

172. 11 F.3d 1189 (3d Cir. 1993).

173. *Id.* at 1190-91. Remarkably, the incident occurred just six months after an intoxicated

protection of wildlife, resources, and public safety.¹⁷⁴ Although the arbitrator correctly interpreted the collective bargaining agreement, it was incumbent upon the court to consider the interest of society as a whole.

The increase in arbitration agreements makes it extremely important that courts have the ability to vacate arbitration awards when the award is contrary to prevailing public policy. As a general matter, courts have always considered the public policy effects of their decisions, especially with regard to public safety.¹⁷⁵ In *Exxon Shipping Co.*, the arbitrator considered only the dispute; however, a holistic approach must be taken in order to prevent arbitration awards from contradicting sound public policy. The Eleventh Circuit's elimination of the public policy ground for vacatur diminishes the ability of a federal court to vacate an arbitration award that is contrary to public policy. If arbitration awards contrary to public policy are confirmed, the court's role in promoting good public policy will be subverted.

The court's role in promoting sound public policy goes beyond the resolution of a single dispute and into the theories behind our governmental institutions. While a discussion of the purpose of the judicial system is beyond the scope of this article, it is widely accepted that the judicial branch should aspire to make common-law rules that advance the public good. In fact, much of the judicial branch's early hostility toward arbitration was based on the idea that it was too mechanical and unable to take into account the effects a decision may have on society as a whole.¹⁷⁶ If courts are unable to vacate arbitration awards based on public policy concerns, the early fears of the judicial branch will be realized and there will be no comprehensive check on arbitration awards.

3. Congressional Intent is Best Served by the Preservation of Non-Statutory Grounds for Vacatur

It is also reasonable to conclude that Congress has intended for public policy reasons for vacatur of arbitration awards to survive. Non-statutory grounds for vacatur have been in use for over fifty years.¹⁷⁷ During that time,

ship captain ran the Exxon Valdez, an oil tanker bound for California, into the Bligh Reef off Prince Williams Sound, Alaska. *Id.* at 1194. The accident was an environmental disaster which raised awareness about the culture of shipping industry employees and alcoholism.

174. *Id.* at 1196.

175. See Stewart E. Sterk, Commentary, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 482 (1981).

176. Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986).

177. See *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

there have been no attempts by Congress to amend § 10 of the FAA and declare the statutory grounds listed as the exclusive grounds for vacatur.¹⁷⁸ In fact, Congress has amended the FAA five times since enacting the FAA in 1925—amending § 10 as recently as 1990.¹⁷⁹ Additionally, it is hard to imagine that Congress intended the likely dangerous and unjust results that would have been reached in *Exxon Shipping Co.* and *Halligan* in the absence of non-statutory grounds for vacatur. Congress did not intend a system that would endanger the public or allow patently unjust results; therefore, the preservation and exercise of non-statutory grounds for vacatur best serve congressional intent.

At a time when docket control complicates judicial efficiency, arbitration proves an invaluable asset.¹⁸⁰ Like other areas of law, including contract law, arbitration must be subject to control beyond the will of the parties or the judgment of arbitrators. Arbitration requires judicial safety valves in order to avoid awards that undermine justice and public safety.¹⁸¹

B. Contract Law as a Model for Judicial Safeguards

Arbitration is a creature of contract law; thus some similar themes exist.¹⁸² Judicially created safeguards in arbitration mirror judicially created grounds for contract avoidance. The law of contracts includes a number of judicially created reasons to prohibit the enforcement of contracts, including public policy and unconscionability.¹⁸³ Just as the FAA is a provision that governs the enforcement of arbitration awards, the law of contracts is an elaborate framework designed to enforce contractual agreements.¹⁸⁴ Although *caveat*

178. Thomas E. Carbonneau, *"Arbitracide": The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT'L ARB. 233, 278 (2007) ("Title 9, U.S.C. §§ 1-14, was first enacted Feb. 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692). Two new sections, both initially denominated 15 and later corrected to 15 and 16, were passed by the U.S. Congress in October 1988. The renumbering took place on December 1, 1990 (Pub. L. Nos. 669 and 702); Chapter 3 was added on August 15, 1990 (Pub. L. Nos. 101-369); and § 10 was amended on November 15, 1990.").

179. *Id.*

180. See Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 930-36 (1983).

181. See *supra* Part IV.A.2.

182. See, e.g., *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194 (3d Cir. 2001).

183. CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 585, 632 (6th ed. 2007).

184. See generally *id.*

emptor is a theme that is present in the law of contracts,¹⁸⁵ courts have routinely carved out exceptions in the enforcement of contracts in order to protect the parties from the dangers involved with unfettered contract enforcement.¹⁸⁶ At the start of the twentieth century, courts developed common law exceptions to the general rule of *caveat emptor*.¹⁸⁷ In many situations, contracts seemed unfair as written, even though all of the parties agreed to the contractual terms and there were no procedural deficiencies in the contract formation.¹⁸⁸ These unfair contracts made courts uncomfortable enforcing the substantive terms of otherwise valid contracts—leading to the creation of common-law exceptions to contract enforcement.¹⁸⁹ In sum, courts were uncomfortable with blind enforcement of the provisions of contracts merely because parties agreed to those provisions.

Since “arbitration is a creature of contract,” the law of contracts should govern it.¹⁹⁰ Judicial discomfort with enforcement of unjust contracts is analogous to the discomfort courts experienced with the enforcement of unjust arbitration awards prior to the recognition of judicially created grounds for vacatur. Because the law of contracts recognizes judicially created safeguards designed to avoid the enforcement of unjust contracts, freedom of contract does not justify the *Frazier* court’s express repudiation of the judicially created grounds for vacatur. The lack of logical policy justification for the elimination of judicially created grounds is particularly troubling given the limited scope of *Hall Street*.

C. Hall Street Should be Read Narrowly

1. *Frazier* and Hall Street are Factually Distinguishable

The *Frazier* court incorrectly applied *Hall Street* to the case because the facts and issues in *Frazier* were not analogous to those in *Hall Street*. The *Frazier* court was specifically faced with the issue of whether judicially created grounds for vacatur were available to the Fraziers. The Fraziers alleged that the district court erred when it refused to vacate their award in

185. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965) (Danaher, J., dissenting).

186. See generally KNAPP ET AL., *supra* note 183, at 585.

187. See, e.g., *Williams*, 350 F.2d at 450; *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004); *Higgins v. Superior Court of L.A. Cnty.*, 45 Cal. Rptr. 3d 293, 300-01 (Ct. App. 2006).

188. See E. Allan Farnsworth, *CONTRACTS* § 4.28, 298-99 (4th ed. 2004).

189. KNAPP ET AL., *supra* note 183, at 585, 632.

190. *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194-95 (3d Cir. 2001).

part because “the arbitrator’s decision was contrary to public policy and [was] made in manifest disregard of the law.”¹⁹¹ The Fraziers failed to raise any proposition of error alleging a contractually expanded review, nor does the record indicate that the parties contracted to expand the scope of review under the FAA.¹⁹² Thus, *Frazier* can be factually and legally distinguished from *Hall Street* because *Hall Street* involved the contractual expansion of the grounds for vacatur under the FAA.¹⁹³ Nevertheless, this distinction can be overcome if *Hall Street* can be interpreted broadly enough to cover all grounds for vacatur under the FAA. But it cannot.

2. *The Intended Scope of Hall Street*

As the Supreme Court is the ultimate interpreter of the law, the meaning of *Hall Street* is essential in determining if judicially created grounds for vacatur exist under the FAA.¹⁹⁴ If *Hall Street* expressly limited the grounds for vacatur under the FAA to §§ 9 and 10, then the circuit courts of appeal would have no choice but to follow precedent and declare judicially created grounds for vacatur void.¹⁹⁵ However, if *Hall Street* applied only to the contractual expansion of the grounds for review under the FAA, then it would not apply to *Frazier*. In order to determine whether the Eleventh Circuit’s holding was based on binding precedent, the scope of the *Hall Street* holding must be explored.

The *Hall Street* opinion did not expressly eliminate judicially created grounds for vacatur.¹⁹⁶ The holding in *Hall Street* was directed at the contracting parties’ ability to contractually expand the depth of review provided by a federal court.¹⁹⁷ The basic and fundamental question addressed by the Court was whether parties may contractually expand the standard of review beyond what is provided for by the FAA.¹⁹⁸ The Court answered this question negatively, holding that §§ 9 and 10 are the exclusive grounds for

191. *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1321 (11th Cir. 2010).

192. *Id.* at 1320-21.

193. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

194. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

195. *See Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir. 1996) (“Where prior panel precedent conflicts with a subsequent Supreme Court decision, we follow the Supreme Court decision.”) (citing *Lufkin v. McCallum*, 956 F.2d 1104, 1107 (11th Cir. 1992)).

196. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1767-68 n.3 (2010); *Hall St.*, 552 U.S. 576, 588 (2008).

197. *Hall St.*, 552 U.S. at 581 (“We granted certiorari to decide whether the grounds for vacatur and modification provided by §§ 10 and 11 of the FAA are exclusive.”).

198. *Id.*

vacatur under the FAA.¹⁹⁹ Next, the Court engaged in a discussion of judicially created grounds for review in the context of contractually expanded grounds for vacatur—above and beyond the statutorily created grounds in the FAA.²⁰⁰ However, the Court’s discussion was limited to contractual expansion of the grounds for review.²⁰¹ The Court discussed manifest disregard by citing the petitioner’s contention that “if judges can add grounds to vacate (or modify), so can contracting parties.”²⁰² This language makes it clear that the Court was specifically referring to a *party’s* right to contractually expand the level of review, not to the non-statutory grounds for vacatur.

As noted previously, *Stolt-Nielsen* suggests that the Court did not intend to address the issue of judicially created grounds for vacatur when it decided *Hall Street*.²⁰³ The Court explicitly stated, “We do not decide whether ‘manifest disregard’ survives our decision in *Hall Street* . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.”²⁰⁴ Therefore, the issue is left to the circuits because the Supreme Court has confirmed that it has not spoken on that issue.²⁰⁵ Because *Hall Street* did not eliminate the judicially created grounds for vacatur, the Circuit Courts are free to decide these issues considering the law in their circuit and policy rationale.

Because *Hall Street* does not apply to the judicially created grounds for vacatur addressed in *Frazier*, the Eleventh Circuit should have instead looked to circuit precedent. Prior decisions of the Eleventh Circuit unequivocally recognized judicially created grounds for vacatur under the FAA.²⁰⁶ Even the *Frazier* court acknowledged the existence of non-statutory grounds for vacatur.²⁰⁷ Citing *B.L. Harbert International*, the *Frazier* court recognized a

199. *Id.* at 576.

200. *Id.* at 584-85.

201. Robert Ellis, Recent Developments, *Imperfect Minimalism: Unanswered Questions in Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), 32 HARV. J.L. & PUB. POL’Y 1187, 1191-92 (2009). See John S. Baker IV, Recent Developments, *Hall Street Associates v. Mattel, Inc.: What are the Exclusive Grounds for Modifying an Arbitration Award Under the Federal Arbitration Act?*, 32 AM. J. TRIAL ADVOC. 207, 207, 212 (2008).

202. *Hall St.*, 552 U.S. at 585.

203. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1767-68 n.3 (2010).

204. *Id.*

205. See *United States v. Holloway*, 499 F.3d 114, 118 (1st Cir. 2007).

206. See *B.L. Harbert Int’l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006); *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997); *O.R. Sec., Inc. v. Prof’l Planning Assocs.*, 857 F.2d 742 (11th Cir. 1988).

207. *Frazier v. CitiFinancial*, 604 F.3d 1313, 1322 (11th Cir. 2010).

long history that supported the use of judicially created grounds for vacatur in the Eleventh Circuit.²⁰⁸ Therefore, circuit law opposes *Frazier*, leaving only policy justifications as a rationale for departure from prior jurisprudence.

D. The Eleventh Circuit's Policy Rationale is Misplaced

The Eleventh Circuit's holding in *Frazier* was not a product of stare decisis; rather, the holding was based on flawed policy justifications. One of the most valuable assets that reviewing courts have is their ability to consider the changing effects of the rule of law.²⁰⁹ Ignoring the misinterpretation of *Hall Street* by the Eleventh Circuit—concluding that *Hall Street* mandated the elimination of non-statutory grounds for vacatur—it is possible that the *Frazier* court saw the *Hall Street* opinion as a call to reconsider the usefulness of judicially created grounds for vacatur. In order to properly analyze the merits of the decision, the policy rationale cited by the *Frazier* court must be examined. The court relied on the policy goals of judicial efficiency and arbitration award finality. The court discussed these issues through the lens of *Hall Street* and cited the Supreme Court's opinion.²¹⁰

1. Non-Statutory Grounds for Vacatur Do Not Undermine Judicial Efficiency

The *Frazier* court's judicial efficiency and arbitration award finality justification has merit on its face because both of these values are important to the effectiveness of the arbitration system under the FAA. The court recognized the need for arbitration awards to be final.²¹¹ If arbitration awards can simply be appealed to the federal district court and receive a full merits hearing, then the purpose of arbitration is frustrated because there would be little chance for parties to avoid litigation.²¹² It was logical for the *Frazier* court to protect the finality of awards; however, most commentators were satisfied with the finality of arbitration awards even with the availability of

208. *Id.* (citing *B.L. Harbert Int'l*, 441 F.3d at 910).

209. *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

210. *Frazier*, 604 F.3d at 1322 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008)).

211. *Id.*; *see also* *U.S. Postal Serv. v. Am. Postal Workers Union*, 204 F.3d 523, 527 (4th Cir. 2000); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (observing that “a restrictive standard of review is necessary to . . . prevent arbitration from becoming a ‘preliminary step to judicial resolution’”) (citing *E.I. DuPont de Nemours v. Grasselli Emps. Indep. Ass'n*, 790 F.2d 611, 614 (7th Cir. 1986)).

212. *U.S. Postal Serv.*, 204 F.3d at 527.

judicially created grounds for vacatur so long as the standard for setting aside the awards remained stringent.²¹³

The need to protect finality of arbitration awards is not sufficient to justify eliminating judicially created grounds for vacatur. A study conducted in 2006 revealed that arbitration awards are confirmed at a rate of ninety percent in federal courts across the United States.²¹⁴ The study also found that among all arbitration awards vacated, in both state and federal court, only four percent can be attributed to non-statutory grounds for vacatur.²¹⁵ This can be explained by the significant burden that must be met in order to meet the *prima facie* case for non-statutory vacatur.²¹⁶ The rigid standards and low success rates associated with petitions for vacatur on non-statutory grounds provide evidence that the existence of these grounds does not undermine the goal of judicial efficiency.

2. Illusory Policy: There Is No National Policy Favoring Arbitration

Since many courts and commentators believe the primary point of the FAA and the “national policy favoring arbitration” is to avoid time-consuming, expensive, merits adjudications, it is not completely irrational to explore the possibility that eliminating judicially created grounds for vacatur would be a sensible way of promoting judicial efficiency.²¹⁷ However, there is some debate about the underlying value that drives such strict adherence to arbitration awards—“the national policy favoring arbitration.”²¹⁸

In support of its holding, the *Frazier* court reasoned there is a “national policy favoring arbitration.”²¹⁹ Therefore, it is important to explore the notion

213. See Lawrence R. Mills et al., *Vacating Arbitration Awards*, 11 DISP. RESOL. MAG., Summer 2005, at 23, 25 (finding that manifest disregard was only successful four percent of the time it was argued, while arbitration awards are confirmed ninety percent of the time in federal court); see also Eric D. Dunlap, *Setting Aside Arbitration Awards and the Manifest Disregard of the Law Standard*, 80 FLA. B.J., July-Aug. 2006, at 51.

214. Mills, *supra* note 213, at 25.

215. *Id.*

216. See Dunlap, *supra* note 213, at 51.

217. KESSLER, *supra* note 27, at 85-86.

218. Compare Steven Walt, *Decision By Division: The Contractarian Structure of Commercial Arbitration*, 51 RUTGERS L. REV. 369 (1999) (arguing that the national policy favoring arbitration is really a policy favoring freedom of contract), with William R. Casto, *The Steelworkers Trilogy as Rules of Decision Applicable by Analogy to Public Sector Collective Bargaining Agreements: The Tennessee Valley Authority Paradigm*, 26 B.C. L. REV. 1, 14-15 (1984) (arguing that it was the intent of Congress to encourage parties to use *arbitration* to resolve their disputes, as opposed to the courts).

219. *Frazier v. CitiFinancial*, 604 F.3d 1313, 1322 (11th Cir. 2010) (“Read together, sections 9-11 ‘substantiat[e] a national policy favoring arbitration with just the limited review

that the FAA created a policy that favors arbitration. This notion originated in the dicta of early arbitration cases, but is nowhere in the FAA.²²⁰ The FAA does not, implicitly or explicitly, declare a national policy favoring arbitration; instead, the FAA simply provides a framework for enforcing arbitration awards.²²¹ In addition, the legislative history reveals that the plain focus of the FAA at the time of passage was to make arbitration awards enforceable in federal courts by statutorily eliminating a common law doctrine that disfavored arbitration.²²² This distinction is subtle, but if the courts are going to eliminate judicially created grounds for vacatur on the basis that the FAA's policy requires the courts to favor arbitration, then it is important to question that assumption.

Many courts have challenged the existence of a national policy favoring arbitration.²²³ Instead of viewing the FAA as a statement by Congress in favor of arbitration, those courts focus on the elimination of judicial hostility toward arbitration.²²⁴ In *Gotham Holdings, LP v. Health Grades, Inc.*, the Seventh Circuit Court of Appeals explained that there is no national policy favoring arbitration.²²⁵ In reality, the FAA acts as a mechanism to eliminate judicial hostility towards arbitration agreements.²²⁶ Although the Supreme Court's language in *Hall Street* suggests that there is in fact a national policy favoring arbitration, more recent opinions by the Court call that assumption

needed to maintain arbitration's essential virtue of resolving disputes straightaway.”)(internal citations omitted).

220. *Southland Corp. v. Keating*, 465 U.S. 1, 10-14 (1984) (citing H.R. REP. NO. 68-96, at 1 (1924))(exploring the legislative history of the FAA making it clear that Congress's intent in passing the FAA was simply “to place “[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs.”).

221. 9 U.S.C. § 10 (2006).

222. H.R. REP. NO. 68-96, at 1 (“The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be subject to litigation in the Federal courts . . . [t]he need for the law arises from . . . the jealousy of the English courts for their own jurisdiction This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment . . .”).

223. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 666 (7th Cir. 2009); see also *Arthur Andersen, L.L.P. v. Carlisle*, 129 S. Ct. 1896 (2009).

224. *Gotham Holdings*, 580 F.3d at 666.

225. *Id.*

226. *Id.*

into question.²²⁷ In *Arthur Andersen, LLP v. Carlisle*, the Court clarified federal policy by explaining that the goal of the FAA is “to place [arbitration] agreements upon the same footing as other contracts.”²²⁸ Even in recent Supreme Court cases, such as *AT&T Mobility LLC v. Concepcion*, which boldly tout the national policy favoring arbitration, the explanation of what the national policy favoring arbitration *means* contradicted the very idea that arbitration is favored.²²⁹ In *Concepcion*, the Court explained that the federal policy favoring arbitration simply means “courts must *place arbitration agreements on equal footing with other contracts, and enforce them according to their terms.*”²³⁰ In sum, the national policy favoring contract enforcement includes arbitration contracts. The federal policy toward arbitration is equal treatment and enforcement of arbitration contracts, not promotion of arbitration. As explained in *Gotham Holdings*, parties do not violate or undermine the integrity and utility of arbitration by litigating instead of arbitrating.²³¹ The absence of a national policy favoring arbitration undermines the primary policy justification advanced by the *Frazier* court for eliminating non-statutory grounds for vacatur.

V. Conclusion

The validity of non-statutory grounds for vacatur under the FAA is important to the vitality of the arbitration system. If arbitration agreements are given nearly unfettered deference by the courts, the result will undoubtedly be unjust arbitration awards and the erosion of confidence in the arbitration system. The *Frazier* decision places the arbitration system at risk by relying on the limited scope of *Hall Street* and flawed policy justifications to support its holding. *Hall Street* applies only to circumstances where parties have contractually expanded the grounds for vacatur, not as a mandate for the elimination of judicially created grounds for vacatur. The policies underlying the *Frazier* decision are also flawed because of two

227. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 577 (2008); *AT&T Mobility L.L.C. v. Concepcion*, 131 S.Ct. 1740, 1745-46 (2011).

228. *Arthur Andersen*, 129 S. Ct. at 1901 (quoting *Volt Info. Scis.*, 489 U.S. at 478) (internal quotation marks omitted).

229. *Concepcion*, 131 S.Ct. at 1745-46 (2011) (“We have described this provision as reflecting both a ‘liberal federal policy favoring arbitration,’ and the ‘fundamental principle that arbitration is a matter of contract.’ In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.”) (internal citations omitted).

230. *Id.* (emphasis added).

231. 580 F.3d at 666.

fundamentally erroneous assumptions: (1) non-statutory grounds for vacatur undermine judicial efficiency and (2) the FAA enacted a national policy favoring arbitration. Both of these assumptions are incorrect. While finality is an important value, it cannot be advanced at the expense of ensuring that arbitration awards are just and do not violate public policy. Instead, the same approach taken with regard to contracts should be maintained in the arbitration system—courts should have safety valves in order to avoid confirmation of unjust awards. Just as these safety valves have not undermined freedom of contract, evidence suggests they do not undermine the arbitration system. Therefore, non-statutory grounds for vacatur under the FAA should be maintained in order to ensure that courts have a legal basis for vacating arbitrary arbitration awards.

Sean C. Wagner