

CODIFYING MANIFEST DISREGARD

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INTRODUCTION

Despite being overruled in 1989, *Wilko v. Swan*¹ continues to be cited as authorizing courts to review arbitration awards for “manifest disregard of the law.”² Of course, *Wilko* itself did not review an award for manifest disregard of the law, much less vacate an award on that ground. Instead, while holding that pre-dispute agreements to arbitrate 1933 Securities Act claims were unenforceable (the holding that has been overruled), the Court stated its famous dictum that “[i]n unrestricted submissions . . . the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation.”³ The Federal Arbitration Act (“FAA”) nowhere expressly provides for an award to be vacated for manifest disregard of the law,⁴ nor has the Supreme Court since *Wilko* ever reviewed an award on that ground.⁵ Nonetheless, based on the *Wilko* dictum, every United States Court of Appeals has adopted some form of “manifest disregard” review.⁶

As a “non-statutory”⁷ or “judicially-created”⁸ ground for vacating arbitration awards, based on dicta in an overruled Supreme Court case, *Wilko* lacks a firm doctrinal footing. The circuits disagree on what manifest disregard is (with the Seventh Circuit in particular adopting its own, idiosyncratic

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¹ *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds* by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

² A search of the LexisNexis “Federal & State Cases, Combined” database on August 24, 2007, found that *Wilko* has been cited 449 times in state and federal court opinions since being overruled. A similar search of the LexisNexis “U.S. Law Reviews and Journals, Combined” database revealed that *Wilko* has been cited 604 times in law journals over the same period. Certainly some of the citations were to the fact that *Wilko* had been overruled, but not all (or even most).

³ *Wilko*, 346 U.S. at 436-37 (emphasis added).

⁴ 9 U.S.C. § 10 (2000). *But see infra* text accompanying notes 39-43.

⁵ *See infra* text accompanying notes 48-56.

⁶ *See infra* text accompanying notes 11-15.

⁷ *E.g.*, *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir.), *cert. denied*, 540 U.S. 878 (2003).

⁸ *E.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).

approach) and how the standard should be applied.⁹ Moreover, manifest disregard review is difficult to justify, as some have done, as a device for ensuring that arbitrators properly apply mandatory rules in their awards.¹⁰ Courts using manifest disregard review to ensure compliance with mandatory rules face a dilemma: If they apply manifest disregard review narrowly, arbitrators can easily evade court review, rendering it ineffective; if they apply manifest disregard review broadly, court review will be so intrusive that it will undercut the arbitration process.

Nonetheless, this Article argues in favor of codifying manifest disregard of the law as a ground for vacating arbitration awards. Codification would substantially reduce uncertainty by giving manifest disregard both a solid statutory foundation and a settled statutory definition. The policy justification for codification is not to prevent underenforcement of mandatory rules, but rather to preserve the integrity of the court system. Without manifest disregard review, a court may face the prospect of having to confirm an arbitration award in which the arbitrators on the face of the award blatantly refuse to apply clearly applicable law. Putting the power of the court behind such an award would undercut the legitimacy of the judicial system. Manifest disregard review permits courts to protect their own integrity—even if only rarely (if ever) actually vacating an award.

This Article proceeds in four parts. Part I describes the current status of review for manifest disregard of the law. Part II looks at the (very shaky) doctrinal basis for manifest disregard review. Part III discusses the dilemma courts face in trying to use manifest disregard to ensure that arbitrators apply mandatory rules of law. Part IV argues for codifying manifest disregard as a way of protecting the legitimacy and integrity of the courts in enforcing arbitration awards.

I. MANIFEST DISREGARD OF THE LAW AS A GROUND FOR VACATING AWARDS

Every United States Court of Appeals has reviewed arbitral awards for some form of “manifest disregard of the law.”¹¹ A common formulation of the test for manifest disregard is the following: “A party seeking to establish manifest disregard of the law sufficient to warrant setting aside an arbitral award must demonstrate that the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it.”¹² Some circuits add that law must be “well defined, explicit, and clearly applicable to the case” (although that may be implicit in the general test),¹³ or that enforcing

⁹ See *infra* text accompanying notes 24-29; see, e.g., *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001).

¹⁰ See *infra* text accompanying notes 67-94.

¹¹ See *Birmingham News Co. v. Horn*, 901 So. 2d 27, 48-49 (Ala. 2004) (citing cases). By comparison, in construing their own arbitration statutes, some states have refused to recognize manifest disregard as a ground for vacatur, while others have adopted it. See *Sooner Builders & Inv., Inc. v. Nolan Hatcher Constr. Servs., L.L.C.*, 164 P.3d 1063, 1072 nn.14-15 (Okla. 2007) (citing cases).

¹² *Cytec Corp. v. Deka Prods. Ltd. P'ship*, 439 F.3d 27, 35 (1st Cir. 2006).

¹³ *Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 90 (2d Cir. 2005).

the award would “result in significant injustice.”¹⁴ Under the usual standard for manifest disregard of the law, it is not enough that the arbitrators make an error of law in reaching their award.¹⁵ Instead, the arbitrators must know what the law is and consciously refuse to apply it.

Stephen Hayford has identified three different ways courts apply this usual standard, which he calls the “futility acknowledged” approach, the “big error” approach, and the “presumption-based” approach.¹⁶ He defines these approaches as follows:

- “Futility Acknowledged” Approach: “In the most simplistic mode of response reviewing courts concede the futility of attempting to divine the arbitrator’s state of mind . . . in the absence of a reasoned award and summarily reject the petition for vacatur.”¹⁷
- “Big Error” Approach: This approach “bypasses the ‘mens rea’ component entirely and relies instead upon an inference of constructive knowledge of the law by the arbitrator based on the clarity of the relevant law and the degree of error reflected in the challenged award.”¹⁸ As a result, “[t]his mode of analysis effectively transforms the ‘manifest disregard’ of the law test into a standard warranting vacatur anytime an arbitrator commits what amounts to a ‘big error’ of law.”¹⁹
- “Presumption-Based” Approach: Under this approach, courts “presume, through various devices, arbitral knowledge of the correct interpretation of the law at issue, based upon the courts[’] independent evaluation of the record made in arbitration, and . . . based on the presumption, . . . infer a conscious or intentional disregard of the law.”²⁰

Hayford argues that the usual standard for manifest disregard often “permutes from a test centering on the arbitrator’s state of mind . . . and his conduct . . . into an analysis concerned only with the purported correctness of the arbitration award on the law, and in some cases the facts.”²¹ As a result, he concludes that manifest disregard review encourages losing parties in arbitration to challenge awards on grounds of legal error, without regard to whether the arbitrator knew or disregarded governing law.²² Hayford is not alone in this assertion, as discussed further below.²³

¹⁴ Sarofim v. Trust Co. of the W., 440 F.3d 213, 217 (5th Cir. 2006).

¹⁵ E.g., P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 32 (1st Cir. 2005) (“Thus, ‘a mere mistake of law by an arbitrator cannot serve as the basis for judicial review.’ Rather, ‘manifest disregard’ means that ‘arbitrators knew the law and explicitly disregarded it.’” (internal citation omitted)); cf. United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) (“The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.” (quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960))).

¹⁶ Stephen L. Hayford, *Reining in the “Manifest Disregard” of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 125-32. Further variations have developed since Hayford wrote the article, most notably the Seventh Circuit’s variant discussed *infra* text accompanying notes 24-29.

¹⁷ Hayford, *supra* note 16, at 125-26.

¹⁸ *Id.* at 127.

¹⁹ *Id.*

²⁰ *Id.* at 129 (citing, e.g., Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998)).

²¹ *Id.* at 132.

²² *Id.*

²³ See *infra* text accompanying notes 89-94.

Alternative standards for manifest disregard exist as well, most notably in the Seventh Circuit. That court initially took an approach to manifest disregard similar to that of other circuits.²⁴ But in *Baravati v. Josephthal, Lyon & Ross, Inc.*,²⁵ Judge Richard A. Posner expressed skepticism about manifest disregard as a ground for vacatur, concluding that “[t]he grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that *Wilko* is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation.”²⁶ In *George Watts & Son, Inc. v. Tiffany & Co.*,²⁷ the Seventh Circuit “resolve[d] the tension in the competing lines of cases” by construing manifest disregard of the law to apply only when the arbitrator “direct[s] the parties to violate the law.”²⁸ Subsequently, the court of appeals explained that this definition is “so narrow [] that it fits comfortably” as a case in which the arbitrators have exceeded their authority—a ground for vacatur under section 10(a)(4) of the FAA.²⁹ No other circuit has followed the Seventh Circuit’s interpretation of manifest disregard.

Although parties often challenge awards on the ground that arbitrators manifestly disregarded the law, only rarely do they succeed. Michael H. LeRoy and Peter Feuille studied 336 state and federal cases challenging employment arbitration awards from 1975-2006.³⁰ They found that manifest disregard of the law was the most commonly asserted ground for vacatur: A party challenged an award as being in manifest disregard of the law in 35.1% (84 of 239) of the trial court cases studied and 30.4% (49 of 161) of the appellate court cases studied.³¹ But the challenges only rarely were successful: Courts vacated awards for manifest disregard in only 7.1% of the trial court cases (6 of 84) and 8.2% of the appellate court cases (4 of 49) in which it was raised. Lawrence R. Mills et al. obtained similar results based on a sample of all reported state and federal cases in which parties sought to vacate arbitration awards between January 1, 2004, and October 31, 2004.³² They found that while manifest disregard of the law was the second most commonly asserted ground (in 52 out of 182 cases, or 28.6%), the challenge succeeded only twice (3.8%).³³ Given the showing required for establishing manifest disregard,

²⁴ *E.g.*, *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992).

²⁵ *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994).

²⁶ *Id.* at 706.

²⁷ *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001).

²⁸ *Id.* at 580.

²⁹ *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 268 (2006).

³⁰ Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending ii* (Spring 2007) (unpublished manuscript, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=michael_leroy).

³¹ *Id.* at 25; see also Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861, 907 (2004) (“The most frequent variant alleged that the award was made in manifest disregard of the law (sixty-five cases, or 42.8%).”).

³² Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23.

³³ *Id.* at 25. The most commonly asserted ground was that the arbitrators exceeded their authority, which was raised in 101 of the 182 cases, and was successful in 21 cases (20.8% of those in which it was raised). *Id.*

those results are not surprising³⁴ but certainly add support to the criticisms by Hayford (and others).³⁵

II. DOCTRINAL ORIGINS OF MANIFEST DISREGARD OF THE LAW

Although manifest disregard of the law is now widely accepted by lower courts as a ground for reviewing arbitration awards, its doctrinal foundations are far from solid. The FAA does not expressly list manifest disregard as a ground for vacatur, and attempts to derive the manifest disregard standard from the statutory grounds have not proven persuasive. Instead, lower courts continue to cite *Wilko v. Swan* as the source of manifest disregard review, even though that case has been overruled and its original statement concerning manifest disregard was merely dictum. Indeed, the authorities cited in the *Wilko* opinion support a very different conception of manifest disregard from the one used today, casting further doubt on the standard. At best, *Wilko* provides a very shaky foundation for the modern conception of manifest disregard.

A. *Manifest Disregard and the FAA*

Section 10 of the Federal Arbitration Act sets out the familiar “statutory” grounds for vacating an arbitration award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.³⁶

These statutory grounds focus on the fairness of the procedure and the authority of the arbitrator,³⁷ much as the Due Process Clauses of the United States Constitution require courts to hold fundamentally fair trials and to have personal jurisdiction over the defendant.³⁸ Section 10 by its terms does not provide for review of the substance of an arbitration award—whether for manifest disregard of the law or otherwise.

³⁴ 4 IAN R MACNEIL ET AL., FEDERAL ARBITRATION LAW § 40.7.1, at 40:85 (1994) (“In terms of outcome of judicial decisions, however, the doctrine seems singularly unimportant. It is nearly impossible to find FAA arbitration decisions where application of the doctrine has resulted in upsetting of an award.”).

³⁵ See *supra* text accompanying notes 16-22 and *infra* text accompanying notes 89-94.

³⁶ 9 U.S.C. § 10 (2000). In addition, section 11 of the FAA sets out grounds on which a court may modify or correct an award. *Id.* § 11.

³⁷ WILLIAM W. PARK, PROCEDURAL EVOLUTION IN BUSINESS ARBITRATION: THREE STUDIES IN CHANGE 9 (2006) (“[C]ourts intervene *only* to monitor arbitration’s basic procedural integrity, by assuring (i) the basic procedural fairness of an arbitration (lack of bias, right to be heard, and equality of arms) and (ii) respect for limits of arbitral jurisdiction.”).

³⁸ A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 629 (2006).

To be sure, some courts and commentators have sought to derive manifest disregard of the law from one of the statutory grounds in section 10. For example, Ian R. Macneil et al. treat manifest disregard as an application of the excess of authority ground in section 10(a)(4).³⁹ They argue that in the absence of any express agreement between the parties, the scope of the arbitrators' authority is defined by implied arbitral powers—those “generally expected in American arbitration and allowed under American arbitration law.”⁴⁰ On this view, a challenge for manifest disregard “is based on the assumption that the parties did not agree to allow the arbitrators manifestly to disregard the law,” and so when the arbitrators did, they exceeded their authority.⁴¹ But this argument seems to assume its answer—that in fact it is generally expected that arbitrators will not manifestly disregard the law. Moreover, it is by no means clear that that is the case, as discussed below.⁴²

Others have suggested that manifest disregard might be a form of arbitral misconduct within the meaning of 9 U.S.C. § 10(a)(3). Stephen Hayford asserts:

[A] more plausible reading of the *Wilko* dictum is one in which its oblique reference to “manifest disregard” is viewed as identifying a type of arbitral misconduct or misbehavior of the nature addressed in section 10(a)(3) of the FAA, which can trigger vacatur under that provision. This mode of analysis would turn, not on the degree of an arbitrator's purported error of law, but rather on the “degree of [her] disregard” of the law If the court concludes that the arbitrator did ignore the law that she correctly understood, vacatur of the disputed arbitration award would be warranted, under section 10(a)(3) of the FAA, based on the arbitrator's improper conduct.⁴³

This seems to be a generous reading of the Court's *Wilko* dictum, which focused on the lack of substantive review of awards rather than on possible arbitrator misconduct. The statutory interpretation question is whether manifest disregard of the law is sufficiently like the types of arbitrator “misconduct” listed in section 10(a)(3)—i.e., refusing to postpone the hearing and refusing to hear pertinent evidence—to fall within the scope of the provision.

While both of these possibilities provide a statutory hook for manifest disregard of the law, they are by no means conclusive. Nor have they been widely

³⁹ See 4 MACNEIL ET AL., *supra* note 34, § 40.1.3.2, at 40:11-12 (“These purportedly non-statutory powers are, however, in fact very closely related to the ground for vacation in FAA § 10(d) that the arbitrators exceeded their powers. Indeed, all these grounds can easily be viewed as simply definitions of what it means for the arbitrators to exceed their powers under FAA § 10(d).”).

⁴⁰ *Id.* § 40.5.2.4, at 40:46.

⁴¹ *Id.* § 40.5.2.4, at 40:47.

⁴² See *infra* text accompanying notes 60-66.

⁴³ Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 816-17 (1996) (footnotes omitted).

accepted. With some exceptions,⁴⁴ courts commonly continue to cite to *Wilko* as the source for manifest disregard review rather than the FAA itself.⁴⁵

B. Supreme Court Precedent and the Origins of Manifest Disregard Review

As indicated above, the “manifest disregard of the law” ground for vacatur typically is traced to a single sentence in *Wilko*, which states that “[i]n unrestricted submissions . . . the interpretations of law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation.”⁴⁶ Given that *Wilko* did not involve an action to vacate an arbitration award, and has been overruled in any event, this doctrinal basis is a “slender . . . reed” indeed on which to base such a legal doctrine.⁴⁷

The Supreme Court has twice referred to the “manifest disregard” standard since *Wilko*’s overruling.⁴⁸ Most notably, in *First Options of Chicago, Inc. v. Kaplan*,⁴⁹ the Court described the grounds for vacating arbitration awards as follows:

The party still can ask a court to review the arbitrator’s decision, but the court will set that decision aside only in very unusual circumstances. See, e.g., 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953) (parties bound by arbitrator’s decision not in “manifest disregard” of the law), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).⁵⁰

⁴⁴ See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc) (“We have held that arbitrators ‘exceed their powers’ in this regard not when they merely interpret or apply the governing law incorrectly, but when the award is ‘completely irrational,’ or exhibits a ‘manifest disregard of law.’” (internal citation omitted)); *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) (“Similar manifest infidelity to what the arbitrators know to be the law, but deliberately disregard might well be regarded as the use of ‘undue means’ within the meaning of subdivision (a) of 9 U.S.C. § 10, or amount to ‘partiality’ within the meaning of subdivision (b) thereof.”).

⁴⁵ See *supra* text accompanying notes 1-2.

⁴⁶ *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (emphasis added), overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The discussion in text focuses on the phrase “manifest disregard of the law.” In addition, the opening clause of the quote—“[i]n unrestricted submission”—also has significant implications for American arbitration law. An “unrestricted submission” is one in which the parties do not require the arbitrators to follow the law. In such a case, as the *Wilko* Court notes, court review of awards on the merits is highly deferential. By contrast, a “restricted submission” is one in which the parties agree to require the arbitrators to follow the law. At common law, when arbitrators decided under a restricted submission, courts could review the award de novo for mistakes of law—thus permitting parties to contract for expanded review of an award. See Christopher R. Drahozal, *Contracting Around RUAAs: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 431-33 (2003).

⁴⁷ Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standard for Vacatur*, 66 GEO. WASH. L. REV. 443, 471 (1998).

⁴⁸ For discussion of pre-overruling references to *Wilko* in Supreme Court cases, see Hayford, *supra* note 43, at 775.

⁴⁹ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

⁵⁰ *Id.* at 942.

On the basis of this citation, Macneil et al. state that “however dead the rest of *Wilko* undoubtedly is, the ‘manifest disregard’ aspect of *Wilko* seems to be alive and well, having been resurrected, if ever dead, by the Supreme Court in” *First Options*.⁵¹ In addition, Justice Stevens dissenting in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*⁵² likewise cited *Wilko* in describing the limited judicial review of arbitration awards.⁵³

But in neither of these cases did the Court actually rely on manifest disregard to review an award, much less vacate an award on that ground. A citation (in dicta) to an overruled dictum in a prior Supreme Court case is a weak basis on which to conclude that the prior dictum has been “resurrected” as a ground for judicial review. At least *First Options*, unlike *Wilko* itself, involved an action to vacate an award.⁵⁴ But the vacatur ground asserted was not manifest disregard of the law. Instead, the Kaplans argued that they had never agreed to arbitrate, relying on the section 10(a)(4) excess of authority ground⁵⁵ (because if they never agreed to arbitrate, the arbitrator lacked authority to proceed). And Justice Stevens’ dissent was just that—a dissent—in a case in which the issue was the enforceability of an agreement to arbitrate, not a challenge to an award.⁵⁶ Thus, the “slender reed” supporting manifest disregard review is a slender one indeed.

Not only is the authority for manifest disregard weak, the Supreme Court has offered no guidance on what the phrase “manifest disregard of the law” means. The above-quoted references do little more than reiterate the phrase “manifest disregard” and suggest that the standard for vacatur is a high one. The courts of appeals have adopted what seems to be a textual understanding of the phrase, interpreting “manifest disregard” much as they would a statute. As Hans Smit explains:

In subsequent lower court decisions, the courts have stressed that disregard implies an element of deliberateness and have required that the arbitrators knowingly and purposefully disregarded what they knew the law to be. The circumstance that the errors of law had to be manifest or obvious, to a certain extent, facilitated the requisite finding of deliberativeness.⁵⁷

The result of that textual interpretation, as discussed above, is the nearly universal test for manifest disregard of the law: that arbitrators must know what the law is and knowingly refuse to follow it. But the Supreme Court has never

⁵¹ See 4 MACNEIL ET AL., *supra* note 34, § 40.7.1, at 40:43-40:44 (Supp. 1999) (“In *First Options of Chicago, Inc. v. Kaplan* (U.S. 1995), the Supreme Court made clear that the only nonstatutory ground for vacation is manifest disregard of the law.”).

⁵² *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

⁵³ *Id.* at 548-49 (Stevens, J., dissenting) (referring to “high standard applicable to vacation of arbitration awards”).

⁵⁴ *First Options*, 514 U.S. at 941.

⁵⁵ *Id.*

⁵⁶ *Vimar Seguros*, 515 U.S. at 530.

⁵⁷ Hans Smit, *Manifest Disregard of the Law in the New York Supreme Court, Appellate Division, First Department*, 15 AM. REV. INT’L ARB. 111, 121 (2004); see, e.g., *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990) (“In this context . . . ‘disregard’ implies that the arbitrators appreciated the existence of a governing legal rule but willfully decided not to apply it.”).

addressed that interpretation,⁵⁸ and one can certainly question whether Supreme Court opinions should be read as if they were statutes.

Moreover, the authorities the *Wilko* Court cited in support of its statement about the scope of court review cast light on the meaning of the dictum. Footnote 24 of the opinion, which appears immediately after the dictum concerning judicial review, contains a long citation list:

Burchell v. Marsh, 17 How. 344, 349; *United States v. Farragut*, 22 Wall. 406, 413, 419–421 (note the right of review); *Kleine v. Catara*, 14 Fed. Cas. 732, No. 7,869; *Texas & P. R. Co. v. St. Louis Southwestern R. Co.*, 158 F. 2d 251, 256; *The Hartbridge*, 62 F.2d 72, 73. In *Mutual Benefit Health & Acc. Assn. v. United Cas. Co.*, 142 F. 2d 390, 393, the problem was dealt with on the basis of the Massachusetts law. See Sturges, [Commercial Arbitrations and Awards]; Note, Judicial Review of Arbitration Awards on the Merits, 63 Harv. L. Rev. 681, 685, Award Based on Erroneous Rule; Cox, The Place of Law in Labor Arbitration, XXXIV Chicago Bar Rec. 205.⁵⁹

Those authorities suggest an understanding of manifest disregard of the law very much at odds with the current doctrine.

As discussed above, the modern conception of manifest disregard permits courts to vacate an arbitration award only when the arbitrator knowingly refuses to apply clearly applicable law. Courts cannot vacate an award simply because the arbitrator makes an error of law, even if the error is obvious on the face of the award. Under the common law of arbitration predating the FAA—as reflected in the sources cited by the Court in *Wilko* (among others)—the rule was the opposite: Arbitrators could knowingly disregard the law, but if they tried to follow it and did so incorrectly, the award would be set aside. Thus, James Gaitis writes, based on analysis of “the substantial body of case law that existed at the time *Wilko* was decided,” that “contrary to the general thrust of the *Wilko* ‘manifest disregard’ statement, under ‘unrestricted’ arbitration submissions, arbitrators should be deemed to be authorized to intentionally disregard applicable law should they so choose.”⁶⁰ As Michael Scodro concludes in his analysis, “[T]he historical sources on which the *Wilko* Court relied . . . are of tremendous interest because many actually *conflict* with the ‘manifest disregard’ standard in use today.”⁶¹

The following excerpt from Justice Story’s opinion (while riding circuit) in *Kleine v. Catara*,⁶² which was cited in *Wilko*, provides a good illustration:

If, therefore, under an unqualified submission, the referees meaning to take upon themselves the whole responsibility, and not to refer it to the court, to decide differently from what the court would on a point of law, the award ought not to be set aside. If, however, the referees mean to decide according to law, and mistake, and refer it to the court to review their decision, (as in all cases, where they specially state

⁵⁸ Hayford, *supra* note 47, at 466.

⁵⁹ *Wilko v. Swan*, 346 U.S. 427, 437 n.24 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

⁶⁰ James M. Gaitis, *Unraveling the Mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 PEPP. DISP. RESOL. L.J. 1, 4–5 (2007).

⁶¹ Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547, 581 (2005).

⁶² *Kleine v. Catara*, 14 F. Cas. 732 (C.C.D. Mass. 1814) (No. 7869).

the principles, on which they have acted, they are presumed to do,) in such cases, the court will set aside the award, for it is not the award, which the referees meant to make, and they acted under a mistake.⁶³

In other words, at common law, if the arbitrators intentionally disregarded the law, the court would not vacate the award. But if the arbitrators attempted to follow the law and made a mistake, the award was subject to vacatur. The modern conception of manifest disregard turns the common law standard on its head.

That said, there is some support in common law authorities for manifest disregard of the law as it is currently formulated—although these sources were not cited by the Court in *Wilko*. In *Allen v. Smith's Administrator*,⁶⁴ an 1845 Delaware Superior Court case, the court described its standard of review as follows:

But in no case will the court re-try the cause, or go into an examination of the merits of an award; or set it aside because they would have drawn different conclusions from the arbitrators, from conflicting testimony; or would have made a different award. But where it manifestly appears that the arbitrators have clearly mistaken the law, or *that they knew what the law was, and purposely disregarded it*, or that they have made an evident mistake in matter of fact, the court[s] are bound to set aside an award, as they are to set aside a verdict which is manifestly against the law or the facts.⁶⁵

Allen in turn was cited by Philip G. Phillips in a 1934 *Harvard Law Review* article as providing “some intimation . . . that if the arbitrators know the law, and deliberately choose to disregard it, their awards may be set aside.”⁶⁶ Nonetheless, the great bulk of the common law authority—including those on point cited in *Wilko*—conflicts with rather than supports the current standard for manifest disregard of the law.

III. MANIFEST DISREGARD AND FEDERAL STATUTORY CLAIMS

Not only is the doctrinal basis for manifest disregard weak, but courts using manifest disregard review to ensure compliance with mandatory legal rules have distorted its application.⁶⁷ Courts using manifest disregard for such an end face a dilemma: either apply manifest disregard narrowly, in which case arbitrators easily can evade review, or apply it broadly, in which case it risks undercutting the arbitration process altogether.

The Supreme Court's decisions permitting arbitration of federal statutory claims—culminating in the overruling of *Wilko*—have led to fears that arbi-

⁶³ *Id.* at 735.

⁶⁴ *Allen v. Smith's Adm'r*, 4 Del. (4 Harr.) 234 (1845).

⁶⁵ *Id.* at 236-37 (emphasis added).

⁶⁶ Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 604 (1934) (citing *Allen*, 4 Del. (4 Harr.) 234).

⁶⁷ Commentators have criticized manifest disregard review on other grounds as well. *See, e.g.*, 4 MACNEIL ET AL., *supra* note 34, § 40.7.2.5, at 40:91 (“Three criticisms may be made of manifest disregard doctrine: (1) it fails to focus on the very issues appearing to underlie it; (2) it often confers power on arbitrators beyond what at least one party intended or would have intended if fully informed; and (3) perhaps parties should not be able to confer so much power on arbitrators, that is, their freedom of contract should be curtailed.”).

trators will misapply federal law, permitting parties to turn mandatory rules into default rules.⁶⁸ Dicta in several of the cases, including *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁶⁹ and *Gilmer v. Interstate/Johnson Lane Corp.*,⁷⁰ seem designed to assuage these fears—by suggesting that courts retain at least some power to review the merits of awards. Thus, the Court in *Mitsubishi* stated that “[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.”⁷¹ Likewise, in *Gilmer*, the Court rejected the contention that “judicial review of arbitration decisions is too limited,” quoting *Shearson/American Express Inc. v. McMahon*⁷² to the effect that “‘although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute’ at issue.”⁷³

Subsequent courts have linked these statements to manifest disregard review. According to the D.C. Circuit in *Cole v. Burns International Security Services*⁷⁴:

Two assumptions have been central to the Court’s decisions in this area. First, the Court has insisted that, “[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” Second, the Court has stated repeatedly that, “‘although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute’ at issue.” These twin assumptions regarding the arbitration of statutory claims are valid only if judicial review under the “manifest disregard of the law” standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.⁷⁵

⁶⁸ E.g., Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704 (1999).

⁶⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁷⁰ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁷¹ *Mitsubishi*, 473 U.S. at 638. The Court goes on to state that “[w]hile the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.” *Id.* Commentators have described the *Mitsubishi* dictum as permitting courts to take a “second look” at the award—i.e., determining whether or not “the tribunal took cognizance of the antitrust claims and actually decided them.” Donald Francis Donovan & Alexander K.A. Greenawalt, *Mitsubishi After Twenty Years: Mandatory Rules Before Courts and International Arbitrators*, in PERVERSIVE PROBLEMS IN INTERNATIONAL ARBITRATION 11, 23, 27 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

⁷² *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987).

⁷³ *Gilmer*, 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232).

⁷⁴ *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

⁷⁵ *Id.* at 1487 (internal citations omitted); see Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 525 (2005) (“It is true that as disputes arising from mandatory law are increasingly swept into arbitration, courts naturally have come under increasing pressure to ensure that statutory policy is being vindicated. . . . As a consequence they may think it necessary—as Judge Edwards suggested in *Cole*—to breathe new life into the ‘manifest disregard of law’ standard . . .”).

Stated otherwise, such authorities treat manifest disregard review—applied “sufficiently rigorous[ly]”—as a means of ensuring that arbitrators properly apply mandatory legal rules.⁷⁶

Courts using manifest disregard for such an end, however, face a dilemma. A narrow manifest disregard standard is likely to be ineffective in ensuring compliance with mandatory legal rules. Arbitrators who want to disregard the law can readily evade such manifest disregard review. In domestic arbitrations, they can simply not make a reasoned award.⁷⁷ Without a reasoned award, there is little a reviewing court can do to find manifest disregard, at least under a narrow manifest disregard standard. Even if the arbitrators make a reasoned award, they need only make unsupported factual findings (because manifest disregard of the facts ordinarily is not a ground for vacating an award).⁷⁸ Presumably it is for reasons such as these that Alan Scott Rau said, after describing manifest disregard as requiring that “the losing party must demonstrate that the arbitrators ‘deliberately disregarded what they knew to be the law in order to reach the result they did,’” that: “This will never happen in our lifetimes.”⁷⁹

But it has, in fact “happen[ed] in our lifetimes,” albeit not very often.⁸⁰ Courts have vacated awards for manifest disregard of the law—usually by applying what Hayford describes as the “big error” approach or the “presumption-based” approach.⁸¹ The most notable example (which Hayford includes in the latter category) is *Halligan v. Piper Jaffray, Inc.*,⁸² in which the Second Circuit vacated an employment arbitration award for manifest disregard of the “law or the evidence or both.”⁸³ In *Halligan*, a claimant sought to vacate an award that rejected a claim of age discrimination in employment. On appeal,

⁷⁶ *Cole*, 105 F.3d at 1487. As Steve Ware rightly points out, although the focus often is on federal statutory claims, the important distinction is between mandatory rules (whether statutory or otherwise) and default rules. Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 88, 116-20 (2006).

⁷⁷ Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 529-30 (1997).

⁷⁸ See *Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004).

⁷⁹ Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT'L ARB. 213, 237-38 (1996); see also Lucy Reed & Phillip Riblett, *Expansion of Defenses to Enforcement of International Arbitral Awards in U.S. Courts?*, 13 SW. J. L. & TRADE AM. 121, 133 (2006) (“It is difficult to imagine an international arbitrator writing an award in which he or she painstakingly sets out an applicable legal principle and then defiantly ignores it or states that he or she will not apply it.”); Hans Smit, *Is Manifest Disregard of the Law or the Evidence or Both a Ground for Vacatur of an Arbitral Award?*, 8 AM. REV. INT'L ARB. 341, 342 (1997) (The manifest disregard standard “presupposes an exceptionally obtuse arbitrator.”).

⁸⁰ See *supra* text accompanying notes 30-33. Indeed, Rau later recanted, stating that “my powers of prophecy—reasoning to what I consider to be unimpeachably ‘correct’ results—are occasionally flawed.” Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 83 n.199 (2003).

⁸¹ See *supra* text accompanying notes 18-20.

⁸² *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999).

⁸³ *Id.* at 204. Subsequently, the Second Circuit made clear that while manifest disregard of the law was a ground for vacating arbitration awards, manifest disregard of the evidence was not. *Wallace*, 378 F.3d at 193.

the Second Circuit found “strong evidence that Halligan was fired because of his age.”⁸⁴ Because the parties agreed that “the arbitrators were correctly advised of the applicable legal principles,” the court stated that it was “inclined to hold that they ignored the law or the evidence or both.”⁸⁵ The court bolstered its conclusion by drawing a negative inference from the lack of a reasoned award by the arbitrators: “[W]here a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court’s confidence that the arbitrators engaged in manifest disregard.”⁸⁶ Other courts have applied manifest disregard broadly by extending it to manifest disregard of the contract⁸⁷ and manifest disregard of a default (rather than mandatory) legal rule.⁸⁸

These sorts of attempts by courts to prevent parties and arbitrators from evading review for manifest disregard of the law are likely to undercut the arbitration process itself and (in international arbitrations) to discourage the selection of the United States as an arbitral situs.⁸⁹ William W. Park has described manifest disregard as “hang[ing] like the sword of Damocles to be grasped by award debtors who understandably seek relief from costly damages”;⁹⁰ “[t]he prospect of such judicial meddling in the arbitral process can only alarm foreign enterprises contemplating arbitration in the United States.”⁹¹ According to Hans Smit:

[T]he mere existence of this ground has proved a significant lure to losers in arbitration. . . . Added to this has been the judicial reluctance to accept the loss of adjudicatory power to arbitrators. . . . [A]most surreptitiously, this power has, on occasion, been expanded . . . to manifest disregard of the terms of the agreement, which tends to expand judicial review to virtually the entire arbitral work product. . . . By this process, the very foundations of the institution of arbitration are eaten away.⁹²

The empirical evidence described above—which shows that parties frequently challenge awards for manifest disregard but rarely succeed—is consistent with these views,⁹³ as is Hayford’s categorization of the manifest disregard cases.⁹⁴ In short, by attempting to use manifest disregard review to police arbitrator applications of mandatory rules, courts jeopardize the arbitration process itself.

⁸⁴ *Halligan*, 148 F.3d at 204.

⁸⁵ *Id.*

⁸⁶ *Id.* (although emphasizing that “we are not holding that arbitrators should write opinions in every case or even in most cases”).

⁸⁷ *E.g.*, *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 235 (4th Cir.) (“[T]he arbitrator disregarded the plain and unambiguous language of the governing arbitration agreement.”), *cert. denied*, 127 S. Ct. 434 (2006).

⁸⁸ *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 783 N.Y.S.2d 339, 341 (App. Div. 2004), *rev’d*, 846 N.E.2d 1201 (N.Y. 2006).

⁸⁹ By contrast, narrowly constrained manifest disregard review—perhaps reinforced by various other measures—should be far less destructive of the arbitration process. *See infra* text accompanying notes 104-108.

⁹⁰ PARK, *supra* note 37, at 18.

⁹¹ William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT’L L. 1241, 1253 (2003).

⁹² *E.g.*, Smit, *supra* note 57, at 122.

⁹³ *See supra* text accompanying notes 30-33.

⁹⁴ *See supra* text accompanying notes 16-22.

IV. CODIFYING MANIFEST DISREGARD OF THE LAW

Given the doctrinal weaknesses of manifest disregard review and its counterproductive application by the courts, what should be done? My proposal: Amend the Federal Arbitration Act to make manifest disregard of the law a statutory ground for vacating arbitration awards. Define manifest disregard narrowly, to require an intentional disregard of a well-established mandatory (not default) rule. Preclude the court from reexamining the entire record of the arbitration proceeding; instead, permit a court to vacate an award for manifest disregard of the law only if (1) the arbitrators state in a written award that they are disregarding the law, or (2) the record shows that counsel for the prevailing party urged the arbitrators to disregard the law.

Codification plainly would resolve the doctrinal uncertainties, and the narrow statutory definition should restrict counterproductive applications of manifest disregard by the courts. The proposal codifies the current standard for manifest disregard but makes clear that manifest disregard does not apply to default rules or issues of fact. It also rejects the approach taken by the Second Circuit in *Halligan*, in which the court of appeals reexamined the arbitral record and relied on the lack of a written award in finding manifest disregard. Thus, the proposal takes as its starting point the current narrow standard for manifest disregard and narrows it further.

This approach will, of course, likely render manifest disregard ineffective as a way of ensuring compliance with mandatory legal rules. But that is not the justification for codifying manifest disregard. Instead, the justification is to ensure the integrity of the judicial process. Without manifest disregard of the law as a ground for vacating an award, courts may be faced with the prospect of having to enforce an arbitration award where the award on its face openly refuses to follow established law. Enforcing such an award would harm the legitimacy of the judicial system and also could result in a political backlash against the arbitration process.⁹⁵ Thus, the justification for codifying manifest disregard is based not on the fact that the arbitrator is disregarding the law, but rather on the open and notorious use of the judicial system to enforce an award in which the arbitrator disregards the law.⁹⁶

Sarah Cole has made a similar point in analyzing whether courts should enforce expanded review provisions—contract provisions that provide for court

⁹⁵ See *Economos v. Liljedahl Bros., Inc.*, 901 A.2d 1198, 1203-04 (Conn. 2006).

So delimited, the principle of vacating an award because of a manifest disregard of the law is an important safeguard of the integrity of alternate dispute resolution mechanisms. Judicial approval of arbitration decisions that so egregiously depart from established law that they border on the irrational would undermine society's confidence in the legitimacy of the arbitration process.

Id. at 1203 (quoting *Garrity v. McCaskey*, 612 A.2d 742, 747-48 (Conn. 1992)); see also Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 516 (1998) (also quoting *Garrity*, 612 A.2d at 747-48).

⁹⁶ I reserve opinion on the need for court review of awards to constrain parties from using arbitration to avoid mandatory rules (in a less open and notorious fashion) but note that there is little evidence so far of that happening. See Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187 (2006).

review of arbitration awards on grounds other than those set out in the FAA.⁹⁷ While generally supporting party autonomy on the issue,⁹⁸ she argues that courts to date “have virtually ignored the threat the use of such standards pose[s] to institutional integrity.”⁹⁹ One exception she points to is Judge Kozinski’s concurring opinion in *Lapine Technology Corp. v. Kyocera Corp.*,¹⁰⁰ in which he agreed that the expanded review provision at issue in the case was enforceable but stated that he “would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl.”¹⁰¹ According to Cole, Judge Kozinski’s “comment . . . shows a recognition that freedom of contract must yield in those cases where the integrity of the courts as an institution is threatened.”¹⁰² The same applies with manifest disregard review: An award that manifestly disregards a mandatory rule of law should be vacated because court enforcement of such an award would threaten “the integrity of the courts as an institution.”¹⁰³

I recognize that some parties might still overuse manifest disregard review, even defined narrowly, in an attempt to avoid liability under an arbitral award. Presumably a narrow, statutory definition of manifest disregard would reduce its attractiveness as a basis for challenging an award and thus the likelihood of abusive vacatur actions. In addition, the following measures could be considered as ways to reduce further the possibility of excessive challenges to awards:¹⁰⁴

- Require parties that unsuccessfully challenge an award on grounds of manifest disregard to pay the other party’s attorneys’ fees or subject them to some other sanction.¹⁰⁵

⁹⁷ Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1206 (2000).

⁹⁸ *Id.* at 1258-59.

⁹⁹ *Id.* at 1259.

¹⁰⁰ *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring), *vacated*, *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc).

¹⁰¹ *Kyocera*, 341 F.3d at 891.

¹⁰² Cole, *supra* note 97, at 1259 n.259 (quoting *Lapine*, 130 F.3d at 891). I withhold judgment on the sorts of expanded review provisions that might threaten the integrity of the courts, but surely a clause requiring a judge to “study[] the entrails of a dead fowl” would qualify.

¹⁰³ *Id.* To reiterate the point—in my view what threatens the integrity of the judicial system is not court enforcement of awards that make mistakes of law, or awards in which arbitrators disregard the law, but awards in which it is clear on the face of the award (or by extrinsic evidence) that the arbitrators knew what the law was and nonetheless disregarded it. If a court would have to reexamine the evidence underlying the award, or draw inferences from the lack of a written award, the manifest disregard is not sufficiently clear.

¹⁰⁴ Another possibility has been suggested by Stephen J. Ware:

[C]ourts may need to require parties to announce at the outset of arbitration whether they are asserting any claims under mandatory law. . . . [P]arties who do not announce at the outset of arbitration that claims under mandatory law are being asserted should be precluded from seeking judicial review of the arbitrators’ legal rulings. They have waived such review.

Ware, *supra* note 68, at 740-41.

¹⁰⁵ *Cf. B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913-14 (11th Cir. 2006) (“Courts cannot prevent parties from trying to convert arbitration losses into court victories,

- Permit non-American parties who agree to arbitrate in the United States to opt out of the manifest disregard vacatur standard. The opt-out would be limited to arbitrations solely between non-American parties.¹⁰⁶ Awards resulting from such arbitrations would have much less likelihood of being enforced in the United States,¹⁰⁷ and the availability of an opt-out would reduce the risk that manifest disregard review would discourage non-American parties from arbitrating in the United States.¹⁰⁸

Such measures should help avoid the sorts of routine challenges that unnecessarily run up the costs of arbitral dispute resolution.

CONCLUSION

Manifest disregard of the law is a “non-statutory” or “judicially-created” ground for vacating arbitration awards. It does not appear in the Federal Arbitration Act, but instead has been developed by courts—which typically derive the doctrine from dictum in the overruled Supreme Court case of *Wilko v. Swan*. The usual test for manifest disregard—that the arbitrator knows the applicable law but intentionally refuses to apply it—is based on a literal reading of the *Wilko* dictum and is directly contrary to the common law authorities cited by the *Wilko* Court. Indeed, in seeking to ensure that arbitrators correctly apply mandatory rules of law in their awards, lower courts have distorted the doctrine further, in ways that undercut the arbitration process itself. In short, manifest disregard of the law, as currently applied, leaves much to be desired.

but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions. A realistic threat of sanctions may discourage baseless litigation over arbitration awards and help fulfill the purposes of the pro-arbitration policy contained in the FAA.”).

¹⁰⁶ Cf. Swiss Private International Law Act art. 192(1) (1987), in 4 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Switzerland: Annex II-1, II-5 (Jan Paulsson ed., Supp. 1988) (“Where none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Art. 190, para. 2.”).

¹⁰⁷ The New York Convention sets out the exclusive grounds on which courts can refuse to enforce arbitration awards but does not preclude countries from adopting different grounds on which awards made in the country can be vacated. Thus, consistent with the New York Convention, an American court could apply manifest disregard review to an international arbitration award made in the United States. See generally Reed & Riblett, *supra* note 79, at 128-32 (providing overview of governing law).

¹⁰⁸ Thus, I would preserve manifest disregard as a ground for vacatur for at least some international arbitrations held in the U.S. and would not go so far as those commentators who would eliminate manifest disregard review altogether for international arbitration awards made in the United States. E.g., Richard E. Speidel, *International Commercial Arbitration: Implementing the New York Convention*, in ARBITRATION LAW IN AMERICA, *supra* note 76, at 185, 305 (urging Congress to adopt “Article 34 of the Model Law[, which] permits recourse against the non-domestic award whether or not a motion for recognition and enforcement has been filed under the same standards provided in Article V” of the New York Convention; if Congress did so, “the domestic law of the United States for purposes of Article V(1)(e), whether here or abroad, would be consistent with Article V and the ‘manifest disregard’ exception would be relegated to the international trash can”).

Nonetheless, in “Rethinking the Federal Arbitration Act,” manifest disregard of the law should be codified as a ground for vacatur. The justification for codifying manifest disregard is not to ensure that arbitrators follow mandatory rules of law in their awards. Instead, the justification is to protect the integrity of the judicial process—by enabling courts to avoid putting their power and authority behind arbitral awards that openly flaunt the law. As codified, challenges to arbitration awards for manifest disregard of the law will rarely, if ever, succeed. But the need to protect the integrity of the court system justifies codifying manifest disregard, even if the doctrine only rarely is applied.