DETERRENCE AND IMPLIED LIMITS ON ARBITRAL POWER

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ABSTRACT

Employment, brokerage, and other contracts routinely include "predispute" arbitration clauses—provisions requiring the parties to submit any and all future disputes to arbitrators rather than courts. In recent years, courts have come to enforce these clauses in the vast run of cases, requiring parties to arbitrate even when the underlying dispute implicates employment discrimination, antitrust, or other "public law" rights. In response to this trend, interest has grown in the extent of courts' authority to overturn arbitral awards that do not give effect to such rights. At first blush, the Federal Arbitration Act (FAA) does not appear to authorize any such review, but federal and many state courts have come to recognize an additional, judge-made ground for overturning awards in cases in which arbitrators have "manifestly disregarded" governing law.

This Article concludes that the "manifest disregard" doctrine as it stands is legally baseless and should be abandoned. In its place, the Article urges courts to recognize a distinct but related ground for overturning arbitral awards—a ground rooted in the arbitration contract itself. Traditional contract law doctrines encourage courts to choose contract readings or imply contract terms needed to make an agreement valid and enforceable. The Article contends that in many cases predispute arbitration clauses would be invalid absent an

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arbitral duty to apply the law in good faith because, without this duty, such clauses would interfere with the law's deterrent function. Society has a powerful interest in the role many legal rights play in deterring misconduct, and studies show that deterrence depends critically on a legal regime's accuracy. A duty to take the law seriously and make good faith efforts to apply it correctly should be a bare minimum required for effective deterrence within any system of adjudication, and it is this duty that courts therefore must find in agreements to arbitrate future disputes. Having recognized this duty, the Article concludes that the FAA itself gives courts the power to review awards to ensure that arbitrators are living up to it in rendering awards.

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INTRODUCTION

Commercial arbitration has undergone a remarkable transformation.[1] Up until just twenty years ago, U.S. courts generally refused to enforce "predispute" arbitration clauses—contract provisions requiring parties to resolve any future disputes in arbitration rather than in court—when doing so meant ordering parties to arbitrate antitrust, securities fraud, or other examples of what are sometimes termed "public law" claims. Courts enforced such predispute clauses when disputes arose over the meaning of contract terms. Judges feared that arbitrators might not fully vindicate public law rights, however, and courts therefore refused on policy grounds to order binding arbitration when such rights were at stake.[2] This was the state of the law throughout much of the twentieth century, notwithstanding the 1925 enactment of the Federal Arbitration Act (FAA or the Act),[3] legislation that on its face requires courts to enforce predispute arbitration clauses as they would enforce any other contract, without regard to the substance of the parties' underlying disputes.[4]

Judicial concern for the fate of public law claims in arbitration was not unfounded. In addition to various procedural differences between judicial and arbitral proceedings, it was often said that commercial arbitrators were not bound to apply substantive law. At the same time, the FAA enumerates only very narrow grounds for disturbing arbitral awards—gross procedural defects such as arbitrator corruption, fraud, or unauthorized conduct.[5] Therefore, substantive review for decades has been chiefly the province of a purported judge-made addition to these statutory grounds, applicable only when an arbitrator has "manifestly disregarded" governing law.[6] Courts understandably feared that important, public law rights might not get their due in arbitration and that the available grounds for judicial review were inadequate to correct arbitral missteps.

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1. This Article uses the term "commercial" arbitration broadly to refer to all arbitration governed by the Federal Arbitration Act—or its state law counterparts—as opposed to union-management arbitration governed by the Labor Management Relations (Taft Hartley) Act, 29 U.S.C. §§ 185–87 (2000).

2. *See infra* Part I.B.

3. 9 U.S.C. §§ 1–16 (2000).

4. *Id.* § 2.

5. *Id.* § 10(a).

6. *See infra* Part II.A–B.

Beginning in 1985, however, the Supreme Court changed course. In a series of decisions involving antitrust, securities fraud, RICO, and employment discrimination claims, the Court enforced predispute arbitration clauses in the parties' contracts and ordered plaintiffs' complaints out of court and into arbitration.[7] As a result of these decisions, today all manner of statutory, public law claims are subject to mandatory arbitration pursuant to such clauses.

This sea change has not washed away longstanding concerns about the fate of public law claims in arbitration, however. On the contrary, arbitration's procedural informality and concerns over arbitral competence, bias, or the likelihood of legal error have led some to question it as a method for resolving such disputes.[8] Indeed, a large and growing group of commentators is willing to accept arbitration's recently expanded role only if parties to arbitration can obtain *de novo* or similar review of arbitrators' legal rulings in court.[9] For many of these commentators and for at least one federal appeals court, the "manifest disregard" standard is the ready vehicle for obtaining the review thought necessary to protect public law rights in arbitration.[10]

The "manifest disregard" doctrine is fatally flawed, however, and provides no legitimate, independent ground for judicial review of arbitral awards. The phrase originated in dicta in a 1953 decision that the Court has since expressly overruled.[11] Furthermore, the authorities that the Supreme Court cited in conjunction with its reference to "manifest disregard" in 1953 are incompatible with the doctrine's modern form.[12] Because it is the product of passing dicta, moreover, the doctrine has no fixed definition, leaving courts to apply it inconsistently.

Most damning, however, is that a freestanding, judge-made ground for reviewing the substance of arbitral awards would seem to be an affront to the FAA. The statute includes a list of specific bases for overturning awards, and with few exceptions courts and

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7. *See infra* Part I.C.

8. *See infra* note 122 and accompanying text.

9. *See infra* notes 121–24 and accompanying text.

10. *See infra* Part II.B.

11. *See* Wilko v. Swan, 346 U.S. 427, 436–37 (1953) ("In 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."), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

12. *See infra* notes 162–86 and accompanying text.

commentators do not even attempt to root the "manifest disregard" doctrine in this list.[13] It is almost universally understood as a judicial addendum to the statute—a dubious prospect in any case but particularly so for a doctrine arising from passing dicta in an overturned decision. It should come as no surprise, therefore, that some courts and commentators reject the "manifest disregard" doctrine outright and refuse to embrace any form of substantive judicial review of arbitral awards.[14]

This Article draws on deterrence theory and traditional principles of contract law to propose a new basis for limited judicial review of arbitral awards—one that offers some additional protections for society's interest in the enforcement of certain, mandatory laws. It does so, however, without affronting the FAA's limited review scheme. The approach outlined in this Article is true to the Act's motivating premise that arbitration clauses should be subject to traditional contract rules and enforced in the same manner as other contracts. The standard of review draws its essence from the predispute arbitration agreement itself, as seen through the lens of traditional canons of contract law.

The Article proceeds from the principle that many rights, both statutory and common law, are "nonwaivable" in the following, limited sense: courts will not enforce contracts purporting to waive a party's right to sue to enforce these rights *prospectively*, before alleged misconduct has occurred.[15] Thus, for example, courts will not enforce a clause in an employment contract in which an employee vows not to sue for any future acts of employment discrimination.[16] On top of what may be called a paternalistic concern that parties will not receive sufficient consideration for rights waived prospectively, this inalienability is justified on the ground that prospective waivers will detract from the law's critical deterrent function. Put simply, parties who know that they will not be sued for misbehavior are

13. *See infra* notes 250–53 and accompanying text.

14. *See infra* Part II.C.

15. This Article uses the term "nonwaivable" as a shorthand to describe these rights, recognizing that they can be "waived" insofar as plaintiffs or would-be plaintiffs may be able to settle suits advancing these rights or contract away their ability to file suit to vindicate them once the wrongdoing has occurred.

16. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII.").

presumed to be more likely to misbehave, especially if they have paid for that luxury.[17]

Nor may parties do indirectly through an arbitration clause what they may not do directly with an outright, prospective waiver. A predispute arbitration provision requiring the arbitrator to ignore employment discrimination or antitrust law, should such a dispute arise, would undoubtedly be unenforceable.[18] But what of the clause that leaves it to the arbitrator's discretion whether to apply the law strictly or to ignore it in favor of the arbitrator's own sense of equity on a case-by-case basis? This Article contends that such a clause should also fail because, like a full-out prospective waiver, it would detract from the law's intended deterrent effect.

For this conclusion, the Article relies on studies modeling deterrence and mapping the variables bearing on a law's deterrent power. Numerous models illustrate, specifically, that a perceived chance of legal error—a departure from the correct adjudicatory outcome favoring either the plaintiff or the defendant—reduces the law's capacity to deter misconduct.[19] Adjudication inevitably entails some risk of legal error, of course. A court may commit a good-faith mistake, particularly when interpreting nonforum law, addressing a novel issue, or otherwise applying unfamiliar norms. But there is a pronounced, qualitative difference between such unavoidable variability and the uncertainty that would arise if adjudicators lacked even the basic duty to respect and apply the law to the best of their ability. In light of its negative impact on the law's deterrent effect, a predispute arbitration clause failing to impose this basic duty on an arbitrator would constitute a prospective waiver of the right to sue, unenforceable as to the many nonwaivable rights that parties may seek to vindicate in arbitration.

In fact, arbitration clauses rarely say whether arbitrators must follow substantive law, but traditional canons of contract law seek to read contracts in a way that renders them lawful and enforceable. When nonwaivable rights are at issue, that means understanding the contract to include an arbitral duty to apply relevant law in good faith.

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17. *See infra* notes 204–17 and accompanying text.
18. *See infra* note 226 and accompanying text.
19. *See infra* Part III.B.1.

Once predispute arbitration contracts are seen to include an implicit, mandatory limit on arbitral discretion, it becomes clear that the FAA itself authorizes a form of judicial review. Among its enumerated grounds for overturning an arbitration award, the Act empowers courts to intervene when arbitrators "exceed[] their powers" under contract.[20] Arbitrators who do not work in good faith to identify and apply the law properly (i.e., as a court would) exceed their authority under contract. This realization provides a firm, statutory grounding for a limited right of judicial review.

The Article proceeds as follows. Part I provides a short history of American arbitration law. Part II describes the "manifest disregard of the law" doctrine—including the attention it has recently enjoyed—but concludes that the doctrine as it is currently understood is hopelessly confused and ultimately lacks any legitimate, legal footing. Finally, in Part III, the Article outlines an alternative—a contractual duty on the part of arbitrators to apply the law faithfully and a corresponding ground for judicial review under the FAA's own, enumerated bases for overturning awards.

I. A BRIEF HISTORY OF AMERICAN ARBITRATION

Appreciating the modern debate over judicial review of arbitral awards requires some historical perspective. Congress in the early twentieth century, and the Supreme Court more recently, ushered in an era in which arbitrators frequently resolve employment discrimination, antitrust, securities fraud, and other public law claims pursuant to predispute arbitration clauses. Not surprisingly, this shift has increased the call for courts to review the substance of arbitral awards, particularly when such important public law rights are at stake.

A. The Enforceability of Predispute Arbitration Clauses

Contracts requiring parties to arbitrate disputes historically met with disfavor. Courts permitted parties to withdraw their contractual consent to arbitrate at any point before the arbitrator rendered an award, at times invoking the mantra that private agreements could not "oust" the courts of their jurisdiction over legal controversies.[21] In

20. 9 U.S.C. § 10(a)(4) (2000).

21. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 73–74.

the early twentieth century, however, prominent support arose for laws upholding arbitration agreements—including "predispute" agreements requiring parties to submit wholly future disputes to arbitration—first and most notably in the New York State Chamber of Commerce.[22] The state legislature ultimately codified this vision, enacting the New York Arbitration Act in 1920.[23] In relevant part, the law made predispute arbitration clauses enforceable and enumerated only very narrow grounds for postaward judicial review of arbitral awards.[24]

Shortly thereafter, the New York model suffered a setback, when the ABA's Conference of Commissioners on Uniform State Laws drew up the Uniform Arbitration Act, model legislation that reflected the historical antagonism toward predispute arbitration agreements. Promulgated in 1924, the Act did not afford courts any authority to enforce such agreements. It only permitted parties to contract to arbitrate "any controversy *existing between them at the time of the agreement to submit*" the dispute to arbitration.[25] A group of states implemented legislation on the model of the Uniform Arbitration Act.[26] Two others passed laws making predispute clauses enforceable but requiring or empowering courts to answer legal questions certified to them by the parties to arbitration or by the arbitrators themselves.[27]

In the end, however, the New York model prevailed. In 1925, Congress passed the Federal Arbitration Act, which directed courts to uphold predispute arbitration clauses and provided only narrow grounds for judicial review of the resulting awards.[28] Specifically,

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22. IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 25–28 (1992).

23. *Id.* at 31.

24. *Id.* at 35–37; *see also* Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155, 161 (1970) (referring to New York's 1920 arbitration act as a "revolutionary step" that "enabl[ed] parties in dispute to control *future* disputes as well as to settle *existing* disputes").

25. Nathan William MacChesney, *An Act Concerning Arbitration, to Make Uniform the Law with Reference Thereto*, 50 A.B.A. COMMITTEE ON UNIFORM ST. L. REP. app. A at 590 (1925) (emphasis added).

26. *See* Michael A. Scodro, Note, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1941 & n.80 (1996) (Nevada, North Carolina, Utah, and Wyoming).

27. *See id.* at 1941–42 & nn.81–82 (describing Connecticut and Massachusetts statutes).

28. The FAA's legislative history indicates that a prominent proponent of the New York legislation drafted the Act. *See J. Hearings Before the Subcomms. of the Comms. on the*

§ 10(a) of the Act empowers courts to vacate an award only in the following limited cases:

> (1) Where the award was procured by corruption, fraud, or undue means;
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> (2) Where there was evident partiality or corruption in the arbitrators, or either of them;
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> (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
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> (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.[29]

The FAA elsewhere authorizes courts to modify an award for numerical error, inaccurate "description of any person, thing, or property referred to in the award," or when "the arbitrators have awarded upon a matter not submitted to them" or "the award is imperfect in matter of form."[30] The FAA provides none but these extremely circumscribed bases for disturbing arbitral awards.

Although the federal statute applies to any "contract evidencing a transaction involving commerce"[31]—a limitation coextensive with Congress's Commerce Clause power[32]—the states have their own statutory schemes governing arbitration. Here, too, the New York model ultimately prevailed: the Commissioners on Uniform State Laws withdrew their 1924 act and replaced it with a 1955 version

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Judiciary, 68th Cong., 1st Sess. 19 (1924) (testimony of Francis B. James, former member of ABA Committee on Commerce, Trade, and Commercial Law) (stating that Julius Henry Cohen, a leading force behind the New York law, bore "the burden . . . of drafting the [federal] bill").

29. 9 U.S.C. § 10(a) (2000).

30. *Id*. § 11.

31. *Id.* § 2.

32. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277 (1995) ("[W]e conclude that the word 'involving' . . . signals an intent to exercise Congress' commerce power to the full.").

modeled on the New York and federal legislation.[33] Adopted by most states,[34] the 1955 act upholds predispute arbitration clauses and provides for only limited, postaward judicial review along the lines of § 10 of the FAA.[35]

In short, the first half of the twentieth century witnessed what courts and commentators have characterized as a legislative reversal of the "traditional judicial hostility toward arbitration."[36] Predispute agreements to arbitrate became enforceable, and courts retained only narrow grounds for disturbing arbitral awards.

B. Ongoing Judicial Hostility: "Public Policy" Limits on Arbitrability

Notwithstanding these statutory changes, judicial skepticism toward arbitration persisted. Agreements to arbitrate future disputes were now enforceable as a general matter, but courts nonetheless refused to send particular *classes* of claims to arbitration pursuant to predispute clauses. Statutory claims, in particular, were exempt from arbitration as a matter of a judge-made, public policy doctrine.

The Supreme Court endorsed such limits on the enforcement of predispute arbitration clauses in the 1953 *Wilko v. Swan*[37] decision. The plaintiff in *Wilko* alleged violations of § 12(2) of the Securities Act arising from his broker's purported fraud in connection with a stock sale.[38] The broker moved to stay the federal action pending arbitration pursuant to the terms of the plaintiff's margin agreement, which required that "[a]ny controversy arising between [the parties] under [the agreement would] be determined by arbitration."[39]

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33. MACNEIL, *supra* note 22, at 55.

34. The website maintained by the National Conference of Commissioners on Uniform State Laws notes that 49 jurisdictions adopted this version of the act. *See* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (last visited Jan. 17, 2006).

35. *See* UNIF. ARBITRATION ACT § 12 (1955). The National Conference of Commissioners on Uniform State Laws approved a Revised Uniform Arbitration Act in 2000. The new model, which twelve states have adopted, is similar to the 1955 act as relevant to this Article. *See* UNIF. ARBITRATION ACT § 23 (2000); *see also* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (listing 12 states that have adopted revised act) (last visited Jan. 17, 2006).

36. Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 256 (1987); *see also* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219–20 (1985) (noting that the FAA was intended "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate").

37. 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

38. *Id.* at 428–29.

39. Wilko v. Swan, 201 F.2d 439, 442 (2d Cir. 1953).

Overruling the court of appeals, the Supreme Court denied the broker's stay motion and refused to compel arbitration.[40] The Court grounded its decision in § 14 of the Securities Act, which voids "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the [SEC]."[41] In the majority's view, "the right to select the judicial forum"—available for suits under § 12(2)—"is the kind of 'provision' that cannot be waived [prospectively] under § 14."[42] The Court reasoned that a securities buyer who agrees in advance to arbitrate any disputes gives up the "wide[] choice of courts and venue" that § 12(2) allows "at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary."[43]

Underlying this conclusion was the belief that the Securities Act's "effectiveness in application is lessened in arbitration as compared to judicial proceedings."[44] The plaintiff's securities fraud claim would require arbitrators to make and apply "subjective findings on the [defendant's] purpose and knowledge . . . without judicial instruction on the law."[45] To make matters worse, the award would be immune from any serious judicial review:

> In [an] unrestricted submission[], such as the present margin agreements envisage, 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. The United States Arbitration Act contains no provision for judicial determination of legal issues . . . .[46]

"While the Securities Act does not require [a plaintiff] to sue," the Court concluded, "a waiver in advance of a controversy stands upon a different footing."[47]

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40. *Wilko*, 346 U.S. at 438.
41. 15 U.S.C. § 77n. (2000).
42. *Wilko*, 346 U.S. at 435.
43. *Id.*
44. *Id.*
45. *Id.* at 435–36.
46. *Id.* at 436–37 (footnote omitted). Writing for himself and Justice Minton in dissent, Justice Frankfurter objected that "nothing in the record" suggested that arbitration "would not afford the plaintiff the rights to which he [was] entitled" under the Securities Act. *Id.* at 439–40 (Frankfurter, J., dissenting).
47. *Id.* at 438 (footnote omitted).

Courts following *Wilko* applied its "public policy" exception to exempt other public law claims from arbitration otherwise required by predispute agreement.[48] Among the most recognized decisions in this line was the Second Circuit's opinion in a case arising under the Sherman Antitrust Act—*American Safety Equipment Corp. v. J.P. Maguire & Co.*[49] Unlike the Securities Act, there is no language in the Sherman Act expressly barring parties from waiving the right to sue prospectively, but the Second Circuit concluded that antitrust law's important, public aspects warranted formal, public adjudication.[50] The court reasoned that "[a] claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney general who protects the public's interest."[51] The court was concerned that "commercial arbitrators are frequently men drawn for their business expertise" and concluded that it was not "proper for them to determine these issues of great public interest. In some situations," the court reasoned, "Congress has allowed parties to obtain the advantages of arbitration if they 'are willing to accept less certainty of legally correct adjustment' . . . but we do not think that this is one of them."[52]

The Supreme Court reiterated some of these same concerns in 1974 in *Alexander v. Gardner-Denver Co.*[53] The plaintiff in *Alexander* sought to bring a Title VII complaint in federal court after losing a discrimination claim under the arbitration procedure mandated by his union's collective bargaining agreement.[54] In concluding that the adverse arbitral decision did not bar the employee from suing under Title VII, the Court recognized the important public interest in the litigation of employment discrimination claims: "[T]he private litigant not only redresses his own injury but also vindicates the important

48. Schwartz, *supra* note 21, at 89–91; *see* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 714–15 (1999) (listing formerly nonarbitrable subject matter and concluding that "[u]ntil about twenty-five years ago, arbitration seemed largely confined to contract claims").

49. 391 F.2d 821 (2d Cir. 1968).

50. *Id.* at 826–28.

51. *Id.* at 826.

52. *Id.* at 827–28 (quoting Wilko v. Swan, 346 U.S. 427, 438 (1953)).

53. 415 U.S. 36 (1974).

54. *Id.* at 39–43.

congressional policy against discriminatory employment practices."[55] Arbitrators are empowered to give effect to the parties' intent under the contract, not to advance public policies embodied in federal statutes, the Court reasoned; accordingly, arbitrators must enforce the parties' agreement even at the expense of statutory law.[56] "[T]he resolution of statutory or constitutional issues is a primary responsibility of courts," the Court continued, "and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts."[57] *Alexander* thus built on the principle—already elaborated in *Wilko* and *American Safety*—that public courts are the appropriate fora for resolving public law disputes.

C. A Change of Course for the Supreme Court

The very year that it decided *Alexander*, the Supreme Court also laid the theoretical groundwork for a new, more generous view of arbitration's proper role in the adjudication of public law claims. Changes first occurred in the context of international commercial contracts. *Scherk v. Alberto-Culver Co.*[58] involved an American company's purchase of certain German business entities. Alberto-Culver, the American corporation, filed suit in federal court claiming that Scherk, the seller, had induced the purchases with misrepresentations actionable under the antifraud provisions of the Securities Exchange Act.[59] Scherk moved to stay the federal proceedings pending arbitration before the International Chamber of Commerce in Paris, as required by an arbitration clause in the parties' contract.[60] The district court denied Scherk's motion and the court of appeals affirmed, relying on *Wilko*'s holding that purchasers of securities can proceed in U.S. courts notwithstanding their agreement to arbitrate future disputes.[61]

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55. *Id.* at 45.

56. *Id.* at 53 ("As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. . . . The arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties . . . .").

57. *Id.* at 57.

58. 417 U.S. 506 (1974).

59. *Id.* at 509.

60. *Id.*

61. *Id.* at 510.

The Supreme Court reversed. In the Court's view, the fact that the contract at issue "was a truly international agreement" meant that the rule announced in *Wilko* did not apply.[62] Citing the contract's international character, the Court reasoned that "in the absence of the arbitration provision," there would be "considerable uncertainty" over "the law applicable to the resolution of disputes arising out of the contract."[63] The predictability that comes from an arbitration clause avoids a "legal no-man's-land" in which parties might engage in "unseemly and mutually destructive . . . litigation advantages" by racing to file competing suits in different countries.[64] The *Scherk* Court concluded that this predictability favored enforcement of the predispute arbitration clause, notwithstanding the public law nature of the plaintiff's claim.[65]

Scherk foreshadowed the Supreme Court's changing views on arbitration. It did not effect any immediate changes outside the international context, however. For the time being, courts continued to adhere to the old "public policy" exception in purely domestic cases.[66]

With a series of four decisions beginning in 1985, however, the Supreme Court picked up where *Scherk* left off and eviscerated the "public policy" exception, making even core, public law rights susceptible to mandatory arbitration by virtue of predispute agreements. The first of these decisions was, like *Scherk*, international

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62. *Id.* at 515.

63. *Id.* at 516.

64. *Id.* at 517.

65. *Id.* at 519–20.

66. *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 215 n.1 (1985) (citing cases applying *Wilko* to render agreements unenforceable when plaintiffs raised claims under § 10(b) of the Securities Exchange Act). The Supreme Court, moreover, continued to adhere to *Alexander*, allowing employees to sue in court to vindicate federal statutory rights notwithstanding adverse decisions in arbitration required under collective bargaining agreements. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), a Fair Labor Standards Act (FLSA) claim, and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), a § 1983 claim alleging violation of First Amendment rights, the Court reiterated that courts, not labor arbitrators, should have the last word in interpreting federal public law rights. *See Barrentine*, 450 U.S. at 745 (rejecting the argument that FLSA claims were barred by their "prior submission" to arbitration on the ground that "Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum"); *McDonald*, 466 U.S. at 290 ("[A]lthough arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard.").

in character. The petitioner in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[67] was a Japanese corporation that had entered into sales and distribution agreements with respondent, a company headquartered in Puerto Rico that agreed to purchase and distribute Mitsubishi vehicles.[68] The relationship deteriorated, and Mitsubishi sought a federal court order directing the parties to arbitrate Mitsubishi's claims against respondent before the Japan Commercial Arbitration Association, as required under the parties' contracts.[69] Soler filed numerous counterclaims, including a claim under the Sherman Antitrust Act.[70] The question before the Supreme Court was whether Soler's antitrust counterclaim should be resolved in federal court or through arbitration.[71]

The Supreme Court sided with Mitsubishi and ordered Soler's antitrust counterclaim to arbitration. Following *Scherk*, the majority held that predispute clauses should be enforceable "where the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution."[72] Of particular relevance, the Court specifically responded to Soler's claim that Japanese arbitrators may not apply U.S. antitrust law:

> There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. *Cf. Wilko v. Swan*, 346 U.S., at 433–434. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the

67. 473 U.S. 614 (1985).
68. *Id.* at 616–17.
69. *Id.* at 618–19.
70. *Id.* at 619–20.
71. *Id.* at 624.
72. *Id.* at 636.

> statute will continue to serve both its remedial and deterrent function.[73]

The Court continued:

> Having 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 . . . . While 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.[74]

The Supreme Court thus presumed that Soler could "vindicate" its rights "effectively" and that U.S. courts could ensure arbitral "cognizance" of federal antitrust law when asked to enforce the award.

The Supreme Court brought these same presumptions to bear on a wholly domestic dispute two years later in *Shearson/American Express Inc. v. McMahon.*[75] The plaintiffs in that case were customers of the defendant brokers, whom the plaintiffs accused of fraud in violation of the Securities Exchange Act and federal RICO law.[76] The defendants moved to compel arbitration pursuant to clauses in the parties' customer agreements.[77]

The Supreme Court ruled for the defendants. The Court interpreted its 1953 decision in *Wilko* to hold not that the Securities Act's antiwaiver provision made it unlawful to waive the right to a judicial forum, but that agreeing to resolve claims in arbitration was tantamount to waiving the Act's substantive rights.[78] The *McMahon* majority concluded that *Wilko*'s suspicion of arbitration was out of line with the Court's more recent, proarbitration pronouncements:

> Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable. In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and

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73. *Id.* at 636–37 (footnote omitted).
74. *Id.* at 638 (footnote omitted).
75. 482 U.S. 220 (1987).
76. *Id.* at 222–23.
77. *Id.* at 223.
78. *Id.* at 228–29.

> legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.[79]

Applying these more contemporary assumptions, the Court held that plaintiffs had not waived their substantive rights under the Securities Exchange Act by agreeing to submit future disputes to arbitration.[80]

Likewise, the Court found "no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims."[81] The Court rejected the respondents' argument "that the public interest in the enforcement of RICO precludes its submission to arbitration."[82] *Mitsubishi* compelled the arbitration of an antitrust claim, the Court reasoned, and

> there is even more reason to suppose that arbitration will adequately serve the purposes of RICO than that it will adequately protect private enforcement of the antitrust laws. The private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff, and does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute.[83]

Although the Court's 1953 holding in *Wilko* technically survived *McMahon*—the former resolved a claim under the Securities Act whereas the latter involved RICO and the Securities Exchange Act—the opinion in *McMahon* discredited *Wilko*'s reservations about arbitration as a vehicle for resolving public law disputes. The Court formally overruled *Wilko* only two years after *McMahon*. Plaintiffs in *Rodriguez de Quijas v. Shearson/American Express, Inc.*[84] were investors who sued their broker for violations of a Securities Act

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79. *Id.* at 232 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 633–34, 636–37 & n.19 (1985)).

80. *Id.* at 234.

81. *Id.* at 242.

82. *Id.* at 240.

83. *Id.* at 241–42.

84. 490 U.S. 477 (1989).

antifraud provision,[85] the same law that the *Wilko* plaintiff was permitted to pursue in court notwithstanding a predispute arbitration clause. This time, however, the Court concluded that the securities claim was eligible for arbitration under the customer agreement: "To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[86]

Finally, the Court solidified its "endorsement" of arbitration as an appropriate means to resolve public law disputes with its 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*[87] The plaintiff in that case filed suit in federal court claiming that his former employer had fired him because of his age in violation of the Age Discrimination in Employment Act (ADEA).[88] The employer sought to divert the claim to arbitration pursuant to a clause in the plaintiff's original application for registration as a securities representative.[89] The Supreme Court ruled in the employer's favor, rejecting the plaintiff's position that enforcing the predispute arbitration clause would be inconsistent with the "statutory framework and purposes of the ADEA."[90] The Court reiterated its observation from *Mitsubishi* that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'"[91] The Court then rejected a series of arguments that arbitration is inadequate or otherwise inappropriate as a vehicle for resolving ADEA rights, notwithstanding the fact that the ADEA is meant "not only to address individual grievances, but also to further important social policies."[92]

Thus, by 1991, the Supreme Court had made clear that, barring some patent expression of congressional intent proscribing

85. *Id.* at 478–79.

86. *Id.* at 481.

87. 500 U.S. 20 (1991).

88. *Id.* at 23–24.

89. *Id.* at 24.

90. *Id.* at 27.

91. *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

92. *Id.* at 27; *see also id.* at 27–35 (outlining Gilmer's arguments that arbitration is inappropriate and explaining the reasoning behind the Court's rejection of these claims).

arbitration, agreements to arbitrate future disputes were enforceable even when statutory, public law rights were at stake.

II. JUDICIAL REVIEW AND "MANIFEST DISREGARD OF THE LAW"

With the death of the "public policy" exception and with greater enforceability of predispute arbitration clauses, more and more attention has focused on courts' ability to review arbitration awards. A large and growing number of commentators are advocating *de novo* or other forms of substantive judicial review of awards, at least in cases involving public law claims.[93]

As noted previously, however, the FAA provides only very limited grounds for modifying or vacating awards.[94] The statute protects against fraud, overreaching, and other forms of arbitrator misconduct, but it does not explicitly authorize courts to review the substance of arbitral decisionmaking.[95] It is not surprising, therefore, that many of those seeking to expand judicial review beyond the statute's process-oriented grounds rely on the prevailing, supposedly judge-made or extrastatutory basis for merits review: the "manifest disregard of the law" standard.

This Part reviews the origins of the "manifest disregard" doctrine, the inconsistency in its application, the way it has been stretched to meet concerns over public law arbitration, and the ongoing attacks on the doctrine. In light of its history and apparent incompatibility with the FAA, this Part concludes that as an avowedly freestanding, extrastatutory doctrine it is an illegitimate basis for reviewing arbitral awards.

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93. *See infra* notes 121–24 and accompanying text.

94. *See supra* text accompanying notes 28–30.

95. Barbara Black & Jill I. Gross, *Making It Up as They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1032 (2002) (observing that "the stated grounds" for overturning arbitration awards in the FAA do not "explicitly provide[] for a review of the merits. Rather, the focus of the statutory concerns is improper conduct on the part of the arbitrators.").

A. Origins and Applications of the "Manifest Disregard of the Law" Doctrine

To varying degrees, courts have recognized a variety of judge-made grounds for reviewing arbitration awards.[96] Far and away the most prominent and well-used vehicle for inquiring into the substance of an award, however, is the so-called "manifest disregard of the law" standard.[97] The "manifest disregard" locution originated in the

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96. See, for example, Julian J. Moore, Note, *Arbitral Review (or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572, 1585 (2000) (citing examples from case law):

> In addition to the statutory grounds, there are several common law grounds for overturning an arbitral decision: Courts have expressed their willingness to overturn an arbitral decision when it: (1) is in manifest disregard of the law; (2) conflicts with public policy; (3) is arbitrary and capricious; (4) is completely irrational; or (5) fails to draw its essence from the parties' underlying contract.

(footnotes and internal quotations omitted).

97. *See* UNIF. ARBITRATION ACT § 23, cmt. C.2 (2000) ("'Manifest disregard of the law' is the seminal nonstatutory ground for vacatur of commercial arbitration awards."); Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 465 (1998) (same); Noah Rubins, *"Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT'L ARB. 363, 366, 368 (2001) (referring to the manifest disregard standard as "the most widely recognized extra-statutory ground upon which courts can set aside arbitration awards under U.S. federal law," and observing that "[i]n the United States, the 'manifest disregard of the law' standard remains the most common way to supplement the FAA's narrow procedural protections and give judges a way to avoid enforcing a particular subset of erroneous awards"); Marcus Mungioli, Comment, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 ST. MARY'S L.J. 1079, 1080 (2000) (describing the "manifest disregard" doctrine as "the most recognizable and universally accepted non-statutory standard of review for an arbitration award"); Michael P. O'Mullan, Note, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 FORDHAM L. REV. 1121, 1124 (1995) ("Chief among [the] judicially-created standards is review for the arbitrators' 'manifest disregard of the law.'"); *see also* Moore, *supra* note 96, at 1585 ("By far, 'manifest disregard of the law' has been the most hotly contested common law ground for judicial review of arbitral awards.").

Another well-used basis for attacking arbitration awards is the nonstatutory "public policy" doctrine. Not to be confused with the "public policy" exception that, until *Mitsubishi* and its progeny, kept public law claims out of arbitration, courts still refuse to enforce awards that *themselves* violate "public policy" by compelling illegal conduct. This doctrine is rooted in the longstanding rule that courts will not enforce a contract requiring parties to violate the law or otherwise act contrary to the public welfare. Some lower courts originally interpreted this ground broadly, but the Supreme Court has since narrowly circumscribed it. Today, an award can be vacated for violating "public policy" only if it "run[s] contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests." E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 63 (2000); *see also* David M. Glanstein, *A Hail Mary Pass: Public Policy Review of Arbitration Awards*, 16 OHIO ST. J. ON DISP. RESOL. 297, 301 (2001) ("In *Eastern Associated Coal* the Supreme Court adhered to the so called narrow approach . . .

Supreme Court's decision in *Wilko*, where the Court observed in dicta that "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."[98] A majority of the Supreme Court has only even hinted approval of the doctrine on one occasion since *Wilko* was decided in 1953. In a 1995 opinion, the Court observed that "court[s] will set [an arbitrator's] decision aside only in very unusual circumstances," citing § 10 of the FAA and *Wilko*, the latter with the following parenthetical explanation: "[P]arties [are] bound by [an] arbitrator's decision not in 'manifest disregard' of the law."[99] Beyond these references—and passing mention in the dissent in *Mitsubishi*[100] and the majority opinion and partial dissent in *McMahon*[101]—no member of the Court has so much as mentioned the "manifest disregard" standard. Needless to say, the Court has yet to apply the doctrine, let alone use it to vacate an arbitration award.

Despite its humble origins and lack of explication from the Supreme Court, the "manifest disregard" doctrine has taken hold in every federal circuit and in many state courts. Today, parties dissatisfied with arbitral awards routinely seek judicial review on the theory that arbitrators "manifestly disregarded the law" in reaching their decisions,[102] although such claims are only rarely successful.[103]

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namely that a reviewing court must find the terms of an award, not the underlying conduct at issue, violated public policy."). As such, the "public policy" doctrine provides no grounds for revisiting the merits of an arbitration award in court.

98. Wilko v. Swan, 346 U.S. 427, 436–37 (1953) (emphasis added); *see supra* text accompanying note 46.

99. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

100. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640, 656 (1985) (Stevens, J., dissenting) (stating that arbitration awards can only be reviewed for manifest disregard and citing the FAA).

101. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 231 (1987) (mentioning "manifest disregard" in the description of the *Wilko* decision); *id.* at 242, 257 (Blackmun, J., concurring in part and dissenting in part) (same).

102. A search conducted on December 16, 2005, of all federal and state court cases since January 1, 2000, in the Lexis database using the terms "manifest disregard" and "arbitration" produced 703 results.

103. *See, e.g.*, Hardy v. Walsh Manning Secs., LLC, 341 F.3d 126, 129–34 (2d Cir. 2003) (remanding to arbitral panel for clarification in light of possible manifest disregard of New York law); Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843, 847 (6th Cir. 2003) ("To the extent that the arbitration award vests any rights in AISUK [a nonparty to the arbitration], or creates any obligation to AISUK, it is in manifest disregard for the legal principle that an arbitration panel may not assert jurisdiction over non-parties to the arbitration."); Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC, 319 F.3d 1060, 1069 (8th Cir. 2003) (upholding vacatur of arbitrators' award of attorneys fees in manifest disregard of Minnesota

Nevertheless, there is widespread acknowledgement that the doctrine has no grounding in the FAA; courts and commentators almost universally characterize it as a wholly nonstatutory, judicial addition to the narrow grounds for vacatur set out in § 10 of the Act.[104] As one commentator put it, "[m]uch has been made of the brief excerpt from *Wilko*, turning it from an unexplained comment into a widely-cited authority with no support in the statutory scheme."[105]

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law); Halligan v. Piper Jaffrey, Inc. 148 F.3d 197, 204 (2d Cir. 1998) (holding that an arbitrator manifestly disregarded law in ruling against an employee's ADEA claim); Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1464 (11th Cir. 1997) (holding that an arbitrator manifestly disregard law in rejecting an employee's FLSA claim); Wien & Malkin LLP v. Helmsley-Spear, Inc., 12 A.D.3d 65, 71–72 (N.Y. App. Div. 2004) (finding manifest disregard of a "clear, applicable principle" of New York law and of governing contractual provisions); Sawtelle v. Waddell & Reed, Inc., 754 N.Y.S.2d 264, 273–75 (App. Div. 2003) (finding that an arbitrator's award of punitive damages was in manifest disregard of New York law); *see also* Freightliner, LLC v. Teamsters Local 305, 336 F. Supp.2d 1118, 1127 (D. Or. 2004) (holding, in course of decision reviewing labor arbitration award, that award manifestly disregarded state statute to the extent that arbitrator "effectively applied his own notions of what the law should be" and read statute to invalidate provisions of collective bargaining agreement).

104. *See, e.g.*, Siegel v. Prudential Ins. Co. of Am., 79 Cal. Rptr. 2d 726, 739 (Ct. App. 1998) ("Every federal circuit that has discussed the issue has recognized the manifest disregard of the law standard for vacating an arbitration award is a judicially created standard; it is not part of the [FAA]."); MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 33:00, at 2 (2002) (referring to "manifest disregard" as a "judicially created ground[] for challenging an award"); Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 88 (1997) (listing the "manifest disregard standard" among "nonstatutory grounds for vacatur"); 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, 118 (1998) ("Seminal among the nonstatutory grounds for vacatur is the 'manifest disregard' of the law standard . . . ."); Bonnie Roach, *Recent Development:* George Watts & Son v. Tiffany & Co., 17 OHIO ST. J. ON DISP. RESOL. 503, 504 (2002) ("Manifest disregard is almost universally thought of as a non-statutory basis for vacating an arbitration award."); Calvin William Sharpe, *Integrity Review of Statutory Arbitration Awards*, 54 HASTINGS L.J. 311, 332 (2003) (listing "manifest disregard" among "non-statutory grounds for vacating arbitration awards" that courts have recognized); Paul Turner, *Preemption: The United States Arbitration Act, the Manifest Disregard of the Law Test for Vacating an Arbitration Award, and State Courts*, 26 PEPP. L. REV. 519, 529 (1999) ("[T]he manifest disregard of the law doctrine is not statutorily based, but is premised on federal common law."); Marta B. Varela, *Arbitration and the Doctrine of Manifest Disregard*, DISP. RESOL. J., June 1994, at 64, 64 ("Those resisting enforcement of an arbitral award claim manifest disregard is another ground for *vacatur* in addition to those found in the United States Arbitration Act and the United Nations Convention on the Recognition and Enforcement of Foreign Judgments . . . ."); Adam Milam, Comment, *A House Built on Sand: Vacating Arbitration Awards for Manifest Disregard of the Law*, 29 CUMB. L. REV. 705, 706 (1998–1999) ("[M]anifest disregard of the law is not one of the four statutory grounds explicitly set out in the FAA.").

105. O'Mullan, *supra* note 97, at 1141; *see also* Hayford, *supra* note 104, at 120 ("The oft-cited *Wilko* dictum is the sole basis for the 'manifest disregard' of the law standard.").

Without statutory or other grounding aside from conclusory dicta in *Wilko*, however, defining "manifest disregard" has been a slippery task.[106] "[A] legion of federal and state courts has had to evaluate what the Supreme Court could have been thinking of when it coined the term 'manifest disregard.'"[107] "[N]o secure basis exists upon which courts can apply the standard, thus leading to arbitrary and inconsistent interpretations and applications among the circuits."[108] Some prevailing definitional elements have emerged, however. Perhaps the most well-known and repeated elaboration of the standard appeared in the Second Circuit's 1986 opinion in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*[109]:

> "Manifest disregard of the law" by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in *Wilko* . . . . It is not to be found in the federal arbitration law. 9 U.S.C. § 10. Although the bounds of this

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106. *See, e.g.*, DOMKE, *supra* note 104, § 34:01, at 2 (noting that, in light of the Supreme Court's silence, "state and federal courts have been left in a state of confusion and have tried to fill the void by building on dictum in the Supreme Court's decisions in *Wilko v. Swan*[, 346 U.S. 427 (1953)] and *Enterprise Wheel & Car*[, 363 U.S. 593 (1960)]" (footnotes omitted)); Milam, *supra* note 104, at 705 ("The 'manifest disregard of the law' standard of review for arbitration awards has traditionally been a constant source of confusion for attorneys and courts."); Roach, *supra* note 104, at 505 ("[I]t is very unclear from the dicta as to how the courts should apply the standard."); Sharpe, *supra* note 104, at 335 ("[Lower courts] have also entered the breach to supply content to the [manifest disregard standard] in the face of virtually no guidance from the Supreme Court."); Varela, *supra* note 104, at 64 ("The court did not explain in *Wilko*, and has not explained in subsequent decisions, what it meant by [manifest disregard]."); *id.* at 65 (noting that "the doctrine is non-statutory in its origins," claiming that "it is the product of an ambiguous phrase in a Supreme Court decision," and concluding that "in consequence, manifest disregard is a vague and imprecise term"); Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 250 (1993) ("Since *Wilko*, courts have struggled to determine what grounds are valid for vacating commercial arbitration awards.").

107. Varela, *supra* note 104, at 64.

108. Milam, *supra* note 104, at 708; *see also id.* ("Because the basis of manifest disregard of the law is one that was judicially created in dictum of the United States Supreme Court, the definition and application given manifest disregard of the law has varied with the circuits."); Moore, *supra* note 96, at 1586 ("The Court has never elucidated the meaning of 'manifest disregard of the law' and, as a result, lower courts continue to debate the validity and scope of this judicial standard."); Galbraith, *supra* note 106, at 250 ("Not only have courts grappled with whether the 'manifest disregard' referred to in *Wilko* was intended by the Court to be a judicially created exception to the Federal Arbitration Act, they have also had difficulty determining what was meant by the phrase 'manifest disregard' of the law."); Mungioli, *supra* note 97, at 1080 ("[T]remendous disparity remains in the application of the manifest disregard standard."); *id.* at 1115–16 ("Courts have been confronted with an unnecessarily burdensome task of searching for a useful definition of manifest disregard, which must end.").

109. 808 F.2d 930 (2d Cir. 1986).

> ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. *The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. . . .* The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it.[110]

This passage includes elements that have become common among courts interpreting the "manifest disregard" standard. Seeking to give content to the doctrine using the only evidence available regarding its intended meaning—the words "manifest" and "disregard"[111]—most courts follow *Bobker*'s lead and limit "manifest disregard" to instances in which "the law is totally clear, the arbitrator understood the law, and chose to ignore it."[112]

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110. *Id*. at 933–34 (emphasis added) (citations omitted); *see also* Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. REV. 759, 766 ("[T]he most often cited formulation of the manifest disregard standard originated in the Second Circuit." (citing *Bobker*, 808 F.2d at 933)); Galbraith, *supra* note 106, at 251–52 (referring to the *Bobker* decision as "[t]he most notable attempt at creating a functional definition of 'manifest disregard' of the law," and reporting that "[t]he Second Circuit's explanation of 'manifest disregard' of the law in *Bobker* is often cited by courts when reviewing commercial arbitration awards to determine whether the arbitrators acted in 'manifest disregard' of the law").

111. *See, e.g.*, Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1461 (11th Cir. 1997) (using the *Black's Law Dictionary* and *American Heritage Dictionary* definitions of "manifest" and "disregard" to give content to the "manifest disregard" doctrine); Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 510 (1998) ("Used as a noun, 'disregard' means the 'lack of thoughtful attention or due regard' . . . , [whereas] '[m]anifest' means 'clearly apparent to the sight or understanding; obvious.'").

112. Sharpe, *supra* note 104, at 335; *see also* DOMKE, *supra* note 104, § 33:00, at 2 ("[T]o successfully challenge an award based upon manifest disregard of the law, most courts require proof that: (1) the arbitrator knew of the governing legal precedent yet refused to apply it or ignored it and (2) the law ignored by the arbitrator was well-defined, explicit and clearly applicable to the case."); *id.* § 33:08, at 33 ("Under [the manifest disregard] exception an arbitration award can be vacated where the arbitrators conspicuously choose to disregard a clearly applicable legal principle."). As one commentator observed, courts read "manifest disregard" to have "an 'actus reus'-like dimension: the commission of a very serious error of law by the arbitrator," and also to "require[] a reviewing court to evaluate the arbitrator's knowledge, or awareness, of the relevant law, leading to a 'mens rea'-like, state-of-mind determination." Hayford, *supra* note 97, at 468; *see also* Hayford, *supra* note 104, at 124 (describing the same "two constituent elements" of "manifest disregard" doctrine "as currently applied by the U.S. Courts of Appeals").

To these common elements, courts have added their own innovations. The Fifth Circuit, for example, requires an additional showing that the erroneous award will cause "significant injustice."[113] Other differences are purely methodological in nature. "[T]he Second Circuit is willing to infer manifest disregard from the record and underlying facts," for instance, while "the Eleventh Circuit requires a clear showing from the record."[114] Indeed, absent any substantive grounding, such evidentiary requirements take on special importance as the doctrine's only real source of content.

B. "Manifest Disregard" as a Vehicle for Substantive Judicial Review

The doctrine's malleability has led some courts to use it to strike a "balance" between "'the public interest in having arbitrators stay within the applicable law [and] the public policy in favor of speedy and economical function of the arbitration process.'"[115] As one scholar explained:

> The manifest disregard test illustrates two warring forces within the judicial mind. After centuries of antagonism toward arbitration, judges have embraced the national policy favoring agreements to arbitrate, if not a policy promoting arbitration itself. In the hope of fostering a just yet efficient system, this policy substantially removes arbitration from the oversight of the judiciary. Yet judges are torn. By training and temperament, they seem unable to relinquish some role in reviewing arbitration awards for error. Ambiguous Supreme Court dictum provided the unlikely basis for an ambivalent judiciary to fashion a limited, if not illusory, standard of review.[116]

In the words of another commentator, "[t]he judicially created 'manifest disregard' ground for vacatur represents an attempt by the federal courts to resolve the inherent contradiction between the goal that arbitrators faithfully and accurately apply the law and the absence of meaningful judicial review to enforce this goal."[117] Viewed through this lens, modern doctrinal inconsistencies "reflect[] each circuit's struggle to establish an application of the standard that grants

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113. *See* Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752, 762 (5th Cir. 1999) (quoting and adopting the test described in IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 40.7.2.6, at 95 (1994)).

114. Milam, *supra* note 104, at 708.

115. Poser, *supra* note 111, at 505 (quoting Varela, *supra* note 104, at 71).

116. Davis, *supra* note 104, at 89.

117. Poser, *supra* note 111, at 504–05.

proper deference to the arbitrator's decision while vindicating statutory rights."[118] In short, the "manifest disregard" standard "has become a repository for all sorts of outlandish theories of arbitral misconduct, devised with but one aim in mind: the application of standards of appellate review to the arbitration process, and ultimately, to *vacatur* of a particular arbitral award."[119]

Commentators have advanced a variety of policy-based proposals to shape the flexible, "manifest disregard" doctrine.[120] In fact, judicial and scholarly interest in the review of arbitral awards generally has grown as laws such as those in the antitrust, securities fraud, and employment contexts have become the subject of predispute arbitration clauses. Many commentators now argue that, as a matter of policy, arbitrators' legal conclusions should be subject to *de novo* or other substantive review.[121] For these scholars, the informality of arbitral procedures, arbitrators' lack of legal expertise, and even supposed arbitral bias raise the specter of awards depriving

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118. Mungioli, *supra* note 97, at 1103.

119. Varela, *supra* note 104, at 65; *see also* C. Evan Stewart, *Securities Arbitration Appeal: An Oxymoron No Longer?*, 79 KY. L.J. 347, 352–54 (1991) (describing the "manifest disregard" standard as under pressure to expand).

120. For example, Professor Macneil's treatise recommends a "manifest disregard" standard that allows for the vacation of awards derived from any obvious legal error, provided the error "result[s] in significant injustice." MACNEIL ET AL., *supra* note 113, § 40.7.2.6, at 95; *see supra* text accompanying note 113.

121. *See, e.g.*, Robert N. Covington, *Employment Arbitration after* Gilmer*: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345, 387 (1998) ("Critics of [the Supreme Court's decision in] *Gilmer* sometimes suggest that the harm done by that decision can be undone in part by providing for *de novo* review of arbitrators' decisions."); Laurie Leader & Melissa Burger, *Let's Get a Vision: Drafting Effective Arbitration Agreements in Employment and Effecting Other Safeguards to Insure Equal Access to Justice*, 8 EMP. RTS. & EMP. POL'Y J. 87, 117–21 (2004) (reviewing a range of scholarly recommendations for judicial review of arbitral awards and recommending the authors' own variation on the "manifest disregard" doctrine); Martin H. Malin, *Privatizing Justice but by How Much? Questions* Gilmer *Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 631 (2001) (arguing that "courts should police arbitration awards for errors of law" because "[f]ailure to do so can lead to the use of mandatory arbitration systems as vehicles for contracting out of statutory obligations"); Poser, *supra* note 111, at 518 (seeking a standard allowing courts to upset awards that "show[] an extraordinary lack of fidelity to established legal principles or an egregious departure from established law"); Sharpe, *supra* note 104, at 346 (recommending "integrity" review allowing courts to reexamine "the arbitrator's reasoning process to determine whether the arbitrator's reasons plausibly lead to the decision"—an appraisal of the arbitrator's conclusions of law and fact); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 732 (2004) ("Where statutory rights are involved, the [FAA] needs to be amended to provide for a standard of review of the arbitrator's decision that is equivalent to the standard a trial court would receive.").

claimants of their proper, statutory remedies.[122] Other commentators contend that predispute arbitration clauses in employment agreements or other contracts of adhesion are inherently unfair because they require parties to relinquish their right to a public, judicial proceeding under coercion and at a time when they are unlikely to appreciate the effect of their actions.[123] Still others make the point that legally erroneous arbitration awards effectively permit parties to modify "mandatory" laws, such as the securities and antitrust laws, which parties are not permitted to alter by contract.[124]

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122. *See, e.g.*, Malin, *supra* note 121, at 594 (summarizing scholarly concerns).

123. *See, e.g.*, *id.* at 596 (reasoning that, when agreeing to a predispute arbitration clause, "[t]he employee or job applicant is unable to assess the likelihood that she may end up in litigation with the employer").

124. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989) (distinguishing between "default" rules, which parties can modify by contract, and mandatory or "immutable" rules, which "parties cannot change by contractual agreement").

An example of this approach appears in Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 456 (1999) ("[P]rivate arbitral decisions resolving mandatory law claims, or resolving claims according to principles that do not subvert those of displaced mandatory law, are far less likely than public judicial decisions to effectuate the purposes of the mandatory laws."). As Professor Stephen Ware writes:

> When courts confirm arbitration awards that make errors of law, parties lose the substantive rights that would have been vindicated by an application of the law. Only in rare cases does a court vacate an arbitration award because of the arbitrator's legal error. Outside these rare cases, an agreement to arbitrate is, in effect, an agreement to comply with the arbitrator's decision whether or not the arbitrator applies the law. Such an agreement, then, contracts out of all the law that would have been applied by a court but for the agreement. All such law, in effect, consists of default rules because arbitration agreements are enforced. Arbitration agreements contract out of substantive law; they privatize law.

Ware, *supra* note 48, at 726–27 (footnote omitted). For these observers, too, the prescription is *de novo* judicial review to correct arbitral error, at least on legal questions. *See id.* at 727 (arguing that the Supreme Court should either revert to the pre-*Mitsubishi* status quo and "reverse its decisions that claims arising under otherwise mandatory rules are arbitrable" or "require de novo judicial review of arbitrators' legal rulings on such claims"); McConnaughay, *supra*, at 461 (calling for "exacting merits review" of awards resolving claims under mandatory law). Professor Alan Scott Rau likewise draws the critical distinction between mandatory and default rules in the context of judicial review. *See* Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 527 (2005) (criticizing the fact that courts applying the "manifest disregard" standard "without exception omit even a glance in the direction of the quite elementary distinction . . . between legal rules that contracting parties are free to vary (or, which is the same thing, free to entrust to their agents), and those that they are not"); *see also id.* at 530 ("The conceptual spillover—from a concern for the protective effects of mandatory rules, to the suggestion that arbitrators are bound also to respect default, background rules—is evident, and has been careless and unreflective."). Professor Andrew Guzman also relies on the distinction between mandatory and default rules in his article advocating a scheme of arbitrator liability. *See* Andrew T. Guzman, *Arbitrator Liability:*

Some courts and commentators see the "manifest disregard" doctrine as grounds for broad, substantive review of arbitral awards by interpreting the doctrine in connection with the Supreme Court's apparent presumption in *Mitsubishi* and *McMahon* that courts had some means of ensuring that arbitrators at least "took cognizance" of or "compl[ied] with the requirements of" relevant law.[125] Some have read this language to authorize substantive review of arbitral awards under the "manifest disregard" rubric in cases implicating public law rights.[126]

An example of this approach is the D.C. Circuit's decision in *Cole v. Burns International Security Services*,[127] a case involving an employer's effort to compel arbitration of a former employee's Title VII race-discrimination claim.[128] In an opinion by then-Chief Justice Edwards, the panel majority upheld the employer's right to refer the suit to arbitration, but only after first concluding that the employee could obtain *de novo* judicial review of an adverse arbitral legal determination.[129] The court recognized that the "manifest disregard" doctrine "ha[d] not been defined by the [Supreme] Court, and the circuits ha[d] adopted various formulations," but concluded that "this type of review must be defined by reference to the assumptions underlying the Court's endorsement of arbitration."[130] In particular:

Reconciling Arbitration and Mandatory Rules, 49 DUKE L.J. 1279, 1306 (2000). Professor Guzman recommends imposing a duty, not in the arbitration agreement between the disputing parties but in the contract between the parties and the arbitrator, requiring the arbitrators to apply mandatory law. Arbitrators' failure to do so would not subject their awards to vacatur, under this proposal, but disappointed parties could seek contract damages from arbitrators who ruled against them by ignoring the law. *See id.* at 1316–17.

125. *See supra* text accompanying notes 74, 79.

126. *See* Poser, *supra* note 111, at 514–15 (reasoning that a broad reading of the "manifest disregard" standard for statutory claims "follows from several statements of the Supreme Court asserting that [parties] who bring claims under the antitrust laws, the securities laws, and other statutes should not be deprived of their statutory rights because they have agreed to arbitrate their claims" (footnotes omitted)); *see also* Stewart, *supra* note 119, at 352–53 (reasoning that the Supreme Court's statements "that arbitrators must look to and follow the law" have likely caused "more courts" to "embrace" the manifest disregard standard "and openly look for ways in which to review arbitration awards that appear to be clearly contrary to law"); Mungioli, *supra* note 97, at 1113 ("Implicitly, the manifest disregard standard binds an arbitrator to the requirement of applying the substantive law, which accommodates the Supreme Court's stated corollary interest.").

127. 105 F.3d 1465 (D.C. Cir. 1997).

128. *Id.* at 1469–70.

129. *Id*. at 1467–69.

130. *Id.* at 1486–87.

> Two assumptions have been central to the [Supreme] 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.'" [Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)] (alteration in original); *see also* [Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 229–30 (1987)]. 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." *Gilmer*, 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232). 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.[131]

The *Cole* court thus expressly molded reality to conform to the Supreme Court's assumptions about judicial review of arbitral awards.

C. Rejecting a Freestanding Right to Judicial Review

Although some courts and commentators seek expansive judicial review of arbitration awards under the "manifest disregard" rubric, others see no role for the doctrine. Some commentators have advocated its abolition.[132] As one scholar commented, "[t]he manifest disregard standard, with its dubious origins, conflicts with the policy that the arbitrators' decision is final so long as the parties received a

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131. *Id.*; *see also* Montes v. Shearson Lehman Brothers, Inc., 128 F.3d 1456, 1459 (11th Cir. 1997) (citing language from *Gilmer* for the proposition that "[w]hen a claim arises under specific laws, . . . the arbitrators are bound to follow those laws in the absence of a valid and legal agreement not to do so").

132. See, *e.g.*, R. Glenn Bauer, *Upsetting a Charter Party Arbitration Award: Are the Courts Lowering the Bar on Judicial Review?*, 25 TUL. MAR. L.J. 419, 439 (2001) (calling for the elimination of the freestanding "manifest disregard" doctrine, at least as to maritime and other commercial cases); Varela, *supra* note 104, at 66 (arguing that the doctrine "ought not to be interpreted to create a new basis for *vacatur*"); Galbraith, *supra* note 106, at 263–65 (advocating the elimination of "manifest disregard" as a separate, nonstatutory basis for review); O'Mullan, *supra* note 97, at 1155 ("[T]he manifest disregard standard should be rejected."); *see also* Davis, *supra* note 104, at 98 ("Wrung out of ambiguous Supreme Court dictum, the manifest disregard standard has incited a rash of disapproval.")

fair hearing."[133] Relatedly, Judge Paul Turner of the California Court of Appeal authored an article arguing that state courts are free to ignore the "manifest disregard" doctrine as federal common law that does not preempt state law forbidding such review.[134] In a decision to the same effect, Judge Turner reasoned that even a California court *applying the FAA* need not provide any merits review—not even for "manifest disregard of the law"—because that standard lacks any grounding in the FAA.[135] A Tennessee appellate court has likewise refused to apply the "manifest disregard" doctrine in a case otherwise governed by the federal act,[136] and some state courts have refused to recognize the doctrine under their own state arbitration statutes.[137]

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133. Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 U. CIN. L. REV. 415, 434 (2003); *see id.* at 444 (arguing that "'manifest disregard' should be eliminated as a basis for vacating arbitration awards").

134. Turner, *supra* note 104, at 542.

135. Siegel v. Prudential Ins. Co. of Am., 79 Cal. Rptr. 2d 726, 739–40 (Ct. App. 1998).

136. Warbington Constr., Inc. v. Franklin Landmark, L.L.C., 66 S.W.3d 853, 858–59 (Tenn. Ct. App. 2001).

137. *See, e.g.*, Coors Brewing Co. v. Cabo, 114 P.3d 60, 63 (Colo. Ct. App. 2004) ("We decline to adopt an arbitrator's manifest disregard of the law as a ground for vacating an arbitration award under [Colorado's arbitration statute or common law]."), *cert. denied*, 2005 WL 1273570 (Colo. 2005); Police Officers Fed. v. City of Minn., No. C4-99-2041, 2000 WL 719860, at *1 (Minn. Ct. App. June 6, 2000) (explaining in dicta that "Minnesota has not adopted manifest disregard of the law as a test for reviewing arbitration awards"); Maxwell-Gabel Contracting Co. v. City of Milan, 147 S.W.3d 93, 97 (Mo. App. 2004) ("'Manifest disregard for the law' is not a basis under [Missouri's arbitration statute] for a reviewing court to reverse the trial court's judgment affirming an arbitration award. . . . The concept of 'manifest disregard of the law' is a judicially created basis for vacating an arbitration award made under the FAA."); Action Box Co. v. Panel Prints, Inc., 130 S.W.3d 249, 252 (Tex. App. 2004) (refusing to recognize the "manifest disregard" doctrine in a case governed by Texas law, observing that "the manifest disregard standard is a federal common law doctrine, the underlying rationale for which the United States Supreme Court has largely rejected"); Signal Corp. v. Keane Fed. Sys., Inc., 574 S.E.2d 253, 257 (Va. 2003) ("Even though courts in other jurisdictions have vacated arbitration awards when there has been a 'manifest disregard of the law,' we refuse to adopt that standard in this case because to do so would require that this Court add words to [the Virginia arbitration statute] . . . ."); *see also* Double Diamond Constr. v. Farmers Coop. Elevator Ass'n, 680 N.W.2d 658, 660 n.1 (S.D. 2004) (noting that so far "South Dakota has not adopted the theory of a 'manifest disregard of the law' as a ground for vacation of an arbitration award"). Likewise, the Georgia Supreme Court recently rejected the "manifest disregard" doctrine. *See* Martha Neil, *In Georgia, Arbitrators May Disregard the Law*, ABA J. E-REPORT, July 26, 2002, at 5 (discussing Progressive Data Sys., Inc. v. Jefferson Randolph Corp., 275 Ga. 420, 568 S.E.2d 474 (2002), and noting that "[e]ven manifest disregard of the law isn't reason to reverse an arbitration decision in Georgia, the state's highest court has decided"). The state legislature resurrected it with an amendment to the state's arbitration statute. Brent S. Gilfedder, Note, *"A Manifest Disregard of Arbitration?" An Analysis of Recent Georgia Legislation Adding "Manifest Disregard of the Law" to the Georgia Arbitration Code as a*

Even among the federal courts of appeals, one circuit—although purporting to give effect to the "manifest disregard" standard—effectively defined it out of existence by taking an extremely narrow view of judicial review of arbitral awards. In *George Watts & Son, Inc. v. Tiffany & Co.*,[138] the plaintiff sued for alleged breach of contract and violation of Wisconsin's Fair Dealership Law.[139] The parties ultimately agreed, after the suit was filed, that they would submit the matter to arbitration.[140] The arbitrator granted the plaintiff some relief but did not award attorneys' fees or costs, as Wisconsin law supposedly required, and the plaintiff challenged this aspect of the award in federal court on the theory that the arbitrator had disregarded controlling Wisconsin law.[141] The Seventh Circuit asked: "What could it mean to say that an arbitrator manifestly disregarded the law?"[142] The panel majority found "conflicting lines of precedent" among the court's own decisions and observed that "[t]he law in other circuits is similarly confused, doubtless because the Supreme Court has been opaque. The dictum in *Wilko* and *First Options* [*of Chicago, Inc. v. Kaplan*] was unexplained and unilluminated by any concrete application."[143]

Without statutory grounding or Supreme Court guidance, the *George Watts* majority used policy to arrive at a definition. "Manifest disregard" could not mean mere "legal error," the court reasoned, because "then arbitration [could not] be final. Every arbitration could be followed by a suit, seeking review of legal errors, serving the same function as an appeal within a unitary judicial system."[144] Nor could "manifest disregard" mean "'clear' error." Here again, the court concluded, "arbitration [would] not be final, and the postarbitration litigation would be even more complex than a search for simple error."[145]

The court ultimately settled on a definition "that preserve[d] the established relation between court and arbitrator and resolve[d] the

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Statutory Ground for Vacatur, 39 GA. L. REV. 259, 259–60 (2004) (describing H.R. 91, 147th Gen. Assem., Reg. Sess. (Ga. 2003)).

138. 248 F.3d 577 (7th Cir. 2001).

139. *Id.* at 578.

140. *Id.*

141. *Id.* at 579.

142. *Id.*

143. *Id.* at 580.

144. *Id.* at 579.

145. *Id.*

tension in the competing lines of cases. It [was] this: an arbitrator may not direct the parties to violate the law."[146] As Judge Williams recognized in her concurrence, however, this definition conflate[d] the "manifest disregard" doctrine with the "public policy exception" to the enforcement of arbitral awards.[147] Courts do not need the "manifest disregard" standard to block awards that mandate illegal behavior; courts will refuse to enforce such awards by operation of basic contract law.[148] The *George Watts* decision thus narrowed the scope of judicial review in the Seventh Circuit by effectively abolishing the "manifest disregard" doctrine as an independent ground for vacating an arbitral award.[149]

Historical notions of arbitral discretion are consistent with a refusal to vacate awards even where arbitrators intentionally disregard the law. Traditional doctrine provides that arbitrators are not bound to apply any particular substantive law unless the parties expressly contract to limit the arbitrator in this way.[150] As one leading arbitration scholar summarizes: "The general rule . . . is that arbitrators need not follow otherwise applicable law when deciding issues before them unless they are commanded to do so by the terms of the arbitration agreement."[151] Indeed, the same point is often made about (at least the practical realities of) modern arbitration.[152]

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146. *Id* at 580. The court elsewhere indicated that it would also be a "manifest disregard" of the law to render an award "that does not adhere to the legal principles specified by contract, and hence unenforceable under § 10(a)(4)." *Id.* at 581. This Article ultimately works from a related principle. Importantly, however, it does so *without* requiring parties to specify any legal rules in their agreement.

147. *Id.* at 582. Indeed, the majority expressly drew support for its standard from the Supreme Court's decision in *E. Associated Coal Corp. v. United Mine Workers*, *Dist. 17*, 531 U.S. 57 (2000), a case about the "public policy" exception, not "manifest disregard of the law." *Id.* at 580; *see also supra* note 97.

148. S*ee supra* note 97.

149. *See* Roach, *supra* note 104, at 512 ("[T]he *Watts* case represents . . . the rejection of the manifest disregard doctrine . . . ."); *see also* DOMKE, *supra* note 104, § 33:08, at 35 ("It is an open question whether other courts will follow the Seventh Circuit's new and very restrictive approach to the manifest disregard rule.").

150. *See, e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 345 ("[T]he arbitrator has been under no duty to resolve a dispute in compliance with the parties' legal rights.").

151. DOMKE, *supra* note 104, § 25.01, at 3 (internal quotations omitted).

152. S*ee, e.g.*, Kristen M. Blankley, *Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) Be Resolved by Class-Action Arbitration*, 20 OHIO ST. J. ON DISP. RESOL. 451, 467 (2005) ("Arbitrators are not required to follow the law when making their decisions."); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992) ("[The] freedom from substantive rules creates a milieu in which arbitrators can ignore

Some arbitral codes and training materials also reflect this expansive view of arbitrator discretion. Neither the National Association of Securities Dealers (NASD) nor the New York Stock Exchange arbitration codes inform arbitrators that they must apply governing law.[153] Arbitrators are warned not to manifestly disregard the law, but they are also instructed that they "'are not strictly bound by legal precedent or statutory law.'"[154] Whenever "'the law is not clear,'" or even if an arbitrator "'cannot determine whether it applies to the facts of [the] case,'" NASD arbitrators are directed to "'look to equity, fairness and justice'" rather than try to divine what the statute or other law requires.[155] This is not to say that most commercial

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the law when making decisions."); Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255, 302 n.277 (1998) ("Arbitrators do not have to follow the law unless the arbitration agreement directs them to do so. Generally, they may enforce their own sense of justice."); Davis, *supra* note 104, at 76 (explaining that, "[u]nless the agreement directs arbitrators to apply particular law, the arbitrators may resolve the dispute as they deem appropriate, regardless of prevailing legal norms," but also that "[b]y agreeing to arbitrate a statutory claim, the parties direct the arbitrators to apply the statute in question"); *see also* Marc I. Steinberg, *Securities Arbitration in the United States*, *in* YEARBOOK OF INTERNATIONAL FINANCIAL & ECONOMIC LAW 1997, 251, 261 (Joseph J. Norton ed., 1999) ("Arbitrators, not being bound by precise legal standards in their decisions, may render awards premised on the standards of applicable self-regulatory organi[z]ations' (SROs) standards, industry custom, or even concepts of equity and fairness." (footnotes omitted)); Lionel G. Hest, *The Tension Between the Policy Favoring Arbitration and the Adequacy of Arbitration as a Means of Vindicating Statutory Rights*, 1264 PLI/Corp 669, 673 (2001) ("Under New York law, arbitrators need not follow the law."). *But see* William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1290 n.217 (2003) ("The assertion that arbitrators are allowed to be lawless is at odds with the existence of 'manifest disregard of the law' as a standard for judicial review, and inconsistent with the provisions of many arbitration rules.").

153. Hest, *supra* note 152, at 672.

154. *Id.* (quoting the NASD Arbitrator Training Manual). Similarly, see SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, THE ARBITRATOR'S MANUAL 31 (May 2005), which provides that:

> Arbitrators are not strictly bound by case precedent or statutory law. Rather, they are guided in their analysis by the underlying policies of the law and are given wide latitude in their interpretation of legal concepts. On the other hand, if an arbitrator manifestly disregards the law, an award may be vacated.

The Arbitrator's Manual begins with the following quote from Domke: "'Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.'" *Id.* at 2. *See also* Rau, *supra* note 124, at 515 n.272 (quoting the same passage from the NASD manual).

155. Hest, *supra* note 152, at 672 (quoting the NASD Arbitrator Training Manual). In contrast, some arbitration codes require arbitrators to apply the law. *See, e.g.*, NAT'L ARBITRATION FORUM, CODE OF PROCEDURE Rule 20(d) (2005), *available at* http://www.arb-forum.com/programs/code_new/2005_Code.doc ("An arbitrator shall follow the applicable substantive law . . . ."). Influential protocols designed to govern particular classes of arbitration

arbitrators do not diligently seek to apply the law in resolving disputes.[156] The question, rather, is whether they are *bound* to do so and, if so, on what basis. And although studies suggest that most commercial arbitrators believe that they should decide their cases under settled principles of law, many also believe that they have the legal freedom to ignore substantive law if justice demands.[157]

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likewise direct arbitrators to apply substantive law. *See, e.g.*, DUE PROCESS PROTOCOL FOR MEDIATION & ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP § C(5) (1995) ("The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency."); DUE PROCESS PROTOCOL FOR CONSUMER DISPUTES, Principle 15.2 (1998) ("In making the award, the arbitrator should apply any identified, pertinent contract terms, statutes and legal precedents."). While such protocols "do not have the force of law," "the major arbitration service providers have formally or informally endorsed [them], crafted rules to reflect the due process principles set forth in [them], and agreed to decline to provide arbitration services if the agreement does not comport with [them]." Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOLUTION 369, 370, 423 (2004).

156. *See, e.g.*, John F.X. Peloso, *A Discussion of Whether Arbitrators Have a Duty to Apply the Law*, 949 PLI/CORP. 61, 61 (July–Aug. 1996) (citing former president of American Arbitration Association and arbitration scholar for proposition that "[s]everal commentators have stressed the responsibility of arbitrators to follow established legal principles when making their decisions"); Rau, *supra* note 124, at 514 ("Now I imagine it is fair to say that arbitrators usually do try their best to model their awards on what courts would do in similar cases—and that as often as not they succeed in doing so.").

157. Ware, *supra* note 48, at 719–21; *see* STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 93 (2001) ("Many arbitrators believe they are free to ignore legal rules whenever they think that more just decisions would be reached by so doing."); Guzman, *supra* note 124, at 1306 ("More modern discussions of labor arbitration similarly conclude that arbitrators believe they should adhere to the collective bargaining agreement rather than the law."); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961) ("Eighty per cent of the experimental arbitrators thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost 90 per cent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing."). Professor Mentschikoff noted, however, that the results of her survey were "curiously parallel to the attitudes that seem to be implicit in our appellate courts." *Id.* A more recent survey of American Arbitration Association construction arbitrators found that 72 percent of respondents indicated that they "always follow[ed] the law in formulating [their awards]," though fewer than one third of those who explained this response expressly indicated that they always followed the law because "it was essential or their duty" to do so. Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 154–55 (1994). Among the 20 percent of respondents who indicated that they do not always follow the law, several "stated they did not know the law and therefore could not follow it," while an equal number "said they would not follow the law if it led to an inequitable result." *Id.*

D. *The Absence of Legal Grounding for the Modern "Manifest Disregard" Doctrine*

The "manifest disregard" doctrine is thus the focus of widely diverging views—some observers see it as a vehicle for *de novo* judicial review and others as an illegitimate judicial gloss on the FAA. Of these positions, those who claim that the doctrine is ill-founded as an "extrastatutory" doctrine would seem to have the better argument. As described above, the FAA permits courts to vacate or modify arbitral awards only under certain carefully enumerated circumstances.[158] "Notably absent from that list is any mention of manifest disregard of the law, or, for that matter, any substantive review. According to the common law maxim of contract and statutory interpretation *expressio unius est exclusio alterius*, such a list should be read as exclusive."[159] In short, the Act would seem to foreclose additional, wholly judge-made grounds for overturning arbitral awards.

Commentators have correctly remarked that dicta in *Wilko* is shaky ground for a freestanding, nonstatutory doctrine in any event.[160] This is all the more obviously true when one recalls that *Wilko* is no longer good law; the Supreme Court overturned that case's "public policy" rule in *Rodriguez de Quijas*.[161] Conclusory dicta in an overturned decision is exceptionally weak footing for any doctrine, let alone one that flies in the face of Congress's effort to circumscribe the grounds for judicial review.

Nor are the historical sources on which the *Wilko* Court relied of any help. In fact, although these sources have received relatively little scholarly attention in this context, they are of tremendous interest because many actually *conflict* with the "manifest disregard" standard in use today. The *Wilko* Court cited a string of authorities in connection with its "manifest disregard" language, but several of these sources justified judicial review as a way *to give effect to the*

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158. *See supra* text accompanying notes 28–30.

159. O'Mullan, *supra* note 97, at 1138 (footnotes omitted).

160. *See, e.g.*, Hayford, *supra* note 97, at 471. As Professor Hayford writes:

> This nonstatutory ground for vacatur was created 'ex nihilo' in what may well have been only a passing, insignificant reference in dictum. The oblique nature of the Supreme Court's reference to the 'manifest disregard of the law' ground in *Wilko* and the subsequent lack of guidance from the Court as to the proper meaning and effect of this criterion for vacatur indicate how slender a reed the standard rests upon.

Id.

161. *See supra* notes 84–86 and accompanying text.

arbitrator's intent, not to override the arbitrator's will as the modern "manifest disregard" doctrine purports to do.[162] These sources reflected the idea that a mistake of law visible on the face of an award suggested that the award did not represent the arbitrator's intended resolution of the dispute. The courts were prepared to correct the mistake—and modify the award accordingly—to give effect to the arbitrator's presumed intent. Relatedly, there was the notion that arbitrators who laid their legal reasoning bare in their awards did so to elicit judicial review; a court would review an award, and correct legal mistakes therein, to oblige the arbitrator's tacit request for judicial aid. Because the *Wilko* authorities have received relatively scant attention, I touch briefly on each in turn.

The *Wilko* majority supported its reference to "manifest disregard" in part by citing the Supreme Court's mid-nineteenth-century decision in *Burchell v. Marsh*.[163] The Court in that case acknowledged that the bench may "interfere" with an award in cases of "'gross mistake,'" but only if the error was "'made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award.'"[164] In other words, courts could only correct inadvertent arbitral error—an effort to give effect to the arbitrator's actual intent.

The Supreme Court's opinion in *United States v. Farragut*[165] likewise described courts' ability to correct arbitral error when an award "f[ound] or announce[d] concrete propositions of law, unmixed with facts" and misinterpret[ed] those legal propositions.[166] In the pages on which *Wilko* relied, the *Farragut* Court also spoke in terms of "manifest *mistake* of law" and arbitral "*misapprehension* of the law."[167] Once again, the Court appeared concerned that innocent error might trip up the arbitrator bent on applying the law correctly.

In *Kleine v. Catara*,[168] an 1814 District of Massachusetts decision authored by Justice Story, the court *expressly* distinguished between arbitrators' innocent legal mistakes—which courts would correct—

162. *See infra* notes 163–86 and accompanying text.

163. 58 U.S. (17 How.) 344 (1855).

164. *Id.* at 350 (quoting Lord Thurlow's opinion in *Knox v. Symmonds*, (1791) 30 Eng. Rep. 390 (A.C.)).

165. 89 U.S. (22 Wall.) 406 (1875).

166. *Id.* at 420.

167. *Id.* at 420–21 (emphases added).

168. 14 F. Cas. 732 (C.C.D. Mass. 1814) (No. 7,869).

and knowing departures from legal norms—which courts would not disturb.[169] Justice Story agreed "that if the referees [made a] mistake in a plain point of law or fact, either apparent upon the award itself, or made out in proof, the court ought to set aside the award."[170] But unless the parties' contract provided otherwise, the arbitrators "[we]re not bound to award upon the mere dry principles of law applicable to the case before them. They [could] decide upon principles of equity and good conscience, and [could] make their award ex aequo et bono."[171] The ensuing discussion put this distinction in sharp relief:

> 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 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. On the other hand, if knowing what the law is, they mean not to be bound by it, but to decide, what in equity and good conscience ought to be done between the parties, their award ought to be supported, although the whole proceedings should be apparent on the face of the award.[172]

Justice Story made plain that courts would intervene only to advance the arbitrator's intent, not to conform an award to the law when an arbitrator consciously chose to ignore it.

The final three opinions cited by the *Wilko* majority added little as to when courts would disturb arbitral awards. The Eighth Circuit's decision in *Texas & Pacific Railway Co. v. St. Louis Southwestern Railway Co.*[173] merely noted that the court would not revisit a question of interpretation under the Mandatory Freight Accounting Rules submitted to arbitration pursuant to those rules.[174] The Second Circuit in *North of England S.S. Co. v. Munson S.S. Line (In re The*

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169. *Id.* at 734–35.
170. *Id.* at 734.
171. *Id.* at 735.
172. *Id.*
173. 158 F.2d 251 (8th Cir. 1946).
174. *Id.* at 256–57.

Hartbridge),[175] upheld an award purportedly founded on fundamental error.[176] And although the First Circuit in *Mutual Benefit Health & Accident Ass'n v. United Casualty Co.*[177] noted that Massachusetts law required arbitrators to "act[] in good faith" and within the scope of their "authority," the court upheld the award over an objection that the arbitrator had misinterpreted the contract, without any statement to the effect that a "manifest disregard" of the law would have been grounds for vacateur.[178]

The *Wilko* majority also cited Professor Wesley Sturges' arbitration treatise in conjunction with the Court's reference to "manifest disregard."[179] In relevant part, however, Professor Sturges recognized the traditional rule that "under an unrestricted submission arbitrators are not required to decide 'according to law'"; and "[w]hile the parties may expressly require the arbitrators to decide according to law, it is clear that the courts will not readily allow an award to fall by construing a submission agreement as making such requirement."[180] Like Justice Story, Professor Sturges distinguished cases in which arbitrators intended to follow the law but inadvertently erred:

> If, however, it is made to appear that the arbitrators undertook to decide according to law but missed it, that is, if it is made to appear that the arbitrators assumed the law to be in a certain way, and that they would have decided differently if they had known, before they rendered their award, that their assumption was wrong, they are said to have made a "mistake of law." This is sufficient cause to invalidate an award.[181]

Once again, the aim of judicial review was to correct error interfering with the arbitrator's intended outcome, not to convert a consciously nonlegal award into a legal one.

Another source cited by the *Wilko* majority for its reference to "manifest disregard" was a 1950 student note published in the

175. 62 F.2d 72 (2d Cir. 1932).

176. *Id.* at 73.

177. 142 F.2d 390 (1st Cir. 1944).

178. *Id.* at 393–94.

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

180. WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATION & AWARDS 500–02 (1930); *see also supra* text accompanying note 151.

181. *Id.* at 503.

Harvard Law Review.[182] Far from supporting some form of judicial review, however, the portion of the note on which the Court relied reported that "[a]side from [a] few [outlying] cases, the general view, both at common law and by statute, is that the courts will *not* review for its wisdom or soundness the principle selected by the arbitrator, unless his discretion in making that selection is limited by the terms of the submission agreement."[183] Moreover, the note acknowledged a rule in some jurisdictions granting courts authority to overturn legally erroneous awards only when it was clear that the arbitrator *intended* to follow the law.[184]

Finally, the *Wilko* majority cited an article by Professor Archibald Cox in the *Chicago Bar Record*.[185] Although Professor Cox urged arbitrators to "give effect to settled statutory duties," he counseled against any judicial review of arbitral awards.[186] He neither described nor recommended a practice of judicial review aimed at thwarting arbitrators' conscious efforts to disregard the law.

* * *

In short, the authorities on which the *Wilko* majority relied for its "manifest disregard" dicta do not support the doctrine in its current form—that is, as a check on an arbitrator's intentional departure from established law. On the contrary, courts and commentators contemplated judicial intervention as a means *to give effect* to the arbitrator's intent. Courts following this rationale would vacate an award when the arbitrator manifested an intention to adhere to the law but erred in executing this intention,[187] not when the arbitrator

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182. Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681 (1950).

183. *Id.* at 685 (emphasis added). Professor Rau quotes this same passage and likewise concludes that, although cited by the *Wilko* majority, the Note "says nothing" whatever about a "manifest disregard" standard of review. Rau, *supra* note 124, at 522 n.299.

184. *See* Note, *Judicial Review of Arbitration Awards on the Merits*, *supra* note 182, at 687 ("This power to interfere is justified in the decisions as a means to prevent an award from achieving an effect which the arbitrator, as can be seen from his own theory, really did not intend.").

185. Archibald Cox, *The Place of Law in Labor Arbitration*, CHI. BAR REC., Oct. 1952, at 205, 208, 210.

186. *Id.* at 208, 210.

187. For a more recent statement justifying review on these grounds, see *Allen v. A & W Contractors, Inc.*, 433 So. 2d 839, 842 (La. Ct. App. 1983), holding that a court can set aside an arbitral award "where, in the case of an error of law, it clearly appears from a statement of the basis of the award that the arbitrators meant to decide the case according to law" (quoting 5 AM. JUR. 2D *Arbitration and Award* § 167).

consciously disregarded legal rules, as the modern "manifest disregard" standard allows.[188] As Professor Rau recently summarized the doctrine's mysterious pedigree:

> I can't find even the slightest trace of the paternity of this phrase in any context remotely related to arbitration; if it ever appeared in the cases before *Wilko*, it was as a mere catchphrase trotted out in a hodgepodge of entirely alien settings—sometimes to suggest a highly restrictive standard of scrutiny, sometimes as a rhetorical flourish at the moment of overturning a jury verdict or the judgment of some other inferior tribunal.[189]

The doctrine's dubious origins, coupled with the FAA's expressly circumscribed list of bases for review, make the doctrine especially weak. Nor is there any sound basis for rooting a power of judicial review—or for expanding the "manifest disregard" standard—in the Court's presumption in *Mitsubishi* and its progeny that arbitration awards will receive scrutiny "sufficient to ensure that arbitrators comply with the requirements of the statute at issue."[190] Like the "manifest disregard" doctrine, such an approach builds entirely on conclusory phrases from Supreme Court opinions as grounds for a new, extrastatutory review mechanism. More importantly, the Court does not purport to create standards for review in *Mitsubishi* or *McMahon*; the Court claims merely to describe the existing state of affairs.[191] If the standards the Court presumes to exist do not, that may

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188. Professor Rau recently characterized the perverse motives put in place by this historical approach

> It must have created some odd incentives indeed: For if the modern arbitrator, in order to safeguard the currency of his award, will often purport to have followed legal principles—even when he hasn't—the common-law arbitrator must have often felt the need—even while scrupulously straining to apply the law—to appear to disregard it completely!

Rau, *supra* note 124, at 511 n.248.

189. *Id.* at 522. This is not to say that reference was not occasionally made in the pre-*Wilko* era to review for what would now be called "manifest disregard." Along these lines, see Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 604 (1934): "There is some intimation, however, that if the arbitrators know the law, and deliberately choose to disregard it, their awards may be set aside." Professor Phillips cites, for support, *Allen v. Smith's Administrator*, 4 Del. (4 Harr.) 234 (Del. 1845). I am grateful to Professor Christopher Drahozal for bringing this reference to my attention.

190. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987); *see supra* text accompanying notes 74, 79, & 130–31.

191. *Cf.* Chisolm v. Kidder, Peabody Asset Mgmt., Inc., 966 F. Supp. 218, 226–27 (S.D.N.Y. 1997), *aff'd*, 164 F.3d 617 (2d Cir. 1998) (table):

> While it is true that the Supreme Court has indicated that rights are not surrendered when a party agrees to arbitrate and that judicial review, though limited, is sufficient

be grounds for revisiting the Court's decision to compel arbitration, not for creating a new standard commensurate with an erroneous premise. Once again, moreover, any addition to the FAA's narrowly circumscribed grounds for review would seem boldly at odds with congressional intent.[192]

All in all, it is by no means surprising that the "manifest disregard" doctrine suffers from all of the definitional and legitimacy problems described in this Part. Nor is it surprising that some of those seeking to preserve the doctrine hope that Congress will amend the FAA to provide expressly for a legitimate "manifest disregard" review.[193] As the doctrine is typically characterized, however—as a judge-made addition to the FAA premised on dicta in *Wilko*—there is little to recommend it.

III. A STATUTORY BASIS FOR JUDICIAL REVIEW

In lieu of the troubled "manifest disregard" doctrine, this Part develops a related, but distinct, standard grounded firmly in the FAA and arising from limits on arbitral authority inherent in predispute arbitration clauses themselves. Admittedly, arbitration clauses rarely specify expressly whether arbitrators must adhere to the law or whether they have the discretion to disregard it.[194] Nor is there necessarily any obvious assumption as to whether contracting parties *think* that arbitrators will faithfully apply applicable substantive law.[195]

> to ensure that arbitrators comply with the law . . . there is absolutely nothing in any of these Supreme Court cases . . . which indicates that the scope of review for statutory claims is any different from any other arbitrated claims.

192. *See supra* text accompanying notes 94–95 & 104–05.

193. One of these authors implies, correctly I think, that the standard will remain amorphous and inconsistently applied until it has some statutory or other legal grounding. Milam, *supra* note 104, at 711, 716, 729–32. Under another proposal to amend the FAA, review for manifest disregard would only be available if the parties agreed to such review in their contract. Mungioli, *supra* note 97, at 1116, 1121.

194. *Cf.* DOMKE, *supra* note 104, § 25.01, at 2–3 ("Standard arbitration clauses do not usually contain any reference to . . . the law to be applied . . . ."). Professor Macneil's treatise observes that contracts "often do not" include choice of law provisions. MACNEIL, *supra* note 113, § 40.7.2.4, at 90. In fact:

> [Even] when they do, the meaning of the choice of law clause may be obscure. It may (or may not) refer only to the general body of substantive law the parties expect the arbitrators to look to, to whatever extent they apply legal principles. It may (or may not) be intended to require the arbitrators to apply the designated law correctly.

Id.

195. Professor Macneil's treatise provides that, "since parties quite commonly confer powers on arbitrators only in general terms, . . . much will turn on assumptions the courts make about what parties in general do intend to consent to respecting arbitral powers." MACNEIL, *supra*

Here, however, traditional principles of contract interpretation and construction come into play. Absent evidence to the contrary, courts assume that parties *do* intend for their contracts to be enforceable, and ambiguous language in a contract is read to this end. Likewise, contractual gaps are filled, when necessary, to allow for the contract's enforceability.

Viewed through the lens of these well-worn rules, arbitration clauses themselves prohibit arbitrators from disregarding "nonwaivable" statutory and common law rights. Predispute arbitration clauses should be understood to impose a duty on arbitrators to identify and apply the law in good faith when such rights are at issue.[196] Without that duty, arbitration would materially undermine the law's deterrent effect, and the arbitration clause would therefore become an unenforceable, prospective waiver of the right to sue. Arbitrators' failure to satisfy this duty to apply the law in good faith would permit courts to overturn the resulting awards on the ground that the arbitrators exceeded their authority under contract, a basis for vacating awards under the FAA.

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note 113, § 40.7.2.6, at 95. The ubiquity of the idea that arbitrators are not bound to apply substantive law makes it difficult to presume that the parties to predispute arbitration agreements expect arbitrators to feel bound by legal rules. *See* DOMKE, *supra* note 104, § 25.01, at 3 ("It is often said that the parties do not expect the arbitrators to make their decision according to rules but rather, especially when the arbitrators are not lawyers, on the basis of their experience, knowledge of the customs of the trade, and fair and good sense for equitable relief."); David A. Lipton, *The Standard on Which Arbitrators Base Their Decisions: The SROs Must Decide*, 16 SEC. REG. L.J. 3, 18 (1988) ("Parties to arbitration do select that forum of dispute resolution precisely because of the opportunity to have a dispute resolved in accordance with equitable judgment rather than by strict adherence to the law."); Ware, *supra* note 48, at 720 ("The widespread belief among arbitrators that they are under no duty to apply the law is consistent with standard expectations about arbitration . . . ."). *But see* Rau, *supra* note 124, at 515 (reasoning that arbitrators' presumed efforts to follow the law are "most likely . . . congruent with the ex ante expectations of contracting parties, who—behind the proverbial veil of ignorance—may not have supposed that in drafting an arbitration clause, they were entirely surrendering the right to have their conduct judged by external legal standards").

196. The following discussion is necessarily specific to arbitration involving "nonwaivable" rights, as that term is defined in this Article. *See supra* note 15. The theory outlined in this Article would not apply to arbitration implicating only laws whose protections can be waived prospectively. For an argument favoring arbitral discretion to reject or modify such "default" rules, see *Ware*, *supra* note 48, at 744–50.

A. *The Deterrent Function of Rights that Cannot Be Waived Prospectively*

Certain rights cannot be traded away, at least prospectively, by the parties who enjoy their protections.[197] Often called "exculpatory" clauses, contract provisions waiving a party's right to sue are therefore frequently unenforceable.[198] Congress and the courts have made plain that parties cannot contract away the right to sue to vindicate any of an array of statutory rights.[199] Recall that the *Wilko* Court relied on language in the Securities Act forbidding parties to waive their rights prospectively;[200] the Court in *Mitsubishi* likewise made clear that parties cannot waive their right to sue under the antitrust laws.[201] Many common law actions, including suits for intentional, reckless, and even grossly negligent torts, also cannot be

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197. *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111–15 (1972) (describing "inalienable entitlements").

198. Schwartz, *supra* note 21, at 110–13.

199. For example, the Securities Exchange Act provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78cc(a) (2000); *see also id.* § 77n (providing for a similar rule under the Securities Act); *id.* § 80b-15(a) (providing for a similar rule under the Investment Advisers Act). ERISA likewise provides that, with certain exceptions, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a) (2000). Many times, the courts have held that statutory rights are not waivable prospectively, even absent statutory language to that effect. Thus, for example, the Supreme Court has declared "that there can be no prospective waiver of an employee's rights under Title VII." Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1973); *see also* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 740 (1981) (stating that FLSA "rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate" (quoting Brooklyn Savs. Bank v. O'Neil, 324 U.S. 697, 707 (1945))); 8 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 19:26, at 316 (1998) ("A purported exemption from statutory liability is usually void, unless the purpose of the statute is merely to give an added remedy which is not based on any strong policy." (footnote omitted)).

200. *See* Wilko v. Swan, 346 U.S. 427, 435 (1953) (holding that the language of the judicial forum selection provision of the Securities Act prohibits waivers); *supra* text accompanying note 41.

201. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) ("[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.").

waived prospectively.[202] Often, courts allow actions for even common negligence to proceed notwithstanding a predispute waiver.[203]

Courts and scholars offer two primary reasons for voiding prospective litigation waivers—deterrence and compensation.[204] These are obviously related goals; a civil sanction deters by requiring violators to compensate their victims. Ultimately, however, deterrence is often identified as the more important *public* benefit, and it is that benefit—and the limit it places on parties' capacity to waive rights prospectively—that is the focus of this Article. Indeed, "[a]t the heart of most command statutes is a deterrence goal. Congress wishes to stop particular conduct either because the conduct itself directly causes harm, or because secondary consequences of the conduct cause harm."[205]

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202. *See* Schwartz, *supra* note 21, at 112 ("Courts generally hold contract clauses to be void as against public policy if their effect is to exempt a party from liability for its own future fraud or intentional torts, violations of statute, and injuries caused by gross negligence or recklessness." (footnotes omitted)); *see also id.* ("General principles of common law likewise have broadly disfavored prospective waivers of extra-contractual rights, whether those be rights grounded in the law of tort or in statutes."); E. ALLEN FARNSWORTH, CONTRACTS § 5.2, at 328 (3d ed. 1999) ("A party clearly cannot exempt itself from liability in tort for harm that it causes intentionally or recklessly."); 8 WILLISTON, *supra* note 199, § 19:23, at 291–97 ("An attempted exemption from liability for a future intentional tort or crime or for a future willful or grossly negligent act is generally held void . . . ." (footnotes omitted)); Anita Cava & Don Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, 28 SANTA CLARA L. REV. 611, 613 (1988) ("Courts uphold exculpatory clauses only if simple negligence is at issue."); Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to "Nerf®" Tiddlywinks*, 53 OHIO ST. L.J. 683, 727 (1992) ("Even if an exculpatory agreement is otherwise valid, many courts have held that such agreements will not preclude tort liability for various forms of more serious tortuous conduct.").

203. *Recent Case,* Wagenblast v. Odessa School District*, 110 Wash. 2d 845, 758 P.2d 968 (1988)*, 102 HARV. L. REV. 729, 729–34 (1989) (summarizing state court tests for deciding when to enforce exculpatory clauses in negligence cases).

204. *See, e.g.*, *Mitsubishi*, 473 U.S. at 637 (referring to antitrust law's "remedial and deterrent function"); Judith A. McMorrow, *Who Owns Rights: Waiving and Settling Private Rights of Action*, 34 VILL. L. REV. 429, 434 (1989) ("Both compensatory and deterrent goals are present in private rights of action . . . .").

205. McMorrow, *supra* note 204, at 456; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (noting that Title VII aims to compensate but that "its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress, but to avoid harm"); Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 278–84 (2002) (contending that the foremost purpose behind U.S. antitrust law, as interpreted by courts, is deterrence); Steven S. Poindexter, Note, *Pre-Dispute Mandatory Arbitration Agreements and Title VII: Promoting Efficiency While Protecting Employee Rights*, 2003 J. DISP. RESOL. 301, 311 ("The primary purpose of Title VII is to avoid harm to employees by discrimination, not to redress harm to individual employees."). More broadly, "[a] decrease in the deterrent effect of the law is especially problematic in the United States, where tort duties are a major component of how social policy is enforced." Elizabeth G.

The deterrence goal looms particularly large before a dispute arises. At that point, society's primary interest in a putative right of action lies in its ability to deter misconduct: "Remedies have both deterrent and compensatory effects, but at different times in the process, deterrence or compensation may predominate. Prior to the existence of a particular dispute, the potential availability of compensatory remedies acts purely as a deterrent, telling potential defendants how to order their conduct."[206] Giving private parties the right to sue to protect their own substantive rights lessens the government's burden in enforcing its laws.[207] "[T]he mere possibility that one can sue if a wrongful act is committed discourages commission of the act."[208] Settlement after the fact is, of course, permissible[209]—parties are not compelled to raise claims let alone litigate them to a final and public conclusion—because unlike "prospective waivers," settlements do not "affect the public interest by diminishing deterrence."[210] As another commentator put the point, "prospective waivers, unlike settlements, can be viewed as undermining the goals of statutes that regulate market relationships to reduce the occurrence of activity condemned as intrinsically bad."[211]

The deterrent effect of nonwaivable rights is of the utmost importance, not solely to the individual who may become the victim of misconduct, but also to third parties and to society generally. To take an example, the law strictly limits the class of parties permitted to advance federal antitrust claims; suits by "downstream" purchasers and others injured indirectly by anticompetitive behavior are often

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Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253, 271 (2004).

206. Schwartz, *supra* note 21, at 118.

207. McMorrow, *supra* note 204, at 449.

208. *Id.* at 464; *see also id.* ("[A] proper tension of inchoate rights to sue discourages wrongful acts.").

209. *Id.* at 459–61, 463–65.

210. Schwartz, *supra* note 21, at 118; *see also* Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271, 1296 (1993) ("[T]he prospective sale of a right to be free of discrimination primarily facilitates future acts of discrimination. The employer who has purchased the right to discriminate is surely more likely to indulge discriminatory preferences.").

211. Harper, *supra* note 210, at 1296.

disallowed in favor of more immediate victims.[212] More broadly, the deterrent effect of a nonwaivable law may protect even more diffuse interests.[213] Moreover, studies in the criminal context have shown that misconduct breeds like misconduct: "[I]ndividuals' decisions to commit crimes are responsive to the decisions of other individuals and not just to the price of crime."[214] Indeed, "studies reveal a strong correlation between a person's obedience and her perception of others' behavior and attitudes toward the law."[215] Put simply, failure to deter one illegal act may facilitate other bad acts toward additional victims. In any event, the reality of existing law is that the Supreme Court has repeatedly emphasized the deterrent benefit of certain laws,[216] and it has indicated that arbitration clauses may not be used to detract from this benefit.[217]

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212. II PHILLIP E. AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES & THEIR APPLICATION ¶ 339e, at 331 (2d ed. 2000) (noting that plaintiff may lack antitrust standing when a "more immediate victim of the defendant's violation is available as a 'superior' plaintiff to vindicate the public interest"). Among the reasons for this limitation, it is recognized that "damages for all 'remote' plaintiffs are more than necessary to deter illegal conduct and may overdeter." *Id.* ¶ 335c3, at 290. I am grateful to Professor Max Schanzenbach for this illustration.

213. *See, e.g.*, Richard A. Epstein, *Standing in Law & Equity*, 6 GREEN BAG 2D 17, 19 (2002) (noting that standing doctrine "simplif[ies] the legal system by channeling the rights of action through one party" on the theory that, "[s]o long as [that party] is allowed to sue, others receive the indirect benefits of deterrence before the loss, even if they do not get any direct compensation after the fact"). Professor Judith McMorrow contends that "[t]he mere fact that Congress uses its . . . authority to regulate private interactions indicates some effect or consequence of those private acts on the public . . . . The mere presence of federal . . . law indicates . . . that there are interests—however slight—involved in the statute beyond the private interactions of the parties regulated." McMorrow, *supra* note 204, at 453–54.

214. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 355 (1997).

215. *Id.* at 354; *see also* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 18 (1987) ("Dispute processing systems that are predicated upon so-called 'creative' solutions send a false signal to the community that the outcomes dictated by substantive law are unworthy of enforcement.").

216. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (emphasizing that Title VII's chief aim is to deter discrimination).

217. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (noting, in the course of enforcing an arbitration agreement, that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function[s]"); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (quoting this passage from *Mitsubishi*).

B. *Arbitral Discretion to Ignore the Law as a Prospective Waiver*

Courts frequently grapple with questions as to what constitutes a "waiver" of the right to sue. Courts have considered, for example, whether arbitration agreements placing burdensome costs on plaintiffs are void by virtue of the contract's power to inhibit plaintiffs from pursuing their legal rights.[218] In another line of cases, courts have evaluated whether choice-of-forum and choice-of-law clauses amount to impermissible, prospective waivers of U.S. law.[219] This Section approaches waivers from a different perspective—as the product of added uncertainty over whether and to what extent disputes will be resolved under established rules of law. Studies conclude that increased levels of inaccuracy in the outcome of legal disputes can hamper the law's deterrent effect. This Section applies those lessons and concludes that predispute arbitration clauses permitting arbitrators to ignore the law should be treated like prospective waivers because of their effect on the law's capacity to deter.

1. *The Link between Adjudicatory Accuracy and Deterrence*. Studies show that a law's capacity to deter misconduct can depend heavily on the perceived certainty that violators will be punished.[220] In the criminal context, "[t]he most common view among scholars is that punishment certainty has a greater marginal deterrent effect than

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218. *See generally* Jennifer L. Peresie, Case Note, *Reducing the Presumption of Arbitrability*, 22 YALE L. & POL'Y REV. 453, 455–60 (2004) (describing two competing court of appeals approaches to question whether arbitration provisions are enforceable when they impose costs on plaintiffs).

219. *See generally* Anthony Ragozino, *Domesticating the United States' Securities Laws: The Ninth Circuit Joins the Majority in Enforcing Forum Selection and Choice of Law Clauses Displacing U.S. Law in* Richards v. Lloyd's of London, 10 PACE INT'L L. REV. 31, 36–55, 64–75 (1998) (summarizing decisions considering enforceability of choice-of-law and forum selection clauses in suits alleging violations of U.S. securities law).

220. *See* Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 481 n.27 (2003) ("The relative certainty of consequences, of course, affects the overall deterrent effect of legal rules."); Jeffrey Grogger, *Certainty v. Severity of Punishment*, ECON. INQUIRY, Apr. 1, 1991, at 297, 308 ("The results [of Grogger's study] point to large deterrent effects emanating from increased certainty of punishment, and much smaller, and generally insignificant effects, stemming from increased severity of sanction."); Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1322 (2003) ("Unsurprisingly, . . . analyses generally agree that criminal behavior is increasingly effectively deterred as punishment becomes either more certain or more severe."); *see also* King, *supra* note 202, at 738–39 (suggesting that jury verdicts in personal injury cases have become "so unpredictable" that the law's deterrent effect is impaired).

punishment severity."[221] Indeed, policymakers in both the civil and criminal spheres have acted on the understood link between the certainty of punishment and deterrence.[222]

Just as deterrence benefits from consistently holding violators accountable, mistakes that punish *lawful* conduct detract from the law's deterrent power.[223] Parties contemplating whether to violate the law will weigh the likely sanction they will suffer if they do with the extent to which they may be erroneously penalized if they do not. Anything that increases the cost of compliance, including the chance that an innocent party will be found liable, reduces the law's deterrent effect. As Professors Kaplow and Shavell summarize their findings, "deterrence is . . . increased by a higher level of accuracy, because it raises the expected sanction for individuals who commit harmful acts (by reducing false negatives) and decreases the expected sanction for

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221. Strandburg, *supra* note 220, at 1322; *see* Johannes Andenaes, PUNISHMENT & DETERRENCE 54 (1974) ("At least since the time of Beccaria, it has been commonly accepted that the certainty of detection and punishment is of greater consequence in deterring people from committing crimes than is the severity of the penalty."); Kahan, *supra* note 214, at 379 ("A high-certainty/low-severity strategy . . . is more likely to generate a low crime-rate equilibrium."); *see also id.* at 380 ("[E]mpirical studies . . . conclude that certainty of conviction plays a much bigger role in discouraging all manner of crime than does severity of punishment."). Indeed, Professor Kahan's "social influence" model actually attributes even more effect to certainty than the traditional economic model does. *Id.* at 379.

222. The 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure making sanctions mandatory rather than discretionary was intended to increase the rule's power to deter frivolous filings. *See, e.g.*, Barbara Comninos Kruzansky, Note, *Sanctions for Nonfrivolous Complaints?* Sussman v. Bank of Israel *and Implications for the Improper Purpose Prong of Rule 11*, 61 ALB. L. REV. 1359, 1372 (1998) ("Through the 1983 amendments to Rule 11, federal rulemakers sought to emphasize deterrence by making violators of the Rule subject to mandatory sanctions."); *see also* Bruce G. Vanyo & Ignacio E. Salceda, *Making Motions to Dismiss More Moving: The Securities Litigation Reform Act*, 1996S PLI/CORP. 35, 45 (noting that, even when the Rule 11 sanctions were mandatory, between 1983 and 1993, experience showed that "the application of sanctions is all too often haphazard, leading to the lessening of the deterrent effects of a sanctions provision"). The U.S. Sentencing Commission made the related observation that "[c]omplexity can seriously compromise the certainty of punishment and its deterrent effect." U.S. SENTENCING GUIDELINES MANUAL pt. A, § 1.2 (1987).

223. *See* I.P.L. Png, Note, *Optimal Subsidies & Damages in the Presence of Judicial Error*, 6 INT'L REV. L. & ECON. 101, 101 (1986) ("[T]o the extent that an individual who has not violated the law will be made to pay damages, the cost of violating the law, relative to not doing so, will be reduced. The result will be more violations of the law."); *see also* Gail B. Agrawal & Mark A. Hall, *What If You Could Sue Your HMO? Managed Care Liability Beyond the ERISA Shield*, 47 ST. LOUIS U. L.J. 235, 261 (2003) (observing that "[e]ven if a general deterrent effect could be proved [for medical malpractice litigation], that effect would be lessened by the uncertainty of sanction for harm resulting from the undesirable behavior and the possibility of sanction for harm unrelated to bad acts"); Strandburg, *supra* note 220, at 1321 (advancing the thesis that conviction of the innocent lessens criminal law's deterrent effect).

individuals who do not (by reducing false positives)."[224] In short, the greater the perceived likelihood that violators—and only violators—will be sanctioned, the greater the law's deterrent power. False negatives and false positives both tend to undermine the law's capacity to deter wrongdoing.[225]

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224. Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 2–3 (1994); *see also* Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 223, 229 (2000) (noting a positive correlation between adjudicatory accuracy and deterrence); A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J.L. ECON. & ORG. 99, 100 (1989) ("Assuming a suit will be brought, both types of error reduce an individual's incentive to obey the law."). Judge Frank Easterbrook makes the same point in the criminal context: "Deterrence increases with the difference between what happens to you if you violate the law and what happens to those who don't. Every conviction of an innocent person undermines deterrence by reducing the marginal punishment of the guilty . . . ." Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1970 (1992).

225. "[B]oth types of error reduce deterrence . . . ." A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, J. ECON. LITERATURE, Mar. 2000, at 45, 60 (emphasis omitted). When the universe of possible behavior can be described by a continuum—as is often true with negligence claims, for example—*ill-defined* legal standards may promote *overdeterrence*. *See* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 281–82 & n.8 (1986) (describing their model's overdeterrence implications in assuming that actors choose from a spectrum of possible conduct rather than "from only two discrete options—to commit or not to commit the crime"); *see also* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 967 (1984) (explaining that the authors' analysis is interested chiefly in "parties who must choose some course of action from a more or less continuous range of choices"). The idea is that uncertainty over the location of the legal limit on the continuum will motivate parties to occupy points below it—so long as the likelihood of being found liable for innocent conduct decreases as one gets farther from that limit. Even taking account of this effect, however, Craswell and Calfee conclude that parties may "undercomply"—may be insufficiently deterred from engaging in proscribed conduct—as the level of uncertainty rises to more substantial levels. *See* Craswell & Calfee, *Deterrence and Uncertain Legal Standards*, *supra*, at 280 (summarizing their finding that "[v]ery broad uncertainty . . . is more likely to lead to undercompliance").

If arbitrators were authorized to ignore the law in their discretion, *see infra* Part III.B.2, the result would be tremendous uncertainty. Moreover, such discretion would likely foster a situation far closer to the legal "error" scenario—in which inaccuracy undermines deterrence—than to the "vague standard" scenario in which parties can predictably reduce the likelihood of being found liable simply by adjusting their behavior along a defined continuum. Arbitrators free to ignore the law in favor of their sense of justice would not be confined to such a continuum, making it difficult for parties to avoid false liability by "overcomplying" with established law. For example, the arbitrator might decide that a terminated employee should get something as a matter of distributive justice, even if the employer is innocent of wrongdoing; alternatively, the arbitrator might opt to relieve the employer of liability for a clear act of employment discrimination because an adverse award would impose a substantial hardship on the employer, or because the employer is a first-time offender.

2. *Arbitrators' Discretion to Ignore Nonwaivable Law*. Arbitrators derive their powers solely from the parties' contract. With respect to nonwaivable rights, this contract either tells the arbitrator whether to apply these norms or—tacitly or expressly—it gives the arbitrator discretion over whether to do so. Plainly, a predispute arbitration clause *directing* an arbitrator to ignore nonwaivable law in any future arbitration would be a void, prospective waiver.[226] This Article contends, however, that the same would be true of a contract allowing the arbitrator to decide *whether* to apply nonwaivable rights.[227]

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226. As one court put it in the context of all (not just nonwaivable) legal claims: "Parties to a contract calling for statutory arbitration are not free to agree, implicitly or explicitly, that their dispute will be resolved in disregard of controlling principles of constitutional, statutory, or judge-made law, and expect the courts to approve and enforce the result." Detroit Auto. Inter-Ins. Exch. v. Gavin, 331 N.W.2d 418, 429–30 (Mich. 1982). The court derived this conclusion from a conception of the court's own institutional integrity. *See id.* at 430 ("We cannot give parties the use, and benefit, and authority of the state's judicial process which exists *solely* to interpret and apply the law by giving effect to an agreement to ignore the law.").

Nonwaivable rights are subject neither to full and direct nor partial and indirect waiver. *See, e.g.*, Schwartz, *supra* note 21, at 113 ("Where it applies, this general public policy against limitation-of-liability clauses operates to invalidate not only contract clauses purporting to eliminate liability for future wrongs, but also clauses tending to limit liability, even partially or indirectly . . . ."); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) ("[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."). In fact, parties can use choice-of-law clauses to select the law that will govern their relationship—even if that means opting out of one jurisdiction's "mandatory" law—provided that certain criteria are satisfied. *See* Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 261–66 (1993) (outlining requirements for the enforcement of contractual choice-of-law clauses). There is often an inherent legal uncertainty among parties to a contract from different jurisdictions, however, meaning the deterrent effect of any arguably relevant "mandatory" law is already compromised. Recall that the "considerable uncertainty" over governing law was the impetus behind the Supreme Court's decision in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). *See supra* text accompanying notes 62–65. At least with choice-of-law clauses, moreover, the parties are limited to rules that *some* jurisdiction has adopted. Ribstein, *supra*, at 255 ("[U]se of choice-of-law clauses to avoid mandatory rules is constrained by the fact that avoidance [of mandatory rules] requires applying a state law . . . ."). This is a critical limitation obviously absent in cases when arbitrators are free to ignore the law in favor of an intuitive sense of equity.

227. The rationale is not that arbitrators lack authority that the parties to a predispute agreement themselves lack, *see, e.g.*, Ware, *supra* note 48, at 737–38 n.148 (noting that contracting parties "lack the power to contract out of a mandatory law prior to a dispute" and therefore cannot delegate that power to an arbitrator); Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319, 332 (1996) ("The argument has been made that arbitrators must apply mandatory rules because the parties cannot confer on the arbitral tribunal more freedom than

Affording an arbiter of future conflicts the discretion to ignore the law introduces substantial uncertainty into the dispute resolution process.[228] Of course, all adjudications carry some risk of error,[229] and assigning the case to an adjudicator relatively more prone to good faith error increases the likelihood of a mistaken outcome. But this increase is quantitative, it is one of degree. Parties face such a risk, for example, when choice-of-law rules require courts in one state to apply the laws of another. The forum state will be less familiar with the foreign law and therefore, theoretically, more likely to commit legal error.

Agreeing to assign future disputes to adjudicators free to ignore the law entirely and who can instead apply their own norms is qualitatively different. Such an agreement completely unhinges future disputes from substantive legal rules.[230] The arbitrator trying to apply the law may make a mistake, but any error is more likely to involve less well-entrenched or settled areas of the law—precisely the areas in which courts themselves are more likely to reach conflicting outcomes. In contrast, an adjudicator free to ignore the law entirely may abandon legal rules even in the most obvious or egregious cases. The "error" that would accompany such freedom is sure to detract materially from the law's deterrent effect. In that way, a predispute agreement authorizing arbitrators to disregard the law in their discretion is tantamount to a prospective waiver of legal rights.[231]

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they have under the national legal systems involved."), a rationale that would prohibit parties from requiring arbitrators to ignore nonwaivable rights in resolving any future disputes. Parties *are* presumably free to agree, predispute, to consult one another if a conflict arises and to *consider* resolving their controversy in a way that a court bound by law would not. What parties cannot do, this Article contends, is commit in advance to let a *third party* decide whether to follow the law in resolving some future dispute.

228. *See* Lipton, *supra* note 195, at 6 ("[I]f arbitrators are not strictly bound by the law, parties to arbitration will not receive the same degree of outcome predictability as they would in judicial litigation.").

229. *See, e.g.*, Craswell & Calfee, *Deterrence and Uncertain Legal Standards*, *supra* note 225, at 284 (noting that, even if jurors are properly instructed, they may render an erroneous verdict).

230. *See generally* Davis, *supra* note 104, at 83–84 ("Some argue that ignoring law diminishes respect for legal norms. Parties enter into arbitration agreements, knowing that if they or their employees act irresponsibly the arbitrators may not hold them to the standards of substantive law."); *id.* at 84 ("Critics of arbitration argue that to the extent that arbitrators do not apply substantive law, they remove the incentive to abide by it."); *see also* Mehra, *supra* note 205, at 315 (asserting that the fact that an international arbitrator "may apply completely different legal rules than a U.S. court would" reduces "the expected value of an antitrust claim").

231. An arbitrator contractually permitted to ignore the law undermines nonwaivable legal principles in another way, too. The law is not merely a deterrent; it is a means of communicating

Note that this conclusion follows solely from the potential for unpredictable error; it does not assume that arbitral error is biased toward one party or the other. Scholars have observed that an arbitral system that "systemically reduces the legal liability of . . . defendants" necessarily reduces the law's deterrent effect.[232] Some scholars now suggest that plaintiffs may fare better on the whole in certain types of arbitration than in litigation, however.[233] Additional empirical study is needed on this score, and the theory outlined in this Article does not assume systemic bias in favor of defendants. Indeed, the law's deterrent effect could be equally compromised if arbitration began to favor plaintiffs by mistakenly holding defendants liable for perfectly legal conduct.[234] It is the perceived, heightened likelihood of any kind of error that undermines deterrence.

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decisions society has made about proper conduct. The incentive to learn and internalize these norms is not weakened because there is a chance that an adjudicator will inadvertently misapply them: arguing before a relatively inexperienced judge still requires counsel to master the public law and argue for its application in the client's favor, and a client's best bet is still to learn established legal limits and live within them. Not so with adjudicators free to abandon settled rules in favor of their own sense of justice. In such a case, the public law becomes significantly less important, reduced to one of many tools that counsel can use in the client's defense. *See* Brunet, *supra* note 215, at 19 ("Once a citizen loses the predictability of a probable law-constrained court outcome, the benefit of 'law' as signal is lost."). Lawyers in that context no longer need to speak the same language—i.e., the relevant statutory terms and interpretative case law. They can urge the arbiter to ignore all of that in favor of an intuitive sense of fairness.

232. Schwartz, *supra* note 21, at 37. Citing data suggesting that employers fare better as defendants in arbitration than in litigation, Professor Schwartz concludes that a predispute arbitration clause acts as a prospective waiver of substantive rights. *See id.* at 113 ("If, as I have argued, a regime of compelled arbitration reduces aggregate plaintiffs' compensation and defense costs of statutory violations, then it functions in much the same way as an indirect, prospective waiver of substantive rights."); *see also* Brunet, *supra* note 215, at 17–18 ("[I]f society learns that [alternative dispute resolution] is a way to avoid the harsh consequences of breach of contract, then the deterrence effect of damages for breach is weakened considerably."). Professor Schwartz is particularly concerned with predispute arbitration clauses that appear in employment agreements and other contracts of adhesion. He proposes that such clauses be unenforceable when they appear in adhesive contracts or that the Supreme Court protect employees by overruling or severely limiting its decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), described *supra* in the text accompanying notes 87–92. Schwartz, *supra* note 21, at 125–30.

233. *See, e.g.*, Leader & Burger, *supra* note 121, at 88–89 (reviewing statistical data on employer-employee arbitration); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 45–54 (1998) (same).

234. *See supra* text accompanying notes 223–24.

C. *Reading the Contract to Avoid an Unenforceable Waiver*

In the vast run of cases, of course, the arbitration agreement is silent regarding the arbitrator's duty to apply substantive law.[235] Contract law is well equipped to grapple with this situation, however. The law recognizes that contracting parties may fail to address a contingency for any number of reasons, and courts are prepared to imply a term, at times to advance the interests of "society in general."[236]

Likewise, courts faced with contractual vagueness or ambiguity presume that the contracting parties meant to execute a legally enforceable agreement. This canon of interpretation aims to give effect to the parties' actual intentions.[237] Applied to an arbitration contract, this presumption favors an interpretation that does *not* create an invalid waiver by leaving arbitrators free to ignore the law surrounding nonwaivable rights.

Courts also rely on a canon of contract construction—a rule that imports meaning regardless of the parties' actual, underlying intentions—favoring agreements that are enforceable and in the public interest. "The rule that courts favor a construction in the public

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235. *See supra* note 194 and accompanying text.

236. FARNSWORTH, *supra* note 202, § 7.15, at 494–97, § 7.16, at 501.

237. See 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 24.22, at 235–38 (Joseph M. Perillo ed., 1998):

> Many cases can be seen in which, when the words of the contract can be interpreted either in a way which would cause the contract to be valid or in a way which would result in invalidity, courts have chosen the former interpretation. This preference is based upon the judicial belief that the parties intend their agreement to be valid rather than invalid, lawful rather than unlawful, and honest and effective rather than fraudulent and voidable.

Corbin comments on this issue elsewhere as well. *See id.* at 232 ("Courts often state that when a contract term can be interpreted in at least two ways, and when one of those interpretations would result in a valid contract and the other would cause the agreement to be void or illegal, the former interpretation is preferred."); *id.* at 234 ("If . . . the words of a contract have more than one possible meaning, and one of these meanings would produce a legal effect that the court believes the parties intended to produce, while another meaning would not, the court should unhesitatingly adopt the first meaning."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."); FARNSWORTH, *supra* note 202, § 5.1, at 325 ("Given a choice between two reasonable interpretations of an agreement, a court will prefer the one under which the agreement involves no contravention of public policy and is enforceable to the one under which it involves such a contravention and is not enforceable."); *id.* (noting that this interpretive principle "is epitomized in the maxim *ut res magis valeat quam pereat* ('that the thing may rather have effect than perish')").

interest is not a rule of interpretation because it is not designed to discern the parties' intended meaning. It is instead a rule of construction because it determines the legal effect of their contract."[238] Here again, the preferred construction would be one that does not encumber a right's deterrent value by giving an arbitrator discretion to ignore governing law in resolving future disputes.

The upshot of all of this is that longstanding contract conventions should read a predispute agreement to *require* the arbitrator to apply nonwaivable law in good faith, unless the contract expressly directs the arbitrator to act contrary to law or expressly grants the arbitrator discretion to ignore nonwaivable rights (in which cases this clause would be unenforceable).[239] By operation of law, the contract imposes a duty on arbitrators to identify and apply governing law in good faith. By way of analogy and illustration, this is the same fundamental duty that the Full Faith and Credit Clause imposes on state courts applying the laws of other states. As Justice Stevens described it, the "Clause requires only that States . . . acknowledge the validity and finality of such laws and attempt in good faith to apply them when necessary as they would be applied by home state courts."[240] Likewise, Justice Holmes commented that the court's duty is to "candidly constru[e]" another state's law "to the best of its ability," even if the court ultimately does so in a way that the home state would reject.[241] It is this minimal duty that the law should read otherwise silent arbitration contracts to include, whenever nonwaivable rights are at issue, to render the contract legal and enforceable.

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238. CORBIN, *supra* note 237, § 24.25, at 266; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 207 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.").

239. In this sense, parties could not avoid the effect of this arbitral duty by express contract language. *Cf.* 2 ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.17, at 356 (2004) (noting that parties cannot contract away duty of good faith performance implied between contracting parties).

240. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 834–35 (1985) (Stevens, J., concurring in part and dissenting in part). For an articulation of this duty that bears particular resemblance to the "manifest disregard" doctrine, see *Sun Oil Corp. v. Wortman*, 486 U.S. 717, 730–31 (1988) ("To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause . . . . our cases make plain that [a state court's] misconstruction [of another state's law] must contradict law of the other [s]tate that is clearly established and that has been brought to the court's attention.").

241. Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917), *quoted in Shutts*, 472 U.S. at 835.

D. A Basis for Limited Judicial Review under the FAA

Having identified a contractual duty on the part of arbitrators resolving disputes governed by nonwaivable law, a basis for limited judicial review emerges. Unlike "manifest disregard," which is frequently depicted as an extrastatutory, judge-made addition to the FAA, this basis has its footing in § 10(a) itself. And although it is in many ways similar to the besieged "manifest disregard" doctrine, this FAA-based review benefits from an identifiable contractual and statutory grounding.[242]

1. Exceeding Arbitral Power Under § 10(a)(4). Recall that § 10(a)(4) allows courts to overturn arbitral awards in cases "where the arbitrators exceed[] their powers."[243] Understanding that under traditional contract rules arbitration clauses require arbitrators to interpret and apply nonwaivable rules in good faith, § 10(a)(4) authorizes courts to overturn awards when arbitrators "exceed" their power by abandoning this duty.

Some have warned against the use of § 10(a)(4) as a basis for reviewing the merits of arbitral awards.[244] "[T]he powers of . . . arbitrator[s] are contractual in nature,"[245] the argument runs, and arbitrators exceed their authority only by doing more than the contract permits.[246] "It is the submission of issues to the arbitrator, and the definition of the arbitrator's authority as set forth in the arbitration agreement, that define section 10(a)(4)'s 'exceeded powers' inquiry."[247] As one commentator explained:

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242. Historically, courts resisted finding that the parties required arbitrators to apply the law correctly, absent clear language to this effect. STURGES, *supra* note 180, § 366, at 794–96.

243. 9 U.S.C. §10(a)(4) (2000); *see supra* text accompanying note 29. This provision has an analogue in state arbitration statutes. UNIF. ARBITRATION ACT § 23(a)(4) (2000); UNIF. ARBITRATION ACT § 12(a)(3) (1955).

244. *See, e.g.*, Mungioli, *supra* note 97, at 1091 (citing cases supporting the proposition that because an arbitrator's power derives from the parties' contract, "the test for vacatur under the first clause of section 10(a)(4) of the FAA, whether the 'arbitrator exceeded the powers delegated to him by the parties,' does not necessarily give courts the authority to scrutinize the merits of an arbitration award").

245. *Id.* at 1090.

246. *See* Hayford, *supra* note 97, at 455 ("The case law demonstrates a judicial belief that the arbitrator's 'powers' referred to in the first clause of section 10(a)(4) are contractual in nature.").

247. *Id.* at 455–56. One scholar explains that

> where the parties, without stipulating applicable law, agree to submit a dispute to arbitration, the arbitrators are not constrained by any particular legal norms. The

> Courts have held, as a general rule, that 'arbitrators need not follow otherwise applicable law when deciding issues before them *unless they are commanded to do so by the terms of the arbitration agreement*.' This rule derives from the fundamental principle of arbitration: the agreement shapes the process. If the agreement requires the arbitrators to apply particular law, they must. If the agreement does not stipulate any law, the natural inference is that the parties' silence frees the arbitrators to enforce their own sense of justice.[248]

As another scholar described the practical effect of contractual silence, "[I]n the absence of restrictions agreed to by the parties, arbitrators have the power to interpret the contract they are enforcing, to interpret the law, and, to a very considerable degree, to disregard or err respecting the law."[249]

Likewise, only very few courts and commentators have tried to ground anything akin to the "manifest disregard" standard in the FAA (as opposed to treating it as a purely judge-made doctrine).[250] A handful of courts have cited § 10(a)(4) in conjunction with the

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> arbitrators may draw on state law, federal law, or natural law. If so inclined, they may borrow from French civil law. Or, they may simply enforce their own sense of justice.

Davis, *supra* note 104, at 124. "By agreeing to arbitrate a statutory claim," however, Davis argues that "the parties direct the arbitrators to apply the statute in question." *Id.* at 125. "At the beginning of an arbitration, the parties, given the choice, would surely desire judicial correction rather than enforcement of awards violating the rule of decision that they instructed the arbitrator to apply." *Id.* at 126. This position is consistent with the argument outlined herein to the extent that the two parties to a dispute mutually provide that an arbitration must proceed pursuant to particular law, as through an express statement to that effect in the predispute arbitration clause. If the predispute clause is silent as to governing law, however, it is less clear that a defendant patently liable under established law, for example, would want the arbitrators to apply that law faithfully to the exclusion of a defense argument grounded in notions of equity or fairness.

248. Davis, *supra* note 104, at 59 (emphasis added) (quoting Univ. of Alaska v. Modern Constr., Inc., 522 P.2d 1132, 1140 (Alaska 1974)); *see also id.* at 76 ("Unless the agreement directs arbitrators to apply particular law, the arbitrators may resolve the dispute as they deem appropriate, regardless of prevailing legal norms.").

249. MACNEIL, *supra* note 113, § 40.5.2.4, at 48.

250. *But see id.*, § 40.5.1.3, at 37–40 (arguing that "manifest disregard" is best understood as an excess of arbitral authority, on the theory that courts can "defin[e] just what are the powers of the arbitrators"); Rau, *supra* note 124, at 532 ("[T]he lion's share of the 'manifest disregard' cases can be redistributed and placed within an alternative analytical construct—a simple inquiry into the contractual powers of the arbitrator required by §10(a)(4)."); Rebecca Hanner White, *Arbitration and the Administrative State*, 39 WAKE FOREST L. REV. 1283, 1300 (2003) ("It appears as though 'manifest disregard' is merely the Court's understanding of what Section 10(a)(4) of the FAA means rather than a judicially crafted exception to arbitral finality.").

"manifest disregard" doctrine, without explanation,[251] and one court read it into § 10(a)(1)'s provision for "undue means" and § 10(a)(2)'s remedies for "evident partiality."[252] These courts invoke the statutory restrictions, however, without ever attempting to explain why arbitrators are powerless to decide cases based on their own normative sense. As one commentator observed, it is purely "because of their interpretation of the [*Wilko*] dictum that [these courts] are attempting to read into the FAA."[253]

If an agreement expressly requires an arbitrator to make a good faith effort to follow the law, it would follow that § 10 affords a remedy if and when the arbitrator chooses to disregard it. Indeed, this is one way to read the Second Circuit's decision in *Wilko*.[254] The court recognized that arbitrators might "not ordinarily consider themselves bound to decide strictly according to legal rules," but the court concluded that arbitrators in that case would be "bound to decide in accordance with the provisions of section 12(2)" because the margin agreement was *expressly* "subject to" the securities laws.[255] "Failure to [decide in accordance with these laws] would, in [the court's] opinion, constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act . . . ."[256]

This Article contends, however, that predispute arbitration clauses *do* contain such a limitation on arbitral authority even when—as is usually the case—the agreement is silent. The FAA review that some would agree is available when parties expressly require the

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251. *See, e.g.*, Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991); Saguenay Terminals, Ltd. v. San Martin Compania de Navegacion, S.A., 293 F.2d 796, 801 (9th Cir. 1961).

252. Metal Prods. Workers Union v. Torrington Co., 242 F. Supp. 813, 824 (D. Conn. 1965), *aff'd* 358 F.2d 103 (2d Cir. 1966).

253. Milam, *supra* note 104, at 711–12. Professor Hayford argues that the doctrine is best read into the prohibition on arbitrator misconduct in § 10(a)(3). Hayford, *supra* note 104, at 137:

> If 'manifest disregard' is understood only to occur, as the author has suggested, when an arbitrator has correctly interpreted the law and then consciously or intentionally ignored it, then 'manifest disregard' describes a kind of untoward arbitral behavior which fits neatly within the proscription on arbitrator 'misconduct' and 'misbehavior' contained in Section 10(a)(3) of the FAA.

In Professor Hayford's view, "the 'manifest disregard' of the law ground for vacatur most likely will be addressed in one of two ways—either by the Supreme Court rejecting it as inconsistent with Section 10(a) of the FAA, or by the Court bringing it within the embrace of Section 10(a)(3) of the Act." *Id.* at 139.

254. 201 F.2d 439 (2d Cir. 1953).

255. *Id.* at 444–45.

256. *Id.* at 445.

arbitrator to apply the law is available in all cases, this Article maintains, involving nonwaivable legal rights.[257]

2. *Characteristics of the "Good Faith" Standard and Its Practical Effects*. The standard of review advocated in this Article thus proceeds from the understanding that arbitrators have a contractual duty to apply the law as courts would: in good faith and to the best of their ability. Courts authorized by § 10(a)(4) to investigate alleged breaches of that duty need not review the arbitrators' legal decisionmaking *de novo*. Good faith legal error is possible in any system of adjudication. It is the substantial increase in unpredictable, nonlegal awards that comes from adjudication without a duty to apply the law faithfully—and its profound, negative effect on the law's deterrent effect—that offends the bar on prospective waivers. The standard outlined herein would empower courts to intervene under § 10(a)(4) only when arbitrators abandoned that good faith duty.

Nor would the § 10(a)(4) judicial inquiry depend on a written award, a rarity in commercial arbitration. For example, if the written filings or the transcript (available as a matter of course in some arbitrations[258]) show a party inviting arbitrators to ignore established legal norms, judgment for that party without an explanation would be powerful evidence that the arbitrators exceeded their authority by

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257. Analogously, some scholars have argued that if the parties contract to require the arbitrators to decide legal questions correctly, legally erroneous awards can be overturned for an arbitrator's excess of authority under § 10(a)(4). *See, e.g.*, Christopher R. Drahozal, *Contracting Around the RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 431–33 (2003); Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 193 (2002) ("If the arbitration agreement or arbitration code of procedure requires the arbitrator to follow the law, arbitrators must comply with its requirement or otherwise exceed their power and authority."); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 239 (1997) ("A contract that *withdraws* errors of law from the authority conferred on the arbitrator—that, in other words, places issues of law 'beyond the scope of the submission' to binding arbitration—should, then, allow an aggrieved party on 'review' to invoke §10(a)(4)."). Professor Christopher Drahozal found that among thirty-four franchise agreements requiring arbitration of future claims, two "effectively provided for judicial review of errors of law by making legal errors beyond the scope of the arbitrator's jurisdiction." Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 731.

258. See, for example, NASD Code of Arbitration Procedure § 10326(a) (2000):

> A verbatim record by stenographic reporter or a tape recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed.

failing to apply the law in good faith.[259] It makes sense in these circumstances to place the burden on the arbitrators to show that they did not accept the winning party's invitation to ignore settled norms. Moreover, doing so will discourage parties from inciting arbitrators to ignore the law and will force arbitrators to take seriously objections that a party is encouraging arbitrators to overstep their authority.

Likewise, in some cases an apparent compromise decision by arbitrators to "split the difference" between the parties might support an inference that arbitrators ignored their duty to apply the law as a court would.[260] Arbitrators who believe that the law as properly applied affords some less-than-full relief would have an incentive to reduce their reasoning to writing to rebut any such inference. Here again, the "good faith" standard would actually encourage a written award—the converse of the incentive fostered by current application of the "manifest disregard" standard.[261]

Also, unlike the "manifest disregard" doctrine, the "good faith" standard would not apply only when the arbitrator plainly "knew" the governing rule but chose to ignore it. Rather, any evidence suggesting that the arbitrator did not feel bound to decide the decision under controlling law would be evidence of a dereliction of duty. Declining to hear an argument because the arbitrator did not "want to get into the law on that," for example, would be evidence of arbitral overreaching, as would an award based solely on an arbitrator's "gut"

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259. The Eleventh Circuit followed essentially this approach to the evidence in *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (1997), wherein the court overturned an arbitral award for "manifest disregard of the law." *Id.* at 1462. Montes sued her employer for allegedly violating the FLSA. *Id.* at 1458. The suit went to arbitration pursuant to a predispute agreement, and the arbitrator ruled for the employer, but only after the employer's attorney urged the arbitrators to ignore relevant law and decide the case in the defendant's favor as a matter of "equity." *Id.* at 1459. Citing *Wilko*, the court recognized "manifest disregard" as a nonstatutory ground for vacating an arbitral award. *Id.* at 1459–62 & n.5. Because "[t]here [was] nothing in the award or elsewhere in the record to indicate that [the arbitrators] did not heed this plea" to ignore the law, and given "the marginal evidence presented" by the defense, the court decided that it could not conclude that the arbitrators had decided the case according to law. *Id.* at 1467.

260. Another inference is also possible in some such cases. In her seminal 1961 article, Professor Soia Mentschikoff reported the results of her survey of commercial arbitrators and awards, including her finding that when arbitrators did render "partial awards," many of them "[were] arrived at in a judicial manner since they result[ed] from the striking of particular items of damage that the arbitrators believe[d] [were] not justified under the facts or law of the particular case." Mentschikoff, *supra* note 157, at 861.

261. *See, e.g.*, Hayford, *supra* note 104, at 140 ("[T]he 'manifest disregard' of the law standard has prevented the emergence of on the record decision making (i.e., reasoned awards) in commercial arbitration.").

sense of fairness—even if the governing legal standard were uncertain.[262]

In the end, this Article not only calls on courts to abandon the "manifest disregard" doctrine as a *nonstatutory* vehicle for judicial review, but also provides a vehicle for limited judicial review in those jurisdictions that currently refuse to recognize any duty on arbitrators to apply substantive law.[263] Both the original and revised Uniform Arbitration Acts permit courts to vacate arbitral awards when arbitrators exceed their authority under contract,[264] something they do whenever they fail to make a good faith effort to apply nonwaivable law. Indeed, if the law at issue is one that cannot be waived prospectively, courts wishing to reject any and all grounds for substantive review must recognize that, in doing so, they are necessarily presuming that the arbitration contract left it to the arbitrator to decide whether to follow or to disregard that law. But that presumes an arbitration clause that is a void, predispute waiver of nonwaivable rights. Better to read the contract so that it is valid and enforceable and to overturn an award that exceeds the arbitrator's contractual authority than to read the arbitration clause as unenforceable *ab initio*.

CONCLUSION

Among the most controversial questions in the law of commercial arbitration is what authority, if any, courts have to review the substance of arbitral awards. Not surprisingly, courts and commentators have grown particularly concerned that certain "public law" rights will not be handled properly in private arbitration, to the detriment of the arbitrating parties and the public at large.

This Article advances a new perspective on predispute arbitration clauses, focusing on the limits these clauses themselves impose on arbitrators' authority. The Article contends that parties

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262. *See* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to* Gilmer, 44 HASTINGS L.J. 1187, 1233 (1993) (recommending that when addressing unsettled legal questions, "employment arbitrators should continue to place predominant value on judicial caution"); *cf.* Fid. Union Trust Co. v. Field, 311 U.S. 169, 177 (1940) (observing a duty on the part of a federal court sitting in diversity "to ascertain and apply" state law even when a state high court has not yet decided the issue).

263. *See supra* text accompanying notes 134–49 (describing both the Seventh Circuit's elimination of even "manifest disregard" review and decisions in California and other states).

264. *See infra* notes 34–35 and accompanying text.

cannot enter into binding predispute agreements giving arbitrators the discretion to decide *whether* to apply the law surrounding statutory and other "nonwaivable" rights. The tremendous unpredictability brought about by such a contract would undermine the deterrent effect of the underlying, substantive rights, making the conferral of arbitral discretion tantamount to an outright—and void—waiver of the ability to vindicate those rights.

From this premise follows an FAA-based rule of judicial review of arbitral awards. In the many cases where nonwaivable rights are at stake, arbitrators exceed their authority under contract (in contravention of the FAA) if they do not make a good faith effort to identify and apply the law in the same manner that a court would. This rule lends legitimacy, legal grounding, and definitional consistency to a degree of judicial review, and it provides some additional safeguards for many of the claims resolved in private arbitration.