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## Unraveling the Mystery of *Wilko v. Swan*: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy

James M. Gaitis

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# Unraveling the Mystery of *Wilko v. Swan*: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy

James M. Gaitis\*

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## I. INTRODUCTION

For American arbitration practitioners and scholars, no greater mystery exists than the question of the origins and intended meaning of the United States Supreme Court's famous utterance in its 1953 decision in *Wilko v. Swan*<sup>1</sup> that "[i]n unrestricted submission . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."<sup>2</sup> Despite the fact that there is nothing in the *Wilko* decision suggesting the Court intended to establish an exception to either the Federal Arbitration Act (the "FAA")<sup>3</sup> or the law upon which it was based, the Court's use of the phrase "manifest disregard" has nevertheless gradually transmuted into an accepted legal doctrine under which the FAA's policy favoring party autonomy has been subverted in favor of other, more amorphous objectives.<sup>4</sup> In essence, and despite the total absence of a legislative or judicial declaration that public policy does, or should, forbid parties from agreeing that arbitrators shall correctly apply the law in resolving the parties' dispute, courts now consistently hold that such an arbitration provision is unenforceable under the FAA.<sup>5</sup> In accord

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<sup>1</sup> 346 U.S. 427 (1953), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). The issues addressed in this article do not relate solely to domestic American arbitration. Because the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16 (2000), applies to international arbitrations conducted in the United States, the issues addressed here should be of equal importance to parties interested in international arbitration and so-called nondomestic arbitrations conducted in the United States. For a discussion of the applicability of the FAA and American vacatur law to international arbitrations conducted in the United States, see James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT'L ARB. 9, 52-62 (2004).

<sup>2</sup> *Wilko*, 346 U.S. at 436.

<sup>3</sup> 9 U.S.C. §§ 1-16.

<sup>4</sup> See *infra* notes 290-93.

<sup>5</sup> Of course, most parties do not expressly state in their arbitration provision that the arbitrators are obligated to "correctly" apply the law identified as governing the parties' dispute. Nonetheless, it is nonsensical that in such an instance the parties do not have a contractual expectation that their rights will be determined by a correct application of the law. As will be shown throughout this article, the traditional American arbitration vacatur law relied upon by the *Wilko* Court clearly provided that when the parties provide that the arbitrators shall apply a particular law in determining their rights, a reviewing court will understand not only that the parties did expect that such law would be applied correctly but, also, that manifest errors in the application of that law can justify the vacatur of the award. Interestingly, at least one court has expressly acknowledged that when the parties do expressly state that the arbitrators shall "correctly" apply the chosen law and the arbitrator then fails to correctly apply that law, the arbitrator has acted "in excess" of arbitral authority such that the award is subject to vacatur. See *Keyclick Outsourcing, Inc. v. Ochsner Health Plan, Inc.*, 2006 WL 3094077, No. 06-CA-359, \*1-2 (La. App. Oct. 31, 2006) (involving an arbitration agreement that

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with the manifest disregard doctrine, state and federal courts now routinely declare that arbitral awards infected by patently obvious errors in the application of clearly established substantive law are not subject to vacatur unless the arbitral tribunal was aware of and understood the law and then intentionally elected not to apply it.<sup>6</sup>

Given the significance of the manifest disregard of the law doctrine, it seems odd that the doctrine itself was bred out of a regrettable cascade of events that began with the Supreme Court both misstating and rephrasing the operation of established arbitration vacatur law, and concluded with every federal circuit,<sup>7</sup> and many state courts,<sup>8</sup> adopting an interpretation of the *Wilko* decision that has no valid basis in law or theory.<sup>9</sup> Interestingly, the errors in legal analysis respectively committed first by the Supreme Court and then by the federal courts not only differ in highly significant ways but also came about for entirely different reasons. The only material error in the Supreme Court's analysis was occasioned by a seemingly inadvertent mischaracterization of a single aspect of traditional American arbitration vacatur law, whereas the errors in the reasoning of subsequent federal appellate court decisions, and in the rationale for the "doctrine" of manifest disregard

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provided that "[t]he arbitrator shall have no authority to make material errors of law" and holding that, in light of the parties' arbitration agreement, a material error of law constituted an act in excess of arbitral authority that warranted the vacatur of the award).

<sup>6</sup> See, e.g., *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001); *Hoffman v. Cargill Inc.*, 236 F.3d 458, 462 (8th Cir. 2001); *Prudential-Bache Securities, Inc. v. Tanner*, 72 F.3d 234, 240 (1st Cir. 1995); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995).

<sup>7</sup> For a list of "representative cases" showing that every federal circuit has now recognized some form of the manifest disregard doctrine, see *Birmingham News Co. v. Horn*, 901 So. 2d 27, 48-49 (Ala. 2004). See also Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards* 30 GA. L. REV. 731, 764-79 (1996) (providing a survey of manifest disregard cases through 1996).

<sup>8</sup> See, e.g., *Birmingham News Co.*, 901 So. 2d at 50 (adopting the manifest disregard of the law doctrine and listing eleven other states that had already done so). It is significant to note that the federal manifest disregard of the law doctrine can apply in a state court proceeding even when the state has not adopted the standard. See, e.g., *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 480 (2006). The threshold question for the state court in a confirmation or vacatur proceeding relating to an arbitration award covered by the FAA is whether, under that state's laws, federal vacatur standards are viewed as being procedural or substantive in nature. *Allied-Bruce Terminix Cos. V. Dobson*, 513 U.S. 265, 271-72 (1995). As a consequence, while some state courts consider themselves to be bound to apply the federal vacatur law in a state court proceeding concerning the confirmation or vacatur of an arbitration award covered by the FAA, others do not. See generally James M. Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Final Awards in Domestic and International Arbitrations*, 16 AM. REV. INT'L ARB. 1, 77-82 (2005).

<sup>9</sup> See *infra* Parts III-V.

of the law as we know it, result from an unduly dogmatic analysis in which the normal investigative tools of historical inquiry and case law consideration were neglected in favor of the peremptory application of a nonexistent policy.<sup>10</sup> It is therefore the case that for more than a half century following the issuance of the Supreme Court's decision in *Wilko*, no court or commentator has undertaken the task of dissecting the language of *Wilko* and of analyzing that language in light of the legislative history of the FAA and the substantial body of case law that existed at the time *Wilko* was decided.<sup>11</sup>

Remarkably, such an analysis strongly suggests that under the case law the *Wilko* Court attempted to apply, courts do have, or at least should have, the authority in some circumstances to vacate arbitral awards that are clearly based on faulty legal reasoning.<sup>12</sup> More specifically, a proper construction of *Wilko*, the FAA, and previously existing law lends strong support to four specific legal conclusions that will seem extraordinary, if not outlandish, to American arbitration practitioners and scholars.<sup>13</sup> First, and contrary to popular opinion,<sup>14</sup> it was not Congress' intent in passing the FAA to impose greater limits on judicial review of arbitral awards than those that existed under traditional vacatur law.<sup>15</sup> Second, and contrary to the general thrust of

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<sup>10</sup> See *infra* Parts III-V.

<sup>11</sup> One recent scholarly article has addressed the lack of legal foundation for the manifest disregard doctrine. See Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547 (2006). The author's analysis, however, only summarily discusses the authorities cited by the *Wilko* Court and essentially disregards the legislative history of the FAA. See *id.* at 584-89. In essence, the author concludes that a refined version of the manifest disregard of the law doctrine should apply, but only in instances in which the arbitrators are legally required to apply mandatory or other "nonwaivable" law. See *id.* 606-07. The author, therefore, does not discuss the central issue of this article—i.e., whether the *Wilko* Court meant to apply traditional arbitration vacatur law and, more importantly, whether prevailing principles relating to party autonomy and the associated intent of the FAA dictate that the same vacatur law should apply to contemporary arbitrations governed by the FAA. Nevertheless, the instant article does not dispute Professor Scodro's conclusion that the application of mandatory law may not be waived via a pre-dispute arbitration agreement. See *id.*

<sup>12</sup> See *infra* Parts III-IV.

<sup>13</sup> Many American arbitration practitioners fail to realize that a variety of countries, including England, do permit merit-based review of arbitral awards. For a discussion of the arbitration laws of various countries, including England, New Zealand, Switzerland, and Belgium, that permit varying degrees of merit-based review, see WILLIAM W. PARK, *Procedural Evolution in Business Arbitration: Three Studies in Change* 11-12, reprinted from *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* (2006). Notably, the laws of those nations are based on the premise that principles of party autonomy dictate that awards must be subject to review for legal error to ensure that the contracting parties' expectations are fulfilled. See, e.g., Fraser Davidson, *The New Arbitration Act—A Model Law?* 1997 J. BUS. LAW 101, 125 (quoting representatives of the United Kingdom who participated in the drafting of the UNCITRAL Model Law as stating that "the logical consequence of party autonomy is that they should be allowed to have recourse, if that is what they have agreed").

<sup>14</sup> See *infra* notes 187-89 and accompanying text.

<sup>15</sup> See *infra* Part IV.A-B.

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the *Wilko* “manifest disregard” statement, under “unrestricted” arbitration submissions, arbitrators should be deemed to be authorized to intentionally disregard applicable law should they so choose.<sup>16</sup> Third, when arbitrators acting under an unrestricted submission intend to base their award on applicable law, the resulting award should be subject to vacatur if it is clearly established that the arbitrators committed error in the application of that law.<sup>17</sup> Finally, under the same rationale as applied to the third principle stated above, when the arbitration proceeding is governed by a “restricted” submission that explicitly requires the arbitrators to apply a particular law, or implicitly requires the application of a mandatory law, the resulting award should be subject to vacatur when it can be clearly shown that the arbitrator failed to properly apply that law or materially erred in applying clearly established law.<sup>18</sup>

Despite the fact that the arbitration laws of some developed nations recognize these same principles,<sup>19</sup> they no doubt will seem repugnant to an American arbitration community and judiciary that have vigorously sought to severely limit judicial review of arbitral awards based on an ideology that places paramount importance on considerations of “efficiency” and “finality.” It must nonetheless be recognized that the above-stated propositions not only emanate from an exceedingly substantial body of case law—which the *Wilko* Court clearly meant to endorse—but also are utterly consistent with controlling policy considerations relating to party autonomy.<sup>20</sup> Moreover, although the point will surely be contested, there is nothing in the history of the FAA, or in the FAA itself, that suggests these time-honored principles should suddenly and radically be abolished by the enactment of the

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<sup>16</sup> Again, this proviso is subject to the limitation proposed by Professor Scodro and others that mandatory law cannot be waived in a pre-dispute arbitration agreement. See generally Scodro, *supra* note 11; Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 737 (1999) (acknowledging the plausibility of the argument “that FAA section 10(a)(4) authorizes courts to vacate awards where the arbitrators exceeded their powers and arbitrators do not have the power to decide disputes without applying mandatory law”). Examples of contracts (or claims) that inherently require the application of certain law include those contracts or claims regarding securities transactions, restraint of trade, or employment. Laws relating to such contracts or claims are mandatory because their enforcement is intended to protect public, rather than private, interests. The “public policy” exception to both the confirmation of arbitral awards and the recognition and enforcement of foreign arbitral awards is ingrained in arbitration law. See generally, Gaitis, *supra* note 1, at 47-48, 71-76.

<sup>17</sup> See *infra* Parts III-IV.

<sup>18</sup> See *infra* Parts III-V.

<sup>19</sup> See *supra* note 13 and accompanying text.

<sup>20</sup> See *id.*

FAA, which, after all, was intended to enforce party autonomy and private agreements to arbitrate rather than thwart them.<sup>21</sup>

This article conducts an analysis of these issues, commencing with a brief description of what the *Wilko* Court actually said with respect to the vacatur of arbitral awards and how federal and state appellate courts have construed that language.<sup>22</sup> Traditional American arbitration vacatur law,<sup>23</sup> including but not limited to the cases relied upon by the *Wilko* Court, are then reviewed in depth such that the *Wilko* decision and the *Wilko* Court's choice of language may be placed in context and fully examined.<sup>24</sup> The intent and proper operation of the FAA are then discussed based on both the legislative history of the FAA and other authorities that consistently recognize the fundamental objective of the FAA is to enforce private agreements to resolve civil disputes through arbitration processes.<sup>25</sup> Next, the *Wilko* decision is reconsidered in light of traditional vacatur law and the intent of the FAA. The clearly discernable manner in which the *Wilko* Court modestly strayed, no doubt inadvertently, from that law is highlighted and the erroneous foundation for the contemporary doctrine of manifest disregard of the law, as applied by every federal circuit, is thereby exposed. Finally, the article concludes by briefly discussing the contemporary issues that implicate principles of party autonomy in connection with the review and finality of arbitral awards. This paper emphasizes that until such time as *Wilko* is reconsidered, and principles of party autonomy are resurrected under the FAA, the objective of the enforcement of party autonomy will never be realized.

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<sup>21</sup> See *infra* Part IV.

<sup>22</sup> See *infra* Part II.A.

<sup>23</sup> The phrase "traditional American arbitration vacatur law" is used in this article to refer to the most commonly accepted approach to merits-based review of arbitral awards during the nineteenth and the first half of the twentieth centuries. The use of the phrase is not intended to suggest that the various states of the United States have always been in agreement as to the manner in which the law should operate in this regard. To the contrary, in-depth legal research reveals that there has always been a great diversity of opinion on the topic. See *infra* notes 247-52 and accompanying text. Nevertheless, an examination of the case law reflects not only that the most thoroughly reasoned decisions consistently permitted the vacatur of arbitral awards based on a manifest mistake in the application of law but, also, and more importantly, the United States Supreme Court recognized that principle with reasonable consistency. See *infra* Part III.A-D. Given the imprimatur of the Supreme Court in this regard, and because this article pertains specifically to federal arbitration law, those cases, as a whole, are deemed here to reflect legal principles that embodied traditional and generally accepted law.

<sup>24</sup> See *infra* Part III.A-D.

<sup>25</sup> See *infra* Part III.E.

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## II. AN OVERVIEW OF THE *WILKO* OPINION AND ITS APPLICATION BY LOWER COURTS

### A. *What Wilko Actually Says*

Given that every court that has attempted to apply the *Wilko* Court's observations regarding manifest disregard of the law has failed to fully analyze the Supreme Court's language and the historical context that preceded *Wilko*, it is not particularly surprising that those courts often have quoted only isolated or incomplete portions of *Wilko* in applying what they perceived to be the law. As is frequently the case, those aspects of the *Wilko* opinion that have been neglected by courts are, in many ways, more revealing than the truncated excerpts from *Wilko* that are most typically mentioned. An initial review of what the Supreme Court said in its *Wilko* decision is therefore helpful in connection with both the analytical deconstruction of *Wilko* based on a historical legal analysis and an examination of subsequent attempts to apply *Wilko*.

Any review of *Wilko* should begin by acknowledging that in granting certiorari to review the decision of the Court of Appeals for the Second Circuit in *Wilko v. Swan*,<sup>26</sup> the United States Supreme Court did not specifically agree to resolve a dispute regarding the correct application of vacatur law under the FAA.<sup>27</sup> *Wilko* involved an appeal from a district court order denying a motion to compel arbitration,<sup>28</sup> consequently, neither of the parties nor amicus curiae—the Securities and Exchange Commission<sup>29</sup>—suggested that there was an issue regarding what judicial standards of review apply once an arbitral award is issued. The much narrower issue in *Wilko* involved the question of whether an agreement to arbitrate a future controversy arising under section 12(2) of the Securities Act of 1933<sup>30</sup> (the “Securities Act” or the “Act”) was violative of section 14 of the Act, which prohibited prospective waivers of the protections the Act was designed to guarantee.<sup>31</sup> That is not to say, however, that questions concerning the correct application of federal arbitration vacatur law were not relevant to the Court's analysis of the

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<sup>26</sup> 201 F.2d 439 (2d Cir. 1953).

<sup>27</sup> See *Wilko*, 346 U.S. at 430 (noting that the issue was “whether an agreement to arbitrate a future controversy is a ‘condition, stipulation, or provision binding any person acquiring any security to waive compliance with the provision’ of the Securities Act which [section] 14 declares ‘void’”).

<sup>28</sup> See *Wilko v. Swan*, 107 F. Supp. 75 (S.D.N.Y. 1952).

<sup>29</sup> See *Wilko*, 346 U.S. at 427-28.

<sup>30</sup> See 15 U.S.C. § 77a (2000).

<sup>31</sup> See *Wilko*, 346 U.S. at 430.



waiver issue. Such questions presumably were of particular importance both to the Court and to the Second Circuit in its decision below because if courts generally maintained authority to review the legal reasoning underlying an arbitral award, the arbitration of securities claims arguably would not result in a waiver of the legal protections guaranteed by the Securities Act.<sup>32</sup>

When the Second Circuit reversed the district court's order denying the motion to compel arbitration and held that the arbitration agreement did not constitute a waiver under the Securities Act, an important element of the Second Circuit's reasoning involved its determination that courts did have the authority to review the legal reasoning in arbitral awards *when the pertinent arbitration agreement required the arbitral tribunal to decide issues in accordance with a particular law*:

[W]hile it may be true that arbitrators do not ordinarily consider themselves bound to decide strictly according to legal rules, *there can be no doubt that they are so bound if the arbitration agreement so provides*. Undoubtedly it is true in this country, as said in *American Almond Prod. Co. v. Consolidated Pecan Sales Co.*, 2 Cir., 144 F.2d 448, 451, 154 A.L.R. 1205, when parties have adopted arbitration, ordinarily "they must content themselves with looser approximations to the enforcement of their rights than those that the law accord them, when they resort to its machinery." But, as previously noted, the agreement in the case at bar is "subject to" the 1933 Act; consequently the arbitrators are bound to decide in accordance with the provisions of Section 12(2). *Failure to do so would, in our opinion,*

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<sup>32</sup> Many courts at one time or another have consciously or subconsciously attempted to minimize the significance of the *Wilko* Court's manifest disregard language through the simple artifice of characterizing that language as "dicta." See, e.g., *Nat'l R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 143 n.9 (7th Cir. 1977); *Chapman v. Se. Region I.L.G.W.U. Health & Welfare Recreation Fund*, 280 F. Supp. 766, 770 (D.C.S.C. 1968). These characterizations fail, however, to distinguish between "obiter dicta" and "judicial dicta." See Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 712-13 (1999). Obiter dictum—otherwise known as mere dictum—is nothing more than a passing opinion, the persuasiveness of which is debatable. *Id.* at 713. In contrast, judicial dictum can be of much greater significance because it reflects a "court's reasoned consideration and elaboration upon a legal norm." *Id.* at 713-14. The Supreme Court thus recognizes that judicial dictum can essentially have precedential effect when it reiterates "well-established rationale upon which the Court based the results of its earlier decisions." See *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1966). More importantly, and as the Court has observed, "principle[s] of stare decisis [require courts, including the Supreme Court] to adhere not only to the holdings of . . . prior cases, but also to . . . explications of the governing rules of law." *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989). To the extent that the *Wilko* Court's discussion of traditional vacatur law and its manifest disregard language was mere dictum, it was clearly judicial dictum both because the discussion was essential to the Court's reasoning and because that reasoning was based, in part, on earlier decisions by the Court. The fact that the discussion in *Wilko* might have been judicial dictum, therefore, does not detract from its significance.

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*constitute grounds for vacating the award pursuant to section 10 of the [FAA].*<sup>33</sup>

It is particularly noteworthy that on writ of certiorari to the Court of Appeals for the Second Circuit, the respondent and the Supreme Court expressly refrained from disagreeing with the court of appeal's observation in this regard.<sup>34</sup> The seeming unanimity between the Court of Appeals for the Second Circuit, the respondent, and the *Wilko* majority on this point shows that neither the courts nor the parties that were involved in *Wilko* were advocating the creation of an exception to existing, known vacatur law under either the FAA or the common law decisions on which the FAA was based.<sup>35</sup>

Ultimately, the *Wilko* majority determined that a complainant's rights under the Securities Act could be impaired, and thus waived, under an arbitration agreement for a variety of reasons, including the fact that *under both the FAA and traditional American arbitration law*, judicial review of arbitral awards was more limited than that permitted with respect to district court judgments.<sup>36</sup> The Court's reasoning consequently includes what purports to be an explication of the law pertaining to vacatur of arbitral awards that are founded on erroneous legal reasoning; and it is here that the manifest disregard language, together with several important hints as to its meaning, is to be found:

As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," . . . cannot be examined. Power to vacate an award is limited. While it may be true, as the Court of Appeals thought, that *a failure of the arbitrators to decide in accordance with the provisions of the Securities Act* would "constitute grounds for vacating the award pursuant to section 10 of the [FAA]," *that failure would*

<sup>33</sup> *Wilko*, 201 F.2d at 444-45 (footnote citations omitted) (emphasis added).

<sup>34</sup> *Wilko*, 346 U.S. at 433-34. It is interesting to note that this phraseology has been all but ignored by courts and commentators despite the fact that there would seem to be an obvious difference between simply attempting to apply a law and deciding "in accordance" with the law. Although a labored analysis that focuses on the meaning of the phrase "in accordance" and cites cases discussing whether a decision was "in accordance with the law" would be too rudimentary, it should at least be observed that contemporary jurisprudence regarding the application of the doctrine of manifest disregard of the law and section 10 of the FAA does not require that arbitral decisions be in accord with the law and, instead, merely requires arbitrators to attempt to apply the law when they realize the law exists and is applicable to the issues before them.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 434-38.

*need to be made clearly to appear.* In 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 [FAA] contains no provision for judicial determination of legal issues such as is found in English law.<sup>37</sup>

The above-quoted statement in *Wilko* was supported by reasonably extensive footnotes.<sup>38</sup> For example, in observing that the “[p]ower to vacate an award is limited,” the Court cited and quoted the entirety of section 10 of the FAA.<sup>39</sup> Similarly, in the lengthy statement that contained not only the infamous manifest disregard language but also the qualifying phrase “[i]n unrestricted submission,” the Court cited a long series of authorities that included several important cases, including Justice Story’s 1814 opinion in *Kleine v. Catara*<sup>40</sup> and the Supreme Court’s 1874 decision in *United States v. Farragut*,<sup>41</sup> as well as an equally interesting student law review note.<sup>42</sup> As shown below, the Court’s reasoning and the support it provided therefore were not merely the idle ramblings of obiter dicta; they provide essential clues as to the state of the law at the time *Wilko* was decided and of the meaning of the language employed by the Court in deciding the issues at hand.

The dissenting opinion of Justice Frankfurter, in which Justice Minton joined, also warrants brief mention at this stage of the analysis.<sup>43</sup> The dissenting opinion generally agrees with the explanation of applicable vacatur

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<sup>37</sup> *Wilko*, 346 U.S. at 436-37 (citations omitted) (emphasis added). Any thought that the Court’s reference to “English law” aids in gaining an understanding of “manifest disregard” is easily dispelled by an examination of section 21 of the English Arbitration Act 1950 [hereinafter the “English Act”], which the Court cited in connection with its reference to English law. *See id.* at 437 n.25. Section 21 provided for a “stated case procedure” where “either party could apply to the arbitrator to state a special case to the High Court for an order compelling the arbitrator to state the case [in order] to ensure that arbitrators properly applied the law in arbitration proceedings.” Okezie Chukwumerije, *Reform and Consolidation of English Arbitration Law*, 8 AM. REV. INT’L ARB. 21, 43 (1997). The *Wilko* Court’s observation that the FAA contains no such provision, thus, both reaffirms the Court’s earlier statement in the same paragraph that the ability of a court to review an award might be impaired because of the lack of “a complete record” and emphasizes that unlike the broad review permitted at that time under the English Act, American vacatur law and the FAA provided for more limited review. The former point was sufficiently critical to the majority’s decision that Justice Frankfurter, in dissent, argued that the FAA must be read to impliedly require “some [arbitral] record or opinion.” *Wilko*, 346 U.S. at 440 (Frankfurter, J., dissenting).

<sup>38</sup> *See* 346 U.S. at 346-47 n.22-25.

<sup>39</sup> *Id.* at 436 n.22.

<sup>40</sup> *Kleine v. Catara*, 14 F. Cas. 732 (C.C.D. Mass. 1814) (No. 7869).

<sup>41</sup> *United States v. Farragut*, 89 U.S. (22 Wall.) 406 (1874).

<sup>42</sup> *Id.* at 436-37 & n.24.

<sup>43</sup> *Id.* at 439-40 (Frankfurter, J., dissenting).

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law offered by both the court of appeals and the *Wilko* majority.<sup>44</sup> More importantly, and as discussed in more detail later,<sup>45</sup> Justice Frankfurter's use of the word "disregard" in both his 1953 dissent in *Wilko* and a separate 1957 opinion helps to shed light on the likely meaning of that word in the *Wilko* majority opinion:

Arbitrators may not disregard the law. Specifically they are, as Chief Judge Swan pointed out, "bound to decide in accordance with the provisions of section 12(2)." On this we are all agreed. It is suggested, however, that there is no effective way of assuring obedience by the arbitrators to the governing law. But since their failure to observe the law "would constitute grounds for vacating the award pursuant to section 10 of the FAA," appropriate means for judicial scrutiny must be implied in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award.<sup>46</sup>

This article ultimately shows that with the exception of Justice Jackson who explicitly refrained from expressing an opinion on the issue,<sup>47</sup> every member of the United States Supreme Court and the court of appeals below was probably of the opinion that the FAA could be harmonized with previously existing vacatur law that under some circumstances permitted the vacatur of arbitral awards based on errors in legal reasoning. Before embarking on a critical analysis of the specific language employed by the *Wilko* Court and the historical context in which that language was used, however, it is further enlightening to generally highlight how the *Wilko* manifest disregard language, under the rubric of the manifest disregard of the law doctrine, is applied by contemporary courts.

### *B. The Spontaneous Generation of the Doctrine of Manifest Disregard of the Law*

It cannot be said that subsequent judicial interpretations of *Wilko* evolved through a deliberate process whereby the doctrine of manifest disregard of the law was gradually refined and perfected. Instead, the doctrine appears to have originated in a single federal appellate court decision that steadily gained acceptance by every federal circuit and by the highest appel-

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<sup>44</sup> *Id.* at 440 (Frankfurter, J., dissenting).

<sup>45</sup> See *infra* notes 262-65 and accompanying text.

<sup>46</sup> *Wilko*, 346 U.S. at 440 (Frankfurter, J., dissenting) (citations omitted) (emphasis added).

<sup>47</sup> *Id.* at 438 (Jackson, J., concurring).

late courts of many states.<sup>48</sup> Yet the generally accepted interpretation of *Wilko* cannot be characterized as obvious. The first federal district courts to cite *Wilko* as providing guidance with respect to the law relating to the vacatur of arbitral awards, thus, either avoided suggesting that *Wilko* altered or embellished previously existing law<sup>49</sup> or cautiously and very generally attempted to reconcile *Wilko* with existing arbitration law.<sup>50</sup> It might be argued that those federal district courts were not particularly concerned with the quality or validity of the legal reasoning contained in the arbitral awards under review and that they, therefore, had no particular reason to interpret the *Wilko* manifest disregard language further. Be that as it may, and given the inevitability of the occurrence of occasional arbitral errors in legal reasoning,<sup>51</sup> it was only a matter of time before a federal appellate court would be motivated to determine whether the *Wilko* Court's observations regarding manifest disregard merely constituted another way to describe previously established law or alternatively, either broadened or narrowed the grounds on which an arbitral award could be vacated.

That time came less than a decade after the issuance of the *Wilko* decision when, in *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*,<sup>52</sup> the Court of Appeals for the Ninth Circuit expressed clear doubts relating to the validity of the legal reasoning underlying an award.<sup>53</sup> Under these circumstances, the court presumably felt compelled to explain the legal limitations on the authority of federal courts to vacate arbitral

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<sup>48</sup> *Birmingham News Co.*, 901 So. 2d at 48-50.

<sup>49</sup> See *Dulien Steel Prods. Inc. v. Ogeka*, 147 F. Supp. 167, 169 (D. Wash. 1956) (quoting the manifest disregard language of *Wilko* and citing that language as supporting of the general proposition that "there should be a great hesitation in upsetting an arbitral award").

<sup>50</sup> See *Gramling v. Food Mach. & Chem. Corp.*, 151 F. Supp. 853, 857 (D.S.C. 1957) (observing that "[t]he statutory grounds for vacating an award, 9 U.S.C. § 10, are substantially the same as those at common law").

<sup>51</sup> See, e.g., Gaitis, *supra* note 1 *passim* (discussing the periodic occurrence of factual and legal errors in the reasoning of reasoned awards and arguing in favor of granting arbitrators the limited opportunity to remedy such errors); Hans Smit, *Correcting Arbitral Mistakes*, 10 AM. REV. INT'L ARB. 225, 228 (2001) ("[r]egrettably, but understandably, arbitrators sometimes make mistakes"); William H. Knull III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option*, 11 AM. REV. INT'L ARB. 531, 541 (2000) ("[T]here is no reason to assume that arbitrators are any less fallible than judges.").

<sup>52</sup> 293 F.2d 796 (9th Cir. 1961). The district court had modified the award based on the finding that certain damages findings in the award were "not in accordance with law and beyond the scope of the arbitrators' authority." *Id.* at 798. The appellate court, thus, ruled that an error in the application of law is tantamount to an arbitral act in excess of authority, one of the enumerated grounds for vacating an award under section 10 of the FAA. For a further discussion of the interrelationship of this statutory ground for vacating an award and manifest disregard doctrine, see *infra* notes 95-101, 199-211, 249, 278 and accompanying text.

<sup>53</sup> *Id.* at 801 (observing that "it may well be that the arbitrators' view of the law was questionable" and that "the arbitrators may have been mistaken in the view of the law respecting abuse of process").

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awards and, having elected to provide such an explanation, was immediately confronted with the *Wilko* decision.<sup>54</sup>

Unfortunately, in its effort to divine the meaning of *Wilko*, the *San Martine* court did not attempt to reconcile *Wilko* with the FAA, despite the fact that the FAA had already been in existence for more than a quarter century.<sup>55</sup> Nor did the *San Martine* court carefully examine all, or even most, of the cases and other authorities cited by the *Wilko* majority.<sup>56</sup> Instead, the reasoning of the *San Martine* decision relating to the meaning of the *Wilko* manifest disregard language appears to be based on the unfounded premise that *Wilko* somehow contradicted, or at least was not entirely consistent with, a single 1854 United States Supreme Court case—*Burchell v. Marsh*<sup>57</sup>—that the *Wilko* Court had in fact cited and in which the *Burchell* Court, in part, had generally observed that “an award . . . within the terms of the submission . . . will not be set aside by a court for error either in law or fact.”<sup>58</sup> Had the court of appeals examined the issue more deeply, it would have realized that in one respect, the manifest disregard language in *Wilko* essentially amplifies the principle stated in *Burchell* and, more significantly, is consistent with a long line of cases that came into existence before and after the *Burchell* decision, some of which had been cited by the *Wilko* Court. As if to demonstrate that the basic principle mentioned in *Burchell* does not admit of further analysis or explanation, the Ninth Circuit simply endorsed its truncated quotation of *Burchell* and then observed that sections 10 and 11 of the FAA “do not authorize [the] setting aside [of an award] on the grounds of erroneous finding of fact or of misinterpretation of law.”<sup>59</sup> As is discussed in more detail later, these observations were correct only to the extent that they reflected the proper starting point of an analysis regarding the then-existing law concerning the vacatur of arbitral awards.

A complete analysis of the existing law would have reflected that the *Wilko* majority had attempted to reconcile traditional American vacatur law with the FAA, but failed because the Court for some reason had confused one term of art and, furthermore, had utilized a phrase that differed slightly

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<sup>54</sup> *Id.*

<sup>55</sup> *San Martine*, 293 F.2d at 801.

<sup>56</sup> *Id.*

<sup>57</sup> 58 U.S. (17 How.) 344 (1854).

<sup>58</sup> *Wilko*, 293 F.2d at 800.

<sup>59</sup> *San Martine*, 293 F.2d at 800 (quoting *Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp.*, 274 F.2d 805 (2d Cir. 1960), *cert. denied*, 363 U.S. 843 (1960)).

from phraseology that had been used by other courts in the past.<sup>60</sup> As a result of its incomplete analysis, the Ninth Circuit was left with no other recourse than to presume that the manifest disregard language of *Wilko* reflected a new and ambiguous refinement of arbitration vacatur law. The Ninth Circuit, therefore, complained that the *Wilko* Court “did not undertake to define what it meant by ‘manifest disregard’ or indicate where the line would be drawn between a case of ‘manifest disregard’ and a case of error in interpretation of the law.”<sup>61</sup> Having failed to recognize that the answers to these questions were provided by the very cases that had been cited by the *Wilko* majority, the court of appeals then further derided the *Wilko* decision in a lengthy textual footnote and purported to explain why what it perceived to be the most literal interpretation of *Wilko* was highly problematic:

Frankly, the Supreme Court’s use of the words “manifest disregard”, has caused us trouble here. Conceivably the words may have been used to indicate that whether an award may be set aside for errors of law would be a question of degree. Thus if the award was based on a mistaken view of the law, but in their assumption of what the law was, the arbitrators had not gone too far afield, then, the award would stand; but if the error is an egregious one, such as no sensible layman would be guilty of, then the award could be set aside. Such a “degree of error” test would, we think, be most difficult to apply. Results would likely vary from judge to judge. We believe this is not what the court had in mind when it spoke of “manifest disregard.”<sup>62</sup>

From these observations, the court of appeals in *San Martine* concluded that “manifest disregard of the law must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.”<sup>63</sup> The court thus pursued other analytical avenues in search of an answer to the *Wilko* puzzle, as the court saw it.

The Ninth Circuit somehow found that an analytical compromise of sorts could be constructed out of two additional United States Supreme Court decisions, both issued after *Wilko*. The *San Martine* court quoted the first of these two Supreme Court decisions, *Bernhardt v. Polygraphic Co.*,<sup>64</sup> as support for the same general principle that had also been acknowledged in

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<sup>60</sup> See *infra* Part V. Specifically, the Court (1) mistakenly characterized the parties’ arbitration submission as “unrestricted” when it was clearly “restricted,” and (2) altered traditional vacatur law phraseology when it alluded to “manifest disregard” of the law, rather than to “manifest mistake” in the application of law.

<sup>61</sup> *San Martine*, 293 F.2d at 801.

<sup>62</sup> *Id.* at n.4.

<sup>63</sup> *Id.* at 801.

<sup>64</sup> *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956).

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*Burchell*, noting that “[w]hether the arbitrators misconstrued a contract is not open to judicial review.”<sup>65</sup> The second Supreme Court decision, *United Steelworkers v. Enterprise Corp.*,<sup>66</sup> which involved a labor arbitration,<sup>67</sup> was then quoted by the court in *San Martine* for the far different proposition that “[w]hen the arbitrator’s words manifest an infidelity to [the essence of the parties’ contract], courts have no choice but to refuse enforcement of the award.”<sup>68</sup> The Ninth Circuit apparently perceived that these two general principles could be synthesized in a manner that allowed for a third principle that fell between the harsh rule of the first, and the more lenient rule of the second. Thus, by a process akin to triangulation, the manifest disregard of the law doctrine, as we know it today, was born:

We apprehend that a manifest disregard of the law in the context of the language used in *Wilko v. Swan*, *supra*, might be present when arbitrators understand and correctly state the law, but proceed to disregard same. We think this is the sort of thing the Court had in mind in *United Steelworkers* . . . .

Similar *manifest infidelity* to what the arbitrators know to be the law, but deliberately *disregard* might well be regarded as the use of “undue means” within the meaning of subdivision (a) of 9 U.S.C. 10, or amount to “partiality” within the meaning of subdivision (b) thereof.<sup>69</sup>

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<sup>65</sup> *San Martine*, 293 F.2d at 801 (quoting *Bernhardt*, 350 U.S. at 198).

<sup>66</sup> 363 U.S. 593 (1960).

<sup>67</sup> *Id.* at 597.

<sup>68</sup> *San Martine*, 293 F.2d at 801 (quoting *United Steelworkers*, 363 U.S. at 593).

<sup>69</sup> *Id.* (emphasis added). Some commentators have observed that other courts most frequently cite a much later, 1986 opinion by the Court of Appeals for the Second Circuit as the authoritative source for the contemporary manifest disregard doctrine. See, e.g., Scodro, *supra* note 11, at 571-72 (discussing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930 (2d Cir. 1986), which applied essentially the same standard as *San Martine*, and observing that “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’”); Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. REV. 759, 766 (referring to *Bobker* as “the most often cited formulation of the manifest disregard standard”). Nevertheless, the trend toward adopting the reasoning of the *San Martine* decision dates back to the early 1970s. See, e.g., *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972) (observing that the *San Martine* court struggled to interpret *Wilko* and stating that “if the arbitrators simply ignore the applicable law, the literal application of a ‘manifest disregard’ standard should presumably compel vacation of the award”). See also *Upshur Coals Corp. v. UAW*, Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991) (quoting *San Martine*); *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 893 (2d Cir. 1985) (observing that “[m]anifest disregard of the law may be found . . . if the arbitrator ‘understood and correctly stated the law but proceeded to ignore it’” (quoting *Bell Aerospace Co. v. Local 516*, 356 F. Supp. 354, 356 (W.D.N.Y. 1973), *rev’d on other grounds*, 500 F.2d 921 (2d Cir. 1974))).



There is much that can be said of the *San Martine* decision and the manner in which it illegitimately gave birth to the manifest disregard of the law doctrine. And in light of the fact that the reasoning in *San Martine* and the *San Martine* court's interpretation of the *Wilko* manifest disregard language have now been adopted in one form or another by every federal circuit and many state courts, much should be said and done about the so-called doctrine of manifest disregard of the law. For the moment, it suffices to observe that the Court of Appeals for the Ninth Circuit erred substantially in its reasoning in *San Martine* and in its ad hoc construction of the doctrine of manifest disregard of the law. The nature of that error was to go unnoticed, and remains undetected to this day, by every court and commentator that has subsequently attempted to apply or understand the manifest disregard language of the *Wilko* decision.

### III. TRADITIONAL AMERICAN VACATUR LAW PERTAINING TO ERRORS IN THE APPLICATION OF LAW

There should be no doubt that an understanding of traditional American arbitration law is essential to gaining an understanding of the *Wilko* opinion. The *Wilko* majority's observations relating to restricted submissions, manifest disregard, and interpretations of the law or error in interpretation<sup>70</sup> were supported by a single lengthy footnote that contained cases dating back to 1814.<sup>71</sup> These cases, when considered together with the Court's citation to section 10 of the FAA,<sup>72</sup> indicate that the Court believed that the FAA did not alter those aspects of the common law of arbitration pertaining to the vacatur of awards due to the occurrence of legal error. An oblique parenthetical in footnote 24<sup>73</sup> and the reference to a student law review article<sup>74</sup> further corroborate that conclusion. The subsequent interpretation of *Wilko* by the Court of Appeals for the Ninth Circuit in *San Martine*, and the endorsement by other courts of the *San Martine* court's version of the manifest disregard doctrine, are often based, at least in part, on what is argued here to be a misunderstanding of early cases addressing the vacatur of arbitral awards. A review of traditional arbitration vacatur law is thus imperative in order to determine (1) what the *Wilko* Court meant when it observed that "[i]n unrestricted submission . . . the interpretations of the law by the arbitrators in

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<sup>70</sup> *Wilko*, 346 U.S. at 436-37.

<sup>71</sup> *Id.* at n.24.

<sup>72</sup> *Id.* at 436 & n.22.

<sup>73</sup> *Id.* at 437 n.24 (citing *United States v. Farragut*, 89 U.S. (22 Wall.) 406 (1874) and stating, "note the right of review").

<sup>74</sup> *Id.*

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contrast to manifest disregard are not subject to judicial review for error,<sup>75</sup> and (2) to what extent, if any, legal considerations relating to restricted and unrestricted submissions, and the policy favoring party autonomy, warrant limited judicial review of arbitral awards containing errors in legal reasoning.

*A. Kleine v. Catara—The Implications of Restricted and Unrestricted Submissions*

The time is long overdue for courts, arbitration practitioners, and arbitral institutions to realize and acknowledge that in our collective zeal to extol the benefits of arbitration, the controlling principle of arbitration law—the parties’ autonomous right to contractually determine the nature of the process to be utilized in the private settlement of disputes—has been all but overwhelmed by dogmatic and ideological theory relating to ancillary policy objectives such as finality and expediency in arbitration. From its earliest beginnings, the foundation of American arbitration law always has been the fundamental principle that it is the parties’ “submission” that determines the scope of the arbitrators’ authority and, in consequence, the power of courts to vacate arbitral awards.<sup>76</sup> The powers of arbitrators and courts therefore always have been inextricably interrelated because the only means by which private parties can be protected against acts in excess of arbitral authority is through intervention by the courts.<sup>77</sup>

Arbitral submissions logically and traditionally come in two generic forms: restricted submissions that limit the arbitrators’ authority in some respect and unrestricted or general submissions that grant the arbitrators *carte blanche* authority to resolve the parties’ dispute without necessarily resorting to a strict application of the law.<sup>78</sup> By the time the Supreme Court granted *certiorari* in *Wilko*, American courts had been considering the differing legal ramifications of restricted and unrestricted submissions on arbitrator and judicial authority for one and a half centuries.<sup>79</sup>

Arbitration submissions naturally can take as many forms as the imagination permits. But there is only one true form of general or unrestricted submission because an unrestricted submission literally imposes no con-

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<sup>75</sup> See *Wilko*, 346 U.S. at 436.

<sup>76</sup> See *infra* notes 82-94 and accompanying text.

<sup>77</sup> See *id.*

<sup>78</sup> See *infra* notes 82-144 and accompanying text.

<sup>79</sup> See *infra* note 247.

straints on the decision-making authority of an arbitrator other than specific limitations relating to the claims to be decided and, at least by inference, the requirement that the arbitrator be unbiased and conduct the proceeding in a fundamentally fair manner.<sup>80</sup> Although it is possible to search far back in time for the earliest dates on which American courts addressed the concept of unrestricted submissions,<sup>81</sup> it is convenient in the course of an analysis of *Wilko* to begin with the 1814 decision of the Federal Circuit Court in *Kleine v. Catara*,<sup>82</sup> which was authored by Justice Story and cited by the *Wilko* majority in its footnote 24.<sup>83</sup> Because *Kleine* has been both expressly and implicitly endorsed over the years by many courts, including the United States Supreme Court, the explanation by the court in *Kleine* of the significance of unrestricted submissions and their effect on the authority of arbitrators and courts is, thus, worth quoting at length:

If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission; they may restrain or enlarge its operation as they please. If no such reservation is made in the submission, the parties are presumed to agree, that every thing, both as to law and fact, which is necessary to the ultimate decision, is included in the authority of the referees.

Under a general submission, therefore, arbitrators have rightfully a power to decide on the law and fact; and an error in either respect ought not to be the subject of complaint by either party, for it is their own choice to be concluded by the judgment of the arbitrators. *Besides, under such a general submission, the reasonable rule seems to be, that the referees are not bound to award upon the mere dry principles of law applicable to the case before them. They may decide upon principles of equity and good conscience, and may make their award ex aequo et bono. 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*

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<sup>80</sup> See generally *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (recognizing the “denial of a fundamentally fair hearing” as a nonstatutory ground for vacatur of an arbitral award under the FAA). See also *Karah Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298-99 (5th Cir. 2004), cert. denied, 543 U.S. 917 (2004) (holding that under Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, recognition and enforcement must be denied when a party has not been provided with a “fundamentally fair hearing,” and stating that the determination of whether a hearing was fundamentally fair should be made by applying U.S. standards of due process).

<sup>81</sup> Perhaps the most convenient sources for such cases are the decisions of later courts, in which the origins of traditional vacatur law are examined. One example is Justice Story’s opinion in *Kleine v. Catara*, 14 F. Cas. 732 (C.C.D. Mass. 1814) (No. 7869), a case that is discussed throughout this article.

<sup>82</sup> *Kleine*, 14 F. Cas. at 732.

<sup>83</sup> See *Wilko*, 346 U.S. at 437 n.24.

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*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 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.*<sup>84</sup>

In summary then, *Kleine* established the following regarding the authority of arbitrators to issue awards under a restricted submission and the related power of courts to review such awards:

1. Under an unrestricted submission, arbitrators may, but are not obligated to, follow the substantive law that applies to the dispute.
2. In the event the arbitrators elect to apply the law in resolving a dispute under an unrestricted submission and identify the legal reasoning supporting the award, courts are empowered to set aside the award when it is based on mistakes in the application of that law.

Interestingly, the first of these two principles means that when acting under an unrestricted submission, arbitrators may elect to knowingly “disregard the law”—a proposition directly contrary to that stated in *Wilko*. Of equal import is the fact that the basis for the second rule enunciated in *Kleine* is that courts are empowered to vacate such awards due to the occurrence of legal errors because “it is not the award, which the referees meant to make, and they acted under mistake.”<sup>85</sup> The gist of *Kleine* is simple, and is made even plainer by the fact that the court made a point of emphasizing that it is the issuance of a *reasoned* award that compels the court to ensure that the award is not infected by erroneous legal reasoning: If the arbitrators, acting under an unrestricted submission, elect to apply the law in resolving the parties’ dispute and issue a reasoned award that reflects the legal reasoning on which the award was based, then the award is properly subject to judicial review and vacatur.<sup>86</sup>

Before considering more recent authorities, it is worthwhile to reflect upon the reasons why *Kleine* is wholly consistent with principles relating to party autonomy. The enforcement of the highly generalized decision-making process afforded by an unrestricted submission grants the parties the widest possible latitude in agreeing that the award may be based on consid-

<sup>84</sup> *Kleine*, 14 F. Cas. at 735 (emphasis added) (citations omitted).

<sup>85</sup> *Kleine*, 14 F. Cas. at 735.

<sup>86</sup> *Id.* (“But here, the referees have expressly laid the grounds of their decision before us, and have thereby submitted it for our consideration.”).

erations of fairness or equity that transcend strict legal principles. Should the parties desire to insulate the award from judicial review, they can, in the words of the *Kleine* court, “restrain” the submission by providing that the arbitrators are to issue “a general award, without any specification of the reasons of their decision.”<sup>87</sup> But once the arbitrators elect to apply the law and issue a reasoned award, or the parties require that a reasoned award be issued, judicial review may be necessary to ensure that the award is the award the arbitrators “meant to make” and not an aberration, bred of inadvertent mistake.<sup>88</sup> Judicial review is available under such a circumstance, however, not merely to effectuate the “intent” of the arbitrators, but also to effectuate and enforce the intent of the parties.<sup>89</sup> That *Kleine* and its progeny ultimately were based on a policy of enforcing party autonomy is clear because the initial focus of the inquiry is whether the submission is restricted or unrestricted.<sup>90</sup> *Kleine* and many of the other cases discussed in this article thus hold that when the submission is restricted in a manner that compels the arbitrators to apply a particular law in resolving the dispute, the parties are contractually entitled to have the law so applied and the arbitrators are therefore obligated to apply the law in that manner.<sup>91</sup> In the absence of a finding that an arbitrator has violated a restricted submission by intentionally ignoring applicable law, a reviewing court can only conclude that the arbitrator was attempting to faithfully apply the law. When the arbitrator plainly fails in that good faith attempt to apply clearly established law, the reviewing court thus can intervene *not only* in order to fulfill the realization of the arbitrator’s intent but also to enforce the parties’ contractual expectations. In essence, *Kleine* and the many cases that preceded and followed it represent the ultimate manifestation of a policy endorsing party autonomy in arbitration.

Although this logic seems plain enough in a contractual context in which two parties agree to the terms of a commercial transaction,<sup>92</sup> it is to be

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<sup>87</sup> *Id.*

<sup>88</sup> *Kleine*, 14 F. Cas. at 735.

<sup>89</sup> At least one commentator has suggested that under this line of cases, the purpose of such limited review was only to ensure that the award was consistent with the intent of the arbitrators. See, e.g., Scodro, *supra* note 11, at 583-84.

<sup>90</sup> See 14 F. Cas. at 732. See also *infra* notes 100-01 and accompanying text.

<sup>91</sup> The corollary to this point is that when the arbitrators fail to fulfill their duties in this regard, they act in excess of their authority. See *infra* notes 95-101, 199-211, 249, 278 and accompanying text.

<sup>92</sup> The suggestion that parties to an arbitration agreement agree that any arbitral mistake is acceptable to them, although plausible, seems odd because particularly egregious errors can totally undermine the essence of the parties’ agreement. It is for this reason that some courts continue to acknowledge that an arbitral award that creates a “new contract” for the parties is subject to vacatur. See *infra* note 275 and accompanying text. Nonetheless, and in accord with the principle of party autonomy, parties should be permitted to waive any right to merits-based judicial review. The laws of some nations therefore permit parties to opt into or out of such review. See Park, *supra* note 13, at 12.

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conceded that in some circumstances parties might agree at the outset that they will accept an arbitrator's decision regardless of how absurdly incorrect it might be. And, in point of fact, the *Kleine* court seemed almost on the verge of altering its analytical course when it observed that the argument that "arbitrators cannot award contrary to law, because that is beyond their power, for the parties intend to submit to them only the legal consequences of their transactions and agreements," in essence "begg[ed] the question."<sup>93</sup> In the end, however, the court in *Kleine* applied the rules it had discussed, and the rationale underlying its decision would prove to be sufficiently durable to be adopted by the United States Supreme Court.

It is clear that the critical element in the *Kleine* approach to the reviewability of awards issued under an unrestricted submission involves the question of whether the award contains express reasoning that attempts to explain how applicable law supports the arbitrators' decision. But the only true significance of this consideration is that it reflects a measured judicial reluctance to ascertain and review the underlying basis of an arbitral decision when the award does not clearly state the arbitrators' reasoning.<sup>94</sup> *Kleine* thus established that awards containing legal reasoning were subject to vacatur due to the existence of "mistakes" in the application of law. Contrary to current thought and dogma, that principle never changed during the 113 years leading up to the Supreme Court's decision in *Wilko*.

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<sup>93</sup> See *Kleine*, 14 F. Cas. at 732.

<sup>94</sup> The rule that it is the existence of a sufficiently reasoned award that determines whether a court can even attempt to review an award for legal error was sufficiently obscure that the Supreme Court, without Justice Story partaking, confused it in its 1840 decision in *Rhode Island v. Massachusetts*, 39 U.S. (14 Pet.) 210 (1840) in which the Court first confirmed the general rule that courts cannot vacate arbitral awards because of a mistake in the application of law, but then vaguely affirmed the exception to that rule by stating, "The case is different where arbitrators, *conscious of a mistake*, desire to rectify it, because in that position, the supposed decision is not their judgment." *Id.* at 223 (emphasis added). Among a substantial number of other cases, the Court cited *Kleine* as supporting these observations. *Id.* And in an effort to highlight the fact that its decision served to resolve any perceived conflict in the case law—such as that with which the *Kleine* court itself seems to have struggled—the Court added that "this [latter] consideration *reconciles* any cases of a seemingly different character from these above cited." *Id.* (emphasis added). Rather than reconciling the law, these observations—which failed (1) to distinguish between the parties' expectations under restricted and unrestricted submissions, (2) to explain the significance of the existence of legal reasoning in an award, and (3) which incorrectly suggested that the arbitrator must be "conscious" of the mistake—confused the law as explained in *Kleine*. The *Rhode Island* decision apparently faded into permanent obscurity, perhaps due to the fact that the Supreme Court had further opportunities to clarify the law during the next few decades. See *infra* notes 102-14 and 143-74 and accompanying text.

These same principles were confirmed and thoroughly examined in the New Hampshire Supreme Court's 1842 decision in *Johnson v. Noble*,<sup>95</sup> a case of particular interest in connection with an analysis of *Wilko* because the court in *Noble* not only relied on *Kleine*<sup>96</sup> but also made essentially the same observations as were made by the *Wilko* Court regarding manifest disregard, all in the context of a discussion of unrestricted and restricted submissions. In other words, *Noble* provides significant evidence that the *Wilko* Court did not intend to create a new doctrine relating to instances in which arbitrators manifestly disregard applicable law and, instead, merely attempted to apply legal principles that were ingrained in American arbitration law.

The complaining party in *Noble* sought the vacatur of an arbitral award based on the allegation that the arbitrators “h[ad] not acted in conformity with their authority.”<sup>97</sup> The allegation that the arbitrators had acted in excess of their authority was based on the more specific contention that despite the fact that the submission required the arbitrators to decide the parties’ dispute “according to the strict rules of law,” the arbitrators allegedly “disregard[ed] the law.”<sup>98</sup> These allegations did not involve the more arcane niceties of the modern doctrine of manifest disregard of the law; no issue was raised regarding whether the arbitrators in *Noble* understood the law and then intentionally ignored it. The defendant in *Noble* simply asserted that the arbitrators’ failure to decide the case “according to the strict rules of law” meant that the award should be vacated. In other words, the defendant argued that it had a contractual right to have the issues decided by a correct application of the law.

The New Hampshire Supreme Court’s analysis in *Noble* begins in much the same fashion as that of the Court in *Wilko*—by emphasizing that public policy supports the right of private parties to resolve their disputes through private dispute resolution processes and that the parties therefore were free “to bind themselves” to the decisions of the arbitrators.<sup>99</sup> One natural incident to the parties’ autonomy in entering into arbitration submissions is the right to limit those submissions, and the court in *Noble* thus affirmed the same general principles that had been described by the court in *Kleine* in 1814 relating to the diverse manner in which arbitration submissions may be restricted.<sup>100</sup> These concepts are sufficiently fundamental that

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<sup>95</sup> 13 N.H. 286 (1842) (discussing early American and English cases applying arbitration vacatur law).

<sup>96</sup> *Id.* at 290.

<sup>97</sup> *Noble*, 13 N.H. at 289.

<sup>98</sup> *Id.* (emphasis added).

<sup>99</sup> *Id.* at 290.

<sup>100</sup> *Id.*

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they do not vary from contemporary American notions of arbitration law and theory. But the equally logical principles that the court in *Noble* then proceeded to explain somehow became lost and forsaken in the aftermath of *Wilko* and the surge of arbitration cases that today seemingly are overwhelming the courts. For it is here, in the 1842 *Noble* decision, that is found perhaps the first discussion of the interrelationship between unrestricted submissions, disregard of the law by arbitrators, and mistakes in the application of the law:

And it is very well settled, that in [a general submission] arbitrators are not restricted by the submission to decide according to strict principles of law, but their decision will be in conformity with the submission, *although it be made in disregard of the law, and contrary thereto*. They are not bound to decide upon “mere dry principles of law,” but may decide upon principles of equity and good conscience, and may make their award “*ex aequo et bono*.”

The broad, reasonable, and well settled doctrine seems to be, that if, under an unqualified or unrestricted submission, the referees, intending to assume the whole responsibility of determining the law, and not to refer it to the court, decide differently from what the court would, on a point of law, the award will be regarded as authorized and conclusive, and will not be set aside. *But if the referees, intending to decide according to law, mistake the law, and refer the same to the court for revision, either by an express reference, or by stating specially the principles upon which they have acted, which raises the presumption of intention so to refer, the award will be set aside, not for want of authority in the arbitrators to decide against law, if they deem it just and equitable so to decide, but for the reason that in such a case it is apparent that the award is not such as the referees intended to make.*<sup>101</sup>

*Noble* thus affirms the same reasoning that is found in *Kleine*, including the proposition that arbitrators acting under an unrestricted submission are free to not rely on applicable law in resolving the parties' dispute. The implications of this rule with respect to the proper interpretation of *Wilko* and whether the Supreme Court actually misunderstood *Kleine* when it cited the case in support of its manifest disregard language, raise a variety of intriguing issues that deserve, and will receive, greater attention at a later stage of the analysis.

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<sup>101</sup> *Noble*, 13 N.H. at 291 (quoting *Kleine* and citing other cases with approval) (citations omitted) (emphasis added).



### B. *Burchell v. Marsh*—“Gross Mistake” vs. “Error of Judgment”

In attempting to enforce a perceived policy objective of efficiency in arbitration, federal courts all too often have resorted to a brief quotation of an isolated sentence contained in the United States Supreme Court’s decision in *Burchell v. Marsh*<sup>102</sup> as supporting the proposition that courts can never review arbitral awards for errors in the application of law. Indeed, the origins of the manifest disregard doctrine can, in part, be attributed to a misreading of, and undue reliance upon, the *Burchell* decision by lower federal courts.<sup>103</sup> Ironically, a more thorough review of *Burchell* reveals that that decision (1) is consistent with the principles discussed in both *Kleine* and *Noble* and (2) supports a far different rule of law than that suggested by federal appellate courts that have attempted to interpret and enforce *Wilko*.

Although the *Burchell* opinion does not specifically describe the parties’ arbitration submission in that case as being unrestricted, it nevertheless appears that the submission was unrestricted.<sup>104</sup> More importantly, the underlying award in *Burchell* apparently did not contain sufficient reasoning for the Court to apply the legal principles that cases such as *Kleine* and *Noble* affirmed.<sup>105</sup> The Court, thus, firmly stated that “it cannot be *inferred* that the arbitrators went beyond the submission” and that “there is *nothing on the record to show* that the arbitrators, in making this award, exceeded their authority, or went beyond the limits of the submission.”<sup>106</sup>

Contrary to popular belief, *Burchell* is not a landmark case in which the United States Supreme Court established new legal principles relating to the judicial review of awards for errors in legal reasoning. The Court merely offered a generalization of existing law to emphasize that courts should not pry into the subjective analysis of the arbitrators, particularly when that analysis cannot be clearly discerned due to the lack of a fully reasoned award. More to the point, the abbreviated quotation from *Burchell* that is all too frequently offered by courts and commentators ignores the more complete statement in *Burchell* where the Court emphasized the distinction that must be made between gross mistakes that are apparent and mere errors in arbitral judgment. Because this distinction is of the highest relevance in at-

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<sup>102</sup> 58 U.S. (17 How.) 344 (1854).

<sup>103</sup> See *infra* Part IV.B.

<sup>104</sup> 58 U.S. (17 How.) at 350. Pursuant to the parties’ arbitration agreement, the parties agreed to “submit ‘all demands, suits, claims, causes of action, controversies, and disputes between them, to the arbitration and award of F. B. Mosley,’ &c., ‘who are to hear all matters of claim of either party, upon or against the other, in law or equity.’” *Id.*

<sup>105</sup> *Id.* at 351 (observing that “the record shows no admission of proof that the arbitrators allowed any damages for the slander of Cross” and that whether the arbitrators’ “decision [on questions of law and fact] was erroneous, does not appear”).

<sup>106</sup> *Id.* (emphasis added).

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tempting to understand why and how the *Wilko* Court cited both *Burchell* and *Kleine* as supporting its manifest disregard language, the pertinent discussion from *Burchell* is quoted in full:

If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court in equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the *judgment* of the chancellor in the place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. In order, says Lord Thurlow, (*Knox v. Symonds*, 1 Ves. Jr. 369,) “to induce the court to interfere, there must be *something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence; but in the case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award.*”

*Courts should be careful to avoid wrong use of the word “mistake,” and, by making it synonymous with mere error of judgment,*<sup>107</sup> assume to themselves an arbitrary power over awards.

Unfortunately, this careful admonition by the Supreme Court in *Burchell* has been all but ignored.<sup>108</sup>

Still, at least in one respect, the subsequent and frequent misreliance by other courts on the first two sentences of the above-quoted passage from *Burchell* is understandable. The *Burchell* Court’s statement, when viewed out of context, does arguably seem to say that courts are never permitted to review arbitral awards for legal error. The perpetual inability of courts to discern the true meaning of *Burchell* arises from those courts’ failure (1) to consider the meaning of the phrase “honest decision of the arbitrators” and (2) to consider the legal distinction between “gross mistakes” that are “apparent” on the face of the award and an “error of judgment.” A careful reading of *Burchell*, as well as other cases,<sup>109</sup> suggests that the phrase “honest

<sup>107</sup> *Burchell*, 58 U.S. (17 How.) at 349-50 (emphasis added).

<sup>108</sup> Indeed, with the exception of the general acknowledgement of this statement by the court in *Mancusco v. L. Gillarde Co.*, 61 A.2d 677, 678-79 (D.C. 1948), no other court has bothered to cite *Burchell* for this proposition.

<sup>109</sup> See, e.g., *Johnson v. Noble*, 13 N.H. 286, 291 (1842) (observing that an award may be set aside when “it is apparent that the award is not such as the referees intended to make”); *Kleine v. Catara*, 14 F. Cas. 732 (C.C.D. Mass. 1814) (No. 7869) (stating that awards will be set aside when the award is “not the award[] which the referees meant to make”). The difference between the “honest deci-

decision” does not necessarily refer simply and only to the question of whether a decision is corrupted by dishonesty but, rather, can also relate to the subtler question regarding whether a decision is the decision that the arbitrator actually meant to make.<sup>110</sup> In any event, the oft-quoted phrase in *Burchell* relating to “the honest decision of the arbitrators,” does not significantly differ from the Court’s observation in the latter part of the same paragraph that distinguished between an error in judgment—in which the arbitrator’s subjective determination might be questionable but nonetheless reflects the arbitrator’s intended decision—and gross mistakes, which not only must be apparent/manifest but also must be shown to relate to an objective matter that, if properly understood by the arbitrator, would have been correctly applied by the arbitrator.

That these distinctions are real and relevant to an analysis of both *Wilko* and *Burchell* is shown by a comparison of what the Supreme Court said in those two decisions, spanned, as they were, by one hundred years of arbitration jurisprudence. In *Wilko*, the Court stated that courts are empowered to review awards when the arbitrators “manifest[ly] disregard” the law, but not when arbitrators err in the “interpretation of the law.”<sup>111</sup> In *Burchell*, the Court declined to vacate the award because the award involved a subjective—i.e., interpretive—issue that required the arbitrators to “estimate” damages and render “their estimation of a matter that depends on discretion rather than calculation.”<sup>112</sup> The *Burchell* Court thus reasoned that the arbitrators might have committed “an error in judgment, but it is no cause for setting aside the award.”<sup>113</sup>

It therefore seems clear both from the issues involved in *Burchell* and from subsequent Supreme Court decisions that the generalized observation made in dicta by the *Burchell* Court relating to errors of law in arbitral decision making cannot be viewed as a critical juncture in the history of American arbitration law. Rather, *Burchell* constituted a clear affirmation of previous law that provided that an award infected by manifest errors relating to objective matters was subject to vacatur. In any event, and as the *Wilko* Court knew, the aftermath of the Civil War produced a much more signifi-

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sion” of the arbitrators and the inability of arbitrators to “fairly” exercise” their judgment due to a mistaken belief as to the application of law seems amorphous at best.

<sup>110</sup> This observation might, on its face, seem oddly circular, yet the stated principle is ingrained in the FAA. Section 11 of the FAA, which grants courts authority to correct certain mistakes in awards—such as might arise in the course of a mathematical calculation or the description of a person—specifically provides that the court “may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.” 9 U.S.C. § 11 (emphasis added).

<sup>111</sup> *Wilko*, 346 U.S. at 427.

<sup>112</sup> *Burchell*, 58 U.S. (17 How.) at 351.

<sup>113</sup> *Id.* at 351-52.

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cant Supreme Court decision relating to judicial review of arbitral awards for errors in legal reasoning.<sup>114</sup>

### C. State Court Decisions in the Immediate Wake of *Burchell*

If *Burchell* actually stood for the strict rule that has been attributed to it by federal courts subsequent to the *Wilko* opinion, one would expect that jurists contemporary to the *Burchell* Court would have, at a minimum, considered whether *Burchell* gave reason for those courts to reconsider previously established law. Such was not the case.

As previously discussed, in its 1842 decision in *Noble*, the New Hampshire Supreme Court had affirmed the authority of New Hampshire courts to review arbitral awards infected by errors in the application of law.<sup>115</sup> The court's application of that rule was in no way altered by the United States Supreme Court's decision in *Burchell*. Instead, in two thoroughly reasoned decisions, the New Hampshire Supreme Court generally reaffirmed its prior holding in *Noble* and, in so doing, utilized phraseology with significant similarities to that employed many years later by the *Wilko* Court.<sup>116</sup>

The 1859 decision of the New Hampshire Supreme Court in *White Mountains Railroad v. Beane* marks one of the first instances in which a court carefully juxtaposed the applicable arbitration law pertaining to restricted and unrestricted submissions and contemporaneously explained the distinction between a "mistake of law" and an error in the "exercise of judgment."<sup>117</sup> Although these distinctions are relevant to an understanding of *Wilko*, *White Mountains* is perhaps most significant for illustrating that there is no justification for the limiting definition that federal courts have placed on the *Wilko* Court's use of the word "disregard." Federal courts have themselves neglected to use a more complete definition of the word "disregard" and, instead, have selectively and narrowly interpreted disregard to mean "intentionally ignore."<sup>118</sup> However, *White Mountains* shows that "disregard," in the context of arbitration vacatur law, can occur when arbitrators mistake the law—i.e., unintentionally misapply the law.

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<sup>114</sup> See *infra* Part II.D.

<sup>115</sup> See *supra* notes 95-101 and accompanying text.

<sup>116</sup> *White Mountains R.R. v. Beane*, 39 N.H. 107 (1859); *Sanborn v. Murphy*, 50 N.H. 65 (1870).

<sup>117</sup> See generally *White Mountains*, 39 N.H. 107.

<sup>118</sup> See *infra* notes 257-61.

Under *White Mountains*, when the submission is limited, “any disregard of the limitations . . . will be fatal to the award.”<sup>119</sup> In connection with this statement, the only illustration the court offered as an example of such disregard is the instance in which “the parties agree that the arbitrators shall make their award agreeably to legal principles, and if they mistake the law the award will be set aside.”<sup>120</sup> In a manner consistent with *Kleine, Noble*, and *Burchell*, the *White Mountains* court also acknowledged that a slightly different rule applied to unrestricted submissions. The distinction arises because unrestricted submissions accord to the arbitrators wider latitude in rendering their decision; in the phraseology of *White Mountains*, arbitrators acting under an unrestricted submission are merely obligated to “fairly exercise[] their judgment upon the question submitted to them.”<sup>121</sup>

Thus, *White Mountains* affirmed that when arbitrators are acting under an unrestricted submission, the award may be vacated when the arbitrators “have fallen into any error of facts or law which has prevented *the free and fair exercise of their judgment*.”<sup>122</sup> This observation is entirely consistent with the similar observation made by the Supreme Court in *Burchell*.<sup>123</sup> As the *White Mountains* court further noted, when the pertinent law is unsettled or uncertain and the arbitrator is thus required to interpret the law, courts are not empowered to declare that the arbitrator’s exercise of subjective judgment in interpreting the law is erroneous.<sup>124</sup>

By 1870, the New Hampshire Supreme Court’s contribution toward an understanding of arbitration law had already been substantial. Its 1870 opinion in *Sanborn v. Murphy*<sup>125</sup>—a decision that was to be frequently cited by

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<sup>119</sup> *White Mountains*, 39 N.H. at 108 (emphasis added).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 109 (emphasis added).

<sup>123</sup> See *Burchell*, 58 U.S. (17 How.) at 349-50 (stating that an award will not be vacated if it contains “the honest decision of the arbitrators”).

<sup>124</sup> *White Mountains*, 39 N.H. at 109. Although the court in *White Mountains* did not utilize the word “interpretation,” it is abundantly clear that the court was discussing interpretations of subjective legal issues:

[T]he sole ground of exception to their award is, that upon a material point of law, upon which the rights of the parties depended, upon which the parties were fully heard by their counsel, upon which there was room for discussion, and for much diversity of opinion, the arbitrators, after exercising their best judgment, have arrived at a conclusion which we are asked to consider and to pronounce to be erroneous. Such an exception cannot be sustained. The parties have selected their own judges, they have deliberately submitted the matter to their decision, and by that decision they are bound.

*Id.* (emphasis added).

<sup>125</sup> *Sanborn v. Murphy*, 50 N.H. 65 (1870) (hereinafter *Sanborn*).

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other courts<sup>126</sup>—further clarified the law and due to the depth of its analysis and the use of certain terminology, also assists in achieving a proper understanding of *Wilko*. The court’s opinion in *Sanborn* commences by confirming the general law discussed in *Noble* and *White Mountains* regarding the reviewability of awards issued under unrestricted submissions<sup>127</sup> and then proceeds to reaffirm many of the principles already discussed by earlier courts, including the Supreme Court in *Burchell*. The court in *Sanborn* thus did not suggest there was a meaningful distinction between disregarding the law and mistaking the law when it observed that in restricted submissions, when the arbitrators “disregard or mistake the law, the award will be set aside.”<sup>128</sup>

Equally significant was the court’s reminder that despite the broader discretion granted to arbitrators under unrestricted submissions, awards issued under such submissions may be vacated when they are not “deliberately and fairly made.”<sup>129</sup> An examination of what the court meant in its use of the phrase “deliberately and fairly made” proves to be instructive on two fronts. First, the *Sanborn* opinion confirms prior case law by emphasizing that when arbitrators “manifestly fall[] into . . . error with regard to . . . law,” such an error can “prevent[] the free and fair exercise of their judgment.”<sup>130</sup> Second, after favorably quoting the observations previously made in *White Mountains* regarding the unassailable nature of subjective arbitral decisions concerning issues “upon which there was room for discussion and for much diversity of opinion,”<sup>131</sup> the court in *Sanborn* offered the following statement, which almost seems to be designed to presciently render aid in comprehending the *Wilko* decision: “The exception has reference, it will be understood, not to an erroneous conclusion or judgment upon the application of

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<sup>126</sup> See, e.g., *Crumlish v. Wilmington & W.R. Co.*, 5 Del. Ch. 270, 273 (1879); *Sanborn v. Paul*, 60 Me. 325, 328 (1872) (observing that under *Sanborn*, parties can contractually specify that the arbitrators “shall be governed by the strict common rules of common law”). Even as of the date of the issuance of the *Wilko* opinion, the New Hampshire Supreme Court continued to rely on *Sanborn* as support for the principle that an award can be vacated for manifest error: “This being a general submission the award will not be disturbed for mistake except where the arbitrators ‘have manifestly fallen into such an error with regard to facts or law in the case before them as must have prevented the full and fair exercise of their judgment upon the subject submitted to them.’” See *Franklin Needle Co. v. Am. Fed’n. of Hosiery Workers*, 105 A.2d 382, 385 (1954) (quoting *Sanborn*, 50 N.H. at 69).

<sup>127</sup> *Sanborn*, 50 N.H. at 68.

<sup>128</sup> *Id.* at 67.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 69.

<sup>131</sup> *Id.*

law, but to a manifest mistake, *such as must have precluded the exercise of judgment.*"<sup>132</sup> The *Sanborn* court's use of the phrase "palpable error or mistake . . . of law"<sup>133</sup> can easily be easily reconciled with the phrase "manifest disregard" contained in *Wilko*.<sup>134</sup> In qualifying the stated exception as *not* applying to "an erroneous conclusion or judgment upon the application of the law,"<sup>135</sup> the *Sanborn* opinion does not materially differ from the limitation described in *Wilko* regarding "interpretations" of the law. Thus, the concluding, emphatic principle in *Sanborn* that the manifest mistake "*must have precluded the exercise of judgment*" in no way differs from the *Burchell* Court's requirement that the award contain the honest decision of the arbitrators.<sup>136</sup>

The 1874 opinion of the Supreme Court of Appeals of Virginia in *Willoughby v. Thomas*<sup>137</sup> also generally confirmed the "well-settled rule[s]" that (1) arbitrators "may disregard the law entirely and decide upon principles of equity and good conscience exclusively" and (2) "[i]f [the arbitrators] mean to conform to the law, and they plainly mistake it, such mistake is sufficient to invalidate it."<sup>138</sup> As a synonym for a "plain mistake of law," the court in *Willoughby* also used various phrases, including "plain and palpable mistake of law"<sup>139</sup> and "manifest mistake of law,"<sup>140</sup> the latter of which approximates the very language used by the *Wilko* Court. As if to contrast subjective interpretations of unsettled law with the understanding of objective, clearly established law, and in a manner consistent with several cases—including *Burchell*—that already have been discussed above, the court concluded that it could not say that the award "was made under misapprehension of the law."<sup>141</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *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.").

<sup>135</sup> *Sanborn*, 50 N.H. at 69.

<sup>136</sup> *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 352 (1854).

<sup>137</sup> *Willoughby v. Thomas*, 65 Va. (24 Gratt.) 521 (1874).

<sup>138</sup> *Id.* at 531 (quoting *Moore v. Luckess*, 64 Va. (23 Gratt.) 160 (1873)). In *Moore*, the court also used the phrase "plain and palpable" in characterizing the showing that must be made in order for a court to vacate an award based on errors of law, 64 Va. (23 Gratt.) at 165, and, in that discussion, observed that "[t]here is no controversy in regard to these principles." The "real difficulty" addressed by the court in *Moore* concerned the ancillary question of whether "such mistake [may] be established by extrinsic evidence." *Id.* at 164. The court's resolution of that issue reflects a pragmatic and reasonably modern approach that denies the use of testimony for such a purpose but does allow the use of formal "pleadings and exhibits filed in the pending case." *Id.* at 165.

<sup>139</sup> *Willoughby*, 65 Va. (24 Gratt.) at 530-31.

<sup>140</sup> *Id.* at 531.

<sup>141</sup> *Moore*, 64 Va. (23 Gratt.) at 163.

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At least one other state court was to apply these long-standing arbitration principles in the first two decades following *Burchell*.<sup>142</sup> Before that decision was affirmed, however, the Supreme Court issued its decision in *United States v. Farragut*,<sup>143</sup> a case that provides great insights into the Court's decision in *Wilko* and which, indeed, was cited by the Court in *Wilko*<sup>144</sup> but which, for unknown reasons, has been neglected by courts and commentators who have attempted to analyze the illusive meaning of manifest disregard of the law.

#### D. *United States v. Farragut*—“*Note the Right of Review*”

The only thing unclear about the United States Supreme Court's 1874 decision in *Farragut* is why the opinion has never received the attention it deserves from scholars and the courts. To a certainty, the Supreme Court's lengthy discussion, and resulting application, of vacatur law in *Farragut* was clear and decisive. Thus, it comes as no surprise that the *Wilko* Court not only cited *Farragut* in its footnote 24 as supporting its observations regarding “manifest disregard” and errors in “interpretation of law” but also took care, through the means of a parenthetical statement accompanying its citation to *Farragut*, to caution future readers to “note the right of review” that was affirmed in *Farragut*.<sup>145</sup> It confounds reason that under these circumstances, not a single case has ever seriously analyzed the Court's decision in *Farragut* in an effort to understand *Wilko*. Yet that appears to be just what has occurred or, better stated, what has never occurred.

The facts that gave rise to *Farragut* are of such historical significance in relation to the American Civil War,<sup>146</sup> and the personalities of the litigants, their counsel, and the arbitrators so dynamic and remarkable,<sup>147</sup> that it is

<sup>142</sup> See *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N.Y. 392 (App. Div. 1875).

<sup>143</sup> 89 U.S. (22 Wall.) 406 (1874).

<sup>144</sup> *Wilko v. Swan*, 346 U.S. 427, 437 n.24 (1953).

<sup>145</sup> *Id.*

<sup>146</sup> In a lengthy essay describing “the opening of the Mississippi” in the early years of the Civil War, one of the parties to *Farragut*—Admiral David Porter—asserted that “the most important event of the War of the Rebellion, with the exception of the fall of Richmond, was the capture of New Orleans and the forts Jackson and St. Philip, guarding the approach to that city.” See David D. Porter, Admiral, U.S.N., *The Opening of the Lower Mississippi*, in *BATTLES AND LEADERS OF THE CIVIL WAR, NORTH TO ANTIETAM* 22 (1956).

<sup>147</sup> Admiral Farragut, who was deceased by the time the *Farragut* decision was issued, had gained fame immemorial as a result of not only the capture of New Orleans but also the even more publicized victory at the battle of Mobile Bay at which he reportedly commanded his men to lash him to the ship's rigging in order to preserve his view of the combat and at which he supposedly gave the



tempting to linger over such matters at length. In the interest of brevity, however, it is sufficient here to provide only the most general of summaries relating to the nature of the case.

The underlying facts in *Farragut* concerned the “capture of a large number of vessels, coal, and other property” in the course of the naval and land battle for New Orleans and Forts Jackson and St. Philip during early 1862.<sup>148</sup> At the time of those famous events, David Farragut was the Flag-Officer of the Western Gulf Squadron of the United States Navy, which was charged with blockading Confederate maritime traffic in the Gulf of Mexico.<sup>149</sup> During a period of approximately six weeks, and in cooperation with Major-General Butler, who controlled a land force of 18,000 men, Flag-Officer Farragut “reduced” the Confederate-controlled forts in the immediate vicinity of New Orleans, after which, and with the aid of a general mutiny by the Confederate garrison at Fort Jackson, Major-General Butler’s

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command, “Damn the Torpedoes—full speed ahead!” See BATTLES AND LEADERS OF THE CIVIL WAR, THE WAY TO APPOMATTOX, 379-419 (1956); BRUCE CANTON, THE AMERICAN HERITAGE PICTURE HISTORY OF THE CIVIL WAR 517 (1960). But Farragut was not the only “personality” involved in the appeal to the Supreme Court. The named libellants also included Admiral David Porter, who played his own pivotal role in the United States Navy’s conquest of the Confederate forts, including Vicksburg, which lined the lower Mississippi River. The arbitration panel, itself, also included luminaries such as Gustavus Vasa Fox, a Civil War-era assistant secretary of the Navy, and Henry W. Paine, a prominent New England lawyer and one-time candidate for the governorship of Massachusetts. See generally CORRESPONDENCE OF GUSTAVUS VASA FOX 1861-1865 (R. M. Thompson & R. Wainwright eds. 1918); WILLIAM MATHEWS, HENRY W. PAINE, A GREAT NEW ENGLAND LAWYER (1894). Counsel for the disputing parties also enjoyed their own measure of fame. In addition to being represented by G. H. Williams, the attorney general of the United States, the government retained the services of R. M. Corwine, an Ohio attorney who, among other accomplishments, gained notoriety as one of four Republican delegates to alter their votes at the infamous Chicago Convention of 1860, thereby giving Abraham Lincoln the necessary majority to obtain the party nomination for the presidency of the United States. SEE H. HOWE, HISTORICAL COLLECTIONS OF OHIO, VOL. 1 939 (1888). Not to be outdone, Admiral Farragut’s interests were represented by none other than the same former Major General Benjamin F. Butler who commanded the land forces during the capture of New Orleans and whose stormy relationship with first general and then President Ulysses S. Grant was paralleled by a populist political career that included serving as governor of Massachusetts and accepting the nomination of the Greenback and Anti-Monopoly parties for the presidency in 1888. See generally Francis Russell, *Butler the Beast?* AMERICAN HERITAGE MAGAZINE, Apr. 1968. Similarly, Admiral Porter was represented by Hubley Ashton, a former assistant attorney general and confidant of William Douglas O’Conner. See generally DESHAE E. LOTT, WALT WHITMAN: AN ENCYCLOPEDIA (1998), available at <http://www.whitmanarchive.org/disciples/oconner/biograph.html>. For an abbreviated chronology identifying the Civil War naval campaigns of Farragut, Porter, and others, see the Department of the Navy’s Naval Historical Center website at <http://www.history.navy.mil/wars/civilwar.htm> (last visited April 11, 2006).

<sup>148</sup> 89 U.S. (22 Wall.) at 410.

<sup>149</sup> See BRUCE CANTON, THE AMERICAN HERITAGE PICTURE HISTORY OF THE CIVIL WAR 170-72 (1960) (describing the blockade of the Confederate coast line and depicting the disposition of the various United States navy squadrons); Porter, *supra* note 146, at 29 (“As soon as possible Farragut proceeded to his station and took command of the West Gulf Blockading Squadron.”).

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troops occupied the forts and then took possession of the city.<sup>150</sup> In the aftermath of the battle, the United States naval and land forces seized a substantial number of vessels and other property. The captured property was promptly appraised for the purposes of the “prize laws” but was never relinquished to a local federal court for a variety of reasons, including the absence of a local functioning federal district court and the predictable fact that much of the property had been confiscated by the United States Army and Navy, which had more immediate uses for the property in mind.<sup>151</sup> The pressing events of the moment distracted the interested parties and therefore it was not until 1869 that Congress enacted legislation designed to grant to then-Admiral Farragut and the officers and crews of the Western Gulf Squadron “the benefits of the prize laws in the same manner as they would have been” had circumstances allowed immediately following the battle for New Orleans.<sup>152</sup> On behalf of himself and his fellow officers and crews, Admiral Farragut then promptly filed his libel in the Supreme Court of the District of Columbia seeking compensation for a variety of property primarily composed of an extraordinary collection of sailing vessels and steamships, some of which had been sunk and others which were still under construction at the time of the critical events.<sup>153</sup>

In pursuance of its duties to the American public, the United States Treasury Department “informed the District Attorney of the United States at Washington” that the captures were not prize of war and thus proposed that the claim in libel be resisted.<sup>154</sup> By agreement, the parties submitted the entire controversy to three arbitrators and agreed in the text of the arbitration submission that the resulting award would be entered as a decree in the Supreme Court of the District Columbia and that either party would be entitled “to appeal to the Supreme Court of the United States as from other decrees or judgments in prize cases.”<sup>155</sup> The resulting arbitral award was clearly favorable to the libellants, and the United States appealed.<sup>156</sup>

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<sup>150</sup> *Farragut*, 89 U.S. (22 Wall.) at 408.

<sup>151</sup> *Id.* Relinquishment to a local federal court was required by law in order for the property to be “condemned as prize at the time of capture.” *Id.*

<sup>152</sup> *Id.* at 410-11.

<sup>153</sup> *Id.* at 411-12.

<sup>154</sup> *Id.* at 412.

<sup>155</sup> *Id.* at 413.

<sup>156</sup> *Id.* at 415.

With so much at stake, both in terms of fame and fortune,<sup>157</sup> it is likely that the disputing parties were surprised to find, upon their first reading of the Supreme Court's opinion in *Farragut*, that the Court's analysis spent little time discussing the logistics of the famous battle or the niceties and peculiarities of the law of capture and instead, provided a thorough discussion of arbitration vacatur law.<sup>158</sup> To the chagrin at least of the United States government, the pivotal issue in the appeal proved to be precisely the same issue as is addressed in this article and by the Supreme Court in *Wilko*—i.e., the scope of a reviewing court's authority to vacate an arbitral award based on the occurrence of error in the application of substantive law.<sup>159</sup>

The Court's analysis in *Farragut* begins by deftly dispensing with preliminary arguments that would sound familiar to contemporary litigators who seek the most favorable judicial construction of their client's arbitration provision.<sup>160</sup> Accordingly, the Court rejected both the government's argument that the special provision granting a right of appeal to the Supreme Court "opens the entire case . . . as though no award had been made"<sup>161</sup> and the libellants' contention that the provision that declared that the award would be "final upon all questions of law and fact . . . forbids any inquiry into any question of law or fact passed on by the arbitrators."<sup>162</sup> The Court, in essence, found these provisions to simply be designed to ensure that the arbitrators' award was treated as any other award on appeal.<sup>163</sup>

Before discussing controlling arbitration vacatur law, the *Farragut* Court first noted that although the parties had agreed to submit their dispute to an arbitration process that would culminate in the issuance of an award that was "final upon all questions of law and fact," that agreement did not mean that the resulting arbitral award necessarily represented the last word as to the correct application of the law in the parties' dispute.<sup>164</sup> The Court then proceeded to concisely describe the proper operation of vacatur law in

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<sup>157</sup> At least one source claims that the portion of the damages sustained by the Supreme Court in *Farragut* constituted the highest damages award affirmed by the Court at that time. See Russell, *supra* note 147.

<sup>158</sup> 89 U.S. (22 Wall.) at 419-24.

<sup>159</sup> *Id.* at 419 ("The first and most important question arising in the argument of the case before us, respects the validity of the award and its effect in limiting the field of investigation of this court on appeal.") (emphasis added).

<sup>160</sup> *Id.* at 419-20.

<sup>161</sup> *Id.* at 419.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 419 ("This award is to be construed here and its effect determined by the same general principles which would govern it in a court of common law or of equity.").

<sup>164</sup> *Id.* at 420. "Nor do we conceive, notwithstanding the expression in the agreement of submission, that all questions of law in the case are concluded by the award. In this respect, it is no more than a submission of all matters involved in the suit." *Id.*

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terminology consistent with earlier cases and with the phraseology that would be employed eighty years later by the Supreme Court in *Wilko*:

The award was also liable, *like any other award*, to be set aside in the court below, for such reasons as are sufficient in other courts. For exceeding the power conferred by the submission, *for manifest mistake of law*, for fraud, and for all the reasons on which awards are set aside in courts of law or chancery.<sup>165</sup>

It would give the *Farragut* Court undue credit to suggest that it was in *Farragut* that the concept of manifest mistake of the law—i.e., manifest disregard of the law—was born. Other decisions, such as those in *Kleine*,<sup>166</sup> *Burchell*,<sup>167</sup> and *Noble*,<sup>168</sup> plainly illustrate that the same concepts, described through the use of varying terminology, were applied at earlier times. The *Wilko* Court's endorsement, in a single footnote, of *Kleine*, *Burchell*, and *Farragut* surely was meant to show that the concept of manifest mistake of the law was recognized in all three of those decisions.

The *Farragut* Court's statement that "unless it can be shown that in making this award [the arbitrators] have acted upon a *manifest mistake of law*, the award must be upheld,"<sup>169</sup> cannot logically be said to differ from the *Wilko* Court's observation, for which it cited *Farragut* as authority, that "the interpretations of the law by arbitrators in contrast to *manifest disregard* are not subject, in the federal courts, to judicial review."<sup>170</sup> Similarly, in light of the *Farragut* Court's observation that "[t]here [was] no evidence here of any *misapprehension of the law* . . . and the award, is therefore, conclusive,"<sup>171</sup> it must be presumed that the *Wilko* Court perceived the distinction between an "apprehension" of the law and an "interpretation" of the law when the Court offered the contrasting observation that "*error in interpretation*" is not subject to judicial review.<sup>172</sup> It was no doubt for this very reason—that subjective, interpretive arbitral decisions cannot be subjected to a subsequent judicial interpretation of the same issue—that the Court in *Farragut* emphasized that although "*concrete propositions of law*" made by ar-

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<sup>165</sup> *Id.* (emphasis added).

<sup>166</sup> *Kleine v. Catara*, 14 F. Cas. 732 (C.C.D. Mass. 1814) (No. 7869).

<sup>167</sup> *Burchell v. Marsh*, 58 U.S. (17 How.) 344 (1854).

<sup>168</sup> *Johnson v. Noble*, 13 N.H. 286 (1842).

<sup>169</sup> *Farragut*, 89 U.S. (22 Wall.) at 421 (emphasis added).

<sup>170</sup> *Wilko*, 346 U.S. at 436 (emphasis added).

<sup>171</sup> *Farragut*, 89 U.S. (22 Wall.) at 420 (emphasis added).

<sup>172</sup> *Wilko*, 346 U.S. at 436 (emphasis added).

bitrators are reviewable, “[w]here a proposition is one of mixed fact and law, in which the error of law, if there is one, *cannot be distinctly shown*, the parties must abide by the award.”<sup>173</sup>

The heart of the *Farragut* opinion concerns the proper application of arbitration vacatur law. The Court summarily affirmed the primary factual determinations of the arbitrators concerning the identification of the vessels and property at issue and the legal conclusion that such property “was liable to capture, and condemnation, and lawful prize of war,” but ordered the vacatur of one modest aspect of the arbitrators’ damages determination because it was “apparent” and “seen on the face of the award” that the arbitrators “violate[d] law and justice” when, without legal justification, they granted incremental damages for salvage of certain vessels.<sup>174</sup> There is nothing in *Farragut* to suggest that the arbitrators deliberately ignored the law in this respect; the opinion only indicates that they manifestly mistook the law or misapprehended it.

#### E. Prelude to the FAA

At least as it is applied by state courts and lower federal courts, contemporary American arbitration vacatur law has little resemblance to the law as explained and applied in cases such as *Kleine*, *Noble*, *Burchell*, and *Farragut*. And yet there are no clear policy-based reasons why the law of the past should differ so greatly from the law of the present. Following the issuance of the *Farragut* opinion, and for at least another decade, appellate courts in a variety of jurisdictions, including New York,<sup>175</sup> Delaware,<sup>176</sup> and Maryland,<sup>177</sup> continued to recognize the law as established in those earlier decisions. By 1888, however, state courts began, for no apparent reason, to ap-

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<sup>173</sup> 89 U.S. (22 Wall.) at 420 (emphasis added). The reason being that arbitral interpretations of unsettled law cannot be subjected to judicial review.

<sup>174</sup> *Id.* at 424.

<sup>175</sup> See *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N.Y. 392, 400 (App. Div. 1875) (applying *Kleine* and affirming that in unrestricted submissions (1) an award may be “set aside for error of law, when the question of law is stated on the face of the award, and it appears that the arbitrators meant to decide according to the law but did not,” and (2) arbitrators may “disregard strict rules of law or evidence and decide according to their sense of equity”).

<sup>176</sup> See *Crumlish v. Wilmington & Western R.R. Co.*, 5 Del. Ch. 270 (1879) (citing *Sanborn* and stating that the “exception” to the general rule that arbitral awards are not reviewable for legal error “is the case where the arbitrators have manifestly fallen into such error with regard to the facts or law . . . as must have prevented the free and fair exercise of their judgment”).

<sup>177</sup> See *Woods v. Matchett*, 47 Md. 390, 392 (1877) (citing various cases, including *Farragut*, as supporting the general principle that, “if an arbitrator discloses in his award the grounds of his decision, the presumption is that he intended to decide according to law, and, if such award is contrary to law, it may be set aside”).

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ply the former decisions more narrowly<sup>178</sup> or to occasionally neglect to acknowledge the existence of certain “exceptions” that allowed the vacatur of awards for legal error under limited circumstances.<sup>179</sup> Lawyers have always been a convenient foil for explaining something good gone bad, and in this case, there may be some validity to the maxim; there is clear evidence that before the conclusion of the nineteenth century, trial counsel were actively offering formal legal arguments that confused the meaning of the Supreme Court’s decisions in *Burchell* and *Farragut*.<sup>180</sup>

With the passage of additional time, and with some exceptions,<sup>181</sup> federal courts seemed to be more and more content to fall into a pattern in which they limited the application of the rule established in *Burchell* and other cases that permitted the vacatur of awards based on manifest legal errors so as to apply it only in instances in which the arbitrator was guilty of some form of bad faith conduct.<sup>182</sup> It seems likely that these developments

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<sup>178</sup> See, e.g., *Brush v. Fisher*, 70 Mich. 469, 476 (1888) (citing, inter alia, *Burchell* for supposedly supporting a rule that provides that an error in the application of law is not grounds for setting aside an award “unless the error was so gross as of itself to furnish clear proof of corruption and fraud”).

<sup>179</sup> See, e.g., *Masury v. Whiton*, 111 N.Y. 679, 680 (1888) (incorrectly citing *Fudickar* as holding that in the absence of “proof of any misconduct on the part of the arbitrator,” an award cannot be set aside); *Hoffman v. DeGraff*, 109 N.Y. 638, 640 (1888) (incorrectly citing *Fudickar* as supporting the proposition that awards cannot be vacated for errors of law “in the absence of corruption or misconduct”).

<sup>180</sup> See, e.g., *Bailey v. District of Columbia*, 4 App. D.C. 356 (D.C. Cir. 1894). The description of the arguments of counsel in the case clearly illustrates the risk at which courts are placed when they are dependent on counsel for an explication of the law. In *Bailey*, counsel for the appellant vigorously asserted that *Burchell* “precise[ly]” determined that arbitral awards issued under an unrestricted submission were not subject to judicial review, whereas counsel for the appellee relied on *Farragut* as establishing that “[i]f the arbitrator professes to decide upon the law and he mistakes it, the court will set aside the award.” *Id.* In the end, the court disposed of the case on other grounds and, therefore, did not address the issue. *Id.*

<sup>181</sup> See, e.g., *Brodhead-Garret Co. v. Davis Lumber Co.*, 124 S.E. 600, 601-02 (W.Va. 1924). The court’s decision in *Brodhead-Garret*, which relies, in part, on *Noble*, provides yet another detailed explanation of traditional arbitration vacatur law, under which (1) arbitrators acting under unrestricted submissions “do not have to follow strict rules of law,” (2) awards issued under unrestricted submissions may be vacated due to “a clear and palpable mistake of law” when “the arbitrators intended to decide the controversy according to the rules of law,” and (3) if the arbitrators who “mistake the law on some doubtful point, it will not cause the award to be disturbed.” *Id.*

<sup>182</sup> See, e.g., *United States v. Mason*, 33 App. D.C. 350 (D.C. Cir. 1909) (citing *Burchell* and reasoning that “[t]here is no allegation of any fraud practised upon him by which his mistakes, if any, were superinduced; [h]ence, the so-called mistakes of law and fact . . . amount to errors of judgment committed in that determination, and nothing more”); *Robertson v. Lion Ins. Co.*, 73 F. 928, 930 (C.C.W.D. Va. 1896) (citing *Burchell* and then observing that the “true test of the award is this: Is this of so extravagant a character as to warrant the conclusion that it was found and concluded from a partisan bias towards one of the parties?”).

at the turn of the twentieth century were inadvertent and did not mark some form of judicial activism in the arena of arbitration law or indicate that courts were intentionally ignoring a century and more of court decisions and United States Supreme Court precedent. That conclusion gains only some support from the fact that not a single decision in which *Burchell* and other cases were misapplied is accompanied by either an explanation of why the court believed it was necessary and proper to deviate from existing law or an acknowledgment that the court was deviating from existing law. It is something of an irony that these developments occurred in tandem with the evolving trend of judicial hostility toward the enforcement of arbitration agreements and the resulting ouster doctrine under which courts refused to enforce waivers of the right to access to the courts.<sup>183</sup> The latter attitude—judicial hostility to the enforcement of arbitration agreements—was viewed by the business community as an immediate problem of critical proportions,<sup>184</sup> whereas the fact of the former development—of intermediate courts' failure properly to apply existing vacatur law—went all but unnoticed.

#### IV. THE HISTORY AND ENACTMENT OF THE FAA

##### A. *The Legislative History of the FAA*

No one can deny that the passage of the FAA in 1925 represented a watershed event in American arbitration law.<sup>185</sup> Indeed, the very purpose of the FAA was to counter evolving judicial “hostility” to arbitration clauses, which hostility was manifested by the so-called ouster doctrine.<sup>186</sup> But that was its only purpose. The FAA was not intended to meaningfully alter tradi-

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<sup>183</sup> See, e.g., *Mitchell v. Dougherty*, 90 F. 639, 642 (3d Cir. 1898) (observing that contracts that “oust the jurisdiction of the courts, and substitute for them an extra-legal tribunal of their own creation” are unenforceable).

<sup>184</sup> See Milana Koptsiovsky, Note, *A Right to Contract for Judicial Review of an Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements?* 36 CONN. L. REV. 609, 612 & n.24 (2004) (pertaining to enhanced review clauses in arbitration agreements). The student author provides a notably thorough analysis of the legislative history of the FAA and concludes that under the FAA, contracting parties should be permitted to contractually modify the FAA to permit enhanced judicial review “because the standards set forth in the FAA are merely default provisions, effective only in the absence of a contractual clause.” *Id.* at 611.

<sup>185</sup> The advent of the statute is viewed by some authorities as having been sufficiently momentous as to warrant a periodic birthday celebration. See, e.g., William K. Slate II, *An Anniversary Worth Celebrating: 80 Years of the FAA*, 59 DISP. RESOL. J., Nov. 2004-Jan. 2005, at 1; Gene Truncellito, *Year-Long Lecture Series Celebrating FAA's 80th Birthday Begins*, 59 DISP. RESOL. J., Nov. 2004-Jan. 2005, at 4.

<sup>186</sup> For Congress' 1924 description of the ouster doctrine, see H.R. Rep. No. 68-96, at 1-2 (1924).

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tional American arbitration vacatur law and the force and significance of cases such as *Kleine, Burchell*, and *Farragut*.

There are those commentators who assert that the FAA, and more specifically section 10 of the FAA, served to quell forever the notion that courts were empowered to review arbitral awards for legal error. Those assertions, however, do not rely on specific legislative history, but instead tend to be characterized by (1) unsupported argument,<sup>187</sup> (2) reliance on considerations apparently relating to efficiency,<sup>188</sup> or (3) an isolated reading of section 10 of the FAA that ignores the historical context that is directly relevant in evaluating the actual language of the statute.<sup>189</sup> Moreover, all of these

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<sup>187</sup> See, e.g., Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through a Functional Analysis*, 37 GA. L. REV. 123, 149 (2002) (stating that the "drafters [of the FAA] debated whether awards should be subject to substantive judicial review for error of fact and law, and decided limited review was integral to the goals and functions of arbitration" (emphasis added)). In actuality, there was no "debate" on the floor of either chamber regarding the vacatur provisions of the FAA. More importantly, the "drafters" to whom the author refers additionally stated in a publication that was contemporaneous with the passage of the FAA that the provisions of the FAA allowed for vacatur of an award when the "enforcement would obviously be unjust," a standard that is more than reminiscent of the gross mistake or manifest mistake standards the Supreme Court applied respectively in *Burchell* and *Farragut*. See *infra* note 198. Finally, the Supreme Court has firmly stated that the very authorities relied on by the author cannot be considered to be "legislative history" that can be relied upon in interpreting the FAA. See *infra* note 198. Nevertheless, in the interest of a complete discussion of the history of the FAA, the statements by the "drafters" of the FAA will also be discussed in this article. See also Katherine van Wezel Stone, 77 N.C. L. REV. 931 979-84 (1999) (asserting (1) that in an "attempt to appease critics of the New York arbitration act," the primary author of that statute—Julius Henry Cohen—actually intentionally misrepresented the intent of the statute when he stated in a 1921 Yale Law Journal article that under the New York statute awards were subject to vacatur for "mistake"; and (2) that Cohen offered "a misleading . . . description" of the New York act's provisions). These allegations are not only unsupported, but also seem to suggest that Congress could not have relied on, and did not rely on, the veracity of Cohen's statements when it considered the passage of the FAA. If anything, the author's observations tend to corroborate the proposition that in enacting the FAA, Congress did, indeed, intend to permit the vacatur of arbitral awards for traditional arbitration law grounds since the clear representation by Cohen—one of the authors of the predecessor New York statute—was that review of awards for legal error was permissible under some circumstances. In his 1921 article Cohen thus distinguished between the determination of "questions of fact," which became the sole province of the arbitrator under the statute, and "common-law . . . protection of the courts," which remained undisturbed by the statute. See *id.* at 984, n.327 (emphasis added). Cohen generally repeated these statements in a 1926 article when he observed that under the FAA awards may be vacated in "cases in which enforcement would obviously be unjust." See *infra* note 198.

<sup>188</sup> See, e.g., THOMAS CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION 260 (1997) (stating that the "practice" of judicial review of the merits of arbitral awards "contradicts the gravamen of the legislation and the judicial policy that sprung from it").

<sup>189</sup> See, e.g., 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, 450 n.21, 489 (1998) (stating that the legislative history of the FAA does not provide guidance



commentators apparently are comfortable with the idea that in passing the FAA, Congress radically and yet unanimously altered existing vacatur law with no debate and no express statement that such was Congress' intent.<sup>190</sup>

Other commentators contend that the FAA does permit limited judicial review for legal error, and yet they also fail to consider the actual legislative and judicial history underlying and preceding the act.<sup>191</sup> These competing perspectives lend more mystery to the *Wilko* saga, if only for the reason that they underscore the question regarding why the conventional interpretation of *Wilko* has not been more rigorously challenged by an analysis that includes a specific consideration of the legislative history of the FAA. After all, in connection with its discussion of vacatur law and in conjunction with its manifest disregard language and its citations to *Kleine*, *Burchell*, and *Farragut*, the *Wilko* Court not only specifically cited section 10 of the FAA

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in interpreting section 10. "Congress's intent regarding the vacatur of commercial arbitration awards must be divined from the clear and unambiguous language of section 10(a)."; Hayford, *supra* note 7, at 746 ("Because of the scant instructive legislative history underlying section 10(a) and the remainder of the FAA the intent of Congress regarding vacatur of commercial arbitration awards must be divined from the clear and unambiguous words of the subject provision."). Professor Hayford's observations in this regard do not appear to take into account the origins of the relevant statutory language or the fact that courts had been applying those same statutory and common law standards for many years prior to the enactment of the FAA. Furthermore, it is debatable whether the provisions of section 10 are truly "clear and unambiguous." As is noted elsewhere in this article, the concept of an act in excess of arbitral authority and that of the imperfect execution of arbitral powers both have been interpreted variously by different courts. See *supra* notes 95-101 and accompanying text. See *infra* notes 199-211, 249, 278 and accompanying text. Section 10 merely reiterates these time-honored standards and its enactment therefore did nothing to clarify when and how arbitrators can exceed their authority or imperfectly execute their duties. In any event, it is difficult to see how it can be said that arbitrators who have committed a gross or manifest mistake have executed their duties with perfection. In contrast, it is far easier to demonstrate that when the submission implicitly or explicitly requires the correct application of law, any incorrect application of law is not consistent with the authority granted to the arbitrator. At least since the 1814 decision in *Kleine*, courts have debated the question regarding whether a manifestly erroneous decision violates an arbitration submission and, thus, constitutes an arbitral act in excess of authority. Under these circumstances, it cannot be said that in adopting the long-standing excess of authority and imperfect execution of powers standards for vacating arbitral awards, Congress clearly and unambiguously directed that those grounds could not be relied upon in instances of gross mistake or manifest errors in the application of clearly established law.

<sup>190</sup> IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 108 (1992).

<sup>191</sup> See, e.g., EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 324, 411-12 (1997) (contending that the use of the term "rights" in section 10(a)(3) suggests that "the drafters intended that courts should have some ability to set aside awards for denial of rights," including the right to have the law correctly interpreted). See also Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. J. 1199, 1254 (2000) (quoting Brunet & Craver, *supra*, and observing that the argument "certainly raises the question whether [section 10(a)(3)] should be more broadly construed").

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but also made it clear that it saw no contradiction between section 10 and the vacatur of awards for what it called “manifest disregard” of the law.<sup>192</sup>

Although it was not the purpose of Professor Ian Macneil to linger on, or address in depth, the topic of merits-based review of awards under the FAA, he nonetheless has offered the most definitive and accurate statement of congressional intent with regard to vacatur under the FAA. According to Professor Macneil, Section 10 was not intended to alter then-existing common law relating to vacatur, but instead was merely an effort to acknowledge that law through extremely generalized statutory codification:

Sections [10 and 11] constitute limitations on the basic principle enunciated in section 2 in the form of specified grounds for vacation and modification of arbitral awards. *They do not, however, constitute a significant departure from common law or statutory arbitration as it existed before modern arbitration statutes.* The A.B.A and Congress might have adopted the [FAA] without such sections and simply relied on the common law. Instead this somewhat tidier solution was adopted.<sup>193</sup>

The legislative history of the FAA both directly and indirectly corroborates this conclusion.

As noted above, there was only one real purpose to the FAA: it had nothing to do with vacatur law and everything to do with remedying the recurrent problems caused by the ouster doctrine, under which courts routinely refused to enforce agreements to arbitrate.<sup>194</sup> This fact is consistently evidenced by the testimony of witnesses who appeared before various congressional committees and by statements made by congressional members prior to the unanimous enactment of the FAA. For example, as early as 1923, in an effort to explain the purpose of the proposed legislation, the first witness to testify before the Senate Judiciary Committee simply stated, “The fundamental conception underlying the law is to make arbitration agreements valid, irrevocable, and enforceable.”<sup>195</sup> At the opening of the January 9,

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<sup>192</sup> See *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (observing that “it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would ‘constitute grounds for vacating the award pursuant to section 10 of the [FAA]’”) (quoting *Wilko v. Swan*, 201 F.2d 439, 445 (2d Cir. 1953)).

<sup>193</sup> MACNEIL, *supra* note 190, at 104 (emphasis added).

<sup>194</sup> See, e.g., *Mitchell v. Dougherty*, 90 F. 639, 642 (3d Cir. 1898); *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1010-11 (S.D.N.Y. 1915).

<sup>195</sup> *Sales and Contracts to sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Comm. on the Judiciary*, 67th

1924 joint hearings before the Senate and House Subcommittees of the Committees on the Judiciary, Senator Sterling similarly noted that the proposed legislation were bills “to make valid and enforceable written provisions or agreements for arbitration.”<sup>196</sup> The 1924 House Report on the proposed legislation, thus, states in clear terms that “[t]he purpose of this bill is to make valid and enforceable agreements for arbitration” and that “[t]he bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.”<sup>197</sup> And, as if to ensure that there would be no future debate regarding the true intent of the FAA, Representative Graham emphatically observed that other than resolving issues relating to the ouster doctrine, the legislation did not change existing law or create new law:

*It does not involve any new principle of law except to provide a simple method by which parties may be brought before the court in order to give enforcement to that which they have already agreed to. It does not affect any contract that has not the agreement in it to arbitrate, and only gives the opportunity after personal service of asking the parties to come in and carry through, in good faith, what they have agreed to do. It does nothing more than that. It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.*<sup>198</sup>

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Cong. 2 (1923) (testimony of Charles L. Bernheimer, Chairman, Arbitration Comm. of the New York Chamber of Commerce).

<sup>196</sup> *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong. 1 (1924).

<sup>197</sup> H.R. REP. NO. 96-68, at 1-2 (1924).

<sup>198</sup> 65 CONG. REC. 1931 (1924) (emphasis added). It is well known that the FAA was modeled after New York’s existing arbitration statute. See 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 8.1. But that fact does not alter or affect the conclusions established here. Interestingly, the “true” drafters of the FAA—virtually all of who were American Bar Association [hereinafter “ABA”] delegates—authored publications contemporaneous with the enactment of the FAA in which their post-enactment descriptions of the intent and purpose of the FAA did not differ from that of the statements by other witnesses and sponsors of the FAA. See Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 155 (1925) (“[T]he primary purpose of the statute is to make enforceable in Federal courts such agreements for arbitration . . . .”); Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926) (stating that the FAA was intended to “reverse the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable”). It should be acknowledged that in the article by Cohen and Dayton, both of whom were involved in the lobbying effort before Congress, the authors also provided a lengthy, if not somewhat rambling, description of the operation of section 10. That description is so meandering, however, that it defies understanding. For instance, the authors stated that an award is subject to vacatur for defects that are “so inherently vicious that, as a matter of common morality, it ought not to be enforced” and that awards may be vacated in “cases in which enforcement would obviously be unjust,” and then seemed to contradict these statements by noting that “[t]here is not opportunity for the court, in connection with the

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*B. The Origins of Section 10 of the FAA*

While it may be true that there is less legislative history relating to the FAA, at least in the form of transcribed testimony and statement than might be the norm with respect to contemporary legislation, there certainly is sufficient evidence to conclude that in passing the FAA, Congress did not intend to alter existing vacatur law. That conclusion is corroborated by the fact that the language of the FAA specifying the grounds upon which an award could be vacated was not newly created to enforce a novel, more rigid standard of review and, instead, found its origins in traditional American vacatur law. More to the point, for more than a century prior to the enactment of the FAA, the very language that later became embodied in the FAA, and which described the limited grounds upon which an award could be vacated, was deemed by courts to include the circumstances in which a manifest mistake in the application of clearly established law occurred.

In this respect, the wording of section 10(a)(4) of the FAA, allows for the vacatur of an award “[w]here 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,”<sup>199</sup> is particularly important. It is more than mere coincidence that this very phrase was in use by the courts of New York at least as early as the beginning of the nineteenth century. In *Jackson v. Ambler*,<sup>200</sup> the court thus observed that “[w]here a submission has been sanctioned by an act of the legislature, it cannot be drawn into question, unless the arbitrators have exceeded their powers, or executed them imperfectly.”<sup>201</sup> Even modern New York jurisprudence recognizes that some errors in legal reasoning can constitute an act in excess of authority,<sup>202</sup> thus, there seems to be little reason to argue that when Congress adopted the same standard it did not intend for the same rule to apply. Significantly, by the mid-nineteenth century, the dual grounds for vacating an award based on

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award, to inject its own ideas of what the award should have been.” *Id.* at 273. It is perhaps for this very reason that the United States Supreme Court has made it clear that at least with respect to divining the legislative intent of the FAA, the statements of the ABA delegates are not to be considered. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001) (referring to the 1923 hearing before the Subcommittee of the Senate Committee on the Judiciary and stating “we ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal—even assuming the precise intent of the group can be determined”).

<sup>199</sup> 9 U.S.C. § 10(a)(4) (emphasis added).

<sup>200</sup> 14 Johns. 96 (N.Y. Sup. Ct. 1817).

<sup>201</sup> *Id.* at 111.

<sup>202</sup> See *infra* note 275 and accompanying text.

acts exceeding authority or constituting an imperfect execution of powers were imbedded not only in New York statutory law,<sup>203</sup> but also the statutory law of other states.<sup>204</sup>

At the commencement of the twentieth century, the New York Court of Appeals, the highest court of the state of New York, found occasion to apply section 2374 of the New York Revised Statutes, which clearly also was a precursor to section 10 of the FAA.<sup>205</sup> The decision of the New York Court of Appeals in *Wilkins v. Allen*<sup>206</sup> is particularly important to an analysis of both the intent of the FAA, and the intended meaning of the manifest disregard language in *Wilko*. The *Wilkins* court discussed the limited statutory grounds on which an arbitral award could be set aside, including awards found to be based on a “perverse misconstruction . . . on the part of the arbitrator.”<sup>207</sup> This principle, which may well have included perverse misconstruction of either law or fact, was no aberration of New York arbitration law.<sup>208</sup> For many years after the issuance of the *Wilkins* opinion and, indeed, after the passage of the FAA, New York courts continued to acknowledge that despite New York’s limited statutory grounds for vacating an award, “perverse misconstruction” was not among the “risks” parties assumed when they entered into agreements to arbitrate.<sup>209</sup> One need look no further than the *Wilko* decision to see that as of 1953, the United States Supreme Court agreed and understood that the limited vacatur grounds set forth in section 10 of the FAA did not eliminate a party’s right to obtain vacatur under similar circumstances.<sup>210</sup> In support of its discussion of arbitration vacatur law and the concept of manifest disregard, the *Wilko* majority cited *The Hartbridge*,<sup>211</sup> a 1932 decision by the Court of Appeals for the Second Circuit in

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<sup>203</sup> See *In re Williams*, 4 Denio 194 (N.Y. Sup. Ct. 1847) (discussing allegations that the arbitrators exceeded and imperfectly executed their powers and noting both New York statutes and case law that recognize those grounds for vacating an award).

<sup>204</sup> See, e.g., *The Indiana Cent. Ry. Co. v. Bradley*, 7 Ind. 49 (1855) (applying an 1852 statute that contains the following language, which is virtually identical to section 10 of the FAA: “That the arbitrator exceeded his powers or so imperfectly executed them that a final award on the subject matter was not made”).

<sup>205</sup> See *Wilkins v. Allen*, 169 N.Y. 494, 497 (1902) (“Section 2374 provides that the court must make an order vacating an award, where . . . [the arbitrators] have exceeded their powers or imperfectly executed them.”).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 496.

<sup>208</sup> *Id.*

<sup>209</sup> See, e.g., *Silver Refrigerator Mfg. Corp. v. Clementi*, 99 N.Y.S.2d 767, 768-69 (Sup. Ct. 1950); *Janet Shops, Inc. v. Tweens, Inc.*, 82 N.Y.S.2d 185, 188 (Sup. Ct. 1948); *Bond v. Shubert*, 36 N.Y.S.2d 147, 154 (Sup.Ct. 1942), *aff’d*, *In re Bond*, 290 N.Y. 901 (1943).

<sup>210</sup> *Wilko v. Swan*, 346 U.S. 437 (1953).

<sup>211</sup> *Wilko*, 346 U.S. 437 n.24 (citing *The Hartbridge (North of England S.S. Co.) v. Munson S.S. Line*, 62 F.2d 72,73 (2d Cir. 1932)).

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which the court discussed *Wilkins* and the “perverse misconstruction” ground for vacating an award.

Nor is the “perverse misconstruction” standard unique to New York; several states apply the principle that an arbitral award based on perverse misconstruction is subject to vacatur and, more importantly, both state and federal courts have equated the standard with manifest disregard of the law.<sup>212</sup> There is therefore little need to purport to dissect the phrase “perverse misconstruction.” The phrase differs little from the concept of “gross mistake” applied by the Supreme Court in *Burchell* or “manifest error” or “palpable error.”<sup>213</sup> What matters is that the state statutory law on which section 10 of the FAA was modeled, and the traditional vacatur law that the FAA was not intended to alter, separately and together allowed for at least limited judicial review of arbitral awards for legal error. In the first few years after the issuance of the *Wilko* opinion, courts both recognized this fact<sup>214</sup> and then even later were willing to concede that the *Wilko* manifest disregard language might have been based on the “exceed powers” or “imperfectly executed powers” phraseology of section 10.<sup>215</sup> It is not insignifi-

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<sup>212</sup> See, e.g., *Flexible Mfr. Sys. Pty Ltd. v. Super Pords. Corp.*, 86 F.3d 96, 99 (7th Cir. 1996) (stating that the “approach to the scope of judicial review” announced in *Wilko* is “identical” to that of the Wisconsin Supreme Court); *City of Madison v. Madison Prof'l Police Officers Assoc.*, 425 N.W.2d 8, 11 (Wis. 1988) (stating it [the court] would “not overturn the arbitrator’s decision for mere errors of law or fact, but only when perverse misconstruction or positive misconduct [is] plainly established, or if there is manifest disregard of the law”); *Int’l Bhd. of Police Officers, Local 530 v. Town of Fairchild*, 2005 WL 2857925, \*5 (Conn. Sup. Oct. 14, 2005) (“Under the manifest disregard of the law standard our Supreme Court has held that [a]bsent a showing of perverse misconstruction . . . the arbitrator’s decision is not subject to judicial inquiry”) (quoting *Clairol, Inc. v. Entertac Corp.*, 44 Conn. App. 506, 512 (1997), cert. denied, 241 Conn. 906 (1997)); *Harris v. Bennet*, 332 S.C. 238, 244-45 (Ct. App. 1998) (indicating that manifest disregard and perverse misconstruction are one and the same standard).

<sup>213</sup> *Burchell v. Marsh*, 58 U.S. (17 How.) 344 (1854).

<sup>214</sup> See *Gramling v. Food Mach. & Chem. Corp.*, 151 F. Supp. 853, 857 (W.D.S.C. 1957) (“[T]he statutory grounds for vacating an award, 9 U.S.C. § 10, are substantially the same as those at common law.”).

<sup>215</sup> See, e.g., *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (stating that section 10(a)(4) serves as the basis for the manifest disregard doctrine); *I/S Stavborg v. Nat’l Metal Converters, Inc.*, 500 F.2d 424, 431 (2d Cir. 1973) (“[P]erhaps the rubric ‘manifest disregard’ is after all not to be given independent significance; rather it is to be interpreted only in the context of the specific narrow provisions of 9 U.S.C. §§ 10-11.”); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960), cert. denied, 363 U.S. 843 (1960); *In re Sociedad Armadora Aristomenis Panama*, 184 F. Supp. 738, 744 (S.D.N.Y. 1960) (observing that the *Wilko* Court “apparently rel[ie]d” on the “exceeded their powers” language of section 10(d) when it drafted the manifest disregard portion of the opinion); *Metropolitan Waste Control Comm. v. City of Minnetonka*, 242 N.W.2d 830, 832 (Minn. 1976) (equating manifest disregard

cant to note that New York courts also have acknowledged repeatedly that the “perverse misconstruction” standard is premised on the statutory provisions that allow for vacatur of awards when arbitrators exceed their powers<sup>216</sup> and that irrational constructions of contractual provisions in dispute “in effect, ma[kes] a new contract for the parties” and constitutes an act in excess of arbitral powers.<sup>217</sup>

### C. Confusing Policy Objectives with Fortuitous Impacts

The fact that the legislative history of the FAA and its interrelationship with traditional vacatur law has been all but ignored by courts and commentators in this regard illustrates the risks of confusing the potential benefits of arbitration with the policy objectives underlying the enforcement of agreements to arbitrate. For good reason, courts frequently exalt the efficiencies normally associated with the arbitration process.<sup>218</sup> However, when courts elevate the benefits of arbitration to the status of policy objective, they run the risk of frustrating the FAA’s goal of enforcing the parties’ contractual agreement to arbitrate. This propensity to both disregard the primacy of policies favoring enforcement of party autonomy, and to place undue emphasis on the efficiencies attendant with arbitration is sufficiently common to have caused the United States Supreme Court to unanimously observe in *Dean Witter Reynolds, Inc. v. Byrd*<sup>219</sup> that although efficiency is obviously a desirable attribute of arbitration, it is not a policy objective under the FAA.<sup>220</sup>

The legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. *We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.* The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements. The House Report accompanying the

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to an act in excess of authority). For a partial list of commentators who suggest that the manifest disregard standard is based on section 10(a)(4), see Scodro, *supra* note 11, at 604 n.250.

<sup>216</sup> In re Sweeney, 1980 WL 27632, \*3 (N.Y. Sup.Ct. Dec. 22, 1980).

<sup>217</sup> Nat’l Cash Register Co. v. Wilson, 8 N.Y.2d 377, 383 (1960).

<sup>218</sup> See, e.g., Smoothline Ltd. v. North Am. Foreign Trading Corp., 249 F.3d 147, 148 (2d Cir. 2001) (describing arbitration as “speedy and relatively inexpensive trial before specialists”) (quoting *Conticommodity Serv. v. Phillip & Lion*, 613 F.3d 1222, 1224 (2d Cir. 1980)); *Ariz. Elec. Power Co-op. Inc. v. Berkeley*, 59 F.3d 988, 992 (9th Cir. 1995) (stating that efficiency is the primary advantage of arbitration).

<sup>219</sup> 470 U.S. 213 (1985).

<sup>220</sup> *Id.*

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Act makes clear that its purpose was to place an arbitration agreement “upon the same footing as other contracts, where it belongs,”<sup>221</sup> and to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate. This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. . . .

Nonetheless, passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.<sup>222</sup>

That the Court unanimously supported these observations by quoting the same 1924 statement by Representative Graham that is set forth above<sup>223</sup> only underscores the Court’s insistence that the provisions of the FAA should not be interpreted based on the premise that the FAA was designed to further a supposed public policy favoring the efficient resolution of disputes.

The Supreme Court’s unanimous statement in *Byrd* distinguishing between the FAA’s policy objective of enforcing agreements to arbitrate and the “fortuitous” fact that efficiencies might result from the enforcement of such agreements, was sufficiently notable to have been acknowledged and quoted by many federal courts over the years.<sup>224</sup> None of the many cases in which courts have acknowledged and quoted this controlling principle, however, involve issues concerning the vacatur of arbitral awards or the scope of review relating to awards. For reasons that seem to be related to the erroneous and unsubstantiated perception that in the name of efficiency, the FAA eliminated the right of arbitrating parties’ to agree to an arbitral adjudication based on a correct application of the law, lower federal courts have all ignored the Supreme Court’s warning in *Byrd* that the intent of the FAA

<sup>221</sup> *Byrd*, 470 U.S. at 219 (citing H.R.REP. NO. 96, 68th Cong., 1st Sess., 1 (1924)).

<sup>222</sup> *Id.* at 219 (emphasis added). See also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (quoting the *Byrd* decision for the same proposition).

<sup>223</sup> *Id.* at 219 n.7. See *supra* text accompanying note 198.

<sup>224</sup> See, e.g., *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004); *Am. Centennial Ins. Co. v. Nat’l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 888 (2d Cir. 1985); *Equinox Software Sys., Inc. v. Airgas, Inc.*, 1997 WL 570931, \*7 (E.D. Pa. Sept. 5, 1997); *In re Interactive Video Res., Inc.*, 170 B.R. 716, 722 n.8 (S.D. Fla. 1994); *Torrence v. Murphy*, 815 F. Supp. 965, 975 (S.D. Miss. 1993); *Paine Webber, Inc. v. Fowler*, 791 F. Supp. 821, 825 (D. Kan. 1992); *Am. Centennial Ins. Co. v. Nat’l Cas. Co.*, 761 F. Supp. 472, 474 (N.D. Ohio 1991), *aff’d*, 951 F.2d 107 (6th Cir. 1991); *Compuserve, Inc. v. Vigny Int’l Fin. Ltd.*, 760 F. Supp. 1273, 1279 (S.D. Ohio 1990); *In re Hemphill Bus Sales, Inc.*, 259 B.R. 865, 869 n.6 (Bankr. E.D. Tex. 2001); *In re Chorus Data Sys., Inc.*, 122 B.R. 845, 850 (Bankr. D.N.H. 1990).



merely was to enforce agreements to arbitrate based on whatever the terms of that agreement provide.<sup>225</sup> It thus is worthwhile to emphasize that the Supreme Court's clear description in *Byrd* of the limited and narrow legislative intent of the FAA was not merely idle dicta to be ignored in favor of ideological or dogmatic preferences.<sup>226</sup> Rather, and as the Supreme Court has emphasized time and again, any correct understanding of the intent and operation of the FAA must be based in part on a recognition that the achievement of efficiencies is irrelevant to determining Congress' intent in passing the FAA:

After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, *Dean Witter Reynolds, supra*, at 219-20, 105 S.Ct., at 1241-1242, but to ensure that commercial arbitration agreements, like other contracts, "are enforced according to their terms," *Mastrobuono*, 514 U.S., at 54, 115 S.Ct., at 1214 (quoting *Volt Information Sciences*, 489 U.S., at 479, 109 S.Ct., at 1256), and according to the intentions of the parties, *Mitsubishi Motors*, 473 U.S., at 626, 105 S.Ct., at 3353. See *Allied-Bruce*, 513 U.S., at 271, 115 S.Ct., at 838.<sup>227</sup>

There is nothing in the legislative history of the FAA to suggest that, in addition to the primary policy objective of the enforcement of agreements to arbitrate, the FAA promoted an utterly contradictory exception to that policy whereby any contractual expectation that an arbitral tribunal would *correctly* apply the law would be deemed *unenforceable* under the FAA. A correct interpretation of the provisions of the FAA must be based on the premise that the FAA was designed to permit parties to delineate the nature of the arbitration process to which they could agree and to allow the courts to then enforce that contractual agreement. It was presumably for this reason that the *Wilko* Court saw no contradiction in relying on both the FAA and traditional American vacatur law when it observed that "it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would 'constitute grounds for vacating the award pursuant to section 10 of the [FAA].'"<sup>228</sup>

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<sup>225</sup> See, e.g., *MacTek Inc. v. Gorelick*, 427 F.3d 821, 829 (10th Cir. 2005) (observing that the fundamental purpose of the FAA "is to reduce litigation costs by providing a more efficient forum" and stating that "it makes sense to uphold contractual provisions that support that aim while striking down provisions that subvert it"); *Sevenson Envtl Serv. v. Sapp Battery Site*, 2004 WL 936764, No. 04 Civ. 0670JFK, \*2 (S.D.N.Y. April 29, 2004) ("In order to prevent the twin goals of arbitration--efficient dispute resolution and avoidance of long and costly litigation--from being undermined, judicial review of arbitration awards is severely limited and narrow in scope.").

<sup>226</sup> *Byrd*, 470 U.S. at 214.

<sup>227</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

<sup>228</sup> *Wilko*, 346 U.S. at 436 (quoting *Wilko v. Swan*, 201 F.2d 439, 445 (2d Cir. 1953)).

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*D. On the Eve of Wilko v. Swan*

Another indication that the enactment of the FAA did not result in a radical change in arbitration vacatur law is the fact that the advent of the FAA was not immediately followed by a wholesale judicial abandonment of previously existing vacatur law. To be sure, there were those courts that seemed to be uncertain whether the FAA had altered prior law, but even those courts refrained from holding that it did. One example of that reluctance is found in the 1932 opinion of the Court of Appeals for the Second Circuit in *The Hartbridge*,<sup>229</sup> in which the court openly struggled to reconcile section 10 of the FAA, *Burchell*, and the decision of the New York Court of Appeals in *Wilkins*.<sup>230</sup> The state court's decision in *Wilkins*<sup>231</sup> was directly relevant to the Second Circuit's analysis of the case because the appellant relied on *Wilkins* as support for the proposition that an award could be vacated due to "perverse misconstruction,"<sup>232</sup> and presumably because the *Wilkins* court's holding in this regard pertained to a New York arbitration vacatur statute that contained essentially the same grounds for vacating an award as those contained in Section 10 of the FAA.<sup>233</sup> With some hesitation, the Second Circuit therefore reviewed the award to determine if it contained the alleged legal error; when the court found that no such error had occurred, it stated that the underlying facts and law "would seem to justify the award, if, indeed, justification were necessary."<sup>234</sup> Based on these determinations, the court, relying on *Burchell* and other cases, then held that the arbitrators did not exceed their authority or otherwise act impartially and that the award was thus final and binding.<sup>235</sup>

The decision by the court of appeals in *Hartbridge* is sufficiently vague that it is difficult to argue that it has any single meaning. Nevertheless, the *Wilko* Court cited *Hartbridge* in its footnote 24, along with *Kleine*, *Burchell*,

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<sup>229</sup> *The Hartbridge (North of England S.S. Co. Ltd.) v. Munson S.S. Line*, 62 F.2d 72 (2d Cir. 1932), *cert. denied*, 288 U.S. 601 (1933).

<sup>230</sup> *See id.* at 73.

<sup>231</sup> *Wilkins v. Allen*, 169 N.Y. 494 (1902).

<sup>232</sup> *See The Hartbridge*, 62 F.2d at 73.

<sup>233</sup> *See Wilkins*, 169 N.Y. at 497 (discussing section 2374 of the New York Revised Statutes, which the court stated "provides that the court must make an order vacating an award, where it is procured by corruption, fraud or undue means, where the arbitrators are partial or corrupt, or guilty of misconduct or other misbehavior which prejudiced the rights of any party, or where they have exceeded their powers or imperfectly executed them").

<sup>234</sup> *The Hartbridge*, 62 F.2d at 73.

<sup>235</sup> *Id.*

*Farragut*, and other authorities, as supporting its observations regarding manifest disregard.<sup>236</sup> In view of the clear meaning of those other decisions, the Court's reference to *Hartbridge* is best interpreted to mean that the *Wilko* Court generally agreed with the principles affirmed in *Wilkins* and considered by the court of appeals in *Hartbridge*.

On the eve of the *Wilko* decision, other courts also suggested that statutory language such as that contained in Section 10 of the FAA could not be read to mean that courts were never empowered to vacate arbitral awards for legal error. For example, in *Franklin v. Nat C. Goldstone Agency*,<sup>237</sup> a California district court of appeal considered a state vacatur statute that contained virtually the same language of section 10.<sup>238</sup> In discussing the operation and intent of the California statute, and relying on a long series of decisions by California courts, the court applied all of the same arbitration vacatur principles previously discussed in this article pertaining to unrestricted submissions, including (1) the arbitrators' right under an unrestricted submission to ignore the law and (2) the rule that awards issued under an unrestricted submission can be vacated for gross error or mistake apparent on the face of the award.<sup>239</sup> Virtually contemporaneously, in *Mancusco v. L. Gillarde Co.*, the Municipal Court of Appeals for the District of Columbia<sup>240</sup> not only acknowledged the applicability of the gross mistake standard applied by the Supreme Court in *Burchell* but also further emphasized that in the "later [*Farragut*] decision" the Supreme Court "laid down the . . . rule" that an award based on a mistake relating to a concrete proposition of law or a manifest mistake of law may be set aside.<sup>241</sup> Two years later, the Maryland Supreme Court provided a helpful analysis of these principles in *Schreiber v. Pacific Coast Fire Ins. Co.*<sup>242</sup> In emphasizing that errors that impede the arbitrators' ability to exercise their judgment are reversible, the court stated that:

When it is sought to set aside an award, upon the ground of a mistake committed by arbitrators, it is not sufficient to show that they came to a conclusion of fact erroneously,

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<sup>236</sup> *Wilko*, 346 U.S. at 437 n.24.

<sup>237</sup> *Franklin v. Nat C. Goldstone Agency*, 188 P.2d 60 (Cal. Dist. Ct. App. 1948), *vacated on other grounds*, 204 P.2d 37 (Cal. 1949).

<sup>238</sup> *Id.* at 62. The court cited to section 1288 of the California Civil Code of Procedure to substantiate this point, claiming that it contained the same grounds for vacating awards as is set forth in section 10 of the FAA. *Id.* See also 9 U.S.C. § 10. However, as of the time of the publication of this article, the standards for vacatur of award are located in section 1286.2, as amended in 2001. See CAL. CIV. PROC. CODE § 1286.2 (West 2002).

<sup>239</sup> *Franklin*, 188 P.2d at 62-63.

<sup>240</sup> See *Mancusco v. L. Gillarde Co.*, 61 A.2d 677 (D.C. 1948).

<sup>241</sup> *Id.* at 678-80.

<sup>242</sup> See *Schreiber v. Pac. Coast Fire Ins. Co.*, 75 A.2d 108, 112-13 (1950).

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however clearly it may be demonstrated that the inference drawn by them was wrong. It must be shown that, by some error, they were so misled or deceived that they did not apply the rules which they intended to apply to the decision of the case, *so that upon their own theory, a mistake was made which has caused the result to be somewhat different from that which they had reached by their reason and judgment.*<sup>243</sup>

Twenty-five years after the passage of the FAA, and as of the midpoint of the twentieth century, American vacatur law still seemed to stand on a reasonably firm foundation that, at a minimum, permitted judicial review of arbitral awards for legal error at least under limited circumstances. The topic drew the attention of a Harvard law student who authored an article on the subject<sup>244</sup>—a worthy enough deed in its own right, but one hardly worth mentioning were it not for the fact that the *Wilko* Court perceived that the article further supported its manifest disregard statement and thus included it in its list of authorities in footnote 24.<sup>245</sup> The student article was laden with citations reflecting the diverse manner in which various state courts had applied vacatur law, with the result that there was no agreement on the exact application of that law or the full extent of its nuances and exceptions.<sup>246</sup> Nevertheless, in the very next section of the article cited by the *Wilko* Court,<sup>247</sup> the author plainly stated that even in jurisdictions that had more conservative vacatur laws, awards entered in those jurisdictions could be vacated when the arbitrator “made a logical error in applying his own principle.”<sup>248</sup> Perhaps more significantly, the author observed that when the parties’ arbitration agreement contains a restriction to the effect that the arbitrators should decide the issues according to a “specific standard” or, alternatively, a choice of law provision requiring the application of the law of a particular jurisdiction, then “[t]he courts generally—even in those jurisdic-

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<sup>243</sup> *Schreiber*, 75 A.2d at 112 (quoting 5 C.J. 179) (emphasis added).

<sup>244</sup> See Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681 (1950).

<sup>245</sup> *Wilko*, 346 U.S. at 437 n.24.

<sup>246</sup> See Note, *supra* note 244, at 685-87.

<sup>247</sup> *Id.* at 687. The Court’s “jump cite” to the Harvard article actually references only page 685, but it seems clear that the Court meant to reference multiple pages beginning with the discussion that commenced at that page—entitled “Award Based on Erroneous Rule”—because that discussion continues on for several pages and has no logical breaking point anywhere in its text. See Note, *supra* note 244, at 685-87.

<sup>248</sup> *Id.* at 687.

tions which otherwise strictly limit review on the merits—are quick to upset an award which does not conform to the stipulation.”<sup>249</sup>

While at least two arbitration scholars have attempted to discredit the legitimacy of the student author’s analysis and thereby impeach the *Wilko* Court’s reliance on the article,<sup>250</sup> the fact remains that the student article is generally consistent with a century and a half of arbitration jurisprudence. It was no doubt for that reason that the United States Supreme Court relied on the article when it pronounced its understanding of the law in *Wilko*. It was presumably for the same reason that the *Wilko* Court also cited Professor Wesley Sturges’ 1930 arbitration treatise in its footnote 24. As Professor Sturges noted, under the prevailing law as of 1930, an award was subject to vacatur when the arbitrators “undertook to decide according to law but missed.”<sup>251</sup>

The entirety of the above discussion relating to traditional American vacatur law and the legislative history of the FAA is to be contrasted with a particularly revealing statement made by the Court of Appeals for the Ninth Circuit in *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*,<sup>252</sup> the first decision to describe the perceived parameters of the contemporary doctrine of manifest disregard of the law.<sup>253</sup> It has already been noted that the *San Martine* decision selectively relied on, and incorrectly read, the Supreme Court’s 1854 decision in *Burchell* when it arrived at its unique—and now widely accepted—extrapolation of the meaning of the *Wilko* majority’s manifest disregard language.<sup>254</sup> The Ninth Circuit’s con-

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<sup>249</sup> *Id.* at 688.

<sup>250</sup> See Scodro, *supra* note 11, at 584-85; Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L. J. 449, 522-23 n.299 (2005). Professor Rau asserts that the *Wilko* Court should not have relied on the article in support of its manifest disregard discussion because the article “says nothing of the kind—concluding merely that ‘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’ in the absence of some explicit limitation on his power.” *Id.* n.299 (quoting 63 HARV. L. REV. at 685). Professor Rau adds that he was unable to “find even the slightest trace of the paternity of th[e] phrase [manifest disregard] in any context remotely related to arbitration.” 50 TEX. INT’L LAW J. at 522. He, thus, further concludes that if the phrase “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.” *Id.* at 522 (citing several decisions not pertaining to arbitration law and awards). It is to be hoped that the present article, at the very minimum, serves to show that there is a clear and demonstrable paternity to the phrase “manifest disregard” and that those origins preceded the *Wilko* decision by many decades.

<sup>251</sup> See Scodro, *supra* note 11, at 584 (quoting WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATION & AWARDS 500-02 (1930)).

<sup>252</sup> 293 F.2d 796 (9th Cir. 1961).

<sup>253</sup> See *supra* note 69.

<sup>254</sup> *Id.*

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cluding remarks in this regard are particularly significant since they show why a complete analysis and understanding of traditional vacatur law and the legislative history of the FAA should lead only to the conclusion that in passing the FAA, Congress did not intend to alter existing vacatur law. Specifically, the Ninth Circuit stated as follows:

It is inconceivable that in enacting these sections [10 and 11 of the FAA] Congress was unaware of the rule of *Burchell v. Marsh*, *supra*, to the effect that a court will not set aside a decision of the arbitrators for error either in law or fact. Had Congress contemplated that any different rule should now become operative, or that a mere error of law should be a basis for setting aside an award, it would have had no difficulty in drafting a separate subdivision of sections 10 or 11 which would say that.<sup>255</sup>

The extraordinary irony of this statement should be apparent. For good reason, the court in *San Martine* charged Congress with the knowledge of existing vacatur law and then vigorously asserted that if Congress had intended to change that law in the course of passing the FAA it “would have had no difficulty in drafting a separate subdivision . . . which would say that.” Given the extraordinary nature of the Supreme Court’s 1875 decision in *Farragut*, however, and the much more obscure nature of the Court’s 1854 decision in *Burchell*, it is fair to observe that it is all but “inconceivable” that Congress was not aware of the *Farragut* opinion, as well as the many other cases discussed here relating to traditional vacatur law. Moreover, in interpreting the FAA, it should be presumed that Congress was aware not only of existing law but also of the correct application of that law, such that Congress would have known that *Burchell* stood for a far different proposition than suggested in *San Martine*. As a result, and applying the *San Martine* court’s observations regarding the manner in which Congress drafts and passes legislation, one can only conclude that had Congress intended to alter the principles established in those many cases—including but not limited to *Burchell* and *Farragut*—that allow for the vacatur of arbitral awards based on clear errors in the application of established law, Congress would have done so through specific legislative enactment that clearly altered that law.

We, of course, know from the statements of the congressional sponsors of the FAA that the FAA did “*not involve any new principle of law[,] . . . create[d] no new legislation, [and] grant[ed] no new rights, except a rem-*

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<sup>255</sup> *San Martine*, 293 F.2d at 802.

edy to enforce an agreement in commercial contracts and in admiralty contracts.”<sup>256</sup> It was for these very reasons—i.e., that Congress (1) was well aware of the rule that permitted vacatur of awards for clear errors in legal reasoning and (2) had no intention of changing that law—that section 10 of the FAA simply reiterated long-standing principles relating to traditional vacatur law and did not alter or embellish them. Without realizing it, the court in *San Martine* not only showed why its own construction of the *Wilko* court’s manifest disregard language was incorrect but also provided yet another reason for concluding that in passing the FAA, the Congress did not intend to impose new limitations on the courts’ authority to review arbitral awards for legal error.

## V. REEXAMINING THE *WILKO* OPINION

The preceding discussion of traditional American arbitration vacatur law and the legislative history of the FAA illustrates that there is ample reason to analyze the *Wilko* decision in light of that law and history. From that discussion it should be obvious that in their efforts to apply *Wilko*’s admonition regarding manifest disregard, lower courts were, and continue to be, wrong in concluding that the *Wilko* Court’s manifest disregard language represented newly anointed, “judicially made” law. It should be just as obvious that in its attempt to apply traditional American arbitration law, the *Wilko* Court confused one principle and slightly rephrased another, thereby giving rise to the confusion that has perpetuated to this day. It is therefore time to reassess *Wilko* to show how the Court’s opinion incorrectly described the operation of traditional vacatur law as well as why the commonly accepted interpretation of *Wilko* is dramatically in error.

### A. The Meaning of “Disregard”

It has been primarily for ideological reasons—associated with the misperception that the prevailing public policy underlying the enforcement of agreements to arbitrate is to achieve “efficiencies” in alternative dispute resolution—that courts continually have concluded that in using the word “disregard” in *Wilko*, the Supreme Court could have only meant to describe an *intentional* act by arbitrators. Federal courts therefore uniformly hold that for the manifest disregard doctrine to apply, the arbitrators must be aware of the operation of applicable law and then intentionally elect not to

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<sup>256</sup> 65 CONG. REC. 1931 (1924) (emphasis added); see also *supra* note 198 and accompanying text.

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apply that law.<sup>257</sup> In so doing, federal courts not only fail to consider the historical context that preceded *Wilko* but also seemingly ignore the fact that common definitions of the word “disregard” are not limited in a fashion that exclusively requires scienter. In different recognized dictionaries, the word “disregard”—which can be either a noun or a verb—is variously defined to characterize a circumstance in which the actor gives no thought to, or pays no attention to, something<sup>258</sup> or treats something without proper respect or attentiveness<sup>259</sup> or with a lack of consideration or respect.<sup>260</sup> These definitions, which do not require that the actor knowingly ignore the subject matter and, instead, require only that the actor fails to lend due attention to the subject matter, are sufficiently common enough that some courts have quoted them and then, without explanation, have ignored them.<sup>261</sup>

In any event, the best illustration that it is unnecessary for a party or a court to be aware of a law, and then ignore it, in order to be charged with “disregarding” that law, is the fact that courts, with sufficient regularity, use the word “disregard” in a variety of contexts in which the limiting condition of scienter has no application. For example, in *Lawlor v. National Screen Service Corp.*,<sup>262</sup> which was decided only a few years after *Wilko*, Justice Frankfurter, joined by Justices Burton and Harlan, issued a dissenting opinion in which he discussed the circumstance in which a lower federal court “challengingly or *ignorantly* disregards the controlling law as set forth by [the Supreme] Court.”<sup>263</sup> Justice Frankfurter’s 1957 acknowledgement in *Lawlor* that a party could disregard something both intentionally (i.e., “challengingly”) and unintentionally (i.e., “ignorantly”) sheds light on how Justice Frankfurter understood the word “disregard” was being used by the *Wilko* majority. It is consistent to conclude that when Justice Frankfurter authored his dissenting opinion only four years earlier in *Wilko* and stated that, “[a]rbitrators may not disregard the law . . . [and instead are] ‘bound to

<sup>257</sup> See *Birmingham News Co. v. Horn*, 901 So. 2d 27, 48-49 (Ala. 2004); see also Hayford, *supra* note 7, at 764-78 (providing a survey of manifest disregard cases through 1996).

<sup>258</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 655 (3d ed. 1986).

<sup>259</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (also defining the noun “disregard” to mean the “[l]ack of thoughtful attention or due regard”).

<sup>260</sup> CAMBRIDGE DICTIONARY OF AMERICAN ENGLISH (2006).

<sup>261</sup> See, e.g., *Birmingham News*, 901 So. 2d at 51 (quoting *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461-62 (11th Cir. 1997)).

<sup>262</sup> 352 U.S. 992 (1957).

<sup>263</sup> *Id.* at 995 (Frankfurter, J., dissenting) (emphasis added).



decide *in accordance* with the [law]”<sup>264</sup> and that “their failure to *observe* the law ‘would . . . constitute grounds for vacating the award,’”<sup>265</sup> he meant that any failure, whether intentional or unintentional, to properly observe or decide in accordance with the law was equivalent to a disregard of the law. Similarly, the Supreme Court has referred to instances in which there occurs an “*intentional* disregard of such laws”<sup>266</sup> and, alternatively, to instances in which a “*negligent* disregard of the laws” occurs.<sup>267</sup> Other courts have acknowledged that a law may be “unintentionally” disregarded.<sup>268</sup> Modern tax law even recognizes two separate forms of claims—one maintainable against the IRS and the other against the taxpayer—for “*negligent* disregard of the law.”<sup>269</sup>

Many cases that preceded *Wilko*, including *Kleine*, *Burchell*, and *Farragut*, recognized that “manifest” or “gross” or clear mistakes or errors in legal reasoning could be remedied upon judicial review of an arbitral award. Those cases did not require that the error be occasioned by an intentional, overt act by which the arbitrator knew the correct application of the law and then intentionally proceeded to ignore it. In fact, those decisions presumed precisely the opposite—that the arbitrators’ manifest error was inadvertent such that the arbitrators would have corrected their decision had they been aware of the error.<sup>270</sup> There is absolutely no reason to believe that when the *Wilko* Court cited those cases in its footnote 24 and then used the term disregard instead of mistake, the Court intended both to alter the meaning of those cases and to create an entirely new legal doctrine that narrowly addressed intentional acts by arbitrators in derogation of clearly known, existing law. Rather, the more logical conclusion is that when the *Wilko* Court employed the word disregard, it meant for the word to be inclusive such that

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<sup>264</sup> *Wilko*, 346 U.S. at 440 (Frankfurter, J., dissenting) (emphasis added) (quoting *Wilko v. Swan*, 201 F.2d 439, 445 (2d Cir. 1953)).

<sup>265</sup> *Id.* at 440 (Frankfurter, J., dissenting) (emphasis added) (quoting *Wilko v. Swan*, 201 F.2d 439, 445 (2d Cir. 1953)).

<sup>266</sup> *United States v. Bd. of Comm’rs*, 251 U.S. 128, 134 (1919) (emphasis added).

<sup>267</sup> *Johnson v. Lankford*, 245 U.S. 541, 545 (1918) (emphasis added) (distinguishing between “willful” and “negligent” disregard of law). See also *Mobile, Jackson, & Kansas City R.R. Co. v. Mississippi*, 210 U.S. 187, 190 (1908) (describing an allegation that a party was guilty of “willful disregard of the law”).

<sup>268</sup> See *Henrietta D. v. Giuliani*, 81 F. Supp. 2d 425, 428 (E.D.N.Y. 2000) (discussing both “intentional or unintentional disregard of the law”).

<sup>269</sup> *Fenceroy v. I.R.S.*, 153 F. Supp. 2d 893, 899 (N.D. Tex. 2001). Compare *Fenceroy*, 153 F. Supp. 2d at 899 (recognizing a cause of action against the IRS for “negligent disregard of the law”) with *Lund v. Comm’r*, 80 T.C.M. (CCH) 599 (2000), *aff’d*, 40 Fed. Appx. 592 (9th Cir. 2002) (finding that as a result of having “negligently disregarded the tax law,” a party was liable for “accuracy-related penalties”).

<sup>270</sup> See *supra* Part II.

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it would be broadly defined to describe the circumstance in which the actor fails to give due consideration to a clearly established principle of law.

*B. The Distinction Between Error in Interpretation and Manifest Disregard*

Admittedly, on a colloquial level, the distinction between an error in the interpretation of a law and an error in the application of a law is not easy to perceive. The *Wilko* Court did not, however, create the distinction; the distinction existed for many decades prior to the issuance of the *Wilko* opinion and has been amply discussed here. Without unnecessarily revisiting the numerous instances in which courts—including those that decided *White Mountains Railroad v. Beane*<sup>271</sup> and *Sanborn v. Murphy*<sup>272</sup>—distinguished between the circumstance in which the law was sufficiently clear and established such that there was no need for an “interpretation” by the arbitrator and the very different circumstance in which “there was room for discussion, and for much diversity of opinion” regarding the operation of the law,<sup>273</sup> it must be emphasized that the distinction is easily reconcilable both with a policy of deference to the decisions of arbitral tribunals and also a policy that seeks to enforce the contracting parties’ expectations.

In the instance in which there is room for a difference of opinion regarding the operation of a law that is ambiguous or amenable to more than one interpretation, the principle articulated in not only *Wilko* but also the many other cases discussed in this article ensures that complete deference is granted to the subjective decision of the arbitral tribunal. In contrast, when the tribunal plainly errs in the application of clearly established, incontrovertible law, there is no policy objective that is served by “deferring” to the tribunal’s erroneous application of that law; the law and the parties both assume that it is the intention of the tribunal to correctly apply that law and that the parties’ contractual rights will be determined not by some erroneous construction of that law but by the law as it stands. To hold otherwise is to suggest that when parties enter into an arbitration agreement that calls for the application of a particular law, they agree that the arbitrator can make the most blatant mistakes in the application of clearly established law such that their rights—conceivably including ongoing rights in a long-term contract—

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<sup>271</sup> See *White Mountains R.R. v. Beane*, 39 N.H. 107 (1859).

<sup>272</sup> See *Sanborn v. Murphy*, 50 N.H. 65 (1870).

<sup>273</sup> *White Mountains*, 39 N.H. at 108. See also *Brodhead-Garrett Co. v. Davis Lumber Co.*, 124 S.E. 600, 602 (W. Va. 1924) (stating that if the arbitrators “mistake the law on a doubtful point [the award] will not be disturbed”).

can legitimately be forever altered by an arbitral ruling based on a fundamental legal error that is plainly demonstrable. There is nothing in the legislative history of the FAA to support such a result; rather, the preexisting case law, which the FAA endorsed, illustrates that the law logically does not contemplate that parties to arbitration agreements typically and intentionally seek to grant arbitral tribunals the latitude to undermine their contractual rights when they are clearly determined by established legal principles. It is for that very reason that New York law, on which the FAA was based, recognizes that awards founded on a “perverse construction” of a contract may be vacated<sup>274</sup> and why New York courts have equated such a perverse misconstruction with arbitral acts in excess of authority because they, in essence, create “a new contract.”<sup>275</sup>

For these reasons, the *Wilko* majority, the dissenting Justices in *Wilko*, and the Court of Appeals for the Second Circuit in the decision below all harmoniously refrained from suggesting that an arbitral award could never be reviewed for legal error.<sup>276</sup> As was true with respect to the *Wilko* Court’s use of the word “disregard,” every federal circuit and many state courts have misconstrued the meaning and significance of the *Wilko* Court’s reference to “interpretations of the law” when it said 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.”<sup>277</sup>

### C. Confusing Unrestricted and Restricted Submissions

Having succeeded in correctly stating the operation of two aspects of traditional American arbitration vacatur law, it is disappointing that the *Wilko* Court would struggle, and fail, to properly articulate the operation of the third aspect relating to the distinction between restricted and unrestricted submissions. After all, the Court had identified at least one of the main cases that discussed the distinction—*Kleine*—and obviously was aware that the distinction existed. Yet it is clear that the Court did confuse the two concepts. The catalyst for that error appears to be the unfounded supposition that to determine whether there are any restrictions on the scope of the arbitral tribunals’ authority, an arbitration provision contained within a contract must be examined in utter isolation without giving consideration to other

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<sup>274</sup> *Bd. of Educ. v. Dover-Wingdale Teachers’ Ass’n*, 467 N.Y.S.2d 270, 274 (N.Y. App. Div. 1983), *aff’d*, 61 N.Y.2d 913 (1984); *Civil Serv. Employee’s Ass’n, Inc. v. County of Niagara*, 427 N.Y.S.2d 131, 132 (N.Y. Sup. Ct. 1978).

<sup>275</sup> See *Nat’l Cash Register Co. v. Wilson*, 171 N.E.2d 302, 305 (N.Y. 1960).

<sup>276</sup> See *supra* notes 34–47 and accompanying text.

<sup>277</sup> *Wilko*, 346 U.S. at 436.

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significant contractual provisions, particularly including a choice of law clause.

It is difficult to comprehend a material difference between a contract that contains separate choice of law and arbitration provisions and a contract containing an arbitration provision that states that the arbitrators shall apply a particular law in resolving any disputes between the parties. In the former circumstance, the parties have memorialized an agreement that a particular law will determine their rights and obligations and that an arbitral tribunal will adjudicate disputes regarding those rights and obligations; in the latter circumstance, the parties have agreed to precisely the same principle. To suggest that in the former circumstance the tribunal is not required to apply the law specified in the separate choice of law provision results in a complete emasculation of the choice of law provision and the negation of the parties' contractual expectations. This point is sufficiently sound that it has been recognized by at least one federal appellate court.<sup>278</sup>

In *Wilko*, the parties' contract contained a separate choice of law provision acknowledging that their transaction "shall be subject to the provisions of the Securities Exchange Act of 1934 and present and future acts amendatory thereto."<sup>279</sup> Although the choice of law provision did not explicitly mention the Securities Act of 1933, the *Wilko* Court nonetheless suggested it was probable that the intent of the provision was to include the Act.<sup>280</sup> In contrast, the separate arbitration provision of the agreement simply specified the procedural rules and arbitration statute under which any arbitration would be conducted.<sup>281</sup> The choice of law provision clearly acknowledged the applicability of the securities laws. However, the *Wilko* majority concluded that the parties' contract did not specifically require the arbitral tribunal to apply the securities law in resolving any disputes between the parties. Indeed, the Court was steadfast with its decision even after the respondent agreed that the arbitration provision did not eliminate the applicability of those provisions of the Securities Act relating to liability or burden of

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<sup>278</sup> *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 579 (7th Cir. 2001). Ironically, the acknowledgement of this principle was made in the context of the application of the manifest disregard of the law doctrine. *Id.* The court in *George Watts* observed, by way of offering an example of the application of the doctrine, that if the parties' contract specifies that Wisconsin law will apply and the arbitrator "declar[es] he prefers New York law," then the ensuing award may be vacated under section 10(a)(4) of the FAA. *Id.*

<sup>279</sup> *Wilko*, 346 U.S. at 434.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 432 n.15.

proof.<sup>282</sup> In the end, however, and because of the mandatory nature of the securities laws, the Court was reluctantly forced to concede that the “transaction would necessarily be subject to [the Securities Act of 1934]”<sup>283</sup> and the Court of Appeals and the respondent were both correct in concluding that “in so far as the award in arbitration may be affected by legal requirements, statutes or common law, rather than by considerations of fairness, the provisions of the Securities Act control.”<sup>284</sup>

Due both to the explicit provisions of the parties’ contract and the Court’s view that the mandatory protections of the securities law could not be waived in a predispute arbitration agreement, the parties’ arbitration agreement should have been viewed as being “restricted” in nature. The arbitral tribunal was not free to determine a dispute between the parties without applying the securities laws. The Court of Appeals, therefore reasoned that, “the agreement in the case at bar is ‘subject to’ the 1933 Act; consequently the arbitrators are bound to decide in accordance with the provisions of section 12(2).”<sup>285</sup>

In its effort to determine whether to refuse to compel arbitration of the petitioner’s securities claims, the *Wilko* majority attempted to explain existing vacatur law and, it is here that the manifest disregard language is found. The discussion was meant to show that judicial review of arbitral awards was more limited than judicial review of district court judgments, a long-established principle that *Kleine, Burchell, Farragut*, and other cases show has always been the rule in American arbitration law. The Court therefore correctly cited those cases as support for its reasoning and its comments regarding manifest disregard. The Court plainly erred, however, in suggesting that the arbitration agreement in the case before it was an “unrestricted” submission and then compounded that error by suggesting that when arbitrators acting under an unrestricted submission “manifestly disregard” the law, the resulting award is subject to vacatur. Under the very cases cited by the *Wilko* Court, arbitrators acting under an unrestricted submission are free to manifestly and knowingly disregard the law should they elect to resolve the dispute in a different manner.

Had the *Wilko* majority correctly stated the pertinent law as it applied to the case at bar, it would have stated something to the effect that “under a restricted submission that requires the arbitrators to apply a particular law, the subjective interpretations of the arbitrators in contrast to manifest mistake in the application of clearly established law are not subject, in federal courts, to

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<sup>282</sup> *Id.* at 433-34 (stating “this proposed agreement has no requirement that the arbitrators follow the law”).

<sup>283</sup> *Id.* at 434 n.18.

<sup>284</sup> *Id.* at 433-34, 434 n.18.

<sup>285</sup> *Wilko v. Swan*, 201 F.2d 439, 445 (2d Cir. 1953).

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judicial review for error in interpretation.” In hindsight, the *Wilko* majority’s observations regarding manifest disregard of the law were not far removed from being accurate. In the event, the Court’s misdescription of the arbitration provisions as being “unrestricted,” together with the Court’s use of the word “disregard” as a synonym for “mistake,”<sup>286</sup> have given rise vicariously to an illegitimate legal doctrine, recognized by every federal circuit, that thwarts the primary objective of the FAA and leaves parties without a legal remedy for clearly demonstrable errors in the application of definitively established law.

## VI. REVITALIZING PARTY AUTONOMY

After the passage of more than fifty years since the issuance of the *Wilko* opinion, it is difficult to be sanguine about the possibility that the United States Supreme Court, or one or more federal circuit courts, will come to the realization that it was not Congress’ intention in passing the FAA to negate that aspect of traditional American vacatur law that permitted judicial review of arbitral awards for clear error in the application of established law. As Justice O’Conner observed in 1995 in *Allied-Bruce Terminix Companies, Inc. v. Dobson*,<sup>287</sup> “the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”<sup>288</sup> There is little in Supreme Court jurisprudence to suggest that the Court is willing to reverse that practice. If anything, admonitions by lower courts against parties seeking judicial review on the basis of legal error—even when based on the manifest disregard doctrine—have become increasingly shrill and insistent,<sup>289</sup> signaling a heightened reluctance to consider issues relating to the intent of the FAA and chilling the voices of those who otherwise might argue for a judicial reconsideration of misguided interpretations of the FAA.

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<sup>286</sup> It is noteworthy in this regard that one prominent dictionary states that the synonym for “disregard” is “neglect,” a word that allows for unintentional acts such as those committed through negligence, and that is thus far broader than the narrow construction placed on the word “disregard” by the many courts that have attempted to apply *Wilko*. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d. 1986).

<sup>287</sup> 513 U.S. 265 (1995).

<sup>288</sup> *Id.* at 283 (O’Connor, J., concurring). For a particularly scholarly and aggressive discussion of the Supreme Court’s propensity in this regard, see MACNEIL, *supra* note 190, at 170-76.

<sup>289</sup> See, e.g., *B.L. Harbert Int’l LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006) (threatening, in a lengthy discourse, to issue severe sanctions against parties and their counsel who, without sufficient basis, seek vacatur on the ground of manifest disregard).

This probability of a permanent entrenchment by not only the courts, but also Congress, with respect to the generally accepted interpretation of section 10 of the FAA, has been further supported by institutional influences that, in essence, lobby against any legislative amendment to the FAA even when such an amendment might be designed to clarify the original intent of Congress.<sup>290</sup>

On the other hand, there are subtle indications that the judiciary, arbitration practitioners, and arbitral institutions are struggling to reconcile the dual propositions (1) that courts are not empowered to enforce an arbitration agreement that requires the arbitrators to correctly apply the law and (2) that courts cannot rectify manifest errors in the application of law to ensure that the true intent of the arbitrators is effectuated. Perhaps the best illustration of this philosophical discomfort is that some federal circuits uphold the enforceability of so-called enhanced review clauses,<sup>291</sup> under which parties purport to agree to alter the force and effect of Section 10 of the FAA by specifically providing for merits-based judicial review of an arbitral award. Similarly, and on a seemingly ad hoc basis, courts at various times have held that an award may be vacated when the award is “arbitrary and capricious,”<sup>292</sup> “completely irrational,”<sup>293</sup> or fails to “draw its essence” from the parties’ contract.<sup>294</sup> The doctrine of *functus officio*, under which arbitrators are precluded from correcting their own errors in the application of law, is

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<sup>290</sup> See, e.g., John M. Townsend, *The Federal Arbitration Act is too Important to Amend*, 4(2) INT’L ARB. NEWS 19, 21 (2004). Mr. Townsend, a Washington, D.C. attorney and member of the Board of Directors and chairperson of the Executive Committee of the American Arbitration Association, asserted that to the extent there are any deficiencies in the FAA, they are adequately compensated by evolving arbitration jurisprudence, which Mr. Townsend stated has accorded to the FAA “a widely accepted and relied-upon set of meanings,” and that any effort to amend the FAA, “however well intentioned, . . . will have the effect of opening the statute to other amendments that may have radically different objectives.” *Id.*

<sup>291</sup> Compare *Harris v. Parker College of Chiropractic*, 286 F.3d 790, 794 (5th Cir. 2002) (reasoning that parties may contractually agree to a specific standard of review in their arbitration provisions) with *UHC Mgmt. Co. v. Computer Sci. Corp.*, 148 F.3d 992, 997-98 (8th Cir. 1998) (questioning whether expanded review clauses are enforceable). See generally Kenneth M. Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 OHIO ST. J. ON DISP. RESOL. 337 (2000); Stephen J. Ware, “Opt-in” for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act, 8 AM. REV. INT’L ARB. 263 (1997).

<sup>292</sup> See, e.g., *Drummon Coal Co. v. United Mine Workers*, 748 F.2d 1495, 1497 (11th Cir. 1984); *Lifecare Int’l Inc. v. CD Medical, Inc.*, 68 F.3d 429, 435 (11th Cir. 1995) (observing that the “arbitrary and capricious” exception is “a very difficult standard for the party contesting the arbitration award to overcome” and that for the exception to apply, “the Panel’s award must contain more than an error of law or interpretation”).

<sup>293</sup> *French v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 784 F.2d 902, 906 (9th Cir. 1986).

<sup>294</sup> *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990), cert. denied, 501 U.S. 1206 (1991) (holding “the award must, in some logical way, be derived from the wording or purpose of the contract”).

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also coming under increasing attack by both commentators and courts.<sup>295</sup> And even arbitral institutions<sup>296</sup> and individual arbitrators<sup>297</sup> strive to find ways to mitigate the consequences that attend arbitral awards infected by errors in legal analysis. These developments must be seen as providing only a disjointed and moderating affect on what has truly been a judicial and institutional campaign against merits-based judicial review of awards.

Ultimately, it must be recognized that contemporary American arbitration law, and the illegitimate birth of the manifest disregard of the law doctrine, have given rise to an extraordinary circumstance in which a nonlegislated and undeclared policy prohibits parties from entering into an enforceable arbitration provision that provides that any contractual disputes will be resolved through a correct application of the law. In the totality of American civil law, no other circumstance exists in which the judiciary has concluded that it will not and cannot enforce such a benign and commercially valid objective.<sup>298</sup> As a result, and until the status quo is altered, parties to commercial contracts must realize that the FAA does not purport to ensure an alternative system of justice. Instead, the FAA, as applied by the courts, merely fosters an alternative system of dispute resolution in which the assurance of a just result has been made subservient to a judicially imposed objective of expediency.

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<sup>295</sup> See *supra* note 51. It is notable that the codification of the *functus officio* doctrine in the FAA recognizes that the purpose of the doctrine is to “effect the intent” of the award. See 9 U.S.C. § 11. The same principle serves as the basis for the traditional rule that awards based on clear errors in the application of law may be vacated. See *supra* Part II.

<sup>296</sup> See, e.g., CPR International Institute for Conflict Prevention and Resolution, Arbitration Appeal Procedure, <http://www.cpradr.org/adrsrn.asp?M=9.1> (last visited May 21, 2006).

<sup>297</sup> See Gaitis, *supra* note 1, at 92 n.371-72.

<sup>298</sup> Ironically, in the international commercial arena, contracting parties can easily circumvent a particular nation’s aversion to the judicial review of arbitral awards simply by agreeing to the *lex arbitri* of a nation that does permit such review. See Park, *supra* note 13, at 12.



