THE PROPRIETY OF EXPANDED JUDICIAL REVIEW UNDER THE FAA: ACHIEVING A BALANCE BETWEEN ENFORCING PARTIES’ AGREEMENTS ACCORDING TO THEIR TERMS AND MAINTAINING ARBITRAL EFFICIENCY

Eric Chafetz*

I. INTRODUCTION

After an arbitration is concluded, the arbitrator or panel issues an award. An award is analogous to a court’s judgment. Parties to an arbitration award can voluntarily comply with the award, without court intervention.¹ However, unlike a trial where a judge’s order marks the end of the proceedings, an arbitrator’s award has no actual legal affect without court intervention.² Court intervention occurs when a party files a motion either to confirm or to vacate an arbitration award.³

The Federal Arbitration Act (“FAA”) provides four means by which an arbitrator’s award can be vacated by a reviewing court and three ways in which it can be modified or corrected.⁴ Section 9 of the FAA governs the confirmation and vacatur of arbitration awards in the federal courts.⁵ Section 9 reads, “the court must grant such an order [confirming the award] unless the award is va-

* The author, Eric Chafetz, Esq., is a 2004 graduate of Brooklyn Law School and an attorney licensed to practice law in New York and New Jersey. The author is currently an associate with Togut, Segal & Segal in New York, New York. He would like to thank Professor Claire Kelly of Brooklyn Law School for her insights and assistance throughout the entire writing process.


² See Hoeft v. MVL Group, Inc., 343 F.3d 57, 64 (2d Cir. 2003) (“Arbitration agreements are private contracts, but at the end of the process the successful party may obtain a judgment affording resort to the potent public legal remedies available to judgment creditors.”); see also Moses, supra note 1, at 445.

³ See infra at p. 2 discussing §§10 and 11 of the FAA.

⁴ This article only touches upon how an award can be modified or corrected.

Section 10 of the FAA provides for vacatur of an arbitration award:

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.8

Section 11 of the FAA, also allows a court to modify or correct an award:

(a) where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award; (b) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; (c) where the award is imperfect in matter of form not affecting the merits of the controversy.9

There is a relatively recent trend whereby parties attempt to contract around the grounds of judicial review enumerated in the FAA.10 Parties attempt to contract for either more or less judicial review than provided for by the FAA.11 Neither the text of section 10, nor the legislative intent behind this section, shed much light on whether parties can agree to expand or lessen the FAA’s vacatur provisions by contract. It is also important to note that certain courts, on their own initiative, have created grounds for vacatur to supplement section 10’s vacatur pro-

---

6 The fact that not enough attention has been paid to the words “must” and “as prescribed in” will be discussed in more detail infra at pp. 36 and 38-39.
11 This article primarily concerns those parties contracting for more review.
visions. For example, all the federal circuit courts agree that Article III judges have the power to vacate an arbitration award if it is made in manifest disregard of the law.\footnote{Birmingham News Company v. Horn, Nos. 901 So.2d 27, 47-49 (Ala. 2004); see infra at pp. 41 for other court created grounds of review.}

There is a split between the circuits and the districts that have addressed whether parties can agree to expand or contract the FAA’s judicial review provisions.\footnote{Longo, supra note 10, at 1009 (observing the existence of the circuit split).} Additionally, the commentators do not agree whether expanded judicial review is consistent with the FAA.\footnote{See, e.g., Longo, supra note 10, at 1030 (proposing a unique solution whereby a rebuttable “[p]resumption in [f]avor of the [r]ight to [c]ontract for [e]xpanded [j]udicial [r]eview” would be created); Karon A. Sasser, Freedom to Contract for Expanded Judicial Review in Arbitration Agreements, 31 CUMB. L. REV. 337 (2001) (favoring expanded judicial review); William H. Knnull, 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 (2000) (discussing disadvantages of expanded judicial review and favoring arbitral appellate review).} The approaches of the courts can be organized into four main categories.\footnote{Although there are four categories, courts within each category rely on different arguments to reach their respective conclusions.}

The first category includes courts that enforce parties’ agreements to expand the FAA’s review provisions. In doing so, they rely on \textit{Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University},\footnote{Volt Info. Scis., Inc. v. Leland Stanford Junior Univ., 489 U.S. 468 (1989).} among other cases, and conclude that enforcing parties’ agreements according to their terms always outweighs the FAA’s other purposes, including the efficiency that arbitration as an institution provides.\footnote{Efficiency in the context of this article refers to how long an arbitration takes to complete from beginning to end. Also, it is intertwined with various other purposes of the FAA, including, but not limited to, lessening the burden on judges’ calendars and encouraging arbitral finality.}

The second category, on the other end of the spectrum, includes courts that refuse to enforce parties’ agreements supplementing the FAA’s vacatur provisions despite the contracting parties’ unequivocal intentions to do so. These courts reason that, although enforcing parties’ agreements according to their terms is important, \textit{Volt} dictates that other purposes behind the FAA, including preserving arbitral efficiency, warrant serious consideration.\footnote{\textit{Volt}, 489 U.S. at 478-479.}

Two other categories lie between the first and second categories on the spectrum. The third category includes courts that allow expanded judicial review, but only when the proceedings are con-
ducted by a second arbitration panel, not a court. These courts rationalize that the parties cannot tell the courts what to do, however, review by an entity outside the judiciary is appropriate.

The courts in the fourth and final category attempt to resolve this dispute by defining the outer limits of clauses to expand judicial review. These courts do so by drawing a line that provides examples of clauses a reviewing court will not enforce.\(^{19}\)

This Article addresses these four conflicting groups of courts and concludes that none of them have properly analyzed this issue. This Article will demonstrate that the positions taken by these groups insufficiently balance the underlying purposes of the FAA by adopting black and white rules instead of more flexible standards. The FAA has various purposes,\(^{20}\) but according to Dean Witter Reynolds, Inc. v. Byrd\(^ {21}\) and First Options, Inc. v. Kaplan,\(^ {22}\) the two most important purposes are enforcing parties’ agreements according to their terms and the efficiency arbitration as an institution is supposed to provide.

This Article advocates that when the Supreme Court addresses this issue, it should require all the lower reviewing district courts to quantify the effects of the expanded judicial review clauses on arbitral efficiency. To measure a clause’s effects on efficiency, reviewing courts should be required to apply ten factors.\(^ {23}\) Under the ten factor test, the purpose of enforcing parties’ agreements according to their own terms is given substantial weight and will often be determinative; however, if the ten factors, when taken together, would adversely affect arbitral efficiency, then the expansion of judicial review clause should not be enforced. This ap-

\(^{19}\) For example, in his Lapine I concurrence, Judge Kozinski said he “would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl.” LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884,891 (9th Cir. 1997) [hereinafter Lapine I].

\(^{20}\) See infra at pp. 7-9.


\(^{22}\) 514 U.S. 938 (1995) [hereinafter First Options]; see infra at pp. 15-16.

\(^{23}\) The factors, which are discussed in more detail infra at pp. 55-60, include: (i) the amount of time the case has been open; (ii) the complexity of the issues involved; (iii) the length of the record; (iv) whether discovery must be redone and if the rules of evidence apply; (v) what the standard of review entails – i.e. review of issues of law, fact, sufficiency of the evidence; (vi) whether the parties involved are sophisticated business people; (vii) whether the arbitrator or members of the panel are lawyers, retired judges, individuals engaged in the business that the dispute revolves around or laymen and how the arbitrator or members of the panel were chosen; (viii) how detailed the arbitral award is; (ix) whether the proceedings were taped and (x) all other factors a court may wish to consider.

\(^{24}\) Courts will be required to determine what is meant by “adversely affect arbitral efficiency” on a case-by-case basis.
proach does not disregard the effects of expanded judicial review on efficiency like the existing approaches. Instead, it would allow a reviewing court to balance the two main purposes underlying the FAA on a case-by-case basis.

This Article will begin by discussing the FAA’s underlying legislative history in general and then examine the legislative history specifically relating to sections 10 and 11. Second, this Article will discuss various federal court decisions that both elaborate on the FAA’s legislative history and provide a more detailed overview of the scope and purposes of the FAA. Third, this Article will address and preliminarily analyze certain Supreme Court cases, upon which courts rely when addressing the expansion issue. Fourth, this Article will discuss the courts employing the four methodologies. Fifth, this Article will analyze the problems with the arguments made by the courts falling into the four categories. Finally, because the arguments made by the four prevailing methodologies insufficiently address this issue, this Article will discuss the factors the Supreme Court should consider when formulating the ten factor balancing test.

II. The Legislative History of the FAA

The FAA was established by the United States Arbitration Act (USAA).25 The bill was initially introduced during the 68th Congress, in the House of Representatives, on December 5, 1923, as House Bill No. 646.26 The identical bill was introduced to the Senate on December 12, 1923.27 The headings both read: “[a] BILL . . . To make valid and enforceable written provisions or arrangements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.”28

While debating the soundness of a national arbitration law in 1924, the 68th Congress had before it a transcript of hearings dated January 31, 1923, considering the same issue.29 This 1923 transcript

26 Siegel, 79 Cal. Rptr. 2d at 738 (citing H.R. 646, at 1-11).
27 Id. at 738 (citing S. 1005, 68th Cong. (1st Sess. 1923) at 1-11).
28 Id. at 738 (citing H.R. 646, at 1 and S. 1005, at 1).
29 Id. at 738 (citing Statement of Charles L. Bernheimer, Hearings on the Subject of Interstate Commercial Disputes Before the Subcomm. on the Judiciary, 68th Cong. (1st Sess. 1924)).
states, in pertinent part: “[t]he fundamental conception underlying the law is to make arbitration agreements valid, irrevocable, and enforceable.”30

The reports prepared by both the House of Representatives and the Senate were similar. The House Report opined: “[t]he purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in the Federal courts.”31 The Senate Report stated:

[t]he purpose of the bill is clearly set forth in section 2, which, as proposed to be amended, reads as follows: . . . Sec. 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.32

The Senate understood the bill to mean that it “would [ ] abolish the judicial reluctance to enforce arbitration agreements.”33 Senator Thomas J. Walsh, during the course of a senate debate remarked, “[i]n short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced.”34 The House debate elicited the same remarks.35

The transcripts from the legislative committee reports and the congressional debates are almost entirely devoid of discussion of the judicial review of arbitration awards.36 Specifically, there was

30 Id. at 738 (citing Statement of Charles L. Bernheimer, Hearings Before the Subcomm. on the Judiciary, 67th Cong., 4th (2d Sess. 1923)).
31 Id. at 738 (citing H.R.Rep. No. 68-96, at 1 (1924)).
32 Id. at 738 (citing S. Rep. No. 68-536 (1924)).
34 Id. at 738-39 (citing Remarks of Senator Walsh, 68 Cong. Rec. 984 (1924)).
35 Id. at 739 (citing Remarks of Congressman Graham, 68 Cong. Rec. 1931 (1924) (observing, the bill “creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts”)).
36 Id. at 739 (concluding “[n]othing in the legislative reports and debates evidences a congressional intention that post-award and state court litigation rules be preempted so long as the basic policy upholding the enforceability of arbitration agreements remained in full force and effect”); see also Michael H. Leroy & Peter Feuille, The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award, 19 OHIO ST. J. ON DISP. RESOL. 861, 870-73 (2004).
no discussion about section 10 of the FAA. The 1924 House Report made only one reference to judicial review. It stated: “[t]he award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form.” The equivalent 1924 Senate Report also only briefly dealt with the issue. It stated that an award could be vacated only when:

it was secured by ‘corruption, fraud, or undue means’; ‘there was partiality or corruption on the part of the arbitrators’; in a situation where an arbitrator has been guilty of misconduct or refused to hear evidence; there was prejudicial misbehavior by the parties; and the arbitrator has exceeded his or her powers.

A brief addressing the review of an award was also utilized by Congress and made part of the record during the Senate hearings. The brief began: “The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced.” The brief then further explained this position and stated:

[t]his exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means—cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.

The FAA’s legislative history does not address all of the FAA’s underlying purposes. There is no dispute that the FAA’s legislative history establishes that one of its main purposes was to enforce parties’ agreements according to their terms. There also is no dispute that the legislative history addresses the importance of arbitral efficiency by stressing the limited nature of a court’s review. However, the history does not specifically speak to whether parties can contract to expand judicial review.

37 Siegel, 79 Cal. Rptr. 2d at 739.
38 Id. at 739 (citing H.R.Rep. No. 68-96, at 2) (quotations omitted).
39 Id. at 739 (citing S. Rep. No. 68-536, at 4).
40 Id. at 739 (citing Statement of W.W. Nichols, 68th Cong., Hearings on the Subject of Interstate Commercial Disputes Before the Subcomm. on the Judiciary 36 (1st Sess. 1924)) (quotations omitted) (emphasis added).
41 Id. at 739 (citing Statement of W.W. Nichols, 68th Cong., 1st Sess., 36) (quotations omitted) (emphasis added).
An argument can be made that by stressing the limited nature of expanded judicial review, i.e. efficiency, the legislative history implies that parties cannot contract to expand judicial review. However, because the expansion issue is not squarely addressed, the legislative history is not determinative and an analysis of those court’s construing the legislative history and directly addressing the expansion issue must be undertaken.

III. Judicial Pronouncements About the Purposes and Scope of the FAA

The FAA is unique in that it does not confer “independent federal question jurisdiction.” The FAA was promulgated pursuant to Congress’ power to enact substantive rules under the Commerce Clause. The FAA “creates a body of federal substantive law” that applies in both state and federal courts.

The drafters of the FAA had many purposes in mind. First, its goal was to place arbitration agreements “upon the same footing as other contracts.” Accordingly, arbitration is a matter of contract, and “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” Second, the FAA


45 See Allied-Bruce, 513 U.S. at 271-272; Perry, 482 U.S. at 489; Southland, 465 U.S. at 12.


47 Volt, 489 U.S. at 478 (“the FAA does not require parties to arbitrate when they have not agreed to do so”); Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 582 (1960).
aimed “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts.”48 Third, it sought to “foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”49

A fourth consideration was that the FAA hoped to promote the arbitration of civil disputes outside the judicial forum.50 A fifth and final purpose was to provide a more efficient means of dispute resolution than litigation. As the Supreme Court observed, when agreeing to arbitrate, parties “trade[ ] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”51 Also, “[a]rbitration is designed primarily to avoid the complex, time-consuming and costly alternative of litigation.”52 Further, Byrd observed “[i]t is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.”53 All told, there is a “liberal federal policy favoring arbitration agreements.”54

IV. Supreme Court Cases Relevant to the Expansion of Judicial Review

A. Volt

The majority of cases analyzing whether parties can contract around the FAA’s vacatur provisions, rely to some extent on Volt.

48 See Gilmer, 500 U.S. at 24; Byrd, 470 U.S. at 219-20 n. 6.
50 Cone Hospital, 460 U.S. at 24.
53 Byrd, 470 U.S. at 219 (citation omitted).
54 Mitsubishi Motors, 473 U.S. at 626 (in interpreting an arbitration agreement within the scope of the FAA, “as with any other contract, the parties’ intentions control, but those intentions are generously construed as to issues of arbitrability”); see also Moses H. Cone, 460 U.S. at 24:

[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.
Most cases relying on *Volt* recognize that *Volt* does not directly speak to whether parties can contract to expand judicial review, but that it is the closest applicable Supreme Court precedent.

In *Volt*, the Appellant, Volt Information Sciences, Inc. (Volt), and the Appellee, Board of Trustees of Leland Stanford Junior University (Stanford), entered into a construction contract.55 The contract included an arbitration clause and a choice-of-law clause.56 After a dispute arose between the parties, Volt formally demanded arbitration.57 In response, Stanford filed a complaint in California Superior Court alleging various causes of action.58

Volt then filed a petition in the California Superior Court to compel arbitration of the dispute, and in response, Stanford moved to stay the arbitration.59 Stanford relied on Cal.Civ.Proc.Code Ann. § 1281.2(c), which allows, in part, for a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where “there is a possibility of conflicting rulings on a common issue of law or fact.”60 The Superior Court refused to compel arbitration, and instead, based on §1281.2(c), “stayed the arbitration proceedings pending the outcome of the litigation.”61

The California Court of Appeals affirmed the California Superior Court’s decision. The Court of Appeals made various observations and stressed that the FAA’s purpose was “‘not [to] mandate the arbitration of all claims, but merely the enforcement. . .of privately negotiated arbitration agreements.’”62 The California Supreme Court denied Volt’s petition for discretionary review and the Supreme Court of the United States then granted *certiorari.*63

As recognized by various courts addressing this issue, the *Volt* court addresses the importance of enforcing arbitration agreements according to their terms. The Supreme Court in *Volt* dictates “[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the en-

---

55 *Volt*, 489 U.S. at 470.
56 The arbitration clause required any disputes between the parties “arising out of or relating to this contract or the breach thereof” be arbitrated. The choice of law clause read “[t]he Contract shall be governed by the law of the place where the Project is located.” *Id.* at 470.
57 *Id.*
58 *Id.* at 470-71.
59 *Id.* at 471.
60 *Id.* at 471.
61 *Id.*
62 *Id.* at 472 (citations omitted).
63 *Id.* at 472-73.
forceability, according to their terms, of private agreements to arbitrate." The relevant language courts rely upon when analyzing whether parties can contract to expand judicial review begins as follows:

[i]n recognition of Congress’ principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which “require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. [Southland] (finding pre-empted a state statute which rendered agreements to arbitrate certain franchise claims unenforceable); [Perry] (finding pre-empted a state statute which rendered unenforceable private agreements to arbitrate certain wage collection claims).65

The Supreme Court continued:

[b]ut it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, [see Mitsubishi], so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to “rigorously enforce” such agreements according to their terms, [see Byrd], we give affect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.66

i. Volt’s Limiting Language67

The limiting language in Volt includes its pronouncement that the state rules parties wish to apply must neither “undermine the

64 Volt, 489 U.S. at 469.
65 Id. at 478-79.
66 Id. at 470 (emphasis added).
67 The phrases “qualifying language” and “countervailing language” are used throughout this Article and have the same meaning as “limiting language”.

goals and policies of the FAA”68, nor “do[ ] violence to the policies behind the FAA.”69 Other qualifying language includes the statement that preemption only occurs when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”70 A final limiting phrase is the court’s statement that “parties are generally free to structure their arbitration agreements as they see fit.”71 If the Supreme Court had wished for parties to have unfettered discretion to agree to any provision, they would not have used the phrase “generally free,” but would instead have used the word “always,” or a synonym thereof.

While stressing the importance of enforcing parties’ agreements according to their terms, the Volt court unquestionably determined that the FAA did not entirely preempt state arbitration schemes. State arbitration rules would apply if the parties’ intent so evidenced. Courts relying on Volt argue that this premise concerning parties’ intent can be extended to parties’ agreements to expand judicial review. Thus, if parties intend for judicial review beyond that provided for in the FAA, then Article III courts must oblige and apply their agreed upon standards. However, the aforesaid countervailing language suggests that not all state laws would preempt the FAA, irrespective of the parties’ intent. Arguably then, this premise should also be applied to parties’ agreements to expand the FAA’s vacatur provisions.

As will be discussed in more detail, infra, this qualifying language is confusingly not addressed in all the opinions relying on Volt and allowing expansion of the FAA’s vacatur provisions. It is not clear from the language in Volt which standard the Supreme Court wanted the lower courts to apply in a given case. There is no indication that the Supreme Court intended for all the language to mean the same thing and, as demonstrated, infra, the language

---

68 Volt, 489 U.S. at 477-78.
69 Id. at 478-79 (emphasis added); but see, Milana Koptsovska, A Right To Contract For Judicial Review of An Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements?, 36 C TLR 609, 638 (2004) (citations omitted) (In light of Byrd, the Tenth Circuit construed the Supreme Court’s “doing violence” language in Volt as applying to only one policy, “the Act’s overriding purpose of ensuring that private arbitration agreements are enforced according to their terms.”); see also Longo, supra note 10, at 1021-22 (internal quotations and citations omitted).
70 Volt, 489 U.S. at 477 (emphasis added); but see, Enkishev, infra note 200, at 71 (recognizing the phrase in Volt, “without doing violence to the policies behind... the FAA” is “often forgotten” and that “the policy and purpose behind the FAA is to ‘reverse the longstanding judicial hostility to arbitration agreements.’”).
71 Volt, 489 U.S. at 478-79 (emphasis added).
2006] EXPANDED JUDICIAL REVIEW UNDER FAA 13
does not.\textsuperscript{72} Assuming the language does not have the same meaning, there is also no indication as to when or why one standard would apply to a given case, but not to another case. This unclear standard results in ambiguity, confusion and difficulty in predicting when parties’ agreements to apply state law or to expand the FAA’s vacatur provisions will be preempted.

B. \textit{Byrd} and First Options

Various courts and commentators also rely on \textit{Byrd}\textsuperscript{73} and \textit{First Options}\textsuperscript{74} when analyzing whether parties can contract for expanded judicial review. Those courts recognize that pursuant to \textit{Byrd} and \textit{First Options}, the resolution of this issue depends on the balance between the two main purposes underlying the FAA: (i) enforcing parties’ agreements according to their terms and (ii) maintaining arbitral efficiency.\textsuperscript{75}

i. \textit{Byrd}

In \textit{Byrd}, Lamar Byrd (Mr. Byrd) opened a securities account with Dean Witter Reynolds Inc. (Dean Witter).\textsuperscript{76} The parties’ Customer Agreement included an arbitration clause.\textsuperscript{77} Mr. Byrd sued Dean Witter in Federal Court and alleged violations of the Federal Securities Laws and pendent state claims.\textsuperscript{78} Dean Witter argued that the District Court should order arbitration of the pendent state claims, but at the same time stay arbitration of those claims until the federal claims were litigated in federal court.\textsuperscript{79} The District Court denied this request, and the Ninth Circuit Court of Appeals affirmed.\textsuperscript{80}

The question presented to the Supreme Court in \textit{Byrd} was “whether, when a complaint raises both federal securities claims

\textsuperscript{72} See infra at pp. 42-47.
\textsuperscript{73} 470 U.S. at 213.
\textsuperscript{74} 514 U.S. at 938.
\textsuperscript{75} But see, Longo, supra note 10, at 1022-23 (arguing that with the increasing complexity and the lack of empirical research pertaining to the efficiency of arbitration, it is impossible to argue “arbitration is really simpler, more informal, or more expeditious than commercial litigation”).
\textsuperscript{76} \textit{Byrd}, 470 U.S. at 214.
\textsuperscript{77} The arbitration clause stated “[a]ny controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration.” \textit{Id.} at 215 (quotations omitted).
\textsuperscript{78} \textit{Id.} at 214.
\textsuperscript{79} \textit{Id.} at 215.
\textsuperscript{80} \textit{Id.} at 215-16.
and pendent state claims, a Federal District Court may deny a motion to compel arbitration of the state-law claims despite the parties’ agreement to arbitrate their disputes.”81 The Supreme Court held that “the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be possibly inefficient maintenance of separate proceedings in different forums.”82

In reaching this conclusion, the Supreme Court found that the overriding goal of the FAA was not to “promote the expeditious resolution of claims,” but to enforce arbitration agreements to the same extent as any other contracts, according to their terms.83 However, “this is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes.”84

The Supreme Court then compared the FAA’s two main purposes (i) maintaining arbitral efficiency and (ii) enforcing parties’ agreements according to their terms. The court observed:

[we therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is “piecemeal” litigation, at least absent a countervailing policy manifested in another federal statute. [ ] By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.85

About ten years after the Supreme Court addressed the interaction between two of the FAA’s main purposes in Byrd - (i) maintaining arbitral efficiency and (ii) enforcing parties’ agreements according to their terms - the Supreme Court again addressed it in First Options.

81 Id. at 214.
82 Id. at 218.
83 Id. at 219-20 (citing H.R.Rep. No. 68-96, at 1).
84 Id.
85 Id. at 221 (emphasis added).
ii. First Options

First Options concerned a securities dispute. The dispute was between First Options of Chicago, Inc. (First Options), Manuel Kaplan (Mr. Kaplan) and Carol Kaplan (Ms. Kaplan) and Mr. Kaplan’s wholly owned investment company, MK Investments Inc. (MKI). MKI and the Kaplans incurred a substantial amount of debt to First Options after the 1987 stock market crash.

The Kaplans and MKI entered into an agreement to alleviate the Kaplan’s debt load. Of the documents signed by the Kaplans, only a workout agreement signed by MKI contained an arbitration clause. The Kaplans and MKI could not satisfy all of their debts to First Options, and First Options sought arbitration against the Kaplans and MKI to protect its interests. Since only MKI signed the workout agreement containing the arbitration clause, the Kaplans refused to arbitrate. Despite the Kaplans’ objections, the arbitrators decided that they had the power to rule upon the merits of the parties’ dispute and ruled in favor of First Options. The federal district court confirmed the award.

The Third Circuit overruled the district court, and held that the Kaplans did not have to arbitrate their dispute. The Supreme Court granted certiorari to resolve two questions, only one of which is important for purposes of this Article. The important question is, “whether the parties agree[d] to submit the arbitrability question[] itself to arbitration?” The court determined that the terms of the parties’ agreement govern who decides the issue of arbitrability.

The Supreme Court addressed three counter-arguments in support of its position that the Kaplans had to arbitrate made by First Options. The second and third of those are relevant to balancing the FAA’s two most important purposes – maintaining arbi-

---

86 Manuel Kaplan and Carol Kaplan are collectively referred to as “the Kaplans.”
87 First Options, 514 U.S. at 940.
88 Id.
89 Id. at 940-41.
90 Id. at 941.
91 Id. at 941.
92 Id. at 941.
93 Id. at 940.
94 Id. at 940.
95 Id.
96 Id. at 943.
97 Id. at 943.
98 Id. at 946.
tral efficiency and enforcing parties’ agreements according to their terms. The second counter-argument proposed that “permitting parties to argue arbitrability to an arbitrator without being bound by the result would cause delay and waste in the resolution of disputes.”99 The third counter-argument was “that the Arbitration Act [] requires a presumption that the Kaplans agreed to be bound by the arbitrators’ decision, not the contrary.”100

As to the second argument, the court observed it was inconclusive “for factual circumstances vary too greatly to permit a confident conclusion about whether allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination would, in general, slow down the dispute resolution process.”101 In addressing the third argument, the court held it to be legally erroneous and found that “there is no strong arbitration-related policy favoring First Options in respect to its particular argument here.”102

The court then relied upon Byrd, Mastrobuono, Mitsubishi Motors, Allied Bruce and Volt and stated that “the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties.”103

V. COURTS HOLDING PARTIES CAN CONTRACT TO EXPAND JUDICIAL REVIEW104

This first category of courts concludes that, pursuant to Volt, Byrd, First Options and other Supreme Court decisions, parties can contract to expand the FAA’s judicial review provisions.

---

99 First Options, 514 U.S. at 946.
100 Id.
101 Id. at 946-47.
102 Id. at 947.
103 Id. at 947 (internal quotations and citations omitted).
104 This article is not meant to be a comprehensive review of all federal cases dealing with this issue.
2006] EXPANDED JUDICIAL REVIEW UNDER FAA 17

The Fifth Circuit,105 Fourth Circuit,106 Third Circuit,107 the Ninth Circuit’s *Lapine I* majority,108 and Judge Kozinski’s Ninth Circuit *Lapine I* concurrence109 have all held that contractual expansion is appropriate.110 District courts allowing expanded judicial review include the Southern District of New York,111 the District of Columbia,112 the Eastern District of Wisconsin,113 and the District of Massachusetts.114 The Georgia Supreme Court applies the FAA and reached the same conclusion.115

A. Fifth Circuit

In *Gateway Technologies, Inc. v. MCI Telecommunications*, the Fifth Circuit, dealt with a contract containing an expansion clause specifying, “*errors of law shall be subject to appeal.*”116 A dispute

---

105 *Gateway Technologies, Inc. v. MCI Telecommunications*, 64 F.3d 993 (5th Cir 1995); see also *Hughes Training Inc. v. Cook*, 254 F.3d 588, 590, 593 (5th Cir. 2001) *cert. denied*, 534 U.S. 1172 (2002). See, e.g., *Prescott v. Northlake Christian School*, 369 F.3d 491, 494-98 (5th Cir. 2004); *Action Industries, Inc. v. U.S. Fidelity & Guar. Co.*, 358 F.3d 337, 341 (5th Cir. 2004); *Harris v. Parker College of Chiropractic*, 286 F.3d 790 (5th Cir. 2002); *Ford v. NYLCare Health Plans*, 141 F.3d 243, 247 (5th Cir. 1998); see infra at p. 18.


108 *Lapine I*, 130 F.3d at 884; see infra at pp. 18-21.

109 *Lapine I*, 130 F.3d at 891 (Kozinski, J., concurring) [hereinafter “Judge Kozinski’s Ninth Circuit *Lapine I* Concurrence”]; see infra at p. 21.

110 See also *Bargenquast v. Nakano Foods, Inc.*, 243 F. Supp. 772, 774-75 (N.D. Ill. 2003) (describing how the courts allowing expanded judicial review construe *Volt*). Judge Bucklo stated those “circuits allowing expanded review read *Volt* and its progeny to mean that if parties specify in an arbitration agreement that a heightened standard of judicial review is to be applied, courts are obliged to enforce that term of the agreement.”); see infra at pp. 33-36.


116 *Gateway*, 64 F.3d at 995 (emphasis added).
arose and the court held it must abide by the parties’ intent, so errors of law had to be reviewed *de novo*. The *Gateway* court observed:

> [p]rudent or not, the contract expressly and unambiguously provides for review of “errors of law”; to interpret this phrase short of de novo review would render the language meaningless and would frustrate the mutual intent of the parties. When, as here, the parties agree contractually to subject an arbitration award to expanded judicial review, federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract.\(^\text{118}\)

The court also found the FAA is a set of default rules and argued “[o]f course, the FAA would govern review of the arbitration had the contract been silent. However, the FAA does not prohibit parties who voluntarily agree to arbitration from providing contractually for more expansive judicial review of the award.”\(^\text{119}\)

The *Gateway* court’s analysis typifies those courts that argue enforcing parties’ agreements according to their terms always supercedes the affects of expanded judicial review on arbitral efficiency. The court concludes preserving efficiency and quick resolution of disputes are insufficient justifications to undermine the parties’ clear intent for expansive judicial review.\(^\text{120}\)

### B. Fourth Circuit

The Fourth Circuit, in *Syncor International Corp. v. McLeland*, analyzed an arbitration agreement that included the following expanded review provision: “[t]he arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for any such error.”\(^\text{121}\) The court held that since the parties contracted for *de novo* review of errors of law, the court had to abide by the parties’ intentions.\(^\text{122}\)

Although *Syncor* seemingly resolved this issue for the Fourth Circuit, in 1998, Judge Diana Gribbon Motz (Judge Motz), confusingly did not cite *Syncor* when drafting her opinion in *ANR Coal*
2006] EXPANDED JUDICIAL REVIEW UNDER FAA

Co. v. Cogentrix, Inc.123 Judge Motz addressed the expanded review issue in the context of “an agreement to conduct an arbitration under ethical rules adopted by arbitration providers.”124 The court observed that ANR Coal “has failed to cite a single case holding that a failure to disclose in violation of the arbitration rules constitutes an independent basis for vacatur absent proof that, in addition, the nondisclosure proves one of the statutory grounds for vacatur.”125 Accordingly, the court held “[w]hen parties agree to be bound by the AAA rules, those rules do not give a federal court license to vacate an award on grounds other than those set forth in 9 U.S.C. § 10.”126

C. Third Circuit

In Roadway Package System, Inc. v. Kayser, the Third Circuit addressed a choice of law clause reading: “[the contract] shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania.”127 The court concluded, “[w]e now join with the great weight of authority and hold that parties may opt out of the FAA’s off-the-rack vacatur standards and fashion their own (including by referencing state law standards).”128

D. The Ninth Circuit’s Lapine I Majority

Judge Fernandez, writing for the Lapine I majority, addressed an arbitration clause that provided in part as follows:

[i]he arbitrators shall issue a written award which shall state the bases of the award and include detailed findings of fact and conclusions of law. The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators’ findings of fact

124 Id. (citing ANR Coal Co., 173 F3d at 499).
125 ANR Coal Co., 173 F3d at 499-500.
126 Id. at 499.
127 Roadway, 257 F.3d at 289-90.
128 Id. at 292-93.
are not supported by substantial evidence, or (iii) where the arbitrators’ conclusions of law are erroneous.129

Judge Fernandez observed:

[w]e recognize that agreeing to the scope of review by a court is not precisely the same as agreeing to the scope of the arbitration itself. Nevertheless, the standards against which the work of the arbitrator will be measured are inextricably intertwined with the arbitration’s scope, affect its whole structure, and may even encourage the arbitrator to adhere to a high standard of decision making. [...] We perceive no sufficient reason to pay less respect to the review provision than we pay to the myriad of other agreements which the parties have been pleased to make.130

Additionally, with respect to the balance between efficiency and enforcing parties’ agreements according to their terms, the court observed, the “FAA is not an apotropaion designed to avert overburdened court dockets; it was designed to avert interference with the contractual rights of parties.”131 Judge Fernandez, relying on *Fils et Cables d’Acier de Lens v. Midland Metals Corp.*,132 determined judicial efficiency is preserved even if the more expansive scope of review is applied.133 Particularly, he reasoned that, even with expanded review, the presiding court is not responsible for deciding all aspects of a dispute.134 The presiding court has a task “far less searching and time-consuming than a full trial.”135

The Lapine I majority also distinguishes *Chicago Typographical*.136 Judge Fernandez observes:

[the court, however, did not explain what had evoked that pronouncement, nor did it further explain the reasoning behind it. The opinion does not indicate that the parties attempted to confer appellate jurisdiction on the court, nor does it even indicate that the parties had asked for some exotic standard of review. . .137

---


130 *Lapine I*, 130 F.3d at 891 (emphasis added).

131 *Id.*

132 *Fils*, 584 F. Supp. at 242 (emphasis added); see infra pp. 21-22.

133 *Lapine I*, 130 F.3d at 889 (citing *Fils*, 584 F. Supp at 244).

134 *Id.*

135 *Id.*; see infra at p. 59-60 for why a trial is not the proper comparison point.

136 *Id.* at 890 (citing *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991)); see infra at p. 35-39 discussing *Chicago Typographical*.

137 *Lapine I*, 130 F.3d at 890 (emphasis added).
E. Judge Kozinski’s Lapine I Concurrence

Judge Kozinski’s Lapine I concurrence described this as a close case, but found that the parties’ agreement was enforceable.\textsuperscript{138} Judge Kozinski observed that none of the cases cited by the majority allow a party to tell a federal court how to conduct its business, rather they allow litigants to “set the time, place and manner of the arbitration.”\textsuperscript{139} Only Congress has the power to tell courts how to conduct their business.\textsuperscript{140}

Unlike other judges addressing the issue, Judge Kozinski concluded that, by applying a clause expanding judicial review, courts were not doing more work, but, instead, a different type of work.\textsuperscript{141} Although it was a different type of work, Judge Kozinski determined it was similar to the work done by district courts on appeals from administrative agencies, bankruptcy proceedings or habeus corpus petitions.\textsuperscript{142} Due to these similarities, Judge Kozinski held the parties’ agreement could be enforced.\textsuperscript{143}

F. Southern District of New York

The Southern District of New York in \textit{Fils} was confronted with an arbitration clause that read:

The arbitrator shall make findings of fact and shall render an award based thereon and a transcript of the evidence adduced thereat shall, upon request, be made available to either party. Upon an application to the court for an order confirming said award, the court shall have the power to review (1) whether the findings of fact rendered by the arbitrator are, on the entire record of said arbitration proceedings, \textit{supported by substantial evidence}, and (2) whether as a matter of law based on said findings of fact the award should be affirmed, modified or vacated. Upon such determination, judgment shall be entered in favor of either party consistent therewith.\textsuperscript{144}

\textsuperscript{138} \textit{Id.} at 891 (Kozinski, J., concurring).
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Fils}, 584 F. Supp. at 242 (emphasis added).
Judge Connor, writing for the Fils court, held that parties’ agreements to expand judicial review must be enforced unless there is: (i) a convincing jurisdictional or (ii) a public policy argument to inhibit such enforcement.\footnote{145} The court stated that a jurisdictional impediment did not exist, based on the facts before it, because increased jurisdictional review “is not independently jurisdictional in nature.”\footnote{146} This was especially true since independent subject matter jurisdiction already existed.\footnote{147}

The court also observed there was no public policy argument justifying the non-enforcement of the parties’ agreement.\footnote{148} The court defined public policy solely in terms of efficiency, and admitted expanded judicial review negatively impacted efficiency.\footnote{149} The court first observed how much work is required by a court when it conducts an entire trial.\footnote{150} Then, the court observed how much work would be necessary if a court applied the expanded review clause at issue - “review the arbitrators’ findings for substantial evidence and legal validity.”\footnote{151} Next, the court compared the two and found that the burden on a court would be lessened if it applied the parties agreed upon expanded review clause.\footnote{152} As such, the court held parties’ agreements to expand judicial review did not violate either the jurisdictional or public policy prongs, and thus were enforceable.\footnote{153}

G. District Columbia

The Roadway court relied on a District of Columbia case, Flight Systems v. Paul A. Laurence Co., in support of allowing private contractual agreements to supplement the FAA’s vacatur provisions.\footnote{154} The Roadway court relied on this opinion as an example...
of how expansion of judicial review can be accomplished by “referenci-
ing state law standards.”155 During confirmation proceedings, one party argued that the FAA should apply, while Flight Systems argued that Virginia arbitration law (Virginia Code §8.01-581.01 et seq.) applies.156

The Flight Systems court, relying on Volt, analyzed the interac-
tion between federal arbitration law and state arbitration law. The court determined state arbitration law was not preempted unless it “conflicts with” federal law or “stands as an obstacle to the accom-
plishment and execution of the full purposes and objectives of Congress.”157 Based on these propositions, the court concluded the vacatur standards in Virginia’s arbitration law did not directly conflict with, or stand as an obstacle to, the FAA’s goals and, ac-
cordingly, could be applied.158

H. Eastern District of Wisconsin

The Roadway court also construed Flexible Manufacturing Systems v. Super Products Corp.,159 an Eastern District of Wiscon-
sin decision authored by Judge Warren, as allowing expansion of judicial review “by referencing state law standards.”160 Judge War-
ren observed that Volt held the FAA did not preempt all state arbitra-
tion statutes and that preemption only occurs when the state policy “undermines the purpose of the FAA” or “stands as an ob-
stacle to” Congressional statutory intent.161 Relying on Volt, the court held the Wisconsin Arbitration Act did not undermine the FAA’s purposes, and could be applied.162

155 Id.
157 Id. at 1127 (citing Volt, 109 S. Ct. at 1255) (quoting Hines v Davidowitz, 312 U.S. 52, 67 (1941)) (emphasis added); see supra at pp. 11-13; see infra at pp. 39-45.
158 Id. at 1127.
159 Flexible, 874 F.Supp. at 248-49.
160 Roadway, 257 F3d at 293 n. 3 (citing Flexible, 874 F.Supp. at 248).
161 Flexible, 847 F. Supp. at 248-49 (citing Volt, 289 U.S. at 477) (quoting Hines, 312 U.S. at 67) (emphasis added); see supra at pp. 12-13; see infra at pp. 42-47.
162 Flexible, 847 F. Supp. at 249.
I. The District Court of Massachusetts

The District Court of Massachusetts came to the same conclusion in New England Utilities v. Hydro-Quebec. The court analyzed a clause in an arbitration agreement reading:

[the arbitration proceeding shall be conducted in Boston, Massachusetts or such other places as may be agreed to by the parties. In construing this Contract, the Arbitrator shall apply the laws of Quebec. The Arbitrator shall have no power to amend or add to this Contract. Subject to such limitation, the decision of the Arbitrator shall be final and binding on all parties except that any party may petition a court of competent jurisdiction for review of errors of law.]

The court recognized “[t]he First Circuit has not addressed a case like this one wherein parties agreed to expand the scope of judicial review by contract to include review for errors of law.” Relying on a First Circuit decision, however, the court observed, “submission of disputes to this type of forum is totally dependent on the private will of the parties as embodied in whatever contract they have entered into.” Accordingly, the court held review was appropriate because among other reasons, it does not “require diversion from the courts’ normal mode of operation.”

The New England Utilities court also addressed the argument that arbitral efficiency is frustrated if expanded judicial review is permissible. The court rejected the argument that expanded judicial review transforms arbitration “from a commercially useful alternative method of dispute resolution into a burdensome additional step on the march through the court system.” The court also cited First Options and observed, “the basic objective in this

163 See New England Util., 10 F.Supp.2d at 63. The Roadway court relied on this opinion as another example of how expansion of judicial review can be accomplished by “referencing state law standards.” See also, M&L Power Servs., Inc. v. American Networks Int’l, 44 F.Supp.2d 134, 141 (D.R.I.1999) (adopting the reasoning of Volt and New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 6-7 (1st Cir.1988) and holding the FAA only preempts state law to the extent said state law provides lesser protection for arbitration agreements and awards than does federal law. Where state law provides greater or equal protection for arbitration decisions when compared to the FAA, the state law does not conflict with Congress’s policy favoring arbitration.).
164 Id.
165 Id.
166 Id.
167 Id. at 64 (citing Judge Kozinski’s Ninth Circuit Lapine I Concurrence, at 891).
168 Id.
169 Id.
area is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes, . . . but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms.”

The court, relying on Byrd, concluded, “[w]e therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims.”

J. Supreme Court of Georgia

The arbitration clause in Primerica Financial Services, Inc. v. Wise read as follows: “a reviewing court may also vacate, modify or correct the award if the conclusions of law are contrary to law, or if the findings of fact are not supported by the facts (as determined by whether there was any pertinent and material evidence to support the findings.).” The court in Primerica was addressing the FAA, not Georgia’s arbitration statute. The Georgia Supreme Court in Primerica applied the standard agreed upon by parties because it was similar to a standard applied in another class of cases.

VI. COURTS HOLDING PARTIES CANNOT EXPAND JUDICIAL REVIEW

This group of courts argues that those courts willing to enforce parties’ agreements to expand judicial review improperly construe the breadth of Volt, Byrd and First Options. The Tenth Circuit, the Ninth Circuit’s Lapine II en banc decision, and Judge

170 Id. at 64 (citing First Options, 514 U.S. at 947); see also, Moses, supra note 1, at 441 (relying on Byrd and observing “[w]here there is a conflict of goals between (1) speed and flexibility and (2) enforcing the parties’ agreement according to its terms, the Supreme Court, [ ] has had no hesitation in finding that enforcement of the parties’ agreement trumped efficiency, since [t]he preeminent concern of Congress in passing the Act was to enforce private agreements.”).


172 Primerica, 456 S.E. 2d at 633 (emphasis added).

173 Id. at 632-33.

174 Id. at 631.

175 Many of these courts also argue Congress and the federal courts have provided the exclusive standards a court applying the FAA can measure an award against.

176 Bowen v. Amoco Pipeline Company, 254 F.3d 925, 925 (10th Cir. 2001); see infra at pp. 25-29.

Mayer’s *Lapine I* dissent\textsuperscript{178} have held that private parties cannot contract to supplement the vacatur provisions in section 10 of the FAA. The Eighth Circuit\textsuperscript{179} and the Seventh Circuit\textsuperscript{180} have not reached a definitive decision on this issue, but have indicated they would not allow expansion. The Northern District of Illinois\textsuperscript{181} and the Northern District of California\textsuperscript{182} have also held parties cannot contract to expand judicial review.

A. Tenth Circuit

In *Bowen v. Amoco Pipeline Company*, the parties entered into a right of way agreement in 1918.\textsuperscript{183} The original 1918 agreement did not include an expansion of review clause.\textsuperscript{184} A post-1918 agreement between the parties required an appeal of the arbitration award to be made within 30 days of an arbitration “on the grounds that the award is not supported by the evidence.”\textsuperscript{185} Judge Tacha held that, absent clear congressional or judicial authority, parties could not agree to expand the FAA’s vacatur standards.\textsuperscript{186}

Judge Tacha observed, “through the FAA, Congress has provided explicit guidance regarding judicial standards of review of arbitration awards.”\textsuperscript{187} Additionally, “[t]he decisions directing courts to honor parties’ agreements and to resolve close questions in favor of arbitration simply do not dictate that courts submit to

\textsuperscript{178} LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir.1997) (overruled) (Mayer J., dissenting) [hereinafter “Judge Mayer’s *Lapine I* Dissent”]; see infra at pp. 30-31.

\textsuperscript{179} UHC Management Co. v. Computer Sciences Corp., 148 F.3d 992, 998 (8th Cir.1998); see also, Delta Mine Holding Co. v. AFC Coal Properties, Inc., 280 F.3d 815, 820 (8th Cir.2001); Schoch v. Infousa, Inc., 341 F.3d 785 (8th Cir. 2003); see infra at pp. 30-32.

\textsuperscript{180} Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983); see infra at pp. 33-34.

This Circuit’s decision in *Chicago Typographical* falls into Category Three.

\textsuperscript{181} Bargenquast v. Nakano Foods, Inc., 243 F. Supp. 772 (N.D. Ill. 2003); see infra at pp. 31-33.

\textsuperscript{182} *Northern District I*, 909 F.Supp. at 699 (overruled); see infra at pp. 33-35.

\textsuperscript{183} *Bowen*, 254 F.3d at 930.

\textsuperscript{184} *Id.* at 930; see also, *Longo*, supra note 10, at 1023-24 (arguing the *Bowen* holding should be limited to its facts, because the clause specifying expanded judicial review was not part of the parties’ original 1918 agreement, but only a “separate, post-1918 addition”, and thus, not a material portion of the arbitration agreement. Further, “[s]uch a separate contract to expand judicial review, not relied upon by the parties when they initially decided to arbitrate, could fairly be characterized as an abuse of the federal judiciary, or what Judge Posner [in *Chicago Typographical*] calls an attempt to create federal jurisdiction by contract.”) (citation omitted).

\textsuperscript{185} *Bowen*, 254 F.3d at 930 (emphasis added).

\textsuperscript{186} *Id.* at 937.

\textsuperscript{187} *Id.* at 934.
varying standards of review imposed by private contract.”¹⁸⁸ In other words, there is something inherently different between a court honoring an agreement to conduct an arbitration in a certain manner and a court enforcing an agreement concerning its powers to review an arbitration award. Furthermore, Judge Tacha recognized the Supreme Court has never said that “parties are free to interfere with the judicial process” or, specifically, “how federal courts review arbitration awards.”¹⁸⁹

Judge Tacha also observed that the Volt court enforced the contract it was addressing because it “[gave] affect to the contractual rights and expectations of the parties without doing violence to the policies behind . . . the FAA.”¹⁹⁰ Based on this statement from Volt, the Tenth Circuit posed the following question around which it framed its analysis: “[does] the alternate rule [conflict] with the federal policies furthered by the FAA[?]”¹⁹¹ Pursuant to this test, the Bowen court concluded the parties’ agreement to expand the FAA’s judicial review provisions conflicted with the federal policies furthered by the FAA and accordingly refused to enforce the agreement.¹⁹²

The Bowen court also observed that when consenting to arbitration “a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”¹⁹³ Moreover, “expanded judicial review would require arbitrators to issue written opinions with conclusions of law and findings of fact further sacrificing the simplicity, expediency, and cost-effectiveness of arbitration. . . .”¹⁹⁴

Judge Tacha admitted that the court would be doing less work if it allowed expanded judicial review than if the court had to hear a dispute from beginning to end.¹⁹⁵ However, he did not concentrate on the volume of work, but rather on how courts would be doing different work.¹⁹⁶ The Tenth Circuit then concluded that this

---

¹⁸⁸ Id.
¹⁸⁹ Id.
¹⁹⁰ Bowen, 254 F.3d at 934 (quoting Volt, 489 at 479) (emphasis in original) (quotations omitted).
¹⁹¹ Id. at 935; see also, Longo, supra note 10, at 1021-22; see supra at pp. 11-12; see infra at pp. 42-47.
¹⁹² Bowen, 254 F.3d at 937 (emphasis added).
¹⁹³ Id. at 932 (citing Brown v. Coleman Co., 220 F.3d 1180, 1182 (10th Cir.2000) (quoting Gilmer, 500 U.S. at 31)).
¹⁹⁴ Id. at 936 n.7.
¹⁹⁵ Bowen, 254 F.3d at 935-36 (citing Lapine II, 130 F.3d at 889-90).
¹⁹⁶ Id. at 936 (citing Judge Koziński’s Ninth Circuit Lapine I Concurrence, at 891); See also, UHC, 148 F.3d at 998.
different work would force “courts to apply unfamiliar rules and procedures.”

The Bowen court, relying on W.R. Grace & Co. v. Local Union also addressed the FAA’s finality purpose. It recognized:

because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

Additionally, if expanded judicial review was allowed:

rather than providing a single instance of dispute resolution with limited review, arbitration would become yet another step on the ladder of litigation. The drafters of the Revised Uniform Arbitration Act (RUAA) recognized these concerns, noting that expanded judicial review would allow parties a second bite at the apple on the merits [which] affectively eviscerates arbitration as a true alternative to traditional litigation.

The Bowen court then concluded limited review “ensures judicial respect for the arbitration process and prevents the courts from enforcing parties’ agreements to arbitrate only to refuse to respect the results of the arbitration.”

B. Ninth Circuit’s Lapine II en banc decision

The Ninth Circuit, in its Lapine II en banc decision, found that Congress established the sole standards a federal court may apply when reviewing an arbitration award. Also, “Congress nowhere intimated that the federal courts were authorized to apply any

197 Bowen, 245 F.3d at 936 (citing Agfa-Gevaert, A.G. v. A.B. Dick Co., 879 F.2d 1518, 1525 (7th Cir.1989)).
200 Bowen, 254 F.3d at 936 n. 7 (internal quotations omitted)( internal citations omitted) (emphasis added); see also, Ilya Enkishev, Above the Law: Practical and Philosophical Implications of Contracting For Expanded Judicial Review, 3 J.AM. Arb. 61, 71 (2004) (arguing that “[p]rivately contracted expansion of judicial review does nothing more than allow courts to overturn the results achieved in arbitration. Moreover, such contract provisions destroy the autonomy and freedom of arbitration by making arbitration awards subject to a review on the merits”).
201 Bowen, 254 F.3d at 935 (emphasis added).
202 Lapine II, 341 F. 3d at 996.
other standard” than those in the FAA. As such, parties cannot impose their own standards on the courts.

Judge Reinhardt, writing for the Lapine II court, “agree[d] with the Seventh, Eighth, and Tenth Circuits that private parties have no power to determine the rules by which federal courts proceed, especially when Congress has explicitly prescribed those standards.” The Lapine II court also made an interesting observation concerning the reach of parties’ contractual rights. The court observed:

[p]ursuant to [Volt.], parties have complete freedom to contractually modify the arbitration process by designing whatever procedures and systems they think will best meet their needs—including review by one or more appellate arbitration panels. Once a case reaches the federal courts, however, the private arbitration process is complete, and because Congress has specified standards for confirming an arbitration award, federal courts must act pursuant to those standards and no others. Private parties’ freedom to fashion their own arbitration process has no bearing whatsoever on their inability to amend the statutorily prescribed standards governing federal court review. Even when Congress is silent on the matter, private parties lack the power to dictate how the federal courts conduct the business of resolving disputes. A fortiori, private parties lack the power to dictate a

\[^{203}\] Id. at 998.

\[^{204}\] Id.

\[^{205}\] Id. at 1000. Although the Lapine II majority did not explicitly say so, it adopted much of Judge Mayer’s Lapine I dissent, especially his conclusion. But see, Lapine II, 341 F. 3d at 1004 (Judge Rymer and Judge Trott wrote a separate statement vociferously condemning the re-hearing of this case by an en banc panel); Moses, supra note 1, at 440 (commenting on Judge Rymer’s and Judge Trott’s statement and arguing en banc hearing was “improvidently granted because the issue is not dispositive, does not matter to the parties, was not identified as an issue on appeal, was not thoroughly vented in oral or written argument, is not inconsistent with Ninth Circuit precedent, and does not resolve a circuit split.”).

\[^{206}\] Id. at 1000 (citing Worth v. Tyer, 276 F.3d 249, 262 n.4 (7th Cir. 2001) (“However, the court, not the parties, must determine the standard of review. . . .”) (emphasis added); K & T Enters., Inc. v. Zurich Ins. Co., 97 F.3d 171, 175 (6th Cir. 1996); United States v. Vontsteen, 950 F.2d 1086, 1091 (5th Cir. 1992) (“The parties’ failure to brief and argue properly the appropriate standard may lead the court to choose the wrong standard. But no party has the power to control our standard of review.”) (emphasis added)); see also Jones v. Metropolitan Life Ins. Co., 385 F.3d 654, 660 n. 4 (6th Cir. 2004); Whitehead v. Food Max of Mississippi, Inc., 163 F.3d 265, 270 (5th Cir. 1998); U.S. v. Milton, 147 F.3d 414, 420 n.* (5th Cir. 1998) (quoting Vontsteen, 950 F.2d at 1091); St. Tammany Parish School Bd. v. State of La., 142 F.3d 776 (5th Cir. 1998) (quoting Vontsteen, 950 F.2d at 1091); Vizcaino v. Microsoft Corp., 120 F.3d 1006 n.4 (9th Cir. 1997) (en banc) (O’Scannlain, J, concurring in part and dissenting in part); United States v. Pierre, 958 F.2d 1304, 1311 n. 1 (5th Cir.1992) (en banc) (quoting Vontsteen, 950 F.2d at 1091); but see, Moses, supra note 1, at 441-443 (distinguishing between standards of review and grounds of
broad standard of review when Congress has specifically pre-
scribed a narrower standard.” 207

Further, akin to Judge Ingram’s analysis in Northern District I,
Judge Reinhardt’s opinion emphasized various benefits of arbitra-
tion, including informality, privacy, speed and economy. 208 Like
Northern District I, the Lapine II court stated this appeal “would
require a detailed examination of California law and the applica-
tion of that law to a factual record spanning several years and
many thousands of pages.” 209 Judge Reinhardt observed these
benefits would be sacrificed if a lengthy judicial review process
were permissible. 210 Accordingly, the court concluded, “we correct
the law of the circuit regarding the proper standard for review of arbitral decision under the Federal Arbitration Act.” 211

C. Judge Mayer’s Lapine I Dissent

Judge Mayer, in his Lapine I dissent, argued the parties’ agree-
ment 212 was unenforceable. 213 Like Judge Ingram’s Northern Dis-
trict I opinion, Judge Mayer distinguishes Volt. 214 He also explicitly
states what Northern District I merely implied – that there is no
statutory authority allowing parties to tell Article III judges how to
do their jobs. 215

D. Eighth Circuit

The Eighth Circuit has not conclusively resolved the issue of
expanded judicial review, but hinted at how it would rule when

---

207 Lapine II, 341 F.3d at 1000 (emphasis added).
208 Id. at 998; but see, Moses, supra note 1, at 445 (2004) (relying upon Byrd, noting “Where
there is a conflict of goals between (1) speed and flexibility and (2) enforcing the parties’ agree-
ment according to its terms, the Supreme Court, as noted earlier, has had no hesitation in finding
that enforcement of the parties’ agreement trumped efficiency, since [t]he preeminent concern
of Congress in passing the Act was to enforce private agreements.”).
209 Lapine II, 341 F.3d at 996
210 Id. at 998.
211 Id. at 994.
212 See supra at pp. 18-20 for text of agreement.
213 Judge Mayer’s Lapine I Dissent, at 891.
214 Id.
215 Id.
EXPANDED JUDICIAL REVIEW UNDER FAA

squarely confronted by it. In UHC Management Co. v. Computer Sciences Corp., the court observed:

[although Computer Sciences’ argument raises an interesting question, we are content to reserve its resolution for a time when circumstances require it. Assuming that it is possible to contract for expanded judicial review of an arbitration award, the parties’ intent to do so must be clearly and unmistakably expressed. (citation and parenthetical omitted). In contrast to the agreements at issue in [Lapine] and [Gateway], the present agreement does not manifest such an intent. To the contrary, UHC and Computer Sciences agreed to arbitration that would be “binding,” rather than merely constituting a trial run of their claims precedent to a merits disposition in federal court. Thus, the district court correctly reviewed the award under the narrow standards of the FAA.216

However, the court also observed that “Congress did not authorize de novo review of [an arbitration award] on its merits; it commanded that when the exceptions [in the FAA] do not apply, a federal court has no choice but to confirm.”217

The Eighth Circuit made a similar remark in Delta Mine Holding Co. v, AFC Coal Properties, Inc.218 when it observed that “arbitration rules and ethical codes ‘do not have the force of law[ ]’” and that a reviewing court is required to “focus exclusively on [the] statutory grounds” in deciding whether the arbitrator’s conduct required the arbitration award to be set aside.219

In Schoch v. Infousa, Inc., the Eighth Circuit again revisited the issue of expanded judicial review without reaching a conclusion.220 The court refused to adopt the Bowen court’s reasoning, but reiterated the same skepticism about expansion of judicial review as was expressed in UHC and Delta Mine Holding.221 The Schoch court observed that allowing supplemental review under the FAA “would seemingly amend the FAA, crown arbitrators

216 UHC, 148 F.3d at 998.
217 UHC, 148 F.3d at 997.
218 Delta Mine Holding, 280 F.3d at 820.
219 Id. at 820.
220 Schoch, 341 F.3d at 785.
221 Schoch, 341 F.3d at 789 n.3; see also, Longo, supra note 10, at 1019 (observing the UHC court “explicitly reserve[d] the question of expansion of judicial review for another time” and that “in dicta, did not allow the argument for contractual expansion to get very far.”); but see, Longo, supra note 10, at 1019 n. 122 (observing the Schoch court like the UHC court reserved judgment on the issue until the parties evidenced the requisite intent, and arguing “the Eighth Circuit may be sympathetic to parties that rely on an unambiguous expansion of judicial review as a material part of their contract to arbitrate.”).
mini-district courts, force federal trial courts to sit as appellate courts, and completely transform the nature of arbitration and judicial review.\textsuperscript{222}

The Schoch court also made two observations about efficiency and finality. First, relying on Hoffman v. Cargill, Inc., the court observed:

\begin{quote}
[a]rbitration is not a perfect system of justice, nor is it designed to be. [W]here arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication. \textit{Arbitration is designed primarily to avoid the complex, time-consuming and costly alternative of litigation}.\textsuperscript{223}
\end{quote}

The court also relied on Eljer Manufacturing, Inc. v. Kowin Development Corp., which stated:

\begin{quote}
[a]rbitration \textit{does not provide a system of junior varsity trial courts’ offering the losing party complete and rigorous de novo review}. It is a private system of justice offering benefits of reduced delay and expense. A restrictive standard of review is necessary to preserve these benefits and to prevent arbitration from becoming a ‘preliminary step to judicial resolution’\textsuperscript{224}
\end{quote}

E. Seventh Circuit

\textit{Mariner Financial Group, Inc. v. Bossley}, a Texas Supreme Court case, determined that a Seventh Circuit decision authored by Judge Posner, \textit{Merit Insurance Co. v. Leatherby Insurance Co.}, refused to honor an expanded judicial review clause.\textsuperscript{225} In construing a potential conflict of interest exhibited by an arbitrator, Judge Posner observed in \textit{Merit}: “even if the [arbitrator’s] failure to disclose was a material violation of the ethical standards applicable to arbitration proceedings, it does not follow that the arbitration award may be nullified judicially.”\textsuperscript{226}

Judge Posner continued:

\begin{itemize}
  \item \textsuperscript{222} Schoch, 341 F.3d at 789 n. 3 (emphasis added).
  \item \textsuperscript{223} \textit{Id.} at 789 (quoting Hoffman v. Cargill, Inc., 236 F.3d, 458, 462 (8th Cir. 2001)) (citations omitted) (internal quotations omitted).
  \item \textsuperscript{224} \textit{Id.} (quoting Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994)) (citations omitted) (emphasis added) (internal quotations omitted).
  \item \textsuperscript{225} \textit{Mariner}, 79 S.W.3d at 45 (citing \textit{Merit}, 714 F.2d at 680-681).
  \item \textsuperscript{226} \textit{Merit}, 714 F.2d at 680.
\end{itemize}
[a]lthough we have great respect for the Commercial Arbitration Rules and the Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award’s validity under section 10 of the United States Arbitration Act . . . . The arbitration rules and code do not have the force of law. . . . [T]o get the arbitration award set aside [the aggrieved party] must bring itself within the statute . . . . The statute specifies limited grounds for setting aside an arbitration award. * * * The American Arbitration Association . . . may set its standards as high or low as it thinks its customers want. The statute has a different purpose—to make arbitration affective by putting the coercive force of the federal courts behind arbitration decrees that affect interstate commerce or are otherwise of federal concern . . . . The standards for judicial intervention are therefore narrowly drawn to assure the basic integrity of the arbitration process without meddling in it . . . . The fact that the AAA went beyond the statutory standards in drafting its own code of ethics does not lower the threshold for judicial intervention.227

F. Northern District of Illinois

Judge Bucklo, writing for the Northern District of Illinois concluded, “[a]bsent such explicit authority from Congress, the Supreme Court, or the Seventh Circuit, I will not defer to parties’ agreement to alter the well-established narrow standard of review.”228 In Bargenquast v. Nakano Foods, Inc., the court reached the same conclusion as Bowen, but relied on the “doing violence” language instead of the “conflict with” language the Bowen court formulated. Judge Bucklo determined the arbitration clause was not enforceable because violence was done to the policies underlying the FAA.229

Judge Bucklo also observed the work required of courts in reviewing arbitration awards is different than the work in which courts generally engage.230 The work places the court “in the awkward position of reviewing proceedings conducted under potentially unfamiliar rules and procedures[.]”231 Further, the

227 Id. at 681 (emphasis added).
228 Bargenquast, 243 F.Supp.2d at 776.
229 Id. at 775 (citing Bowen, 254 F.3d at 925).
230 Id.
231 Id. (quoting Agfa-Gevaert, 879 F.2d at 1525 (The Seventh Circuit has stated “[p]arties cannot by contract require a court to follow procedures unfamiliar to it.”)); see supra at pp. 27-30 for a more detailed discussion of this issue.
Bargenquast court recognized that “allowing parties to contract for a heightened standard of judicial review would undermine FAA policies such as ‘the independence of the arbitration process and . . . finality of arbitration awards.’”

G. Northern District of California

Northern District I held that private parties cannot agree to expand the FAA’s review provisions because the practice is offensive to public policy. The public policy referred to by Northern District I concerns how arbitration was meant to be a “quick and informal alternative mode of dispute resolution.” In other words, arbitration can be “less time consuming and procedurally less complicated than [ ] a trial.”

Judge Ingram, writing for Northern District I observed:

[both Volt and Mastrobuouno] concern the powers of disputing parties to contractually specify matters pertaining to the subject matter and rules of arbitration between them [and are not] helpful because they do not deal with contractually agreed appellate review of arbitration awards. As stated in [Chicago Typographical], the parties may contract freely with respect to the manner in which they may arbitrate their disputes, but enlargement of judicial powers of review by contract does not lie within their competence.

Judge Ingram also noted that any provision expanding judicial review “assume[s] the prerogative of Congress, in that they presume to direct this court as to the substance and parameters of its exercise of judicial power.”

Judge Ingram relied on two Seventh Circuit Cases. He observed:

[from the totality of the [General Fire] holding it may be gleaned that parties may fully regulate by agreement the conduct of arbitration proceedings: they may agree to simplify the subsequent adjudicatory process by stipulation, but they may not enlarge the adjudicatory process by enlarging the limits

---

232 Bargenquast, 243 F.Supp.2d at 775 (emphasis added).
233 Northern District I, 909 F. Supp. at 706.
234 Id.
235 Id.
236 Id.
237 Id.
upon it set by statute. This would amount to statutory amendment by private persons."238

He continued:

[w]hile a court may have subject matter jurisdiction over the substance of a cause subject to arbitration, whether under diversity jurisdiction or otherwise, its power to adjudicate in the exercise of that jurisdiction, particularly where conferred by statute as here, cannot be changed or altered by the agreement of the parties. The role of the federal courts cannot be subverted to serve private interests at the whim of contracting parties.239

Northern District I also examined the Fils court’s assessment of how expanded judicial review affects the speed and simplicity of arbitration. This Court came to the opposite conclusion. Judge Ingram recognized that based on the facts before Fils, that court was correct in holding arbitration would still be “a quick and informal alternative mode of dispute resolution” compared to what is required during a trial.240

However, Judge Ingram determined this argument was not compelling based on the facts before his court.241 Specifically, he observed the expanded review described in the arbitration clause would require the court to redo the four-year fact finding mission the arbitrators already completed.242 The arbitrators had already produced a vast record, including hundreds of thousands of exhibits.243 In sum, Judge Ingram found that based on the facts before him, expanded judicial review “is offensive to the public policy which supports arbitration and those aspects of arbitration which are beneficial to the parties as well as to the courts whose responsibilities are eased by alternative forms of dispute resolution.”244

Further, Northern District I also recognized the importance of finality. It observed:

[j]udicial review of arbitration awards is tightly limited; perhaps it ought not to be called “review” at all. By including an arbitration clause in their contract the parties agree to submit disputes arising out of a contract to a nonjudicial forum, and we do not

238 Northern District I, 909 F. Supp. at 705 (citing DDI Seamless Cylinder v. General Fire Extinguisher, 14 F.3d 1163 (7th Cir.1994)) (emphasis added).
239 Northern District I, 909 F. Supp. at 702 (citing Chicago Typographical, 935 F.2d at 1505) (emphasis added).
240 Id.
241 Id. at 706.
242 Id.
243 Id.
244 Id. (emphasis added).
allow the disappointed party to bring his dispute into court by the back door, arguing that he is entitled to appellate review of the arbitrators’ decision.245

VII. COURTS ADVOCATING AN APPELLATE ARBITRATION PANEL

A third group of courts do not reject the idea of all types of judicial review, only those contracts specifying that Article III judges conduct the review. Judge Posner, writing for the Seventh Circuit in Chicago Typographical, was the first judge to argue that parties can contract to have an appellate arbitration panel review an arbitration award. He observed: “[i]f the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award. But they cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract.”246

VIII. COURTS DRAWING A BLURRY LINE AROUND WHICH PARTIES CAN CONTRACT

The fourth group of courts draws a line that puts parties on notice about the limits of contracting for expanded judicial review. In his Lapine I concurrence, Judge Kozinski drew an extremely blurry line after agreeing to enforce the parties’ contract to expand judicial review beyond the FAA’s vacatur provisions.247 Judge Kozinski said he “would call the case differently if the agreement provided that the district judge would review the award by flipping

245 Northern District I, 909 F. Supp. at 702 (quoting Bavarati, 28 F.3d at 706).
246 Chicago Typographical, 935 F.2d at 1505. Various courts, including Judge Mayer’s dissenting opinion in Lapine I, Lapine II’s en banc decision, Bowen and the Eighth Circuit’s decision in UHC, have relied on Judge Posner’s decision to hold parties can contract to have one or more appellate arbitration panels review their dispute. On the other hand, various courts and commentators have relegated Judge Posner’s discussion to the realm of dicta. See Lapine I, 130 F.3d at 890; Longo, supra note 10, at 1016; Edward Brunet, Replacing Folklore Arbitration With A Contract Model of Arbitration, 74 Tul. L. Rev. 39, 69-71 (1999). The discussion is arguably dicta, because two contracting parties were not attempting to expand the scope of §10 or §11 of the FAA. However, the decision foreshadows what the Seventh Circuit might do if confronted with this issue in the future. This can be seen by Judge Posner’s decision in Merit, 714 F.2d at 680-681 (see supra notes 225 and 226) and in how the Northern District of Illinois relied on Judge Posner’s decisions when deciding Bargenquast (see supra notes 228 through 232).
247 Lapine I, 130 F.3d at 891.
a coin or studying the entrails of a dead fowl."248 Since the parties’ agreement did not go to such an extreme, the court would enforce the agreement.

The District of Massachusetts, in *New England Utilities*, relied on Judge Kozinski’s concurrence in addressing an argument concerning how much power private contracts should have over the functioning of the judiciary.249 The court discounted the concern that private parties had too much power. It relied on Judge Kozinski’s observation that expanded contractual review is appropriate if it does not “require diversion from the courts’ normal mode of operation.”250 Since the parties’ contract to expand judicial review did not require the court to flip a coin or study the entrails of dead fowl, it was enforceable.251

IX. Analysis

The split among the circuit and district courts surrounding this issue has created substantial confusion. In part, this confusion results from weaknesses in the various arguments courts comprising the four categories make to support their conclusions.

A. Textual and Legislative History Argument

The courts allowing expanded judicial review, category one, and other categories addressing the expansion issue, pay insufficient attention to the text of the FAA and its legislative history.252 It is important to concentrate on how the words “must” and “pre-
scribed in” are used in Section 9 of the FAA. The use of the words “must” and “prescribed in” demonstrate the limited role Congress envisioned the courts would play in the arbitration process. If Congress intended to implement a flexible approach, they would have used the words “may” or “should” or “can”, instead of the word “must”. Similarly, instead of modifying the word “in” with the word “prescribed”, the court could have used the word “in” alone. The use of the word “prescribed” further demonstrates the hands off approach Congress envisioned for reviewing courts to take. Although Section 9 does not directly speak to the issue of parties’ contracting to expand judicial review, the use of the aforementioned language does offer some insight into Congress’ intent.

Like the text of the FAA, the legislative history offers certain, albeit minimal, insights into Congress’ intent regarding this issue. There is not much in the legislative history that says parties can contract to expand judicial review. However, one brief utilized by Congress and made part of the Senate hearings was very forceful in its emphasis on the limited scope of judicial review. The brief began: “[t]he courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced.” The brief then further explained this position, stating:


[t]his exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means—cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.

Although this language does not directly speak to the enforcement of private parties’ agreements, the use of the phrase “only when” is significant. These words imply, if not direct, that the only time an arbitration award can be vacated, regardless of parties’ intent, is when one of the FAA’s four enumerated vacatur provisions is satisfied.

253 Section 9 of the FAA reads “the court must grant such an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the FAA].” 9 U.S.C. § 9 (LEXIS through P.L. 109-287, Sept. 27, 2006) (emphasis added).

254 Siegel, 79 Cal.Rptr.2d at 739 (citing Statement of W.W. Nichols, Hearings on the Subject of Interstate Commercial Disputes Before the Subcommittees on the Judiciary, 68th Cong., 36 (1924)) (quotations omitted) (emphasis added).

255 Id. (quotations omitted) (emphasis added).
2006\ EXPANDED JUDICIAL REVIEW UNDER FAA \ 39

This provision in the legislative history, combined with the text of Section 9, arguably undermines the view of those courts that allow for expanded judicial review.

B. The Logical Extension of Those Courts Allowing Expanded Judicial Review

Taken to its logical conclusion, the reasoning of those courts allowing expanded judicial review would necessitate enforcing parties’ contracts abolishing all judicial review of arbitration awards, because courts in category one mandate abiding by the contracting parties’ intentions. Contracting to remove all judicial review of arbitration agreements would entirely undermine the checks and balances provided by Congress in the FAA that govern the interaction between the arbitral process and Article III courts.\footnote{See supra at pp. 1-2, discussing §§10 and 11 of the FAA.} None of the courts in category one had the foresight to recognize this implication of their analysis.\footnote{See supra at pp. 16-26.}

Only the courts that have concluded parties cannot contract to expand judicial review have recognized the problems inherent in undermining those checks and balances. The courts have reached mixed conclusions and generally only discuss the issue in dicta. For example, the Tenth Circuit in \textit{Bowen} addressed this issue and found “although parties to an arbitration agreement may eliminate judicial review by contract, their intention to do so must be clear and unequivocal.”\footnote{Bowen, 254 F.3d at 931 (quoting Dep’t of the Air Force v. Fed. Labor Relations Auth., 775 F.2d 727, 733 (6th Cir. 1985) (holding that parties did not completely waive right to appeal when agreement specified “further rights of appeal are hereby waived except that all articles must be in conformance with law and Executive Order”) and quoting Aerojet-Gen. Corp. v. Am. Arbitration Ass’n, 478 F.2d 248, 251 (9th Cir. 1973) (“While it has been held that parties to an arbitration can agree to eliminate all court review of the proceedings, the intention to do so must clearly appear.”)) (citations omitted) (emphasis added); \textit{see also}, Neuger v. Fine Realty, Inc., No. C-790389, 1980 WL 352922 (Ohio App. Dist. 1980) (citing various cases for the proposition that parties can agree to waive their rights to appeal).}

In addition, the \textit{Lapine II} court addressed this issue and found that “the decision to contract for a narrower standard of review than the courts generally apply in the absence of a statutory command is a decision that \textit{may be less troublesome} than the attempt to
contract for a broader standard of review than that authorized by Congress.”

The Second Circuit, in *Hoeft*, addressed this issue most thoroughly and convincingly. Judge Parker, writing for the *Hoeft* court, observed that:

there is a fundamental difference between an agreement to increase the scrutiny that courts apply when considering whether to confirm or vacate an arbitration award and an agreement to prevent courts from reviewing the substance of an arbitration award at all.

Judge Parker continued and recognized:

*Parties seeking to enforce arbitration awards through federal-court confirmation judgments may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliance with § 10(a) and the manifest disregard standard...* Arbitration agreements are private contracts, but at the end of the process the successful party may obtain a judgment affording resort to the potent public legal remedies available to judgment creditors. In enacting § 10(a), Congress impressed limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct. This balance would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards, flawed for any of these reasons, must nevertheless be blessed by federal courts. Since federal courts are not rubber stamps, parties may not, by private agree-

---

259 *Lapine II*, 341 F.3d at 998-99 n.16 (observing that the Second Circuit and the Supreme Court have “skirted the issue.”) (emphasis added). The Second Circuit, in Westinghouse Elec. Corp. v. N.Y. City Transit Auth., 14 F.3d 818, 821-23 (2d Cir. 1994), addressed this issue, but pursuant to New York State Law, not the FAA. Additionally, the *Lapine II* court recognized that the Supreme Court, in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 104-115, (1989), addressed this issue in dicta and in the ERISA context. The *Firestone* Court hinted “that parties might be able in some circumstances to contract for a narrower standard of review than that normally applied under federal common law.” However, the *Lapine II* court found *Firestone* readily distinguishable. Unlike the FAA, which provides the standard of review courts should apply directly in its text, see 9 U.S.C. §§ 9-11, the ERISA statute includes no such direction.

260 *Hoeft*, 343 F.3d at 57.

261 *Id.* at 64 (emphasis added).
2006] EXPANDED JUDICIAL REVIEW UNDER FAA

ment, relieve them of their obligation to review arbitration awards for compliance with § 10(a).\textsuperscript{262}

This “fundamental difference” stressed by Hoeft is irreconcilable with the argument made by the category one courts that enforcing parties’ agreements according to their terms is the only FAA purpose worth considering. Therefore, in order for category one courts to adequately address this issue, they must discuss what they would do if parties wished to eliminate all judicial review via contract.

C. Slippery Slope

The approach taken by category one courts, which allows for expanded judicial review, does take into account the slippery slope created by their decisions. If the District Court must always enforce clauses in parties’ arbitration agreements expanding judicial review, it is arguable that the Circuit Courts and Supreme Court must also apply private parties’ agreements setting the standard of review.

D. Existence of Manifest Disregard of the Law and Other Standards of Review Outside Sections 10 and 11 of the FAA

The category two courts do not sufficiently deal with how all the federal circuits have recognized grounds for judicial review not included in the FAA’s text. Specifically, these Courts, which do not sufficiently recognize parties’ right to contractually expand judicial review, do not discuss how recognizing manifest disregard of the law and the like differ from private contractual expansion of judicial review. Also, these courts do not reconcile how the words “must” and “prescribed in” can be used when describing the interaction between section 9 and sections 10 and 11 of the FAA and how judicially proscribed standards like manifest disregard of the law and the like can coexist.\textsuperscript{263} Significantly, all circuits now recog-

\textsuperscript{262} \textit{Id.} at 66 and 64 (emphasis added); \textit{but see} Aerojet-General, 478 F2d at 251 (recognizing how certain courts have allowed the elimination of all judicial review if explicit intent to do so is demonstrated).

\textsuperscript{263} \textit{See supra} at pp. 1 and 37-38.
nize “manifest disregard of the law” as another rationale for vacating an arbitration award. Some of the Circuits recognizing manifest disregard of the law, refer to that standard as “completely irrational.” Some courts will also vacate an award where it is determined to be arbitrary or capricious. Other courts apply a standard enabling them to vacate an award where it is contrary to public policy. In addition, another rationale will lead a court to vacate an award where it fails to draw its essence from the underlying contract.

At least one scholar, Margaret Moses, argues that the recognition of the “manifest disregard of the law” standard by Article III judges is indistinguishable from an agreement between private parties to expand the judicial review of an arbitration award beyond the four recognized vacatur provisions in Section 10. Specifically, the scholar argues that “[a]pparently, the court views the grounds in the statute as mandatory for parties, but not for judges.” This same argument can be extended to all of the other court-created exceptions.

However, while this reasoning is initially appealing, there are crucial shortcomings that must be recognized. First, it is the responsibility of Article III courts to interpret and elaborate on federal statutes if Congress’ intent so evidences. Second, the FAA does not allow private parties, even contracting ones, to expand an Article III court’s scope of review, which is predetermined by Congress. Third, courts that enforce parties’ enhanced standards of review do not rely on any authority to do so. In fact, it is the courts,
not the parties, that are responsible for determining the applicable standard of review. Finally, the existence of the circuit split, whereby certain courts refuse to allow expanded judicial review, undercuts the argument that judicial recognition of forms of review outside of the face of the FAA is the same as individuals contracting for expanded judicial review.

E. Volt’s Limiting Language

All four categories of courts addressing whether parties can agree to expand judicial review rely on the Supreme Court’s decision in Volt to support their respective positions. Many of the courts ignore Volt’s limiting language, and others cherry pick the language in Volt that supports their respective position. None of the courts addressing this issue concentrate on all of Volt’s limiting language.

The courts and judges, such as those in Northern District I, Lapine I, Lapine II, Gateway, Syncor, ANR Coal, Roadway, that do not at least discuss the countervailing language in Volt – among various others – are very disingenuous, considering the emphasis they put on other portions of Volt. They neither attempt to explain away the language’s significance by arguing it is ambiguous, nor apply it to parties’ agreements to expand judicial review. Instead, they choose to ignore the language.

It is not surprising that the only Circuit Court that applies portions of this language to the issue of whether parties can expand

272 See supra at pp. 28-30.
273 See supra note 68.
274 See supra at pp. 11-12 for Volt’s limiting language.
275 Surprisingly, the category two courts that do not allow parties to contract for expanded judicial review, do not rely on this limiting language. The language arguably favors the position of those courts.
276 See supra at pp. 33-35.
277 See supra at pp 18-21.
278 See supra at pp. 28-31.
279 See supra at p. 16-17.
280 See supra at pp. 17-19.
281 See supra at p. 18-19.
282 See supra at p. 18-19.
283 See supra at pp. 9-12.
284 See supra at pp. 11-12 for Volt’s limiting language.
285 See infra at pp. 43-47.
judicial review is Bowen, and it concludes parties cannot expand judicial review.286

The limiting language is important on at least three levels. First, it demonstrates that the Supreme Court does not believe just because parties enter into arbitration agreements, they are given carte blanche to agree to anything. Second, there is more than one policy underlying the FAA that must be considered. Third, the existence of multiple variations of the language creates ambiguity and uncertainty.

First, the mere existence of the countervailing language means there are limits as to what parties can contract for in an arbitration agreement. As such, the reasoning of the category one courts allowing expanded judicial review, must at least be questioned. Second, various courts do not recognize how Volt specifically acknowledges more than one policy underlying the FAA. This recognition is evident from how the Supreme Court uses the language “not undermine the goals and policies of the FAA” and “do [ ] violence to the policies behind the FAA.”287 Also, as the category one courts allowing expanded review have argued, because Volt says the “primary purpose”288 of the FAA is to enforce parties’ agreements according to their terms, all other policies do not deserve serious recognition.

However, the Supreme Court has never addressed the validity of enforcing parties’ agreements to expand judicial review. Meaning, although the policy of enforcing parties’ agreements according to their terms was “primary” based on the facts of Volt, the Supreme Court has not said other policies are not important or even very important when analyzing the expansion issue. Also, although something is a primary purpose, it is not clear how primary it actually is. By using the word “primary” and not the word “only,” the door is left open to consider other purposes. Besides the “primary purpose,” Congress had in its collective mind various other purposes when the FAA was promulgated.289 Pursuant to First Options290 and Byrd,291 the main other purpose is efficiency.

Third, there is confusion and ambiguity because not only does Volt include the following countervailing language: “do [ ] violence

286 See supra at pp. 31-35 and infra at pp. 43-47, discussing Bargenquast, which reaches the same conclusion.
287 See supra at pp. 11-12.
288 See supra at p. 9-11.
289 See supra at pp. 6-9.
290 See supra at pp. 12-14.
291 See supra at pp. 15-17.
to the policies behind the FAA” and “not undermine the goals and policies of the FAA” relied upon by Flexible and Bowen. It also includes, the “stands as an obstacle” standard relied upon by Flexible and Flight Systems. Moreover, the Bowen court introduces its own variation of the above-referenced language, which the Bargenquast court also relies upon. It conditions enforcement of parties’ agreements on whether the agreement “conflicts with federal policies furthered by the FAA.”

All the limiting language in Volt and the limiting language promulgated by Bowen, have different meanings. The precise meaning of the “doing violence” standard is not ascertainable, because the Volt court does not define the phrase. However, based on the definition of violence, the use of the standard signifies a high bar that must be met before a court will not enforce parties’ agreements according to their terms. The word “violence” means “intense, turbulent, or furious and often destructive action or force”, a very weighty standard.

The “undermine the goals and policies” standard relied upon by Flexible and Bowen signifies a less exacting standard than the

---

292 See supra at p. 22-24.
293 See supra at pp. 25-29.
294 See supra at p. 22-24.
295 See supra at p. 22-23.
296 See supra at pp. 25-29.
297 At least one commentator argues the Bowen court’s holding is only justified because Judge Tacha misconstrued Volt’s holding. Specifically, the commentator argues that Judge Tacha substituted Volt’s determination that the provision in question could be upheld because it “[gave] effect to the contractual rights and expectations of the parties, without doing violence to the policies behind . . . the FAA[ ]” with a standard focused on “conflicts with federal policies furthered by the FAA.” Longo, supra note 10, at 1021-1022 (emphasis added). The commentator does not attempt to define the standards or explain why they are different from one another. Instead, the commentator reaches a conclusion with no analysis. Although, Judge Tacha did not rely on the “doing violence” language, he did recognize other qualifying language in Volt, which reads parties’ agreements cannot “undermine the goals and policies of the FAA.” The commentator conveniently does not recognize the presence of the latter language from Volt in Bowen. The commentator also does not recognize that Bargenquast relies on the “doing violence” standard and comes to the same conclusion as Bowen. Specifically, that expanded judicial review did violence to the policies underlying the FAA. See also Moses, supra note 1, at 436 (arguing the Bowen court’s determination that an agreement for expansion of judicial review, unlike the issue presented in Volt – the stay of arbitration proceedings if certain conditions are met – undermines or does violence to the FAA’s policies is misplaced, because the provision concerning expansion of judicial review is part of a private agreement to arbitrate and must be enforced according to its terms and thus does not do violence. This author’s interpretation renders the “doing violence” language superfluous by implying nothing can do violence to the policies underlying the FAA because all agreements must always be enforced according to their terms).
“doing violence” standard. The word “undermine” means to “weaken or ruin by degrees.” This is a less demanding standard than the doing violence standing. This is portrayed by a synonym of undermine, which is to “weaken.”

Likewise, the word “obstacle” means “something that impedes progress or achievement.” Something that impedes the progress of the policies behind the FAA is less drastic than when something violent is done to those policies. Thus, the definition of “obstacle” is less forceful than the definition of violence and therefore more analogous, but not identical to the definition of “undermine.”

Similarly, the “conflicts with federal policies” standard formulated by Bowen and relied upon by Bargenquast and the Flight Systems courts, denotes a less stringent standard than the “doing violence” standard. The word “conflicts” means a “mental struggle resulting from incompatible or opposing needs, drives, wishes, or external or internal demands.” A synonym of “conflict” is “discord,” which means “lack of agreement or harmony.” A standard that is incompatible with or in lack of agreement with the policies underlying the FAA, represents a lesser quantum of inconsistency than something that “does violence” to the same policies.

By incorporating three inconsistent standards - the “doing violence” standard, the “undermine the goals and policies” standard, and the “stands as an obstacle to” standard - not defining the standards, and not specifying when to apply any combination of the three, which all have different meanings, the Supreme Court in Volt has created unnecessary confusion.

This ambiguity is exacerbated when courts like Bowen, Bargenquast and Flight Systems apply an entirely different standard – the “conflicts with federal policies” standard – when conducting their analysis. Furthermore, although the “undermine the goals and policies” standard, the “stands as an obstacle” standard, and the “conflicts with federal policy” standard are similar, they are not identical, and depending on the facts of a given case, can be construed to have different meanings. The fact the operative words can be construed to have different meanings is supported by the fact that none of them – conflicts, undermines, or obstacle – are synonyms of one another.

Additionally, like the Volt court, the Bargenquast court, the Bowen court and the Flight Systems court do not define the “conflicts with federal policy” standard. Finally, none of these courts explain why they apply a different standard, considering the Supreme Court has not said whether or not the standards in Volt are exclusive or if they are meant to have the same meaning.

F. The Line Drawn in Judge Kozinski’s Lapine I
Concurring Opinion

As the first category courts allowing judicial review would argue, since the overriding purpose of the FAA is to enforce arbitration agreements to the same extent as any other contracts, the recognition of a line undoubtedly undermines this purpose. The recognition sets a limit on contractual freedom not applying to all contracts, only on those governed by the FAA.

Also, the line drawn by the fourth category of courts that is supposed to provide parties with guidance as to whether their expansion provision will be enforced, in actuality causes more confusion. The line formulated in Judge Kozinski’s Lapine I concurring opinion arguably results in a gray area. On one side of the gray area are the common law contract principles that apply to all contracts – unconscionability, fraud, duress, lack of capacity, etc. – that if proven, lead to certain contracts or provisions of contracts being declared void or voidable. On the other, the identifiable limits on parties’ freedom to contract around – either for more or less protection – the FAA’s judicial review provisions referenced in Judge Kozinski’s line. This side applies only to contracts governed by the FAA and not other types of contacts.
Beside the common law contract principles that apply to all contracts, the line drawn by Judge Kozinski – referencing “flipping a coin” or “study[ing] the entrails of dead fowl” – adds another layer of possible voidability of which contracting parties must be aware. This line creates the gray area. Based on this line, it is impossible to tell whether any agreement short of “flipping a coin” or “study[ing] the entrails of dead fowl” and not violating one of the common law contract principles, would result in a contract governed by the FAA being unenforceable.

On the other hand, an argument can also be made no gray area was created by the line, and Judge Kozinski was really only referring to unconscionable agreements. That, however, is not clear, because Judge Kozinski does not elaborate on his intentions.

Another possible interpretation of this arbitrary line is that what Judge Kozinski refers to arguably would be invalidated under section 10 of the FAA and as such really creates no line. If this is the case, Judge Kozinski’s opinion really is a category one court in disguise advocating expanded judicial review.

Still another way to construe this line is to argue that due to the absurdity and impracticability of the line, there really is no line. No rational contracting parties would agree to have judicial review of their disputes governed by the flipping of a coin or the examination of the entrails of dead fowl. If there really is no line, there are no specific limits to parties’ powers to contract around the FAA that do not apply to all contracts.

Regardless of how to interpret Judge Kozinski’s pronouncement, it is impossible for parties to predict whether any contracts in the grey area would be enforceable, or what the exact parameters of the gray area entail.

G. Appellate Arbitration Panels

The argument made by the fourth category of courts for an appellate arbitration panel looks persuasive initially. However, this line of argument is both hypocritical and illogical if courts advocating appellate arbitral review also stress that the purposes of preserving arbitral efficiency and finality should co-exist with enforcing parties’ agreements according to their terms. The Lapine II en banc decision305 and the Bowen court306 have adopted this con-
flicted line of reasoning. If two concerns of arbitration are to preserve arbitral efficiency and finality, then those courts stressing efficiency and finality should not advocate more substantive review than provided by sections 10 and 11 of the FAA. Whether an Article III court or an appellate arbitration panel conducts expanded review, the review process is prolonged compared to review constrained by sections 10 and 11 and/or certain other court promulgated provisions.

H. Problems with Comparing Agreed upon Standards of Review to Standards of Review Courts Use in Other Types of Cases

Various courts have either affirmatively stated or implied, while addressing whether parties can contract to expand the FAA’s judicial review provisions, parties cannot force a court to apply a standard or procedure unfamiliar to it.307

The argument made by Primerica308 and Judge Kozinski’s Lapine I concurrence309 that parties’ agreements to expand judicial review should be enforced because the standards and procedures applied are similar to the standards and procedures courts apply in other matters, vastly oversimplifies the issue. Especially since the underlying subject matter of the cases the standards or procedures are being applied to, are completely different from the subject matter of the cases the standards or procedures were originally formulated to apply to.

First, the standards district courts apply when reviewing any type of case are either statutorily or judicially mandated. Second, none of the standards or procedures in the parties’ agreements are exactly the same as those applied in other types of cases. This is clear from Judge Kozinski’s Lapine I concurrence310 and the Primerica decision,311 both specifying the respective parties’ standards are only similar. Since they are only similar, courts are

306 See supra at pp. 25-29.
307 It logically follows that those same courts would allow a court to apply a procedure that is familiar. This must be distinguished from those courts that say parties cannot ever tell the court what standard to apply. See supra at pp. 29-31.
308 See supra at p. 24-25.
309 See supra at p. 20-21.
310 See supra at p. 20-21.
311 See supra at p. 24-25.
forced to apply standards and procedures that by definition are unfamiliar to them.

Third, contrary to the arguments made in *Primerica* and Judge Kozinski’s *Lapine I* concurrence, there is no indication the parties, when drafting their arbitration agreements, had an intention to apply the standards or procedures district courts use in various types of cases including bankruptcy cases, administrative law decisions and habeus corpus proceedings. Instead, they had the intention to apply the vague standards they agreed upon because the parties drafted their own unique standards without reference to any pre-established standards. Just because they were similar to other standards courts apply to entirely different classes of cases, does not mean a court should apply the provisions. Since the standards and procedures are unique, and not tied to any recognized standards or procedures, how is a court to know for sure what the parties’ standards mean and require?

Fourth, the standards of review and procedures courts apply to bankruptcy proceedings, administrative law proceedings and

---

312 *See supra* at p. 20-21.

313 Rule 8013 of the Federal Rules of Bankruptcy Procedure, governs the weight a district court or bankruptcy appellate court must place on a bankruptcy judges’ findings of fact. Fed. R. Bankr. P. 8013. The rule reads:

On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge’s judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Fed. R. Bankr. P. 8013 (emphasis added). When you type Rule 8013 into Westlaw, hundreds if not thousands of cases concerning the standard of review district courts must apply in reviewing bankruptcy court proceedings are revealed. Also, there are various court interpretations of Rule 8013 that have developed over time to supplement the rules’ text. Thus, the standard of review courts apply to bankruptcy cases is not just the standard in the rule, but also the courts’ multiple interpretations of the rule. Due to these multiple interpretations, the standards and procedures parties wish for the courts to apply in reviewing their arbitration proceedings, are even less comparable to the rules district courts apply to bankruptcy proceedings.

314 The problems with this argument are readily apparent when examining Judge Kozinski’s reference to “appeals from administrative agencies.” Judge Kozinski’s *Lapine I* concurrence’s blanket reference to “appeals from administrative agencies” is misleading. Grossly different standards of review apply to different varieties of administrative proceedings. Below are three different standards federal district courts apply to three different types of administrative proceedings. This is by no means comprehensive, in that there are dozens of other types of administrative proceedings, all requiring some sort of judicial review. Additionally, the courts have greatly refined these standards and have gone into much greater detail than what is originally in the respective statutes. First, under the Individuals with Disabilities Education Act (IDEA), district courts are required to apply a “modified de novo standard of review.” *Deal v. Hamilton County Board of Education*, 392 F.3d 840, 849-850 (6th Cir. 2004). Second, in decisions concerning determinations of the National Labor Relations Board (NLRB), federal courts accord “a very high degree of deference to administrative adjudications by the NLRB. When the NLRB
habeus corpus proceedings do not only exist in the statute, but also in the courts’ multiple interpretations of the standards of review. Since there is no indication the parties intended for the standards and procedures themselves to apply, an argument cannot be made an intention existed to include the various court interpretations of the standards that have developed over time to supplement the text of the standards.

Fifth, there is a fundamental difference between courts applying standards of review authorized by Congressional statutes for certain classes of cases – i.e. administrative law, bankruptcy law and habeus corpus proceedings – and parties attempting to conclude no violation of the National Labor Relations Act has occurred, that finding is upheld unless it ‘has no rational basis’ or is ‘unsupported by substantial evidence.’ United Steelworkers of Am., AFL-CIO-CLC v. Nat’l Labor Rels. Board, 983 F.2d 240, 244 (D.C. 1993) (citations omitted). Third, the standard of review governing the review of a final administrative decision of the Commissioner of Social Security is set forth in §205(g) of the Social Security Act. Mikesell v. Chater, 108 F.3d 1372 (4th Cir. Mar 11, 1997) (unpublished opinion) (citing 42 U.S.C. §405(g)). This section provides for review “to determine whether there is substantial evidence in the record to support the Commissioner’s finding.” Id.

Federal court review of habeus corpus petitions brought by state prison inmates is governed by 28 U.S.C.A. § 2254. An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (emphasis added). The next section states: [I]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.


If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that the claim relies on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.


A different outcome would be warranted if the parties unequivocally specified their agreements were to be governed by the standards and procedures district courts use in reviewing bankruptcy decisions, administrative decisions and habeas corpus decisions.
tract with one another for a court to apply a standard similar to one authorized by statute or by a court for a particular situation. In determining what standards should be applied to a certain class of cases, Congress or the courts tailor the standard of review to those specific types of cases. This is done after careful consideration of all relevant factors. When parties’ agree to apply “similar standards,” these careful considerations are not undertaken, and parties are assuming the prerogative of Congress and the courts.

This is readily apparent in the field of arbitration law, where Congress has provided certain standards of review in sections 10 and 11 of the FAA, which arguably were promulgated to assume the field.317 Additionally, all the federal circuit courts are vocal in recognizing manifest disregard of the law and certain other extra-statutorial standards.318

Sixth, another problem is that these courts relying on “similar standards” do not properly define what they mean by similar standards. This is especially true with regard to administrative proceedings. There are many different types of administrative proceedings, many of which are governed by different standards of review. The court does not state what type of administrative proceeding they are referring to.319

Still further, the Lapine I majority’s reference to “exotic standards” is even more obtuse.320 There is no indication whatsoever what an exotic standard of review would entail. Due to this lack of analysis, it is unclear how much similarity is necessary to constitute a similar standard or procedure.

As a result, parties do not know in advance if the standards they agree to in their agreements will withstand judicial scrutiny. Furthermore, the cases discussing the similarity of standards have only concentrated on those standards and procedures similar to bankruptcy decisions, administrative law decisions and habeus corpus proceedings. It is not clear if parties can agree to standards or procedures used in reviewing other types of matters.

317 See supra at pp. 1-2.
318 See supra at pp. 41-43.
319 See supra at pp. 48-54.
320 See supra at p. 20-21.
I. Problems with the Dual Pronged Approach Adopted by Fils

The dual pronged approach initially promulgated by Fils oversimplifies the issue. First, the jurisdictional prong is a sham. If the FAA is being analyzed in either federal or state court, there is clearly subject matter jurisdiction. The appropriate question to ask is not whether there is jurisdiction, but whether parties can force a court to apply a standard of review – in essence amending a congressional statute – when Congress and the courts provide standards governing the judicial review of arbitration awards.

Second, by treating efficiency as the only public policy issue underlying the FAA, the public policy prong vastly oversimplifies the public policy issue. Other important public policy issues should have been considered in the second prong, including enforcing parties’ agreements according to their terms, arbitral finality and maintaining viable differences between arbitration and litigation. By only considering efficiency, the Court’s analysis is fundamentally flawed. Congress had various purposes when passing the FAA, none that is more important than the enforcing parties’ agreements according to their terms. If the enforcement of parties’ agreements according to their terms is not at least discussed within a comprehensive analytical framework, the expansion issue is being misconstrued.

J. Courts Improperly Construing Finality

Those courts stressing the finality arbitration provides fail to recognize finality is not an all or nothing proposition, but really a concept examinable only in degrees. If the losing party is conducive to paying an award without resort to the court system, the benefit of finality is unquestionably preserved. However, the FAA dictates interaction with the courts – in a confirmation or vacatur proceeding – to enforce an arbitration award, if the losing party is not willing to voluntarily abide by an award. This overlap between the judicial and arbitral processes manifests itself in the application of sections 10 or 11 of the FAA, or one of the various court created exceptions. These proceedings impact the finality arbitration as an

321 See supra note 39-40
322 See supra at pp. 29-31 (discussing parties telling courts what standards to apply).
323 See supra at pp. 8-10.
324 See supra note 1.
institution provides, and makes arbitration look more like litigation.

Finality is further affected if parties appeal a District Court’s vacatur or confirmation ruling to a Circuit Court, or if the Supreme Court grants certiorari; also, if any of the aforementioned courts decide to remand the action back to a lower court or to the arbitration panel. If remanded back to the arbitration panel, there always is the possibility of another vacatur proceeding after the panel makes their ruling. Although the Circuit Courts and the Supreme Court are not embarking on de novo review of all aspects of a dispute, the application of Congress’s albeit limited, but at the same time “critical safeguards,” undoubtedly, and to a certain degree, impact the finality of the arbitral process.325

Parties’ agreements to expand the FAA’s vacatur provisions further erode the benefit of finality. Thus, those courts that argue expanded judicial review is giving parties a second bite at the apple are only half correct, because the aforementioned congressionally and judicially promulgated review mechanisms already give parties a second, albeit limited, bite of the apple.

Finality is also adversely affected if parties are allowed to contract for one or more appellate arbitration panels to review their dispute. It is irreconcilable for courts to enforce contracts specifying appellate arbitral review and also to stress the finality benefit. A proceeding is by definition not final if another proceeding follows it, regardless of where the proceedings take place. Two such courts that make this mistake are the Bowen court326 and the Lapine II en banc panel.327

K. Courts Misconstruing or Not Recognizing the Importance of Efficiency

Various courts incorrectly balance the two policies Byrd and First Options treat as the most important policies underlying the FAA, preserving arbitral efficiency and enforcing parties’ agreements according to their terms.328

The issues considered in Byrd and First Options are clearly distinguishable from the issue of parties agreeing to expand judicial

325 Hoeft, 343 F.3d at 64; see also, supra at pp. 38-40.
326 See supra at pp. 25-29.
327 See supra at pp. 29-34.
328 See supra at pp. 12-16.
2006] EXPANDED JUDICIAL REVIEW UNDER FAA

review. First, based on the facts before the Byrd court – assessing the bifurcation of proceedings – and the First Options court – the determination of who decides arbitrability – the Supreme Court held the policy of enforcing parties’ agreements according to their terms trumps the efficient resolution of disputes.

However, both Byrd and First Options dealt with situations where not following the parties’ intent would have lead to the parties’ disputes not being arbitrated. In Byrd, the Supreme Court held a court must grant a motion to compel arbitration of pendant state law claims, even if the federal claims are not arbitrable and the ruling would result in the bifurcation of the proceedings; in other words, a concurrent and overlapping arbitration and litigation addressing different issues. Also, First Options addressed whether parties were allowed to decide who should decide the issue of arbitrability. In a broader context, can parties decide which issues are to be arbitrated?

Since the expansion of judicial review issue is distinguishable from these two issues, the Supreme Court would arguably balance maintaining arbitral efficiency and enforcing parties’ agreements according to their terms differently.

Second, if Byrd made a determinative statement about the balance between maintaining arbitral efficiency and enforcing parties’ agreements according to their terms, First Options would have cited Byrd for that proposition. Although First Options did cite Byrd, it was not for this purpose. Thus, it is virtually impossible to argue Byrd’s reasoning is determinative on this issue, being that First Options did not rely on Byrd.

Additionally, the fact this is an open question is demonstrated by how the Supreme Court in First Options does not decisively resolve the issue. As discussed supra, those courts that rely on First Options and argue maintaining arbitral efficiency was not Congress’ primary goal in promulgating the FAA, only concentrate on the Supreme Court’s response to First Options’ third argument and fail to recognize the ambiguity introduced by the Court’s analysis of the second.

The Supreme Court’s analysis of these two arguments is irreconcilable. As to the second, the court implies the “slow[ing] down of the dispute resolution process” is material if “factual[ ] circumstances . . . could permit a confident conclusion” the dispute resolu-

329 First Options, 514 U.S. at 945.
330 See supra at pp. 15-16.
tion process would be slowed down. In response to the third argument, the court specifically states the FAA’s underlying purpose was “not to resolve disputes in the quickest manner possible,” but to enforce arbitration agreements according to their terms, like any other agreement.

There is irrefutable evidence that the dispute resolution process is slowed down and is less efficient when parties contract to expand the judicial review of arbitration awards. This type of review is often referred to as “expanded” or “supplemental” review, and this characterization alone supports this argument. Also, without expanded judicial review, the confirmation of arbitration awards would be limited to the restrictive judicial review provisions set forth in sections 10 and 11 of the FAA and other court promulgated standards.

Courts, when applying expanded review provisions, are forced to interpret and apply parties’ unfamiliar standards, however detailed and invasive they may be, greatly complicating and making the review process less efficient. Certain courts - Fils, Judge Fernandez’s Lapine I decision, Northern District I and Lapine II - attempt to refute this argument by comparing the amount of work a court does when applying an expanded judicial provision, with the amount of work a normal trial entails. However, the amount of work expanded judicial review requires should be compared to the amount of work courts are required to do under sections 10 and 11 of the FAA and certain court fashioned vacatur standards.331

The standards in sections 10 and 11 of the FAA were promulgated by Congress to address the amount of interaction a reviewing court is to have with the arbitral process. If this proper comparison is made, a court is undoubtedly responsible for more work, negatively impacting arbitral efficiency. The view that the proper comparison point is a trial is preposterous, because (i) the existence of sections 10 and 11 of the FAA and (ii) taken to its logical conclusion expanded judicial review would be allowed up until the reviewing court has to read one less word than required by conducting an entire trial.

Since efficiency is adversely affected by expanding judicial review, the Supreme Court arguably would resolve the second argument in First Options in a different fashion. The court would then have to balance expanded judicial review’s affects on efficiency, with the enforcement of parties’ agreements according to their

331 For a more detailed discussion, see supra at pp. 57-59.
terms, and try to clarify this glaring ambiguity between argument two and argument three. The rest of this article proposes an analytical framework to achieve this balance.

X. FACTORS FIGURING INTO THE DETERMINATION OF THE EFFECTS OF EXPANDED JUDICIAL REVIEW ON ARBITRAL EFFICIENCY

Most of the courts and commentators addressing whether parties can expand judicial review, adopt bright line rules, and in support of those rules, make various arguments. The arguments made and rules promulgated do not properly account for the FAA’s most important underlying purposes. The remainder of this article advocates that when the Supreme Court of the United States addresses issue, it must balance, on a case-by-case basis, the FAA’s most important purposes, maintaining arbitral efficiency and enforcing parties’ agreements according to their terms, like any other contracts. Unlike previous articles, this article measures the effects of expanded judicial review on arbitral efficiency by formulating various factors reviewing courts should apply on a case-by-case basis.

The factors a court should apply and balance when measuring efficiency include: (i) the amount of time the case has been open; (ii) the complexity of the issues involved; (iii) the length of the record; (iv) whether discovery must be redone and if the rules of evidence apply; (v) what the standard of review entails – i.e. review of issues of law, fact, sufficiency of the evidence; (vi) whether the parties involved are sophisticated business people; (vii) whether the arbitrator or members of the panel are lawyers, retired judges, individuals engaged in the business that the dispute revolves around or laymen and how the arbitrator or members of the panel were chosen; (viii) how detailed the arbitral award is; (ix) whether the proceedings were taped and (x) all other factors a court may wish to consider.

As to the first factor, the longer a case has been open, the more arbitral efficiency is negatively impacted. Accordingly, when determining whether to enforce parties’ agreements expanding judicial review, if the case has been pending for a “substantial amount of time,” this would weigh against enforcing the clause.

---

332 It is important to recognize that, a lot of these factors overlap.
333 The determination as to what constitutes a “substantial amount of time,” must be made on a case-by-case basis.
On the other hand, if the case has not been open for long, this factor would tend to support enforcing the clause.

The second factor concerns the difficulty of the issues involved. In determining the complexity of the issues in dispute, the reviewing court should examine whether there is a Circuit or District Court split and any other relevant circumstances. If the issues are not difficult or confusing, this factor would weigh in favor of applying the clause. To the contrary, the more difficult the issues, the longer it would take a court to review the arbitrator’s decision, which in turn makes the process less efficient.

The third factor is the length of the record. This factor goes hand and hand with the first factor. The longer the record, more than likely, the longer the case has been open. The longer the record, the more work a reviewing court has to do, and the less likely this factor will weigh in favor of enforcing the clause. To the contrary, the shorter the record, the less effect there will be on efficiency and the more weight this factor should be given when determining whether to enforce the expanded review clause.

The fourth factor concerns, what if anything, the agreed upon standard says about discovery and whether the rules of evidence are to be applied. If the standard requires discovery to be partially or completely redone, arbitral efficiency will be negatively impacted; especially if documents would have to be re-produced, interrogatories re-served and re-answered, etc.334 As such, the more discovery that is required, the more likely a reviewing court will construe this factor against enforcing the clause.

Additionally, since discovery is very liberal in the federal courts, a lot of information obtained during discovery is not admissible during trial. Unlike during a trial, an arbitrator’s decision can be based upon inadmissible evidence. Efficiency is adversely impacted and a court should be hesitant to apply an expanded review clause, if a court is required to sift through the evidence an arbitrator relied upon, make determinations as to what is admissible and then make its decision.

The fifth factor concerns the language of the standard of review and the amount of review a court is required to undertake as a result. There are countless variations as to what an expanded review clause can include and require. For example, a standard specifying de novo review or that both issues of fact and law have to be reviewed is more imposing and time-consuming than if the

334 See supra at p. 31.
sufficiency of the evidence or issues of fact or law alone have to be reviewed. The more work a clause requires a court to do, the more negative effect there is on arbitral efficiency and the less likely a court should be to construe this factor in favor of enforcing the clause. A court must make a case-by-case determination as to what work the clause before it requires and then make a determination about how the clause will affect arbitral efficiency.

The sixth factor involves the sophistication of all parties involved. If the parties are all sophisticated, then a court should weigh this factor in favor of enforcing the clause. Sophisticated parties’ agreements to expand judicial review are less likely to be overturned, because an argument cannot be made that the parties have unequal bargaining power. As such, efficiency is preserved if the expanded review clause cannot be challenged. However, if not all parties are sophisticated, and the non-sophisticated party is not aware of the significance of the clause, this factor should weigh against enforcing the clause because a challenge could be made to its validity. This would be less efficient because the additional proceedings would waste both the parties’ and court’s time.

The seventh factor concerns whether the arbitrator or members of the panel are lawyers, retired judges, individuals engaged in the business of the underlying dispute or laymen. If the arbitrator or member of the panel is a laymen, the reviewing court should make a determination as to whether the arbitrator understood the issues it was faced with.

If the issues are difficult, a lay arbitrator or member of a panel will generally have a difficult time analyzing and understanding them. If they had a difficult time, it is more likely they resolved the issues incorrectly. The more problems with the arbitrator or panel’s decision, the more work a reviewing court would have to do and the more adverse affect on arbitral efficiency there would be. To the contrary, if the issues are straightforward, there is less of a chance the lay arbitrator will make a mistake. As such, the reviewing judge would have to do less work and this factor would be construed in favor of enforcing the clause.

If the arbitrator or members of the panel are attorneys, retired judges, or individuals engaged in the same business as the underlying dispute, a court should be more likely to weigh this factor in favor of applying the expanded judicial review provision. Irrespective of the issue’s difficulty, if the arbitrator is familiar with the issues involved, there is less chance they would make a mistake. Accordingly, the reviewing court would have to do less work and
arbitral efficiency would be less affected if the expanded review clause is enforced.

Regardless of the profession of the arbitrator or member of the panel, if the parties chose the specific individual to serve as the arbitrator or member of a panel, this factor would weigh against applying the expanded review provision, regardless of what the arbitrator does for a living. A court should construe this factor in favor of enforcing the clause if the arbitrator is chosen from a list or randomly selected. If parties make their own choice of arbitrator or members of a panel, it would be inefficient for a court to second guess the parties’ personal choice regardless of their decision.

The eighth factor concerns the detail or lack of detail of the award. If the award is detailed, the reviewing court has to do less work (i.e. fact finding or reaching legal conclusions). If this is the case, this factor should be weighed in favor of applying the clause. However, if the award solely lays out the amount of the award and does not go into detail about the reasons underlying the award, or only briefly discusses the arbitrator’s reasoning, the court or judge will be forced, regardless of the agreed upon standard, to embark on an intensive finding of facts and a review of legal conclusions, making the process less efficient.

The ninth factor is similar to the eighth. If all the arbitral proceedings are transcribed, the court will have to do less fact finding because the important facts will be in the transcript. As such, because the court is doing less work, this factor should be construed in favor of applying the clause. However, if the proceedings are not transcribed, the court will have to do more work to figure out what the dispute is about, which by definition will adversely affect arbitral efficiency.

The tenth and last factor is a catch-all provision, which would allow the court to consider anything not addressed in the first ten factors, if relevant to the case.

After making a determination as to how each factor should be weighed individually, the reviewing court should then look at the factors in conjunction with one another and measure their effect on arbitral efficiency. If the factors when taken together too adversely affect efficiency, the expanded review clause should not be applied. However, if the affects on efficiency are limited or it is too close to call, the parties’ agreement to apply the expanded judicial review clause should be honored.
XI. Conclusion

This article recognizes enforcing parties’ agreements according to their terms is the most important purpose underlying the FAA. However, it provides a case-by-case framework to account for the second most important purpose underlying the FAA, maintaining arbitral efficiency. The purpose of enforcing parties’ agreements according to their terms is given substantial weight and often times will be determinative, but courts will also be required to apply the aforementioned efficiency factors. If a court determines after applying the factors that the efficiency of arbitration as an institution is too negatively impacted, than that finding will outweigh the purpose of enforcing parties’ agreements according to their terms, and the expansion clause will not be enforced. However, if it determined that efficiency is not too impacted or too close to call, then the court will enforce the expansion clause. This framework accounts for all the purposes underlying the FAA and reconciles the Supreme Court’s decisions in Volt, Byrd, and First Options.