
Joshua K. Norton  
*University of Nebraska College of Law*

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation  
Available at: https://digitalcommons.unl.edu/nlr/vol86/iss1/9

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Note*


TABLE OF CONTENTS

I. Introduction ............................................. 184
II. Background ............................................. 185
   A. The FAA—Legislative Intent and Supreme Court Interpretation .................................... 185
      1. The FAA and Legislative Intent .................................. 185
      2. Supreme Court Interpretation .................................. 186
   B. Grounds for Review of an Arbitration Award ................. 188
      1. Statutory Grounds for Review ............................... 188
      2. Judicially Created Grounds for Review ..................... 188
   C. Circuit Split Over Expanded Judicial Review .............. 190
      1. Cases Recognizing Right to Contract for Expanded Judicial Review ..................... 190
      2. Cases Disallowing Expanded Judicial Review ........... 193
      3. The Eighth Circuit and *Schoch*: Undecided .......... 196
      4. *Schoch v. InfoUSA* ........................................ 197
III. Analysis ................................................ 198
   A. Freedom to Contract Prevails .......................... 199
      1. Enforcement by Terms Trumps Concerns of Efficiency .................................. 199
   B. Balancing FAA Concerns: The Clear and Unmistakable Intent Requirement ............... 201
   C. Overcoming Concerns with Expanded Review .............. 203

© Copyright held by the NEBRASKA LAW REVIEW.

* Joshua K. Norton, B.A., 2004, Nebraska Wesleyan University; J.D. expected 2008, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Research Editor, 2007). Special thanks to my wife Adriana for her unending support.
I. INTRODUCTION

As Dramatist John Heywood first memorialized in his 1546 work, you cannot have your cake and eat it too. Whether this proverb is relevant to an arbitration clause providing for expanded review is an issue of sharp contention among the federal circuits. Expanded judicial review is applied to arbitration agreements in the context of the Federal Arbitration Act (FAA), under which parties to an arbitration agreement can choose to rely on a federal district court to review an arbitrator’s decision and either confirm or vacate the arbitral award. Within this framework, at issue is whether parties to an arbitration agreement can contract for expanded judicial review of their arbitration decision, rather than have the court apply only the statutorily and judicially created standards.

In Schoch v. InfoUSA, the Eighth Circuit Court of Appeals, without expressly deciding the issue, strongly suggested that it would not allow expanded review of arbitrators’ decisions. Nevertheless, Schoch represents the Eight Circuit’s position at the center of a circuit divide. On one side, courts allow expanded review of arbitration decisions, stressing the contractual nature of arbitration and the FAA policy favoring the freedom of parties to structure their agreements as they see fit. On the other side, courts disallow expanded review because allowing it would endanger the independence and efficiency of the arbitration process and, more fundamentally, because the FAA provides the exclusive grounds for review of arbitration awards, thus precluding any expanded review.

1. THE HOME BOOK OF QUOTATIONS: CLASSICAL AND MODERN 1561 (Burton Stevenson ed., 6th ed. 1952). The actual phrase from Heywood’s Proverbs is “would ye both eat your cake and have your cake?”
3. See infra Part II.B.
4. 341 F.3d 785 (8th Cir. 2003).
6. See Kyocera Corp v. Prudential-Bache Trade Servs., 341 F.3d 987 (9th Cir. 2003); Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001).
This Note will address the circuit split over expanded review, and the reasons why the Eighth Circuit should decide in favor of expanded review. Sections II.A and B establish the necessary foundation for discussing the split over expanded review. Section II.A is a brief discussion of the history of the FAA and the Supreme Court's treatment of it, while Section II.B discusses the statutory grounds of review provided in the FAA and the judicially created grounds of review. Then, Section II.C discusses the case law allowing and disallowing expanded review, concluding with a description of Schoch. Section III.A explains why Supreme Court interpretation of the FAA, and its emphasis on freedom of contract, overrides any concerns about the effects of expanded review on arbitral efficiency or on the dynamics of the arbitration process. Section III.B argues that the "clear and unmistakable" requirement suggested in Schoch sufficiently balances FAA concerns over judicial interference with the policy favoring enforcement of arbitration agreements by their terms. Section III.C argues: that practical limitations sufficiently bind parties seeking expanded review to structure their arbitration agreements accordingly, so as not to unduly interfere with the functioning of a reviewing court; that the Eighth Circuit's suggestion that the FAA standards are the exclusive means for review of an arbitration decision is undercut by the appellate courts' own acknowledgement of judicially created standards; and finally, that the creation of federal jurisdiction by contract is not a consequence of allowing expanded review.

II. BACKGROUND

A. The FAA—Legislative Intent and Supreme Court Interpretation

1. The FAA and Legislative Intent

In 1925, Congress passed the United States Arbitration Act (codified in 1947 as the Federal Arbitration Act) with the purpose of "mak[ing] valid and enforcible agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts." The root necessity for the FAA's promulgation can be traced back centuries to English courts' adamant refusal to enforce arbitration agreements, which the courts viewed as stripping them of jurisdiction. American courts inherited this longstanding "jealousy," and

8. H.R. REP. No. 68-96, at 1–2. See also U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007 (D.C.N.Y. 1915) ("It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated 'in the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every
by 1925 Congress felt that this jealousy was so embedded in jurisprudence that a legislative enactment was necessary to ensure the enforcement of arbitration agreements.  

2. Supreme Court Interpretation

Supreme Court analysis and interpretation of the FAA over the last forty years demonstrates a principal theme of enforcing arbitration agreements by their terms. Three cases frequently cited when discussing expanded review, *Dean Witter Reynolds, Inc. v. Byrd*, 11 *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 12 and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 13 are demonstrative of the Supreme Court's overarching disposition.

Settling a circuit split, the *Dean Witter* Court concluded that the FAA requires district courts to compel arbitration of an otherwise arbitrable claim, even when doing so leads to inefficient, bifurcated proceedings, during which nonarbitrable claims are resolved in the courts and arbitrable claims are resolved through arbitration. 14 The circuits that had previously denied arbitration of the arbitrable claims in order to avoid bifurcation based their decisions to do so in part on effi-

---


10. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272–73 (1995) (holding that the FAA preempted a state law less favorable to arbitration, court rested decision in part on the purpose of the FAA to overcome “judicial hostility to arbitration agreements”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (finding that an arbitration agreement valid and enforceable even for a statutory age discrimination claim); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (holding that when there is an enforceable agreement arbitrate, the FAA provides a “clear federal policy of requiring arbitration”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20, 24 (1983) (finding that the FAA “requires piecemeal resolution” if it is necessary to enforce an arbitration agreement by its terms, because “Section 2 of the FAA is a congressional declaration of a liberal federal policy favoring arbitration agreements notwithstanding any state substantive or procedural policies to the contrary.”); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (noting that the purpose of the FAA is “to make arbitration agreements as enforceable as other contracts, but not more so”).


ciency: by avoiding bifurcation, they could steer clear of possibly litigating the same issues twice. The Supreme Court disagreed and instead sided with the circuits that allowed bifurcation. The Court agreed that the FAA’s “plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate.” Acknowledging that the FAA’s drafters did not explicitly contemplate the possibility of bifurcated proceedings, the Court looked to the legislative history of the Act for guidance. From this history, the Court concluded that the overriding goal of the FAA was to “ensure judicial enforcement of privately made agreements to arbitrate,” not to ensure the “expeditious resolution of claims.”

In Volt, the Court held that when parties, through a choice-of-law provision, agree that state law should apply to their arbitration agreement, the FAA should not preempt the state law, even if the state law (in contrast to the FAA) allows for a stay in arbitration while related litigation is pending between a party to the arbitration agreement and a third party. The Court found that allowing the parties to apply California arbitration rules rather than those provided by the FAA did not offend the “federal policy favoring arbitration.” The Court opined:

There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. . . . Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.

The Court again demonstrated its emphasis on enforcing arbitration agreements according to their terms in Mastrobuono. There, an arbitrator awarded punitive damages, even though New York courts (where the case was arbitrated) did not allow arbitrators to do so. The Court held that if parties contracted to include any potential claims for punitive damages among their arbitrable claims, the FAA ensures that their agreement will be enforced according to its terms, notwithstanding a state rule to the contrary.

Although addressing different concerns, Dean Witter, Volt, and Mastrobuono all rely on the same notion: under the FAA, the overriding concern is that agreements to arbitrate be enforced according to their terms.

15. Id. at 217.
16. Id.
17. Id. at 219.
19. Id. at 476, 479.
21. Id. at 54.
22. Id. at 59.
B. Grounds for Review of an Arbitration Award

1. Statutory Grounds for Review

Although the overall purpose of the FAA was to make arbitration decisions enforceable, most of its provisions are concerned with the court's role in the arbitral process, typically at the "front end" or "back end" of the arbitration.\textsuperscript{23} The provisions that relate to the "back end" of the arbitration process are relevant when discussing review of arbitration decisions. Section 10(a), providing four limited grounds for review of an arbitrator's award, reads:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

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.\textsuperscript{24}

Of these grounds, the first three deal only with party or arbitrator misconduct or some other inherent flaw in the arbitration process. Subsection (4) offers some review of the substance of an arbitration award, but stops short of providing review of the merits of the decision.\textsuperscript{25}

2. Judicially Created Grounds for Review

In addition to the grounds established in Section 10(a), most, if not all, circuits recognize additional judicially created standards. The most widely adopted judicially created standard is the "manifest disre-
gard of the law" standard, which can be traced back to dicta in the 1953 Supreme Court case, Wilko v. Swan. The mention of the "manifest disregard" standard by the Supreme Court in First Options of Chicago, Inc. v. Kaplan seemed to solidify its place as a legitimate non-statutory ground of review. The dispute in Kaplan arose over Kaplan's investment company's failure to comply with a series of agreements to repay the debt owed by Kaplan to a stock trading company (First Options of Chicago). The issue on appeal was over the arbitrability of the parties' agreement. When discussing the district court's standard of review, the Court listed the statutory standards of review from Section 10 and, citing Wilko, the "manifest disregard of the law" standard.

In addition to the wide acceptance of the "manifest disregard" standard, different circuits have recognized an array of standards applicable to arbitration cases under the FAA. These include vacating an award that is in "violation[] of public policy," "arbitrary and capricious," or "completely irrational." As discussed in Schoch, the Eighth Circuit has adopted the "manifest disregard" standard as well as the "completely irrational" standard, interpreting the latter to apply when an arbitration award "fails to draw its essence from the agreement."


While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.

29. Id. at 940.
30. Id. at 942.
31. Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001); Denver & Rio Grande W. R. Co. v. Union Pac. R. Co., 119 F.3d 847, 849 (10th Cir. 1997).
32. Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429, 435 (11th Cir. 1995) ("An award is arbitrary and capricious only if a ground for the arbitrator's decision cannot be inferred from the facts of the case.") (internal citations omitted). The Eleventh Circuit is the only circuit to adopt the arbitrary and capricious standard. See Larry E. Edmondson, 1 Domke on Commercial Arbitration § 39:10 (3d ed. 2003) (stating that the application of the arbitrary and capricious standard is a "construct of the Eleventh Circuit").
33. Schoch v. InfoUSA, Inc., 341 F.3d 785, 788 (8th Cir. 2003); G.C. and K.B. Inv., Inc. v. Wilson 326 F.3d 1096, 1105 (9th Cir. 2003); Roadway Packages Sys., Inc. v. Kayser, 257 F.3d 287, 292 n. 2 (3d Cir. 2001).
34. Schoch, 341 F.3d at 788 (quoting Boise Cascade Corp. v. Paper Allied-Indus., Chem. & Energy Workers, 309 F.3d 1075, 1080 (8th Cir. 2002)).
C. Circuit Split Over Expanded Judicial Review

The issue of expanded review arises when parties desire judicial review outside of the typical statutory or judicially created standards, and include language in their arbitration agreement calling for more searching review of an arbitrator's award. The circuits are split over the propriety of allowing parties to contract for expanded review: The First, Third, Fourth, and Fifth Circuits have expressly allowed expanded judicial review, while the Seventh, Ninth and Tenth Circuits have held that there can be no contractually expanded review. As mentioned above, the Eighth Circuit has not yet been forced to decide the issue, but the court did express doubt about the propriety of allowing expanded review in both *UHC Management Co., Inc. v. Computer Sciences Corp.* and *Schoch.*

I. Cases Recognizing Right to Contract for Expanded Judicial Review

The circuits recognizing the ability to contract for expanded review premise their decisions on the freedom to contract and the FAA's overall purpose to ensure enforcement of arbitration agreements according to their terms. These courts have held that the FAA's grounds for review serve only as default rules that are presumptively applicable, with parties having the ability to opt for more expanded review, but only if the intent to do so is clearly expressed in the agreement.

In *Gateway Technologies, Inc. v. MCI Telecommunications, Corp.*, the Fifth Circuit Court of Appeals became the first circuit to expressly accept a party's right to contract for expanded judicial review. In this case, Gateway subcontracted MCI to install and maintain the telephone system for Virginia's correctional facilities. The parties' subcontracting agreement contained an arbitration clause, which provided in part that "'[t]he arbitration decision shall be final and binding on both parties, except that errors of law shall be subject..."

35. The Seventh Circuit has not expressly disallowed the expanded review under the FAA, but it has strongly expressed the inability to do so. See discussion infra Part II.C.2.
36. 148 F.3d 992 (8th Cir. 1998).
38. Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 997 (5th Cir. 1995); Syncor Int'l Corp. v. McLeod, No. 96-2261, 1997 WL 452245 (4th Cir. Aug. 11, 1997).
41. *P.R. Telephone*, 427 F.3d at 31; *Roadway*, 257 F.3d at 294.
42. 64 F.3d 993 (5th Cir. 1995).
to appeal." Relying on the language used in *Mastrobuono* and *Volt*, the court reasoned that the FAA neither demands arbitration under any particular set of rules nor operates without regard to the intent of the contracting parties. Arbitration, instead, is essentially a "creature of contract." The court concluded that "prudent or not," the parties agreed to expanded review, and "to interpret this phrase short of de novo review would render the language meaningless and would frustrate the mutual intent of the parties."

In an unpublished opinion, the Fourth Circuit Court of Appeals adopted the rationale of *Gateway*, concluding that parties could contract for full de novo review by a district court. The pertinent arbitration provision in that case read, "The 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."

In *Roadway Package System, Inc. v. Kayser*, the Third Circuit Court of Appeals recognized the right to contract for expanded review, and also held that a generic choice-of-law clause by itself is insufficient to support a finding of an agreement for expanded review. In deciding to allow expanded review, the court stated that

---

43. *Id.* at 996 (quoting the parties' arbitration agreement).
44. See discussion supra Part II.A.2.
45. *Gateway*, 64 F.3d at 996.
46. *Id.* at 997. After announcing its recognition of the ability of parties to contract for expanded review, the Fifth Circuit has had several opportunities to determine whether or not parties actually contracted for such review. See *Prescott v. Northlake Christian Sch.*, 369 F.3d 491, 497–98 (5th Cir. 2004) (finding that handwritten clause added to form employment contract which read "no party waives appeal rights, if any by signing this [arbitration] agreement" strongly suggested intent for expanded review but was not conclusive, remanded case to district court for more fact finding); *Harris v. Parker Coll. of Chiropractic*, 286 F.3d 790, 793 (5th Cir. 2002) (applying the de novo standard of review contracted for by the parties to arbitration agreement); *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001) (concluding that parties had chosen to supplement FAA standards with standards set out in the Employment Problem Resolution Procedures guide).
48. *Id.* at *6 (quoting the parties' arbitration agreement).
49. *Roadway Packages Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001) (The court declared, "We 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).”).
50. *Id.* at 296. The contract at issue contained an arbitration clause as well as a generic choice of law clause, but no language expressly establishing a standard of review broader than that of the FAA. *Id.* The arbitration clause stated that the parties bind themselves to resolve any disputes "by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association." *Id.* at 293 (quoting the parties' arbitration agreement). The court held "that a generic choice-of-law clause, standing alone, raises no inference that contacting parties intended to opt out of the FAA's default regime." *Id.* at 297.
the FAA permits parties to choose the rules under which they will arbitrate, and that courts are bound to enforce those agreements. In deciding the "truly difficult question" of whether the parties actually did contract for expanded review, the court cited three reasons why it determined that a generic choice-of-law clause was not alone sufficient to warrant a finding of expanded review: first, such a rule limits the frequency of finding an expanded standard when such was not intended; second, it creates an easy rule for courts to apply; and third, it provides a useable rule that sophisticated parties can contract around without undue added expense.

The court concluded that requiring parties to clearly express intentions to expand judicial review was consistent with the goals of the FAA, and also preserved parties' ability "to contract around the default federal standards."

Agreeing with the rationale forwarded in Gateway and Roadway, the First Circuit Court of Appeals recognized the ability to contract for expanded review in Puerto Rico Telephone Co. v. U.S. Phone Manufacturing Corp., emphasizing that the principle goal of the FAA was to ensure enforcement of arbitration agreements by the agreements' terms. In addition, the court directly addressed two of the arguments forwarded against allowing expanded review. First, the court pointed out that the idea that expanded review would allow creation of jurisdiction by contract was misplaced, noting the "well settled" principle that federal courts can exercise jurisdiction over suits to confirm or vacate arbitration awards only if there is some independent basis for the court's jurisdiction. Second, the court addressed concerns over the effect of expanded review on the efficiency of the arbitration process, citing Dean Witter for the notion "that efficient dispute resolution should not be favored over the FAA's primary goal of enforcing private agreements to arbitrate." While emphasizing the importance of enforcing a contract according to its terms, the court also acknowledged the importance of recognizing the authority of arbitrators.

To balance the concerns of undue infringement on the authority of arbitrators while still recognizing parties' ability to contract for expanded review, the court held that the FAA creates a presumption that the narrow statutorily prescribed FAA standards will

51. Id. at 292–93.
52. Id. at 293.
53. Id. at 296–97.
54. Id. at 297.
55. 427 F.3d 21 (1st Cir. 2005).
56. Id. at 31.
57. Id. at 30–31. See also discussion infra Parts II.C.2, III.C.3.
58. P.R. Telephone, 427 F.3d at 31.
59. Id.
apply, but parties can overcome this presumption and contract for expanded review by clearly expressing such intent in their agreement.  

2. Cases Disallowing Expanded Judicial Review

The courts disallowing expanded review have done so for several reasons: First, they say expanded review would adversely affect the efficiency of arbitration and fundamentally alter the dynamics of the arbitral process. Second, allowing expanded review is inimical to the basic policy behind the FAA of preventing judicial interference with arbitration. Third, the grounds of review provided by the FAA are the exclusive grounds for review, thus precluding the application of additional expanded standards. Fourth, expanded review would unduly interfere with judicial independence by forcing courts to review unfamiliar procedures by standards dictated by the private parties. And finally, expanded judicial review would impermissibly create jurisdiction by contract.

In Bowen v. Amoco Pipeline Co., the Tenth Circuit Court of Appeals became the first circuit to expressly disallow expanded review, holding that neither the purposes behind the FAA nor Supreme Court precedent support “allowing parties to alter the judicial process by private contract.” The case involved a dispute between Amoco and a landowner (Bowen), who alleged that Amoco’s leaking oil lines had contaminated a stream running across his property. The parties agreed to submit the issue to arbitration, agreeing specifically to expanded review of the arbitration award “on the grounds that the award is not supported by the evidence.”

The Bowen court began its analysis of the expanded review question similarly to courts that have allowed expanded review, by first discussing the Supreme Court’s emphasis on the importance of enforcing arbitration agreements by their terms. The court, however, distinguished expanded review from situations dealt with by the Supreme Court and expounded on several other reasons to disallow

60. *Id.* The court then decided that the contract at issue did not include sufficient language to overcome this presumption. *Id.*

61. See *infra* text accompanying notes 73, 102.

62. See *infra* text accompanying notes 74–75.

63. See *infra* text accompanying notes 87–88.

64. See *infra* text accompanying note 76.

65. See *infra* text accompanying notes 90–91.

66. 254 F.3d 925 (10th Cir. 2001).

67. *Id.* at 933.

68. *Id.* at 930 (quoting the parties’ arbitration agreement). The initial arbitration agreement between the parties was via a 1918 right-of-way agreement entered into by predecessors in interest of both parties. Bowen and Amoco then agreed to use the Rules for Non Administered Arbitration of Business Disputes (NABD), modified with the expanded review clause. *Id.* at 928 n.1.

69. *Id.* at 933–34.
expanded review.70 Distinguishing the question of expanded review from *Volt* and *Mastrobuono*, where the issues involved only what arbitral procedural rules to apply, the appellate court stated that expanded review interferes with the judicial process by telling courts what varying standards they should apply.71 The “key question” was whether allowing expanded review would conflict with the policies behind the FAA.72 The court cited several potential effects that could undermine underlying FAA policies, including diluting the finality of an arbitral decision, lessening the independence and creativity of arbitrators, and sacrificing the efficiency and expediency of arbitration.73 However, the primary problem that the court perceived was the lessening of arbitral independence, which would in turn endanger the primary FAA policy of judicial respect for the arbitration process. The court opined, “[Expanded review] threatens to undermine the policies behind the FAA. We would reach an illogical result if we concluded that the FAA’s policy of ensuring judicial enforcement of arbitration agreements is well served by allowing for expansive judicial review after the matter is arbitrated.”74 The court reasoned that the “illogical result” of allowing expanded review is that courts could agree to enforce an arbitration agreement only to later refuse to “respect the results” of the arbitration process.75 As a final cog in its analysis, the court explained that expanded review would “place[] federal courts in the awkward position of reviewing proceedings conducted under potentially unfamiliar rules and procedures” and that courts are not equipped to provide such review for arbitration proceedings.76

The Ninth Circuit Court of Appeals initially recognized the ability to contract for expanded review in *Lapine Technology Corp. v. Kyocera Corp.*,77 but changed its mind in an en banc decision six years later.78 Despite the change of course, the concurrence to the initial opinion still gets considerable attention as a middle ground approach to the

---

70. See infra text accompanying notes 70–74.
71. Id. at 933–34.
72. Id. at 935.
73. Id. at 935, 936 n.6. The court suggested that “expanded judicial review would threaten the independence of arbitration and weaken the distinction between arbitration and adjudication.... [Arbitrators are able] to fashion creative remedies and solutions that courts may be less likely to endorse. Expanded judicial review therefore places a court in the position of reviewing that which it would not do and reduces arbitrators’ willingness to create particularized solutions for fear the decision will be vacated by a reviewing court.” Id. at 936.
74. Id. at 935.
75. Id.
76. Id. at 935–36.
77. 130 F.3d 884 (9th Cir. 1997), overruled by Kyocera Corp. v. Prudential-Bache Trade Servs. Inc., 341 F.3d 987 (9th Cir. 2003).
78. See infra text accompanying notes 83–88.
expanded review issue. In that concurrence, Judge Kozinski noted his apprehension in allowing expanded review, due to a lack of direct Supreme Court or Congressional approval of parties' ability to direct courts as to what standard to apply. Nonetheless, Judge Kozinski ultimately decided that the court should enforce an arbitration agreement by its terms, due to the "strong policy of party empowerment embodied in the [FAA]...." He found support for his decision in the fact that the review the parties contracted for—review for errors of law and fact—would create work no different than the work district courts perform on "appeals from administrative agencies and bankruptcy courts, or on habeas corpus." He then quipped, "I 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."

In Kyocera Corp. v. Prudential-Bache Trade Services, the Ninth Circuit abruptly reversed Lapine, holding that the FAA provides the exclusive standards of review for arbitration decisions and that parties therefore should not be able to compel the enforcement of their contractually chosen standards. In support of its reversal, the court first suggested that allowing expanded review could potentially eliminate the benefits of arbitration; arbitration would simply serve as a prologue to litigation. Next, the court acknowledged that Volt and Mastrobuono provide parties free reign in modifying their rules and procedure for their arbitration process, but determined that once the case reaches federal court, the arbitration process is over, and the latitude provided by the Supreme Court has "no bearing whatsoever on [parties'] inability to amend the statutorily prescribed standards gov-

---

79. See, e.g., Maggio & Bales, supra note 9, at 169–70.
80. Lapine, 130 F.3d at 891 (Kozinski, J., concurring). Kozinski explained further, "I see no reason why Congress would object to enforcement of this agreement. This is not quite an express congressional authorization but, given the [FAA's] policy, it's probably enough." Id.
81. Id.
82. Id. "Reading" the intestines of dead animals for divinatory meaning is a widespread practice in East Africa. One anthropologist explained the underlying process like this: "[W]hile there is a set of rules underlying the discourse of entrail-reading, it is the body of tacit, social, contextual clues which sets the bounds of 'meaning' of the message in the entrails—details of the physical structure of the intestines have no determinate meaning in themselves." J. Abbink, Reading the Entrails: Analysis of an African Divination Discourse, 28 MAN 705, 705 (1993).
83. 341 F.3d 987 (9th Cir. 2003).
84. Id. at 994.
85. Id. at 998 ("Arbitration is a dispute resolution process designed... to respond to the wishes of the parties more flexibly and expeditiously than the federal courts' uniform rules of procedure allow... Broad judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.").
erning federal court review." The court, however, seemed to ground its decision primarily on the FAA itself, suggesting that Section 10 contains the exclusive grounds for review of arbitration decisions. The fact that parties have freedom to personalize arbitration rules and procedures has no effect on their inability to change "statutorily prescribed standards governing federal court review." The court concluded that because Congress has explicitly prescribed exclusive standards of review, parties cannot contract to expand them.

Although not expressly deciding the issue, Judge Posner's dicta in Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc. strongly demonstrates the Seventh Circuit Court of Appeal's negative disposition toward allowing expanded judicial review. The case involved interpretation of a section of the Taft-Hartley Act, but the court, looking to the FAA, opined, "[Parties] 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." Posner advocated a "severely limited" role in reviewing an arbitrator's decision and that it would be a "serious practical mistake . . . to subject the reasoning in arbitrators' opinions to beady-eyed scrutiny."

3. The Eighth Circuit and Schoch: Undecided

The Eighth Circuit has been presented with the expanded review issue twice, first in UHC Management, and most recently in Schoch. Although not deciding the issue definitively, the court has expressed serious doubt about allowing expanded review.

In UHC Management, the court first expressed its doubtfulness about expanded review, stating, "We do not believe it is yet a foregone conclusion that parties may effectively agree to compel a federal court

86. Id. at 1000.
87. Id.
88. Id. Earlier, discussing the "exclusive" statutory grounds provided in the FAA, the court stated that they could find that arbitrators had "exceed[ed] their powers" under 10(a)(4), "when the award is 'completely irrational' . . . or exhibits a 'manifest disregard of law' . . . ." Id. at 997 (quoting French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir. 1986) and Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1059-60 (9th Cir. 1991) respectively).
89. 935 F.2d 1501 (7th Cir. 1991).
90. Id. at 1505. As an alternative, Posner suggested that parties could instead contract for review from an appellate arbitration panel. Id. Although not discussing this creation of jurisdiction argument, the court in Kyocera cited (with approval) the same excerpt cited in the text, suggesting that it adopted the same rationale. Kyocera Corp v. Prudential-Bache Trade Servs. 341 F.3d 987, 999 (9th Cir. 2003).
91. Chicago Typographical Union No. 16, 935 F.2d at 1506 (suggesting that such "beady-eyed scrutiny" might "discourage [arbitrators] from writing opinions at all," which are a good thing, because "writing disciplines thought").
to cast aside sections 9, 10, and 11 of the FAA."92 This case arose over a subcontracting agreement between UHC and Computer Science Corporation that contained an arbitration provision which stated that the arbitrators should be "bound by controlling law."93 Computer Sciences contended this signified an agreement for expanded judicial review.94 On appeal, the court was not forced to decide whether it would ultimately allow expanded review because the court found that even if it were to recognize expanded review, the aforementioned language did not "clearly and unmistakably" express the parties' intent to adopt such standards.95 Showing its distaste for expanded review, the court concluded that instead of contracting for expanded review, the parties "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."96

4. Schoch v. InfoUSA

In March 2000, Schoch, a former infoUSA employee, filed suit in the U.S. District Court for the District of Nebraska against infoUSA for breach of contract, reformation, and unjust enrichment.97 The suit stemmed from infoUSA's refusal to allow Schoch to exercise an option to purchase infoUSA stock pursuant to an agreement infoUSA claimed was expired. The parties agreed to submit the claim to arbitration, and the district court stayed the pending suit. A retired state trial judge arbitrated the dispute and, after three days of hearings and post-hearing briefs, found for Schoch. In his nine-page opinion, the arbitrator held that the stock option had not expired when Schoch attempted to exercise it and accordingly awarded Schoch $1,632,000 in damages.98

Following the decision, pursuant to Section 9 of the FAA, Schoch moved to have the district court confirm the award, and infoUSA moved to vacate the award, arguing that the arbitration agreement called for an expanded standard of review.99 InfoUSA specifically pointed to the language near the end of the arbitration agreement, which required the arbitrated matter to be "resolved in accordance with applicable law."100 The district court refused to apply an ex-

93. Id. (quoting the parties' arbitration agreement).
94. Id.
95. Id. at 998.
96. Id.
97. Schoch v. InfoUSA, Inc., 341 F.3d 785, 787 (8th Cir. 2003).
98. Id.
99. Id.
100. Id. at 788 (quoting the parties' arbitration agreement). The court cited more of the arbitration agreement: "The Arbitrator shall issue an award consisting of findings of fact and conclusions of law . . . . The Arbitrator's decision and award
panded standard of review and confirmed the arbitrator's award. InfoUSA appealed the decision to the Eighth Circuit Court of Appeals.

Addressing the expanded review question on appeal, the Eighth Circuit began by acknowledging the narrow statutory grounds for review and the two judicially created standards recognized by the Circuit. In regard to the propriety of expanded review, the court renewed its "grave skepticism" expressed five years earlier in UHC Management, stating: "It is not clear, however, that parties have any say in how a federal court will review an arbitration award when Congress has ordained a specific, self-limiting procedure for how such a review is to occur [under the FAA]." The court cited other reasons for its skepticism as well, suggesting that allowing expanded review would effectively amend the FAA, fundamentally alter arbitration, and change the nature of judicial review. The court also stated that when arbitration is involved, courts "are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles."

Despite its skepticism, the court chose not to expressly decide the issue, instead suggesting that (assuming expanded review was allowed) if parties want an expanded standard of review, this intent must be "clearly and unmistakably expressed"—a standard it found the language in the arbitration provision at issue did not meet.

III. ANALYSIS

Contrary to the inclinations expressed in Schoch, the overriding goals of the FAA—as interpreted and repeatedly explained by the Supreme Court—dictate the enforcement of arbitration clauses that provide for expanded judicial review.

shall be valid and binding, judgment may be entered on such award, and such award shall be final as to the Parties, as long as the Arbitrator has not exceeded his or her authority (i.e., the award would be limited to disputes arising out of the [Complaint] . . . and resolved in accordance with applicable law)."

Id. at 787–88 (quoting the parties' arbitration agreement).

101. See supra text accompanying note 34.
102. Schoch, 341 F.3d at 789 (quoting UHC Mgmt. Co., Inc. v. Computer Scis. Corp, 148 F.3d 992, 997 (8th Cir. 1998)). The court continued, "Congress did not authorize de novo review of [an arbitration] award on its merits; it commanded that when the [statutory] exceptions do not apply, a federal court has no choice but to confirm." Id. (quoting UHC Mgmt., 148 F.3d at 997).
103. Id. at 789 n.3 (expressing its skepticism about expanded review, "which would seemingly amend the FAA, crown arbitrators mini-district courts, force federal trial courts to sit as appellate courts, and completely transform the nature of arbitration and judicial review") (citing Hoffman v. Cargill, Inc., 236 F.3d 458, 462 (8th Cir. 2001)).
104. Id. (quoting Hoffman, 236 F.3d at 462).
105. Id. at 789.
A. Freedom to Contract Prevails

1. Enforcement by Terms Trumps Concerns of Efficiency

The importance of enforcing an arbitration agreement according to its terms should override a court's concerns about the effect of expanded review on the efficiency of the arbitration process. Speed and efficiency have long been a recognized benefit of the arbitration process, and even commentators who support expanded review concede that it could operate to slow down the arbitral process. However, as expressly stated in Dean Witter, the overall goal of the FAA is not to "promote the expeditious resolution of claims," but instead to "ensure judicial enforcement of privately made agreements to arbitrate." Given the similarities between the bifurcation issue in Dean Witter and the expanded review question, the Court's rationale in deciding that case is instructive in examining the expanded review issue. Dean Witter involved enforcement of arbitration agreements that resulted in bifurcation, which, like expanded review, could operate to slow down the arbitration process. In addition, the Dean Witter Court acknowledged that bifurcation was not contemplated by the drafters of the FAA, just as the drafters undoubtedly did not contemplate parties' wanting to contract for expanded judicial review. Because the FAA's drafters did not explicitly consider the possibility of bifurcated proceedings when formulating the FAA, the Dean Witter Court looked to the overall legislative purpose, which it determined to be to ensure the enforcement of arbitration agreements according to their terms. The same rationale should apply when parties contract for expanded review. The overriding purpose of the FAA to enforce arbitration agreements by their terms dictates that expanded review provisions should be enforced—even if it is at the expense of some efficiency.

106. Maggio & Bales, supra note 9, at 192.
107. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985). See discussion, supra Part II.A.2. But see also Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003) (describing Congress's intent to limit judicial review, stating arbitration is meant "to respond to the wishes of the parties more flexibly and expeditiously than the federal courts' uniform rules of procedure allow"); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 n.7 (10th Cir. 2001) (allowing expanded judicial review would "further sacrific[e] the simplicity, expediency, and cost-effectiveness of arbitration. Rather than providing a single instance of dispute resolution with limited review, arbitration would become yet another step on the ladder of litigation.").
108. See supra Part II.A.2.
109. See infra note 124.
2. Changing Arbitration Process Does Not Endanger Enforceability

Similar to concerns about adverse effects on arbitral efficiency, the Schoch court suggested that allowing expanded review could transform arbitration panels into "mini-district courts," completely changing the arbitration process.111 Other courts have evinced similar concerns, suggesting that expanded review would eliminate the very benefits of arbitration by endangering its independence and lessening arbitrators' willingness to provide creative remedies, thus blurring the line between arbitration and adjudication.112 While concerns like these have been the subjects of rigorous debate among alternative dispute resolution professionals,113 they should not be of major import to the courts, which are bound to enforce arbitration agreements according to their terms, even if they provide for a different arbitration procedure than that specified in the FAA.114 As demonstrated in Volt, the FAA does not favor arbitration under a particular set of procedures, nor does the FAA operate to coerce parties to arbitrate in an established manner.115 This same rationale suggests that FAA policies would not be offended by allowing expanded judicial review beyond what is specified in the statute.116

In practice, parties will choose arbitration with or without expanded review only after weighing the benefits and drawbacks associ
ated with it. Further, although the impact of expanded review on the functioning and dynamics of arbitration raises valid concerns in any particular case, these concerns should be considered by the parties to the contract—not the courts. This is not to suggest that expanded review cannot be beneficial; on the contrary, there are many reasons why parties would choose expanded review. Three of the most commonly cited benefits of allowing expanded review are: it establishes an attractive middle ground for parties who desire arbitration but also highly value "reasoned and correct decision over instant justice;" it gives added security in choosing arbitration in complex cases or when there are substantial assets at stake; and it provides protection from "maverick arbitrators" who are less likely to award aberrant awards when faced with expanded review. In sum, there are valid reasons to support a decision for expanded review, and when parties do opt for expanded review, courts are bound to honor the terms of the arbitration contract just as they would other language in contracts.

B. Balancing FAA Concerns: The Clear and Unmistakable Intent Requirement

Although side-stepping the larger issue of deciding definitively whether it would allow expanded judicial review, the Schoch court made it clear that if it were to allow expanded review, it would require parties to include in their arbitration clauses "clear and unmistakable" language establishing expanded review. This standard would be appropriate and sufficiently stringent to preserve the underlying FAA policy of avoiding uninvited judicial intervention while still honoring the mutual intent of the parties.

Undisputedly, a goal of the FAA is to ensure that courts cannot unduly interject their own judgments to supplant the reasoning of arbitrators. However, courts that have disallowed expanded review fail to recognize the differing considerations between: (1) a situation where parties are desirous of increased court participation and (2) other situations where the court's interference is unwanted (or unwarranted). Thus, these courts incorrectly construe the policy of preventing undue court intervention as applicable to both situations. Bowen

117. Id. at 192. See also Di Jiang Schuerger, supra note 113, at 246 ("[F]inality of an arbitral award may be either a benefit or drawback of arbitration, depending on the parties' interests. Some parties may appreciate a fast and final decision, while others would rather have the assurance that any possible legal or factual mistakes can be brought to a court for correction.").
118. Maggio & Bales, supra note 9, at 192.
120. Younger, supra note 25, at 262.
121. See supra note 105 and accompanying text.
122. See Maggio & Bales, supra note 9, at 181.
is a prime example. There, the court failed to appreciate the differing dynamic when judicial review is invited rather than unduly imposed, suggesting any expanded review would undermine the FAA's policies of "judicial respect for the arbitration process." On the contrary, when parties clearly and unmistakably choose to allow judicial review, there is no improper court interference—the parties have chosen to have a court review their award and perhaps disallow it for nonconformity to their chosen standard.

Courts that have allowed expanded review have noted the important consideration of avoiding uninvited court interference, but have uniformly compensated by choosing a high enough standard so as to both prevent uninvited interference and allow the enforcement of the agreement by its terms. Applying standards similar to the "clear and unmistakable" standard proposed in Schoch, these courts have refused, for example, to acknowledge expanded judicial review based on the mere existence of a choice-of-law clause where the preferred state law allows expanded review.

The three reasons presented in Roadway in determining that a generic choice-of-law clause did not in itself suffice as an agreement for expanded review further demonstrate the workability of implementing a stringent standard before finding that parties contracted for expanded review. First, a high standard would reduce the chance

123. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 935 (10th Cir. 2001) ("[T]he contract clause in this case threatens to undermine the policies behind the FAA. We would reach an illogical result if we concluded that the FAA's policy of ensuring judicial enforcement of arbitration agreements is well served by allowing for expansive judicial review after the matter is arbitrated.").

124. Maggio and Bales write:
Certainly in the hostile judicial atmosphere of 1925 the 68th Congress could not foresee that a time would come where contracting parties would desire judicial review of their award on the merits. Therefore, the FAA did not anticipate or address the situation where parties agree that judicial review of the award would proceed under standards other than those provided in the Act. The language anticipates and prevents judicial interference but does not preclude judicial review by invitation or contract.

Maggio & Bales, supra note 9, at 181–82 (footnote omitted).

125. P.R. Tel. Co., Inc. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 31 (1st Cir. 2005) (presumption that FAA standards apply can be replaced only with explicitly "clear contractual language"), Action Indus., Inc. v. U.S. Fidelity & Guar. Co., 358 F.3d 337, 341 (5th Cir. 2004) (requiring "clear and unambiguous contractual language" to opt out of FAA rules, which could be satisfied when "a contract expressly references state arbitration law, or if [the] arbitration clause specifies with certain exactitude how the FAA rules are to be modified") Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 294 (3d Cir. 2001) (must "clearly evidence an intent to opt out"). See supra Part II.C.1.

126. See Action Indus., 358 F.3d at 341–43 (finding a generic choice of law clause insufficient in supplanting statutory standards); text supra accompanying notes 50–54.

127. See supra Part II.C.1.
that courts will determine that parties have opted out of the FAA standards when they did not intend to do so. Next, it would assist in establishing a rule that arbitrators and judges could both easily apply. Finally, it would create a rule that sophisticated parties could still negotiate around without additional expense. As the Roadway rationale demonstrates, the "clear and unmistakable" standard strikes a balance. It protects against undue court interference by thwarting a court from reading expanded review into a contract where it was not contemplated, but it allows sophisticated parties to negotiate and choose expanded review. The "clear and unmistakable" standard thus preserves both FAA concerns: avoidance of undue court interference and enforcement of arbitration agreements according to their terms.

C. Overcoming Concerns with Expanded Review

1. Practical Safeguards in Implementing Expanded Review

The importance of enforcing arbitration agreements by their terms is a potent argument in favor of expanded review, but it is not all encompassing. One of the most forceful arguments forwarded against expanded review is that parties cannot interfere with judicial independence by requiring the court to apply standards chosen by private parties, as requiring the application of such varying standards would require a court to review unfamiliar proceedings in a manner that it is ill-equipped to carry out. Although proponents of contractual expanded review can point to no explicit statutory language firmly establishing the ability to contract for expanded review, practical considerations weigh in their favor. The established functions of a court create practical limitations that parties must consider when structuring their arbitration agreement and determining their desired grounds for judicial review. First, when parties choose to establish expanded review, they inevitably contract for grounds that are reason-

128. Roadway, 257 F.3d at 296 (3d Cir. 2001) (conceding that any default rule will lead to some inaccuracies, but concluding, in light of the historical hostility toward arbitration, that it would be better to wrongly conclude a party did not opt out than the other way around).

129. Id. The court suggests that it would be easy to apply in that the analysis would essentially be over once it was concluded that the contract contained nothing more than a generic choice-of-law clause. This is significant because to hold otherwise would require courts to examine the substantive law of the chosen jurisdiction to determine whether or not it allows or requires expanded review. This could cause considerable confusion and increase the chances of finding that parties who never contemplated expanded review will be found to have "opted out" of the statutorily prescribed standards. Id. at 297.

130. Id. at 296–97.

131. See supra Part II.C.2.
able and that can be readily applied by the judiciary.\textsuperscript{132} Thus far, no party has asked a court to review an arbitrator’s award by foreign standards like “flipping a coin or studying the entrails of a dead fowl.”\textsuperscript{133} sticking instead to familiar standards—review for errors of law or fact.\textsuperscript{134} Second, in an effort to provide the district court with substance to review, parties desirous of expanded review must structure their arbitration agreement accordingly; this most likely means requiring a written opinion and, perhaps, a transcript of the proceeding.\textsuperscript{135} Providing a written opinion ensures that the court can conduct its review based on a record it is comfortable and familiar with. In the event that parties unwisely fail to contract for a written opinion yet seek expanded review, a court would be justified in denying a motion to vacate because the party seeking to vacate the arbitral award would have failed to meet its necessary burden for establishing the agreed upon grounds for review.\textsuperscript{136}

Assuming parties select reasonable grounds for review and otherwise structure their arbitration agreements to facilitate expanded review, conducting such review would not require courts to do unfamiliar work, nor would it create an unjustifiable burden. These practical considerations should suffice to assuage the notion expressed in \textit{Schoch} that courts are not equipped to provide similar review to arbitrators’ decisions as they do for other “structured judgments defined by procedural rules and legal principles.”\textsuperscript{137} As pointed out by Judge Kozinski in his \textit{Lapine} concurrence, reviewing an arbitration decision for errors of law or fact is “no different from [the review] performed by the district courts in appeals from administrative agencies

\begin{itemize}
\item \textsuperscript{132} See Maggio & Bales, \textit{supra} note 9, at 188–89.
\item \textsuperscript{133} Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) overruled by Kyocera Corp. v. Prudential-Bache Trade Servs., 341 F.3d 987 (9th Cir. 2003). See also \textit{supra} note 82.
\item \textsuperscript{134} As to the potential of parties choosing an asinine standard like “studying the entrails of a dead fowl”, Professor Goldman makes clear that a court could refuse to enforce it. He stated further, “Given the unlikelihood that parties would choose such an arbitrary standard, case by case review is sufficient.” Goldman, \textit{supra} note 110, at 186. On the issue, Maggio and Bales write, “[W]here parties involve the judiciary, respect for tradition and the institution itself are important considerations. . . . Thus, like so much else in the law, parties are free to agree for expanded review within reason. . . . [I]f they choose to involve the courts in the confirmation and review of the arbitration award, the standards they choose for that review must be reasonable and applicable within the traditional structure of the judiciary.” Maggio & Bales, \textit{supra} note 9, at 188–89. Cf. Blankley, \textit{supra} note 22, at 425 (“[T]he day will soon come when the parties ask the court to review their award under an unfamiliar standard.”).
\item \textsuperscript{135} Blankley, \textit{supra} note 22, at 409.
\item \textsuperscript{136} Goldman, \textit{supra} note 110, at 187.
\item \textsuperscript{137} Schoch v. InfoUSA, Inc., 341 F.3d 785, 789 n.3 (8th Cir. 2003) (quoting Hoffman v. Cargill, Inc., 236 F.3d 458, 462 (8th Cir. 2001)).
\end{itemize}
and bankruptcy courts, or on habeas corpus."\textsuperscript{138} Despite disallowing expanded review, the court in \textit{Bowen} conceded that reviewing an arbitration award is less work than hearing an entire case, and—even with expanded review—arbitration would still help lighten the load of the district courts.\textsuperscript{139} Given these practical realities, it is unrealistic to assume that a private contract will dictate how a court will conduct its business. Interestingly, at least one commentator suggests that such unrealistic sentiments helped to spur Congress to adopt the FAA in the first place.\textsuperscript{140}

\section*{2. Permissibility of Additional Grounds of Review}

\textit{Schoch}'s questioning of the ability of parties to contract for expanded review when Congress has set forth "a specific self-limiting procedure" for such review is undercut by the court's own recognition of two additional judicially created grounds for review.\textsuperscript{141} Indeed, the judicial creation and acknowledgment of additional, albeit narrow, grounds for review puts to rest the idea that Section 10 of the FAA provides the exclusive grounds for review of an arbitral award.\textsuperscript{142} The courts in \textit{Bowen}, \textit{Kyocera}, and \textit{Schoch} all failed to recognize the inconsistency of stressing the exclusivity of the FAA standards while acknowledging judicially created grounds of review.\textsuperscript{143} Concededly, any of the recognized judicial standards are much narrower than review for errors of law or fact that may be contracted for by parties. Nonetheless, the mere recognition of any extra-statutory grounds at all underlines the argument that the FAA provides the exclusive grounds

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{138} \textit{Lapine}, 130 F.3d at 891 (Kozinski, J., concurring).
\item \textsuperscript{139} \textit{Bowen} v. Amoco Pipeline Co., 254 F.3d 925, 936 n.6 (10th Cir. 2001).
\item \textsuperscript{140} Moses, \textit{supra} note 37, at 444.
\item \textsuperscript{141} \textit{See supra} Part II.C.3. The fact that the judicially created standards adopted by the Eighth Circuit, are in the court's words, "extremely narrow," especially compared to a de novo or other more intensive standard for which parties could contract, is of no consequence for the purposes of this argument; their mere acknowledgement suggests a belief that the statute did not necessarily create the exclusive means for review. \textit{See infra} note 143.
\item \textsuperscript{142} \textit{See supra} Part II.B.2.
\item \textsuperscript{143} \textit{See supra} Part II.B.2, II.C.2. Interestingly, in discussing permissible grounds for review, the \textit{Kyocera} court mentioned the "completely irrational" and "manifest disregard" standards as if they were a subset of FAA 10(a)(4) ("where the arbitrators exceeds their powers") and actually statutory grounds. \textit{See supra} note 88. This seems contradictory to previous treatment by the circuit, as well as contrary to most case law and commentators who treat the aforementioned standards as judicially created. Erik Van Ginkel, "\textit{Expanded} Judicial Review Revisited" \textit{Kyocera Overturns Lapine}, 4 \textit{PEPP. DISP. RESOL. L.J.} 47, 52–53 (2003). \textit{See} Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997) (mentioning "completely irrational" and "manifest disregard" standards disjunctively with statutory grounds), \textit{overruled} by Kyocera Corp v. Prudential-Bache Trade Servs., 341 F.3d 987 (9th Cir. 2003).
\end{itemize}
\end{footnotesize}
for review. Perhaps more importantly, if the court were to apply its own judicially created standard rather than grounds chosen by the parties, it would effectively assert its own prerogative rather than honoring the intent of the parties, thus violating a fundamental principle of the FAA to ensure enforcement of arbitration agreements according to their terms. The court in Gateway correctly recognized this inconsistency, reversing a district court that chose to apply its judicially crafted “harmless error standard” rather than the “errors of law” standard chosen by the parties. To apply grounds of review different than what is agreed upon by the parties would frustrate those parties’ mutual intent and offend the federal arbitration policy requiring a court to “conduct its review according to the terms of the arbitration contract.”

If FAA Section 10 is not the exclusive ground for reviewing an arbitrator’s award, which—as evinced by the widespread acknowledgement of judicially created exceptions—has been at least implicitly concluded by the vast majority of courts, then the overriding purpose of the FAA to ensure enforcement of arbitration agreements according to their terms dictates that parties should be able to choose their own grounds for review. Allowing parties to opt for different grounds of review would be consistent with the Supreme Court’s stance that the rules provided in the FAA can give way when parties choose different ways of effectuating the arbitral process.

3. Expanded Review Does Not Create Jurisdiction by Contract

The argument forwarded in Chicago Typographical Union No. 16 that allowing expanded review would create jurisdiction by contract is misplaced, and it is the least compelling argument against allowing expanded review. Section 4 of the FAA requires an order compelling arbitration only when the federal court would otherwise have jurisdiction over the case. Therefore, although the FAA creates substantive law that acts to ensure enforcement of arbitration agreements, it does not in and of itself create jurisdiction. The Supreme Court summed up the unique stature of the FAA, explaining:

[T]he [FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any inde-

144. See Moses, supra note 37, at 442–43 (discussing contradiction of Ninth and Tenth Circuits position that FAA standards were exclusive while recognizing judicially created standards).
146. Id.
147. See supra Part II.A.2.
148. See supra text accompanying notes 90–91.
pendent federal-question jurisdiction under 28 U.S.C § 1331 or otherwise. ... [T]here must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue.\textsuperscript{150}

Given the FAA requirement for an independent basis for federal jurisdiction, it is unclear how allowing expanded review could somehow create jurisdiction.\textsuperscript{151}

\section*{IV. CONCLUSION}

Arbitration is a creature of contract. The underlying policies behind the FAA, as interpreted by the Supreme Court, dictate the enforcement of arbitration agreements by their terms—even if that leads to the sacrifice of some efficiency or to changes in the structure of the arbitration process. This policy is applicable to expanded review. The Eighth Circuit should allow parties to contract for expanded judicial review when the arbitration clause "clearly and unmistakably" demonstrates the parties' intent for expanded review. Although expressing grave skepticism in \textit{Schoch} about the validity of expanded review, the Eighth Circuit has not definitively decided the issue, and—given the Supreme Court's refusal thus far to grant certiorari to settle the circuit split\textsuperscript{152}—it could again get the chance to recognize the ability of a party to have arbitration and expanded review too.

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{151}] See Blankley, \textit{supra} note 22, at 426.
\end{enumerate}
\end{footnotesize}