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AGREEING TO DISAGREE: A BALANCED SOLUTION TO WHETHER PARTIES MAY CONTRACT FOR EXPANDED JUDICIAL REVIEW BEYOND THE FAA

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INTRODUCTION

The silver-haired Kingsfieldian[1] Contracts professor surveys a full room of nervous Harts[2] and minds and asks a simple question, "Why do people make contracts?"[3] After an uncomfortable silence, the Professor offers uncharacteristic help. "People enter into contracts because they all want the same thing out of life. Tell me what that one thing is."[4] After a few sporadic and unsatisfactory answers, the Professor simply answers, "more."[5]

Everybody wants "more;" the essential nature of contract law is to provide a system of controls for parties as they pursue "more."[6] To get

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1 THE PAPER CHASE (20th Century Fox 1973). John Houseman won an Academy Award (Best Supporting Actor) for his portrayal of an intimidating Contracts professor in this 1973 movie classic.

2. *Id.* Timothy Bottoms played Hart, the terrified Contracts student.

3. Professor Leonard Jay Shrager, Contracts Lecture at The John Marshall Law School (Apr. 15, 2002).

4. *Id.*

5. *Id.*

6. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272-74 (1986) (asserting that one purpose of contract law is to impose responsibility on promisors). *See also* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941) (asserting that contract law should follow certain formalities; these formalities will foster individual liberty, private autonomy, and freedom of transaction in the private sector, but will be subject to minimum controls by courts who should support promisors and promisees who exercise their freedom to contract). *See also* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 7-28 (1981) (asserting that contract law is vital to upholding moral conduct by upholding the sanctity

"more", a contracting party offers something it has in exchange for something it wants.[7] Both parties in a contractual transaction want what they are getting "more" than what they are giving up.[8] This desire for "more" is currently at the center of a split between several federal Circuit Courts of Appeals.[9]

A. The Issue

Contracting parties to pre-dispute arbitration clauses have begun asking the courts to do more.[10] Pre-dispute arbitration clauses have been historically utilized, since the enactment of the 1925 Federal Arbitration Act ("FAA"), to contractually bind two or more commercial parties to arbitration in lieu of traditional litigation, if a dispute arose from their commercial relationship.[11] Recently, however, lawyers have used pre-dispute arbitration clauses to demand more from the arbitration process and the federal district court system. Lawyers have taken a more active drafting role by inserting judicial review expansion clauses into the pre-dispute arbitration contract itself.

The notion that lawyers knowingly advise commercial clients to sign a contract to arbitrate, where that contract arguably ignores a federal statute the contract relies on, may cause one to raise a legal eyebrow in contempt.[12] The eyebrow settles somewhat, however, when one remembers that the parties would not have binding arbitration pursuant to the FAA available to them without that contract; what the parties agree to in the contract, even if it is an agreement to supplement the governing statute, is thus not so contemptuous. This heightened review is in addition to and beyond the limited scope of judicial review provided in the FAA.[13] To illustrate, a demand commonly

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of the promise). PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979) (examining the history of contract law from the English common law to the failure of classic contract theory).

7. *See* Lecture, *supra* note 3 (explaining that individuals value what they are receiving under a contract more than what they are giving up).

8. *Id.*

9. Kevin A. Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 510 (2002).

10. *See* Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) (reasoning that despite the plaintiff's desire to have an arbitration award reviewed by a court of law, parties "cannot contract for *judicial* review of that award;" Judge Posner implied that such expanded review of arbitration awards was outside the job of the courts, and that the parties could rather contract for an appellate arbitration panel to review the award instead).

11. 9 U.S.C. §§ 1-16 (2000).

12. *See* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 128-29 (2002) (arguing that the root cause for parties succeeding in contractually expanding the scope of judicial review is the court's inattention to the literal and functional meaning of finality in the governing statute).

13. Tom Cullinan, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 398-400 (1998).

inserted into pre-dispute arbitration clauses is that the arbitration award[14] must be reviewed by a federal district judge for arbitrator error in applying the rule of law.[15]

B. *The FAA Offers No Judicial Review For Errors in Applying the Law*

Commercial arbitration awards under the FAA[16] are not subject to a statutorily mandated review for errors of law.[17] Rather, the FAA maintains only four limited grounds for vacatur that a party may pursue, in a federal district court, if dissatisfied with the arbitrator's decision.[18] In other words, the losing party at arbitration can use the FAA to ask a federal district court to vacate the arbitration award, but that party will succeed only if one of the

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14. *See* Fils et Cables D'Acier de Lens v. Midland Metals Corp., 584 F. Supp. 240, 243 (S.D.N.Y. 1984) (commenting that arbitrators are not required, nor should they be required, to explain the reasoning behind an arbitration award because such a rule would undermine the quickness, efficiency and informality of arbitration as an alternative to litigation).

15. *Fils*, 584 F. Supp. at 242. The contracting parties inserted the following contractual language expanding the scope of judicial review:

> 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, 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.

Id.

16. 9 U.S.C. §§ 1-16 (2000).

17. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 346-47 (1996) (noting that even when the violation of law is egregious, the FAA does not mandate judicial review of the arbitration award for errors of law). *See also* Brandeis Intsel Ltd. V. Calabrian Chem. Corp., 656 F. Supp. 160, 167 (S.D.N.Y. 1987) (reminding the parties that a foreign arbitration award is at issue which further restricts the reasoning behind reviewing arbitration awards for legal error); TOM CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION 260 (1997) (arguing the judicial review on the merits of the law was never contemplated under the FAA, in fact, such a review is antithetical to the statute).

18. 9 U.S.C. § 10 (2000) (setting forth the grounds under which a federal district court can vacate an arbitration award). This statute, in allowing vacatur of an arbitration award, states the following:

> (a) 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-
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> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party may 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.

Id.

four FAA listed grounds were violated.[19] Briefly, these four grounds are (1) arbitrator corruption, fraud[20] or undue means;[21] (2) evident partiality;[22] (3) misconduct or misbehavior;[23] and (4) misuse of power.[24]

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19. *Id.*

20. *See* Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988) (explaining that to warrant vacation of arbitration award for fraud, "the movant must establish the fraud by clear and convincing evidence," "the fraud must not have been discoverable upon the exercise of due diligence prior to or during arbitration," and "the person seeking to vacate the award must demonstrate that the fraud materially related to an issue in arbitration," but the movant is not required to prove that result of proceedings would have been different absent the fraud).

21. *See* Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 108-09 (N.D. Ill. 1980) (reasoning that "'undue means' requires some type of bad faith in procurement of the [arbitration] award" and does not apply to allegations regarding evidence presented at an arbitration proceeding "without any specific allegations that there was bad faith, fraud, or corruption as to such evidence"). ANR Coal Co. v. Cogentrix of N.C. Inc., 173 F.3d 493, 497 (4th Cir. 1999) (holding there to be no basis to vacate an arbitration award when the arbitrator failed to disclose his law firm's association with a customer of one of the parties in dispute, because the association, in and of itself, provided no basis for vacation due to the triviality of the relationship, even though undisclosed).
See also Local Union 1160 v. Busy Beaver Bldg. Ctrs., 616 F. Supp. 812, 814 (W.D. Pa. 1985) (holding that allegations of "undue means," specifically that the defendant intimidated one of its witnesses, is insufficient to vacate an arbitration award where the arbitrator did not accord substantial weight to the witness's testimony).

22. *See* Delta Mine Holding Co. v. AFC Coal Props., 280 F.3d 815, 821 (8th Cir. 2001) (reasoning that since "parties to an arbitration choose their method of dispute resolution, [they] can ask [for] no more impartiality than inheres in the method they have chosen"). *See also* Gianelli Money Purchase Plan & Trust v. ADM Investor Serv. 146 F.3d 1309, 1311-12 (11th Cir. 1998) (reasoning that an arbitrator is not guilty of "evident partiality" merely because evidence surfaces of past business contacts between his employer and an interested party, absent actual knowledge of real or potential conflict of interest); Int'l Produce v. A/S Rosshavet, 638 F.2d 548, 551 (2d Cir. 1981) (reasoning that the standard of "evident partiality," which would authorize vacating an arbitration award due to bias of the arbitrator, is not made out by mere appearance of bias); Standard Tankers Co. v. Motor Tank Vessel, Akti, 438 F. Supp. 153, 160 (E.D.N.C. 1977) (commenting that to constitute evident partiality "some overt misconduct or demonstration of partiality is required," and a court would not vacate an arbitration award where a reading of the arbitrator's opinion filed in support of his vote "show[ed] that it [was] based on reason and fact and, accordingly, [could] not be characterized as evidently partial").

23. *See, e.g.*, Allendale Nursing Home, Inc. v. Local 1115 Joint Bd., 377 F. Supp. 1208, 1213-14 (S.D.N.Y. 1974) (finding arbitrator misbehavior or misconduct when arbitrator was clearly aware of a legitimate and serious illness of a party's key witness, but still refused to grant the requested adjournment). Seldner Corp. v. W.R. Grace & Co., 22 F. Supp. 388, 392-93 (D. Md. 1938) (finding misconduct or misbehavior prejudicing the plaintiff where the arbitrators failed to give notice regarding the time and place of the arbitration hearing, thus restricting timely submission of relevant evidence); *See* Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc., 607 F.2d 649, 653 (5th Cir. 1979) (finding that an *ex parte* receipt of evidence by the arbitrators bearing on the amount of the award to be made amounted to misbehavior or misconduct). *See also* Agarwal v. Agarwal, 775 F. Supp. 588, 590-91 (E.D.N.Y 1991) (holding that an arbitrator's award will not be vacated under the FAA for his misconduct in failing to postpone a hearing, where the arbitration losers had already once postponed hearing and represented that they would not seek any further adjournment, even though the losing party's counsel subsequently withdrew from representing them in the arbitration proceeding). *See* Riko Enter., Inc. v. Seattle Supersonics Corp. 357 F. Supp. 521, 526 (S.D.N.Y. 1973) (finding arbitrator

The dilemma created by contractually expanding the scope of judicial review of an arbitration award beyond these four statutory grounds is readily apparent. These four grounds are very narrow, and solely focused on the arbitrator's behavior, and it would appear that Congress intended it to be that way.[25] At the same time, though, if the FAA was intended to encourage parties to exercise their freedom to contract for arbitration rather than litigation, those same contractually liberated parties should be free to agree on everything affecting their arbitration, including a standard of judicial review that makes them comfortable and keeps them out of litigation.

Whether parties can contractually demand that a federal district court review the arbitration award for grounds not mentioned in the FAA has split the federal Circuit Courts of Appeals. Some circuits, such as the Fourth, Fifth and, until very recently, the Ninth allow such a demand.[26] Others, such as the Seventh, Eighth, Tenth and the recently converted Ninth do not allow such a supplementation of the FAA.[27]

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misconduct or misbehavior, and thus vacating an award, was appropriate where National Basketball Association Commissioner, acting as an arbitrator, failed to conduct a hearing and refused to allow the party charged with misconduct to rebut charges with evidence).

24. *See, e.g.*, Neary v. Prudential Ins. Co. of Am., 63 F. Supp. 2d 208, 210-11 (D. Conn. 1999) (finding that a terminated employee is entitled to vacation of the arbitration award denying his claim pursuant to the manifest disregard of the law standard where the arbitration panel seemed to have ignored his substantial evidence of bad motive, ignored the summary judgment standard, and focused solely on the employer's justification for termination. *See* Employers Ins. Co. v. Jeffries & Co., 958 F.2d 258, 261-62 (9th Cir. 1992) (explaining that a party cannot be forced into arbitration according to terms for which it did not bargain, and for the arbitrator to attempt to force this is a misuse of power); Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991) (noting that manifest disregard of the law can be a misuse of arbitrator power and may provide a basis for vacating an arbitration award where it is shown that the arbitrator knew the law, the law was clearly defined, and the arbitrator decided to ignore the law).

25. *See* 9 U.S.C. §§ 1-16 (2000) (codifying a law that expressly limits judicial review of arbitration awards to the four avenues for vacatur listed in the statute). *See contra*, Edward Brunet, *Replacing Folklore Arbitration With A Contract Model of Arbitration*, 74 TUL. L. REV. 39, 79-80 (1999) (arguing that the legislative history behind the FAA indicates that this law was promulgated in order to maximize party intent).

26. Gateway Tech., Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 997 (5th Cir. 1995) (holding that parties to pre-dispute arbitration clauses may contractually expand the scope of judicial review beyond the limited grounds set forth in the FAA). Syncor Int'l. Corp. v. McLeland, No. 96-2261, 1997 U.S. App. LEXIS 21248, at *16 (4th Cir. Aug. 11, 1997) (per curium) (holding parties to pre-dispute arbitration clauses may contractually expand the scope of judicial review beyond the limited grounds set forth in the FAA). LaPine Tech. Corp. v. Kyocera, 130 F.3d 884, 889-90 (9th Cir. 1997) (hereinafter "LaPine I") (holding parties to pre-dispute arbitration clauses may contractually expand the scope of judicial review beyond the limited grounds set forth in the FAA).

27. *See Chicago Typographical*, 935 F.2d at 1505 (commenting, in dicta, that parties to pre-dispute arbitration contracts may not expand the scope of judicial review beyond the FAA, as this would be creating federal jurisdiction by contract). *See also* UHC Mgmt. Co., Inc. v. Computer Sci. Corp., 148 F.3d 992, 998 (8th Cir. 1998) (following Judge Posner's dicta and forbidding the parties to contractually expand the scope of judicial review beyond the FAA); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001) (holding that parties may not expand the scope of judicial review beyond the FAA); Kyocera Corp. v. Prudential-Bache Trade Corp., 341 F.3d 987 (9th Cir. 2003) (hereinafter

C. A Brief Glimpse at This Article's Proposal

The Supreme Court of the United States should adopt an alternative solution to resolve the circuit split. Instead of one hard rule, either permitting the expansion of judicial review in all cases or denying it in all cases, the Court should avoid the potentially disastrous consequences of such a hard-line position. It should establish a presumption in favor of freedom to contract for expanded review, placing a burden on the opponent to demonstrate why the contractually expanded review would offend state contract law or policy.

D. Roadmap

Part II of this Comment will acquaint the reader with federal Circuit Court of Appeals' holdings allowing parties to contractually expand the scope of judicial review beyond that which the FAA allows. Part II will also include a look at how the Supreme Court has previously dealt with issues arising under the FAA, forecasting why a presumption in favor of freedom to contract would be readily acceptable to the Court. Part III will analyze the federal Circuit Courts of Appeals cases that have invalidated parties' attempts to contractually expand judicial review. Finally, Part IV will provide a detailed roadmap for the Court to use as its tool for resolving the circuit split by avoiding the potentially disastrous consequences of merely adopting a *per se* stance on the issue, as some Circuits have done.

II. THE FREEDOM TO CONTRACT FOR EXPANDED JUDICIAL REVIEW

A. Fils: *A Case of First and Lasting Impression*

The first federal case to evaluate whether parties to pre-dispute arbitration contracts may contractually expand the scope of judicial review beyond the limited grounds set forth by the FAA was *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*[28] Judge Conner, writing for the United States District Court for the Southern District of New York, held that parties may indeed expand the scope of judicial review by contract.[29]

In *Fils*, the parties had entered into two contracts for the purchase and sale of galvanized wire.[30] The contracts contained pre-dispute arbitration clauses binding them to commercial arbitration for dispute resolution, should a disagreement surface.[31] Included in the contract was a clause that expanded the scope of judicial review to include review for errors in weighing evidence and application of law.[32] This heightened standard is

"LaPine II") (reversing its stance from LaPine I and holding that parties may not expand the scope of judicial review beyond the FAA).

28. *See Fils*, 584 F. Supp. at 240.

29. *Id.* at 244.

30. *Id.* at 242.

31. *Id.*

32. *Id.*

beyond the four narrow grounds listed in the FAA.[33] At arbitration, the arbitrator awarded damages to Fils et Cables,[34] while simultaneously ordering Fils et Cables to pay Midland for settlement and related expenses.[35] Fils et Cables sought the help of Judge Conner and the District Court to confirm the award in all respects, while Midland attempted to have the award vacated in part.[36]

The court began its analysis by noting that arbitration is a "creature of contract, . . . favored by Congress and the courts as an alternative to the complications" and price of traditional litigation.[37] The court explained that arbitration is wholly dependent upon the agreement of the parties; therefore, the resolution of this issue should find its answer directly in the terms of the contract.[38] The court was confident that this dispute should be resolved in one of two ways.[39] The arbitration contract should either be enforced with the expanded scope of judicial review, or the entire arbitration agreement should be voided.[40] In Judge Conner's words, "a party cannot be compelled to submit his dispute to arbitration under rules to which he has not assented."[41] Therefore, the court could not simply draw a line through paragraph thirteen of the arbitration contract calling for an expanded scope of judicial review as if this clause was separable from the arbitration contract itself.[42] The expansion provision in question was a material part of the arbitration contract and had to either be enforced or the entire arbitration contract voided, forcing the parties to pursue traditional litigation.[43] The court chose to enforce the arbitration contract with the expansion clause in the name of freedom of contract principles.[44] This recognition of party autonomy was not, however, without express restrictions.[45]

The court allowed the contractual expansion of judicial review because

33. *See supra* notes 20-24 and accompanying text.

34. *Fils*, 584 F. Supp. at 243. Midland was directed to pay: "(a) $266,217.30 for merchandise made in Taiwan; (b) $4,788.97 for merchandise in the hands of customers; (c) 1,004,503 French francs for inventory; and (d) interest of $25,000 plus 135,000 francs plus another 11 percent." *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 244 (reminding the parties that "[I]t nevertheless remains that arbitration is wholly dependent upon agreement").

39. *Id.*

40. *Fils*, 584 F. Supp. at 243. If paragraph thirteen should not be enforced, "then the entire arbitration provision of these contracts could not be enforced. The parties did not agree to arbitrate their disputes in the customary sense; rather they agreed to a process by which a nonjudicial body would make a determination, which would then be subject to substantial judicial review." *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* Freedom of contract ruled the day in the instant case because the facts were absent a "jurisdictional or public policy barrier" to the parties' agreement to "alter the standard roles" of an Article III Court. *Fils*, 584 F. Supp. at 243.

there were no apparent jurisdictional or public policy impediments.[46] Jurisdiction was based upon diversity pursuant to 28 U.S.C. § 1332.[47] The court was unable to discover public policy impediments.[48] The court also reasoned that although contractually expanding the scope of judicial review could take away some of the efficiency and finality of the arbitration process, a district court hearing an appeal pursuant to an expansion clause would be less burdened than it would be with a complete trial.[49]

B. A Court of Appeals Weighs In

In 1995, the Fifth Circuit became the first of the federal Circuit Courts of Appeals to decide the issue of contractual expansion of judicial review beyond the FAA.[50] In *Gateway Technologies, Inc., v. MCI Telecommunications Corp.*,[51] the Virginia Department of Corrections hired MCI[52] to devise and operate a telephone system that would allow prisoners to make collect calls to approved individuals without operator assistance.[53] MCI subcontracted Gateway to furnish, install, and maintain all the necessary technology for the system.[54] The parties' subcontract provided for binding arbitration, "except that errors of law shall be subject to appeal."[55] A dispute between the parties ensued,[56] good faith negotiations proved fruitless and the arbitration award in favor of Gateway was eventually appealed to the Fifth Circuit.[57]

As a threshold issue,[58] the Fifth Circuit held that parties may

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46. *Id.*

47. 28 U.S.C. § 1332 (2000).

48. *Fils*, 584 F. Supp. at 244.

49. *Id.* Judge Conner's opinion explained why there existed no public policy grounds in that case to trump the freedom of parties to contract for the judicial review they desired. *Id.* Judge Conner admitted that the efficiency incentive of arbitration was injured by paragraph thirteen's lengthening the duration of the dispute, but that did not provide enough of a public policy reason sufficient to overcome freedom of contract in that case. *Id.* He emphasized that arbitration did limit the burden on the court system, whereas a full-blown trial did no such thing. *Id.*

50. *Gateway*, 64 F.3d at 993.

51. *Id.*

52. *Id.* at 995. MCI is a telephone service carrier, whose job it was to secure the local lines over which the inmates would place the collect calls. *Id.*

53. *Id.* MCI was the successful bidder for the project. *Id.*

54. *Id.*

55. *Gateway*, 64 F.3d at 993. This short, succinct contractual expansion of the scope of judicial review proved just as legally sufficient to provide for the expanded review as the longer one in *Fils*. *Fils*, 584 F. Supp at 242.

56. *Gateway*, 64 F.3d at 995-96. After installation, MCI complained to Gateway that inmates were succeeding in placing many unauthorized collect calls. *Id.* at 995. MCI decided to input its own system to bypass Gateway's allegedly faulty one. *Id.* MCI thereby increased its profits an additional $84,000 each month. *Id.* at 996. In response, Gateway offered to fix the faults in the system, but MCI refused to sign a confidentiality agreement for the new Gateway software. *Id.*

57. *Id.* There was a contractual duty to negotiate in good faith in the event of a contract dispute. *Gateway*, 64 F.3d at 995. The arbitrator found that MCI had breached this provision. *Id.*

58. *Id.* at 996. The court was forced to determine first whether the arbitration award

contractually expand the scope of judicial review under the FAA because, "arbitration is a creature of contract and the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties."[59] The court thought it foolish to "frustrate the mutual intent of the parties."[60] However, the opinion failed to establish any qualifications upon this freedom of contract principle as the *Fils* court had done eleven years earlier in New York.[61]

C. *Unpublished Support From the Fourth Circuit*

In *Syncor International Corp. v. McLeland*,[62] the Fourth Circuit Court of Appeals, in an unpublished opinion, adopted the holding and reasoning of *Gateway*.[63] Noting that while ordinarily a federal district court's review of an arbitration award is extraordinarily narrow pursuant to the FAA, such review will be expanded because the parties agreed that "the arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal."[64] Relying on *Gateway*, the court was satisfied that this contractual expansion of judicial review under the FAA was permissible.[65]

D. *The Ninth Circuit: LaPine I and Supplementation of the FAA*

Before its recent about-face on the issue, the Ninth Circuit Court of Appeals had authored the most articulate opinion allowing parties to contractually expand the scope of judicial review beyond the four narrow

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could be lawfully vacated under the FAA. *Id.*

59. *Id.* The Court also initially considered the standard of review to be *de novo*, reversing the district court's specially crafted "harmless error standard." *Id.*

60. *Id.* at 997.

61. *Fils*, 584 F. Supp. at 244. The *Gateway* Court failed to qualify its strong holding to freedom of contract principles as the primary justification for allowing parties to contractually expand the scope of judicial review beyond the FAA. *Gateway*, 64 F.3d at 997. There was no mention of public policy or jurisdictional qualifiers. *Id.* Whether the *Gateway* Court thought these qualifiers unimportant, or merely sidestepped discussion of them because they were not present, is an open question.

62. Syncor Int'l. Corp. v. McLeland, No. 96-2261, 1997 U.S. App. LEXIS 21248, at *16 (4th Cir. Aug. 11, 1997).

63. *Id.* The *Syncor* Court explained its reasoning as follows:

> In this case, however, the parties contractually agreed to permit expanded review of the arbitration award by the federal courts. Specifically, their contract details that 'the arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal . . . . Such a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract . . . . Because these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA's default standard of review and allows for de novo review of issues of law embodied in the arbitration award.

Id.

64. *Id.* This contractual expansion of the scope of judicial review, though worded differently, provided the same legal effect as the two other cases surveyed thus far. *See Fils*, 584 F. Supp. at 242; *Gateway*, 64 F.3d at 995.

65. *Syncor*, 1997 U.S. App. LEXIS 21248, at *16.

standards listed in the FAA.[66] In *LaPine Technology v. Kyocera*,[67] (hereinafter "LaPine I") both corporations were partners in a three-party[68] venture to manufacture and market computer disk drives.[69] An unfortunate fiscal downturn for LaPine resulted in a restructuring of the partnership.[70] The third partner was eliminated pursuant to a new agreement, requiring Kyocera to take on added responsibility.[71] Kyocera objected to this revision and later refused to comply with the new contract; LaPine then sued for breach.[72]

The revised agreement contained a binding pre-dispute arbitration clause.[73] Additionally, the parties had agreed on an expanded scope of judicial review beyond the FAA.[74] At arbitration, an award was entered in favor of LaPine, causing Kyocera to petition the federal district court for vacatur of the award, while LaPine moved for confirmation.[75] The district court had decided to review the arbitration award on only the limited FAA grounds for vacatur and, not surprisingly, found no reason to vacate the award.[76] Kyocera then appealed to the Ninth Circuit arguing error on behalf of the district court for failure to review the case on the contractually expanded review standard.[77]

The Ninth Circuit reversed the federal district court and decided to honor the contract to expand judicial review, aligning itself with *Fils*, *Syncor*, and *Gateway*.[78] The circuit court began its analysis by noting that

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66. *LaPine I*, 130 F.3d at 884.

67. *Id.*

68. *Id.* at 886. The third party was Prudential-Bache, who provided financing for this venture as a middleman. *Id.* Prudential-Bache "would purchase Kyocera's entire output of drives and sell those drives to LaPine," who was responsible for the marketing of the drives. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *LaPine I*, 130 F.3d at 886.

73. *Id.* at 886-87. The arbitration clause set forth the following procedures and rules:

> A party desiring to submit a matter to arbitration shall give written notice to the other parties hereto . . . . The arbitrators shall decide the matters submitted based upon the evidence presented, the terms of this Agreement, the Agreement in Principle and the laws of the State of California. The arbitrators shall issue a written award which shall state the basis of the award and include detailed findings of fact and conclusions of law.

Id.

74. *Id.* at 887. This clause prescribes that:

> 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 are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous.

Id.

75. *Id.*

76. *Id.*

77. *LaPine I*, 130 F.3d at 887.

78. *Id.* at 888.

there were other judge-made grounds for vacatur beyond the FAA, such as the "completely irrational" test and the "manifest disregard of law" standard,[79] implying that courts should not deny arbitrating parties expanded review on the narrow interpretation that the four grounds listed in the FAA were the only gateway to such review. The Ninth Circuit stated that [the] "FAA is not an apotropaion[[80]] designed to avert overburdened court dockets; it is designed to avert interference with the contractual rights of parties."[81]

As previously mentioned, the Ninth Circuit later reversed itself and thus abandoned the above reasoning. The reversal will be discussed later.

E. The Contractually Expansionist Courts: A Summary

Freedom of contract has powerful justification for allowing a contractually expanded scope of judicial review.[82] There are, however, subtle differences among these circuits. *Fils* offered a qualified principle of freedom of contract.[83] *Gateway* and *Syncor* were, for the most part, devoid of limits on party autonomy.[84] The *LaPine I* court pointed to the established ability of the federal district courts to supplement the FAA when needed.[85] *LaPine I* was also quick to caution its critics that the FAA is not a magic wand for judges to wave and thus alleviate their dockets by refusing to hear petitions for vacatur beyond the four grounds listed in the FAA.[86]

III. JUDICIAL REFUSAL TO ALLOW CONTRACTUAL EXPANSION

Four federal circuits have, conversely, rejected arbitrating parties' efforts to contractually expand the scope of judicial review beyond the FAA.[87] Although contractual expansion is the better approach[88] and is

79. *Id. See also* Marcus Mungioli, *The Manifest Disregard Of The Law Standard: A Vehicle For Modernization Of The Federal Arbitration Act*, 31 ST. MARY'S L.J. 1079, 1080-1122 (2000) (reviewing various appellate circuit courts that have adopted the manifest disregard of the law standard).

80. WORLD BOOK DICTIONARY 99 (25th ed. 1990). Apotropaic is defined as "able or believed to be able to ward off evil." *Id.*

81. *LaPine I*, 130 F.3d at 891.

82. In addition to the above cases that discuss contractual expansion, see Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) (illustrating the Third Circuit's position: parties may opt out of the FAA's limited grounds for vacatur and fashion their own more restrictive grounds for review). The Third Circuit examined the issue only briefly, footnoted the "great weight of authority," and reasoned "parties may opt-out of the FAA's off-the-rack vacatur standards and fashion their own." *Kayser*, 257 F.3d at 293.

83. *Fils*, 584 F. Supp. at 240.

84. *Syncor*, U.S. App. LEXIS 21248 at *16; *Gateway*, 64 F.3d at 993.

85. *LaPine I*, 130 F.3d at 888-89.

86. *Id.* at 891.

87. *See supra* note 27 and accompanying text (rejecting, sometimes in dicta, the notion that parties may contractually expand the scope of judicial review of arbitration awards).

88. *See* Cullinan, *supra* note 13, at 428 (explaining that allowing contractual expansion is sound policy because the primary goal of the FAA is "to enforce the parties' agreements to the letter, lending confidence" to arbitration as a viable alternative dispute resolution

supported by previous Supreme Court holdings,[89] circuits prohibiting contractual expansion when federal policy favors expansion should not be entirely disregarded.[90] The following cases should be respected as a firm warning of the possible havoc that might be wrought if the Supreme Court allows unqualified contractual expansion of the scope of judicial review beyond the FAA.[91] Because of this possible havoc, the Supreme Court should recognize possible policy and contract defenses that could rebut the presumption of freedom to contract.

A. The Seventh Circuit Genesis

In 1991, Judge Richard Posner, writing for the Seventh Circuit Court of Appeals, rejected the idea that parties to a pre-dispute arbitration clause could contractually expand the scope of judicial review beyond the FAA.[92] In *Chicago Typographical Union v. Chicago Sun-Times, Inc.*,[93] the union brought a grievance complaining that the *Sun-Times* had made changes to some of the conditions and terms of employment; these changes were alleged to be in violation of a contract called the "Supplemental Agreement".[94] At arbitration, the *Sun-Times* prevailed.[95] The union subsequently brought an unsuccessful petition to vacate the arbitration award in federal district court, while the *Sun-Times* won confirmation of the award.[96]

On appeal, the Seventh Circuit upheld the arbitrator's award, explaining that its ability to reverse the decision was severely constrained.[97] Though contractual expansion of the scope of judicial review was not a direct issue in the case, Judge Posner offered his thoughts on the topic as dicta.[98] "If the parties want, they can contract for an appellate arbitration

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option).

89. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) (reasoning that courts should interpret contracts in such a way that respects "the expressed intentions of the parties"); Volt Info. Sci., Inc. v. Bd. of Trustees, 489 U.S. 468, 479 (1989) (commenting that since parties can specify the issues to be arbitrated in the contract, they can also name the rules to govern the arbitration); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985) (observing that the FAA's legislative history was unambiguous in its belief that arbitration contracts should be enforced exactly the same as any other type of contract so as to correct the historic judicial hesitance to enforce such arbitration contracts).

90. *See* Sullivan, *supra* note 9, at 511 (warning the judiciary against the problems that come with allowing contractual expansion of judicial review under the FAA).

91. *Id.*

92. *Chicago Typographical*, 935 F.2d at 1505.

93. *Id.* at 1501.

94. *Id.* at 1503.

95. *Id.*

96. *Id.* at 1503-04.

97. *Id.* at 1504-05. Posner remarked:

> The appeal from the decision upholding the arbitration award is the easier, so let us take it first. Federal courts do not review the soundness of arbitration awards. An agreement to submit a dispute over the interpretation of a labor or other contract to arbitration is a contractual commitment to abide by the arbitrator's interpretation.

Id.

98. *LaPine I*, 130 F.3d at 890. "Thus, it seems that [Posner's] cryptic assertion about

panel to review the arbitrator's award. But they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract."[99]

1. An Observation

Judge Posner's suggestion that parties should consider contracting for an appellate arbitration panel is a temporary solution, and may be a delicious alternative for many potential parties who would like to reserve a second bite at the apple.[100] Regardless, Judge Posner's rejection of parties' ability to contract for expanded judicial review of an arbitration award is tenuous.[101]

Binding arbitration under the FAA cannot exist without parties contracting for resolution of their dispute outside of the courtroom in front of an arbitrator.[102] By insisting that parties can never create federal appellate jurisdiction by contract, Judge Posner was most likely endeavoring to protect the federal docket from the voluminous appeals that would result from district court reviews.[103] It is at least safe to assume this was the case since he failed to cite any authority for the above dicta.[104] However, it appears that the Seventh Circuit did not consider that by making such a hardline rule, parties might be scared away from arbitration altogether, choosing litigation instead.[105]

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jurisdiction is dicta." *Id. See also* Diane P. Wood, *The Brave New World of Arbitration*, 31 CAP. U.L. REV. 383, 405 (2003) (suggesting that Congress, not the courts, settle this dispute; Wood is currently a Seventh Circuit Justice).

99. *Chicago Typographical*, 935 F.2d at 1505.

100. *See* Sullivan, *supra* note 9, at 549 (stating that the main advantage of arbitration is that it allows parties to avoid the court system, and this advantage will be lost if parties are allowed back into the court system for a second bite at the apple).

101. *See* Brunet, *supra* note 25, at 69-71 (explaining that Judge Posner's dicta is especially cryptic and somewhat surprising, as it may be against market based economic considerations). *See also* Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942) (pleading with sister courts to "shake off the old judicial hostility to arbitration"); Carrington, *supra* note 17, at 339 (reminding the reader that one has to go back as far as the 19th Century to see American courts guard their jurisdiction from contractual arbitration).

102. 9 U.S.C. § 2 (2000). This section reads:

> 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 such grounds as exist at law or in equity for the revocation of any contract.

Id.

103. *See* Carrington, *supra* note 17, at 332 (explaining that the judicial trend when viewing commercial arbitration is one of conserving judicial resources by encouraging arbitration in lieu of litigation).

104. *See LaPine I*, 130 F.3d at 890 (commenting that Judge Posner's dicta concerning parties' inability to create federal jurisdiction by contract under the FAA was never reasoned or explained).

105. *Recent Case: Arbitration - Standard of Review - Tenth Circuit Rejects Contractual Expansion of Judicial Review of Arbitration Awards*, 115 HARV. L. REV. 1267, 1272 (2002). "Many parties, as evidenced by Bowen and cases arising in similar contexts,

The Seventh Circuit will thus be faced with the same large number of appeals, only now the appeals will contain lengthy trial records to review[106] instead of their streamlined arbitration counterparts.[107] Although Judge Posner suggested that contracting for an *appellate* arbitration panel to review the arbitration award for errors of law might solve this dilemma and satisfy the parties, it is difficult to believe that parties to arbitration, who desire the proper legal outcome, will place the legal error review in the hands of non-judges.[108]

2. *Judge Posner's Dicta: A Useful Warning*

Nonetheless, Judge Posner's hesitance concerning jurisdiction is a reality check to those who espouse unlimited freedom of contract.[109] After all, the FAA does not confer jurisdiction independently.[110] It would be a dangerous precedent to allow arbitration parties into federal court through the backdoor of contractual expansion of judicial review, when neither federal question nor diversity jurisdiction is satisfied.[111] This concern is not new, as Judge Connor expressed jurisdictional hesitance to expand the scope of judicial review of arbitration in *Fils*.[112]

B. *The Eighth Circuit Contributes Its Own Dicta, But With Passivity*

The case of *UHC Management Co. v. Computer Sciences Corp.* was

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appear to tie their commitments to arbitration to the availability of contractually modified standards of judicial review." *Id.*

106. *See* Baravati v. Josephthal, Lyon & Ross Inc., 28 F.3d 704, 706 (7th Cir. 1994) (explaining that the phrase, "judicial review of arbitration awards" is a non-sequitur and should not be called "review," since this circuit is not dedicated to allowing disappointed parties back into litigation through the backdoor of appellate review). *Id.*

107. *See Bowen*, 254 F.3d at 936 (admitting that even the Tenth Circuit realizes appellate review of an arbitration award is certainly less arduous than hearing a diversity or federal question case).

108. *See* Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 753 (1999) (pointing out that creating law is difficult, "requiring education in the law and sensitivity to the interests of various groups in society," and that judges are better suited than private parties to make law).

109. *See* Di Jiang-Schuerger, *Perfect Arbitration = Arbitration + Litigation?*, 4 HARV. NEGOT. L. REV. 231, 237-39 (1999) (reminding the reader that concern over jurisdiction is vital to any expanded judicial review analysis). *See also* Bargenquast v. Nakano Foods, Inc., 243 F. Supp. 2d 772, 776 (N.D. Ill. 2002) (holding parties may not contractually expand the scope of judicial review beyond the FAA, as Judge Posner has already settled this issue).

110. Jiang-Schuerger, *supra* note 109, at 237.

111. *See* Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983) (commenting that the FAA is quite the anomaly in the realm of federal jurisdiction because when an arbitrating party enlists the help of a federal court, an independent jurisdictional basis is required). *See also* Pryner v. Tractor Supply Co., 109 F.3d 354, 359 (7th Cir. 1997) (explaining that the FAA may not be a source of jurisdiction, but rather, an offer of procedures for a "class of cases otherwise within federal jurisdiction").

112. *See Fils*, 584 F. Supp. at 244 (noting that jurisdictional or public policy issues might preclude such expansion of judicial review).

brought to the Eighth Circuit Court of Appeals in 1998.[113] The case involved UHC, a fund contractor, and Computer Sciences Corporation, a claim processing company.[114] The parties entered into a contract in which Computer Sciences agreed to process claims from the beneficiaries of an employee medical care fund.[115] A dispute arose; both parties, after a fruitless attempt to negotiate in good faith, demanded arbitration pursuant to the contract.[116]

At arbitration, a panel found a mutual breach of contract,[117] but damages were solely proven by UHC in the amount of 1.3 million dollars.[118] UHC successfully moved the district court for confirmation of the award while Computer Sciences unsuccessfully sought vacature of the award.[119] Because the contract included a clause that the arbitration be "bound by controlling law," Computer Sciences appealed on the basis that there was contractual expansion of judicial review agreed to by UHC.[120]

Though the court did explicitly reserve the question of expansion of judicial review for another time,[121] the court, in dicta, did not allow the argument for contractual expansion to get very far.[122] Citing a previous

113. *UHC*, 148 F.3d at 992.

114. *Id.* at 994.

115. *Id.*

116. *Id.* The agreement to arbitrate was set forth as follows:

> Disputes - In the event a dispute between United and Contractor arises out of or is related to this Agreement, the parties shall meet and negotiate in good faith to attempt to resolve the dispute. In the event the dispute is not resolved within 30 days of the date one party sent written notice of the dispute to the other party, and if either party wishes to pursue the dispute, either party may submit it to binding arbitration in accordance with the rules of the American Arbitration Association. In no event may arbitration be initiated more than one year following the sending of written notice of the dispute. Any arbitration proceeding under this Agreement shall be conducted in Hennepin County, Minnesota, U.S.A., or in a mutually agreeable location. The arbitrators shall have no authority to award any punitive or exemplary damages, or to vary or ignore the terms of this Agreement, and shall be bound by controlling law.

Id.

117. *Id.*

118. *Id.*

119. *UHC*, 148 F.3d at 994-95.

120. *Id.* at 996-97.

121. *Id.* at 998. The *UHC* Court decided that the resolution of this issue regarding whether parties may contractually expand the scope of judicial review beyond the FAA was better left to another case that was more on point: "Although Computer Sciences's argument raises an interesting question, we are content to reserve its resolution for a time when circumstances require it." *Id.*

122. *Id.* The court thought that the parties had not expressed clear intent that their arbitration be subject to expanded judicial review. *Id. See also, Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8th Cir. 2003) (reaffirming the Eighth Circuit emphasis on unambiguous clarity of intent as a prerequisite to expanding the scope of judicial review). Although the *Schoch* court remained academically skeptical of contractual expansion of judicial review, a definitive stance on the issue was once again delayed until the circumstances require it. *Id.* at 794. By insisting on clarity of intent, it would appear that 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. *Id.*

Eighth Circuit case, the court reasoned, "that where 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."[123] The court also stated, "Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication."[124]

The Eighth Circuit also cited the dissenting opinion of the Ninth Circuit in *LaPine I*, where Judge Mayer explained that contracts to expand the scope of judicial review are not an element of procedure that arbitrating parties customarily alter pursuant to contract; such expansion is instead an attempt to compel a federal court to do as the parties please.[125] The *UHC* court did, however, leave the door open to possible future contractual expansion of the scope of judicial review as long as the parties' intent is unambiguous.[126] The clause in the case at bar lacked this clarity of intent; the court was therefore content to end the analysis of the issue with a denial of expansion.[127] A fair reading of this case indicates that the Eighth Circuit may be willing to allow contractual expansion when the parties' intent to do so is clear.[128]

C. The Tenth Circuit Anomaly: A Questionable, But Nonetheless Distinguishable, Precedent

In 2001, the Tenth Circuit Court of Appeals, in *Bowen v. Amoco Petroleum*, rejected contractual expansion of the scope of judicial review beyond the FAA, and became the first Circuit to come out from behind the warm blanket of dicta to do so.[129] When an Amoco pipeline polluted a creek, property owner Ernesto Bowen sought damages in an Oklahoma federal district court.[130] Amoco did not respond to the complaint, but successfully moved for a stay of the proceedings while asking for an order

123. Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 (8th Cir. 1986).

124. *Id.*

125. *UHC*, 148 F.3d at 997-998 (quoting *LaPine I*, 130 F.3d at 884)

> Whether to arbitrate, what to arbitrate, how to arbitrate, and when to arbitrate are matters that parties may specify contractually . . . However, Kyocera cites no authority explicitly empowering litigants to dictate how an Article III court must review an arbitration decision. Absent this, they may not. Should parties desire more scrutiny than the [FAA] authorizes courts to apply, "they can contract for an appellate arbitration panel to review the arbitrator's award[;] they cannot contract for judicial review of that award.

Id.

126. *Id.* at 998. "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." *Id.*

127. *Id.*

128. *Id.* The court would not, it seems, have assumed it was "possible to contract for expanded judicial review of an arbitration award" if the court thought it was impossible. *Id.*

129. *Bowen*, 254 F.3d at 936. "Although we are the first circuit to hold that parties may not contract for an expanded standard of review, two circuits have indicated they too would reject contractually expanded standards. In dicta, both the Seventh and the Eighth Circuits have expressed disapproval of contractually expanded standards of review." *Id.*

130. *Id.* at 928.

compelling arbitration pursuant to a provision in a 1918 right-of-way contract.[131] Prior to arbitration, the parties also agreed that their arbitration would include the right to appeal any arbitration award to the district court within thirty days "on the grounds that the award is not supported by the evidence."[132]

Following an arbitration panel's consideration of the case, an award was issued in favor of the Bowens in excess of five million dollars for compensatory and punitive damages.[133] The Bowens then successfully moved the Oklahoma federal district court for confirmation of the award, while Amoco filed its doomed notice of appeal.[134]

The federal district court confirmed the arbitration award[135] and the Tenth Circuit affirmed.[136] The Tenth Circuit's analysis began by acknowledging that both the Fifth and Ninth Circuits have allowed such contractual expansion by following the reasoning in the United States Supreme Court case of *Volt Information Sciences v. Board of Trustees*.[137] In *Volt*, the Court held that the FAA's purpose is that of "ensuring that private agreements to arbitrate are enforced according to their terms."[138] Other Supreme Court cases have held steadfastly to the notion that a contract to arbitrate should be enforced rigorously.[139] After paying homage to the litany of decisions where the Court emphasized the contractual nature of arbitration,[140] the Tenth Circuit proceeded to justify its anomalous holding.

1. The Tenth Circuit Used a Sleight-of-Word Tactic to Justify its Holding

According to the Tenth Circuit, the expanded judicial review clause was an attempt to "interfere with the judicial process."[141] The Court astutely pointed to the *Volt* opinion as rather supportive of its view, and not supportive of the contractual expansionists.[142] The Supreme Court in *Volt*

131. *Id.*
132. *Id.* at 930.
133. *Id.*
134. *Bowen*, 254 F.3d at 930.
135. *Id.*
136. *Id.* at 941.
137. *Volt*, 489 U.S. at 479. The Supreme Court stated that contracts for arbitration are to be enforced according to their terms without qualification. *Id.*
138. *Id.*
139. *See Mastrobuono*, 514 U.S. at 57 (stating that in interpreting arbitration contracts, the courts should defer to the intentions of the parties). *See also* Allied-Bruce Terminix v. Dobson, 513 U.S. 265, 270 (1995) (pointing out that the purpose of the FAA was to encourage courts to enforce arbitration agreements); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (noting that the FAA mandates the enforcement of these private agreements); Prima Paint Corp. v. Flood, 388 U.S. 395, 404 (1967) (stating that the FAA was intended to make arbitration agreements "as enforceable as other contracts").
140. *Bowen*, 254 F.3d at 933-34.
141. *Id.* at 934. "We disagree, however, with the Fifth and Ninth Circuits' conclusion that the Supreme Court precedent emphasizing the FAA's primary purpose compels enforcement of contractual modifications of judicial review . . . [Volt] never said parties are free to interfere with the judicial process." *Id.*
142. *Id.*

noted that enforcing the parties' contract in that case "[gave] effect to the contractual rights and expectations of the parties, without *doing violence* to the policies behind . . . the FAA."[143] Following this quote in the *Volt* holding, the Tenth Circuit creatively reframed the issue as whether the proposed contractual expansion "*conflicts* with federal policies furthered by the FAA."[144] The court thereby converted the more demanding "doing violence" standard required by the *Volt* Supreme Court into the easier "conflicts" standard.[145] It is this sleight-of-word that enabled the Tenth Circuit to make a persuasive case against freedom to contract principles.[146]

2. Reliance On Arbitration as Cheaper and Quicker: Misplaced?

The *Bowen* court explained the conflicts it found apparent in the proposed contractual expansion of judicial review.[147] First, it noted that expanded judicial review conflicts with the legislative intent to only allow limited vacatur grounds, thus ensuring "judicial respect for the arbitration process,"[148] and to preserve "the independence of the arbitration process."[149] Secondly, the court found a conflict between expanded review and the Supreme Court's established view, found in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.'"[150]

However, this position seems a relic given the expansion in complexity

143. *Volt*, 489 U.S. at 479. (emphasis added).

144. *Bowen*, 254 F.3d at 935. (emphasis added). The Tenth Circuit narrowed the ultimate question to "whether the alternate rule conflicts with federal policies furthered by the FAA." *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* The Tenth Circuit discussed its view that the FAA intended to provide a narrow scope of review of these agreements:

> Unlike the contract clause at issue in Volt, the 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. The FAA's limited review ensures judicial respect for the arbitration process and prevents courts from enforcing parties' agreements to arbitrate only to refuse to respect the results of the arbitration. These limited standards manifest a legislative intent to further the federal policy favoring arbitration by preserving the independence of the arbitration process.

Id.

149. *Bowen*, 254 F.3d at 935.

150. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). In *Mitsubishi*, the plaintiff car manufacturer had signed a pre-dispute arbitration clause with defendant car dealership sending all disputes to arbitration under the FAA. *Id.* at 617. The trial court held that the defendant's antitrust claims were appropriate for arbitration. *Id.* at 620-21. The reviewing court reversed this order. *Id.* at 623. The Supreme Court then reversed the reviewing court. *Id.* at 640. The Supreme Court held that the antitrust claim did not invalidate the arbitration agreement. *Id.* at 628-29. The Court emphasized the strong presumption in favor of arbitration agreements in international commerce. *Id.*

and volume of arbitration over the years.[151] There is a need for empirical research into whether commercial arbitration is really simpler, more informal, or more expeditious than commercial litigation before the Supreme Court is persuaded to affirm the Tenth Circuit's holding on these unexplored foundations.[152] To affirm the Tenth Circuit would be to arrest the freedom of contract in the name of *Mitsubishi's* dubious foundations.[153] Such blanket confirmation should not be endorsed by a court of final review.[154]

3. The Hidden Secret Behind the Tenth Circuit's Holding: The Separate Agreement to Contractually Expand Judicial Review

It is important to understand that the clause attempting to contractually expand the scope of judicial review in *Bowen* was not part of the original 1918 agreement for arbitration, as was the case in all the holdings examined previously.[155] The *Bowen* contractual expansion of judicial review was a separate, post-dispute, post-1918 addition.[156] Therefore, unlike the contractual expansionist cases reviewed above, the *Bowen* parties did not rely on the expansion of judicial review as a material part of their arbitration contract.[157] They, instead, agreed to it later, some years after the agreement to arbitrate. *Bowen* can therefore be limited to its peculiar facts.

Such 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 calls an attempt to create federal jurisdiction by contract.[158] A rule preventing this kind of contract would be a good idea. *Bowen's* precedential weight should be limited to that rule, however. It would be completely ignorant of basic

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151. *See* Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 348 (1995) (commenting that "increasing numbers of more complex commercial disputes . . . are being routinely submitted to arbitration" under the FAA).

152. *See* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 432 (1988) (lamenting the lack of empirical research on commercial arbitration). *But see* Celeste M. Hammond, *The (Pre) (As) summed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 643-46 (2003) (discussing a recent survey of transactional lawyers regarding their expectations of and attitudes about commercial binding arbitration).

153. *Mitsubishi*, 473 U.S. at 628.

154. *Contra Gilmer*, 500 U.S. at 31. If, however, modern federal binding arbitration is really not so simple, informal, and expeditious when compared to modern litigation, it would be a grave mistake to deprive parties the freedom to contract for expanded judicial review relying on such a fiction. If through empirical research or otherwise, the Supreme Court realizes that its *Mitsubishi* quote is unfounded, it would be incumbent upon them to welcome parties into an appellate review of their arbitration awards because arbitration is forever debunked as a meaningful alternative to litigation. *Mitsubishi*, 473 U.S. at 628. "[Arbitration] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.*

155. *Bowen*, 254 F.3d at 930.

156. *Id.*

157. *Id.*

158. *Chicago Typographical*, 935 F.2d at 1505.

contract law principles for any court to *per se* void a dickered expansion clause, relied upon in an initial contract to arbitrate, and still confirm the arbitration award.[159] Because of its facts, *Bowen* did not go that far, nor should subsequent courts read *Bowen* that broadly.

D. The Ninth Circuit Revisited: LaPine II *and En Banc Reversal*

After winding its way back up the appellate ladder, *Lapine I*, was reconsidered *en banc* by the Ninth Circuit in *LaPine II* and reversed.[160] After seven pages of procedurally justifying its self-reversal, and likening itself to the *Lawrence v. Texas* Supreme Court, the *Lapine II* court set forth its legal reasoning for changing its mind.[161]

LaPine II began by emphasizing, as did *Bowen*, that contracting to expand judicial review may potentially make arbitration longer, costlier and less private, thus removing the long-storied traditional benefits of the arbitration process.[162] Given this emphasis, the Ninth Circuit will no longer allow parties to contractually expand the scope of judicial review.[163] The problem with rejecting contractual expansion for fear of the aforementioned is that the Court seems to forget that parties are completely free to contract for "benefit-less" arbitration if they so choose. Therefore, such paternalism stressing preservation of these traditional benefits for the parties is surely appreciated, but is understandably unwelcome when parties contract to risk some of those benefits in exchange for a legally sound outcome.

The Court then addressed a contractual issue that had not been mentioned in the cases since the *Fils* court discussed it over a decade ago.[164] The issue was whether the judicial expansion clause could be severed from the agreement to arbitrate.[165] The *Fils* court had determined that they could not simply remove this material part from the contract to arbitrate under the law.[166] The *LaPine II* court came to the opposite conclusion, however, as a recent California Supreme Court case held that judicial review expansion clauses are illegal and thus severable under certain conditions.[167] *LaPine II* thus announced the illegality of the expansion clause and promptly severed it from the underlying contract to arbitrate.[168]

E. The Contractually Cautious Courts: A Summary

The courts that hold parties to pre-dispute arbitration contracts may not

159. *See* Fuller, *supra* note 6, at 810-12 (explaining that parties to contracts rely on the "expectation that the promise [will] be fulfilled").

160. *LaPine II*, 341 F.3d 987 (9th Cir. 2003).

161. *Id.* at 994-97.

162. *Id.* at 998.

163. *Id.* at 1000.

164. *Id.* at 1000-02.

165. *Id.*

166. *Fils*, 584 F. Supp at 243.

167. Little v. Auto Stiegler, Inc., 63 P.3d 979, 985-987 (Cal. 2003).

168. *LaPine II*, 341 F.3d at 1002.

supplement the FAA by contractually expanding the scope of judicial review do not emphasize the freedom to contract.[169] Instead, they uniformly find it repugnant that parties could be allowed to reach beyond the FAA and agree to federal appellate review of an arbitration award beyond what Congress listed in that statute.[170] However, the contractual expansion of judicial review has never been disallowed when it was relied upon as a material part of an underlying pre-dispute arbitration contract, unless there was a state law contractual defense thereto. If such a case presents itself, the pre-dispute contractual expansion clause should carry a presumption of enforceability.

There is also a fear, in the contractually cautious circuits, that such contractual expansion would turn arbitration into a step-ladder to appellate litigation on the legal merits.[171] The Supreme Court will thus be faced with the quandary of how to best resolve this collision between its own endorsement of freedom of contract principles and Congress's intention to allow only limited grounds for review of arbitration awards.[172]

IV. A PROPOSED SOLUTION FOR THE SUPREME COURT

Whether arbitrating parties may contractually expand the scope of judicial review beyond the FAA to include judicial review for errors of law will continue to depend on which court the parties find themselves in until the Supreme Court resolves this circuit split.[173] Rather than simply affirming one of the two positions in this controversy, the Court should preserve binding arbitration as a meaningful alternate method of dispute resolution by appeasing those commercial parties who wish to utilize arbitration, but who also demand a legally correct outcome.[174]

First, the Supreme Court must recognize that federal binding arbitration is at a critical juncture and that American jurisprudence must be careful when deciding an issue of this magnitude.[175] Second, the Court must

169. *See Chicago Typographical*, 935 F.2d at 1505 (placing less emphasis on freedom to contract as the Court, instead, commented that parties cannot create jurisdiction by contract).

170. *Id.*

171. *See* Sullivan, *supra* note 9, at 524 (commenting that "there must have been Congressional intent [in the FAA] to not allow arbitrable matters back into court for a review of the merits of an arbitration award").

172. *See* Ronald Greenberg, *Uncertain Appeal: Both Opponents and Advocates of Expanded Judicial Review of Arbitration Decisions Invoke the Intent of the Federal Arbitration Act*, 25 LOS ANGELES LAWYER 35, 38 (October 2002) (commenting that a review of the relevant Federal Circuit Court of Appeals cases on this issue shows that the contractually expansionist Circuits' "focus is upon the FAA's strong policy of enforcing the right of the parties to define their agreements to arbitrate," while the contractually cautious Circuits' "focus is upon the congressional intent of the FAA, which is to limit the scope of appellate review").

173. *See* David Daar, *Closing Argument: When Arbitration Loses its Appeal*, 25 LOS ANGELES LAWYER 68, 68 (July/August 2002) (noting that parties can always contract for appellate arbitration review, rather than judicial review).

174. *See* Prima Paint Corp. v. Flood, 388 U.S. 395, 407 (1967) (Black, J. dissenting) (noting that arbitrators may be "wholly unqualified to decide legal issues").

175. *See* Hayford & Peeples, *supra* note 151, at 346 (stating that "[c]ommercial

acknowledge that either strictly allowing or strictly denying arbitrating parties the option to contract for expanded judicial review could be disastrous as to whether parties view arbitration as a healthy option for resolving disputes.[176] Third, the Court should establish a presumption in favor of the right to contract for expanded review, but still allow opponents an avenue to overcome the presumption and have the expansion defeated if it violates public policy or contract principles.[177]

A. The First Step: Understanding that Federal Binding Arbitration is at a Critical Juncture

For too long,[178] American courts have ignored possible concerns for the longevity of federal binding arbitration.[179] Recently, commentators have noted that the future of commercial arbitration is by no means assured.[180] There are inherent characteristics of federal binding arbitration that put it at a disadvantage with state and federal judiciaries as the preferred method of dispute resolution.[181]

Federal courts, including the Supreme Court, have ignored the faults of arbitration for too long and are at least partly responsible[182] for the almost

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arbitration is at a critical juncture in its movement from the periphery of the civil justice system to its center stage"). *See also* Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 105 (1997) (commenting that the growing volume and variety of arbitration cases are evidence that businesses are increasingly turning to binding arbitration as a dispute resolution mechanism).

176. *See infra* notes 180-190 and accompanying text (explaining the potential negative impact on the perception of arbitration as a healthy alternative dispute resolution option if one extreme or another is adopted).

177. *See supra* Introduction (indicating that this Comment's proposal will provide such a plan).

178. *See* Pierson v. Post, 3 Cai. R. 175, 180 (N.Y. 1805) (Livingston, J., dissenting) (writing, "this . . . [case] should have been submitted to the arbitration of sportsmen").

179. *See* Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 854-56 (1961) (noting that arbitration has been practiced in America for over two hundred years); Hayford and Peeples, *supra* note 151, at 380 (stating that "[t]he preceding description of contemporary commercial arbitration reveals several dimensions of the current process that may limit its long-run viability as a widely-employed substitute for traditional litigation"). *See also* Jean Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 4 (1997) (predicting that in the year 2010, teachers of civics will recall for their students that once upon a time, before the dominance of arbitration, the United States Constitution guaranteed all persons a trial by jury, due process of law, adequate notice, an unbiased judge, "the right to be represented by counsel . . . the right to present evidence, the right to confront and cross-examine adverse witnesses, and the right to some explanation of the judge's decision").

180. *See* Hayford and Peeples, *supra* note 151, at 380 (pointing out that whether commercial arbitration will survive as a viable entity is an open question).

181. *See id.* at 413 (warning that today there are numerous "substantial question[s] as to whether the process of commercial arbitration will achieve the level of rigor and reliability necessary to justify" the kind of strong historical deference given it by the federal courts).

182. *See* Levin, *supra* note 175, at 105-06 (commenting that the federal judiciary has played a key role in furthering the growing role of commercial arbitration by enforcing

obscene growth of this lucrative,[183] privatized industry.[184] Many scholars, including a preeminent commentator in the field, Jean R. Sternlight, have criticized the Supreme Court's almost blind preference for arbitration.[185] Not only is the justice system becoming privatized, there is also no development of the law.[186] Even if an arbitrator writes an opinion, it cannot be cited for any precedential value, thus partly debunking the myth that arbitration is time saving and efficient.[187] It would undoubtedly save time if arbitrator opinions from previous cases could narrow or dispose of new disputes through precedence.[188]

The Supreme Court must, therefore, use this opportunity to reassess its jealous preference for arbitration and inject sound principles of law into binding arbitration under the FAA, not only because parties are asking for it, but also because it will ensure that parties continue to choose arbitration in lieu of traditional litigation.[189]

B. The Second Step: Acknowledging the Dangers Inherent in Choosing One Position and Wholly Excluding the Other

The policy and purpose behind Congressional enactment of the FAA in 1925 was to provide parties with an avenue to contract for arbitration that would not only settle their dispute, but also an agreement that subsequent

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pre-dispute arbitration clauses and "showing deference to the decisions of arbitrators"). *See also Terminix*, 513 U.S. at 272-73 (holding that contracts to arbitrate disputes involving or affecting interstate commerce are enforceable).

183. *See* Brunet, *supra* note 25, at 52 (noting, "At present, arbitration services are supplied in a very competitive market. Parties . . . have a broad and diverse choice of arbitrators. Rivalry is intense among individual arbitrators and firms who provide arbitration services").

184. *See* Keith N. Hylton, *Agreements to Waive or Arbitrate Legal Claims: An Economic Analysis*, 8 S. CT. ECON. REV. 209, 243 (2000) (noting that one influential argument against arbitration is that its privatized nature contributes to the "erosion of the publicly accessible stock of common-law rules" and stunts the growth of new legal rules). *See also* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-87 (1984) (resisting the trend towards private adjudicators).

185. *See* Sternlight, *supra* note 9, at 10 (arguing that the United States Supreme Court's interpretation of the FAA as favoring arbitration over traditional litigation is unconstitutional because it contradicts constitutional rights to a trial, a life tenured judge, and due process).

186. Interview with Professor Celeste Hammond, Director of Real Estate Law, The John Marshall Law School, in Chicago, Ill. (June 13, 2002). *See* Carbonneau, *supra* note 17, at 224 (arguing that unlimited arbitrability privatizes an entire range of formerly public juridical responsibilities).

187. Calvin William Sharpe, *Integrity Review of Statutory Arbitration Awards*, 54 HASTINGS L.J. 311, 354-58 (2003) (emphasizing the importance of an arbitrator's written opinion to a subsequent judicial review).

188. *Id.*

189. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking The Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 701 (1996) (asserting that "[I]t is time for the Supreme Court to reassess its extreme preference for mandatory binding arbitration"). *See contra* United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. 222 F. 1006, 1010-11 (S.D.N.Y. 1915) (expressing judicial hostility towards arbitration).

courts would respect and enforce.[190] In light of this policy goal, it may seem to many a forgone conclusion that the Court should allow parties to contractually expand the scope of judicial review. Adopting this stance wholesale, however, as the Fourth, Fifth, and formerly the Ninth Circuits have done, may lead to the emasculation of binding arbitration as an appetizing option for future parties.[191]

To allow unchecked contractual expansion of judicial review generates a very real practical concern, namely the survival of binding arbitration as a meaningful alternative method of dispute resolution.[192] Parties may decide to opt for litigation in lieu of arbitration because extended judicial review strips arbitration of its qualities of efficiency and affordability.[193] When faced with choosing litigation or arbitration with the right of judicial appeal, parties and their attorneys may abandon arbitration, as it seems to offer no real distinguishing qualities from litigation,[194] other than being less structured and less predictable.[195] The arbitration process and the courts will be more efficient if the Supreme Court can prevent potential arbitrating parties from making their decision to contract for arbitration dependent upon the availability to contract for a higher standard of review.

This Comment's proposal achieves this end by advocating a dynamic, case-by-case, consideration of the issue. The proposal dangles freedom to contract for expanded judicial review as an incentive to arbitrate, while simultaneously advocating its disappearance, if policy or other contractual impediments justify.

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190. H.R. REP. NO. 68-96, at 1 (1924).

191. *See* Sullivan, *supra* note 9, at 560 (writing that arbitration may become "just another step in the litigation process"). *See also* Flexible Mfg. Sys. Pty. Ltd. v. Super Prod. Corp., 86 F.3d 96, 100 (7th Cir. 1996) (commenting that a more searching review of arbitration awards pursuant to an error of law standard could arguably convert arbitration from a "commercially useful alternative method of dispute resolution into a burdensome additional step on the march through the court system"). *Contra LaPine*, 130 F.3d at 891 (Kozinski, J. concurring). In *LaPine I*, Judge Kozinski stated:

> 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. Given the strong public policy of party empowerment embodied in the Arbitration Act, I see no reason why Congress would object to enforcement of this agreement.

Id.

See also BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS: THE STORRS LECTURES DELIVERED AT YALE UNIVERSITY 120 (1921) (instructing the reader that a good judge should "shape his judgment of the law in obedience to the same aims" of the Legislature considering the issue).

192. Sullivan, *supra* note 9, at 511. "Expansion of judicial review will threaten the integrity of the arbitration process." *Id.*

193. *Id.* at 551-52.

194. *Id.* at 559. "An arbitration agreement expanding judicial review . . . would permit the dispute to get into court through the back door." *Id.*

195. *See* Hayford and Peeples, *supra* note 151, at 416 (revealing skepticism towards arbitration's longevity: "the profession of commercial arbitration indicates a certain shallowness, a lack of substance that does not bode well for the ability of the process to stand in the place of the state and federal judiciaries, especially in complex, high-stakes disputes").

The Court, therefore, is strongly cautioned to resist the temptation to merely affirm the contractual expansionist circuits.[196] Instead, it should temper freedom of contract in the spirit of the *Fils* and *LaPine II* courts, thus allowing for the contractual expansion to be defeated only in light of public policy other contractual considerations.[197] But the Court should not let public policy or jurisdictional issues swallow freedom of contract as did the Seventh, Eighth, Tenth and in some ways the Ninth Circuits.[198]

On the other hand, affirming a holding similar to the contractually cautious circuits, and wholly excluding freedom to contract for expanded review, is inherently more dangerous than its converse.[199] These circuits are, in effect, choosing to ignore parties' rights to contractually design arbitration when the entire process is inextricably dependent upon contract for its survival.[200] Though these contractually cautious circuits maintain that they are holding true to the intent of Congress to keep grounds for vacatur narrow, their loyalty to this purported congressional intent leaves parties and the courts with an oxymoronic impression of contract law. If the Supreme Court affirms the wholesale denial of contractually expanded judicial review, potential arbitrating parties that value a legally correct resolution of their dispute in an arbitration setting might feel that arbitration is too risky for their business.[201]

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196. *See supra* notes 81-85 and accompanying text (describing the reasoning behind the holdings of the contractual expansionist courts).

197. *Fils*, 584 F. Supp. at 244.

198. *See supra* notes 156-59 and accompanying text (discussing the holdings of the contractually cautious circuits and how those courts allowed jurisdictional and public policy arguments to overshadow critical basics of contract law).

199. *See supra* notes 156-59 and accompanying text (discussing the holdings of the contractually cautious circuits).

200. *See* Cynthia A. Murray, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 76 ST. JOHN'S L. REV. 633, 655-56 (2002) (arguing that contractual expansion of judicial review should be enforced, contrary to the holding of the Tenth Circuit). *See also* Anthony J. Jacob, *Expanding Judicial Review To Encourage Employers and Employees To Enter The Arbitration Arena*, 30 J. MARSHALL L. REV. 1099, 1118 (1997) (commenting that the bargain between the parties is the foundation of arbitration vitality). *See generally* Karon A. Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337, 347-350 (2000/2001) (describing the Fourth and Fifth Circuit's reasoning that freedom to contract principles trump counter arguments on the issue of expansion of judicial review under the FAA).

201. Hayford & Peeples, *supra* note 151, at 414. The commentators expressed the practical considerations of the arbitration alternative:

> The decision by business executives to utilize arbitration in lieu of permitting commercial disputes to proceed to traditional litigation is based on an implicit risk-return assessment. The risks of submitting one's business fortunes, *a priori*, to a private system of adjudication, virtually immune from judicial interference or usurpation are considerable. Commercial arbitration will continue to prosper only for so long as it produces returns sufficient to outweigh the risks its adoption entails.

Id.

C. The Final Step: Establishing Only a Presumption in Favor of the Right to Contract for Expanded Judicial Review

When the Supreme Court chooses a case to resolve the circuit split, the proponent of the contractually expanded judicial review, usually the loser at arbitration, should be allowed to argue for vacatur based on legal error on the presumption that parties who agree to arbitrate disputes have the freedom to contractually supplement the default statutory grounds for vacatur provided in the FAA.[202] It is entirely possible that the loser at arbitration/proponent of the expansion clause will not assert the expansion clause because the party is unconfident in the prospects for vacatur on the legal merits. The Court should then allow the opponent of the expansion clause, usually the winner at arbitration, to cite a public policy, or a contractual defense, in order to overcome this presumption, and thus prevent legal arguments before the district court.[203] Of course it is entirely possible that this winning party/opponent of the expansion clause will forego an attack on the presumption because they are confident in the legal propriety of the arbitratior's decision.

This proposed model will alleviate federal binding arbitration of the ill effects that a hard and fast rule will have on arbitrating parties and ensure its vitality as an alternative method of dispute resolution.

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202. Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 231 (1997). Rau agreed that labeling the narrow grounds for vacatur in the FAA as "default" rules is appropriate:

> By contrast, I have always thought that the principal purpose of § 10 of the FAA - and for that matter, of equivalent provisions found in all modern arbitration laws - is rather to insulate from parochial or intrusive judicial review awards that the parties intended in the usual sense to be binding. That is, § 10 serves to assure the parties to an arbitral proceeding that they need not fear an officious or meddlesome inquiry into the merits which would impair the efficacy of the arbitral process for them. But such a purpose has nothing at all, as far as I can see, to do with the situation where the parties are eager to depart from the protective rule of § 10. It is one thing to say that their awards must have legal currency in accordance with the parties' presumed wishes - it is something totally different to say that their awards will have this currency, by God, over the parties' expressed wishes to the contrary. I should think that such interference with private autonomy would have to be justified - and on other than paternalistic grounds.

Id.

203. *See* RESTATEMENT (SECOND) OF CONTRACTS: HOW AN EVENT MAY BE MADE A CONDITION § 226 (1979) (detailing the law pertaining to an event as a condition in a contract). *See also* Robert Childres, *Conditions In the Law of Contracts*, 45 N.Y.U. L. REV. 33 (1970) (reviewing case law that enforces both express conditions in a contract and those conditions that are material to the contract). In addition to the illegality/severability defense from *LaPine* II, the argument that expanded judicial review of an arbitration award for errors in law was not a condition on which the underlying contract to arbitrate was based might be a contractual defense to overcome a proposed presumption in favor of freedom to contract for expanded judicial review. *Id.*

V. CONCLUSION

The future of federal binding arbitration under the FAA is at a critical juncture, and the issue at hand is potentially crippling to the arbitration process itself.[204] Short of a congressional amendment to the FAA, only the Supreme Court can preserve both the policies behind the FAA and the expectations of parties who consider arbitration in lieu of litigation.[205]

The Supreme Court has instructed the legal community that, "Some [problems] will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."[206] This article's proposal is tailored to satisfy such a conundrum and will prevent potential arbitrating parties, who desire a legally sound outcome, from abandoning the arbitration alternative altogether, while at the same time preserving the congressional intent to place the arbitration contract on equal footing with other contracts.

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204. *See* Hayford & Peeples, *supra* note 151, at 415 (noting that there are now "viable alternatives" to arbitration).

205. *Id.* at 414. The commentators chastised the arbitration process for not living up to its billing:

> It would be a most egregious error and the height of vanity for the champions of commercial arbitration to believe that the courts . . . will stand idly by if, over time, arbitration fails to provide the parties that employ it with a dispute resolution mechanism that is cost effective, procedurally consistent, and fair, and capable.

Id.

206. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 457 (1957). *But see* Sullivan, *supra* note 9, at 555 (arguing that the issue of contractually expanded judicial review calls for no such judicial inventiveness, as the FAA expressly forbids such expansion).