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Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the Federal Arbitration Act

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INTRODUCTION

Recent circuit court decisions have created a split of authority regarding the enforceability of arbitration provisions by which parties seek to eliminate or relax the statutory restrictions on the judicial overturning of arbitration awards.\textsuperscript{1} As set forth in 9 U.S.C. § 10 of the Federal Arbitration Act (FAA or the “Act”), the statutory grounds for judicial overturning of awards are extremely limited.\textsuperscript{2} As a rule, arbitration awards may not be vacated for errors of law or fact.\textsuperscript{3} In Lapine

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\textsuperscript{3} See Bowen, 254 F.3d at 932 ("A court may not . . . independently judge an arbitration award."); Lapine Tech. Corp., 130 F.3d at 888 ("[A] federal court may vacate or modify an arbitration award only if that award is 'completely irrational,' exhibits a 'manifest disregard of law,' or otherwise falls within one of the grounds set forth in 9 U.S.C. §§ 10 or 11.") (emphasis added) (citations omitted); see also Hans Smit, \textit{Contractual Modification of the Scope of Judicial Review of Arbitral Awards}, 8 AM. REV. INT’L ARB. 147, 148 (1997).
Technology Corp. v. Kyocera Corp.\textsuperscript{4} and Gateway Technologies, Inc. v. MCI Telecommunications Corp.,\textsuperscript{5} however, two circuit courts held that parties may contract for expanded judicial review of arbitration awards. In contrast, in Bowen v. Amoco Pipeline Co.,\textsuperscript{6} the Tenth Circuit held that the scope of judicial review under the FAA cannot be contractually expanded. There is also dicta from the Seventh Circuit suggesting that parties may not contract for expanded judicial review of an arbitration award.\textsuperscript{7}

The question of whether parties may expand the scope of judicial review of arbitration awards—typically to provide vacation of an award for what would be reversible of errors of law or fact in a court system—is based on "contract, jurisdictional, and public policy arguments."\textsuperscript{8} Supporters of expanded review, similar to the type accorded trial court determinations, emphasize that the purpose of the Act is to make arbitral provisions as enforceable as other contracts.\textsuperscript{9} Opponents of such expansion claim that fuller judicial review would hinder critical aspects of the arbitral process, including its finality and relative speed.\textsuperscript{10} Opponents also point to perceived constitutional limits on the scope of federal court jurisdiction, claiming that alteration of such jurisdiction by contract is an impermissible usurpation of congressional authority.\textsuperscript{11}

This Note asserts that allowing parties to agree to expand judicial review efficiently promotes the congressional intent underlying the FAA, which is to require that the parties be free to place contractual restrictions on arbitral power. Part I provides background information about the FAA. Part II

\begin{itemize}
\item \textsuperscript{4} 130 F.3d 884 (9th Cir. 1997).
\item \textsuperscript{5} 64 F.3d 993 (5th Cir. 1995).
\item \textsuperscript{6} 254 F.3d 925 (10th Cir. 2001).
\item \textsuperscript{7} See Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc., 935 F.2d 1501, 1504–05 (7th Cir. 1991) ("Federal courts do not review the soundness of arbitration awards.").
\item \textsuperscript{8} Montgomery, supra note 2, at 550.
\item \textsuperscript{9} See infra Part III.A.
\item \textsuperscript{10} See Smit, supra note 3, at 151 (asserting that limited judicial review is necessary to ensure that arbitration remains a "single-instance form of adjudication"); Karon Sasser, Comment, Freedom to Contract for Expanded Judicial Review in Arbitration Agreements, 31 CUMB. L. REV. 337, 365 (2001) (suggesting that expanded judicial review of arbitration awards will result in a lengthier, more expensive, and more complicated process, thereby undermining the purpose of arbitration).
\item \textsuperscript{11} See infra Part III.B.
\end{itemize}
discusses the enforceability of agreements concerning how the arbitration is to be conducted, and then examines the cases dealing with attempts to broaden judicial review by contract. Part III analyzes the contract, constitutional, and other policy arguments concerning expansion of review and demonstrates that the arguments favoring a permissive judicial attitude in this area are persuasive. Part III also shows that federal courts have already overridden perceived statutory restrictions on the scope of judicial review, particularly for statutory claims. Finally, this Note concludes that the underlying purposes of the FAA support contractual expansion of the scope of judicial review of arbitration awards.

I. BACKGROUND OF THE FEDERAL ARBITRATION ACT

Until the early twentieth century, the American legal system, having adopted the English common law view, harbored an "inhospitable attitude toward arbitration."12 Congress enacted the FAA in 1925 in an effort to change this anti-arbitration policy.13 In adopting the Act, Congress was "motivated, first and foremost, by a ... desire' to change this antiarbitration rule. It intended courts to 'enforce [arbitration] agreements into which parties had entered,' and to 'place such agreements "upon the same footing as other contracts."'14 The statute states:

A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a

12 Thomas E. Carbonneau, Arbitral Justice: The Demise of Due Process in American Law, 70 TUL. L. REV. 1945, 1949 (1996). Prior to the early twentieth century, the traditional view was that if courts were to function as the national source of justice, there was no room for "makeshift, party-confected modes of dispute resolution." Id. at 1947. The sense was that arbitration was untrustworthy and unacceptable. See id. at 1948.

13 See Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (noting that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts").

contract or transaction...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.\textsuperscript{15}

Although the FAA does not create independent federal jurisdiction,\textsuperscript{16} it does create a body of substantive federal law.\textsuperscript{17} The FAA is constitutional, as it was enacted pursuant to Congress's Commerce Clause and admiralty powers.\textsuperscript{18} The FAA has also been found to have significant preemptive force over both state courts and state arbitral systems that restrict the enforceability of arbitration clauses.\textsuperscript{19}

The Supreme Court has acknowledged Congress's intention to treat arbitration agreements the same as other contracts\textsuperscript{20}
and has instructed courts to enforce arbitration agreements according to their terms.\(^{21}\) The Court has also emphasized the importance of finality of an arbitrator's decision and, accordingly, district courts should vacate an arbitrator's award only in narrow circumstances.\(^{22}\) Additionally, the Court has established a liberal federal policy favoring the use of arbitration to resolve an increasingly broad array of disputes.\(^{23}\)

Congress has established narrow grounds for vacating arbitration awards under section 10 of the FAA:\(^{24}\)

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; and
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.\(^{25}\)

As previously noted, section 10 of the FAA is not generally read to permit overturning of arbitral awards for errors of fact or law.\(^{26}\) In general, if the arbitral award in question does not fall into one of the four categories above, the court will simply confirm the award made by the arbitrator.\(^{27}\) Indeed, most

\(^{21}\) See Volt, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.").

\(^{22}\) See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) ("[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute ... [b]ut, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value.").

\(^{23}\) See Dean Witter Reynolds, Inc., 470 U.S. at 221 ("The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate...."); Southland Corp., 465 U.S. at 10 (explaining that in enacting the FAA Congress not only "declared a national policy favoring arbitration" but also "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"); Moses H. Cone Mem'l Hosp., 460 U.S. at 24.


\(^{25}\) Id.

\(^{26}\) See supra text accompanying note 3.

\(^{27}\) See Alan Scott Rau, Contracting Out of the Arbitration Act, 8 AM. REV. INT'L ARB. 225, 230–31 (1997) (stating that the provisions of the FAA "direct courts to
awards in domestic commercial arbitration do not specify the factual and/or legal grounds on which they are based, thus making judicial review impractical and, at times, impossible. Accordingly, there are numerous examples where courts have upheld arbitral awards that appear contrary to law and fact. As arbitration grows in popularity as an alternative form of dispute resolution, the grounds for review of an arbitral award found in section 10 of the FAA have become the subject of increased debate.

II. MODIFICATIONS OF THE SCOPE OF JUDICIAL REVIEW

A. General Enforceability of Party Specifications in Arbitration Clauses

Arbitration is "a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." In order to feel more secure in the arbitration process, parties have attempted to modify the scope of judicial review in a number of ways. The Supreme Court has acknowledged that contractual specifications regarding the confirm awards unless certain specified grounds for vacatur are present.


29 See, e.g., Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990) (upholding an arbitral award even though the arbitrators committed legal error); Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc., 894 F.2d 862, 866 (6th Cir. 1990) (finding that errors of law do not require vacatur); In re Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985) (confirming an arbitrator's award for damages even though damages had been calculated using "higher prices than those the parties agreed to in the contracts, by awarding lost profits or consequential damages despite the contracts' express disallowance of their recovery"); Marion Mfg. Co. v. W.B. Long, 588 F.2d 538, 542 (6th Cir. 1978) (confirming an award ordering a seller of cotton to deliver bales of cotton to the buyer under a contract even though specific performance is an unusual remedy in a contract for sale of a product); Cal-Circuit Abco, Inc. v. Solbourne Computer, Inc., 848 F. Supp. 1506, 1510 (D.C. Colo. 1994) (confirming an arbitral award where seller submitted a claim for lost profits under the U.C.C. but where the arbitrator invented a claim for price of unpaid orders under another section of the U.C.C.).


arbitration process are enforceable absent a severe clash with perceived public policy favoring arbitration.\textsuperscript{32} Although the FAA contains no preemptive provision, state law may be preempted by the FAA "to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' \textsuperscript{33} Notwithstanding federal preemption, parties can agree to have state law arbitral rules govern their arbitration as long as the state law does not clash with the policies underlying the FAA.\textsuperscript{34} For example, parties can alter the arbitral rules to broaden pretrial discovery or to require the arbitrator to provide his reasoning for the award.\textsuperscript{35} Parties can also provide for broad review of awards by arbitral appellate tribunals.\textsuperscript{36} In reviewing arbitration clauses, the Supreme Court has recognized the importance of freedom of contract, and most courts have demonstrated a willingness to enforce these clauses according to the agreed upon specifications.\textsuperscript{37}

B. Expanded Judicial Review

The Fifth Circuit addressed the issue of expanding judicial review in \textit{Gateway Technologies, Inc. v. MCI Telecommunications Corp.}\textsuperscript{38} The facts involve MCI's successful bid for a project with the Virginia Department of Corrections in which MCI would implement a telephone system that would allow inmates to place collect calls without operator assistance.\textsuperscript{39} MCI then subcontracted with Gateway who promised to furnish, install, and maintain all the equipment and technology necessary to support the collect calls.\textsuperscript{40} The contract provided that all disputes arising from the contract would be subject to binding

\textsuperscript{32} See \textit{id.} at 479 (concluding that parties may alter the procedural rules of the arbitration process as long as those rules do not conflict with the underlying policies of the FAA). The FAA, however, preempts state rules that undermine the principles of the FAA. See, \textit{e.g.}, \textit{Southland Corp. v. Keating}, 465 U.S. 1, 10 (1984).

\textsuperscript{33} \textit{Volt}, 489 U.S. at 477 (quoting \textit{Hines v. Davidowitz}, 312 U.S. 52, 67 (1941)).

\textsuperscript{34} See, \textit{e.g.}, \textit{Mastrobuono v. Shearson Lehman Hutton, Inc.}, 514 U.S. 52, 58 (1995); \textit{Volt}, 489 U.S. at 479.


\textsuperscript{36} See \textit{infra} notes 88–90 and accompanying text.

\textsuperscript{37} See \textit{infra} Part III.A.

\textsuperscript{38} 64 F.3d 993 (5th Cir. 1995).

\textsuperscript{39} \textit{Id.} at 995.

\textsuperscript{40} \textit{Id.}
arbitration, "except that errors of law shall be subject to appeal."41 A dispute arose and the arbitrator found that MCI had breached its contractual duty to negotiate in good faith and awarded Gateway actual as well as punitive damages.42 MCI moved to vacate the award in the Northern District of Texas, and Gateway simultaneously moved to confirm the award.43 The district court chose to review the award under a "harmless error standard" and confirmed the award for Gateway in its entirety.44

The Fifth Circuit concluded that the district court had erred in applying a harmless error standard instead of reviewing the award de novo for "errors of law."45 The court stated that "[p]rudent or not, the contract expressly and unambiguously provides for review of 'errors of law'; to interpret this phrase short of de novo review would render the language meaningless and would frustrate the mutual intent of the parties."46 The court held that the contractual modification of the scope of judicial review was enforceable because "arbitration is a creature of contract."47 Additionally, the court viewed the FAA as a default set of rules which the parties may supplement with their own provisions.48 Since one of the FAA's purposes is to enforce contractual agreements according to their terms, the court found that MCI and Gateway's contractual modification of the default standard of review was enforceable.49 The court did not address any Article III jurisdictional concerns.

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41 Id.
42 Id. at 996.
43 Id.
44 Id.
45 Id. at 997.
46 Id. (adding that federal arbitration policy requires that a court conduct review of an arbitration award according to the terms of the agreement, even where the parties agree to expanded judicial review).
47 Id. at 996 (noting that it would not make sense if the FAA prevented "the enforcement of agreements to arbitrate under different rules that those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's purpose of ensuring that private agreements to arbitrate are enforced according to their terms" (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989))).
48 Id. at 997.
49 Id. at 996. The court noted that had the parties not contracted for expanded judicial review, the standards of review set forth in the FAA would have governed. Id. at 997 n.3.
The same issue was addressed a few years later by the Ninth Circuit in *Lapine Technology Corp. v. Kyocera Corp.* The dispute arose after Lapine issued a manufacturing license to Kyocera to build disk drives. When Kyocera refused to perform under the contract, Lapine filed suit in federal district court. The parties' contract contained an arbitration clause which provided, inter alia, that an arbitrator's decision may be vacated by a court "(a) based upon any grounds referred to in the Act, or (b) where the Tribunal's findings of fact are not supported by substantial evidence, or (c) where the Tribunal's conclusions of law are erroneous."

The Tribunal issued its decision in favor of Lapine, and Kyocera moved to vacate the arbitrator's award. The district court denied Kyocera's motion to vacate and held that it would not review the award for errors of law but rather would only consider the statutory grounds for vacatur under the FAA. Kyocera's appeal to the Ninth Circuit essentially focused on one major issue: "Is federal court review of an arbitration agreement necessarily limited to the grounds set forth in the FAA or can the court apply greater scrutiny, if the parties have so agreed?"

Reversing the district court's decision, the Ninth Circuit relied on the premise that the primary purpose of the FAA is to enforce private agreements to arbitrate in accordance with their terms. The Ninth Circuit fully agreed with the Fifth Circuit's view in *Gateway* that the scope of judicial review may be expanded beyond the limitations of the FAA if the parties have provided for such review in the contract. The court reasoned that a federal court is not necessarily limited to the grounds set forth in the FAA in reviewing an arbitration agreement; rather the court can apply greater scrutiny when the parties so agree.

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50 130 F.3d 884 (9th Cir. 1997).
51 *Id.* at 886.
52 *Id.*
53 *Id.* at 887.
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.* at 888.
58 See *id.* at 889 ("Federal courts can expand their review of an arbitration award beyond the FAA's grounds, when (but only to the extent that) the parties have so agreed. To do otherwise would make hostility to arbitration agreements erumpent under the guise of deference to the arbitration concept.").
59 *Id.* at 888–89 (perceiving no adequate reason to prohibit parties from
Moreover, the FAA not only allows parties to place conditions on a federal court’s review of an arbitrator’s decision to review for errors of fact and law but also encourages such conditions.60

Most recently, the Tenth Circuit directly addressed the issue of expanded judicial review of arbitral awards in Bowen v. Amoco Pipeline Co.61 After noticing an oily sheen in a creek on his property, the owner sought remediation from the oil company that owned the pipelines crossing the creek.62 Following Amoco’s continued denial of responsibility for the oil leak, the owners filed suit in district court.63 The district court granted Amoco’s request to stay the litigation and to compel arbitration under an arbitration clause in the parties’ 1918 right-of-way agreement.64 The parties agreed to use the Rules for Non-Administered Arbitration of Business Disputes and modified the rules to expand the scope of judicial review.65 The agreement provided that either party would have 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’ ” and “the district court’s ruling ‘shall be final.’ ”66

The arbitrator awarded the owners of the land compensatory and punitive damages exceeding five million dollars.67 The Bowens filed a motion in district court to confirm the award while Amoco filed a motion to vacate the award.68 In its review of the award, the district court did not apply the expanded review to the arbitration agreement.69 Instead, the court limited its review to the standards under the FAA and declined to vacate the award.70 Amoco appealed the district court’s decision, arguing that the court erred by disregarding the parties’ agreed upon contractually created standard.71
Contrary to the Fifth and Ninth Circuits, the Tenth Circuit concluded that parties may not expand the standards of review set forth under the FAA. While the court agreed that parties may contract as to what issues to arbitrate and what rules will govern arbitration, "no authority clearly allows private parties to determine how federal courts review arbitration awards." Rather, Congress has provided explicit provisions regarding standards of review of arbitration awards through the FAA. Allowing parties to contractually expand judicial review of arbitration awards would undermine the policies of the FAA. Relying on dicta from the Seventh and Eighth Circuits, the court stated:

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.

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72 Id. at 935.
73 Id. at 934.
74 Id.
75 Id. ("The decisions directing courts to honor parties' agreements and to resolve close questions in favor of arbitration simply do not dictate that courts submit to varying standards of review imposed by private contract.").
76 See id. at 935 (allowing for expansive judicial review after the matter has been arbitrated would violate the FAA's policy of ensuring judicial enforcement of arbitration agreements). Additionally, "[b]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" Id. (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991)); see also Kenneth M. Curtin, An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards, 15 OHIO ST. J. ON DISP. RESOL. 337, 367 (2000) (reasoning that although allowing parties to contractually expand review would promote freedom of contract, it would also undermine the certainty and predictability in enforcing arbitral awards).
78 Bowen, 254 F.3d at 935. The court added:

Contractually expanded standards, particularly those that allow for factual review, clearly threaten to undermine the independence of the arbitration process and dilute the finality of arbitration awards because, in order for
While acknowledging that the Supreme Court has emphasized "that Congress's intent in enacting the FAA was to ensure judicial enforcement of private arbitration agreements," the Tenth Circuit nonetheless disagreed with the Fifth and Ninth Circuits' conclusions that contractual modifications of judicial review are enforceable. The Tenth Circuit thus concluded that "although the [Supreme] Court has emphasized that parties may 'specify by contract the rules under which [ ] arbitration will be conducted,' it has never said parties are free to interfere with the judicial process." Furthermore, the court stated that the FAA does not contain any language that would require federal courts to follow parties' agreements.

In reaching its decision, the court found that the parties' attempt to expand the scope of judicial review was in direct conflict with the policies of the FAA. Rejecting the parties' demand for expanded review, the court emphasized that Congress has provided explicit boundaries for the standards of review of arbitration awards and as such, those standards are not subject to modification. The underlying rationale for the Tenth Circuit's decision appears to be that allowing parties to contract for judicial review of an arbitral award would, in effect, grant parties the power to create federal jurisdiction. This would permit parties to override Congress's power to convey jurisdiction to the federal courts under Article III of the United States Constitution. The Tenth Circuit also relied on the idea that expanded judicial review would impermissibly force courts

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arbitration awards to be effective, courts must not only enforce the agreements to arbitrate but also enforce the resulting arbitration awards.

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79 Id. at 933.
80 Id. at 934.
81 Id. (alteration in original) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)). See Smit, supra note 3, at 150 (concluding that even though parties are permitted to structure their arbitration by agreement, this does not imply that the parties are also permitted to alter the judicial process).
82 See Bowen, 254 F.3d at 935.
83 See id.
84 See id.
85 See id. n.8; see also Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc. 935 F.2d 1501, 1505 (7th Cir. 1991).
86 See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
to apply varying standards of review and unfamiliar rules and procedures.\textsuperscript{87}

\textbf{C. Limited Judicial Review and Appellate Arbitration}

There is very little case law illustrating parties' attempts to eliminate judicial review of an arbitral award. None of the cases discussed deals with appellate arbitration, where an arbitration panel will review the hearing panel’s or single arbitrator’s decision.\textsuperscript{88} Such panels, as creatures of contract, may be empowered to use as broad a standard of review as provided for and can “provide a check on the otherwise unreviewable nature of the ... arbitration award.”\textsuperscript{89} Such clauses are not at all uncommon, particularly in large commercial contracts.\textsuperscript{90}

\textsuperscript{87} See Bowen, 254 F.3d at 936 (recognizing 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’” (quoting UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 998 (8th Cir. 1998))).

\textsuperscript{88} See Chi. Typographical Union No. 16, 935 F.2d at 1505 (“If the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award.”).


\textsuperscript{90} For an example of contractual provisions for the review of an arbitral award by an appellate arbitration panel, see Hochman, \textit{supra} note 28, at 124–25:

\textbf{Right to Review by Appellate Arbitration Panel}

(a) If either party is dissatisfied with (i) the decision or award rendered by a sole arbitrator or (ii) a less than unanimous decision or award rendered by a panel of three arbitrators, such dissatisfied party (“Appellant”) may appeal the arbitrator’s award to a panel of three appellate arbitrators by filing with the American Arbitration Association (AAA) and the other party (“Appellee”), within twenty days after transmittal of the award, a written brief, not to exceed twenty pages, stating the reasons why the arbitrator’s decision should be reversed or modified. The Appellee shall file with the AAA and serve on the Appellant, within twenty days after receiving the Appellant’s brief, an opposition brief, not to exceed twenty pages, which may include a cross-appeal, in which case Appellant shall be entitled to reply within ten days after its receipt thereof.

(b) The appellate arbitration panel shall consist of two lawyers having the qualifications and experience set forth in [Section ___] hereof and one retired federal or state court judge of a court of record in the state in which the arbitration was held. The two lawyers shall be appointed in the same manner as provided in [Section ___] hereof. If the parties cannot agree on a mutually acceptable retired judge to serve as the third appellate arbitrator, the President of [the ___ Bar Association] shall submit to both parties a list containing the names of three retired judges who, in his or her opinion, also meet the criteria set forth in [Section ___] hereof. Each party shall be entitled to strike one of such three names on a peremptory basis, for any reason or no reason, indicating its order of preference with
III. POLICY ANALYSIS

The policy dimensions of this debate appear to set the “arbitration as a matter of contract” advocates against those who see attempted expansion of judicial review of arbitral awards as an usurpation of Congress’s power to determine the scope of lower federal court subject matter jurisdiction under Article III of the Constitution.

A. The Contract Approach

Arbitration is founded upon freedom of contract.¹ The respect to the remaining names, and the selection of the third appellate arbitrator shall be made from among such name(s) that have not been so stricken by either party in accordance with their designated order of mutual preference.

(c) Either party may request oral argument before the appellate panel, which, if requested, should be conducted within thirty days following the selection of the appellate panel. The appellate arbitration shall be based only on the record of the initial hearing, appellate briefs and oral argument, if any. The appellate arbitrators shall render a written decision, signed by a majority of such arbitrators, affirming, reversing, modifying or remanding the arbitrator’s decision and award within thirty days after receiving the final appellate submissions. The appellate arbitrators may reverse or modify the arbitrator's decision and award or remand the matter for further proceedings by the arbitrator, on any of the following grounds:

(i) Any ground specified in Sections 10 and 11 of the Federal Arbitration Act;
(ii) The arbitrator committed prejudicial error by erroneously applying the law to the issues and facts presented for resolution of the dispute or there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award;
(iii) Material failure of the arbitrator, the administrator or the Appellee to follow the procedures set forth in this Agreement unless the Appellant continued the arbitration proceeding with notice of such failure and without objection;
(iv) The arbitrator’s award is arbitrary, capricious or clearly erroneous; or
(v) The appellate panel may render a final decision on appeal or remand the matter for further proceedings by the arbitrator. The decision of the appellate panel shall be final and binding on the parties and shall not be subject to judicial review except to the extent otherwise provided in Sections 10 or 11 of the FAA.

¹ See WARE, supra note 35, § 2.43, at 90 (“Judicial enforcement of arbitration awards is an example of courts enforcing contracts.”); see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (recognizing that arbitration “is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit”).
parties alone determine what is to be arbitrated. The parties, subject only to unconscionability and other limited restrictions, can set the types of damages the arbitrator may award. The parties also determine if there is to be appellate arbitration. Most importantly, the parties, by incorporation or specification, set the rules governing the arbitration process itself. Although the American Arbitration Association (AAA) discourages arbitrators from explaining the reasons for their awards, parties may require an arbitrator to provide a written explanation for his decision.

Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University illustrates the “contract theory” of arbitration. Volt had entered into a contract with

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92 See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) (acknowledging the principle that “a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration”); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (acknowledging that parties may exclude certain claims from the scope of an arbitration agreement); Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997) (declaring that parties may limit the issues which will be subject to arbitration).

93 See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58 (1995) (determining that if the parties' arbitration agreement permits punitive damages, the agreement will be enforced according to its terms even if state law would otherwise preclude such claims from arbitration).

94 See Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) (“If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award.”).

95 See Volt, 489 U.S. at 478–79 (holding that parties may specify by contract to arbitrate under rules different from those established by the FAA absent any direct conflict with FAA policies); see also AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL DISPUTE RESOLUTION PROCEDURES, R-1 (effective July 1, 2002) available at http://www.adr.org/index (“The parties, by written agreement, may vary the procedures set forth in these rules.”).

96 See Hochman, supra note 28, at 104 (quoting the AAA’s Guide for Commercial Arbitrators as stating that “written opinions might open avenues for attack on the award by the losing party”).

97 No provision in the FAA requires arbitrators to include a written opinion. When arbitrators fail to provide written explanations for an arbitration award, parties are left to speculate as to the grounds on which the award was made and providing a written opinion may help to raise confidence in the proceedings. See Hochman, supra note 28, at 105 (explaining that the “more understandable the award, the more likely it is to be respected, even by the losing party”). In this regard, the standards set forth under the FAA can be seen as a set of “default rules” that can be varied by express intent of the parties. See Rau, supra note 27, at 231 (characterizing default rules as a “ready-made stock of implied terms” that can naturally be altered by parties who wish to expand the statutory grounds of review or even restrict the grounds of review).

Stanford University in which Volt was to install an electrical system on the school’s campus. The contract contained an agreement to arbitrate all disputes arising out of the contract, along with a choice of law clause providing that California law governed the contract. During the project, a dispute arose and Stanford filed an action against Volt in California Superior Court. Volt responded by petitioning the court to compel arbitration of the dispute. The California Superior Court denied Volt’s request to compel arbitration, relying on a California statute that permitted “a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where ‘there is a possibility of conflicting rulings on a common issue of law or fact.’” The California Court of Appeals affirmed, holding that by specifying that the contract would be governed by the laws of California, “the parties had incorporated the California rules of arbitration... into their arbitration agreement.” The California Supreme Court denied Volt’s request for discretionary review.

The United States Supreme Court affirmed the California courts’ refusal to compel arbitration. By incorporating California law into the contract, the Court found that the parties had adopted the California statutory scheme permitting a stay of arbitration of related claims. The Court held that the FAA does not confer an automatic right to compel arbitration of all claims; rather, it simply requires courts to enforce privately negotiated agreements to arbitrate in the manner provided in the agreement. In holding that the California statute in question did not undermine the goals and policies of the FAA,
the Court concluded that the FAA does not "prevent[] the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself.... Just as they may limit by contract the issues which they will arbitrate so too may they specify by contract the rules under which that arbitration will be conducted."\textsuperscript{111} In other words, because the federal policy favoring arbitration does not dictate arbitration under a particular set of rules, parties may contract to a set of rules as long as those rules are not in direct and serious conflict with the federal policy goals of the FAA.\textsuperscript{112} This ensures that the parties have some latitude in customizing their arbitration process.\textsuperscript{113}

B. Perceived Constitutional Limitations

The constitutional argument against permitting parties to expand the scope of judicial review is that because federal courts are courts of limited subject matter jurisdiction,\textsuperscript{114} parties may not create jurisdiction by contract.\textsuperscript{115} It is a well-settled principal that federal jurisdiction cannot be waived nor can it be conferred by consent of the parties.\textsuperscript{116} Under Article III of the Constitution, Congress alone has the authority to convey jurisdiction to the federal courts,\textsuperscript{117} and courts must raise the threshold issue of subject matter jurisdiction sua sponte.\textsuperscript{118} But does party expansion of judicial review invoke and confront the constitutional dynamic just described? The answer should be no.

In a contractual dispute, the arbitrator derives his powers to encourage resort to the arbitral process\textsuperscript{112}.

\textsuperscript{111} Id. at 479 (citation omitted).
\textsuperscript{112} See id. at 478–79.
\textsuperscript{113} See id. at 472 (finding that parties should not be forced to arbitrate in a manner contrary to their agreement).
\textsuperscript{114} See generally JOHN H. FRIEDENTHAL ET AL., CIVIL PROCEDURE (3d ed. 1999).
\textsuperscript{115} See Bowen v. Amoco Pipeline, Inc. 254 F.3d 925, 933 (10th Cir. 2001); Lapine Tech. Corp. v. Kyocera Corp., 130 F. 3d 884, 891 (9th Cir. 1997) (Mayer, J., dissenting) (arguing that the majority cited no explicit authority that would allow parties to instruct an Article III court to review an arbitration decision).
\textsuperscript{116} See FRIEDENTHAL, supra note 114, § 2.2, at 12 (noting that jurisdiction is determined by the situation as it exists when the suit is filed).
\textsuperscript{117} See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.")
\textsuperscript{118} See FRIEDENTHAL ET AL., supra note 114, § 2.2, at 12 (noting that courts are under a duty to raise subject matter defects).
from the arbitration clause. Parties may, in effect, expand the standard of review of an arbitration award by specifying how much discretion the arbitrator is to have in deciding disputes. Parties could direct an arbitrator to rule according to the specific law of a jurisdiction and to decide facts consistently with the weight of the evidence. If the arbitrator does not comply with the rules laid out in the arbitration agreement, then the parties would seek to have the award vacated by claiming that the arbitrator has exceeded his power under 9 U.S.C. § 10(a)(4). By this method, the parties effectively broaden the scope of judicial review of an arbitral award while remaining within the express confines of section 10 of the FAA. By limiting the arbitrator's discretion, the effect will be to modify the scope of review without raising any constitutional issues.

The viability of this approach is recognized in certain New York cases. Similar to section 10(a) of the FAA, New York's CPLR 7511(b)(1)(iii) states that an arbitration award shall be vacated when "an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." The New York Court of Appeals has stated that by "provision in the arbitration agreement," the parties can deprive an arbitrator of his normal power to depart from the law and or the evidence. Accordingly, an arbitrator would be bound to abide by principles of substantive law or rules of procedure when the parties so provide in the arbitration clause.

119 See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04 (1967) (explaining that under the "separability" doctrine, a federal court should compel arbitration "once it is satisfied that 'the making of the agreement for arbitration or the failure to comply with the arbitration agreement is not in issue'") (alteration in original); see also WARE, supra note 35, § 2.30, at 68.

120 See generally WARE, supra note 35, § 2.30, at 68 (explaining that because the arbitration process is a creature of contract, the parties may determine the issue(s) to be arbitrated and the rules by which the arbitrator must comply).

121 See id. § 2.44(d), at 92 (noting that courts may vacate arbitration awards where the arbitrator has "exceeded [his or her] power").


124 See id.; see also Rochester City Sch. Dist. v. Rochester Teachers Ass'n, 362 N.E.2d 977, 981 (N.Y. 1977) (affirming the arbitrator's award because the "arbitrator had been granted broad power to resolve any 'claim * * * [of] misinterpretation or inequitable application of * * * the terms of this agreement'") (alteration in original); Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 255 N.E.2d 168, 171 (N.Y. 1969) (Brietel, J., dissenting) (stating that the parties can
C. "Non-Statutory" Grounds of Review

There are additional arguments that refute the Tenth Circuit's conclusion precluding parties from expanding judicial review. While parties have attempted to provide for expanded review by contract, the courts themselves, in some contexts, review certain types of awards on an "error of law" basis. Federal courts have routinely interpreted the FAA to include, by implication, grounds for judicial overturning not expressly set forth in section 10.125 These grounds are not said to face constitutional impediments because they are supported by the congressional objectives in enacting the FAA.126

Even though arbitral awards are not normally set aside for errors in law or fact by the arbitrators,127 it is broadly accepted that arbitral awards may be vacated for "manifest disregard of the law."128 The Supreme Court recognized the "manifest disregard" test in dictum in Wilko v. Swan.129 Virtually all of the circuit courts have articulated a rule that allows for a limited right of review on the merits of an arbitration award for a manifest disregard of the law.130 Under a restrictive application, there is only "manifest disregard" when the arbitrator has acknowledged the existence of clearly applicable law and

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125 See generally Ware, supra note 35, § 2.45.
126 See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (stating that the FAA's "purpose was to place arbitration agreements 'upon the same footing as other contracts, where it belongs'" (quoting H.R. REP. NO. 68-96 (1924))); see also Stephen L. Hayford, A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur, 66 Geo. Wash. L. Rev. 443, 462-63 (1998) (stating that while courts normally give substantial deference to an arbitrator's decision, "this deference 'does not grant carte blanche approval to any decision that the arbitrator might make' " and, therefore, courts "retain a very limited power to review commercial arbitration awards outside of section 10(a)" (alteration in original) (quoting Advest, Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990))).
127 See supra note 3 and accompanying text; Curtin, supra note 76, at 350.
128 O'Mullan, supra note 30, at 1135–36.
130 See Montes v. Shearson Lehman Brothers, Inc., 128 F.3d 1456, 1460 (11th Cir. 1997) (observing that every circuit except the Fifth Circuit has recognized that "manifest disregard of the law" constitutes sufficient grounds to vacate an arbitrator's decision); see also Paul Turner, Preemption: The United States Arbitration Act, The Manifest Disregard of the Law Test for Vacating an Arbitration Award, and State Courts, 26 Pepp. L. Rev. 519, 528 (1999).
explicitly disregarded it.131 Under a broader application, an award will be upheld even where an arbitrator has "acted contrary to the applicable law," unless "the award [would] result in significant injustice."132

The Second Circuit has recognized the manifest disregard of the law test but has also acknowledged that the doctrine is severely limited.133 In Halligan v. Piper Jaffray,134 the court cautioned that manifest disregard "clearly means more than error or misunderstanding with respect to the law."135 The court further noted that in order "to modify or vacate an award on this ground, a court must find both that the (1) arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case."136

Most state and federal courts have established a number of other non-statutory grounds justifying vacatur of an arbitral award.137 Grounds for vacatur that are outside the express statutory scope of section 10 of the FAA include violation of public policy,138 arbitrariness or capriciousness,139 irrationality,140 or failure to draw the essence of the award from the underlying contract.141 The courts often find them difficult to

131 See Bowen v. Amoco Pipeline Co., 254 F.3d 925, 939 (10th Cir. 2001) (interpreting manifest disregard of the law to mean "'willful inattentiveness to the governing law'" (quoting ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995)); see also Sasser, supra note 10, at 342-43.
132 Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752, 762 (5th Cir. 1999).
134 148 F.3d 197 (2d Cir. 1998).
135 Id. at 202 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)).
136 Id.
137 See Williams, 197 F.3d at 757-58.
138 See WARE, supra note 35, § 2.45, at 95-96.
139 See Raiford v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1990) (noting that an award will be found to be arbitrary and capricious only when "'the arbitrator's decision can[not] be inferred from the facts of the case'") (alteration in original) (citations omitted).
140 See Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1131 (3d Cir. 1972) ("[A]n award may not stand if it does not meet the test of fundamental rationality.").
141 See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) ("As long as the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate." (quoting United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960))).
apply, however, because these non-statutory standards for
vacatur can be vague and confusing.142

In addition to the court-created “non-statutory” grounds of
review, the review of arbitral awards made under federal
statutory claims has been expanded as a matter of judicial
policy, again, with no perception of violation of constitutional
restraints. The Supreme Court has firmly established that
statutory claims may be the subject of an arbitration agreement
enforceable under the FAA.143 Pre-dispute agreements to
arbitrate a claim have been held to be enforceable under various
federal statutes including the Age Discrimination in Employment
Act,144 the Sherman Act,145 the civil provisions of the Racketeer
Influenced and Corrupt Organizations Act (RICO),146 the
Securities Act of 1933,147 the Securities Exchange Act of 1934,148
and Title VII of the Civil Rights Act of 1964.149

In response to those who argue that arbitrators may not
know the intricacies of a statute, the Supreme Court has stated
that “although judicial scrutiny of arbitration awards necessarily
is limited, such review is sufficient to ensure that arbitrators
comply with the requirements of the statute” in question.150
Although the Court has not elaborated on what such review
encompasses, it suggests an “error of law” standard of precisely
the standard of review rejected by the Tenth Circuit in Bowen
and the Seventh Circuit in Chicago Typographical Union No. 16
v. Chicago Sun-Times.151 While a court will normally give

142 See generally WARE, supra note 35, § 2.45, at 94; see also Hochman, supra
note 28, at 110; Sasser, supra note 10, at 342 n.34.
generally WARE, supra note 35, § 2.27, at 63 (describing how prior to the 1980s, the
FAA was largely confined to contract disputes). During the 1980s, “the Supreme
Court revolutionized arbitration law to require enforcement of agreements to
arbitrate regardless of the claims asserted,” including statutory claims. Id. § 2.27, at
63.
144 See Gilmer, 500 U.S. at 35.
145 See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614,
146 See Gilmer, 500 U.S. at 26.
147 See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485–
86 (1989).
149 See Litaker v. Lehman Bros. Holdings, No. 97 Civ. 1607 (DC), 1999 U.S.
150 Gilmer, 500 U.S. at 32 n.4 (quoting Shearson/Am. Express, Inc. v. McMahon,
482 U.S. 220, 232 (1987)).
deference to an arbitrator's decision, "there is no reason why [arbitrators'] interpretations of the proper application of statutes should be given greater weight than that of the district courts." On the contrary, it is argued that arbitrators should be subject to more stringent review when resolving statutory claims because judges have greater expertise in interpreting statutory law than arbitrators.

The Supreme Court addressed the issue of judicial review of arbitration of statutory claims in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. This case involved business partners and federal antitrust laws. Soler had agreed to sell Mitsubishi-manufactured vehicles in an area of Puerto Rico. The sales agreement provided that all disputes would be settled by arbitration. When Soler was unable to meet its expected sales volume, it refused to accept shipments of vehicles it had ordered, and Mitsubishi filed suit in United States District Court in Puerto Rico, claiming breach of contract. Soler counterclaimed, alleging violation of the Sherman Antitrust Act. The district court ordered Soler and Mitsubishi to arbitrate in compliance with the provision in the sales agreement. The court of appeals found that Soler's antitrust claims under the Sherman Act were not subject to arbitration and reversed that portion of the district court's order.

The Supreme Court reversed, finding Soler's antitrust claims arbitrable. Specifically, the Court stated that by agreeing to arbitrate claims under federal laws, "a party does not

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153 See Julian J. Moore, Arbitral Review (Or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims, 100 COLUM. L. REV. 1572, 1583 (2000) (suggesting that the deference normally given to arbitrators should not extend to statutory claims).
155 Id. at 616–17.
156 Id. at 617.
157 Id.
158 Id. at 618.
159 Id. at 619–20.
160 Id. at 620–21.
161 Id. at 623.
162 See id. at 628–29. The Court also noted that "[n]othing...prevents a party from excluding statutory claims from the scope of an agreement to arbitrate." Id. at 628.
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forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”

The Court added, “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” Furthermore, if an arbitrator fails to take recognition of a statutory cause of action, the Court will consider the arbitration agreement to be against public policy. This decision suggests that, where a statutory claim is raised, “federal district courts and courts of appeals are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes.” Such oversight would require courts to conduct an expanded review of the award not typically permitted under the FAA, in order to determine if in fact the arbitral award is contrary to the intent and requirements of the statute. Thus, the freedom of contract in arbitration and the protection of parties with statutory claims supports expanded judicial review of arbitral awards. An expanded review for compliance with the law is a minimal procedural safeguard in the arbitration of statutory claims.

CONCLUSION

The primary purpose of the FAA is to place contracts to arbitrate on equal footing with other contracts. Accordingly, if parties decide to expand the scope of review and sacrifice some of the perceived benefits of arbitration, the agreement should be enforced according to its terms. Yet the circuit courts remain
split on whether freedom of contract allows parties to expand the scope of judicial review of arbitration awards. The available case law suggests that if parties make no modifications with respect to review within their arbitration agreements, then the arbitration award will be reviewed under the standards set forth under section 10 of the FAA. Arbitration is based, however, upon freedom of contract, and as such, parties should be able to structure arbitration agreements according to their wishes. Furthermore, parties can expand the scope of review without raising any jurisdictional or constitutional issues by limiting an arbitrator’s discretion in the arbitration clause.

As has been seen, the courts have already granted expanded review of arbitration awards made under statutory claims because of the nature and importance of the claims. Although permitting parties to modify the scope of judicial review may impose issues of efficiency and finality upon the courts, parties will be more likely to submit to arbitration if they feel that they have some control over the outcome of the process. In order to promote arbitration as an alternative to litigation, as opposed to “a preliminary step before litigation,” the importance of freedom of contract and individual rights must be recognized. The practice of allowing parties to contractually modify the scope of review of arbitration awards effectively promotes the legislative intent of the FAA and, equally as important, is not unconstitutional.

\[169\] See generally Sasser, supra note 10, at 363–66 (discussing the public policy and impracticalities of permitting parties to expand the scope of judicial review). But see In re Fils et Cables D'Acier de Lens v. Midland Metals Corp., 584 F. Supp. 240, 244 (S.D.N.Y 1984) (recognizing that while review of an arbitration award under expanded review would increase the burden on the court, that burden is still significantly less than what it would be had the parties forgone arbitration completely and demanded a full trial).

\[170\] See WARE, supra note 35, § 2.43, at 89–90.