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# Does the Federal Arbitration Act Mandate the Holding of Bowen v. Amoco Pipeline Company

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# DOES THE FEDERAL ARBITRATION ACT MANDATE THE HOLDING OF *BOWEN V. AMOCO PIPELINE COMPANY*?

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## I. INTRODUCTION

The Federal Arbitration Act (FAA) limits judicial scrutiny of arbitration awards to cases where there is fraud, evident bias, or corruption, or where arbitrators exceed their authority.[1] Because of this limited review, parties wary of the arbitral decision-making process have attempted to expand the scope of judicial review by private contract, inserting a judicial review clause in the arbitration agreement to expand the scope of review beyond that articulated in the FAA in the hopes that the court will enforce the clause. The Ninth and Fifth Circuit Courts have allowed parties to expand the scope of judicial review by contract, finding that United States Supreme Court precedent mandates the enforcement of arbitration agreements and requires courts to enforce clauses that expand judicial review according to their terms.[2] Yet the Tenth Circuit, standing alone, has refused to enforce these contract clauses beyond the review articulated in Section 10 of the FAA and the "manifest disregard of the law" exception articulated in *Wilko v. Swan*.[3] In *Bowen v. Amoco Pipeline Company*,[4] the Tenth Circuit concluded that the "purposes behind the FAA, as well as the principles announced in various Supreme Cases, do not support a rule allowing parties to alter the judicial process by private contract."[5]

Though there may be advantages to allowing private parties to expand judicial review beyond the standards articulated in the FAA and the common law, the expansion of judicial review by private contract has met with considerable controversy.[6] One side argues that the expansion will impair the efficiency and

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1. *See generally* 9 U.S.C. §§ 10-11 (1994). The courts have also crafted a "manifest disregard to the law" exception to supplement Sections 10 and 11. Wilko v. Swan, 346 U.S. 427 (1953). The Tenth Circuit has interpreted this "manifest disregard" exception to mean, "the record will show the arbitrators knew the law and explicitly disregarded it." Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001). This manifest disregard of the law exception is rarely applied. *See, e.g.*, Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 764-74 (1996); *see also* Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1349-50 (2002).

2. Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993 (5th Cir. 1995); La Pine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997).

3. Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001); *Wilko*, 346 U.S. at 436-37.

4. 254 F.3d 925 (10th Cir. 2001).

5. *Id.* at 933.

6. *See generally* Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV INT'L ARB. 147 (1997) (arguing that contractual modification is socially undesirable and contrary to law); Kenneth M. Curtin, *Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 56 DISP. RESOL. J. 74, 81 (2001) (noting that "a strict, unguided adherence to the principle of freedom of contract needs to be tempered with a respect for the arbitration process"); Sabin, *supra* note 1 (arguing that private expansion of judicial review will not give the necessary credibility to the arbitral process, but public oversight will). *But see* Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225 (1997) (arguing that the Ninth Circuit's decision in *La Pine* was correct and the courts should allow for expanded review for questions of legal error); Stephen J. Ware, *"Opt-in" for Judicial Review of Errors of Law under the Revised Uniform Arbitration Act*, 8 AM. REV. INT'L ARB. 263 (1997) (finding that arbitrators often do not apply the law and the courts still enforce

overall usefulness of arbitration, while the other side argues that it will assuage parties' fears of maverick arbitrators, thus increasing the use of arbitration and decreasing the size of court dockets.[7] Both sides argue within the limits of the FAA, either taking the side that the policies of the FAA, and the interpretations by the Supreme Court, mandate private contractual expansion or that the FAA policies would be frustrated if this expansion is allowed. In *Bowen*, the Tenth Circuit takes the latter view in this argument that expansion of judicial review would not benefit the arbitral process; therefore, the goals of the FAA are not furthered.[8] Though this issue is interesting, these concerns have been addressed in considerable depth by others and will not be discussed in any depth in this note.[9] Instead, this note will argue that there is no indication in case precedent or in the FAA that it either prohibits or requires private contractual expansion of judicial review. Because there is no precedent or policy requiring this result,[10] and the arguments for and against expansion of judicial review both have merit,[11] the issue seems to be whether or not the courts should allow for the expansion of judicial review by private individuals based on its effects on the court system.

The Tenth Circuit briefly addresses this policy reason, stating that private individuals should not be able to tell the courts the level at which they must review an award.[12] The Tenth Circuit's rationale implies that if the courts allow parties to an arbitration agreement to expand judicial review, they would be allowed to affect the rules of the courts, an action they could not do had they chosen to go to court directly.[13] This, in turn, usurps congressional powers to establish rules and procedures of the courts by allowing private individuals to establish these rules under a guise of deference to the policies of the FAA.[14] This rationale not only furthers the goals of the courts but also allows state courts to experiment with statutorily created "opt-in" provisions.[15]

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the award, therefore "opt-in" review is sound policy); Tom Cullinan, Note, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395 (1998) (arguing that Supreme Court decisions require that courts allow for contractual modification of judicial review); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241 (1999) (reasoning that expanded judicial review for legal error may help quell maverick impulses of arbitrators).

7. For a general discussion of these two arguments, see Rua, *supra* note 6, and Smit, *supra* note 6. The Tenth Circuit did recognize that expansion of judicial review may reduce the burden on the district courts. *Bowen*, 254 F.3d at 936 n.6 ("Expanded standards of review...reduce[ ] the burden on district courts.").

8. *Bowen*, 254 F.3d at 936 (stating, "expanded judicial review...reduces arbitrators' willingness to create particularized solutions.").

9. *See* articles listed *supra* note 6.

10. *Id.* at 934 (noting that the Supreme Court has never said parties are free to interfere with the judicial process).

11. *See supra* note 6.

12. *Bowen*, 254 F.3d at 934.

13. The Tenth Circuit also recognized that parties to a contract may be attempting to create federal jurisdiction because courts would have to vacate awards they would not otherwise vacate and rely on grounds not available under the FAA or common law. *Bowen*, 254 F.3d at 937 n.8. This issue will not be addressed by this note.

14. Arguments for the expansion of judicial review do note that there is a possibility of creating another tier in the judicial process; that is, there is a possibility that it might create an informal step in the judicial process, allowing for arbitration first, then the judicial process. *See generally*, Rau, *supra* note 6, at 261.

15. *See generally* Ware, *supra* note 6. "Opt-in" review allows parties to opt-in for expanded review under the Revised Uniform Arbitration Act (RUAA). *Id.* at 263. Opt-in review under RUAA is limited to the review allowed under the statute. *Id.* Thus, if the statute allows parties to an arbitration agreement to "opt-in" for review of errors of law under a de novo standard, they cannot opt-in for review of factual errors under the same standard.

But the Tenth Circuit did not stop there. Instead, the court also analyzed this issue under a second rationale: expansion of judicial review by contract is contrary to the policies of the FAA.[16] This argument seems no less reasonable than the decisions of the Fifth and the Ninth Circuits allowing for expansion of judicial review by contract.[17] Neither the FAA, nor its policy of enforcing agreements to arbitrate, expressly allows or disallows the use of privately expanding judicial review. In fact, the holding of the Tenth Circuit that expansion of judicial review does violence to the policies of the FAA may have deleterious implications on state courts that wish to allow parties to "opt-in" for some expanded review.[18] Because the FAA preempts state laws that do "violence to the policies of the FAA," the Tenth Circuit's holding would preempt state legislators from allowing private parties to expand judicial review.[19]

As was stated earlier, this note will not add much to the debate on whether expansion of judicial review will increase or decrease the use of arbitration. Instead, this note will focus on the effects of the Tenth Circuit's differing rationales and the implications of the *Bowen* decision on state courts. This note will give a brief statement of the case; some background on arbitration, including its history, the FAA, and the reason for its promulgation; and case precedent that has analyzed the FAA. This note will also analyze the case and discuss the implications of the decision.

## II. STATEMENT OF THE CASE

In this case, the Bowens initially brought suit in federal district court against Amoco Pipeline Company (Amoco) for damages relating to a leaking oil pipeline that was owned by Amoco and ran through the Bowens' property.[20] Amoco sought to compel arbitration[21] based on an arbitration clause in the easement agreement upon which the oil pipeline burdened the Bowens' property.[22] The district court granted Amoco's motion and entered an order compelling arbitration between Amoco and the Bowens.[23]

In August of 1999, the case was arbitrated before a panel that adopted the Rules for Non-Administered Arbitration of Business Disputes (NABD) with some

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*Id.*

16. *Bowen*, 254 F.3d at 934-36.

17. *Id.* at 934-35.

18. *Id.* at 935 ("Contract clause in this case threatens to undermine the policies behind the FAA.")

19. The court in *Bowen* is not clear on whether expanded judicial review in general is against the policies of the FAA or if privately created standards are against the policies of the FAA. *See id.* at 934-36. The bulk of this note attempts to determine this issue.

20. *Id.* at 927-30.

21. *Id.* at 929. Under 9 U.S.C. § 2 (1994), an agreement to arbitrate "an existing controversy arising out of such 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." The Supreme Court has iterated that, "by its terms, the [Federal Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds v. Byrd, 470 U.S. 213, 218 (1985).

22. *Bowen*, 254 F.3d at 928 ("In 1918, the predecessors in interest of both parties entered into a right-of-way agreement, which contained an arbitration provision. This agreement, which governed the grant of a pipeline easement, was ratified by a second agreement.").

23. *Id.*

modifications.[24] The modifications, agreed upon by both parties, included a clause stating that both parties "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.'"[25] On October 18, 1999, the arbitration panel granted the Bowens substantial relief,[26] based partially on Amoco's "less than forthcoming approach to th[e] entire matter."[27]

The Bowens then filed a motion for confirmation of the arbitration award in district court, pursuant to 9 U.S.C Section 9.[28] Upon the filing of the confirmation, Amoco filed an objection to the confirmation and then filed a motion requesting the court to vacate the award.[29] Amoco also filed an appeal of the arbitration award with

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24. *Id.* at 930.

25. *Id.*

26. *Id.* The relief was as follows: $3,032,000 to be used for the abatement of the contaminated property caused by the leaking oil pipeline; $100,000 for the diminution of the Bowens' property value; $1,200,000 for annoyance, inconvenience, and aggravation caused by Amoco's continual denial that they were the cause of the problem and their attempts to hide certain data from the Bowens; $1,000,000 in punitive damages; and $41,000 for the costs of investigation and mitigation.

27. *Id.* at 929 n.1.

28. *Id.* at 930. A court must confirm a pre-dispute arbitration award that the parties agree to be final and binding unless it is procured by fraud, corruption, partiality, or other undue means. See below:

9 U.S.C. § 9 (1947) states, the court must confirm the award if

> the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

Section 10 of the FAA states,

> (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—
>
> (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.
>
> (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
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.
>
> (b) The United States district court for the district wherein an award that was issued made pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Section 11 of the FAA states,

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> (a) where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c)Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

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

the district court pursuant to the modified arbitration rules agreed upon by Amoco and the Bowens.[30]

The district court refused to apply the modified standard of review agreed upon by the parties in the arbitration agreement.[31] Instead, the district court limited its review to the standards set out in 9 U.S.C Section 10 of the FAA.[32] Using the FAA standard, the court refused to vacate the award, granting the Bowens their motion to confirm the award.[33] Amoco appealed the district court's order, asking the Tenth Circuit Court of Appeals to vacate the award and remand for a new arbitration or to vacate the remediation award and remand the case for review based on the modified standard of review agreed upon between the parties.[34] The Bowens sought to dismiss Amoco's appeal for lack of appellate jurisdiction. The Tenth Circuit found that they had appellate jurisdiction[35] and upheld the district court's decision to limit the review to the FAA's standard.[36]

## III. BACKGROUND

Arbitration has become a popular dispute resolution tool. With this widespread use of arbitration has come court acceptance of arbitration as a legitimate means of resolving disputes.[37] In fact, the Supreme Court has held that arbitration is just another forum to settle disputes and so long as a party's substantive rights are enforced, arbitration is an adequate forum to settle substantive issues.[38] Though the Supreme Court has shed its judicial hostility of arbitration, there are differences between the two forums. In fact, the very things that make arbitration and adjudication different are the reasons why arbitration is less expensive than litigation.[39] Given that, it is important to understand these distinctions in order to determine the purposes and goals of the two forums. This background section will give a brief discussion of the differences between arbitration and litigation, give the history of arbitration and the inception of the FAA, and discuss relevant case precedent relating to the issue of privately expanding judicial review.

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30. *Id.*

31. *Id.*

32. *Id. See also supra* note 28 (listing each subsection of 9 U.S.C. § 10 (1994)).

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

34. *Id.* The remediation award was the cost of abatement of the contaminated property, which was $3,032,000. *Id.*

35. *Id.* at 930-31. The court summarily dismissed this issue, arguing that the clause stating that the district courts ruling "shall be final" was merely a finality clause conferring jurisdiction on the district court to confirm the award, which is required under 9 U.S.C § 9. *Id. See also* Erika Van Ausdall, *Confirmation of Arbitral Awards: The Confusion Surrounding Section 9 of the Federal Arbitration Act*, 49 DRAKE L. REV. 41 (2000) (stating that agreeing to arbitrate is insufficient to establish that the arbitration award shall be final and binding under the FAA, but *evidence* that the arbitration award would be final and binding should suffice). The court further stated that the language in the arbitration agreement attempting to limit the amount of review to the district court level was too ambiguous and therefore the amount of review would not be limited in this case. *Bowen*, 254 F.3d at 931. The language in this case indicates that the court would be willing to limit review to the district court level if the language was clearer as to that purpose. *Id.* The court gave no guidance as to how the clause should be worded. *Id.*

36. *Bowen*, 254 F.3d at 930-38.

37. *See* Rodriguez De Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480 (1989) (noting the Court's "current strong endorsement of the federal statutes favoring this method of resolving disputes").

38. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

39. *See generally* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997).

### A. *Arbitration versus Litigation*

Arbitration is a private form of dispute resolution agreed upon by the parties to the dispute.[40] Typically, arbitration is similar to civil litigation, except that arbitration tends to be more streamlined, with less discovery and more relaxed evidentiary and formal rules than court proceedings.[41] Arbitration is a creature of contract, and, therefore, parties are not bound to arbitration unless the parties agree to it.[42] Parties to an arbitration agreement may agree to any number of different procedures and rules to govern the proceeding, including choosing the arbitrator, based on their needs.[43] Thus, arbitration typically makes for a more efficient and speedy resolution of the dispute relative to litigation.[44] Equally, because of its efficiency, private parties concerned about the costs of litigation will choose this forum over the courts. This is beneficial to the courts and the public in general because it reduces the burden on the courts.[45]

Besides arbitration being more efficient and informal than litigation, there is also a difference in how an arbitrator is allowed to make a decision relative to that of a judge. Typically, the arbitrator is allowed to use his experience to determine the case based on "industry custom, rough justice, over all equity, and their gut reactions to the dispute."[46] A judge, on the other hand, is required to follow "legal logic"; that is, judges must follow set principles and procedures established by common law and statutes.[47] Thus, judges are not given as much freedom to follow their gut instincts or to do what they feel is just. Equally, because arbitrators use more creative methods to decide issues, they are generally not required to justify their findings through a written decision;[48] thus, parties to an arbitration agreement may not know the arbitrator's reason for the decision. Also, arbitrators are not constrained by the rules and ethics of the bar and have very limited oversight of any ethical standards.[49] Given that arbitrators do not have to substantiate their decision through a written

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40. Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law through Arbitration*, 88 MINN. L. REV. 703, 708-09 (1999).

41. *See* Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 265 (1990).

42. *See* Ware, *supra* note 40, at 709.

43. *See* Stempel, *supra* note 41, at 264-71; *see also* Edward Brunet & Walter E. Stern, *Drafting the Effective ADR Clause for Natural Resources and Energy Contracts*, 11 NAT. RESOURCES & ENV'T 7 (1996) (noting that "arbitrators must follow the written directives of the disputants and courts tend to rely on the written intent of the parties").

44. Sabin, *supra* note 1, at 1359.

45. *Id.* (noting that arbitration is efficient, but also stating that there is debate as to whether arbitration is actually more efficient for the courts and the parties involved).

46. *Id.* Of course, parties to an arbitration agreement can limit the amount of "rough justice" that an arbitrator can use by stipulating such in the contract. The issue is whether the courts will require the arbitrator to strictly adhere to the contractual terms. *See* Ware, *supra* note 40, at 711 (noting that "an agreement to arbitrate is, in effect, an agreement to comply with the arbitrator's decision whether or not the arbitrator applies the law"); *see also* Major League Baseball Players Assoc. v. Steve Garvey, 121 S. Ct. 1724, 1728 (2001) (stating that "if an arbitrator is even arguably construing the law or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision").

47. *See* Stempel, *supra* note 41, at 267.

48. *See* Michael Hunter Schwartz, *From Star to Supernova to Dark, Cold Neutron Star: The Early Life, the Explosion and the Collapse of Arbitration* 22 W. ST. U. L. REV. 1, 17 (1994).

49. *See* Sabin, *supra* note 1, at 1354.

opinion and they are not constrained by any ethical standards, arbitrators not only have more freedom in the decision-making process relative to a judge, they also have more unrestrained power in the process as well.[50]

Though the arbitral process is a speedy and cost-effective resolution tool, those things that make it that way are the very things that parties seek to redress through litigation, namely the quality of the decision.[51] Because of the relaxed rules of evidence, evidence that would not be admitted in a trial, such as hearsay evidence, could be admitted in an arbitral proceeding.[52] Also, with the limited role discovery plays in arbitration, the parties to the arbitral proceeding may be "left in the dark" as to how to allocate resources and plan for the ensuing arbitration.[53] Of course, parties may contractually limit or increase the types and the formalities of any of the rules and procedures they wish to incorporate into the arbitral process.[54] These changes naturally increase or decrease the cost of the arbitration process; thus, the very things that make arbitration attractive, namely the efficiency and informality, may impact the quality of the decision.[55] Therefore, by increasing the quality of the decision, the value of arbitration as a dispute resolution procedure may actually decrease.

Perhaps of greater significance than the differences and similarities between arbitration and litigation are the reasons why the two forums exist in the first place. Arbitration allows parties to look outside the issues and to shape and mold the arbitral process in a way that may benefit the parties beyond that of the dispute itself.[56] Thus, parties might construct an arbitral proceeding for any number of different reasons besides the issue that is before them, and it allows them to do it in a private forum rather than a public forum like the courts. Litigation, on the other hand, develops law through precedent and is imbedded with quality control mechanisms that result in more finely tuned and accurate decisions.[57] Part of the reason for these formalities and quality control mechanisms is because the judiciary serves more than the interests of the private individual.[58] The courts develop laws for the public when they make a ruling for the individuals involved in the dispute.[59] This informs the public of the law and allows the public to act accordingly.[60]

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50. Schwartz, *supra* note 48, at 16-17; *see also*, Sabin, supra note 1, at 1341-44.

51. There is no data indicating that adjudication creates higher quality decisions than arbitration, though it seems to make sense that the more formal procedures of a trial court, coupled with the review process, would create more finely tuned decisions—or the image of quality. *See* Stempel, *supra* note 41, at 269; *see also* Schwartz, *supra* note 48, at 16 (stating that there is no empirical data showing that arbitrators decide cases unjustly or unethically).

52. *See* Schwartz, *supra* note 48, at 18-19.

53. *Id.* at 14.

54. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985) (stating that the purpose of the FAA was to enforce private agreements into which parties had entered).

55. *See* Schwartz, *supra* note 48, at 24 (noting that the deficiencies in arbitration stem from its inherent benefits, most notably, its lower costs).

56. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-96 (1978) (noting that polycentric issues might be better resolved through arbitration rather than litigation).

57. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 124 (stating that "the evidentiary function of legal formalities is to provide information to courts in order to lower the costs of subsequent decision making").

58. *See* Schwartz, *supra* note 48, at 21.

59. *Id.* This, of course, increases the costs of litigation. *See* Stempel, *supra* note 41, at 270.

60. *See* Fuller, *supra* note 56, at 366 ("[A]djudication is...a device which gives formal and institutional

Equally, the rules and formalities of the courts constrain and limit the judge's power in order to create the image of an unbiased court so that the individual who seeks redress there feels that he/she has had his/her "day in court."[61] The formalities of the court both inform the public of the law and foster an image of integrity so that parties will feel that they received justice and that the law is justified.[62] This, of course, is different from arbitration, which seeks only to arbitrate for the parties to the contract's claims.[63] An arbitrator is not worried about the development of precedent or the public in general, but only in following the terms of a contract agreed upon by private parties.[64]

Arbitration is an efficient method for resolving disputes, but with that efficiency comes rules and procedures that are different from the judiciary. If the dispute is over a small award of money damages, arbitration may be an adequate forum because of the costs of litigation.[65] But when the dispute is of major public concern, or the remedy may be a large money damage claim, parties to the dispute may want more formalities, and checks on the arbitrator, to protect their interests.[66]

### *B. History of Arbitration and Its Progeny in the United States*

Arbitration is a form of dispute resolution with roots at least as deep as the British Law Merchant.[67] "The Law Merchant was an outgrowth" of business disputes and an attempt by commercial industry to settle disputes through their industries' custom and/or trade.[68] The Law Merchant was originally an informal tribunal administered and decided by non-lawyers.[69] Eventually, the Law Merchant ceased to exist as a separate entity and cases formerly decided by this tribunal were adjudicated in the Common Pleas, with the doctrines and principles of the Law Merchant effectively becoming precedent for the courts.[70] Upon the absorption of the Law Merchant into the British Courts and the degradation of the speed, inexpensiveness, and informality of the Law Merchant due to this incorporation, businessmen began to develop another forum: arbitration.[71] Initially, arbitration meant presenting a dispute to a merchant, or group of merchants, and asking the merchant for an oral ruling on the dispute.[72] Because the courts had a monopoly on coercive remedies, if a disputant failed to abide by the arbitrated decision, the other party's remedy was adverse publicity and ostracism.[73] Though parties to an arbitration agreement theoretically had specific enforcement of the contract through the courts, merchants

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expression."); see also Schwartz, *supra* note 48, at 21 (stating "precedent also guides behavior").

61. *See* Schwartz, *supra* note 48, at 21.

62. *Id.*

63. See Ware, *supra* note 6, at 745 ("[A]rbitrator's ruling only governs the parties to that particular dispute.").

64. *Id.*

65. *See* Schwartz, *supra* note 48, at 23.

66. *See* Younger, *supra* note 6, at 261-62 ("[I]f the primary concern is avoiding irrational results, the party may be better off in conventional litigation.").

67. *See* Stempel, *supra* note 41, at 270-71.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

who sought to specifically enforce arbitration agreements were met with hostility from the British courts.[74] The courts reasoned that such agreements were "against public policy because they 'oust the jurisdiction' of the courts."[75] Thus, parties to an arbitration agreement had no coercive remedy to enforce the clause, save for the informal methods mentioned.

Of course, the party who breached an arbitration agreement had some reason for their action, and there were a number of reasons why a party might want to breach an arbitration agreement.[76] If the informal costs of market punishment were minimal, a party to an arbitration agreement might breach when they had "a better legal position than commercial position; wanted a jury trial; *distrusted the arbitrator or organization and wanted appellate review*; sought consequential and exemplary damages, which were commonly thought to be more freely and generously awarded by courts; or when both their legal and commercial positions were untenable and they desired to delay the inevitable loss."[77] Inevitably, under the right circumstances, a party to an arbitration agreement would breach the contract knowing full well that the agreement would not be enforced and they would not suffer any substantial damage to their reputation.[78]

In the nineteenth century, the U.S. courts adopted the English courts' hostility to arbitration, refusing to specifically enforce arbitration agreements, or to stay a proceeding on the original cause of action.[79] Because businessmen had no effective remedy due to the adoption of the English courts' judicial hostility, Congress adopted the Federal Arbitration Act in 1925, which mandated that agreements to arbitrate be specifically enforced by the federal courts.[80] The legislative history states that the purpose of the FAA was to eliminate the judicial hostility adopted by the U.S. courts from the English courts a few centuries prior.[81] As a House Report indicates, the need for the FAA arose because of an

> anachronism of our American Law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.[82]

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74. *Id.* at 272.

75. *Id. See also* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942) (noting that judges were paid fees to settle cases and therefore they may have wanted to keep control of jurisdiction and profit). There were other justifications for not specifically performing the contract. Some English courts reasoned that they were agents for each principal to the contract and that either principal could ask the court for relief in court. Schwartz, *supra* note 39, at 74. The courts also used remedial measures to not enforce the contract, reasoning that specific performance of a contract was an extraordinary measure under contract and measuring damages for breach was too difficult. *Id.*

76. Stempel, *supra* note 41, at 276.

77. *Id.* (emphasis added).

78. Stempel, *supra* note 41, at 277.

79. *Kulukundis Shipping Co.*, 126 F.2d at 984.

80. *Id.* at 985.

81. *Id.*

82. *Id.*

Congress created the FAA to place arbitration agreements on the "same footing as other contracts, where it belongs" so that "such agreements for arbitration shall be enforced and provide[] a procedure in Federal courts for their enforcement."[83] In establishing the FAA, Congress recognized that the expense and delay of litigation could be eliminated "if arbitration agreements are made valid and enforceable."[84]

The FAA grants an aggrieved party to an arbitration clause certain specific remedies to enforce the agreement.[85] The FAA gives parties who contract for arbitration in "a contract evidencing a transaction involving commerce" the power to enforce the contract in a court of law.[86] If a party to an arbitration agreement refuses to arbitrate the claim, the aggrieved party may petition any U.S. district court "for an order directing that such arbitration proceed in the manner provided for in such agreement."[87] Also, the FAA allows a party involved in a judicial proceeding who has an issue that may be referable to arbitration to stay the judicial proceeding until the issue is resolved through arbitration.[88]

Limiting judicial control of the arbitral process further enhances this enforcement power.[89] The courts must enforce the arbitration agreement "save upon such grounds as exist at law or in equity for the revocation of any contract."[90] Once an arbitration panel grants an award, the court must enter a judgment on the award "unless the award is vacated, modified or corrected."[91] Though the court may vacate the award, it may only do so if it was procured by fraud, where there was evident partiality or corruption by the arbitrator, arbitrator misconduct, or the arbitrator exceeded his powers.[92] The courts may only modify or correct the award when there is an evident miscalculation of the figures or a mistake as to the thing referred to in the award.[93] Thus, courts' review of arbitration awards is extremely narrow under the FAA.

### *C. Relevant Case Precedent on the FAA*

The Supreme Court has stated, "[the] passage of the [Federal Arbitration] Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing this statute."[94] Thus, the Supreme Court has held that there is a "federal policy favoring arbitration" and issues as to the enforcement of an arbitration clause

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83. *Id.*
84. *Kulukundis*, 126 F.2d at 985.
85. *See generally* 9 U.S.C. §§ 2-11 (1994).
86. 9 U.S.C. § 2 states,
> 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.
87. 9 U.S.C. § 4 (1994).
88. 9 U.S.C. § 3 (1994).
89. *See* Rau, *supra* note 6, at 230-32.
90. 9 U.S.C. § 2 (1994).
91. 9 U.S.C. § 9 (1994).
92. 9 U.S.C. § 10 (1994).
93. 9 U.S.C. § 11 (1994).
94. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985).

are "resolved in favor of arbitration."[95] This policy favoring arbitration has led the Supreme Court to expressly uphold the enforcement of arbitration agreements for claims under the Age Discrimination in Employment Act[96] and the Racketeer Influenced and Corrupt Organizations Act.[97] The Supreme Court has further upheld arbitration agreements for securities acts,[98] anti-trust,[99] and labor dispute claims.[100] Though the Supreme Court has not expressly ruled on whether or not it should expand the scope of judicial review of arbitration awards by contract, it has stated that the court must "rigorously enforce agreements according to their terms,"[101] above and beyond the policy concerns of efficient and speedy resolution of the claim.[102] Yet the Court has also stated that arbitration agreements are as enforceable as other contracts, "but not more so."[103]

One Supreme Court decision that has defined the contractual nature of arbitration agreements is *Dean Witter Reynolds, Inc. v. Byrd*.[104] The Court in *Byrd* explicitly stated that agreements to arbitrate should be rigorously enforced, even above the concerns of efficiency and informality, the battle cries for arbitration generally.[105] In *Byrd*, one party to the arbitration agreement wished to stay the arbitral claims until other claims were resolved in court.[106] The Supreme Court found that claims that are arbitrable under the FAA should be arbitrated under the terms of the agreement.[107] The Court stated that sections three and four of the FAA leave the courts no room to exercise discretion but instead mandate that the court direct the parties to "proceed to arbitration on issues as to which an arbitration agreement has been signed."[108] The Court reasoned that

> The legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. [The Supreme Court] therefore reject[s] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims....The House Report accompanying the Act makes clear that its purpose was to *place an arbitration agreement 'upon the same footing as other contracts, where it belongs,'* and *to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.*[109]

The Court recognized that the purpose of the FAA was to shed judicial hostility and to protect the contractual bargain of the parties, but nothing more.[110] Thus, the

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95. Volt Info. Sci., Inc. v. Board of Trustees of the Leland Stanford Jr. Univ., 489 U.S 468, 476 (1989).
96. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
97. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).
98. *See id.*; *see also* Rodriguez De Quijas v. Shearson Am. Express, Inc., 490 U.S. 477 (1989).
99. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
100. Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001).
101. *Volt*, 489 U.S. at 479.
102. *Byrd*, 470 U.S. at 221.
103. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967).
104. 470 U.S. 213 (1985).
105. *Id.* at 218.
106. *Id.* at 215.
107. *Id.* at 217.
108. *Id.* at 218.
109. *Id.* at 219 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (emphasis added)).
110. *Id.* at 217-21. *See also Prima Paint Corp.*, 388 U.S. at 404 n.12.

Court found that the FAA does not allow the court to determine the parties' wisdom to decide to arbitrate some of the issues, but must protect the contract rights of the parties.[111]

In a similar case, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[112] the Supreme Court found that parties may submit themselves to state arbitration laws if those laws do not "do[] violence to the policies behind the FAA."[113] Though the agreement in *Volt* required that the arbitration be stayed until after certain issues were litigated, the Court reasoned that the FAA has "no express pre-emptive provision nor does it reflect a congressional intent to occupy the entire field of arbitration," therefore "parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate...so too may they specify by contract the rules under which that arbitration will be conducted."[114] The Court allowed the parties to stay arbitration because of the principal purpose of the FAA, which is "to ensure that private arbitration agreements are enforced according to their terms."[115] From this Supreme Court precedent, and the policies articulated by other Supreme Court cases,[116] some circuits have allowed for the expansion of judicial review by private contract.[117]

The Fifth Circuit was the first federal appellate court to decide that parties to an arbitration agreement may expand the scope of judicial review.[118] In this case MCI Telecommunications Corporation (MCI) breached a contract with Gateway Technologies, Inc. (Gateway).[119] Prior to the dispute, the parties agreed to binding arbitration, inserting a clause in the agreement stating "that errors of law shall be subject to appeal."[120] The parties went to arbitration and Gateway was awarded actual and punitive damages in an arbitration award.[121] MCI challenged the award and the district court reviewed the award under a harmless error standard, "but with due regard for the federal policy favoring arbitration," instead of reviewing the award de novo, which is the typical standard of review a court would use for errors of law.[122] The Fifth Circuit reversed this holding and instead held that the parties contracted for appellate review, and because the standard that a court must apply in reviewing the trial court would be de novo, the court must review the arbitration

111. *Byrd*, 470 U.S. at 221; *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (1995) (citing *Byrd*, 470 U.S. at 221, for the proposition that the objective of the FAA was "not to resolve disputes in the quickest manner possible").

112. 489 U.S. 468 (1989).

113. *Id.* at 479.

114. *Id.*

115. *Id.*

116. *See, e.g.*, Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993 (5th Cir. 1995) (citing First Options of Chicago v. Kaplan, 514 U.S. 938 (1995); Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mastrobuono v. Shearson Lehman Hutton, Inc., 542 U.S. 52 (1995)).

117. *See, e.g., id.*; La Pine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997).

118. *Gateway*, 64 F.3d 993.

119. *Id.* at 996.

120. *Id.* at 995.

121. *Id.*

122. *Id.* at 996.

award under a de novo standard.[123] The court reasoned that the "FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties."[124] Because of this policy, they were required to interpret the clause as the parties requested, otherwise it would "frustrate the mutual intent of the parties" and would be contrary to the edict established by the Supreme Court that agreements to arbitrate be upheld, according to their terms.[125] For this reason, the court found that "federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract."[126]

The Ninth Circuit followed suit, similarly determining that the Supreme Court has established a policy in favor of arbitration and that the court must enforce arbitration agreements that expand the scope of judicial review.[127] The court further added that the expansion of review by private parties to an arbitration agreement "is far less searching and time-consuming inquiry than a full trial."[128] The court recognized that "agreeing to the scope of review by a court is not the same as agreeing to the scope of the arbitration itself;" therefore, there was no reason to "pay less respect to the review provision than we pay to the myriad of other agreements which the parties have been pleased to make."[129] Thus, the court found that expansion of judicial review was within the purview of the FAA.[130]

Though the Fifth and Ninth Circuits have determined that the expansion of judicial review by contract is within the purview of the FAA, others do not agree with their holding.[131] In *Chicago Typographical Union v. Chicago Sun-Times*, Justice Posner stated,

> 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. If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract.[132]

Equally, Mayer's dissent in *La Pine* stated, "Kyocera cites no authority explicitly empowering litigants to dictate how an Article III court must review an arbitration decision. Absent this they may not."[133] Even a concurring opinion in the *La Pine* decision stressed that the decision to expand judicial review was "closer than most."[134] Judge Kozinski stated that the Supreme Court decisions are "helpful," but the pro-arbitration policy announced by the Court cannot be the only justification.[135]

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123. *Id.* at 997.
124. *Id.* at 996.
125. *Id.* at 997.
126. *Id.*
127. *La Pine*, 130 F.3d at 887.
128. *Id.* at 889.
129. *Id.*
130. *Id.* at 890.
131. Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991); *La Pine*, 130 F.3d at 891, (Mayer, J., dissenting).
132. *Chicago Typographical*, 935 F.2d at 1505. For an interesting discussion on the jurisdictional issue, see Di Jiang-Schuerger, Note, *Perfect Arbitration = Arbitration + Litigation?* 4 HARV. NEGOT. L. REV. 231 (1999).
133. *La Pine*, 130 F.3d at 891 (Mayer, J., dissenting).
134. *Id.* (Kozinski, J., concurring).
135. *Id.*

Kozinski reasoned that because there was jurisdiction in the case,[136] and since enforcing an expanded judicial review clause in an arbitration agreement will consume fewer court resources, the clause should be upheld.[137] Yet Kozinski did state that Congress never authorized courts to review arbitral awards under standards adopted by the parties and "[i]n general, [he did] not believe parties may impose on the federal courts burdens and functions that Congress ha[d] withheld."[138]

Though the decisions articulated in *La Pine* and *Gateway* depend on the pro-arbitration policy established by the Supreme Court, the Court has recently found that pro-arbitration policies of the FAA do not allow parties to stretch the agreement beyond general principles of contract theory.[139] In *EEOC v. Waffle House, Inc.*,[140] the Court refused to compel arbitration between the EEOC and Waffle House, Inc. (Waffle House) because the EEOC was not a party to the original arbitration agreement.[141] In this case, a Waffle House employee signed an arbitration agreement when he was hired.[142] The arbitration agreement stipulated that "any dispute or claim concerning [applicant's] employment [with Waffle House]...will[] be settled by binding arbitration."[143] An employee filed an ADA claim with the EEOC, but never sought arbitration or relief in court against Waffle House.[144] The EEOC brought an action in federal district court against Waffle House, requesting that the employee be made "whole."[145] Waffle House requested that the court compel arbitration, which was denied at the district court level and granted at the appellate level.[146] The Supreme Court reversed the appellate court's decision to compel arbitration, stating, "it goes without saying that a contract cannot bind a nonparty. Accordingly, the pro arbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so."[147] Thus, the Supreme Court refused to extend the FAA beyond the reach of common law contract theory.

Though the Tenth Circuit stands alone in its decision not to enforce a privately expanded judicial review of an arbitration award, there are legitimate reasons for not enforcing such contractual provisions. The Tenth Circuit's rationale for its decision will be discussed next, followed by an analysis of that decision.

## IV. RATIONALE

The Tenth Circuit disagreed with the rationale of the Fifth and Ninth Circuits.[148] Though the court recognized that the Supreme Court has made it abundantly clear that the FAA was designed for the primary purpose of ensuring judicial enforcement

136. *Id.* at 891 (noting that "any case properly in district court under the [FAA] must have an independent jurisdictional basis").
137. *Id.*
138. *Id.*
139. EEOC v. Waffle House, Inc., 122 S. Ct. 754 (2002).
140. *Id.*
141. *Id.* at 758.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 758.
146. *Id.* at 762-63.
147. *Id.* at 764.
148. *Bowen*, 254 F.3d at 934 ("We disagree, however, with the Fifth and Ninth Circuits' conclusion.").

of private agreements, the court refused to accept the circuit court's conclusions that this ultimately requires that courts must enforce private, contractually modified, judicial review.[149] The Tenth Circuit concluded, "the purposes behind the FAA, as well as the principles announced in various Supreme Cases, do not support a ruling allowing parties to alter the judicial process by private contract."[150] The Tenth Circuit used two rationales to come to this conclusion.[151] The first justification given by the court was based on the idea that parties cannot dictate how the courts should run their affairs.[152] The Tenth Circuit also reasoned that the expansion of judicial review was contrary to the FAA's pro-arbitration policy because they "clearly threaten to undermine the independence of the arbitration process and dilute the finality of arbitration awards."[153]

In coming to this conclusion, the Tenth Circuit first determined that the FAA's primary purpose of enforcing agreements to arbitrate does not require that courts enforce private agreements that modify judicial review.[154] The Tenth Circuit analyzed Supreme Court cases that dealt with arbitration and the FAA and determined that those cases emphasize that parties may specify by contract the rules that will govern the arbitration proceedings, but they have never stated that parties are free to interfere with the judicial process.[155] The Tenth Circuit then looked at the specific language of the FAA and determined that "Congress has provided explicit guidance" regarding the type of judicial review of arbitration awards[156] and that parties may contract for an appellate arbitration panel if they want.[157] Though the Tenth Circuit touched on the issue of whether or not private parties could create federal jurisdiction by private contract, the Tenth Circuit explicitly chose not to analyze this case under that argument.[158] Instead, the court chose to hold that, "in the absence of clear authority to the contrary, parties may not interfere with the judicial process by dictating how the federal courts operate."[159] In the end, the Tenth Circuit found that the decisions of the Supreme Court "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."[160] From these findings, the court found that neither the FAA nor Supreme Court cases required courts to analyze arbitration awards under privately modified standards and therefore the court was under no obligation to do so.[161]

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149. *Bowen*, 254 F.3d at 934.
150. *Id.* at 933.
151. *Id.* at 934-37.
152. *Id.* at 934.
153. *Id.* at 935.
154. *Id.* at 934.
155. *Id. See also id.* at 937 n.8 ("Because we hold that, in the absence of clear authority to the otherwise, parties may not interfere with the judicial process by dictating how the federal courts operate, we need not decide whether contractually created standards impermissibly attempt to create federal jurisdiction.").
156. *See* 9 U.S.C. §§ 10-11.
157. *Id.*
158. *Bowen*, 254 F.3d at 937 n.8.
159. *Id.*
160. *Id.* at 934.
161. *Id.*

After the Tenth Circuit determined that there was no Supreme Court precedent allowing for varying standards of review by private contract, the court then analyzed the case under the rule adopted by the Supreme Court in *Volt Information Sciences, Inc.v. Board of Trustees of Leland Stanford Junior University.*[162] The Tenth Circuit reasoned that if private expansion of judicial review does "violence to the policies behind the...FAA," then courts cannot allow for judicial expansion.[163] First, the court determined that the standard of review set out in the FAA is more than a set of default rules[164] that parties may alter with discretion.[165] The court then argued that if Section 10 is not a default rule, the court must determine if the alternate rule, expansion of judicial review, conflicts with the rules in the FAA.[166]

The court then analyzed the effects of expanding judicial review by private contract and concluded that this type of agreement would "undermine the policies behind the FAA."[167] The Tenth Circuit looked at the FAA, Supreme Court cases, and the purpose and function of arbitration to determine that Congress intended that arbitration under the FAA be separate and distinct from the judicial process.[168] First, the Tenth Circuit reasoned that the FAA's limited review "ensures judicial respect for the arbitration process" and "manifest[s] a legislative intent to further the federal policy favoring arbitration by preserving the independence of the arbitration process."[169] The court denied that Sections 10 and 11 of the FAA are default standards, able to be changed by the parties.[170] The court argued that, unlike Section 4 of the FAA, which requires the federal court to compel arbitration in the manner provided for in the agreement, Sections 10 and 11 do not contain language requiring the district court to follow parties' agreements.[171] This, the Tenth Circuit argued, indicates a congressional intent to keep arbitration and adjudication separate.[172]

The Tenth Circuit then reviewed Supreme Court cases and determined that they reflect the Court's view that arbitration and judicial review should be kept separate.[173] The Tenth Circuit reasoned that a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[174] The Tenth Circuit argued that the distinction between litigation and arbitration would be eroded if the courts were required to not only enforce the agreement to arbitrate, but also the resulting arbitration.[175] Though the Tenth Circuit's reasoning is not very clear on this point, the court seems to imply that the Supreme Court has recognized that the two types of dispute resolution are

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162. 489 U.S. 468 (1989).
163. *Bowen*, 254 F.3d at 934 (citing *Volt*, 489 U.S. at 479).
164. *See Gateway*, 64 F.3d at 997 ("Because these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA's default standard of review.").
165. *Bowen*, 254 F.3d at 934-35 (citing Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).
166. *Id.*
167. *Id.*
168. *Id.* at 935-36.
169. *Id.* at 935.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Bowen*, 254 F.3d at 935 (quoting *Gilmer*, 500 U.S. at 31).
175. *Id.*

distinct: one is informal and efficient, the other formal and more scrutinizing.[176] Thus, the Tenth Circuit argued, parties who contracted for expanded review would create a new step in the arbitration process that would undermine the informality and efficiency of the arbitration process and further erode the independence of arbitration and adjudication.[177]

The court also noted that expanded judicial review would put the courts in an awkward position of reviewing proceedings under potentially unfamiliar rules and procedures and reduce arbitrators' willingness to create particularized solutions.[178] The Tenth Circuit reasoned that arbitration is a different creature from litigation and that appellate courts, which review lower courts' decisions and are constrained by procedural rules and legal principles, are not equipped to review arbitration awards that may be granted under different standards.[179] Because of these differences between arbitration and litigation, the Tenth Circuit further argued that "specialized" arbitrators, who would typically fashion creative arbitral awards, would be unwilling to fashion creative remedies, fearful of vacation by the reviewing court.[180] Thus, expanded review by private contract would further threaten the independence of arbitration and litigation and "weaken the distinction between arbitration and adjudication."[181]

These two justifications, though coming to the same conclusion that parties may not contractually expand judicial review, are wholly different analyses of the reasons why the court should not allow for expansion of judicial review and could have implications that are not readily apparent from the decision. An analysis and the implications of this decision will be discussed next.

## V. ANALYSIS

The Tenth Circuit's two arguments, though coming to the same conclusion of barring judicial review by contract, are not based on the same policy arguments. The first argument, that parties to an arbitration agreement cannot dictate how a court will review an arbitration decision, analyzes the effects of private contractual expansion on the judiciary.[182] The second argument, that one of the FAA's policies is to ensure that the independence of arbitration and adjudication, is not aimed at protecting the independence of the courts directly, but is an attempt to establish policy on the functions and purposes of arbitration and how Congress wished this function and purpose to be enforced by the statute.[183] These distinctions are important because one argument limits the way a party may affect the courts, the

176. *Id.*

177. *Id.* The court also analyzes Supreme Court decisions reviewing arbitration agreements controlled under different statutes. *Id.* at 935 n.5. The Tenth Circuit found that the Supreme Court's role in reviewing arbitrators' awards is not the same as an appellate court reviewing decisions of lower courts. *See id.* at n.5 (citing United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37-38 (1987)).

178. *Id.* at 935-36.

179. *Id.* at 936.

180. *Id.*

181. *Id.* The court did recognize that even a hybrid of arbitration that allowed for expanded review would be more efficient than a full-blown trial. *See id.* at 936, n.6 (noting "that even under expanded standards of review, arbitration reduces the burden on district courts").

182. *Bowen*, 254 F.3d at 933-35.

183. *Id.* at 934-36.

other sets policy limits on the FAA itself.[184] Thus, an argument that parties may not dictate to the courts how to review an award will reflect the harms to the court and its processes, while the argument that expanded review does violence to the pro-arbitration policy of the FAA reflects the affects on arbitration through this expansion. This means that the former argument will be tailored towards the undue harms on the court itself, and so long as the Supreme Court, or legislators, do not mandate that the lower courts must expand judicial review, this argument upholds the integrity of the court and its formality. Yet the latter argument must be tailored to show that the FAA specifically sought to limit the expansion of judicial review through the legislature and the FAA itself.[185] This argument is a hard row because there is no explicit legislative history or statute that expressly denounces, or allows, expansion of judicial review.[186] Equally, Supreme Court precedent does not state that the FAA and its policy would not allow for the expansion of judicial review.[187] Given this, the former argument of restricting intervention into the courts by private contract seems the wiser argument while the latter argument seems less tenable.

### *A. The Policies of the FAA Do Not Mandate Expansion of Judicial Review by Private Contract*

The Tenth Circuit correctly determined that neither the Supreme Court nor the FAA explicitly allows the expansion of judicial review by private contract.[188] The Court in *Byrd* recognized that the purpose of the FAA was to eliminate judicial hostility toward arbitration by requiring the courts to enforce those agreements like a contract, but not more so.[189] The Supreme Court never explicitly states that parties may encroach upon the judiciary. In fact, the Court explicitly recognizes legislative history that states, "[the FAA] creates no new legislation, grants no new rights, except a remedy to enforce an agreement" to arbitrate.[190] There is no indication in the legislative history of the FAA or Supreme Court cases that the FAA was promulgated to give parties more power then they otherwise would have had they not agreed to arbitration.[191] The *Byrd* court clearly states that arbitration agreements are to be treated as contracts to be specifically enforced, but not more so.[192] If courts allow for expanded review by private contract, parties to the agreement have the power to control the standard of review of the arbitral award, a power that they would not have had they decided to go to court directly.[193] This seems to usurp

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184. *Id.*

185. *See* Rau, *supra* note 6, at 231 (stating that the principal purpose of the FAA was to insulate parties from judicial parochialism or intrusion).

186. *See Gateway*, 64 F.3d at 997 n.3 (noting that "the FAA does not prohibit parties who voluntarily agree to arbitration from providing contractually for more expansive judicial review"). *But see* Bowen, 254 F.3d at 934 ("No authority clearly allows private parties to determine how federal courts review arbitration awards.").

187. *See* Cullinan, *supra* note 6, at 421 (noting that Supreme Court precedent would allow for expansion of judicial review). *But see* Curtin, *supra* note 6, at 78-79 (arguing that the Supreme Court allows parties to contractually modify the procedures in arbitration, not the substantive law of the FAA).

188. *Bowen*, 254 F.3d at 934.

189. *Byrd*, 470 U.S. at 219-21.

190. *Id.* at 220 n.7 (citing 65 CONG. REC. 1931 (1924)).

191. *Id.*

192. *Id.* at 221.

193. If parties to an arbitration agreement decided to go to court, they could not ask the court to be bound by

Congress's power to dictate to the courts the processes and procedures that the court should use in the public interest.[194] Thus, parties would have powers they would not have had save for the fact that they agreed to binding arbitration.

Equally, the Court in *Volt* found that the judiciary must enforce agreements to arbitrate, but "the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'"[195] Thus, the Court held that courts must enforce arbitration agreements so long as those agreements do not do violence to the policy of "ensuring that private arbitration agreements are enforced."[196] The *Volt* decision seems to imply that agreements to arbitrate must be upheld above any rules adopted by the parties that would nullify this federal policy favoring arbitration; that is, parties cannot adopt rules and procedures that will completely abrogate the parties agreement to arbitrate. In the case of expansion of judicial review by private contract, there is no indication that by refusing to enforce expanded review by contract, arbitration agreements will not be enforced or that the arbitration award itself will not be enforced by the courts. On the contrary, it would seem that more arbitral awards would be enforced if judicial standards articulated in the FAA do not become default standards, because these standards are "among the narrowest known to the law"[197] and courts rarely, if ever, overturn arbitral decisions.[198] Thus, by following the traditional standards, the court, arguably, could be furthering the policies of the FAA.[199]

Though the Supreme Court decided *EEOC* subsequent to this case, it seems that the Court's trend is to limit the FAA's pro-arbitration policy with regard to the parties' freedom to contract.[200] The *EEOC* decision makes it clear that parties cannot go beyond common law contract theory and bind non-parties to a contract.[201] There is no reason why the courts should be exempt from this proposition. In fact, it would seem that the courts, which are a public resource, should be an even greater

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the terms of the arbitration agreement, because the court must follow the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 2071 (1994); FED. RULES CIV. PROC. Rule 1, 28 U.S.C. (1994); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1011 (2d ed. 1969).

194. *See* Edward T. Harris, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668, 678 (stating that "a potential danger of ADR is that disputants who seek only understanding and reconciliation may treat as irrelevant the choices made by our law makers"); *see also* Ayres & Gertner, *supra* note 57, at 124 (noting that legal formalities lower costs of subsequent decision making).

195. *Volt*, 489 U.S. at 478 (citing Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).

196. *Id.*

197. *Bowen*, 254 F.3d at 932 (citing ARW Exploration Corp. v. Aguirre, 45 F.3d, 1455, 1462 (10th Cir. 1995)).

198. *See* Ware, *supra* note 40, at 711.

199. Smit, *supra* note 6, at 149. Equally, keeping arbitration and litigation separate may actually force parties to think more about the choice to litigate the case or to go to arbitration. *See* Sabin, *supra* note 1, at 1364. Without that hard choice, parties may be more willing to craft hybrids of arbitration/litigation. *Id.* This may lessen the efficiency of arbitration because the parties may have chosen one or the other. *Id.*

200. *EEOC*, 122 S. Ct. at 754.

201. *Id.*

concern.[202] Given this, it would seem that parties to an arbitration agreement cannot bind the court to an agreement that it had no say in.

Moreover, the Tenth Circuit recognized that the Supreme Court has explicitly noted that the judiciary and arbitration are different forums entirely.[203] The Court in *Gilmer* stated that when parties agree to arbitrate, they trade the "procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[204] In an earlier case, the Court recognized that when parties agree to arbitrate, they are authorizing the arbitrator to give meaning to the contract.[205] The Court then explained, "though the arbitrator's decision must draw its essence from the agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*"[206] Equally, the Court has made it clear that when parties submit their claims to arbitration, they submit "to their resolution in an arbitral, rather than a judicial, forum."[207] Though the Court has expressly held that the courts are not hostile to arbitration,[208] they have made it clear that there are differences between the two forums and these differences are an integral reason why parties choose arbitration over litigation.[209]

### *B. Neither the FAA nor Supreme Court Cases Explicitly Require That Arbitration and Adjudication Be Separate*

Though the Tenth Circuit recognized that the FAA does not explicitly allow for the expansion of judicial review by private contract, it found that arbitration and adjudication must be kept "independent."[210] This argument is no less reasonable than the Fifth and Ninth Circuits' argument that parties to an arbitration agreement should be allowed to expand judicial review by contract because of FAA policy.[211] There is no indication in the legislative history of the FAA or in Supreme Court precedent that parties to an arbitration agreement cannot ask the court to intervene more than articulated in the FAA. The Supreme Court has found that the purpose of

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202. This concern of binding a non-party to a contract seems even more important with regard to this issue of changing judicial review by private contract. Parties to an arbitration agreement are analyzing their wants and desires from their perspective, but the courts are confronted with two choices: to make the parties whole and to protect the integrity and the efficiency of the courts. *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 676-77 (1986). The courts cannot make informed decisions on the use of these public resources if they are not informed prior to the agreement and are not given the opportunity to determine whether the agreement is in the interests of the judicial system. Equally, Congress, who creates the laws, is an indirect nonparty to the agreement. Never agreeing to the expanded review, Congress's power to make laws and have those laws enforced by the courts is usurped by private contract.

203. *Garvey*, 121 S. Ct. 1724.

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

205. United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 41 (1987).

206. *Id.*

207. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

208. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

209. With less discovery, fewer rules of evidence, and typically less formality, arbitration is not a full-blown trial with all the rules and procedures in place as checks upon the decision maker and the court proceeding itself. *See* Schwartz, *supra* note 48, at 25 (arguing that the efficiency and informality of the arbitration decision-making process is the virtue that makes arbitration less in quality than the court process). Thus, arbitral integrity is naturally going to be less than the courts. *Id.*

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

211. *Gateway*, 64 F.3d at 997; *La Pine*, 130 F.3d at 888.

the FAA was to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" and "to place an arbitration agreement upon the same footing as other contracts."[212] Thus, it was the courts refusal to enforce arbitration agreements that prompted the FAA rather than an attempt to keep private individuals from expanding judicial review. In fact, it would seem that Congress never thought that private individuals would attempt to expand judicial review by private contract because of the judicial hostility towards arbitration at the time of inception of the FAA.[213]

Yet, the *Bowen* court argued that Sections 10 and 11 of the FAA establish the "federal policy favoring arbitration by preserving the independence of the arbitration process."[214] Though it is clear that the review standards articulated in Sections 10 and 11 of the FAA are strict, these sections mandate that the court vacate, modify, or correct the award under those strict review standards upon the request of one of the parties to the agreement, but it does not stipulate that parties cannot agree to alter these review standards prior to the dispute.[215] Thus, it would seem that Congress was concerned that the court, through one party's request, would not enforce the contract according to its terms; but it does not seem that the FAA was promulgated to keep adjudication and arbitration separate or not to allow both parties to agree to expansion of review beyond that articulated in the FAA.[216] In fact, there may be strong policy justifications under the FAA for allowing for expanded judicial review in certain circumstances.[217] The Supreme Court has explicitly stated that it favors arbitration laws and rules that increase the use of arbitration, so long as those rules do not do violence to the policies of the FAA.[218] If some form of expansion actually increases the use of arbitration, it may be justified under the FAA to allow for some expansion of judicial review.[219]

Equally, Supreme Court cases that recognize arbitration and adjudication are different do not establish a draconian rule that there should not be an increased level of judicial review at some level.[220] Certainly, the Court may recognize that there are differences, and that the two forums should be independent, but there is no indication that the Supreme Court's justification for noting the differences between arbitration and adjudication are based on the FAA's policy mandating the independence of arbitration and litigation.[221] In fact, the Supreme Court has found

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212. *Byrd*, 470 U.S. at 219-20 (citing H.R. REP. NO. 96 (1924)).

213. *See* Rau, *supra* note 6, at 230-31.

214. 254 F.3d at 935.

215. *See* 9 U.S.C. § 10 (noting that "[the court] may make an order vacating the award upon the application of any party to the arbitration").

216. *See* Rau, *supra* note 6, at 231 ("[Section] 10 serves to assure the parties to an arbitral proceeding that they need not fear an officious or meddlesome inquiry into the merits.").

217. *See* Ware, *supra* note 6; Younger, *supra* note 6.

218. *Volt*, 489 U.S. at 479.

219. Statutory "opt-in" review is one such method that may actually increase the use of arbitration. *See* Ware, *supra* note 6, at 263.

220. *See generally* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-43 (1995) (stating that who should decide the issue of arbitrability depends on what the parties agreed to, but does not turn on the difference between the two forums).

221. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 ( "[A] party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

that "rules which are manifestly designed to encourage resort to the arbitral process simply do[] not offend...polic[ies] embodied in the FAA."[222] Given the fact that expansion of judicial review by private contract may actually increase the use of arbitration, the policy justification adopted by the Tenth Circuit seems weak.

In a similar vein, the Tenth Circuit's argument that expanding judicial review would weaken the differences between arbitration and adjudication and does violence to the policies of the FAA is also no less tenable.[223] The Supreme Court has made it clear that parties may create agreements as they see fit and the court is not to determine the wisdom of that agreement.[224] The Tenth Circuit's determination that arbitration allows for "creative decision making" and that this flexibility of the arbitration process would be lost if judicial review by private contract were allowed seems to do violence to the Supreme Court holding.[225] The Tenth Circuit's determination assumes that the parties want creativity and flexibility when the parties contract for arbitration. But what if parties want a more formal, trial-type arbitration? Should they be denied this type of arbitration because the court does not think it is wise? The Tenth Circuit seems to be making a policy judgment on the proper role of arbitration, determining that it would be unwise to allow parties to freely contract for expanded review under the FAA because what they really want is a creative decision maker.[226] This type of argument seems contrary to Supreme Court precedent that mandates that courts should not sit to determine the wisdom of the terms of the arbitration agreement.[227] Thus, the argument that the purpose of the FAA was to keep arbitration and adjudication separate because it would harm the creative decision-making process of arbitration does not seem reasonable given FAA policy and Supreme Court precedent.

Besides the fact that the argument that the pro-arbitration policies of the FAA require keeping arbitration and adjudication separate is weak, this argument also conflicts with the argument that parties cannot interfere with the judicial process.[228] This conflict can be shown with a very simple example. Suppose parties to an arbitration agreement choose not to expand judicial review, but choose to contract the standards of review narrower than those articulated in the FAA. If the argument is that parties cannot interfere with the judicial process then parties cannot narrow the standards below those set out in the FAA. But if the argument is that one of the purposes for the FAA standards is to keep arbitration and litigation independent of each other, then contraction of the standards set out in the FAA would further the goals of the FAA by further limiting the courts' role in deciding the legitimacy of the arbitration award. In short, because the Tenth Circuit's two rationales are not based on the same purposes, they conflict.

Given this, it seems that the main justification for the Tenth Circuit's holding was to protect the courts from interference by private individuals. The Tenth Circuit

222. *Volt*, 489 U.S. at 476.
223. *Bowen*, 254 F.3d at 935-36.
224. *Byrd*, 470 U.S. at 221.
225. *Id.*
226. *Bowen*, 254 F.3d at 936.
227. *See Byrd*, 470 U.S. at 221.
228. *Bowen*, 254 F.3d at 934-36.

explicitly states that "through the FAA Congress has provided *explicit guidance regarding judicial standards of review of arbitration awards*."[229] This seems to indicate that the Tenth Circuit's focus was not on the policies of the FAA per se, but on following the edicts of Congress. In fact, the Tenth Circuit stated in a footnote, "[b]ecause we hold that, *in the absence of clear authority to the contrary*, parties may not interfere with the judicial process by dictating how the federal courts operate, we need not decide whether contractually created standards impermissibly attempt to create federal jurisdiction." [230] Thus, it seems that the main concern of the Tenth Circuit was not whether the policies of the FAA mandate that the judiciary be kept separate, but that parties may not interfere with the judiciary.[231]

### *C. If Congress Does Not Explicitly Grant Powers to Private Parties to Expand Judicial Review by Contract, the Courts Should Not Allow Them to Override the Traditional Standards Set Out in the FAA*

The Tenth Circuit's decision that the FAA does not explicitly grant the courts the power to allow for the private expansion of judicial review was a wise decision.[232] Although the decisions to uphold the expansion of judicial review are based on the federal policy favoring arbitration, this deference to arbitration should not allow private parties to usurp powers specifically granted to Congress under the Constitution.[233] The decisions allowing private parties to expand judicial review, because they take the more efficient route of arbitration, allow parties to stipulate to the courts how it should conduct its affairs, something that could not happen had they chosen to go to court directly.[234] It allows parties to contract around the rules of judicial review, overriding the Rules of Civil Procedure and common law, by private contract, thus usurping the lawmaking powers of Congress and the judiciary's role of interpreting those laws.[235]

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229. *Bowen*, 254 F3d at 934 (emphasis added) (citing *Prima Paint Corp.*, 388 U.S. at 45).

230. *Id.* at 937 n.8 (emphasis added). *But see id.* at 936 n.7 (reiterating Revised Uniform Arbitration Act comment that expanded judicial review through opt-in clause would allow for a "second bite at the apple").

231. Because this holding implies that parties may not expand or contract judicial review by private contract, the implications of contraction of judicial review will not be discussed. *Bowen*, 254 F.3d at 933 (stating that parties may not alter the traditional standards of review). Theoretically, parties could mutually agree to contract the standards of review below those standards articulated in the FAA, though there would be no reason why parties would agree to an arbitration that would be unfair or unconscionable. But it is important to note that if the policies of the FAA allow for the contraction of judicial review, this could allow some businesses to completely abrogate the review standards of the FAA in consumer arbitration clauses. Simply, consumers who do not know the law and agree to purchase goods that contain an arbitration agreement that contracts the standards of review below those of the FAA could agree to review standards that allowed the arbitrator to commit fraud, duress, or any other unconscionable act. Of course, the court could determine that this type of clause is unconscionable because arbitration agreements carry the same weight as other contractual agreements, but not more so. *See Waffle House*, 122 S. Ct. at 754. Thus, under state contract law, an arbitration agreement procured by fraud would most likely be considered unconscionable under state law, and therefore void. *See* Ware, *supra* note 6, at 269 ("[G]enerally applicable contract defenses...may be applied to invalidate arbitration agreements."); Schwartz, *supra* note 39 (criticizing the Court's policy favoring arbitration in binding pre-dispute arbitration agreements between consumers and businessmen).

232. *Bowen*, 254 F.3d at 934.

233. *See generally* Ex Parte New Orleans City Bank, 44 U.S. 292 (1845); Wayman v. Southard, 23 U.S. 1 (1825); Livingston v. Story, 34 U.S. 632 (1835).

234. *Byrd*, 470 U.S. at 220 n.7 (noting, "[the FAA] creates no new legislation, grants no new rights").

235. *See* 28 U.S.C. § 2701 (1994).

The court has developed over hundreds of years to uphold the law and to do that which is equitable.[236] Fine-tuning and slight tweaks through case precedent and statute have created a courtroom designed to make the people feel it is equitable and just, though it may be rigid and inflexible at times.[237] By allowing parties to change the laws governing the courtroom, parties affect this fine line that the judiciary must walk: the judge must do that which is equitable and follow the law.[238] If it allows parties to shun case precedent and ask the court to act differently, perhaps more like an arbitrator, private parties may be affecting the power balance and integrity of the courtroom.[239] Judges may be asked to review a record created by a non-lawyer not versed in "legalese" or asked to use standards that are not easily reviewable by courts.[240] Thus, courts would be required to act as arbitrators to decide issues, not as judges.[241]

Of course, the courts could develop precedent that would limit the amount of intervention into the courts by private contract. But could this decision be justified under the FAA if the policies of the FAA, according to the argument, require that the court follow the parties' contract according to its terms?[242] There seems to be nothing stopping the parties to the contract from requiring a court to review an arbitrator's award below the standards that a court would review a trial court's award, or under differing standards. In fact, if the parties so chose, they could require the court, after an appellate review of an award that the court finds to be unjustified, to grant the parties a trial under rules and procedures that the parties adopt merely because the parties agreed to arbitrate the claim first and had stipulated in that agreement that they would go to trial governed by their own adopted rules and procedures if the review court should overturn the award. But why stop there? If parties have the power to change the rules of the courts because they chose arbitration prior to litigation, why shouldn't the parties be able to stipulate that the court shall act as arbitrator and then agree to their own trial court rules and procedures in the agreement, doing away with the middleman—the private arbitrator. Thus, because the parties agreed to arbitrate the claim and chose the judge as their arbitrator, the courts would be bound by the parties' decision and the judge would have to act as arbitrator, following the rules and procedures adopted by the parties. Certainly, these arguments seem ridiculous, but under the holdings of the Fifth and Ninth Circuits, it would seem that the court would be required to stand on its head if the parties contracted for it.[243]

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236. *See* Pound, *infra* note 237, at 63.

237. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 63 (1954) ( "[N]ow, as in the Sixteenth and the Seventeenth Century reaction from the strict law, come those who would turn over the whole field of judicial justice to administrative methods.").

238. *Id.*

239. *See generally id.*; Fuller, *supra* note 56.

240. Rau, *supra* note 6, at 252.

241. *See* Harris, *supra* note 194, at 768 (noting that judges are experts at law and should decide issues of law and that "nonlegal" values should be handled by "substantive expertise").

242. *See generally La Pine*, 64 F.3d at 888; *Gateway*, 64 F.3d at 996-98.

243. *See* Rau, *supra* note 6, at 248 ("Can the value of private autonomy justify...allow[ing] parties to create...innovative and 'exotic,' procedures?").

Courts do review other forums, such as administrative agencies and the like.[244] Yet it is important to note that these forums, and the standards that govern the review of these proceedings and awards, are imposed on the courts by statute[245] or develop through the common law.[246] There is no reason why legislators, both state and federal, could not incorporate differing standards into arbitration law that would be more consistent with the roles of the courts.[247] Given that there are strong policy reasons on both sides of the argument for and against the expansion of judicial review,[248] the balancing of these different policy concerns should not be for the courts when the courts have clear rules that Congress has developed and parties to the arbitration process have an infinite number of ways that they may protect their interests.[249]

The court's role, as formal and traditional as it is, serves a function that is distinctly different from arbitration.[250] The court, though deciding private matters, is not in the "free market" selling its judicial wares, but is instead a public resource controlled by Congress and the judicial branch.[251] Congress has chosen to limit judicial roles and clearly define rules and procedures of the court to protect its integrity and maximize its efficiency.[252] Thus, the concerns of the court should not be maximizing the use of arbitration. The concern of arbitral integrity should be left to the states, or Congress, or the parties directly involved with the arbitration forum to develop techniques to make the process worthwhile for the parties.[253]

## VI. IMPLICATIONS

Because of the reasonings of the Tenth Circuit that there is no statute or court precedent authorizing private individuals to expand judicial review through an arbitration agreement and that expansion of judicial review does violence to the policies of the FAA,[254] this decision may have several different implications. The obvious implication of this decision is that parties who attempt to expand judicial review by private contract within the jurisdiction of the Tenth Circuit will not be able to do so.[255] But more profound than this obvious holding is the affect on state courts and the policies of the FAA depending on the reasoning that the courts adopt to justify the holding. If the Tenth Circuit adopts the reasoning that the policies of

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244. *See generally* Kenneth Culp Davis and Richard J. Pierce, ADMINISTRATIVE LAW TREATISE, §§ 8.1-11.5 (1994).

245. *See, e.g.*, Younger, *supra* note 6, at 260 (discussing automatic rights of appeal under "rent-a-judge" statutes).

246. *See* Davis, *supra* note 244, § 11.2.

247. One argument is that courts should allow parties to contract for legal errors to be reviewed under less strict standards. *See generally* Ware, *supra* note 6; Rau, *supra* note 6.

248. *See* articles cited in *supra* note 6.

249. *See Bowen*, 254 F.3d at 934 (stating that "if parties desire broader appellate review, they can contract for an appellate arbitration panel to review the arbitrator's award"); Sabin, *supra* note 1 (analyzing numerous arbitration reform proposals).

250. *See* Harris, *supra* note194, at 676-77.

251. *Id.*

252. *Id.*

253. It is important to note that whenever the courts do get involved in the process, it becomes more formal. *See* Stempel, *supra* note 41, at 270-71.

254. *Bowen, 254 F.3d at 934-37.*

255. *Id.* at 937.

the FAA mandate the independence of arbitration, this holding may have deleterious effects on state legislators who wish to experiment with opt-in clauses or other arbitration/adjudication hybrids that affect the independence of arbitration and adjudication.[256] Yet, the argument that private parties to a contract cannot dictate to the federal judiciary how it should run its affairs would not have this affect because it does not affect the holding of *Volt* and, therefore, does not affect the policies of the FAA, though it does affect arbitration generally. Thus, depending on the reasoning the court adopts, the holding of the Tenth Circuit could have profound affects on the future of arbitration and the FAA.

Before an analysis of the implications of this case under the *Volt* holding, it is necessary to analyze this case with regard to its holding on state laws affecting arbitration. The *Volt* court held that "application of the California statute is not pre-empted by the [FAA] when the state laws allowed for stay of arbitration pending litigation."[257] Because the contract agreed upon by the parties contained a "choice-of-law clause providing that 'the contract shall be governed where the project is located,'" which was California, the state law allowing for a stay of arbitration was granted.[258] The court reasoned that there

> is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate...rules which are manifestly designed to encourage resort to the arbitral process simply do[] not offend...policy embodied in the FAA.[259]

The Supreme Court found that the fact that "[Sections] 3 and 4 of the FAA are fully applicable in state-court proceedings" did not prevent parties from adopting state rules.[260] The court reasoned that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration," finding that "state law may nonetheless be pre-empted to the extent that it...would undermine the goals and policies of the FAA."[261] Thus, if parties to an arbitration agreement adopt state laws that do not completely abrogate agreements to arbitrate, the state laws must be enforced according to their terms so long as they do not do violence to the policies of the FAA.[262]

The *Volt* court seems to imply that the states should be free to experiment with arbitration rules and procedures, so long as they do not do violence to the policies of the FAA.[263] Expansion of judicial review does not completely abrogate a party's agreement to arbitrate.[264] In fact, it seems to have some benefits that may actually

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256. *See generally* Ware, *supra* note 6, at 269-70.

257. 489 U.S. at 470, 476.

258. For an interesting discussion of this case and its choice of law holding, see Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250 (2002).

259. *Volt*, 489 U.S. at 476.

260. *Id.* at 477.

261. *Id.* at 477-78.

262. *Id.* at 478-79; *see also* Ware, *supra* note 6, at 269 (noting that "the FAA preempt[s] state anti-contract law").

263. *Volt*, 489 U.S. at 477.

264. *See* Ware, *supra* note 6, at 269-71.

increase the use of arbitration.[265] It would seem that allowing parties to expand judicial review, in and of itself, does not do violence to the policies of the FAA.

Yet the Tenth Circuit's argument that the policies of the FAA mandate that the courts and arbitration be independent and that allowing for the expansion of judicial review does violence to the policies of the FAA seems to expand the holding in *Volt* beyond that articulated in the case itself.[266] Because the Tenth Circuit used the *Volt* holding to justify its decision that judicial expansion does violence to the policies of the FAA, the FAA pre-empts any law or agreement that expands judicial review or decreases the independence of arbitration and adjudication at some level.[267] Thus, state legislators in the Tenth Circuit's jurisdiction are precluded from statutorily allowing for expansion of judicial review through opt-in provisions, nor are they allowed the opportunity to experiment with arbitration if it affects the independence of arbitration and the courts, though it might actually increase the use of arbitration and reduce court dockets, typical justifications for adopting arbitration generally. Equally, parties to an arbitration agreement who adopt state laws that allow for varying standards will not be able to have those standards enforced in the Tenth Circuit.

Though the argument that expansion of judicial review by private contract does violence to the policies of the FAA, the argument that private parties cannot dictate to the courts how they should review arbitration awards does not preclude state courts from adopting varying standards of review. This argument only disallows private parties from affecting the judicial process, but it does not make any pronouncement on the policies of the FAA—for good or for ill. In fact, the court in *Volt* made it clear that the FAA is not the only arbitration act that can be adopted by parties to an arbitration agreement.[268] Thus, state legislators may adopt opt-in provisions into their arbitration acts and parties to an arbitration agreement may choose these laws as part of their agreement, even in cases where the FAA would be controlling.[269] Accordingly, because this holding does not affect the policies of the FAA, states would still have the power to create legislation to allow parties to an arbitration agreement to expand judicial review beyond the standards articulated in the FAA so long as those same laws do not abrogate the agreement entirely.

Clearly, the effects of each reason that the court gave could have a huge impact on how state legislators may create effective and legitimate rules and procedures for arbitration proceedings.

## VII. CONCLUSION

The Tenth Circuit's decision that parties may not interfere with the judicial process upholds the integrity of the process. As Lon Fuller stated,

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265. *See* Rau, *supra* note 6, at 247; Younger, *supra* note 6, at 262 (noting that heightened judicial review may curb arbitrator's maverick impulses).

266. *Volt*, 468 U.S. 477-78.

267. *Id.* at 476.

268. *Volt*, 489 U.S. at 477-78.

269. Of course, parties to the agreement would essentially be choosing to expand the scope of judicial review, but they would not have free rein to adopt any rules that they so choose that may affect the federal courts. *See generally* Ware, *supra* note 6. Equally, the federal courts could still control the state laws through the "violence to the policies of the FAA" holding in *Volt*. *Volt*, 489 U.S. at 479.

> [adjudication] assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting.[270]

It is this demand of rationality that has constricted the courts and required them to follow rules and procedures developed over years of practical application. It would be a radical move for the judiciary to allow parties to privately alter this system.

Though the former argument is sound, the court's determination that the expansion of judicial review does violence to the policies of the FAA could hinder state legislators from developing standards and procedures whereby expanded review by a court of an arbitration award may actually benefit both the courts and the quality of the arbitration process itself. As the Tenth Circuit recognized, this was a "difficult question."[271] Though all the reasoning of the decision is not reasonable, it seems that the Tenth Circuit is heading in the right direction.

270. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366-67 (1978).
271. *Bowen*, 254 F.3d at 933.