Arbitration and Article III

by

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Article III vests “the Judicial Power of the United States” in the “Supreme Court and such inferior courts as Congress may from time to time ordain and establish.” The meaning of that deceptively simple phrase has bedeviled courts and scholars for over two centuries. One might read it literally – that is to say that federal courts, and only federal courts, may decide cases falling within the jurisdictional grants contained in Article III, Section 2 such as cases “arising under the Constitution” or the “Laws of the United States.”¹ That reading, as many have explained, may well be inconsistent with the text, structure, history and doctrine.² Moreover, as a matter of doctrine, the Supreme Court has squarely rejected it. Since the founding and in the centuries that followed, numerous other entities such as state courts, Article I courts and, most recently, administrative agencies have exercised power to hear and decide such cases.³ With rare exception, the Supreme Court has rejected numerous attacks on schemes that allow non-Article III

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³ See generally Currie, Bankruptcy Judges and the Independent Judiciary, 16 Creighton L. Rev. 441, 446-459 (1982-83) (charting the history of non-Article III tribunals).
decision makers to resolve questions falling within the competence of the federal courts. The upshot of this jurisprudence is that Congress enjoys considerable, though certainly not absolute, flexibility in permitting non-Article III-actors to resolve federal claims in the first instance.\(^4\)

Arbitration tests the limits of this jurisprudence. Arbitral panels differ from both Article III courts and from the above-described non-Article III institutions in several (potentially) salient respects. As compared to Article III courts, arbitrators have none of the hallmarks of that office: presidential nomination, senatorial consent, life tenure (or at least tenure during periods of “good behaviour”), removal only by impeachment and non-diminished compensation. Arbitrators also differ from non-Article III actors previously approved by the Court. For example, arbitrators, unlike state judges, do not take oaths to support the Constitution and are not bound by the Supremacy Clause. Moreover, federal judicial review of arbitral awards is far more circumscribed (even on pure legal questions) than comparable review of decisions by state courts, Article I courts or administrative agencies. Unlike administrative agencies, arbitrators do not necessarily have the expertise in some highly complex regulatory arena that might justify deferential review of their decisions. Finally, unlike all of these actors, arbitrators have personal financial stakes both in the instant case (in terms of their fees) and in future cases (in terms of the effect of their participation in the instant case on downstream revenue) – stakes that have caused some to call into doubt the arbitrator’s very neutrality.\(^5\)

\(^4\) Paul Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 Ind. L. Rev. 233, 235 (1990) (“For some 200 years, Congress has consistently acted on the premise that it has the authority, in exercising its legislative powers, to reach the conclusion that it is necessary and proper to constitute special courts, tribunals and agencies which exercise – or at least seem to exercise the federal judicial power … and yet which are not the inferior courts specified in Article III. And during this time, with virtually equal consistency, the exercise of that power has been sustained by the courts.”).

\(^5\) On the centrality of judicial independence to Article III, see Currie, 1986 Sup. Ct. Rev. at 37.
A close examination of these and other differences between arbitration and other institutions that may decide federal claims naturally spawns a number of important questions: Does resolution of federal claims by arbitrators ever violate Article III? If so, why? Under what circumstances? A lot rides on the answer to this question. An absolute rule prohibiting all arbitration of federal claims (the “arbitrate never” position) would shut down a significant and increasingly popular form of dispute resolution, sending those cases back to federal and state court. Conversely, a blanket rule permitting arbitration of federal claims (the “arbitrate always” position) has dramatic implications – it allows private individuals, not bound to the Constitution, with no particular expertise to resolve questions of federal law. Finally, a view that arbitration is compatible with Article III under some circumstances (the “arbitration sometimes” position) has the potential to reconcile these competing values. But that position is defensible only if one can articulate a coherent theory of the precise preconditions under which arbitration is compatible with Article III.

For much of the country’s history, federal courts could conveniently avoid these nettlesome questions. Prior to the twentieth-century, courts simply declined to enforce pre-dispute arbitration agreements as unenforceable attempts to oust them of

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7 It also carries implications for other constitutional rights of the participants. Under the Supreme Court’s decision in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53-54 (1989), if the party does not have a right to an Article III forum, any Seventh Amendment concerns drop out as well. See Geldermann, 836 F.2d at 323-24.
from the early decades of the twentieth century (with the enactment of the FAA in 1925) through the 1960s, the non-arbitrability doctrine prevented arbitrators from resolving issues of federal statutory law. Notably, while both of these doctrines minimized the tension between arbitration and the Constitution, neither specifically was anchored in Article III. The “jurisdictional ouster” argument found its roots in contract law – essentially treating the arbitration agreement as a void contract that offended public policy. The “non-arbitrability doctrine” operated as a statutory interpretation tool – essentially that the FAA should not be interpreted to deprive a plaintiff of a federal forum on his statutory claim.

Developments since the early 1970s and particularly in the last two decades have stripped theorists of the tools that enabled them to avoid the tension between arbitration and Article III. In 1974, the Court held in Scherck v. Alberto-Culver Co. that parties could agree to arbitrate a federal securities claim in an international arbitration. More recently, in a line of cases beginning with Shearson/American Express, Inc. v. McMahon, the Court extended the principle in Scherck to the domestic context. The effect of this line of cases has been to make arbitration a viable (and increasingly popular) method for resolving a variety of disputes even though those disputes fall under a core jurisdictional grant of Article III. As Judith Resnik recently observed, “federal judges who once had

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10 Macneil, Speidel, & Stipanowich, Federal Arbitration Law § 4.3.2.2 (Supp. 1999).
declined to enforce *ex ante* agreements to arbitrate federal statutory rights now generally insist on holding parties to such bargains, thereby outsourcing an array of claims.”

As the jurisdictional ouster and non-arbitrability doctrines have waned, the unresolved Article III issues have waxed. Litigation over the constitutionality of NAFTA presents the most recent, contemporary manifestation of this phenomenon. As explained in greater detail in Part III, a “centerpiece” of NAFTA and its implementing legislation was a dispute resolution mechanism that divested Article III courts of virtually all jurisdiction over countervailing duty and anti-dumping decisions under NAFTA and invested that authority in panels of arbitrators, whose decisions are subject to virtually no federal court review. A group of American softwood lumber producers, dissatisfied by the decision of a NAFTA panel, challenged NAFTA’s dispute resolution mechanism on a variety of grounds, including, among others, the argument that the NAFTA system violates Article III. The parties ultimately settled the case, perhaps motivated in part by fears over the consequences if a court invalidated the scheme. As representatives of both Canada and the United States government made clear during oral argument in the D.C. Circuit, that challenge, if successful, had the potential to unravel NAFTA’s entire scheme.

Apart from the particular challenge to NAFTA, proper resolution of the compatibility of arbitration with Article III has broader implications. In other industries,

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17 See Brief of the United States in No. 05-1366 (on file with author); Brief of the Government in Canada in No. 05-1366 (on file with author).
particularly the securities industry, plaintiffs have mounted several Article III challenges to arbitration. Various other markets, including foreign direct investment and transnational commerce, likewise depend on robust arbitration systems. Unless these systems can securely withstand constitutional challenge, their enforceability will remain vulnerable.

Despite the critical need for a coherent theory, few commentators or courts have made serious attempts to provide one. Most judicial arguments seek refuge in one of two facile lines of argumentation – (1) that parties to an arbitration “waive” their right to an Article III forum by agreeing to arbitration or (2) that arbitration involves “public” rights and, consequently, does not implicate Article III. Part I of this Article examines these arguments and explains why none of them offers a sufficient account for why arbitration comports with Article III. Part I then turns to the scant literature on the subject and demonstrates why those accounts likewise do not suffice.

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Part II of this Article offers a fresh approach. Part II argues that “appellate review” theory, first formulated in another context by Richard Fallon, provides the most promising approach for reconciling arbitration with Article III. At its core, appellate review theory argues that a non-Article III decision-making mechanism is constitutional so long as an Article III court has a sufficient opportunity to review the decision. Unlike the theories rejected in Part I, appellate review theory does the best job of advancing the ideals of underpinning Article III while upsetting a minimal amount of precedent.

A critical question for any “appellate review” account of arbitration is the degree of appellate review necessary for a non-Article III scheme to pass constitutional muster. Fallon derives the standard from a delicate balancing of certain values. On one side of the scale are those values underpinning the need for Article III tribunals; on the other side are those underpinning the need for non-Article III decision makers. Based on this balance, Fallon posits that Article III Courts must have plenary review of all legal questions (constitutional and nonconstitutional) and, with a few exceptions, minimal review of factual findings.

The theory developed in Part II builds upon Fallon’s theory but modifies it in two important ways. First, the account given here is more flexible than Fallon’s: it allows the standard of constitutionally required review to vary with the particular dispute resolution structure at issue. Second, once liberated from Fallon’s unnecessarily rigid approach, the account given here takes into consideration the unique balance of values relevant to arbitral systems. While differing from Fallon’s theory in important respects, the modified appellate review theory proposed here is entirely consistent with its underlying premises and does not upend much existing precedent. Under this modified balance, appellate
review theory counsels in favor of plenary Article III review of an arbitrator’s rulings on constitutional questions, more limited review of nonconstitutional questions and minimal review of factual findings.

Part III of this Article applies the theory developed in Part II for three forms of arbitration: (1) regular commercial arbitration under the FAA and New York Convention, (2) arbitrations under NAFTA and (3) investment arbitrations. In brief, I conclude that, under the modified version of appellate review theory offered here, each of these systems passes muster under Article III: this theory puts arbitration on a surer constitutional footing. Part III then turns to potential criticisms of the theory and its implications for other schemes.

I. Traditional Explanations for the compatibility between arbitration and Article III are unsatisfactory.

This Section unfolds in two parts. First, it demonstrates the inadequacy of traditional explanations in the caselaw for the compatibility of arbitration with Article III. Second, it demonstrates that the existing accounts in the academic literature fare no better.

A. Traditional Accounts in the Case Law

Though the Supreme Court “has never questioned the constitutionality of the Federal Arbitration Act,”20 lower courts consistently have upheld arbitral schemes in the face of Article III challenges. Those efforts take two main forms. Some maintain that arbitration of federal questions does not violate Article III because parties have waived

20 Zick, 82 Marq. L. Rev. at 262.
their arbitration rights. Others rely on the “public rights” doctrine to uphold arbitral schemes. As I explain below, none of these theories offers an adequate account for why arbitration comports with Article III.

1. The Waiver Argument

The waiver argument has received the most widespread acceptance and finds its roots in CFTC v. Schor.21 Schor involved a constitutional challenge to the jurisdiction of the Commodity Futures Trading Commission (“CFTC”). An independent agency created under the Commodity Exchange Act, the CFTC was responsible for, among other things, resolving disputes between customers and professional commodity brokers. The CFTC served as an alternative to either federal court litigation or arbitration, which were perceived to be too costly and inefficient. Regulations promulgated by the CFTC extended its jurisdiction to counterclaims “aris[ing] out of the transaction or occurrence or series of transactions set forth in [a] complaint.” Schor, a dissatisfied investor, filed a claim with the CFTC against his broker, Conticommodity Services, Inc. and others. Conticommodity lodged a counterclaim against Schor in federal court, and Schor argued that the entire matter would be better resolved before the CFTC. Following voluntary dismissal by Conticommodity, CFTC exercised jurisdiction over the counterclaim under the above-quoted regulation. After the CFTC ruled in favor of Conticommodity on both its counterclaim and Schor’s claim, Schor argued that the CFTC’s exercise of jurisdiction over Conticommodity counterclaim violated Article III. The Supreme Court disagreed.

and held that the CFTC’s exercise of jurisdiction over Conticommodity’s counterclaim comported with Article III.

Though the case technically did not involve a challenge to a system of private arbitration but, rather, an independent federal agency, several points underlying the Court’s holding bear on the question at the center of this article. First, the Court stressed the fact that the right to a decision by an Article III Court was a “personal right” and consequently “subject to waiver” – a waiver that Schor had expressly effected by arguing that Conticommodity had to pursue its counterclaim before the CFTC.\(^{22}\) This enabled the Court to distinguish its earlier decision in *Northern Pipeline* which had held Article III barred the *involuntary* resolution of a state law damages action before a bankruptcy judge whose decisions were subject only to limited review under the Bankruptcy Act of 1978.\(^{23}\)

Second, the Court acknowledged that Article III not only supplied a personal right but also involved a “structural principle” to prevent the encroachment and aggrandizement of one branch at the expense of another.\(^{24}\) The *Schor* Court then articulated a series of factors to determine whether a particular dispute resolution system crossed the Article III line: (1) whether the “essential attributes of judicial power” are reserved to Article III Courts, (2) the origin and importance of the rights to be adjudicated and (3) the concerns that drove Congress to depart from the requirements of Article III. In the Court’s view, the limited extension of CFTC jurisdiction (only over permissive counterclaims), the degree of judicial review (*de novo* review of legal questions), the

\(^{22}\) 478 U.S. at 848.  
\(^{24}\) 478 U.S. at 850.
voluntary nature of the activity, and the need for a workable dispute resolution program all supported the constitutionality of the CFTC scheme.

Third, the Court specifically discounted any encroachment difficulties by analogizing the CFTC program to arbitration. Critical in its view was the fact that the parties had affirmatively chosen to invoke the CFTC, leaving the jurisdiction of the federal courts unaffected. The Court explained:

In such matters, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.25

The Court, however, added an important qualifier to this general approbation of voluntary dispute resolution mechanisms:

[If Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in that forum would not necessarily save the scheme from constitutional attack.26

These three points in Schor are central to the waiver argument.

The waiver argument suffers from several shortcomings. For one thing, as a matter of theory, there is a reasonable argument that Schor was wrong to conclude that Article III rights were waivable.27 It is noteworthy that Schor provides virtually no

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25 478 U.S. at 855.
26 Id.
27 See Bator, 65 Ind. L. J. at 259 (“The ideals of separation of powers seem to me structural and political ideals; it is far from clear that they were designed to generate a system of private rights.”).
analysis supporting its bald assertion that Article III rights are personal. This is perhaps unsurprising: all of the constitutional sources point in precisely the opposite direction.

Notions of Article III qua personal right are difficult to square with the text. Nothing in the text speaks in terms of a “right” to a decision in a federal forum. Rather, the language speaks in definitional terms – that is, defining the meaning of “judicial power of the United States.” Article III discusses the subjects over which it extends and the courts in which it is vested. As some have noted, the use of terms like “shall extend” and “all Cases” could be read to support a mandatory view, at least for some heads of jurisdiction.

The “personal rights” theory flies in the face of this. Taken to its logical conclusion, the personal rights argument would suggest that any structural feature of our government, as defined by the opening articles of the Constitution, are “waivable.” Could anyone possibly countenance the argument that there is a “personal” right to a “President” or a “Representative” which is waivable in favor of some other individual (or collective body) exercising the executive or legislative power respectively? As a matter

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28 478 U.S. at 848-49. The Court’s analysis consists of nothing other than the assertion that Article III confers a “personal right” and citation to a number of disanalogous precedents on criminal rights, dicta from the opinions in *Northern Pipeline* and earlier decisions that did not confront the “personal rights” question. *Schor* also cites an Article by Professor David Currie for the proposition that Article III rights are primarily “personal.” *Id.* at 148 (citing Currie, 16 Creighton L. Rev. at 460 n. 108). That citation, though, at best twists Currie’s argument and, at worst, is simply wrong. Sovereign immunity is, by definition, a type of personal privilege that is specific to the litigant (namely the state); the doctrine’s primary purpose is to protect a private litigant and, in cases where the litigant for whatever reason does not desire that protection, waiver of the right makes sense. Currie argues that the tenure and salary provisions serve an analogous function to the private litigant. But he does not argue that the jurisdictional grants envisioned in Article III are themselves personal rights, as the *Schor* opinion seems to imply. Elsewhere he has acknowledged that “[i]t may well be, as several of our most thoughtful judges have argued, that the requirement of an independent tribunal serves purposes beyond protection of the immediate parties.” Currie, *The Distribution of Powers After Bowsher*, 1986 Sup. Ct. Rev. 19, 39. Even if *Schor* reads Currie’s thesis correctly, it is nonetheless clear, as I explain below, that Article III, beyond the tenure and salary provisions, serves additional public purposes that are not confined to the interests of the individual litigants.

of logic, the same textual reasons supporting rejection of this argument likewise support
rejection of any argument that Article III should be understood in terms of personal
rights.

Beyond text, the structure of the Constitution likewise does not support reading
Article III in terms of personal rights. As countless constitutional law scholars have
noted, the opening articles of the Constitution primarily address the structural
organization of our system of government; most of the discussion of rights appears in the
Amendments.\textsuperscript{30} A few passages in the initial articles such as Article III, Section 2’s
guarantee of a jury in criminal cases do speak in terms of rights.\textsuperscript{31} But those passages
merely prove that, even before the drafting and ratification of the Bill of Rights, the
framers knew how to draft the Constitution in terms of personal rights when they wanted.
In light of this contrasting language, their failure to draft the “Judicial Power” clause in
terms of a personal “right” to a federal forum supports the inference that this Clause was
never meant to confer a personal right.

Recall too that Article III, Section 2 delineates the scope of the “Judicial Power of
the United States.” It lists several heads of jurisdiction which, when coupled with a
congressional authorization, confer “subject matter jurisdiction on the federal courts – in
other words, the power to hear and to decide the case. Yet subject matter jurisdiction is
not, and has never been, considered waivable. Indeed, any student of federal courts (or
for that matter civil procedure if they have covered Federal Rule of Civil Procedure 12)
knows that lack of subject matter jurisdiction, unlike personal jurisdiction, is not a

\textsuperscript{30} \textit{See e.g.,} Erwin Chemerinsky, Constitutional Law: Principles and Policies § 1.1 (2002).
Indeed, courts have an affirmative obligation *sua sponte* to flag and to resolve doubts about their subject matter jurisdiction. Thus, to talk in terms of the waivability of Article III rights simply does not square with an understanding of the provision’s purpose.

Finally, the history behind the drafting of Article III does not support a “personal rights” theory. To be sure, evidence of the framers’ intent behind Article III is fragmentary and has prompted much debate over its meaning. Much of that debate is not relevant for purposes of this Article. What is, however, relevant about those debates are the terms over which they are fought – most debates focus on questions of the vertical and horizontal distribution of power, the necessity for inferior federal courts, the heads of federal jurisdiction, and the scope of Congress’s power to control the jurisdiction of the Supreme Court and lower federal courts. The primary sources do not suggest that the Framers drafted Article III in order to confer a personal right on anyone. Hamilton’s classic defense of the values underpinning Article III, in Federalist 78, discusses the provision primarily in structural terms:

> That inflexible and uniform adherence to the rights of the constitution and of individuals which we perceive to be *indispensable* in the courts of justice, can certainly not be expected from judges who hold their officials by a temporary commission. … [W]e can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter.

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35 Federalist 78. While the above-quoted passage does refer to “the rights … of individuals,” it would be erroneous to infer from that passage that Article III rights are waivable. Rather, that reference is better understood to mean that safeguarding individual rights is one purpose, among many, of an independent judiciary – not that the independent judiciary itself is a personal, waivable right.
Indeed, the drafters’ failure to include a right to a civil jury trial in Article III was among the Anti-federalists great complaints about the Article during the ratification debate (had Article III included such a right, that would have provided important evidence supporting a “waiver” theory36). Schor never really grapples with this history. And if Schor were wrongly decided, that would have substantial implications for the compatibility of Article III and arbitration. Private parties could not “waive” their right to an Article III forum -- no such right would exist!

Of course, as explained above, Schor went the other way. But even if Schor is correct on its personal rights theory, that proposition begs the question whether an agreement to arbitrate constitutes an effective “waiver.” Jean Sternlight argues that arbitration agreements do not effectively waive the Article III rights because the waivers are not knowing, voluntary and intelligent.37 That argument does not present a very strong ground on which to attack the waiver account. For one thing, it is questionable whether that standard even applies to Article III. As Steven Ware has explained, it mistakenly attempts to graft standards governing the waiver of criminal rights onto civil cases.38 For another thing, the argument does not yield a very workable principle. It depends too greatly on the facts and circumstances of particular cases – what one might consider “knowing, voluntary and intelligent,” in an arbitration agreement between two corporate parties may arguably not be satisfactory in an arbitration between a major

37 Sternlight, 72 Tul. L. Rev. at 79-80.
38 See Ware, Arbitration Clauses, Jury Waiver Clauses, and Other Contractual Waivers of Constitutional Rights, 67 Law & Contemp. Probs. 167, 176-83 (2004).
corporation and a legally unsophisticated citizen. Thus, one must dig deeper for stronger
reasons to attack the waiver account.39

A stronger attack on the waiver account is that the account does a relatively poor
job at explaining some important nuances in the doctrine. For example, the waiver theory
cannot adequately explain the doctrine regarding arbitration against nonsignatories. A
number of doctrines permit the enforcement of arbitration agreements against parties
even where those parties have not formally signed the agreement. These include, among
others, *alter ego*, agency, guarantor, assumption, assignment, estoppel, third-party
beneficiary and the group of companies’ theory.40 Likewise, as explained in greater
detail in Part III, an increasingly important set of international arbitrations under bilateral
investment treaties involves no pre-existing arbitration agreement between the parties. In
none of these instances has the party actually signed an arbitration agreement. In many
of them, the party may not have signed anything at all. Absent any arbitration agreement
or other writing, the waiver account cannot really explain how these parties have
“waived” their Article III rights. Despite this theoretical conundrum, some courts have
held that such non-signatories effectively waived their rights to an Article III forum.41

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39 Sternlight and Ware centered their debate on the effect of commercial arbitration on Seventh
Amendment to a jury. Unfortunately, having the debate solely on those terms overlooks the importance of
Article III and *Schor* to the broader waiver issue. As note above, *supra* note [x], some courts have treated
the Seventh Amendment issues as critically interrelated to the Article III ones.

40 For a good synopsis of these doctrines, see Gary Born, *International Commercial Arbitration* 668-
72 (2d ed. 2001). For recent case law, see *Employers Ins. of Wausau v. Bright Metal Specialties, Inc*, 251
F.3d 1316, 1322-23 (11th Cir.2001) (discussing theories under which non-signatories may be bound to
arbitration agreements of others); *Long v. Silver*, 248 F.3d 309, 319-20 (4th Cir. 2001) (a non-signatory
may invoke an arbitration clause under ordinary state-law principles of agency or contract); *Gibson v. Wal-
Mart Stores, Inc.*, 181 F.3d 1163, 1170 n. 3 (10th Cir.1999) (arbitration agreement may be enforced against
third-party beneficiary); *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1460-61 (10th Cir.1995)
(finding non-signatory may be bound by a contract containing an arbitration clause under alter ego theory).

41 *O’Brien v. Pipkin*, 64 F.3d 257 (7th Cir. 1995); *Belom v. NFA*, 284 F.3d 795, 799 (7th Cir. 2002)
(holding that employee waived right to Article III forum by virtue of his employer’s affiliation with
National Future’s Association).
More fundamentally, even if an arbitration agreement does effectively waive the Article III right, the waiver theory still does not adequately explain why arbitration is compatible with Article III. *Schor* itself recognized that, in addition to its “personal” component, Article III also implicates a public concern about the structure of government. As *Schor* explained, “[w]hen these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.” In light of *Schor*’s emphasis on this second, nonwaivable feature of Article III, it is remarkable how many courts reject the Article III challenge to arbitration with a simple statement about waiver and a perfunctory cite to *Schor*.43

Those few courts that have confronted the nonwaivable aspect of Article III in a constitutional challenge to arbitration have not adequately grappled with the subtleties of the issue. Recall that *Schor* concerned the competence of the Commodity Futures Trading Commission to hear state law counterclaims. In concluding that the CFTC’s exercise of jurisdiction over such claims did not violate Article III, the *Schor* majority stressed several distinctive features of the CFTC mechanism.44 First, CFTC’s dispute resolution system was virtually identical to an agency adjudication with the exception of its jurisdiction over common-law counterclaims. Second, CFTC was addressing “only a particularized area of law” and did not extend to a broader array of proceedings.45 Third,

42 478 U.S. at 851.
43 See Sternlight, 72 Tulane L. Rev. at 79 (“Just as parties cannot by consent confer subject matter jurisdiction on a federal court, so too are they prohibited from allowing their claims to be heard by a non-Article III forum where such waiver would threaten the institutional integrity of the judicial branch.”) (footnotes omitted).
44 478 U.S. at 851-53.
45 See Dellinger Memo, 7 World Arb. & Med. Rep. at 31 (“The most significant factor [as to the compatibility of arbitration with Article III separation of powers concerns] is whether the adjudication involves a subject matter that is part of or closely intertwined with a public regulatory scheme.”).
CFTC orders only were enforceable by order of a federal district court. Fourth, the CFTC’s legal rulings were subject to *de novo* review. Fifth, the CFTC could not exercise all ordinary powers of district courts.

Arbitral systems differ from the CFTC with respect to several of these salient characteristics. For one thing, private arbitrators bear little resemblance to decision makers in the CFTC dispute resolution process – they are not part of an agency, and their proceedings do not unfold like an agency adjudication. For another thing, the jurisdiction of private arbitrators is not limited to a “particularized area of law” wherein they have a particular expertise but may extend to whatever claims are encompassed by the parties’ arbitration agreement. Perhaps most notably, as discussed in greater detail in Part III, the legal rulings underpinning arbitral awards are subject to virtually no review by an Article III courts, in stark contrast to the *de novo* review of CFTC rulings. To be sure arbitration and the CFTC process at issue in *Schor* share some common characteristics – the lack of plenary powers and the dependence on a district court order for their enforceability. But these similarities pale in comparison to the glaring differences between the two regimes.

Another problem with *Schor* is its characterization of an arbitral regime in light of separation of powers questions. In the Court’s view, the reparations proceeding did not involve a separation-of-powers problem. Rather, the reparations proceeding, like settlement or arbitration, is merely an efficient means by which Congress may “encourage parties” to settle their differences “at their option.”

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46 *See infra* note [x] and accompanying text.
47 *Schor*, 478 U.S. at 855.
This argument wrongly conflates settlement and arbitration. Specifically, it ignores the legal effect given to arbitral awards and the concomitant reduction in judicial power over such awards. Specifically, as explained in greater detail in Part III, the Federal Arbitration Act does not simply alter the forum in which a dispute will be resolved. It also sets forth the mandate that federal courts must give effects to the arbitral award subject to very limited exceptions. The federal court enjoys virtually no power to review the merits of the award but merely the procedures followed by the arbitrator. To the extent there is review of the merits, that review is practically toothless. Provided one of these limited grounds does not apply, the Court must give legal effect to the award and treat the award as if it were a judicial judgment enforceable by compulsion.

In this respect, the Schor Court is flatly wrong when it does not treat arbitration as presenting a separation-of-powers problem. By mandating the enforcement of the award and controlling the scope of Article III review, particularly the extent of review of the merits of the federal question, Congress is effectively stripping federal courts of the power to interpret the meaning of federal law and erecting a system by which others, namely arbitrators, can define it. It also is effectively imposing a mandate on federal courts to treat the result of this private dispute resolution system as a judgment of a federal court, with all of the accoutrements that accompany that judgment. Thus, arbitration does involve a separation of powers problem.

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48 See infra note [x] and accompanying text.
This is not to say, of course, that the congressional encroachment renders the arbitral system unconstitutional. Rather, it shows that the explanation offered by the Schor Court (and relied upon by other courts) is too facile. It does not adequately wrestle with the Article III challenges presented by arbitration. We return to these themes in Part II of the paper.

2 The Public Rights Argument

The second argument offered in defense of the constitutionality of arbitration under Article III derives from the Court’s jurisprudence differentiating public rights from private rights. As a matter of constitutional doctrine, the distinction is important. Since Murray’s Lessee, the Court has consistently held that cases involving public rights do not necessarily have to be heard by Article III courts. By contrast, Article III places greater strictures on where claims of private right may be heard (the nature of these strictures has evolved over time, as I discuss below). This distinction was critical to the Supreme Court’s decision in Thomas v. Union Carbide Agricultural Products Co., and several courts have relied on Thomas to reject Article III challenges to arbitral schemes.

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51 “There are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.” Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856). See also Chen, 49 Wash. & Lee L. Rev. at 1469 (“Short of abridging due process, imposing an unconstitutional condition, violating the nondelegation doctrine, or denying an Article III forum for constitutional claims, Congress may bar Article III courts from hearing cases involving pure public rights.”) (footnote omitted); Sternlight, 72 Tul. L. Rev. at 78 (“Although the Supreme Court has allowed Congress to require certain disputes as to ‘public rights’ to be heard by non-Article III courts, in doing so the Court also has sharply limited Congress’s ability to require ‘private’ claims be resolved out of an Article III Court.”).
52 See infra notes [x] and accompanying text.
Unlike Schor, Thomas actually involved a challenge to an arbitral system, albeit an unusual one. Thomas arose under the Federal Insecticide Fungicide and Rodenticide Act (“FIFRA”). FIFRA required registrants of pesticides, as a precondition for registration, to participate in mandatory arbitration to resolve disputes over the compensation due to a registrant whose data is subsequently used by another registrant. Congress established the scheme to relieve the EPA of the time-consuming task of resolving compensation disputes, a process that was slow and consequently had resulted in a backlog of litigation. Federal courts could review arbitral awards from the FIFRA scheme only for “fraud, misrepresentation or other misconduct.”

Several companies engaged in the development and marketing of chemicals used to manufacture pesticides challenged the scheme arguing, among other things, that it violated Article III.

The Court rejected the challenge and, as in Schor, rested its holding on several grounds potentially relevant to the broader question about the compatibility of arbitration with Article III. First, the Court reiterated the view expressed in prior cases that Article III does not bar congress from vesting certain decision making power in entities lacking the attributes of Article III courts (such as administrative agencies). Even though such claims for compensation arguably entailed private rights, the Court held that the arbitration system did not transgress Article III, reasoning that the private right was “so closely integrated into a public regulatory scheme” that Article III permitted “agency resolution with limited involvement by the Article III judiciary.”

Second, the Court stressed the fact that the right at issue here was one of congressional creation, as opposed

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54 FIFRA §3(c)(1)(D)(ii).
55 Thomas, 473 U.S. at 583.
56 Id. at 594.
to the private state-law right of compensation at issue under *Northern Pipeline*.

Third, the Court noted that the FIFRA scheme had several key aspects shielding it from Article III attack – the “public” nature of the right, the fact that it was enacted in response to the difficult problem of spreading research costs across competing industry participants, the fact that the FIFRA scheme relied primarily on its own internal system of sanctions rather than enforcement of Article III courts, and finally the fact that the FIFRA scheme provided for some (albeit limited) federal review.

As with the waiver argument, *Thomas* does not support the broad reading given by courts that have relied on it to support arbitral schemes more generally. For one thing, as a theoretical matter, *Thomas* arguably erred in its treatment of the public rights/private rights distinction. Traditionally, public rights were those claims that involved the government as a party or where the government had an actual interest in the dispute. This connection between public rights, sovereign immunity and the availability of an Article III forum made sense. For the doctrine of sovereign immunity itself could be seen as a limit on the jurisdiction of Article III courts. If the sovereign chose not to waive its immunity, the federal court could not hear the case. And if that proposition were accepted, then it would be a small step to say that, to the extent the sovereign wished to yield its immunity, it could do so in whatever forum (and under whatever circumstances) it wished, even if that forum were one of the sovereign’s own creation (i.e., an Article I Court). There would be little point in the Article III courts invalidating such a maneuver.

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57 *Id.* at 585-86.
58 *Id.* at 589-92.
59 *See Granfinanciera*, 492 U.S. at 65 (Scalia, J., concurring in part and concurring in the judgment) (“In my view, a matter of public rights, whose adjudication Congress may assign to tribunals lacking the essential characteristics of Article III courts, must at a minimum arise between the government and others.”) (citation and internal quotations omitted).
For if they did, it likely would simply prompt the sovereign to reassert its immunity altogether – foreclosing any judicial relief whatsoever.

Until recently, the Supreme Court’s cases were largely compatible with that theory. For example, *Murray’s Lessee*, the case that spawned the public rights doctrine, concerned the government’s effort to collect a debt owed by one of its customs agents. *Ex Parte Bakelite* concerned a claim between the government and a private individual over a customs assessment imposed by the government. In both cases, the Court held (or later characterized) the rights as being “public rights.” *Crowell v. Benson* sought to provide a non-exhaustive list of examples including: matters found in connection with the congressional power “[a]s to interstate and foreign commerce, taxation, immigration, the public lands, public health, facilities of the post office, pensions and payments to veterans.”

Perhaps the clearest statement came from the plurality in *Northern Pipeline*: “[A] matter of public rights must at a minimum arise ‘between the government and others.’”

By contrast, claims exclusively between private individuals, even when the claims were ones of statutory creation, were ones of private right. For example, the Court in *Crowell* termed a worker’s compensation claim by a longshoreman against his employer a private right, even though federal statutory law created that claim. The plurality in *Northern Pipeline* classified a state law breach of contract claim as a private right, even where that claim was wrapped up in a governmentally created bankruptcy system for

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60 285 U.S. at 51.
61 458 U.S. at 69 (quoting *Ex Parte Bakelite*, 279 U.S. at 451).
restructuring debtor-creditor relations. Finally, the Court in Granfinanciera classified a bankruptcy trustee’s right to recover for a fraudulent conveyance a “private right,” even where the trustee’s power to maintain the action derives from federally created bankruptcy law. Again, the Northern Pipeline stated the tradition clearly: “The liability of one individual to another under the law as defined’ is a matter of private rights.”

Thomas broke with that tradition. Thomas classified certain claims as potentially public rights even where the claim arose between two private parties. Despite the traditionally “private” nature of this dispute, the Court held that such a claim bore “many of the characteristics of a ‘public’ right.” Specifically, the use of the data supported a public purpose – for it was an integral part of a program safeguarding public health. Moreover, in the Court’s view, the compensation claim was functionally indistinguishable from a system of fees and subsidies that EPA might have created and that, according to the Court, would not have “implicat[ed] Article III.”

Even if Thomas correctly concluded that disputes between private individuals over a congressionally created right are analogous to “public rights,” the decision still

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63 Northern Pipeline, 458 U.S. at 71 (plurality opinion). Of course, it should be acknowledge that Justice Brennan’s argument in Northern Pipeline rested on a characterization of Crowell, one that did not necessarily follow from the case and that Justice Scalia later criticized in Granfinanciera.
64 Granfinanciera, 492 U.S. at 55-56. Moreover, Granfinanciera’s discussion of private rights connects the Article III inquiry to the Seventh Amendment inquiry. But, unlike Article III, the Seventh Amendment is closer to a truly personal right and, thus, can be waived.
66 Thomas, 473 U.S. at 589.
67 Id. at 589. The Court’s assertion that a system of fees and subsidies would not have implicated Article III is dubious. In fact, such a system would have implicated Article III in at least two respects. First, the very structure of the program would have implicated a host of constitutional claims, including claims under the Takings Clause, the Due Process Clause, and the Equal Protection Clause. Second, the application of the fee or subsidy in a particular case would have implicated a number of federal statutory claims under the Administrative Procedure Act – including (1) whether the fee and subsidy schedule was irrational or arbitrary and capricious and (2) whether a particular imposition of a fee was supported by substantial evidence. Each of these claims would have implicated questions falling within the jurisdiction of the federal courts.
does not broadly support the constitutionality of arbitration. With few exceptions, the government typically is not a party to a private commercial arbitration, whether between international conglomerates or between employer and employee. Indeed, unlike the claims in *Thomas*, most arbitral claims are “not so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by an Article III judiciary.”

Rather most arbitrations, as Jean Sternlight has noted, involve claims for compensation arising out of breaches of contract or tortuous conduct related thereto. Whatever the gravamen of the claim, the ultimate relief sought is a compensatory action for damages against a private party. At bottom, then, claims in private commercial arbitration are no different from the breach of contract claim at issue in *Northern Pipeline* or the fraudulent conveyance claim at issue in *Granfinanciera*, claims that in both cases the Court held to constitute private rights (and thus subject to Article III’s strict limits on Congress’ ability to reallocate the adjudicative authority away from Article III decision makers). Therefore, one of the key underpinnings for the *Thomas* rationale drops away and, consequently, so too does the theory explaining why arbitration of the claim (to the extent it otherwise would be cognizable in federal court) does not violate Article III.

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68 *Thomas* at 593-94. See also Young, 35 Buff. L. Rev. at 855 ("[T]he *Thomas* majority does suggest that there is at least some additional minimal content remaining in a private-rights category, aside from the state-created and constitutional rights content recognized by the majority in *Northern Pipeline.*").

69 Sternlight, 72 Tulane L. Rev. at 78.

70 Finally, one other distinction, though not central to the analysis in *Thomas*, should be noted. In *Thomas*, both parties to the dispute were commercially sophisticated entities –businesses that sought to sort out rights over the entitlement to use and compensation for proprietary data. By contrast, some arbitrations (but certainly not all) involve a mixture of commercially sophisticated parties and unsophisticated ones (consumers or employees, to offer a gross over-generalization). This distinction might matter –for greater doubts might arise over the underlying procedural fairness of a forum chosen by the more commercially sophisticated party with the greater bargaining power. The Supreme Court has hinted at these concerns about arbitration in some decisions in decisions like *Gilmer* and *Circuit City* but never explicitly rooted them in its Article III analysis.
Even if *Thomas* is read more broadly to reject the public/private rights distinction, the scheme at issue in *Thomas* differed substantially from most arbitrations. First, the system of “arbitration” at issue in *Thomas* was more like an administrative hearing, a point that the Court repeatedly stressed. Second, the procedure was unusual: the Federal Mediation and Conciliation Service, an independent federal agency, supplied the rules for the dispute and, in the event that the parties could not agree on the identity of the arbitrators, appointed them. Third, the claim at issue had a public purpose: “[u]se of a registrant’s data to support a follow-on registration serves a public purpose as an integral part of program safeguarding public health.”

Other dispute resolution systems, though perhaps sharing the same label (“arbitration”) as the system in *Thomas*, differ in salient respects. As already noted, arbitrations typically lack the features of an administrative adjudication. Unlike an administrative adjudication, the parties to an arbitration often have control over the choice of the decision maker. Additionally, the rules governing an arbitration often are the product of private choice whereas the rules governing an administrative adjudication normally are the result of agency promulgations that require congressional authorization.

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71 That argument is hard to square with the Court’s post-*Thomas* decision in *Granfinanciera*, which relied on the private rights doctrine to hold that requiring non-jury resolution of a claim against a private party violated Article III. See *Granfinanciera*, S.A. v. Nordberg, 492 U.S. 33, 53-54 (1989).
72 Indeed, right at the outset of its Article III analysis, the Court stressed the principle that “Many matters that involve the application of legal standards of acts and affect private interests are routinely decided by agency action with limited or no review by Article III courts.” Later, when comparing the issues in *Thomas* to the issues in *Crowell*, the Court again explained that the logic of the arguments by the parties opposing the FIFRA arbitration “many quasi-adjudicative activities carried on by administrative agencies involving claims between individuals would be thrown into doubt.” Finally, the Court again stressed the quasi-administrative nature of the program, noting that Congress, as an exercise of its Article I power, could have simply imposed fees on registrants who use data of prior registrants.
73 *Thomas*, 473 U.S. at 590.
74 473 U.S. at 589. See also Currie, 1986 Sup. Ct. Rev. at 39 (“Rightly or wrongly, *Thomas* assimilated the provision for compulsory cost arbitration to *Bakelite*’s long-standing and limited category of matters such as claims against the United States … ”).
and are subject to public notice and comment. Finally, most arbitral claims do not have a closely connected public purpose like the FIFRA scheme in *Thomas.*

Thus, the public rights argument, like the waiver argument, does not provide an adequate foundation for reconciling arbitration with Article III.

B. Literature Review

Unlike the case law, which has uniformly accepted the compatibility of Article III, the academic literature has reached differing conclusions. Surprisingly few commentators have systematically addressed the question. Among those that have, some have reached the conclusion that arbitration is always compatible with Article III (the “arbitrate always” position). Others have reached the opposite conclusion and determined that arbitration in all forms is incompatible with Article III (the “arbitrate never” position). This Section analyzes both positions and shows how neither offers an adequate account.

1. The Arbitrate Always Position. The “arbitrate always” position rests at bottom on claims of functional necessity. The argument runs as follows – during the years decades following the FAA’s enactment, the Court adopted a cautious approach to the arbitrability of federal claims. Following the enactment of federal civil rights legislation,

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75 An exception to this general rule exists in cases of certain *ad hoc* arbitrations. Where parties have opted for an arbitration but not opted into a particular set of institutional rules, the Federal Arbitration Act will fill the gap and authorizes the federal district courts to appoint an arbitrator in case of default or lack of party consensus. 9 U.S.C. § 5.

76 See Zick, 82 Marq. L. Rev. at 267-70. To be fair to the author, Zick does not appear actually to advocate this position but merely suggests that this jurisprudence of practical necessity explains the Supreme Court’s preference for arbitration over the past thirty years. Indeed, Zick appears to favor a restoration of federal claims in federal courts though her comment does not really attempt to anchor this position in a principle but rather prove it through an attack on the Court’s alleged jurisprudence of practical necessity.
particularly employment discrimination legislation, the federal courts experienced an explosion in the number of lawsuits that they were not prepared to handle. Out of practical necessity, the courts responded to this litigation explosion through refashioning a number of their constitutional doctrines, including Article III. Thus, if one accepts the premise that constitutional doctrines are sufficiently flexible to adapt to changing circumstances, then arbitration is compatible with Article III out of the sheer necessity that, if it were not, the federal court would be inundated with claims and eventually come to a standstill.

This argument really begs more questions than it answers. For one thing, it rests on a flimsy set of empirical premises. A number of the operative precedents favoring arbitration (e.g., Scherck) developed after the enactment of federal employment discrimination laws. Even after the explosive growth in those (and other federal) claims that have been deemed arbitrable, the Court still has never formally confronted the compatibility of the FAA with Article III.

For another thing, the argument also rests on a flimsy set of normative premises. To argue (or suggest) that constitutional principles should evolve according to practical necessity merely begs the question “how necessary must a set of circumstances be before the principle must be adapted?” Conversely, in the event that practical necessities no longer arise (i.e., a decline in the number of claims), the practical necessity argument leaves the principled jurist hanging. Under these circumstances, does the jurisprudence of practical necessity dictate that the court return to some “status quo ante practical necessity” (i.e., a stricter and more formalist view of Article III)? Or should the jurist retain the flexible view of Article III in the expectation that practical necessities in the
future again will arise and dictate the need for alternative dispute resolution mechanisms?
The jurisprudence of practical necessity does not help to answer any of these questions.

A more basic flaw with the argument from practical necessity is that the conclusion does not follow from the premises. Specifically, if we accept the necessity for some sort of non-Article III mechanism for resolving federal questions, it does not follow that arbitrators must fulfill that role. For example, state courts might serve as the initial forums for resolving such questions, subject to *certiorari* review by the Supreme Court. Similarly, federal magistrates might resolve such claims subject to *de novo* review by the federal courts. Even assuming that arbitrators are the proper non-Article III mechanism, the scope of federal review of awards need not be as constrained as they are under Section 10 of the FAA. Federal courts might scrutinize the awards more closely even where arbitrators have performed an initial decision making function. All of these alternatives demonstrate that the argument from practical necessity proves too little in showing how the current system of arbitration squares with Article III.

2. *The Arbitrate Never Position.* If existing theories that attempt to justify the compatibility of arbitration with Article III are inadequate, are we resigned to accept the incompatibility of arbitration with Article III? In one of the few articles to tackle the question head-on, Jean Sternlight suggests that the answer is “yes.”

Sternlight’s argument rests on two premises. The premises are (1) arbitration claims are private rights and (2) *Granfinanciera* permits Congress to authorize adjudication of some private rights by non-Article III actors only where essential to a furtherance of the “relevant statutory scheme.” In Sternlight’s view, the only possible “relevant statutory scheme” is the FAA,

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77 72 Tulane L. Rev. at 78-79.
but this cannot be the basis for supporting arbitration under Article III. According to Sternlight, that argument proves too much: Congress “could pass a statute requiring that all claims be heard by judges without life tenure.” According to Sternlight, “[p]resumably the Supreme Court would reject such a statute.” It follows, therefore, that the FAA is incompatible with Article III.

This argument is not an especially persuasive one on which to test the compatibility of arbitration with Article III. For one thing, Sternlight’s argument rests on rebutting a straw man – that the FAA is the only relevant statutory scheme. But that line of thinking does not track how the Court has employed that concept in other cases like Thomas or Northern Pipeline. In Thomas, the statutory scheme was the statute providing for allocation of royalties, not the underlying dispute resolution mechanism. In Northern Pipeline, the statutory scheme was a mechanism for channeling claims by and against the bankrupt estate into a single proceeding, not the underlying dispute resolution mechanism. Thus, Sternlight is mistaken to focus on the FAA as the underlying statutory scheme rather than the underlying statutes whose claims are subjected to arbitration.

Apart from the dubious nature of Sternlight’s straw man argument, her ultimate conclusion – the incompatibility of the FAA with Article III – does not follow from the premises. For even if it were true that the Supreme Court would strike down a law that stripped federal courts of jurisdiction over “all claims,” the FAA differs from Sternlight’s

78 Id. at 79.
79 Id.
80 Moreover, any argument that the FAA provides a relevant statutory scheme for Article III purposes is especially dubious in light of the Supreme Court’s holding that Title I of the FAA, the provisions governing domestic arbitrations and non-domestic ones not falling under the New York or Panama Conventions, does not supply a source of federal subject matter jurisdiction. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 613 (1985).
hypothetical statute in material respects. Specifically, unlike Sternlight’s hypothetical statute, the FAA does not strip federal courts of jurisdiction entirely. Rather, it merely defers their consideration of the dispute and then limits the scope of their review. Indeed, even if the Congress were to strip federal district courts of their power to review arbitral awards, a constitutional infirmity would not necessarily arise. Presumably, such matters would be litigated in the state courts, and resort could be had to the Supreme Court’s *certiorari* jurisdiction in the event that the case presented a federal issue.

Thus, while Sternlight is right to identify the basic tensions between Article III and arbitration, her critique does not settle the issue. It simply begs the question whether a theory can be constructed that salvages the essential components of arbitration while putting it on a surer constitutional footing vis-à-vis Article III? I believe that this last course is possible and begin to do so in the next Part.

II. **Arbitration and Appellate Review Theory.**

This Part of the Article constructs a theory on which arbitration might be compatible with Article III. It draws heavily on “appellate review” theory to explain how arbitration passes constitutional muster provided that an Article III Court has an adequate opportunity to review the arbitrator’s award. The first section argues that appellate review theory provides the best account for how a dispute resolution system can be compatible with Article III. The second section begins to translate “appellate review theory” to arbitration but identifies a tension in Fallon’s account. The third section

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81 Compare with the situation in *Schor* where the Court said that Congress could not replace Article III courts entirely with a phalanx of non-Article III judges and vest them with the complete power to resolve Article III controversies.

82 *See Crowell*, 285 U.S. at 87-88 (Brandeis, J., dissenting).
refines appellate review to overcome this tension and provides a modified appellate review theory by which to judge the compatibility of various dispute resolution models with Article III.

A. The superiority of appellate review theory.

Article III scholars long have debated the extent to which Article III tolerates decisions by non-Article III actors of cases that otherwise would fall within the jurisdiction of the federal courts. One ventures into this field at his or her own peril. As Paul Bator once observed: “[T]he Supreme Court has been unable, in these 150 years, to find a coherent and satisfying theory for justifying the existence of legislative and administrative courts. … [Its] opinions devoted to the subject are as troubled, arcane, confused and confusing as could be imagined.”

Some have adopted a literalist framework. Under the literalist framework, Article III judges, and only Article III judges, may resolve the cases or controversies arising under the heads of jurisdiction specified in Article III.84 Literalist theory may well be appealing as a matter of first impression. But as several scholars have noted, there simply is too much precedential water under the bridge for a literalist theory to be viable at this stage.85 As James Pfander tersely explained in the most recent exhaustive inquiry into the Article III question: “[W]hile scholars continue to hold up a literal interpretations of Article III as a goal to which the law might aspire, this approach suffers from serious

83 Id.
problems of institutional fit.”86 In some areas, Congress has foreclosed judicial review in Article III Courts altogether. Examples of claims where Congress has effectively stripped Article III courts of any control include certain administrative determinations by the Veterans’ Administration, the Department of Health and Human Services and the Justice Department.87 The Court has consistently approved of these efforts.88 Adoption of a literalist theory would require invalidation of numerous non-Article III schemes, including adjudication by administrative agencies. By parity of reasoning, arbitration could not survive under literalist theory – the theory would bar arbitrators, as non-Article III actors, from resolving cases or controversies falling under Article III’s heads of jurisdiction.

An alternative account stresses the distinction in Article III between “cases” and controversies, an account originally developed by Justice Story and later formalized by Akhil Amar.89 Under the Story/Amar account, an Article III court must have the jurisdiction to decide “cases” (including federal questions) but needed not necessarily have the jurisdiction to decide “controversies” (such as diversity controversies). While this theory “has substantial historical support,” it too lacks adequate explanatory value in light of intervening Supreme Court precedent.90 Adoption of this approach likewise would require invalidation of federal administrative agency schemes that allow non-

87 See Chen, 49 Wash & Lee L. Rev. at 1473-74.
90 Wells & Larson, 70 Tulane L. Rev. at 91-92; Chen, 49 Wash. & Lee L. Rev. at 1467-68.
Article III decision makers to interpret federal law and allow Article III courts to defer to those interpretations provided that the law is ambiguous and the agency interpretation is reasonable.\(^{91}\) By analogy, here too, the Story/Amar theory would require invalidation of arbitral schemes, at least to the extent that they concerned claims arising under federal law. Given the large number of arbitrable federal claims following the decline of the non-arbitrability doctrine, the institutional costs of this account are too great.

Recognizing the practical limitations of the literalist and Story/Amar accounts, appellate review theory seeks, as much as possible, to salvage the textual and historical underpinnings of those accounts while not doing excessive violence to the existing doctrine.\(^{92}\) The theory finds its genesis in a seminal article by Richard Fallon and traces its roots ultimately to the Supreme Court’s decision in *Crowell v. Benson*.\(^{93}\) The core claim of appellate review theory “is that sufficiently searching review of a legislative court’s or administrative agency’s decisions by a constitutional court will always satisfy the requirements of Article III.”\(^{94}\)

Fallon derives the theory from a consideration of both the values supporting non-Article III tribunals and the values underlying Article III itself. In general, the values supporting non-Article III tribunals include

1. *Expertise* - making the best use of the non-Article III decision maker’s substantive expertise;

2. *Governmental Functions* - maintenance of efficiency and order in the performance of governmental functions;

3. *Flexibility* - flexibility in adapting a scheme of administration and adjudication to changing needs and political priorities;

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\(^{91}\) Chen, 49 Wash. & Lee L. Rev. at 1468.

\(^{92}\) Fallon, 101 Harv. L. Rev. at 933.

\(^{93}\) Id. at 915. *See also Crowell v. Benson*, 285 U.S. 22 (1932).

\(^{94}\) Fallon, 101 Harv. L. Rev. at 933.
4. *Fairness* - producing fairer and more consistent results;

5. *Sovereign immunity* – as many claims before non-Article III proceedings involve ones where the government is a party, principles of sovereign immunity counsel in favor of the government’s ability to control the scope of those proceedings.

According to Fallon, these values must be balanced against others ones that underpin the need for Article III tribunal, including

1. *Separation of Powers* – Article III review promotes separation of powers by ensuring principled decisions on legal questions by institutions immune from political pressure;

2. *Fairness* – Article III review helps to ensure fairness to litigants (through some combination of the independence of a life-tenured judiciary plus due process guarantees);

3. *Judicial Integrity* – this term captures the idea that judges, through their immunity from political pressure, can offer their imprimatur of legitimacy for the action of agencies that have a “hybrid and problematic status in our constitutional system”95

In Fallon’s view, “adequately searching appellate review” by a federal court of action by a non-Article III tribunal adequately reconciles these values and remains reasonably consistent with the constitutional text, Framers’ intent, precedent and the underlying purposes of Article III.

Based on this balance of values, Fallon argues that the necessity and scope of “adequately searching appellate review” turn on the type of determination. With respect to pure questions of constitutional law, appellate review theory requires *de novo* review by the Article III Courts.96 As to the necessity of review, Fallon argues that Article III review is necessary for two reasons: first, to protect separation-of-powers principles and,

95 Id. at 942.
96 Id. at 975-976.
second, to ensure fairness to individual litigants particularly where their constitutional rights are at stake. As to the scope of review, Fallon explains that it should be *de novo* in order to check against the separation of powers values that are implicated when “another agency of government has strayed beyond its constitutional limits.”

With respect to pure questions of nonconstitutional law, Fallon argues that appellate review theory also demands *de novo* review. Fallon justifies both the necessity and scope of this review in terms of a “needed [check] against arbitrariness and self-aggrandizement by legislative courts and especially by administrative agencies.” In Fallon’s view, those agencies are not electorally accountable, not insulated from political pressures, are susceptible to capture by “powerful private groups” and “may also have a bureaucratic tendency to expand their own power.” Pure questions of law, whether constitutional or non-constitutional law, require *de novo* review. By contrast, as to factfinding, judicial review is unnecessary unless the facts are of a constitutional or jurisdictional nature.

Finally, with respect to findings of fact, Fallon distinguishes between two kinds of facts. With respect to ordinary findings of fact, Fallon does not believe that review is strictly necessary. Such findings by a non-Article III tribunal implicate neither separation of powers concerns nor fairness concerns. With respect to questions of constitutional or jurisdictional fact, Fallon submits that Article III courts should have the power, though

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97 Id. at 976.
98 Id. at 977.
99 Id. at 977-978.
100 Id. at 983-84. Fallon recognizes that a weaker form of this claim would be to require *de novo* review of pure questions of law while permitting more deferential review in cases merely applying those norms to a given set of facts. Id. at 982.
101 Id. at 987-89. For the seminal work on the constitutional fact doctrine, see Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).
102 Id. at 989.
not the obligation, to review another tribunal’s determination. In Fallon’s view, this approach ensures the ability of Article III courts to correct suspected determinations while avoiding “costly relitigation in the vast run of cases.”\textsuperscript{103}

Unlike literalism or the Story/Amar account, appellate review theory best squares with the extant precedent, prompting James Pfander recently to note that it has “fared best” among the modern accounts of Article III.\textsuperscript{104} In each of the cases where the Court has rejected an Article III challenge, the judicial review scheme preserved partial or full opportunity for judicial review of the non-Article III decision maker’s legal conclusions. For example, under various schemes the Court has reviewed, the non-Article III decision maker’s legal conclusions were subject to \textit{de novo} review.\textsuperscript{105} In sum, appellate review theory offers the best available tool for assessing the compatibility of arbitration with Article III. In the next section, I begin to trace through how the theory applies in this context.

B. Appellate Review Theory And Arbitration,

Fallon does not make a concerted effort to apply appellate review theory to arbitration. His account does, however, offer two signals on the topic. Unfortunately, these two signals are in substantial tension with each other and complicate an effort to analyze the constitutionality of arbitration in terms of appellate review theory.

First, Fallon suggests that the constitutionality of an arbitral scheme turns on the opportunity for federal courts to conduct \textit{de novo} review of questions of law. Under this

\textsuperscript{103} Id. at 990.
\textsuperscript{104} Pfander, 118 Harv. L. Rev. at 666.
standard, *Thomas* was wrongly decided. In Fallon’s view, the core defect of the scheme in *Thomas* was that
decisions of federal law were committed to an arbitrator, whose ruling were subject to judicial review only for fraud or misconduct. In the absence of judicial review, investiture of authority to decide questions of law in a non-article III federal decisionmaker encroaches too deeply on the fairness and separation of powers values that article III embodies.

By contrast, *Schor* was rightly decided. The salient feature in *Schor* was that the Commodities Exchange Act provided for *de novo* review of questions of law provided by an Article III Court.106

The second hint in Fallon’s analysis is that the constitutionality of arbitration turns on whether the parties have validly waived their entitlement to an Article III tribunal. That second hint comes in Fallon’s analysis of *Schor*:

[Schor] thus suggests a question – which would have been presented directly had full appellate review not been provided – about the legitimacy and effectiveness of waivers of article III rights in the absence of appellate review. As long as the waiver is not procured by any form of illegitimate pressure, waiver ought to be held permissible within an appellate review theory. Waiver substantially alleviates any concern of unfairness to the parties. Moreover, when both parties are satisfied that the adjudicatory scheme treats them fairly, there is substantial assurance that the agency is not generally behaving arbitrarily or otherwise offending separation-of-powers values.107

Here it is worth noting that waiver places a different role in Fallon’s argument than in *Schor*. In *Schor*, the Court used waiver in a categorical sense – that is, Article III was a right that, to a point, could be waived by a private party. By contrast, Fallon uses waiver in an instrumental sense – explaining that waiver serves to mitigate the separation of

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106  Fallon, 101 Harv. L. Rev. at 991.
107  101 Harv. L. Rev. at 991-92.
powers concerns that might otherwise underpin an alternative dispute resolution scheme providing for only limited judicial review.

Unfortunately, the effect of these two hints in Fallon’s analysis is to offer conflicting guidance on the constitutionality of arbitration. Had Fallon’s analysis ended with the first hint (the necessity of *de novo* review of legal questions), the implications of his theory would have been quite clear but also quite fatal for arbitration. Just like the scheme in *Thomas*, federal courts are precluded from conducting *de novo* review of the arbitrator’s legal conclusions. Instead, at most, federal courts only review arbitral awards for manifest disregard of the law – a highly deferential, perhaps toothless, standard upon which few awards have been set aside.

Contrary to the preceding analysis, Fallon’s second hint potentially salvages many arbitrations. So long as the parties to an arbitration, like the parties in *Schor*, voluntarily submit their dispute to a non-Article III decision maker, the separation of powers concerns diminish. As noted above in Part I.A, most – but not all – arbitrations are voluntary ones. So, subject to those exceptions and provided that the undertaking is truly “voluntary,” arbitration presents no Article III problem.

How does one reconcile these seemingly conflicting hints in Fallon’s analysis? In my view, the flaw lies in the underdeveloped second premise – the notion that consent to a non-Article III dispute addresses the separation of powers problem and relieves the need for “adequately searching appellate review.”

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108 See infra notes [x] and accompanying text.
109 See Norman Posner *Judicial Review of Arbitral Awards: Manifest Disregard of the Law* 64 Brook. L. Rev. 471, 506 (1998) (“Consequently, although most circuit courts have adopted "manifest disregard of the law" as a non-statutory ground for vacating or modifying an award, until recently there have been few cases in which a court has set aside an arbitral award on this ground.”), Noah Rubins, ‘*Manifest Disregard of the Law*’ and ‘*Vacatur of Arbitral Awards in the United States*,’ 12 Am. Rev. Int’l Arb. 363 (2001).
Why is this last aspect of Fallon’s appellate review theory weak? For one thing, it is inconsistent with his account of Thomas. One could equally say that the pesticide applicants in Thomas voluntarily participated in the FIFRA arbitration scheme when they chose to file the pesticide application. Under Fallon’s second argument on Schor, that voluntary activity should have eliminated any Article III problem (absent any undue pressure, and there was no evidence of such pressure in Thomas). How then can Fallon conclude that Thomas was wrongly decided? Either his analysis of Thomas or his waiver argument is flawed; both cannot comfortably coexist in the theory.

More fundamentally, though, Fallon does not adequately explain why waiver of the right to an Article III forum has anything to do with separation of powers. As explained above in the critique of Schor, separation of powers concerns can arise even in cases of waiver. By setting the standards of review narrowly, Congress is indeed curtailing the power of federal courts, despite the initial voluntary undertaking by the parties.

A more extreme example proves the flaw in Fallon’s argument. Suppose that the scheme in Schor had provided for no federal review of the CFTC’s decision – essentially making the CFTC’s ruling on Conticommodity’s counterclaim final and unreviewable. If Fallon were correct, then any separation of power concerns would drop out so long as Conticommodity and Schor had voluntarily opted into that system. Yet under these circumstances, Congress is clearly at least diminishing the power of the lower federal courts by stripping them of the ability to review a claim that might otherwise fall within their jurisdiction. Even the Schor Court might well not tolerate such a result for it would

110 See supra note [x] and accompanying text.
111 Such a law is more than fanciful. Some countries such as Belgium have adopted arbitration laws that bar any judicial review.
be analogous (though, admittedly, not identical) to the “phalanx of non-Article III
tribunals equipped to handle the entire business of the Article III courts without any
Article III supervision or control and without evidence of valid and specific legislative
necessities….” Limited federal review presents the same quality of diminution
problems, though perhaps not as extreme as this example. It shows, nonetheless, that
separation of powers problems can exist even in a system into which parties have
voluntarily opted.

Thus, despite its significant contributions to scholarship on Article III, Fallon’s
“appellate review” theory does not provide a completely workable model in the abstract
for testing the constitutionality of arbitration. At least some refinements in the theory are
necessary to determine the relevance (if any) of consent to the analysis and, as well, other
unique features of arbitration that might warrant modification of the meaning of
“adequately searching federal review.” The next section supplies those refinements.

C. Refining Appellate Review Theory

How did appellate review theory go astray on this point? Why did it provide two
conflicting messages about the constitutionality of arbitration? The root of the problem
lies, I believe, in a very deliberate choice that Fallon made – but did not have to make –
when articulating the theory. Specifically, as described above, Fallon opted for a single,
unbending set of rules governing Article III review regardless of the underlying
circumstances. In doing so, he rejected an alternative approach – tailoring the
constitutionally required standard of review to the particular claim. Fallon concedes such
an approach would have been consistent with appellate review theory:
An alternative mode of analysis, which would be consistent with the principal assumptions of [appellate review] theory, would answer questions about the necessity and requisite scope of judicial review only after weighing article III values against competing governmental interest on a case-by-case basis.\(^{112}\)

This more nimble approach has two main advantages over Fallon’s uniform standard. First, it reflects the fact that different claims and different dispute resolution schemes will involve different sets of values. Take, for example, sovereign immunity – one of the above-noted values central to appellate review theory. In some arbitrations, such as commercial ones between purely private companies, those considerations drop out entirely. In others, such as arbitrations under NAFTA or under bilateral investment treaties, those considerations play a much more prominent role. Varying the constitutionally required standard of review with the presence or absence of a factor such as this one would better calibrate the constitutional rules to the actual values at stake in a particular case. Second, a more nuanced standard of review also offers better hope of harmonizing the existing case law. By contrast, Fallon’s original theory – once one accepts the invalidity of his argument on consent – would be largely fatal to the constitutionality of most arbitral schemes.

If this more nuanced approach comports with appellate review theory and offers these comparative advantages, why then did Fallon reject it? Fallon rejected this approach principally on the ground that “a prescription of ad hoc balancing offers too little guidance about how balances ought to be struck.”\(^{113}\) His choice thus elevates clarity and predictability over other values that might have supported the more nuanced standard described above.

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\(^{112}\) 101 Harv. L. Rev. at 975 (emphasis added)

\(^{113}\) Id.
Fallon’s choice of the categorical rule over the balancing test is a familiar one in the annals of jurisprudence.\textsuperscript{114} In brief, “rules” offer the advantage of clarity but often come at the cost of rigidity. For example, if a rule provides “no entry into the park after 10pm,” that is a rule which almost anyone can understand, yet it may prevent desirable outcomes (such as an overnight camping trip in the park). By contrast, multi-factor balancing tests offer the advantage of adaptability but often are vague. For example, if a rule provides “drive as fast as the circumstances demand,” few people will be able to discern the appropriate speed limit, but the rule is nimble enough to accommodate both the daily commuter and the father racing to the hospital while his wife is in labor. The lesson from this simple debate – and one that Fallon inexplicably overlooks – is the need to craft a rule with sufficient clarity to permit its easy application but also with sufficient flexibility to permit its adaptation to different contexts.

In this context, appellate review theory does not force one to choose between the two poles of a rigid bright-line rule (as Fallon does) and a completely amorphous \textit{ad hoc} balancing test (the only other choice Fallon sees). Rather, appellate review theory admits of a middle ground – one that remains true to its origins, is sufficiently clear as to capture the benefits of Fallon’s original set of rules, and yet is also more nuanced to reflect the distinct values underpinning a particular dispute resolution regime. How exactly, then, would such a system operate?

Recall that appellate review theory is rooted in two sets of values – one underpinning the benefits of Article III tribunals and the other underpinning the benefits of non-Article III ones. Thus, to determine how such a system would operate, it becomes

\textsuperscript{114} See generally Llewellyn, \textit{The Bramble Bush} (1951).
necessary to revisit Fallon’s value balance and determine how, in the particular context of
arbitration, those values translate.

In certain respects, Fallon’s theory translates well. Begin with the values
supporting the use of non-Article III tribunals:

1. **Expertise** - Arbitration potentially offers the specialized expertise arbitrators can
   bring to the dispute;\(^{115}\)

2. **Governmental Functions** – to the extent arbitration involves purely private
disputes, concerns about efficient government operation drop out here; by contrast
to the extent arbitration involves public disputes (like NAFTA claims), this
consideration is more salient.

3. **Flexibility** – Arbitration offers greater flexibility than an Article III forum in
   adapting a scheme of administration and adjudication. Parties are generally free
to tailor the procedures of the arbitration to their particular needs.\(^{116}\)

4. **Fairness** – Whether arbitration produces fairer results is a hotly disputed
   proposition. A long line of literature criticizes arbitration precisely on the ground
that its unfair procedures are biased in favor of the party with the stronger
bargaining position.\(^{117}\) More recent empirical evidence, however, suggests that in
fact arbitration in fact produces fair results.\(^{118}\)


5. Sovereign immunity – As with factor (2) (governmental functions), the salience of this factor turns on the claim. Purely private claims do not implicate sovereign immunity; by contrast, public ones – whether under NAFTA or BITs – do implicate sovereign immunity concerns (whether of the United States, in case of NAFTA, or a foreign sovereign, in case of BITs).

Now balance these values against the ones underpinning the need for Article III tribunals:

1. Separation of Powers – As discussed above, arbitration could present separation of powers problems (though the problem technically is a diminution problem, as opposed to an encroachment one present in the Article I Court situation). Specifically, Congress diminishes the power of the Article III courts by vesting their decision making power in another non-Article III institution and then requiring federal courts to give effect to those decisions, subject to very limited grounds for review.\(^{119}\)

2. Fairness – This is the flipside of the fairness factor (4) above. Depending on the state of the empirical research, arbitration, in contrast to federal litigation, might run a greater risk of unfairness to litigants. Particularly in areas where the litigants are of unequal bargaining positions and, consequently, the stronger party might prefer a forum or set of rules systematically biased in its favor.\(^{120}\)

3. Judicial Integrity – arbitration does not present a “judicial integrity” problem, as Fallon has conceptualized it, for arbitrators, unlike administrative agencies, do not have a “hybrid and problematic status in our constitutional system.”

Thus, an analysis of the values underpinning appellate review theory reveals that they translate well but that the balance is not the same as that in Fallon’s model.

Specifically, at least two values justifying the need for non-Article III tribunals – government function and sovereign immunity – drop out in private commercial arbitration (while remaining present in trade or investment arbitration involving

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Arbitrations, (Aug. 5, 1999) (copy on file with author) (paper presented at the National Meeting of the Academy of Legal Studies in Business) (same showing in NASD arbitrations); see also Report of the Arbitration Policy Task Force to the Board of Governors of the National Association of Securities Dealers, Inc., reprinted in 95-96 Fed. Sec. L. Rep. (CCH) 85, 735 (1996) (finding securities arbitration generally "to be a relatively efficient, fair, and less costly forum for resolution of disputes involving public investors, member firms, and firm employees...")

119 See FAA § 10; New York Convention Art. 5.
governments). On the other side of the scale, one of the values justifying the need for Article III tribunals—judicial integrity—is not as salient due to the absence of constitutionally problematic administrative agencies. The lesson from this analysis, therefore, is that the standard for “adequately searching appellate review” may be less taxing in cases of arbitrations involving sovereigns than in cases of arbitrations between purely private parties.

The solution then becomes to identify a limited number of factors with which the constitutionally required standard of review might vary. They should be robust enough to capture the partially competing values underpinning arbitration and Article III. At the same time, they should be sufficiently defined to avoid Fallon’s fear of lapsing into a vague and unpredictable “totality of the circumstances” test. While my claim here is tentative, I believe that the two critical values, at bottom, are the voluntariness of the undertaking and the presence (or absence) of a sovereign in the dispute.

Voluntariness operates as a proxy for fairness. As noted above, fairness was one of the critical values on Fallon’s scheme justifying the role for Article III Courts. In the administrative cases that concerned Fallon, the parties often will not have opted into the system; instead, a federal statute typically directs them there. By contrast, in a voluntary arbitration (like a private commercial one), the parties will have chosen the preferred forum for resolving their dispute. As a theoretical matter, that choice signals a mutual faith by both parties, before any dispute has arisen, that the dispute resolution mechanism will reach a fair result. General judicial acceptance of a variety of private choices such as forum selection agreements, choice-of-law clauses, and consent to jurisdiction clauses all
support this conception of private choice as an indicium of fairness. Thus, fairness concerns diminish in a voluntary arbitration and, consequently, so too does the need for plenary Article III review. By contrast, in a truly involuntary arbitration, such as the BIT arbitrations described below, the fairness concerns remain dominant and, thus, so too does the need for Article III review.

Sovereign immunity recognizes the separation of powers values. As noted above, where a sovereign is a party to the dispute, the law accords great deference to the political branches to control judicial jurisdiction. Absent consent, the sovereign cannot be sued in its own forum. As to foreign sovereigns, their immunity likewise (at least in recent years) has remained firmly within the control of the legislative branch. Thus, in any case involving a sovereign, the political branches could cut off judicial jurisdiction almost entirely (whether through declining to waive immunity or narrowing the scope of judicial jurisdiction over foreign sovereigns). That greater power to cut off jurisdiction implies therefore a lesser power to regulate that jurisdiction. Consequently, Article III values are, in such cases, relatively minimal.

The upshot of this modified appellate review theory is to vary the degree of constitutionally required review along two axes. At one extreme lie involuntary private arbitrations. In those circumstances, the need for Article III review is at its zenith. At the other extreme lie voluntary arbitrations involving the sovereign. In those circumstances, the need for Article III review is at its nadir. The intermediate cases are voluntary, private arbitrations and involuntary, sovereign arbitrations.

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123 See 28 U.S.C. §§1601 et seq.
How does this translate onto the different types of issues under review? With respect to questions of constitutional law, *de novo* review should still be required. As to the necessity of review, arbitration does not affect Fallon’s basic analysis: Article III review of constitutional questions is necessary both to promote separation-of-powers principles and to provide an essential fairness to individual litigants when their constitutional rights are at stake.\(^\text{124}\) As to the scope of review, the analysis admittedly does not map perfectly. Fallon justified *de novo* review of constitutional questions on the ground that “separation of powers values are deeply implicated” if “another agency of government has strayed beyond constitutional limits.” Arbitration does not present a situation where an agency of government can act *ultra vires*. Nonetheless, anything less than plenary review could implicate separation of powers concerns animating Fallon’s standard. If Congress could strip Article III courts of their power to review an arbitrator’s findings on questions of constitutional law, such a regime would undermine separation of powers principles just as much as the aggrandizement of a federal agency’s power. Requiring plenary review of constitutional questions eliminates that concern.

As to questions of law, translating the modified appellate review theory is a challenging undertaking. In some respects, the reasons justifying plenary review of legal questions in cases of Article I Courts or administrative agencies do not apply in the context of arbitration. For example, arbitrators lack the capacity “to expand their own power.” Unlike bureaucrats, arbitrators are not necessarily repeat players in a dispute settlement procedure. Their decisions lack any precedential force that might be used to justify a more expansive conception of their power in a later case. Nor are arbitrators

\(^{124}\) Fallon, 101 Harv. L. Rev. at 975-976.
subject to “political pressure” from another branch of government, as might be the case
with respect to administrative agencies or legislative courts.

At the same time, in at least three respects, arbitrators present at least some of the
dangers that led Fallon to conclude that appellate review theory required Article III
review of nonconstitutional legal questions. First, just like agencies, arbitrators can be
arbitrary. They can get the law wrong; they also can render “split the baby” awards that
leave both parties relatively satisfied but, as a principled matter, lack a legal basis for the
decision. Second, while individual arbitrators may lack the capacity for bureaucratic self-
aggrandizement, arbitration as an institution does have that capacity. As noted above,
arbitrators and arbitral institutions have a direct financial interest in being able to exercise
jurisdiction over a matter, one that may give them an incentive to take an expansive
notion of their kompetenz in the run of cases.125 Third, arbitration presents at least some
risk of capture by powerful political entities, albeit in a manner different from the capture
at play in the bureaucratic setting. As I have explained elsewhere, arbitrators, unlike
bureaucrats or judges, are often nominated by parties to resolve a dispute, and, critically,
their compensation is tied to their service.126 In theory, then, this nomination process
gives the arbitrators a financial incentive to decide a case in favor of the player most
likely to give the arbitrator repeated business in the future, thereby skewing the result in
favor of the more powerful party.

Thus, modified appellate review theory justifies at least some degree of Article III
review of an arbitrator’s legal determinations, though perhaps not as exacting as that

\[125\] Courts have some ability to control this tendency toward expansion through judicial review of the
arbitrator’s jurisdiction, either at the pre-arbitration stage or the enforcement stage. See First Options v.

required in Fallon’s original model. Some of the values that justify plenary review in the
agency or legislative court context – such as political pressure or aggrandizement – drop
out here. Others, by contrast, such as arbitrariness, expansive conceptions of jurisdiction
or capture remain relevant in the context of arbitration.

Deference by Article III courts to determinations of federal law made by other
non-Article III entities is a familiar one. For example, in administrative law, Skidmore,
Chevron and Meade allow a federal court to defer to an agency interpretation of an
ambiguous statute. In criminal procedure, both pre-AEDPA and post-AEDPA case
law permit a federal court to defer to a state court’s interpretation of a federal
constitutional question. At the same time, under these doctrines, federal courts can
override the prior decision maker’s “unreasonable” determinations.

To be sure, the analogies here are not exact – the former involves deference to
another branch of government (thereby assuring some degree of political accountability);
the latter involves deference to a different sovereign’s courts (who, as noted above,
occupy a different position from arbitrators). Nonetheless, doctrines like these illustrate
that our constitutional scheme can tolerate a limited degree of deference by Article III
courts to another entity’s construction of federal law when some underlying policy reason
justifies that deference. Just as the expertise of an administrative agency or federalism
and finality may justify some deference in these contexts, so too can the promotion of
arbitration support such deference here.

127 I am especially grateful to Laura Appleman and Norman Williams for helping me tease out this
argument.
deferece to agency statutory interpretations).
Finally, as to factual review, arbitration does not alter Fallon’s analysis and, indeed, fits quite comfortably with it. Factual findings by arbitrators, like those of administrative agencies or legislative courts, present no particular threat to either separation-of-powers values or fundamental fairness. As to the special categories of facts warranting separate treatment – constitutional or jurisdictional – a discretionary approach ideally balances the need to correct “suspect” findings against the desire to avoid costly relitigation of issues.

In sum, appellate review theory provides the most promising basis for reconciling the tension between Article III and arbitration. Such a theory vindicates the textual, historical and policy concerns underpinning Article III while doing minimum violence to the existing precedent. The precise degree of review by an Article III Court should not be a rigid, uniform standard as the original expositor of appellate review theory proposed. Instead, it should reflect the distinct mix of values underpinning the dispute resolution system – a methodology that Fallon acknowledged was consistent with the underlying spirit of appellate review theory but ultimately dismissed for debatable reasons. Once that aspect of Fallon’s analysis is altered, the proper standard of review should take into account both the voluntary nature of most arbitrations and the special legal status of an award under a judicial system. The next Part applies appellate review theory to determine whether the FAA and other arbitral schemes in fact comport with Article III.


The preceding Part developed a revised version of appellate review theory as the basis for evaluating the compatibility of arbitration with Article III. This final Part
explores the theory’s implications. It first applies the theory to several arbitral schemes:

(a) international commercial awards under the FAA and New York Convention, (b) 
awards rendered by NAFTA Dispute Resolution Boards, and (c) investment arbitrations.

In brief, I conclude that, under the modified appellate review theory offered here, each 
can survive an Article III challenge. Part III then anticipates several criticisms of the 
theory and explores its implications for related areas of the law.

A. Preliminary Applications

1. International Commercial Awards: International commercial arbitration 
awards are subject to judicial review under one of two main frameworks. First, in 
some cases of confirmation (reducing a foreign or nondomestic award rendered in the 
United States to judgment) and enforcement (reducing an award rendered abroad to 
judgment), a multilateral treaty, typically the 1958 Convention on the Recognition and 
Enforcement of Foreign Arbitral Awards (“New York Convention”) will set forth the 
review standard. Roughly speaking, Article V of the New York Convention provides 
that an award may be denied recognition or enforcement where:

- The parties lacked capacity to enter it;
- The losing party lacked adequate notice of the proceeding or an 
opportunity to be heard;
- The award concerns a matter beyond the parties’ submission;

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129 For discussions of the law governing the recognition and enforcement of international arbitral 
awards, see Born & Rutledge, *International Civil Litigation in the United States* (4th ed. 2006); Born 
*International Commercial Arbitration* 779-904. (2d ed. 2001)

130 Less frequently, other conventions may apply. These include the Panama Convention (governing 
awards in certain Latin American arbitrations) and, discussed below, the Washington Convention 
(governing awards for certain investment arbitrations). The standards of judicial review under the Panama 
Convention are virtually identical to those under the New York Convention so the analysis in the text 
applies equally in these specialized contexts.
The composition of the tribunal or the arbitral procedure deviated from the parties’ agreement or, absent such agreement, the law of the arbitral forum;

- The award has been set aside;
- The dispute is non-arbitrable in the country where enforcement is sought;
- The award violates the public policy of the country where enforcement is sought.

Second, in cases of vacatur (setting aside an award rendered in the United States) and cases of confirmation and enforcement not falling under a treaty, the Federal Arbitration Act (“FAA”) sets forth the default framework for judicial review. Section 10 of the FAA provides as follows:

[A district court] 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 arbitrations, or either of them (sic);

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.

On their face, neither Article V of the New York Convention nor Section 10 of the FAA provides for any Article III review of the merits of the decision, whether on statutory or constitutional grounds. Under the modified appellate review theory articulated above, this gap would seemingly be fatal to the entire scheme.

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131 Indeed, nearly a century and a half ago, the Supreme Court seemed to envision this state of affairs. In *Burchell v. Marsh*, the Supreme Court explained that “[i]f the award is within the submission, and
Despite the absence of any textual authorization for Article III review of legal questions, judicial decision has partly filled in the gap, for courts have constructed a doctrine that, at least arguably, might attempt to temper this harsh conclusion. For several decades, the “manifest disregard of the law” doctrine has enabled federal courts to take a quick look at the merits of the award (even though that doctrine does not find any formal footing in the text of Section 10). The formulations of the “manifest disregard” doctrine vary in slight terms. Under the generally accepted formulation of the doctrine, a federal court may vacate the award where the arbitrator was aware of the applicable law yet refused to apply it. Putting to one side the legitimacy of the manifest disregard doctrine (a topic I have explored elsewhere), the question then becomes whether the manifest disregard of the law doctrine adequately rescues the FAA from constitutional infirmity.

Ordinary private international commercial arbitration survives Article III challenge under modified appellate review theory. Courts almost never review arbitral awards for factual errors, yet modified appellate review theory suggests that this does not present an Article III concern. As to questions of constitutional law, the available review under the FAA and the New York Convention suffices. In some cases, courts can rule on constitutional issues at the outset of the arbitration in ruling on a motion to

\footnotesize{contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.” 58 U.S. 344 (1855).}

132  See supra note [x].
compel arbitration or stay litigation. In other cases, courts can rule on constitutional issues when reviewing the arbitral award – several of the above-mentioned standards under the New York Convention or the Federal Arbitration Act incorporate constitutional norms. For example, both laws provide that an award can be denied enforcement (or vacated under the FAA) in cases where a party lacked proper notice of the arbitral proceedings. Courts applying these standards have generally imported due process norms to evaluate those claims. Thus, under modified appellate review theory, the current regime provides Article III courts sufficient oversight of constitutional questions.

The trickiest aspect of the analysis here is, however, the limited role of Article III Courts in reviewing arbitral awards for legal errors. Courts routinely decline to set aside arbitral awards (or refuse to enforce them) even where the arbitrator has reached an erroneous legal conclusion. This gap would be fatal to arbitration under the original conception of appellate review theory. Nonetheless, under modified appellate review theory, the manifest disregard of the law standard arguably supplies the necessary degree of federal appellate review. The freedom-of-contract values underpinning arbitration justify a reduced role for federal courts. At the same time, the manifest disregard standard preserves a limited role for federal courts vindicating the Article III values still present in a scheme of arbitration.

Ironically, the origins of the manifest disregard of the law doctrine strengthen this claim. The manifest disregard of the law standard appears nowhere in the Federal Arbitration Act (or, for that matter, any other statute or treaty governing the enforcement

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136 *Id.* at 208-216 (collecting cases for the proposition that courts can rule on challenges that arbitration agreements are void on grounds of illegality).
137 *Id.* at 832-833, 841-849.
138 *Id.* at 811.
of arbitral awards in the United States). Rather, it traces its origins entirely to the
Supreme Court’s decisions, almost as a type of federal common law governing the
enforcement of awards.139 This judicial pedigree affords a court greater flexibility to
shape its contours than if a statutory text constrained its interpretation. While courts
generally have been reluctant to vacate awards (or decline enforcement) on this ground,
several recent noteworthy decisions involving federal statutory claims have done so.140
This trend suggests that the doctrine is malleable enough to vindicate the Article III
values underpinning appellate review theory in this context.

The question is extremely close, but the manifest disregard doctrine, in my
opinion, saves private international arbitration from constitutional defect.141

2. NAFTA: Under Chapters 11 and 19 of the North American Free Trade
Agreement, the signatory countries agree to submit disputes over discriminatory
treatment, expropriation, anti-dumping and countervailing duties laws (following an
initial agency determination) to a binational panel of arbitrators.142 With respect to
disputes over imports into the United States, NAFTA requires binational panels to choose
U.S. law as the applicable substantive rule of decision. In the event a party disagrees
with the panel’s determination, it may appeal that decision to an extraordinary challenge
committee. Following that committee’s review (or in the event no such committee is

discrimination case).
141 While this paper focuses principally on international cases, the logic of the argument largely
supports the same result in domestic cases such as the securities cases described in Part I.A.
142 For discussions NAFTA’s dispute resolution procedure, see Karamanian, Dispute Settlement
Under NAFTA Chapter 11: A Response to the Critics (paper on file with author); Pfander, 118 Harv. L.
Rev. at 766-768; Bradley, 55 Stan. L. Rev. at 1575-77; Chen, 49 Wash. & Lee L. Rev. 1455.
convened), the only recourse that a party has to a federal court is to file a constitutional challenge (the Canadian Softwood Lumber case, which recently settled following oral argument in the D.C. Circuit, involved such a challenge). Thus, even though the interpretation of NAFTA is undoubtedly a federal question, a party may not, apart from the narrow exception for constitutional questions, seek review of the merits of a NAFTA tribunal’s determinations in an Article III court.

NAFTA arbitration also survives under appellate review theory. With respect to two types of findings, the analysis is quite straightforward. A provision of the NAFTA implementing legislation expressly grants the D.C. Circuit, an Article III Court, original jurisdiction over facial constitutional challenges to NAFTA’s binational panel review system. Additionally, the Court of International Trade, also an Article III Court, has jurisdiction over constitutional issues arising out of U.S. agency determinations that implement binational panel decisions in countervailing duty and antidumping cases. While neither NAFTA nor its implementing legislation authorize Article III review of a binational panel’s factual findings, appellate review theory – both in its original form

144 “The judicial power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. Const. Art. III, sec. 2. See also Born & Rutledge, International Civil Litigation in the United States (4th ed. 2006) (describing how claims under treaties of the United States arise under federal law).
145 Though not central to my thesis, I also believe that it would survive even under public rights theory, as the Court has articulated it. Jim Chen has offered a forceful attack on NAFTA arguing, among other things, that its dispute resolution system violates Article III. Appointments with Disaster: The Unconstitutionality of Binational Arbitration Review under the United States-Canada Free Trade Agreement, 49 Wash. & Lee L. Rev. 1455 (1992). Central to Chen’s Article III argument is his contention that the claims under NAFTA constitute private rights. While powerful, Chen’s argument ultimately cannot overcome Ex Parte Bakelite’s clear holding that claims against the government arising out of customs determinations represent core public rights for which Congress can cut off Article III review altogether. 279 U.S. 483 (1929). Indeed, until 1979, Article III Courts had no jurisdiction over customs determinations whatsoever. See Ehrenhaft, The Judicialization of Trade Law, 56 Notre Dame L. Rev. 595 (1981).
advanced by Fallon and in the modified form advanced here – do not find this troublesome.

The tougher aspect of NAFTA’s system is the complete lack of federal judicial review of any legal findings by binational panels. This would clearly be fatal to the NAFTA scheme under Fallon’s original appellate review theory. Under the modified appellate review theory offered here, however, this limit is not fatal. Evaluated under the flexible balance articulated in Part II, NAFTA claims represent core claims implicating principles of sovereign immunity. The Canadian Softwood Lumber case, for example, technically involve an action by United States companies against the United States government (and Canadian intervenors). Barring a waiver, sovereign immunity principles would foreclose any action whatsoever, a result entirely consistent with Article III. Thus, a scheme foreclosing judicial review of binational panels’ determinations of pure legal questions does not violate Article III.

3. **Investment arbitration**: To facilitate the flow of capital to lesser developed countries, the United States and other western nations have entered into more than 2,000 bilateral investment treaties (BITs) with capital importing countries. A critical feature of these treaties is that they protect the foreign investor against

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148 Pfander, 118 Harv. L. Rev. at 767.
expropriatory or other conduct. To substantiate this guarantee, many BITs include offers by the capital-importing country to arbitrate any expropriation claim often administered under the auspices of the World Bank’s International Center for the Settlement of Investment Dispute (“ICSID”). A critical feature distinguishing BIT awards from other international commercial arbitral awards is that they do not require an underlying agreement to arbitrate. Rather, the capital-importing nation’s treaty obligations suffice to subject the country to the jurisdiction of an arbitral tribunal. In an ICSID-administered arbitration, following decision by a panel, an appellate arbitral panel reviews the decision. Thereafter, if both countries are signatories, judicial review is governed by the Washington Convention of 1965. Under that Convention, “awards are theoretically directly enforceable in signatory states without any method of review in national courts.”

Investment arbitration has some of the qualities of ordinary international commercial arbitration but with three salient differences. First, unlike international commercial arbitration, investment arbitration does not involve the voluntary agreement between the parties to submit their dispute to arbitration. Rather the submission arises from the pre-existing agreement of the capital-importing country or the state-owned entity with which the foreign investor is doing business. Second, unlike private commercial arbitration, investment arbitration implicates concerns of sovereign

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151 For a discussion of the Washington Convention, see Born, *International Commercial Arbitration* 24-25. If one of the countries is not a signatory to the Washington Convention, then either another multilateral convention such as the New York Convention or, alternatively, the enforcement country’s arbitration law supplies the relevant standard on enforcement. See generally Franck, 73 Fordham L. Rev. at 1545-1557.


153 The non-contractual feature here resembles the system of compulsory arbitration in *Thomas* described *supra*. Notably, the Court in *Thomas* eschewed any effort to characterize the arbitration as “voluntary” by reference to the prior decision to register the pesticide with the EPA.
immunity. As noted in the preceding section, both the voluntariness of the undertaking and the presence of sovereign immunity weigh in the value scale that determines the necessary degree of “adequately search appellate review.” Third, judicial review is far more circumscribed than in private international commercial arbitration.

With respect to questions of constitutional law and findings of fact, the analysis of bilateral investment treaties does not differ materially from the analysis of ordinary private commercial arbitration. With respect to legal questions, however, the analysis is markedly different for the above-noted reasons. The absence of privity between the foreign sovereign and the investor suggest that greater scrutiny is required. On the other hand, the presence of sovereign immunity concerns reduces the need for plenary Article III review. Here, of course, it is not the immunity of the United States at issue but, instead the immunity of the foreign sovereign. That immunity, of course, is the subject of legislative grace, one that Congress can strip if it so desires.\(^{154}\) Here too, the question is close. Ultimately, though, Congress’s control over the foreign sovereign’s immunity logically entails a power also to decide the scope of any judicial action over the sovereign. Since Congress could restore the sovereign’s immunity altogether, it follows that it should likewise be able to regulate the degree to which the sovereign is amenable to suit in an Article III Court. Given the dominance of the sovereign immunity values here, investment arbitrations, despite the limited review for legal errors, likewise pass constitutional muster.

B. Criticism and Implications

This Section explores the criticisms and implications of the modified appellate review theory.

Choice of Forum Clauses: One potential criticism of the thesis presented here is its implications for other efforts to shift disputes away from Article III forums. For example, courts have, within limits, generally approved parties’ use of choice-of-forum clauses to refer disputes to a foreign forum. In some cases, parties may combine the choice-of-forum clause with a choice-of-law clause – thereby opting out of a jurisdiction’s procedural system and its substantive liability rules. These efforts have generally received judicial approval, albeit amid much academic criticism. Should international choice-of-forum clauses (whether standing alone or coupled with choice-of-law clauses) survive the test articulated here?

In fact, such cases fit quite comfortably within the theory. In contrast to arbitral awards, the standards governing judicial review of foreign judgments are more exacting; courts enjoy relatively greater latitude to decline to enforce foreign judgments that they find problematic, including a robust public policy exception (permitting a review of the substance of the judgment) and procedural grounds (permitting a review of the procedures utilized to reach that judgment). This greater flexibility makes the forum

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155 I am especially grateful to Ralph Steinhardt, Peter Murphy and Symeon Symeonides for helping me work through this puzzle in the argument.
159 For recent examples of courts relying on these more robust standards, see, e.g., *Yahoo!, Inc. v. La Ligue Contre le Racisme et L’Antisémitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001), rev’d on other grounds, 433 F.3d 1199 (9th Cir. 2006) *(en banc)*; *Bridgeway Corp. v. Citibank*, 45 F.Supp.2d 276 (S.D.N.Y. 1999), aff’d, 201 F.3d 134 (2d Cir. 2000); *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997).
selection/choice-of-law cases easier, not harder, than the arbitration cases under appellate review theory.¹⁶⁰

_The Voluntariness Line:_ A second potential criticism concerns the importance that the theory places on the difference between voluntary and involuntary agreements. A rich literature has argued that certain arbitration agreements, particularly in cases of parties involving unequal bargaining power (such as consumer contracts and employment agreements), should not be understood as voluntary at all.¹⁶¹ Rather they should be deemed contracts of adhesion where the use of a standard form arbitration clause in an industry is so rampant that the party with the inferior bargaining position cannot honestly be said to have engaged in a free choice.

This argument presents a potentially formidable objection to the theory presented here, particularly in the context of domestic arbitrations involving statutory claims (such

¹⁶⁰ The newly signed Hague Convention on Choice of Court Agreements may, though, test the limits of this argument. That convention tightens the obligations on courts to give effect to choice-of-forum clauses and foreign judgments rendered thereto. As I have argued elsewhere, the treaty (which the United States has signed but not yet ratified) could eliminate a major difference in the legal regime governing judgment enforcement and award enforcement and, consequently, require re-examination of the Article III questions explored here. See Rutledge, _Post-Hague Hangover: Three Predictions About the Future of the Law Governing the Enforcement of Foreign Judgments and Arbitral Awards_, in Occasional Papers of the University of Lisbon/Catholic University Law Conference (forthcoming 2007).

To take the argument one step further, one might ponder its implications for settlement agreements and consent decrees. Does the argument here require different treatment of those efforts at “alternative dispute resolution.” For three reasons, I do not believe that these other forms are completely analogous to arbitration agreements. First, with respect to settlement agreements, no federal statute compels courts to reduce the agreement to a judgment (as is the case with arbitral awards). Second, settlement agreements and consent decrees are more properly understood as “post-dispute” attempts at settlement rather than “pre-dispute” agreements about how to settle a case; under those circumstances, considerations of fairness are less pronounced. Third, while the standards vary across jurisdictions and with the issue, the degree of judicial review of these sorts of resolutions is more exacting and, thereby, promotes the Article III values. See, e.g., Weisburst, _Judicial Review of Settlements and Consent Decrees: An Economic Analysis_, 28 J. Legal Stud. 55 (1999) (describing the differing degrees of judicial deference to party-initiated settlement).

as in Title VII or the Truth in Lending Act). Nonetheless, I do not think that it sinks the theory for two main reasons.

First, as I have argued elsewhere, it would be a mistake to characterize these sorts of agreements as involuntary.\(^{162}\) Narrowing the definition of “voluntary” to exclude agreements of this sort could undermine valuable public policies that benefit both sides in transactions, including the party with the lesser bargaining power. For example, some studies of the credit card industry indicate that companies utilizing arbitration agreements in their credit card contracts are able to reduce their litigation costs and, consequently, are able to pass those savings onto their customers in the form of a lower interest rate.\(^{163}\) Such benefits obviously would be lost if agreements of this sort were deemed involuntary, and the judicial review found inadequate under appellate review theory.

Second, it bears emphasis that the objection flows from the exceptional “one size fits all” approach typical of arbitration in the United States – that is, so long as something qualifies as “arbitration” in the United States, the governing law does not meaningfully distinguish between arbitrations among commercially sophisticated parties and arbitrations among parties with different bargaining position. Here, we can draw a lesson from Europe. In contrast to the system here, European systems have two different sets of arbitration laws: one governing “commercial” arbitrations and another governing consumer or employment arbitrations. The solution to such cases, therefore may lie not in jettisoning the voluntariness/involuntariness line as a matter of constitutional doctrine but, instead, in carving out categories of cases where the disparities in bargaining power are severe.


At bottom, though, I candidly acknowledge this vulnerability in the argument. Further empirical research may undercut the evidence from the credit card industry. Moreover, the lesson gleaned from the data in that example may not necessarily translate into other contexts, such as employment contracts, where it is far from clear that the economic benefits from arbitration of employment-related claims yield substantial benefits – economic or otherwise – to the employee. If this were not the case – and such agreements were properly deemed “involuntary” – then I freely admit that, under the logic of the argument presented here, there would be a greater need for more exacting judicial review of any award. This could come, for example, through strengthening of the manifest disregard of the law doctrine.

CONCLUSION

The decline of the jurisdictional ouster and non-arbitrability doctrines have given rise to a host of new questions about the relationship between arbitration and the Constitution, including the compatibility of arbitration with Article III. Despite the salient differences between arbitration and other non-Article III schemes that the Supreme Court has previously approved, courts have unreflectively rejected Article III attacks on constitutional schemes. While the sparse academic literature admits greater skepticism, those accounts too provide an inadequate account. In contrast to these efforts, appellate review theory, grounded in a careful balancing of values, provides the most useful tool for evaluating the constitutionality of arbitration. The theory is not flawless and, as originally designed, yields conflicting answers to the question. Nonetheless, a more flexible approach, one entirely consistent with appellate review
theory’s underlying principles is possible. Once refined to reflect a more flexible balancing of values, appellate review theory yields a more coherent system for evaluating arbitral schemes, one that adequately explains the constitutionality of both private and public international arbitration.