A Framework to Apply the Article III Case or Controversy Requirement to Motions to Confirm or Vacate Arbitral Awards Pursuant to the Federal Arbitration Act

Aaron Franklin
A Framework to Apply the Article III Case or Controversy Requirement to Motions to Confirm or Vacate Arbitral Awards Pursuant to the Federal Arbitration Act

Arbitration is an important method of dispute resolution but it requires courts that can confirm or vacate arbitral awards. When parties move to confirm or vacate these awards, federal courts largely ignore the Article III case or controversy requirement’s role as a limit on their power. Applying this requirement is not as simple as it sounds, and courts have little guidance in doing so. This Article therefore provides a framework that resolves two problems. First, motions to confirm or vacate arbitral awards always involve an underlying dispute (the dispute that necessitated arbitration) and a dispute about whether to grant the motion. It is not clear which dispute needs to be a case or controversy. Second, if the motion itself must meet this test, it is unclear whether the injury supporting standing is to a federal right or based on the effect of the award. This Article resolves both problems and analyzes a recent Supreme Court case involving this issue.
Introduction

This Article presents a framework to apply the case or controversy requirement to motions to confirm or vacate an arbitral award. The case or controversy requirement, which refers to a limit on federal court jurisdiction found in Article III of the U.S. Constitution, must be satisfied before federal court action. Despite the unquestioned applicability of this requirement, most federal courts neglect this rule when faced with a motion to confirm or vacate an arbitral award.¹

This cannot go on forever. As arbitration continues to increase its share of the dispute resolution market, parties will increase their arsenal of defenses to judicial review. Federal courts will be forced to confront the constitutional limits on their judicial power as parties challenge it directly. This Article provides a framework to resolve those challenges.

The framework this Article offers is helpful for three reasons. First, how to apply the case or controversy requirement is not self-evident because motions to confirm or vacate an arbitral award involve two disputes. The first is the dispute that necessitated arbitration, such as whether a supplier delivered goods that conformed to a contract. This is the Underlying Dispute. The second is the dispute about the award, such as whether it should be vacated. This is the Motion Dispute. A federal statute, the Federal Arbitration Act (FAA),² provides reasons to

¹ A motion to confirm an arbitral award is a request that a court grant the force of legal judgment to a decision by an arbitrator or arbitral panel. A motion to vacate an arbitral award is a request that a court refuse to confirm the award and extinguish any future potential legal rights from that award.

vacate an arbitral award. One example would be corruption among the arbitrators.\footnote{9 U.S.C. §§ 1,10.} This Article establishes which dispute matters for the case or controversy requirement.

Another way that the manner in which courts should apply the case or controversy requirement is not self-evident is that, if the relevant dispute is the Motion Dispute, another dilemma appears regarding the nature of rights at stake. On one hand, courts could consider the relevant case or controversy to be about the effect of the award on one of the parties. On the other hand, courts could consider that the FAA creates a federal right to judicial confirmation or vacatur. This might render moot the contents of the award. This Article clarifies the nature of the rights at stake for these motions.

The second reason the framework in this Article is helpful is that judicial opinions and academic commentaries have left this topic largely unconsidered. The one notable exception is the Supreme Court’s 2010 opinion \textit{Stolt-Nielsen S.A. v. AnimalFeeds International Corp.},\footnote{Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp., 130 S. Ct. 1758 (2010).} in which the Court hinted at its views. The predictive value of its analysis, however, is limited. Justice Alito’s majority opinion relied on the idea that granting certiorari meant the court necessarily considered and rejected problems with the justiciability of the conflict.\footnote{Id. at 1767 n.2. This Article uses “justiciability” as shorthand for the case or controversy requirement, notwithstanding broader uses of the term.} Also noting that the “argument [was] not pressed in or considered by the courts below,” he wrote only a footnote on the issue.\footnote{Id.} He applied a standard test without discussion and gave no warrants.\footnote{Id.} Justice Ginsburg’s dissent, joined by Justices Breyer and Stevens, would have dismissed the
motion to vacate as non-justiciable but cited no cases on justiciability or the case or controversy requirement. It is therefore likely that this case will not control when the topic is more squarely presented.

The third reason that the framework in this Article is helpful is that courts still need to screen out arbitral awards unfit for judicial review. To do so, however, they rely on increasingly permissive tests derived from the FAA. The statutory tests are allowing review of orders increasingly removed from the end of the arbitral process. This creates tension with arbitration’s hope to be more efficient than litigation. At some point, courts will need to decide whether the case or controversy requirement limits their power to decide these motions, and if so, how.

This Article maps a course for courts applying the case or controversy requirement to motions to confirm or vacate an arbitral award. It begins by providing relevant background on federal jurisdiction, arbitration, and how motions to confirm or vacate an arbitral award operate

8 Id. at 1777 & n.2 (Ginsburg, J., dissenting) (“The Court errs in addressing an issue not ripe for judicial review . . . I would dismiss the petition as improvidently granted.”); (“I would vacate with instructions to dismiss for lack of present jurisdiction.”).


10 “To allow judicial intervention prior to the final award . . . would interfere with the purpose of arbitration: the speedy resolution of grievances without the time and expense of court proceedings.” Millmen Local 550 v. Wells Exterior Trim, 828 F.2d 1373, 1375 (9th Cir.1987). See also Michaels v. Mariforum, S.A., 624 F.2d 411, 414-15 (2d Cir. 1989) (court intervention contravenes purposes of arbitration such as more expeditious resolution or disputes and less judicial involvement); Hart Surgical, Inc. v. Ultracision, Inc., 244 F.3d 231, 233 (1st Cir. 2001); Gaitis, supra note 9.
under the FAA. This includes some basics on what the statute requires a party to submit to confirm or vacate an award.

Section II addresses which dispute must meet the case or controversy requirement. As described above, there are two disputes involved in these motions. The case or controversy requirement might be satisfied if one specific dispute is justiciable, both are justiciable, or at least one is justiciable. This Article argues that to satisfy the case or controversy requirement the motion itself must meet the case or controversy requirement.

Sections III and IV address what the case or controversy requirement requires. Section III looks at how one of the doctrines enforcing the case or controversy requirement, the standing doctrine, would apply to these motions and identifies at least two potential injuries. Section IV then argues that only one of the potential injuries should be sufficient to create a case or controversy.

The Article concludes by revisiting the Supreme Court’s decision in *Stolt-Nielsen*. The conclusion applies the Article’s framework to demonstrate how it would apply to an actual case. As this topic reaches courts with increasing frequency, the framework this Article provides can only become more important.

**I. Background**

This Article applies a doctrine limiting the jurisdiction of federal courts to motions pursuant to the FAA to confirm or vacate arbitral awards. Thus, the first part of this section describes the relevant rules for federal jurisdiction. The second describes the process of arbitration and confirming or vacating resulting awards.
A. Federal Court Jurisdiction

This part first explains a foundational principle necessary to understand federal courts. Then, it explains how the Constitution and federal statutes implement this principle.

1. The Limited Jurisdiction of Federal Courts

All federal courts have limited jurisdiction, as distinct from the courts of the several states, which can have general jurisdiction.11 Limited jurisdiction means that federal courts can only hear the matters to which the Article III judicial power extends.12 Failure to heed this limit is not only a procedural violation, but also a violation of the Constitutional division of power between federal and state governments.13

Article III of the Constitution divides federal courts into the Supreme Court and the inferior courts.14 Most relevant to this Article are the “inferior courts,” such as the federal district courts that would first hear a motion to confirm or vacate an arbitral award. The Constitution did not create lower courts.15 Congress created these courts, and Congress may limit their jurisdiction to less than what the Constitution would allow.16 A court may therefore only hear matters that “(1) are within the judicial power of the United States, as defined in the

---

13 C. WRIGHT, A. MILLER, & E. COOPER, supra note 11 § 3522.
14 U.S. CONST. art. III §§ 1-2.
15 U.S. CONST. art. III § 1 (“The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).
16 See, e.g., Cary v. Curtis, 44 U.S. 236 (1845).
Constitution, and (2) that have been entrusted to them by a jurisdictional grant by Congress.”

This is commonly referred to being within their “subject matter jurisdiction.”

2. The Subject Matter Jurisdiction of Federal Courts

To define the subject matter jurisdiction of federal courts, this part addresses both constitutional and statutory limits. As relevant here, Article III of the Constitution limits the subject matter jurisdiction of federal courts in two ways. Article III, Section 2 reads:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The first way that Article III limits federal court jurisdiction relates to the type of claim or the status of the parties. One way that federal courts can have jurisdiction is for matters that “aris[e] under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority” or concern “admiralty and maritime Jurisdiction.”18 This type of jurisdiction is commonly known as “federal question jurisdiction,” and it arises only when the complaint

17 C. Wright, A. Miller, & E. Cooper, supra note 11 § 3522

18 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).
standing alone “establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.”

Another way in which federal courts can have jurisdiction is based on the status of the parties. When a federal court has jurisdiction because the dispute is between citizens of different states, it is commonly called “diversity jurisdiction.” Congress limits diversity jurisdiction to disputes for more than $75,000. These are the two most common forms of federal subject matter jurisdiction.

The second way that Article III limits federal subject matter jurisdiction derives from the words “Cases” and “Controversies.” These words “have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government.” Later sections describe the tests that enforce this requirement, but the general meaning of the case or controversy requirement is that federal courts only have power to hear “questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” Thus, federal courts will not issue advisory opinions, hear feigned or collusive suits, hear claims from parties with nothing at stake, hear future or

---

20 28 U.S.C. §§ 1332 (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between- (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state.”). E.g. Green v. Ameritech Corp., 200 F.3d 967, 973 (6th Cir. 2000).
21 This Article refers to this as the “case or controversy requirement.” Accord Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 150, (1951) (Frankfurter, J., concurring).
23 Flast, 392 U.S. at 94.
potentially irrelevant claims, hear disputes already resolved, or disputes that infringe too much into the legislative or executive branches of government.\textsuperscript{24}

The goal of this Article is to explain how courts should apply the case or controversy limit on the subject matter jurisdiction of federal courts to motions to confirm or vacate an arbitral award. This section provided background information on the case or controversy requirement and the next section provides background information on motions to confirm or vacate an arbitral award.

**B. Motions to Confirm or Vacate Arbitral Awards**

Part 1 explains how parties use arbitration to resolve disputes and the legal regime supporting that process. One aspect of that legal regime is the potential to request that a court to confirm or vacate an arbitral award. Part 2 explains how these motions operate when presented to federal courts.

**1. Arbitration and the Federal Legal Regime**

Arbitration is a process for parties to resolve their dispute with reduced judicial or governmental involvement.\textsuperscript{25} Typically, arbitration takes place after parties agreed in a contract that any dispute that arises between them would be resolved by arbitration.\textsuperscript{26} The arbitral process in theory concludes the dispute rather than precedes the standard judicial process. In many cases, enhanced efficiency, reduced costs, and increased confidentiality motivate at least

\textsuperscript{24} See generally C. Wright, A. Miller, & E. Cooper, supra note 11 § 3529.

\textsuperscript{25} 1 Domke on Com. Arb. § 1:1 (2009).

\textsuperscript{26} Id.
one of the parties to request an “arbitration agreement.” Arbitration agreements are now common in all types of commerce, including consumer and employment contracts.

Judicial involvement is reduced, not eliminated, when parties choose to arbitrate. Parties in some cases request judicial intervention to specifically enforce agreements to arbitrate or to lend judicial power to an arbitrator’s award, for example. To govern how courts such handle such requests, Congress passed the FAA in 1925. The FAA declared a national policy in favor of arbitration and purported to reverse “long-standing judicial hostility” to arbitration. The FAA’s substantive rule that courts should enforce arbitration agreements applies in both federal and state courts. While the FAA does not apply to all arbitration-related judicial action, this Article is limited to the FAA.

The FAA applies when contracts involving maritime transactions or interstate commerce include an arbitration clause. In the FAA, “interstate commerce” refers to the full range of Congress’ constitutional regulatory power. Section 1 of the FAA excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,” but courts construe this narrowly to apply only to transportation

---


32 Allied-Bruce Terminix, 513 U.S. at 270.
employment contracts. Although parties can attempt to enforce an arbitral award in their favor through a common law contract action, typically they move for confirmation or vacatur pursuant to the FAA.

2. Operation of Motions to Confirm or Vacate an Arbitral Award

   This part expands on the general information provided in part 1 by directly addressing the motions to confirm or vacate arbitral awards. Federal courts encounter these motions when a party moves to confirm an arbitral award pursuant to 9 U.S.C. § 9 or moves to vacate an arbitral award pursuant to 9 U.S.C. § 10. Judicial confirmation of an award grants it the force of legal judgment, while judicial vacatur of an award extinguishes any rights the award created. The next two parts explain in turn the elements of a motion to confirm and a motion to vacate an arbitral award. Then, part iii describes federal subject matter jurisdiction in the FAA context.

i. Award Confirmation Process

   This part explains the elements of a motion to confirm an arbitral award. Sections 9 and 10 of the FAA establish a default rule that courts confirm awards so long as the moving party satisfies the procedural requirements. This default rule is subject to limited statutory exceptions, described in part ii, in which a court vacates the award. Section 9 provides that:

---


34 Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576, 590 (2008) (“The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under . . . common law.”).

35 9 U.S.C. § 6 (“Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.”).

36 9 U.S.C. § 11 governs modification of arbitral awards. This Article does not address such motions because they present no unique issues from motions to vacate in this context.
If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . then at any time within one year after the award is made any party to the arbitration may apply . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. . . . Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding.

A federal court therefore confirms an arbitral award upon finding that:

a) it has jurisdiction,

b) the agreement specifies that judgment shall be entered upon the award,

c) the moving party filed its motion to confirm within one year of the award,

d) the moving party served notice to the adverse party, and

e) there is no successful motion to vacate or modify the award.

When a federal court confirms an arbitral award, that award has the same force and effect as a federal court judgment.\(^\text{37}\)

**ii. Award Vacating Process**

This part explains the elements of a motion to vacate an arbitral award. Section 10(a) states that a federal court “may make an order vacating the award upon the application of any party to the arbitration” in four cases:

1. Where the award was procured by corruption, fraud, or undue means.

2. Where there was evident partiality or corruption in the arbitrators, or either of them.

3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.\(^{38}\)

If a court vacates an award, then § 10(b) allows that if “the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.” Lastly, § 12 states, “[n]otice of a motion to vacate . . . an award must be served upon the adverse party . . . within three months after the award is filed or delivered.”

A federal court therefore vacates an arbitral award upon motion by a party to the arbitration if the moving party can show:

a) jurisdiction,

b) one of the 10(a) grounds, and

c) notice served within the three months of the award.\(^{39}\)

Once vacated, an award has no legal effect.\(^{40}\)

\(^{38}\) 9 U.S.C. § 10(a)(1-4). Section 10(c) also allows non-parties to vacate arbitral awards in specific instances in which a federal agency resolved a dispute through arbitration.

\(^{39}\) See Green v. Ameritech Corp., 200 F.3d 967, 973 n.5 (6th Cir. 2000).

\(^{40}\) See generally T. Oehmke, COMMERCIAL ARBITRATION § 139 (3d ed. 2009).
iii. Federal Court Statutory Jurisdiction Over Motions to Confirm or Vacate an Arbitral Award

Sections 9 and 10 of the FAA create no new federal question jurisdiction.41 This means that a party seeking to confirm or vacate an award in a federal court using federal question jurisdiction must show that the dispute arises under a separate federal law. By consequence, federal jurisdiction over motions to confirm or vacate arbitral awards will normally be through diversity.42 FAA § 203, by contrast, specifies that federal question jurisdiction extends to disputes arising from arbitration agreements that are not “entirely between citizens of the United States.”43

41 Vaden v. Discover Bank, 129 S. Ct. 1229, 1271 (2009); Section 10 specifically does not create independent federal question jurisdiction. *Accord* Smith v. Rush Retail Ctrs., Inc., 360 F.3d 504, 505 & n.6 (5th Cir.2004) (per curiam) (listing cases from D.C., Second, Sixth, Seventh, Ninth, and Eleventh Circuits holding same).

42 Specifically federal grounds to vacate an award would likely be sufficient, but federal grounds are scarce. One example is *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 25–28 (2d Cir. 2000). In this case, the Second Circuit found federal question jurisdiction when the motion to vacate is based on manifest disregard of a federal law that so immerses the court in determining federal law that jurisdiction attaches. This ground is tenuous in light of the Supreme Court’s rejection of extra-statutory grounds for vacatur in *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008).

43 9 U.S.C. § 203 (“An action or proceeding falling under the Convention [on Recognition and Enforcement of Foreign Arbitral Awards] shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.”). 9 U.S.C. § 202 (including all commercial arbitration agreements as “falling under the Convention,” except those “entirely between citizens of the United States.” These domestic contracts are nevertheless “under the Convention” if the parties’ contract “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”).
II. Federal Courts Should Apply the Case or Controversy Requirement Only to the Dispute Presented by the Motion to Confirm or Vacate an Arbitral Award

As described in the introductory section, how courts should apply the case or controversy requirement is not self-evident for motions to confirm or vacate an arbitral award. This is so primarily because each motion entails a Motion Dispute, the dispute over whether to grant the motion, and an Underlying Dispute, the dispute that necessitated arbitration. Courts faced with these motions could apply the Article III case or controversy requirement in several ways:

- Motion Dispute approach – satisfied if and only if the Motion Dispute meets the case or controversy requirement.
- Underlying Dispute approach – satisfied if and only if the Underlying Dispute meets the case or controversy requirement.
- Disjunctive approach – satisfied if either or both the Motion Dispute or Underlying Dispute meet the case or controversy requirement.
- Conjunctive approach – satisfied if and only if both the Motion Dispute and the Underlying Dispute meet the case or controversy requirement.

This section argues for the Motion Dispute approach.

The Supreme Court hinted at how it will handle this question in *Stolt-Neilsen v. Animalfeeds*. In that case, an arbitral panel issued a “Partial Final Clause Construction Award” that allowed future hearings to determine whether to certify a plaintiff class for the arbitration of an otherwise justiciable antitrust claim. Respondents argued that the motion to vacate did not present a case or controversy because the award’s only “injury” to Petitioner would be further

---

In its Reply, Petitioner argued that, regardless of the effect of this award, the motion was justiciable because the antitrust claims, the Underlying Dispute, were obviously justiciable. Justice Alito’s majority opinion implicitly rejected Petitioner’s argument by making the effect of vacating the award the locus of his ripeness analysis. Petitioners showed “sufficient hardship” because refusal to vacate the award would have required them to “submit to class determination proceedings . . .”

The Court could have adopted the Underlying Dispute approach and found a clear justiciable controversy. That it did not suggests that a majority of the justices would adopt either the Motion Dispute or Conjunctive approach. As described in the introduction, the court’s limited treatment of this issue is unlikely to predict how it would handle the same issue in the future.

This section argues in favor of the Motion Dispute approach – that a motion to confirm or vacate an arbitral award is a case or controversy if and only if the Motion Dispute is a case or controversy. Part A argues that the Motion Dispute approach best accomplishes the purposes of the case or controversy requirement. Part B argues that this approach accords with how federal courts examine their statutory subject matter jurisdiction for motions to confirm or vacate arbitral awards based on federal questions.

---

47 Stolt-Nielsen, 130 S. Ct. at 1767 n.2. As described below, ripeness is a doctrine that enforces the case or controversy requirement.
48 Stolt-Nielsen, 130 S. Ct. at 1767 n.2.
A. The Motion Dispute Approach Best Accomplishes the Purposes of the Case or Controversy Requirement

The starting point for analysis of the case or controversy requirement is the text. Article III, Section 2 of the U.S. Constitution reads:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The text does not explain which dispute must fall within the judicial power. Both the Motion Dispute and the Underlying Dispute might, for example, be “Controversies . . . between Citizens of different States.” As described previously, it is not self-evident whether the Constitution requires one or both to be “Controversies” as defined by judicial articulations.

Instead, this part argues in favor of the Motion Dispute approach because it best effectuates the functions of the case or controversy requirement. As described in part 2 of this section, courts frequently identify values and purposes behind different justiciability tests. This section uses those articulations to compare outcomes under the different approaches. Part 1 begins by describing the doctrines courts use to enforce the case or controversy requirement. Then, part 2 describes the relevant purposes of these doctrines. Last, part 3 argues that the Motion Dispute approach best accomplishes these goals.
1. Doctrines that Enforce the Case or Controversy Requirement

As foundation to support the next two parts, this part explains the doctrinal tests that enforce the case or controversy requirement. Several doctrines play this role. As relevant here, they are the prohibition on advisory opinions, standing doctrine, ripeness doctrine, and mootness doctrine.\(^\text{49}\) The following discussion provides only a brief overview of these doctrines, notwithstanding practical difficulties courts have had in applying them.

The prohibition on advisory opinions refers to the refusal of federal courts to exercise the judicial power for matters that do not present an actual dispute in which there is a substantial likelihood that a favorable court decision will bring about change.\(^\text{50}\) This is “the oldest and most consistent thread in the federal law of justiciability”\(^\text{51}\) and “the most important Article III limit on judicial power.”\(^\text{52}\) Prohibited advisory opinions include hypothetical,\(^\text{53}\) feigned,\(^\text{54}\) or collusive cases.\(^\text{55}\) To an extent, each of the following justiciability doctrines implements the prohibition on advisory opinions.\(^\text{56}\)

Standing requires that the plaintiff suffer “‘injury in fact’ - an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) ‘actual or imminent, not

\(^{49}\) This Article does not discuss the political question doctrine, although commentators include it among the justiciability doctrines. See, e.g., Erwin Chemerinsky, Federal Jurisdiction § 2.6 (2007 ed.).

\(^{50}\) Chemerinsky, supra note 49, at 49-50.

\(^{51}\) C. Wright, A. Miller, & E. Cooper, supra note 11 § 3529.1.

\(^{52}\) Chemerinsky, supra note 49, at 48.

\(^{53}\) C. Wright, A. Miller, & E. Cooper, supra note 11 § 3529.1.


\(^{55}\) Muskrat v. United States, 219 U.S. 346 (1911).

\(^{56}\) Chemerinsky, supra note 49, at 57.
conjectural or hypothetical . . . .”57 Additionally, “there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”58 Lastly, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”59

Ripeness seeks to “separate matters that are premature for review because the injury is speculative and may never occur” from Article III cases or controversies.60 The Supreme Court evaluates ripeness based on “the fitness of the issues for judicial decision” and “the hardship to the parties of withholding court consideration.”61 This test asks not whether a qualitatively sufficient injury is alleged, but whether its likelihood is sufficiently certain to justify review.

Mootness ensures that a justiciable dispute exists during all phases of litigation.62 For example, a suit seeking to enjoin another party from breaching a contract would become moot when the contract expired. Two key exceptions limit the scope of the mootness doctrine. First, a dispute is not moot if it regards “wrongs capable of repetition but evading review.”63 Second, a

58 Id. at 560-61 (internal citations omitted).
59 Id.
60 See CHEMERINSKY, supra note 49, at 117.
62 CHEMERINSKY, supra note 49, at 129.
63 CHEMERINSKY, supra note 49, at 135. The paradigm example of this exception is Roe v. Wade, in which the pregnancy that provided standing to challenge criminal abortion laws necessarily would always be moot before reaching the Supreme Court. 410 U.S. 113 (1973).
dispute cannot be rendered moot by voluntary cessation of offending conduct that the defendant is free to resume at any time.\textsuperscript{64}

2. The Relevant Purposes of the Case or Controversy Requirement as Applied to Arbitration

This part explains the purposes that courts ascribe to the justiciability doctrines and the case or controversy test. The following part will compare how well the different approaches accomplish these purposes when applied to motions to confirm or vacate arbitral awards.

i. The Case or Controversy Requirement Prevents Waste of Judicial Resources by Limiting When Courts Review Arbitral Action

By limiting the cases subject to judicial review, the case or controversy requirement helps to conserve judicial resources.\textsuperscript{65} Courts have limited time and money and need to exercise control over their docket.\textsuperscript{66} Some scholars also argue that courts have limited political capital, or that courts cannot consistently clash with the political branches and maintain credibility.\textsuperscript{67} To this end, each justiciability doctrines allow courts to abstain from decisions on the merits and preserve their ability to rule on clear cases and controversies.

This goal is particularly relevant to motions to confirm/vacate arbitral awards because Congress intended the act to reduce the judiciary’s workload.\textsuperscript{68} Congress approved by the Judiciary Act of 1925 and the FAA as part of a “two-pronged attack aimed at relieving an

\textsuperscript{64} CHEMERINSKY, supra note 49, at 139.

\textsuperscript{65} See, e.g., U. S. v. Richardson, 418 U.S. 166, 192 (1974); C. WRIGHT, A. MILLER, & E. COOPER, supra note 11, § 3531.13.

\textsuperscript{66} CHEMERINSKY, supra note 49, at 45-46.

\textsuperscript{67} Id.

overburdened judiciary.”69 While the Judiciary Act reduced the Supreme Court’s caseload by all but eliminating its mandatory jurisdiction,70 it left “‘unchecked’ the ‘major’ problem of escalating caseloads of the district courts.”71 The FAA, however, provided summary procedures to encourage arbitration and swiftly dispose of related actions.72 This suggests that this policy goal be considered prominently in considering the justiciability of these motions. The proper approach, therefore, does not force judicial review without practical impact.

ii. The Case or Controversy Requirement Promotes Sound Judicial Decision Making By Ensuring a Well-Developed Arbitral Record

Through the ripeness doctrine, the case or controversy requirement prevents judicial review when the facts are not sufficiently certain.73 To an extent, this prevents courts from guessing at future events and predicting behavior among the parties.74 This ensures that judicial holdings have practical effects and are not rendered meaningless by future contingencies. Also, this ensures that courts apply the law as clearly and correctly as possible after careful development of the past facts.75

69 Id. at 369.

70 Id. at 370 (citing Jeremy Buchman, Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925, 24 JUST. SYS. J. 1 (2003)).

71 Id. at 371 (citing FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 272, 294 (1928)).

72 Id. at 371-72.


For motions to confirm an arbitral award, the relevant facts are whether, as described above, the agreement specifies that judgment shall be entered upon the award, the moving party filed its motion to confirm within one year of the award, the moving party served notice to the adverse party, and there is no successful motion to vacate or modify the award. For motions to vacate an arbitral award, the relevant facts are whether one of the § 10(a) grounds applies, and whether notice was timely served. These facts relate to the arbitration, the conduct of the arbitrators, and the arbitration agreement. They do not relate to, for instance, whether one party breached the substantive contract. The proper approach, therefore, ensures an arbitral record with these developed facts.

iii. The Case or Controversy Requirement Promotes Fairness and Accuracy by Ensuring the Proper Parties

Through justiciability doctrines such as standing and the prohibition on feigned or collusive suits, the case or controversy requirement ensures that courts base their rulings on the arguments of the parties with the most at stake. For instance, courts require that a party suffer

---

76 “1. Where the award was procured by corruption, fraud, or undue means. 2. Where there was evident partiality or corruption in the arbitrators, or either of them. 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. 4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”
sufficient injury to invoke judicial process.\textsuperscript{77} This ensures vigorous litigation and fairness to those whom the court’s ruling will bind.\textsuperscript{78}

For motions to confirm or vacate arbitral awards, the subjects of the award have the most at stake. The subjects of the award would be those who are ordered to do something, or those who benefit from an order to do something directed to someone else. The proper approach, therefore, only allows the subjects of the award to benefit from judicial process.

iv. The Case or Controversy Requirement Maintains a Proper Balance Between Congress and the Judiciary

The case or controversy requirement supports proper separation of powers between Congress and the judiciary by limiting when federal courts review the actions of other branches of government.\textsuperscript{79} For example, the prohibition on advisory opinions prevents courts from opining on the legality of pending legislation. By requiring a legally cognizable injury, the standing doctrine prevents wholesale review of government programs.\textsuperscript{80} The case or controversy requirement therefore balances deference to Congress and an independent judiciary.

Superficially, motions to confirm/vacate arbitral awards cause little concern regarding separation of powers. District courts normally review a private adjudication process, rather than an agency decision or federal statute. Arbitrators are unlikely to decide on the constitutionality of a rule or the legality of a government act and therefore unlikely to directly interfere with the prerogatives of the political branches. When arbitrators consider statutory rights, such as anti-


\textsuperscript{78} C. Wright, A. Miller, & E. Cooper, supra note 11, § 3530 (“[T]he self-interests of the adversaries are relied upon to provide the foundation for sound adjudication.”).

\textsuperscript{79} Chemerinsky, supra note 49, at 45.

\textsuperscript{80} C. Wright, A. Miller, & E. Cooper, supra note 11, § 3531.13.
discrimination claims\textsuperscript{81} or antitrust claims,\textsuperscript{82} separation of powers concerns appear more relevant because the arbitrators are implementing federally created rights. This concern would be that arbitrators either over or under enforce the relevant law, and thus interfere with the statutory scheme. The Supreme Court, however, has consistently rejected such claims,\textsuperscript{83} calling them “far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.”\textsuperscript{84}

For motions to confirm or vacate arbitral awards, the concern is that the case or controversy requirement maintains a balanced role for the courts. Congress endorses arbitration and the role of federal courts in the federal legal regime. The proper approach, therefore, does not limit the role of federal courts without purpose. It allows courts to review arbitral orders when to do so would not contravene the other purposes of the case or controversy requirement. In that way, it respects the Congressional scheme while preserving judicial autonomy.

Each of the previous parts of this section described different goals of the case or controversy requirement. The following subpart turns to comparing how well the approaches to applying the case or controversy requirement to motions to confirm or vacate arbitral awards accomplish these goals.


\textsuperscript{83} Gilmer, 500 U.S. at 30.

3. The Motion Dispute Approach Best Accomplishes the Purposes of the Case or Controversy Requirement
   As described above, the case or controversy requirement could be applied in four ways to motions to confirm or vacate an arbitral award.\textsuperscript{85} This section argues that the Motion Dispute approach best accomplish each of the purposes of the case or controversy requirement mentioned in the previous part. The first three parts argue that the Motion Dispute approach is most likely to prevent improper judicial review relative to the Underlying Dispute and Disjunctive approaches.\textsuperscript{86} The fourth part argues that the Conjunctive approach prevents too much judicial review relative to the Motion Dispute approach.

i. The Motion Dispute Approach Best Prevents Waste of Judicial Resources
   The Motion Dispute approach best allows courts to conserve resources because it lets them avoid cases that are functionally moot. This approach requires that the relief requested, confirmation or vacatur, be timely and effective. If such relief would not cause a practical change for one of the parties, then the motion would not be a case or controversy.

   Under both the Underlying Dispute approach and the Disjunctive approach, however, courts would be forced to decide motions to confirm or vacate an arbitral award when the result will cause no practical effect. One example of this circumstance is when a winning party moves

\textsuperscript{85} Motion Dispute approach – satisfied if and only if the Motion Dispute is justiciable. Underlying Dispute approach – satisfied if and only if the Underlying Dispute is justiciable. Disjunctive approach – satisfied if either the Motion Dispute or Underlying Dispute is justiciable. Conjunctive approach – satisfied if and only if both the Motion Dispute and the Underlying Dispute are justiciable.

\textsuperscript{86} Notwithstanding the ability of federal courts to refrain from acting on prudential grounds. See C. WRIGHT, A. MILLER, & E. COOPER, \textit{supra} note 11 § 3529. Such prudential grounds are available regardless of which approach and therefore do not impact the analysis. Any reliance on prudential grounds as a safety valve for an improperly designed framework effectively removes the legal test for which cases fall within the judicial power.
to vacate an award in its favor. If an Underlying Dispute is justiciable, such as a breach of contract action, the successful respondent might still wish to challenge the basis for the panel’s decision if it contained objectionable reasoning or went beyond the arbitrator’s power. The order might rely on a two independently sufficient theories, for instance. In this case, a federal court decision to vacate the award would be advisory because respondents would have no present legal interest. Such review would be required, however, because the Underlying Dispute is justiciable.

Another example is if an arbitral order itself were advisory. If the parties to an arbitration request that the panel rule on their rights and obligations going forward when the Underlying Dispute is justiciable, such an order could be the subject of a motion to confirm/vacate. Judicial review of this order would not be ripe because there is no imminent or foreseeable dispute and no hardship to the parties from withholding review. Under the Underlying Dispute and Disjunctive approaches, however, courts would be required to hear this motion because the Underlying Dispute is a case or controversy.

ii. The Motion Dispute Approach Best Promotes Sound Judicial Decision-Making

The Motion Dispute approach best supports sound judicial decision-making because it ensures that the relevant facts for the motion to confirm or vacate an arbitral award are already established. If the conduct and result of the arbitration is not yet clear then the motion to confirm

---

87 Cf. Maria Santiago v. Corporacion De Renovacion Urbana Y Vivienda De Puerto Rico, 554 F.2d 1210, 1212, 1213 (1st Cir. 1977) (refusing to decide a case when “the defendants will be bound as tightly by the judgment below whether they ‘win’ this appeal or lose it.”).

or vacate an arbitral award would not be justiciable under the Motion Dispute approach. An example would be if one of the parties moved to vacate an arbitral award not yet issued. Such a motion is not justiciable because the relevant facts are not yet established. In contrast, such a motion would be justiciable under the Underlying Dispute and Disjunctive approaches so long as the Underlying Dispute is justiciable.

Another example would be when a party to a multi-party arbitration moves to vacate or confirm an award in which it is not involved. In a multi-party arbitration, more than two parties participate. If the panel orders party A to pay damages to party B, party C might move to vacate the order because it disagrees that the panel had authority to resolve the dispute. A federal court would be forced to hear the claim of such a party if the Underlying Dispute were justiciable. Party C is not paying damages, has no damages in its favor, and is not a third-party beneficiary. This forces the court to decide the motion based on the arguments of a party with no legal stake. This contravenes the goal of the case or controversy requirement to promote sound decision-making.

iii. The Motion Dispute Approach is Most Fair to Parties Not Present

The Motion Dispute approach is most fair to parties not present because it ensures that the party bringing a motion to confirm or vacate an arbitral award has injury-in-fact. For instance, if a customer unsuccessfully arbitrates a dispute with a telecommunications company, a motion to vacate that award by a competitor to the company is not justiciable because only the customer has enough at stake to vigorously litigate the claim.

Another example of when the Underlying Dispute and Disjunctive approaches could lead to improper judicial involvement would be if the parties colluded to have the arbitrators issue a particular award. If the parties have a sufficient Underlying Dispute, they might seek to resolve
it by having the panel issue an award that impairs the rights of a third party.  
For example, two parties to a contract could collude in having the panel find that there was no intended third-party beneficiary to enable rescission of a contract. One or both of the parties could move for a court to confirm that award, and the court would need to hear that motion.

iv. The Motion Dispute Approach Best Maintains Separation of Powers by Not Excessively Limiting the Role of Federal Courts

The previous three parts argued that the Motion Dispute approach is superior to the Underlying Dispute and Disjunctive approaches because the Motion Dispute approach uniquely prevents judicial involvement when it would be contrary to the purposes of the case or controversy requirement. This section changes the focus to the Conjunctive approach. It argues that the Motion Dispute approach is superior to the Conjunctive approach not because the Conjunctive approach demands too much judicial review, but because it allows too little. As such, the Conjunctive approach intrudes too far into Congressional authority to authorize judicial review.

The Conjunctive approach would disrupt the statutory arbitration scheme because it would require that federal courts find that the Underlying Dispute, in addition to the Motion Dispute, is a case or controversy. Arbitral panels, however, do not limit themselves to deciding disputes that qualify as cases or controversies in the Article III, Section 2 sense.  

---

89 See, e.g., South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300 (1882) (refusing to hear claim between parent corporation and subsidiary corporation that would adjudicate the rights of minority shareholders who were not independently represented at trial).

90 See Environmental Barrier Co., LLC v. Slurry Systems, Inc., 540 F.3d 598, 605 (7th Cir. 2008) (“There is no reason to suppose that arbitrators are bound to the case-or-controversy requirement that circumscribes the judicial power of the United States.”).
words, “[a] dispute may be arbitrable within the specific meaning of the arbitration clause, and not give rise to a justiciable cause of action . . .”91 This could happen, for example, if a party sought indemnity for a harm for which it had yet to be found liable.92 By excluding federal courts from regulating awards based on non-justiciable Underlying Disputes, the Conjunctive approach would alter the arbitration landscape in the U.S. after eighty-five years of Congressional tacit approval.93

This intrusion into the statutory scheme would be especially problematic in the international context. Sections 202 and 203 of the FAA evince a special concern that international arbitration awards be enforced in federal court.94 It would frustrate this purpose if only those international Underlying Disputes that meet the constitutional case or controversy requirement could then be heard in federal court.

91 Greenwich Marine, Inc. v. S. S. Alexandra, 339 F.2d 901, 908 (2d Cir. 1965). Cf. N.Y. C.P.L.R. § 7501 (“A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy . . .”); Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576, 589 n.7 (2008) (noting that the FAA was based on the NY arbitration law).

92 See Greenwich Marine, 339 F.2d at 908. In this case, a charterer contracted a ship to a third-party who brought action for damages against charterer. The charter sought indemnification from ship owner for damages in the event that it was found liable to the third-party. For other examples of disputes that would be arbitrable but not justiciable, see Cohen v. Orthalliance New Image, Inc., 252 F. Supp. 2d 761, 769-71 (N.D. Ind. 2003) (motion to declare invalidity of an option to buy plaintiff’s dental practice was not justiciable because a condition precedent to that option had not been realized); M & M Transp. Co. v. U. S. Industries, Inc., 416 F. Supp. 865 (S.D.N.Y. 1976) (action for declaratory judgment against former parent corporation on entitlement to tax refund was premature because the tax refund had yet to be given to either party).

93 Parties would be able to confirm or vacate awards in state courts in most cases.

94 See supra note 43 and accompanying text.
That it limits Congressional power is not necessarily a reason to reject the Conjunctive approach because the Constitution always limits. This intrusion, however, should be rejected because it does not promote any of the case or controversy purposes, such as conservation of resources, sound judicial decision-making, or fairness to parties not present. The Conjunctive approach does not promote these goals because, even when the Underlying Dispute is not justiciable, the Motion Dispute can be sufficient to create a case or controversy. For example, if an arbitral panel issues an award for money damages in a dispute that would not have been ripe in a federal court, the dispute over the money damages is nevertheless a case or controversy. It presents an order to pay money from one party to another.

Prior case or controversy cases support the Motion Dispute approach, and its corollary that the Underlying Dispute does not need to be a case or controversy for a federal court to take jurisdiction. In *ASARCO v. Kadish*, the Supreme Court confronted the analogous situation of a state court’s resolution of a non-justiciable dispute creating a justiciable dispute for the losing party.\(^9^5\) In that case, the Court held that, had they been in federal court, state taxpayers would not have had standing to seek an injunction against a state law for sale of mineral leases because they suffered no individuated harm.\(^9^6\) Once the state court awarded those taxpayers an injunction, however, the effect of that injunction on the holders of the mineral leases created a sufficient case or controversy to allow an appeal in federal court.\(^9^7\) This case shows that a party seeking relief in federal court need only show that the present request provides a sufficient case or controversy. This supports the Motion Dispute approach because it shows that federal courts

\(^{95}\) 490 U.S. 605 (1989).

\(^{96}\) *ASARCO*, 490 U.S. at 613-17.

\(^{97}\) *Id.* at 617-19.
should only be concerned with the justiciability of the matter on which they are asked to decide. This means the motion to confirm or vacate the arbitral award, rather than the dispute that necessitated arbitration.

Part A thus shows why federal courts should use the Motion Dispute approach to determine whether a motion to confirm or vacate an arbitral award is a case or controversy. The Motion Dispute approach accomplishes the purposes of this requirement better than its rivals, the Underlying Dispute, Disjunctive, and Conjunctive approaches. By limiting judicial review that would defeat these purposes and authorizing judicial review otherwise, the Motion Dispute approach is the best alternative.

**B. Federal Courts Use the Motion Dispute Approach to Analyze Whether They Have Federal Question Jurisdiction For Motions to Confirm or Vacate Arbitral Awards**

The second reason why federal courts should use the Motion Dispute approach to determine whether a motion to confirm or vacate an arbitral award is a case or controversy is that federal courts use this approach to determine whether they have federal question jurisdiction. As described in the federal court jurisdiction background section, Article III of the Constitution limits federal jurisdiction in two ways. One limit, the case or controversy requirement, is the focus of this Article. The other limit, which relates to the type of claim (i.e. federal question jurisdiction) or status of parties (e.g. diversity jurisdiction), also requires courts to choose an approach for motions to confirm or vacate an arbitral award. In other words, a federal court adopting the Motion Dispute approach would find that the motion raises a federal question if and only if the motion itself raised a federal question. This part begins by explaining that federal courts have, in fact, adopted this approach. Then, this part distinguishes recent precedent and supports continued use of the Motion Dispute approach. As federal courts use this approach for
one limit on their subject matter jurisdiction (federal question), they should use it for the other (the case or controversy requirement) for doctrinal simplicity and coherence.

According to every federal appellate court to consider the issue, the dispute presented by the motion to confirm or vacate an arbitral award itself must present a “substantial question of federal law” to invoke federal question jurisdiction under §§ 9 and 10.98 *Peabody Coal Co. v. Navajo Nation* illustrates how these courts use the Motion Dispute approach. In *Peabody*, the Ninth Circuit upheld the district court’s decision to refuse jurisdiction because Peabody’s motion to enforce an arbitration award did not raise a substantial federal question.99 Peabody argued that its motion presented a federal question because the Underlying Dispute alleged that the Navajo Nation violated a lease that the Secretary of the Interior approved. While conceding that the Underlying Dispute would present a substantial federal question, the court emphasized that only the dispute presented by the motion to confirm the award could present the necessary jurisdictional basis.100

The Court’s opinion in *Vaden v. Discover Bank* does not alter this rule. In that case, the Court specified that federal courts should “look through” to the underlying controversy to

---


99 *Peabody Coal*, 373 F.3d at 951-52.

100 *Peabody Coal*, 373 F.3d at 951. The court held as much despite understanding that Peabody’s only other option would be a claim in Navajo tribal court.
determine federal question jurisdiction over a petition to compel arbitration under § 4 of the FAA.\textsuperscript{101} This opinion resolved a prior circuit split.\textsuperscript{102}

Although it creates asymmetry, federal courts should continue to refrain from looking through to the Underlying Dispute to find federal question jurisdiction for motions to confirm or vacate arbitral awards. First, the critical language in § 4 that justified the Court’s departure from the Motion Dispute approach is absent from §§ 9 and 10, the sections governing confirmation and vacatur.\textsuperscript{103} Section 4 allows parties to move for specific enforcement of an arbitration agreement in a “court which, save for [the arbitration] agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties.” The “save for” language was critical.

The second reason courts should continue to use the Motion Dispute approach to assess federal question jurisdiction over motions to confirm or vacate arbitral awards is that any asymmetry with motions to compel arbitration might be intentional. Congress might have had far greater concern for enforcing agreements to arbitrate relative to vacating completed awards.\textsuperscript{104} Additionally, Congress might have considered the substantive grounds for vacating an award, such as fraud and corruption, to be primarily questions of state law for state courts.\textsuperscript{105}

\textsuperscript{101} 129 S.Ct. 1262 (2009).
\textsuperscript{102} \textit{Vaden}, 129 S. Ct. at 1270.
\textsuperscript{103} \textit{Kasap}, at 1247; \textit{see Vaden}, 129 S. Ct. at 1273-74 ("The phrase ‘save for [the arbitration] agreement’ indicates that the district court should assume the absence of the arbitration agreement and determine whether it ‘would have jurisdiction under title 28’ without it.").
\textsuperscript{104} \textit{Kasap}, 166 F.3d at 1247.
\textsuperscript{105} \textit{Kasap}, 166 F.3d at 1247.
The third reason federal courts should continue to use the Motion Dispute approach to assess whether motions to confirm or vacate arbitral awards present a federal question is that, federal appellate courts unanimously choose the Motion Dispute approach. Each court that considered the issue adhered to the traditional rule that "subject matter jurisdiction must be supported by facts appearing on the face of a well-pleaded petition to vacate." This focus on the petition itself was reiterated by the Court in Vaden, testifying to its continued validity. Even after Vaden, courts continue to correctly apply the Motion Dispute approach to assess whether these motions present a federal question.

Part A of this section explained how the Motion Dispute approach best accomplishes the purposes of the case or controversy requirement. Part B explained how federal courts already use the Motion Dispute approach to determine whether they have federal question jurisdiction. These arguments suggest that federal courts should adopt the Motion Dispute approach. Sections III and IV assess what federal courts should look for when applying the case or controversy requirement. This is the second-level dilemma identified in the introduction, and to which the Article now turns.

III. The Nature of the Case or Controversy Requirement for Motions to Confirm or Vacate Arbitral Awards

This section moves from identifying the locus of the case or controversy analysis to what this analysis entails. From this point forward, the Article assumes that courts will use the Motion Dispute approach. Even with this assumption, federal courts must still resolve the second level


107 Vaden, 129 S. Ct. at 1276-77.

problem of determining what a motion must allege to be a case or controversy. A motion to confirm or vacate an arbitral award can be construed as protecting two different types of interests. Determining which interests are sufficient to support a case or controversy affects whether the case or controversy requirement will be an empty or meaningful test. This section presents background information and then presents possible options, while the following section contains the argument. This section starts by explaining some background information on standing doctrine, one of the doctrines that enforces the case or controversy requirement.

A case or controversy includes an injury to a legally protected interest. The standing doctrine requires that this injury be identified and analyzed. To have standing, a plaintiff must allege “‘injury in fact’ - an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) ‘actual or imminent, not conjectural or hypothetical . . . .”\(^{109}\)

Additionally, “there must be a causal connection between the injury and the conduct complained of-the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”\(^{110}\) Lastly, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”\(^{111}\)

When analyzed through the lens of standing doctrine, a party moving to confirm an arbitral award must explain which legally protected interest the award affects and how the court can redress that injury by confirming the award. This might take two forms. First is the Federal Rights theory. This theory holds that FAA § 9 created a federal right to have a court confirm an

---


\(^{110}\) Lujan, 504 U.S. at 560-61 (internal citations omitted).

\(^{111}\) Lujan, 504 U.S. at 561.
award meeting the statutory criteria. The unconfirmed award, regardless of content, would be sufficient injury. Second is the Effect of the Award theory. This theory holds that the injury is that the award has not been performed. This theory focuses on the impact of performance of the award, rather than on whether a court has confirmed it, and implies that Congress did not intend to create a new legally protected interest.

The same two theories might apply to motions to vacate arbitral awards. In this case, the Federal Rights theory identifies the legally protected interest as the right to have a court vacate an arbitral award when one of the § 10 substantive grounds is satisfied. A respondent would have an injury when an order suffers from a § 10 defect, even if it was in favor of the respondent. The Effect of the Award theory, in contrast, identifies the legally protected interest as the consequence of having to comply with an award. For example, if a panel issues an award that orders the respondent to pay damages to the claimant, then respondent’s injury is the requirement to pay damages.

Before determining which injuries support standing, and thus a case or controversy, the foregoing section presented two possibilities. Section IV presents an argument in favor of the Effect of the Award theory by criticizing the Federal Rights theory.

IV. Courts Should Reject the Federal Rights Theory of Injury for Motions to Confirm or Vacate an Arbitral Award

This section argues against the Federal Rights theory. Part A explains how the federal rights approach would functionally eliminate the justiciability tests. Part B argues that this is objectionable because the statutory tests that would be left to control which arbitral orders federal courts could review are undesirable. Part C follows by arguing that courts should not adopt a theory that functionally eliminates the justiciability doctrines because they provide unique value in this context. Last, part D argues that the Federal Rights theory would be
inconsistent with the non-jurisdictional cast of the FAA. The consequence of these arguments is that, by process of elimination, federal courts should adopt the Effect of the Award theory when assessing whether a party has standing to move to confirm or vacate an arbitral award.

**A. The Federal Rights Theory Functionally Eliminates the Justiciability Doctrines**

The Federal Rights theory would functionally eliminate the justiciability tests by allowing lack of confirmation or vacatur to constitute a legal injury. Although a court might formally assess whether a motion presented a case or controversy, an affirmative finding is pre-ordained by how the Federal Rights theory defines injury. As described above, standing requires injury in fact, a causal connection between the injury and the conduct complained of, and the injury must be redressable by a favorable decision. A motion to confirm an award would always show injury in fact because the Federal Rights theory defines injury as a yet-to-be-confirmed arbitral order. This injury is caused by the conduct complained of, that is, lack of judicial confirmation. Were a court to confirm the award, the injury of lack of confirmation would be redressed in a triumph of circularity. By consequence, the Federal Rights theory conflates justiciability analysis with the merits of § 9 or 10. Courts would, in effect, be asking the same question to decide whether they have jurisdiction and how they should rule. This is even more obvious for a motion to vacate an arbitral award. Under the Federal Rights theory, to determine whether a party alleged injury in fact the court asks if there is an award to which one of the § 10(a) grounds applies. The party suffers no injury if none of the grounds apply to the award. If the court finds it has jurisdiction over the controversy, it would decide the merits. The merits would be whether to vacate the award because one of the § 10(a) grounds applies.

---

112 *Lujan*, 504 U.S. at 560-61.
This analytical confusion suggests something amiss with the Federal Rights theory. If federal courts assess injury in reference to the statute, they let Congress decide whether the Constitution allows judicial review. Even if this were not objectionable in itself, the next three parts explain the drawbacks of his theory.

B. Courts Should Not Rely on the Statutory Test to Limit Judicial Review

Judge Posner has written:

There can be a jurisdictional question in cases challenging or seeking enforcement of arbitration awards, for although no statute corresponding to section 1291 tells the courts when an arbitration award is ripe for judicial enforcement or review, the courts are naturally reluctant to invite a judicial proceeding every time the arbitrator sneezes.\(^{113}\)

Before acting, federal courts need to be satisfied that the requested action is within their Article III judicial power and that a federal state authorizes their action. This means that, even when the Federal Rights theory functionally eliminates the case or controversy requirement, federal courts must determine whether a statute authorizes them to review an arbitral action. Thus, they find a doctrine within the FAA. The first part examines this doctrine and the second explains its deficiencies.

1. The Statutory “Finality Test” and Its Applications

Courts interpret the FAA to limit judicial review to “final” arbitral orders, as opposed to those that do not dispose of all issues submitted to the arbitrator.\(^{114}\) To illustrate this distinction,


\(^{114}\) Publicis Communication v. True North Communications, Inc., 206 F.3d 725, 728 (7th Cir. 2000) (“If the arbitration tribunal's . . . decision was final, then [the district court] had the authority to confirm it. If the arbitrators'
consider an arbitration in which the parties request the arbitrator to issue a separate award on its own jurisdiction before issuing an award resolving the merits of the dispute. An award resolving both jurisdiction and the merits would dispose of all the issues submitted to the arbitrator, while an award resolving only jurisdiction would not. The “Finality Test” is used to distinguish awards fit for judicial review.

Courts derive the Finality Test from one of the substantive grounds for vacatur. Section 10(a)(4) allows the district court to vacate an arbitral award “[w]here 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.” Courts consider this test to be a jurisdictional requirement, rather than a substantive grounds for vacatur.\(^{115}\) Although § 9, concerning confirmation of awards, does not reference finality, courts nevertheless require that motions to confirm arbitral awards pass the Finality Test. They do so because courts must confirm an award unless one of the substantive grounds applies and thus confirmation implies the non-applicability of the grounds for vacatur.\(^{116}\)

Two theories appear consistently to define the Finality Test. The first theory focuses on the intent of the arbitrators and the parties. According to the intention theory, courts assess an

\(^{115}\) Hart Surgical, Inc. v. Ultracision, Inc., 244 F.3d 231, 233 (1st Cir. 2001). (“In applying this statute, we have followed the principle that ‘[i]t is essential for the district court’s jurisdiction that the arbitrator’s decision was final, not interlocutory.’”)

\(^{116}\) Yasuda Fire & Marine Ins. Co. of Europe v. Continental Casualty Co., 37 F.3d 345, 347-48 & n.4 (7th Cir. 1994). See also Widman, supra note 114, (“[I]t makes sense that finality is an implied requirement under FAA Section 9, particularly since non-finality is grounds for the opposite relief-vacatur-in FAA Section 10(a)(4).”)
award’s finality by “the intent of the parties in agreeing to a particular process and the intent of the arbitrators in issuing the award.”[117] Specifically, “if the arbitrator himself thinks he’s through with the case, then his award is final and appealable.”[118] An award can also be “appealable” if the parties agreed that it would be, either formally or informally.[119]

The second theory imports the collateral-order doctrine to define finality.[120] The collateral-order doctrine determines when federal appellate courts have jurisdiction over appeals from federal district courts.[121] Normally, appellate courts may only hear appeals from “final decisions of the district courts of the United States.”[122] The collateral-order doctrine allows appellate courts to hear appeals of district court decisions that “finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”[123] This doctrine would prohibit appellate review of district court decisions that decide liability but do not decide damages.[124] If calculation of damages is ministerial or mechanical after liability is found, however, an appellate court can exercise

---

[117] Gaitis, Risks and Incongruities, supra note 9, at 42-43. (citing trade/transport at 195); Hart Surgical, 244 F.3d at 235 (“the definiteness with which the parties have expressed an intent to bifurcate is an important consideration.”); Providence Journal Company v. Providence Newspaper Guild, 271 F.3d 16, 19 (1st Cir. 2001).


[119] Providence, 271 F.3d at 19.

[120] Smart, 315 F.3d at 725; Home Insurance Co. v. RHA/Pennsylvania Nursing Homes Inc., 127 F. Supp. 2d 482, 487-88 (S.D.N.Y. 2001); Hart Surgical, 244 F.3d at 235 n.3.

[121] Cf. Smart, 315 F.3d at 725.


If a district court judgment only awaits calculation of attorney’s fees, for example, the judgment is final for § 1291. Courts sometimes use the collateral-order doctrine to test awards for finality.

The Finality Test allows judicial review for three different scenarios of arbitral orders that fall short of a final and complete disposition of all claims submitted to the arbitrator. First, this test allows review of arbitral orders for injunctive relief. This includes orders to post a

---

125 Smart, 315 F.3d at 726.
127 Island Creek Coal Sales Co. v. City of Gainesville, Florida, 729 F.2d 1046, 1049 (6th Cir.1984) (an interim arbitration award that required the defendant-city to continue performance of a coal purchase contract until the arbitration panel issued its final award was subject to confirmation.). Sperry Int'l Trade v. Israel, 689 F.2d 301, 304 n. 3 (2d Cir.1982) (relating district court's conclusion that an interim award “was a final decision as to the severable issues regarding the letter of credit” in light of award’s own stipulation that either party could seek confirmation). Home Insurance Co., 127 F. Supp. 2d at 487-488; Pacific Reinsurance v. Ohio Reinsurance, 935 F.2d 1019, 1023 (9th Cir.1991). See Widman, supra note 144 (“Case law shows that there are five theories by which an interim award granting equitable relief will be deemed final, and thus confirmable, by a district court under FAA Section 9.”).
bond on a future award\textsuperscript{128} or injunctive orders “necessary to prevent a potential final award from being meaningless.”\textsuperscript{129}

Second, this test allows review of arbitral orders deciding liability but not damages.\textsuperscript{130} For instance, the First Circuit upheld jurisdiction over an award deciding whether the contract had been violated, but not damages, in \textit{Providence Journal Company v. Providence Newspaper Guild}.\textsuperscript{131} In this case, “the parties agreed to divide the arbitration hearing into two parts: the first phase required the arbitrator to determine whether the collective bargaining agreement had been violated; and the second phase required him to fashion a remedy.”\textsuperscript{132} This case extended a prior First Circuit ruling by considering interim arbitral awards “final” even when the parties only


\textsuperscript{129} Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1023 (9th Cir. 1991); Ace/Cleardefense, Inc. v. Clear Defense, Inc., 47 Fed. Appx. 582, 582 (D.C. Cir. 2002).

\textsuperscript{130} Gaitis, \textit{Risks and Incongruities}, supra note 9, at 50 (citing Providence Journal Company v. Providence Newspaper Guild, 271 F.3d 16 (1st Cir. 2001)).

\textsuperscript{131} \textit{Providence}, 271 F.3d at 19.

informally agreed to bifurcate the arbitration.\footnote{Stuart M. Widman, \textit{Surveying the Split: More Theories on Confirming Awards Where There Are or Appear to Be More Than One Claim or Issue}, 24 \textsc{Alternatives to the High Cost of Litig.} 118, 118 (2006) (citing Hart Surgical Inc. v. UltraCision Inc., 244 F.3d 231 (1st Cir. 2001)).} As the collateral-order doctrine would prohibit such review, courts have focused on the intention-focused theory for this scenario.\footnote{\textit{Hart Surgical}, 244 F.3d at 235 & n.3.}

Third, this test allows judicial review of arbitral awards over “separate and independent claims.”\footnote{\textit{Publicis}, 206 F.3d at 729.} For example, in \textit{Publicis Communication v. True North Communications, Inc.}, the Seventh Circuit upheld review of an arbitral order requiring one party to disclose tax records to the other.\footnote{\textit{Publicis Communication v. True North Communications, Inc.}, 206 F.3d 725, 729-30 (7th Cir. 2000).} Although one party characterized the order as a discovery order, the court held that “[a] ruling on a discrete, time-sensitive issue may be final and ripe for confirmation even though other claims remain to be addressed by arbitrators.”\footnote{\textit{Publicis}, 206 F.3d at 729.} In so holding, the court explained that “producing the documents wasn't just some procedural matter - it was the very issue True North wanted arbitrated.”\footnote{\textit{Publicis}, 206 F.3d at 729.} Courts have used similar logic to enforce damage awards when the entire liability claim had yet to be evaluated.\footnote{\textit{Home Insurance Co. v. RHA/Pennsylvania Nursing Homes Inc.}, 127 F. Supp. 2d 482, 487-488 (S.D.N.Y. 2001) (directing party to pay amount “admittedly due” before deciding actual contract liability claim); \textit{Compania Chilena deNavegacion Interoceanica, S. A. v. Norton, Lilly & Co.}, 652 F. Supp. 1512, 1515 (S.D.N.Y. 1987) (ordering payment “based solely on defendant's accounting” of what they owed plaintiffs). \textit{But see TIG Ins. Co. v. Security Ins. Co. of Hartford}, 2003 WL 22289273, *2 (D.Conn Jan 22, 2003) (NO. CIV. 302CV2206 PCD) (refusing to confirm an interim award because the damages were part of a claim not yet finally decided).}

\begin{flushright}
133 Widman, \textit{Surveying the Split: More Theories on Confirming Awards Where There Are or Appear to Be More Than One Claim or Issue}, 24 \textsc{Alternatives to the High Cost of Litig.} 118, 118 (2006) (citing Hart Surgical Inc. v. UltraCision Inc., 244 F.3d 231 (1st Cir. 2001)).

134 \textit{Hart Surgical}, 244 F.3d at 235 & n.3.

135 Widman, \textit{ supra} note 133, at 119.

136 \textit{Publicis Communication v. True North Communications, Inc.}, 206 F.3d 725, 729-30 (7th Cir. 2000).

137 \textit{Publicis}, 206 F.3d at 729.

138 \textit{Publicis}, 206 F.3d at 729.

\end{flushright}
The foregoing discussion of the Finality Test provides the background necessary for its rejection. The Federal Rights theory would make the Finality Test the sole mediator of federal court review of motions to confirm or vacate arbitral awards. The following argues that this test has inherent flaws.

2. Reasons to Reject the Finality Test

The first reason to reject the Finality Test is that it lacks support in the text. First, it reads § 9 as requiring the party moving to confirm an arbitral award to prove the award is final. Section 9, however, allows courts to confirm “award[s]” generally, with no qualification. As described in the previous components, courts justify the Finality Test by arguing that lack of finality is a substantive ground for vacatur under § 10(a)(4), and thus confirmation implies that no vacatur grounds apply. This may be so, but the party opposing the motion to confirm should then bear the burden of proving lack of finality. By casting the Finality Test as jurisdictional, courts place this burden on the party moving for confirmation.

The second reason the Finality Test lacks support in the text is that no principled reason explains why only one of the substantive grounds for vacatur is jurisdictional. Courts must vacate awards procured by corruption, fraud, or undue means, for example, but courts do not consider the absence of these grounds to be a jurisdictional requirement. Possibly, only making “finality” a jurisdictional rule shows courts reading into the statutory test part of the justiciability doctrines. For instance, courts might be analogizing to the prohibition on advisory opinions in preventing courts from reviewing arbitral orders subject to later revision by the arbitrators. Instead of selectively choosing language to approximate the purposes of the justiciability doctrines, courts should apply them as such.

140 See FAA § 10(a)(1).
The third reason the Finality Test lacks support in the text is that it elevates a ground justifying vacatur to a jurisdictional hurdle. Even if courts were correct to argue that confirmation implies that no grounds to vacate apply, the consequence of failing the Finality Test should be vacatur. Instead, the consequence is that the court refuses to hear the motion. It would be absurd to vacate non-final orders simply because one party was too hasty in moving for confirmation. Yet, this would be the more logical result of using the Finality Test.

The fourth reason the Finality Test lacks support in the text is that it does not replicate the statutory ground for vacatur. Specifically, courts require a lesser degree of finality to satisfy their jurisdiction than the statute requires to vacate the award. To the extent that a court adheres to the intention-focused method of defining finality, an award is final if the arbitrators indicate that it is final. That award might not address all the necessary issues, however, as required by the statute.\(^{141}\) In that case, the award would be final enough for jurisdiction, but not final enough to be confirmed. Such a result is inconsistent with the idea that the Finality Test was already part of the FAA.

Beyond lack of support in the text, another warrant against the Finality Test is the weakness of analogy to the collateral order doctrine. Appealing a district court’s ruling is different in important ways from moving to vacate an arbitrator’s judgment. First, an arbitral panel, unlike a district court, does not need to ensure statutory and constitutional jurisdiction; it just needs consent. Second, the collateral order doctrine and the final judgment rule represent the way courts and Congress balance the competing goals of efficiency in dispute resolution and ensuring accurate judgments. One of arbitration’s benefits is that it allows parties to strike their

\(^{141}\) See FAA § 10(a)(4).
own balance between efficiency and truth-seeking. Importing this test ignores the very nature of arbitration.

Part B explained the Finality Test and what review it allows. It then criticized this test as weakly supported by the text. This argument suggests rejecting the Federal Rights theory that leaves the statutory tests as the sole mediator of when federal courts review motions to confirm or vacate arbitral awards. The next part builds on the argument against the Federal Rights theory by arguing for the benefits of the justiciability doctrines this theory displaces.

**C. The Importance of Justiciability Doctrines for Motions to Confirm or Vacate Arbitral Awards**

As explained in part A of this section, a consequence of the Federal Rights theory is that the justiciability doctrines that enforce the case or controversy requirement would have no practical effect. This part revisits the benefits of this requirement and explains a unique benefit relative to a purely statutory test.

The case or controversy requirement advances several important interests in the abstract and in the context of the FAA. This Article explained in sections II and III how the case or controversy requirement furthers policy interests such as conservation of judicial resources, sound judicial decision making, fairness to parties not present, and separation of powers between Congress and the judiciary. This requirement cannot provide this benefits under the Federal Rights theory that relies completely on the statutory test.

A further benefit of the case or controversy requirement is that it limits Congressional authority to expand the role of federal courts beyond their proper domain. In other words, even if the Finality Test was a coherent test that provided appropriate limits on the judiciary, courts should still refuse to cede so much authority to Congress because Congress could always revise the FAA and create a new jurisdictional test. For example, Congress might explicitly direct
federal courts to review arbitral orders subject to later revision. Or, Congress might direct federal courts to review arbitral orders in which the litigants were not truly adverse. In this way, courts might undertake judicial review that settled law otherwise prohibits. This is only possible when the case or controversy requirement has been functionally eliminated. Thus, the Federal Rights theory eliminates the case or controversy requirement’s ability to preserve a proper separation of powers between branches of government.

D. The Federal Rights Theory Conflicts with Supreme Court Precedent Interpreting the FAA

After part A explained how the Federal Rights theory would practically nullify the case or controversy requirement, part B argued that the Finality Test that would remain had inherent flaws. Part C argued that nullifying the case or controversy requirement would prevent it from serving important functions. This part concludes by arguing that the Federal Rights theory conflicts with how the Supreme Court interprets the FAA.

As described in the federal court jurisdiction background section, Article III of the Constitution limits federal jurisdiction in two ways. One limit is the case or controversy requirement. The other limit relates to the type of claim (i.e. federal question jurisdiction) or status of parties (e.g. diversity jurisdiction). The Federal Rights theory holds that the first limit is satisfied if a party is entitled to judicial confirmation or vacatur, but a court has yet to act. In other words, such a situation presents a sufficient case or controversy to bring the matter within the judicial power of the federal courts.

Regarding the second limit, the Federal Rights theory would suggest that enforcing the right to confirmation or vacatur would be a federal question. Federal law, the FAA, defines the right so it stands to reason that resolving the merits of motion to confirm or vacate an arbitral award would present a substantial federal question.
The Supreme Court has rejected this interpretation of the FAA, however. The Supreme Court unequivocally holds that motions pursuant to the FAA do not raise a federal question.\textsuperscript{142} For this reason, the Supreme Court refers to the FAA as “something of an anomaly in the field of federal-court jurisdiction.”\textsuperscript{143} It would exceed “anomaly” if the FAA creates a federal right that satisfies the case or controversy requirement but cannot support federal question jurisdiction. Yet, this would be the result if courts were to interpret the FAA as creating a federal right to judicial process on a valid award. It seems implausible that Congress intended to create federal rights that cannot be protected in a federal forum without an independent jurisdictional ground.

Section IV argued that, when analyzing motions to confirm or vacate arbitral awards, federal courts should use the Effect of the Award approach. They should do so because the alternative, the Federal Rights approach, leaves a flawed statutory test, loses the benefits of the case or controversy requirement, and is inconsistent with Supreme Court precedent. This section thus resolves the second level problem of how federal courts apply the case or controversy requirement after they have decided to which dispute.

**Conclusion**

This Article answered two questions federal courts must resolve before they apply the case or controversy requirement to motions to confirm or vacate an arbitral award. First, which dispute is the correct locus of analysis? Although some might argue that the court should ensure that the Underlying Dispute is justiciable, this paper argues that a court should find such a matter to be within its judicial power if and only if the motion itself presents a case or controversy. Second, what type of injury must a moving party show for the controversy to meet the case or

\textsuperscript{142} Hall Street, 552, U.S. at 581-82.

\textsuperscript{143} Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 25, n. 32 (1983).
controversy requirement? Rejecting the possibility of a federal right, this Article argues that the moving party must show that performance of the award must affect a legally protected interest. The conclusion now revisits the Supreme Court’s recent application of the case or controversy requirement to a motion to vacate an arbitral award.

In *Stolt-Nielsen*, petitioners moved to vacate an arbitral award that construed the contract as authorizing, in theory, class arbitration.\(^{144}\) In Justice Alito’s words, this meant “that petitioners must now submit to class determination proceedings before arbitrators who, if petitioners are correct, have no authority to require class arbitration absent the parties’ agreement to resolve their disputes on that basis.”\(^{145}\) His majority opinion also noted “[s]hould petitioners refuse to proceed with what they maintain is essentially an ultra vires proceeding, they would almost certainly be subject to a petition to compel arbitration under 9 U.S.C. § 4.”\(^{146}\) This section analyzes the Court’s description of the effect of the award, and concludes that the motion to vacate this award did not present a case or controversy.

Under this Article’s framework, the Court should have found that the motion presented a case or controversy if and only if the Motion Dispute was justiciable. The Underlying Dispute was clearly a case or controversy, but the Court analyzed the consequences of the motion to vacate to justify its finding. This shows that the court followed either the Motion Dispute approach or the Conjunctive approach, which requires both disputes to meet the case or controversy requirement. Otherwise, the Motion Dispute would have been irrelevant. Further, this Article suggests that the justiciability of the motion turns on the effects of the court’s


\(^{145}\) *Id.* at 1767 n.2.

\(^{146}\) *Id.*
decision on the motion, not on a federal right to confirmation or vacatur. Here, the Court appeared to follow this Article’s framework because it focused on the impact on petitioners of confirmation.

Nevertheless, the majority’s analysis of the effect of the award was flawed. The first inquiry is to what legally protected interest petitioners allege injury. Petitioners could not argue that the award injured them by forcing them to participate in class arbitration because the arbitrators never authorized a class.\footnote{In its Reply brief, the petitioners accepted that the relevant injury came only from the arbitral award, and not the potential for class arbitration in the future. See Reply Brief for the Petitioners, Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp., No. 08-1198, at 26 (May 2009).} The strongest remaining way to characterize the injury, adopted by the Court, is that the award would have forced petitioners to participate in extensive class determination litigation. This is an injury because it imposes heavy costs and forces them to act. Describing injury this way has three problems.

First, participating in an additional step of an on-going arbitration is not a traditionally recognized form of injury. Additional litigation burden is not typically a justiciable injury.\footnote{Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 735 (1998); FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 (1980); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) (“Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.”); Petroleum Exploration, Inc. v. Public Serv. Comm’n, 304 U.S. 209, 222 (1938). The Court applies this rule more frequently in the collateral-order doctrine context. See Will v. Hallock, 546 U.S. 345, 346 (2006) (litigation burden only cognizable harm when going forward “would imperil a substantial public interest”); Federal Trade Comm’n v. Standard Oil Co. of Calif., 449 U.S. 232, 242-243 (1980) (determining that even “substantial” burden of defending litigation was inadequate to support interlocutory review); Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994).} This injury seems even less likely to warrant judicial review than the injury asserted in \textit{Ohio Forestry Association v. Sierra Club}. In that case, plaintiffs argued that a plan for approval of
future logging rights would lead to illegal clearcutting. The Court found that this asserted injury was not ripe for review because the plan did not authorize any specific logging, but only created the framework under which future decisions would be made. The Court considered and rejected Sierra Club’s argument that the future burden of challenging each site-specific logging decision could render the case ripe for judicial review. This seems more onerous than the alleged injury in Stolt-Nielsen because in Sierra Club the harm was whole litigations, not additional steps in on-going litigations.

In Stolt-Nielsen, the Court did not respond to this argument other than by suggesting that it had necessarily considered and rejected it during the certiorari stage. In its reply brief, petitioners argued first that the case was ripe even without taking into account litigation costs and that delaying judicial review would impose sufficient costs on petitioners. As petitioners did not assert another type of injury, however, this argument was hollow. Petitioners’ reference to “the costs . . . from delay” is cryptic. In this case, delay would mean judicial review after class determination. Other than litigation burden, such delay imposes no cost. This leaves the awkward idea that the threat of spending money on legal process is sufficient injury to gain access to federal legal process.

---

149 Ohio Forestry, 532 U.S. at 731.
150 Ohio Forestry, 532 U.S. at 733-34.
151 Ohio Forestry, 532 U.S. at 734-35.
152 This was not correct. In their opposition to certiorari, respondents argued that the injury of participating in a class arbitration was unripe. Brief in Opposition, Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp, No. 08-1198, at 24-25 (May 2009). In their reply, petitioners framed injury as only litigating class certification. Reply Brief of the Petitioners, Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp, No. 08-1198, at 26 (May 2009).
A second problem evident in the Court’s description of injury is the possible significance of consent. Justice Alito did not just refer to participation in class determination proceedings. He specified that those proceedings would be “before arbitrators who . . . have no authority to require class arbitration absent the parties’ agreement to resolve their disputes on that basis.”

This language might be ornamental and to that extent it neither helps nor hinders his analysis. To the extent this language is part of the argument, however, it conflates the injury requirement with the merits. The implicit argument would be that the non-consensual nature of the hearings is an additional or aggravating injury to petitioners. The problem here is that petitioners’ consent to class arbitration was the question before the arbitrators. Far from their usual deference to arbitral awards, the Court not only overruled the merits of an arbitral panel’s decision, but did so implicitly through justiciability analysis.

The third problem with how the Court described injury was that Justice Alito’s majority opinion assumed that the arbitral award would coerce petitioners into class determination proceedings. This might not be right. The contract construction award did “not command anyone to do anything or to refrain from doing anything; [it did] not grant, withhold, or modify any formal legal license, power, or authority; [it did] not subject anyone to any civil or criminal liability; [it] create[d] no legal rights or obligations.” The Court recognized this, and argued that the matter was nevertheless ripe for review because, were petitioners to refuse to participate, “they would almost certainly be subject to a petition to compel arbitration under 9 U.S.C. § 4.”

---

153 Stolt-Nielsen, 130 S. Ct. at 1767 n.2.


155 Stolt-Nielsen, 130 S. Ct. at 1767 n.2.
Petitioners might not have been subject to a petition to compel, however. Section 4 allows courts to order specific performance of arbitration agreements. It is not obvious, however, that this section applies when one party refuses to participate only in a single step of an on-going arbitration. Even if this section does apply, no order would issue if the arbitral panel or respondents preferred to proceed ex parte. In any event, intervening to prevent an allegedly improper order to compel under § 4 conflicts with § 16, which prohibits interlocutory appeals from such orders. Relying on the imminence of such an order, the Court thought review was ripe even though, once issued, the order could not have been appealed.

To justify finding a ripe controversy, the Court cited the Regional Rail Reorganization Act Cases for the proposition that “[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.” That case involved judicial conveyance of property once a government agency fulfilled a statutory mandate. There was no discretion for either the government or the court. This is unlike Stolt-Nielsen,

---

156 9 U.S.C. § 4 reads: “A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.”

157 9 U.S.C. 16(b)(2) (“an appeal may not be taken from an interlocutory order . . . (2) directing arbitration to proceed under section 4 of this title;”).


159 Regional Rail Reorganization Act Cases, 419 U.S. at 141-43. The Court’s use of a “cf.” signal shows that it was not blind to the strained analogy.
which involved the choice of a private party to move for a motion that may not be justified by the statute. The situation in *Stolt-Nielsen* thus fell far short of patent inevitability.

Arbitration is growing and arbitrators will issue an ever-increasing volume of awards, injunctions, and orders. Federal courts confronting requests to confirm or vacate these orders currently rely exclusively on flawed statutory tests to control their jurisdiction. This circumstance is undesirable and unnecessary. Article III limits on the judicial power apply to these motions, but courts have not paid much attention. To some extent, this is likely because how to apply these limits is unclear. Courts need a framework to apply these rules and may be hesitant to create one from whole cloth in an opinion. This Article seeks to provide that framework and thus improve the way that federal courts interact with arbitration.