Arbitration and Article III

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by
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Abstract: This Article is part of a broader research agenda that studies the relationship between arbitration and constitutional law. Taking its cue from the recent Canadian Softwood Lumber dispute over the constitutionality of NAFTA’s dispute resolution boards, this paper asks a broader question: “Why is arbitration compatible with Article III?” Under the traditional account, parties waive their right to an Article III forum, thereby eliminating any Article III issue. Accounts grounded in waiver, however, fail to grapple adequately with the significant structural concerns presented by arbitration. Instead, this paper defends the need for a more robust theory, one that accounts for these structural concerns and can address the novel constitutional challenges presented by a variety of arbitral schemes ranging from domestic employment disputes to international commercial ones. Drawing on appellate review theory, the paper proposes a bi-polar matrix for assessing the constitutionality of arbitration – an approach that comports with the core principles of the theory and also enhances its explanatory value. The paper concludes by applying this modified appellate review theory to a variety of contexts in arbitration law – including international commercial arbitration and NAFTA arbitration.

Arbitration implicates serious constitutional concerns that have not received adequate attention in the caselaw or the commentary. Recent litigation in the D.C. Circuit over the constitutionality of NAFTA represents simply the most recent, high-profile example. A “centerpiece” of NAFTA and its implementing legislation was an arbitration mechanism that divested Article III courts of virtually all jurisdiction over countervailing duty and anti-dumping claims and invested that authority in panels of

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arbitrators, whose decisions are subject to virtually no federal court review. A group of American softwood lumber producers, dissatisfied by the arbitrators’ decision, challenged NAFTA’s dispute resolution mechanism on a variety of grounds, including, among others, its incompatibility with Article III. The parties ultimately settled the case, perhaps motivated in part by fears over the consequences if a court invalidated the scheme. As representatives of both Canada and the United States government made clear during oral argument in the D.C. Circuit, that challenge, if successful, had the potential to unravel NAFTA’s entire scheme.

Had that settlement not been struck, any judicial decision would have had enormous repercussions for arbitration. Had the D.C. Circuit held that NAFTA’s Dispute Resolution Boards violated Article III, it would have destroyed a keystone of the legal architecture supporting America’s trade and investment policy over the past several decades. It also would have jeopardized various other markets, such as foreign direct investment, that likewise depend on robust arbitration systems. Alternatively, had the D.C. Circuit sustained NAFTA’s scheme, it would have marked the first time that a federal appellate court had upheld an arbitral system that provided for virtually no judicial review by the Article III courts. It is unlikely that this holding could have been confined to the international trade context. Unlike other nations, the United States does not accord different legal treatment to different types of arbitration. Given this “one-size-fits-all” quality of American arbitration jurisprudence, a decision upholding NAFTA’s

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3 See Brief of the United States in No. 05-1366 (on file with author); Brief of the Government in Canada in No. 05-1366 (on file with author).
scheme would have provided an opportunity for similarly constricted judicial review in other areas such as securities law or employment discrimination. 4

Does arbitration violate Article III? Despite the critical need for a coherent theory to answer this question, few commentators or courts have made serious attempts to provide one. 5 For much of the country’s history, federal courts could conveniently avoid these nettlesome questions. 6 Prior to the twentieth-century, courts simply declined to enforce pre-dispute arbitration agreements as unenforceable attempts to oust them of jurisdiction. 7 From the early decades of the twentieth century (with the enactment of the FAA in 1925) through the 1960s, the non-arbitrability doctrine prevented arbitrators from

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6 On at least one occasion, the Supreme Court has considered the compatibility of the Federal Arbitration Act with Article III, but the issues explored here were not squarely presented. In Marine Transit Corp. v. Dreyfus, the Court held that Congress could, consistent with Article III, grant federal courts sitting in admiralty the remedial power to order specific performance of arbitration agreements. 284 U.S. at 277-79. Dreyfus did not explore whether the limitations on federal judicial review of arbitral awards also comport with Article III. I thank Chris Drahozal for bringing this case to my attention.

resolving issues of federal statutory law. Notably, while both of these doctrines minimized the tension between arbitration and the Constitution, neither specifically was anchored in Article III. Instead, the “jurisdictional ouster” argument found its roots in contract law – essentially treating the arbitration agreement as a void contract that offended public policy. And the “non-arbitrability doctrine” operated as a statutory interpretation tool – essentially that the FAA should not be interpreted to deprive a plaintiff of a federal forum on his statutory claim.

Doctrinal developments since the early 1970s and particularly in the last two decades have eliminated any tools that enabled the Court to avoid the tension between arbitration and Article III. In 1974, the Court held in Scherck that parties could agree to arbitrate a federal securities claim in an international arbitration. More recently, in a line of cases beginning with Shearson, the Court extended the principle in Scherck to the domestic context. The effect of this line of cases has been to make arbitration a viable (and increasingly popular) method for resolving a variety of disputes “arising under federal law,” even though those disputes fall under a core jurisdictional grant of Article III. As Judith Resnik recently observed, “federal judges who once had declined to enforce ex ante agreements to arbitrate federal statutory rights now generally insist on holding parties to such bargains, thereby outsourcing an array of claims.”

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9 Macneil, Speidel, & Stipanowich, Federal Arbitration Law § 4.3.2.2 (Supp. 1999).
As the jurisdictional ouster and non-arbitrability doctrines have waned, the unresolved Article III issues have grown in importance. While they have been simmering in the lower courts for several years, the pot finally boiled over in the Canadian Softwood Lumber litigation. Settlement enabled the question to go away – for now – but the need for a coherent theory endures.

The traditional theory used to explain arbitration’s compatibility with Article III rests on principles of waiver. In brief, according to this argument, parties entering into an arbitration agreement have waived their right to a federal forum, thereby eliminating any Article III concern. Part I of this paper demonstrates that waiver theory no longer can adequately serve to reconcile arbitration with Article III. Waiver theory overlooks significant structural concerns presented by arbitration, structural concerns that threaten Article III values. These structural concerns take two forms. First, in cases of voluntary arbitration (i.e., mutual submission of a dispute pursuant to an arbitration agreement), the Federal Arbitration Act diminishes the power of the federal Judiciary. It does so by mandating that federal courts confirm arbitral awards as judgments (subject to a few non-substantive exceptions). In presenting this strand of the argument, I debunk the common misconception that arbitration is no different from settlement agreements – a premise central to the waiver account. Second, in cases of mandatory arbitration (such as the required submission of a dispute to arbitration under NAFTA), arbitral schemes potentially aggrandize other branches’ power at the expense of the Judiciary. Here, the waiver account obviously has no explanatory value, for the parties have not voluntarily opted into arbitration. Thus, Part I concludes on the premise that arbitration implicates
serious structural values underpinning Article III, values that the traditional account is unable to accommodate.

Part II of this Article offers a fresh approach that pays closer attention to these structural concerns. It draws on appellate review theory to provide a more promising approach for reconciling arbitration with Article III. At its core, appellate review theory argues that a non-Article III decision-making mechanism is constitutional so long as an Article III court has a sufficient opportunity to review the decision. Initially, the paper explains why appellate review theory, first developed in the administrative law context, supplies a helpful analogy for arbitration. After justifying the analogy, I consider the core question – what constitutes a “sufficient opportunity” for Article III review. In its original formulation, appellate review theory prescribed a single standard of constitutionally required review across all cases: plenary review of all legal questions (constitutional and nonconstitutional) and, with a few exceptions, minimal review of factual findings. By contrast, this paper proposes that the standard should vary along two axes – the voluntariness of the dispute and the presence of the sovereign in the dispute. This modified appellate review theory is entirely consistent with the original theory’s underlying premises and does not upend much existing precedent. Under this modified balance, appellate review theory counsels in favor of plenary Article III review of an arbitrator’s rulings on constitutional questions, more limited review of nonconstitutional questions and minimal review of factual findings.

Part III of this Article applies this theory to various forms of arbitration: (1) private commercial arbitration under the FAA and New York Convention, (2) arbitrations under NAFTA, and (3) investment arbitrations. In brief, I conclude that, under the
modified version of appellate review theory offered here, each of these systems passes muster under Article III. This conclusion is perhaps not as sexy as one that shreds the constitutional fabric of this country’s dispute resolution system. While perhaps anti-climatic, this conclusion is nonetheless important. The theory offered here puts arbitration on a far surer constitutional footing and provides a blueprint for the design of future dispute resolution schemes. Part III finally concludes by responding to potential criticisms of the theory.

I. Against Waiver

Traditional dispute resolution theory teaches that disputes can be plotted along a spectrum.\(^\text{14}\) At one end of the spectrum lies simple forms of extrajudicial dispute resolution that do not entail any intervention by the state such as a handshake between neighbors to resolve a minor misunderstanding. At the other end of the spectrum lie complex disputes between a citizen and the state (or two private citizens) that can culminate in the forcible deprivation of liberty or property such as a criminal prosecution, an administrative hearing or a civil trial ending in a verdict.\(^\text{15}\) A variety of other forms of dispute resolution such as contractual settlements, consent decrees, conciliation, mediation and arbitration lie between these poles.\(^\text{16}\)

Depending on its place on the spectrum, a particular form of dispute resolution will entail different procedural protections and enforceability rules. For example, no

\(^{14}\) See generally Owen Fiss, Against Settlement, 93 Yale L.J. 1073 (1984); Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978).

\(^{15}\) For a discussion of the varying degrees of formality in systems of dispute resolution, see Fuller, 92 Harv. L. Rev. at 358-59.

formal procedural rules govern the discussions between neighbors that culminate in the handshake.\textsuperscript{17} Perhaps unsurprisingly, therefore, that handshake is entitled to minimal judicial enforceability. Conversely, criminal trials and administrative hearings are subject to a panoply of constitutional and non-constitutional procedural protections. Reflecting those protections, the results of that criminal or administrative hearing are generally more judicially enforceable than the handshake between neighbors.\textsuperscript{18} These examples yield up a predictable principle – a direct correlation between the procedural protections in a particular system of dispute resolution and the degree of judicial enforceability of the result.\textsuperscript{19}

Certain forms of dispute resolution do not fit neatly within the above-described pattern. This is especially true with arbitration. In contrast to a full-blown trial, arbitration carries few procedural protections.\textsuperscript{20} Despite this quality, the result of the dispute – the arbitration award – carries with it a high degree of judicial enforceability.\textsuperscript{21} Indeed, this presumption of enforceability and the limited degree of judicial review represent some of the defining features of arbitration. Arbitral awards are subject to far less judicial scrutiny than a civil court judgment or an administrative determination despite the greater degree of procedural protections in those forms of dispute resolution.\textsuperscript{22}

How can this anomaly be explained?

By far the dominant explanation in the case law and the literature is that the parties have waived their right to an Article III forum. The modern-day defense of the

\begin{footnotesize}
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\item[17] While formal rules may not govern the handshake, informal norms of course might.
\item[18] \textit{See} Fiss, 93 Yale L.J. at 1077.
\item[19] \textit{See} Fiss, 93 Yale L.J. at 1084-85 (describing differences in judicial willingness to enforce consent decrees depending on whether settlement underpins decree).
\item[20] \textit{See generally} Gary Born, \textit{International Commercial Arbitration} 8-9 (2001); Fuller, 92 Harv. L. Rev. at 387-89.
\item[22] \textit{Id}.
\end{enumerate}
\end{footnotesize}
waiver argument springs from CFTC v. Schor, 23 Schor held that the CFTC’s exercise over a common-law counter claim in a dispute between a customer and a commodities broker did not violate Article III. Though the case technically did not involve a challenge to a system of private arbitration but, rather, adjudication before an independent federal agency, the case nonetheless has served as the intellectual foundation of decisions rejecting constitutional attack on arbitral schemes. Central to the reasoning in Schor was the idea that Article III had both a personal (and thus waivable) component as well as a nonwaivable component (which would be tested against a multi-factor balancing test). 24 Critical in its view was the fact that the parties had affirmatively chosen to invoke the CFTC, leaving the jurisdiction of the federal courts unaffected. The Court explained:

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

In my view, this passage from Schor, so central to the traditional account explaining the compatibility of arbitration with Article III, is deeply flawed in three respects.

First, as a matter of theory, there is a reasonable argument that Schor was wrong to conclude that Article III rights were waivable. 26 Schor provides virtually no analysis

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24 478 U.S. at 848. The Schor Court then articulated a series of factors to determine whether a particular dispute resolution system crossed the Article III line: (1) whether the “essential attributes of judicial power” are reserved to Article III Courts, (2) the origin and importance of the rights to be adjudicated and (3) the concerns that drove Congress to depart from the requirements of Article III.
25 478 U.S. at 855.
26 See Bator, 65 Ind. L. J. at 259 (“The ideals of separation of powers seem to me structural and political ideals; it is far from clear that they were designed to generate a system of private rights.”).
supporting its bald assertion that Article III rights are personal.\textsuperscript{27} This is perhaps unsurprising: all of the constitutional sources point in precisely the opposite direction.

Notions of Article III \textit{qua} personal right are difficult to square with the text. Nothing in the text speaks in terms of a “right” to a decision in a federal forum. Rather, the language speaks in definitional terms – that is, defining the meaning of “judicial power of the United States.” Article III discusses the subjects over which it extends and the courts in which it is vested. As some have noted, the use of terms like “shall extend” and “all Cases” could be read to support a mandatory view, at least for some heads of jurisdiction.\textsuperscript{28}

Beyond text, the structure of the Constitution likewise does not support reading Article III in terms of personal rights. The opening articles of the Constitution primarily address the structural organization of our system of government; most of the discussion of rights appears in the Amendments.\textsuperscript{29} A few passages in the initial articles such as

\textsuperscript{27} 478 U.S. at 848-49. The Court’s analysis consists of nothing other than the assertion that Article III confers a “personal right” and citation to a number of disanalogous precedents on criminal rights, dicta from the opinions in \textit{Northern Pipeline} and earlier decisions that did not confront the “personal rights” question. \textit{Schor} also cites an Article by Professor David Currie for the proposition that Article III rights are primarily “personal.” \textit{Id.} at 148 (citing Currie, 16 Creighton L. Rev. at 460 n. 108). That citation, though, at best twists Currie’s argument and, at worst, is simply wrong. Sovereign immunity is, by definition, a type of personal privilege that is specific to the litigant (namely the state); the doctrine’s primary purpose is to protect a private litigant and, in cases where the litigant for whatever reason does not desire that protection, waiver of the right makes sense. Currie argues \textit{that the tenure and salary provisions serve an analogous function to the private litigant}. But he does not argue that the jurisdictional grants envisioned in Article III are themselves personal rights, as the \textit{Schor} opinion seems to imply. Elsewhere he has acknowledged that “[i]t may well be, as several of our most thoughtful judges have argued, that the requirement of an independent tribunal serves purposes beyond protection of the immediate parties.” Currie, \textit{The Distribution of Powers After Bowsher}, 1986 Sup. Ct. Rev. 19, 39. Even if \textit{Schor} reads Currie’s thesis correctly, it is nonetheless clear, as I explain below, that Article III, beyond the tenure and salary provisions, serves additional public purposes that are not confined to the interests of the individual litigants.


\textsuperscript{29} See e.g., Erwin Chemerinsky, Constitutional Law: Principles and Policies § 1.1 (2002).
Article III, Section 2’s guarantee of a jury in criminal cases do speak in terms of rights. But those passages merely prove that, even before the drafting and ratification of the Bill of Rights, the framers knew how to draft the Constitution in terms of personal rights when they wanted. In light of this contrasting language, their failure to draft the “Judicial Power” clause in terms of a personal “right” to a federal forum supports the inference that this Clause was never meant to confer a personal right.

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

That inflexible and uniform adherence to the rights of the constitution and of individuals which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their officials by a temporary commission. … [W]e can never hope to see realised in practice the complete separation of the judicial from the legislative power,

in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter.33

Indeed, the drafters’ failure to include a right to a civil jury trial in Article III was among the Anti-federalists’ great complaints about the Article during the ratification debate (had Article III included such a right, that would have provided important evidence supporting a “waiver” theory34). Schor never really grapples with this history. And if Schor were wrongly decided, that would have substantial implications for the compatibility of Article III and arbitration. Private parties could not “waive” their right to an Article III forum -- no such right would exist! Thus, the first problem with waiver theory is that it rests on dubious textual, structural and historical foundations..

The second problem with waiver theory is that it mistakenly conflates equates arbitration with settlement. Settlements differ from arbitration in several material respects. For one thing, in the case of settlement, the parties know the substantive terms of their bargain in advance of their agreement to be bound.35 By contrast, in case of arbitration, the parties are bound to their bargain (i.e., an agreement to arbitrate) before they know the substantive terms. Thus, in contrast to settlement, arbitration involves less party autonomy. For another thing, most forms of settlement involve greater judicial scrutiny than arbitration awards.36 Generally, speaking, settlement agreements are simply a species of contract; before they are enforced, they are subject to the typical judicial

33 Federalist 78. While the above-quoted passage does refer to “the rights … of individuals,” it would be erroneous to infer from that passage that Article III rights are waivable. Rather, that reference is better understood to mean that safeguarding individual rights is one purpose, among many, of an independent judiciary – not that the independent judiciary itself is a personal, waivable right.
34 Zick, 142 U. Pa. L. Rev. at 801, 803-10.
35 See Fuller, 92 Harv. L. Rev. at 366-67.
36 See Fiss, Against Settlement, 93 Yale L.J. at 1084 (describing judicial scrutiny of consent decree in Meat Packers litigation).
Arbitration awards receive much different treatment. The Federal Arbitration Act sets forth the mandate that federal courts must give effects to the arbitral award subject to very limited exceptions. Federal courts enjoy virtually no power to review the merits of the award but merely the procedures followed by the arbitrator. To the extent there is review of the merits, that review is practically toothless. Provided one of these limited grounds does not apply, the Court must give legal effect to the award and treat the award as if it were a judicial judgment enforceable by compulsion.

The third and final problem with the waiver theory is that it fails to grapple with the serious structural problems posed by arbitration. The roots of this problem do not lay solely with Schor: there, the Court recognized that, in addition to its “personal” component, Article III also implicates a public concern about the structure of government. As Schor explained, “[w]hen these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.” Yet despite Schor’s recognition on this nonwaivable feature of Article III, many courts have rejected the Article III challenge to arbitration with a simple statement about waiver and a perfunctory cite to Schor.

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39 478 U.S. at 851.

40 See Sternlight, 72 Tulane L. Rev. at 79 (“Just as parties cannot by consent confer subject matter jurisdiction on a federal court, so too are they prohibited from allowing their claims to be heard by a non-
This line of reasoning is flatly wrong. While judicial enforcement of arbitral awards does not directly “aggrandize” the power of a coordinate branch of government, it does diminish the power of the Judicial Branch. By mandating the enforcement of the award and controlling the scope of Article III review, particularly the extent of review of the merits of the federal question, Congress is effectively stripping federal courts of the power to interpret the meaning of federal law and erecting a system by which others, namely arbitrators, can define it. It also is effectively imposing a mandate on federal courts to treat the result of this private dispute resolution system as a judgment of a federal court, with all of the accoutrements that accompany that judgment.41

This separation-of-powers problem might be analogized to the constitutional limits on federal commandeering of state executive officials in cases like Printz v. United States.42 By analogy, Congress is commandeering the federal courts when it mandates that they reduce an extrajudicial dispute resolution to a judgment. To be sure, the problems are not identical – whereas Printz involves vertical separation-of-powers issues, the problem addressed here involves horizontal ones. Nonetheless, Printz does provide a potentially helpful analogy demonstrating how separation-of-powers principles prohibits certain forms of commandeering of another branch of government.43

Article III forum where such waiver would threaten the institutional integrity of the judicial branch.”)

41 This separation-of-powers problem might be analogized to the commandeering of state executive officials at issue in Printz v. United States, 512 U.S. 898 (1997). To be sure, the problems are not identical – whereas Printz involves vertical separation-of-powers issues, the problem addressed here involves horizontal ones. Nonetheless, Printz does provide a potentially helpful analogy demonstrating how separation-of-powers principles prohibits certain forms of commandeering of another branch of government. I am grateful to Randy Beck for his thoughts on this point.


43 I am grateful to Randy Beck for his thoughts on this point.
The Bonner Mall line of cases also provide a helpful, though not perfectly apt, analogy here.\textsuperscript{44} There, the Court has held that parties who settle a case on appeal are not automatically entitled to the vacatur of the judgment below. The Court’s decision reinforced the public interest in judicial precedent. Analogously, a congressional requirement that the judicial must reduce arbitral awards to judgment without meaningful review of the merits likewise deprives the public of the value of precedent. Here too, the analogy here is imperfect. In Bonner Mall, the parties were seeking to vacate a judgment already rendered; in arbitration, Congress is merely requiring the courts to enforce the parties’ extrajudicial resolution of the parties’ dispute. Nonetheless, Bonner Mall does support the notion, relevant here, that there is a public interest in a dispute beyond the immediate interests of the parties, and that those public interests can be undermined through efforts to undermine the judiciary’s role.\textsuperscript{45}

To identify a more significant separation-of-powers problem does not necessarily mean that arbitration violates Article III. Rather, it shows that the waiver account offered by the Schor Court (and relied upon by other courts to uphold the constitutionality of arbitration) is too facile. It does not adequately wrestle with the underlying constitutional problems presented by arbitration. We return to these themes in Part II of the paper.

If waiver theory is inadequate, are we resigned to accept the incompatibility of arbitration with Article III? In one of the few articles to tackle the question head-on, Jean Sternlight suggests that the answer is “yes.”\textsuperscript{46} Sternlight’s argument rests on two

\textsuperscript{45} I am grateful to participants in workshops at Willamette Law School and the University of Georgia for their insights on this point.
\textsuperscript{46} 72 Tulane L. Rev. at 78-79.
premises. The premises are (1) arbitration claims typically involve private rights\textsuperscript{47} and (2) \textit{Granfinanciera} permits Congress to authorize adjudication of some private rights by non-Article III actors only where essential to a furtherance of the “relevant statutory scheme.” In Sternlight’s view, the only possible “relevant statutory scheme” is the FAA, but this cannot be the basis for supporting arbitration under Article III. According to Sternlight, that argument proves too much: Congress “could pass a statute requiring that all claims be heard by judges without life tenure.”\textsuperscript{48} According to Sternlight, “[p]resumably the Supreme Court would reject such a statute.”\textsuperscript{49} It follows, therefore, that the FAA is incompatible with Article III.

This argument, while an important contribution to the scant literature on the topic, does not ultimately provide a viable basis on which to test the compatibility of arbitration with Article III. Sternlight’s argument rests on an important premise -- that the FAA is the only relevant statutory scheme. But that mode of thinking does not track how the Court has employed that concept in other cases like \textit{Thomas} or \textit{Northern Pipeline}. In \textit{Thomas}, the “relevant statutory scheme” was the mechanism for allocating royalties, not the underlying dispute resolution mechanism.\textsuperscript{50} In \textit{Northern Pipeline}, the statutory

\textsuperscript{47} The public/private rights distinction traces its roots to the Supreme Court’s decisions in \textit{Northern Pipeline}, \textit{Crowell} and \textit{Murray’s Lessee}. The meaning of the distinction has evolved over time. At one time, public rights involved cases where the sovereign was a party. See \textit{Granfinanciers}, 492 U.S. at 65 (Scalia, J., concurring in part and concurring in the judgment). \textit{Thomas} broke with this tradition by classifying certain claims as “public rights” even though they arose between two private parties. 473 U.S. at 589. I return to the public/private rights distinction in Part II, \textit{infra}.

\textsuperscript{48} \textit{Id.} at 79.

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{Thomas} arose under the Federal Insecticide Fungicide and Rodenticide Act (“FIFRA”). FIFRA required registrants of pesticides, as a precondition for registration, to participate in mandatory arbitration to resolve disputes over the compensation due to a registrant whose data is subsequently used by another registrant. Congress established the scheme to relieve the EPA of the time-consuming task of resolving compensation disputes, a process that was slow and consequently had resulted in a backlog of litigation. Federal courts could review arbitral awards from the FIFRA scheme only for “fraud, misrepresentation or other misconduct. The Court rejected an Article III challenge to this unusual arbitral scheme. It reasoned that FIFRA royalty claims were “so closely integrated into a public regulatory scheme” that Article III
scheme was a mechanism for channeling claims by and against the bankrupt estate into a single proceeding, not the underlying dispute resolution mechanism. To be consistent, Sternlight should have focused on underlying statutes whose claims are subjected to arbitration rather than the FAA itself.

The second problem with Sternlight’s argument is that her ultimate conclusion – the incompatibility of the FAA with Article III – does not follow from the premises. Even if it were true that the Supreme Court would strike down a law that stripped federal courts of jurisdiction over “all claims,” the FAA differs from Sternlight’s hypothetical statute in material respects. Specifically, unlike Sternlight’s hypothetical statute, the FAA does not strip federal courts of jurisdiction entirely. Rather, it merely defers their consideration of the dispute and then limits the scope of their review. Indeed, even if the Congress were to strip federal district courts of their power to review arbitral awards, a constitutional infirmity would not necessarily arise. Presumably, such matters would be litigated in the state courts, and resort could be had to the Supreme Court’s certiorari jurisdiction in the event that the case presented a federal issue.

Thus, while Sternlight is right to identify the basic tensions between Article III and arbitration, her critique does not satisfactorily settle the issue. Yet it certainly permitted “agency resolution with limited involvement by the Article III judiciary.” 473 U.S. at 594. It also stressed the fact that the right at issue here was one of congressional creation, as opposed to the private state-law right of compensation at issue under Northern Pipeline. Id. at 585-86.

Northern Pipeline involved a challenge to the Bankruptcy Act of 1978. That Act conferred extensive powers on Article I bankruptcy judges and Article III review of their decisions. A bare majority of the Court held that requiring adjudication of a breach of contract claim before such a tribunal transgressed Article III. But the majority split on the reasoning. Three justices held that Article III required federal courts to review all claims subject to certain narrow exceptions such as territorial courts, military tribunals or “adjuncts” such as magistrates. Two concurring justices agreed with the result but declined to circumscribe the constitutional limits on non-Article III limits so strictly.

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

See Crowell, 285 U.S. at 87-88 (Brandeis, J., dissenting).
presents a challenge: Can a theory be constructed that salvages the essential components of arbitration while putting it on a surer constitutional footing vis-à-vis Article III? I believe that this last course is possible and begin to do so in the next Part.

II. Arbitration and Appellate Review Theory

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

A. Article III and Appellate Review Theory.

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

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

In some areas, Congress has foreclosed judicial review in Article III Courts altogether. Examples of claims where Congress has effectively stripped Article III courts of any control include certain administrative determinations by the Veterans’ Administration, the Department of Health and Human Services and the Justice Department. The Court has consistently approved of these efforts. Adoption of a literalist theory would require invalidation of numerous non-Article III schemes,

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54 Id.
58 See Chen, 49 Wash & Lee L. Rev. at 1473-74.
including adjudication by administrative agencies. By parity of reasoning, arbitration could not survive under literalist theory – the theory would bar arbitrators, as non-Article III actors, from resolving cases or controversies falling under Article III’s heads of jurisdiction.

An alternative account stresses the distinction in Article III between “cases” and controversies, an account originally developed by Justice Story and later formalized by Akhil Amar. 60 Under the Story/Amar account, an Article III court must have the jurisdiction to decide “cases” (including federal questions) but need not necessarily have the jurisdiction to decide “controversies” (such as diversity controversies). While this theory “has substantial historical support,” it too lacks adequate explanatory value in light of intervening Supreme Court precedent. 61 Adoption of this approach likewise would require invalidation of federal administrative agency schemes that allow non-Article III decision makers to interpret federal law and allow Article III courts to defer to those interpretations provided that the law is ambiguous and the agency interpretation is reasonable. 62 By analogy, here too, the Story/Amar theory would require invalidation of arbitral schemes, at least to the extent that they concerned claims arising under federal law. Given the large number of arbitrable federal claims following the decline of the non-arbitrability doctrine, the institutional costs of this account are too great.

Recognizing the practical limitations of the literalist and Story/Amar accounts, appellate review theory seeks, as much as possible, to salvage the textual and historical underpinnings of those accounts while not doing excessive violence to the existing

61 Wells & Larson, 70 Tulane L. Rev. at 91-92; Chen, 49 Wash. & Lee L. Rev. at 1467-68.
62 Chen, 49 Wash. & Lee L. Rev. at 1468.
The theory finds its genesis in a seminal article by Richard Fallon and traces its roots ultimately to the Supreme Court’s decision in *Crowell v. Benson*[^64] The core claim of appellate review theory “is that sufficiently searching review of a legislative court’s or administrative agency’s decisions by a constitutional court will always satisfy the requirements of Article III.”[^65]

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

1. **Expertise** - making the best use of the non-Article III decision maker’s substantive expertise;
2. **Governmental Functions** - maintenance of efficiency and order in the performance of governmental functions;
3. **Flexibility** - flexibility in adapting a scheme of administration and adjudication to changing needs and political priorities;
4. **Fairness** - producing fairer and more consistent results;
5. **Sovereign immunity** – as many claims before non-Article III proceedings involve ones where the government is a party, principles of sovereign immunity counsel in favor of the government’s ability to control the scope of those proceedings.

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

1. **Separation of Powers** – Article III review promotes separation of powers by ensuring principled decisions on legal questions by institutions immune from political pressure;
2. **Fairness** – Article III review helps to ensure fairness to litigants (through some combination of the independence of a life-tenured judiciary plus due process guarantees);

[^63]: Fallon, 101 Harv. L. Rev. at 933.
[^64]: Id. at 915. See also *Crowell v. Benson*, 285 U.S. 22 (1932).
[^65]: Fallon, 101 Harv. L. Rev. at 933.
3. **Judicial Integrity** – this term captures the idea that judges, through their immunity from political pressure, can offer their imprimatur of legitimacy for the action of agencies that have a “hybrid and problematic status in our constitutional system”  

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

Based on this balance of values, Fallon argues that the necessity and scope of “adequately searching appellate review” turn on the type of determination. With respect to pure questions of constitutional law, appellate review theory requires *de novo* review by the Article III Courts.  

As to the necessity of review, Fallon argues that Article III review is necessary for two reasons: first, to protect separation-of-powers principles and, second, to ensure fairness to individual litigants particularly where their constitutional rights are at stake. As to the scope of review, Fallon explains that it should be *de novo* in order to check against the separation of powers values that are implicated when “another agency of government has strayed beyond its constitutional limits.”

With respect to pure questions of nonconstitutional law, Fallon argues that appellate review theory also demands *de novo* review. Fallon justifies both the necessity and scope of this review in terms of a “needed [check] against arbitrariness and self-aggrandizement by legislative courts and especially by administrative agencies.” In Fallon’s view, those agencies are not electorally accountable, not insulted from political

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66 Id. at 942.
67 Id. at 975-976.
68 Id. at 976.
69 Id. at 977.
pressures, are susceptible to capture by “powerful private groups” and “may also have a bureaucratic tendency to expand their own power.” Pure questions of law, whether constitutional or non-constitutional law, require de novo review. By contrast, as to factfinding, judicial review is unnecessary unless the facts are of a constitutional or jurisdictional nature.

Finally, with respect to findings of fact, Fallon distinguishes between two kinds of facts. With respect to ordinary findings of fact, Fallon does not believe that review is strictly necessary. Such findings by a non-Article III tribunal implicate neither separation of powers concerns nor fairness concerns. With respect to questions of constitutional or jurisdictional fact, Fallon submits that Article III courts should have the power, though not the obligation, to review another tribunal’s determination. In Fallon’s view, this approach ensures the ability of Article III courts to correct suspected determinations while avoiding “costly relitigation in the vast run of cases.”

Unlike literalism or the Story/Amar account, appellate review theory best squares with the extant precedent, prompting James Pfander recently to note that it has “fared best” among the modern accounts of Article III. In each of the cases where the Court has rejected an Article III challenge, the judicial review scheme preserved partial or full opportunity for judicial review of the non-Article III decision maker’s legal conclusions. For example, under various schemes the Court has reviewed, the non-Article III decision

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70 Id. at 977-978.
71 Id. at 983-84. Fallon recognizes that a weaker form of this claim would be to require de novo review of pure questions of law while permitting more deferential review in cases merely applying those norms to a given set of facts. Id. at 982.
72 Id. at 987-89. For the seminal work on the constitutional fact doctrine, see Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985).
73 Id. at 989.
74 Id. at 990.
75 Pfander, 118 Harv. L. Rev. at 666.
maker’s legal conclusions were subject to *de novo* review. In sum, appellate review theory offers the best available tool for assessing the compatibility of a dispute resolution scheme with Article III. In the next section, I begin to trace through how the theory applies to arbitration.

B. Appellate Review Theory And Arbitration

Before plunging further into the theory, it is worth pausing to consider an obvious query. Even accepting the two premises posited so far – (1) that arbitration presents an Article III problem and (2) that waiver theory is inadequate, why should we look to a theory developed in the context of administrative law to supply the framework for a more coherent theory reconciling arbitration and Article III?

Two points answer this query and justify the bridge between administrative law and arbitration law. The first is to recognize, as Lon Fuller did nearly three decades ago, that arbitration and administrative adjudication ultimately are simply different “forms” of dispute resolution. That is to say, the lie on the same spectrum even if in different places. The second is to recognize that arbitration, like administrative adjudication, implicates the structural concerns developed in Part I. To be clear, the structural concerns may not be the same, but they both implicate the diminution of judicial power. To the extent appellate review theory seeks to set boundaries on the diminution of that

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77 See Fuller, 92 Harv. L. Rev. at 354-56, 389. The parallels between the two systems do not end with the issue of judicial review. As Rebecca White recently has explained, the two fields also share synergies over the extent to which courts should defer to the extra-judicial decisionmaker, whether an arbitrator or an agency. See Rebecca Hanner White, *Arbitration and the Administrative State*, 38 Wake Forest L. Rev. 1283 (2003).
power, it supplies at least a starting point for a theory (though as I explain later on, arbitration sheds light on how that theory should be modified).

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

First, Fallon suggests that the constitutionality of an arbitral scheme turns on the opportunity for federal courts to conduct *de novo* review of questions of law. Under this standard, *Thomas* was wrongly decided.\(^78\) In Fallon’s view, the core defect of the scheme in *Thomas* was that

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\text{[d]ecisions of federal law were committed to an arbitrator, whose ruling were subject to judicial review only for fraud or misconduct. In the absence of judicial review, investiture of authority to decide questions of law in a non-article III federal decisionmaker encroaches too deeply on the fairness and separation of powers values that article III embodies.}
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The second hint in Fallon’s analysis is that the constitutionality of arbitration turns on whether the parties have validly waived their entitlement to an Article III tribunal. That second hint comes in Fallon’s analysis of *Schor*:

\[
\text{[Schor] thus suggests a question – which would have been presented directly had full appellate review not been provided – about the legitimacy and effectiveness of waivers of article III rights in the absence of appellate review. As long as the waiver is not procured by any form of illegitimate pressure, waiver ought to be held permissible within an appellate review theory. Waiver substantially alleviates any concern of unfairness to the parties. Moreover, when both parties are satisfied that the adjudicatory scheme treats them fairly, there is substantial assurance that the agency is not generally behaving arbitrarily or otherwise offending separation-of-powers values.}\(^79\)
\]

\(^78\) For a factual synopsis of *Thomas*, see note [x] *supra*.

\(^79\) 101 Harv. L. Rev. at 991-92.
Unfortunately, the effect of these two hints in Fallon’s analysis is to offer conflicting guidance on the constitutionality of arbitration. Had Fallon’s analysis ended with his discussion of *Thomas*, the implications of his theory would have been quite clear but also quite fatal for arbitration. Just like the scheme in *Thomas*, federal courts are precluded from conducting *de novo* review of the arbitrator’s legal conclusions.\(^{80}\) Instead, at most, federal courts only review arbitral awards for manifest disregard of the law – a highly deferential, perhaps toothless, standard upon which few awards have been set aside.\(^{81}\)

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

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

\(^{80}\) *See infra* notes [x] and accompanying text.

\(^{81}\) *See* Norman Posner *Judicial Review of Arbitral Awards: Manifest Disregard of the Law* 64 Brook. L. Rev. 471, 506 (1998) (“Consequently, although most circuit courts have adopted "manifest disregard of the law" as a non-statutory ground for vacating or modifying an award, until recently there have been few cases in which a court has set aside an arbitral award on this ground.”), Noah Rubins, ‘*Manifest Disregard of the Law*’ and ‘*Vacatur of Arbitral Awards in the United States*,’ 12 Am. Rev. Int’l Arb. 363 (2001).
Why is this last aspect of Fallon’s appellate review theory weak? For one thing, it is inconsistent with his account of *Thomas*. One could equally say that the pesticide applicants in *Thomas* voluntarily participated in the FIFRA arbitration scheme when they chose to file the pesticide application. Under Fallon’s second argument on *Schor*, that voluntary activity should have eliminated any Article III problem (absent any undue pressure, and there was no evidence of such pressure in *Thomas*). How then can Fallon conclude that *Thomas* was wrongly decided? Either his analysis of *Thomas* or his waiver argument is flawed; both cannot comfortably coexist in the theory.

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

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

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

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

C. Refining Appellate Review Theory

How did appellate review theory end up providing two conflicting messages about the compatibility of arbitration with Article III? The root of the problem lies, I believe, in a very deliberate choice that Fallon made – but did not have to make – when articulating the theory. Specifically, as described above, Fallon opted for a single, unbending set of rules governing Article III review regardless of the underlying circumstances. In doing so, he rejected an alternative approach – one that tailored the constitutionally required degree of Article III review to the particular claim. Fallon concedes such an approach would have been consistent with appellate review theory:

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

If this more nuanced approach comports with appellate review theory and offers these comparative advantages, why then did Fallon reject it? Fallon rejected this approach principally on the ground that “a prescription of ad hoc balancing offers too little guidance about how balances ought to be struck.”

84 101 Harv. L. Rev. at 975 (emphasis added)
85 Id.
Fallon’s choice of the categorical rule over the balancing test is a familiar one in the annals of jurisprudence. In brief, “rules” offer the advantage of clarity but often come at the cost of rigidity. For example, if a rule provides “no entry into the park after 10pm,” that is a rule which almost anyone can understand, yet it may prevent desirable outcomes (such as an overnight camping trip in the park). By contrast, multi-factor balancing tests offer the advantage of adaptability but often are vague. For example, if a rule provides “drive as fast as the circumstances demand,” few people will be able to discern the appropriate speed limit, but the rule is nimble enough to accommodate both the daily commuter and the father racing to the hospital while his wife is in labor. The lesson from this simple debate – and one that Fallon inexplicably overlooks – is the need to craft a rule with sufficient clarity to permit its easy application but also with sufficient flexibility to permit its adaptation to different contexts.

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

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

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necessary to revisit Fallon’s value balance and determine how, in the particular context of arbitration, those values translate.

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

1. **Expertise** - Arbitration potentially offers the specialized expertise arbitrators can bring to the dispute.87

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

3. **Flexibility** – Arbitration offers greater flexibility than an Article III forum in adapting a scheme of administration and adjudication. Parties are generally free to tailor the procedures of the arbitration to their particular needs.88

4. **Fairness** – Whether arbitration produces fairer results is a hotly disputed proposition. A long line of literature criticizes arbitration precisely on the ground that its unfair procedures are biased in favor of the party with the stronger bargaining position.89 More recent empirical evidence, however, suggests that in fact arbitration in fact produces fair results.90

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

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

1. **Separation of Powers** – As discussed above, arbitration could present separation of powers problems (though the problem technically is a diminution problem, as opposed to an encroachment one present in the Article I Court situation). Specifically, Congress diminishes the power of the Article III courts by vesting their decision making power in another non-Article III institution and then requiring federal courts to give effect to those decisions, subject to very limited grounds for review.91

2. **Fairness** – This is the flipside of the fairness factor (4) above. Depending on the state of the empirical research, arbitration, in contrast to federal litigation, might run a greater risk of unfairness to litigants. Particularly in areas where the litigants are of unequal bargaining positions and, consequently, the stronger party might prefer a forum or set of rules systematically biased in its favor.92

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

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

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

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

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

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

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

One may legitimately question whether these are the only values by which the scope of review should vary. Specifically, should the scope of review also depend on

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95 See 28 U.S.C. §§1601 et seq.
96 This explicit consideration of the sovereign’s presence in the litigation also helps square the modified appellate review theory with the public rights doctrine (at least in its original form). As discussed above, beginning with Murray’s Lessee, the public rights doctrine justified restrictions on the jurisdiction of the Article III courts in cases where the sovereign was a party. Thomas broke with this tradition by classifying certain claims as “public rights” even though they arose between two private parties. 473 U.S. at 589. As Fallon himself admits, Thomas remains a dubious precedent under appellate review theory, and so to does it under the modified from offered here. With the exception of Thomas, the other public rights cases fit comfortably within my model.

Of course, the sovereign immunity argument can be turned on its ahead. Arguably, the need for judicial oversight may be at its zenith precisely when the sovereign is a party in the case. In such cases, judicial oversight is necessary as a check on governmental overreaching and to ensure neutral application of relevant legal principles. Such a position, while principled, would require overruling the public rights cases tracing all the way back to Murray’s Lessee and is beyond the scope of this paper. I am grateful to Michael Wells for his insights on this point.
whether the case is an international one? This argument is not without foundation, and at least two starting points are possible. One starting point could trace back to cases like *Dames & Moore v. Regan.* Under this line of argument, treaties will govern most international arbitration cases; as treaties require cooperation between the executive and legislative branches, courts should be less inclined to interfere. The other starting point could trace back to the line of cases suggesting the need for judicial deference in matters of foreign affairs or foreign commerce. Whatever starting points, both arguments would yield the same conclusion – that the scope of constitutionally required judicial review should be lower in international cases (and conversely should be greater in purely domestic cases).

Such a course might a have been possible at one time. Particularly following the Supreme Court’s decision in *Scherck,* it could plausibly maintain a distinction between international arbitration cases and domestic ones. Nonetheless, by the mid 1980’s, any attempt to preserve a doctrinal distinction between domestic and international cases was lost. With cases such as *Rodriguez de Quijas,* the Court put domestic cases on an equal footing with international ones as a matter of doctrine. Since that time, it has shown no solicitude toward efforts to separate the two types of cases. Thus, while this argument has great theoretical appeal, I ultimately reject it, for it undermines the theory’s explanatory value.

The upshot of this modified appellate review theory is to vary the degree of constitutionally required review along two axes. At one extreme lie involuntary private

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97 I am grateful Leila Sadat for her insights on this point.
arbitrations. In those circumstances, the need for Article III review is at its zenith. At the other extreme lie voluntary arbitrations involving the sovereign. In those circumstances, the need for Article III review is at its nadir. The intermediate cases are voluntary, private arbitrations and involuntary, sovereign arbitrations. I depict those axes below:

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<tr>
<td>Intermediate Case</td>
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<tr>
<td>Voluntary</td>
<td>Intermediate Case</td>
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How does this translate onto the different types of issues under review? With respect to questions of constitutional law, *de novo* review should still be required. As to the necessity of review, arbitration does not affect Fallon’s basic analysis: Article III review of constitutional questions is necessary both to promote separation-of-powers principles and to provide an essential fairness to individual litigants when their constitutional rights are at stake.\(^{101}\) As to the scope of review, the analysis admittedly does not map perfectly. Fallon justified *de novo* review of constitutional questions on the ground that “separation of powers values are deeply implicated” if “another agency of government has strayed beyond constitutional limits.” Arbitration does not present a

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\(^{101}\) Fallon, 101 Harv. L. Rev. at 975-976.
situation where an agency of government can act *ultra vires*. Nonetheless, anything less than plenary review could implicate separation of powers concerns animating Fallon’s standard. If Congress could strip Article III courts of their power to review an arbitrator’s findings on questions of constitutional law, such a regime would undermine separation of powers principles just as much as the aggrandizement of a federal agency’s power. Requiring plenary review of constitutional questions eliminates that concern.

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

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

Thus, modified appellate review theory justifies at least some degree of Article III review of an arbitrator’s legal determinations, though perhaps not as exacting as that required in Fallon’s original model. Some of the values that justify plenary review in the agency or legislative court context – such as political pressure or aggrandizement – drop out here. Others, by contrast, such as arbitrariness, expansive conceptions of jurisdiction or capture remain relevant in the context of arbitration.

Deference by Article III courts to determinations of federal law made by other non-Article III entities is a familiar one. For example, in administrative law, Skidmore and Chevron both allow a federal court to defer to an agency interpretation of an ambiguous statute. In criminal procedure, both pre-AEDPA and post-AEDPA case law permit a federal court to defer to a state court’s interpretation of a federal law.

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102 Courts have some ability to control this tendency toward expansion through judicial review of the arbitrator’s jurisdiction, either at the pre-arbitration stage or the enforcement stage. See First Options v. Kaplan, 514 U.S. 938 (1995).
104 I am especially grateful to Laura Appleman for helping me tease out this argument. See also See Rebecca Hanner White, Arbitration and the Administrative State, 38 Wake Forest L. Rev. 1283 (2003).
constitutional question. At the same time, both doctrines permit the federal courts to override the prior decision maker’s “unreasonable” determinations. To be sure, the analogies here are not exact – the former involves deference to another branch of government (thereby assuring some degree of political accountability); the latter involves deference to a different sovereign’s courts (who, as noted above, occupy a different position from arbitrators). Nonetheless, doctrines like these illustrate that our constitutional scheme can tolerate a limited degree of deference by Article III courts to another entity’s construction of federal law when some underlying policy reason justifies that deference. Just as the expertise of an administrative agency or federalism and finality may justify some deference in these contexts, so too can the promotion of arbitration support such deference here.

Finally, as to factual review, arbitration does not alter Fallon’s analysis and, indeed, fits quite comfortably with it. Factual findings by arbitrators, like those of administrative agencies or legislative courts, present no particular threat to either separation-of-powers values or fundamental fairness. As to the special categories of facts warranting separate treatment – constitutional or jurisdictional – a discretionary approach ideally balances the need to correct “suspect” findings against the desire to avoid costly relitigation of issues.

At this point, it is worth addressing how modified appellate review theory differs from the present doctrine, with perhaps a nudge for the judiciary to enforce Schor more rigorously. How much does the “voluntariness” prong differ from Schor’s waiver analysis? How much does the presence of the sovereign in the dispute differ from the non-waivable aspects of Article III noted in Schor? The synergies with existing doctrine

106 I thank Heather Elliott for forcing me to think through this question.
are unsurprising for, as already noted, one of the key appeals of appellate review theory (whether in its original or modified form) is to remain in harmony with existing doctrine. Harmony, though, is not the same as identity, and in at least three critical respects, modified appellate review theory differs from the current landscape.

First, modified appellate review theory utilizes an entirely different metric from *Schor*. Whereas *Schor* utilizes waiver categorically – that is to say, a party waives its right to an Article III forum – modified appellate review theory utilizes the concept of voluntariness instrumentally. In other words, a party’s voluntary submission to an arbitral scheme may affect the degree of constitutionally required review but not the need for it. By contrast, as noted above, some courts relying on *Schor* to justify the constitutionality of arbitration have ended the argument with the waiver analysis.

Second, the structural analysis under modified appellate review theory differs from the “nonwaivable” aspects of *Schor*. With respect to Schor’s “nonwaivable” aspect of Article III, the Court evaluates a dispute resolution scheme’s constitutionality under multi-factor balancing test. By contrast, modified appellate review theory tests the constitutionality of a scheme by reference to a single metric – the degree of Article III review – and calibrates the necessary degree of review along the axes of voluntariness and sovereign immunity.

Third, modified appellate review theory transforms the public rights doctrine. Some courts have relied on that doctrine to uphold certain arbitral schemes, and the Canadian Government relied upon it to defend NAFTA’s arbitral scheme in the *Canadian Softwood Lumber* case. Traditionally, public rights were those claims that involved the
government as a party or where the government had a an actual interest in the dispute.  

By contrast, claims exclusively between private individuals, even when the claims were ones of statutory creation, were ones of private right.  

Thomas broke with that tradition when it classified certain claims as potentially public rights even where the claim arose between two private parties.  Modified appellate review theory rejects this expansion of the public rights doctrine in Thomas.  Instead, its emphasis on the presence or absence of a sovereign in the dispute more closely approximates the classic formulation of the public rights doctrine in cases like Murrays’ Lessee and Crowell.

In sum, appellate review theory provides the most promising basis for reconciling the tension between Article III and arbitration.  Such a theory vindicates the textual, historical and policy concerns underpinning Article III while doing minimum violence to the existing precedent.  The precise degree of review by an Article III Court should not be a rigid, uniform standard as the original expositor of appellate review theory proposed.  Instead, it should reflect the distinct mix of values underpinning the dispute resolution

107 See Granfinanciera, 492 U.S. at 65 (Scalia, J., concurring in part and concurring in the judgment) (“In my view, a matter of public rights, whose adjudication Congress may assign to tribunals lacking the essential characteristics of Article III courts, must at a minimum arise between the government and others.”) (citation and internal quotations omitted).  For example, Murray’s Lessee, the case that spawned the public rights doctrine, concerned the government’s effort to collect a debt owed by one of its customs agents.  285 U.S. at 51.  Ex Parte Bakelite concerned a claim between the government and a private individual over a customs assessment imposed by the government.  In both cases, the Court held (or later characterized) the rights as being “public rights.”  279 U.S. at 451  Crowell sought to provide a non-exhaustive list of examples including: matters found in connection with the congressional power “As to interstate and foreign commerce, taxation, immigration, the public lands, public health, facilities of the post office, pensions and payments to veterans.”  285 U.S. at 51.  Perhaps the clearest statement came from the plurality in Northern Pipeline: “[A] matter of public rights must at a minimum arise ‘between the government and others.’”  458 U.S. at 71 (plurality opinion).

108 For example, the Court in Crowell termed a worker’s compensation claim by a longshoreman against his employer a private right, even though federal statutory law created that claim.  285 U.S. at 51  The plurality in Northern Pipeline classified a state law breach of contract claim as a private right, even where that claim was wrapped up in a governmentally created bankruptcy system for restructuring debtor-creditor relations.  458 U.S. at 71  Finally, the Court in Granfinanciera classified a bankruptcy trustee’s right to recover for a fraudulent conveyance a “private right,” even where the trustee’s power to maintain the action derives from federally created bankruptcy law.  492 U.S. at 55-56.  Again, the Northern Pipeline stated the tradition clearly: “The liability of one individual to another under the law as defined’ is a matter of private rights.”  458 U.S. at 69-70 (quoting Crowell, 285 U.S. at 51).
system – a methodology that Fallon acknowledged was consistent with the underlying spirit of appellate review theory but ultimately dismissed for debatable reasons. Once that aspect of Fallon’s analysis is altered, the proper standard of review should take into account both the voluntary nature of most arbitrations and the special legal status of an award under a judicial system. The next Part applies appellate review theory to determine whether the FAA and other arbitral schemes in fact comport with Article III.

III. Applications and Criticisms

The preceding Part developed a revised version of appellate review theory as the basis for evaluating the compatibility of arbitration with Article III. This final Part explores the theory’s implications. It first applies the theory to several arbitral schemes: (a) private commercial awards under the FAA and New York Convention, (b) awards rendered by NAFTA Dispute Resolution Boards, and (c) investment arbitrations. In brief, I conclude that, under the modified appellate review theory offered here, most forms of private commercial arbitration, NAFTA arbitration, investment treaty arbitration and party-initiated expansions of judicial review all survive an Article III challenge. By contrast, the scheme in *Thomas* violated Article III, and party-initiated contractions of judicial review should not be enforced. Part III then anticipates several criticisms of the theory and explores its implications for related areas of the law.
A. Preliminary Applications

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

- The parties lacked capacity to enter it;
- The losing party lacked adequate notice of the proceeding or an opportunity to be heard;
- The award concerns a matter beyond the parties’ submission;
- The composition of the tribunal or the arbitral procedure deviated from the parties’ agreement or, absent such agreement, the law of the arbitral forum;
- The award has been set aside;
- The dispute is non-arbitrable in the country were enforcement is sought;
- The award violates the public policy of the country where enforcement is sought.


110 Less frequently, other conventions may apply. These include the Panama Convention (governing awards in certain Latin American arbitrations) and, discussed below, the Washington Convention (governing awards for certain investment arbitrations). The standards of judicial review under the Panama Convention are virtually identical to those under the New York Convention so the analysis in the text applies equally in these specialized contexts.
Second, in cases of vacatur (setting aside an award rendered in the United States) and cases of confirmation and enforcement not falling under a treaty, the Federal Arbitration Act ("FAA") sets forth the default framework for judicial review. Section 10 of the FAA provides as follows:

[A district court] may make an order vacating the award upon the application of any party to the arbitration –

(1) Where the award was procured by corruption, fraud or undue means;

(2) Where there was evident partiality or corruption in the arbitrations, or either of them (sic);

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

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

On their face, neither Article V of the New York Convention nor Section 10 of the FAA provides for any Article III review of the merits of the decision, whether on statutory or constitutional grounds.\(^{111}\)

Despite the absence of any textual authorization for Article III review of legal questions, judicial decision has partly filled in the gap, for courts have constructed a doctrine that, at least arguably, might attempt to temper this harsh conclusion. For several decades, the “manifest disregard of the law” doctrine has enabled federal courts to take a quick look at the merits of the award (even though that doctrine does not find any

\(^{111}\) Indeed, nearly a century and a half ago, the Supreme Court seemed to envision this state of affairs. In *Burchell v. Marsh*, the Supreme Court explained that “[i]f the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, *either in law or fact*. A contrary course would be a substitution of judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.” 58 U.S. 344 (1855).
formal footing in the text of Section 10). The formulations of the “manifest disregard”
doctrine vary in slight terms, and its scope is not fully settled. Under the generally
accepted formulation of the doctrine, a federal court may vacate the award where the
arbitrator was aware of the applicable law yet refused to apply it. Putting to one side
the legitimacy of the manifest disregard doctrine (a topic I have explored elsewhere),
the question then becomes whether the manifest disregard of the law doctrine adequately
rescues the FAA from constitutional infirmity.

While the issue is close, I ultimately conclude that ordinary private commercial
arbitration survives Article III challenge under modified appellate review theory. Courts
almost never review arbitral awards for factual errors, yet modified appellate review
theory suggests that this does not present an Article III concern. As to questions of
constitutional law, the available review under the FAA and the New York Convention
suffices. In some cases, courts can rule on constitutional issues at the outset of the
arbitration in ruling on a motion to compel arbitration or stay litigation. In other cases,
courts can rule on constitutional issues when reviewing the arbitral award – several of the
above-mentioned standards under the New York Convention or the Federal Arbitration
Act incorporate constitutional norms. For example, both laws provide that an award can
be denied enforcement (or vacated under the FAA) in cases where a party lacked proper
notice of the arbitral proceedings. Courts applying these standards have generally

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112 See supra note [x].
113 As I have explored elsewhere, a disagreement persists among the lower federal courts over
whether the manifest disregard of the law doctrine is available in enforcement actions falling under the
117 Id. at 208-216 (collecting cases for the proposition that courts can rule on challenges that
arbitration agreements are void on grounds of illegality).
imported due process norms to evaluate those claims.\textsuperscript{118} Thus, under modified appellate review theory, the current regime provides Article III courts sufficient oversight of constitutional questions.

The trickiest aspect of the analysis here is, however, the limited role of Article III. This gap would be fatal to arbitration under the original conception of appellate review theory. Once one rejects “consent” as an escape hatch for the theory, federal courts are not conducting the \textit{de novo} review of nonconstitutional questions that the theory requires. Nonetheless, under modified appellate review theory, the manifest disregard of the law standard arguably supplies the necessary degree of federal appellate review. The voluntariness of the undertaking justifies a reduced role for federal courts. At the same time, the manifest disregard standard preserves a limited role for federal courts vindicating the Article III values still present in a scheme of arbitration.

Ironically, the origins of the manifest disregard of the law doctrine strengthen this claim.\textsuperscript{119} The manifest disregard of the law standard appears nowhere in the Federal Arbitration Act (or, for that matter, any other statute or treaty governing the enforcement of arbitral awards in the United States). Rather, it traces its origins entirely to the Supreme Court’s decisions, almost as a type of federal common law governing the enforcement of awards.\textsuperscript{120} This judicial pedigree affords a court greater flexibility to shape its contours than if a statutory text constrained its interpretation. While courts generally have been reluctant to vacate awards (or decline enforcement) on this ground,

\textsuperscript{118} \textit{Id.} at 832-833, 841-849.
\textsuperscript{119} I am grateful to Jo Potuto for her thoughts on this point.
several recent noteworthy decisions involving federal statutory claims have done so. 121

This trend suggests that the doctrine is malleable enough to vindicate the Article III values underpinning appellate review theory in this context.

While private commercial arbitration survives Article III challenge under modified appellate review theory, the scheme in Thomas does not. Compared to the judicial review governing private commercial awards, judicial review under the FIFRA scheme in Thomas was more limited: FIFRA reserved absolutely no role for reviewing courts to evaluate the arbitrator’s award, even where the arbitrator manifestly disregarded the law. That utter lack of judicial review over the merits of a dispute between two private parties cuts too deeply into the separation of powers values animating Article III review. Thus, like Fallon’s original appellate review theory, the modified theory offered here would reject the holding in Thomas.

Modified appellate review theory also offers some insights over the ongoing debates about the enforceability of party-initiated efforts to modify the scope of judicial review contractually, a topic that the Supreme Court recently decided to resolve. 122 In some cases, parties attempt to expand the grounds of judicial review (for example by providing that the arbitrator’s factual findings shall be reviewed for clear error and the legal findings reviewed de novo). 123 Under the logic of the theory presented here, such clauses should be enforced for they re-enforce the separation-of-powers values justifying a role for the judiciary in reviewing an award. In other cases, parties attempt to limit the

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123 See, e.g., Lapine Technology Corp. v. Kyocera, 130 F.3d 884 (9th Cir. 1997).
grounds of judicial review (for example by subjecting the award to review under state law
grounds which may be narrower than those under the FAA).124 Modified appellate
review theory suggests that such clauses should be unenforceable, for they further erode
the judiciary’s residual role in policing awards before they are reduced to judgment.

The question is extremely close, but the manifest disregard doctrine, in my
opinion, saves private commercial arbitration from constitutional defect. Its absence
from the review scheme in Thomas, however, renders that scheme unconstitutional.

2. **NAFTA**: Under Chapters 11 and 19 of the North American Free Trade
Agreement, the signatory countries agree to submit disputes over discriminatory
treatment, expropriation, anti-dumping and countervailing duties laws (following an
initial agency determination) to a binational panel of arbitrators.125 With respect to
disputes over imports into the United States, NAFTA requires binational panels to choose
U.S. law as the applicable substantive rule of decision. In the event a party disagrees
with the panel’s determination, it may appeal that decision to an extraordinary challenge
committee. Following that committee’s review (or in the event no such committee is
convened), the only recourse that a party has to a federal court is to file a constitutional
challenge (the *Canadian Softwood Lumber* case, which recently settled following oral
argument in the D.C. Circuit, involved such a challenge).126 Thus, even though the

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125 For discussions NAFTA’s dispute resolution procedure, see Karamanian, *Dispute Settlement
Under NAFTA Chapter 11: A Response to the Critics* (paper on file with author); Monaghan, 107 Colum.
L. Rev. 833; Pfander, 118 Harv. L. Rev. at 766-768; Bradley, 55 Stan. L. Rev. at 1575-77; Chen, 49 Wash.
& Lee L. Rev. 1455.
126 See *Coalition for Fair Lumber Imports, Executive Committee v. United States*, Slip Op. No. 05-
1366 (Dec. 12, 2006).
interpretation of NAFTA is undoubtedly a federal question, a party may not, apart
from the narrow exception for constitutional questions, seek review of the merits of a
NAFTA tribunal’s determinations in an Article III court.

NAFTA arbitration also survives under appellate review theory. With respect
to two types of findings, the analysis is quite straightforward. A provision of the NAFTA
implementing legislation expressly grants the D.C. Circuit, an Article III Court, original
jurisdiction over facial constitutional challenges to NAFTA’s binational panel review
system. Additionally, the Court of International Trade, also an Article III Court, has
jurisdiction over constitutional issues arising out of U.S. agency determinations that
implement binational panel decisions in countervailing duty and antidumping cases. While neither NAFTA nor its implementing legislation authorize Article III review of a
binational panel’s factual findings, appellate review theory – both in its original form
advanced by Fallon and in the modified form advanced here – do not find this
troublesome.

The tougher aspect of NAFTA’s system is the complete lack of federal judicial
review of any legal findings by binational panels. This would clearly be fatal to the

127 “The judicial power shall extend to all Cases, in Law and Equity, arising under the Constitution,
the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S.
2006) (describing how claims under treaties of the United States arise under federal law).
128 Though not central to my thesis, I also believe that it would survive even under public rights
theory, as the Court has articulated it. Jim Chen has offered a forceful attack on NAFTA arguing, among
other things, that its dispute resolution system violates Article III. Appointments with Disaster: The
Unconstitutionality of Binational Arbitration Review under the United States-Canada Free Trade
Agreement, 49 Wash. & Lee L. Rev. 1455 (1992). Central to Chen’s Article III argument is his contention
that the claims under NAFTA constitute private rights. While powerful, Chen’s argument ultimately
cannot overcome Ex Parte Bakelite’s clear holding that claims against the government arising out of
customs determinations represent core public rights for which Congress can cut off Article III review
altogether. 279 U.S. 483 (1929). Indeed, until 1979, Article III Courts had no jurisdiction over customs
determinations whatsoever. See Ehrenhaft, The Judicialization of Trade Law, 56 Notre Dame L. Rev. 595
NAFTA scheme under Fallon’s original appellate review theory. Under the modified appellate review theory offered here, however, this limit is not fatal. Evaluated under the flexible balance articulated in Part II, NAFTA claims represent core claims implicating principles of sovereign immunity. The Canadian Softwood Lumber case, for example, technically involve an action by United States companies against the United States government (and Canadian intervenors). Barring a waiver, sovereign immunity principles would foreclose any action whatsoever, a result entirely consistent with Article III. Thus, a scheme foreclosing judicial review of binational panels’ determinations of pure legal questions does not violate Article III.

3. Investment arbitration: To facilitate the flow of capital to lesser developed countries, the United States and other western nations have entered into more than 2,000 bilateral investment treaties (BITs) with capital importing countries. A critical feature of these treaties is that they protect the foreign investor against expropriatory or other conduct. To substantiate this guarantee, many BITs include offers by the capital-importing country to arbitrate any expropriation claim often administered under the auspices of the World Bank’s International Center for the Settlement of Investment Dispute (“ICSID”). A critical feature distinguishing BIT awards from other

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131 Pfander, 118 Harv. L. Rev. at 767.
international commercial arbitral awards is that they do not require an underlying agreement to arbitrate. Rather, the capital-importing nation’s treaty obligations suffice to subject the country to the jurisdiction of an arbitral tribunal. In an ICSID-administered arbitration, following decision by a panel, an appellate arbitral panel reviews the decision. Thereafter, if both countries are signatories, judicial review is governed by the Washington Convention of 1965. Under that Convention, “awards are theoretically directly enforceable in signatory states without any method of review in national courts.”

Investment arbitration has some of the qualities of ordinary international commercial arbitration but with three salient differences. First, unlike international commercial arbitration, investment arbitration does not involve the voluntary agreement between the parties to submit their dispute to arbitration. Rather the submission arises from the pre-existing agreement of the capital-importing country or the state-owned entity with which the foreign investor is doing business. Second, unlike private commercial arbitration, investment arbitration implicates concerns of sovereign immunity. As noted in the preceding section, both the voluntariness of the undertaking and the presence of sovereign immunity weigh in the value scale that determines the necessary degree of “adequately search appellate review.” Third, judicial review is far more circumscribed than in private international commercial arbitration.

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


136 The non-contractual feature here resembles the system of compulsory arbitration in Thomas described supra. Notably, the Court in Thomas eschewed any effort to characterize the arbitration as “voluntary” by reference to the prior decision to register the pesticide with the EPA.
With respect to questions of constitutional law and findings of fact, the analysis of bilateral investment treaties does not differ materially from the analysis of ordinary private commercial arbitration. With respect to legal questions, however, the analysis is markedly different for the above-noted reasons. The absence of privity between the foreign sovereign and the investor suggest that greater scrutiny is required. On the other hand, the presence of sovereign immunity concerns reduces the need for plenary Article III review. Here, of course, it is not the immunity of the United States at issue but, instead the immunity of the foreign sovereign. That immunity, of course, is the subject of legislative grace, one that Congress can strip if it so desires.137 Here too, the question is close. Ultimately, though, Congress’s control over the foreign sovereign’s immunity logically entails a power also to decide the scope of any judicial action over the sovereign. Since Congress could restore the sovereign’s immunity altogether, it follows that it should likewise be able to regulate the degree to which the sovereign is amenable to suit in an Article III Court. Given the dominance of the sovereign immunity values here, investment arbitrations, despite the limited review for legal errors, likewise pass constitutional muster.

B. Criticism

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

Choice of Forum Clauses: One potential criticism of the thesis presented here is its implications for other efforts to shift disputes away from Article III forums.138 For example, courts have, within limits, generally approved parties’ use of choice-of-forum

138 I am especially grateful to Symeon Symeonides, Ralph Steinhardt and Peter Murphy for helping me work through this puzzle in the argument.
clauses to refer disputes to a foreign forum. In some cases, parties may combine the choice-of-forum clause with a choice-of-law clause – thereby opting out of a jurisdiction’s procedural system and its substantive liability rules. These efforts have generally received judicial approval, albeit amid much academic criticism. Should international choice-of-forum clauses (whether standing alone or coupled with choice-of-law clauses) survive the test articulated here?

In fact, such cases fit quite comfortably within the theory. In contrast to arbitral awards, the standards governing judicial review of foreign judgments are more exacting; courts enjoy relatively greater latitude to decline to enforce foreign judgments that they find problematic, including a robust public policy exception (permitting a review of the substance of the judgment) and due process rules (permitting a review of the procedures utilized to reach that judgment). This greater flexibility makes the forum selection/choice-of-law cases easier, not harder, than the arbitration cases under appellate review theory.

142 For recent examples of courts relying on these more robust standards, see, e.g., *Yahoo!, Inc. v. La Ligue Contre le Racisme et L’Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001), *rev’d on other grounds*, 433 F.3d 1199 (9th Cir. 2006) (*en banc*); *Bridgeway Corp. v. Citibank*, 45 F.Supp.2d 276 (S.D.N.Y. 1999), *aff’d*, 201 F.3d 134 (2d Cir. 2000); *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997).
143 The newly signed Hague Convention on Choice of Court Agreements may, though, test the limits of this argument. That convention tightens the obligations on courts to give effect to choice-of-forum clauses and foreign judgments rendered thereto. As I have argued elsewhere, the treaty (which the United States has signed but not yet ratified) could eliminate a major difference in the legal regime governing judgment enforcement and award enforcement and, consequently, require re-examination of the Article III questions explored here. See Rutledge, *Post-Hague Hangover: Three Predictions About the Future of the Law Governing the Enforcement of Foreign Judgments and Arbitral Awards*, in *Occasional Papers of the University of Lisbon/Catholic University Law Conference* (forthcoming 2007).

To take the argument one step further, one might ponder its implications for settlement agreements and consent decrees. Does the argument here require different treatment of those efforts at “alternative
The Voluntariness Line: A second potential criticism concerns the importance that the theory places on the difference between voluntary and involuntary agreements. A rich literature has argued that certain arbitration agreements, particularly in cases of parties involving unequal bargaining power (such as consumer contracts and employment agreements), should not be understood as voluntary at all. Rather they should be deemed contracts of adhesion where the use of a standard form arbitration clause in an industry is so rampant that the party with the inferior bargaining position cannot honestly be said to have engaged in a free choice.

This argument presents a potentially formidable objection to the theory presented here, particularly in the context of domestic arbitrations involving statutory claims (such as in Title VII or the Truth in Lending Act). Nonetheless, I do not think that it jeopardizes the theory for two main reasons.

First, as I have argued elsewhere, it would be a mistake to characterize these sorts of arbitrations as involuntary.144 Narrowing the definition of “voluntary” to exclude agreements of this sort could undermine valuable public policies that benefit both sides in transactions of this sort, including the party with the lesser bargaining power. For example, law and economics theory suggests that companies who can reduce their dispute resolution costs through arbitration clauses can pass on those savings in the form of resolution.” For three reasons, I do not believe that these other forms are completely analogous to arbitration agreements. First, with respect to settlement agreements, no federal statute compels courts to reduce the agreement to a judgment (as is the case with arbitral awards). Second, settlement agreements and consent decrees are more properly understood as “post-dispute” attempts at settlement rather than “pre-dispute” agreements about how to settle a case; under those circumstances, considerations of fairness are less pronounced. Third, while the standards vary across jurisdictions and with the issue, the degree of judicial review of these sorts of resolutions is more exacting and, thereby, promotes the Article III values. See, e.g., Weisburst, Judicial Review of Settlements and Consent Decrees: An Economic Analysis, 28 J. Legal Stud. 55 (1999) (describing the differing degrees of judicial deference to party-initiated settlement).

of reduced prices to their customers. Such benefits obviously would be lost if agreements of this sort were deemed involuntary, and the judicial review found inadequate under appellate review theory.

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

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

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145 Anecdotal evidence from the credit card lends some support to this hypothesis, though the data re scarce. See Drahozal, Unfair Arbitration Clauses, 2001 U. ILL. L. REV. 695, 742-48.
CONCLUSION

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