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Arbitration and Article III

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Despite the critical need for a coherent theory relating Article III courts to non-Article III institutions, few commentators or courts have made serious attempts to provide one. Most judicial arguments seek refuge in one of three facile lines of argumentation – (1) that parties to an arbitration “waive” their right to an Article III forum by agreeing to arbitration; (2) that arbitration involves “public” rights and, consequently, does not implicate Article III; or (3) that the Supreme Court’s decision in *Gilmer* definitively settles the Article III question. Part I of this Article examines these arguments and explains why none of them offers a sufficient account for why arbitration comports with Article III. Part I then turns to the scant literature on the subject and demonstrates why those accounts likewise do not suffice.

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

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

Part III of this Article traces the implication of the theory developed in Part II for three forms of international arbitration: (1) regular commercial arbitration under the FAA and New York Convention, (2) arbitrations under NAFTA and (3) investment arbitrations. In brief, I conclude that, under the modified version of appellate review theory offered here, each of these systems passes muster under Article III. This theory puts arbitration on a surer constitutional footing.