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Arbitration and Article III

*Peter B. Rutledge**

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Arbitration implicates serious constitutional concerns that have not received adequate attention in case law or commentary. Recent litigation in the D.C. Circuit over the constitutionality of the North American Free Trade Agreement (“NAFTA”) represents the most recent, high-profile example. A centerpiece of NAFTA and its implementing legislation is an arbitration mechanism that divests Article III courts of virtually all jurisdiction over countervailing duty and anti-dumping claims and invests that authority in panels of

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arbitrators whose decisions are subject to virtually no federal court review.¹ A group of American softwood lumber producers, dissatisfied with the arbitrators' decision, challenged NAFTA's dispute resolution mechanism on a variety of grounds, including its incompatibility with Article III.² The parties ultimately settled the case, perhaps motivated in part by fear of the consequences if a court invalidated the scheme.³ As representatives of both Canada and the U.S. government made clear during oral argument in the D.C. Circuit, a successful challenge had the potential to unravel the entire NAFTA regime.⁴

Had the settlement not been struck, any judicial decision would have had enormous repercussions for arbitration. If the D.C. Circuit had 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 Article III courts. Moreover, 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 scheme would have provided an opportunity for similarly constricted judicial

1. *United States-Canada Free Trade Agreement: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 87 (1988) (statement of Hon. Sam M. Gibbons, Chairman, Subcomm. on Trade of the H. Comm. on Ways and Means); H.R. REP. NO. 100-816, pt. 4, at 1 (1988).

2. *Coal. for Fair Lumber Imps., Executive Comm. v. United States*, 471 F.3d 1329, 1332 (D.C. Cir. 2006).

3. *See id.* at 1332-33 (dismissing case for lack of jurisdiction due to settlement following oral argument).

4. *See* Brief for Respondents at 25, *Coal. for Fair Lumber Imps.*, 471 F.3d 1329 (No. 05-1366) (arguing that the "binational dispute resolution mechanism was designed to ameliorate serious frictions between the United States, Canada, and Mexico, and amounts to a bargained-for element of an agreement among them"); Brief of Respondents-Intervenors the Government of Canada, the Government of Alberta, the Government of British Columbia, the Government of Ontario, and the Gouvernement du Quebec at 1, *Coal. for Fair Lumber Imps.*, 471 F.3d 1329 (No. 05-1366) (asserting that the binational dispute resolution mechanism is a "key element" of NAFTA).

review in other areas, such as securities law and employment discrimination.⁵

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.⁶ For much of the country's history, federal courts conveniently could avoid this nettlesome question.⁷ Prior to the twentieth century, courts simply declined to

5. See *Belom v. Nat'l Futures Ass'n*, 284 F.3d 795, 799 (7th Cir. 2002) (holding that the right to an Article III forum is not absolute and where an individual consents to arbitration in a futures market employment contract, "he waives the right to an impartial and independent adjudication"); *Desiderio v. NASD, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999) (rejecting a constitutional challenge to the mandatory arbitration clause in Form U-4 on the ground that the requisite state action was absent); *Geldermann, Inc. v. CFTC*, 836 F.2d 310, 311-12 (7th Cir. 1987) (holding that Congress intended to require commodity exchange members to submit to customer-initiated arbitration and that such a requirement did not violate Article III); *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1471 (N.D. Ill. 1997) (holding that the NYSE- and NASD-mandated arbitration of discrimination claims posed no threat to an employee's right to an Article III court); *Springfield Terminal Ry. Co. v. United Transp. Union*, 767 F. Supp. 333, 355 (D. Me. 1991) (holding that the arbitration mandated by the Federal Railroad Safety Act does not contravene Article III); *United Transp. Union v. Consol. Rail Corp.*, 593 F. Supp. 1346, 1347 (Reg'l Rail Reorg. Ct. 1984) (holding that Section 714 of the Regional Rail Reorganization Act provides that arbitration is the exclusive remedy for disputes arising under the Act). Though not directly relevant to the Article III question, state courts have entertained and, in some cases, accepted constitutional challenges to arbitration predicated on state constitutional analogues to Article III. See *State v. Neb. Ass'n of Pub. Employees*, 477 N.W.2d 577, 580 (Neb. 1991) (holding that statute authorizing binding arbitration violated "open courts" provision of Nebraska Constitution). See generally R. D. Hursh, Annotation, *Constitutionality of Arbitration Statutes*, 55 A.L.R.2d 432, 434 (1957 & Supp. 2004) (discussing the agreement of the courts that "no constitutional defect inheres in arbitration statutes which provide that agreements to arbitrate future disputes are valid, enforceable, and irrevocable").

6. For literature addressing the relationship between commercial arbitration and Article III, see Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1456-57 (1992); Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 842 (2007); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 78-80 (1997); Vicki Zick, Comment, *Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration*, 82 MARQ. L. REV. 247, 249 (1998). For a sampling of the broader literature addressing various constitutional aspects of arbitration, see Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 81 (1992). The United States Justice Department's Office of Legal Counsel has released an opinion addressing some of the constitutional complications attendant to binding federal arbitration involving the federal government. Memorandum from Walter Dellinger, Assistant Attorney General, to John Schmidt, Associate Attorney General, *Constitutional Limitations on Federal Government Participation in Binding Arbitration* (Sept. 7, 1995), reprinted in 7 WORLD ARB. & MEDIATION REP. 23 (1996).

7. 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. 263, 277-79 (1932). *Dreyfus* did not explore

enforce pre-dispute arbitration agreements as unenforceable attempts to appropriate their jurisdiction.⁸ From the early decades of the twentieth century (with the enactment of the Federal Arbitration Act ("FAA")⁹ in 1925) through the 1960s, the non-arbitrability doctrine prevented arbitrators from resolving issues of federal statutory law.¹⁰ Notably, while both of these doctrines minimized the tension between arbitration and the Constitution, neither 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.¹¹ And the "non-arbitrability doctrine" operated as a statutory interpretation tool that refused to interpret the FAA to deprive a plaintiff of a federal forum on his statutory claim.¹²

Doctrinal developments since the early 1970s, and particularly in the last two decades, have eliminated the tools that enabled the Court to sidestep the tension between arbitration and Article III. In 1974, the Court held in *Scherk v. Alberto-Culver Co.* that parties could agree to arbitrate a federal securities claim in an international arbitration.¹³ More recently, in a line of cases beginning with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court extended the *Scherk* principle to the domestic context.¹⁴ This line of cases has made 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

whether the limitations on federal judicial review of arbitral awards also comported with Article III. I thank Chris Drahozal for bringing this case to my attention.

8. GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 993 (3d ed. 1996); 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 4.3.2.2 (Supp. 1999); Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 256 (1928).

9. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-16 (2000)).

10. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 245-47 (2d ed. 2001) (discussing the historical development of the non-arbitrability doctrine).

11. 1 MACNEIL ET AL., *supra* note 8, § 4.3.2.2.

12. BORN, *supra* note 10, at 246.

13. 417 U.S. 506, 519-20 (1974).

14. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-28 (1985).

rights now generally insist on holding parties to such bargains, thereby outsourcing an array of claims.”¹⁵

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.¹⁶ Settlement, however, 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 the principle of waiver. In brief, parties entering into an arbitration agreement have waived their right to a federal forum, thereby eliminating any Article III concern. Part I of this Article demonstrates that waiver theory no longer can adequately reconcile arbitration with Article III. Waiver theory overlooks significant structural concerns presented by arbitration—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 FAA 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 than a settlement agreement—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' powers at the expense of the judiciary. Here, the waiver account obviously has no explanatory value, for the parties have not 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 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 decisionmaking mechanism is constitutional, so long as an

15. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005); see also Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 393-96 (2005) (describing the ascendancy of an “arbitration hegemony” over federal statutory claims).

16. *Coal. for Fair Lumber Imps., Executive Comm. v. United States*, 471 F.3d 1329, 1332 (D.C. Cir. 2006).

Article III court has a sufficient opportunity to review the decision.¹⁷ 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.¹⁸ 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 applies this theory to various forms of arbitration: (1) private commercial arbitration under the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”),¹⁹ (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 is consistent with Article III. This conclusion is 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 far surer constitutional footing and provides a blueprint for the design of future dispute resolution schemes. Part III 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.²⁰ At one end of the spectrum lie simple

17. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies and Article III*, 101 HARV. L. REV. 915, 933 (1988).

18. See *id.* at 974-91.

19. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

20. See generally Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1087 (1984) (arguing that settlement generally should not be preferred to judgment because not all

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 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.²¹ A variety of other forms of dispute resolution, such as contractual settlements, consent decrees, conciliation, mediation, and arbitration, lie between these poles.²²

Depending on its position along the spectrum, a particular form of dispute resolution will entail different procedural protections and enforceability rules.²³ For example, no formal procedural rules govern the discussions between neighbors that culminate in a handshake.²⁴ 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 nonconstitutional procedural protections.²⁵ Reflecting those protections, the results of that criminal or administrative hearing generally are more judicially enforceable than the handshake between neighbors.²⁶ These examples yield 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.²⁷

Certain forms of dispute resolution do not fit neatly within the pattern described above. This is especially true of arbitration. In

cases are "equal"); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 355 (1978) (explaining that "certain problems by their intrinsic nature fall beyond the proper limits of adjudication").

21. For a discussion of the varying degrees of formality in systems of dispute resolution, see Fuller, *supra* note 20, at 358-59.

22. See Fiss, *supra* note 20, at 1083-84 (arguing that the drive for settlement often leads to poorly planned consent decrees that eventually bring the parties back to court); William Twining, *Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics*, 56 MOD. L. REV. 380, 382 (1993) (noting that standard alternatives to litigation such as negotiation, compromise, and mediation often constitute phases within litigation).

23. I am grateful to participants in the University of Montreal/McGill University faculty matinee, especially Roderick McDonald, for their insights into this Part of the Article. McDonald rightly reminds us that arbitration is part of a broader social phenomenon about the distribution of the social power to resolve disputes.

24. While formal rules may not govern the handshake, informal norms of course might.

25. Fiss, *supra* note 20, at 1077.

26. See *id.* (asserting that the presence of a judge can "lessen the impact of distributional inequalities").

27. See *id.* at 1084-85 (describing differences in judicial willingness to enforce consent decrees depending on whether settlement underpins decree).

contrast to a full-blown trial, arbitration carries few procedural protections.²⁸ Despite this quality, the result of the dispute—the arbitration award—carries with it a high degree of judicial enforceability.²⁹ 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.³⁰ 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.³¹ The modern-day defense of the waiver argument springs from *CFTC v. Schor*, where the Court held that the Commodity Futures Trading Commission's ("CFTC's") exercise over a common law counterclaim in a dispute between a customer and a commodities broker did not violate Article III.³² 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 has served as the intellectual foundation for 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).³³ Critical in the

28. See generally BORN, *supra* note 10, at 8-9 (discussing both the benefits and the consequences of arbitration's less formal procedures); Fuller, *supra* note 20, at 387-89 (explaining that arbitrators usually do not render opinions, often basing their decisions on grounds not argued or merely mentioned in passing by the parties).

29. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 1126-27 (4th ed. 2007) (explaining that an arbitral award is not a judgment of a court and noting that the parties must seek judicial enforcement if they do not voluntarily comply with the arbitration agreement).

30. *Id.*

31. See, e.g., *Belom v. Nat'l Futures Ass'n*, 284 F.3d 795, 799 (7th Cir. 2002) ("Where an individual consents to arbitration, he waives the right to an impartial and independent adjudication."); *Geldermann, Inc. v. CFTC*, 836 F.2d 310, 317 (7th Cir. 1987) (explaining that, under the Federal Insecticide, Fungicide, and Rodenticide Act, a "follow-on" registrant "explicitly consents to have his rights determined by arbitration"); *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1470 (N.D. Ill. 1997) (explaining that, unless the employee waived her right to an Article III forum, she would be entitled to "her day in court"); *Illyes v. John Nuveen & Co.*, 949 F. Supp. 580, 582-83 (N.D. Ill. 1996) (holding that the Form U-4 the former employee signed incorporated by reference the arbitration provisions later adopted by the NASD and that the plaintiff effectively agreed to arbitrate certain disputes).

32. 478 U.S. 833, 851-53 (1986).

33. *Id.* 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

Court's view was the fact that the parties affirmatively had chosen to invoke the CFTC, leaving the jurisdiction of the federal courts unaffected. The Court explained:

In such circumstances, 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.³⁴

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 are waivable.³⁵ *Schor* provides virtually no analysis supporting its bold assertion that Article III rights are personal.³⁶ This is perhaps unsurprising: all of the constitutional sources point in precisely the opposite direction. Textually, it is difficult to argue that Article III confers a personal right. Nothing in the text speaks in terms of a

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. *Id.* at 851.

34. *Id.* at 855.

35. See Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 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.").

36. See 478 U.S. at 848-49 (describing Article III's role to preserve the structure of tripartite government and to protect litigants' personal rights). The Court's analysis consists of nothing other than the assertion that Article III confers a "personal right" and a citation to a number of disanalogous precedents on criminal rights—dicta from the opinions in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion) and earlier decisions that did not confront the "personal rights" question. *Schor* also cites an article by Professor David Currie for the proposition that Article III rights are primarily "personal." 478 U.S. at 848 (citing David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 460 n.108 (1983)).

That citation, however, at best twists Currie's argument and, at worst, is simply wrong. Sovereign immunity is, by definition, a type of personal privilege that is specific to the litigant (namely, the state); the doctrine's primary purpose is to protect a private litigant, and, in cases where the litigant, for whatever reason, does not desire that protection, waiver of the right makes sense. Currie argues that *the tenure and salary provisions* serve an analogous function to the private litigant. But he does not argue that the jurisdictional grants envisioned in Article III are themselves personal rights, as the *Schor* opinion seems to imply. Elsewhere he has acknowledged that "[i]t may 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" David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 39. Even if *Schor* reads Currie's thesis correctly, it is nonetheless clear, as I explain below, that Article III, beyond the tenure and salary provisions, serves additional public purposes that are not confined to the interests of the individual litigants.

“right” to a decision in a federal forum. Rather, the language speaks in definitional terms—defining the “judicial power of the United States.”³⁷ Article III discusses the subjects over which it extends and the courts in which it is vested.³⁸ 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.³⁹

Beyond the 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.⁴⁰ A few passages in the initial articles, such as the Article III, Section 2 guarantee of a jury in criminal cases, do speak in terms of rights.⁴¹ 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. 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 never was meant to confer a personal right.

Finally, the history behind Article III does not support a “personal rights” theory.⁴² It is true that 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 relevant are the terms over which the debate is waged—most commentators 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

37. U.S. CONST. art. III, § 2.

38. *Id.* art. III, §§ 1-2.

39. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 166-77 (1833); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 211 (1985). For a critique of originalist interpretations of Article III, see Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 93-121 (1995).

40. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 1.1 (2002).

41. U.S. CONST. art. III, § 2, cl. 3; see also *id.* art. I, §§ 2, 9.

42. For an exhaustive discussion of the history behind Article III’s development and adoption, see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984).

anyone.⁴³ Alexander 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 offices by a temporary commission."⁴⁴ He also argues that "we can never hope to see realized 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."⁴⁵ 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, the inclusion would have provided important evidence supporting a waiver theory⁴⁶).

Schor never really grapples with this history. Moreover, if *Schor* were wrongly decided, that would have substantial implications for the compatibility of Article III and arbitration. Private parties would not be able to waive their right to an Article III forum as 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 arbitration with settlement. Settlement differs 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.⁴⁷ By contrast, in the case of arbitration, the parties are bound to their bargain (i.e., an agreement to arbitrate) before they know its substantive terms.⁴⁸ Thus, arbitration involves less party autonomy than does settlement.

43. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 37-49, 422-33 (Max Farrand ed., 1911); Charles Warren, *The Making of the Constitution* 325-36, 531-48 (1928).

44. THE FEDERALIST NO. 78 (Alexander Hamilton). 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.

45. THE FEDERALIST NO. 79 (Alexander Hamilton).

46. Clinton, *supra* note 42, at 801, 803-10.

47. See Fuller, *supra* note 20, at 406-07.

48. As a matter of consent theory, one might think about the difference between arbitration and settlement in terms of their different temporal bases. Arbitration is a form of consent to process at an earlier point in time of a dispute. Settlement is a form of consent to outcome later on in the dispute. I thank a participant in the McGill/University of Montreal matinee for his comments on this point.

Furthermore, most forms of settlement involve greater judicial scrutiny than arbitration awards.⁴⁹ Generally speaking, settlement agreements are simply a species of contract; before they are enforced, they are subject to the typical judicial review that precedes an enforcement decision.⁵⁰ Arbitration awards receive much different treatment. The FAA mandates that federal courts must give effect to the arbitral award subject to very limited exceptions.⁵¹ Federal courts enjoy virtually no power to review the merits of the award but instead are confined to reviewing the procedures followed by the arbitrator. Whatever review of the merits exists is practically toothless.⁵² Provided that one of the limited grounds for merit review does not apply, the court must give legal effect to the award and treat it 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 lie 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.⁵³ 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.”⁵⁴ Yet despite the Court’s recognition of this nonwaivable feature of Article III, many courts have rejected Article III challenges to arbitration with a simple statement about waiver and a perfunctory cite to *Schor*.⁵⁵

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 diminishes the power

49. See Fiss, *supra* note 20, at 1084 (describing judicial scrutiny of consent decree in Meat Packers litigation).

50. See, e.g., Sanford I. 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).

51. 9 U.S.C. §§ 9-11 (2000).

52. Very few cases have set aside awards on grounds of manifest disregard of the law. See Peter Bowman Rutledge, *On the Importance of Institutions—Review of Arbitral Awards for Legal Errors*, 19 J. INT’L ARB. 81 (2002). Some cases, for example *Yusuf Ahmend Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997), do not even allow manifest disregard review for confirmation of New York Convention awards.

53. 478 U.S. 833, 850 (1986).

54. *Id.* at 851.

55. See Sternlight, *supra* note 6, at 79 (“Just as parties cannot by consent confer subject matter jurisdiction on a federal court, so too are they prohibited from allowing their claims to be heard by a non-Article III forum where such waiver would threaten the institutional integrity of the judicial branch.” (footnotes omitted)).

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 federal questions, Congress effectively is 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 effectively is mandating that federal courts 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.

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*.⁵⁶ By analogy, Congress commandeers 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* involved vertical separation of powers issues, the problem addressed here involves horizontal ones. Nonetheless, *Printz* provides a potentially helpful analogy, demonstrating how separation of powers principles generally prohibit the commandeering of another branch of government.⁵⁷

The *Bonner Mall* line of cases also provides a helpful analogy.⁵⁸ In these cases, the Court held that parties who settle a case on appeal are not automatically entitled to the vacatur of the judgment below.⁵⁹ The Court's decisions reenforce the public interest in judicial precedent. Analogously, a congressional requirement that the judicial branch must reduce arbitral awards to judgment without meaningful review of the merits deprives the public of valuable precedent. The analogy here is imperfect. In *Bonner Mall*, the parties were seeking to vacate a judgment already rendered; in arbitration, Congress merely is requiring the courts to enforce the parties' extrajudicial resolution of the parties' dispute. Nonetheless, *Bonner Mall* supports the notion that there is a public interest in a dispute beyond the immediate interests of the parties and the idea that the public interest can be undermined through efforts to undermine the judiciary's role.⁶⁰

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

56. 521 U.S. 898 (1997).

57. I am grateful to Randy Beck for his thoughts on this point.

58. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994).

59. *Id.* at 29.

60. I am grateful to participants in workshops at Willamette Law School and the University of Georgia for their insights on this point.

relied on by other courts) is too facile. It does not adequately wrestle with the underlying constitutional problems presented by arbitration. I return to these themes in Part II of the Article. However, in one of the few articles that tackles the inadequacy of the waiver account, Jean Sternlight suggests that we are resigned to accept the incompatibility of arbitration with Article III.⁶¹ Sternlight's argument rests on two premises: (1) arbitration claims typically involve private rights,⁶² and (2) *Granfinanciera* permits Congress to authorize adjudication of some private rights by non-Article III actors where it is essential to further 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.⁶³ According to Sternlight, while "Congress could pass a statute requiring that all claims be heard by judges without life tenure, . . . [p]resumably, the Supreme Court would reject such a statute."⁶⁴ It follows, therefore, that the FAA is incompatible with Article III.

Sternlight's argument, while an important contribution to the scant literature on the topic, ultimately does not provide a viable basis on which to test the compatibility of arbitration with Article III. It rests on an important premise—that the FAA is the only relevant statutory scheme. But that proposition does not track the Court's language in cases like *Thomas v. Union Carbide Agricultural Products, Co.* and *Northern Pipeline*.

Thomas arose under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").⁶⁵ As a precondition for pesticide registration, FIFRA required registrants to participate in mandatory arbitration to resolve disputes over the compensation due to a registrant whose data is subsequently used by another registrant.⁶⁶ Congress established the scheme to relieve the Environmental Protection Agency ("EPA") of the task of resolving compensation

61. Sternlight, *supra* note 6, at 78-80.

62. The public/private rights distinction traces its roots to the Supreme Court's decisions in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion), *Crowell v. Benson*, 285 U.S. 22 (1932), and *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855). The meaning of the distinction has evolved over time. At one time, public rights involved cases where the sovereign was a party. See *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33, 65 (1989) (Scalia, J., concurring in part and concurring in the judgment). *Thomas v. Union Carbide Agricultural Products Co.* broke with this tradition by classifying certain claims as "public rights" even though they arose between two private parties. 473 U.S. 568, 589 (1985). I return to the public/private rights distinction in Part II, *infra*.

63. Sternlight, *supra* note 6, at 78-79.

64. *Id.* at 79.

65. 7 U.S.C. §§ 136-136y (2000).

66. *Id.* § 136a(c)(1)(F)(iii).

disputes, a slow process that had resulted in a backlog of litigation.⁶⁷ Federal courts could review arbitral awards from the FIFRA scheme only for “fraud, misrepresentation or other misconduct.”⁶⁸ Contrary to Sternlight’s reasoning, the Court did not describe the relevant statutory scheme as the underlying dispute resolution mechanism. Instead, it characterized the scheme as the mechanism for allocating royalties.⁶⁹

Northern Pipeline adopted a similar approach. There, the Court considered a constitutional challenge to the Bankruptcy Act of 1978. That Act conferred extensive powers on Article I bankruptcy judges and mandated Article III review of their decisions. While a divided majority found that system constitutionally deficient, it too described the relevant statutory scheme in terms of the mechanism for channeling claims by and against the bankrupt estate into a single proceeding, not the underlying dispute resolution mechanism.⁷⁰ To be consistent, Sternlight should have focused on underlying statutes whose claims are subject to arbitration (such as Title VII, the securities laws, the Americans with Disabilities Act, etc.) 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 her premise. 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 defers their consideration of the dispute and then limits the scope of their review. Indeed, even if Congress were to strip federal district courts of their power to review arbitral awards, a constitutional infirmity would not necessarily arise.⁷¹ Presumably, such matters would be litigated in the state courts, and there would be resort to the Supreme Court’s *certiorari* jurisdiction if the case presented a federal issue.⁷²

Thus, while Sternlight is right to identify the basic tension between Article III and arbitration, her critique does not settle the

67. *Thomas*, 473 U.S. at 573.

68. *Id.* at 573-74.

69. *Id.* at 589-94.

70. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84-87 (1982).

71. 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. *CFTC v. Schor*, 478 U.S. 833, 855 (1986).

72. See *Crowell v. Benson*, 285 U.S. 22, 87-88 (1932) (Brandeis, J., dissenting).

issue. Yet, it certainly presents a challenge: Can one construct a theory that salvages the essential components of arbitration while putting it on surer constitutional footing vis-à-vis Article III? I 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 apply appellate review theory to arbitration but identifies a tension in the account. The third Section refines appellate review theory 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 in cases that otherwise would fall within the jurisdiction of the federal courts. One ventures into this field at his 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."⁷³

Some have adopted a literalist framework, according to which Article III judges, and only Article III judges, may resolve the cases or controversies arising under the heads of jurisdiction specified in Article III.⁷⁴ Literalist theory may well be appealing as a matter of first impression. But, as several scholars have noted, there is too much precedential water under the bridge for such a theory to be viable.⁷⁵ As James Pfander tersely explained in the most recent exhaustive

73. Bator, *supra* note 35, at 239.

74. See Clinton, *supra* note 42, 749-50; Currie, *supra* note 36.

75. See Fallon, *supra* note 17, at 918-26; see also James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 656-60 (2004); Wells & Larson, *supra* note 39, at 76-78.

inquiry into the Article III question: “[W]hile scholars continue to hold up a literal interpretation of Article III as a goal to which the law might aspire, this approach suffers from serious problems of institutional fit.”⁷⁶ In some areas, Congress has foreclosed judicial review in Article III courts. Examples of claims where Congress effectively has stripped Article III courts of any control include administrative determinations by the Veterans’ Administration, the Department of Health and Human Services, and the Justice Department.⁷⁷ The Court consistently has approved of these efforts.⁷⁸ Adoption of a literalist theory would require invalidation of numerous non-Article III schemes, including adjudication by administrative agencies. By parity of reasoning, arbitration could not survive under literalist theory—the theory would bar arbitrators, as non-Article III actors, from resolving cases or controversies falling under Article III’s heads of jurisdiction.

An alternative account stresses the Articles III distinction between “cases” and “controversies,” an account originally developed by Justice Story and later formalized by Akhil Amar.⁷⁹ 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).⁸⁰ While this theory “has substantial historical support,”⁸¹ it too lacks adequate explanatory value in light of intervening Supreme Court precedent. Adoption of this approach likewise would require invalidation of federal administrative agency schemes that allow non-Article III decisionmakers 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.⁸² By analogy, the Story/Amar theory would require invalidation of arbitral schemes, at least to the extent that they concern claims arising under federal law. Given the large number of

76. Pfander, *supra* note 75, at 656.

77. See Chen, *supra* note 6, at 1473-74.

78. See *Webster v. Doe*, 486 U.S. 592, 601 (1988) (holding CIA director’s decision to discharge employee was not subject to judicial review); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 348 (1984) (holding that consumers of dairy products could not obtain judicial review of milk market orders); *Morris v. Gressette*, 432 U.S. 491, 501-02 (1977) (finding that the Attorney General’s failure to make timely objection under the Voting Rights Act of 1965 is not subject to judicial review); *Johnson v. Robinson*, 415 U.S. 361, 367 (1974) (precluding judicial review of certain Veteran’s Administration determinations).

79. See Amar, *supra* note 39, at 210-19.

80. *Id.*

81. Chen, *supra* note 6, at 1467-68; see also Wells & Larson, *supra* note 39, at 91-93.

82. See Chen, *supra* note 6, at 1468.

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 upsetting the existing doctrine.⁸³ The theory finds its genesis in a seminal article by Richard Fallon and traces its roots to the Supreme Court's decision in *Crowell v. Benson*.⁸⁴ "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."⁸⁵

Fallon derived 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 decisionmaker'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*—principles of sovereign immunity counsel in favor of the government's ability to control the scope of the non-Article III proceedings in which it is a party.

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

1. *Separation of Powers*—Article III review promotes separation of powers by ensuring principled decisions on

83. See Fallon, *supra* note 17, at 933 (introducing appellate review theory).

84. *Crowell v. Benson*, 285 U.S. 22, 62-65 (1932); Fallon, *supra* note 17, at 915.

85. Fallon, *supra* note 17, at 933.

legal questions by institutions immune from political pressure;

2. *Fairness*—Article III review helps to ensure fairness to litigants through some combination of the independence of a life-tenured judiciary plus due process guarantees;
3. *Judicial Integrity*—this term captures the idea that judges, through their immunity from political pressure, can offer their imprimatur of legitimacy on the action of agencies that have a “hybrid and problematic status in our constitutional system.”⁸⁶

In Fallon’s view, “adequately searching appellate review” of a federal court action by a non-Article III tribunal sufficiently reconciles these values and is 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 Article III Courts.⁸⁷ According to Fallon, Article III review is necessary for two reasons: to protect separation of powers principles and to ensure fairness to individual litigants, particularly where their constitutional rights are at stake.⁸⁸ Fallon explains that the review 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 constitutional limits.”⁸⁹

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.”⁹⁰ In Fallon’s view, those agencies are not electorally accountable, are not insulated from political pressures, are susceptible to capture by

86. *Id.* at 937-42.

87. *Id.* at 976.

88. *Id.* at 975-76.

89. *Id.* at 976.

90. *Id.* at 977-78.

“powerful private groups,” and “may also have a bureaucratic tendency to expand their own power.”⁹¹

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 necessary, as such findings by a non-Article III tribunal implicate neither separation of powers concerns nor fairness concerns.⁹² However, 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.⁹³ In Fallon’s view, this approach ensures that Article III courts are able to correct suspect determinations while avoiding “costly relitigation in the vast run of cases.”⁹⁴

Compared with literalism and the Story/Amar account, appellate review theory best squares with the extant precedent, prompting James Pfander to note that it has “fared best” among the modern accounts of Article III.⁹⁵ 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 decisionmaker’s legal conclusions. For example, under various schemes that the Court has reviewed, the non-Article III decisionmaker’s legal conclusions were subject to *de novo* review.⁹⁶ 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 explain how the theory applies to arbitration.

B. Appellate Review Theory and Arbitration

Before delving further into appellate review theory, it is worth pausing to consider an obvious question. 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 to reconcile arbitration and Article III?

91. *Id.* at 978.

92. Fallon, *supra* note 17, at 989.

93. *Id.* at 990.

94. *Id.*

95. Pfander, *supra* note 75, at 666.

96. See, e.g., *CFTC v. Schor*, 478 U.S. 833, 853 (1986); *United States v. Raddatz*, 447 U.S. 667, 673-74 (1980).

Two points answer this question and justify the bridge between administrative law and arbitration. The first is to recognize, as Lon Fuller did nearly three decades ago, that arbitration and administrative adjudication are simply different “forms” of dispute resolution.⁹⁷ That is to say, they lie along the same spectrum, just at different points. 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 that appellate review theory seeks to set boundaries on the diminution of that 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).

Despite his acceptance of the relevance of appellate review theory to arbitration, Fallon does not attempt to apply his theory in this particular context. His account does, however, offer two suggestions. Unfortunately, these suggestions 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.⁹⁸ Under this standard, *Thomas*⁹⁹ was wrongly decided.¹⁰⁰ In Fallon’s view, the core defect of the scheme in *Thomas* was that

[d]ecisions of federal law were committed to an arbitrator, whose rulings 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.¹⁰¹

The second suggestion 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. This suggestion may be inferred from Fallon’s analysis of *Schor*:

97. See Fuller, *supra* note 20, at 354-56, 389. The parallels between the two systems do not end with the issue of judicial review. See Rebecca Hanner White, *Arbitration and the Administrative State*, 38 WAKE FOREST L. REV. 1283, 1323-26 (2003) (explaining that the two fields also share synergies over the extent to which courts should defer to the extrajudicial decisionmaker, whether an arbitrator or an agency).

98. Fallon, *supra* note 17, at 976.

99. 473 U.S. 568 (1985).

100. For a factual synopsis of *Thomas*, see text accompanying notes 65-69.

101. Fallon, *supra* note 17, at 991.

[*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.¹⁰²

Unfortunately, Fallon's two suggestions offer conflicting guidance on the constitutionality of arbitration. Had his 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.¹⁰³ Instead, at most, federal courts only review arbitral awards for manifest disregard of the law—a highly deferential, perhaps toothless, standard on which few awards have been set aside.¹⁰⁴

By contrast, Fallon's second suggestion 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 decisionmaker, the separation of powers concerns diminish. As noted in Part I.A, most—but not all—arbitrations are voluntary. So, subject to the exceptions discussed therein, and provided that the undertaking is truly “voluntary,” arbitration presents no Article III problem.

How does one reconcile the seemingly conflicting inferences 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.”

Why is this last aspect of Fallon's appellate review theory weak? First, 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

102. *Id.* at 991-92.

103. *See infra* notes 120, 153-55 and accompanying text (discussing and differentiating *Thomas* from other precedent).

104. *See* Norman S. Poser, *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, 366 (2001) (describing this doctrine as “the most widely-recognized extra-statutory ground upon which courts can set aside arbitration awards under U.S. federal law”).

the pesticide application. Under the argument inferable from Fallon's *Schor* analysis, the 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 coexist in the theory.

More fundamentally, though, Fallon does not explain why waiver of the right to an Article III forum adequately addresses separation of powers concerns. As explained above, such concerns can arise even in cases of waiver.¹⁰⁵ By setting the standards of review narrowly, Congress is 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.¹⁰⁶ If Fallon were correct, then any separation of powers concerns would drop out so long as Conticommodity and *Schor* voluntarily had opted into that system. Yet under these circumstances, Congress is at least diminishing the power of the lower federal courts by stripping them of the ability to review a claim that otherwise might fall within their jurisdiction. Even the *Schor* Court might not tolerate such a result because it would be analogous (though, admittedly, not identical) to the “phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities. . . .”¹⁰⁷ Limited federal review presents the same quality of diminution problems, though perhaps not as extremely as in this example. It shows, nonetheless, that separation of powers problems can exist even in a system into which parties have opted.

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

105. See *supra* notes 32-55 and accompanying text.

106. Such a law is more than fanciful. Some countries, such as Belgium, have adopted arbitration laws that bar any judicial review.

107. *CFTC v. Schor*, 478 U.S. 833, 855 (1986).

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 tailors the constitutionally required degree of Article III review to the particular claim. Fallon concedes that such an approach would be consistent with appellate review theory:

An alternative mode of analysis, which would be consistent with the principal assumptions of [appellate review] theory, would answer questions about the necessity and requisite scope of judicial review only after weighing article III values against competing governmental interests on a case-by-case basis.¹⁰⁸

This more nimble approach has two 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. In others, such as arbitrations under NAFTA or bilateral investment treaties ("BITs"), 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 sovereign immunity 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 fatal to the constitutionality of most arbitral schemes.

If this more nuanced approach comports with appellate review theory and offers these comparative advantages, why 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."¹⁰⁹ His choice thus elevates clarity and predictability over other values that might have supported the more nuanced standard described above.

108. Fallon, *supra* note 17, at 975.

109. *Id.*

Fallon's choice of the categorical rule over the balancing test is a familiar one in the annals of jurisprudence.¹¹⁰ 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 10 P.M.," it provides clarity, 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 man 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 circumstances.

In this context, appellate review theory does not force one to choose between 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 also is nuanced enough 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 courts and the other underpinning the benefits of non-Article III tribunals. Thus, to determine how such a system would operate, it becomes necessary to revisit Fallon's value balance and to 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 that arbitrators can bring to the dispute;¹¹¹

110. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621-23 (1992) (proposing proper relative weights for "rules" and "standards"). For a recent discussion of the literature, see Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1092 & n.159.

111. Bruce L. Bensen, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 482 (1995) (noting that expert arbitrators were a widely perceived benefit of arbitration over litigation); Terry A. Bethel, *Wrongful Discharge: Litigation or Arbitration?*, 1993 J. DISP. RESOL. 289, 298 ("Perhaps

2. *Governmental Functions*—to the extent that arbitration involves purely private disputes, concerns about efficient government operation drop out; by contrast, to the extent that 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 generally are free to tailor the procedures of the arbitration to their needs;¹¹²
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.¹¹³ More recent empirical evidence, however, suggests that arbitration produces fair results;¹¹⁴

the most heralded advantage of arbitration over ordinary litigation is the special competence of the arbitrator.”); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 43 (1999) (noting that expertise of arbitrators historically has been regarded as a benefit to arbitration).

112. On the procedural flexibility of arbitration, see Stefano E. Cirielli, *Arbitration, Financial Markets and Banking Disputes*, 14 AM. REV. INT’L ARB. 243, 248 (2003) (“One of the major advantages of arbitration, in fact, is that the parties can agree to numerous substantive and procedural aspects, and are entitled to choose an informal and flexible process, which can be specially adapted to fit their dispute.”); Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 208 (1996); Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT’L LAW. 187, 197-98 (1989).

113. *E.g.*, Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); Gilles, *supra* note 15, at 399-412; Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635; Sternlight, *supra* note 6.

114. See U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS (1992), reprinted in *Securities Arbitration: How Investors Fare*, in SECURITIES ARBITRATION 1992, at 79 (PLI Corp. Law & Practice, Course Handbook Series No. B4-7006), WL 781 PLI/CORP 19, 79 (finding no pro-industry bias in the context of securities arbitration in industry-sponsored fora); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at a Low Cost*, 58 DISP. RESOL. J. 9 (2003) (statistical analysis of AAA employment arbitrations indicating that they are not systematically biased in favor of the employer as repeat player); Gary Tidwell et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* (Aug. 5, 1999) (unpublished manuscript, presented at the National Meeting of the Academy of Legal Studies in Business, on file with Vanderbilt Law Review) (finding that parties in NASD arbitrations believe the fora and arbitrators are fair and unbiased); see also REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS OF THE NATIONAL ASSOCIATION

5. *Sovereign Immunity*—as with 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 the case of NAFTA, or a foreign sovereign, in the 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 decisionmaking power in another non-Article III institution and requiring federal courts to effectuate those decisions, subject to very limited grounds for review;¹¹⁵
2. *Fairness*—this is the flipside of the fairness factor above. Depending on the state of the empirical research, arbitration, in contrast to federal litigation, might run a greater risk of unfairness to litigants. This is the case 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;¹¹⁶
3. *Judicial Integrity*—arbitration does not present a “judicial integrity” problem, as Fallon has

OF SECURITIES DEALERS, INC., reprinted in [1995-1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,735 (1996) (finding securities arbitration generally “to be a relatively efficient, fair, and less costly forum for resolution of disputes involving public investors, member firms, and firm employees”).

115. See Federal Arbitration Act § 10, 9 U.S.C. § 10 (2000); New York Convention, *supra* note 19, art. V.

116. See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (1999) (“The Hooters rules when taken as a whole, however, are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding.”).

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 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 is that the standard for “adequately searching appellate review” may be less taxing in arbitrations involving sovereigns than in arbitrations between purely private parties.

The solution, then, is to identify a limited number of factors based on which the constitutionally required standard of review might vary. These factors should be robust enough to capture the partially competing values underpinning arbitration and Article III. At the same time, they should be defined sufficiently 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 are the voluntariness of the undertaking and the presence (or absence) of the sovereign in the dispute.

Voluntariness operates as a proxy for fairness. As noted above, fairness was one of the critical values in 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, and consent to jurisdiction demonstrate a judicial solicitude for such private choices.¹¹⁷ By contrast, in a truly involuntary arbitration, such as the

117. BORN & RUTLEDGE, *supra* note 29.

BIT arbitrations described below, the fairness concerns remain dominant and, thus, so too does the need for Article III review.

The sovereign immunity doctrine 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.¹¹⁸ Foreign sovereigns' immunity likewise has remained firmly within the control of the legislative branch—at least in recent years.¹¹⁹ 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 jurisdiction over foreign sovereigns). That greater power to cut off jurisdiction also implies a lesser power to regulate the jurisdiction. Consequently, Article III values are, in such cases, relatively minimal.¹²⁰

One legitimately may question whether these are the only values by which the scope of review should vary. Specifically, should the scope of review also depend on whether the case is an international one?¹²¹ 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*.¹²² 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

118. *E.g.*, *Alden v. Maine*, 527 U.S. 706, 712 (1999).

119. *See* 28 U.S.C. §§ 1602-11 (2000).

120. 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 v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855), the public rights doctrine justified restrictions on the jurisdiction of the Article III courts in cases where the sovereign was a party. *Thomas v. Union Carbide Agricultural Products Co.* broke with this tradition by classifying certain claims as "public rights" even though they arose between two private parties. 473 U.S. 568, 589 (1985). As Fallon himself admits, *Thomas* remains a dubious precedent under appellate review theory and so, too, does it under the modified form 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 head. 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.

121. I am grateful to Leila Sadat for her insights on this point.

122. 453 U.S. 654 (1981).

commerce.¹²³ Whichever starting point is chosen, both arguments 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 have been possible at one time. Particularly following its decision in *Scherk v. Alberto-Culver, Inc.*,¹²⁴ the Court plausibly could have maintained a distinction between international and domestic arbitration cases. Nonetheless, by the mid 1980s, any attempt to preserve a doctrinal distinction between domestic and international cases was lost. With cases such as *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court put domestic cases on an equal footing with international ones as a matter of doctrine.¹²⁵ 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 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 in the following table:

Sovereign			
Involuntary	Intermediate Case	Minimum AIII Review	Voluntary
	Maximum AIII Review	Intermediate Case	
		Private	

123. See BORN & RUTLEDGE, *supra* note 29, at 601-03.

124. 417 U.S. 506 (1974).

125. 490 U.S. 477 (1989).

How does this translate onto the different types of issues under review? With respect to questions of constitutional law, *de novo* review still should 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 essential fairness to individual litigants when their constitutional rights are at stake.¹²⁶ As to the scope of review, the analysis admittedly does not map perfectly. Fallon justifies *de novo* review of constitutional questions on the ground that "separation of powers values are deeply implicated" if "another agency of government has strayed beyond constitutional limits." Arbitration does not present a situation where an agency of government can act *ultra vires*. Nonetheless, anything less than plenary review could implicate separation of powers concerns animating Fallon's standard. If Congress could strip Article III courts of their power to review an arbitrator's findings on questions of constitutional law, such a regime would undermine separation of powers principles just as much as the aggrandizement of a federal agency's power. Requiring plenary review of constitutional questions eliminates that concern.

As to questions of law, translating the modified appellate review theory is a challenge. 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. Second, while individual arbitrators may lack the capacity for bureaucratic self-aggrandizement, arbitration as an institution retains that capacity. As noted above, arbitrators and arbitral institutions have a direct financial interest in being able to

126. Fallon, *supra* note 17, at 975-76.

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.¹²⁷ 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, often are nominated by parties to resolve a dispute, and, critically, their compensation is tied to their service.¹²⁸ In theory, 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, 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, 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 concept.¹²⁹ For example, in administrative law, *Skidmore*¹³⁰ and *Chevron*¹³¹ both allow a federal court to defer to an agency interpretation of an ambiguous statute.¹³² In criminal procedure, both pre-AEDPA and post-AEDPA case law permit a federal court to defer to a state court's interpretation of a federal constitutional question. At the same time, both doctrines permit the federal courts to override the prior decisionmaker'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), while the latter involves deference to a different sovereign's courts (who, as noted above, occupy a different position than arbitrators). Nonetheless, doctrines like these illustrate that our

127. 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 at the enforcement stage. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942-47 (1995).

128. Peter B. Rutledge, *Toward a Contractual Theory of Arbitral Immunity*, 39 GA. L. REV. 151 (2004).

129. I am especially grateful to Laura Appleman for helping me tease out this argument. See also White, *supra* note 97 (exploring judicial deference to adjudication).

130. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

131. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

132. See generally *United States v. Mead Corp.*, 533 U.S. 218 (2001) (discussing degrees of judicial deference to agency statutory interpretations).

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. Much 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.

Finally, as to factual review, arbitration does not alter Fallon's analysis, but instead 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.¹³³ How much does the “voluntariness” prong differ from *Schor*'s¹³⁴ 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 are unsurprising for, as already noted, one of the main benefits of appellate review theory (whether in its original or modified form) is that it remains in harmony with existing doctrine. Harmony, though, is not the same as duplication, and in at least three critical respects, modified appellate review theory differs from the current landscape.

First, modified appellate review theory uses an entirely different metric from *Schor*. Whereas *Schor* uses waiver categorically—that is to say, a party waives its right to an Article III forum—modified appellate review theory uses the concept of voluntariness instrumentally. In other words, while a party's voluntary submission to an arbitral scheme may affect the *degree* of constitutionally required review, it does not affect 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” aspect of *Schor*. With respect to this nonwaivable aspect of Article III, the Court evaluates a dispute resolution scheme's constitutionality using a multi-factor balancing test. By contrast, modified appellate review theory tests the

133. I thank Heather Elliott for forcing me to think through this question.

134. 478 U.S. 833 (1986).

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 this doctrine to uphold certain arbitral schemes, and the Canadian government relied on it to defend NAFTA's arbitral scheme in *Canadian Softwood Lumber*.¹³⁵ Traditionally, public rights were those claims where the government was a party or where the government had an actual interest in the dispute.¹³⁶ By contrast, claims exclusively between private individuals, even when the claims were of statutory creation, were ones of private right.¹³⁷ *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 *Murray's Lessee*¹³⁸ and *Crowell*.¹³⁹

135. Brief of Respondents-Intervenors, *supra* note 4, at 27-33.

136. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 65 (1989) (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 v. Hoboken Land & Improvement Co.*, the case that spawned the public rights doctrine, concerned the government's effort to collect a debt owed by one of its customs agents. 59 U.S. 272, 275 (1855). *Ex Parte Bakelite Corp.* concerned a claim between the government and a private individual over a customs assessment imposed by the government. 279 U.S. 438, 447 (1929). In both cases, the Court held that the rights were "public rights." *Id.* at 452; *Murray's Lessee*, 59 U.S. 283-85. *Crowell v. Benson* 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. 22, 51 (1932). Perhaps the clearest statement came from the plurality in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*: "[A] matter of public rights must at a minimum arise 'between the government and others.'" 458 U.S. 50, 71 (1982) (plurality opinion).

137. 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* plurality 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).

138. 59 U.S. 272.

139. 285 U.S. 22.

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 minimal violence to the existing precedent. The precise degree of review by an Article III court should not be a rigid, uniform standard, as the original expositor of appellate review theory proposed. Instead, it should reflect the distinct mix of values underpinning the dispute resolution system—a methodology that Fallon acknowledges is 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 account for 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 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 survive Article III challenge. By contrast, the scheme in *Thomas* violated Article III, and party-initiated contractions of judicial review should not be enforced. This Part 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.¹⁴⁰ 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 New York Convention, will set forth the standard of review.¹⁴¹ 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 where enforcement is sought;

The award violates the public policy of the country where enforcement is sought.

Second, in cases of vacatur (setting aside an award rendered in the United States) and cases of confirmation and enforcement not falling under a treaty, the 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;

140. For discussions of the law governing the recognition and enforcement of international arbitral awards, see BORN, *supra* note 10; BORN & RUTLEDGE, *supra* note 29.

141. Less frequently, other conventions may apply. These include the Inter-American Convention on International Commercial Arbitration (Panama Convention), *opened for signature* Jan. 30, 1975, 104 Stat. 448, 1438 U.N.T.S. 245 (governing awards in certain Latin American arbitrations) and, discussed *infra* text accompanying notes 167-168, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention), *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (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.

(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.¹⁴²

Neither Article V of the New York Convention nor Section 10 of the FAA expressly provides for *any* Article III review of the merits of the decision, whether on statutory or constitutional grounds.¹⁴³

Despite the absence of any textual authorization for Article III review of legal questions, judicial decisions have partly filled the gap, for courts have constructed a doctrine that, at least arguably, attempts to mitigate this harsh conclusion. For several decades, the “manifest disregard of the law” doctrine has enabled federal courts to take a quick look at the merits of the award (even though that doctrine does not find any formal footing in the text of Section 10).¹⁴⁴ The formulations of the manifest disregard doctrine vary in slight terms, and its scope is not fully settled.¹⁴⁵ Under the generally accepted formulation of the doctrine, a federal court may vacate an award where the arbitrator was aware of the applicable law yet refused to apply it.¹⁴⁶ Putting to one side the legitimacy of the manifest disregard doctrine (a topic I have explored elsewhere),¹⁴⁷ the question then becomes whether the manifest disregard doctrine rescues the FAA from constitutional infirmity.

142. 9 U.S.C. § 10 (2000).

143. 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:

If 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, 349 (1854) (emphasis added).

144. See *supra* note 104 and accompanying text. Of course, manifest disregard need not be the standard governing the relationship between arbitration and the courts. Other systems utilize arbitrators more as referees or provide for de novo review of the arbitrator’s decision. I am grateful to Roderick McDonald’s *replique* to my presentation at the McGill/University of Montreal matinee on this point.

145. 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 New York Convention. See Rutledge, *supra* note 52.

146. BORN, *supra* note 10, at 797-814.

147. Rutledge, *supra* note 52.

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.¹⁴⁸ 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 by ruling on a motion to compel arbitration or stay litigation.¹⁴⁹ 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 FAA 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 generally have imported due process norms to evaluate those claims.¹⁵⁰ Thus, under modified appellate review theory, the current regime provides Article III courts with sufficient oversight of constitutional questions.

The trickiest aspect of the analysis here is 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 *de novo* review of nonconstitutional questions that the theory requires. Nonetheless, under modified appellate review theory, the manifest disregard doctrine 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 doctrine preserves a limited role for federal courts vindicating the Article III values still present in an arbitration scheme.

Ironically, the origins of the manifest disregard doctrine strengthen this claim.¹⁵¹ The manifest disregard standard appears nowhere in the FAA (or, for that matter, in 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

148. See BORN, *supra* note 10, at 794-814.

149. *Id.* at 208-16 (collecting cases for the proposition that courts can rule on a challenge to an arbitration agreement as void on grounds of illegality).

150. *Id.* at 832-33, 841-49.

151. I am grateful to Jo Potuto for her thoughts on this point.

awards.¹⁵² This judicial pedigree affords a court greater flexibility to shape its contours than if a statute constrained its interpretation. While courts generally have been reluctant to vacate awards (or to decline enforcement) on this ground, several recent noteworthy decisions involving federal statutory claims have done so.¹⁵³ 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 the modified appellate review theory, the scheme in *Thomas* does not.¹⁵⁴ 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 disregards the law. The total 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 into 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 addressed in *Hall Street Associates, L.L.C. v. Mattel, Inc.*¹⁵⁵ 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).¹⁵⁶ Under the logic of the theory presented here, such clauses should be enforced, for they reenforce the separation of powers values justifying a role for the judiciary in reviewing an award. In this respect, *Hall Street Associates* may have been wrongly decided.

152. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (holding that parties bound by arbitrator's decision were not in "manifest disregard" of the law), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

153. See, e.g., *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 237 (4th Cir. 2006) (vacating award in age discrimination case).

154. 473 U.S. 568 (1985).

155. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (holding that the only justifications for vacating or modifying an arbitration award are those enumerated in the FAA provisions). See generally CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION 569-77 (2002) (summarizing split in case law and commentary). *Hall Street Assocs.* was decided just before this article went to press. Thus, any comments herein are preliminary.

156. See, e.g., *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997), *overruled by* *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003).

In other cases, parties attempt to limit the 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).¹⁵⁷ Modified appellate review theory suggests that these clauses should be unenforceable, because 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 NAFTA, 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.¹⁵⁸ 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 that a party disagrees with the panel's determination, it may appeal the decision to an extraordinary challenge committee. Following that committee's review (or if 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.¹⁵⁹ Thus, even though the interpretation of NAFTA is undoubtedly a federal question,¹⁶⁰ a party may not seek review of the merits of a NAFTA tribunal's determinations in an Article III court, apart from the narrow exception for constitutional questions.

157. See, e.g., *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001).

158. For discussions of NAFTA's dispute resolution procedure, see Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1575-77 (2003); Chen, *supra* note 6, at 1465-79; Susan L. Karamanian, *Dispute Resolution Under NAFTA Chapter 11: A Response to the Critics*, in CESARE ROMANO, THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS (forthcoming 2008); Monaghan, *supra* note 6, at 837-39; Pfander, *supra* note 75, at 766-68.

159. See *Coal. for Fair Lumber Imps., Executive Comm. v. United States*, 471 F.3d 1329, 1330 (D.C. Cir. 2006).

160. "The judicial power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and *Treaties made, or which shall be made, under their Authority.*" U.S. CONST. art. III, § 2 (emphasis added); see also BORN & RUTLEDGE, *supra* note 29, at 28-29 (describing how claims under treaties of the United States arise under federal law).

NAFTA arbitration also survives under appellate review theory.¹⁶¹ 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.¹⁶² 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.¹⁶³ While neither NAFTA nor its implementing legislation authorizes 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—does not find this troublesome.

The more problematic aspect of NAFTA's system is the complete lack of federal judicial review of any legal findings made by binational panels. This clearly would be fatal to the NAFTA scheme under Fallon's original appellate review theory.¹⁶⁴ Under the modified appellate review theory offered here, however, this limit is not fatal. Evaluated by the flexible balance articulated in Part II, NAFTA claims implicate principles of sovereign immunity. The *Canadian Softwood Lumber* case, for example, technically involves an action by U.S. companies against the U.S. government (and Canadian intervenors). Barring a waiver, sovereign immunity principles would foreclose any action, a result entirely consistent with Article III.¹⁶⁵ Thus, a scheme foreclosing judicial review of binational panels' determinations of pure legal questions does not violate Article III.

161. 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. Chen, *supra* note 6, at 1463-79. 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 Corp.*'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. 438, 460-61 (1929). Indeed, until 1979, Article III Courts had no jurisdiction over customs determinations whatsoever. See Peter D. Ehrenhaft, *The "Judicialization" of Trade Law*, 56 NOTRE DAME L. REV. 595, 608 (1981).

162. 19 U.S.C. § 1516a(g)(4)(A) (2000).

163. *Id.* § 1516a(g)(4)(B).

164. Pfander, *supra* note 75, at 767.

165. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." (quoting *FDIC v. Meyer*, 510 U.S. 471 (1994))).

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 BITs with capital importing countries.¹⁶⁶ 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 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, an appellate arbitral panel reviews the initial panel decision. Thereafter, if both countries are signatories, judicial review is governed by the Washington Convention of 1965.¹⁶⁷ Under that convention, "awards are theoretically directly enforceable in signatory states without any method of review in national courts."¹⁶⁸

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 a 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.¹⁶⁹ Second, unlike private commercial

166. For discussions of BIT arbitrations, see BORN, *supra* note 10, 191-95; BORN & RUTLEDGE, *supra* note 29, at 313-14; ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 474-501 (4th ed. 2004); Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809 (2005); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005) [hereinafter Franck, *The Legitimacy Crisis*]; Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47 (2005).

167. For a discussion of the Washington Convention, see BORN, *supra* note 10, at 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, *The Legitimacy Crisis*, *supra* note 166, at 1545-57.

168. BORN, *supra* note 10, at 25; see also Washington Convention, *supra* note 141, arts. 53-54.

169. The non-contractual feature here resembles the system of compulsory arbitration in *Thomas* described *supra* Part II.B. Notably, the Court in *Thomas* eschewed any effort to

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 searching appellate review.” Third, judicial review is far more circumscribed than in private international commercial arbitration.

With respect to questions of constitutional law and findings of fact, the analysis of bilateral investment treaties does not differ materially from the analysis of ordinary private commercial arbitration. With respect to legal questions, however, the analysis is markedly different for the above-noted reasons. The absence of privity between the foreign sovereign and the investor suggests 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, but the immunity of the foreign sovereign, at issue. That immunity is the subject of legislative grace—one that Congress can strip if it so desires.¹⁷⁰ Here too, the question is close. Ultimately Congress’s control over the foreign sovereign’s immunity logically entails a power to decide the scope of any judicial action over the sovereign. Because Congress could restore the sovereign’s immunity altogether, it proceeds logically that it should 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.

1. Choice-of-Forum Clauses

One potential criticism of the thesis presented here is its implication for other efforts to shift disputes from Article III forums.¹⁷¹ For example, courts generally have approved, within limits, parties’

characterize the arbitration as “voluntary” by reference to the prior decision to register the pesticide with the EPA. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 577-78 (1985).

170. See BORN & RUTLEDGE, *supra* note 29, at 317-33.

171. I am especially grateful to Symeon Symeonides, Ralph Steinhardt, and Peter Murphy for helping me work through this puzzle in the argument.

use of choice-of-forum clauses to refer disputes to a foreign forum.¹⁷² 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.¹⁷³ These efforts generally have received judicial approval, albeit amid much academic criticism.¹⁷⁴ 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 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 used to reach that judgment).¹⁷⁵ This greater flexibility makes the forum selection/choice-of-law cases easier, not harder, than the arbitration cases under appellate review theory.¹⁷⁶

172. See, e.g., *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

173. See, e.g., *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998) (en banc). See generally BORN & RUTLEDGE, *supra* note 29, at 493-500.

174. See generally BORN & RUTLEDGE, *supra* note 29, at 435-519. For academic criticism of this trend in the jurisprudence governing forum selection and choice-of-law clauses, see Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A 'Second Look' at International Commercial Arbitration*, 93 NW. U. L. REV. 453 (1999).

175. For recent examples of courts relying on these more robust standards, see *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1192-94 (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, 285-88 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000); *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997).

176. The newly signed Hague Convention on Choice of Court Agreements, however, may 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 Peter B. Rutledge, *Post-Hague Hangover: Three Predictions About the Future of the Law Governing the Enforcement of Foreign Judgments and Arbitral Awards*, in *EUROPEAN UNION ISSUES FROM A PORTUGUESE PERSPECTIVE* 107-25 (Marshall J. Breger & Markus G. Pruder eds., 2007).

To take the argument one step further, one might ponder its implications for settlement agreements and consent decrees. Does the argument here require different treatment of those efforts at "alternative dispute resolution"? For three reasons, I do not believe that these other forms are completely analogous to arbitration agreements. First, with respect to settlement agreements, no federal statute compels courts to reduce the agreement to a judgment (as is the case with arbitral awards). Second, settlement agreements and consent decrees are more properly understood as "post-dispute" attempts at settlement rather than "pre-dispute" agreements about how to settle a case; under those circumstances, considerations of fairness are less pronounced. Third, while the standards vary across jurisdictions and with the issue, the degree of judicial review of these sorts of resolutions is more exacting and, thereby, promotes the

2. 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 cases where the parties enjoy unequal bargaining power (such as consumer contracts and employment agreements), should not be understood as voluntary. 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 be said to have engaged in 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 arbitrations as involuntary.¹⁷⁷ Narrowing the definition of “voluntary” to exclude agreements of this sort could undermine valuable public policies that benefit both sides in these kinds of transactions, including the party with the lesser bargaining power. For example, law and economics theory suggests companies that can reduce their dispute resolution costs through arbitration clauses can pass on those savings in the form of reduced prices to their customers.¹⁷⁸ 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 positions. Here, we can draw a lesson from Europe. European systems have very different arbitration laws governing commercial

Article III values. See generally Sanford I. 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).

177. See Rutledge, *supra* note 128, at 158.

178. Anecdotal evidence from the credit card lends some support to this hypothesis, though the data are scarce. See Christopher R. Drahozal, *“Unfair” Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 742-48.

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 most 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 advantages to the employee. If this were not the case—and such agreements properly were deemed “involuntary”—then I freely admit that, under the logic of the argument presented here, there would be a heightened need for exacting judicial review of any award. This could come, for example, from strengthening of the manifest disregard doctrine.

IV. CONCLUSION

The decline of the jurisdictional ouster and non-arbitrability doctrines has 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 approved, courts have mechanically rejected Article III attacks on constitutional schemes. While the sparse academic literature admits greater skepticism, those accounts also provide an inadequate explanation. 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.