

ARTICLES

ARTICLE III JUDICIAL POWER AND THE FEDERAL ARBITRATION ACT

ROGER J. PERLSTADT*

Arbitrators determine facts and apply law to those facts to bindingly resolve disputes between two or more parties, a task normally reserved for judges. The Federal Arbitration Act (FAA) makes agreements to arbitrate disputes enforceable, including disputes that would normally be heard by an Article III judge, such as those arising under federal law or between parties of diverse citizenship. Accordingly, disputes subject to an arbitration agreement brought before a federal court for adjudication must instead, pursuant to the FAA, be resolved by an arbitrator. Yet, while Article III ostensibly mandates that life-tenured and salary-protected judges decide such disputes, arbitrators—selected and compensated by one or more of the parties—enjoy neither protection. A literal reading of Article III thus suggests that sending federal disputes to non-Article III arbitrators under the FAA is unconstitutional. Although courts and scholars have roundly rejected Article III literalism and have adopted various theories justifying non-Article III adjudication of Article III disputes, whether the FAA is consistent with Article III has received little analysis. This Article addresses that gap by applying the leading judicial and scholarly theories of non-Article III adjudication to the FAA, ultimately determining that none of them justify arbitration. While a legislative change could remedy the tension between Article III and the FAA, this Article suggests that the better

* Visiting Assistant Professor, *University of Florida Levin College of Law*. Thanks to Jonathan Cohen, Christopher Drahozal, Mark Fenster, David Horton, Lea Johnston, Ronald Krotoszynski, Lyrisa Lidsky, Tom Lin, Rachel Rebouché, Sharon Rush, Peter Rutledge, Fredrick Vars, and Stephen Ware for valuable comments. This Article also benefitted from presentation at a 2012 Southeastern Association of Law Schools New Scholar Workshop, the Third Annual Southeastern Law Scholars Conference, the 2012 11th Circuit Legal Scholarship Forum, and faculty workshops at the *University of Florida* and *Arizona State University*.

approach is simply to acknowledge the fundamental inconsistency of the FAA with Article III while recognizing that parties may waive their constitutional right to an Article III forum. Given that arbitration is a waiver of Article III rights, however, this Article concludes that consent to arbitration must be determined under the standards used to determine waiver of constitutional rights generally, a fundamental shift from current FAA jurisprudence.

TABLE OF CONTENTS

Introduction.....	202
I. The Federal Arbitration Act.....	210
A. Scope of the Act.....	212
1. Transactions covered	213
2. Disputes covered	214
B. Consent to Arbitration	215
C. Judicial Review of Arbitration Awards	219
II. The FAA's Article III Problem	223
A. Arbitrators and Judicial Power.....	223
B. The FAA and Current Theories of Non-Article III Adjudication	227
1. Supreme Court approaches: Categorical exceptions and balancing	227
2. Scholarly approach: Appellate review theory	235
III. Remediating the Problem	238
A. A Categorical Exception? More Searching Review?	238
B. Waiver Theory.....	240
1. Individual and structural concerns	240
2. Implications for FAA consent jurisprudence	246
Conclusion	251

INTRODUCTION

Imagine a typical employment discrimination case in which an employee files suit in federal court alleging that she has been discriminated against on the basis of her race or gender in violation of federal anti-discrimination statutes. The employer responds by pointing to an arbitration clause in an employment agreement or employee handbook stating that any disputes between the employee and employer will be resolved by binding arbitration. Under the Federal Arbitration Act¹ (FAA), the court must dismiss or stay the litigation, and order the parties to arbitrate the claim pursuant to the arbitration agreement.² While the widespread use of predispute

1. Ch. 392, 61 Stat. 669 (1947) (codified at 9 U.S.C. §§ 1–14 (2006)).

2. 9 U.S.C. §§ 3–4 (2006).

arbitration agreements³ and the Supreme Court's consistent endorsement of them⁴ may render this scenario common, something quite remarkable is occurring: a dispute arising under federal law and brought by one of the parties to an Article III court for adjudication has been sent elsewhere—as required by an act of Congress—for resolution by one or more arbitrators who are not federal judges subject to Article III's salary and tenure protections. Indeed, the arbitrator may be selected and compensated by the employer, one of the parties to the dispute.⁵ This raises the question of whether the FAA is consistent with Article III's ostensible assignment of the task of resolving the dispute to the federal judiciary.

Article III of the Constitution vests the judicial power of the United States in the Supreme Court and whatever lower federal courts Congress decides to establish.⁶ Although not defined in the Constitution, judicial power can generally be understood as encompassing the power to bindingly resolve a controversy between two or more disputants by determining facts and applying the law to those facts.⁷ Article III extends this power to certain specified cases and controversies, including, among others, cases arising under federal law and controversies between citizens of different states.⁸ Importantly, Article III mandates that this power be exercised by judges enjoying life tenure and salary protection.⁹ A literal reading of Article III thus suggests that any entities authorized by Congress to

3. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1639–40 (2005).

4. See generally *infra* Part I.A–B.

5. See, e.g., *McMullen v. Meijer, Inc.*, 355 F.3d 485, 488 (6th Cir. 2004) (per curiam) (describing an arbitration program in which an employer unilaterally established pool from which arbitrator must be selected); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1483 (D.C. Cir. 1997) (stating that it is common practice for employers in the securities industry to pay the arbitrators' fees); RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 109 (1997) (describing an employee dispute resolution program in which the employer paid all costs of arbitration exceeding a \$50 filing fee).

6. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

7. See *infra* notes 109–11 and accompanying text.

8. U.S. CONST. art. III, § 2.

9. *Id.* § 1. Note that the Constitution does, however, contemplate state courts—whose judges may lack life tenure and salary protections—exercising judicial power over Article III disputes. For a discussion of state court adjudication of federal disputes, see *infra* notes 118–19 and accompanying text.

exercise the judicial power, i.e., to resolve disputes of the type specified in Article III, must be Article III courts whose determinations are made by judges with life tenure and salary protection.¹⁰

“Article III literalism,” as it has been dubbed,¹¹ however, is simply untenable in today’s legal landscape.¹² For example, administrative agencies, bankruptcy courts, courts-martial, and federal magistrate judges, all exercise judicial power over Article III disputes without tenure and salary protections. Both courts and commentators have explored the contours of Article III and discussed when and how non-Article III tribunals may resolve Article III disputes.¹³ Yet one important type of adjudication of Article III disputes by non-Article III bodies has received little analysis: private arbitration under the FAA. Arbitrators exercise judicial power, determining facts and applying law to those facts to bindingly resolve disputes between private parties.¹⁴ Such disputes often arise under federal law or between parties of diverse citizenship—precisely the kinds of disputes expressly covered by Article III. Yet arbitrators enjoy neither the tenure nor the salary protections of Article III judges. Instead, the parties to the dispute being arbitrated select and compensate the arbitrator.

Determining whether the FAA is consistent with Article III is important for at least two reasons. First, and most obviously, legislative fidelity to the Constitution is important simply as part of the tradition of American constitutionalism, the essence of which is “the distinction between ordinary and fundamental law.”¹⁵ To the

10. See Richard H. Fallon, Jr. *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918–19 (1988) (describing “article III literalism” as the view that Article III’s language creates a system in which “the only federal tribunals that can be assigned to resolve justiciable controversies are ‘article III courts’”).

11. See *id.*

12. See *id.* at 919–26; see also Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 625 (2007) (“[T]he letter of Article III is both wildly impractical . . . and at war with history”); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 656 (2004) (“[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.”); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 228 (“Perhaps it is simply too late in the day to suggest an absolute construction of article III; a distinguished—if largely confused and unprincipled—line of cases has taken us well beyond that stage.”).

13. See *infra* Part II.B.

14. See *infra* Part II.A.

15. Christian G. Fritz, *Fallacies of American Constitutionalism*, 35 RUTGERS L.J. 1327, 1332 (2004); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)

extent “ordinary” legislation (such as the FAA) is inconsistent with the “fundamental” law of the Constitution, the legislation must yield.¹⁶ As Alexander Hamilton noted in the *Federalist Papers*, “[t]here is no position which depends on clearer principles.”¹⁷ Identifying irreconcilable conflicts between legislation and the Constitution in order to remedy the offending legislation, or, alternatively, explaining why apparent conflicts are not irreconcilable, helps maintain the proper functioning of American constitutionalism.

The other reason why it is important to determine whether resolution of Article III disputes by non-Article III arbitrators is consistent with the Constitution is the significant, and potentially determinative, differences between Article III courts and arbitration. Article III judges, who enjoy life tenure and salary protections, have radically different incentives than non-Article III arbitrators retained and paid for by the parties to a dispute. For example, because arbitrators are chosen by and compensated by the parties, they are competing with each other for dispute resolution business. Indeed, one arbitration provider, JAMS, openly acknowledges this competition, encouraging disputants to choose it over other providers the disputants may have already selected.¹⁸ Consequently, the incentive exists for arbitrators to favor parties they expect to require arbitration services again in the future.¹⁹ This kind of

(contrasting the Constitution as “superior, paramount law, unchangeable by ordinary means” with “ordinary legislative acts”).

16. See *Marbury*, 5 U.S. (1 Cranch) at 177 (“This theory [that an act of the legislature repugnant to the constitution is void] is . . . one of the fundamental principles of our society.”); THE FEDERALIST NO. 78, at 524–25 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“No legislative act . . . contrary to the constitution can be valid If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”).

17. THE FEDERALIST NO. 78, *supra* note 16, at 524.

18. See *JAMS Arbitration Practice*, JAMS, <http://www.jamsadr.com/adr-arbitration> (last visited Dec. 17, 2012) (“If another arbitration provider was written into your contract, call an experienced JAMS Case Manager to discuss having your case administered by JAMS.”).

19. See BALES, *supra* note 5, at 128 (noting that the knowledge that an employer is more likely than an employee to hire an arbitrator in the future may consciously or subconsciously induce the arbitrator to favor the employer); Roger J. Perlstadt, Comment, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. CHI. L. REV. 1983, 1986–87 (2002) (describing incentive of arbitrators in disputes between Internet domain name registrants and trademark holders to find in favor of trademark holders to attract their business in the future); Letter from Lori Swanson, Att’y Gen. of Minn., to President, Am. Arbitration Ass’n (July 19, 2009), available at <http://pubcit.typepad.com/files/nafconsentdecree.pdf> (describing the findings of a year-long investigation of consumer arbitration providers including that “an arbitrator is more likely to favor the party that is likely to send [it] future

incentive, which understandably raises a concern of arbitrator bias in favor of repeat players, is completely absent from Article III judges.²⁰ Further, despite this higher risk of bias, arbitrators are actually held to a *lower* standard of impartiality than Article III judges.²¹ Establishing that these differences between arbitrators and Article III judges are actually outcome-determinative is a difficult empirical question beyond the scope of this Article.²² Nevertheless, the structural incentives of arbitrators, coupled with the lower impartiality standard, are an important distinction between

cases”). *But see* Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 126 (2004) (noting that “market competition . . . may improve the quality of [arbitrators’] decisionmaking by inducing greater care”).

20. *See* 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 n.335 (1997) (“[A federal] judge, who is appointed for life, may well be less subject to bias than an arbitrator, who relies on parties and their lawyers for repeat business.”); Letter from Lori Swanson, *supra* note 19 (“This bias does not exist in a court, where the judge is not reliant on a dominant player for his or her future income.”). Alexander Hamilton defended the salary protections in Article III by suggesting that such protections help to eliminate bias because “in the general course of human nature, a power over a man’s subsistence amounts to a power over his will.” THE FEDERALIST NO. 79, *supra* note 16, at 531 (Alexander Hamilton) (emphasis omitted).

21. *See, e.g.*, *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002) (“Arbitration differs from adjudication, among many other ways, because the ‘appearance of partiality’ ground of disqualification for judges does not apply to arbitrators”); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (“Arbitrators are not held to the ethical standards required of Article III judges”); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173–74 (2d Cir. 1984) (“The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator.”).

22. Empirical evidence comparing arbitration results to litigation results is sparse and inconclusive. *See, e.g.*, Jean R. Sternlight, *Consumer Arbitration, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 127, 151–54 (Edward Brunet et al. eds., 2006) (describing the difficulties in studying the differences between arbitration and litigation); *see also* Omri Ben-Shahar, *How Bad Are Mandatory Arbitration Terms?*, 41 U. MICH. J.L. REFORM 777, 778–79 (2008). Introducing a symposium aimed at “strengthening the empirical basis of the debate over arbitration clauses,” Professor Ben-Shahar pointed to two conflicting empirical claims made by the California Supreme Court and the Seventh Circuit regarding whether employees do better in arbitration or litigation against employers. The California Supreme Court has noted that “[v]arious studies show that arbitration is advantageous to employers . . . because it reduces the size of the award that an employee is likely to get, particularly if the employer is a ‘repeat player’ in the arbitration system.” *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189 (1997); David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60–61). Contrast the above with the Seventh Circuit’s statement that “[e]mployees fare well in arbitration with their employers—better by some standards than employees who litigate” *Obliv. Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) (citing Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44).

arbitrators and Article III judges. This distinction suggests at least a potential for decision-maker bias that is greater when a dispute is resolved through arbitration rather than before an Article III judge. Consequently, determining whether non-Article III arbitrators may resolve Article III disputes has practical significance in addition to the theoretical importance in preserving American constitutionalism.

Despite the importance of determining whether private arbitration under the FAA is consistent with Article III, the issue has received little attention from either courts or commentators. The Supreme Court, notwithstanding a steady docket of FAA cases, has never fully analyzed this Article III issue. The only opinion in which the Court offered even a cursory analysis of the issue is an admiralty case from 1932, *Marine Transit Corp. v. Dreyfus*.²³ In that case, the Supreme Court upheld enforcement of an arbitration agreement against an Article III challenge.²⁴ The Court noted that while Article III declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, it does not direct the court to adopt any particular procedure.²⁵ Thus, held the Court, Congress could, in such cases, “give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice.”²⁶ What the Court failed to explain, however, is how having the dispute bindingly resolved by arbitrators was simply “modify[ing] the practice of the court in [some] respect,”²⁷ as opposed to a wholesale delegation of judicial power to non-Article III actors. *Marine Transit’s* limited analysis was contemporaneously described as a “summary disposal of the question of constitutionality.”²⁸ Further, the decision has not been subsequently cited by any of the lower federal courts addressing the issue of whether the FAA is consistent with Article III. To the contrary, those lower courts addressing the issue have—also with little analysis—uniformly adopted what could be called waiver theory, holding that enforcement of arbitration agreements under the Act

23. 284 U.S. 263 (1932); see also Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 978 n.123 (2000) (“Remarkably perhaps, admiralty is the only context in which the Supreme Court has upheld the constitutionality of the FAA.”).

24. *Marine Transit*, 284 U.S. at 279.

25. *Id.* at 278.

26. *Id.* at 278–79 (quoting *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 460 (1851)).

27. *Id.*

28. Recent Case, *Arbitration—Constitutionality of the United States Arbitration Act*, 45 HARV. L. REV. 925, 926 (1932).

presents no Article III problem because the right to have a dispute resolved in an Article III forum may be waived by the disputants.²⁹

Like the courts, scholars too have largely failed to address the FAA's potential Article III problem.³⁰ While there has been some scholarly debate over how to reconcile arbitration with the Seventh Amendment's right to a jury,³¹ the Seventh Amendment question is rendered moot by the potential Article III problem. The Seventh Amendment does not apply to adjudications before non-Article III tribunals,³² and thus, determining whether the FAA is consistent with Article III makes the Seventh Amendment inquiry unnecessary. If private arbitration under the FAA violates Article III, it is irrelevant whether it also violates the Seventh Amendment; conversely, if private arbitration under the FAA may proceed despite its non-Article III status, the Seventh Amendment is simply not implicated. In addition,

29. See, e.g., *Belom v. Nat'l Futures Ass'n*, 284 F.3d 795, 799 (7th Cir. 2002) ("The right to an Article III forum is not absolute and may be waived. Where an individual consents to arbitration, he waives the right to an impartial and independent adjudication." (citation omitted)); *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994) ("[A] person may, by contract, waive his or her right to [Article III] adjudication" (citing 9 U.S.C. § 2)); *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 730 (N.D. Tex. 1997) ("If defendants had wanted this dispute resolved by an Article III judge and a jury, they could have refused to enter into an arbitration clause in the Agreement."). One lower federal court simply called an Article III challenge to the Federal Arbitration Act "frivolous." *Sutter Corp. v. P & P Indus.*, No. 3:96-CV-1005-H, 1996 WL 622465, at *2 n.6 (N.D. Tex. Aug. 14, 1996), *rev'd on other grounds*, 125 F.3d 914 (5th Cir. 1997). That court offered no additional analysis of the Article III challenge, citing only *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), for support, despite the fact that the Supreme Court there did not address Article III concerns.

30. But see Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1194–204 (2008) (rejecting waiver theory and proposing a "modified appellate review theory"); Sternlight, *supra* note 20, at 78–80 (raising concerns about arbitration's potential Article III problem); see also 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, 261–70 (1998) (arguing that the Federal Arbitration Act represents an erosion of Article III, and rejecting waiver theory).

31. See, e.g., KATHERINE V.W. STONE & RICHARD A. BALES, *ARBITRATION LAW* 382 (2d ed. 2010) (citing debate over the course of several articles between Jean Sternlight and Stephen Ware over waivers of Seventh Amendment jury rights in arbitration).

32. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53–54 (1989) ("[I]f [an] action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder."); see also *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 460–61 (1977) (holding that the Seventh Amendment did not prohibit Congress from assigning adjudicative powers to administrative fora); Colleen P. Murphy, Note, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 YALE L.J. 1459, 1459–60 (1986) ("[I]n a non-Article III federal forum . . . the Seventh Amendment simply does not apply.").

given that the vast majority of federal cases are resolved by dispositive motion prior to ever reaching a jury,³³ the practical significance of protecting a Seventh Amendment right to a jury seems dwarfed by the importance of protecting access to an Article III tribunal.

In a notable exception to the general scholarly silence on the FAA's potential Article III problem, Peter Rutledge has explicitly rejected the waiver theory adopted by courts, offering as an alternative what he calls "modified appellate review theory."³⁴ Applying his modified appellate review theory to private voluntary arbitration under the FAA, Professor Rutledge concludes that, "[w]hile the issue is close," such arbitration survives Article III challenge.³⁵

This Article respectfully disagrees with Professor Rutledge's conclusion that the FAA is consistent with Article III under an appellate review theory, and concludes that waiver theory offers the only feasible way to justify arbitration in light of Article III. In doing so, this Article fills a major analytic gap of waiver theory. The main shortcoming of waiver theory as currently articulated is that it proposes a solution (waiver) without ever grappling with whether a problem (the inconsistency of the FAA with Article III) really exists. This Article addresses that gap by asking whether the FAA actually has an Article III problem that needs to be waived. It does so by applying the leading judicial and scholarly theories of non-Article III adjudication to the FAA. In ultimately endorsing waiver theory, this Article also responds to the argument that Article III protects not only personal rights to an Article III forum, but also structural separation of powers concerns that are not waivable by disputants,³⁶ filling another gap in current waiver theory.³⁷

33. See, e.g., STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 149 tbl.C-4 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf> (reporting 245,288 civil case terminations by court action prior to trial and only 2254 jury trials for the twelve months ending September 30, 2011).

34. Rutledge, *supra* note 30, at 1194–2004.

35. *Id.* at 1226.

36. See, e.g., *id.* at 1200.

37. The federal courts espousing waiver theory do not address the structural separation of powers argument, and Professor Sternlight addresses it by simply noting that parties may not waive their right to an Article III forum "where such waiver would threaten the institutional integrity of the judicial branch." Sternlight, *supra* note 20, at 79. Professor Sternlight seems to suggest, however, that most, if not all, arbitration threatens the judicial branch, *id.* at 79–80, in which case her limitation on waiver would potentially eviscerate waiver theory. This Article argues that private arbitration under the FAA does not implicate structural separation of

This Article proceeds as follows: Part I provides a brief overview of those aspects of the FAA relevant to examining its potential inconsistency with Article III. Part II sets out the judicial and scholarly theories of adjudication by non-Article III tribunals and demonstrates that none of those theories renders the FAA consistent with Article III. Part III addresses potential solutions, ultimately concluding that the best approach is simply to acknowledge the fundamental inconsistency of the FAA with Article III, but to recognize, as waiver theory suggests, that disputants may waive their right to an Article III forum. Finally, this Article concludes that, given that arbitration is a waiver of Article III rights, consent to arbitration must be determined under the standards used to determine waiver of constitutional rights generally, a fundamental departure from current FAA jurisprudence.

I. THE FEDERAL ARBITRATION ACT

Prior to the 1920s, disputes brought in court were not typically sent to arbitration, regardless of any arbitration agreement between the parties. Courts generally would not specifically enforce arbitration agreements, refusing to stay litigation and compel arbitration of disputes covered by such agreements.³⁸ At best, courts would award nominal damages against a party refusing to arbitrate for breach of the agreement to arbitrate.³⁹ Two rationales were invoked for this judicial refusal to enforce arbitration agreements.⁴⁰ First, it was argued that private parties could not “oust” courts of their jurisdiction to resolve disputes.⁴¹ Second, it was argued that

powers concerns, but only waivable individual rights to an Article III forum. *See infra* Part III.B.1.

38. *See* *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 120–21 (1924) (“The federal courts—like those of the States and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance or to stay proceedings on the original cause of action.” (footnote omitted) (citation omitted)); STONE & BALES, *supra* note 31, at 22 (discussing the early history of judicial treatment of arbitration agreements and the “revocability doctrine”); *see also* IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION* 20 (1992) (noting several weaknesses in the early arbitration system such as lack of enforceability and the lack of specific performance as a remedy for breach).

39. STONE & BALES, *supra* note 31, at 22.

40. *Id.* at 22–23.

41. *See, e.g.*, *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (“[Numerous cases] show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”); *see also* *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 983 (2d Cir. 1942) (“[I]t became fashionable in the middle of the 18th century to say that [arbitration] agreements were against public

arbitration was simply ineffective at administering justice.⁴² In the early part of the twentieth century, however, a reform movement began gaining steam in an effort to reverse the non-enforcement of arbitration agreements.⁴³ A primary reason why reformers wanted arbitration agreements to be made enforceable was their belief that arbitration was less costly and more efficient than litigation.⁴⁴

In 1920, New York adopted an arbitration act making arbitration agreements specifically enforceable.⁴⁵ Following their success in New York, the reformers wanted to create a uniform arbitration act that would be adopted by every other state, and to have Congress pass a federal arbitration act.⁴⁶ The reason the reformers wanted a federal act was because in the pre-*Erie* world in which they operated, even if every state had an arbitration statute making arbitration agreements valid, federal courts exercising diversity jurisdiction would not have to enforce such agreements.⁴⁷ As explained by the late Ian R. MacNeil:

[T]he most important fact in the legal background [against which the FAA was presented to Congress] was the universal understanding in the period from 1922 to 1925 that the enforcement and nonenforcement of arbitration agreements and

policy because they ‘oust the jurisdiction’ of the courts.”). *Kulukundis* has been described as “the official history of arbitration in America.” STEPHEN K. HUBER & MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 5 (3d ed. 2011).

42. See, e.g., *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065) (“[Arbitrators] are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear that the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?”); see also *Kulukundis*, 126 F.2d at 983 (“An effort has been made to justify this judicial hostility to the executory arbitration agreement on the ground that arbitrations, if unsupervised by the courts, are undesirable . . .”).

43. See MACNEIL, *supra* note 38, at 25–47 (describing reform efforts from 1911 to 1925).

44. *Id.* at 29–30.

45. See STONE & BALES, *supra* note 31, at 29.

46. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101–02 (2006) (describing the efforts of Julius Cohen and Charles Bernheimer to promote the use of arbitration).

47. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275–76 (1926) (“Every one of the States in the Union might declare [arbitration] agreement[s] to be valid and enforceable, and still in the Federal courts [they] would remain void and unenforceable without this statute [the Federal Arbitration Act].”); see also *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 16 (1924) [hereinafter *Joint Hearings on Arbitration*] (statement of Julius Henry Cohen) (“Why do you have to have [an arbitration act] in the Federal law? . . . [T]he Federal court will not be bound by any State statute.”); MACNEIL, *supra* note 38, at 132 (“The practical concern advanced by Cohen and Dayton was a product of the rule of *Swift v. Tyson* . . . as yet unmodified by [*Erie*].”).

awards, particularly specific enforcement of arbitration agreements, were matters of remedy. In that day, before *Erie* had complicated such matters, remedial issues of this kind were indisputably within the exclusive province of the court in which enforcement was sought, the forum court. Moreover, the federal courts plainly were hellbent on sticking to the proposition that state arbitration statutes were not substantive law, and hence not binding on the federal courts. This was their position, whether in admiralty or in diversity cases, and whether or not interstate commerce was involved.⁴⁸

Against this backdrop, the FAA was passed in 1925.⁴⁹ Under the FAA, arbitration agreements are deemed as enforceable as any other contract.⁵⁰ If a dispute covered by an arbitration agreement is brought to court, the court must stay the litigation⁵¹ and compel the parties to arbitrate pursuant to the agreement.⁵² Thus, following enactment of the FAA, disputes brought to federal court could be sent to non-Article III arbitration for adjudication. Interestingly, the question whether such an act was consistent with Article III's allocation to federal courts of the power to bindingly adjudicate disputes within Article III's jurisdictional grant does not appear to have been a concern of the FAA's drafters.⁵³

Three important aspects of the FAA and its jurisprudence are particularly relevant to determining whether private arbitration of federal disputes is consistent with Article III. First, the Supreme Court has broadly interpreted the FAA to cover a wide range of potential disputes. Second, under current FAA jurisprudence, whether parties have consented to arbitrate a dispute is determined

48. MACNEIL, *supra* note 38, at 109–10 (footnote omitted).

49. See *generally id.* at 84–101 (describing the enactment of FAA, then known as the United States Arbitration Act).

50. 9 U.S.C. § 2 (2006).

51. *Id.* § 3.

52. *Id.* § 4.

53. If it were a concern of the drafters, it appears to have been well-hidden because the issue does not seem to arise in the legislative history. See *generally* MACNEIL, *supra* note 38, at 84–121 (describing enactment of the FAA and providing a detailed analysis of the legislative history). In testimony before the House and Senate Judiciary Subcommittees, Julius Cohen, one of the primary drafters of the FAA, noted that the drafters had considered “one” constitutional provision, namely the Seventh Amendment. See *Joint Hearings on Arbitration*, *supra* note 47, at 17 (statement of Julius Henry Cohen) (“Now, there is one constitutional provision which we considered The one constitutional provision we have got is that you have a right of trial by jury.”). This statement suggests by implication that the drafters did not consider the potential Article III problem, which, as discussed above, is preliminary to the Seventh Amendment question. See *supra* notes 31–33 and accompanying text.

by ordinary contract principles, which disregard the subjective intent of the parties. Third, judicial review of arbitration awards is extremely limited.

A. *Scope of the Act*

The FAA makes enforceable any “written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction.”⁵⁴ Thus, the FAA applies to disputes that (1) arise out of transactions involving commerce, and (2) are covered by written arbitration provisions. The Supreme Court has interpreted both elements broadly, and the FAA thus covers a large number of disputes otherwise falling within the coverage of Article III.

1. *Transactions covered*

With respect to the first element—whether the dispute arises out of a transaction involving commerce—the Supreme Court has read the FAA to extend to the limits of Congress’s power to regulate interstate commerce.⁵⁵ For example, the Court in *Allied-Bruce Terminix Cos. v. Dobson*⁵⁶ held that the FAA applied to a dispute over allegedly ineffective residential pest control services because the exterminator was a multi-state firm and used out-of-state materials in performing the services.⁵⁷

While broadly reading the FAA to extend to the limits of Congress’s commerce power, however, the Supreme Court has narrowly read an express exception in the FAA that states that the act shall not apply to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁵⁸ Six years after *Allied-Bruce Terminix*, the Court held, relying on *ejusdem generis*,⁵⁹ that the exception for

54. 9 U.S.C. § 2.

55. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (reading section two as “extending the Act’s reach to the limits of Congress’ Commerce Clause power”); *Perry v. Thomas*, 482 U.S. 483, 490–91 (1987) (describing the Act as “a statute that embodies Congress’ intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause”).

56. 513 U.S. 265 (1995).

57. *Id.* at 282.

58. 9 U.S.C. § 1.

59. *Ejusdem generis* is a canon of statutory construction whereby a general phrase following a list of specific persons or things will be interpreted to include only persons or things of the same type as those listed. See BLACK’S LAW DICTIONARY 594 (9th ed. 2009).

“workers engaged in foreign or interstate commerce” included only transportation workers, like seamen and railroad workers.⁶⁰ Thus, while a contract for residential pest-control services is considered a transaction involving commerce such that a dispute arising out of those services is covered by the FAA, an exterminator performing those services is not deemed a worker engaged in interstate commerce such that his employment contract is excluded from the FAA’s coverage. Consequently, under the Court’s jurisprudence, the FAA can apply to disputes arising out of all transactions within the scope of Congress’s commerce power, including employment agreements of all but a narrow class of transportation workers.

2. *Disputes covered*

The second element establishing the scope of the FAA—whether the dispute is covered by a written arbitration provision—also sweeps broadly. Written arbitration provisions often cover “all disputes that arise out of or in relation” to the contract or transaction at issue,⁶¹ and are construed liberally.⁶² Courts have put few, if any, limitations on the kinds of disputes covered by these broad boilerplate agreements.⁶³ Historically, one category of disputes not arbitrable, even under a broad arbitration clause, was federal statutory claims. In 1953, for example, the Court held in *Wilko v. Swan*⁶⁴ that claims under the Securities Act of 1933 were not arbitrable, despite a broadly worded agreement of the parties subjecting to arbitration “[a]ny controversy arising between [them].”⁶⁵ Following *Wilko*,

60. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–19 (2001).

61. *STONE & BALES*, *supra* note 31, at 96; *see, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (involving an arbitration clause stating that “[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration”).

62. *See, e.g.* *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (“[D]ue regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .”).

63. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720–21 (9th Cir. 1999) (discussing cases that “liberally” and “expansively” construe agreements to arbitrate “[a]ll disputes arising in connection with this Agreement,” “any and all disputes arising under the arrangements contemplated hereunder,” “[a]ll disputes arising in connection with the present contract,” and “any dispute arising in connection with the implementation, interpretation or enforcement” of an agreement (alterations in original)).

64. 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

65. *Id.* at 432 n.15, 433–35.

courts found claims under other federal statutes, such as the Fair Labor Standards Act, ERISA, Title VII, and the ADEA, not arbitrable as well.⁶⁶ Yet in the 1980s, the Supreme Court began backing away from *Wilko* and started holding federal statutory claims arbitrable.⁶⁷ Ultimately, the Court expressly overturned *Wilko*,⁶⁸ and, as it stated shortly thereafter, “[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”⁶⁹

Between the Court’s broad reading of the FAA as covering all transactions within the scope of Congress’s Commerce Clause power (except employment contracts of a limited class of transportation workers), and its failure to place any limits on the kinds of disputes arising out of such transactions that can be arbitrated (including federal statutory claims), a large number of disputes ostensibly falling within the coverage of Article III can be made subject to arbitration agreements enforceable by the FAA.

B. Consent to Arbitration

Given that a large number of Article III disputes can be made the subject of an enforceable arbitration agreement, the question arises whether any particular dispute, in fact, is. Arbitration under the FAA is ostensibly a creature of consent.⁷⁰ By the express terms of the Act, a federal court may refuse to hear a dispute brought before it and, instead, send it to arbitration only if the dispute is subject to an “agreement” to arbitrate.⁷¹ Under current FAA jurisprudence,

66. See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 451–53 (2011) (collecting cases).

67. See, e.g., *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 238, 242 (1987) (holding claims under the Securities Exchange Act of 1934 and RICO arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638–40 (1985) (holding Sherman Act claims arbitrable); see also *McMahon*, 482 U.S. at 233 (“[T]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time.”).

68. *Rodriguez de Quijas*, 490 U.S. at 484 (“We now conclude that *Wilko* was incorrectly decided . . .”).

69. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

70. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion . . .”); *id.* at 478 (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so . . .”).

71. 9 U.S.C. § 3 (2006) (stating that courts must stay litigation of “any issue referable to arbitration under an agreement in writing for such arbitration . . . upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement”); *id.* § 4 (“[U]pon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an

whether such an agreement exists is determined by ordinary contract principles.⁷² Ordinary contract principles hold, however, that the existence of an agreement is determined not by the subjective actual intent of the parties, but by their objective overt actions, such as signing a written document.⁷³ Thus, a party signing a contract containing an arbitration provision will generally be bound by that provision, even if the party was unaware of the provision and had no actual intent to consent to arbitration.⁷⁴ Similarly, an individual may be bound by an arbitration provision unilaterally adopted by an employer or service provider if that individual continues to work or use the service, regardless of any subjective knowledge of or

order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”).

72. See, e.g., *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (“[The Federal Arbitration Act does not] alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).”); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”).

73. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6, at 208–10 (3d ed. 2004) (explaining objective theory of assent and noting that “courts universally accept it today”); *id.* § 4.26, at 558 (“A party that signs an agreement is regarded as manifesting assent to it and may not later complain about not having read or understood it”); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 113–14 (1996) (“The requirement to form a contract is not that parties *actually* assent to its terms. The requirement is that they take actions—such as signing their names on a document or saying certain words—that would lead a reasonable person to believe that they have assented to the terms of the contract.”).

74. See, e.g., *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 222–23 (3d Cir. 2008) (holding that a non-English speaking employee was bound by an English-language arbitration agreement he signed); *Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 264–65 (5th Cir. 2004) (enforcing an arbitration agreement despite an illiterate party’s inability to understand the agreement he signed). While the Ninth Circuit has adopted a heightened standard that would require subjective intent to consent to arbitrate, *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (“[W]e conclude that a Title VII plaintiff may only be forced to . . . arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration.”), it applies only to a narrow class of statutory claims, *Renteria v. Prudential Ins. Co. of Am.*, 113 F.3d 1104, 1107 (9th Cir. 1997) (“The *Lai* knowing waiver requirement applies only to a comparatively small class of claims arising under Title VII or similar laws”), and other circuit courts have not followed suit. See *Morales*, 541 F.3d at 224; *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1371 (11th Cir. 2005); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997). Confusingly, while the Sixth Circuit has stated that it has adopted a “knowing and voluntary” standard, it appears not to require subjective intent. See *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 971, 974 (6th Cir. 2007) (finding a “knowing and voluntary” waiver where an employee simply attended an informational meeting and received a copy of the employer’s dispute resolution policy).

agreement to be bound by the provision.⁷⁵

Another example of how disputants may be bound to an arbitration clause to which they did not subjectively assent is the enforcement of arbitration agreements against non-parties. In *Arthur Andersen LLP v. Carlisle*,⁷⁶ the Supreme Court held that “[b]ecause traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,” there is no per se reason why non-parties could not enforce an arbitration agreement.⁷⁷ While *Arthur Andersen* involved enforcement of an arbitration agreement by a non-party to the agreement, lower courts have read that case as authority supporting the enforcement of arbitration agreements against non-parties.⁷⁸ In addition, even before *Arthur Andersen*, some courts had held that arbitration agreements could bind non-parties.⁷⁹ Thus, various courts have ruled that a husband asserting a wrongful death suit was bound by an arbitration agreement between his deceased wife and her insurer,⁸⁰ a patient asserting a personal injury

75. See, e.g., *Seawright*, 507 F.3d at 972–74 (holding that by continuing to work, an employee assented to her employer’s unilateral adoption of an arbitration program); *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1030–31 (S.D. Miss. 2000) (holding that by failing to close their account, depositors assented to an arbitration clause unilaterally adopted by a bank in a revised deposit agreement; that depositors did not read revised agreement was deemed irrelevant). Finding assent in such cases is not without its critics. See, e.g., *Seawright*, 507 F.3d at 980 (Martin, J., dissenting) (criticizing a holding that an employee was bound to a unilaterally adopted arbitration clause, noting that “[t]his is not how contracts are formed”); *Horton*, *supra* note 66, at 456–59 (criticizing courts’ receptiveness to companies’ use of nondescript bill stuffers to unilaterally add arbitration provisions to millions of consumer contracts as “hard to square with the strong presumption against inferring acceptance by silence”).

76. 556 U.S. 624 (2009).

77. *Id.* at 631 (quoting 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:19, at 183 (4th ed. 2001)) (internal quotation marks omitted).

78. See, e.g., *Todd v. S.S. Mut. Underwriting Ass’n (Berm.) Ltd.*, 601 F.3d 329, 333–34 (5th Cir. 2010) (reading *Arthur Andersen* as “concluding . . . that nonsignatories to arbitration agreements . . . may sometimes be compelled to arbitrate”); *THI of N.M. at Hobbs Ctr., LLC v. Patton*, Civ No. 11-537 LH/CG, 2012 WL 112216, at *6–10 (D.N.M. Jan. 3, 2012) (citing *Arthur Anderson* in holding a nonsignatory bound by an arbitration agreement), *aff’d sub nom.* *Fundamental Admin. Servs., LLC v. Patton*, Nos. 12-2014, 12-2065, 2012 WL 5992259 (10th Cir. Dec. 3, 2012).

79. See, e.g., *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003) (“[N]onsignatories may be bound to an arbitration agreement under ordinary contract and agency principles.”); *Bel-Ray Co. v. Chemrite (Pty.) Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999) (“When asked to enforce an arbitration agreement against a nonsignatory, we ask whether he or she is bound by that agreement under traditional principles of contract and agency law.”).

80. *Drissi v. Kaiser Found. Hosps., Inc.*, 543 F. Supp. 2d 1076, 1081 (N.D. Cal. 2008).

claim against a nursing home was bound by an arbitration agreement between her mother and the home,⁸¹ and an employee injured at a corporate leadership workshop was bound by an arbitration agreement between his employer and the workshop provider.⁸² In those cases, disputants seeking to bring claims in court were bound by arbitration agreements to which they were not even parties, let alone to which they had subjectively assented.

An additional aspect of federal arbitration law—the so-called separability doctrine—further undermines any notion that a party must subjectively consent to arbitration. The separability doctrine was first endorsed by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁸³ In that case, Prima Paint and F & C had entered into a “Consulting Agreement” shortly after Prima Paint’s purchase of F & C’s paint business.⁸⁴ Under the Consulting Agreement, Prima Paint would take over the servicing of former F & C customers and pay F & C a percentage of receipts from those customers in exchange for various consulting services from F & C and a covenant not to compete.⁸⁵ Prima Paint subsequently filed suit in federal court, alleging that it had been fraudulently induced to enter into the Consulting Agreement by F & C’s representations that it was solvent and able to perform its contractual obligations, when in fact, F & C was headed towards bankruptcy.⁸⁶ F & C moved to stay the litigation pending arbitration pursuant to an arbitration clause in the allegedly fraudulently induced Consulting Agreement.⁸⁷ The issue before the Court was thus “whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators.”⁸⁸ Holding that the fraudulent inducement claim would be submitted to arbitration, the Court adopted the separability doctrine:

[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the “making” of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the [FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.⁸⁹

81. J.P. Morgan Chase & Co. v. Conegie *ex rel.* Lee, 492 F.3d 596, 600 (5th Cir. 2007).

82. Parker v. Ctr. for Creative Leadership, 15 P.3d 297, 299 (Colo. App. 2000).

83. 388 U.S. 395 (1967).

84. *Id.* at 397.

85. *Id.*

86. *Id.* at 398.

87. *Id.* at 399.

88. *Id.* at 402.

89. *Id.* at 403–04.

Thus, under the separability doctrine, a party alleging that it had been fraudulently induced to enter into a contract containing an arbitration clause will be required to arbitrate its fraudulent inducement claim, unless it alleges fraud specifically with respect to the arbitration provision itself.

The separability doctrine undermines any notion that subjective intent is required to consent to an arbitration agreement because if a party is acting under the influence of a misrepresentation—even if that misrepresentation does not pertain specifically to the arbitration clause—it is not truly consenting. Stephen Ware analogizes *Prima Paint* to a situation where a party signs a contract containing an arbitration clause because someone is pointing a gun at his head.⁹⁰ While a signature obtained at gunpoint—like a fraudulently induced signature—does objectively manifest assent to the terms of a contract, it does not represent the actual subjective desire of the signer. Applying the separability doctrine to a case in which a plaintiff alleged that he signed a contract containing an arbitration clause at gunpoint and allowing the arbitrator to decide whether to enforce the contract “enforces a duty assumed through coerced, not voluntary, consent.”⁹¹ Likewise, if a plaintiff was fraudulently induced to enter a contract containing an arbitration provision, the separability rule enforces a duty assumed through fraud, not true knowing consent.

In sum, while arbitration is ostensibly a creature of consent, several major aspects of current FAA jurisprudence—including determining consent through contract law objective manifestation of intent standards, enforcing arbitration agreements against non-parties, and applying the separability rule—reject the idea that such consent must represent the subjective, knowing intent of the parties.

C. *Judicial Review of Arbitration Awards*

The final aspect of FAA jurisprudence relevant to determining whether it is consistent with Article III is judicial review of arbitration awards. Under the FAA, judicial review of arbitration awards is extremely limited. The Act requires a court to issue an order confirming an arbitration award upon the request of one of the parties, unless the award is vacated or modified for one of seven reasons specified in the FAA:

90. Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT*, *supra* note 22, at 88, 100–02.

91. *Id.* at 100.

- (1) The award was procured by corruption, fraud, or undue means;
- (2) There was evident partiality or corruption in any of the arbitrators;
- (3) The arbitrators were guilty of misconduct prejudicial to the rights of any party;
- (4) The arbitrators exceeded their powers;
- (5) There was an evident miscalculation of figures or mistake in describing persons or property in the award;
- (6) The arbitrators made an award on a matter not submitted to them;
- (7) The award is imperfect in a matter of form not affecting the merits.⁹²

These statutory grounds for modifying or vacating an arbitral award provide for a much narrower review than that typically given by an appellate court reviewing a lower court decision. Indeed, while appellate courts review lower courts' legal rulings de novo and factual findings for clear error,⁹³ the statutory grounds for modification or vacatur of arbitral awards allow for review essentially only of the arbitrators' conduct, not of the substance of the arbitrators' factual or legal determinations on the merits of the dispute.⁹⁴ As one court has explained:

[T]he scope of judicial review [of] an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. Indeed . . . in reviewing such an award, a district or appellate court is limited to determin[ing] whether the arbitrators did the job they were told to

92. 9 U.S.C. §§ 9–11 (2006).

93. See 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588, at 443–57 (3d ed. 2008).

94. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (“[I]t would stretch basic interpretive principles to expand the stated grounds [for review in the FAA] to the point of evidentiary and legal review generally.”); CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS § 7.03, at 494 (2d ed. 2006) (“[T]he grounds on which courts review arbitration awards are much narrower than the grounds on which appeals courts review decisions of trial courts”); HUBER & WESTON, *supra* note 41, at 427 (“[T]hese grounds [for review of arbitral awards under the Federal Arbitration Act] are narrower than the standards for appellate review in a judicial case where a court reviews a lower court’s legal rulings de novo and factual findings for clear error.”); Stephen Wills Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 892 (2010) (“Conspicuously absent from [the Federal Arbitration Act’s judicial review provisions] is the ability of the court to intervene and vacate an award for arbitrators’ substantive errors of law or fact.”).

do—not whether they did it well, or correctly, or reasonably, but simply whether they did it.⁹⁵

In addition to the narrow statutory grounds for modifying or vacating an arbitration award, however, courts have historically—at least prior to 2008—endorsed various non-statutory grounds for vacating an arbitration award.⁹⁶ Chief among these was the ground that the arbitrator’s decision was in “manifest disregard” of the law.⁹⁷ Under the manifest disregard standard, a court may vacate an arbitral award where the arbitrator “refus[ed] to apply a clearly defined legal principle known to the arbitrator to be controlling.”⁹⁸ Manifest disregard of the law means something more than just a mistaken or erroneous determination or application of law,⁹⁹ and thus review for manifest disregard is less searching than de novo review for correction of legal errors. While other non-statutory grounds for vacating arbitral awards have been endorsed by various courts, like manifest disregard they are rather limited grounds for review and none of them adopt an appellate-court-like de novo review of legal determinations.¹⁰⁰

95. *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007) (citation omitted) (internal quotation marks omitted). In addition, as a practical matter, reviewing an arbitral award on the merits can be difficult given that arbitrators are oftentimes not required to issue written opinions. See BALES, *supra* note 5, at 133 (“The securities industry arbitration rules require the arbitrator to issue a written *award*, which does little more than state who shall receive what and when the individual shall receive it. The arbitrator is not required to issue an *opinion* giving reasons for the award.” (footnote omitted)); THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* 558 (6th ed. 2012) (“[F]rom a practical perspective, the review of commercial arbitration awards on the merits is difficult, if not impossible, to accomplish. The commonplace practice domestically has been to render awards without legal explanation or with only a limited explanation. Additionally, informal arbitral proceedings usually are not codified in a verbatim transcript.”).

96. See Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 146–47 (2011) (explaining that historically courts have vacated arbitration awards for several reasons, including making “some obvious mistake of law,” or committing “fraud, accident, mistake, or illegality”).

97. See *id.* at 158–59 (noting that “by 1999 every circuit court of appeals had adopted the manifest disregard standard”).

98. MyLinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S.C. L. REV. 407, 413 (2010) (quoting Jeffrey W. Sarles, *US Courts Wrestle with “Manifest Disregard” After Hall Street*, MAYER BROWN (Aug. 10, 2009), <http://www.mayerbrown.com/publications/US-Courts-Wrestle-with-Manifest-Disregard-after-IHall-Street-08-10-2009>). See generally Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 774–78 (1996) (explaining the manifest disregard standard).

99. See Hayford, *supra* note 98, at 776–77; Sims & Bales, *supra* note 98, at 413.

100. See generally Hayford, *supra* note 98, at 778–98 (explaining non-statutory grounds for vacating arbitral awards including that the award is in direct conflict with public policy, is arbitrary and capricious, is completely irrational, or fails to draw its essence from the parties’ underlying contract); see also Hiro N. Aragaki, *The Mess of*

In 2008, however, the Supreme Court appeared to put the kibosh on the use of non-statutory grounds for vacating arbitral awards when it decided *Hall Street Associates, L.L.C. v. Mattel, Inc.*¹⁰¹ While *Hall Street* did not involve a judicially-created non-statutory review standard such as manifest disregard, but rather a contractually-created review standard that the parties had written into their arbitration agreement,¹⁰² the Court stated that “we granted certiorari to decide whether the grounds for vacatur and modification provided by . . . the FAA are exclusive [and] [w]e agree . . . that they are.”¹⁰³ Despite the apparently clear language of the Court that the statute provides the exclusive grounds for vacatur or modification of arbitral awards, however, lower courts’ interpretations of *Hall Street* have been mixed.

For example, while some circuits have read *Hall Street* as rejecting non-statutory grounds for modification or vacatur of arbitral awards,¹⁰⁴ at least one circuit has held that non-statutory grounds such as manifest disregard remain permissible.¹⁰⁵ A third, middle-ground position adopted by some circuits is that while *Hall Street* may have held that the FAA provides the exclusive grounds for vacating an arbitral award, manifest disregard survives as a judicial gloss on the express FAA ground allowing vacatur where an arbitrator has

Manifest Disregard, 119 YALE L.J. ONLINE 1, 3 (2009), <http://yalelawjournal.org/images/pdfs/817.pdf> (characterizing manifest disregard, completely irrational, and against public policy as “equivalent”).

101. 552 U.S. 576 (2008).

102. The arbitration agreement between the parties in *Hall Street* provided that “[t]he Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.” *Id.* at 579.

103. *Id.* at 581 (citation omitted).

104. *E.g.*, *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008); *see also Crawford Grp., Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008) (citing *Hall Street* for the proposition that “[a]n arbitral award may be vacated only for the reasons enumerated in the FAA”).

105. *See Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 418–19 (6th Cir. 2008) (“In *Hall Street Assocs.*, the Supreme Court significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in [the FAA], but it did not foreclose federal courts’ review for an arbitrator’s manifest disregard of the law Accordingly, this Court will follow its well-established precedent here and continue to employ the ‘manifest disregard’ standard.” (citation omitted)). Various commentators have endorsed this view that the use of non-statutory vacatur grounds survives *Hall Street*. *See, e.g.*, Aragaki, *supra* note 100, at 13 (“On the narrow reading of *Hall Street* that I propose, the FAA section 10 standards are ‘exclusive’ in the sense that private parties may not change or expand them by contract. Such a holding is fully consistent with the continued vitality of judicially-created vacatur doctrines.”); Sims & Bales, *supra* note 98, at 431–33 (arguing that manifest disregard survives *Hall Street*).

exceeded its powers.¹⁰⁶ Adding to the confusion is the Supreme Court's comment in a subsequent case that "[w]e do not decide whether 'manifest disregard' survives our decision in *Hall Street* as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth [in the FAA]."¹⁰⁷ Nevertheless, at best, while some circuits may continue to allow manifest disregard or other originally non-statutory grounds for vacatur, as noted above, such grounds call for less-than-appellate-court-like de novo review of legal determinations. The relevant point here is that judicial review of arbitral awards is quite limited.

II. THE FAA'S ARTICLE III PROBLEM

As explained above, under the FAA, a broad range of disputes ostensibly assigned to Article III courts can be sent instead to arbitration with extremely limited judicial review. This Part explores whether sending such disputes to arbitration is consistent with Article III, first by asking whether a conflict actually exists between the FAA and Article III, and second, after finding that one does, by determining whether any of the current judicial or scholarly approaches to non-Article III adjudication can resolve the conflict.

A. Arbitrators and Judicial Power

Article III allocates the exercise of judicial power over Article III disputes to life-tenured and salary-protected judges,¹⁰⁸ which arbitrators are not. If resolution of Article III disputes by arbitrators not subject to Article III tenure and salary requirements is the

106. *E.g.*, *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) ("[W]e conclude that, after *Hall Street Associates*, manifest disregard of the law remains a valid ground for vacatur because it is part of § 10(a)(4)."); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008) ("[Other courts] think that 'manifest disregard,' reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards. We agree with those courts" (citations omitted)), *rev'd on other grounds*, 130 S. Ct. 1758 (2010). This was the position of the Seventh Circuit even before *Hall Street*. See *Wise v. Wachovia Secs., LLC*, 450 F.3d 265, 268 (7th Cir. 2006) ("[W]e have defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory ground [of the FAA]."). In addition, while the Fourth Circuit has stated that manifest disregard survives *Hall Street*, it has not decided whether it survives as a judicial gloss on section 10 or as a non-statutory ground. *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) ("Although we find that manifest disregard continues to exist either as an independent ground for review or as a judicial gloss, we need not decide which of the two it is").

107. *Stolt-Nielsen*, 130 S. Ct. at 1768 n.3 (citation omitted).

108. U.S. CONST. art. III, § 1.

exercise of judicial power over such disputes, there is a potential conflict between Article III and the FAA. Conversely, if arbitrators do not exercise judicial power, the FAA does not have an Article III problem.

While Article III does not define “judicial power,” the term can be understood as the power to bindingly resolve a controversy between two or more disputants by determining facts and applying the law to those facts.¹⁰⁹ Indeed, Blackstone’s Commentaries, with which the drafters of Article III were no doubt familiar,¹¹⁰ defines “judicial power” as the power “to examine the truth of the fact, to determine the law arriving upon that fact, and, if any injury appears to have been done, to ascertain and by its officers to apply the remedy.”¹¹¹ Determining facts, applying the law to those facts, and ascertaining a remedy to be applied to the parties is precisely what arbitrators do.¹¹² For example, one arbitration provider, the National Arbitration Forum, describes its arbitration services as “very similar to court” and states that “[i]n a FORUM arbitration, two disputing parties bring their dispute before a legal expert who renders a decision in favor of one of the parties based on the law and applicable rules.”¹¹³

109. See BLACK’S LAW DICTIONARY, *supra* note 59, at 924 (defining “judicial power” as “[t]he authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it”); see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (“[A] ‘judicial Power’ is one to render dispositive judgments.” (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990))); Craig A. Stern, *What’s a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1052–53 (1998) (“If [application of law to facts] is done for opposing parties by a neutral with the purpose of authoritatively pronouncing the law in officially resolving a dispute between these opponents, then it is an exercise of the judicial power.”).

110. See Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 744–45 (1976) (noting that “a number of [Blackstone’s] readers and at least one of his former students were delegates to the Philadelphia Constitutional Convention,” and that his Commentaries “acted as a convenient reference work”); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 614–15 (2009) (noting that Blackstone was one of the two “most influential English sources to which the Framers turned in shaping American law”).

111. 3 WILLIAM BLACKSTONE, COMMENTARIES *25.

112. One could argue that a relevant distinction between arbitration and judicial power is that while a judicial decision can invoke state power to enforce the decision (say by having a sheriff assist with collecting assets from a recalcitrant losing party), an arbitration award alone may be insufficient to do so. See, e.g., *FIA Card Servs., N.A. v. Weaver*, 62 So. 3d 709, 712 (La. 2011) (“For an arbitral award to be made enforceable by law, it must first be confirmed by a court.”). Given that an arbitration award can be turned into an enforceable judgment with extremely limited judicial review, see *supra* Part I.C, such a distinction seems a weak basis to argue that arbitrators do not exercise judicial power.

113. FAQ: *How is the FORUM Similar to a Court?*, NAT’L ARBITRATION FORUM,

Bindingly resolving a dispute by applying law to determined facts in this way is the exercise of “judicial power” and, indeed, arbitrators are often characterized as private judges.¹¹⁴

One could argue that arbitration is not the exercise of judicial power because arbitration is merely a glorified form of settlement. Certainly there is no Article III problem where two parties to a dispute that falls within Article III jurisdiction simply settle the dispute. While settlement represents one kind of resolution of an Article III dispute, such self-resolution does not involve the exercise of “judicial power” over the dispute. No third-party entity is determining facts, applying law to those facts, and issuing a resolution binding on the disputants. Although a settlement agreement may be binding as a matter of contract, it is hard to argue that two parties who have agreed to settle a dispute have exercised “judicial power” in doing so. As Craig Stern has noted, the word “judicial” derives from the Latin *jus dicere* (“to speak the law”), and “judicial power” is thus “an official ‘speaking of the law’ to other parties so as to resolve a dispute between them.”¹¹⁵ While parties to a dispute may resolve it through anything from a handshake to a complex settlement agreement, it is hard to argue that when the parties themselves have negotiated a resolution (rather than having one bindingly imposed on them by a third-party adjudicator) that they have exercised “judicial power.” As soon as a third party is brought in to render a

<http://www.adrforum.com/faq.aspx?faq=872> (last visited Dec. 17, 2012). Other arbitration providers describe arbitration similarly. See, e.g., *Arbitration*, AM. ARBITRATION ASS’N, http://www.adr.org/arb_med (last visited Dec. 17, 2012) (“Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision, known as an ‘award.’”); *Arbitration Definition*, JAMS, <http://www.jamsadr.com/arbitration-defined> (last visited Dec. 17, 2012) (“The arbitrator reads briefs and documentary evidence, hears testimony, examines evidence and renders *an opinion on liability and damages* in the form of an ‘award of the arbitrator’ after the hearing.”); *Arbitration Overview*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/Overview> (last visited Dec. 17, 2012) (“[Arbitrators] read the pleadings filed by the parties, listen to the arguments, study the documentary and/or testimonial evidence, and render a decision.”); see also BLACK’S LAW DICTIONARY, *supra* note 59, at 119 (defining “arbitration” as “[a] method of dispute resolution involving one or more neutral third parties . . . whose decision is binding”).

114. See *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854) (“Arbitrators are judges chosen by the parties to decide the matters submitted to them”); W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1097 (2012) (“[T]he service arbitrators provide to litigants—binding, third-party dispute resolution—is essentially the same as that provided by judges.”). For example, Anheuser-Busch’s employee dispute resolution system states that “[t]he arbitrator essentially substitutes for a judge and jury who might decide the case in a court setting.” *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99, 101 (Ill. 2006) (quoting Anheuser-Busch Dispute Resolution Program Policy Statement).

115. Stern, *supra* note 109, at 1053–54 (emphasis added).

binding adjudication, however, even if brought in voluntarily by the parties, that third party is exercising judicial power, and thus potentially encroaching on Article III's allocation of such power to Article III courts.¹¹⁶

One could also make a textual argument that even if arbitrators bindingly adjudicating Article III disputes are exercising judicial power, they are not exercising the judicial power "*of the United States*," which is what Article III allocates to life-tenured and salary-protected judges.¹¹⁷ The argument would be that because private arbitrators are not federal officers and part of some federal governmental entity, whatever judicial power they are exercising is not that of the United States. But saying that a body is not exercising the judicial power of the United States because it is not a federal governmental entity misses the point. The judicial power of the United States is the power to bindingly resolve disputes of the kind set out in Article III. If an entity is exercising that power, it is exercising the judicial power of the United States, whether or not it is a federal governmental entity. Indeed, state courts adjudicating Article III disputes are exercising the judicial power of the United States.¹¹⁸ Similarly, though arbitrators, like state court judges, are not United States officers, they are nonetheless exercising the judicial power of the United States when they adjudicate Article III disputes. While state court exercise of such judicial power is consistent with Article III because such resolution was clearly contemplated by the Framers and assumed to

116. Professor Rutledge offers two additional reasons why arbitration should not be conflated with settlement. First, he argues that arbitration involves less party autonomy than settlement because unlike in settlement, parties to arbitration are bound to the bargain before they know its substantive terms. Second, he argues that greater judicial scrutiny is given to settlement agreements than to arbitration awards. Rutledge, *supra* note 30, at 1199–200.

117. U.S. CONST. art. III, § 1 (emphasis added).

118. See James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191 (2007) [hereinafter Pfander, *Federal Supremacy*] (arguing that state courts adjudicating federal disputes are essentially inferior federal tribunals, which Congress has the power to constitute under Article I, § 8). One could argue that Professor Pfander's inferior tribunal account could be applied to arbitration, i.e., that an arbitral forum is simply an inferior federal tribunal constituted by Congress (through enactment of the Federal Arbitration Act) pursuant to its Article I, § 8 power. A key element of Professor Pfander's inferior tribunal theory, however, is the inferiority requirement, which includes appellate review by the Article III judiciary. See Pfander, *supra* note 12, at 689 ("[T]he inferiority requirement creates a foundational rule under which all tribunals must answer to the head of the Article III judiciary."). As discussed below, however, *infra* Part II.B.2, judicial review by Article III courts of arbitral awards is insufficient to justify arbitrators' exercise of judicial power.

be part of the constitutional structure,¹¹⁹ however, no such historical or structural justification exists to support arbitrators' similar adjudication of Article III disputes.

Because arbitration is not simply a glorified form of settlement, and arbitrators bindingly resolve disputes by applying law to facts they determine, arbitrators exercise judicial power. Further, to the extent arbitrators exercise such judicial power over disputes falling within the coverage of Article III, they are exercising the judicial power of the United States, which Article III assigns exclusively to life-tenured and salary-protected judges. Thus, resolution of such disputes by arbitrators pursuant to the FAA is in tension with the literal mandate of Article III.

B. The FAA and Current Theories of Non-Article III Adjudication

While Article III literalism has been rejected by both courts and scholars, a uniform approach to determining when adjudication of Article III disputes by non-Article III bodies is constitutional has not emerged. The Supreme Court has proposed both a categorical exceptions approach and a balancing test, while scholars have settled on what is termed appellate review theory. As discussed below, however, none of these approaches render the FAA consistent with Article III.

1. Supreme Court approaches: Categorical exceptions and balancing

Supreme Court precedent over the past thirty years on the constitutionality of adjudication of Article III disputes by non-Article III bodies has been less than illuminating. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹²⁰ a plurality of the Court endorsed a categorical approach to determining when Congress could constitutionally authorize the exercise of federal judicial power

119. Pfander, *Federal Supremacy*, *supra* note 118, at 197–98 (“The Madisonian Compromise resulted in the adoption of language in Article III that empowers, but does not require, Congress to create lower federal courts. Convention holds that Congress has broad freedom either to establish lower federal courts, or to leave matters to the state courts instead.” (footnote omitted)); see RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 282–83 (6th ed. 2009) (“[S]ince [under the Madisonian Compromise and the structural logic of Article III] Congress need not create any lower federal courts at all, state courts must be regarded as enjoying constitutional parity with the lower federal courts.”); THE FEDERALIST NO. 82, *supra* note 16, at 555 (Alexander Hamilton) (“[I]n every case in which [state courts] were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth.”).

120. 458 U.S. 50 (1982).

by non-Article III tribunals.¹²¹ Specifically, Justice Brennan's opinion for the Court held that there were "three narrow situations" not subject to the constitutional command that judicial power be exercised only by Article III courts.¹²² These three exceptions were territorial courts, courts-martial, and cases involving the adjudication of "public rights," defined as those cases in which the government is a party.¹²³

In addition to these three exceptions to Article III, Justice Brennan's opinion also stated that certain adjudicatory functions could be delegated to non-Article III "adjuncts" of Article III courts, so long as "the essential attributes of the judicial power" were retained by the Article III court.¹²⁴ Justice Brennan referred to *Crowell v. Benson*¹²⁵ and *United States v. Raddatz*¹²⁶ as two cases in which use of non-Article III bodies had been justified as adjuncts to Article III courts.¹²⁷ In *Crowell*, the Court upheld adjudication of worker injury claims by the United States Employees' Compensation Commission,¹²⁸ and in *Raddatz*, the Court upheld the use of non-Article III magistrate judges to decide motions to suppress evidence in criminal matters.¹²⁹ In both *Crowell* and *Raddatz*, the essential attributes of judicial power remained in Article III district courts, because the district courts retained the ultimate power to decide the controversy.¹³⁰ While Justice Brennan refused to call adjuncts an "exception" to Article

121. *Id.* at 70 (plurality opinion).

122. *Id.* at 63–64.

123. *Id.* at 63–70.

124. *Id.* at 76–77 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

125. 285 U.S. 22 (1932).

126. 447 U.S. 667 (1980).

127. *N. Pipeline*, 458 U.S. at 77 (plurality opinion).

128. 285 U.S. at 64–65.

129. 447 U.S. at 686.

130. In *Crowell*, while factual findings of the Commission were generally considered final, rulings on questions of law were not, and "full opportunity [was] afforded for their determination by the Federal courts." 285 U.S. at 45–46. Thus, the essential attributes of judicial power remained in Article III courts. *See id.* at 54 ("[T]he reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."). In *Raddatz*, the Court noted that "Congress has provided that the magistrate's proposed findings and recommendations shall be subjected to a *de novo* determination 'by the judge who . . . then exercise[s] the ultimate authority to issue an appropriate order.'" 447 U.S. at 681–82 (alteration in original) (quoting S. REP. NO. 94-625, at 3 (1976)); *see also id.* at 682 ("[T]he authority—and the responsibility—to make an informed, final determination . . . remains with the [Article III district court] judge." (quoting *Mathews v. Weber*, 423 U.S. 261, 271 (1976) (internal quotation marks omitted))); *id.* at 686 (Blackmun, J., concurring) ("Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities.").

III,¹³¹ the result of the *Northern Pipeline* plurality was that it established a set of four categories in which non-Article III bodies could constitutionally exercise judicial power: territorial courts, courts-martial, public rights cases, and adjuncts to Article III courts.

Shortly after *Northern Pipeline*, however, the Court expressly rejected this categorical approach to analyzing the proper use of non-Article III tribunals. In *Commodities Futures Trading Commission v. Schor*,¹³² the Court stated that:

[T]he constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. This inquiry, in turn, is guided by the principle that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.¹³³

In rejecting *Northern Pipeline's* “doctrinaire reliance on formal categories,” *Schor* instead established a balancing test focusing on three main factors to determine whether a non-Article III body was impermissibly exercising judicial power, specifically:

[1] [T]he extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III.¹³⁴

In its most recent opinion on the subject, however, the Court appears to have changed course once again, rejecting *Schor's* balancing test and returning once again to the categorical approach of *Northern Pipeline*. In *Stern v. Marshall*,¹³⁵ the Court addressed whether adjudication of a common law tort claim by a bankruptcy court (whose judges do not enjoy Article III tenure and salary protections) was constitutional.¹³⁶ In analyzing the issue, the Court did not use the balancing test from *Schor*, but rather asked whether the case fell within the public rights exception of *Northern Pipeline*,¹³⁷

131. See *N. Pipeline* 458 U.S. at 77 n.29 (plurality opinion) (“Congress’ power to create adjuncts and assign them limited adjudicatory functions is in no sense an ‘exception’ to Art. III.”).

132. 478 U.S. 833 (1986).

133. *Id.* at 847–48 (citations omitted) (internal quotation marks omitted).

134. *Id.* at 851.

135. 131 S. Ct. 2594 (2011).

136. *Id.* at 2600–01.

137. *Id.* at 2611–15.

or, alternatively, whether bankruptcy courts could properly be considered adjuncts of Article III district courts.¹³⁸ *Stern* suggests at least an implicit endorsement of *Northern Pipeline's* categorical approach. Indeed, Justice Scalia, one of five justices in the majority, wrote a separate concurrence emphasizing his support of *Northern Pipeline's* categorical approach,¹³⁹ and the four justice minority lamented the Court's reliance on *Northern Pipeline* over *Schor*.¹⁴⁰

While seemingly reviving the *Northern Pipeline* categorical exceptions approach, the Court in *Stern* did alter one aspect of that approach: it rejected *Northern Pipeline's* limitation of public rights cases to cases to which the government was a party.¹⁴¹ Instead, it held that public rights cases (which can be adjudicated by non-Article III bodies under the categorical exceptions approach) are those in which the claim at issue derives from a federal regulatory scheme or in which adjudication of the claim by the non-Article III tribunal is essential to some regulatory objective.¹⁴² "In other words," the Court stated, "it is still the case that what makes a right 'public' rather than private is that the right is integrally related to particular federal government action."¹⁴³ The Court recognized, however, that this departure from *Northern Pipeline's* bright-line rule that public rights cases are those to which the government is a party to a blurrier "integrally related" test could fail to provide concrete guidance in particular cases.¹⁴⁴

Can either of the Supreme Court's approaches to non-Article III tribunals reconcile the FAA with Article III? Under the categorical exceptions approach, exercise of judicial power by a non-Article III body is constitutional in four situations, three of which are based on

138. *Id.* at 2618–19.

139. *Id.* at 2621 (Scalia, J., concurring) ("[I]n my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary. For that reason . . . I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true 'public rights' cases."). By "true 'public rights' cases," Scalia means, as *Northern Pipeline* held, cases arising between the government and others. *See id.* (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion)).

140. *See id.* at 2622 (Breyer, J., dissenting) ("In my view, the majority . . . overstates the importance of an analysis that did not command a Court majority in *Northern Pipeline* and that was subsequently disavowed . . . [a]nd it fails to follow the analysis that this Court more recently has held applicable to the evaluation of claims of a kind before us here, namely, claims that a congressional delegation of adjudicatory authority violates separation-of-powers principles derived from Article III." (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986))).

141. *Id.* at 2613–14 (majority opinion).

142. *Id.* at 2613.

143. *Id.*

144. *Id.* at 2615.

the nature of the tribunal, and one of which is based on the nature of the dispute.¹⁴⁵ Thus, under this approach, courts-martial, territorial courts, and adjuncts to an Article III court may all exercise judicial power over Article III disputes.¹⁴⁶ In addition, other non-Article III bodies may also adjudicate Article III disputes involving public rights.¹⁴⁷

Arbitration under the FAA is clearly neither a court-martial nor a territorial court. Further, it is hard to argue that arbitrators act as adjuncts to Article III courts. As noted above, under the adjunct categorical exception, certain adjudicatory functions can be delegated to non-Article III adjuncts of Article III courts so long as “the essential attributes of the judicial power” are retained by the Article III court.¹⁴⁸ In the context of arbitration, however, *no* attributes of the judicial power are retained by an Article III court when an Article III dispute is sent to arbitration. The arbitrator determines facts, applies the law to those facts, and issues an award binding on the parties.¹⁴⁹ Other than confirming the award (subject to the extremely narrow grounds for vacatur),¹⁵⁰ there is nothing left for an Article III court to do. In the words of *Stern* quoting *Northern Pipeline* (both of which rejected arguments that bankruptcy courts are adjuncts of Article III courts), “the authority—and the responsibility—to make an informed, final determination . . . remains with” the arbitrators, not an Article III court.¹⁵¹ Thus, arbitrators are not adjuncts of Article III courts.

Because arbitration under the FAA is not a court-martial, a territorial court, or an adjunct of an Article III court, it can be justified under the categorical exceptions approach only in public rights cases.¹⁵² As noted above, the Court in *Stern* explained that public rights cases are those in which the claim at issue derives from a federal regulatory scheme or in which adjudication of the claim by the non-Article III tribunal is essential to some regulatory objective.¹⁵³ Thus, disputes arising solely under state common law are not public

145. See *supra* notes 121–30 and accompanying text.

146. See *supra* notes 122–24 and accompanying text.

147. *Stern*, 131 S. Ct. at 2612–13.

148. See *supra* notes 124–30 and accompanying text.

149. See *supra* notes 112–14 and accompanying text.

150. See *supra* Part I.C.

151. *Stern*, 131 S. Ct. at 2619 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982) (plurality opinion)).

152. One could argue that arbitration should be a fifth categorical exception to Article III, but there is little to support such an argument. See *infra* notes 194–98 and accompanying text.

153. See *supra* notes 142–44 and accompanying text.

rights cases.¹⁵⁴ To the extent such disputes arise between parties of diverse citizenship, they fall within the coverage of Article III,¹⁵⁵ and to the extent such disputes also involve interstate commerce, arbitration of them is subject to the FAA.¹⁵⁶ Yet because such disputes involve only private rights, arbitration of them under the FAA cannot be justified under the public rights exception.

The only disputes subject to arbitration under the FAA that could possibly be justified under the public rights exception, then, would be federal statutory claims. For example, employment discrimination claims arising under federal antidiscrimination statutes can be subjected to pre-dispute arbitration agreements enforceable under the FAA.¹⁵⁷ While such disputes typically involve the liability of one private party to another, one could argue that they nevertheless involve public rights claims such that they need not be decided by an Article III court under the categorical exceptions approach of *Northern Pipeline* and *Stern*.¹⁵⁸ Recall that *Stern*, departing somewhat from *Northern Pipeline*'s requirement that public rights cases involve the government as party, held that whether a claim is a public rights claim depends on whether the claim is "integrally related to

154. See *Stern*, 131 S. Ct. at 2614 ("Vickie's counterclaim . . . does not fall within any of the varied formulations of the public rights exception in this Court's cases. . . . The claim is instead one under state common law between two private parties. It does not depend[] on the will of [C]ongress; Congress has nothing to do with it." (internal quotation marks omitted)); see also *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853 (1986) ("[A] private right for which state law provides the rule of decision . . . is . . . a claim of the kind assumed to be at the core of matters normally reserved to Article III courts." (internal quotation marks omitted)).

155. U.S. CONST. art. III, § 2; 28 U.S.C. § 1332(a) (2006).

156. See *supra* Part I.A.1.

157. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that an ADEA claim can be subject to compulsory arbitration where neither the statute's language nor the legislative history explicitly prohibits the possibility).

158. See, e.g., Charles B. Craver, *The Use of Non-Judicial Procedures To Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL'Y 141, 168 (2001) ("The various employment discrimination statutes involve both 'private' and 'public' rights. The specific individuals who file claims under those enactments may believe that they are asserting wholly 'private' rights, but the strong government interest in the elimination of pernicious discrimination renders the rights created by these laws 'public.' . . . Under these circumstances, Congress would probably have the right to assign the adjudication of employment discrimination claims to Article I administrative procedures rather than to Article III judicial forums."); Marcia L. McCormick, *Federal Regulation and the Problem of Adjudication*, 56 ST. LOUIS U. L.J. 39, 73 (2011) ("Title VII and the other employment discrimination statutes do not fall perfectly into the public rights/private rights categories. They involve both."); Andrew P. Walsh, Note, *Mahoney v. RFE/RL, Inc.: The "Foreign Laws" Exception to the ADEA—When a Collective Bargaining Agreement Equals a Law*, 19 W. NEW ENG. L. REV. 455, 494 (1997) ("Employment discrimination statutes by their very nature concern 'public rights.'").

particular federal government action.”¹⁵⁹ One could potentially argue that private employment discrimination claims are “integrally related” to federal regulation of the workplace to ensure equal employment opportunity, and thus fall within the public rights exception.¹⁶⁰ To the extent various statutory claims involve public rights, arbitration of such disputes pursuant to a pre-dispute arbitration agreement made fully enforceable by the FAA may not be problematic with respect to Article III under the categorical exception for public rights cases.

Nevertheless, such cases represent only a subset of all Article III disputes potentially subject to the FAA,¹⁶¹ and fully private claims do not fall within any of the categorical exceptions. For example, even assuming that Title VII employment discrimination claims were public rights claims, and thus that compelling arbitration under the FAA of a sexual harassment claim would not conflict with Article III, compelling arbitration of related state law tort claims (such as assault or intentional infliction of emotional distress) would.¹⁶² Unlike courts-martial, territorial courts, and adjuncts, the public rights categorical exception focuses on the dispute, not the body adjudicating the dispute. Consequently, while a public rights categorical exception could potentially justify arbitration under the FAA of some Article III disputes, it does not justify all such arbitration. The categorical exceptions approach to non-Article III adjudication (set out in *Northern Pipeline* and potentially revived in *Stern*) thus does not save the FAA.

Even if the Court’s decision in *Stern* did not revive the categorical approach, however, and the balancing approach laid out in *Schor* remains good law, the FAA does not fare any better. Recall that under the balancing approach, the three factors to consider in determining whether a non-Article III body is impermissibly exercising Article III judicial power are:

159. See *supra* notes 141–43 and accompanying text.

160. One making such an argument might look to *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 589 (1985), in which the Supreme Court held that statutorily mandated arbitration of a dispute between two private parties arising under a federal pesticide registration law did not violate Article III because the claim at issue “b[ore] many of the characteristics of a ‘public’ right,” and was “an integral part” of a federal regulatory program.

161. For example, the Financial Industry Regulatory Authority (FINRA) arbitrates thousands of disputes each year involving private common law claims such as breach of contract, negligence, and breach of fiduciary duty. See *Dispute Resolution Statistics*, FINRA, <http://www.finra.org/arbitrationandmediation/finradisputeresolution/additionalresources/statistics> (last visited Dec. 17, 2012).

162. Assuming diverse parties.

[1] [T]he extent to which “the essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III.¹⁶³

With respect to the first prong, as noted above in explaining why arbitration cannot be considered an adjunct of an Article III court, *no* essential attributes of judicial power are reserved to Article III courts when arbitration of a federal dispute is compelled pursuant to the FAA.¹⁶⁴ To the contrary, in disputes subject to arbitration, it is arbitrators, not courts, that “exercise[] the range of jurisdiction and powers normally vested only in Article III courts.”¹⁶⁵ As explained above, the jurisdiction of arbitrators is broad, covering federal statutory claims as well as common law diversity disputes touching on interstate commerce (defined expansively).¹⁶⁶ This broad range of disputes that arbitrators can adjudicate stands in stark contrast to the narrow jurisdiction of the Commodity Futures Trading Commission (CFTC) upheld in *Schor* under the balancing test.¹⁶⁷ In upholding adjudication of certain disputes by that non-Article III body, the Court noted that the CFTC “deals only with a particularized area of law.”¹⁶⁸ In addition, arbitrators also exercise a broad range of powers normally confined to the judiciary, including summoning witnesses to testify or provide other evidence¹⁶⁹ and issuing a wide range of preliminary and final relief.¹⁷⁰ Because under the FAA, arbitrators, not Article III courts, exercise the essential attributes of judicial power, application of the first prong of the balancing test cuts against the constitutionality of such arbitration.

The second prong of the balancing test—the origins and importance of the right to be adjudicated—addresses the private

163. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986).

164. *Supra* notes 148–51 and accompanying text.

165. *Schor*, 478 U.S. at 851.

166. *See supra* Part I.A.

167. *Schor*, 478 U.S. at 850–57.

168. *Id.* at 852 (internal quotation marks omitted).

169. 9 U.S.C. § 7 (2006) (“The arbitrators . . . may summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”).

170. DRAHOZAL, *supra* note 94, at 393 (“Most arbitration rules grant arbitrators the authority to award provisional measures.”); HUBER & WESTON, *supra* note 41, at 374–75 (citing rules of leading arbitration organizations in which “arbitrators are accorded broad remedial powers”).

rights/public rights issue described above.¹⁷¹ Again, while some statutory claims subject to arbitration may arguably be public rights claims, and thus amenable to non-Article III adjudication, other disputes subject to arbitration under the FAA are not.¹⁷² The second prong thus potentially weighs in favor of the appropriateness of arbitration in resolving some Article III disputes, but not others.

Finally, consideration of the third prong—the concerns that drove Congress to depart from the requirements of Article III—seems, like the first prong, to cut against the consistency of FAA arbitration with Article III. The purpose behind passage of the FAA was to ensure enforcement of arbitration agreements,¹⁷³ and one of the primary motivations for Congress to make arbitration agreements enforceable was the perceived cost and efficiency advantages of arbitration over litigation.¹⁷⁴ Congressional concern over non-enforcement of purportedly cheap and efficient arbitration agreements, however, stands in stark contrast to the concerns that drove Congress to establish the system of non-Article III CFTC adjudication upheld in *Schor*. In *Schor*, the Court noted that in authorizing the CFTC to adjudicate certain kinds of disputes, Congress’s “primary focus was on making effective a specific and limited regulatory scheme, not on allocating jurisdiction among federal tribunals.”¹⁷⁵ The specific and limited regulatory scheme in *Schor* was oversight of the “volatile and esoteric futures trading complex” by the CFTC, an agency that “would be relatively immune” from politics.¹⁷⁶ In contrast, the FAA’s transfer of dispute resolution from federal courts to arbitration for reasons of cost and efficiency does not make effective some specific and limited regulatory regime, but simply allocates jurisdiction

171. See *Schor*, 478 U.S. at 853 (noting that whether the claim at issue is a private right, which is “assumed to be at the ‘core’ of matters normally reserved to Article III courts,” while not dispositive, “has significance in [the] Article III analysis”).

172. See *supra* notes 161–62 and accompanying text.

173. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219–21 (1985) (discussing congressional intent to ensure that agreements to arbitrate carried equal effect to other contracts).

174. See H.R. REP. NO. 68-96, at 2 (1924) (“It is practically appropriate that [the FAA should be passed] at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.”); S. REP. NO. 68-536, at 3 (1924) (“The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase.”); *supra* note 44 and accompanying text; see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (discussing “two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution” (quoting *Dean Witter*, 470 U.S. at 221)).

175. 478 U.S. at 855.

176. *Id.* at 836.

among adjudicatory bodies.

Other than application of the second prong to the subset of public rights disputes, all prongs of the *Schor* balancing test weigh against finding the FAA consistent with Article III. Consequently, neither of the Supreme Court's approaches, categorical exceptions or balancing, justifies arbitration under the FAA as a non-Article III tribunal.

2. *Scholarly approach: Appellate review theory*

As James Pfander has pointed out, “[s]cholars have expressed little enthusiasm for either the Court’s categorical approach or its balancing approach.”¹⁷⁷ The leading alternative to the Court’s approaches offered by scholars is appellate review theory.¹⁷⁸ Appellate review theory asserts that the exercise of judicial power over an Article III dispute by a non-Article III body is constitutional so long as the non-Article III body’s decisions are subject to sufficiently searching appellate review by an Article III court.¹⁷⁹ One

177. Pfander, *supra* note 12, at 665 & n.111 (citing Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 248–51, 257–58 (1990); Fallon, *supra* note 10, at 926–29; Richard B. Saphire & Michael E. Solimine, *Shoring up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 101–06 (1988)). Professor Pfander himself likewise shows little enthusiasm for either the categorical or balancing approaches. Pfander, *supra* note 12, at 671 (“In the end, the available models of the relationship between Article I and Article III all suffer from serious difficulties.”).

178. Pfander, *supra* note 12, at 666 (noting that “an appellate review theory of judicial power, in one form or another, has fared best”); *see also infra* note 179. Professor Pfander offers what he terms an “inferior tribunals” approach to analyzing non-Article III tribunals. Pfander, *supra* note 12, at 650–51. While this approach, grounded as it is in the Inferior Tribunals Clause of Article I, may offer a more solid textual foundation than appellate review theory, it is, as noted by Caleb Nelson, more a supplement to appellate review theory than a substitute for it. *See* Nelson, *supra* note 12, at 616 n.230. In contrast to the scholars endorsing appellate review theory, Craig Stern endorses the categorical exceptions approach of *Northern Pipeline*, although he argues that “exceptions” is a misnomer. Stern, *supra* note 109, at 1076 (“The text of the Constitution permits courts-martial, territorial courts, executive adjudication of public rights, and the participation of judicial adjuncts—all without the protection of [Article III’s salary and tenure provisions]. . . . The provenance of the so-called ‘exceptions’ to Article III rests upon the Constitution, not upon an unprincipled departure from the Constitution under the guise of historical necessity.”).

179. *See* Fallon, *supra* note 10, at 933 (“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.”); Redish, *supra* note 12, at 227 (“[I]f in every case falling within the judicial power there exists an opportunity for review in an article III court, it would seem that the constitutional requirement that the judicial power ‘be vested’ in these courts is fully satisfied.”); Saphire & Solimine, *supra* note 177, at 139 (“[W]e conclude that the mandate of article III is only satisfied when Congress, in creating a non-article III tribunal, makes available article III review of that tribunal’s factual and legal

attractive element of appellate review theory is that it is at least “an absolute construction” of Article III—a construction that does not rely on the nature of the claim adjudicated—in contrast to both the Supreme Court’s categorical approach, which distinguishes between public and private rights, and its balancing approach, which looks to the origin and importance of the right to be adjudicated.¹⁸⁰

Appellate review theory is based on two premises.¹⁸¹ First, given the institutional and doctrinal history of non-Article III bodies, Congress should have the discretion to authorize the use of such bodies to make initial adjudications of Article III disputes.¹⁸² Second, however, notwithstanding this history and the importance of non-Article tribunals, the underlying values of Article III—which include individual disputants’ interest in impartial adjudication as well as structural interests in maintaining proper separation of powers¹⁸³—must not be forgotten or balanced away.¹⁸⁴ From these two premises, appellate review theory holds that while disputes ostensibly falling within the coverage of Article III may, in the first instance, be heard by a non-Article III adjudicator,¹⁸⁵ the decision of the non-Article III body must be subject to sufficiently searching review by an Article III court. Specifically, appellate review theory provides that legal determinations made by the non-Article III body must be subject to independent *de novo* review by an Article III court,¹⁸⁶ though

determinations.”). For one criticism of appellate review theory, see Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 772, 777–92 (2010), which explains that “[w]hen viewed in light of the operation of the bankruptcy courts . . . the appellate review theory advanced by scholars leave[s] much to be desired.”

180. See Redish, *supra* note 12, at 226–27 (noting the desirability of an absolute construction of Article III, such as appellate review theory offers, because the language of Article III appears to tolerate no exceptions to its requirements). *But see* Nelson, *supra* note 12, at 616–20 (noting that “[i]n academic circles . . . the appellate review theory of Article III is often perceived as a unitary approach that does not vary according to the type of legal interests being adjudicated,” but explaining that “[o]n closer inspection, [the theory] does not actually transcend the public/private distinction”).

181. See Fallon, *supra* note 10, at 917–18. Professor Fallon is generally credited with providing the “leading account” of appellate review theory. See, e.g., Nelson, *supra* note 12, at 614–15; Pfander, *supra* note 12, at 666. For a brief discussion of some of the minor variations among scholars endorsing appellate review theory, see Nelson, *supra* note 12, at 615 n.230.

182. Fallon, *supra* note 10, at 917.

183. See *id.* at 937–43 (describing Article III values, including “fairness to litigants” and separation of powers); *infra* Part III.B.1.

184. Fallon, *supra* note 10, at 917–18.

185. See *id.* at 949.

186. See *id.* at 982–83; Saphire & Solimine, *supra* note 177, at 142–44; see also Redish, *supra* note 12, at 227–28 (calling for “nondeferential review” of agency interpretations of law by Article III courts).

determinations of fact may be subject only to a more deferential inquiry into whether the factual findings are supported by substantial evidence.¹⁸⁷

Unfortunately, appellate review theory does not fare any better than the categorical exceptions and balancing test in resolving the tension between Article III and the FAA. While appellate review theory requires sufficiently searching Article III review of decisions by non-Article III tribunals, as discussed above, judicial review of arbitral awards under the FAA is extremely limited.¹⁸⁸ The statutory grounds set forth in the FAA allow for review essentially only of the arbitrators' conduct, not of the substance of their factual or legal determinations.¹⁸⁹ Further, to the extent any non-statutory grounds of review by Article III courts, such as "manifest disregard," survive the Supreme Court's decision in *Hall Street*, such review falls short of the de novo review of legal determinations required by appellate review theory.¹⁹⁰ Consequently, adjudication of Article III disputes by arbitrators under the FAA cannot be justified under appellate review theory.¹⁹¹

187. See Fallon, *supra* note 10, at 989; Saphire & Solimine, *supra* note 177, at 143–44; see also Redish, *supra* note 12, at 227 (questioning whether review of factual findings under a substantial evidence test provides for meaningful appellate review, but conceding that such limited review may be appropriate).

188. *Supra* Part I.C.

189. *Supra* notes 93–95 and accompanying text.

190. *Supra* notes 96–107 and accompanying text. Arbitrators routinely make determinations of law. Even at the time of the Federal Arbitration Act's enactment it was clear that arbitrators make such determinations. See *Joint Hearings on Arbitration*, *supra* note 47, at 27 (statement of Alexander Rose, representing the Arbitration Society of America) ("I never knew of an arbitration where questions of law were not to be passed upon . . .").

191. Professor Rutledge has proposed a "modified appellate review theory," which he asserts would justify arbitration under the FAA. Under this modified appellate review theory, the fact that arbitration is a voluntary undertaking lessens the need for plenary Article III review. Rutledge, *supra* note 30, at 1216. According to Professor Rutledge, this lessened need allows for Article III review at some standard less than de novo, which he argues is satisfied by review for "manifest disregard." *Id.* at 1226 ("[U]nder 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."). There are two problems with this analysis. First, in many cases it is questionable whether arbitration—even pursuant to a purported agreement—is truly voluntary and thus justifying under modified appellate review theory a lesser standard of review. See generally *supra* Part I.B. Second, Professor Rutledge's reliance on manifest disregard to supply such lesser review likely does not survive *Hall Street*. See Rutledge, *supra* note 30, at 1227 n.155 (noting that *Hall Street* was decided just before his article went to press).

III. REMEDYING THE PROBLEM

Given that private arbitration under the FAA is not consistent with Article III under any of the judicial¹⁹² or scholarly approaches¹⁹³ to non-Article III adjudication, the question becomes whether there is any other way to resolve the tension. One possibility would be to create a categorical exception to Article III for arbitration. Another potential fix would be to amend the FAA to permit more searching judicial review of arbitration awards. As discussed below, however, neither of these solutions is ultimately satisfactory.

A. *A Categorical Exception? More Searching Review?*

One could argue that arbitration under the FAA should simply be considered an additional exception to Article III literalism, and thus justified under the categorical exceptions approach of *Northern Pipeline* and *Stern*. Yet, while the current exceptions for courts-martial, territorial courts, and public rights cases are premised on historical precedent,¹⁹⁴ no such historical precedent exists to support a categorical exception for arbitration.¹⁹⁵ As discussed above,¹⁹⁶ prior to enactment of the FAA, disputes brought in court were not typically sent to arbitration, regardless of any arbitration agreement between the parties. Courts generally would not enforce arbitration agreements and, in fact, it was this traditional judicial hostility to arbitration that the FAA was intended to overcome.¹⁹⁷ Thus, there seems to be little to support a historically-based categorical exception for arbitration.¹⁹⁸

192. See *supra* Part II.B.1.

193. See *supra* Part II.B.2.

194. See *Stern v. Marshall*, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring) (“[I]n my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary.” (emphasis omitted)); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion) (noting that the exceptions recognize “historically . . . exceptional” circumstances and that Article III “must be interpreted in light of the historical context”). Recall that Justice Brennan’s plurality opinion in *Northern Pipeline* refused to call adjuncts an “exception” to Article III. Adjuncts were justified not on historical precedent, but because the “essential attributes of judicial power” were retained by Article III courts in such cases. See *supra* notes 124–31 and accompanying text.

195. But see *Geraldine A. Fagan*, 49 F.2d 215, 216 (2d Cir. 1931) (“[R]eference of maritime controversies to arbitration ha[s] long been common practice.” (quoting *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 122 (1924))), *aff’d sub nom. Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932)).

196. See *supra* notes 38–42 and accompanying text.

197. See *supra* notes 38–49 and accompanying text.

198. Another potential downside of justifying arbitration as a new categorical exception to Article III is the risk that goes with choosing a side in an ongoing Article

Another option for reconciling the FAA with Article III would be to authorize Article III courts to perform de novo review over legal determinations made by arbitrators. While such a change would justify FAA arbitration under the appellate review theory proposed by scholars,¹⁹⁹ there are two main problems with this option. First, in light of *Hall Street's* holding that the narrow statutory grounds in the FAA for modification or vacatur of arbitral awards are exclusive,²⁰⁰ granting Article III courts de novo review power would require a legislative change to the act.²⁰¹ Relying on Congress to remedy the statute may not be the most effective way to solve the problem. As Amanda Frost has noted, “[a]lthough Congress always has the power to amend legislation, Congress is busy and has limited resources, and so more often than not would leave even problematic legislation in place.”²⁰² Second, even if Congress had the time and resources to amend the FAA to provide for de novo review by Article III courts, it is not at all clear that such an amendment is desirable. While requiring sufficient appellate review of arbitral awards may make the act consistent with Article III, it would tend to undermine one of the primary motivations behind the FAA, namely to provide for quick, inexpensive, informal resolution of disputes.²⁰³ Any expansion of appellate review beyond the limited review originally called for by the FAA undermines that purpose.²⁰⁴

III debate. Should the Supreme Court ultimately reject the categorical exceptions approach to non-Article III adjudication generally (as it appeared to before *Stern* undermined *Schor*), a new justification for arbitration would be needed.

199. See *supra* Part II.B.2. In addition, such a change could potentially justify FAA arbitration under the balancing approach and the adjunct categorical exception because allowing de novo review would arguably allow Article III courts to retain “essential attributes of the judicial power,” the basis for the adjunct exception, see *supra* notes 124–30 and accompanying text, and the first prong of the balancing approach, see *supra* notes 132–34 and accompanying text.

200. See *supra* notes 101–03 and accompanying text; see also *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).

201. See *supra* notes 189–91 and accompanying text.

202. Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 39 (2007).

203. See *supra* notes 44, 173–74 and accompanying text.

204. See *Hall St.*, 552 U.S. at 588 (noting that the FAA judicial review sections provide “just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway” and suggesting that a broader review standard would “open[] the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process and bring arbitration theory to grief in postarbitration process” (alteration in original) (citation omitted) (internal quotation marks omitted)).

B. Waiver Theory

Having explained that arbitration is fundamentally inconsistent with Article III under the leading judicial and scholarly approaches to adjudication by non-Article III bodies, and having determined that the two possible remedies to this inconsistency are ultimately unsatisfactory, this Article does not go on to conclude that simply striking down the FAA as unconstitutional is the answer.²⁰⁵ Instead, it asks whether disputants may waive the FAA's Article III problem and have their federal dispute resolved by an arbitrator nonetheless. As discussed below, whether disputants may waive Article III problems depends on the nature of the interests protected by Article III.

1. Individual and structural concerns

In *Schor*, the Supreme Court explained that Article III's requirement of an independent adjudicator with life tenure and salary protections safeguards two separate interests: "Article III, § 1, not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as an inseparable element of the constitutional system of checks and balances."²⁰⁶

The Court further held that to the extent Article III protects the personal rights of disputants to adjudication by a life-tenured and salary-protected adjudicator, those rights may be waived.²⁰⁷ On the other hand, to the extent Article III's salary and tenure protections safeguard against encroachment on the judiciary by the legislative or executive branches, and against aggrandizement of those other branches at the judiciary's expense, such concerns cannot be waived by the disputants.²⁰⁸

205. Such a result is unlikely to occur in any event. See Reuben, *supra* note 23, at 978 n.123 ("[I]t is implausible to imagine the Supreme Court striking down the [FAA] at this point, given the body of law that has developed under it and the widespread national and international reliance on its validity.").

206. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (internal quotation marks omitted); see also *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (noting that Article III "serve[s] two related purposes," protecting individuals and protecting each branch of government); Fallon, *supra* note 10, at 937–43 (describing Article III values, including "fairness to litigants," and separation of powers).

207. *Schor*, 478 U.S. at 848–49 ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.").

208. *Id.* at 850–51 ("To the extent that this structural principal is implicated in a given case, the parties cannot by consent cure the constitutional difficulty When these Article III limitations are at issue, notions of consent and waiver cannot

The idea that Article III creates a personal right waivable by individual disputants is not without its critics. In *Schor* itself, Justice Brennan dissented, arguing that “[b]ecause the individual and structural interests served by Article III are coextensive, I do not believe that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required.”²⁰⁹ Professor Rutledge similarly argues that Article III problems are not waivable by disputants because nothing in the text, structure, or history of Article III suggests that it confers a personal right.²¹⁰ While it is true that Article III does not expressly state that its tenure and salary provisions establish an individual right in disputants to an independent decision-maker with these protections, it was not a stretch for the *Schor* majority to find such a personal right. To read Article III as not conferring a personal right to a life-tenured and salary-protected adjudicator would be to render the requirement a meaningless formalism. Protection of the judiciary from the other branches alone cannot explain the judicial insulation provisions of Article III. As Rebecca Brown has noted, “separation of powers is not an end in itself.”²¹¹ The tenure and salary provisions of Article III protect individuals,²¹² and it was thus not unreasonable for the majority in *Schor* to read such provisions as conferring personal, individual rights.²¹³ Indeed, Alexander Hamilton argued that the structural provisions of the Constitution protected individual rights such that a separate bill of rights would be superfluous.²¹⁴

be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.”).

209. *Id.* at 867 (Brennan, J., dissenting).

210. Rutledge, *supra* note 30, at 1197–99.

211. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516 (1991).

212. *See id.* at 1538 (arguing that the structural provisions of the Constitution, including separation of powers, provided protection of individual rights); *see also* Stanley K. Laughlin, Jr., *The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379, 432 (1991) (“The core of article III is the independence of the judiciary. The self-evident purpose of judicial independence is to provide a fair and impartial tribunal for litigants.”).

213. One interesting question that arises from a finding that Article III creates a personal, individual right to a life-tenured and salary-protected adjudicator for federal disputes is whether corporate disputants also enjoy this constitutional right. *See generally* Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 909–14 (2011) (explaining the “broken jurisprudence of corporate constitutional rights”).

214. THE FEDERALIST NO. 84, *supra* note 16, at 581 (Alexander Hamilton) (urging ratification of the Constitution even absent an express bill of rights, noting that “the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS”); *see also* Brown, *supra* note 211, at 1515 (“[O]nce the body of the Constitution was essentially complete, some opposed the addition of a bill of

Assuming, then, that *Schor* properly read Article III as conferring an individual right to a life-tenured and salary-protected judge, such a right is waivable. To the extent Article III also protects the judiciary more generally from encroachment by the other branches, however, such structural protections are not waivable by individual disputants in any particular case. Where such structural concerns are not implicated, however, parties remain free to waive their personal right to an Article III judge. A primary example of such a situation is consent jurisdiction of magistrate judges. Federal magistrate judges do not enjoy Article III's tenure and salary protections.²¹⁵ Nevertheless, under the Federal Magistrates Act, parties to a federal case can consent to have a magistrate judge conduct all proceedings in the matter and enter a final order.²¹⁶ Absent consent of the parties, it is unlikely that complete adjudication of the dispute and entry of judgment by a non-Article III magistrate would pass constitutional muster.²¹⁷ Nevertheless, consent of the parties cures any constitutional defect.²¹⁸ Parties may waive their right to an Article III forum in these circumstances because adjudication by a magistrate judge does not implicate any structural separation of powers concerns. In an en banc decision of the Ninth Circuit, then-Judge Kennedy noted that magistrate adjudication by consent does not present "the paradigmatic separation of powers case, where the integrity of one branch is threatened by another," and that, among other things, magistrates are not directly dependent on the legislative or executive branches because the selection and retention of magistrates is the responsibility of Article III judges.²¹⁹

rights on the ground that the structure of the government, with its own self-limiting principles, would make any express protection of individual liberties superfluous . . .").

215. 28 U.S.C. § 631 (2006) (providing that federal magistrate judges are appointed by United States District Court judges for eight-year terms).

216. *Id.* § 636(c)(1).

217. *See, e.g., Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 542 (9th Cir. 1984) (en banc) ("A mandatory provision for trial of an unrestricted class of civil cases by a magistrate and not by Article III judges would violate the constitutional rights of the litigants.").

218. Although the Supreme Court has not addressed the question, the circuit courts have uniformly held that party consent to adjudication of civil disputes by magistrates cures any constitutional defects. *See A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 252 n.3 (1993) (citing cases). Indeed, the legitimacy of magistrates' consent jurisdiction is so well established that one court has held that challenging it was "abusive of the judicial process." *D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1033 (Fed. Cir. 1985).

219. *Pacemaker*, 725 F.2d at 544-45; *see also* 28 U.S.C. § 631 (stating that the responsibility for appointment and removal of magistrates belongs to federal district judges).

Like consent jurisdiction of magistrate judges, private arbitration under the FAA does not implicate the non-waivable structural concerns of Article III. While the FAA represents a diminishment of the Article III judiciary by removing from it the adjudication of some subset of cases it would otherwise decide, there is no corresponding aggrandizement of the legislative or executive branches. When Article III disputes are removed from the judiciary and resolved by either administrative or legislative courts, those disputes are resolved by adjudicators controlled by the other branches of the federal government.²²⁰ In contrast, when Article III disputes are removed from the judiciary pursuant to the FAA, they are resolved by adjudicators who remain as independent of the executive and legislative branches as they are of the judicial branch. Indeed, arbitration arguably diminishes the power of all three branches, given the executive and legislative branches' roles in selecting Article III judges.²²¹ In any event, the FAA's diminishment of the federal judiciary without a corresponding aggrandizement of another branch of government fails to implicate the non-waivable structural concerns of Article III.²²²

In arguing that arbitration nonetheless implicates non-waivable Article III structural concerns even absent aggrandizement of the other branches, Professor Rutledge asserts that Congress is (1)

220. See, e.g., 5 U.S.C. § 7521 (providing that “[a]n action [including removal, suspension, or reduction in pay] may be taken against an administrative law judge . . . by the agency in which the administrative law judge is employed”); 26 U.S.C. § 7443(f) (“Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office . . .”).

221. See U.S. CONST. art. II, § 2, cl. 2 (setting forth the role of the President to appoint judges with the advice and consent of the Senate).

222. Adjudication of federal disputes by state courts provides another example of diminishment of the federal judiciary without corresponding aggrandizement of the other federal branches. Where parties file in state court and fail to remove to federal court cases that could otherwise be brought in federal court, they essentially waive their right to Article III adjudication, and state court adjudication of Article III disputes does not implicate structural separation of powers concerns. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 n.15 (1982) (plurality opinion) (“Congress has no control over state-court judges; accordingly the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges.”); Thomas G. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297, 304 (1981) (“Because untenured state court judges are not appointed, confirmed, paid or removed by Congress, no separation of powers principle is violated by permitting Congress to leave application of its statutes to these judges.”). Clearly, state court adjudication of federal disputes does not violate Article III, although one could argue that state courts are a unique non-Article III tribunal that the framers intended would resolve federal disputes. See generally *supra* notes 118–19 and accompanying text.

stripping the courts of their power to interpret the meaning of federal law (and depriving the public of valuable precedent), and (2) commandeering the courts when it requires them to enforce arbitration awards.²²³ With respect to the first point, while Congress may be reducing the opportunity for federal courts to develop precedent by allowing parties to avoid Article III adjudication (and thereby reducing the number of disputes presented to Article III courts), the FAA in no way “strip[s] federal courts of the power to interpret the meaning of federal law and erect[s] a system by which others, namely arbitrators, can define it,” as argued by Professor Rutledge.²²⁴ The FAA has no impact on how Article III courts interpret federal law and establish precedent in those cases that come before them, nor do arbitrators define federal law.²²⁵ Unless all disputants voluntarily agree to arbitrate every Article III dispute, thereby removing every private case from Article III adjudication—a highly unlikely scenario—Article III courts retain the opportunity to interpret law and establish precedent, with neither Congress nor arbitrators affecting how they do so.²²⁶ Further, to the extent disputants comply with arbitration agreements without resorting to the FAA for enforcement, they are denying Article III courts the opportunity to interpret law and establish precedent in their case—the concerns identified by Professor Rutledge—without any congressional action at all (other than to the extent that the FAA casts a shadow over disputants’ decision to comply with an arbitration agreement). Such arbitration without FAA enforcement, while still

223. Rutledge, *supra* note 30, at 1201. Professor Sternlight makes a claim similar to Professor Rutledge’s first argument when she states that arbitration “threatens the existence of the judicial branch by privatizing a substantial number of claims that would otherwise have been heard by Article III courts.” Sternlight, *supra* note 20, at 79.

224. Rutledge, *supra* note 30, at 1201.

225. See Richard M. Alderman, *Consumer Arbitration: Destruction of the Common Law*, 2 J. AM. ARB. 1, 11–12 (2003) (“[A]rbitration lacks the ability to formulate policy or change existing law.”); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 785 (2002) (“Where cases are decided by courts of law, in reported decisions, a substantial change of direction by the decision-makers will be a matter of public record. Since arbitration decisions do not have this public quality, neither a tendency to follow past decisions nor a resolve to *depart* from them would be a matter of public record. So *neither* kind of law—the precedent-respecting or the precedent-rejecting—is thereby created.”).

226. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31–32 (1991) (rejecting the argument that allowing arbitration of ADEA claims would result in “a stifling of the development of the law” because “judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements”).

the exercise of judicial power by a non-Article III body,²²⁷ clearly raises no structural separation of powers concerns, suggesting that simply denying courts opportunities to interpret law and make precedent is not sufficient.

With respect to Professor Rutledge's second point, it is just not clear how Congress can be said to be "commandeering" the federal judiciary through the FAA's requirement that courts confirm arbitration awards. Professor Rutledge analogizes to *Printz v. United States*²²⁸ where the Court held that Congress could not commandeer state officials to administer federal gun control regulations under the Brady Act.²²⁹ While Professor Rutledge acknowledges that *Printz* dealt with federal-state relations, not federal inter-branch separation of powers issues, he fails to explain either how exactly the *Printz* anti-commandeering principle translates to such horizontal separation of powers issues or how the FAA's requirement that courts confirm arbitration awards commandeers the federal judiciary in the same way that Congress commandeered state law enforcement officers through the Brady Act. It does not violate separation of powers principles for Congress to dictate to courts the situations in which they should render judgment for one side or another (such as where one side has obtained an award from an arbitrator). Indeed, that is precisely the proper role of the legislature vis-à-vis the judiciary.²³⁰ Regardless, at the end of the day, aggrandizement of other branches seems ultimately to be the fundamental separation of powers concern,²³¹ which, as Professor Rutledge acknowledges, is simply lacking with respect to arbitration under the FAA.²³² Indeed, in *Schor*

227. See *supra* Part II.A.

228. 521 U.S. 898 (1997).

229. *Id.* at 933; Rutledge, *supra* note 30, at 1201 (stating that *Printz* demonstrates "separation of powers principles generally prohibit the commandeering of another branch of government").

230. See A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 WASH. U. L.Q. 435, 475-76 (2000) ("Courts exist to resolve disputes. Implicit in that role is the requirement that judges interpret and enforce the law . . . and that function requires judges to follow commands issued by others Therefore, being commandeered is inherent in being a judge . . .").

231. See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1147-48 (2000) (noting that despite surface disagreement, "courts and commentators agree on the following objective: The system of separation of powers is intended to prevent a single governmental institution from possessing and exercising too much power").

232. Rutledge, *supra* note 30, at 1200. Arguably the Ninth Circuit's opinion in *Pacemaker* authored by then-Judge Kennedy could be read to suggest that erosion of the judiciary alone (even absent corresponding aggrandizement of the other branches) can implicate non-waivable structural concerns. In *Pacemaker*, the Ninth

itself, the Supreme Court noted that “Congress may encourage parties to . . . resort to arbitration without impermissible incursions on the separation of powers.”²³³

Simply stated, the FAA implicates only the personal rights aspect of Article III and not any structural separation of powers concerns. As a result, disputants can waive their right to have an Article III judge adjudicate their dispute in favor of resolution by a non-Article III arbitrator.²³⁴

2. *Implications for FAA consent jurisprudence*

Acknowledging that the FAA is fundamentally inconsistent with Article III and that waiver theory offers the only feasible justification for compelling arbitration of Article III disputes raises to constitutional importance the question of disputants’ consent to arbitration. As explained above, under current FAA jurisprudence, consent to arbitration is generally measured by a contract law objective manifestation of intent standard.²³⁵ Yet it is not at all clear that this is the proper standard for determining whether disputants

Circuit held that consenting to adjudication by a magistrate was consistent with Article III. In so holding, the court noted that in addition to magistrates not being subject to the control of either the legislative or executive branches, Article III courts retained some control over magistrate consent jurisdiction. *Pacemaker Diagnostic Clinic of Am., Inc v. Instromedix, Inc.*, 725 F.2d 537, 544–45 (9th Cir. 1984) (en banc). Nevertheless, while such Article III control over magistrates certainly supported the court’s finding that non-waivable structural separation of powers concerns were not implicated, it is not clear that such additional control is necessary where, as in the case of adjudication by both magistrates and arbitrators, other branches’ power is not aggrandized. Indeed, adjudication of Article III disputes by state court judges (who are similarly not answerable to Congress or the Executive) does not implicate Article III structural separation of powers concerns despite a lack of the kinds of control by Article III courts noted in *Pacemaker*. See *supra* note 219 and accompanying text.

233. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 855 (1986).

234. Some have argued that once a dispute has been brought before a court, it should be resolved by the court, and the parties therefore may not voluntarily remove the dispute from the court. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). This argument is premised on a belief that “the purpose of adjudication is not the resolution of a dispute, not to produce peace, but rather justice” Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1276–77 (2009) (explaining *Against Settlement*). Carrie Menkel-Meadow has characterized the debate over the primary purpose of adjudication as the question of who “owns” any particular dispute, the disputants themselves, or the community generally. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2679–80 (1995). Addressing this question in detail is beyond the scope of this Article. Clearly, however, the idea that disputants have and may waive an individual right to have an Article III judge resolve their dispute takes as a fundamental premise that the disputants themselves “own” their dispute.

235. See *supra* Part I.B.

have waived their constitutional right to an Article III forum.²³⁶ While the Supreme Court has made clear that the standard for determining waiver of constitutional rights in the criminal context is a subjective one requiring knowing and voluntary waiver,²³⁷ it has not expressly extended that requirement to waivers of constitutional rights in the civil context.

Nevertheless, the Supreme Court has strongly suggested that the standards are the same. For example, in *D.H. Overmyer Co. v. Frick Co.*,²³⁸ Overmyer contracted with Frick to install a refrigeration system in one of Overmyer's warehouses.²³⁹ Following various renegotiations of payment terms, Overmyer ultimately signed a note containing a confession of judgment clause allowing Frick to have a civil judgment entered against it without notice or hearing in the event the company defaulted on its payment obligations.²⁴⁰ This is sometimes called a cognovit clause.²⁴¹ In upholding the validity of a judgment obtained pursuant to the cognovit clause, the Supreme Court held that Overmyer had "voluntarily, intelligently, and knowingly" waived its constitutional due process rights when it agreed to the confession of judgment provision.²⁴² While careful to note that it was only assuming, not deciding, that the same standards governing waivers of constitutional rights in the criminal context likewise applied in the civil context, the Court suggested that in a future case where a waiver was not voluntarily, intelligently, and knowingly made, it might not be upheld.²⁴³ Indeed, in a companion case decided the same day as *Overmyer*, the Court affirmed a district court opinion refusing to enforce cognovit clauses in consumer financing agreements absent a

236. The Supreme Court has not expressly addressed what level of consent is required to waive the individual constitutional right to an Article III forum. In *Schor*, the Court noted that a party had effectively waived his right to have an Article III court adjudicate a counterclaim when he participated in a non-Article III agency proceeding "with full knowledge" that the agency would exercise jurisdiction over his counterclaim. *Schor*, 478 U.S. at 850. Whether "full knowledge" is a minimum requirement or whether some level of consent less than full knowledge would be sufficient to waive Article III rights, however, is not clear from the opinion.

237. See, e.g., *Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (noting that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right" and requiring an "intelligent and competent" waiver).

238. 405 U.S. 174 (1972).

239. *Id.* at 179.

240. *Id.* at 180-81.

241. *Id.* at 176.

242. *Id.* at 187.

243. *Id.* at 185, 187-88.

showing that debtors had “intentionally, understandingly, and voluntarily” waived their constitutional due process rights at the time they signed the agreements.²⁴⁴ Similarly, less than four months later, the Court in *Fuentes v. Shevin*²⁴⁵ found that consumers had not waived their constitutional right to pre-seizure process where they signed agreements allowing sellers to repossess merchandise in the event the consumers defaulted on payment.²⁴⁶ In that case, the Court noted that the facts were “a far cry from those of *Overmyer*,” pointing out that:

There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.²⁴⁷

While the Court in *Fuentes* ultimately did not rely on involuntariness or unintelligence of the waiver,²⁴⁸ and neither *Fuentes* nor *Overmyer* expressly transferred the subjective waiver standards from the criminal context to the civil context,²⁴⁹ circuit courts addressing the issue have generally adopted the strong implication of those cases that waiver of civil constitutional rights likewise requires knowing and voluntary consent.²⁵⁰

244. *Swarb v. Lennox*, 405 U.S. 191, 196–200 (1972).

245. 407 U.S. 67 (1972).

246. *Id.* at 95–96.

247. *Id.* at 95.

248. *Id.*

249. *Id.* at 94–95.

250. *See, e.g., Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 205 (3d Cir. 2012) (“[C]onstitutional rights . . . may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver.” (quoting *Erie Telecomm., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988))), *petition for cert. filed*, 81 U.S.L.W. 3197 (U.S. Sept. 21, 2012) (No. 12-373); *Walls v. Cent. Contra Costa Transit Auth.*, 653 F.3d 963, 969 (9th Cir. 2011) (per curiam) (holding that a waiver of both civil and criminal constitutional rights must be knowing and voluntary); *Echavarria v. Pitts*, 641 F.3d 92, 94 n.1 (5th Cir. 2011) (noting, in civil cases, that a “waiver of constitutional rights is not effective unless the right is intentionally and knowingly relinquished” (quoting *Davis Oil Co. v. Mills*, 873 F.2d 774, 787 (5th Cir. 1989))); *Bayo v. Napolitano*, 593 F.3d 495, 505 (7th Cir. 2010) (en banc) (holding that waiver of due process rights to a deportation hearing “must be done both knowingly and voluntarily”); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) (citing as controlling the Supreme Court’s application of the identical civil and criminal waiver standard of “voluntarily, intelligently, and knowingly” made (citing *Fuentes*, 407 U.S. at 94–95)), *abrogated on other grounds by Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Lake James Cmty. Volunteer Fire Dep’t, Inc. v. Burke*

Although courts thus seem to endorse a subjective knowing and voluntary standard for determining waiver of constitutional rights—even in the civil context—as discussed above, they apply only an objective, contract-level standard of consent to arbitration.²⁵¹ Recognizing that arbitration can be justified only as a waiver of Article III rights exposes the tension in this state of affairs. This mismatch suggests that standards of consent to arbitration must be raised to the constitutional knowing and voluntary standard in order to align FAA jurisprudence with constitutional waiver jurisprudence.²⁵² In addition, the Supreme Court has long recognized a presumption against the waiver of constitutional rights.²⁵³ Thus, given that arbitration under the FAA is a waiver of constitutional rights, determining whether parties have consented to arbitration must also be subject to a presumption against arbitration.

While an interpretation of the Constitution requiring knowing and voluntary waiver of constitutional rights necessarily trumps any statutory interpretation of the FAA requiring only a contract-level standard of consent, it is nevertheless worth pointing out that knowing and voluntary consent to arbitration is not inconsistent with the text of the FAA. Defenders of contract-level waiver standards point to the language of section 2 of the FAA, which states that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁵⁴ While section 2 requires that arbitration agreements be treated as enforceable as any other kind of

County, 149 F.3d 277, 280 (4th Cir. 1998) (“The contractual waiver of a constitutional right must be a knowing waiver [and] must be voluntarily given . . .”); *Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir. 1997) (noting that Second Circuit precedent “suggests that the waiver of a fundamental right in the context of civil cases must be made voluntarily, knowingly and intelligently”). While the Eighth Circuit does not appear to expressly endorse a knowing and voluntary standard, it reads *Fuentes* as requiring at least that contractual waivers of civil constitutional rights “be clear and unambiguous.” *In re Workers’ Comp. Refund*, 46 F.3d 813, 819 (8th Cir. 1995).

251. *Supra* Part I.B.

252. See generally Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 545 (1981) (“[T]he contract standard cannot be used to justify those waivers that involve constitutional rights since such rights necessarily take precedence over the contract policy of honoring private agreements.”).

253. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *Fuentes*, 407 U.S. at 94 n.31; *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937).

254. 9 U.S.C. § 2 (2006); see, e.g., *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1371 (11th Cir. 2005); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 167, 170.

agreement,²⁵⁵ a necessary prerequisite to enforcing an arbitration agreement is the existence of such an agreement. Yet enforceability and existence of an arbitration agreement are separate concepts,²⁵⁶ and section 2 addresses only the former. Determination of the existence of an agreement to arbitrate is covered in section 4 of the FAA, which requires that before a court compels arbitration, it must be “satisfied that the making of the agreement for arbitration . . . is not in issue.”²⁵⁷ Unlike the enforceability determination under section 2, however, the determination under section 4—whether an agreement actually has been made—does not reference contract law. Indeed, section 4 does not specify the standards by which a court is to satisfy itself that an agreement to arbitrate exists. Thus, requiring knowing and voluntary consent to arbitration before compelling arbitration is not inconsistent with the text of the FAA.²⁵⁸

In sum, this Article’s thesis—that arbitration under the FAA can only be justified as a waiver of Article III rights—suggests that consent to arbitration must be determined under the standards used to determine waiver of civil constitutional rights generally, namely a subjective knowing and voluntary standard with a presumption against waiver. Before concluding, however, it is important to point out two caveats. The first caveat is that this Article does not attempt to lay out in detail how a subjective consent standard with a presumption against arbitration would be applied in practice. On the one hand, it seems likely that practices such as unilateral adoption of arbitration agreements by employers or consumer service providers²⁵⁹ would not pass muster under the standard suggested here. On the other hand, agreements to arbitrate an existing dispute would seem to raise few, if any, questions of consent,²⁶⁰ and perhaps a

255. See 9 U.S.C. § 2; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745–46 (2011).

256. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006).

257. 9 U.S.C. § 4. Section 3 similarly requires that before a court may stay litigation in favor of arbitration, it must be satisfied that an arbitration agreement exists covering the dispute. *Id.* § 3.

258. Nor is section 2 rendered a nullity by requiring knowing and voluntary consent to arbitration. Once a court determines that parties have knowingly and voluntarily consented to arbitration, there are still issues of validity, revocability, and enforceability not related to assent to which section 2 still applies (such as illegality or lack of consideration, for example).

259. See *supra* note 75 and accompanying text.

260. See, e.g., Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 199 (1998) (noting that parties signing post-dispute arbitration agreements are (1) aware that they are obligating themselves to arbitrate because dispute resolution is the only subject matter of such agreements, and (2) likely advised by lawyers).

signed post-dispute arbitration agreement would be enough to establish subjective consent to arbitration. In between those poles lie cases involving issues such as the circumstances in which non-parties should be bound to arbitration agreements and application of the separability rule.²⁶¹ Under the standard suggested here, disputants in such cases would be presumed not to have consented to arbitration, but the question of what kinds of evidence would be required to rebut that presumption and establish subjective consent is not answered here, and perhaps best left to case-by-case evolution of FAA jurisprudence.

The second caveat to keep in mind is that despite the strong implications of *Overmyer* and *Fuentes*, the Supreme Court has not expressly held that the standard for waiving constitutional rights in the civil context is a subjective knowing and voluntary standard. Indeed, Stephen Ware has cautioned against overreliance on *Overmyer* and *Fuentes* and argued that the Supreme Court is in fact more likely, ultimately, to adopt a contract-law standard for waiver of constitutional rights in the civil context than a knowing and voluntary consent standard.²⁶² Were the Court to do so, this Article's conclusion that consent to arbitration must be measured under a subjective knowing and voluntary standard would change, but the fundamental thesis of the Article would not. The fact that only waiver theory can justify arbitration under the FAA and that, consequently, consent to arbitration must be measured by the standards used to determine waiver of civil constitutional rights generally would not be affected. To the extent the law on waiver of civil constitutional rights were to coalesce around a contract-law standard, only the implications on current FAA consent jurisprudence of this Article's thesis—not the thesis itself—would change.

CONCLUSION

Article III of the Constitution allocates judicial power to life-tenured, salary-protected judges. Arbitrators adjudicating disputes that would otherwise be heard in federal court are exercising judicial power without such protections, which suggests that the FAA is inconsistent with a literal reading of Article III. While Article III literalism has been rejected by both courts and scholars, the FAA does not fall comfortably within any of the judicial or scholarly

261. See *supra* notes 76–91 and accompanying text.

262. Ware, *supra* note 254, at 182–88, 205.

approaches justifying resolution of Article III disputes by non-Article III tribunals. Unless arbitration is determined to be an express exception to Article III's mandate, which this Article has argued is not warranted, the FAA cannot be justified under the Supreme Court's categorical exceptions approach to non-Article III adjudication. Nor does the Court's balancing test—to the extent it still remains viable post-*Stern*—justify allowing non-Article III arbitrators to resolve Article III disputes. Finally, given the extremely limited judicial review of arbitration awards—and that any statutory change to the review standards is both unlikely and unwise—the FAA cannot be justified under appellate review theory, the leading scholarly approach to non-Article III adjudication generally.

In light of the fact that the FAA is fundamentally inconsistent with Article III, waiver theory offers the only possible salvation for arbitration. While waiver theory is not new, this article shores up its theoretical foundation by (1) firmly establishing that the FAA is indeed fundamentally inconsistent with Article III, thus filling a gap in current waiver theory, and (2) showing that private arbitration under the FAA does not implicate unwaivable structural separation of powers concerns. In addition, this article points out that acknowledging that arbitration can only be justified as a waiver of Article III rights requires courts to determine whether parties have agreed to arbitration under the standards used to evaluate waiver of civil constitutional rights generally. This represents a fundamental change to current FAA jurisprudence. Specifically, while courts currently determine whether parties have consented to arbitration using contract-law objective standards of consent, given the constitutional mandate that judicial power over Article III disputes not be exercised by arbitrators lacking life tenure and salary protections, courts should instead apply a subjective knowing and voluntary standard.