BUT WE CAN CONSENT TO THAT, RIGHT?: THE CONSTITUTIONALITY OF ARBITRATION UNDER ARTICLE III DOCTRINE

“[C]ould you say a word about the relevance of arbitration here? Because I've been trying to figure out, if there's an Article [III] problem irrespective of consent when Congress adopts some kind of scheme for alternative adjudication, why schemes of mediation and arbitration wouldn't similarly be constitutionally problematic.”

–Justice Kagan¹

“Arbitration is a matter of contract between two parties. Nothing happens in an arbitration until you get a district court to enter a judgment enforcing the contract.”

–Chief Justice Roberts²

I. Introduction

During oral arguments this January, in a case unrelated to arbitration, Chief Justice Roberts and Justice Kagan, perhaps inadvertently, brought to light serious questions about the constitutionality of arbitration.³ Although the case before the Court dealt not with arbitration, but with whether litigants can consent to a bankruptcy court issuing a final judgment on a claim that the court is not constitutionally allowed to hear, and whether bankruptcy judges can issue proposed findings of fact and conclusions of law, then subject to de novo review by an Article III court, the oral argument raised questions about the constitutionality of arbitration. Although the Court recently held that bankruptcy judges may issue proposed findings of fact and conclusions of law in cases they are not otherwise allowed to hear, it made no comments on the issue of arbitration.⁴

² Id. at 54.
³ Id. at 53–54.
Despite the Court’s recent ruling, Justice Kagan seems to be correct that arbitration is constitutionally problematic—it allows, and in some cases requires, disputes to be heard outside the confines of Article III. How can this be though? Congress has explicitly authorized arbitration.\(^5\) It has even expressed a national policy favoring arbitration.\(^6\) And the Supreme Court has stated that arbitration is acceptable and arbitration clauses are enforceable, even including class arbitration waivers.\(^7\)

Arbitration is an agreement between two parties that a dispute, which would normally be adjudicated by the court system, will instead be removed from the courts and heard by arbitrators.\(^8\) In other words, it is the voluntary agreement of the parties to have a private arbitrator resolve the dispute via a binding decision.\(^9\) Certainly parties resolve disputes outside of courts all the time—parties discuss, parties mediate, parties settle. The oral argument before the Court in *Executive Benefits*, though, questioned the ability of parties to resolve certain claims in bankruptcy courts (and perhaps with magistrate judges). Because arbitration, like bankruptcy proceedings, is conducted outside the structures of Article III, limiting the review by Article III courts, it too may be unconstitutional.

This Article questions the constitutionality of arbitration given the Supreme Court’s Article III jurisprudence. Part II discusses the relevant jurisprudence on arbitration and the relevant

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\(^5\) 9 U.S.C. § 2 (2012) (“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).


\(^7\) AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (“Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”).


Supreme Court doctrine on party consent to adjudication by non-Article III tribunals. Part III highlights the potential constitutional problems with arbitration under the current Article III jurisprudence. Part IV reviews potential solutions and proposes a framework for maintaining a system of alternative dispute resolution that is constitutional even if the Supreme Court invalidates tribunals that operate under the flag of party consent. Specifically, Part IV proposes that arbitration agreements should be replaced by mediation agreements, which would require the parties to submit disputes to mediation before utilizing the Article III courts. Utilizing a mediator to facilitate settlement between the parties alleviates the constitutional problems with arbitration because there is no final, binding judgment issued by a non-Article III court.

II. Background

A. Arbitration

Arbitration is a creature of contract between parties. Courts initially, however, were not enforcing arbitration agreements.\(^\text{10}\) There were several justifications for refusing to enforce agreements, including protecting parties with less bargaining power and protecting the jurisdiction of the court.\(^\text{11}\) Incidentally, the second justification—protecting the jurisdiction of the court—forecasted the issue highlighted by the justices in oral argument in January.\(^\text{12}\)

1. The Federal Arbitration Act

In 1925, Congress passed the Federal Arbitration Act. The Federal Arbitration Act intended to stop courts’ indecision about whether to enforce arbitration provisions by presenting a national policy in favor of arbitration.\(^\text{13}\) The Act was intended to put arbitration clauses on equal footing with

\(^{10}\) Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 Penn St. L. Rev. 1103, 1107 (2009)

\(^{11}\) *Id.*


other contracts. Interestingly, however, the Act does not confer federal jurisdiction. Instead, there must be an independent basis for federal jurisdiction. Once the court has jurisdiction, the Act requires that arbitration agreements be “valid, irrevocable, and enforceable” as long as they concern matters of commerce. Such agreements remain enforceable whether they are broad or narrow.

For the first thirty or so years of the Act, courts only enforced it to protect agreements between businesses in federal courts. Such use of the Act is exactly what Congress intended. But in the 1950s and 60s, the Supreme Court began expanding it. And by the 1980s, the Court had held that there was a national policy favoring arbitration and that the Act is substantive law that would apply in both federal and state courts.

After this, the Supreme Court held that statutory as well as common law claims are arbitrable. The Court then went further and held that state courts could not use state law applicable only to arbitration agreements to invalidate those agreements. By the early 2000s, employment disputes were also found to be subject to arbitration. Finally, in the Court’s most recent cases, it enforced arbitration agreements with class action waivers and agreements that would effectively

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14 Id.
15 9 U.S.C. § 4 (2012) (providing that the federal court has jurisdiction only when it would have had jurisdiction but for the arbitration agreement); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25, n. 32 (1983).
20 Id. at 145.
21 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (noting that FAA was based on commerce power and power over admiralty and holding that FAA was substantive law).
26 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011). In 2011, the Supreme Court addressed the issue of class arbitration waivers and refused to invalidate an arbitration clause, despite
deprive the plaintiffs of a remedy due to high costs of litigation. Those cases, decided between 2011 and 2013, seem to express a nearly absolute policy in favor of arbitration, which indicates that the Supreme Court strongly favors arbitration clauses. Because clauses will be upheld even if they are in contracts of adhesion and even if they practically eliminate the possibility of litigation, it appears that the Supreme Court believes disputes should be arbitrated if the parties’ agreement contains an arbitration clause, even if that agreement essentially precludes relief for a consumer. Such policy suggests that the Supreme Court favors following what the parties have consented to in a contract.

2. Review by Courts Under the Federal Arbitration Act

Sections 9 through 11 of the Act provide for review by courts. A court has the power to confirm the award, vacate the award, or modify/correct the award. These procedures provide the exclusive mechanisms by which federal courts can hear cases after arbitration. Section 9 actually requires that the court confirm the award given by the arbitrators unless there are grounds

the fact that it was a contract of adhesion that waived all rights to arbitrate as a class. Id. at 1745, 1750, 1753. This ruling overruled a California rule that class arbitration waivers were unconscionable. Id. at 1753.

27 Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013). In 2013, the Supreme Court addressed the issue of whether an arbitration clause is still valid if it makes it practically impossible for consumers to litigate the claim. Id. at 2308. Even though the arbitration clause in American Express’s contract made it financially impossible for consumers to arbitrate the claims (because they were so small that individual litigation would cost more than the value of the claim), the Supreme Court found the clause to be valid. Id. at 2312.


30 9 U.S.C. § 11 (2012) (providing limited grounds under which an award may be modified or corrected—if (a) there is an evident miscalculation of figures or mistake of description; (b) the arbitrators gave an award on a matter not before them, unless that was immaterial; or (c) the award is “imperfect in a matter of form not affecting the merits of the controversy.”).

31 Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 590 (2008). State courts may still hear the dispute on state law grounds depending on the law of the state. Id.
to vacate, modify, or correct the award.\textsuperscript{32} This provision actually dictates a result to the court instead of giving true power to review the decision.

While the Act does provide that a federal district court may vacate an arbitration award,\textsuperscript{33} the grounds for doing so are quite limited. First, the award may be vacated if it was procured by “corruption, fraud, or undue means.”\textsuperscript{34} Second, if any of the arbitrators demonstrated partiality or corruption, appeal is allowed.\textsuperscript{35} Third, the award may be vacated if the arbitrator engages in misconduct or misbehavior.\textsuperscript{36} And fourth, an award may be vacated if the arbitrator exceeded his powers.\textsuperscript{37} It is important to note that there is no statutory ground for an appeal or vacation of the award based on an error of law or misapplication of the law.

The Supreme Court has held that the statutory grounds for appeal set forth in the Federal Arbitration Act are the exclusive grounds for appeal.\textsuperscript{38} This means that parties cannot contract around the statutory grounds for appeal.\textsuperscript{39} There is still debate as to whether there is a fifth, non-statutory ground for appeal if there is “manifest disregard of the law.”\textsuperscript{40} Some courts think that the term is simply a descriptor for the four grounds of appeal.\textsuperscript{41} Others think that it is a new ground.\textsuperscript{42} After Hall Street, it remains unclear whether there is a fifth ground, but the language in that case is fairly clear that the statutory grounds for appeal are exclusive and that the parties cannot contract around

\begin{enumerate}
\item\textsuperscript{32} 9 U.S.C. § 9.
\item\textsuperscript{33} 9 U.S.C. § 10.
\item\textsuperscript{34} Id. § 10(a)(1).
\item\textsuperscript{35} Id. § 10(a)(2).
\item\textsuperscript{36} Id. § 10(a)(3) (“where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced”).
\item\textsuperscript{37} Id. § 10(a)(4).
\item\textsuperscript{38} Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 583–84 (2008).
\item\textsuperscript{39} Id. at 584.
\item\textsuperscript{40} Id.
\item\textsuperscript{41} Id.
\item\textsuperscript{42} Id. at 584–85 (collecting cases).
\end{enumerate}
those grounds.\textsuperscript{43} The circuits are divided on whether a non-statutory ground for review, such as manifest disregard for the law, is permissible after \textit{Hall Street}, and the Supreme Court did not explicitly resolve the issue.\textsuperscript{44}

Whether appeal is limited to the statutory grounds or extended to review for manifest disregard of the law, there is no question that arbitration awards cannot be reviewed for simple legal error.\textsuperscript{45} In fact, arbitration awards are often confirmed without regard for their correctness.\textsuperscript{46} This indicates the potential problem with arbitration under Article III—non-expert arbitrators are deciding claims that would normally be decided in Article III courts and they are getting the decisions wrong.

**B. Party Consent and Article III**

Even though parties agree to arbitrate, the Supreme Court does not always allow party consent to trump constitutional or policy concerns. Article III of the U.S. Constitution states:

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.\textsuperscript{47}

\textsuperscript{43} \textit{Id}. at 584.
\textsuperscript{44} \textit{Ga. ADR Prac.} & \textit{Proc.} § 9:59, n.10 (3d ed.) (discussing the circuit split and the Court’s failure to resolve the issue).
\textsuperscript{45} As at least one commentator has noted, even manifest disregard is a generally unsuccessful ground for appeal, and its availability likely does not change the arbitration landscape. Weathers P. Bolt, \textit{Note, Much Ado About Nothing: The Effect of Manifest Disregard on Arbitration Agreement Decisions}, 63 \textit{ALA. L. REV.} 161, 176 (2011).
\textsuperscript{46} Reuben, \textit{supra} note 9, at 1129 (“Indeed, the notion of substantive “correctness” or “accuracy” historically has had little place in arbitration precisely because arbitration calls for the exercise of worldly judgment that is informed by a variety of considerations that may not lend themselves to an objective notion of correctness or accuracy, such as knowledge of economic considerations in the securities industry or professional standards and practices in the construction industry. Federal and state courts alike have been consistent in their support of the finality of arbitration, even refusing to disturb arbitration awards that are clearly erroneous on their face.”).
\textsuperscript{47} \textit{U.S. CONST.} art. III, § 1.
This means that judges in Article III courts are employed for life and receive a salary that cannot be decreased. These “Article III protections” are designed to ensure judicial independence and impartiality. The protections ensure that the other branches cannot remove the judiciary’s power, but those protections would be undermined if other branches could remove suits from Article III jurisdiction.

The Supreme Court has therefore recognized that Congress cannot remove Article III courts’ jurisdiction over suits at common law, in equity, or in admiralty. Article III continues by stating that the power of the federal judiciary extends only to cases and controversies. The Court has noted that where the suit is one grounded in traditional common law, it must be resolved by an Article III judge in an Article III court. Certain areas of cases, however, may be resolved outside of Article III. These include cases involving public rights, cases decided by adjuncts of a district court, cases decided by bankruptcy courts in core proceedings, and cases decided by magistrate judges in most circumstances.

1. Public Rights

The Supreme Court has held that certain cases, namely those involving public rights, may be adjudicated by non-Article III courts. Public rights were initially defined as those where the existence of the right depends on the will of Congress. These cases included those such as equitable claims to land by individuals residing in ceded territories. The Court in Murray’s Lessee v. Hoboken Land & Improvement Co. recognized that where Congress controls whether a suit can

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49 Id. at 2609.
51 U.S. CONST. art. III, § 2.
52 Stern, 131 S. Ct. at 2609.
53 The public rights doctrine was first recognized in Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. at 284.
54 Id.
55 Id.
proceed at all, for example when Congress must waive sovereign immunity to permit a suit, the suit involves public rights. \textsuperscript{56} Essentially, public rights are those that arise between the government when performing its executive and legislative functions and the people subject to that authority. \textsuperscript{57} Contrast those public rights cases, where the government creates a scheme of statutory rights, with quintessential private rights cases—those sounding in tort, contract, property, and the like—which must be tried by Article III courts. \textsuperscript{58}

Cases falling under the public rights exception are not limited to those where the government is a party, but rather to those where the claim “derives from a federal regulatory scheme” or an expert government agency must resolve the claim to maintain the integrity of the right. \textsuperscript{59} For example, where a federal statute required arbitration for disputes about compensation between parties under a data sharing agreement, there was no Article III violation because the right to obtain any compensation at all derived from the federal statute, not from any common law or state law right. \textsuperscript{60} Additionally, where an agency needed to exercise jurisdiction over a counterclaim to allow its adjudicatory scheme to function and the agency had jurisdiction only over a small, particularized area of law—federal commodities law—in which it had obvious expertise, allowing the agency to resolve the claim instead of an Article III court was permissible as a public rights claim. \textsuperscript{61}

The Court has found, however, that certain categories of claims do not fall within the public rights exception. In \textit{Granfinanciera, S.A. v. Nordberg}, the Court held that a fraudulent conveyance claim filed by a bankruptcy trustee against a non-creditor did not fall within the

\begin{itemize}
\item \textsuperscript{56} \textit{Id. at} 283–84.
\item \textsuperscript{57} \textit{Crowell v. Benson}, 285 U.S. 22, 50, 51 (1932).
\item \textsuperscript{58} \textit{Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n}, 430 U.S. 442, 458 (1977).
\item \textsuperscript{60} \textit{Thomas v. Union Carbide Agricultural Prods. Co.}, 473 U.S. 568, 571–75, 584 (1985).
\item \textsuperscript{61} \textit{Commodity Futures Trading Comm’n v. Schor}, 478 U.S. 833, 836, 843–44, 856 (1986).
\end{itemize}
exception.\textsuperscript{62} The Court there reasoned that “[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.”\textsuperscript{63} Fraudulent conveyance claims more closely resemble state law contract claims brought at common law than those in bankruptcy, indicating that review should be not by an Article I bankruptcy court, but instead by an Article III court.\textsuperscript{64}

Similarly, in \textit{Stern v. Marshall}, the Court held that a counterclaim in bankruptcy was not a public right.\textsuperscript{65} The Court there looked at the categories of public rights from the other cases and noted that the counterclaim was 1) not one that could be pursued at the grace of the executive and legislative branches, 2) not one historically determined by the other branches, 3) not a claim flowing from a federal statutory scheme, and 4) was not a claim completely dependent upon adjudication of a federal right.\textsuperscript{66} Additionally, because bankruptcy courts are the exclusive way in which creditors can resolve their claims, the parties had no choice but to use them, eliminating the ability to truly consent.\textsuperscript{67} And finally, because bankruptcy courts have broad jurisdiction that is not limited to a particularized area of the law and in this case were not resolving a specific class of claims in which they are experts, the counterclaim in \textit{Stern} could not be considered a public right.\textsuperscript{68} In that case, the public rights question was clear because it involved “the entry of a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of

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\item \textsuperscript{62} 492 U.S. 33, 54–55 (1989).
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.} at 56.
\item \textsuperscript{65} 131 S. Ct. 2954, 2614–15 (2011).
\item \textsuperscript{66} \textit{Id.} at 2614.
\item \textsuperscript{67} \textit{Id.} at 2615.
\item \textsuperscript{68} \textit{Id.}
\end{itemize}
action, when the action neither derive[d] from nor depend[ed] upon any agency regulatory regime.”69

2. Bankruptcy Courts

In 1982, the Supreme Court first addressed the constitutionality of bankruptcy courts specifically. In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, the Court considered whether bankruptcy judges, who lacked the tenure and salary provisions of Article III, could constitutionally resolve a state law contract claim involving a party not otherwise part of the bankruptcy proceeding.70 The Court concluded that allowing a bankruptcy court to issue a final decision on the state law contract claim violated Article III.71 Additionally, the Court held that bankruptcy judges’ power is too broad for them to be “adjuncts” to the district court, which would have allowed them to exercise the same power as those courts.72

The *Northern Pipeline* plurality recognized the public rights exception to Article III doctrine,73 but the full majority of the Court, without reaching agreement the scope of the exception, held that the state law claim at issue (a contract claim) did not fall within it.74 After *Northern Pipeline*, Congress amended the bankruptcy statute. Following the 1984 Amendments, bankruptcy judges are appointed by the courts of appeals in their circuits.75 Additionally, bankruptcy courts may issue final judgments only in certain “core” proceedings—those arising under Title 11 or in a Title 11 case.76 Claims that are not core, but are otherwise related to the bankruptcy proceeding, may be resolved only via

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69 *Id.* (emphasis in original).
71 *Id.* at 52, 87.
72 *Id.* at 71–72, 81–86.
73 *Id.* at 67–68.
74 *Id.* at 68–72.
76 *Id.* § 157(b)(1).
proposed findings by the bankruptcy judge. Those determinations are reviewed by the district court *de novo*.

Some things did remain the same under the 1984 Bankruptcy Act. Bankruptcy courts are still allowed to issue binding, final judgments in core proceedings. They still address all the matters related to counterclaims to the bankruptcy proceedings. And the district court still exercises only limited appeal authority—reversing the bankruptcy court’s determination only if it is clearly erroneous.

The Supreme Court recently held, however, that not all counterclaims may be heard by bankruptcy courts. Specifically, the Court held in *Stern v. Marshall* that certain proceedings may not be finally adjudicated by bankruptcy judges because they are non-Article III judges. In *Stern*, the claim at issue was a counterclaim for tortious interference. The Court held that while the bankruptcy code allowed the bankruptcy court to enter final judgment on the counterclaim, the Constitution does not permit such resolution. Again, the Court found that bankruptcy courts’ power is too broad to consider them mere adjuncts of the district courts. Further, because the claim was one between two private parties and not within a narrow area of expertise best resolved by particularized courts, the Court held that it did not fall within the public rights exception. As a

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77 *Id.* § 157(c)(1).
79 *Stern*, 131 S. Ct. at 2610–11.
81 *Id.* § 158(a); *Stern*, 131 S. Ct. at 2611.
82 *Id.*
83 *Id.*
84 *Id.* at 2604.
85 *Id.* at 2608.
86 *Id.* at 2611.
87 *Id.* at 2614–15; *see also* discussion *supra* Part II.B.1.
more general matter, the Court held that bankruptcy courts lack authority to enter final judgments
on state law claims that are not resolved “in the process of ruling on a creditor’s proof of claim.”

In the October 2013 Term, the Supreme Court took another related case to resolve
questions left open by *Stern.* This case, *Executive Benefits Insurance Agency v. Arkison,* was argued in
January of 2014. It sought to answer the question of whether party consent could cure an Article
III deficit in the bankruptcy context, and whether a bankruptcy court can make findings of fact and
conclusions of law that will be reviewed by a district court de novo. On June 9, 2014, the Court
issued its opinion in the case, holding that where a bankruptcy court may not constitutionally issue a
final judgment, it may issue proposed findings of fact and conclusions of law, which the district
court then reviews de novo. The Court said that such issuance of findings of fact and conclusions
of law does not implicate the constitutional concerns raised in *Stern.* When issuing its decision, the
Court did not address the issue of whether parties may consent to have a bankruptcy court hear
claims it otherwise would be unable to hear, instead holding that because the district court issued
judgment separately, there was a valid judgment below, regardless of consent. This decision leaves
open questions about the constitutionality of arbitration and whether party consent solves that issue.

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88 *Id.* at 2620.
89 Exec. Benefits Ins. Agency v. Arkison, 133 S. Ct. 2880 (2013) (noting that the Court granted the
petition for certiorari).
91 Brief for Petitioner at 12, Exec. Benefits Ins. Agency v. Arkison, 133 S. Ct. 2880 (Sept. 9, 2013)
(No. 12-1200), 2013 WL 4829341.
93 *Id.* at 4.
94 *Id.* at 13.
3. **Magistrate Judges**

Magistrate judges are not Article III judges—they are appointed for eight-year terms and have only limited powers. The Magistrate Act specifically allows magistrate judges, upon party consent, to “conduct any or all proceedings in a jury or nonjury civil matter.” Similar to bankruptcy courts, some have tried to claim that magistrate judges are simply adjuncts to the district courts and are therefore clearly constitutional. This argument fails given the broad power allocated to magistrate judges.

Although the Supreme Court has yet to address directly the constitutionality of magistrate judges entering final judgments, several lower courts have ruled on the matter. The Eleventh Circuit recently held that a magistrate judge may not issue a final judgment in a § 2255 case to vacate an unlawful criminal sentence. Despite using statutory construction rationale to avoid a constitutional issue, the Eleventh Circuit expressed serious doubts about whether magistrate judges are violating Article III. Specifically, the court noted its belief that when magistrate judges try petty offenses and issue final judgments in civil matters, they are exercising “the judicial Power” that is reserved to salaried and tenured judges under Article III.

The Eleventh Circuit also expressed concerns about the fact that allowing a magistrate judge to issue a final order in a § 2255 case would essentially grant the judge appellate power because

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96 Id. § 636(c).
98 Id.
99 The Supreme Court did note in 2003 that § 636 is likely constitutional as applied to typical civil cases, reasoning that a rule for implied consent promotes judicial efficiency and upholds the spirit of Article III. Roell v. Withrow, 538 U.S. 580, 590 (2003). It is important to note, however, that Roell was decided before Stern, which raised serious concerns about the constitutionality of bankruptcy courts. Brown, 2014 WL 1344463, at *1–2.
100 Id. at *48–52 (noting constitutional concerns about magistrate judges in light of the Supreme Court’s decision in Stern v. Marshall).
101 Id. at *24–25.
reviewing a sentence requires reviewing the district court’s judgment. Although the Eleventh Circuit only raised the constitutional concerns without deciding the case on those grounds, the Fifth Circuit has actually held that in certain circumstances, it is unconstitutional for magistrate judges to enter final judgments. In United States v. Johnston, that court held that even the consensual delegation of § 2255 proceedings to a magistrate judge would violate the Constitution because it would undermine the independence of the judiciary.

Most other circuits have found delegation to magistrate judges is constitutional. In the oral argument for Executive Benefits, however, the Justices and the parties both raised questions about magistrate courts. These questions, along with the opinions from the Eleventh and Fifth Circuits indicate that magistrate judges potentially violate Article III, similar to some uses of bankruptcy judges. Although both the Eleventh and Fifth Circuit decisions involved review of criminal sentences, the same concerns about magistrate judges exercising the judicial power reserved to Article III courts arise in civil cases as well.

III. The Constitutional Problem

Arbitration results from a contract between two parties in which they agree to have a particular dispute, a class of disputes, or all disputes between them resolved by an arbitrator or panel of arbitrators instead of through traditional litigation in the court system. Essentially what this does is deprive the federal courts of jurisdiction because a contract between the parties requires that result.

As discussed above, the federal court system has utilized procedures outside of the traditional Article III courts for quite some time. Recently, however, the Supreme Court and the

103 Id. at *53.
104 United States v. Johnston, 258 F.3d 361, 372 (5th Cir. 2001).
105 Id.
106 See id. at 367–78 (collecting cases).
circuit courts have been expressing concern that these procedures are outside the confines of Article III and are therefore potentially unconstitutional.\textsuperscript{108} While some claims may be heard outside of Article III courts, for example public rights claims,\textsuperscript{109} claims heard by adjuncts of the district courts,\textsuperscript{110} and core claims in bankruptcy courts,\textsuperscript{111} claims that exercise the traditional judicial power are reserved to Article III courts.\textsuperscript{112} Upon analysis of arbitration, it is clear that it is not a category of claims that should be susceptible to non-Article III adjudication.

First, arbitration does not encompass public rights. As discussed, public rights are those created by or involving the government.\textsuperscript{113} Under the most recent public rights framework discussed by the Supreme Court in \textit{Stern}, arbitration fails to fall in any of the categories. Under arbitration agreements, any type of claim may be determined by arbitration. It is not therefore limited to claims that can be pursued only at the choice of the executive and legislative branches or have historically been determined by those branches.\textsuperscript{114}

Additionally, arbitration does not deal with claims that flow from a federal statutory scheme and is not entirely dependent upon adjudication of a federal right.\textsuperscript{115} Although the Federal Arbitration Act exists to require courts to enforce arbitration agreements, it does not create the rights at issue—those are created by the common law that led to the dispute. Section 4 of the Act provides for jurisdiction only when the parties may bring suit in federal court only on some other


\textsuperscript{109} See discussion supra Part II.B.1.

\textsuperscript{110} \textit{Stern}, 131 S. Ct. at 2619.

\textsuperscript{111} 28 U.S.C. § 157(b)(1).

\textsuperscript{112} \textit{Stern}, 131 S. Ct. at 2620.

\textsuperscript{113} See discussion supra Part II.B.1.

\textsuperscript{114} See \textit{Stern}, 131 S. Ct. at 2614 (discussing claims that fall within the public rights exception).

\textsuperscript{115} See id. (discussing federal statutory rights portion of the public rights exception).
grounds, for example diversity or federal question jurisdiction. The jurisdictional provision indicates that this statute does not create the rights.

The Supreme Court’s decision in *Thomas v. Union Carbide Agricultural Products Co.* is not to the contrary. There, the Court held that a federal statutory scheme requiring arbitration for a federally created statutory right did not violate Article III. The arbitration there was constitutional because it was only required for statutorily created claims. Arbitration in general, however, deals with many claims that arise not based on statute, but based on common law.

Similar to the problem with bankruptcy courts raised in *Stern*, arbitrators have broad substantive jurisdiction—over whatever claims the contract allows them to arbitrate—and the actions at issue do not derive from or depend on an agency regulatory scheme. Instead, arbitrators are entering binding final judgments on a large class of claims. They are not necessarily experts in any particular area like an administrative agency adjudicating a claim would be. What arbitrators do is resolve quintessentially private claims—those sounding in tort, contract, property, and the like—despite lacking the salary and tenure protections of Article III.

While parties do consent to arbitration, that consent often comes through a contract of adhesion. Parties in effect have no other choice but to sign the contract—otherwise they might be without services such as cell phones and credit cards. This raises the same concern that the Court raised in *Stern* about bankruptcy courts, that parties do not really have a choice about where their claims will be heard.

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116 9 U.S.C. § 4 (providing that the federal court has jurisdiction only when it would have had jurisdiction but for the arbitration agreement).
118 *Stern*, 131 S. Ct. at 2615 (discussing broad jurisdiction of bankruptcy courts).
119 *See Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856 (1986) (explaining that claim was allowable as a public right because it was adjudicated by an expert agency).
120 *Stern*, 131 S. Ct. at 2615.
Arbitration is more similar to resolution by a court than something like mediation or negotiation. It involves the calling of witnesses, potential evidentiary exclusions, and results in a binding award.\footnote{121} This is quite similar to resolution of a dispute by a magistrate judge or by a bankruptcy court.\footnote{122} As discussed above, both bankruptcy courts and magistrate judges exercise broad power to resolve a large body of claims.\footnote{123} Arbitrators have the same broad power. Constitutional issues with bankruptcy courts and magistrate judges, as discussed in Part II, therefore translate to arbitration.

Chief Justice Roberts stated that arbitration is just a contract and nothing happens until a district court enforces the order,\footnote{124} but his comment actually illustrates the issue. First, a contract with an arbitration agreement actually removes jurisdiction from the Article III courts.\footnote{125} Under § 9 of the FAA, the district court essentially has no choice but to enforce the order unless one of a very limited set of circumstances exists allowing review.\footnote{126} These circumstances do not include review for error of law or even abuse of discretion in application of the law, but only if there has been serious misconduct by the arbitrator, some sort of corruption or fraud, or where the arbitrators exceeded their powers.\footnote{127}

The limited grounds of appeal granted by the FAA illustrate the problem with Chief Justice Roberts’s assertion. While district courts may hear the issue, they are not actually deciding the cases—arbitrators are. Arbitrators, however, are not the ones who have been through the confirmation process. They are not the ones who are given life tenure. They are not the ones whose

\footnote{121} Rutledge, supra note 8, at 6–7. \footnote{122} These are the types of dispute resolution at issue in Executive Benefits, specifically bankruptcy courts, but magistrate judges are potentially at issue as well. \footnote{123} See supra Part II.B.2–3. \footnote{124} Transcript of Oral Argument, supra note 1, at 54. \footnote{125} 9 U.S.C. § 4 (noting that claims may only be heard if jurisdiction would exist but for the arbitration agreement). \footnote{126} 9 U.S.C. §§ 9-11. \footnote{127} 9 U.S.C. § 10.
salaries cannot be diminished. Arbitrators entirely lack the protections granted to and required of Article III judges under the Constitution.

In essence, an arbitration clause requires removal of all claims, including traditional common law claims, from Article III courts and requires them to be adjudicated by non-Article III judges. So while Chief Justice Roberts is correct that nothing happens until a district court enforces the order, that district court is limited in its powers. And that limitation was imposed by Congress when it enacted the Federal Arbitration Act, conferring Article III power on non-Article III courts, which the Supreme Court has said is unconstitutional in other circumstances, such as bankruptcy courts.128

IV. Potential Solutions and the Final Proposal

A. Eliminating Arbitration

One potential solution would be to declare arbitration unconstitutional altogether as a violation of Article III. This would require the elimination of all private arbitration agreements, but would allow arbitration under statutory schemes such as that in *Thomas v. Union Carbide*, where the federal statute created the right and required arbitration.129 All cases that would have been decided by arbitrators would need to go through the Article III courts if they were not settled out of court.

It is unlikely, however, that any court would issue an opinion that completely abolishes arbitration. First, arbitration helps to clear court dockets. Eliminating it entirely would likely require the creation of more federal judges to alleviate the workload of current federal judges from the increase in cases. Without more judges, the increase in cases could have a deleterious effect on judicial efficiency. Second, because arbitration requires a contract between the parties, they could become angry that abolition of arbitration is infringing on their right to freedom of contract.

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129 See discussion *supra* Part II.B.1.
B. A New Role for Arbitrators

The constitutional problem with arbitration arises because the disputes at issue are being resolved by non-Article III courts. Two potential solutions that allow arbitration to stand but address the Article III concerns are 1) allowing arbitrators to make a recommended award that is then confirmed by courts upon review, and 2) providing for expanded review of arbitration awards, including for legal error. Both of these solutions take some of the work away from federal courts, allowing the parties to have quick dispute resolution. Additionally, both allow for final adjudication by an Article III court, alleviating the Stern concerns.

Allowing arbitrators to make a recommendation, while certainly alleviating the Article III concerns, would also undermine the purpose of arbitration. Most parties want to use arbitration to avoid the costs and long timeline of traditional litigation. Requiring them to have an arbitrator make a recommendation and then to go to a district court would eliminate a lot of the cost efficiency and would certainly take a great deal longer than simple arbitration. On the plus side, with both an arbitrator and a district court judge reviewing the case, parties would be able to have great confidence in the final result.

The second solution, with expanded review of arbitration awards, has many of the same drawbacks as allowing an arbitrator to make a recommendation. It too would allow cases to be reviewed by the district court much more easily. Contrary to allowing an arbitrator to make a recommendation, however, expanded review would not require all cases to go before both an arbitrator and a judge. Only those cases with grounds for review, whether legal error or something more egregious, would go before a district judge. This would alleviate some of the docket overcrowding concerns associated with the recommendation solution.

More problematic with the expanded review solution, however, is that district judges would essentially become appellate judges with respect to review of arbitration awards. This indicates that
there would potentially still be Article III concerns with arbitrators exercising the trial court power traditionally reserved to Article III judges. In general though, allowing expanded review would eliminate the concern of completely stripping Article III courts of jurisdiction via an arbitration agreement. It would also allow parties more confidence that the correct result was obtained through the process.

In the end, however, allowing for expanded review or allowing arbitrators to make recommendations both leave too many unanswered concerns and constitutional questions to be adopted. Although the Supreme Court has explicitly sanctioned de novo review by district court judges of findings of fact and conclusions of law by non-Article III judges, both of these approaches raise efficiency concerns that traditional arbitration was meant to eliminate (e.g., the arbitrator would probably have to issue a written opinion)—requiring a recommendation eliminates the quickness of arbitration because two adjudicatory bodies must review the case, and expanded review also creates more work for district judges.

C. Mediation Agreements

Another potential solution, and the one that this Article suggests adopting, would be utilizing mediation instead of arbitration. Here, parties would contract to require mediation before any dispute could be litigated in court. Such a contract would be nearly identical to a current arbitration agreement and could contract to mediate all disputes or just certain classes of disputes. Mediation agreements would allow the parties to resolve disputes quickly and cheaply before resorting to traditional litigation. They would essentially serve the same function as a settlement discussion, but would be mandated by contract.

Mandating mediation through contract does not implicate the same Article III concerns raised by arbitration. While there is a third-party neutral in the room, that party is not adjudicating the dispute. The neutral is simply helping the parties come to a mutually-agreeable settlement. This avoids the problem of eliminating a mechanism for alternative dispute resolution, as raised above, and eliminates the concern of resolving the dispute in a non-Article III court-like structure. Additionally, because parties are simply coming to a settlement, which they have always been allowed to do, it is unlikely that any Article III concerns will be raised in the future.

Mediation agreements similarly do not raise large concerns about overcrowding court dockets. While of course some cases will still go to trial, one study of court-based mediation in the Netherlands found that parties reached a full agreement in 55% of cases and at least a partial agreement in 61% of cases.\(^{131}\) Presumably, if the parties have contracted for mediation, the success rate might be even higher because the parties both previously indicated a desire to resolve disputes outside of court (although contracts of adhesion could undermine such a phenomenon). Average processing time in that study was 95 days,\(^{132}\) indicating that mandatory mediation agreements would in fact provide a speedy solution for parties.

One drawback is that a mediation agreement does not provide binding resolution of the claim like arbitration does. This is true to some extent, but if parties reach a settlement, that will result in a contract between the parties that then can be enforced in court.\(^{133}\) Additionally, the fact that parties are reaching an agreement eliminates the concern of arbitration that one or both parties might be truly unhappy with the final award. Even though mediation will not result in a binding award in every case, it will allow for pretrial dispute resolution in many cases, thus eliminating some


\(^{132}\) Id.

\(^{133}\) This solution actually more mimics what Chief Justice Roberts suggests arbitration is like—a contract between the parties where nothing happens until a Court enforces it. *See supra* note 2.
of the docket crowding that would result from the abolition of arbitration, but without raising any constitutional concerns under Article III. Mediation agreements will remain constitutional even if the Supreme Court holds at some point that party consent cannot cure constitutional issues because they do not raise any constitutional issues in the first place.

V. Conclusion

The Supreme Court has expressed a clear policy favoring arbitration. It is helpful for clearing dockets and can be faster and less expensive for parties than traditional litigation. But it uses a court-like mechanism to resolve the dispute. It enters a binding award. Under current Article III jurisprudence, there are already serious concerns about arbitrators exercising the judicial power without the protections of Article III to ensure independence. In its holding in Executive Benefits, the Supreme Court only stated that bankruptcy judges may issue findings of fact and conclusions of law when they are constitutionally unable to issue final judgments, which must in turn be reviewed de novo by district courts.\footnote{134} As Justice Kagan noted in her questioning, arbitration rests on the consent of the parties, as do many of the arguments for allowing disputes to be resolved by magistrate judges or in bankruptcy courts.\footnote{135} Because the Supreme Court left the question of consent open in its decision in Executive Benefits,\footnote{136} arbitration is still constitutionally questionable. Under Article III as it currently stands, arbitration should not be allowed. Instead, parties should be allowed to utilize mediation clauses requiring them to mediate all disputes before entering traditional litigation.

\footnote{135} Transcript of Oral Argument, supra note 1, at 53.
\footnote{136} Executive Benefits, No. 12-1200, slip op. at 13.