ARBITRATION, WHAT IS IT GOOD FOR?*

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In the lead piece of this symposium, Hensler and Khatam bring into relief two paradoxes in contemporary arbitration policy and practice. First, arbitration is beset by hyperspecialization into segmented domains, yet is plagued by reforms that transcend those boundaries. Second, arbitration seeks all the virtue of formal adjudication without the process, yet process is the principal virtue of formal adjudication.

Hensler and Khatam invite readers to think broadly about contemporary arbitration policy and practice. Accepting that invitation, I briefly explore four areas of inquiry that can be reduced to the interrogatives Why?, What?, When?, and Who?, respectively. All four questions locate arbitration within the larger dispute resolution architecture.2

I. WHY?: THE EXISTENTIAL QUESTION

In the past forty years, arbitration has grown like kudzu vine.3 The stems and tendrils of arbitration have attached to and climbed all surfaces of contemp-

* Cf. Edwin Starr, War, on War & Peace (Gordy Records 1970) (“War, what is it good for! Absolutely nothing!”).
† William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. My colleagues Jeffrey Stempel, Jean Sternlight, Lydia Nussbaum, and David McClure offered insightful comments; I benefit routinely from their brilliance and generosity. Thanks also to Dean Daniel Hamilton and Associate Dean Ruben Garcia for their steadfast support of scholarship. And finally, I thank Deborah Hensler, Jean Sternlight (again), and the editors of the Nevada Law Journal for planning this symposium and allowing me to participate.
2 Although I try to consider arbitration broadly “across [its] domains” in this piece, the capacities of my knowledge and the limits of experience tend to restrict my focus to federal, as opposed to state dispute resolution. See id. at 382. Also, because I am unfamiliar with the particulars of investor-state arbitration, I am subject to Hensler and Khatam’s criticism that scholars are regrettably siloed. See id. at 386.
3 Kudzu is a notoriously fast-growing, climbing vine. See Jodi Wilson, How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act, 63 Case W. Res. L. Rev. 91, 92 & n.1 (2012) (quoting Knapp v. Credit Acceptance Corp. (In re Knapp), 229 B.R. 821, 828 ( Bankr. N.D. Ala. 1999)). It would be more precise to say that arbitration clauses have grown like kudzu vine. Because so few people with claims actually arbitrate, the number of arbitration proceedings is relatively modest. Compare CFPB Arbitration Agreements, 82 Fed. Reg. 33210, 33221 (July 19, 2017) (noting Study’s finding that “arbitration agreements are commonly used in contracts for consumer financial products and services,”) with id. at 33254 (noting Study’s finding that a “small number of consumers filed consumer financial
porary life—affecting transactions and occurrences large and small, whether profound or trivial, both public and private. But unlike kudzu, which is part of a fairly uniform genus, the many species of arbitration are heterogeneous.

Arbitration can be extremely informal or highly formal. It can be non-binding, employ informal procedures, and apply customary norms or intuitive notions of justice. [Or it] can resemble a court proceeding with formal adversarial presentations and the application of substantive rules of law to achieve a binding judgment.

Indeed, arbitration has few, if any essential qualities. Importantly, this diversity is not the result of some pathology; rather, it is arbitration’s professed virtue. Promoters of arbitration hail the process because it is infinitely flexible and can be tailored for different types of disputes. But

claims in arbitration”). See also Jean R. Sternlight, Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims, 42 Sw. L. Rev. 87, 87–88 (2012) (discussing when “consumers’ claims are suppressed or eliminated altogether as a result of companies’ use of mandatory arbitration clauses”).


An “arbitration” could be a proceeding between a consumer and a manufacturer occurring in a suburban office park, a proceeding between two multinational corporations in the London Court of Arbitration, or a proceeding between a French bank and the Republic of Burkina Faso in an ICSID proceeding Washington, D.C. See generally Hensler & Khatam, supra note 1, at 381 (identifying three domains of arbitration).

6 Douglas Yarn, The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization, 108 Penn St. L. Rev. 929, 934–35 (2004). In addition to the differences enumerated in the block quote in the text, arbitration may be voluntary or involuntary. Disputes may come before one arbitrator or a panel of three (or some other number of) arbitrators. Arbitrations may or may not be court-annexed. “Baseball” or “final offer” arbitration, for example, may constrain the set of possible resolutions of the dispute. The arbitrator(s) may or may not have subject-matter expertise in the subject matter of the dispute—and they may or may not be attorneys. See Thomas E. Carboneau, Arbitration in a Nutshell VII (2007); David L. Erickson & Peter Geoffrey Bowen, Two Alternatives to Litigation: An Introduction to Arbitration and Mediation, Disp. Resol. J., Nov. 2005–Jan. 2006, at 43–44 (2006). See also Stephen J. Choi et al., Attorneys as Arbitrators, 39 J. Legal Stud. 109, 110–11 (2010) (describing the use of “industry arbitrators”).


this divergent evolution of arbitral practices complicates any effort to engage in a serious discussion of “arbitration” as a mode of dispute resolution. Accordingly, I take a wide arc around the particulars—or essence—of arbitration, and instead begin with a precedent why question about the existence of arbitration.9

In all its manifold and diverse forms, arbitration is often cast as a competitor or alternative to adjudication.10 To be sure, arbitration seeks “business in the form of disputes” formerly processed by courts, which are, in some sense, a rival.11 But, this characterization suggests that arbitration has a separate and independent existence. And that narrative subtly masks—even subverts—an important truth: the enterprise of arbitration presupposes the existence of a formal system.

States have a monopoly on the legitimate use of coercive force; only governments have the authority to vindicate rights and to assign responsibilities.12 To the extent that arbitration participates in the resolution of disputes, it does so not only with the state’s blessing, but also with its assistance. Without the infrastructure provided by formal institutions (namely courts and legislatures13),

9 By invoking the terms existence and essence I am not intending to take a side in a grand philosophical debate. See Jean-Paul Sartre, Essays in Existentialism 35–36 (1965) (noting that “[e]xistence precedes essence,” expressing the notion that humans live and only then conceptualize). I am addressing the ordered sequence of the concepts, not their fundamental separability.


11 Edward Brunet, Questioning the Quality of Alternate Dispute Resolution, 62 Tul. L. Rev. 1, 47 (1987).

12 Max Weber, Politics as a Vocation, reprinted in From Max Weber: Essays in Sociology 77, 77–78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946); “Weber did not mean that others do not use force in a modern state, but that all legitimate force is either wielded by the state itself or by its permission or delegation. . . . This is a normative not a factual monopoly. We may, of course, defy the state; but within the context of law—and that is our context today—we may not do so lawfully.” Charles Fried, Perfect Freedom, Perfect Justice, 78 B.U. L. Rev. 717, 739 (1998).

participation in arbitration would be optional, and arbitrators would have no meaningful authority, and arbitration awards would be non-binding and unenforceable. Thus, at its core, the enterprise of arbitration enjoys neither subjective agency nor self-determination. To paraphrase Maitland, arbitration without courts would be a “castle in the air, an impossibility.”


15 Arbitral proceedings lack the accoutrements of power that effective dispute resolution requires. So courts issue injunctive relief, subpoenas, and contempt orders as adjuncts, often with legislative countenance.

The arbitrators . . . may summon in writing any person to attend before them or any of 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. Said summons shall issue in the name of the arbitrator . . . and shall be directed to the aed person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators . . . are sitting may compel the attendance of such person or persons before said arbitrator . . . or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.


16 Parties who prevail in arbitration could find those awards meaningless; instead, courts enforce those arbitral awards. See, e.g., Comprehensive Acct. Corp. v. Rudell, 760 F.2d 138, 140 (7th Cir. 1985) (“Once a matter has gone through arbitration and an award has been issued, the grounds on which a court asked to confirm (enforce) the award can refuse to do so are limited. . . .”). See also United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) (“Courts . . . do not sit to hear claims of factual or legal error by an arbitrator”); Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 149 (1968) (arbitrators “have completely free rein to decide the law as well as the facts and are not subject to appellate review.”); Baxter Int’l, Inc. v. Abbot Labs., 315 F.3d 829, 832 (7th Cir. 2003) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985)) (observing that allowing parties to raise arguments at the enforcement stage “would just be another way of saying that [the matter is] not arbitrable” and that “[t]he arbitral tribunal in this case ‘took cognizance of the antitrust claims and actually decided them.’ Ensuring this is as far as our review legitimately goes.”). To be sure, there are circumstances where social norms may be strong enough to encourage compliance with an arbitrator’s award and discourage resort to the state. See, e.g., Lee Ann Bambach, The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent, 25 J.L. & RELIGION 379, 383–84 (2009) (discussing religious prohibitions on the use of secular courts); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J.LEGAL STUD. 115, 124–26 (1992).

17 See, e.g., Jean R. Sternlight, Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia, 80 NOTRE DAME L. REV. 681, 697–99 (2005). Scholars have explored this point when considering the extent to which arbitration is “state action.” See generally Richard C. Reuben, Public Justice: Toward a State Action Theory of Alternative Dis-

18
Arbitration is thus not a competitor nor even an alternative to formal adjudication; rather it is a partner of formal adjudication.\(^1\) State support is why arbitration exists: arbitration thrives with it, and would wither without it. This is important for two reasons. First, it means that the formal system must accept responsibility for any of arbitration’s shortcomings vis-à-vis its citizens. Second, the state need not regulate arbitrators or arbitration proceedings directly, but instead could focus on where arbitration interfaces with (and requires the assistance of) courts.\(^2\)

**II. WHAT?: THE OBJECTIVE**

The state’s monopoly over the coercive use of force to resolve disputes is important because the resolution of disputes is a necessary public service. As a public utility provides the necessities of water or electricity, the state is responsible for the infrastructure that provides the public service of dispute resolution. Although one should never mistake the government for a business,\(^3\) the classic public utility is a useful framework for thinking about the state’s broad role with respect to providing dispute resolution services.

First, like water, public dispute resolution is a shared, limited resource.\(^4\) There is a finite number of judges, staffers, courtrooms, and hours. And as water utilities must resolve the competing demands of farmers, commercial users, and as water utilities must resolve the competing demands of farmers, commercial users,

\(^{18}\) *F. W. Maitland, Equity: A Course of Lectures* 19 (A. H. Chaytor & W. J. Whittaker eds., rev. ed. 1936) ("Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. . . . Equity without common law would have been a castle in the air, an impossibility.").


and residents, courts must resolve the competing demands of criminal/civil caseloads, pro se litigants, and high-/low-dollar cases. Further, both water utilities and courts must manage current demand for their resource while also safeguarding it for future consumers.

At the same time, however, public utilities are often obliged to provide universal access. Running miles of electrical lines to serve one rural consumer can be exorbitantly expensive—and extremely “inefficient”—for an electric utility. Yet universal access is the expectation. Consider, then, what would universal access to dispute resolution look like? Naturally, arbitration could be part of that picture.

III. WHEN?: THE COMPARATIVE ADVANTAGE

The question for policymakers is: When is arbitration an appropriate method of dispute resolution? Because we cannot test possible answers to that question under precise experimental conditions, the best available data may be history. History, albeit an imperfect laboratory, can be instructive. Hensler and Khatam survey much of the relevant history, so I discuss just one more case to offer perspective on the when question.

For most of American history, courts viewed arbitration skeptically. This was—and, in fact, still is—a sensible position: If all the accoutrements of formal adjudication (including judges, courts, and formal procedures) are not essential to fair and effective dispute resolution, then why do we have them at all? Engrained with this view, courts were hostile to efforts that purported to oust them of their responsibility to vindicate rights and to assign responsibilities; the judicial function was at stake. This sentiment began to change, how-

23 See Hensler & Khatam, supra note 1, at 387–400.
25 Edward Manson’s statement, quoted by Hensler and Khatam, assumes that arbitration can “have all the virtues which the law lacks” even though the price of those virtues are the costs, complexity, and adversarialism that he is trying to avoid. See Hensler & Khatam, supra note 1, at 401 (quoting Edward Manson, The City of London Chamber of Arbitration, 9 LAW Q. REV. 86, 86 (1893)).
26 See Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974) (noting that Federal Arbitration Act, enacted in 1924 reversed “centuries of judicial hostility to arbitration”); W. H. Blodgett Co. v. Bebe Co., 214 P. 38, 39 (Cal. 1923) (outlining arbitration agreements as unenforceable when used to “oust the legally constituted courts of their jurisdiction and set up private tribunals”); C. Edward Fletcher, III, Privatizing Securities Disputes through the Enforcement of Arbitration Agreements, 71 MINN. L. REV. 393, 394 n.5 (1987) (citing Hurst v. Litchfield, 39 N.Y. 377, 379 (1868) (recognizing courts as the only proper forum for the resolution of legal controversies)). The judicial function includes showing fidelity to the underlying substantive law. When a court declines to assert jurisdiction, the failure to vindicate those substantive rights raises separation-of-powers questions. This notion has long dogged arbitration doctrine, characterizing it as a form of improper judicial law-making. See generally Cohens v. Virginia, 19 U.S. 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”). See also Martin H. Redish, Abstention, Separation...
ever, with Congressional legislation in 1925 that, in turn, led to a string of Supreme Court cases, including two decisions in the early 1970s, that chiseled an inflection point with respect to the treatment of arbitration clauses.27

In M/S Bremen v. Zapata Off-Shore Co., the Supreme Court validated a forum selection clause in a contract between U.S. and German parties that identified London as the situs of litigation.28 Enforcement of the clause meant that party autonomy could properly oust courts of their power to resolve the parties’ dispute.29 Notably this decision denied an American party access to American courts; the company’s only recourse for redress was to travel abroad.30 Although The Bremen involved a forum-selection clause rather than an arbitration clause, the Court, two years later in Scherk v. Alberto-Culver Co., held that arbitration clauses are but “a specialized kind of forum-selection clause.”31 Accordingly, The Bremen is the taproot of our kudzu vine.32

As we ponder broad questions about when arbitration is appropriate, it is instructive to revisit the facts of The Bremen. These facts, after all, persuaded

27 United States Arbitration Act, 43 Stat. 883 (1925). In 1947, this legislation was reenacted and codified by Congress and given its more familiar name the Federal Arbitration Act. See 9 U.S.C. § 2 (1947). The two Supreme Court cases are introduced in note 26, supra, and note 28, infra.

28 M/S Bremen v. Zapata Shore Co. (The Bremen), 407 U.S. 1, 2, 3, 10 (1972) (recognizing forum selection clauses as “prima facie valid”).

29 Id. at 10 (recognizing legacy of ouster doctrine and citing collection of cases supporting that view in “Annot., 56 A.L.R.2d 300, 306–20 (1957), and Later Case Service (1967”).

30 The international nature of this case elevated the consequences of enforcing the clause. Although eight years earlier the Court had upheld the validity of forum-selection clauses in the domestic context, The Bremen is the seminal case for the enforcement of forum-selection clauses. See generally S. I. Strong, Limits of Procedural Choice of Law, 39 BROOK. J. INT’L L. 1027, 1040 (2014) (“Although the Court had already upheld the validity of forum-selection clauses in the domestic context, The Bremen was the first case to address such provisions in the international realm.”) (citing Nat’l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964)).


the Supreme Court to view respect for party autonomy as more important than adhering to its tradition of ensuring that parties could access the courts (or, put another way, more important than adhering to its tradition of ensuring that the law would be enforced). In *The Bremen*, a Texas oil company, Zapata Off-Shore Company, contracted with a German company, Unterweser Reederei, GmBH, to transport The Chaparral, Zapata’s oil-drilling rig, from Louisiana to a location off the coast of Italy. During the tow, a severe storm in the Gulf of Mexico damaged the rig, causing its legs to break off. At Zapata’s direction, Unterweser’s deep-sea tug, The Bremen, towed the rig from international waters to Tampa Bay, Florida.

The Texas oil company brought an admiralty suit in a Florida federal court seeking $3.5 million in damages against Unterweser for negligence and breach of contract. Relying on the forum-selection clause in their contract, the defendant moved to dismiss the suit. Both the trial court and, later, the Circuit Court, instead sided with the Texas oil company, refusing to enforce a clause that would oust the courts of jurisdiction.

In its landmark decision, the Supreme Court enforced the clause. Six key facts framed that decision:

- This transaction was “far from routine.” It contemplated “the tow of [an oil-drilling rig, an] extremely costly piece of equipment,” to a destination six thousand miles away.
- The contract was an “arm’s-length [transaction] by experienced and sophisticated businessmen” with “equal . . . bargaining stature.”

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33 *See The Bremen*, 407 U.S. at 10.
34 Id. at 2.
35 Id. at 3.
36 Id.
37 *Id.* at 3–4. The action was brought in admiralty against Unterweser in personam and against the tugboat in rem. *See* Jonathan M. Gutoff, *Attaching Domestic Assets to Remedy High Seas Pollution: Rule B and Marine Debris*, 22 ROGER WILLIAMS. U. L. REV. 432, 433 (2017) (“Rule B of the Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Actions provides for something many law students and practitioners who recall first-year civil procedure will assume to have vanished: quasi in rem jurisdiction over defendants in cases within the admiralty jurisdiction of the district courts.”).
41 *Id.*
42 *Id.* at 12 & n.21.
The contract was actually negotiated.\(^{43}\)

This clause “was clearly a reasonable effort to bring vital certainty to this international transaction.”\(^{44}\) This uncertainty was as remarkable as it was imminent, and in this sense, the clause “was a vital part of the agreement.”\(^{45}\)

This clause “was clearly a reasonable effort . . . to provide a neutral forum experienced and capable in the resolution of admiralty litigation.”\(^{46}\)

The claim involved the breach of a private agreement.\(^{47}\)

In sum, then, for the (1) uncommon transaction (2) where commercial parties (3) freely negotiate a contract with an arbitration clause (4) where the clause resolves profound uncertainty about the situs of litigation that bedevils both parties, (5) their selection of a neutral arbiter (6) for the resolution of disputes about a private agreement should be respected.

With the kudzu vine released into the wild, however, the enforcement of arbitration clauses did not remain limited to these narrow circumstances. Some additional historical context might help explain arbitration’s sudden popularity. In 1972, the year of *The Bremen*, many federal judges were anxious about the growth of their civil caseloads. This anxiety turned to panic when, over the course of the long decade between 1969 and 1983, civil caseloads more than tripled.\(^{48}\) The number of district judges increased too, but not at the same rate; in fact, during this same period, “[T]he average civil caseload of each federal judge doubled.”\(^{49}\) This pressure led to a number of judicially-inspired reforms to ration scarce judicial resources. Among those reforms was a bigger role for arbitration.\(^{50}\)

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\(^{43}\) Rather than using preprinted form bills of lading, Zapata solicited bids and Unterweser prepared a draft contract. Zapata proposed “several changes” to the contract and Unterweser ultimately accepted those changes. *Id.* at 3, 12.

\(^{44}\) *Id.* at 17. The Chaparral could have been damaged at any point along the route. “Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where *The Bremen* or Unterweser might happen to be found.” *Id.* at 13.

\(^{45}\) *Id.* at 14.

\(^{46}\) *Id.* at 17.

\(^{47}\) *Id.* at 12–13.


\(^{50}\) See Sternlight supra note 20, at 660–61(characterizing the notion that there is a longstanding judicial philosophy favoring arbitration as a “myth” rooted in the Court’s desire to conserve judicial resources); see also Hensler & Khatam, supra note 1, at 388–89 & n.32. The characterization of arbitration as, primarily, a caseload-clearing device is a bastardization of arbitration’s supposed virtues. See generally Thomas O. Main, ADR: The New Equity, 74 U. CIN. L. REV. 329, 354–74 (2005) (collecting authorities re: cost savings to parties, procedural
Since the 1970s, the Court has allowed arbitration to sprawl. Courts now enforce arbitration clauses (1) in routine transactions 51 (2) involving customers and other vulnerable parties,52 who (3) entered into contracts of adhesion53 (4) where the choice of arbitration had nothing to do with resolving uncertainty,54 (5) the drafter of the clause chose the arbitrator,55 and (6) the claims concerned

flexibility, substantive flexibility, expertise, finality, procedural justice, party autonomy, reinforcement of community norms, and access to justice).


statutory rights. Thus, in contemporary arbitration jurisprudence, not one of The Bremen’s six facts is necessary to enforce an arbitration clause.

To be sure, the rationing of scarce judicial resources may be a necessary evil. But questions about when arbitration is an appropriate method of dispute resolution should include accurate data about civil caseloads. The “litigation explosion” that rocked the federal courts in the 1970s has abated. In fact, in the thirty-one years since 1985, there has been virtually no increase in the number of civil cases filed each year. In 1985 there were 273,670 new civil filings, and in 2016 there were 290,430 new civil filings. This represents an annual growth rate of less than one-fifth of 1 percent. Accordingly, promoters of arbitration must defend it as a normative solution, rather than as a necessary accommodation.


For a more sophisticated account of the different ways that one might measure the growth in the civil caseload, see Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. Ill. L. Rev. 1177, 1235–36 (2015).

For the defense of litigation, see generally Alexandra Lahav, *In Praise of Litigation* (2017); Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv. L. Rev. 668 (1986); Owen M. Fiss, Comment, *Against Settlement*, 93 Yale
IV. WHO?: THE MINISTRATION OF POLICY

Skeptics of arbitral policy and practice join a loud chorus of critics who are concerned about other aspects of contemporary federal litigation. Commentators complain about a flawed rulemaking process, how the disappearance of trials threatens our democracy, that case management is a menace, how the curtailment of class actions undermines law enforcement, and that multidistrict litigation cases are devouring the dockets. And those are just some of the warranted criticisms. Another batch of criticisms is familiar, even if empirically unfounded: cases take too long, the civil caseload is exploding, and discovery is a widespread plague.


67 Notwithstanding the popularity of the narrative that cases languish in federal courts, in fact, for the past fifty-five years the time to disposition for the median civil case in federal court has consistently been about eight months, and has never been more than ten months. See Main supra note 22, at 1612–15.
This sundry list of real and perceived defects in federal litigation reminds us that the administration of civil justice is a highly complex system of interconnected components that integrates large numbers of participants, convoluted networks, and dynamic inputs. Critically, the arbitration kudzu vine occupies only part of this landscape. Reforms that do not consider the complexity of the system may not accomplish the desired result—or may have unintended collateral consequences.\(^70\)

The complexity of civil justice reform is hardly a novel observation. But an intriguing question lurks: Who is considering this set of problems in the aggregate? Put another way, who is managing the federal system of civil justice?

Among the three branches of government, the Executive Branch surely bears the least responsibility.\(^71\) As the “largest consumer of judiciary services,” the federal government certainly plays an important role “in promoting the efficiency and effectiveness of the civil justice system.”\(^72\) And of course administrative agencies are empowered to implement legislation through regulations.\(^73\)

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\(^68\) Notwithstanding the popularity of the narrative that civil caseloads are growing at an unmanageable rate, in fact, since 1985, there has been virtually no growth in the number of newly-filed civil cases. See ADMIN. OFFICE OF THE U.S. COURTS, supra note 59 and accompanying text.


\(^70\) Case management, for example, is a reform born of an effort to minimize costs and delay, yet it can have the opposite effect. See JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 54–57 (1996). See generally Braking the Rules, supra note 64.

\(^71\) U.S. CONST. art. II. But see infra note 83.


But in the main, the Executive Branch is enforcing law in furtherance of the public interest, rather than making the laws that ensure civil justice.\(^74\)

Next, the Legislative Branch surely bears at least some of the responsibility for the administration of civil justice.\(^75\) And over the years Congress has, for example, created the Legal Services Corporation,\(^76\) empowered a new layer of judicial officers,\(^77\) changed litigation incentives,\(^78\) institutionalized alternative dispute resolution,\(^79\) and responded to Supreme Court decisions.\(^80\) But Congress’s interventions into the procedural realm are frequently myopic, misguided, clumsy, and/or unwelcome.\(^81\) Indeed, some self-awareness in this regard


\(^75\) U.S. CONST. art. I, § 8 (allocating Congress authority to “constitute” courts).


[Legislatures have neither the immediate familiarity with the day-by-day practice of the courts which would allow them to isolate the pressing problems of procedural revision nor the experience and expertise necessary to the solution of these problems; legislatures are intolerably slow to act and cause even the slightest and most obviously necessary matter of procedural change to be long delayed; legislatures are subject to the influence of other pressures than those which seek the efficient administration of justice and may often push through some particular and ill-advised pet project of an influential legislator while the comprehensive, long-studied proposal of a bar association molders in committee; and legislatures are not held responsible in the public eye for the efficient administration of the courts and hence do not feel pressed to constant reexamination of procedural methods.]

\(\text{Id.}\)

See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). See generally In re HP Inkjet Printer Litigation, 716 F.3d 1173, 1181 (9th Cir. 2013) (“CAFA is poorly drafted” [with wording that is] “clumsy” and “bewildering.”); Lowery v. Ala. Power Co., 483 F.3d 1184, 1198 (11th Cir. 2007) (referring to CAFA’s mass action provisions as an “opaque, baroque maze of interlocking cross-
might explain Congress’s delegating to the Supreme Court the task of prescribing “general rules of practice and procedure” for the federal courts.\(^{82}\)


Interestingly, the original version of the Civil Justice Reform Act (see Judicial Improvements Act of 1990) introduced by Senator Biden contained a proposed congressional finding that the “court, the litigants, and the litigants’ attorneys share responsibility for cost and delay in civil litigation and its impact on access to the courts and the ability of the civil
responsibility could mean double the attention is paid to the civil justice system—or instead that neither branch is ultimately accountable. In either event, let us turn to the Judicial Branch.

The Judicial Conference of the United States is responsible for policy-making and administration of the federal judiciary. Its statutory mandate includes studying “the operation and effect of the general rules of practice and procedure” and proposing changes thereto. Its rulemaking committees, in turn, thus carry substantial responsibility for the administration of civil justice. Like its Congressional counterparts, the Advisory Committee has received sharp criticism for its reforms:

[T]he rules committee acts in haste and is too slow; the committee fails to lead and innovate on things that matter, and engages in irresponsible experiments; the committee is obsessed with trivial wordsmithing and is dangerously politicized. Unfortunately, these oppositional pairs of criticism do not cancel each other out; instead, both halves are accurate, depending on the year and the specific reform at issue.

But more generally, the rulemaking process is also constrained in important ways. Procedural “rules shall not abridge, enlarge or modify any substantive right.” And more importantly, rulemakers can draft only “general rules.” As many commentators have emphasized, the generalizability of the Federal Rules of Civil Procedure is their original sin. This constraint handi-
caps the rulemakers’ capacity to tailor solutions for the varied circumstances that the system of civil justice demands. Hensler and Khatam make this same point when critiquing the widespread judicialization of arbitration: a one-size-fits-all approach fails to appreciate how different types of cases require different procedures.

Of course the Chief Justice of the U.S. Supreme Court occupies an important leadership role and, in that capacity, could reveal his broad vision for the administration of justice, could articulate a desired path for achieving that vision, and could hold himself and the system accountable for progress toward that vision. In fact, the Chief Justice is obliged to "submit to Congress an an-


Perhaps the fundamental concern with trans-substantive rules is that, in order for them to be trans-substantive, they must be drafted with such generality that they are not even rules at all. Stephen B. Burbank, The Costs of Complexity, 85 MICH. L. REV. 1463, 1474 (1987) (“Many of the Federal Rules authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense.”). This creates a paradox where the rule’s lack of direction authorizes judicial discretion that itself undermines the goal of trans-substantivity. See Stephen N. Subrin, Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure, 46 Fla. L. REV. 27, 46 (1994) (“The price of trying to apply the same rules to all cases inevitably leads to general, vague, and flexible rules . . . provide very little guidance for the bar or bench.”); Jay Tidmarsh, Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power, 60 GEO. WASH. L. REV. 1683, 1747 (1992).

90 Hensler & Khatam, supra note 1, at 383–87, 394–96, 406–07, 411–16. Unlike the constraint on federal rulemaking, the creeping judicialization of arbitration is de facto uniformity, not de jure.

91 The Chief Justice has something of a bully pulpit. He can lobby Congress for funding or other procedural reform, but cannot pass the necessary legislation himself. He can influence the content of judicial education, but the judges do not necessarily need to follow his instruction. He can appoint the members of committees who write procedural rules, but the rule-makers have their own agendas. He can, through case law, introduce judicial reform, but only when he can persuade a majority of the Court to join him. He does not possess a bureaucratic infrastructure that can be deployed reliably to achieve some desired civil justice reform.
nual report of the proceedings of the Judicial Conference and its recommendations for legislation.” Unfortunately, his “Year-End Reports on the Federal Judiciary” tend to be brief and are focused on one (or very few) narrow theme(s). To the extent that the Chief Justice has a vision for the civil justice system, he does not put it in these Reports.

CONCLUSION

If arbitration is good for something, it is for cases with factual circumstances like those in The Bremen. In that case, as reflected in all six of the key facts, the parties knowingly and voluntarily bargained away their right to go to court in exchange for something else. Contemporary arbitration case law is unmoored even from that type of inquiry.

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95 I am open to the possibility that it may not be. See supra note 25.
To be sure, some form(s) of arbitration could be a component of our ongoing effort to ensure access to justice. But it is our formal system, not arbitration itself, that determines arbitration’s scope, role, and ultimate destiny. Indeed, contemporary “arbitration” is no less the responsibility of the formal system because it occurs informally, or in suburban office parks, or without adversarial presentations, or without showing fidelity to the substantive law—or when it does not occur at all because the obstacles to initiating arbitration prevent parties from vindicating their rights. Arbitration occurs not merely in the shadow of formal adjudication; arbitrations occur under the auspices of a formal system that must be held accountable.

Structural hurdles complicate procedural reform, but the administration of a system of civil justice requires more than faithful stewards. We need empirical data, honest critics, obsessive planners, and creative problem-solvers.

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98 See supra notes Parts II, III and accompanying text.

99 See supra notes 8, 50 and accompanying text.

100 See supra note 3 and accompanying text.

101 See supra notes 62–94 and accompanying text.

102 Accord Hensler & Khatam, supra note 1, at 386–87.