

RESPONSE: PUBLIC LITIGATION, PRIVATE ARBITRATION?

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How should disputes be allocated between litigation and arbitration? Given strong incentives for many actors to arbitrate everything, the question turns fundamentally on the scope of arbitration under the applicable law. In Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication, Professor Deborah Hensler and Damira Khatam posit that the “public” or “private” nature of a dispute provides the key to whether it belongs in arbitration. While arbitration of private disputes is ok, disputes with “public policy dimensions” belong in the courts. Hensler and Khatam therefore suggest that Congress override Supreme Court decisions mandating arbitration of employment and consumer disputes, which, they contend, would restore domestic arbitration to its proper sphere.

But can disputes really be divided into public and private categories that provide the key to whether they belong in arbitration? This Response suggests that on close examination it is exceedingly difficult to identify a reliable proxy for the public or private nature of a dispute. The absence of such a proxy suggests there is an inescapably political dimension to how disputes are allocated between litigation and arbitration. Whether a category of disputes should be heard in a public court because the disputes impact the public interest turns out to depend on contested judgments about where the public interest lies. This, in turn, suggests a more fundamental reason for Congress to revisit the scope of arbitration under the FAA. If the allocation of disputes between litigation and arbitration is an inescapably political question, it should ideally be addressed by an institution accountable to democratic politics.

INTRODUCTION

Professor Deborah Hensler and Damira Khatam’s engaging survey of the development of domestic, international, and investor-state¹ arbitration makes a trio of contributions to our understanding of this important form of dispute resolution procedure.

First, their article provides a valuable reminder that, although we use “arbitration” to refer to any dispute resolution system where “private decision-makers outside a public court system” deliver “a binding adjudication” of the

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¹ See generally Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 381 (2018).

parties' claims,² the term actually refers to several distinct systems, each with its own basis of authority, procedures, and external constraints. And within each form of "arbitration," we find many dispute resolution systems that spread like branches on the tree of life once parties' authority to bind themselves to arbitrate is recognized.³

Second, the article demonstrates that, notwithstanding differences in the formal legal authorities that underpin different types of arbitration, domestic, international, and investor-state arbitration have developed in a similar way. After arbitration initially was used to resolve quintessentially "private" disputes, its scope (in all these areas) expanded to include "disputes with [] public policy dimensions."⁴ This expansion led parties who were subject to arbitration agreements as well as external constituencies to demand that arbitration adopt court-like procedures—that is, that arbitration "judicialize."⁵ With some notable exceptions,⁶ institutions responsible for the design of arbitral procedure assented to demands for judicialization. The result was a transformation in arbitration: a private system that delivered quick judgments with little process became a system of private courts that, to varying degrees, followed the procedures of their public counterparts.

Third, drawing on the observation that arbitration's changing scope has "blurr[ed] the line between private and public [adjudication]," the article asks whether something has not been lost on the path of arbitration's evolution.⁷ Where we are dealing with a genuinely private dispute, Hensler and Khatam ask, shouldn't the parties be allowed to trade accuracy, fairness, and transparency for speed, finality, and the benefit of having disputes resolved by a subject-matter expert? On the other hand, Hensler and Khatam argue that where a dispute has "public policy dimensions," it should be resolved in court, where it will be decided by a public official whose decision sets a precedent for future cases. Focusing on domestic arbitration, they propose that Congress "reverse the [Supreme] Court's policies with regard to employment and consumer arbi-

² *Id.* at 387.

³ In the United States, major forms of arbitration include traditional business-to-business arbitration, securities arbitration, franchise arbitration, employment arbitration, and commercial arbitration. Each is the subject of its own body of jurisprudence and case law. It should be noted, however, that evolutionary procedural development is not unique to arbitration. *Cf.* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 784-88 (2017) (describing scenarios where actors devised "ad hoc" dispute resolution procedures to address procedural problems that arose in particular cases).

⁴ Hensler & Khatam, *supra* note 1, at 386-87.

⁵ *Id.* at 394-96, 406-07, 411-16.

⁶ *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013) (holding that an agreement to arbitrate need not preserve incentives for private civil litigation that are available in public court, provided the agreement does not violate the express terms of a federal law); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011) (concluding that the Federal Arbitration Act "prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.>").

⁷ Hensler & Khatam, *supra* note 1, at 381, 386.

tration.”⁸ By restricting arbitration to “the purely commercial sphere,” Congress “could re-define the boundary between private arbitration and public adjudication and preserve each for its most appropriate uses.”⁹

But can disputes really be divided into “public” and “private” categories? Is it true that, in the domestic context, the public or private nature of a dispute supplies the key to determining whether it is appropriate for arbitration? In this response, I suggest that on close examination it is exceedingly difficult to identify a reliable proxy for the public or private nature of a dispute—and with it, the propriety of arbitration on Hensler and Khatam’s view. The absence of a reliable proxy for the public or private nature of a dispute suggests a deeper reason for Congress to revisit the scope of arbitration under the Federal Arbitration Act (FAA) than the reasons Hensler and Khatam consider. The allocation of disputes between litigation and arbitration depends on contested judgments about the public interest in judicial resolution of particular claims. Ideally, those judgments would be made by a branch of government that is responsive to democratic politics rather than through judicial exegesis of the FAA.

I begin a step removed from Hensler and Khatam’s proposal that Congress reverse the Supreme Court’s cases expanding consumer and employment arbitration and describe the difficulties with the proxy U.S. law historically used to identify the public or private nature of a dispute—the presence of statutory claims. I then consider other possible proxies for the public or private nature of a dispute, including Hensler and Khatam’s distinction between commercial and non-commercial disputes, and find them equally lacking. The lack of good proxies for the public or private nature of a dispute suggests there is an inescapably political dimension to how disputes are allocated between litigation and arbitration. That, in turn, suggests a need for greater congressional involvement in choices about the scope of the arbitration under the FAA. Because the allocation of disputes between arbitration and litigation turns on inescapably political judgments about the institutions and procedures used to enforce the law, it is difficult to see why those choices should be made by the Supreme Court alone.

I. THE PUBLIC INTEREST IN JUDICIAL RESOLUTION OF STATUTORY CLAIMS

For most of the twentieth century, U.S. law allocated disputes between litigation and arbitration based on the presence of absence or statutory claims.¹⁰ It appears that until the 1950s no party thought to argue that federal statutory claims were subject to arbitration under the FAA.¹¹ When a brokerage argued

⁸ *Id.* at 423.

⁹ *Id.*

¹⁰ For purposes of this discussion, I assume that a dispute is covered by an agreement to arbitrate that is valid as a matter of contract law.

¹¹ *See Wilko v. Swan*, 201 F.2d 439, 441 (2d Cir. 1953) (describing the arbitrability of claims under section 12 of the Securities Act of 1933 as “an interesting question of statutory construction said to be of first impression”); *see also* Margaret L. Moses, *Statutory Micon-*

in *Wilko v. Swan* that claims under section twelve of the Securities Act of 1933 were arbitrable, the Supreme Court rejected the argument in terms which suggested that federal statutory claims could never be arbitrated.¹²

Wilko's exclusion of statutory claims from arbitration was based on the idea that claims to enforce regulatory statutes are qualitatively different from the type of commercial disputes merchants had long arbitrated. The prototypical dispute in arbitration was a claim for breach of contract, which requires the arbitrator to apply the common law of contracts in light of trade practice and the arbitrator's business experience.¹³ In contrast, Congress creates private rights of action to accomplish public regulatory goals through private civil litigation.¹⁴ The public interest in statutory claims, *Wilko* reasoned, requires that they be resolved in court.¹⁵

The difficulties with using the presence of statutory claims to identify the public interest in a dispute are illustrated by *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the landmark 1985 case that abandoned *Wilko's* view that statutory claims are categorically ineligible for arbitration.¹⁶ The case arose out of the breakdown in the business relationship between Mitsubishi, the Japanese car manufacturer, and Soler Chrysler-Plymouth, a Puerto Rican dealership.¹⁷ In the years before the dispute, Soler conducted a brisk business selling Mitsubishi vehicles to the famously car-loving people of Puerto Rico.¹⁸ Expecting that the good times would continue to roll, Mitsubishi and Soler entered into an agreement that obligated Soler to buy and re-sell even more vehicles than it had sold in the coming years. But the market slowed, and Soler found itself unable to sell all of the cars that it had committed to buy.¹⁹

struction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress, 34 FLA. ST. U. L. REV. 99, 139 (2006) (noting that no witnesses during congressional hearings on the FAA discussed arbitration of statutory claims).

¹² See *Wilko v. Swan*, 346 U.S. 427, 435–37 (1953) (reasoning that the effectiveness of the Securities Act depended on the Act being enforced via “judicial proceedings,” and that allowing claims to be arbitrated was inconsistent with the Securities Act because the move from litigation to arbitration would weaken the Act’s “protective provisions”).

¹³ See Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 431–32 (2010).

¹⁴ See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 3–4 (2010); see also Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 33 (1982); David L. Noll, *Regulating Arbitration*, 105 CAL. L. REV. 985, 1010–12 (2017).

¹⁵ See *Wilko*, 346 U.S. at 438.

¹⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 665 (1985). Prior to *Mitsubishi*, the Supreme Court had ordered arbitration of a federal statutory claim in a single case, *Scherk v. Alberto-Culver Co.*, which the Court described as arising out of a “truly international” merger agreement. 417 U.S. 506, 515 (1974).

¹⁷ *Mitsubishi Motors Corp.*, 473 U.S. at 616–17.

¹⁸ *Id.* at 617. On Puerto Rico’s car culture, see GUILLERMO GIUCCI, *THE CULTURAL LIFE OF THE AUTOMOBILE: ROADS TO MODERNITY* 103 (Anne Mayagoitia & Debra Nagao trans. 2012).

¹⁹ *Mitsubishi Motors Corp.*, 473 U.S. at 617.

The dealership attempted to renegotiate its purchase agreement, but Mitsubishi refused, presumably because it relies on dealers' orders to plan production.²⁰ Soler then proposed to "transship" the cars it could not sell to the continental United States, which has a larger new car market than Puerto Rico.²¹ Mitsubishi again refused the request—this time because cars produced for the Puerto Rican market do not have heaters and defoggers needed to operate in cold weather.²² Invoking an arbitration clause in Soler's dealer agreement, Mitsubishi began an arbitration against Soler before the Japan Commercial Arbitration Association, and filed an action to compel Soler to arbitrate in the U.S. District Court for the District of Puerto Rico.²³

It is here that a statutory claim entered the case. At the time, First Circuit precedent did not allow arbitration of Sherman Act claims on the theory that, just as "issues of war and peace are too important to be vested in the generals['] decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community."²⁴ In response to Mitsubishi's motion to compel arbitration under the FAA, Soler asserted a Sherman Act counter-claim, arguing that Mitsubishi's refusal to allow it to transship the excess cars to the continental United States was an unlawful restraint on trade.²⁵

The public interest in Mitsubishi's dispute with Soler was vanishingly small. At bottom, the dispute went to which party, Mitsubishi or Soler, bore the cost of Soler's ill-advised bet that there would continue to be high demand for Mitsubishi vehicles in Puerto Rico. Soler's Sherman Act counter-claim bordered on the frivolous, and appears to have been asserted in an effort to ensure that the Puerto Rico district court rather than the Japanese arbitral panel would hear the merits of the dispute. Notwithstanding the Sherman Act claim, this was not a dispute that many people besides Mitsubishi or Soler would have cared about. Seen from this perspective, one can understand the Supreme Court's conclusion in *Mitsubishi* that statutory claims are not inherently unsuitable for arbitration.²⁶

At the same time, cases that do not involve claims under a federal regulatory statute may implicate the public interest. For example, *In re Checking Ac-*

²⁰ *Id.*

²¹ *Id.* at 617–18.

²² *Id.* at 618, n.1.

²³ The clause provided: "All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id.* at 617–19.

²⁴ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 162 (1st Cir. 1983), *rev'd*, 473 U.S. 614 (1985).

²⁵ *Mitsubishi Motors Corp.*, 473 U.S. at 618–20.

²⁶ See *id.* at 639–40 ("[W]e require this representative of the American business community to honor its bargain by holding this agreement to arbitrate enforceable in accord with the explicit provisions of the Arbitration Act" (citations and alterations in original omitted)).

*count Overdraft Litigation*²⁷ involved banks' practice of reordering checking-account transactions before they were posted to customers' accounts. Virtually all banks charge a fee when a customer attempts a transaction that she lacks adequate funds to complete.²⁸ By reordering the transactions customers performed on a given day from largest to smallest before they were posted to customers' accounts, banks were able to charge many times more overdraft fees than if transactions were posted in chronological order.²⁹ Plaintiffs in the Overdraft litigation alleged that this practice breached the duty of good faith and fair dealing in banks' customer agreements.³⁰ They sought damages for banks' violation of this duty and state unfair competition laws.³¹

Even though the Overdraft litigation did not involve claims under federal regulatory statutes, the case involved matters of obvious public concern. After Congress enacted the 2010 Dodd-Frank Act, overdraft fees reportedly became a major source of revenue to retail banks, creating an incentive for banks to maximize those fees in any way possible.³² The practice at issue in the litigation affected every checking account customer in the United States who has ever overdrawn her account. The forward-looking relief that plaintiffs sought—an injunction directing banks to stop reordering transactions or provide better disclosures—potentially affected bank customers who had never overdrawn their account. Yet, because the plaintiffs chose not to assert federal statutory claims, the case would have been arbitrable under pre-Mitsubishi law if the requirements for arbitration were otherwise met.

As *Mitsubishi* and the Overdraft litigation illustrate, the presence or absence of statutory claims is not a reliable signal of whether a dispute affects the public interest. On one hand, statutory claims may be insubstantial, asserted for strategic reasons, or peripheral to the central dispute in a case. On the other hand, a pure “private law” dispute can affect a large segment of the public and raise important questions about the regulation of business and the rights of firms, consumers, and employees. Moreover, parties may choose not to assert statutory claims for idiosyncratic reasons (avoiding removal to federal court, limiting the scope of discovery, etc.), even though statutory claims could be asserted without violating the applicable rules of procedure and canons of professional responsibility.

²⁷ See *Johnson v. Keybank Nat'l Ass'n*, 754 F.3d 1290, 1293 (11th Cir. 2014).

²⁸ See THE PEW CHARITABLE TRUSTS, *Overdrawn: Persistent Confusion and Concern About Bank Overdraft Practices* 8 (June, 2014), http://www.pewtrusts.org/~media/Assets/2014/06/26/Safe_Checking_Overdraft_Survey_Report.pdf [https://perma.cc/8ECL-R9WG].

²⁹ See *Johnson*, 754 F.3d at 1293.

³⁰ See, e.g., Class Action Complaint at 16, *Kennedy v. Wells Fargo Bank N.A.*, No. 1:11-CV-21313 (N.D. Cal. Mar. 11, 2011).

³¹ *Id.* at 20–21.

³² See Jessica Silver-Greenberg & Michael Corkery, *Rule Could Let Consumers Sue Financial Firms*, N.Y. TIMES, July 11, 2017, at A1.

II. OTHER POTENTIAL CRITERIA FOR ASSESSING THE PUBLIC INTEREST IN DISPUTES

Difficulties with using the presence or absence of statutory claims to identify the public interest in a dispute raise the question of whether an alternative proxy exists that can identify disputes that are inappropriate for arbitration because they implicate the public interest. The obvious alternatives, however, fare no better than the presence or absence of statutory claims in separating “public” disputes from “private” ones.

A. *Quality of Contractual Assent*

One alternative suggested by Hensler and Khatam is to look at the quality of parties’ agreement to arbitrate. Hensler and Khatam contend that, if Congress overrode Supreme Court decisions allowing arbitration of consumer and employment disputes, it would limit arbitration to “purely commercial” disputes that do not affect the public interest.³³ This proposal rests on two assumptions: first, that parties genuinely agree to arbitrate commercial disputes, and second, that disputes where the parties have genuinely agreed to arbitrate are unlikely to affect the public interest. Agreements to arbitrate non-commercial disputes, by contrast, are less likely to be supported by genuine contractual disputes.³⁴ And because those disputes involve parties with unequal bargaining power, they are comparatively more likely to raise issues that affect the public interest than commercial disputes.³⁵

The first assumption—that agreements to arbitrate commercial disputes are based on stronger contractual assent than “agreements” to arbitrate consumer and employment disputes—is undoubtedly correct. When consumers and employees agree to arbitrate legal disputes, they do so via boilerplate clauses in standard-form contracts of adhesion that few consumers notice or understand.³⁶ Even apologists for consumer arbitration concede that the “assent” to arbitrate

³³ See Hensler & Khatam, *supra* note 1, at 423.

³⁴ See *id.* at 422 (“[I]n extending enforcement of arbitration agreements to employment and consumer contracts of adhesion that *require* arbitration, the U.S. Supreme Court has honored the principle [that parties should be permitted to agree to arbitrate] in word only.”).

³⁵ See *id.* at 393 (“[A]rbitration was no longer applied solely to relatively evenly-matched commercial partners, but also to wildly *unequal* employees and employers, consumers and corporations, and patients and health care providers.”).

³⁶ A seminal early study is Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 L. & CONTEMP. PROBS. 55 (2004). For later studies, see, e.g., CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015); Yannis Bakos, et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014).

reflected in such contracts is weaker than the assent to arbitrate in a commercial contract, which will generally be negotiated by counsel.³⁷

But the second assumption—that strong contractual assent to arbitrate indicates the public interest in a dispute is weak—is shakier. On one hand, cases in which sophisticated parties genuinely agree to arbitrate can raise issues of intense public concern. If Apple, Google, and Microsoft agreed to arbitrate all claims against one another for patent infringement, their agreement could not be attacked on the ground that the parties did not genuinely agree to arbitrate. Still, the public would justifiably be interested in the companies' disputes, insofar as those revealed information about the validity and scope of patents that the companies held.³⁸ On the other hand, one can imagine situations in which the public interest supports arbitration even if one side's assent to arbitration is weak. In a fascinating article, Professor Jill Gross documents the origins of domestic securities arbitration in the New York Stock Exchange's requirement that brokers agree to arbitrate customers' claims.³⁹ Based in part on fears that nineteenth-century courts were too slow to provide effective relief to defrauded consumers, the NYSE required brokers to arbitrate customers' claims before an "arbitration committee" of its own members.⁴⁰ This alternative forum, the exchange reasoned, would increase investors' confidence in exchange-traded securities, even if it meant that individual brokers would be worse off than they would be if customers were forced to litigate in court.⁴¹

Brokers' "assent" to arbitrate customers' claims before the NYSE's arbitration committee was as weak as customers' "assent" to arbitrate claims in modern consumer contracts. A broker who wanted to trade securities via the exchange was presented with a take-it-or-leave-it-offer: agree to arbitration, or take your business elsewhere. But requiring arbitration ensured that customers' claims would be adjudicated in a timely manner. In doing so, the exchange's system of "forced" arbitration advanced the public interest by increasing investor confidence in the stock market. Similar considerations underpin an array of federal statutes that encourage arbitration of claims related to public programs

³⁷ See Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 883 (2014) ("[T]he fine print is not a contract. There is no agreement to it, no real consent, not even 'blanket assent.' It is nothing but paperwork. . .") (reviewing MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013)).

³⁸ Based on similar concerns, the Patent Act provides that an arbitral award resolving a claim for patent infringement is not effective until it is delivered to the Director of the Patent and Trademark Office, and requires the office to enter the award in the patent's prosecution history. See 35 U.S.C. §§ 294(d)–(e) (2012).

³⁹ See Jill Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 174–75 (2016).

⁴⁰ See *id.* at 176.

⁴¹ See *id.* (concluding that the exchange mandated arbitration "to ensure that industry norms would be enforced, even if those norms were unlawful and not enforceable in court, and secondarily to provide a rapid resolution of a dispute whose value changed quickly as the stock market rose or fell").

and claims against the government.⁴² The public interest in a dispute, these statutes suggest, does not necessarily track the quality of the contracting parties' assent to arbitrate.

B. *Parties*

Another proxy that might be used to determine whether a dispute affects the public interest looks to the presence of public institutions and officials as parties.⁴³ If a public agency or officer was a party to a dispute, that fact would be taken as conclusive evidence of the dispute's publicness, thereby excluding the dispute from arbitration. The law might even exclude a dispute from arbitration if a government actor participated as an intervener or *amicus curiae*, allowing the public interest in a dispute to be assessed on a case-by-case basis, based on government officials' assessment of the public interest in particular cases.⁴⁴

The difficulty with assessing the public interest in a dispute based on the presence of government parties is that the approach is wildly under-inclusive. No government institution or agency participated in the Overdraft litigation, even though the case touched on matters of obvious public concern. The list of similar cases is virtually limitless. Every major corporate dispute,⁴⁵ every case alleging that a national employer engaged in a pattern and practice of employment discrimination,⁴⁶ and every class action alleging that a corporation defrauded a large number of people⁴⁷ raises issues that are important to the public.

⁴² See, e.g., 5 U.S.C. § 572(a) (providing generally that “[a]n agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding”); 49 U.S.C. § 11708 (authorizing the Surface Transportation Board “to establish a voluntary and binding arbitration process to resolve rail rate and practice complaints subject to the jurisdiction of the Board”). See also *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1229 (2015) (discussing mandatory arbitration of rail service metric disputes under the Passenger Rail Investment and Improvement Act of 2008, 122 Stat. 4907).

⁴³ U.S. arbitration law currently follows a version of this approach. Under *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295–98 (2002), a federal administrative agency such as the Equal Employment Opportunity Commission may pursue victim-specific relief on behalf of a party who is bound to arbitrate disputes, even if the agency pursues the exact same relief (reinstatement, backpay, etc.) that a plaintiff would pursue in arbitration. The formal justification for this rule is that the agency is asserting a cause of action that belongs to it, and is not bound by private parties' agreement to arbitrate.

⁴⁴ See *EEOC v. Doherty Enter., Inc.*, 126 F. Supp. 3d 1305, 1306 (S.D. Fla. 2015) (discussing the Equal Employment Opportunity Commission's efforts to invalidate arbitration agreements used as part of a pattern and practice of employment discrimination). See also Zachary D. Clopton, *Class Actions and Executive Power*, 92 N.Y.U. L. REV. 878, 886–87 (2017); David L. Noll, *Deregulating Arbitration*, 30 LOY. CONS. L. REV. 51, 69 n.66 (2017). On the design of agency pre-screening mechanisms, see generally David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 644 (2013).

⁴⁵ See, e.g., *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 327 (3d Cir. 2015).

⁴⁶ See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

⁴⁷ See, e.g., *Low v. Trump U., LLC*, 246 F. Supp. 3d 1295 (S.D. Cal. 2017).

But such cases are regularly litigated without the involvement, as party, intervener, or amicus curiae, of any governmental actor.

C. *Third-Party Effects*

Still another alternative would be to allocate disputes between litigation and arbitration based on a dispute's likely effects on third parties—that is, to ask whether a dispute is likely to produce externalities.⁴⁸ Following this approach, a dispute with effects that were limited to the named parties would be considered “private” and eligible for arbitration. Disputes that predictably affected third parties would not. To calibrate the allocation of business between litigation and arbitration, the law might insist that third-party effects be non-trivial, substantial, serious, or attain some other threshold.

In a legal system that follows the rule of stare decisis, however, every case is pregnant with the potential to set a precedent that affects the rights of the public at large. Consider *Mitsubishi*. What began as an insignificant dispute about a car dealer's excess inventory became a vehicle for the Supreme Court to reverse the long-standing view that the FAA did not contemplate arbitration of statutory claims.⁴⁹ It strains belief to think that, when Mitsubishi filed its suit seeking to compel Soler to arbitrate, it could anticipate the effects of its lawsuit. A defender of the externalities approach might object that arbitral awards can never affect third parties, because they are not entitled to precedential effect.⁵⁰ But courts and arbitrators increasingly reject this view.⁵¹ As Hensler and Khatam observe, “the publication of awards facilitates the development of a commercial arbitration jurisprudence, wherein arbitrators can look to awards in previously decided similar cases as precedents.”⁵²

CONCLUSION: THE POLITICS OF FORUM CHOICE

The “public” or “private” nature of a dispute provides an intuitively appealing way of sorting cases between litigation and arbitration. But on close examination, it is difficult to identify a proxy that reliably captures a dispute's public or private character. Neither the presence of statutory claims, the quality

⁴⁸ For a doctrinal antecedent to this approach, see *Nw. Nat. Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990) (“We are persuaded that the only good reason for treating a forum selection clause differently from any other contract (specifically, from the contract in which the clause appears) is the possibility of adverse effects on third parties.”). See also David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649 (2012) (proposing that the enforceability of arbitral class-action waivers turn on whether they permit substantial unremedied wrongdoing).

⁴⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁵⁰ See W. Mark C. Weidenmaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091–92 (2012) (describing the traditional view that arbitral awards are not entitled to precedential effect).

⁵¹ See *id.* at 1116.

⁵² See Hensler & Khatam, *supra* note 1, at 408.

of the parties' assent to arbitrate, the presence of public actors as parties, or the likelihood that a dispute will affect third parties reliably signals the public interest in a dispute—and thus, its suitability for arbitration on Hensler and Khatam's view.

The lack of good proxies for the public or private character of a dispute suggests a more basic reason for Congress to engage questions about the scope of arbitration under the FAA than the ones Hensler and Khatam consider. The problem is not that consumer and employment disputes necessarily affect the public interest, or that the FAA's legislative history shows unequivocally that Congress intended those disputes to be resolved in court.⁵³ Rather, the allocation of disputes between litigation and arbitration depends on contested—and inescapably political—judgments about the public interest in judicial resolution of particular disputes. Because of their accountability to democratic politics, those matters are appropriately resolved in the political branches.

Intriguingly, Congress has begun to re-engage the scope of arbitration under the FAA after a long period in which it largely ceded control of the issue to the Supreme Court.⁵⁴ This development is most visible in the area of financial regulation. In the 2010 Dodd-Frank Act Congress prohibited the use of arbitration in domains where it was thought to raise risks of abuse, and authorized the Securities and Exchange Commission and Consumer Financial Protection Bureau to regulate the use of arbitration in broker-dealer and consumer financial contracts.⁵⁵ More recently, the 115th Congress repealed the Consumer Financial Protection Bureau's arbitration rule, which would have prohibited the use of arbitral class action waivers in consumer financial contracts, via the Congressional Review Act.⁵⁶

The merits of this legislation regulating and then de-regulating the use of arbitration can certainly be debated.⁵⁷ But from the perspective of democratic politics, Congress's engagement with the scope of arbitration under the FAA is an improvement over the court-dominated status quo ante. Political actors have long recognized that the institutions and procedures through which the law is enforced are central to its meaning. In addressing the arbitrability of its laws,

⁵³ See Hensler & Khatam, *supra* note 1, at 423 & n.73.

⁵⁴ See generally Noll, *supra* note 44.

⁵⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376 (2010) (authorizing Securities Exchange Commission to regulate broker-dealers' use of arbitration in customer agreements); *id.* § 922 (prohibiting arbitration of certain whistleblower claims); *id.* § 1028 (authorizing Consumer Financial Protection Bureau to regulate consumer financial companies' use of arbitration); *id.* § 1057(d) (prohibiting arbitration of certain whistleblower claims created by Dodd-Frank); *id.* § 1414 (prohibiting use of arbitration clauses in residential mortgage contracts).

⁵⁶ H.R.J. Res. 111, 115th Cong. (2017).

⁵⁷ See David L. Noll, *The Dangerous Consequences of Repealing the CFPB's Arbitration Rule*, REG. REV. (Nov. 6, 2017), <https://www.theregreview.org/2017/11/06/noll-repealing-arbitration-rule/> [<https://perma.cc/HXN7-Y35Z>].

Congress makes clear the political dimensions of this choice—and takes ownership of it.