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.[1] 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 contem-

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* *Cf.* EDWIN STARR, *War*, on WAR & PEACE (Gordy Records 1970) ("War, what is it good for? Absolutely nothing!").

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[1] 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).

[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 Knepp v. Credit Acceptance Corp. (*In re* Knepp), 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.[4] But unlike kudzu, which is part of a fairly uniform genus, the many species of arbitration are heterogeneous.[5]

> 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.[6]

Indeed, arbitration has few, if any essential qualities.[7]

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.[8] But

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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").

[4] *See generally* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008); Jessica Silver-Greenberg & Michael Corkery, *A 'Privatization of the Justice System': In Arbitration, a Bias Towards Business*, N.Y. TIMES, Nov. 2, 2015, at A1.

[5] 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. CARBONNEAU, 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").

[7] *See* Michael A. Landrum & Dean A. Trongard, *Judicial Morphallaxis: Mandatory Arbitration and Statutory Rights*, 24 WM. MITCHELL L. REV. 345, 357 (1998) (noting that the Supreme Court "blurs the essential qualitative differences" between adjudication and arbitration); Niall Mackay Roberts, Note, *Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act*, 49 U.C. DAVIS L. REV. 1547, 1559 (2016) ("Arbitration is undefined in federal law. In their haste to serve the purposes and objectives of the [Federal Arbitration Act], federal courts rarely pause to consider a definition."). Hensler and Khatam offer a conventional definition of arbitration, which excludes little: "[A] binding adjudication of a dispute by private decision-makers outside a public court system." Hensler & Khatam, *supra* note 1, at 387 (citing Jean R. Sternlight, *Is Binding Arbitration a Form of ADR: An Argument That the Term ADR Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97 (2000)).

[8] *See generally* William W. Park, *Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT'L 279 (2003); Judith Resnik, *Diffusing Disputes: The Public*

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 legislatures[13]),

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in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 YALE L.J. 2804 (2015) (recognizing flexibility as a principal virtue of arbitration); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793 (2014).

[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.

[10] For commentary discussing how arbitration competes with courts, see Erin O'Hara O'Connor & Peter B. Rutledge, *Arbitration, the Law Market, and the Law of Lawyering*, 38 INT'L REV. L. & ECON. 87, 90–91 (2014); Paul Rose, *Developing a Market for Employment Discrimination Claims in the Securities Industry*, 48 UCLA L. REV. 399, 423 (2000). For commentary discussing how courts (especially specialized courts) compete with arbitration, see Christopher R. Drahozal, *Business Courts and the Future of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 491, 491–92 (2009); Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 50 n.277 (1997).

[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).

[13] In the international context, treaties create the requisite state authority; in the United States, treaties signed by the President must be ratified by the Senate. *See, e.g.*, Convention on the Settlement of Investment Disputes Between State and Nationals of Other States ("ICSID"), *opened for signature* Aug. 27, 1965, 17 U.S.T. 1270 (entered into force Oct. 14, 1966) (codified at 22 U.S.C. §§ 1650–1650a); The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), *opened for signature* June

participation in arbitration would be optional,[14] arbitrators would have no meaningful authority,[15] and arbitration awards would be non-binding and unenforceable.[16] Thus, at its core, the enterprise of arbitration enjoys neither subjective agency nor self-determination.[17] To paraphrase Maitland, arbitration without courts would be a "castle in the air, an impossibility."[18]

10, 1958, 21 U.S.T. 2517 (entered into force June 7, 1959) (codified at 9 U.S.C. §§ 201–208).

[14] Parties who enter into arbitration agreements could renege and instead file formal actions; instead, courts compel arbitration. *See, e.g.*, CompuCredit Corp. v. Greenwood, 565 U.S. 95, 103–04 (2012); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 223 (1985).

[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 said 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.

9 U.S.C. § 7 (2012). *See also* Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124, 125 (2d Cir. 1984) ("The fact that a dispute is to be arbitrated . . . does not absolve the court of its obligation to consider the merits of a requested preliminary injunction"); Lever Bros. Co. v. Int'l Chem. Workers Union, Local 217, 554 F.2d 115, 117 (4th Cir. 1976) (enjoining party from relocating its plant pending the outcome of the arbitration).

[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) ("[O]nce 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-*

Arbitration is thus not a competitor nor even an alternative to formal adjudication; rather it is a partner of formal adjudication.[19] 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.[20]

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,[21] 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.[22] There is a finite number of judges, staffers, courtrooms, and hours. And as water utilities must resolve the competing demands of farmers, commercial users,

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pute Resolution, 85 CAL. L. REV. 577 (1997); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

[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.").

[19] *See* Vicki Zick, Comment, *Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration*, 82 MARQ. L. REV. 247, 247 (1998) (describing arbitration as the courts' "junior varsity justice system").

[20] Reference to "the state" in this context means primarily the federal government, because the Federal Arbitration Act (FAA) preempts conflicting state laws. *See* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406–07 (1967). For history and context about the FAA, see generally Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

[21] Scholars credit Columbia University political scientist Wallace Sayre for saying: "Public and private management are fundamentally alike in all unimportant respects." *See generally* Graham T. Allison, *Public and Private Management: Are They Fundamentally Alike in All Unimportant Respects?*, *in* CLASSICS OF PUBLIC ADMINISTRATION 387 (Jay M. Shafritz & Albert C. Hyde eds., 7th ed. 2012). *See* John J. DiIulio, Jr., *Measuring Performance When There Is No Bottom Line*, *in* BUREAU OF JUSTICE STATISTICS, PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 142, 142–43 (1993), https://www.bjs.gov/content/pub/pdf/pmcjs.pdf [https://perma.cc/C4WN-7DYN].

[22] *See* Thomas O. Main, *Procedural Constants: How Delay Aversion Shapes Reform*, 15 NEV. L.J. 1597, 1605 (2015) ("The courts are a shared public resource that provides a forum for the resolution of disputes.").

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,[23] so I discuss just one more case to offer perspective on the *when* question.

For most of American history, courts viewed arbitration skeptically.[24] 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?[25] 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.[26] This sentiment began to change, how-

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[23] *See* Hensler & Khatam, *supra* note 1, at 387–400.

[24] *See* Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1251–52 (2011).

[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, Separa-*

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

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tion of Powers, and the Limits of the Judicial Function, 94 YALE L.J. 71, 74–75 (1984) (arguing that federal courts cannot abstain from cases that fall within Congressionally-conferred jurisdiction).

[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)).

[31] *See Scherk*, 417 U.S. at 518–19 (discussing *The Bremen*, 407 U.S. 1). *See also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 698 (2010) (Ginsburg, J., dissenting); Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 534 (1995).

[32] Although *The Bremen* precedent is limited by its facts to admiralty facts federal courts applied *The Bremen* to a variety of federal questions. *The Bremen*, 407 U.S. at 2–3. *See* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 293–96 (1988). *See generally* H. Allen Blair, *Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract*, 95 NEB. L. REV. 787, 823 (2017) (describing how "*The Bremen* revolutionized private procedural ordering"); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1095 (2002) (referring to *The Bremen* as a "sea-change" in the law). For a more nuanced account of *The Bremen*'s place in the development of party-autonomy jurisprudence, see David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 988–94 (2008).

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).[33] 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.[34] During the tow, a severe storm in the Gulf of Mexico damaged the rig, causing its legs to break off.[35] At Zapata's direction, Unterweser's deep-sea tug, The Bremen, towed the rig from international waters to Tampa Bay, Florida.[36]

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.[37] 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.[38]

In its landmark decision, the Supreme Court enforced the clause.[39] Six key facts framed that decision:

- This transaction was "far from routine."[40] It contemplated "the tow of [an oil-drilling rig, an] extremely costly piece of equipment," to a destination six thousand miles away.[41]
- The contract was an "arm's-length [transaction] by experienced and sophisticated businessmen" with "equal . . . bargaining stature."[42]

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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.").

[38] *The Bremen*, 407 U.S. at 6–7.

[39] In fact, the Court vacated the lower court's order and remanded the case to the district court "for further proceedings consistent with [its] opinion." *Id*. at 20. But this is a technicality that no longer seems relevant. *See, e.g*., Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 537 (1995) (observing that in *The Bremen*, the Court "enforced a foreign forum selection clause"); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 64 n.258 (1991) (noting that, in *The Bremen*, "the Court enforced" the clause); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 55 (1992).

[40] *The Bremen*, 407 U.S. at 13.

[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.

[48] *See* ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-1 (1970–1979).

[49] Main, *supra* note 22, at 1600 (citing ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-1 (1970–1979)).

[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 adhesion[53] (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).

[51] *See* Sajida A. Mahdi, *Gateway to Arbitration: Issues of Contract Formation Under the U.C.C. and the Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods*, 96 NW. U. L. REV. 403, 403 (2001) (describing the use of standard form contracts in "ordinary, routine commercial transactions"); Michael J. Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43, 55 (1989) (describing the "banalisation of [international] arbitration"); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 934 (1999) (describing prevalence of arbitration clauses in routine transactions).

[52] *See* Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 28–29 (2004); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 53–54; Lynne Canning, Note, *Have You Volunteered to Arbitrate Today?*, 45 N.M. L. REV. 297, 340–41 (2014).

[53] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991); Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991); Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987). *See generally* Schwartz, *supra* note 52; *See also* Sternlight, *supra* note 20, at 676–77.

[54] *See* Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 895 (2008) (concluding that businesses include arbitration clauses in their contracts to preclude consumer claims). Consumers rarely file in arbitration and when they do they almost always lose or do far worse than they would have in court. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015) [hereinafter ARBITRATION STUDY]; Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIR. L. STUD. 1, 21 (2011). For more on the notion that arbitration (specifically, an arbitration clause combined with a class-action ban) is the corporations' "get out of jail free" card, see Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 KAN. L. REV. 767, 770, 776 (2012); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/C5H9-H7F8] (noting that it can be "nearly impossible for one individual to take on a corporation with vast resources," and quoting federal judge William G. Young who suggested that "business has a good chance of opting out of the legal system altogether and misbehaving without reproach.").

[55] The party who writes the arbitration clause into the contract almost always has a pre-existing relationship with the arbitration provider. The repeat-player in arbitration is also the repeat-payer (to the arbitration provider). *See* ARBITRATION STUDY, *supra* note 54, at 56–68; Stephen J. Choi et al., *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. L. & BUS. REV. 43, 58 (2014); Colvin *supra* note 54, at 21; David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 111 (2015). The effect of the repeat-player problem is controversial. *See* Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1059–60 (2009); David

statutory rights.[56] Thus, in contemporary arbitration jurisprudence, not one of *The Bremen*'s six facts is necessary to enforce an arbitration clause.[57]

To be sure, the rationing of scarce judicial resources may be a necessary evil.[58] 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.[59] In 1985 there were 273,670 new civil filings, and in 2016 there were 290,430 new civil filings.[60] 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.[61]

Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1570 (2005); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 256, 261 (2007); Stephen J. Ware, *The Effects of* Gilmer: *Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 751–53 (2001).

[56] *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 479–80 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238, 242 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616, 640 (1985); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 215, 223–24 (1985); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984). *See generally* Hensler & Khatam, *supra* note 1, at 390 & n.44; Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999).

[57] *See generally* Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383 (2008).

[58] Talk of arbitration as a "necessary evil" is rare. In fact, the virtue of consent is now so deeply imbedded in American legal thought that arbitration is often presumed to be a universal good. Strong advocates of arbitration have come from both the political left and the political right. *See* EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 11 (2006) (discussing party autonomy as a core value in arbitration); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1865 (2014) [hereinafter *Fourth Era*] (citing authorities about the liberal and conservative origins of alternative dispute resolution). For historical background about the Court's romanticism of arbitration (that rivals others' romanticism of litigation), see Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 KAN. L. REV. 795, 817–19 (2012) (noting the absence of empirical data to support the Justices' enthusiasm for arbitration); *see also* Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996).

[59] *See* ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-1 (1985–2016).

[60] ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-1 (1985); *id.* (2016).

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).

[61] 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,[62] how the disappearance of trials threatens our democracy,[63] that case management is a menace,[64] how the curtailment of class actions undermines law enforcement,[65] and that multidistrict litigation cases are devouring the dockets.[66] And those are just some of the warranted criticisms. Another batch of criticisms is familiar, even if empirically unfounded: cases take too long,[67] the civil caseload is exploding,[68] and discovery is a widespread plague.[69]

L.J. 1073 (1984); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

[62] *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1594 (2015); Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841–42 (1993); Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 276–78 (2009); Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 452 (2013).

[63] *See, e.g.*, SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES (2016); Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: A Federal Trial Judge's View*, 48 ARIZ. ST. L.J. 481, 490 (2016); Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401 (2011).

[64] *See, e.g.*, Howard M. Erichson, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117, 1123 (2009); Main, *supra* note 22, 1598–99; Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 75 (1995); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424–31 (1982); Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 509 (2016) [hereinafter *Braking the Rules*]; *Fourth Era*, *supra* note 58, at 1885–88.

[65] *See, e.g.*, Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 594 (2012); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1536–37 (2016); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 513 (2013); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 442 (2013).

[66] *See, e.g.*, Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455, 1469 (2015); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015); Judith Resnik, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1913–16 (2017).

[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.

[69] Notwithstanding the popularity of the narrative that discovery is a widespread problem, in fact, in the vast bulk of cases there is no discovery or a non-controversial amount of discovery. Discovery abuse is a serious problem in only the big cases, which constitute five percent to fifteen percent of the civil docket, but require a disproportionate amount of judicial resources. *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1432 (1994) (discovery "not a problem in the majority of federal civil cases"); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 683 (1998); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 530–31 (2001); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* 64 L. & CONTEMP. PROBS. 197 (2001); *Fourth Era*, *supra* note 58, at 1850 (citing Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 791 (1998)); Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 246–49 & nn.109, 113, 123 (1999).

[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.

[72] Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225, 232 (2009).

[73] The role of federal (and even state) regulators with respect to arbitration is explored in Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939 (2014); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. Rev. 437 (2011). For the role of administrative agencies more generally, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

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

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[74] *See generally* Theodore C. Hirt, *Current Issues Involving the Defense of Congressional and Administrative Agency Programs*, 52 ADMIN. L. REV. 1377 (2000).

[75] U.S. CONST. art. I, § 8 (allocating Congress authority to "constitute" courts).

[76] Legal Services Corporation Act of 1974, Pub. L. No. 93–355, § 1001, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996 (1977)) (an effort to promote equal access to justice for low-income Americans).

[77] *See, e.g.*, Federal Magistrates Act of 1968, Pub. L. No. 90-578, Title I, § 101, 82 Stat. 1108 (codified as amended at 28 U.S.C. §§ 631–639 (2009)) (an effort to improve the quality of justice and to expedite the disposition of the federal courts' growing caseload).

[78] *See, e.g.*, Civil Rights Attorney's Fees Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988) (an effort to encourage civil rights plaintiffs to file suits to enforce their rights). *See also* Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (codified as amended at 5 U.S.C. § 504 (1988) & 28 U.S.C. § 2412 (1988)) (allowing recovery of attorneys' fees by certain litigants who prevail in actions against the United States).

[79] *See* Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 2(1), 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658) (an effort to address caseload backlogs through "greater efficiency in achieving settlements").

[80] *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §§ 1981 & 2000e) (noting that a purpose of the Act is "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 29 U.S.C. §§ 626, 794a & 42 U.S.C. § 2000e) (responding to a Supreme Court decision by relaxing the method for calculating statute of limitations).

[81] A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 10 (1958).

> [L]egislatures 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 expertness 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.

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]

Answering the question *who* is responsible for the administration of civil justice is complicated because it is not altogether clear where Congressional authority ends and interference with the judicial function begins.[83] Overlapping

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references that defy easy interpretation"); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1441 (2008); Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1554 (2008); Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1654 (2006); Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1038 (2006); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008).

See also Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. § 476). *See generally* Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 482–83 (1997) (collecting and categorizing criticism of the CJRA); Carl Tobias, *Warren Burger and the Administration of Justice*, 41 VILL. L. REV. 505, 515–16 (1996) ("Numerous federal judges considered the Civil Justice Reform Act of 1990 to be a congressional attempt at micro-managing the courts' internal operations and, therefore, an unwarranted intrusion by a coordinate branch of government.").

See also Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C. § 78u-4(b)(1)(B)) (instituting heightened pleading requirements for plaintiffs in securities litigation). *See generally* Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 703 (1997); Stephen J. Choi, *Do the Merits Matter* Less *After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600 (2006); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 11 (2010); A.C. Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 VA. L. REV. 925, 960 (1999).

[82] 28 U.S.C. § 2072 (2012).

[83] *See generally* Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147 (2006). *See also* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1297–98 (1993) (Congress acts unconstitutionally when it "involv[es] itself deeply in the internal operations of the federal judiciary"); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 724–25 (1995) (Congressional involvement in federal rulemaking does not violate separation of powers); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1480 (1994) ("Court's implied rulemaking authority, although generally recognized, should be subservient to Congress' except where the Court exercises its power in defense of judicial authority or integrity."); Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 56 & n.263 (1997) (noting the "objection that congressional intervention in court procedures constitutes an unconstitutional intrusion upon the prerogatives of the independent Judicial Branch.").

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.[84] Its statutory mandate includes studying "the operation and effect of the general rules of practice and procedure" and proposing changes thereto.[85] 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.[86]

But more generally, the rulemaking process is also constrained in important ways. Procedural "rules shall not abridge, enlarge or modify any substantive right."[87] And more importantly, rulemakers can draft only "general rules."[88] As many commentators have emphasized, the generalizability of the Federal Rules of Civil Procedure is their original sin.[89] This constraint handi-

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justice system to provide proper and timely judicial relief for aggrieved parties." S. REP. NO. 101-416, at 1 (1990). In the final form of the Act, however, the finding was amended to provide that "the Congress and the executive branch" shared responsibility with courts, litigants and litigants' attorneys for the problems identified. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102(2), 104 Stat. 5089 (codified at 28 U.S.C. § 476); R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687, 704 n.94 (1993).

[84] *Governance and the Judicial Conference*, U.S. CTS., http://www.uscourts.gov/about-federal-courts/governance-judicial-conference [https://perma.cc/XAY2-LVUB] (last visited Jan. 5, 2018).

[85] 28 U.S.C. § 331 (2012).

[86] *Braking the Rules*, *supra* note 64, at 503 (citing Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 449 (2013) (collecting citations)).

[87] 28 U.S.C. § 2072 (2012).

[88] *Id*.

[89] "General rules" has been construed as requiring trans-substantivity, meaning that one set of procedural rules must apply to all civil law suits no matter the size of the litigation, the stakes involved, or the substantive law at issue in the dispute. *See* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376–77 (2010); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One-Size-Fits-All" Assumption*, 87 DENV. U. L. REV. 377, 378 (2010). *See also* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 541–42 (2009) [hereinafter Burbank, *Pleading and the Dilemmas*] (chronicling how the original drafters of the Federal Rules did not discuss the issue of trans-substantivity, but later endorsed it).

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:[90] 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.[91] In fact, the Chief Justice is obliged to "submit to Congress an an-

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The shortcomings of trans-substantive rules are well documented. *See, e.g.*, Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1159 (2006) ("[D]ifferent substantive policies sometimes justify different procedural choices"); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 713–15 (1988); Burbank, *Pleading and the Dilemmas*, *supra*, at 535 (explaining how trans-substantive rules adds unnecessary expense to smaller cases); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547 (1986) (describing the trans-substantive premise of the Rules as "unworkable"); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem,"* 46 FLA. L. REV. 57, 77–97 (1994); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 45–56 (1994) (making the case for substance-specific rules as a cost-saving measure for defense attorneys); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 344 (1989) ("[P]ublic law litigation appears to differ from private disputes in ways that call for distinctive consideration under certain and perhaps all of the Rules.").

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 rulemakers 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."[92] Unfortunately, his "Year-End Reports on the Federal Judiciary" tend to be brief and are focused on one (or very few) narrow theme(s).[93] To the extent that the Chief Justice has a vision for the civil justice system,[94] he does not put it in these Reports.

CONCLUSION

If arbitration is good for something,[95] 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.[96]

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[92] 28 U.S.C. § 331 (2012).

[93] *See Chief Justice's Year-End Reports on the Federal Judiciary*, U.S. SUP. CT., https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx [https://perma.cc/S2F7-767M] (last visited Jan. 5, 2018). The Reports tend to be only about 3,000 words in length. The 2016 Report hails the distinguished public service and hard work routinely performed by U.S. District judges. *See* JOHN G. ROBERTS, JR., U.S. SUPREME COURT, 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2016) [hereinafter ROBERTS, 2016 YEAR-END REPORT]. The 2015 Year-End Report celebrated the 2015 amendments' embrace of more aggressive judicial case management. *See* JOHN G. ROBERTS, JR., U.S. SUPREME COURT, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2015) [hereinafter ROBERTS, 2015 YEAR-END REPORT]. The 2014 Year-End Report focused on information technology in the U.S courts. *See* JOHN G. ROBERTS, JR., U.S. SUPREME COURT, 2014 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–4 (2014) [hereinafter ROBERTS, 2014 YEAR-END REPORT].

Moreover, in light of the fact that Chief Justice Roberts has criticized law professors for their self-indulgent scholarship, see *Clip: A Conversation with Chief Justice Roberts*, C-SPAN (June 25, 2011), https://www.c-span.org/video/?c4460095/clip-conversation-chief-justice-roberts [https://perma.cc/WX64-SRS9] ("Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something . . ."), it is interesting that his Reports tend to start with a fairly obscure historical teaser. For example, the first sentence of his 2016 Report stated: "As winter approached in late 1789, Justice David Sewall of the Massachusetts Supreme Judicial Court. . . ." ROBERTS, 2016 YEAR-END REPORT, *supra*, at 1. He began his 2015 Year-End Report with this sentence: "In 1838, John Lyde Wilson, a former Governor of South Carolina. . . ." ROBERTS, 2015 YEAR-END REPORT, *supra*, at 1. His 2014 Year-End Report began: "On November 10, 1893, the *Washington Post* identified an emerging technology. . . ." ROBERTS, 2014 YEAR-END REPORT, *supra*, at 1.

[94] *See generally* BURBANK & FARHANG, *supra* note 62; Miller, *supra* note 81; Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731 (2014); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010).

[95] I am open to the possibility that it may not be. *See supra* note 25.

[96] *See supra* note 57 and accompanying text. *See also* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RES. 757, 757–58 (2004).

To be sure, some form(s) of arbitration could be a component of our ongoing effort to ensure access to justice.[97] But it is our formal system, not arbitration itself, that determines arbitration's scope, role, and ultimate destiny.[98] 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[99]—or when it does not occur at all because the obstacles to initiating arbitration prevent parties from vindicating their rights.[100] 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.[101] We need empirical data, honest critics, obsessive planners, and creative problem-solvers.[102]

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[97] *See supra* notes 21–22. Naturally, many thoughtful commentators have outlined the virtues of arbitration within a system of dispute resolution. *See, e.g.*, Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 142; Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 564 (2001); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 824 (2003); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990). Moreover, there is an infinite variety of dispute resolution proceedings that would meet the conventional definition of arbitration, to-wit: "[A] binding adjudication of a dispute by private decision-makers outside a public court system." *See supra* notes 6–7. Professor Stempel has observed that even arbitration's repeat players have shown surprisingly little interest in shaping new forms of arbitration. Jeffrey W. Stempel, *Notes from a Quiet Corner: User Concerns About Reinsurance Arbitration—and Attendant Lessons for Selection of Dispute Resolutions Forums and Methods*, 9 ARB. L. REV. 93 (2017). (suggesting that there could be hybrids of arbitration and litigation that customized procedure to address concerns about arbitration). *See also* Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3051 (2015) (suggesting that religious arbitration offers a new paradigm for arbitration that allows parties to elevate the significance of shared values).

[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.

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