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### The Metaphysics of Arbitration: A Reply to Hensler & Khatam

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# THE METAPHYSICS OF ARBITRATION: A REPLY TO HENSLER AND KHATAM

Hiro N. Aragaki\*

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## INTRODUCTION

*Then do the same with the virtues. Even if they are many and various, yet at least they all have some common character which makes them virtues. That is what ought to be kept in view by anyone who answers the question, “What is virtue?”*

Plato, *Meno*, 72c-d (W.K.C. Guthrie, trans.)

What is arbitration? Do all forms of arbitration have a “common character”—for example, that they are designed to handle only private disputes? Is this what makes arbitration categorically different from a court? When procedures sometimes found in more public forms of adjudication—discovery, reasoned awards, and appellate review—become more common in arbitration, at

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what point do they threaten to turn it into something it is not or was not meant to be?

These are the tough, metaphysical questions lurking in the shadows of Professor Deborah Hensler and Ms. Damira Khatam's thought-provoking new article, *Re-inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*. The questions themselves are fascinating and have intrigued me for many years now, for they speak to what Ludwig Wittgenstein referred to as a human "craving for generality."<sup>1</sup> Reading the article gave me the opportunity to grapple with them in more detail, which in turn took me on a long and at times challenging intellectual journey. This reply documents what I discovered and what I take to be the implications for the authors' bold and ambitious project.

I agree in large part with the authors that arbitration today faces something of a legitimacy crisis. For example, I agree that arbitration as we know it is generally not open to the public, generally lacks published records and decisions, and relies on private decision-makers who are not publicly appointed. I also agree that while this private format may have been suitable for purely commercial claims between relatively evenly-matched disputants, at some point arbitration increasingly came to be used for disputes with "significant public policy dimensions,"<sup>2</sup> such as statutory employment discrimination claims in the United States or claims of expropriation by private investors against foreign sovereigns. These newer uses raised real concerns about unvetted private citizens deciding far-reaching cases, about the importance of transparency and accountability, about access to justice for weaker parties, and about moneyed interests co-opting the rule of law.

The real question is what to do about it. My own view is that arbitration is adapting—and should further adapt—to address these concerns. For example, domestic United States arbitration today is a far cry from the old-fashioned, *ad hoc* process that the authors have in mind: It is regulated in specialized sectors such as the financial services industry, largely overseen by institutional providers such as the American Arbitration Association (AAA),<sup>3</sup> and dominated by

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<sup>1</sup> LUDWIG WITTGENSTEIN, *THE BLUE AND BROWN BOOKS: PRELIMINARY STUDIES FOR THE "PHILOSOPHICAL INVESTIGATIONS"* 17 (2d ed. 1969).

<sup>2</sup> 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, 386 (2018).

<sup>3</sup> For example, among other things the AAA requires all employment arbitration awards to be published and for the provider of goods or services to pay all administrative fees and arbitrator remuneration in consumer cases. *See* AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES R. 39(b), at 21 (2009), <https://www.adr.org/sites/default/files/Employment%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Nov%2001%2C%202009.pdf> [<https://perma.cc/Q7HP-R2WV>]; AM. ARB. ASS'N, CONSUMER ARBITRATION RULES R. 43, at 27 (2014), <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf> [<https://perma.cc/9UQ6-G6QU>].

lawyer-advocates and arbitrators for whom reasoned decisions according to law have become the norm. When “re-invented” in these ways, arbitration is not only adequate for the vast majority of consumer and employment disputes it already handles, it may well be indispensable given the significant caseload pressures on overburdened courts.<sup>4</sup>

By contrast, Hensler and Khatam resist arbitration’s adaptation. They are led to do so in large part, I shall argue, because of the implicit stance they have taken on the questions I raised at the beginning of this essay. Hensler and Khatam do not just believe that claims brought in arbitration have historically been of a (more or less) private nature; instead, they think there is something inherently private about arbitration itself, such that public disputes simply cannot be arbitrated without “destroy[ing]” the process along the way.<sup>5</sup> And when discovery or appellate review becomes increasingly common in arbitration, rather than see the march of progress towards better adjudicative procedure, they see a quintessentially private forum metastasizing into a quasi-public one.

The metaphysics of arbitration is not new, of course. A case in point is Justice Stevens’s dissent in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*:<sup>6</sup> “Like any other mechanism . . . arbitration will only succeed if it is realistically limited to tasks it is capable of performing well—the prompt and inexpensive resolution of essentially contractual disputes between commercial partners.”<sup>7</sup> The Court often relied on this type of judgment “centered on the nature of arbitration”<sup>8</sup> to explain why disputes involving public-regarding federal statutes such as Title VII were not in fact amenable to arbitration. This, in turn, helped inform important policy debates about arbitration’s limitations *and* strengths as a dispute resolution forum.<sup>9</sup>

Hensler and Khatam’s article can be seen as taking up the mantle of this longer tradition of teleological thinking in arbitration—a tradition whose roots can be traced as far back as Plato and some of the greatest thinkers in Western Civilization. The ‘big questions’ it raises have given me an opportunity to revisit what I thought I knew about arbitration and courts. But they also under-

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<sup>4</sup> See PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION—A GOOD DEAL FOR CONSUMERS 11, 13 (2008); Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT’L ARB. 455, 464–65 (2007).

<sup>5</sup> See Hensler & Khatam, *supra* note 2, at 386.

<sup>6</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>7</sup> *Id.* at 665 (Stevens, J., dissenting). This passage was quoted with approval in an earlier draft of Hensler and Khatam’s article but was subsequently removed.

<sup>8</sup> 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1471 (2009).

<sup>9</sup> As the Court famously observed, “the informality of arbitral procedure . . . enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution,” but that “[t]his same characteristic . . . makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974).

scored for me some of the difficulties associated with the metaphysical enterprise. In the final analysis, my disagreement with the authors has more to do with their embrace of that enterprise than with their account of the problem or their call to action.

## I. WHAT IS ARBITRATION?

At first glance, domestic United States arbitration, international commercial arbitration (ICA), and investor-state arbitration seem like very different practices, each with their own set of players and legal frameworks. To be sure, there are overlapping “family resemblances”<sup>10</sup> among them, such as that breach of contract and other private law claims have tended to predominate, or that the proceedings and the final award need not be made public. But does this mean that privateness is just a frequent feature of arbitration in these contexts, or does it mean that privateness is part of arbitration’s DNA?

Hensler and Khatam seem to believe the latter. For example, they argue that when public disputes increasingly come to be arbitrated, it is not just that the balance of public and private claims has shifted; instead, it represents arbitration’s “mutat[ion]” into something for which “the procedure arguably was not originally intended.”<sup>11</sup> In other words, they turn the phenotype of privateness—a property shared by many arbitrations—into a veritable genotype of something called “arbitration.” In so doing, they are led to overlook or discount the many contexts in which arbitration was decidedly public—contexts that ought at least to make us question whether it is possible to essentialize arbitration in this way.

### A. *Constructed Categories*

Hensler and Khatam’s argument coheres a great deal around the way they have chosen to construct the category “arbitration” in contradistinction to “public adjudication.” These categories are not unproblematically ‘out there’ waiting to be discovered; instead, they are constituted in ways that betray varying normative assumptions and commitments. For example, the public or private nature of “arbitration” will depend on what processes one deems worthy of this appellation. Hensler and Khatam are probably correct to think of arbitration as private if they are principally concerned with domestic United States arbitration in the early twentieth century. But not if they were thinking of state-to-state arbitration. Indeed, it doesn’t get more public than a dispute between two sovereign states over boundaries or natural resources—disputes that can affect thou-

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<sup>10</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 67 (G.E.M. Anscombe trans., 3d ed. 1986).

<sup>11</sup> Hensler & Khatam, *supra* note 2, at 386.

sands if not millions of people.<sup>12</sup> Tribunals hearing such disputes generally produce lengthy reasoned awards of one hundred pages or more that are typically published.<sup>13</sup> Some of them have been widely cited and have played an important role shaping public international law in specialized domains.<sup>14</sup>

There is no neutral or natural reason why state-to-state arbitration should have been omitted from Hensler and Khatam's account of arbitration.<sup>15</sup> After all, the procedure used in state-to-state arbitration is more or less identical to the procedure used in domestic United States arbitration: Arbitrators are chosen by the parties and need not be publicly appointed (for example, by a standing international body); there are no rigid rules of evidence; there is no right of public access; the rules of procedure are typically informal and do not provide for pre-hearing discovery other than the exchange of documents; there is no right of substantive merits review. To take an obvious example, the same 1976 UNCITRAL Arbitration Rules have been (and continue to be) used in both *ad hoc* private commercial and state-to-state disputes.<sup>16</sup> This begs the question: If

<sup>12</sup> See, e.g., *Rann of Kutch (India v. Pak.)*, 17 R.I.A.A. 1, 1, 7 (Perm. Ct. Arb. 1968); *Island of Palmas Case (Neth., U.S.)*, 2 R.I.A.A. 829, 831 (Perm. Ct. Arb. 1928); *Alabama Claims Case (U.S. v. Gr. Brit.)*, 29 R.I.A.A. 125, 127 (Perm. Ct. Arb. 1872).

<sup>13</sup> Christine Gray & Benedict Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration since 1945*, 63 BRIT. Y.B. INT'L L. 97, 110 (1993) (“[I]nter-State arbitrations in which not even the award is published remain exceptional.”). State-to-state arbitration awards can be found in International Law Reports, in the United Nations Reports of International Arbitration Awards, and on the PCA's website among others. See also chapters 1–6 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY (1898).

<sup>14</sup> As Christine Gray and Benedict Kingsbury explain,

[t]he mass of arbitral awards dating back to the Jay Treaty substantially created international law on State responsibility for injury to aliens (including the local remedies rule and nationality of claims). Other sources, such as diplomatic practice, played a complementary role, but the detailed rules evolved through arbitral decisions. . . . Again, arbitral awards have played a crucial role in the creation of international law on acquisition of territory and boundary delimitation. . . . [T]he nature of the subject-matter—the uniqueness of each geographical and historical situation—meant that arbitral decisions were necessary for the creation of general rules. . . . Similarly, on questions of treaty interpretation, the nature of the subject-matter gave arbitral decisions a central role in the evolution of the law.

Gray & Kingsbury, *supra* note 13, at 131–32. Gary Born has likewise observed that the PCA has produced “a handful of well-reasoned awards that have played a material role in the development of customary international law.” Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 797 (2012).

<sup>15</sup> For instance, it falls squarely within their definition of arbitration as a “binding adjudication of a dispute by private decision-makers outside a public court system.” Hensler & Khatam, *supra* note 2, at 387.

<sup>16</sup> E.g., Jack J. Coe Jr., *The Serviceable Texts of International Commercial Arbitration: An Embarrassment of Riches*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 143, 146–47 (2002) (observing that the UNCITRAL Arbitration Rules have “been the basis of many institutional rule sets, whether intended for private disputes or the more exotic mixed disputes and state-to-state proceedings”). The 2012 Arbitration Rules of the Permanent Court of Arbitration, which are substantially similar to the UNCITRAL Arbitration Rules, may be used in state-to-

substantially the same basic arbitral process has and can be employed in state-to-state arbitrations that affect the public interest on a national and even international scale, why can it not be used or adapted in the domestic sphere to handle employment discrimination and consumer protection claims? For unlike claims brought by or against a state, the latter are in the nature of private disputes between private individuals (albeit ones that affect the public interest in significant ways).

Once we accept, as we must, that state-to-state arbitration is also a type of arbitration, it becomes easier to see how the authors could have drawn their boundaries very differently. For example, state-to-state arbitration arguably has more in common with international courts than it does with domestic United States arbitration. Consider what distinguishes the Permanent Court of Arbitration (PCA), an arbitral body, from the International Court of Justice (ICJ), the first truly international judicial body (established only decades *after* the PCA).<sup>17</sup> Both were created by an international treaty,<sup>18</sup> which is essentially a contract between sovereign nations. Neither exercises compulsory jurisdiction as a default matter, which is to say that states must specifically consent to submit their disputes.<sup>19</sup> From the very beginning there has been a significant over-

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state, investor-state, and private commercial disputes. *See PCA Arbitration Rules*, PERMANENT CT. ARB., <https://pca-cpa.org/en/documents/pca-conventions-and-rules/> [<https://perma.cc/9LHY-CYQF>] (last visited Jan. 23, 2018) (stating that the PCA Arbitration Rules 2012 may be used in “disputes involving various combinations of states, state entities, international organizations, and private parties”).

<sup>17</sup> The PCA was established in 1899. Although the ICJ was not established until 1946, its predecessor, the Permanent Court of Justice, was established in 1922. PERMANENT CT. ARB., <https://pca-cpa.org/en/home/> [<https://perma.cc/2NX3-K3WN>] (last visited Jan. 23, 2018); INT’L CT. JUST., <http://www.icj-cij.org/en/history> [<https://perma.cc/WMK5-HCJK>] (last visited Jan. 23, 2018).

<sup>18</sup> The PCA was established by the 1899 Convention for the Pacific Settlement of International Disputes art. 20, July 29, 1899, 32 Stat. 1779, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> [<https://perma.cc/Q39V-M7TB>] [hereinafter *First Hague Convention*]. The ICJ was established by the UN Charter, which is itself a type of international treaty. *See* U.N. Charter art. 7, ¶ 1.

<sup>19</sup> *First Hague Convention*, *supra* note 18, art. 24; 1907 Convention for the Pacific Settlement of International Disputes art. 31, Oct. 18, 1907, 32 Stat. 1803, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> [<https://perma.cc/JT6A-MB7Y>] [hereinafter *Second Hague Convention*]; PERMANENT CT. OF ARB., ARBITRATION RULES 2012, art. 1 ¶ 1. In the case of the ICJ, states may give their consent either before a particular dispute arises, in the form of a treaty obligation to submit all disputes under the treaty to the ICJ, or afterwards. Statute of the International Court of Justice art. 36 ¶ 1, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 933. They may also consent to the ICJ’s compulsory jurisdiction over all legal disputes “in relation to any other state accepting the same obligation.” *Id.* art. 36 ¶ 2. As of the present writing, 86 out of the 193 U.N. member states have done so. *See* Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice Under Art. 36, Paragraph 2, of the Statute of the Court (Oct. 15, 1946) <https://treaties.un.org/pages/ViewDetails.aspx?src>

lap in the types of claims that both forums may hear; indeed, states are known to forum shop between international arbitral and judicial tribunals depending on their preferences for confidentiality, control in the selection of adjudicators, cost, and other factors.<sup>20</sup> The decision-makers are not mutually exclusive in the sense that nothing prevents an ICJ judge from sitting as a PCA arbitrator,<sup>21</sup> and the final award or judgment must be supported by reasons.<sup>22</sup> In neither forum is there a right of appellate review.<sup>23</sup>

As far as I can tell the only real difference between the PCA and the ICJ is that (i) final judgments of the ICJ must be made public while those of the PCA need not,<sup>24</sup> and (ii) the ICJ has a standing body of full-time adjudicators whereas the parties can choose virtually any individual to arbitrate a case pending at the PCA.<sup>25</sup> This means that judicial bodies such as the ICJ are more likely to develop a *jurisprudence constante* to help enunciate norms and guide future decision-making. But couldn't the PCA require all arbitral awards to be published—as most of them are anyhow—without losing its character as an arbitral body?<sup>26</sup> Couldn't it likewise require arbitrators to be chosen from within the membership of the Court, as was anyhow provided in the original 1899 Hague Convention?<sup>27</sup> The Iran-US Claims Tribunal (IUSCT) would seem to be an obvious case in point. The procedure before the IUSCT is based on a modified version of the 1976 UNCITRAL Arbitration Rules.<sup>28</sup> But the IUSCT is com-

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=IND&mtmsg\_no=I-4&chapter=1&clang=\_en#8 [https://perma.cc/TCQ6-PZ2H] (last visited Jan. 23, 2018).

<sup>20</sup> See Natalie Klein, *Who Litigates and Why*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 584 (Cesare PR Romano et al. eds., 2014); Shigeru Oda, *Further Thoughts on the Chambers Procedure of the International Court of Justice*, 82 AM. J. INT'L L. 556, 558 (1988) (describing the potential for such forum-shopping in the *Gulf of Maine* Chambers proceeding at the ICJ).

<sup>21</sup> ICJ judges have on more than one occasion served as *ad hoc* arbitrators in state-to-state disputes. For example, at the time of their appointment on 22 July 1971, all five arbitrators in *The Beagle Channel* case were judges of the ICJ. Compare *The Beagle Channel* (Arg. v. Chile), 21 R.I.A.A. 53, 61 (Perm. Ct. Arb. 1977), with INT'L CT. JUST., <http://www.icj-cij.org/en/all-members> [https://perma.cc/R6WZ-ELZE] (last visited Jan. 23, 2018).

<sup>22</sup> These two similarities are in sharp contrast to the practice in domestic U.S. arbitration. See *Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493, 502 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013).

<sup>23</sup> Compare PERMANENT CT. OF ARB., ARBITRATION RULES 2012, art. 34 with Statute of the International Court of Justice arts. 56, 60, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 933.

<sup>24</sup> See Statute of the International Court of Justice art. 58, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 933; Rules of the Court, 1978 I.C.J. Acts & Docs., arts. 94–95. There is, however, no requirement under either the ICJ Statute or the ICJ Rules for documents or proceedings other than the final award, such as oral hearings or written pleadings, to be made public.

<sup>25</sup> Compare PERMANENT CT. OF ARB., ARBITRATION RULES 2012, art. 10 with Statute of the International Court of Justice arts. 3, 16, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 933.

<sup>26</sup> See Gray & Kingsbury, *supra* note 13, at 110.

<sup>27</sup> *First Hague Convention*, *supra* note 18, art. 24.

<sup>28</sup> CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 16–20 (1998).



posed of a standing body of judges appointed for fixed terms and, unlike a commercial arbitral institution, it gives parties little say in the composition of each tribunal and it requires all decisions to be made public. Despite these modifications to “classic” arbitration, the IUSCT is still generally understood to be a form of arbitration<sup>29</sup> and its awards are enforceable under the New York Convention.<sup>30</sup> If the arbitration can succeed in this context even while incorporating many of the features traditionally associated with courts, why can it not likewise succeed in the domains that Hensler and Khatam have identified?

State-to-state arbitration therefore explodes the idea that arbitrating public disputes is something of a category mistake, one that “blurs” the otherwise bright “line between private and public dispute resolution.”<sup>31</sup> Excluding it from their construction of arbitration helps the authors exaggerate the discontinuities between arbitration and public adjudication and helps them elide arbitration’s important public law lineage.

### B. *Is Arbitration Essentially Private?*

Even within the three domains they identify, Hensler and Khatam underplay the extent to which public disputes have figured in each of them. For example, most commentators would consider investor-state arbitration to be a form of *quasi*-public arbitration.<sup>32</sup> Since its inception, investor-state arbitration as we know it today has largely been a creature of bilateral investment treaties (BITs) and routinely involves claims based on public international law. Hensler and Khatam make investor-state arbitration look like a mongrelized private forum because they portray it as an outgrowth of international commercial arbitration, which is certainly one way of looking at it.<sup>33</sup> But by changing one’s perspective just the *opposite* story could be told: With the rise of BITs, the same basic arbitration procedure that had been used for centuries in public disputes between sovereign states became accessible to private investors pursuing

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<sup>29</sup> E.g., Jon A. Stanley, Comment, *Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence*, 15 EMORY INT’L L. REV. 349, 355 n.25 (2001).

<sup>30</sup> See, e.g., Michael Durgavich, Comment, *Resolving Disputes Arising Out of the Persian Gulf War: Independent Enforceability of International Agreements to Arbitrate*, 22 CAL. W. INT’L L.J. 389, 422 (1992) (“[T]he New York Convention applies to decisions rendered by the Iran-U.S. Claims Tribunal.”).

<sup>31</sup> Hensler & Khatam, *supra* note 2, at 386.

<sup>32</sup> See Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today?: The Lalive Lecture 2012*, 28 ARB. INT’L. 577, 579 (2012); Anthea Roberts, *Divergence between Investment and Commercial Arbitration*, in AM. SOC’Y INT’L L., PROCEEDINGS OF THE 106TH ANNUAL MEETING 297, 298 (2012); José E. Alvarez, *Is Investor-State Arbitration ‘Public’?* 1 (Inst. for Int’l L. & Just., Working Paper No. 2016/6, 2016).

<sup>33</sup> See Hensler & Khatam, *supra* note 2, at 409–13. Investor-state arbitrations prior to 1960 were often brought under concession agreements and were likely understood by all participants involved as a type of ICA. See *infra* note 36 and accompanying text.

both public- and private-law claims against a state. A case in point is the PCA, which was established in 1899 to hear inter-state disputes. The PCA received its first investor-state case in 2003.<sup>34</sup> In proceedings before the PCA the same or similar rules of arbitral procedure may be used for both types of disputes.<sup>35</sup>

International commercial and domestic arbitration, too, have seen their share of public disputes for quite some time. For example, disputes between investors and states or state-owned entities were handled in private *ad hoc* and institutional ICA well before the developments Hensler and Khatam identify.<sup>36</sup> Several nineteenth century English acts regulating the power of condemnation and eminent domain by public authorities provided for voluntary arbitration to determine the amount of compensation owed.<sup>37</sup> In 1915, Samuel Rosenbaum reported to the American Judicature Society that “[u]nder these [English] Acts arbitrations take place in great numbers every year all over the Kingdom, as practically every condemnation proceeds in this way,” and that “[a]part from the fact that the award must be made within 21 days after the arbitrators are all appointed, there are no further differences from ordinary [commercial] arbitrations.”<sup>38</sup> Going further back in time to Elizabethan England and beyond, Derek Roebuck has meticulously documented the sheer ubiquity of arbitration in its

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<sup>34</sup> The PCA’s website allows one to view all cases that it has coded as “investor-state,” whether or not still pending. See *PCA Case Repository*, PERMANENT CT. ARB., <http://www.pccases.com/web/advancedsearch/> [https://perma.cc/3QKY-86KB] (select “Investment Arbitration” in “Type of Case” drop down menu; then run search; then sort by “Date of commencement of proceeding”) (last visited Jan. 23, 2018).

<sup>35</sup> The PCA Arbitration Rules may be used in investor-state and state-to-state arbitration. PERMANENT CT. OF ARB., ARBITRATION RULES 2012, art. 4. Similarly, the IUSCT, which was established by Iran and the US to hear claims not just between the two state parties but also between private citizens of one state and the other state party, applies a modified version of the UNCITRAL Arbitration Rules to both types of disputes. See BROWER & BRUESCHKE, *supra* note 28, at 16–17; see also *supra* text accompanying note 28.

<sup>36</sup> *E.g.*, Born, *supra* note 14, at 827 (observing that “by the beginning of the twenty-first century,” ICA became the preferred method of resolving claims between private investors and states). The *ad hoc* arbitration between Lena Goldfields, Ltd. and the former Soviet Union over gold mine investments in Siberia is perhaps one of the earliest examples. See generally Arthur Nussbaum, *The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L. Q. 31, 42 (1950) (reprinting the “Text of the Award in the Lena Goldfields, Ltd., Arbitration, September 3, 1930”). Nussbaum reports that the original award was published in the Times of London in 1930. *Id.* at 31, 42. According to some estimates, approximately 10 percent of the ICC’s docket currently involves a state party, and the commercial arbitration rules of private providers such as the ICC and the LCIA are increasingly being used in investor-state arbitration. Böckstiegel, *supra* note 32, at 581.

<sup>37</sup> See, e.g., Housing of the Working Classes Act 1890, 53 & 54 Vict., c. 70, §§ 20–21 (Eng.); Public Health Act 1875, 38 & 39 Vict., c. 55, §§ 179–81 (Eng.); Elementary Education Act 1870, 33 & 34 Vict., c. 75, § 20 (Eng.); Railways Clauses Act 1863, 26 & 27 Vict., c. 92, § 8 (Eng.); Land Clauses Consolidation Act 1845, 8 Vict., c. 18, §§ 23–37 (Eng.). Note that under English law at the time, the arbitrator could state a legal question for determination by the courts. See *infra* note 100.

<sup>38</sup> SAMUEL ROSENBAUM, A REPORT ON COMMERCIAL ARBITRATION IN ENGLAND 33–34 (1916).

private *and* public forms. Contrary to popular belief, disputes between parties with vastly unequal bargaining power,<sup>39</sup> such as noblemen and serfs or employers and wage earners, appear to have been routinely submitted to private arbitration at least as far back as the late middle ages.<sup>40</sup> Nor was it uncommon for serious felonies and other matters of public law to be arbitrated—matters that have not been arbitrable for quite some time in the United States and likely won't be for the foreseeable future.<sup>41</sup> Such proceedings were often highly public affairs, with the award being celebrated “by a dramatic public ritual, [and] large numbers of witnesses in effect serving to enforce future peace, if only by peer pressure.”<sup>42</sup> Public officials were known to sit as arbitrators.<sup>43</sup> Reasoned

<sup>39</sup> Roebuck contends that Queen Elizabeth's Privy Council, which he describes as a form of public arbitration, intervened in cases involving a stark imbalance of wealth between disputants. DEREK ROEBUCK, *THE GOLDEN AGE OF ARBITRATION* 119 (2015). This was in line with the Council's mandate to prioritize cases involving the poor, who typically did not resort to the courts. *Id.*

<sup>40</sup> *Id.* at 194 (“Disputes about wages and similar issues between employer and employee, or master and apprentice, were the regular stuff of private arbitration [in Elizabethan England].”); DEREK ROEBUCK, *MEDIATION AND ARBITRATION IN THE MIDDLE AGES* 87 (2013) (“[I]t is clear not only that employment disputes were arbitrated but that even [criminal] prosecutions under the Statute of Labourers . . . could be substantively disposed of by arbitration.”); Edward Powell, *Arbitration and the Law in England in the Late Middle Ages: The Alexander Prize Essay*, in 33 *TRANSACTIONS ROYAL HIST. SOC'Y* 49, 53 (1983) (“Relations between master and apprentice or employer and wage-earner might also be regulated by arbitration, and even, on occasion, those between landlord and tenant or lord and serf.”); *cf.* Margo Todd, ‘For Eschewing of Trouble and Exorbitant Expense’: *Arbitration in the Early Modern British Isles*, 2016 *J. DISP. RESOL.* 7, 7 (2016) (stating that “[t]he history of binding arbitration in British customary law is very long, and in scope, very broad,” and that arbitration was used “across a broad range of social estates, from craftsmen to lords, alewives to merchant princes. . . .”). It may also come as a surprise to learn that pre-dispute arbitration agreements appear to have been used with some regularity in a variety of contexts, including insurance policies in the sixteenth century and lending transactions within the Jewish community in the thirteenth. *See* ROEBUCK, *THE GOLDEN AGE OF ARBITRATION*, *supra* note 39, at 3–4, 303–05; ROEBUCK, *MEDIATION AND ARBITRATION IN THE MIDDLE AGES*, *supra* at 248.

<sup>41</sup> ROEBUCK, *MEDIATION AND ARBITRATION IN THE MIDDLE AGES*, *supra* note 40, at 69 (arguing that in the High Middle Ages in Britain, arbitration was used by the “widest range of parties to almost any kind of dispute”); Powell, *supra* note 40, at 52 (noting that arbitration was often used in the late middle ages in Britain for disputes involving “leading magnates or the great urban and ecclesiastical corporations of the realm.”).

<sup>42</sup> Todd, *supra* note 40, at 15. As Todd explains:

Publicity *per se* tended to ensure that the settlement would be kept, since violating an agreement witnessed by the whole neighborhood would bring charges of duplicity and undermine reputation. If arbitrators determined that one party was at fault in a dispute, that person could be made formally to process through a town, often to the place where he had offended or to the home of the party he had harmed, there to kneel and apologize, clasp hands or kiss the plaintiff, and drink his health.

*Id.*

<sup>43</sup> ROEBUCK, *THE GOLDEN AGE OF ARBITRATION*, *supra* note 39, at 298 (“The Government made frequent use of judges as arbitrators, deliberately taking matters away from the courts . . . .”); ROEBUCK, *MEDIATION AND ARBITRATION IN THE MIDDLE AGES*, *supra* note 40, at 371 (“It was common to appoint judges as arbitrators.”); Todd, *supra* note 40, at 10 (referring to

awards were issued.<sup>44</sup> There is even evidence that arbitration forums such as Piepowder Courts applied and developed their own (unpublished) precedents, some of which may have exerted significant influence on the development of English common law in the area of warranties.<sup>45</sup>

Even when arbitration was used in these public ways to resolve very public disputes, the same basic procedure that Hensler and Khatam associate with a private forum was followed.<sup>46</sup> For example, the parties had to consent to arbitration; they chose the arbitrators; although there were few rigid rules of procedure, proofs were submitted and witnesses were called to testify and to be cross-examined; an emphasis was placed on deciding cases based on justice and equity but with more efficiency and finality than would be expected in court; awards were often recorded, some in astonishing detail; and there was occasionally even a procedure for appeal and rehearing.<sup>47</sup>

If more or less the same arbitration process has historically been used to resolve a wide variety of disputes affecting the public interest, it suggests at minimum that there is no inherent or obvious impediment to using or adapting arbitration today for similar disputes of a public character. To the extent there are outer limits—and I agree there are—more work will be needed to explain where those limits lie and why they are hard stops rather than sticky defaults. The point is just that there is nothing natural or axiomatic about Hensler and Khatam's claim that arbitration's *telos* is to resolve only private disputes “unlikely to have much public impact,” through a process “subject to little external scrutiny” or procedural formality.<sup>48</sup> The persuasiveness of this claim, I have argued, will largely depend on what forms of arbitration one privileges over others—that is, on how the category of arbitration is constructed.

## II. WHAT'S WRONG WITH REINVENTION?

The most striking claim to originality of Hensler and Khatam's article is that there is an important development common across three disparate arbitral domains that has so far escaped notice because scholars of arbitration have

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the arbitration of a dispute between the Bishop of Ely and Lord Hatton, which was presided over ca. 1677 by the Lord Chancellor and Chief Justice North, among others).

<sup>44</sup> ROEBUCK, *THE GOLDEN AGE OF ARBITRATION*, *supra* note 39, at 76–80.

<sup>45</sup> In a fascinating work-in-progress, my colleague Robert Brain argues that prior to the rise of assumpsit in the 1600s, contract-based warranty law—at that time part of the Law Merchant—evolved primarily through a private system of arbitral precedents that stretched as far back as the thirteenth century. Some records of those arbitral tribunals have been preserved to this day. *See* Robert Brain, *The Common Law Development of Warranties of Quality* 14–15 (July 2017) (unpublished manuscript) (on file with author).

<sup>46</sup> *E.g.*, ROEBUCK, *THE GOLDEN AGE OF ARBITRATION*, *supra* note 39, at 67 (“Whether the arbitration was private or public, the parties expected the arbitrators to follow much the same procedure.”).

<sup>47</sup> *See id.* at 67–86.

<sup>48</sup> *See* Hensler & Khatam, *supra* note 2, at 393, 401.

tended to work in silos.<sup>49</sup> That development is as follows: As more and more non-contractual, non-commercial disputes came within arbitration's scope, the need to "shore up the legitimacy of arbitrations"<sup>50</sup> caused a parallel judicialization of the process. For example, in the domestic United States sphere, arbitration "morphed from a private, informal, streamlined dispute resolution process, subject to little external scrutiny, to a much more formal and quite a bit more public—and arguably more expensive and time consuming—procedure that increasingly resembles litigation."<sup>51</sup> A similar transformation can be seen in ICA, where "parties have imported American-style discovery, including voluminous document exchange, interrogatories, and depositions into what was traditionally envisioned as a streamlined presentation of evidence followed by swift decision-making."<sup>52</sup> Likewise, the authors argue that as the number of claims brought by private investors against states multiplied, new rules were promulgated that now require the final award and important filings to be published, and allow members of the public to attend oral hearings and submit *amicus curiae* briefs.<sup>53</sup>

Some scholars would argue that the differences among these domains are already so great as to elude meaningful comparison.<sup>54</sup> The fact that Hensler and Khatam have managed to make those comparisons nonetheless is a testament to their acuity and ability to think outside the box. Moreover, their account of arbitration's reinvention into the "new litigation" is refreshingly novel, as few scholars before them have attempted to explain this as a response to the expanding scope of arbitrability (as opposed, say, to the stubborn habits of lawyers or meddlesome national courts).<sup>55</sup> I think the authors are more or less cor-

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<sup>49</sup> *Id.* at 381.

<sup>50</sup> *Id.* at 386.

<sup>51</sup> *Id.* at 393.

<sup>52</sup> *Id.* at 384–85.

<sup>53</sup> *Id.* at 386 (citing G.A. Res. 68/109, *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Dec. 16, 2013), <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> [<https://perma.cc/FU2C-YERX>] (last visited Jan. 23, 2018)).

<sup>54</sup> Jan Paulsson, for instance, has argued that "[i]nternational arbitration is no more a 'type' of arbitration than a sea elephant is a type of elephant. True, one reminds us of the other. Yet the essential difference of their nature is so great that their similarities are largely illusory." Jan Paulsson, *International Arbitration Is Not Arbitration*, 2 STOCKHOLM INT'L ARB. REV. 1, 1 (2008).

<sup>55</sup> See, e.g., Eric Bergsten, Professor of Law Emeritus, Pace L. Sch., *The Americanization of International Arbitration*, Address at the International Law Students Association Conference at Pace Law School (Oct. 27–29, 2005), in 18 PACE INT'L L. REV. 289, 301 (2006) (noting a "trend in international arbitration is to move towards the American style of litigation" as a result of which "procedural disputes have multiplied, jurisdictional objections are common, and cross-examination is prevalent."); Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation"*, 7 DEPAUL BUS. & COM. L.J. 383, 386 (2009). In other countries such as India, the blame has fallen on interventionist national courts, the lack of robust institutional oversight, or an ingrained culture of public adjudication whereby retired

rect, too, about the ways in which arbitration has actually morphed over time in all three contexts.

My question is, what's wrong with this metamorphosis? To be sure, some aspects of arbitration's reinvention have been less positive than others. For example, when lawyers needlessly complicate the process with the same full-bore discovery and motion practice they are accustomed to in court, arbitration can lose many of the advantages commonly ascribed to it. But if the influx of new claims involving significant public interests has led stakeholders to insist on more transparency and formality in order to improve legitimacy or accuracy in adjudication, why isn't this the natural process of adaptation?

I think Hensler and Khatam's response here is to say that arbitration's reinvention in these ways somehow contradicts arbitration's fundamental nature or its place in the order of things. To them, reinvention is unnatural—akin to a “mutat[ion]”<sup>56</sup> that ends up producing an entirely “new form of dispute resolution,” one that is no longer truly arbitration.<sup>57</sup> For example, the authors view certain procedural accoutrements that have become increasingly common in arbitration, such as discovery, reasoned awards, or appellate review, as unique hallmarks of litigation rather than as generic procedures for use in adjudicative processes generally. Alternatively, they view these accoutrements as somehow defeating the very purpose or *raison d'être* of arbitration.<sup>58</sup> As a result, they argue for “returning domestic commercial arbitration to the purely commercial sphere . . . [so as to clarify] the boundary between private arbitration and public adjudication and preserve each for its most appropriate uses.”<sup>59</sup> They make a similar recommendation as to investor-state arbitration and would presumably do the same as to ICA but for the fact that the problem is not as acute in that context and, as a practical matter, there is currently no real judicial alternative to arbitrating international commercial disputes.<sup>60</sup>

#### A. *Are Some Procedures Hallmarks of Litigation and Only Litigation?*

Because there are few limits on the design of an arbitral process, scholars have typically distinguished arbitration from litigation on a limited set of grounds such as confidentiality, greater choice of decision-makers and process,

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judges accustomed to formal rules and lawyers lacking arbitration advocacy training tend to conduct arbitration just like a court hearing. *See, e.g.*, Hiro Naraindas Aragaki, *Arbitration Reform in India: Challenges and Opportunities*, in *THE DEVELOPING WORLD OF ARBITRATION* 221, 226–27, 242–43 (Anselmo Reyes & Weixia Gu eds.) (forthcoming 2018) (on file with author).

<sup>56</sup> Hensler & Khatam, *supra* note 2, at 408.

<sup>57</sup> *Id.* at 421.

<sup>58</sup> *Id.* at 386 (arguing that the “expansion of the scope of arbitration in each domain to disputes the procedure arguably was not originally intended. . .”).

<sup>59</sup> *Id.* at 423.

<sup>60</sup> *Id.* at 423–24.

and the lack of a standing body that ensures consistency and coherence in decisions over time.<sup>61</sup> By contrast, Hensler and Khatam draw this distinction at the level of particular procedures. For example, they believe that pre-trial discovery and appellate review are “more reflective of litigation norms than traditional arbitration procedures.”<sup>62</sup> The implication is that they do not belong in arbitration. But how accurate are these assessments? Let’s look at specific examples.

Take pre-trial discovery. Pre-trial discovery is certainly not “characteristic” of litigation<sup>63</sup> especially if one considers the case of foreign and international courts, which are more relevant comparison groups vis-à-vis international commercial and investment arbitration. In most corners of the developed world, pre-trial discovery is viewed with a mixture of disdain and bewilderment as a distinctively American anomaly. If pre-trial discovery is either prohibited or non-existent in most courts around the world, it is difficult to appreciate how the increased use of discovery in ICA is a sign of arbitration’s judicialization as opposed, say, to its Americanization.

Even within the United States, the liberal regime of pre-trial discovery envisioned by the Federal Rules of Civil Procedure is a relatively recent development. By and large, it did not exist in federal court litigation prior to the passage of the Federal Rules in 1938. Some states like California and New York did not adopt it until almost two decades later.<sup>64</sup> Prior to this, therefore, it is no stretch to say that there was roughly the same amount of pre-trial discovery in arbitration as there was in litigation—namely, none. From this standpoint, its increased use in arbitration today could be seen as part of an overall shift in adjudication toward avoiding unfair surprise, adapting to the increasing complexity of modern disputes, or giving parties more discretion and control over fact-finding, rather than as arbitration’s “re-invention” into a quintessentially court-like process.<sup>65</sup>

At the same time, discovery practice in arbitration is likely older than Hensler and Khatam suggest. By 1969, federal courts had begun considering whether, even in the absence of an express statutory provision, arbitrators could

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<sup>61</sup> See, e.g., Cesare PR Romano et al., *Mapping International Adjudicative Bodies, the Issues, and Players*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 5, 10–11 (Cesare PR Romano et al. eds., 2014).

<sup>62</sup> Hensler & Khatam, *supra* note 2, at 396.

<sup>63</sup> *Id.* at 411–12.

<sup>64</sup> See Charles Alan Wright, *Procedural Reform in the States*, 24 *F.R.D.* 85, 91–92, 110 (1960).

<sup>65</sup> It is true that the FAA, which was enacted in 1925, is silent on discovery. Yet it would be a mistake to infer from this silence that the FAA takes any normative position on arbitration’s compatibility with discovery. The most that can be inferred from this silence is that the FAA—no less than contemporaneous procedural codes and rules governing civil litigation until 1938—did not intend to take a position on liberal pre-trial discovery at all. See Hiro N. Aragaki, *Constructions of Arbitration’s Informalism: Autonomy, Efficiency, and Justice*, 2016 *J. DISP. RESOL.* 141, 158 (2016).

order discovery in the interest of a full and fair hearing.<sup>66</sup> The issue was important enough that the Committee on Arbitration of the Association of the Bar of the City of New York released a report on the subject in 1978, in which it concluded that pre-trial discovery was not “incompatible with the fundamental purpose of arbitration” and recommended that the AAA rules be amended to provide for it.<sup>67</sup> The upshot is that pre-trial discovery has not had a materially longer history of use in litigation (even though that use may have been more frequent and regular than in arbitration).

Much the same can be said about published, reasoned awards. Hensler and Khatam make it sound as if every publicly adjudicated dispute ends with a reasoned judgment. But consider jury trials, often posited as the quintessential court-based alternative to arbitration (usually in order to emphasize the constitutional and democratic values that are lost when cases are decided by private arbitrators).<sup>68</sup> Jury trials produce yes/no verdicts that, as a rule, are *never* reasoned.<sup>69</sup> As for the 99 percent of cases that are disposed of in other ways,<sup>70</sup> most are either privately settled, voluntarily dismissed, or disposed of on a mo-

<sup>66</sup> See, e.g., *Chevron Transp. Corp. v. Astro Vencedor Compania Naviera, S.A.*, 300 F. Supp. 179, 181–82 (S.D.N.Y. 1969) (stating, in dictum, that arbitrators could order discovery in such circumstances).

<sup>67</sup> Comm. on Arb., *The Use of Discovery in Arbitration*, 33 ASS’N B. CITY N.Y. 231, 231, 234–35 (1978). Limited discovery became available as of right in securities arbitration by 1987. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 259 n.18 (1987) (Blackmun, J., concurring).

<sup>68</sup> Hensler, for instance, has argued that “[w]hatever else arbitration contracts achieve, they preclude plaintiffs from taking cases to juries, which many business decision makers believe are prejudiced against them.” Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 184 (2003).

<sup>69</sup> John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 856 (1985) (arguing that the “conclusory general verdict of a jury is the antithesis of a reasoned judgment; nor do we insist on much better in the realm of bench trials.”). As Alexandra Lahav put it,

In theory, judges could ask for publicly stated reasons from the jury, and the fact that we accept jury verdicts as legitimate, although they do not provide reasons, demonstrates that the idea that participation in adjudication requires public reason giving is not universal. Conversely, the lack of reasons accompanying jury verdicts may be one reason why there is so much criticism of the civil jury.

Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 519 (2015). Reason-giving may not be all that much more common when it comes to bench trials either. See Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 45–46 (1995) (“What is astonishing . . . is that reasoned judgments in criminal bench trials appear to be the exception rather than the rule in the United States. . . . [M]any states do not provide for specific findings in nonjury criminal trials under any circumstances.”).

<sup>70</sup> See Table C-4: *U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2016*, U.S. CTS, [www.uscourts.gov/sites/default/files/data\\_tables/fjcs\\_c4\\_0331.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c4_0331.2016.pdf) [https://perma.cc/5QLZ-GU4F] (last visited Jan 23, 2018) (reporting that of 270,298 federal district court cases terminated during the reporting period, 2,080 (0.8 percent) reached a jury trial).



tion. Only as to the last is there a possibility of a reasoned decision, and even here the chances of that happening are low—probably less than 30 percent.<sup>71</sup> In civil law jurisdictions, reasoned judgments are strictly unnecessary because, unlike the judgment itself, the *ratio decidendi* does not have the force of law. Many European countries require their courts to give reasons nonetheless.<sup>72</sup> Ironically, this is more than what can be said of federal trial and appellate judges in the United States, who actually have *no positive legal obligation* to provide reasons for their rulings<sup>73</sup> and in this respect are no different from many (but not all) private arbitrators. France is an example of a civil law country that has taken pithiness in judicial writing to an extreme. Even the apex court, the cour de cassation, is known for issuing conclusory and extremely terse judgments of one page or less<sup>74</sup>—that is, judgments whose form is scarcely distinguishable from that of a so-called “standard” (non-reasoned) arbitral award. True, France may be somewhat of an outlier in this respect, but the example goes to show that what we think of as a trademark of public adjudication will depend to a great deal on context.<sup>75</sup>

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<sup>71</sup> In their empirical study of 980 cases from four federal district courts, David Hoffman and his colleagues found that out of a total of 5,376 orders issued, which included everything from ministerial scheduling orders to orders granting summary judgment, only 178 or 3 percent were in the form of a reasoned opinion. David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 709–10 (2007). Out of the approximately 277 appealable, dispositive orders (such as orders granting summary judgment, post-trial motions), only approximately 75 (or 27 percent) resulted in a reasoned opinion. *See id.* at 710, 713–15. At the case level, they found that judges from the Northern District of California averaged writing only one opinion for every 12.4 cases they handled and that in approximately one half of the 980 cases in the study, judges issued no reasoned opinions whatsoever. *Id.* at 710.

<sup>72</sup> *See, e.g.*, Zivilprozessordnung [ZPO] [Code of Civil Procedure], Dec. 5, 2005, § 286 (Ger., amended July 18, 2017) (“In dem Urteil sind die Gründe anzugeben, die für die richterliche Überzeugung leitend gewesen sind.”).

<sup>73</sup> The only exception is where the failure to give reasons would entirely frustrate review by a higher court. *See* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 525–34 (2015). Nor is the failure to provide reasons reversible error. *Id.* at 533. And although some states require their appellate judges to provide reasons, Cohen argues there has historically been no such duty at common law. *Id.* at 525–27.

<sup>74</sup> MITCHEL DE S.-O.-L’E. LASSER, JUDICIAL DELIBERATIONS 30–34 (2004).

<sup>75</sup> Moreover, even in the case of France it would be incorrect to conclude that this one aspect of the judicial system—unreasoned judgments—reveals anything “characteristic” of this particular system. Common law lawyers have fallen into this trap when they take the absence of stated reasons in French court judgments as a sign that the French judiciary—or, worse, civil law systems more generally—is formalistic, authoritarian, or deductive to the core, and in this way essentially different from the more pragmatic, contextual, and policy-driven impulses of common law systems. As Mitchell Lasser has gone to great lengths to explain, these differences in the form of French and common law judgments are largely epiphenomenal because they conceal the important ways in which “serious, frank, long-term, informed, multifaceted, and explicitly substantive deliberation,” often in the form of lengthy written, reasoned analyses that are exchanged among decision-makers, does in fact pervade French judi-

Now consider whether reasoned decisions are foreign to arbitration. A clear counterexample here is inter-state and investor-state arbitral tribunals, which are known for issuing lengthy and meticulously-reasoned awards that can span hundreds of pages.<sup>76</sup> The PCA, which handles state-to-state, investor-state, and ICA cases, has required arbitral awards to be accompanied by a statement of reasons since its founding in 1899.<sup>77</sup> As far back as the turn of the century, some state arbitration statutes in the United States required arbitrators to “state the facts thus found and the conclusions of law separately.”<sup>78</sup> American trade associations and chambers of commerce from the same period sometimes published reasoned arbitral awards even beyond their membership.<sup>79</sup> For his part, Julius Henry Cohen—the mastermind behind the Federal Arbitration Act (FAA)—argued that arbitral awards were valuable as “precedent for the future guidance of other arbitrators” and advocated the use of written, reasoned awards in complex cases.<sup>80</sup> These longstanding norms and practices are perfectly understandable given that arbitration is a type of adjudication, which Lon Fuller famously described as a process of proof and reason-giving.<sup>81</sup> If Fuller is correct, it is difficult to appreciate how requiring arbitrators to record the reasons for their awards amounts to the improper “blurring” of arbitration and public adjudication.

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cial decision-making and inform published judgments; it just occurs within institutional confines and away from public view. *Id.* at 323–29. Much the same point can be made about arbitration vis-à-vis-litigation. That is, any difference in the reasoned character of arbitral awards and court judgments does not necessarily signify essential differences between the two forums. *Cf.* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 387 (1978) (arguing that the lack of reasoned awards in commercial arbitrations at the AAA does not undercut the reasoned character of arbitration *qua* adjudication).

<sup>76</sup> Awards issued in mixed claims commissions and other inter-state arbitration proceedings from the turn of the century were not materially shorter or less reasoned than opinions of the modern United States Supreme Court. Some awards were one hundred pages or more in length. *See, e.g.*, *Affaire des biens britanniques au Maroc espagnol* (Spain v. U.K.), 2 R.I.A.A. 615, 742 (Perm. Ct. Arb. May 1, 1925); *Company General of the Orinoco Case* (Fr. v. Venez.), 10 R.I.A.A. 184, 285 (Perm Ct. Arb. July 31, 1905).

<sup>77</sup> *First Hague Convention*, *supra* note 18, art. 52.

<sup>78</sup> *Compare* IOWA CODE § 12699 (1927) (“All the rules prescribed by law in cases of referees are applicable to arbitrators. . . .”), *with id.* § 11526 (“The report of the referee on the whole issue must state the facts thus found and the conclusions of the law separately. . . .”); *compare* NEB. REV. ST. § 9176 (1922) (“All the rules prescribed by law in cases of referees are applicable to arbitrators. . . .”), *with id.* § 8814 (“The trial before referees is conducted in the same manner as a trial by the court. . . . They must state the facts found and the conclusions of law, separately, and their decision must be given, and may be excepted to and reviewed in like manner.”). *But see* *McKnight v. McCullough*, 21 Iowa 111, 114 (Iowa 1866) (“The law requires the arbitrators to make an award—not facts found and legal conclusions.”).

<sup>79</sup> *See infra* note 95 and accompanying text.

<sup>80</sup> *See* Julius Henry Cohen, *Hand Book for Arbitrators*, in *COMMERCIAL ARBITRATION: A METHOD FOR THE ADJUSTMENT, WITHOUT LITIGATION, OF DIFFERENCES ARISING BETWEEN INDIVIDUALS, FIRMS, OR CORPORATIONS* 52 (1911).

<sup>81</sup> *See* Fuller, *supra* note 75, at 363–72.

Let me make a brief note here about published decisions. It is generally true that there is no requirement to make arbitration awards publicly available, nor is there a right of public access to arbitration proceedings. But that is not the same as saying that arbitration is secret.<sup>82</sup> In the absence of a nondisclosure agreement or a legal presumption of confidentiality,<sup>83</sup> a party to an arbitration may publish any documents including the award. Even with a confidentiality agreement, those materials would be discoverable in litigation.<sup>84</sup> By comparison, although court records are generally publicly available, it is not the norm to publish opinions and many United States courts actually have a presumption against it.<sup>85</sup> For example, on average less than 20 percent of appellate opinions are published.<sup>86</sup> The few studies of federal district court publication rates place the figure anywhere from 1.6 percent to 5.3 percent.<sup>87</sup> That percentage will be even lower in state trial courts—responsible for the vast bulk of litigation in

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<sup>82</sup> See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1218–19 (2006).

<sup>83</sup> Such a presumption exists in some jurisdictions outside the US. *E.g.*, *Ali Shipping Corp. v. Shipyard Trogir* (1998) 2 All ER 136 (K.B.).

<sup>84</sup> See CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* 425 (2002).

<sup>85</sup> *E.g.*, Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of “No-Citation” Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037, 1054 n.105 (2002) (“[N]early half of the federal appeals courts carry a presumption against the publication of opinions.”); Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 L. LIBR. J. 21, 22 (1991).

<sup>86</sup> See Table B-12: *U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2016*, U.S. CTS., [www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b12\\_0930.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2016.pdf) [<https://perma.cc/R2LG-B6W7>] (last visited Jan. 23, 2018) (reporting 11.3 percent publication rate across all circuit courts of appeal); JUD. COUNCIL OF CAL., *2016 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS* 27 (2016) (indicating that in 2014–15, only 9 percent of California Appellate Court opinions were published); Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 26 (2005) (“Less than nineteen percent of the cases disposed of on the merits last year resulted in published opinions.”).

<sup>87</sup> See Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 790 (1992); Allan D. Vestal, *Publishing District Court Opinions in the 1970’s*, 17 LOY. L. REV. 673, 683 tbl.2 (1971). Even when the sample is limited to determinations on the merits, the rate of publication is still surprisingly low. For example, Brian Lizotte found that out of a random sample of 607 cases terminated by summary judgment in the year 2000, only 75 or 12 percent were published in a federal reporter and another 172 or 28 percent were made available via online databases such as LEXIS. See Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 125–26, 130 (2007). The upshot is that the remaining 360 cases terminated by summary judgment were not published in any medium. David Hoffman and his colleagues isolated 1,091 substantive (*i.e.*, non-ministerial) orders in a sample of district court cases and found that only 178 of them (or 16.3 percent) resulted in opinions that were made available on an electronic database (some likely with the designation “unpublished opinion”). Hoffman, *supra* note 71, at 720.

this country—because their opinions are rarely published at all.<sup>88</sup> And when the inquiry is broadened to foreign trial courts, publicity may be an even less consistent quality of public adjudication.<sup>89</sup>

Consider, finally, the issue of appellate review. Hensler and Khatam take the proliferation of appellate arbitration rules and reports of an uptick in appeals of arbitral awards as a sign that arbitration is increasingly crossing the line into public adjudication.<sup>90</sup> The assumption must be that appellate review is either distinctive of courts or uncharacteristic of arbitration. Appellate review as we know it, however, was never a consistent staple of judicial procedure. In England, it was not until 1873 that the losing party to a suit at common law could appeal a question of fact.<sup>91</sup> Federal criminal defendants in the United States could not appeal their convictions until at least 1889.<sup>92</sup> Finally, the Court's longstanding position has been that due process does not require a right of appeal at all.<sup>93</sup>

It is also important to distinguish between two different types of appellate review: error correction, traditionally conceived as a private function, and law enunciation, traditionally conceived in more public terms.<sup>94</sup> It is true that law enunciation has never been regarded as an important function of arbitral tribunals, although as usual there are exceptions. For example, I know of at least one early twentieth century attempt in the United States to organize appellate arbitral awards into a national system of commercial precedent that would “deter-

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<sup>88</sup> See, e.g., Laura Denvir Stith, *Just Because You Can Measure Something, Does It Really Count?*, 58 DUKE L.J. 1743, 1755 n.39 (2009).

<sup>89</sup> For example, it has been reported that in Saudi Arabia, “courts are closed to everyone except for the relevant parties to a dispute and their legal counsel,” that “disputes are resolved behind closed doors,” and that “judicial dockets and opinions are not published or made available to the public.” See Amgad Husein & Jonathan Burns, *Choice of Forum in Contracts with Saudi Arabian Counterparties: An Analysis of the DIFC Common Law Courts from a Saudi Arabian Perspective*, 48 INT'L LAW. 179, 182 (2015).

<sup>90</sup> See Hensler & Khatam, *supra* note 2, at 393, 399.

<sup>91</sup> Lord Justice Atkin, *Appeal in English Law*, 3 CAMBRIDGE L.J. 1, 2 (1927). Unlike the United States, where the best judicial talent and the most resources were invested in the appellate rather than in the trial ranks, English courts historically focused on getting things right at the trial level. Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 128 (1926) (“The English instinct for judicial administration has always recognized the trial, rather than the appeal, as the primary field of court operation.”).

<sup>92</sup> See Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 n.4 (1985). At least as of the time Dalton wrote his article, criminal defendants in West Virginia had no automatic right to appeal their convictions—only a right to apply for the right to appeal. *Id.* at 62 n.2.

<sup>93</sup> Provided, of course, that due process rights were satisfied in the tribunal of first instance. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cty.*, 281 U.S. 74, 80 (1930). FAA section 10 likewise ensures that arbitrations governed by the FAA meet minimum due process standards. See Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 114–15 (1992).

<sup>94</sup> E.g., Michal Bobek, *Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe*, 57 AM. J. COMP. L. 33, 40 (2009).

min[e] authoritatively trade custom as regards the particular issue[s] involved” and “prove [valuable] to the merchant facing situations similar to those adjudicated by commercial bodies.”<sup>95</sup>

By contrast, the examples that Hensler and Khatam provide all have to do with error correction. This is a decidedly private function that is not inconsistent with one of the purposes of arbitration, which was to avoid the problem that commercial cases were often incorrectly decided in court by untutored juries or because of procedural technicalities having nothing to do with the substantive merits.<sup>96</sup> It is true that values such as finality and efficiency have generally militated in favor of narrowly limiting the grounds for correcting errors in arbitral awards. But it would be a stretch to infer from this that appellate review *qua* error correction is so foreign to the idea of arbitration that it threatens something akin to a genetic modification of the process. For example, in the early twentieth century, common law and statutory arbitral awards were reviewable for mistakes of law in some United States states.<sup>97</sup> Appellate arbitration boards were also a staple of certain trade association and chamber of

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<sup>95</sup> H. ARTHUR DUNN & HENRY P. DIMOND, *COMMERCIAL ARBITRATION: BEING A COMPILATION OF AWARDS OF ARBITRATION COMMITTEES OF VARIOUS TRADE ASSOCIATIONS AND CHAMBERS OF COMMERCE IN THE UNITED STATES* 29 (1922); *cf.* FRANCES KELLOR, *ARBITRATION IN ACTION: A CODE FOR CIVIL, COMMERCIAL AND INDUSTRIAL ARBITRATIONS* 127 (1941) (explaining that because trade-association arbitrators are often called upon to “interpret or apply the customs of a trade . . . [their decisions] are usually recorded and are placed at the disposal of subsequent arbitrators.”). Dunn and Dimond compiled reports of selected commercial arbitration decisions from various trade associations and chambers of commerce throughout the country and organized them by subject for “the establishment of a system of Reports of Commercial Arbitrations generally recognized and accepted as sound business doctrine by those engaged in commerce.” DUNN & DIMOND, *Preface to COMMERCIAL ARBITRATION*, *supra*. This effort was likely unique to trade association arbitration boards and likely did not apply to other arbitral forums such as the American Arbitration Association, which reportedly “discourage[d] the use of precedent.” Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 857 (1961).

<sup>96</sup> See Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1973–86 (2014).

<sup>97</sup> *E.g.*, ALA. CODE § 6170 (1928) (providing a right to appeal arbitral awards to the court of appeal or the supreme court); ARIZ. REV. STAT. § 4299 (1928) (providing that parties may agree to appeal arbitral awards to the superior court); S.C. CODE ANN. § 5602 (1922) (“*Provided*, [t]hat either party to the contentions shall have the right of appeal to the Circuit Court by serving written notice upon the opposite party within five days after the finding of said arbitration, setting forth the grounds of said appeal. And on such appeal the Circuit Judge presiding in said Court shall hear said appeal as to all questions of law and fact. . . .”); TEX. REV. CIV. STAT. ANN. art. 233–34 (1925) (providing that parties may agree to appeal arbitral awards to the trial court); *cf.* 5 CORPUS JURIS 183 (William Mack & William Benjamin Hale eds., 1916) (“Whenever the arbitrators are required, by the terms of the submission or by a statute or rule of court under which the arbitration proceeds, to determine the rights of the parties according to law, a plain mistake in their construction of the law is sufficient ground upon which to avoid the award.”).

commerce arbitration programs.<sup>98</sup> And although it did not specifically provide for the appeal of arbitral awards, the English Arbitration Act of 1889—which became a model for arbitration legislation in most crown colonies from Gibraltar to India to Australia<sup>99</sup>—enabled arbitrators to refer legal questions for judicial determination and was interpreted to empower English courts to remit arbitral awards for any clear error of law “appear[ing] on the face of the award.”<sup>100</sup>

*B. Do Some Procedures Defeat the Original Intent of Arbitration?*

Hensler and Khatam could retort that even if these procedural trappings had a longer history in arbitration than we thought, it still wouldn’t change their normative contention that these things never belonged in arbitration in the first place. Why? Because they all tend to make arbitration “time-consuming, expensive, and procedurally rigid,” whereas arbitration’s original purpose was to be “an inexpensive . . . efficient, and final means of resolving commercial disputes.”<sup>101</sup> In other words, they turn arbitration into something it was never supposed to be, something contrary to its very nature.<sup>102</sup>

Although much has been said about the importance of speed and economy in arbitration, it would be incorrect to reduce arbitration to these values

<sup>98</sup> Judging from the many extant reports of such appellate arbitral tribunals the process appears to have been used with some frequency. *See, e.g., Grain Dealers National Association Arbitration Rules*, in DANIEL BLOOMFIELD, SELECTED ARTICLES ON COMMERCIAL ARBITRATION 105, 108–09 (1927); DUNN & DIMOND, *supra* note 95, at 275–76, 279–80, 283–84, 286–90, 295, 304, 306 (setting forth appellate rules of the Chicago and New Orleans Boards of Trade, among several others). As one commentator at the time put it, “[o]ne is immediately struck in examining the trade association rules by the large number providing for an appeal after an arbitrator’s decision to another board of arbitration.” Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 623 (1934). Appellate procedures in trade association arbitration appear to have been common in England as well. *See* G. Ellenbogen, *English Arbitration Practice*, L. & CONTEMP. PROBS. 656, 671–75 (1952) (noting that some trade associations provided for not one but two tiers of appellate review).

<sup>99</sup> *See* Arbitration Act 1895, No. 1895-10 (Gib.); An Act to Amend the Law Relating to Arbitration, No. 9 of 1899, INDIA CODE (1899); *Arbitration Act 1902* (NSW) (Austl.).

<sup>100</sup> *Duff Development Co. v. Kelantan Gov’t.* [1924] AC 797 (HL) 819 (appeal taken from Eng.); Arbitration Act 1889, 52 & 53 Vict. c. 49 §§ 7, 10 (Eng.). International tribunals have likewise combined appellate judicial review (in both its error correction and law enunciation forms) with first-tier adjudication in arbitral forums. For example, since its inception the OHADA Common Court of Justice and Arbitration, a standing judicial appellate body, has had the power to review the awards of *ad hoc* arbitral panels to ensure uniform interpretation regional commercial laws. Treaty on the Harmonization of Business Law in Africa art. 21, Oct. 17, 1993, Org. for the Harmonization of Bus. L. Africa J. Officiel no 4 du 01/11/1997. The WTO likewise involves first-tier decision-making by *ad hoc* arbitral tribunals, followed by review of the same by the WTO Appellate Body, which is the equivalent of an international court.

<sup>101</sup> Hensler & Khatam, *supra* note 2, at 389, 407.

<sup>102</sup> *See id.* at 381.

alone.<sup>103</sup> Early twentieth century United States arbitration supporters did not regard efficiency as an end in itself, to be pursued at all costs regardless of the impact on process or outcomes.<sup>104</sup> Instead, they also saw them as a means to combat the unfairness and injustice that litigants routinely seemed to face in court. The oft-repeated refrain about courtroom litigation *circa* 1900 was “*justice delayed is justice denied.*”<sup>105</sup> That is, when it took not years but decades for a court to resolve a simple case of breach of contract,<sup>106</sup> the problem was not one of lost efficiencies but rather one of lost rights: witnesses forgot details, crucial evidence disappeared, real parties in interest died.<sup>107</sup> Likewise, there were widespread complaints at the turn of the century that court cases were won or lost not on the merits but rather based on which party had “the longest purse.”<sup>108</sup> Many small businesses and individuals with limited resources found themselves with little choice but to settle valid claims rather than vindicate them in court.<sup>109</sup> Arbitration was supposed to be economical not just in order to attract bottom-line-oriented disputants, but also to avoid the problem of wealth discrepancies skewing adjudication in arbitrary ways.

If this is correct, the mere fact that arbitration is getting more expensive or time consuming is not a problem *per se*. As Hensler and Khatam already appreciate, to some degree this is to be expected given the increasing complexity of commercial transactions and their legal-regulatory framework.<sup>110</sup> As long as what we lose in terms of speed or economy is outweighed by what we gain in terms of other arbitration values such as accuracy, legitimacy, or an improvement in the administration of justice,<sup>111</sup> it is difficult to see how arbitration’s reinvention is a problem rather than a potential solution. Even when it comes to courts, the pursuit of accurate decision-making on the merits has never been unqualified. Efficiency has always been an important value and is evident in doctrines such as *res judicata* and collateral estoppel.<sup>112</sup> If litigation cannot be

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<sup>103</sup> As I have argued elsewhere, this is a common move made by supporters and detractors of arbitration alike. *See generally* Aragaki, *supra* note 65.

<sup>104</sup> *Id.* at 152–55. If that were their true goal, the arbitration reformers could have advocated for all disputes to be settled by the toss of a coin. Instead, from what I can tell they had the highest regard for due process and substantive fairness in arbitration. Aragaki, *supra* note 96, at 1980–84.

<sup>105</sup> *E.g.*, William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L.Q. 261, 272–73 (1917) (emphasis added).

<sup>106</sup> For examples, see Aragaki, *supra* note 96, at 1968–69.

<sup>107</sup> *See* Aragaki, *supra* note 65, at 154.

<sup>108</sup> *E.g.*, MOORFIELD STOREY, *THE REFORM OF LEGAL PROCEDURE* 4 (1911).

<sup>109</sup> *E.g.*, Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 406 (1906).

<sup>110</sup> Hensler & Khatam, *supra* note 2, at 421.

<sup>111</sup> For a more detailed discussion of the importance of this last value for the arbitration reform movement that led to the FAA, see Aragaki, *supra* note 96, at 1973–87, 2000–02.

<sup>112</sup> *E.g.*, Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 332–34 (2008); Robert G. Bone, *Improving Rule 1: A Master Rule for the Fed-*

reduced to the untrammelled pursuit of justice, neither should arbitration be reduced to the blinkered pursuit of speed and economy.

C. *The Virtues of Hybridization*

At what point when we incorporate more and more of these procedures do we fail to preserve the essential “differences between arbitration . . . and litigation”<sup>113</sup> such that we risk “destroy[ing]”<sup>114</sup> both? The authors’ argument begs this type of question aimed at settling once and for all the boundary between “private” and “public” adjudication. It’s an alluring set of questions that appeals to the academic in me. But it is less helpful to the legal reformer in me, because even if we could all agree on where that line is as a metaphysical matter it is unclear that crossing it is to be avoided as a normative one.

Consider that the history of Anglo-American civil procedure has been a series of experiments in blurring boundaries—not always successfully—between supposedly distinct dispute resolution forums. In eighteenth and early nineteenth century England, Chancery routinely referred cases that required sophisticated fact-finding to arbitral tribunals.<sup>115</sup> American equity courts eventually abandoned the ancient tradition of a secret, documents-based procedure and began receiving oral testimony in open court.<sup>116</sup> The New York Field Code and the English Judicature Act of 1873 effectively collapsed the centuries-old segregation of law and equity, bringing them both under one roof.<sup>117</sup> Revolutionary reforms to English civil procedure, including the creation of the Commercial Court of the King’s Bench in the nineteenth century, were unabashedly described as based on the “central principle of commercial arbitration.”<sup>118</sup> And as I have elsewhere argued, our current Federal Rules regime was itself greatly inspired by the model of arbitration—in particular its procedural simplicity, efficiency, and ability to cut through technicalities to reach a decision on the merits—in ways hitherto underappreciated.<sup>119</sup> If my argument is correct, American civil procedure today is in many ways the product of *litigation’s* reinvention in arbitration’s image.

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*eral Rules*, 87 DENV. U. L. REV. 287, 302 (2010); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 243–47 (2004).

<sup>113</sup> Hensler & Khatam, *supra* note 2, at 422.

<sup>114</sup> *Id.* at 386.

<sup>115</sup> James Oldham, *On the Question of a Complexity Exception to the Seventh Amendment Guarantee of Trial by Jury*, 71 OHIO ST. L.J. 1031, 1033–36 (2010).

<sup>116</sup> Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1224–38 (2005).

<sup>117</sup> See *An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State*, ch. 379 1848 N.Y. Laws 164; Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66 (Eng.).

<sup>118</sup> See ROSENBAUM, *supra* note 38, at 48–50.

<sup>119</sup> See generally Aragaki, *supra* note 96.



Unlike Hensler and Khatam, therefore, I would like to take a stance in favor of arbitration's reinvention. To me, reinvention is the stuff of progress because real progress always requires a radical departure from the *status quo*. Think of it: human evolution happened only because amphibians ventured on land; modern democracies did not blossom until the divine authority of kings dared to be questioned; women's suffrage become a reality only because women refused to accept the way things always were.

In like manner, some of the most innovative and exciting developments in dispute resolution have been born of hybridization and cross-pollination between arbitration and litigation. We already considered the IUSCT, which is typically understood as an arbitral forum even though some regard it as a court or a claims commission.<sup>120</sup> Another example is the ICJ's *Ad Hoc* Chambers procedure,<sup>121</sup> which has been analogized to arbitration because it gives parties greater control over the composition of the tribunal.<sup>122</sup> Although the ICJ has a standing body of fifteen members who typically sit as a full bench, the Chambers process gives parties broad discretion to choose a smaller subset of members and even *non-members* to decide their dispute. Chambers judgments, however, are treated like any judgment of the full court and must be published.

New commercial courts in jurisdictions from Abu Dhabi to Singapore are also combining the "best of international commercial arbitration" with judicial procedure.<sup>123</sup> For example, the Singapore International Commercial Court (SICC) was created in part to address some of the criticisms of arbitration discussed by Hensler and Khatam. But even though it is a part of the Singapore judiciary, it is still heavily influenced by arbitral practice and procedure: The parties may opt out of the Singapore Rules of Evidence.<sup>124</sup> The court makes use of "international judges"—independent contractors who are neither Singaporean citizens nor full time employees of the court and therefore not publicly ac-

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<sup>120</sup> See *supra* notes 28–30 and accompanying text; Jan Klabbers, *The EJIL Foreword: The Transformation of International Organizations Law*, 26 EUR. J. INT'L L. 9, 58 (2015) (referring to the IUSCT as a "semi-permanent international judicial entity"); David D Caron, *International Claims and Compensation Bodies*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 283, 286 (Cesare PR Romano et al. eds., 2014) (describing the IUSCT as a "claims commission").

<sup>121</sup> See Statute of the International Court of Justice art. 26 ¶ 2, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993; Rules of Court art. 17, 1978 I.C.J. Acts & Docs.

<sup>122</sup> See Stephen M. Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM. J. INT'L L. 831, 843 (1987). Although most commentators would insist that the Chambers process is still judicial, others have taken the position that it is an even clearer example of arbitration than the IUSCT. E.g., John C. Guilds, III, "If It Quacks Like a Duck": Comparing the ICJ Chambers to International Arbitration for a Mechanism of Enforcement, 16 MD. J. INT'L L. & TRADE 43, 43, 81 (1992).

<sup>123</sup> See Firew Tiba, *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia*, 14 LOY. U. CHI. INT'L L. REV. 31, 32 (2016).

<sup>124</sup> Supreme Court of Judicature Act 2014, c. 322, § 80, O. 110, r. 23(1) (Sing.).

countable in quite the same way as their domestic counterparts.<sup>125</sup> And the entire proceedings (including the docket and all filings) may be closed to the public at the request of one party.<sup>126</sup>

Are these examples of “arbitration” or “courts”? Does it matter, especially if they are meeting the evolving needs of end-users while addressing perceived shortcomings of existing dispute resolution options? What these innovations all have in common is that they don’t think of it as an either/or choice between public and private adjudication; instead, they think of dispute resolution holistically, all the while borrowing one device from one process and glomming it on to another without so much as an afterthought. At the end of the day these initiatives in state-to-state and international commercial adjudication have managed to provide creative and workable options for increasingly complex problems. There is no reason why they cannot serve as precedents for similar reforms in investor-state, ICA, and domestic United States arbitration.

### III. FITTING THE FORUM TO THE FUSS

At this point it may be helpful to recap the two basic problems thematized by Hensler and Khatam’s paper. The first has to do with the expanding scope of arbitrability—that is, the increasing influx of public disputes into arbitral forums.<sup>127</sup> This is most evident in the domestic United States context,<sup>128</sup> so it is to this context that I shall confine my remarks in this Part. The second has to do

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<sup>125</sup> See SINGAPORE [CONSTITUTION], Dec. 22, 1965, S 1/63, art. 95(4)(c) (Sing.). A similar practice of using international judges exists in the Gulf region. See, e.g., Dubai International Financial Centre Court Law No. 10 of 2004, § 9(3).

<sup>126</sup> Supreme Court of Judicature Act 2014, c. 322, § 80, O. 110, r. 30(1) (Sing.). Although final judgments must be published, parties may request that sensitive information be redacted and, to the extent redaction is impossible, the SICC may postpone publication for up to ten years. *Id.*

<sup>127</sup> See Hensler & Khatam, *supra* note 2, at 420 (describing the “expansion in substantive scope, from a relatively narrow and homogeneous set of private nature disputes, to a more broad and diverse set of disputes with significant public policy implications”).

<sup>128</sup> It is least evident in ICA. The authors seem to acknowledge this when they observe that “[c]ontroversy in the international commercial arbitration domain focuses on practice rather than on jurisprudence,” by which they mean things like the increasing time and expense of arbitration rather than the influx of public claims. Hensler & Khatam, *supra* note 2, at 384. This is consistent with the fact that pre-dispute arbitration clauses are highly regulated in some countries. See, e.g., Philippe Fouchard, *La Laborieuse Réforme de la Clause Compromissaire Par La Loi Du 15 Mai 2001*, 2001 REVUE DE L’ARBITRAGE 397, 413–14; Council Directive 93/13/EEC art. 6, 1993 O.J. (L 95) 29 (EC) (“Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer . . .”); annex, 1993 O.J. (L 95) 29 (EC) (defining as “unfair” terms that “exclud[e] or hinder[] the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract”).

with reinvention, which is related but slightly different. Reinvention according to the authors (and as discussed above) does not consist in the bare fact that public claims are increasingly coming to be adjudicated in arbitration, for that would make it the same as the expansion of arbitrability. Instead, it is that the arbitration *process* has transformed in order to better accommodate this phenomenon.<sup>129</sup>

The second problem helps shore up an immediate lacuna in the first. Consider that expanding arbitrability would be far more problematic if arbitration procedure had remained frozen in time. But by the authors' own account, this is not what has happened: Due process protocols, publication and transparency requirements, and formal rules have gradually been incorporated into the arbitral process. If so, why is it a problem anymore? The reinvention thesis meets this challenge by contending that arbitration's transformation in these ways is *a priori* incapable of curing the problem—for example, because in doing so it ends up altogether defeating the very purpose of arbitration.

Because of the reservations I expressed in Part II, I am concerned that the reinvention thesis ends up shifting precious attention away from (and ultimately adds little to) what I regard as the more compelling problem: the troubling expansion of arbitrability. I think this problem is also closer to the authors' deeper interests, since their stated goal is not to rectify what they see as arbitration's structural transmogrification toward litigation; instead, it is to "more carefully analyze what disputes are most appropriately assigned to private and public procedures."<sup>130</sup> I take this to mean that the authors would be satisfied if a well-defined category of "public" claims were removed from the domain of "private" tribunals *regardless* of whether those private tribunals remained formal, complex, or encumbered with the accoutrements of litigation. And if so, it might be possible to relax or even jettison the reinvention thesis while still pursuing the authors' ultimate aims.

Those aims are important and deserve serious consideration by critics and supporters of arbitration alike. They also implicate a central preoccupation of ADR theory since Frank Sander's famous remarks at the 1976 Pound Conference.<sup>131</sup> There, Sander argued that litigation is not necessarily the best means of dispute resolution for the needs of every dispute and disputant; thus, some effort should be made to match those needs with more appropriate procedures—

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<sup>129</sup> Hensler & Khatam, *supra* note 2, at 420 (describing "the transformation of the procedure itself from an informal, streamlined, and highly private process, to a process resembling a public adjudicative forum").

<sup>130</sup> *Id.* at 386; see also Deborah R. Hensler, *The Private in Public, the Public in Private: The Blurring Boundary between Public and Private Dispute Resolution* (2014), in *FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION* 68 (Joachim Zekoll et al. eds., 2014).

<sup>131</sup> I am indebted to Jean Sternlight for bringing this to my attention.

an idea Sander would eventually coin as “fitting the forum to the fuss.”<sup>132</sup> In this Part, I take up what strikes me as one of the most important questions raised by Hensler and Khatam’s paper: What disputes should not be arbitrated and why?

To begin, let me clarify something about what Hensler and Khatam refer to as a “public” dispute. The public nature of a claim has traditionally consisted in whether it was brought by or against the state, such as a criminal charge or an action to declare a state law unconstitutional.<sup>133</sup> For good reasons, however, such claims are not arbitrable. The same is largely true of many *in rem* claims and claims whose resolution would affect the rights of third parties.<sup>134</sup> But because there is no credible expansion of arbitrability into these domains, these cannot be the type of disputes that Hensler and Khatam have in mind. Instead, what the authors think of as public disputes are really *private* disputes “with significant public policy dimensions”—for example, employment discrimination or consumer protection claims in which the public arguably has a heightened interest.<sup>135</sup>

I agree in principle with the position that certain claims do not belong in domestic United States arbitration today. I have argued, for instance, that certain remedies such as public injunctions are not appropriately decided in arbitration.<sup>136</sup> The real point of difference between me and the authors is *why*. Hensler and Khatam appear prepared to resolve the question of how to “fit the forum to the fuss” based solely on whether a dispute counts as “public,” for which they believe the essentially private nature of arbitration is a poor fit. But the category “public dispute” is no less stable than the category “arbitration,”<sup>137</sup>

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<sup>132</sup> See generally Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994). See Frank E.A. Sander, *Varieties of Dispute Processing*, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7–9, 1976), in F.R.D. 111, 130–31 (1976).

<sup>133</sup> Thus, when Bell wrote in 1877 that “private parties could not dispose of the public interest by any [arbitration] deed of theirs,” he was referring not to private claims that had a public character but rather to that quintessential form of a public claim: the criminal charge. JOHN MONTGOMERIE BELL, *TREATISE ON THE LAW OF ARBITRATION IN SCOTLAND* 121–22 (2d ed. 1877).

<sup>134</sup> Thus, some so-called “core” bankruptcy proceedings have been held non-arbitrable, as have child custody disputes. See THOMAS H. OEHMKE, *COMMERCIAL ARBITRATION* § 23:4 (2017) (explaining, *inter alia*, that a determination of discharge “constitutes a public rights dispute” that cannot be resolved in arbitration); *Toiberman v. Tisera*, 998 So. 2d 4, 9 (Fla. Dist. Ct. App. 2008) (voiding agreement to arbitrate child custody dispute); *Myers v. Parks*, 855 N.E.2d 112, 115 (Ohio Ct. App. 2006) (same); *Fawzy v. Fawzy*, 948 A.2d 709, 712 (N.J. Super. Ct. App. Div. 2008) (same).

<sup>135</sup> See Hensler & Khatam, *supra* note 2, at 386.

<sup>136</sup> Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1250 (2011).

<sup>137</sup> For example, Hensler and Khatam assume that disputes between “commercial partners over contract terms and performance” fall into the “private” side of the ledger. Hensler &

which is why I do not believe it is especially helpful to label certain things “public” or “private” and to make determinations based on those labels. Instead, I prefer to look at particulars: I would like to know, for instance, precisely how the features of a given arbitration procedure (whether reinvented or not) are inadequate for a particular dispute or category of dispute and, if they are, whether legal, private governance, or practice-based reforms to that procedure could be implemented before we throw the baby out with the bathwater.

Let me give an example from my own personal experience. I have handled several consumer cases as an AAA arbitrator and, as might be expected, there is a great diversity in the nature of the claims asserted. I have had cases involving *pro se* consumer claimants in which the type of due process protections to which Hensler and Khatam refer become all the more important. I have also adjudicated statutory claims where the consumer’s representative was just as sophisticated (or more so) than the respondent’s.<sup>138</sup> None of these cases raised novel legal questions for which new precedents need to be created. The arbitration agreements generally do not contain a confidentiality clause, so the public can still learn about any alleged wrongdoing, as well as the details of what transpired at the evidentiary hearing, as long as the consumer is willing to speak about it. The existence of a class waiver notwithstanding, consumers in these cases still manage to have their claims heard on the merits in part because statutory fee shifting provisions make such cases quite lucrative for lawyers and the provider of goods or services almost always agrees to pay all arbitration costs in non-frivolous matters.<sup>139</sup>

All of these cases are statutory consumer protection disputes and thus presumably count as “public” according to Hensler and Khatam. But they do not all affect the public interest in the same way. Given this, what do we lose by having *some* of them decided in arbitration? And is that better or worse than having *all* of them adjudicated in court? Ironically, it might be better for *pro se* consumer cases to remain in arbitration. Judge Richard Posner recently lament-

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Khatam, *supra* note 2, at 393. But even those who would agree with their overall argument could disagree that such disputes are, in fact, private. Like Hensler and Khatam, Heinrich Kronstein argued over sixty years ago that as an essentially “private” forum, arbitration should be limited to private disputes. Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36, 39–40 (1944). But the similarity ends there, since Kronstein argued that this meant arbitration was not appropriate for disputes even over a shareholder agreement involving only three shareholders. This is because “creditors, representing the public, have an inherent interest in any transaction governing the conduct of a corporation.” *Id.* at 61. Yet surely not even Hensler and Khatam would go this far.

<sup>138</sup> The most common type of consumer dispute I have seen is where the consumer is the one being sued, often by small businesses or solo practitioners, for recovery of sums due (some in the hundreds of thousands of dollars). In a large portion of those cases, the debts are meticulously documented and the consumer fails even to appear.

<sup>139</sup> The lawyers’ fees typically vastly exceed the consumer’s claim for damages, usually on the order of ten to one. For example, in cases where the consumer prevails on a claim of \$10,000 or less, the attorneys’ fees typically approach or exceed \$100,000.

ed that courts treat *pro se* parties unfairly—for example, by frequently dismissing their cases on technical grounds and assigning their appeals to staff lawyers rather than judges.<sup>140</sup> By contrast, the relative lack of formal rules in arbitration—typically cited as a reason why arbitration fails to safeguard the rights of the “little guy”—gives arbitrators the power to cut through technicalities and the letter of the law in order to help untutored litigants get their real grievances heard on the merits.<sup>141</sup>

Another consideration is that we typically know very little about whether a claim has “significant public policy dimensions” until it is already too late to ask whether it belongs in court or in arbitration. This is because, at the time one party moves to compel arbitration, all we have are bare allegations. Wittingly or not, a plaintiff can lead us to categorize what would otherwise be a run-of-the-mill wrongful termination case as an age discrimination claim just by dressing up his or her complaint. Thus, even if we could agree as a theoretical matter on where to draw the line between truly “public” and routine employment disputes, in actuality the sorting process will be over and under-inclusive because in some cases the allegations in the complaint will not accurately capture the gravamen of the claim. Moreover, the strongest of those claims will likely never see a jury trial anyhow, much less extensive pre-trial discovery. Why? Because where liability is clear, both parties are likely to make similar assessments of the outcome. The standard economic model would therefore predict that they are more likely to settle in order to avoid the transaction costs of litigation.<sup>142</sup> It’s the mediocre—or, depending on one’s perspective, “pathological”<sup>143</sup>—cases that make up the bulk of disputes that proceed to trial. If our aim is to bring truly egregious corporate wrongdoing to light, therefore, removing those cases from arbitration may not be all that effective.

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<sup>140</sup> Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html> [<https://perma.cc/AT27-PZLNQ>].

<sup>141</sup> At least one study found that arbitrators do this with some regularity in the securities context, where the law’s rigid and complex requirements can make it difficult for plaintiffs with morally compelling cases to prevail in court. See Barbara Black & Jill I. Gross, *Making It Up as They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1039 (2002) (arguing that investors may fare worse in court than in arbitration given the difficulties of proof, the likelihood that a judge will apply strict pleading requirements, or simply because “customers’ complaints are frequently stronger on the equities . . . while the brokers’ defenses are stronger on the law”).

<sup>142</sup> George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17 (1984). Other models predict that cases selected for trial will disproportionately favor repeat players and parties with more information. See, e.g., Bruce H. Kobayashi, *Case Selection, External Effects, and the Trial/Settlement Decision*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 17, 37 (David A. Anderson ed., 1996); James D. Miller, *Using Lotteries to Expand the Range of Litigation Settlements*, 26 J. LEGAL STUD. 69, 72 (1997).

<sup>143</sup> K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 62 (1960).

Moreover, the public or private nature of the claim is not the only relevant factor. Consent is another. Consider for a moment the Arbitration Fairness Act (AFA), which has been pending in one form or another in Congress since at least 2007.<sup>144</sup> The AFA proposes to make pre-dispute arbitration clauses involving employees, consumers, or civil rights claims unenforceable under the FAA for many of the same reasons identified by Hensler and Khatam. It does not however affect *post*-dispute submission agreements, which is to say that an employer and employee would remain free to agree to binding arbitration as long as they do so after the dispute has arisen. But a post-dispute submission to arbitration would still seem to pose the same problem underscored by Hensler and Khatam—namely, issues with significant public policy dimensions being resolved by a decision-maker who is a private citizen, possibly without discovery or meaningful appellate review, in a closed-door process that results in an unpublished award. Most critics, however, find this unproblematic. For if American litigants have for the longest time had the greater power to remove disputes from the public domain by settling them directly, why shouldn't they have the lesser power to settle them by use of a third-party arbitrator? Unless we are prepared to deny parties the right to settle disputes in which the public has a significant interest, we must accept the fact that consent—the knowing, informed, *post hoc* kind—is generally deemed sufficient to trump the public nature of a claim.

Hensler's own substantial and path-breaking work on mandatory court-annexed arbitration confirms as much. Many such now-defunct court programs required certain types of disputes that Hensler and Khatam would describe as "public" to be heard by practicing lawyers or retired judges who conducted proceedings that were never open to the public and who generally did not provide published reasons for their decisions—in other words, classic private arbitration before its "re-invention."<sup>145</sup> This included consumer cases, civil rights cases, and claims under protective federal statutes such as the Longshoremen & Harbor Worker's Act and the Federal Employer's Liability Act.<sup>146</sup> Some of the-

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<sup>144</sup> The most recent iteration is the Arbitration Fairness Act of 2017. *See* S. 537, 115th Cong. (2017); H.R. 1374, 115th Cong. (2017).

<sup>145</sup> Deborah R. Hensler, *Court-Ordered Arbitration: An Alternative View*, U. CHI. LEGAL F. 399, 401 (1990) [hereinafter Hensler, *Court-Ordered Arbitration*]; *see also* Deborah R. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 1 (1986). The only difference was that the courts exercised oversight over these programs. This may be a material difference compared with *ad hoc* arbitration, but query whether the same is true of arbitrations administered by institutions such as the AAA.

<sup>146</sup> BARBARA S. MEIERHOEFER, FED. JUD. CTR., COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 9 (1990). The types of cases typically excluded from such programs included prisoner cases, administrative appeals, tax and other more traditionally "public" cases that are not relevant to the authors' argument because there is no known expansion of arbitration into these areas. In some programs, however, "civil rights" cases were excluded. *See id.* Here it might be retorted that many disputes that Hensler and Khatam would consider public, such as employment discrimination claims, would have been automatically excluded

se cases were substantial, since in federal courts the upper jurisdictional limit was \$150,000 in 1988 (\$313,000 in 2017 dollars).<sup>147</sup> What made court-annexed arbitration largely unobjectionable to Hensler was the fact that parties retained the right to reject the arbitral award and request a trial *de novo* in court.<sup>148</sup> Even though they had no say in whether to participate in the process, in other words, they had to agree *post hoc* to the final award.

Indeed, Hensler argued that such programs actually added value because the cases diverted to arbitration were overwhelmingly likely to settle rather than go before a jury. This meant that the programs afforded litigants a real shot at getting something they were unlikely to get in court: a hearing on the merits relatively early in the case (albeit in arbitration). Here, then, is another crosscutting consideration: If some cases that would count as “public” are especially prone to informal bargaining if left in court, perhaps they would be better off in arbitration—even the binding kind—where they would at least get adjudicated by well-trained arbitrators who understand the law, in a “reinvented” process that provides many of the procedural safeguards we have come to expect in such cases.

A final problem with drawing lines purely based on the public or private nature of a claim is that it leaves Hensler and Khatam susceptible to the counter-critique that, just as some public claims do not belong in arbitration, some *private* claims may not belong in court. That is, if a dispute truly has no “significant public policy dimensions,” such as Hensler and Khatam’s example of a simple breach of contract dispute between two businesses,<sup>149</sup> is it not in some respect a waste of precious judicial resources, tax dollars, and juror time to have them adjudicated in a public forum? Obvious Article III and state constitutional concerns aside, there is at least a colorable public policy argument to be made that it is. Owen Fiss made just such an argument when he suggested that in cases where “only the interests and behavior of the immediate parties to the dispute are at issue,” it would be an “extravagant use of public resources” for them to be adjudicated in court.<sup>150</sup> He concluded that “it seems quite appro-

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from such programs because they were non-arbitrable under pre-*Gilmer* U.S. Supreme Court precedent in force at the time. But this overlooks the fact that *Gilmer*, *McMahon*, and similar cases responsible for the expansion of arbitrability into federal statutory claims were all FAA cases. The core logic of those cases was that there was no inherent conflict between the relevant federal statute and the FAA because there was no *per se* reason why arbitration was unsuitable to hear claims brought under them. The FAA does not apply to mandatory court-annexed mediation programs because there is no voluntary arbitration agreement.

<sup>147</sup> See MEIERHOEFER, *supra* note 146, at 32–33. The majority of cases actually selected for arbitration were likely of a much lower dollar value, however. *Id.* at 45.

<sup>148</sup> E.g., Hensler, *Court-Ordered Arbitration*, *supra* note 145, at 401 (describing mandatory arbitration as “differ[ing] significantly” from private arbitration because the latter “produces a binding outcome that the parties have a contractual obligation to accept”).

<sup>149</sup> Hensler & Khatam, *supra* note 2, at 393 (referring to disputes “between commercial partners over contract terms and performance”).

<sup>150</sup> Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979).



priate for those disputes to be handled . . . by arbitrators” and that courts may even be justified in mandating arbitration for this reason.<sup>151</sup>

#### CONCLUSION

Hensler and Khatam have done us a tremendous service by posing difficult questions with a breadth of vision that is both unique and refreshing. They have moreover brought together arbitration scholars in different fields, some working in blissful ignorance of one another, and for that I am grateful.

My chief concern is that, in the course of making their otherwise compelling arguments, Hensler and Khatam have managed to entangle themselves in what I am calling the metaphysics of arbitration. The risk here is that while this may help fuel the authors’ arguments, it may be used equally well in ways the authors would find troubling. For example, the Court has recently made similar metaphysical claims in order to force consumers to arbitrate on an individual basis, thus making it more difficult to bring class actions in arbitration. A case in point is *AT&T Mobility v. Concepcion*,<sup>152</sup> where the Court held that the FAA pre-empted a state law that invalidated class arbitration waivers. The rationale was that “[a]rbitration is poorly suited to the higher stakes of class litigation,” that “[a]rbitrators are not generally knowledgeable in the often-dominant procedural aspects of [class] certification” and thus cannot be trusted with ruling on them, and that the class mechanism “interferes with fundamental attributes of arbitration.”<sup>153</sup>

I would have liked the Court to embrace rather than reject the idea of class arbitration, just as I would have liked to see Hensler and Khatam embrace rather than reject arbitration’s reinvention. In both cases, I hold metaphysics partly responsible. After all, metaphysics seeks to capture the way the world is, and focusing on the way things are can lead us to believe that they are that way for a reason. Differences, limits, and the *status quo* can come to be explained in terms of necessity or destiny, which in turn can hinder us from imagining how things could be otherwise.

By contrast, I am interested in the way the world could be. I would dare to know how arbitration can evolve in new and unexpected ways to meet the challenges of future generations. And so it is that I celebrate arbitration’s reinvention.

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<sup>151</sup> *Id.*

<sup>152</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>153</sup> *Id.* at 344, 348, 350. Likewise, in *Stolt-Nielsen S. A. v. AnimalFeeds International Corp.*, the Court held that an arbitration clause that is silent about the availability of class-wide relief must be construed as prohibiting it, since class arbitration “changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010).