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Default Rules from Mandatory Rules:  
Privatizing Law Through Arbitration

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## Default Rules from Mandatory Rules: Privatizing Law Through Arbitration

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## INTRODUCTION

Privatization is all the rage. Over the last generation, private enterprise greatly increased its involvement in many activities that had been largely reserved to government.<sup>1</sup> Has privatization extended to the creation of law? Is this core function of government now being performed privately? This Article will consider the extent to which the creation of law has been privatized through arbitration. It will suggest that, under Supreme Court cases and other current legal doctrine, vast areas of law are privatizable and that this degree of privatization is possible only through arbitration. The implications of this conclusion are far-reaching, both for legal doctrine and for legal theory.

The Article begins by defining terms, particularly what it means to "privatize" law. Part II explains how current arbitration law permits parties to privatize other areas of law. The implications of this point are explored in Part III and are separated along the familiar line between mandatory rules of law and default rules. The first implication is that arbitration jeopardizes mandatory rules of law. To preserve the mandatory effect of these rules, the Supreme Court must make a choice. The Court must either reverse its decisions that claims arising under otherwise mandatory rules are arbitrable, or require de novo judicial review of arbitrators' legal rulings on such claims. The second implication is that claims arising under default rules should be arbitrable and completely free from judicial review for errors of law. The arbitration of claims arising under default rules presents an opportunity to privatize the creation of vast areas of law. It is an opportunity to create private legal systems of unwritten norms,<sup>2</sup> written rules, and the precedents of private courts.

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1. See DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* 12-13 (1998).

2. On the use of the word "norm," see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

[N]onlegal obligations may be created and enforced in a centralized or decentralized manner. Centralized private organizations, such as a diamond bourse, enforce relatively formal, usually written, rules, while groups and entire societies often enforce highly informal rules, such as the property norms ranchers follow in Shasta County. The distinction is important because some theorists prefer to use the term *norms* to refer only to decentralized rules and regard *organizational rules* as a set of obligations falling between centralized law and decentralized norms.

## I. PRIVATIZING LAW

"Private law" can mean different things in different contexts. Used broadly, it can mean all law respecting the rights of private parties against each other, even though such law is created and enforced by government.<sup>3</sup> Used narrowly, "private law" can mean only law created and enforced without any government involvement whatsoever.<sup>4</sup> In this Article, I use "private law" to mean privately-created law that is enforced by government. The most familiar example of private law in this sense is a contract between private parties.<sup>5</sup> A contract term is privately-created law that is enforced by government. The enforcement of contracts privatizes the creation of law. When contracts are enforced, privately-created rights and duties replace whatever government-created rights and duties would otherwise apply.

Not all contract terms are enforced by government. Many government-created rights and duties apply despite private agreements to substitute alternative rights and duties. For example, a manufacturer of consumer products remains under a duty to sell goods not "in a defective condition unreasonably dangerous to the user"<sup>6</sup> even if the user has agreed to accept such goods.<sup>7</sup> This law, requiring safe consumer goods, cannot be privatized.

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*Id.* at 351 (citations omitted).

3. BLACK'S LAW DICTIONARY 1196 (6th ed. 1990) (defining private law as "all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals").

4. Some might object that "law," under any coherent definition, presupposes government, an organized monopoly of coercive force. See, e.g., Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 58, 65 (1941). See generally ERVIN H. POLLACK, JURISPRUDENCE: PRINCIPLES AND APPLICATIONS 521-633 (1979) (discussing legal positivism). Others make strong arguments that law, in a meaningful sense, can exist without government. See, e.g., RANDY E. BARNETT, THE STRUCTURE OF LIBERTY 284-97 (1998) (describing imaginary polycentric legal order); BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (1990) (describing and envisioning law without government). See generally Tom W. Bell, *Polycentric Law*, 7 HUMANE STUD. REV. 1 (Winter 1991/92).

5. Other examples of private law include deeds, wills and trusts, and commercial devices, such as negotiable instruments and letters of credit. Another example is the doctrine of consent in tort. See discussion *infra* note 26.

6. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

7. See *id.* cmt. m ("The consumer's cause of action . . . is not affected by any disclaimer or other agreement."); W. PAGE KEETON ET AL., PROSSER AND

This distinction is often known as the distinction between default rules and mandatory (or immutable) rules.<sup>8</sup> Default rules are those government-created rights and duties that are privatizable, rules that govern unless the parties contract out of them.<sup>9</sup> Mandatory rules are those government-created rights and duties that cannot be avoided by contract, those that are not privatizable.<sup>10</sup> So defined, enormous quantities of state

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KEETON ON TORTS § 97, at 691-92 (5th ed. 1984 & Supp. 1988). This opposition to contract enforcement continues in the proposed revision to the Restatement of Torts. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (1998).

8. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 825 (1992). Another way to phrase the distinction is that between alienable and inalienable rights. Default rules confer alienable rights, while mandatory rules confer inalienable rights. See Stephen M. Bainbridge, *Insider Trading Under the Restatement of the Law Governing Lawyers*, 19 J. CORP. L. 1, 36-37 (1993) ("Default rules in corporate law are analogous to alienable property rights. . . . Continuing the analogy, mandatory rules in corporate law are comparable to inalienable property rights."); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 444 (1993) ("[R]ights that are governed by an immutable rule are 'market-inalienable' because they cannot be traded as part of a contractual exchange. Rights governed by default rules are 'alienable' because parties may alter the rules as part of a market transaction."). Even rights conferred by mandatory rules, however, become alienable once a dispute has arisen. See discussion *infra* notes 115-16 and accompanying text.

9. See, e.g., Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725, 733 (1993) ("[D]efault rules . . . govern in the absence of contract terms to the contrary."); W. David Slawson, *The Futile Search for Principles for Default Rules*, 3 S. CAL. INTERDISC. L.J. 29, 29 (1994) ("The contract preempts a law that would otherwise have determined the rights or duties of the parties."). One can distinguish among default rules by the process parties must use to opt out of them. Some default rules require more elaborate processes than others. See, e.g., Ayres & Gertner, *supra* note 8, *passim* (contrasting penalty, tailored and un-tailored default rules); Stephen J. Ware, *Consumer Arbitration As Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 219 (1998) (contrasting contractual and "knowing and voluntary" standards).

10. See Ayres & Gertner, *supra* note 8, at 88 ("Immutable rules displace freedom of contract."). One can distinguish mandatory rules that are part of contract law from those that are not. Mandatory rules of non-contract law apply whether or not a contract is formed; mandatory rules of contract law apply only if a contract is formed. See Stewart Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237, 239 n.6 (1988) (referring to mandatory rules of contract law "as coercive contract rules"); see also Ayres & Gertner, *supra* note 8, at 87 n.1 ("[I]mmutable entitlements are created by and conditioned upon contract, while inalienable entitlements exist outside of contract."). *But see* Lawrence Kalevitch, *Gaps in Contracts: A Cri-*

and federal law are not privatizable. These vast bodies of law consist of mandatory rules.<sup>11</sup> That, at least, is the prevailing view.

In this Article, I advocate an alternative view. I contend that much of what is widely-believed to be mandatory is, under Supreme Court cases and other current legal doctrine, effectively default. I argue that vast areas of law are, contrary to the received wisdom, privatizable. Parties can contract out of this law, but only by using a particular sort of contract, an arbitration agreement.

## II. PRIVATIZING LAW THROUGH ARBITRATION

### A. OVERVIEW OF ARBITRATION

Arbitration, like litigation, is a form of adjudication.<sup>12</sup> The difference between the two is that arbitration is private adjudication.

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*tique of Consent Theory*, 54 MONT. L. REV. 169, 170 n.1 (1993) (“[I]mmutable rules of contract law are oxymoronic and paradoxical.”).

I suggest a further distinction within mandatory rules of contract law. The mandatory rules specifying the requirements for forming an enforceable contract differ from other mandatory rules of contract law in that the former must, as a matter of logic, be mandatory. See discussion *infra* notes 197-99 and accompanying text.

11. See, e.g., Ware, *supra* note 9, at 207-09. Examples include the tort law of strict products liability, the warranty of habitability in landlord/tenant law, usury laws, and laws prescribing terms of insurance and employment contracts. See *id.*

12. “Arbitration is a form of adjudication because the parties participate in the decisional process by presenting evidence and reasoned arguments to an arbitrator whose final decision should be responsive to the dispute as presented.” I IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW § 2.6.1, at 2:37 n.1 (1994) (citing Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-64 (1978)); see also JOHN S. MURRAY, ALAN SCOTT RAU & EDWARD F. SHERMAN, PROCESSES OF DISPUTE RESOLUTION 500 (2d ed. 1996) (characterizing arbitration as “the process of private adjudication”); William M. Landes & Richard A. Posner, *Adjudication As a Private Good*, 8 J. LEGAL STUD. 235, 235 (1979) (“[E]ven today much adjudication is private (commercial arbitration being an important example).”); Unfortunately, even some of the most thoughtful arbitration scholars contrast “arbitration” with “adjudication.” See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 148 (1992) (“[A]rbitration has important substantive and procedural advantages over adjudication.”); see also Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986) (“In strictly private disputes, ADR mechanisms such as arbitration often are superior to adjudication.”); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 222-28 (1995); Michael Hunter Schwartz, *From Star*

cation, while litigation is government adjudication. In both processes, a non-party decisionmaker resolves the dispute. In arbitration, the decisionmaker is one or more arbitrators; in litigation it is the court, i.e., a judge and, sometimes, a jury.

Adjudication typically produces winners and losers, and the losers may refuse to comply with the adjudicator's decision. When losers defy the ruling of a court, the process for enforcement is well-known. The sheriff or marshal enforces the court's ruling by seizing property, putting a person in jail, or forcibly enjoining a person from doing something.<sup>13</sup> The same enforcement process occurs when the loser at arbitration defies the arbitrator's decision. The winner at arbitration petitions the court for an order confirming the arbitration award.<sup>14</sup> Through confirmation, the court adopts the arbitrator's decision as its own, and that decision is enforced like any other ruling of the court.<sup>15</sup>

In light of the great power this gives arbitrators, many people may wish to keep their disputes out of arbitration. They are free to do so. Disputes go to arbitration only with the consent of all parties to the dispute.<sup>16</sup> This fundamental principle

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*to Supernova to Dark, Cold Neutron Star: The Early Life, the Explosion and the Collapse of Arbitration*, 22 W. ST. U. L. REV. 1, 3 (1994) ("[T]he solutions for arbitration's ills necessarily will involve adapting procedures from adjudication to arbitration."); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 263-69 (comparing arbitration with adjudication).

13. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 15.7-8, at 708-15 (2d ed. 1993).

14. See IV MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 38.1.1, at 38:1 (Supp. 1996).

15. See *id.*

16. As the Supreme Court puts it, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.").

Courts use a number of forms of alternative dispute resolution such as mediation, neutral expert fact-finding, mini-trials, settlement conferences and summary jury trials. See I MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 2.4.1, at 2:29 (Supp. 1994). One of the programs used by many courts is "court-annexed arbitration." *Id.* at 2:30 (Supp. 1994). These proceedings "deviate[ ] sharply" from contractual dispute resolution in two respects: *Id.* First, disputes go to court-annexed arbitration, not because the parties contracted for such a process, but because the court system imposed it. See *id.* Second, a party who does not wish to comply with an arbitral award has a

of arbitration law yields the axiom that "arbitration is a creature of contract."<sup>17</sup> Unless you have contracted to send your dispute to arbitration, you will not be relegated to arbitration. The courthouse door will remain open for you to litigate. On the other hand, if you do agree to arbitrate, that agreement will be enforceable. The Federal Arbitration Act (FAA),<sup>18</sup> which applies to virtually all arbitration agreements,<sup>19</sup> requires courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>20</sup>

While the usual remedy for breach of contract is money damages,<sup>21</sup> courts enforce arbitration agreements with the remedy of specific performance.<sup>22</sup> Consider, for example, a contract for the sale of a car to a consumer. Assume the contract contains a clause obligating its signatories to arbitrate, rather than litigate, any dispute arising out of the transaction. Assuming there is no generally applicable contract defense, this arbitration agreement will be enforced by specific performance. So if the consumer sues the seller, the suit will be stayed.<sup>23</sup> The consumer may prevail, if at all, only through arbitration. Bringing suit breaches the agreement to arbitrate, rather than litigate, and the court orders the consumer to perform that agreement by closing the courthouse door.<sup>24</sup>

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right to a trial de novo if the award was rendered by a court-annexed arbitrator, but not if it was rendered by an arbitrator chosen by contract. *See id.*

17. *See, e.g.,* *Fils et Cables D'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 243 (S.D.N.Y. 1984). A search on July 10, 1998 for the phrase "arbitration is a creature of contract" in the Westlaw ALLCASES database yielded 177 cases.

18. 9 U.S.C. §§ 1-16 (1994).

19. The FAA extends to the limit permitted by the U.S. Constitution's Commerce Clause. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995). There is an exception regarding labor and employment agreements. *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 94 (1996).

20. 9 U.S.C. § 2 (1994).

21. *See* E. ALLAN FARNSWORTH, *CONTRACTS* § 12.8, at 871 (2d ed. 1990).

22. *See* 9 U.S.C. §§ 3-4 (1994).

23. *See id.* § 3.

24. If the consumer seeks to arbitrate and the seller refuses to participate, a court will order the seller to do so. *See id.* § 4. This order is another example of specific performance.



## B. MUST ARBITRATORS APPLY THE LAW?

### 1. Converting Mandatory Rules into Default Rules

As discussed in Part I, when contracts are enforced, privately-created rights and duties replace whatever government-created rights and duties would otherwise apply. Those otherwise-applicable rights and duties derive from default rules. In contrast, rights and duties derived from mandatory rules cannot be replaced with privately-created rights and duties. Contracts purporting to do this are not enforceable. Therefore, one can identify which laws are default and which are mandatory by examining the sorts of contract terms<sup>25</sup> that are, and are not, enforceable. For example, the tort law giving me the right not to be punched in the nose is a default rule because I can make an enforceable contract to enter a boxing match.<sup>26</sup> The law on nose-punching is privatizable. In contrast, the law giving a consumer the right to buy safe goods<sup>27</sup> is mandatory because it applies no matter what the contract terms say.<sup>28</sup> The law on product safety is not privatizable. Nor is it alone in this respect. An enormous amount of state and federal law is ordinarily believed to be mandatory, i.e., unaffected by con-

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25. It is also possible to determine those laws that are default and those that are mandatory by looking to other privately-created law. See *supra* note 5.

26. Technically, it is not the contract that privatizes the law on nose-punching; it is the "consent" doctrine of tort law. See W. PAGE KEETON ET AL., *supra* note 7, § 18, at 112, 114 ("Consent ordinarily bars recovery for intentional interferences with person or property. . . . One who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the understood rules of the game."). Contract cannot privatize the law on intentional torts beyond the privatization inherent in the tort law doctrine of consent. See FARNSWORTH, *supra* note 21, §5.2, at 353 n.17 ("A party clearly cannot exempt itself from liability in tort for harm that it causes intentionally or recklessly. . . . However, if the victim effectively consents, there may be no tort.").

In some jurisdictions in which boxing is illegal, the law on nose-punching is not privatizable. See, e.g., *Hart v. Geysel*, 294 P. 570 (Wash. 1930). See generally Ian Forman, *Boxing in the Legal Arena*, 3 SPORTS L.J. 75 (1996) (exploring the history of and the legal issues surrounding boxing); Peter E. Millsbaugh, *The Federal Regulation of Professional Boxing: Will Congress Answer the Bell?*, 19 SETON HALL LEGIS. J. 33, 41-42 (1994) ("[F]orty-two states and the District of Columbia have come to regulate boxing. At this writing, the sport remains legal but unregulated in the remaining eight states.").

27. Safe goods are those goods not "in a defective condition unreasonably dangerous to the user." RESTATEMENT (SECOND) OF TORTS § 402A (1965).

28. See *supra* note 10.

tract.<sup>29</sup> But this belief fails to account for arbitration. Mandatory law is jeopardized by the enforcement of arbitration agreements. The enforcement of arbitration agreements effectively converts what would otherwise be mandatory law into default law.

To see this, consider what happens when arbitrators do not apply the law to the cases before them. Those arbitration decisions are likely to be enforced anyhow.<sup>30</sup> Courts do not closely review arbitration awards to ensure that arbitrators apply the law.<sup>31</sup> And even if a court discovers that an arbitration award does not apply the law, the court will likely confirm the award. Only in rare cases does a court vacate an arbitration award because of the arbitrator's legal error.<sup>32</sup> Outside these rare cases, an agreement to arbitrate is, in effect, an agreement to comply with the arbitrator's decision whether or not the arbitrator applies the law. Such an agreement, then, contracts out of all the law that would have been applied by a court but for the agreement. All such law, in effect, consists of default rules because arbitration agreements are enforced.<sup>33</sup> All such law is privatizable.

While an arbitration agreement contracts out of all the law that would have been applied by a court, that law may still be applied by the arbitrator. The arbitrator may even apply that law more aggressively than a court would have. Contracting out of law through arbitration agreements does not necessarily mean that such law will be under-enforced in the sense that plaintiffs "do worse" in arbitration than they would have done in court. In some cases, arbitrators reach a more "pro-plaintiff" result than a court would have reached; in others, arbitrators reach a more "pro-defendant" result than a court would have

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29. See *supra* note 11 and accompanying text.

30. See *infra* Part II.B.3.

31. See *infra* Part II.B.3.

32. See *infra* notes 85-100 and accompanying text.

33. See *infra* Part III.A. If a particular law is enforced by a government agency, as well as private plaintiffs, then the arbitration agreement contracts out of it only to the extent it is enforced by private plaintiffs. As Paul Carrington and Paul Haagen put it, the enforcement of arbitration agreements allows parties "to contract out of effective *private* enforcement of regulations adverse to their interests." Paul D. Carrington & Paul Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 338 (emphasis added).

reached. We cannot know which of these deviations occurs more often.<sup>34</sup>

To reiterate, an agreement to arbitrate is, in effect, an agreement to comply with the arbitrator's decision whether or not the arbitrator applies the law. Such an agreement, then, contracts out of all the law that would have been applied by a court but for the agreement.

## 2. The Supreme Court's Denial

The Supreme Court denies that arbitration agreements contract out of substantive, as opposed to procedural, law.<sup>35</sup> Understanding this denial requires a bit of history.

For centuries, arbitration has been widely used among merchants to resolve commercial disputes.<sup>36</sup> The prevalence of arbitration is especially strong with respect to international commercial and maritime matters.<sup>37</sup> And since the enactment of federal labor legislation in the 1930's, arbitration has become the primary means of resolving disputes between labor unions and employers.<sup>38</sup> Only recently, however, has arbitration become significant outside the commercial and labor areas.<sup>39</sup> This expansion was largely driven by the Supreme

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34. At best, we have the impressions of lawyers and parties who frequently litigate and arbitrate similar cases. These lawyers and parties may have impressions such as "plaintiffs in X sort of case do better in arbitration than litigation" or "plaintiffs in Y sort of case do worse in arbitration than litigation." These impressions are unscientific because no two cases are identical. Factual differences between cases, rather than differences between arbitrators and courts, may account for the results.

35. See *infra* notes 59-77 and accompanying text.

36. See, e.g., William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193 (exploring the history of arbitration in New York).

37. See, e.g., MURRAY, RAU & SHERMAN, *supra* note 12, at 529 ("[I]n international commercial contracts, arbitration clauses 'not only predominate but are nowadays almost universal' and are 'virtually taken for granted.'") (quoting The Hon. Mr. Justice Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. L. 164, 165, 171).

38. See STEPHEN B. GOLDBERG, FRANK E.A. SANDER & NANCY H. ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* 199 (2d ed. 1992).

39. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 650 (1985) (Stevens, J., dissenting) (referring to "the undisputed historical fact that arbitration has functioned almost entirely in either the area of labor disputes or in 'ordinary disputes between merchants as to questions of fact'").

Court. The Court's arbitration decisions over the last twenty-five years greatly expanded the scope of arbitrable claims.<sup>40</sup>

An arbitrable claim is one with respect to which a pre-dispute arbitration agreement will be enforced.<sup>41</sup> Consider, for example, a contract between Buyer and Seller containing the following standard arbitration clause:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association<sup>42</sup> under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

If a dispute arises and one party seeks to litigate, while the other seeks to arbitrate, a court will have to decide whether to hear the case or to order arbitration. Assuming there is no generally applicable contract defense, a court will order arbitration if, for example, Seller alleges that Buyer failed to pay, or Buyer alleges that Seller breached a warranty. By sending contract and warranty claims to arbitration over the objection of a party, a court holds that such claims are arbitrable.

But what if Buyer alleges that Seller violated the antitrust laws? Until recently, courts held that antitrust claims were not arbitrable.<sup>43</sup> That is, if either party sought to litigate rather than arbitrate the antitrust claim, a court would have heard the antitrust claim on the merits, rather than ordering arbitration of it. In our example, the court probably would have conceded that Buyer and Seller agreed to arbitrate Buyer's antitrust claim because it, like the contract and warranty claims, "ar[ose] out of" the contract. But the court would have refused to enforce the agreement to arbitrate *antitrust* claims on the grounds that enforcement would violate "public

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40. See *infra* note 57 and accompanying text.

41. The distinction between pre- and post-dispute agreements to arbitrate is discussed *infra* notes 115-17 and accompanying text.

42. See generally AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES (1993).

43. See, e.g., *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968) (declaring antitrust claims "inappropriate for arbitration"). But see *Mitsubishi Motors Corp.*, 473 U.S. at 640 (holding an agreement to arbitrate a claim arising under the Sherman Antitrust Act enforceable). For an interesting discussion of arbitration as a tool of cartels, see Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36 (1944).

policy." In other words, courts held that antitrust claims were inarbitrable.<sup>44</sup>

Antitrust claims were not alone in this regard. Other claims that courts held to be inarbitrable included: securities,<sup>45</sup> RICO,<sup>46</sup> patent,<sup>47</sup> copyright,<sup>48</sup> "non-core" bankruptcy proceedings,<sup>49</sup> Title VII,<sup>50</sup> ADEA,<sup>51</sup> and ERISA.<sup>52</sup> With these statutory claims excluded, arbitration was primarily a method of resolving contract claims. This is not surprising given the two traditional contexts of arbitration: commerce and labor.<sup>53</sup> The typical dispute in both contexts centers on contract: merchants

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44. This Article discusses "subject matter" arbitrability, as opposed to "contractual" arbitrability. The latter is the case-by-case question of whether the particular contract sends to arbitration all claims or only some types of claims. The most important issue regarding contractual arbitrability is who, court or arbitrator, decides whether a claim is arbitrable.

[Most countries' laws] contain the *kompetenz-kompetenz* doctrine, under which arbitral tribunals are given the authority to rule initially at least upon questions of contractual inarbitrability. These determinations are subject to judicial review . . . at the stage of enforcement when a final award can be challenged on the basis of an invalid or non-existent arbitration agreement or for excess of arbitral authority.

Thomas E. Carbonneau, *Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration*, 6 AM. REV. INT'L ARB. 1, 17 (1995). In contrast, the FAA sends contractual arbitrability decisions to courts, rather than arbitrators, see 9 U.S.C. § 3 (1994), but this is a default rule so the parties can agree to have contractual arbitrability decided by the arbitrator. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946-47 (1995).

45. See *Wilko v. Swan*, 346 U.S. 427, 438 (1953).

46. See *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 298-300 (1st Cir. 1986). "RICO" is an abbreviation for "Racketeer Influenced and Corrupt Organizations." 18 U.S.C. §§ 1961-68 (1994).

47. See *Beckman Instruments, Inc. v. Technical Dev. Corp.*, 433 F.2d 55, 63 (7th Cir. 1970).

48. See *Kamakazi Music Corp. v. Robbins Music Corp.*, 522 F. Supp. 125, 137 (S.D.N.Y. 1981), *aff'd*, 684 F.2d 228 (2d Cir. 1982).

49. See *Zimmerman v. Continental Airlines*, 712 F.2d 55, 59 (3rd Cir. 1983). *But see Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1155 (3d Cir. 1989) (overruling and holding that non-core bankruptcy proceedings are arbitrable). A core proceeding involves "the administration of the estate; the allowance of claims against the estate; the avoidance of preferences or fraudulent transfers; determinations as to dischargeability of debts; priorities of liens; or the confirmation of a plan." *Id.* at 1156 n.9.

50. See *Utey v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989).

51. See *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 231 (3rd Cir. 1989).

52. See *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 941 (3d Cir. 1985).

53. See *supra* notes 36-39 and accompanying text.

allege breach of sales contracts, while labor unions allege breach of collective bargaining agreements. Until about twenty-five years ago, arbitration seemed largely confined to contract claims and little attention was given to the question of whether non-contract claims were arbitrable.<sup>54</sup> Then the Supreme Court revolutionized arbitration law.<sup>55</sup>

Over the last twenty-five years, the Supreme Court drastically reduced the scope of the public policy defense to arbitration.<sup>56</sup> In other words, the Court drastically increased the variety of arbitrable claims. Virtually all claims are now arbitrable.<sup>57</sup> Thus arbitration has "moved from the role of commercial court to that of a civil court of general jurisdiction."<sup>58</sup>

A crucial step in the reasoning of the Court's decisions expanding arbitrability is that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."<sup>59</sup> This point is essential to the Court's

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54. Cf. Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 U.M.K.C. L. REV. 449, 462-64 (1996) (explaining that common law courts rarely had occasion to address noncommercial arbitration and would have been skeptical of it); Stempel, *supra* note 12, at 273 (discussing arbitration in early America and noting that no "personal injury actions, employer-employee disputes, or landlord-tenant disputes" arose during that time).

55. See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 134-55 (1992) (discussing the history of arbitration since 1938, focusing on changes in the past 30 years).

56. "[T]he public policy defense is dead under the FAA, unless [in a particular statute] Congress has made plain to the contrary." II MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 16.3.3.1, at 16:41.

57. See *id.* § 16. The Ninth Circuit, however, recently concluded that the Civil Rights Act of 1991 renders Title VII claims inarbitrable. See *Duffield v. Robinson Stephens & Co.*, 144 F.3d 1182, 1199 (9th Cir. 1998) ("Congress intended to preclude compulsory arbitration of Title VII claims."); *accord* *Winkler v. Pacific Brokerage Servs., Inc.*, No. 97 C 7340, 1998 WL 341622 (N.D. Ill. June 19, 1998); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243 (S.D.N.Y. 1998); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998). The majority of circuit courts ruling since the 1991 Civil Rights Act have found that Title VII claims are arbitrable. See *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992).

58. Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997).

59. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987).

conclusion that claims such as antitrust, securities, and employment discrimination are arbitrable.<sup>60</sup> If an agreement to arbitrate one of these claims did entail a "restriction on substantive rights," the Court would not enforce the agreement because the statutes conferring the rights are indisputably mandatory, not default, rules.<sup>61</sup> For example, in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.*,<sup>62</sup> the Court held that antitrust claims were arbitrable. The Court explicitly rested its holding on the premise that the arbitrators would apply federal antitrust statutes to the dispute and that a court would grant a motion to vacate the arbitration award if the arbitrators did not apply them.<sup>63</sup>

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60. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). The Court also cited this proposition in *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 483-84 (1989) (holding that a claim arising under the Securities Act of 1933 may be subject to a pre-dispute mandatory arbitration agreement), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (holding that a claim brought under the ADEA was subject to a pre-dispute mandatory arbitration agreement).

61. Some federal statutes expressly state that they are mandatory rules. For instance, the Securities Act of 1933 declares void "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of [the Act]." 15 U.S.C. § 77(n) (1994). The Securities Exchange Act of 1934 has the same language. See 15 U.S.C. § 78(cc)(a) (1994).

Other statutes do not expressly say whether they are mandatory or default rules, but courts have interpreted them to be mandatory. The employment discrimination statutes are examples of such statutes. See, e.g., MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.84 (1988); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 111.

62. 473 U.S. 614 (1985).

63. *Mitsubishi* involved a sales agreement between Mitsubishi, a Japanese car manufacturer, and Soler, a Puerto Rican corporation. See *id.* at 616-617. The agreement stated that it "will be governed by and construed in all respects according to the laws of the Swiss Confederation," *id.* at 637 n.19, and provided for disputes to "be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id.* at 617 (citing the parties' sales agreement). When a dispute arose, Mitsubishi sued Soler seeking an order compelling arbitration. See *id.* at 618-19. Soler counterclaimed, asserting a variety of claims including one alleging that Mitsubishi had violated the Sherman Act. See *id.* at 619-20.

The Supreme Court held that Soler's antitrust claim was arbitrable. In doing so, it considered the possibility that "the arbitrators could consider Soler's [antitrust claim] to fall within the purview of th[e] choice-of-law provision, with the result that it would be decided under Swiss law rather than the U.S. Sherman Act." *Id.* at 637 n.19. The Court said this was unlikely to occur

*Mitsubishi* and other decisions expanding arbitrability follow from the Court's view of arbitration clauses as "a specialized kind of forum-selection clause."<sup>64</sup> A forum-selection clause specifies the forum to resolve a dispute; it does not specify the law the forum will apply to the dispute.<sup>65</sup> In contrast, a choice-of-law clause does the opposite;<sup>66</sup> it specifies the governing law, but does not specify the forum that will resolve the dispute.<sup>67</sup> As every forum has its own procedures, forum-selection clauses specify the *procedural* law to be used, and choice-of-law clauses specify the *substantive* law.<sup>68</sup> A contract might include a forum-selection clause, a choice-of-law clause, neither or both.

The Court conceives of arbitration clauses as forum-selection clauses, but not as choice-of-law clauses.<sup>69</sup> In the Court's view then, an arbitration clause specifies the procedural law to be used in resolving a dispute, but not the substantive law to be used. With respect to substantive law, *Mitsubishi* indicates that arbitrators must apply the same substantive law a court would apply.<sup>70</sup> Similarly, in *Shearson/American Express, Inc. v. McMahon*,<sup>71</sup> the Court held that claims under the Securities Exchange Act were arbitrable be-

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because "counsel for Mitsubishi conceded that American law applied to the antitrust claims." *Id.* Thus the Court believed that, in the case at hand, little danger existed that the arbitrators would interpret the arbitration clause, in combination with the Swiss choice-of-law clause, as contracting out of the Sherman Act. *See id.* As guidance for future cases, however, the Court cautioned that "in the event the choice-of-forum [arbitration] and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* Finally, "courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.* at 638.

64. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

65. *See, e.g., Johnston County v. R.N. Rouse & Co.*, 414 S.E.2d 30, 33 (N.C. 1992). *See also* Leandra Lederman, Note, *Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 423 n.10 (1991).

66. *See R.N. Rouse & Co.*, 414 S.E.2d at 33.

67. *See id.*

68. "[D]istinctions do not lack respectability because they are not absolute: substance and procedure differ even if, at the margin, they become difficult to distinguish." Paul D. Carrington, "Substance" and "Procedure" in the *Rules Enabling Act*, 1989 DUKE L.J. 281, 284.

69. *See supra* notes 63-67 and accompanying text.

70. *See supra* notes 62-63 and accompanying text.

71. 482 U.S. 220 (1987).



cause "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute."<sup>72</sup> The Court often says that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute."<sup>73</sup> That statement has to mean that arbitrators must apply the statute as governing substantive law. Otherwise, the arbitrator would be depriving a party of the substantive rights afforded by the statute.

There is nothing in the Court's reasoning to confine it to *statutory* law. By agreeing to arbitrate a common law claim, does a party forgo the substantive rights afforded by the common law? The Court has not addressed this question, but nothing in the Court's reasoning indicates it would treat common law rights differently from statutory rights. Both are substantive law. And the Court views an agreement to arbitrate as an agreement about procedural law, not one about substantive law.<sup>74</sup> Therefore, the Court's view seems to be that arbitrators must apply the same substantive law, statutory or common law, that a court would apply.<sup>75</sup>

To say that arbitrators must apply the same law a court would apply does not identify the body of law (e.g., New York law or French law) arbitrators must apply in a particular case. The "law a court would apply" will not always be easily identified. In fact, the entire area of law known as "Conflicts of Laws" is devoted to identifying which government's laws a

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72. *Id.* at 232. "The literal impact of this language would require a court to assess whether a securities arbitrator has complied with the various securities statutes applicable to the dispute." Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1474 (1996).

73. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987); see also *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1459 (11th Cir. 1997) (quoting this statement to support the proposition that "[w]hen a claim arises under specific laws . . . the arbitrators are bound to follow those laws in the absence of a valid and legal agreement not to do so"); Michael A. Scodro, Note, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1946 (1996) (noting that the Supreme Court's view that arbitration does not alter substantive rights "is in keeping with the courts' expectation that arbitrators will follow applicable legal rulings").

74. See *supra* notes 64-68 and accompanying text.

75. Leading arbitration scholars seem to share this view. See III MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 36.3.2.2, at 36:30 (noting that there is "no justification for interpreting an ordinary arbitration clause as a waiver of substantive rights—it is a waiver of the right to normal judicial processes, and that is all").

court will apply to a particular case and the answer sometimes depends on which court is the forum.<sup>76</sup>

Putting aside the point that the "law a court would apply" will not always be easily identified, we can return to the Supreme Court's view that, whatever that law is, an arbitrator must apply it. For simplicity, the rest of this Article does not refer to the Supreme Court's view as "arbitrators must apply the law a court would apply." It refers to the Court's view as "arbitrators must apply the law." It should be remembered that the term "the law" does not imply there is only one body of substantive law applied by all courts. Rather, "the law" is shorthand for "the law a court would apply," with all the Conflicts issues that raises.<sup>77</sup>

### 3. Arbitrators Often Do Not Apply the Law

While the Supreme Court's arbitrability decisions are premised on arbitrators applying the law, arbitrators often do not. Soia Mentschikoff's seminal survey of arbitrators found that eighty percent of the studied commercial arbitrators "thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost ninety percent believed that they were free to ignore these rules whenever they thought that more just decisions would be

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76. EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 1-3 (2d ed. 1992). Many choice-of-law "rules" are flexible enough that the "law a court would apply" will often depend on which court hears a particular case. See *id.* § 2.11. For example, given a particular set of facts, a New York court would apply New York law while, given the same set of facts, an Alabama court would apply Alabama law. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 24-25 (1988).

77. The Court may envision arbitrators applying the choice-of-law rules of the forum state, just as a federal court does. A federal court sitting in Delaware, for example, applies Delaware's choice-of-law rules to determine what government's substantive law to apply. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Perhaps the Court envisions an arbitrator sitting in Delaware doing the same thing.

reached by so doing.<sup>78</sup> A more recent survey of construction arbitrators found that twenty-eight percent of surveyed arbitrators reported that they do not always follow the law in formulating their awards.<sup>79</sup> And among labor arbitrators, the "orthodox" position is that arbitrators should adhere to the collective bargaining agreement and "ignore the law."<sup>80</sup> The widespread belief among arbitrators that they are under no duty to apply the law is consistent with standard expectations about arbitration because "we do not . . . expect that an arbitrator will decide a case the way a judge does. We do not expect that he will necessarily 'follow the law'—or indeed apply or develop any body of general rules as a guide to his decision."<sup>81</sup> Even courts have explicitly acknowledged that arbitrators often do not apply the law.<sup>82</sup> In short, the widespread be-

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78. Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961).

The practice of commercial arbitration in the United States is indeed that the arbitrator has the freedom of determining the disputed questions according to his sense of the justice of the case. Unless parties expressly or impliedly wish the arbitrator to determine the question by application of a specific law, the arbitrator appears free to resolve the dispute on the basis of his just and fair appreciation.

I GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* § 25.01, at 391 (rev. ed. 1995).

79. Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 154-55 (1994).

80. MURRAY, RAU & SHERMAN, *supra* note 12, at 636; see also IV MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 40.5.2.4, at 40:47; Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in *PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS* 59 (1975); Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 INDUS. & LAB. REL. REV. 683, 688 (1992).

81. MURRAY, RAU & SHERMAN, *supra* note 12, at 514; accord Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992) ("The weight of authority permits an arbitrator to 'do justice as he sees it' and fashion an award that embodies the individual justice required by a given set of facts."); Mentschikoff, *supra* note 78, at 867 (stating that arbitrators "must make their own selection of the most appropriate norms for the particular dispute").

82. See, e.g., *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1011 (10th Cir. 1994) ("Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system. . . . One choosing arbitration should not expect the full panoply of procedural and substantive protection offered by a court of law."); *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986) ("[T]he arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law."); *In re Sprinzen and Nomberg*, 415 N.Y.S.2d 974, 976 (1979) ("[T]he arbitrator

lief among arbitrators that they are under no duty to apply the law is consistent with the standard view that many parties choose arbitration because it provides a less legalistic process than litigation.<sup>83</sup> And even those arbitrators who try to apply the law will sometimes fail; they will make honest mistakes of law. In both of these cases—conscious disregard of the law and honest mistakes about the law—the arbitrator has not applied the law. In neither of these cases, however, is a court likely to vacate the arbitrator's award.<sup>84</sup> In sum, an arbitration award that does not apply the law will probably be confirmed by courts.

In most cases in which an arbitrator does not apply the law, it will be virtually impossible for a court to discover that the arbitrator did not apply the law. Arbitrators generally do not write reasoned opinions explaining their decisions.<sup>85</sup> Nor is it "common practice to make a record or transcript of the pro-

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is not bound to abide by, absent a contrary provision in the arbitration agreement, those principles of substantive law or rules of procedure which govern the traditional litigation process."); *Lentine v. Fundaro*, 278 N.E.2d 633, 635 (N.Y. 1972) ("Absent provision to the contrary in the arbitration agreement, arbitrators are not bound by principles of substantive law."); *Aimcee Wholesale Corp. v. Tomar Prod., Inc.*, 237 N.E.2d 223, 225 (N.Y. 1968) ("Arbitrators are not bound by rules of law."); *Moncharsh v. Heily & Blase*, 832 P.2d 899, 919 (Cal. 1992) ("[T]he existence of an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review."); see also *Wilko v. Swan*, 201 F.2d 439, 444 (2d Cir. 1953) ("[W]hile it may be true that arbitrators do not ordinarily consider themselves bound to decide strictly according to legal rules, there can be no doubt that they are so bound if the arbitration agreement so provides."), *rev'd*, 346 U.S. 427 (1953), *overruled in part by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972) (noting that arbitration involves a "sacrifice . . . in terms of legal precision").

83. "It is often said that the parties do not expect the arbitrators to make their decision according to rules but rather, especially when the arbitrators are not lawyers, on the basis of their experience, knowledge of the customs of the trade, and fair and good sense for equitable relief." See WILNER, *supra* note 78, § 25:01, at 391. For a more negative characterization of arbitrators' failure to apply the law, see generally Heinrich Kronstein, *Arbitration Is Power*, 38 N.Y.U. L. REV. 661 (1963).

84. For a discussion of judicial review of arbitration decisions, see *infra* notes 85-100.

85. See I MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 3.2.3, at 3:13; III *id.* § 37.4.1, at 37:10. "Only in a few, specialized types of arbitrations do arbitrators routinely craft written decisions—labor arbitrations, international commercial arbitrations, and maritime arbitrations." EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 324 (1997).

ceedings.<sup>86</sup> As one apparently disgruntled judge reviewing an arbitration award put it:

[A]fter four years and sixty-four days, the arbitrators simply awarded \$14 million to [the plaintiff] without any explanation whatsoever other than a finding that [the defendant] had "failed to properly perform its obligations as construction manager pursuant to the contract . . ." There are no reasons, no findings of fact, no conclusions of law, nothing other than the foregoing. For all we know, the arbitrators concluded that the sun rises in the west, the earth is flat, and damages have nothing to do with the intentions of the parties or the foreseeability of the consequences of a breach.<sup>87</sup>

The absence of a record and reasoned opinions, combined with the very limited grounds on which courts may vacate arbitration awards,<sup>88</sup> results in extremely few awards being vacated.<sup>89</sup> The confidence parties have in the finality of arbitra-

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86. MURRAY, RAU & SHERMAN, *supra* note 12, at 640.

87. *Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 610 A.2d 364, 392 (N.J. 1992) (Wilentz, C.J., concurring).

88. The FAA provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10(a) (1994).

89. "The conventional wisdom is that successful challenges to arbitration awards are rare." MURRAY, RAU & SHERMAN, *supra* note 12, at 624. *Accord* IV MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 40.1.4, at 40:13 ("Over the years, the courts have taken a fairly uniform approach to awards: Awards should be confirmed and enforced as is unless there is clear evidence of a gross impropriety."). The law may be changing so that the absence of reasoned opinions hinders, rather than helps, the finality of arbitration awards. *See, e.g.,* *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) ("[W]here a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard.").

tion encourages parties to agree to arbitration in the first place; if more awards were vacated, arbitration would become more costly in terms of time and money.<sup>90</sup> The standard policy rationale for judicial deference to arbitration awards unsupported by a record or reasoned opinion is that arbitration should be a substitute for litigation, not a prelude to litigation.

While most cases of arbitrators failing to apply the law probably go undetected by courts, sometimes a court will realize that an award does not apply the law. In such a case, a court will likely confirm the award. Courts confirm arbitration awards that do not apply the law because "error of law" is not a ground for vacating them.<sup>91</sup> This point cannot be emphasized too strongly. Courts confirm and enforce arbitration awards even when the courts acknowledge that the arbitrators got the law wrong.

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90. See *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 532-33 (D.C. Cir. 1989) ("The absence of a duty to explain is presumably one of the reasons why arbitration should be faster and cheaper than an ordinary lawsuit." The interest "in assuring that judgment be swift and economical . . . must generally prevail" over any interest "in rooting out possible error."); *Sobel v. Hertz Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972) ("[A] requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement."); *MURRAY, RAU & SHERMAN*, *supra* note 12, at 623 (asserting that if arbitration is "to function as an efficient process of private dispute resolution—to realize the benefits of expert decision-making with reduced cost and delay—litigation challenging the process, or aimed at upsetting the resulting award, must be minimized").

91. See, e.g., *Todd Shipyards Corp. v. Cunard Line*, 943 F.2d 1056, 1060 (9th Cir. 1991) ("[C]onfirmation is required even in the face of erroneous . . . misinterpretations of law. . . . It is not enough that the Panel may have failed to understand or apply the law. . . . An arbitrator's decision must be upheld unless it is completely irrational, or it constitutes a manifest disregard for the law.") (internal citations omitted); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990) (stating that courts are not authorized to reconsider the merits of arbitration awards "[e]ven where such error is painfully clear"); *Miller v. Prudential Bache Secs.*, 884 F.2d 128, 130 (4th Cir. 1989) (holding that "mere" error of law is insufficient to set aside arbitrator's award); *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 272 (7th Cir. 1988) (holding that "mistake" of law is insufficient to vacate arbitration award); *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2nd Cir. 1985) (*per curiam*) (stating that erroneous application of rules of law is not a ground for vacating an arbitrator's award"); *Collins v. Aikman Floor Coverings*, 736 F. Supp. 480, 485-86 (S.D.N.Y. 1990) (holding that error of law was not "manifest"). *But see Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997) (holding that courts have the authority to review arbitrator's award). See also *infra* notes 163-69 and accompanying text.

There are circumstances in which a court will vacate an arbitration award for failure to apply the law, but these circumstances are very rare. Courts will only vacate an award because the arbitrators got the law wrong if (1) the "arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did,"<sup>92</sup> or (2) enforcement of the award would violate public policy.<sup>93</sup> The first of these grounds is known as a "manifest disregard" of law.<sup>94</sup> "In terms of outcome of judicial decisions . . . the [manifest disregard] doctrine seems singularly unimportant. It is nearly impossible to find FAA arbitration decisions where application of the doctrine has resulted in upsetting of an award."<sup>95</sup> There are few cases in which a court can say with confidence that an arbitrator has manifestly disregarded the law.

The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.<sup>96</sup>

So not only does the arbitrator have to make an egregious error, the arbitrator must do so while *consciously* disregarding the correct law. If the arbitrator makes an egregious error out of ignorance, rather than defiance—"pure heart, empty head"—there is no manifest disregard of law.<sup>97</sup>

The sort of "pure heart, empty head" error of law that does not satisfy the "manifest disregard" doctrine might be vacated on the ground that its enforcement would violate "public pol-

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92. *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992).

93. See *infra* note 98.

94. See *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) ("[I]nterpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). See generally IV MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 40.7, at 40:80-40:96; Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 774-78 (1996).

95. IV MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 40.7.1, at 40:85; accord THOMAS OEHMKE, *COMMERCIAL ARBITRATION* § 4.28, at 103 (1987).

96. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). The Second Circuit may have recently strayed from this view of "manifest disregard." See *infra* note 169.

97. See Hayford, *supra* note 94, at 817-18.



icy.<sup>98</sup> Outside of collective bargaining arbitration, courts rarely vacate arbitration awards on public policy grounds.<sup>99</sup> It is difficult, therefore, to predict which public policies are important enough to warrant vacating arbitration awards that violate them. Clearly, however, any public policy in favor of arbitrators applying the law does not rise to this level. As stated above, "error of law" is not a ground for vacating awards.<sup>100</sup> An arbitrator's failure to apply the law, without more, does not violate public policy.

### C. CONCLUSION: ARBITRATION PRIVATIZES SUBSTANTIVE LAW

A major conclusion follows from the fact that arbitrators often do not apply the law. The Supreme Court is simply wrong when it asserts that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."<sup>101</sup> As I wrote some years ago, an enforceable arbitration agreement

necessarily entails a waiver of substantive rights unless courts vacate arbitral awards when arbitrators make errors of law. That courts confirm arbitral awards even when arbitrators make errors of law shows that arbitration agreements constitute waivers of substantive rights. An uncorrected error of law, by definition, deprives a party of the substantive right that would have been vindicated by a correct application of the law. Courts do not correct errors of law, that is, deprivations of substantive rights, by arbitrators, because courts treat an agreement to arbitrate as a waiver of those substantive rights.<sup>102</sup>

Other scholars have reached similar, albeit less stark, conclusions.<sup>103</sup>

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98. See *id.* at 784; IV MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 40.8.1, at 40:96-40:98 (explaining the public policy defense).

99. See generally IV MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 40.8, at 40:96-40:104.

100. See *supra* note 91.

101. See *Shearson/Am. Express, Inc., v. McMahon*, 482 U.S. 220, 232 (1987); see also *Carrington & Haagen*, *supra* note 33, at 349 ("No matter how frequently the Court may insist on this view, it is, for the reasons stated, simply false doctrine.")

102. Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 *FORDHAM L. REV.* 529, 541-42 (1994).

103. See TOM CARBONNEAU, *CASES AND MATERIALS ON COMMERCIAL ARBITRATION* 224 (1997) ("In a practical and very real sense, unlimited arbitrability amounts to the 'deconstruction' of law; it privatizes an entire range of formerly public juridical responsibilities."); I MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 3.2.1, at 3:4 ("Carried to extremes, arbitration



As Leonard Riskin and James Westbrook put it, an "obvious tension" exists between the deferential "manifest disregard" standard of review and the Court's statement that judicial review is "sufficient to ensure that arbitrators comply with" the law.<sup>104</sup> This tension has forced lower courts into self-contradiction. For example, in *Montes v. Shearson Lehman Bros., Inc.*,<sup>105</sup> the Eleventh Circuit said that "[w]hen a claim arises under specific laws . . . the arbitrators are bound to follow those laws,"<sup>106</sup> but in the very next paragraph stated that "[t]his does not mean that arbitrators can be reversed for errors or misinterpretations of law."<sup>107</sup> In what sense are arbitrators "bound" to follow laws if they will not be vacated for failing to do so?<sup>108</sup> Perhaps the Eleventh Circuit left its ordinary realm of legal duties to pontificate on moral duties. More likely, it just got caught in a contradiction the Supreme Court created.

When courts confirm arbitration awards that make errors of law, parties lose the substantive rights that would have been vindicated by an application of the law. Only in rare cases does a court vacate an arbitration award because of the arbitrator's legal error.<sup>109</sup> Outside these rare cases, an agreement to arbitrate is, in effect, an agreement to comply with the arbitrator's decision whether or not the arbitrator applies the law. Such an agreement, then, contracts out of all the law that would have been applied by a court but for the agreement. All such law, in effect, consists of default rules because arbitration

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permits the disputants to contract out of the judicial process and even from the law of liability and remedy governing litigants in courts."); Carrington & Haagen, *supra* note 33, at 338 (arbitration allows parties "to contract out of effective private enforcement of regulations adverse to their interests"); Schwartz, *supra* note 61, at 121 (noting that there is a "degree to which even a facially-neutral arbitration clause works a prospective waiver of substantive rights").

104. LEONARD RISKIN & JAMES WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 564 (2d ed. 1997).

105. 128 F.3d 1456 (11th Cir. 1997).

106. *Id.* at 1459.

107. *Id.* at 1460.

108. "[I]f arbitrators are to be bound by law, their application of that law must be subject to review. Without such review, the fetters that bind them would be loose indeed." Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 484 (1981).

109. See *supra* notes 85-100 and accompanying text.

agreements are enforced. Arbitration agreements contract out of substantive law; they privatize law.

An arbitration clause is, as the Supreme Court recognizes, a specialized kind of forum-selection clause.<sup>110</sup> It is special in that it chooses a private, not government, forum. An arbitration clause is also a specialized kind of choice-of-law clause.<sup>111</sup> Choice-of-law clauses resemble arbitration clauses because they are both pre-dispute agreements alienating substantive rights. But choice-of-law clauses do not *privatize* law. The choice of New York law over Alabama law, or Swiss law over United States law, is merely the choice of one government's law over another government's law. In contrast, arbitration agreements choose privately-created law over all government law. With choice-of-law clauses, the menu of law includes only those options governments have created.<sup>112</sup> In contrast, arbitration agreements permit a menu limited only by the parties' imaginations. The similarity between choice-of-law and arbitration clauses is in what they permit parties to contract out of; the difference is in what they permit parties to contract into.

### III. IMPLICATIONS

#### A. CLAIMS ARISING UNDER MANDATORY RULES

The conclusion that arbitration agreements contract out of substantive law compels the Supreme Court to make a choice if it is to prevent arbitration from effectively converting mandatory rules into default rules. The Court must either (1) reverse its decisions that claims arising under otherwise mandatory rules are arbitrable, or (2) require de novo judicial review of arbitrators' legal rulings on such claims. Until the Court makes one of these choices, the enforcement of arbitration agreements effectively converts what would otherwise be mandatory rules of law into default rules. That these rules would otherwise be mandatory is another way of saying that arbitration is currently the only way to contract out of these vast areas of law. It is inconsistent for the law to treat certain rules

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110. See *supra* note 64 and accompanying text.

111. See Sterk, *supra* note 108, at 491.

112. This is better than no menu at all. See, e.g., Larry Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 250 (1993) ("Permitting contracting parties to choose their governing law gives states an incentive to compete for law business by providing efficient legal rules.").

as mandatory in all contexts except arbitration.<sup>113</sup> As long as legislatures constitutionally enact mandatory legal rules, agreements to arbitrate claims under these statutes should be unenforceable, or there should be de novo judicial review of arbitrators' legal rulings on such claims. The same conclusion applies to mandatory rules of common law.<sup>114</sup>

This conclusion is subject to an important limitation, however. It applies only to *pre-dispute* arbitration agreements and awards rendered in arbitration pursuant to them. It does not apply to *post-dispute* arbitration agreements or awards rendered in arbitration pursuant to them. Post-dispute arbitration agreements are like post-dispute settlement agreements. A post-dispute agreement to arbitrate a claim arising out of a

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113. Some legal rules are treated as mandatory in all contexts except arbitration and choice-of-law clauses. Just as the law allows parties to contract out of otherwise mandatory rules through arbitration clauses, it allows parties to contract out of otherwise mandatory rules through choice-of-law clauses. See Michael J. Whincop & Mary E. Keyes, *Statutes' Domains in Private International Law: An Economic Theory of the Limits of Mandatory Rules*, 20 SYDNEY L. REV. 435, 437 (contrasting "rule default" with "choice of law default"). Larry Ribstein supports courts' practice of "enforc[ing] choice-of-law clauses even in situations in which they would refuse to enforce direct evasion of the mandatory rule." Ribstein, *supra* note 112, at 255-56; see also Bruce Kobayashi & Larry Ribstein, *Federalism, Efficiency and Competition* 34 (Nov. 16, 1997) (unpublished manuscript, on file with the *Minnesota Law Review*). Ribstein's primary reason is that the "use of choice-of-law clauses to avoid mandatory rules is constrained by the fact that avoidance requires applying a state law rather than solely the voluntary act of contracting parties. In other words, the parties cannot enter into a contract that is condemned by all jurisdictions." Ribstein, *supra*, at 255-56. This reason emphatically does not apply to arbitration clauses.

114. This conclusion applies to international, as well as domestic, arbitration. But it leads to different results because courts treat some rules that are mandatory in the domestic context as default in the international context. Consider, for example, the Securities Act, with its non-waiver provision expressly stating that the Act consists of mandatory rules, see *supra* note 61. Despite that provision, most courts allow parties to contract out of the Securities Act with clauses providing that, for example, English law, rather than United States law, shall govern. See *Haynsworth v. The Corporation*, 121 F.3d 956, 965-69 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923, 928-30 (4th Cir. 1996); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 160-62 (7th Cir. 1993); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1361-66 (2d Cir. 1993). But see *Richards v. Lloyd's of London*, 107 F.3d 1422, 1426-28 (9th Cir.) (stating that the clauses were unenforceable), *opinion withdrawn and superseded on reh'g*, 135 F.3d 1289 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998). On arbitrability in international arbitration, see, for example, William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 699-705 (1989); William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOK. J. INT'L L. 629, 664-71 (1986).

mandatory rule is like a post-dispute agreement to settle a claim arising out of a mandatory rule. Such settlement agreements are, of course, routinely enforced.<sup>115</sup> In other words, even rights arising out of mandatory rules are alienable, post-dispute.<sup>116</sup> So post-dispute agreements to arbitrate do not implicate the distinction between mandatory and default rules and they should be enforced regardless of whether they cover mandatory law.<sup>117</sup> Similarly, awards rendered in arbitration pursuant to them should not be reviewed for errors of law anymore than courts review settlement agreements for "errors of law." It is only pre-dispute arbitration agreements that implicate the distinction between mandatory and default rules.

To reiterate, there are two options to prevent arbitration, pursuant to pre-dispute agreements, from effectively converting mandatory rules into default rules. These options are inarbitrability and de novo judicial review. These will be discussed in turn.

## 1. Inarbitrability

### a. Consistency with the FAA

The inarbitrability of claims arising under mandatory law is consistent with the statutes and common law doctrines imposing mandatory law, but is it consistent with the FAA? The entire FAA embodies a strongly contractual approach to arbitration law.<sup>118</sup> The contractual approach is especially reflected in section 2 of the FAA. It requires courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>119</sup> Such grounds clearly include "generally applicable contract defenses, such as

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115. See MURRAY, RAU & SHERMAN, *supra* note 12, at 275 ("The law governing the enforcement and effect of settlement agreements is for the most part ordinary contract law.")

116. See Judith A. McMorrow, *Who Owns Rights: Waiving and Settling Private Rights of Action*, 34 VILL. L. REV. 429, 463-65 (1989). All rights, insofar as they are vindicated through private rights of action, are alienable post-dispute. The rights-holder can simply refrain from suing until the limitations period expires. *See id.*

117. There is no ground for making rights less alienable through arbitration than through other means.

118. See Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1002-06 (1996).

119. 9 U.S.C. § 2 (1994).

fraud, duress or unconscionability."<sup>120</sup> Such grounds do not include grounds applicable only to arbitration agreements, however; any law singling out arbitration agreements by making them less enforceable than other contracts conflicts with section 2 of the FAA.<sup>121</sup> As the Supreme Court put it, a ground "that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with" the FAA.<sup>122</sup>

For this reason, the Court has repeatedly held that the FAA preempts state law that renders some or all types of claims inarbitrable.<sup>123</sup> These holdings are correct with regard to state laws that do nothing other than preclude enforcement of agreements to arbitrate certain claims.<sup>124</sup> These laws provide a ground for the revocation of an arbitration agreement that is not a ground for the revocation of "any contract."

But the ground for inarbitrability of a given claim is not always so specific as a statute expressly precluding enforcement of agreements to arbitrate that type of claim. Grounds for inarbitrability of a type of claim can be cast in more general terms, as well. For instance, prior to the Supreme Court's expansion of arbitrability, courts held various types of claims inarbitrable on the ground of "public policy."<sup>125</sup> One might argue that this ground is consistent with the FAA because courts rely on "public policy" as a ground for denying enforcement to many contracts unrelated to arbitration, such as agreements not to marry or non-competition agreements between employee and employer.<sup>126</sup> "Public policy" is not a ground singling out arbitration agreements. But if courts were to hold that *no* claims are arbitrable on the ground that enforcement of *any*

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120. See *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686 (1996).

121. See *Ware*, *supra* note 118, at 1012.

122. *Doctor's Assocs.*, 517 U.S. at 685.

123. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995) (preempting an Alabama state law denying enforcement to all pre-dispute arbitration agreements); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (preempting state law denying enforcement of agreements to arbitrate California Labor Code claims); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (preempting state law denying enforcement of an agreement to arbitrate California Franchise Investment Law claims). See generally *Ware*, *supra* note 118, at 1035 & n.72 (discussing arbitration and the relationship between federal and state law). I have argued that parties can contract out of FAA preemption of state law but that typical choice-of-law clauses do not do that. See *Ware*, *supra* note 102, at 551-58.

124. See *Ware*, *supra* note 118, at 1012.

125. See *supra* notes 98-99 and accompanying text.

126. See FARNSWORTH, *supra* note 21, §§ 5.1-5.9.

arbitration agreement violates public policy, they would be in direct conflict with the FAA. It would similarly conflict with the FAA if courts held that no claims are arbitrable because every arbitration agreement is unconscionable, even though unconscionability is a ground permitted by the FAA. So the "ground" for inarbitrability must be judged on its substance, not merely its label. The level of specificity with which one chooses to characterize a ground cannot be determinative of whether it conflicts with the FAA. In short, determining whether particular inarbitrability law conflicts with the FAA can be a complex and murky endeavor.

For the sake of simplicity and clarity, courts might well conclude that mandatory legal rules do not conflict with the FAA even though, when properly interpreted, they render claims arising under them inarbitrable. The reasoning would be that mandatory rules do not single out arbitration agreements; rather, they void all pre-dispute contracts purporting to alienate the pertinent substantive rights.<sup>127</sup>

*b. Practical Concerns*

The practical concerns generated by inarbitrability are fairly well known because, until quite recently, many claims were inarbitrable.<sup>128</sup> Courts have experience dealing with inarbitrability, although not with the mandatory/default distinction as the criteria for determining arbitrability. The arbitrability issue arises at the threshold of adjudication, when a lawsuit is met with a motion to stay pending arbitration or when a party moves to compel its adversary to arbitrate. The party seeking to litigate, rather than arbitrate, argues that one or more claims is inarbitrable. The court then analyzes, on a claim-by-claim basis, whether the claims are arbitrable. With respect to arbitrable claims, the court grants the motion to stay litigation or compel arbitration; with respect to inarbitrable claims, the court denies the motion. Arbitration of arbitrable claims proceeds even though litigation of inarbitrable claims is

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127. This reasoning is not beyond criticism. If the test is whether law "singles out" arbitration, does that mean law becomes consistent with the FAA by "doubling out" arbitration, i.e., precluding enforcement of arbitration agreements as just one other type of contract? If so, the FAA can be evaded just by finding some obscure, trivial type of contract and making it, along with arbitration agreements, unenforceable.

128. See *supra* notes 45-55 and accompanying text.

also proceeding.<sup>129</sup> This duplication is the only major practical concern generated by inarbitrability.

This description of inarbitrability in practice was routine prior to the Supreme Court's decisions expanding arbitrability. Future inarbitrability should be similar, except that the basis for determining which claims are arbitrable should be whether the claim arises under a mandatory or default rule.

c. *Clarifying the Basis for Inarbitrability*

While some scholars have argued that the class of inarbitrable claims should be statutory claims,<sup>130</sup> the proper arbitrability distinction is mandatory/default, not statutory/common law.<sup>131</sup> To the extent statutory law consists of default rules,

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129. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). See generally II MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 16.2.2, at 16:20-16:23 (discussing *Dean Witter Reynolds, Inc. v. Byrd* and the intertwining of arbitrable and inarbitrable claims).

130. See Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 273 (1990) (proposing amendment to FAA and arguing that "[c]ases involving the enforcement of fundamental statutory rights cannot be the subject of an arbitration agreement or of an arbitral proceeding"); Schwartz, *supra* note 61, at 125-27 (proposing to not "enforce adhesive arbitration clauses for non-contract claims" and to "create a presumption against compelled arbitration of statutory claims"); Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 206 (1989) ("[U]nlike commercial arbitration, where the limitations of arbitration may be strengths, statutory rights pose issues of public law which require a vindication that arbitration may be unable consistently to provide."); see also CARBONNEAU, *supra* note 103, at 117-257 (chapter discussing arbitration and statutory rights).

A distinction between federal and state law is plausible given the concern, discussed above, that making any type of claim inarbitrable is in some tension with the FAA. One might argue that, given this tension, the FAA preempts state inarbitrability law by virtue of the Constitution's Supremacy Clause, U.S. CONST. art. VI, cl. 2., but that the FAA does not overcome federal inarbitrability law. Federal inarbitrability law survives its tension with the FAA under the ordinary principles by which courts reconcile conflicts between two statutes. This is because "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic v. United States*, 446 U.S. 398, 406 (1980); accord *Edmond v. United States*, 117 S.Ct. 1573, 1578 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."). So a distinction between federal and state law is plausible but its persuasiveness depends on the degree of tension one sees between inarbitrability and the FAA.

131. The mandatory/default distinction can be profitably compared with the arbitrability distinction advocated by Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059, 1082 (1987) (advocating a "distinction between those rights

claims under statutory law should be arbitrable because there is nothing countervailing freedom of contract and the FAA's endorsement of it. There is nothing inherent in the nature of a statutory right preventing it from being alienable, pre-dispute. Conversely, to the extent that common law consists of mandatory rules, claims under common law should be inarbitrable. The rationale for inarbitrability is that arbitration agreements, in effect, contract out of substantive law. Mandatory common law rules deserve no less deference than mandatory statutory rules.

*d. Contractually Reinstating Arbitrability*

The rationale for inarbitrability of claims arising under mandatory law is that arbitrators often do not apply the law. Such claims should become arbitrable if the arbitration agreement requires, as some do,<sup>132</sup> the arbitrator to apply the law. When an award issued pursuant to such an agreement is challenged in court, the court should enforce the agreement by confirming the award only if the arbitrator applied the law. That is, the court should engage in de novo review of the arbitrator's legal, as opposed to factual, rulings.<sup>133</sup> Some courts

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which flow naturally from one person's interaction with another and those which are imposed by the state in furtherance of the collective interest"). While these two approaches might now reach similar conclusions about what claims are arbitrable, Morgan's approach rests on Kantian philosophy, while the mandatory/default distinction is descriptive and positivist so its conclusions will change as positive law changes. The mandatory/default distinction also avoids the flaw of the old "public policy" approach in which courts invaded the province of the legislature by deciding which statutes are arbitrable. See Stempel, *supra* note 12, at 283-335.

132. "A growing number of companies want their arbitrators to 'apply the law' to reward the company's effort to follow the law strictly in business transactions. These firms seek to reduce the risk of an arbitrator deciding the case 'equitably' or arbitrarily." BRUNET & CRAVER, *supra* note 85, at 427; see also Edward Brunet & Walter E. Stern, *Drafting the Effective ADR Clause for Natural Resources and Energy Contracts*, 11 NAT. RESOURCES & ENV'T. 7 (1996).

Whether a particular agreement requires the arbitrator to apply the law is, like any question of contract interpretation, case-specific. It is unlikely though, that an agreement containing an ordinary choice-of-law clause, e.g., "this contract shall be governed by the laws of the State of New York," should be interpreted to require arbitrators to apply the law. To be so interpreted, a clause should explicitly state that it is a directive to the arbitrator, rather than to a court.

133. The law/fact distinction, like the substance/procedure distinction, is useful although it is not absolute. Judicial review would have to extend to arbitrators' factual rulings to the extent necessary to prevent a dishonest arbi-



support this approach;<sup>134</sup> others do not.<sup>135</sup> This approach, of allowing parties to opt in to de novo judicial review, comports with the contractual nature of arbitration.<sup>136</sup> Furthermore, it

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trator from making incorrect factual findings that compel the arbitrators' desired legal rulings.

134. See *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888-90 (9th Cir. 1997); *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at \*6-7 (4th Cir. Aug. 11, 1997) (unpublished) (per curiam); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995); *Tretina Printing, Inc. v. Fitzpatrick & Assocs.*, 640 A.2d 788, 793 (N.J. 1994) (per curiam); *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 244 (S.D.N.Y. 1984).

135. See *Lapine Tech. Corp. v. Kyocera Corp.*, 909 F. Supp. 697 (N.D. Cal. 1995), *rev'd*, 130 F.3d 884 (9th Cir. 1997); *cf. Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 261 (9th Cir. 1992) ("[C]ourts will not heighten their otherwise deferential review of arbitral awards even where the arbitrators misapplied the law. . . . The fact that a court has access to detailed findings of fact and conclusions of law does not alter this deferential review."); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) ("If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract."); Tom Cullinan, Note, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395 (1998). In neither *Western Employers* nor *Chicago Typographical* did the arbitration agreement require the arbitrator to apply the law, so these two cases are hardly on point. For a criticism of *Chicago Typographical*, see BRUNET & CRAVER, *supra* note 85, at 436-37.

136. See *Ware*, *supra* note 102, at 542 n.50 ("[P]arties to such an agreement have contractually reinstated their substantive rights, which otherwise would have been contractually waived by agreeing to arbitrate."); Cullinan, *supra* note 135, at 421-22 ("[T]he grounds for vacatur enumerated in the FAA actually are codified forms of contractual interpretation. They serve only to aid the court in determining exactly for what the parties contracted, by representing implicit limitations on the contractual obligation.").

Kenneth Davis argues that parties to arbitration agreements should be able to choose among varying levels of judicial review. See Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 123-32 (1997). Similarly, I argue here that contracts for de novo judicial review of legal questions should be enforced. The difference is in how we treat parties who do not opt for de novo judicial review. Davis argues, on freedom of contract grounds, that agreements by such parties to arbitrate any and all claims should be enforced. See *id.* That is, he would permit arbitration agreements to privatize vast areas of law. However appealing that is as a normative matter, it cannot be reconciled with a legal system permeated by mandatory rules. It is inconsistent to enforce pre-dispute agreements contracting out of a law through arbitration but not enforce other pre-dispute agreements contracting out of the same law. See *supra* note 113 and accompanying text. My own desire to see virtually all claims arbitrable, see *Ware*, *supra* note 19, at 101-02, follows from a view that there should be little mandatory law.

does not extend a court beyond its proper bounds. As Judge Alex Kozinski stated:

In general, I do not believe parties may impose on the federal courts burdens and functions that Congress has withheld. A partial answer is that any case properly in district court under the Federal Arbitration Act must have an independent jurisdictional basis . . . . Thus, enforcing the arbitration agreement—even with enhanced judicial review—will consume far fewer judicial resources than if the case were given plenary adjudication. The rub is that the work the district court must perform under this arbitration clause is not a subset of what it would be doing if the case were brought directly under diversity or federal question jurisdiction. It's not just less work, it is *different* work. Nowhere has Congress authorized courts to review arbitral awards under the standard the parties here adopted.

Nevertheless, I conclude that we must enforce the arbitration agreement according to its terms. The review to which the parties have agreed is no different from that performed by the district courts in appeals from administrative agencies and bankruptcy courts, or on habeas corpus. I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl. Given the strong policy of party empowerment embodied in the Arbitration Act, I see no reason why Congress would object to enforcement of this agreement. This is not quite an express congressional authorization but, given the Arbitration Act's policy, it's probably enough.<sup>137</sup>

A practical concern about agreements requiring the arbitrator to apply the law is that *de novo* judicial review would necessitate two things often absent from arbitration: (1) a written opinion by the arbitrator reflecting the reasoning behind the award, and (2) a transcript or other record of the arbitration hearing.<sup>138</sup> This objection is stronger with regard to a record than to an opinion. Arbitrator opinions are not essential to judicial review of arbitrators' legal rulings. Jurors do not write opinions, yet judges overturn jury verdicts (JNOV) for failure

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137. *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring). Judge Kozinski's reasoning is phrased in terms of federal courts, but it applies equally to state courts.

138. See I MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 7.40.2, at 7:70-7:73; see also RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 134 (1997) ("A reviewing court cannot ascertain whether the arbitrator correctly followed the law unless the arbitrator states the law in writing and applies it to the facts of the case. Written opinions are critical to any meaningful judicial review of the substantive matters at issue in a case."); GOLDBERG, SANDER & ROGERS, *supra* note 38, at 217 ("[Without a written opinion] it may be difficult for the reviewing court to know whether the arbitrator has complied with the requirements of the statute at issue. . . . [T]he Supreme Court [should] insist on written opinions as a condition to sending statutory claims to arbitration.").

to apply the law.<sup>139</sup> Admittedly, trial judges have observed the trial, while courts reviewing arbitration awards have not observed the arbitration hearing. But appellate courts can and do reverse trial judges' denials of JNOV even though the appellate court has not observed the trial.<sup>140</sup> Moreover, trial court judges do not always write opinions supporting their rulings, yet appellate courts overturn them for failure to apply the law.<sup>141</sup> In sum, adjudicators who do not write reasoned opinions get reversed by those who did not observe the proceedings below. Arbitrators who do not write reasoned opinions can be similarly reversed. In contrast, a record of the proceedings below is essential to a reviewing court. A trial nearly always produces a written record including a transcript, while arbitration typically does not. It is virtually impossible for a court to review whether arbitrators applied the law unless the court has some record of the testimony and other evidence submitted to the arbitrator.<sup>142</sup> How much of a record is necessary will inevitably be determined case-by-case.<sup>143</sup>

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139. See FRIEDENTHAL ET AL., *supra* note 13, § 12.3, at 543-56.

140. See, e.g., *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940).

141. See, e.g., *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188 (3d Cir. 1994) (reversing judgment based on evidentiary ruling for which district court did not set forth reasons); *Spiegel v. Trustees of Tufts College*, 843 F.2d 38 (1st Cir. 1988) (overturning grant of Rule 54(b) certification; district court did not set forth reasons for its order).

142. See *Wilko v. Swan*, 346 U.S. 427, 440 (1953), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (Frankfurter, J., dissenting) (to ensure that arbitrators do not disregard the law, "appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance [with the law] will appear, or want of it will upset the award").

143. Arbitration rules typically allow a party to hire a stenographer or other means of transcribing the arbitration hearing. If both parties choose not to do so, they waive their opportunity to create a record of testimony. A party challenging an award arising out of such an arbitration has only itself to blame for deficiencies in the record available to a reviewing court. If no transcript is prepared in litigation, the trial court's judgment is unlikely to be reversed on appeal. See 4 C.J.S. *Appeal and Error* § 507 (1993) ("Where a stenographic transcript or a substitute therefor is required to raise an issue on appeal and such transcript or substitute is not prepared, the appeal should be dismissed, or the decision should be affirmed, and a party need not be given a second opportunity to create a record.") (footnotes omitted). A court's review of an arbitration award in the absence of a transcript is analogous. So the question should not be whether there is a thorough record of the arbitration hearing but, if there is no such record, whether the party opposing enforcement of the award could have ensured an adequate record.

## 2. De Novo Judicial Review

### a. Consistency with the FAA

The alternative to making claims arising under mandatory rules inarbitrable (except where the agreement requires the arbitrator to apply the law) is to keep such claims arbitrable but to impose de novo judicial review regardless of whether the agreement calls for it. Imposing de novo judicial review, as opposed to allowing parties to contract into it by requiring the arbitrator to apply the law, may be difficult to reconcile with the FAA. Even the current "manifest disregard" standard is arguably difficult to reconcile with the FAA. As Tom Carbonneau argues, "[t]he review of awards on the merits is not contemplated under Section Ten of the FAA; in fact, such a practice contradicts the gravamen of the legislation and the judicial policy that sprang from it."<sup>144</sup> Other scholars and courts agree.<sup>145</sup> In contrast, Edward Brunet and Charles Craver emphasize that FAA section 10(a)(3) uses the word "rights" in authorizing courts to vacate awards.<sup>146</sup> "The presence of this word in the FAA . . . must mean that the drafters intended that courts should have some ability to set aside awards because of denials of 'rights.'"<sup>147</sup> An alternative argument is that FAA section 10(a)(4) authorizes courts to vacate awards where the arbitrators exceeded their powers and arbitrators do not have the power to decide disputes without applying mandatory law.<sup>148</sup> In short, there is substantial debate about the extent to

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144. CARBONNEAU, *supra* note 103, at 260.

145. See GOLDBERG, SANDER & ROGERS, *supra* note 38, at 217 (under a more exacting standard of review than manifest disregard, "the policies underlying [the FAA] will suffer to some extent"); Hayford, *supra* note 94, at 814 ("Any application of the 'manifest disregard' of the law standard that permits a reviewing court to delve into the merits of the arbitrator's award is not legitimate."); see also *International Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Industrial y Comercial*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990) ("The whole point of arbitration is that the merits of the disputes will not be reviewed in the courts . . .").

146. Courts may vacate arbitrators' awards "[w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." Federal Arbitration Act, 9 U.S.C. § 10(a)(3) (1994) (emphasis added).

147. BRUNET & CRAVER, *supra* note 85, at 411-12.

148. Stephen Hayford argues that "[a]ttempts to seek vacatur based on a claim that the arbitrator committed an error of law are not proper under the

which the FAA requires and permits courts to review arbitrators' legal rulings.

*b. Clarifying the Basis for De Novo Review*

Many scholars argue for increased judicial review of arbitrators' legal rulings generally, or with respect to some types of claims, such as statutory claims.<sup>149</sup>

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'exceeded powers' clause of section 10(a)(4)." Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 456 (1998). This is because of the correct "judicial belief that the arbitrator's 'powers' referred to in . . . section 10(a)(4) are contractual in nature." *Id.* at 455. While the arbitrator's powers derive from the parties' contract, the parties lack the power to contract out of a mandatory law prior to a dispute. Even if the parties can delegate all their power to the arbitrator, they should not be able to delegate more power than they have. *Nemo dat qui non habet* (He who hath not cannot give). Compare *id.* at 455-60 with IV MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 40.5.1.3, at 40:37-40:40.

149. See GOLDBERG, SANDER & ROGERS, *supra* note 38, at 216 (predicting that the Supreme Court "will ultimately adopt a meaningful review standard, something more than the 'manifest disregard' standard . . . [because manifest disregard] . . . provides insufficient protection for statutory rights created by Congress"); IV MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 12, § 40.7.2.5, at 40:94 ("Current manifest disregard doctrine confers arbitrary powers on arbitrators that should not be tolerated in a society based on the rule of law."); John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 271-74 (1986); Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345, 410 (1998) ("Whenever an award infringes the protections provided by public law to those who are not parties, due regard for the public decisions made by the Congress requires that a reviewing court see to it that the interpretations of public law reached by the arbitrator are not merely debatable but are, in the court's judgment, correct."); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1350-51 n.22 (1997) ("Framed for contractual disputes, the 'manifest disregard' standard may be too deferential for arbitration of public law claims."); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1230 (1993) ("[C]ourts should subject employment arbitrators' interpretations of statutes to de novo review."); John F.X. Peloso & Stuart M. Sarnoff, *A Discussion of Whether Arbitrators Have a Duty to Apply the Law*, N.Y.L.J., Apr. 18, 1996, at 1, 3 ("Where there are securities law claims, there are compelling reasons for the arbitrators to make an effort to understand and apply substantive law. Perhaps the time is ripe to define that obligation more clearly and develop standards for review that make such a duty more meaningful."); Speidel, *supra* note 130, at 157 ("[C]ourts should have clear authority, when statutory claims are involved, to vacate or modify an arbitrator's award where arbitral procedures denied an adequate hearing or where the arbitrator made a [sic] error of law."); Stempel, *supra* note 12, at 283-335 (concluding that instead of inar-

These arguments fail to respect the distinction between mandatory and default rules. Unless the agreement calls for it, arbitration of claims arising under default rules should not be subject to judicial review for errors of law. A pre-dispute agreement simply to contract away these claims would have been enforceable,<sup>150</sup> so there is no reason to refuse enforcement of a pre-dispute agreement to arbitrate them. Such an agreement alienates the rights specified by the default rule, just as would contracting around the rule, and substitutes whatever rights the arbitrator chooses.<sup>151</sup> Enforcing these new privately-created rights is no different than enforcing any rights created by contract. Imposing judicial review of arbitrators' legal rulings goes beyond contract law in adding an extra barrier to enforcement of arbitration agreements. This would, with respect to claims arising under default rules, contravene freedom of contract, and the FAA's endorsement of it, without any ground for doing so. With respect to claims arising under mandatory rules, imposing judicial review would also contravene freedom of contract but with a solid ground for doing so. The essence of a mandatory rule is that it trumps freedom of contract.<sup>152</sup> Accordingly, courts should review arbitrators' legal rulings on claims arising out of mandatory rules, but not on claims arising out of default rules.<sup>153</sup>

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bitrability, a "[c]ourt might preferably, for example, make more aggressive use of the 'manifest disregard of law' rationale for vacating arbitration awards that do not resolve disputes in accordance with statutory goals"); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 711 (1996) ("Although courts should refuse to conduct de novo review on many arbitration decisions, they should not be reluctant to set aside arbitral awards that are clearly unfounded and inconsistent with applicable law."); Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 293 (1996); U.S. DEPT'S OF COMMERCE AND LABOR, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 31-33 (1994).

150. This is precisely what makes such rules default rules. See *supra* notes 5-10 and accompanying text.

151. See Ware, *supra* note 102, at 542 n.50. ("In agreeing to arbitrate, parties trade their substantive rights for the arbitrator's decision as constrained by the agreement and the limited judicial review of arbitral awards.")

152. See *supra* notes 5-10 and accompanying text.

153. Cf. MURRAY, RAU & SHERMAN, *supra* note 12, at 637-38:

Of course, in thinking about judicial review [of arbitration] on matters of 'law' we should distinguish between mere rules of construction, which come into play in the absence of a contrary agreement, and mandatory rules. . . . Where the parties have bargained for dis-

c. *Practical Concerns*

One practical concern about this approach is that courts would have trouble controlling their understandable desire to do justice. Once the barndoor is open, so to speak, to review some of an arbitrator's legal rulings, will a court be tempted to review all the legal rulings in that case, even though the court should confine itself to rulings on claims arising under mandatory rules?<sup>154</sup> This concern is heightened by the timing of judicial review *after* arbitration, in contrast to the arbitrability decision made *before* arbitration. A court making an arbitrability decision prior to arbitration might be worried about whether the arbitrators might do an injustice. But that worry seems less likely to motivate a court than a completed arbitration award in which the arbitrators actually did injustice.

Another practical concern arises from the fact that arbitration pleadings often do not identify discrete causes of action. There may be nothing resembling what is standard in litigation—a complaint with discrete counts alleging discrete legal claims. Arbitration pleadings are often so informal that there is ambiguity about what claims are asserted or even if the concept of "claims" applies. Thus, parties who lose at arbitration may move to vacate the award on the ground that the arbitrator did not apply mandatory law when there is much doubt about whether claims arising under mandatory law were even asserted in arbitration.

To counter this, courts may need to require parties to announce at the outset of arbitration whether they are asserting any claims arising under mandatory law. This would alert other parties to the risk of a motion to vacate for failure to apply the law and to the need for a record of the arbitration proceedings.<sup>155</sup> Requiring arbitration pleadings to announce whether they assert claims arising under mandatory law would partially "judicialize" arbitration procedure, adding legalistic formalities that may make the process less attractive to many

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pute resolution through arbitration, the method *they* have chosen to fill any gaps in the agreement is the arbitrator's interpretation. His interpretation *is* their bargain. In contrast, legal 'rules' in other areas may reflect stronger and overriding governmental or societal interests.

154. See Hayford, *supra* note 94, at 833 ("Many members of the federal judiciary are simply unwilling to foreclose all possibility of overturning commercial arbitration awards they perceive to be grossly in error. These judges are in the business of ensuring that justice prevails.")

155. See *supra* notes 85-87, 138-43 and accompanying text.



parties. Requiring arbitration pleadings to announce whether they assert claims arising under mandatory law would also contravene the freedom to contract for the procedures of arbitration. Thus it should be imposed only to the extent needed to ensure that parties who, post-dispute, demand an application of mandatory law receive that application. Accordingly, parties who do not announce at the outset of arbitration that claims under mandatory law are being asserted should be precluded from seeking judicial review of the arbitrators' legal rulings. They have waived such review.

### 3. An Assessment and a Prediction

To prevent parties from effectively contracting out of otherwise mandatory law, the Supreme Court must either (1) reverse its decisions that claims arising under otherwise mandatory rules are arbitrable or (2) require de novo judicial review of arbitrators' legal rulings on such claims. The above comparison of inarbitrability and judicial review does not yield a clear winner between these choices. The essential practical choice between inarbitrability and de novo judicial review is where to add the extra layer of procedure. Inarbitrability adds the extra layer at the start of adjudication while de novo judicial review adds it at the end. Wherever the extra layer of procedure is added, it will consume extra time and money.<sup>156</sup>

On balance, inarbitrability seems to be in less tension with the FAA and subject to less troubling practical problems.<sup>157</sup> So inarbitrability is probably a better way to deal with mandatory law in arbitration. Inarbitrability, however, seems unlikely to be revived by the Supreme Court. The Court has so steadily expanded arbitrability in a number of decisions over the last twenty-five years<sup>158</sup> that stare decisis and institutional con-

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156. Even under judicial review of arbitrators' legal rulings, "many claims that are sent to arbitration will not return for judicial review, as both parties will be satisfied with the arbitrator's decision." GOLDBERG, SANDER & ROGERS, *supra* note 38, at 217. A similar point can be made about inarbitrability. Even if claims under mandatory law are inarbitrable, many of them will still go to arbitration because neither party insists on litigating rather than arbitrating. In effect, the parties make a post-dispute agreement to arbitrate all claims, mandatory and default.

157. See *supra* text accompanying notes 118-143.

158. See *supra* text accompanying notes 56-58.



cerns make it highly unlikely the Court will reverse direction so sharply.<sup>159</sup>

In contrast, the Court has devoted little attention to the standard by which courts review arbitrators' legal rulings. The "manifest disregard" standard originated in casual dicta from the Court's 1953 opinion in *Wilko v. Swan*.<sup>160</sup>

This dictum has been revisited by the Supreme Court but three times in the forty-three years since *Wilko*: once in Justice Stevens's dissent in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*; a second time in Justice Blackmun's partially concurring/partially dissenting opinion in *Shearson/American Express, Inc. v. McMahon*; and a third time in a parenthetical phrase in dictum in a 1995 case, *First Options, Inc. v. Kaplan*. Beyond the *Wilko* dictum, the Court has at no time elucidated further as to the meaning and effect it attributes to the "manifest disregard" of the law standard.<sup>161</sup>

The Court can thus write on a nearly clean slate in addressing standards of judicial review. It seems more likely then that the Court will tighten, or permit lower courts to tighten, judicial review of arbitrators' legal rulings, rather than revive inarbitrability.

Tightening judicial review can occur gradually in two ways. One way would be to hold that the current "manifest disregard" standard applies to most claims but that certain claims warrant a more exacting standard. This latter category of claims would expand slowly, case-by-case: first employment discrimination, then securities fraud, and so on. The second way gradually to tighten judicial review would be to treat all claims equally but subject them to incrementally more exacting review over time. This process might be imperceptible in the short run because courts would not announce any change in doctrine. They would just be a bit more critical of arbitration awards. Only in the long run would statistics show a higher percentage of arbitration awards vacated for "manifest disregard."<sup>162</sup>

Both forms of gradualism appear to be underway in the D.C. Circuit case of *Cole v. Burns International Security Serv-*

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159. There are cases holding Title VII claims inarbitrable but they rely on the Civil Rights Act of 1991, which is irrelevant to the arbitrability of other claims. See *supra* note 57 and accompanying text.

160. 346 U.S. 427 (1953).

161. Hayford, *supra* note 94, at 811.

162. Statistics might never show this if arbitrators learn of tightening judicial review and respond to it by focusing more on applying the law.

ices.<sup>163</sup> *Cole* held that agreements to arbitrate Title VII claims are enforceable "only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law."<sup>164</sup> The opinion went on to assert that "the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct."<sup>165</sup> *Cole*, in essence, converts the "manifest disregard" standard into a de novo "error of law" standard, at least with respect to claims under statutory or public law.<sup>166</sup> So *Cole* exhibits gradualism in confining itself to statutory or public law claims, perhaps even to Title VII.<sup>167</sup> And *Cole* announces no overt doctrinal challenge to manifest disregard. It subtly<sup>168</sup> indicates that courts should tighten their review of arbitration awards.<sup>169</sup>

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163. 105 F.3d 1465 (D.C. Cir. 1997). Judge Harry Edwards authored this opinion and has written several law review articles on arbitration. See, e.g., Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3 (1988); Edwards, *supra* note 12.

164. 105 F.3d at 1487.

165. *Id.*

166. Judge Edwards enacted into law views he had previously espoused in a law review:

In strictly private disputes, ADR mechanisms such as arbitration often are superior to adjudication. . . .

However, if ADR is extended to resolve difficult issues of constitutional or public law—making use of nonlegal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties—there is real reason for concern. An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values.

Edwards, *supra* note 12, at 676. "So long as we restrict arbitrators to the application of clearly defined rules of law, and strictly confine the articulation of public law to our courts, ADR can be an effective means of reducing mushrooming caseloads." *Id.* at 680.

167. *Cole* aggravates the worry, discussed above, that courts will miss the distinction between mandatory and default rules. Rather than using the mandatory/default distinction, *Cole* apparently uses either the statutory/common law distinction or the public law/private law distinction.

168. Tom Carbonneau suggests that, in *Cole* "[t]he court appears torn between its desire to invalidate an obviously unfair [arbitration] agreement and its obligation to follow Supreme Court precedent on the validity of arbitration agreements." CARBONNEAU, *supra* note 103, at 26 (Supp. 1998).

169. *Cole*'s message was recently picked up by the Second Circuit. See *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (vacating, for manifest disregard of law, award for employer in discrimination case). *Halligan*'s application of "manifest disregard" seems far less deferential to the arbitrator than the Second Circuit's 1986 application of it in *Bobker*. See *supra* note 96.

While gradualism in the law has its virtues, it risks a lack of clarity and consistency. It would be better for the Supreme Court to announce bright lines: de novo judicial review of arbitrators' rulings on mandatory law, and zero judicial review of arbitrators' rulings on default law. It would probably be better yet for the Supreme Court to announce the bright line of inarbitrable mandatory law and zero judicial review of arbitrators' legal rulings—unless parties contractually require the arbitrator to apply the law, in which case there is universal arbitrability and de novo review.

## B. CLAIMS ARISING UNDER DEFAULT RULES

### 1. Better Gap-Fillers

The first section of Part III discussed implications for arbitration of claims arising out of mandatory rules. This section discusses the arbitration of claims arising out of default rules.

Law consisting of default rules may, by definition, be privatized.<sup>170</sup> This process of privatization occurs with every enforceable contract. The parties substitute privately-created rights and duties for whatever government-created rights and duties are specified by the default rule. How, then, does an arbitration agreement privatize law differently from any other contract?

An answer rests on the incomplete nature of contracts. Parties forming a contract cannot foresee all possible contingencies. Thus, they inevitably leave "gaps" in their contracts.<sup>171</sup> This contractual silence is, in the absence of an arbitration agreement, filled by a court's application of a government-created default rule.<sup>172</sup> With an arbitration agreement, the silence is filled by whatever the parties choose. This freedom opens up infinite possibilities.

One possibility is to fill gaps with the arbitrator's discretion.<sup>173</sup> There is a long tradition of arbitrators deciding on the

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170. See *supra* notes 4-9 and accompanying text.

171. See Barnett, *supra* note 8, at 822 ("Because [parties drafting a contract] cannot foresee every future event or know precisely how their own purposes may change, they cannot negotiate terms specifically to cover all contingencies.").

172. See *id.* at 823-26.

173. See Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 81 n.78 (1994) ("conceiv[ing] of ADR as a way of filling contractual gaps *ex post*"); MURRAY, RAU & SHERMAN, *supra* note 12, at

basis of their own sense of justice, rather than any set of rules.<sup>174</sup> Courts cannot do this without undermining the Rule of Law, i.e., a system of "rules which make it possible to foresee with fair certainty how the [government] authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."<sup>175</sup> In contrast, planning one's affairs based on predictions about how (other people's) arbitrators will rule is not necessary because the arbitrator's ruling only governs the parties to that particular dispute. And the parties have contracted for an unpredictable ruling so they are in no position to complain about it. Those who have not contracted into this unpredictability are not governed by it so Rule of Law concerns simply do not apply.

Arbitrator discretion is not the only possible replacement for government-created default rules. The other possibilities are private rules. These rules can be very general, e.g., the unwritten "norms and customs of the widget industry."<sup>176</sup> Or they can be very specific, e.g., the "written rules and by-laws of the Widget Dealers Association."<sup>177</sup> Either sort of rules, gen-

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637-38 ("[W]here the parties have bargained for dispute resolution through arbitration, the method *they* have chosen to fill any gaps in the agreement is the arbitrator's interpretation.").

174. See *supra* notes 78-83 and accompanying text.

175. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944); see also LON L. FULLER, *THE MORALITY OF LAW* 38-39 (rev. ed. 1969) ("[T]he attempt to create and maintain a system of legal rules may miscarry in at least eight ways . . . . The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis.").

176. See, e.g., *Executive Life Ins. Co. v. Alexander Ins. Ltd.*, 999 F.2d 318, 319 (8th Cir. 1993) (per curiam) (noting that the arbitration agreement provided that the arbitrators "shall be free to reach their decision from the standpoint of equity and customary practices of the insurance and reinsurance industry rather than from that [of] strict law").

177. See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1771-73 (1996) (noting that National Grade and Feed Association arbitrators apply four sets of substantive trade rules). Bernstein cites the following associations that have codified their norms into written trade rules: American Cotton Shippers Association, American Fats and Oils Association, American Peanut Shellers Association, American Seed Trade Association, American Spice Trade Association, American Tin Trade Association, Association of Food Industries, Binding Industries of America, Burlap and Jute Association, Cocoa Merchants' Association of America, Colorado Grain and Feed Association, Diamond Dealers Club, General Arbitration Council of the Textile and Apparel Industries (Worth Street Rules), Green Coffee Association of New Orleans, Green Coffee Association of New York, Kansas City Board of Trade, Memphis Cotton Exchange, Merchants Exchange of Portland, Mid-America Commodity Exchange, National Cottonseed Products Associa-

eral or specific, could be incorporated into a contract without an arbitration clause, and a court would probably try to apply them. But parties may expect that an arbitrator who works in the widget business will apply them better than a judge or jury. The parties may even expect that an arbitrator ignorant of the widget business will apply them better than a judge or jury because the arbitrator is likely to exhibit better or more intelligence, judgment, diligence, etc. In short, rules incorporated by reference into an arbitration agreement may, because of the adjudicator, produce different law than the same rules incorporated into a contract without an arbitration clause.<sup>178</sup>

Not only can agreements require arbitrators to apply rules, agreements can require arbitrators to write reasoned opinions.<sup>179</sup> As the Widget Dealers Association arbitrators build a supply of precedents, they can be contractually required to follow precedents in future cases.<sup>180</sup> So the privately-created law consists of not only unwritten norms and/or written rules, but

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tion, National Hay Association, National Institute of Oilseed Products, North American Wholesale Lumber Association, Pacific Coast Coffee Association, Pacific Northwest Grain and Feed Association, Pennsylvania Rice Millers' Association, Rubber Trade Association, Specialty Coffee Association of America, Tea Association of the USA, Texas Cotton Association, and the Texas Grain and Feed Association. See *id.* at 1805 n.134.

178. See Ribstein, *supra* note 112, at 251-52 (suggesting reasons why parties may prefer government default rules to private ones).

179. See, e.g., Bernstein, *supra* note 177, at 1771-73; see also Bernstein, *supra* note 12, at 150-51.

180. Alan Rau points out the following:

[reasoned arbitrator] opinions may be especially valuable to disputants who are parties to a continuing relationship, where arbitration can fill gaps in open-ended arrangements and send signals that help the parties adjust their behavior in future interactions. Opinions may equally be useful for parties to standardized transactions that may be expected to give rise to a number of similar and often-recurring disputes, and where reasoned opinions may play a role in developing a general consensus on industry standards. So it would be natural to find that a practice of giving reasoned awards has developed in collective bargaining cases as well as in a wide range of trade association arbitrations. In such cases it is likely, too, that reasoned opinions will be increasingly relied on both by disputants and by subsequent arbitrators—so that despite a general understanding that *stare decisis* does not operate here, a sort of "common law" may emerge. But outside of these areas, the continuing and inevitable question is why contracting parties would at all choose *ex ante* to bear the costs of reasoned opinions—merely in order to convey such external benefits on third party free riders.

Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 536-37 (1997) (footnotes omitted); see also Landes & Posner, *supra* note 12, at 248-49. On the virtues of reasoned opinions, see Hayford, *supra* note 94.

also decisional law. In short, arbitration can produce a sophisticated, comprehensive legal system.

Even better, it can produce many such systems. The law—unwritten norms, written rules and decisional law—of the Widget Dealers Association may differ from the law of the Gadget Dealers Association. Both may differ from the laws of the Sierra Club, the Alabama Baptist Convention, the American Association of Retired People, the Rotary Club, or the Saab Owners Association. Thus emerges privatized law in the fullest sense. There is diversity because what is best for some is not best for others.<sup>181</sup> But there is also a process of experimentation in which lawmakers learn from each other and copy laws which seem better.<sup>182</sup> There may even be open competition among different lawmakers to earn money by producing better laws.<sup>183</sup> A market for law develops. This privatized system produces better law than does a system in which government monopolizes lawmaking. The principles animating privatization around the world apply to lawmaking just as they apply to coal mining or mail delivery.<sup>184</sup>

## 2. A Note on Contract Theory

The fact that arbitration creates a market in default rules seems to have gone underappreciated, indeed barely acknowledged, in the debate over consent theories of contract even though that debate includes scholars as thoughtful as Jules

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181. See, e.g., Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 1 (1998) (positing that cultural minorities can use arbitration to avoid the majoritarian bias of the court system).

182. Such copying will be more likely to the extent different lawmakers make their substantive law publicly available. It is possible that the Widget Dealers Association, for example, tries to keep its law secret from all those who do not incorporate it into their contracts. The amount of copying will also depend on the extent to which market pressures lead toward standardization, or convergence in the laws of various groups. The tradeoffs between standardization and individual tailoring apply here as they apply to contract terms generally.

183. Cf. Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 7 (1987) ("Competition and the values underlying competition should play a major role in shaping future dispute resolution mechanisms. . . . Competition produces shifts towards efficiency and creates a healthy environment in which rival dispensers of dispute resolution seek to satisfy perceived demands.").

184. Applying these principles to law enforcement, as opposed to lawmaking, is more complicated. See *supra* note 4.

Coleman and Randy Barnett.<sup>185</sup> Critics of consent theories, who often refer to default rules as "gap-fillers" or "implied-in-law" contract terms, contend that such rules are "imposed by the legal system for reasons of principle or policy rather than consented to by the parties."<sup>186</sup> Barnett replies that consent to be legally bound is "a necessary element of a prima facie contractual obligation,"<sup>187</sup> and is, in most circumstances, best interpreted to include consent to the default rules of whatever court has jurisdiction of the dispute.<sup>188</sup> To which Coleman says:

[T]he parties could be said to consent to a relevant authority's default rule only if they willingly, that is, noncoercively, choose it. This is not typically the case, however. The default rules of any jurisdiction are generally a nonnegotiable part of their bargain. Though the parties can often contract around them, they cannot substitute the default provisions of other jurisdictions. For that reason, it is questionable whether by consenting to a framework of contractual rights and responsibilities the parties consent to the application of operative default provisions.

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In order for the claim that merely by entering into a contract, parties consent to the relevant default rule to be minimally plausible, we would have to assume something like a competitive market in authoritative jurisdictions. Then the parties would choose jurisdictions based, among other things, on the default rules in effect.<sup>189</sup>

Barnett concedes that "this argument has some merit" because "consumers of legal systems are denied free choice among legal jurisdictions."<sup>190</sup>

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185. See *infra* notes 186-92 and accompanying text.

186. Barnett, *supra* note 8, at 822-23 (summarizing "prevailing wisdom" of contract theory).

187. *Id.* at 864.

188. *Id.* at 864-67. Steven Burton "do[es] not think the full range of default rules can be legitimated by the parties' consent, however. To support the contract's legitimate authority, consent must be voluntary, knowing, and deliberate." Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISC. L.J. 115, 154 (1993). This raises timeless philosophical issues about the circumstances that deprive consent of its moral and legal significance. I have argued that to retain its significance, consent must be voluntary, see Ware, *supra* note 19, at 103-08, 138-41, but that it does not have to be knowing or deliberate. See Ware, *supra* note 9, at 200-05. The great virtue of the objective theory of contract is that it disregards claims about subjective knowledge and deliberation. See *id.* at 204-05.

189. JULES COLEMAN, RISKS AND WRONGS 171-72 (1992).

190. Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL'Y 783, 792 (1992).

Arbitration, however, facilitates a market in competitive jurisdictions. This is now a fairly vigorous market, as evidenced by the variety of arbitration systems,<sup>191</sup> and current arbitration law facilitates further expansion of this market. Government default rules are not the only choice; parties can, to use Coleman's words, "substitute the default provisions of other jurisdictions."<sup>192</sup>

Lisa Bernstein is apparently the only scholar to inject this point into the debate over consent theories of contract. She suggests that "a more horizontal system of competing default regimes is being facilitated by the rapid growth in the use of [arbitration]."<sup>193</sup> In response to Bernstein, Barnett says only that arbitration is "a step in [the] direction" of "freely competing legal systems."<sup>194</sup> This is somewhat cryptic: what makes it only a "step in the direction"? I suggest two answers, that is, two problems with the market in lawmaking under current arbitration law. First, even if there is a competitive market for default rules, there certainly is not one for mandatory rules. Government monopolizes the production of mandatory law.<sup>195</sup>

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191. See *supra* note 177; see also Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration* 16-24 (1998) (unpublished manuscript, on file with the *Minnesota Law Review*).

192. COLEMAN, *supra* note 189, at 172.

193. Bernstein, *supra* note 173, at 84. Bernstein uses the term "ADR," rather than "arbitration," in this passage. But earlier in the same article, she refers to "binding private ADR" as the ADR with "important implications for . . . the default rules debate." *Id.* at 81. These qualifiers, "binding" and "private," are crucial. Non-binding methods of ADR, such as negotiation and mediation, resolve disputes contractually, but the contracts are formed post-dispute so they do not implicate the distinction between mandatory and default rules. See *supra* notes 115-17 and accompanying text. Even rights arising out of mandatory rules are alienable, post-dispute. See *id.* Of course, ADR must be private, as opposed to court-annexed, see *supra* note 16, to facilitate anything like a competitive market in authoritative jurisdictions. So it is not ADR facilitating such a market, but binding, private ADR. The paradigmatic form of binding, private ADR, perhaps the only form of it, is arbitration. Arbitration, rather than ADR, is facilitating the market in default rules.

194. Randy E. Barnett, . . . *And Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421, 431-32 (1993). Barnett, like Bernstein, refers to "alternative dispute resolution" rather than "arbitration." See *supra* note 193 for the significance of this distinction.

195. There is some competition among various governments. The benefits of competition among governments seem most thoroughly acknowledged with respect to corporate shopping for law under which to incorporate. See generally Kobayashi & Ribstein, *supra* note 113, at 12; Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1442-43 (1992); Roberta Romano, *Law As a*



Second, the market for default rules is not a level playing field because government default rules are the default default rules. That is, unless parties opt in to some other set of default rules, government default rules will apply. Acknowledging that these two problems exist, we can ask whether they are inevitable. Is there any way to avoid the monopolization of mandatory law or a default provider of default rules?<sup>196</sup>

Barnett suggests that "[i]f meaningful competition among legal systems existed . . . a general consent to be legally bound . . . might be construed as including a genuine consent even to those immutable [mandatory] rules that one cannot contract around."<sup>197</sup> But such rules are ultimately default rules if one becomes bound by them only by contracting into a legal system as a whole. It seems, then, that mandatory rules can only be produced by government. And it is logically impossible for law to consist only of default rules because the concept of a default rule presupposes rules specifying the requirements for forming an enforceable contract.<sup>198</sup> The only way parties could "contract around" the "law on contracting around" would be to form a contract specifying the requirements for forming later contracts among them. The original contract though, would have to be governed by mandatory rules on the formation of enforceable contracts. The mandatory rules specifying the requirements for forming an enforceable contract differ from other mandatory rules in that the former must, as a matter of logic, be mandatory.<sup>199</sup>

### C. THE BOUNDARIES OF PRIVATELY-CREATED LAW

The foregoing note on contract theory serves to remind us that "privatized" lawmaking, as used in this Article, means privately-created law enforced by government. To that extent, government undergirds this "privatized" law. But this should not obscure the vast amount of privatization permitted by cur-

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*Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985).

196. This may be another way of asking whether law can exist without government. For impressive answers, see BARNETT, *supra* note 4, and BENSON, *supra* note 4.

197. Barnett, *supra* note 8, at 905.

198. "[B]efore implementing any default standard, courts need to establish, as a logically prior matter, rules for deciding . . . what is sufficient to contract around a default." Ayres & Gertner, *supra* note 8, at 119-20.

199. This point has implications for arbitration law's separability doctrine, discussed *infra* note 203.

rent arbitration law.<sup>200</sup> As Part II showed, privatized lawmaking can currently extend to otherwise mandatory rules, as well as to default rules, because, under current Supreme Court cases, virtually all claims are arbitrable and courts do not ensure that government law is applied to those claims.<sup>201</sup> An arbitration agreement contracts out of all the law that would have been applied by a court but for the agreement. All such law, in effect, consists of default rules because arbitration agreements are enforced.<sup>202</sup> All such law is privatizable. The first section of Part III argued that, to preserve mandatory law, this must change. Either claims arising out of mandatory rules should become inarbitrable or they should be subject to de novo judicial review.

Even if this were to occur, there would still be wide opportunities for privatization. Privatized lawmaking would still extend to default rules. There would be universal arbitrability of claims arising out of default rules and courts would enforce arbitrators' rulings on such claims regardless of whether the arbitrators applied government law. While this laissez-faire arbitration would be confined to claims arising under default rules, it would not be confined to contract claims.<sup>203</sup> There are numerous default rules outside of contract law,<sup>204</sup> and claims in those areas would remain arbitrable.

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200. Government enforcement of a private judge's decision "no more compromises the private nature of the adjudication system . . . than the law of trespass compromises the private property rights system." Landes & Posner, *supra* note 12, at 237.

201. *See supra* Part II.

202. *See supra* Part II.

203. Nor would it encompass all contract claims. Contract law itself has many mandatory rules, *see* Slawson, *supra* note 9, at 32, and parties should not be able to avoid these by agreeing to arbitrate. In an earlier article I criticize arbitration law's separability doctrine on the ground that it permits parties to avoid mandatory law regarding the formation of enforceable contracts. *See* Ware, *supra* note 19, at 128-38 & n.270. As Alan Rau puts it, "[t]here is simply no agreement to *anything*, for example, where a signature has been forged, or where an authentic signature was obtained at gunpoint." Alan Rau, *The New York Convention in American Courts*, 7 AM. REV. INT'L ARB. 213, 253 n.173 (1996). This can be read as saying that the contract formation requirement of manifestations of assent and the contract defense of duress are both mandatory rules, rules which cannot be contracted around. In contrast, the misrepresentation defense may be a default rule, at least in certain types of transactions. *Cf., e.g.*, the majority and dissenting opinions in *Danann Realty Corp. v. Harris*, 184 N.Y.S.2d 599 (1959).

204. *See, e.g.*, Slawson, *supra* note 9, at 30 ("[M]ost of the common law consists of rules that could be preempted by a contract.").

For example, automobile insurance companies could have an enormous impact on negligence law if all their insurance policies had arbitration clauses making all the company's other policyholders third-party beneficiaries.<sup>205</sup> Then an auto accident involving, for instance, two Allstate customers would go to arbitration, not litigation. If all the insurers contracted with each other, they could extend this arbitration system to accidents involving customers of different insurers. The negligence law of auto accidents could be taken away from judges and juries and produced, instead, by arbitrators.<sup>206</sup> Nor would the arbitration clause in auto insurance policies have to be limited to auto disputes. If the clause was written broadly enough to cover a land dispute between neighbors or a testamentary dispute between devisees, the law in those areas would be privately-created, too. Nor would insurers have to be the only hub of hub-and-spoke arbitration agreements. A magazine could be a hub with spokes connecting all its subscribers. Mastercard could be a hub with spokes connecting all its cardholders. Other hubs might be created for the sole purpose of dispute resolution.

William Landes and Richard Posner point out that in pre-dispute arbitration agreements "the parties agree . . . on the judge (or on the method of selecting him) before the dispute arises."<sup>207</sup> They add that this is possible "only where the dispute arises from a preexisting voluntary relationship between the parties; the typical tort or crime does not."<sup>208</sup> This may be unduly narrow. As the auto accident example indicates, many torts involve disputes between people who, although they have not contracted with each other, are contractually-linked through intermediaries.<sup>209</sup> If arbitration clauses appeared in the contracts of a few major hubs—such as the utilities providing water, electricity or phone service—nearly every American might well agree to arbitrate any dispute with anyone.

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205. With this scenario, compare BARNETT, *supra* note 4, at 284-97, with Carbonneau, *supra* note 44, at 20-22.

206. Negligence law consists largely of default rules. See FARNSWORTH, *supra* note 21, § 5.2, at 353 ("[A] party generally can exempt itself from liability or limit its liability in tort for harm caused by negligence, as long as the provision is not unconscionable.")

207. Landes & Posner, *supra* note 12, at 237.

208. *Id.*

209. Landes and Posner acknowledge this "when both parties to the dispute are members of the same (private) group or association." *Id.* at 238. I am merely explaining how such groups could encompass more people.

Some may feel that this vision goes too far.<sup>210</sup> Creating law, the argument goes, is a difficult, complex process, requiring education in the law and sensitivity to the interests of various groups in society. In general, judges, elected officials and their appointees are better suited to lawmaking than are private parties. The expertise of private parties and their arbitrators is confined to the ways of their particular business or activity. So arbitrators ought to stick to factual questions, not venture into legal ones.<sup>211</sup>

This may be the conclusion everyone reaches. If so, no harm arises in allowing private law to be created through arbitration because people will choose to leave lawmaking in government hands.<sup>212</sup> But the problem with mandatory rules is that they do not permit lawmaking in private hands. When government lawmakers enact mandatory rules and prevent privatization of law, they look like postal workers excluding private firms from the delivery of first-class mail.<sup>213</sup> That is, they look like people opposing privatization, not because of confidence that nobody will switch to private alternatives, but because of fear that many will.

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210. Cf. William J. Woodward, Jr., "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC, 75 WASH. U. L.Q. 243, 257 n.59 (1997) ("The very idea that people do—or should—go shopping for law and forum has a surreal character to it. The vision that comes to my mind is our consumer (or, perhaps, CEO or her lawyer) with a shopping cart ambling down one aisle with products liability 'products,' another with disclaimer 'products,' and perhaps a third with unconscionability 'products.'").

211. As the Supreme Court said in the context of labor arbitration:  
[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts . . . .

Alexander v. Gardner-Denver, 415 U.S. 36, 57 (1974) (citations omitted).

212. Some will worry that those with "economic power" will use "adhesion contracts" to "impose" private law on consumers, employees, etc. These concerns are now addressed by the application of various contract law doctrines to arbitration agreements. Such doctrines include those relating to the formation and interpretation of contracts and defenses to their enforcement. See Ware, *supra* note 9, *passim* (arguing that contract law doctrines are the best way to address these concerns).

213. See generally George L. Priest, *The History of the Postal Monopoly in the United States*, 18 J.L. & ECON. 33 (1975). There is "little evidence to support [the] claim of natural monopoly conditions in the postal industry." *Id.* at 76.

## CONCLUSION

Arbitration privatizes the creation of law. Judicial enforcement of pre-dispute arbitration agreements, in effect, converts what would otherwise be mandatory law into default law. To prevent this, the Supreme Court must either (1) reverse its decisions that claims arising under otherwise mandatory rules are arbitrable, or (2) require de novo judicial review of arbitrators' legal rulings on such claims. The first option seems to be in less tension with the FAA and subject to less troubling practical problems.

Law consisting of default rules should remain arbitrable and subject to zero judicial review. Any alternative would contravene freedom of contract, and the FAA's endorsement of it, without a solid ground for doing so. The arbitration of claims arising under default rules presents an opportunity to privatize the creation of vast areas of law. It is an opportunity to create private legal systems of unwritten norms, written rules, and the precedents of private courts. Parties have only begun to seize this opportunity.