The Grounds of Arbitral Authority

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The United States Supreme Court has repeatedly characterized arbitration as a "creature of contract," and as the upshot of parties' voluntary choices that the Court must honor. Based on this metaphor, the Court has expanded the scope of arbitration even in employment and consumer contracts, giving broad authority to arbitrators and limiting parties' access to procedural mechanisms like class actions and judicial review. The metaphor does not fit the Court's jurisprudence and its aggressive pro-arbitration policy, and rests on a mistaken view about the structure of contract law, which ignores that contract—and, therefore, arbitration—is a creature of law. The contractual view of arbitration also generates normative problems. It leads to a form of "everyday libertarianism," which shields arbitration law from critical scrutiny, generates significant problems in mandatory arbitration in employment and consumer transactions, and even leads the Court's critics to mistakenly assume that lack of consent is the cause of the problems in these contexts. As the Article argues, the mistaken notion of arbitration as a creature of contract is not limited to the domestic level—it also extends to international arbitration.

We thus need to replace the contractual metaphor. This Article offers a better account of the structure of arbitration, based on the notion that arbitration law, like contract law, is a compound rule generating both powers and duties. Based on this more accurate picture of arbitration law, this Article offers two criteria for evaluating arbitration as a legal enforcement institution: its effectiveness as a device for producing law and its aptness as a rights enforcement mechanism. Ultimately, because arbitration requires the law's assistance, law has the authority and the responsibility to ensure that arbitration works adequately. As every exercise of legal authority, arbitration stands in need of justification and should be subject to normative evaluation.

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I. INTRODUCTION

Mattel, Inc. (Mattel) is the manufacturer of Fisher-Price toys, Barbie dolls, and Hot Wheels cars.[1] Mattel was also one of the parties in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[2] a case in which the Supreme Court faced the question of whether parties who agree to arbitration can also agree to judicial review of arbitral awards under the Federal Arbitration Act (FAA).[3] In deciding this question, the Court stated:

> [T]he FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law. But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.
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> To that particular question we think the answer is yes . . .[4]

Any other interpretation, according to the Court, "opens the door to full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process' and bring arbitration theory to grief in post-arbitration process."[5] As Richard Reuben has noted, with this

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1. *Brand Portfolio*, MATTEL, https://corporate.mattel.com/en-us/brand-portfolio [https://perma.cc/5ETB-LKFV] (last visited Feb. 26, 2022).

2. 552 U.S. 576 (2008).

3. Hall St. Assocs., L.L.C. v. Mattel, Inc., 196 F. App'x 476, 477 (9th Cir. 2006), *cert. granted*, 550 U.S. 968 (2007).

4. *Hall St. Assocs., L.L.C.*, 552 U.S. at 586.

5. *Id.* at 588 (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003)).

decision, the Court expressed that considerations pertaining to the goals and finality of arbitration outweigh the parties' freedom of contract.[6]

Hall Street is puzzling given the Court's traditional rhetoric about arbitration,[7] which repeatedly refers to arbitration as *a creature of contract*.[8] The decision also raises a theoretically important question about the grounds of arbitral authority: what makes it the case that a private third-party has the legal authority to issue authoritative decisions that can be legally enforced? The metaphor of arbitration as a creature of contract suggests a somewhat automatic answer: arbitral authority is grounded in the parties' contract.

This Article is a critical examination of the grounds of arbitral authority. As I will argue, while the metaphor of arbitration as a creature of contract can seem superficially correct, it is unhelpful. Analytically, the metaphor provides a distorted picture of arbitration and, at best, constitutes a half-truth. As *Hall Street* illustrates, the purely contractual view of arbitration does not even fit the Court's jurisprudence. Moreover, it is inconsistent with an adequate theoretical understanding of the structure of contract law. Normatively, the metaphor leads to unacceptable outcomes, makes these outcomes harder to overcome, and generates a lack of political responsibility for them. The metaphor also leads to an "everyday libertarian" conception of arbitration, which distorts our normative assessment of legal practices and makes the adequate resolution of the problems generated by mandatory arbitration in consumer and employment transactions harder to achieve.

Because of these issues, we should reject the contractual metaphor, replacing it with a more accurate and normatively attractive understanding of arbitration. This Article offers that alternative understanding of the grounds of arbitration, based on a more accurate account of contract law. In some sense, that alternative understanding is compatible with seeing arbitration as a creature of contract—as long as we have the right theory of contract, which the Court does not. In line with this, this Article offers a conception of arbitration that derives

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6. Richard C. Reuben, *Personal Autonomy and Vacatur after* Hall Street, 113 PENN ST. L. REV. 1103, 1106 (2009).

7. *Id.*

8. *See, e.g.*, United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 570-71 (1960) (Brennan, J., concurring); *see also* Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DEPAUL BUS. & COM. L.J. 383, 388 (2009) (referring to arbitration as a creature of contract).

from an understanding of contract law as a "compound rule."[9] Arbitral authority, under this conception, is always the upshot of a combination of an exercise of legal powers that enable parties to arbitrate their disputes, and legal duties that arise out of this exercise of legal powers, such as the duty to submit disputes about their rights to an arbitrator's authority. Those who exercise arbitral authority exercise a form of legal authority that is most immediately grounded in the exercise of legal (and more specifically, contractual) powers by private citizens.

Because the exercise of arbitral authority is ultimately an exercise of legal authority—even if mediated by contract—it should be subject to normative evaluation. This evaluation should refer to different and sometimes competing criteria. This Article focuses particularly on two such criteria: how the expansion of arbitration might impact the production of law as a public good and how arbitration might fare as a mechanism for the vindication of individual rights.

Here is a roadmap for the rest of the Article. Part II explains the Court's "contractual approach" to arbitration. Part III explores its analytical problems, while Part IV suggests why the approach is not just descriptively distortive but is also normatively problematic given the undesirable consequences it leads to. Part V explains why the metaphor is not just problematic at the domestic level, but also leads to distortions in international arbitration. Part VI suggests a more accurate characterization of arbitral authority as the upshot of a compound rule, and briefly explores some of the implications of this view for normative evaluation along two dimensions: the production of law and the vindication of individual rights. Finally, Part VII offers some conclusions.

II. A CREATURE OF CONTRACT?

There are two ways in which one could understand the Court's metaphor of arbitration as a creature of contract. In its weak form, the metaphor simply states that (i) usually, or in most cases, arbitration arises out of the parties' agreement to subject their dispute to arbitration, and (ii) the parties' agreement constitutes a relevant consideration in determining the scope of arbitral authority. In its strong version, the metaphor entails something more drastic. It entails that

9. Following Klass's account of the structure of contract law. *See generally* Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726 (2008) (characterizing contract law as a compound rule).

arbitration is based on individual choice and consent, and that arbitral authority is entirely derived from the parties' intentions. The strong reading is, in short, a libertarian view of arbitration. Arbitration, under this view, does not just *usually* arise out of the parties' agreement. It is created by the parties' agreement (because contracts *create* or *are the grounds of* things like contractual rights and arbitral authority), and the parties' agreement is its ultimate foundation. Moreover, under this strong interpretation of the metaphor, the scope of the arbitrator's authority is primarily determined by the parties' agreement. Under this strong version, finally, private agreements to arbitrate ought to be enforced out of respect for individuals' autonomy.[10]

There is nothing wrong with the weak version of the contractual metaphor. It contains a great deal of truth, and it does not take the notion that arbitration is a creature of contract more seriously than it should. It simply states that the immediate source of arbitration, the most immediate and natural explanation for when it exists, is typically a contract. Yet, the stronger reading—what I call, following Ware, the "contractual approach"[11]—goes further. It sees contracts as unassailable reflections of parties' intentions, which ought to be sovereign over questions of legal enforcement and provide a necessary and sufficient justification for arbitration as a dispute resolution mechanism. This is, precisely, what the Supreme Court seems to have in mind in its arbitration jurisprudence when it states that arbitration is a creature of contract.

Under this contractual approach, arbitration is "simply a matter of contract between the parties,"[12] legitimated by their voluntary assent to submit their dispute to arbitration.[13] Arbitration is thus seen as a matter of individual choice.[14] In contrast to the Court's older view of

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10. *See* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1955 (2014).

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

12. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 77 (2010) (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995)); *see also* Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of 'Consent,'* 24 ARB. INT'L 199, 199 (2008) ("[A]rbitration is a matter of contract."); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1380-81 (1991) (examining the applicability of contract revocation defenses in arbitration).

13. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (holding that arbitration is a matter of consent).

14. Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 51 (2010).

arbitration as a means for effective dispute resolution, the Court's contractual approach has come to see arbitration as "a purely contractual mechanism,"[15] as a mechanism that is exclusively grounded in the parties' autonomous and voluntary choice,[16] whether because of the intrinsic normative significance of party choice or because of the efficiency effects that flow from deference to it.[17] Naturally, this approach has made arbitration pervasive.[18]

Consistently with this view, the Court sees the Federal Arbitration Act (FAA) as instantiating "the overarching principle that arbitration is a matter of contract."[19] Under this principle, "arbitration 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."[20] The Supreme Court's contractual approach has led the Court, for instance, to claim that the arbitrator's task is to give effect to the parties' intent, and that the source of her authority is the parties' agreement,[21] as well as to hold that courts must defer to arbitrators' arbitrability decisions when the parties submit that matter to arbitration.[22]

As Hiro Aragaki notes,[23] the Court's decision in *Volt Information Sciences v. Leland Stanford, Junior University*[24] offers a good example of the Court's contractual approach. In this case, the Court held that the FAA's central purpose is to ensure that agreements to arbitrate are enforced according to their terms, because arbitration "is a matter of consent, not coercion, and parties are generally free to structure their

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15. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3057 (2015).

16. As well as the view that this pre-legal autonomy is "the highest priority in the pantheon of arbitration values." Edward Brunet, *The Core Values of Arbitration*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 3-28, (Edward Brunet et al. eds., 2006).

17. Cornelis J. W. Baaij, *A Case of Mistaken Identity: Questioning the U.S. Supreme Court's Contract Theory of Arbitration*, 14 VA. L. & BUS. REV. 121, 128 (2020).

18. In the employment context, see Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U.L. REV. 1121, 1149-52 (2019).

19. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 228 (2013).

20. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

21. Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974).

22. *Kaplan*, 514 U.S. at 943. Note that there may be very good reasons to defer to the arbitrator's arbitrability decision, *besides* a presumptive respect for the parties' choice. Here, I am just noting that, in the Court's jurisprudence, there is a connection between that deference and the "contractualist" view of arbitration.

23. Hiro N. Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 ARB. L. REV. 2, 2 (2016).

24. 489 U.S. 468, 475 (1989).

arbitration agreements as they see fit."[25] According to the Court, moreover, by rigorously enforcing arbitral agreements, courts give effect to the contractual rights and expectations of the parties.[26] Under this approach, the authority and legitimacy of arbitration derives from private autonomy,[27] which must be—in the most extreme versions of the view—understood as normatively prior to the state.[28] Consistently, the parties' choice for arbitration should not be interfered with, unless there is some invalidating procedural defect in the bargaining process.[29]

From this perspective, arbitration's primary source of legitimacy is not its efficiency or convenience as a mechanism for resolving disputes. Rather, the justificatory weight is placed on arbitration's ability to allow for voluntary cooperation, its consistency with individual autonomy, and its dual role of limiting state power and investing the arbitrator with an authority that is to a large extent independent from political control.[30] Arbitration, according to the contractual view, manifests individual autonomy and voluntary choice; its central foundation is consent.[31] As a consequence, if the arbitration agreement is valid, the role of the state is to make sure that arbitration enforces the parties' contractual intent.[32]

As I argue below, this strong contractual approach rests on a mistaken view about contracts. However, it is also inconsistent with the Court's own arbitration doctrine, as I explain next.

III. SOME PROBLEMS OF FIT

A. A Policy Favoring Arbitration

At the same time it has used the metaphor of arbitration as a creature of contract, the Court has repeatedly stated that the FAA is based on a liberal policy favoring arbitration as a mechanism for dispute resolution.[33] There is, according to the Court, an "emphatic

25. *Id.* at 479.

26. *Id.*

27. Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059, 1069 (1987).

28. *Id.* at 1070.

29. *Id.* at 1071.

30. Kenneth R. Davis, *A Model for Arbitration: Autonomy, Cooperation and Curtailment of State Power*, 26 FORDHAM URB. L.J. 167, 168-69 (1999).

31. ANDREA STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION 13 (2012).

32. Davis, *supra* note 30, at 169-70.

33. The first reference to the policy is Justice Black's dissent (which, ironically, rejected the policy). Prima Paint Corp. v. Flood & Conklin Mfg. Co. 388 U.S. 395, 425 (1967)

federal policy in favor of arbitral dispute resolution,"[34] which supersedes state law.[35] Thus, the Supreme Court's jurisprudence has used the language of freedom of contract and the rhetoric of party autonomy *at the same time* it has pursued a pro-arbitration policy independently from, and sometimes at the expense of, freedom of contract.[36] The relevant provisions of the FAA, under the Court's jurisprudence, are interpreted as a reflection of both a commitment with party autonomy *and* with a broad policy in favor of arbitration.[37]

As part of this policy, the Court has interpreted contractual ambiguity in favor of arbitration,[38] and has stated—under the notion of "separability"[39]—that the unenforceability of a contract does not necessarily affect the arbitrator's authority.[40] The Court has also held that arbitration can perfectly extend to statutory rights—which, in the Court's view, are not inherently undermined by arbitration[41]—"unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[42] Under this interpretation, issues involving antitrust, securities, and anti-discrimination federal

(Black, J., dissenting); *see* Sanga, *supra* note 18, at 1129. Many other cases restate this idea, endorsing it. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 52 (1995); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012).

34. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

35. *See* Southland Corp. v. Keating, 465 U.S. 1, 19 (1984); Perry v. Thomas, 482 U.S. 483, 486 (1987); Preston v. Ferrer, 552 U.S. 346, 359 (2008).

36. Baaij, *supra* note 17, at 141-47.

37. AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 339 (2011).

38. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25; Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 475-76 (1989); *cf.* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995) (discussing and justifying the interpretive presumption in favor of arbitrability).

39. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 442 (2006). *See generally* Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1 (2003) (discussing separability in arbitration); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819 (2003) (discussing the same issue).

40. Prima Paint Corp. v. Flood & Conklin Mfg. Co. 388 U.S. 395, 402 (1967).

41. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 486 (1989).

42. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); *see, e.g.*, Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226-27 (1987); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

statutes, for instance, are arbitrable.[43] Conflicting state contract law, moreover, is superseded by the FAA and the policy it purportedly embodies.[44] Thus, the Court has expanded the reach of the FAA in multiple ways, consistently with the view that there is a federal policy in favor of arbitration.[45] Whether that interpretation is actually consistent with the text and purpose of the FAA is, at least, unclear.[46]

Perhaps, the policy favoring arbitration could be reinterpreted to be rendered compatible with the strong conception of arbitration as a creature of contract. Yet, it is hard to see how this would be possible. There are important inconsistencies between the rhetoric of radical contractual freedom and the Court's judicial policy in favor of arbitration.[47] Indeed, the Supreme Court, in furthering its pro-arbitration policy, has imposed general interpretive and doctrinal criteria that, at least in principle, seem at odds with a purely contractual basis of arbitration, as well as with the classical notions of contractual freedom that the Court has appealed to. According to Cunningham, because of this tension within the Supreme Court's jurisprudence, there is a gap between a contractual rhetoric and a pro-arbitration reality, which produces decisions "ringing of classical contract-law rhetoric worked into forms that make contract law a tool of social control."[48]

Of course, it could be the case that the pro-arbitration policy is justified. It might be the case, for instance, that an expanded scope for arbitrability, pursued under the notion that the FAA is committed to a

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43. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 392-33 (2016).

44. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 394 (2005).

45. Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 935-36 (1999).

46. For a genealogy, see Sanga, *supra* note 18, at 1129-35.

47. *See* Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129 (2012). Regarding separability, for instance, Ware claims that it:

> [S]ends to arbitration the issue of whether a party's consent to arbitration was voluntary. It relegates a dispute to arbitration without first determining that the parties had voluntarily consented to arbitration. Applying separability to duress then, prevents courts from ensuring that arbitration proceeds only through voluntary consent. Applying separability to mutual assent goes even further. It prevents courts from ensuring that arbitration is consensual at all.

Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 130 (1996).

48. Cunningham, *supra* note 47, at 136.

pro-arbitration policy,[49] is, all things considered, the appropriate position regarding which types of disputes can be legitimately subject to arbitration.[50] But the issue is that, however justified it could be, the policy will conflict—and has in fact conflicted—with the supposedly contractual basis of arbitration.

Such conflict was precisely at stake in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[51] In that case, the Court faced two possible conceptions of arbitration: the one it had repeatedly endorsed of arbitration as a "creature of contract," and a different one, which sees arbitration as a streamlined procedure that strictly requires the enforceability of arbitral awards, exempt from judicial review *even if the parties clearly manifested their desire for such review*.[52] If the Court had been fully committed to the first proposition and the idea of arbitration as purely contractual, it should have accepted that the parties have the authority to craft a procedure that satisfies their purposes, including broader judicial review.[53] But, as *Hall Street* shows, the Court is not, in the end, committed to a purely contractual view.

What does this imply? Well, it implies that arbitration is not, as a matter of American law at least, purely a creature of the parties' contractual intent. On the contrary, it is to a large extent a creature of law—and, particularly, of the Court's interpretation of the FAA. Law, and not the sheer fact of the parties' agreement, dictates the extent, shape, finality, and even possibility of arbitral authority.[54] The obvious truth that American law structures arbitral authority by typically deferring to parties' agreements does not deny this point. In fact, there are persuasive considerations of political morality—such as the ideas of personal autonomy and contractual freedom—and epistemic competence—in principle, no one knows better than the parties what maximizes their joint welfare—for this deference in many, if not all, cases. In other words, there are good moral, political, and economic

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49. *See* Glover, *supra* note 15, at 3062.

50. The opposite is also true: the policy might be inappropriate in many instances, and its application by the Supreme Court might be a form of judicial activism that has no grounds in the FAA.

51. Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 582 (2008).

52. Richard E. Speidel, *Parties' Power to Vary Standards for Review of International Commercial Arbitration Awards*, 8 NEV. L.J. 314, 314-15 (2007).

53. *Id.* at 316.

54. According to Bookman's suggestive analysis, the underlying reason for this might be that the Court, more than pro-arbitration, is anti-litigation—and that when these two positions conflict, the anti-litigation stance trumps. *See* Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1119 (2019).

reasons for arbitration to require, at least in general, voluntary choice by the parties. But the ultimate ground of arbitral authority is always law. The most natural interpretation of *Hall Street* is, precisely, that law—rightly or not—declines to defer to the parties' agreement when it comes to the extent of judicial review of arbitral awards, even if it defers to that agreement for myriad other questions.

In this aspect, the Court's behavior is close to duplicity: the Court acts in ways that directly contradict what it says.[55] It claims that arbitration is a creature of the parties' intentions, and that courts' only role is to effectuate them, but whenever the parties' agreement diverges from the Court's view of arbitration and its interpretation of the FAA, the parties' contract ceases to have this practical authority.

It could be tempting to think that the way to resolve this contradiction is to truly adhere to the contractual approach. That might be justified, under certain conditions. Yet even if that were the strategy to pursue, the reality of arbitral authority would ultimately depend on legal facts. Arbitration is, at the most basic level, a creature of law.

It is true that, except in some rare cases, such as sports arbitration[56] or, historically, some small claims,[57] arbitration is typically contractual in origin. We might worry that the rare instances of legally compulsory arbitration are too far from the core case of voluntary arbitration; that there is something centrally important about arbitration that compulsory arbitration lacks. But some commentators have gone further. They argue that these worries warrant a conceptual distinction between "true" arbitration and legally compulsory arbitration—in other words, they deny that the latter could count as arbitration at all.[58]

I do not see the relevance of semantic distinctions about what types of arbitration *really* are arbitration, or of metaphysical questions about the true nature of dispute resolution mechanisms.[59] Nothing of independent moral significance turns on whether a certain procedure is arbitral or not. But semantic and metaphysical disputes aside, legally imposed arbitration is just an extreme example of something that is true about arbitration in general: that it is not efficacious without, and derives its strength and legal authority from, law. Thus, while it is true,

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55. Sanga, *supra* note 18, at 1129.

56. STEINGRUBER, *supra* note 31, at 23.

57. *See, e.g.*, Maurice Rosenberg & Myra Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448, 448 (1961).

58. *See, e.g.*, JAN PAULSSON, THE IDEA OF ARBITRATION 19-20 (2013).

59. *See* Hiro N. Aragaki, *The Metaphysics of Arbitration: A Reply to Hensler and Khatam*, 18 NEV. L.J. 541, 543 (2018).

as some critics have argued, that, under *Hall Street*, arbitration is not a matter of contract (as understood by the Supreme Court, at least), but "a matter of law and . . . judicial policy,"[60] this is not as surprising or strange as critics suppose. In fact, as the next section argues, the very supposition that there is a stark contrast to draw between a contractual and a legal foundation for arbitration rests on a mistake.

B. Contract Theory Reconsidered

Some commentators draw a contrast between *contractual* and *legal* or *regulatory* approaches to arbitration.[61] Under this contrast, judges are public officials implementing law and adjudicating public rights, while arbitrators are "creatures of contracts, obliged to effectuate the intent of the parties."[62] While the contrast captures a relevant distinction, it is, like many dichotomic contrasts, a too blunt simplification.[63] Or, rather, it is a contrast that rests on a simplified view of contract, which, if taken too seriously as a correct account of the nature of contract, leads to analytical mistakes with normative significance. This is the core conceptual problem of the strong contractual view underlying the Supreme Court's approach to arbitration.

As Joshua Karton writes, except in the rare cases in which law directly imposes arbitration, "the parties' arbitration agreement is undeniably the immediate source of the arbitrators' authority."[64] This is what the metaphor of arbitration as a creature of contract gets right.

The same can be said of contractual rights in general: the immediate source of those rights is the parties' agreement. However, contracts only generate legally binding contractual rights if they are recognized as binding contracts by the legal system. Legally enforceable contractual rights are thus the upshot of legal rules,

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60. Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1956 (1996).

61. *See, e.g.*, Steven Walt, *Decision by Division: The Contractarian Structure of Commercial Arbitration*, 51 RUTGERS L. REV. 369, 369 (1999).

62. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2806 (2015).

63. *See generally* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069 (2011) (arguing that the litigation-arbitration dichotomy is an overblown simplification).

64. Joshua Karton, *The Structure of International Arbitration Law and the Exercise of Arbitral Authority*, 8 CONTEMP. ASIA ARB. J. 229, 236 (2015).

doctrines, and institutions.[65] Of course, some plausible views about the foundations of contract law see the latter as manifesting the moral duties that arise out of individuals' private interaction.[66] So it could be that, when it enforces contracts, the law only renders legally enforceable something that it ought to make enforceable. In other words, on some views, the law's treatment of contracts as enforceable is the warranted reflection of our pre-legal normative powers. One could also see the moral duties that arise out of contracts as constraining in some way the legitimate content of contract law.[67] The more plausible view, in my opinion, sees contract law as a means to obtain the socially valuable effects that flow from voluntary cooperation and interpersonal exchange.[68] But whatever its ultimate moral foundations, contract law is undeniably a legal institution,[69] and the rights it generates, while they might reflect or be constrained by people's moral rights in some way, derive their legally binding force from law. That is, after all, why first year contracts teachers spend so much time teaching consideration doctrine. The doctrine is one of the main devices for determining the boundaries of legally enforceable contracts.

Contract law thus gives individuals the power to create and change some of their legal rights and obligations. It grants them legal deontic powers.[70] This is one of the key contributions of contract law to social life. The legal institution of contract gives parties a powerful tool to organize their affairs and enlist others to cooperate with them in their projects and ventures, by allowing them to structure their relationships through legally binding rights and duties. However, contract law does not just enforce those rights. It also plays a crucial role interacting with the parties' agreement in order to produce

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65. Admittedly, law itself can be the upshot of contractual activity, as Arato argues in the case of international state contracts with foreign investors. This, however, is not the case in arbitration law. *See* Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 230 (2015).

66. *See generally* CHARLES FRIED, CONTRACT AS PROMISE (1981) (offering an interpretation of contract law in terms of promissory obligations).

67. *See* Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 713 (2007).

68. *See, e.g.*, Liam Murphy, *The Practice of Promise and Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 151 (Gregory Klass, Prince Saprai & George Letsas eds., 2014).

69. Even non-conventionalists about promissory morality accept this much as obviously true. *See* Thomas M. Scanlon, *Promises and Contracts*, *in* THE THEORY OF CONTRACT LAW 99 (Peter Benson ed., 2001).

70. I take the term *deontic powers* and its explanation from John R. Searle, *What is an Institution?*, 1 J. INST'L ECON. 1, 10 (2005).

contractual rights and duties.[71] The Uniform Commercial Code reflects precisely this fact when it distinguishes between an agreement and a contract, and when it defines the latter as "the total legal obligation that results from the parties' agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws."[72] Law plays a crucial role in determining not just the legal force of contracts, but their very content, through background frameworks including default and mandatory rules and other standards.[73] These rules are the product of the decisions of legislative and judicial institutions. The way in which we find out and settle what the parties' agreement means is determined by legal rules and standards of interpretation. Contractual rights are legally constructed rights all the way down.

This means that the contrasts drawn between contractual and legal rights, between arbitrators and judges, and between contractual and regulatory conceptions of arbitration, are overblown. They capture something, but like many stylized oppositions, they also distort our understanding—particularly when we take them more seriously than we should. While it is true that the content of contractual rights depends to a large extent on the parties' agreement, that content also depends in part on legal rules and institutions. Because, following Karton, the structure of arbitration is the structure of contract, this is not just true of contract, but also of arbitral authority. The scope of arbitral authority, when (as in most cases) the arbitral procedure arises out of an arbitral agreement, derives from the interaction between legal rules and the agreement of the parties. The process of figuring out the content of that agreement and settling the way in which legal rules constrain and determine its legal upshots is fundamentally dependent on the content of legal rules and doctrines. Arbitral authority, like all rights and obligations derived from a contract, ultimately depends on law to exist. This is true even for arbitrators that are not bound to follow substantive law—when this is the case, it is precisely because law authorizes it.

This is why "arbitration is a 'creature of contract'" is at best a half-truth, and an "awkward conceptual rubric" for thinking about

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71. Lewis A. Kornhauser & W. Bentley MacLeod, *Contracts Between Legal Persons*, *in* THE HANDBOOK OF ORGANIZATIONAL ECONOMICS 918 (Robert Gibbons & John Roberts eds., 2012).

72. U.C.C. § 1-201(12) (AM. L. INST. & UNIF. L. COMM'N 1977).

73. Brian H. Bix, *Contracts*, *in* THE ETHICS OF CONSENT 251, 262-63 (Franklin G. Miller & Alan Wertheimer eds., 2010).

arbitration[74]—not just as a matter of American legal doctrine, but as a matter of legal theory. When a contract includes an arbitration clause, and that clause binds the parties, arbitration is the upshot of the legal rules and principles governing contracts and arbitration. The obligation to subject a dispute to arbitration is, in this narrow sense, just like any other contractual obligation. The force of both is ultimately established by legal conventions; they are both, at the most fundamental level, creatures of law. Now there might be (and, in fact, there are) good reasons, generally, for the legal system to establish arbitral authority only if the parties have agreed to subject their dispute to arbitration. But if that is the case, it is not a matter of conceptual necessity, but a normative conclusion about the proper content and structure of law. In other words, libertarians and arbitration enthusiasts can argue that law ought to honor arbitration agreements because of respect to individuals' autonomy, but they cannot pretend that, when they make this argument, they are simply describing or analyzing the nature or structure of arbitration.

Arbitration is thus not, at the most fundamental level, a creature of contract. Contract is a middle step between arbitration and its ultimate legal foundation, but they are not the efficient cause of arbitration, because contracts themselves are creatures of law. The contractual approach of the Supreme Court, resting as it does on the idea of arbitration as a creature of pure contractual intent, obscures this fact and leads to descriptive and analytical distortions. However, as the next section argues, the problem is not just descriptive or analytical. It is also normative.

IV. THE NORMATIVE DIFFICULTIES OF THE CONTRACTUAL APPROACH

A. Everyday Libertarianism

The Court's contractual approach leads to a confused form of *everyday libertarianism*. The idea of everyday libertarianism starts from the observation that social conventions, when sufficiently pervasive, "can come to seem like a law of nature—a baseline for evaluation rather than something to be evaluated."[75] Pervasive and stable social conventions become familiar, and they are internalized to

74. Aragaki, *supra* note 23, at 13.

75. LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP 8 (2002).

the point of appearing as *natural*.[76] This phenomenon includes, as Nagel and Murphy argue, legal conventions like private property.[77]

The phenomenon is also connected to other social and legal institutions, including the market and contracts. In all of these cases, we live under these institutions, which are robust and exist as a matter of "social fact."[78] The familiarity and stability of these practices can sometimes lead us to think as if their existence is independent from their conventional grounding in our social practices and legal institutions. In the case of the market and property, this can make us think that there could be, even in our complex contemporary societies, markets without governments, property without taxes, etc.[79] The success of social conventions deceives us and leads us down this path of everyday libertarianism.

There is a long philosophical tradition of libertarian political thought that in fact defends a pre-institutional notion of moral rights to property and the like.[80] But the problem with the contractual view of arbitration is *everyday libertarianism*, which is not a political theory but a deceptive illusion that makes us think that our contingent, actually existing legal institutions, such as contract and property, have an existence of their own and must reflect genuine pre-political rights. In these cases, the everyday libertarian view ends up being ideological in the worst way possible: it hides the reality of our own social practices. It does not rest, as the libertarian conception, on a substantive moral argument about the pre-legal morality of property and contract, the existence of innate normative powers, or the limits of state power regarding those pre-legal rights and powers. Instead, it rests on the unwarranted assumption that our legal institutions' language about rights, duties, and obligations must necessarily track or reflect real, pre-legal moral rights, duties, and obligations. This assumption does not stand up to critical scrutiny. Even philosophical (not) libertarians and others who are committed to the existence of pre-legal moral rights of

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76. *Id.* at 9; *see generally* Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 U. TORONTO L.J. 151 (2020) (discussing this trait of social conventions).

77. MURPHY & NAGEL, *supra* note 75.

78. On this, see, for example, G.E.M. Anscombe, *On Brute Facts*, 18 ANALYSIS 69, 69 (1958); Neil MacCormick, *Law as Institutional Fact*, *in* AN INSTITUTIONAL THEORY OF LAW 49, 50-51 (1986); John R. Searle, *How to Derive "Ought" From "Is,"* 73 PHIL. REV. 43, 43 (1964).

79. MURPHY & NAGEL, *supra* note 75, at 32.

80. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 5-7 (1974).

property and contract would readily acknowledge that our existing legal institutions might not correctly track or reflect our genuine entitlements. There is simply no legitimate reason to think that what is coincides with what ought to be.

By leading us to the unwarranted assumption that legal institutions must reflect moral realities, everyday libertarianism lends an aura, a presumptive appearance of moral legitimacy, to social arrangements that should be subject to normative evaluation, and which might turn out, after that evaluation, to not be legitimate.

What does this have to do with arbitration? My claim is, precisely, that the strong version of the metaphor of arbitration as a creature of contract, as understood by the Supreme Court, is a form of everyday libertarianism about arbitration. The metaphor suggests that, since arbitration is nothing but the upshot of the parties' voluntary choice, the state is entirely justified in deferring to what these parties have agreed to do—and has no business or responsibility in regulating the outcomes and effects of that agreement. Since this extreme position is obviously untenable, the Supreme Court has (rightly) understood that there are limits to what parties who agree to arbitrate a dispute can legitimately decide without judicial oversight. However, the extreme position is the logical implication of the strong contractual view of the Court. In fact, the position is actually held by some critics who claim that, when it limits or expands the scope of arbitration for policy reasons, the Court is not really respectful towards the contractual foundations it claims for arbitration.[81] The everyday libertarian position has also led the Court to reach questionable decisions with negative consequences in areas like mandatory arbitration in consumer contracts.[82]

The view of arbitration as a creature of contract, which appears in principle as an entirely legitimate, almost natural description of arbitration, can thus end up concealing normatively problematic situations. In a sense, the phrase captures something true: the contrast between litigation and arbitration, and the typically voluntary source of the latter. However, at the same time the phrase "helps [to] justify a normative vision of arbitration's essential nature as a matter of unfettered choice, and of arbitration law's preeminent purpose as interfering with those choices in the least intrusive way possible."[83] The contractual metaphor inadequately shields the effects of our legal

81. *See, e.g.*, Cunningham, *supra* note 47.
82. *See infra* subpart IV.B.
83. Aragaki, *supra* note 23, at 4.

arrangements from normative scrutiny—after all, those legal arrangements are simply respecting what has been a legitimate voluntary choice.

Interestingly, even progressive critics of the Court's arbitration jurisprudence are, at least sometimes, *everyday libertarians*. For instance, Judith Resnik writes:

> The distinctions between the contractual rights created by agreement and public rights mandated by statute, between federal and state courts, and between judges and arbitrators were robust some fifty years after the FAA's enactment. As a consequence, a unanimous Court ruled in *Alexander v. Gardner-Denver Company* in 1974 that a labor-management agreement requiring arbitration of disputes did not preclude individual employees from pursuing statutory civil rights claims in court. A decade later, in 1984, a unanimous Court likewise concluded that because arbitration "could not provide an adequate substitute" for adjudication, an unsuccessful arbitration under a collective bargaining agreement did not prevent an employee from filing a subsequent civil rights case.[84]

Under this traditional view, Resnik explains, "[c]ontract, not coercion, was the centerpiece of arbitration."[85]

But, at least taken literally, this cannot be right. Contract *is* coercion. It gives people powers, but it also imposes duties,[86] which in case of noncompliance can be coercively enforced. Private law always involves the use of state coercion.[87] Arbitration is, like the rest of private law, a matter of coercion. Of course, coercion is in some cases justified. And, rightly, many people think that voluntariness and consent play an important role in such a justification.[88] But justified coercion is still coercion. Moreover, the question about the justification of a certain instance of coercion cannot even be answered—because it will not be asked—if we assume that, given its connection to a voluntary origin, it *must be* justified. The fixation with arbitration's justificatory connection to voluntariness is also bizarre given that coercion can also be justified on the basis of other normative considerations. Because of this, the fact that the Court's arbitration

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84. Resnik, *supra* note 62, at 2837-38.

85. *Id.* at 2855.

86. *See infra* Part V.

87. *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 476 (1923).

88. *See* A. John Simmons, *Justification and Legitimacy*, 109 ETHICS 739, 745, 751 (1999).

jurisprudence no longer rests on a robust notion of consent is not, in and of itself, an argument against such jurisprudential change.

The flipside is also true: that a certain obligation, decision procedure, or venue for enforcement has been voluntarily agreed to, is not by itself a sufficient condition for their legitimacy. The idea that "arbitration is a creature of contract," and its underlying everyday libertarianism, not only hide that involuntary arbitration can be legitimate; they also hide that voluntary arbitration can be illegitimate. Consent, in reality, is neither necessary nor sufficient for justifying arbitration.

This is not a radical view. Our actual practices have in fact set limits to the parties' ability to subject their disputes to arbitration. For instance, under the notion of arbitrability, certain disputes cannot be subject to arbitration, and therefore the agreement to arbitrate them is invalid.[89] Arbitrability suggests that, from the law's perspective, consent is not sufficient. This is a normatively sensible position. There is always an ulterior moral question to be asked about whether the obligations parties have consented to can be legitimately enforced. The question becomes even more relevant when enforcement mechanisms are the subject of voluntary agreement.[90] Everyday libertarians, including progressive ones, lose sight of this fact when they oppose arbitration and contract to (illegitimate) coercion.

B. Mandatory Arbitration in Contracts of Adhesion

The strong contractual view of arbitration has generated multiple problems. For instance, the metaphor has at least contributed to aggravate the problems of mandatory arbitration in contracts of adhesion. It is well known that, in these contracts, arbitration has been used by businesses "to shorten statutes of limitations, restrict discovery, require a claimant to file in a particular and perhaps distant forum, bar consumers or employees from recovering particular forms of relief, and, most prominently, to preclude plaintiffs from joining together in

89. Bernard Hanotiau, *The Law Applicable to Arbitrability*, 26 SING. ACAD. L.J. 874, 874 (2014); *see also* Franco Ferrari & Friedrich Rosenfeld, *Límites a la Autonomía de las Partes en Arbitraje Internacional*, 10 ARBITRAJE: REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES 335, 356-57 (2017) (providing examples of disputes that cannot be subject to arbitration).

90. Making this argument with regards to remedial clauses, see Seana Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 430 (2016).

aggregate litigation through class action waivers."[91] The Court's treatment of arbitration in these settings has been seen as leading to a "*Lochner* lite" jurisprudence that undoes many of the improvements in workers' and consumers' rights during the twentieth century.[92]

In the case of class action waivers, for instance, the Court, basing its decisions on the view of contract as the foundation of arbitration, has held: that arbitrators cannot impose class arbitration in case the parties didn't explicitly agree to it (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*); that the FAA preempts state law regarding class action waivers (*AT&T Mobility L.L.C. v. Concepcion*);[93] and that class action waivers are enforceable under the FAA, regardless of the cost of bringing individual claims (*American Express Co. v. Italian Colors Restaurant*).[94]

The net effect of this arbitration jurisprudence is that parties are frequently subject to arbitration procedures they did not agree to, their defenses are limited or removed, and their access to class actions and judicial review eliminated. This has happened across several markets and types of transactions, including construction contracts, leases, informed consent forms, credit card applications, employment contracts, etc.[95] Thus, there has been a considerable expansion of arbitration clauses in contracts of adhesion—and through those clauses, associated effects on class actions and even the enforceability of statutory rights.[96] This expansion has been premised on "a reductionist vision of arbitration as *any* set of private dispute resolution procedures chosen by the parties, no matter how onerous or inefficient," under which "the FAA required courts to enforce whatever terms the parties chose."[97]

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91. Glover, *supra* note 15, at 3065-66; *see* David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 461 (2016). *See generally* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015) (providing empirical analysis of the realities of consumer and employment arbitration).

92. Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 198 (2015).

93. AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 352 (2011). *But see* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1223 (2013).

94. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 239 (2013). Glover, *supra* note 15, at 3066-67. For analysis focused on employment contracts, see Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015).

95. Stone, *supra* note 45, at 955-56.

96. Glover, *supra* note 15, at 3076-77.

97. *Id.* at 3072.

One of the central strategies used by practicing lawyers against this trend has been based on unconscionability. This approach makes sense. The doctrine seems to provide a direct route to question the enforceability of unfair contractual provisions—and advocates and litigators reasonably tried to use it to attack arbitration agreements. The doctrine, however, has not been successful in practice as a way of dealing with mandatory arbitration. One of the reasons for this is that, under the doctrine of separability, whether a contract is unconscionable is itself a matter to be decided by the arbitrator.[98] Moreover, unconscionability has been an ineffective tool to address the problems generated by class action waivers in contracts of adhesion.[99]

The idea of arbitration as a creature of contract, in this aspect, generates two problems. The first problem is that, if arbitration is a creature of contract, arbitration clauses in contracts of adhesion are not in any way distinct from any other ordinary clause in a contract of adhesion. It is a contractual stipulation, part of the clauses the consumer or the employee or consumer has presumptively agreed to. The issue, however, is that compelling a party to arbitrate is not, as Katherine Stone correctly notes, merely enforcing a contract.[100]

But the problem is not, as Stone argues, that there is in these cases insufficient consent, or that consent is thin or fictitious.[101] This argument, as Erik Encarnacion argues, proves too much: it would question any clause included in a standard form, offered on a take-it-or-leave-it basis.[102] The specific problem here is that arbitration agreements are agreements about enforcement procedures. Which takes me to the second problem—which, in a way, is problematic *as a solution to the first problem.* If the problem in "mandatory arbitration" is that it is adhesive—in the sense of lacking robust consent, as Stone argues—and arbitration is seen as purely derived from the parties will, then the most obvious, and almost exclusive, doctrinal path for controlling arbitration in contracts of adhesion is, like in contracts of adhesion generally, unconscionability.

However, as we have seen, unconscionability has not been the solution, at least in practice. Admittedly, the problem might be solved

98. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70-73 (2010).

99. J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1737 (2006).

100. Stone, *supra* note 45, at 969.

101. *Id.* at 962.

102. Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 896 (2020).

with a more flexible or ambitious approach to unconscionability doctrine, or with some amendments to the doctrine of severability. However, the contractual focus has made us lose sight of the fact that unconscionability need not be the only response to the problems posed by mandatory arbitration, because the problems of mandatory arbitration are not to be found exclusively in a deficit of contractual consent.

In other words, the problem of mandatory arbitration in contracts of adhesion is not purely contractual, but also procedural.[103] Arbitral clauses, unlike most other contractual clauses,[104] concern questions of legal enforcement. They do not just regulate the bilateral relationship of the parties with each other, but also what third party enforcement mechanisms can be brought to bear on that relationship. Because of this, as Aragaki notes, unconscionability is an awkward doctrinal tool for policing arbitration.[105] Thus, we might profit from focusing on the central problem of mandatory arbitration: that it has failed, in practice, to constitute an adequate form of legal enforcement, or vindication, of primary rights. If that is the case, then the problem might not be solved through unconscionability, but rather through standards that ensure that arbitration facilitates the vindication of rights,[106] or through the complete unenforceability of arbitration agreements in contracts of adhesion. Unconscionability only tracks part of the problem of mandatory arbitration—and not the most important one.

For instance, in the sphere of class action waivers, commentators have rightly noticed that unconscionability fails to capture the most relevant problems.[107] Unconscionability doctrine, based as it is on a singular focus on the contractual agreement and its fairness,[108] is unable to capture the fact that the problems of class action waivers are systemic and aggregate rather than individual.[109] The real problem is not whether class action waivers are unconscionable (in the sense of being unfairly one-sided or exploitative), but whether they are compatible with the enforcement of substantive rights.[110]

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103. Aragaki, *supra* note 10, at 1960-62.

104. The exception being clauses regarding liquidated damages and other remedial issues.

105. Aragaki, *supra* note 23, at 16-17.

106. *See* Glover, *supra* note 15, at 1737.

107. *Id.* at 1749.

108. *Id.* at 1757.

109. *Id.* at 1758-59.

110. *Id.* at 1760.

An important point to bear in mind is that arbitration *could be* a perfectly adequate enforcement mechanism for individual rights. But, paraphrasing David Luban's analysis of settlement, this can only be achieved if arbitration is designed with this end in mind—and if the legal system does not allow arbitration when it is inconsistent with such enforcement.[111]

Thus, and against the critics of mandatory arbitration who think that arbitration without robust consent is necessarily problematic,[112] the problems here are not necessarily generated by arbitration *as such.* Instead, the problems are generated by the distortions created by the conception of arbitration as just the upshot of the parties' contractual intention. It is true that the assent underlying contracts of adhesion is not robust. Thus, it is wrong to assume that the parties have deliberately chosen to have their claims decided by an arbitrator who is extent from judicial oversight and is authorized to disregard the otherwise applicable law, in circumstances that could prevent the enforcement of the parties' rights. But this is not the whole story. True, in these transactions, arbitration is an obstacle to the full protection of individual rights and the rule of law,[113] and transforms mandatory rules into default rules.[114] But the reason for this is not a lack of consent. The issue, instead, lies in the fact that arbitration, in these cases, is a deliberately favored forum by the legal system as a matter of public policy, despite the fact that (as it exists today) it lacks the safeguards and institutional mechanisms that could make it an effective tool for legal enforcement.

Arbitration, then, cannot be seen as a merely private issue, as a legitimate venue *if only* it were genuinely consented to. On the contrary, arbitration is always an enforcement mechanism that the state and its law establish, or at least give force to—and for which the state is thus politically responsible.[115] Arbitration could be legally modeled and structured in different ways, ways that might be better or worse. The

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111. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO L.J. 2619, 2620 (1995).

112. *See, e.g.*, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635 (2005).

113. *See generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013) (arguing that there is a tension between the enforcement of contracts of adhesion containing arbitration clauses and the protection of individual rights and the rule of law).

114. Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 710 (1999).

115. *See infra* subpart VI.B.

emphasis on consent obscures this because, in fact, consent is neither necessary nor sufficient to make an enforcement mechanism legitimate. But the contractual view of arbitration and its everyday libertarianism prevent us from seeing this.

V. THE MYTH OF AUTONOMOUS INTERNATIONAL ARBITRATION

You might agree that the idea of arbitration as a creature of contract leads to unacceptable consequences and wrongheaded answers in domestic consumer and employment arbitration. But, you might think, surely international arbitration between sophisticated commercial parties seems different. The thought is that parties are sufficiently equal to be able to devise equilibrated procedures that, while having all the known advantages of arbitration, allow for the vindication of their rights.[116] More importantly, surely in those cases there is a robust consensual basis for arbitral authority, which is independent from any legal system—since, *ab initio*, the arbitral agreement between the parties establishes a transnational system of dispute resolution *beyond the State*.

Part of this view is entirely correct, since it is true that international arbitration "is amongst the areas of law where party autonomy plays the greatest role and where State influence has receded more conspicuously."[117] Because international commercial arbitration typically faces sophisticated parties on relatively equal footing, moreover, it is reasonable to think that states have less reason to regulate or oversee arbitration in these cases. Many international arbitration scholars (and even some courts), however, take this plausible normative assessment further, and see international arbitration as an entirely autonomous system, independent of any national legal order. The view conceptualizes international arbitration as "an autonomous process . . . independent of all national jurisdictions."[118]

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116. "Though not necessarily nonexistent, the concern [about inequality between the parties] is far less important in a commercial context where typically there will not be significant imbalance between the parties." Gilles Cuniberti, *Beyond Contract—The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L.J. 417, 452-53 (2009).

117. Luca Radicati di Brozolo, *The Impact of National Law and Courts on International Commercial Arbitration: Mythology, Physiology, Pathology, Remedies and Trends*, 3 LES CAHIERS DE L'ARBITRAGE/PARIS INT'L ARB. J. 663, 664 (2011).

118. Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 ARB. INT'L 179, 181 (2006); *see also* Julian D.M. Lew, *Does National Court Involvement Undermine the*

Some commentators make a distinction between this conception of arbitration as an autonomous, transnational system, and the purely contractual view.[119] It is hard to see, however, how the view of international arbitration as an autonomous legal system, akin to a contemporary form of *lex mercatoria*, can get off the ground without the assumption that the parties' agreement is the foundation of arbitral authority. In this aspect, Mann, who is one of the classic critics of the paradigm of autonomous international arbitration, seems to get things exactly right when he characterizes the view as one according to which the arbitrator is "not . . . subject to law . . . [and is] free to derive his decision, not from any municipal system of law," but rather from "[t]he autonomy of the parties."[120] The same can be said of classic proponents of the idea of "delocalized" or "autonomous" international arbitration, such as Pierre Lalive, for whom arbitral authority arises out of the parties' consent[121] and has "a private nature."[122]

To see that the view of autonomous or delocalized international arbitration is indissolubly connected to the notion of arbitration as a creature of contract, perhaps it is best to analyze the propositions put forward by the proponents of the view. Julian Lew, for instance, argues in an aptly titled article (*Achieving the Dream: Autonomous Arbitration*) that, particularly under the 1958 New York Convention, arbitral awards are to be recognized in every country, and should be enforceable by the successful party as long as she can show "the existence of an arbitration agreement and the ensuing award," which can only be refused enforcement on limited grounds.[123] When attempting to provide some normative justification for his "dream," Lew argues that national courts should not intercede in arbitration or second-guess the decisions of arbitrators because this would "ignore the intention and expectation of the parties and the autonomy of

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International Arbitration Process?, 24 AM. U. INT'L L. REV. 489, 490-91 (2009) (arguing for the autonomy of international arbitration).

119. *See, e.g.*, EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 13-14 (2010); Lew, *supra* note 118, at 491.

120. F. A. Mann, *The UNCITRAL Model Law*—Lex Facit Arbitrum, 2 ARB. INT'L 241, 242 (1986).

121. Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 INT'L & COMP. L.Q. 358, 362 (1981) (quoting Pierre Lalive, *Les Règles de Conflit de Lois Appliquées au fond du Litige par L'Arbitre International Siégeant en Suisse*, 3 REVUE DE L'ARBITRAGE 155, 157 (1976)).

122. Paulsson, *supra* note 121.

123. Lew, *supra* note 118, at 189.

international arbitration";[124] that "the arbitration agreement is itself a definitive contract . . . the specific purpose of which is to exclude national courts being involved in disputes between the parties;"[125] that international arbitration is an "autonomous dispute resolution process," the principal basis of which is "still today" party autonomy;[126] and that "the users of international arbitration, and the system itself, expect that national courts will not interfere in the arbitration process, will not review the parties' decision to submit their disputes to arbitration, and will not seek to review or know better than the arbitrators in any particular case."[127] For the defenders of autonomous international arbitration, then, the whole idea derives its normative appeal from the notion that parties have deliberately chosen to have their disputes settled in this way, "free from the controls of parochial national laws, and without the interference or review of national courts."[128]

The idea of "autonomous international arbitration" can be taken far enough as to undermine, and even deny, the contractual foundation of arbitral authority. That has been the case in French law, according to some commentators.[129] But, importantly, even in the French experience the whole foundation for the idea of "autonomous international arbitration" is the premise that there has actually been an agreement to arbitrate. As Cuniberti explains in reference to the *Dalico* case,[130] international arbitration agreements are seen as not governed by any legal system, and as valid in principle, only if there is an actual agreement to arbitrate.[131]

Thus, though *Dalico*, perhaps the iconic demonstration of the idea of "autonomous international arbitration," does do without contractual defenses, it still requires "an actual agreement to arbitrate as between the parties."[132] Despite its supposed enshrinement of the autonomy of international arbitration, the decision is consistent with the view of arbitrators' authority flowing from the agreement of the parties.[133] The

124. *Id.* at 179-80.
125. *Id.* at 180-81.
126. *Id.* at 181.
127. *Id.* at 182.
128. *Id.* at 179.
129. Cuniberti, *supra* note 116, at 434.
130. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 20, 1993, Bull. civ. I, No. 1675 (Fr.).
131. Cuniberti, *supra* note 116, at 435.
132. *Id.* at 437.
133. On the traditional view, see *id.* at 422.

view of arbitration as a creature of contract and the view of autonomous international arbitration, in the end, go hand in hand.[134]

Even before *Dalico*, French law connected the notion of delocalized arbitration with the contractual foundation of arbitration. For instance, in the *Menicucci* case of 1975,[135] the Paris Court of Appeal held that the arbitration agreement "is valid independently of a reference to any national law."[136] With the *Meniccuci* case, as Jean-Pierre Ancel argues, French law affirmed that the validity of arbitration clauses flowed exclusively from the will of the parties, without any reference to the law of any state.[137]

However, the idea that international commercial arbitration is autonomous, and that arbitral authority only requires the agreement of the parties, is mistaken. It is true that international commercial arbitration is in important ways detached from national legal systems—that is an important part of its appeal for parties engaged in transnational commerce. But it has never been autonomous, in the sense that it would be entirely independent from, and efficacious without, state law.[138] States are involved throughout the arbitration process[139] by accepting as valid an arbitration agreement that preempts their courts' jurisdiction; by lending support to the orderly development of the arbitral process, if so asked; and by recognizing and enforcing arbitral awards. State courts can be required by the parties to enforce arbitration agreements and arbitral awards,[140] to prevent arbitrations,

134. Making this connection explicitly, see Karton, *supra* note 64, at 235-36.

135. COUR D'APPEL DE PARIS (4E CH.)—13 DECEMBRE 1975, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 507 (1976).

136. JEAN-FRANÇOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 180 (2007).

137. Jean-Pierre Ancel, *L'Actualité de l'Autonomie de la Clause Compromissoire*, 11 DROIT INTERNATIONAL PRIVE: TRAVAUX DU COMITE FRANÇAIS DE DROIT INTERNATIONAL PRIVE 75, 77 (Stephen V. Berti & Annette Pointi trans., 1994).

138. Radicati di Brozolo, *supra* note 117, at 665.

139. Although international arbitration is sometimes described as a challenge to the traditional conception of sovereign states as the only subjects of international law, states continue to be the essential actors. Whatever theory of international arbitration one subscribes to, it is undeniable in our Westphalian system that arbitration agreements and awards are dead letters without the backstop of state enforcement. Karton, *supra* note 64, at 250; *accord* Luca Radicati di Brozolo, *Arbitration and Mandatory Rules*, 23 AM. REV. INT'L ARB. 49, 49 (2012).

140. Indeed, the available empirical evidence suggests that "parties use the courts to assist in collecting international arbitration awards in a sizable number of cases." Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 PENN ST. L. REV. 1031, 1041 (2009).

and to annul arbitral awards.[141] The only peculiarity is that, as Paulsson notes, "a plurality of legal orders may serve as foundations of the same arbitral process."[142] In the end, the permanent insistence on autonomous international arbitration is, as Michaels puts, it, "at the same time, the plea to state courts to support arbitration and enforce its results."[143] Even substantively, as it is well known, international arbitration depends crucially on domestic laws. Parties and tribunals frequently look to national law to determine the parties' rights and obligations,[144] and parties' autonomy can be significantly limited by national laws.[145]

The impact of national laws is evident, for instance, from the perspective of arbitrators' duty to render an enforceable award. The rendering of an enforceable award is, as commentators have noted, the "ultimate goal" of the arbitral process.[146] An unenforceable award is worthless for the parties, and therefore arbitrators must take into consideration the substance of national laws that might have a bearing on the enforceability of the award.[147] This is clearly reflected in the rules of arbitral institutions such as the International Chamber of Commerce. Arbitration's efficacy requires state enforcement.

This has been labeled as a "great paradox."[148] Arbitration requires the support of the very same public authorities that it wants to be independent from,[149] as even the proponents of autonomous international arbitration acknowledge.[150] The idea of a completely denationalized, autonomous international arbitration is, in the end, an

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141. Ralf Michaels, *Dreaming Law Without a State: Scholarship on Autonomous International Arbitration as Utopian Literature*, 1 LONDON REV. INT'L L. 35, 41 (2013); *see also* Karton, *supra* note 64, at 236 (discussing state involvement in arbitration).

142. PAULSSON, *supra* note 58, at 29.

143. Michaels, *supra* note 141. *See* Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L.J. 400, 403 (2002).

144. Karton, *supra* note 64, at 249.

145. For relevant overviews of limits to party autonomy in international arbitration, see LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION (Franco Ferrari ed., 2016); Ferrari & Rosenfeld, *supra* note 89, at 357-59.

146. W. Laurence Craig, *International Ambition and National Restraints in ICC Arbitration*, 1 ARB. INT'L 49, 69 (1985).

147. Gunther J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18 J. INT'L ARB. 135, 148 (2001); *see also* Martin Platte, *An Arbitrator's Duty to Render Enforceable Awards*, 20 J. INT'L ARB. 307, 311-12 (2003) (discussing national law's impact on arbitrators' duties to render enforceable arbitral awards).

148. PAULSSON, *supra* note 58, at 30.

149. *Id.*

150. Lew, *supra* note 118, at 492.

ideology.[151] International arbitration requires state involvement,[152] and is not a separate or autonomous, fully private, legal system.[153] International arbitration is not, at the most fundamental level, a creature of contract. It is, like domestic arbitration, a creature of law.

VI. POWERS, DUTIES, AND LEGAL ENFORCEMENT

A. The Structure of Arbitration

Some people think that none of this matters too much, that the theory of arbitration is—in the end—a matter of taste. Emmanuel Gaillard, for instance, argues:

> There is no such thing as a right or wrong philosophy of arbitration. As for every other philosophy, one may share it or not. It may be overt or implicit. It may be efficient or inefficient, internally consistent or inconsistent. But it is never right or wrong.[154]

This cannot be, well, right. Surely our understanding and evaluation of important legal and social institutions ought to turn on more than mere matters of taste and personal inclination. We should try to get things right, and to have a clear understanding of the legal institutions under which we live and their implications. The cost of a mistaken view (or, at least, a half-truth), as I have argued, is not just conceptual. Wrongheaded views can have real impacts on our legal and social practices. Therefore, we should improve our understanding of arbitration's underpinnings. This Part of this Article tries to contribute to this task by moving from criticism of the contractual approach to a more accurate account of the grounds of arbitration.

Joshua Karton has argued that the structure of arbitration law is "essentially contractarian," in the sense that it "is structurally similar to the contract law found in any national jurisdiction."[155] I think this is the beginning of a satisfying answer about arbitration in general. It is, in fact, the half-truth that the contractual approach contains.

However, this immediately invites the question of what the structure of "contract law . . . in any national jurisdiction" is. For these purposes, I will use Gregory Klass's account of contract law as a

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151. Michaels, *supra* note 141, at 37.

152. Drahozal, *supra* note 140, at 1032.

153. *Id.* at 1037.

154. Emmanuel Gaillard, *Three Philosophies Of International Arbitration*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (2009) 305, 306 (Arthur Rovine ed., 2010).

155. Karton, *supra* note 64, at 235.

"compound rule."[156] Klass's account does not offer a general theory of contract law, but instead highlights the deep structure of contract law—precisely what the metaphor of arbitration as a creature of contract obscures.

The view of contract law as a compound rule starts from the Hartian distinction between duty-imposing and power-conferring rules.[157] Duty-imposing rules, according to Hart, establish general duties to perform or avoid a certain action.[158] The primary prohibitions of the criminal law are a clear example. Power-conferring rules, on the other hand, provide powers to certain individuals to create or modify duty-imposing rules.[159] According to Hart, wills (in private law) and rules establishing and organizing legislative or judicial authority (in public law) are examples of power-conferring rules.

From the perspective of this distinction, as Klass convincingly argues, contract law is a third type of rule, a compound rule: it is both duty-imposing and power-conferring.[160] Contract law imposes duties to promisees, but also provides individuals with facilities to generate new voluntary obligations.[161]

There is a lot in Klass's subtle analysis that I simply ignore here. But what I want to capture by using Klass's notion of contract law as a *compound rule* is that contract law is both an institution that allows people to generate voluntary legal obligations and an institution that imposes duties—most of the times as a consequence of people's intention to assume legal obligations, but sometimes despite its absence.

If, following Karton, arbitration has a similar structure to domestic contract law, then there is good reason to think that what I just mentioned about contract law is also true about arbitration. Arbitration as a legal institution imposes duties on parties to subject their disputes to arbitration. It also provides parties with legal powers to agree to arbitrate their disputes, subjecting them to these adjudicative

156. Klass, *supra* note 9.
157. H.L.A. HART, THE CONCEPT OF LAW 81 (Paul Craig ed.) (1994).
158. *Id.*
159. *Id.*
160. Klass, *supra* note 9, at 1730.
161. *Id.* at 1783.

mechanisms which diverge from the ordinary system of domestic courts.[162]

Because of this, it is true, as the contractual metaphor suggests, that arbitration is power-conferring and, as such, enhances personal autonomy and provides important means for individuals and firms to tailor and choose the procedural means for the vindication of their rights. Absent strong reasons of public interest or externalities, it is plausible to think that the state is doing something morally permissible when it lends its coercive machinery to enforce arbitral agreements and awards (whether this is ultimately right need not concern us here). However, arbitration also acts towards the parties[163] like a duty-imposing rule. It imposes on them the obligation to subject their disputes to arbitral authority and to follow arbitral decisions. In fact, the duties are sometimes imposed on parties *despite the fact that they did not actually consent to them.* This is evident in the cases of mandatory arbitration in contracts of adhesion, in which, unless we redescribed voluntariness in ways that would deprive it of any moral force, there has been no meaningful voluntary choice by at least one of the parties, and, sometimes, both of them, to subject the dispute to arbitration.

Imposing duties, however, is one of the things law does in general—and it is one of the things it does in particular through legal rules governing jurisdiction and determining the procedures private parties ought to follow to resolve their disputes. The fact that there has been no voluntary intervention from the obligated party in the generation of these duties does not necessarily shock us. It is only the grip of the contractual metaphor that explains the shock when we face this reality in arbitration. Arbitration is about empowering parties to agree to subject their disputes to arbitration. But it is also about imposing on parties the obligation to subject their dispute to arbitration.

In the case of international arbitration, this reinforces Mann's classic argument that arbitration always "requires a firm legal basis."[164] Importantly, Mann sometimes equivocated between two claims: that arbitration is a creature of law, *lex facit arbitrum*, and that arbitration

162. Given the existence of the New York Convention, arbitration also imposes duties on most states in terms of recognizing and enforcing arbitration agreements and arbitral awards.

163. I leave aside, for now, the powers and duties that arbitration law generates regarding arbitrators.

164. Mann, *supra* note 120, at 244.

can only be subject to *one* system of law (in his view, the law of the seat of the arbitration).[165] The latter claim is obviously wrong, since several different legal systems might be relevant beyond the law of the seat of the arbitration.[166] But this does nothing to deny that, when push comes to shove, there will always be *at least one* legal system that will be required to govern the arbitration, and which will ground arbitral authority by establishing the duty to submit the dispute to arbitration. Since many countries have rightly noticed that it is in their interest to provide enforcement for arbitral awards, and therefore that they should commit their courts to support the arbitral process,[167] they have joined the New York Convention. Therefore, many systems will potentially ground arbitral authority.[168] But, if the arbitral award is going to have any teeth, it cannot be the case that none of them will.

In the case of domestic arbitration, arbitration's structure as a compound rule shows that the legal system's enforcement and recognition of arbitral authority reflects a choice to *impose* arbitration. If that is the case, the legal system also ought to establish the necessary safeguards to secure the enforcement of individual rights through arbitration—as it should in adjudication generally.[169] It also shows that, in all arbitration agreements in which consent is robust and significant, the state has empowered the parties to generate new powers and obligations[170]—in such cases, the law *confers* a power.

Because of this, while Karton is correct when he claims that international commercial arbitration law is mostly power-conferring,[171]

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165. *Id.* at 245.

166. *See* Karton, *supra* note 64, at 238; PAULSSON, *supra* note 58, at 33-35.

167. George A. Bermann, *The Gateway Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 2 (2012).

168. In international arbitration, "multiple national and international legal orders collaborate to validate the parties' agreement and enforce the obligations that flow from it." Karton, *supra* note 64, at 255. This, however, is not a peculiarity, strictly speaking, of international arbitration, but an instance of a more general phenomenon of "legal pluralism," under which "two or more legal systems coexist in the same social field." Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988). *See generally* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012) (offering an account of legal pluralism as a phenomenon); Margaret Davies, *Legal Pluralism*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Peter Cane & Herbert M. Kritzer eds., 2010) (presenting a summary presentation of legal pluralism).

169. Thus, if anything, arbitration as the *forum* for dealing with disputes arising from labor or consumer contracts generates a greater pressure for the "judicialization" of arbitration. *See* David S. Schwartz, *If You Love Arbitration, Set It Free: How "Mandatory" Undermines "Arbitration,"* 8 NEV. L.J. 400, 401 (2007).

170. Karton, *supra* note 64, at 240.

171. *Id.* at 245.

this is not entirely correct when it comes to domestic arbitration—or to international arbitration, if it were to take a similar turn to the one that domestic arbitration has taken under the Supreme Court's jurisprudence. In such cases, arbitration law is quite evidently duty-imposing. Note, however, that even in the case of (current) international commercial arbitration there will be duty-imposing aspects, since public intervention might be necessary to impose the duty to comply with the arbitral decision and to submit the dispute to arbitration.[172] Arbitration law, whether domestic or international, is a compound rule. It empowers and coerces.

B. Evaluating Legal Enforcement

If what I have argued is correct, the implication is that the state and its law (as well as those in charge of establishing it) are politically responsible for the scope and effects of arbitration. Indeed, if arbitration is not simply a matter of individual choice, and arbitral authority is always grounded in compound legal rules that empower parties to arbitrate their disputes and impose the duty to submit their claims to arbitration, then there is always a normative question to ask about whether arbitration is working as it should, whether it is an adequate procedure or not for legal enforcement[173]—as well as questions about accountability and responsibility for these situations.

From this perspective, the legal system's rules concerning arbitration, just like the rest of the legal system's rules about legal enforcement, should be subject to normative evaluation.[174] They are not exempt from such evaluation because of a supposedly free choice that the state must respect.[175] More importantly, if those rules lead to normatively undesirable consequences, we should place the blame where it actually belongs. In other words, we should not blame arbitration as such, or the lack of consent in certain contexts, but rather the fact that arbitration is structured and enforced in a way that is morally problematic—a claim that would be true even if there were

172. *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 237 (1979).

173. Aragaki, *supra* note 10, at 1959.

174. From the perspective of democratic values, see Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROB. 279, 280 (2004).

175. "Arbitration, like all other forms of ADR, operates outside the civil justice system but not outside the law. Law polices the boundaries between arbitration and the legal system, defining the shape and role of arbitration in our legal order." Stone, *supra* note 45, at 935.

robust consent to arbitration. In the United States, perhaps this might entail criticizing legislative inaction at the federal level,[176] and the Supreme Court's expansive reading of the FAA, which has failed to consider the nuances about the relevant differences between the multifarious situations in which its expansive reading might have effects.[177]

This latter point is central. In some areas, deference to party choice and arbitral authority might make sense. In other areas, arbitral authority might need to be regulated and subject to more extensive oversight,[178] whether by courts or administrative agencies.[179] In the first types of areas—think, for instance, about international arbitration of disputes that do not immediately raise public interest concerns, between sophisticated firms—it might make sense to treat arbitration as a contractual device between the parties. In the second type (think about arbitration clauses in contracts of adhesion, for instance) it makes more sense to treat arbitration as a form of third-party legal enforcement—with all the procedural safeguards and substantive scrutiny that this entails.[180]

Now there are of course several normative criteria under which one could evaluate legal rules concerning arbitration—just like in the case of rules governing legal enforcement generally. One could ask, in fact, quite ambitious moral questions about whether and how those rules form a coherent and attractive normative conception that justifies state coercion;[181] as well as empirically demanding questions about how those rules fare in terms of maximizing social welfare.[182] One

176. Or, at least the failure to transform legislative action into law, as in the case of the Arbitration Fairness Act.

177. *See* Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111-48 (2015).

178. *See generally* Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309 (2011) (proposing more extensive legal oversight of arbitration).

179. *See* Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 1007 (2017); David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 683 (2018).

180. In the contrast between these two ways of understanding arbitration, though not in the implications he draws from it, I follow Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 432 (2010).

181. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (characterizing legal theory as requiring the development of interpretive views that fit and justify existing legal practice).

182. *See generally* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2006) (arguing for welfare as the basis for legal and policy analysis); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (2011) (applying a welfarist perspective towards the analysis of multiple areas of law).

could also ask more specific questions about, for instance, the impact of arbitration on different parties' ability to win—particularly when they become, as the literature on American arbitration regimes suggests, "repeat players."[183] Here, however, I suggest how the idea of arbitration law as compound rule leads to some more specific questions about the normative value of the legal system's rules concerning arbitration. Particularly, I will suggest two normative criteria that, among other plausible standards, might contribute to evaluate the legal rules that empower parties to arbitrate their disputes and impose duties on them: whether they contribute to the production of law, and whether they allow for the vindication of individual rights. As it is obvious, both of these sets of concerns are particularly relevant when assessing institutions of legal enforcement.

1. Law as a Public Good

As the idea of compound rules suggests, the legal rules concerned with arbitration grant powers to parties and arbitrators. When such powers are granted in relatively limited contexts and at the margin of the legal system, it is plausible to think that those powers serve mainly, if not exclusively, as an instrument for resolving disputes.

What, however, if arbitral powers are granted across the board, for large swaths of contractual relationships? As commentators have noted, this is precisely what has happened in the last decades in the United States in many areas of law, as a consequence of, among other reasons, the Supreme Court's view of the FAA as establishing a liberal policy favoring arbitration.[184] Thus, while arbitration still serves as a dispute resolution mechanism, it is also in the business of interpreting and developing the law regulating several types of relationships—and thus seems to involve the privatization of a typically public function.[185]

Public systems of adjudication serve private and public functions.[186] Both the private and public functions of adjudication are of course of public interest. However, the distinction between private

183. *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 190 (1997).

184. *See* Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law* 21 (NYU Law & Economics Working Paper, Paper No. 18-33, 2018), https://papers.ssrn.com/abstract=3261372 [https://perma.cc/6MXV-NZWK].

185. On the privatization and *contractualization* of aspects of civil procedure, see Kevin Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 512 (2011).

186. Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 206 (2006).

and public functions of adjudication attempts to reflect the fact that we have a public interest in both securing a mechanism for the vindication of private rights and interests, *and* in the development, maintenance, and determination of an open public framework within which those private rights and interests are defined, articulated, and enforced. The first, private function is, in brief, that of resolving the dispute.[187] The public function is that of interpreting and developing the law.[188] When arbitration is *only* a mechanism for dispute resolution—when it works marginally, "in the shadow of the law"[189]—it is playing a fundamentally private role.[190] But when arbitration is massively employed and determines the practical impact of vast areas of legislation, then it is closer to playing the public function of developing the law. In this latter case, arbitration is adjudication in both its private and public functions: it is an important source of information for people beyond the parties to the dispute,[191] determines the practical application of general rules,[192] and helps ensure that whatever collective goals and policies are pursued through those rules are actually achieved.[193] It is, like law generally, a public good.[194]

Obviously, arbitration has important private benefits as a mechanism of private dispute resolution.[195] Nevertheless, adjudication is not just about private dispute resolution—and when arbitration is in the business of generally enforcing and applying vast swaths of legislation, it is also performing a public function.

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187. Though, of course, even at this level there is a public interest in having adequate means for resolving private disputes.

188. *See* Landes & Posner, *supra* note 172, at 242; *see also* Joshua Paine, *International Adjudication as a Global Public Good?*, 29 EUR. J. INT'L L. 1223, 1235-40 (2018) (describing legal adjudication as an international public good); Alec Stone Sweet & Florian Grisel, *The Evolution of International Arbitration: Delegation, Judicialization, Governance*, *in* INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE 25 (Walter Mattli & Thomas Dietz eds., 2014) (discussing same).

189. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

190. Although it is a private role in which we have a public interest.

191. "Precedent is important to us all not only because of the solution it provides to a particular dispute but also because of the ways in which it facilitates bargaining in the shadow of the law by future unknown disputants." Linda Mulcahy, *The Collective Interest in Private Dispute Resolution*, 33 OXFORD J. LEGAL STUD. 59, 60 (2013).

192. Davis and Hershkoff, *supra* note 185, at 541.

193. *See* David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 990 (2017).

194. *See* Bryan Caplan & Edward P. Stringham, *Privatizing the Adjudication of Disputes*, 9 THEORETICAL INQUIRIES L. 503, 504 (2008); John Gardner, *The Twilight of Legality*, 43 J. LEGAL PHIL. 1, 16-17 (2018).

195. Caplan & Stringham, *supra* note 194, at 518-20.

The problem is that arbitration does not necessarily possess the same traits that make adjudication a good producer of public goods, such as publicly accessible legal opinions and binding precedents.[196] Arbitration does not require the existence of written opinions;[197] if written, the judgments are not necessarily made publicly available; and if publicly available, the judgments are not subject to significant substantive control.[198] Arbitration does not seem to fare particularly well as a mechanism for the production of law.

Admittedly, we might not know what the optimal level of production of a specific public good is.[199] There can be oversupply of public goods in certain instances,[200] and in certain sectors with extensive administrative or public enforcement action the lack of private enforcement might not be a problem in this regard. It is thus an open question, subject to empirical analysis, whether American law is currently facing a suboptimal provision of precedents and legal rules, and in which specific sectors. Be that as it may, subjecting large segments of legal disputes to arbitration in their entirety clearly leads in one direction: less of these public goods. Whatever the optimal amount of public goods is, a persistent trajectory towards their decrease will at some point become a problem of undersupply. This is particularly true of public goods, like legal precedents and legal interpretations, which need to be constantly adjusted to changing factual circumstances.

This leaves us with two possibilities: either reduce the scope of disputes that arbitration decides or make it more like adjudication, if it

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196. Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 115 (1986) (drawing a contrast between adjudication and settlement in this regard).

197. [C]ourts have ruled that arbitrators have no obligation to write opinions to accompany their awards. Without an opinion, it is almost impossible for courts to know whether the arbitrator manifestly disregarded the law or not. The manifest disregard standard and the lack of an obligation for arbitrators to write opinions have made arbitral awards virtually bulletproof.

Stone, *supra* note 45, at 955.

198. *See* Gilles, *supra* note 43, at 410-11.

199. I thank Kevin Davis for pressing me on this point.

200. On these issues about public goods, see William C. Brainard & F. Trenery Dolbear, *The Possibility of Oversupply of Local "Public" Goods: A Critical Note*, 75 J. POL. ECON. 86, 86 (1967); Geoffrey Brennan, *The Optimal Provision of Public Goods: A Comment*, 77 J. POL. ECON. 237, 238 (1969); William H. Oakland, *Theory of Public Goods*, *in* HANDBOOK OF PUBLIC ECONOMICS 485 (1987); Mark V. Pauly, *Optimality, "Public" Goods, and Local Governments: A General Theoretical Analysis*, 78 J. POL. ECON. 572, 574 (1970); Alan Williams, *The Optimal Provision of Public Goods in a System of Local Government*, 74 J. POL. ECON. 18, 19 (1966).

is to have that large scope. If we choose the latter path, we might have good reasons not to make arbitration *too much* like adjudication, in order to preserve the classic virtues of procedural efficiency and privacy that arbitration can, at least in theory, provide.[201] But some adjustments will need to be made. First, it might be necessary to introduce a requirement of written opinions; the opinions might need to be made public (with the necessary accommodations to protect confidentiality, when necessary); and the standards of judicial review of arbitral awards might need to be made stricter. From this perspective, particularly the ground of manifest disregard for the law should be reinforced and used more commonly than it is now.[202]

All these changes require legal modification in the context of statutory rights subject to "mandatory arbitration." Some of them, however, might be spontaneously achieved in the context of commercial arbitration between sophisticated parties, in which the very private interests of the parties involved can lead to them, and the parties have the means and the power to transform those interests into practical realities. In international commercial arbitration, for instance, the very needs of the international commercial community, the reputational costs of arbitrators if they do not adjust to such needs, and the economic interest of arbitral institutions to satisfy their customers, can generate a pressure towards reasoned elaboration, publicity, and precedential effect.[203] In these cases, legal reform might not be required. Conversely, in the situations where parties do not have a similar interest, or, if they do, when they lack the means and power to bring the changes about, legal reform will be required if we want to keep the production of law as a public good at adequate levels.

In both cases, I should note, we might end up with arbitration that produces law as a public good: what Knapp calls "the kind of findable, studiable, arguable, appealable, *Restate*able kind of *law* that has characterized the Contract area for over a century."[204] But American arbitration law is far from that, and is closer to produce, in vast areas of

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201. *See* Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line between Private and Public Adjudication*, 18 NEV. L.J. 381, 389 (2018); Teresa J. Verges, *Evolution of the Arbitration Forum as a Response to Mandatory Arbitration*, 18 NEV. L.J. 437, 439 (2018).

202. *See* Reuben, *supra* note 6, at 1111.

203. Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627, 642-43 (2006).

204. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 766 (2002) (emphasis original).

contractual regulation, what commentators have called "the end of law."[205]

2. Vindicating Rights

As I said above, arbitration preeminently serves a private function: it resolves disputes. There are different ways to resolve disputes: tossing a coin or assuming the plaintiff is always right would do the trick. But presumably we want private dispute resolution to track people's legal rights and to actually enforce them. We want dispute resolution not just to resolve disputes, but to do so in ways which are morally acceptable and that individuals will perceive as legitimate.

From this perspective, the problem with mandatory arbitration becomes evident. The problem, again, is not that mandatory arbitration is insufficiently voluntary—that arbitration law imposes a duty that was not voluntarily generated. The problem is that the duty to submit one's claim to arbitration is not joined by an effort to ensure that arbitration works as a morally acceptable way to resolve that claim.

As Shiffrin notes, critics of the Supreme Court's embrace of mandatory arbitration claim that it deprives victims access to justice, and that it can be, and has been, used to preclude class-wide adjudication, which might "render a variety of legal wrongs beyond redress."[206] In the case of employment arbitration, for instance, commentators have argued that employees faced with it are prevented from enforcing their legal rights.[207] This is entirely correct and demands reducing the scope of arbitration or making arbitration a suitable venue for rights enforcement.

Of course, there are better and worse ways of ensuring that arbitration fulfils its role as a mechanism for the vindication of rights. One particularly bad way would be to force arbitral institutions and arbitrators to engage in arbitration for free, or to consider any claim presented before them even by parties who breach their payment obligations towards said institutions and arbitrations—as has arguably happened in the case of "impecunious parties" in recent French arbitration jurisprudence.[208] But this just reinforces the conclusion that

205. Gilles, *supra* note 43.

206. Shiffrin, *supra* note 90, at 440-41; *see also* Resnik, *supra* note 61, at 2810 (discussing the preclusive effect mandatory arbitration has on class-wide adjudication).

207. Sternlight, *supra* note 94, at 1353.

208. *See* Xavier Nyssen & Phillip Dunham, *France*, *in* THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW 70, 70-72 (2015).

it is the state and its national law that should bear the responsibility for the vindication of citizens' rights.

This, in my view, is another important upshot of the view of arbitration as compound rule: the legal system cannot impose duties to submit to arbitration by resorting to the distorted view of arbitration as a creature of contract—by claiming, that is, that it is simply enforcing a voluntary choice. That is not in fact what the legal system is doing when it imposes duties to submit to arbitration. More importantly, even if it were, there is always an ulterior enforcement question about whether arbitration (even if agreed to) provides an adequate mechanism for vindicating citizens' legal rights—as well as a question about how the cost of such vindication should be allocated. All of these questions get lost if we uncritically assume the strong conception of arbitration as a creature of contract.

All of this suggests that the vindication of rights doctrine—which permitted mandatory arbitration as long as it allows for the effective vindication of statutory rights[209]—tracked something important. It also suggests that *American Express Co. v. Italian Colors Restaurant*[210] problematically restricted the scope of this constraint.[211]

VII. CONCLUSION

Arbitration is not *just* a creature of contract. It is a creature of law. It is also a form of dispute resolution, and, at least sometimes, a form of adjudication involved in the production of law.[212] This means that, whenever we face arbitration, there is a normative question to ask about the law that gives it effect—the compound rule that confers powers but also imposes duties to parties and arbitrators. There is also a question to ask about how arbitration fares as a mechanism of private dispute resolution (i.e., how well it enforces private legal rights), and, at least when it is widespread in certain areas of legal regulation, as a mechanism for the production of law.

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209. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985); *see also* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 494 (2011) (criticizing the judicial approach).

210. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013).

211. *See* Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 267-68 (2015); *see also* Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 377-78 (2014) (discussing the trend of decline of the vindication of rights doctrine in American legal practice).

212. Ware, *supra* note 114, at 707-08.

Since arbitration requires the law's assistance, the law has the authority and the responsibility to ensure that arbitration works adequately. As John Gardner puts it, arbitration should get the law's support "mainly on the law's terms—subject to the law's take-it-or-leave-it boilerplate."[213] Gardner thinks this necessarily implies that ordinary courts should retain final jurisdiction over questions of law.[214] I am not sure, and I think we might profit from a more nuanced view, just as we do in contract law generally: in some cases, it might be best to give the parties and their arbitrators considerable leeway;[215] in other cases, it might be best to regulate the processes in order to ensure procedural equality;[216] in some, finally, courts might retain full authority for review. But in any case, the point stands: those who exercise arbitral authority exercise legal authority,[217] because the ultimate grounds of arbitral authority are legal in nature. As every exercise of legal authority, arbitration stands in need of justification; and should be subject to normative evaluation. This is something that the Supreme Court's contractual approach obscures. We should do without that view and replace it with a better understanding of the foundations of arbitration.

213. Gardner, *supra* note 194, at 9.

214. *Id.* at 9-10.

215. This might seem to be the case in international arbitration. For doubts even in this realm, however, see Horatia Muir Watt, *"Party Autonomy" in International Contracts: from the Makings of a Myth to the Requirements of Global Governance*, 6 EUR. REV. CONT. L. 250, 271 (2010).

216. *See* Resnik, *supra* note 62, at 2811.

217. Gardner, *supra* note 194, at 12.

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