

ARTICLE

CONTRACTING OUT OF PUBLIC LAW

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In contract law, standard interpretive doctrine instructs courts to give effect to the intentions of the parties. Efficiency is promoted, we are told, by reducing state intervention into autonomous private decision-making, particularly when contracting parties are sophisticated corporate entities that can presumably bargain for their interests. Enabled by rules adopted over the past several decades expanding the freedom to contract, private entities increasingly control every aspect of their engagement, including the substantive and procedural law governing disputes that arise between contracting parties.

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Alarming, the growing number of commercial agreements that stipulate the application of law with little or no connection to the contracting parties systematically precludes private litigants from activating otherwise mandatory domestic regulatory statutes, including laws designed to deter securities fraud, commercial racketeering, and anti-competitive behavior. This trend is particularly problematic because both Congress and state legislatures frequently devise statutes that rely on private litigants to effectuate regulation aimed at protecting the workings of the market. Challenging the predominant scholarly account that has largely celebrated the enforcement of choice-of-law provisions from an efficiency standpoint, I argue that courts should police commercial agreements that seek an end-run around domestic regulatory law.

I. INTRODUCTION

In private law offices across the United States and abroad, a significant number of contracts worthy of the transactional lawyer's billable rate include a "choice of law" clause.¹ These provisions specify in advance the law to be applied to disputes arising out of or relating to the contract, even when the law has little or no connection to the contracting parties.² Enabled by rules adopted over the past several decades enhancing the ability of contracting parties to select the law governing their relationships, private commercial entities today bargain for the legal regime governing a wide range of issues, including torts, copyright, antitrust, commercial racketeering, and securities fraud.³

This Article uncovers the subtle but significant ways that private entities accrete influence over domestic regulatory law through vast networks of private commercial agreements. Consider commercial transactions that are factually connected to the United States but contractually specify the application of foreign law. Litigators specializing in cross-border disputes in the United States are all too familiar with the implications of choice-of-law provisions. As a result of a contract requiring parties to resolve disputes arising or related to the agreement under English law, for instance, parties are routinely precluded from bringing an otherwise viable claim under the Racketeer Influenced and Corrupt Organizations (RICO) Act or the Securities Act of 1933.⁴ Private litigants are out of luck because English law would not

¹ See, e.g., Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894, 903 (2014) (identifying choice-of-law clauses in seventy percent of contracts on file with the Securities and Exchange Commission).

² See, e.g., *Suzlon Infrastructure, Ltd. v. Pulk*, No. 09-CIV-2206, 2010 WL 3540951 (S.D. Tex. Sept. 10, 2010) (enforcing a contract between a Texas-based logistics company and an Indian corporation concerning the shipment of machinery into the United States with a contractual provision mandating the application of English law); see also GEORGE A. BERMANN, *TRANSNATIONAL LITIGATION IN A NUTSHELL* 15 (2003) ("A typical clause purports to cover all disputes 'arising out of' and/or 'related to' the contract in which it is found.").

³ See *infra* Section II.A.

⁴ See *infra* Section II.A.

recognize a private claim for commercial racketeering or failure to register securities—thereby abrogating federal statutory claims.⁵

This increasingly common phenomenon of legal regime shopping is problematic because both Congress and state legislatures rely heavily on private litigants to effectuate statutory goals.⁶ By contracting out of a legal regime, private commercial entities can undermine the enforcement of public regulatory statutes designed to safeguard a particular vision of the market.⁷ As I show below, this process is further exacerbated by the standing doctrine, which restricts plaintiffs from seeking remedies in courts when their injury is too remote from statutory violations.

To date, the contractual freedom to stipulate the law governing private transactions has been widely celebrated,⁸ especially among scholars who tend to view the law as a “product” supplied by states.⁹ As in any market in which buyers are exposed to a larger number of sellers, eliminating restrictions on private bargaining over applicable law promises to promote efficiency and incentivizes states to produce better laws.¹⁰ Largely owing to the predominance of this view in the literature,¹¹ the dramatic expansion of the types of rules subject to private bargaining has largely escaped scholarly scrutiny from a broader regulatory structure or a legitimacy standpoint.¹²

To be sure, a growing body of academic literature is exposing the erosion of substantive rights that can be expected when contracting parties have unequal bargaining power. Standard form consumer and employment contracts are paradigmatic examples that have received sustained scholarly attention in recent years.¹³ For instance, subscription agreements offered by

⁵ See, e.g., *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1293–97 (9th Cir. 1998) (en banc) (enforcing a contract specifying the application of English law, notwithstanding the acknowledgment that English law would preclude the plaintiffs from seeking otherwise viable remedies available under the Racketeer Influenced and Corrupt Organizations Act and the Securities Act of 1933).

⁶ See John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986) (“Probably to a unique degree, American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.”).

⁷ See *infra* Part III.

⁸ See *infra* Section II.B.

⁹ See, e.g., ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 129 (2009) [hereinafter O’HARA & RIBSTEIN, *LAW MARKET*]. For a seminal account of this view in the corporate law context, see Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985). For brevity, this Article will use the term “state” to refer to both the constituent states of the United States and nation-states.

¹⁰ See Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1152–57 (2000) [hereinafter O’Hara & Ribstein, *Efficiency*].

¹¹ See *infra* Section II.B. (synthesizing modern scholarly accounts focused on efficiency).

¹² Cf. Sanga, *supra* note 1, at 895 (“The literature on choice of corporate law is extensive and dwarfs the literature on choice of transactional law in general. This is somewhat puzzling.”).

¹³ See, e.g., J. Maria Glover, *Arbitration, Transparency, and Privatization: Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) [hereinafter Glover, *Disappearing*]; David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985 (2017) [here-

wireless carriers that require subscribers to resolve disputes individually through arbitration may effectively eviscerate the ability of subscribers to bring class action antitrust lawsuits against providers.¹⁴ The perils of mass arbitration now regularly headline popular media outlets as well.¹⁵

Despite the burgeoning critique of non-negotiable contracts that exploit weaker parties, contemporary legal thinkers largely embrace the model of private contracting between sophisticated parties.¹⁶ Increasingly, this contractual autonomy is extending to parties choosing a source of governing law that bears no other relationship with the contracting parties. In their effort to give effect to the parties' intentions, courts almost mechanically enforce these choice-of-law provisions.¹⁷ "Unconnected choice of law" is the term I offer to describe the network of contractual relationships governed by law with little or no connection to the contracting parties, principally (but not exclusively) through the inclusion of choice-of-law clauses in commercial contracts.¹⁸

While attempts by private parties to control the law governing their relations is nothing new,¹⁹ the scope and prevalence of choice-of-law provi-

inafter Noll, *Regulating Arbitration*]; 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 (2015) [hereinafter Resnik, *Diffusing Disputes*].

¹⁴ See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 3–7* (2014); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 79, 95–104 (2011).

¹⁵ See, e.g., Richard Cordray, Opinion, *Let Consumers Sue Companies*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/let-consumers-sue-companies.html> [<https://perma.cc/BE5Z-R9RJ>]; Michael Corkery & Stacy Cowley, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html> [<https://perma.cc/SHN3-L6B6>]; Michael Corkery & Stacy Cowley, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html> [<https://perma.cc/Z3RB-25KU>]; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/NSK6-DBB3>]; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/V5Q5-Z3F9>].

¹⁶ See, e.g., O'Hara & Ribstein, *Efficiency*, *supra* note 10, at 1197–98 (advocating for the enforcement of "contractual choice-of-law and choice-of-forum clauses irrespective of whether the parties have any contact with the chosen jurisdiction"); see also *infra* Section II.B (synthesizing modern scholarly account).

¹⁷ Erin O'Hara O'Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 692 (2013) [hereinafter O'Hara O'Connor & Ribstein, *Preemption*] ("For many types of contracts today, courts routinely and nearly uniformly enforce choice-of-law clauses.").

¹⁸ I say "not exclusively" because as I show below, ex ante contractual stipulations to litigate in a particular court or arbitration forum (commonly referred to as "forum selection clauses") often play a significant role in the contracting parties' ability to enforce their chosen law. See *infra* Section II.A.

¹⁹ Historically, statutory rules sanctioning party stipulation over applicable law dates back at least to Hellenistic Egypt, where a decree provided that "contracts written in the Egyptian language were subject to the jurisdiction of the Egyptian courts, which applied Egyptian law,

sions in commercial agreements are unprecedented,²⁰ and laden with significant practical and theoretical implications. Practically, the scope and enforceability of choice-of-law provisions often arise in litigation with high financial stakes. After all, a claim involving the same alleged facts could be worth billions of dollars in damages, as opposed to a few million dollars or none, depending on the substantive and procedural law applied by the courts. Theoretically, the enhanced ability of private parties to contract around laws otherwise mandated by the state re-orient the endemic question related to the source and legitimacy of private bargaining rights.²¹ In doing so, this Article reveals the complicated and largely undetected relationship between contracts and public regulatory law.

This form of “private ordering” is distinct from and largely unaccounted for in the prevailing literature describing the role of private actors in public governance. To be sure, scholars have made significant inroads in the past two decades exposing the growing role assumed by private actors in public governance through (1) privatization,²² (2) public-private collaboration,²³ and (3) private agreements that shadow the incentive structure codified in public regulations.²⁴ The form of private ordering that I seek to

whereas contracts written in Greek were subject to the jurisdiction of the Greek courts, which applied Greek law.” SYMEON C. SYMEONIDES, CHOICE OF LAW: OXFORD COMMENTARY ON AMERICAN LAW 362 (2016) [hereinafter SYMEONIDES, CHOICE OF LAW].

²⁰ O’HARA & RIBSTEIN, LAW MARKET, *supra* note 9, at 5. Because private agreements are not necessarily subject to public disclosure, it is difficult to estimate the rate at which commercial contracts employ choice-of-law clauses. A notable survey conducted in 2006, which drew from a database of contracts collected by the SEC, found that 55 percent of the contracts surveyed contained choice-of-law clauses. *See id.* at 82–83. The method employed in that study, in my view, underestimates the rate at which choice-of-law clauses are employed, because the search expression used would not capture the diversity of terms employed in choice-of-law clauses. *See id.* at 237 n.35 (stating that the standard contractual language “laws of the state of” was used to determine the existence of a choice-of-law agreement). A more recent study in 2014 found choice-of-law clauses in 70 percent of contracts extracted from the same SEC database employing a different methodology. *See Sanga, supra* note 1, at 903.

²¹ The legal foundations of contract and private property are intimately connected to contested notions of state regulation and sovereignty. *See* David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 653–54 (2014) (reviewing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014)). More specifically, while private law subjects like contracts and agency law are frequently measured by how rules give effect to private preferences, concepts of state regulation and sovereignty recognize that certain private bargaining rights may need to be curbed by state regulation in the name of sovereignty. *See* MARC MOORE, *CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE* 1–6 (2013).

²² *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369–70 (2003) (noting privatization of traditionally public functions focused on welfare, public education, and prisons); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230–36 (2003) (examining the privatization of schools, prisons, and social services).

²³ *See, e.g.*, Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1310–14 (2003) (describing government agencies contracting with private actors to enforce public regulatory law); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547–49 (2000) (proposing a new conception of governance capturing how public and private actors negotiate over law and policy).

²⁴ *See, e.g.*, Michael P. Vandenberg, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2032–33 (2005) (articulating how private agreements shadow public regulatory law).

uncover involves private actors transcending territorially-configured domestic regulatory law through private stipulation, largely at the cost of eroding the public interest embedded in domestic regulatory statutes.²⁵

Contractual legal regime shopping, at the normative level, raises important questions concerning the legitimacy of unfettered private bargaining rights. On the surface, private entities choosing to be governed by a particular jurisdiction's law seems unproblematic. Today, mainstream legal scholars accept that the state is able to justify its coercive authority to impose law upon its subjects on the theory of implicit consent.²⁶ For instance, while residents of California may not have expressly consented to the state's income-tax law, the residents are nevertheless subject to the law because they have indirectly consented by the virtue of maintaining residence in the state.²⁷ Private entities agreeing to abide by a particular state's law in a bargained-for written contract is perhaps the most explicit form of consent to abide by that state's law. It is therefore unsurprising to find consent as the principal rationale offered by seminal United States Supreme Court decisions in recent decades setting the stage for the emergence of unconnected choice of law.²⁸

A closer examination, however, reveals a more complicated picture. Although typically analyzed as standalone transactions between the parties to the agreement, contracts often give rise to disputes that implicate important regulatory statutes.²⁹ These statutes recognize the interests of parties other than the litigants, namely, the general public that stands to benefit when private litigants activate them through suits. Thus, regulatory statutes are deliberately designed not only to establish private remedies, but also to help effectuate particular legislative goals including the deterrence of commercial racketeering, anti-competitive practices, and securities fraud. Importantly, the mandatory nature of these statutes—that is, private entities typically can-

²⁵ To be clear, the legal phenomenon that I seek to uncover is distinct from how we have conventionally understood private influence on domestic and international lawmaking. Scholars have long understood that private commercial entities, through lobbying and other efforts, exert significant influence on domestic lawmaking. See, e.g., Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 106–09 (1990). Similarly, we have come to appreciate that corporations can directly influence international treaty-making through international investment agreements that effectively allow corporations to act as “lawmakers” in the public international law sense. See Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 230, 231–32 (2015). The breed of private ordering to which I am referring resembles public international law, in that private entities leverage the police power of nation-states to enforce mutual bargaining. However, private agreements contracting around domestic public law cannot be classified as a species of public international law, which is derived from agreements between states, expressly (treaties) and implicitly (customary international law). See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 204–05 (2010).

²⁶ See *infra* Part III.

²⁷ See, e.g., Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1279–80 (1989) [hereinafter Brilmayer, *Rights*].

²⁸ See *infra* Section II.A.

²⁹ See *infra* Section II.A.

not contractually stipulate to waive compliance with these laws³⁰—may be an indication that there are costs associated with certain private misconduct that are not being fully internalized by the private parties.³¹ At a minimum, these policy considerations display a serious need to rethink how we have understood the rise of private entities transcending, and in doing so reconstituting, territorially configured domestic regulatory law.

To that end, this Article begins a normative discussion centered on policing private agreements that can systematically undermine the enforcement of public regulatory law. More broadly speaking, the enhanced ability of private entities to bargain around domestic regulatory law suggests that there is also a critical academic need to study private commercial transactions as they relate to the structure of domestic regulatory law. Because no single account can possibly identify the myriad ways that the rise of unconnected choice of law may alter the overall regulatory regime, this Article presents a broad intellectual bridge that future research can build on to further shed light on the topic.

The remainder of this Article proceeds in three steps. Part II traces the development of rules enabling private parties to choose the law governing their relations, with a focus on federal court jurisprudence. This Part also documents the dramatic shift in the scholarly treatment of privately stipulated law and synthesizes modern accounts on the rise of unconnected choice of law. Part III examines contractual private ordering from a legitimacy standpoint. Here, I develop a theoretical framework to explain why the standing doctrine, working in tandem with choice-of-law clauses, may systematically subvert the operation of domestic regulatory law that relies on private litigants to effectuate the substantive aim of regulatory statutes. Part IV turns to solutions, focusing on judicial scrutiny of sophisticated commercial agreements. Here, I explore the structural role assumed by private litigants in the overall design of regulatory statutes to underscore why courts should police private agreements that subvert the operation of laws designed to benefit the general public.

II. THE MAKING OF UNCONNECTED CHOICE OF LAW

Not too long ago, attempts by private parties to select the law governing their transactions were subject to overwhelming hostility in the United States. While the United States Supreme Court implicitly endorsed the con-

³⁰ For instance, the Securities Act of 1933 and the Securities Exchange Act of 1934 expressly prohibit parties from avoiding liability through direct contractual waiver. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77n (2012) (“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.”).

³¹ *See* Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT’L L. 1, 6–7 (2001).

cept as early as 1825,³² explicit contractual stipulations over applicable law did not begin to appear until the end of the nineteenth century,³³ and were treated with judicial skepticism at the turn of the twentieth century.³⁴

This understanding permeated the scholarly discourse as well. Largely abiding by the formalistic notion that each state has exclusive authority over its own territory, Professor Joseph Beale of Harvard Law School conceptualized courts as enforcers of “vested” legal rights.³⁵ Under this approach, legal rights were created by the substantive law of the place where the cause of action arose and honored elsewhere.³⁶ Professor Ernest Lorenzen, a luminary of Yale Law School, largely endorsed Beale’s view, reasoning that “[a]llowing the parties to choose their law in this regard involves a delegation of sovereign power to private individuals.”³⁷ This formalistic view of the law was canonized in the First Restatement of Conflict of Laws in 1934, of which Beale was the reporter.³⁸ The Restatement emphasized the location of the relevant act as determinative of applicable law,³⁹ leaving little room for parties to stipulate to the applicable law governing private transactions.

The First Restatement was viciously attacked by legal realists in the 1930s and 1940s, who cast Beale’s territorial approach as both outdated and practically infeasible.⁴⁰ The critique eventually developed into the “government interest analysis” approach, which prescribed that courts apply the law of the state with the most interest in applying its law to the dispute at hand.⁴¹ Importantly for our purpose, proponents of this new intellectual movement

³² See *Wayman v. Southard*, 23 U.S. 1, 42–49 (1825).

³³ SYMEONIDES, *CHOICE OF LAW*, *supra* note 19, at 362.

³⁴ BERMANN, *supra* note 2, at 221 (“[C]hoice of law clauses were at one time frowned upon, as private attempts to deprive courts of the right to make a determination that ordinarily is theirs to make . . .”).

³⁵ See LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 18 (1991) [hereinafter BRILMAYER, *CONFLICT*]. This should be unsurprising, given that Beale was one of the early intellectual leaders who introduced legal positivism to the United States. See also William J. Moon, *The Original Meaning of the Law of Nations*, 56 VA. J. INT’L L. 51, 67 (2016).

³⁶ As Professor Bill Dodge explains, under the vested rights theory, “foreign law was not given effect as a matter of comity . . . but rather as a matter of fact.” William S. Dodge, *Extraterritoriality and Conflict-of-laws theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 111 (1998).

³⁷ Ernest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 655, 658 (1921).

³⁸ See Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1226 (1992) (“The territorial theory had its most prolonged and important impact on state choice of law cases, perhaps because Joseph Beale (the foremost intellectual proponent of the theory) was the reporter for the American Law Institute’s *Restatement (First) of the Conflict of Laws*.”).

³⁹ See RESTATEMENT (FIRST) CONFLICT OF LAWS §§ 332, 346 (AM. LAW INST. 1934). The Restatement to a lesser extent also acknowledged the place of performance as a relevant factor in determining applicable law. See *id.* §§ 358, 370.

⁴⁰ See, e.g., WALTER COOK, *THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS* 41 (1942) (“‘[L]aw’ is not a material phenomenon which spreads out like a light wave until it reaches the territorial boundary and then stops.”).

⁴¹ See BRILMAYER, *CONFLICT*, *supra* note 35.

identified the intent of contract signatories as an important factor in determining the applicable law.⁴² For instance, Willis Reese, the reporter for the Second Restatement of Conflict of Laws,⁴³ held the view that the only practical way to achieve predictability in cases involving an interstate element was to “empower [parties] to choose the state whose law is to govern the contract.”⁴⁴

The Second Restatement, adopted in 1971 and considered to be the authoritative source by the plurality of jurisdictions in the United States today,⁴⁵ reflects a bargain struck between various intellectual leaders of the interest analysis movement. Under the Second Restatement, private parties may stipulate the law governing their relationships, so long as (1) they have a substantial connection to the chosen law; and (2) the choice is not contrary to the fundamental policy of a state with substantial connection to the transaction.⁴⁶ The dramatic shift in the Restatement’s treatment of party intent is unsurprising, given the explosive growth of cross-border commercial transactions (both interstate and international) in the twentieth century that put pressure on legal systems to provide for predictability as to what law would apply to cross-border commercial transactions.⁴⁷ The connection requirement

⁴² See Hessel E. Yntema, *Contract and Conflict of Laws: “Autonomy” in Choice of Law in the United States*, 1 N.Y.L.F. 46, 65–66 (1955) (“The contracts of individuals are a social phenomenon, not creations of the territorial sovereign Accordingly, the basic premise of the law of foreign, as of domestic, contracts is that the agreement of the parties, including their intention respecting the law to govern the agreement, should be given legal sanction, except as there are good reasons to the contrary.”); Max Rheinstein, Book Review, 15 U. CHI. L. REV. 478, 485–87 (1948) (reviewing JOHN D. FALCONBRIDGE, *ESSAYS ON THE CONFLICT OF LAWS* (1947)) (“[I]f we regard . . . one of the principal purposes of the conflict-of-laws to protect the justified expectations of the parties, then the intention of the parties rule is the one which fulfills that purpose better than any rival rule, and quite particularly better than the place of contracting rule.”); see also Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT’L L. REV. 511, 531 (2006) (“Many critics of the First Restatement advocated that the choice of law selected by the parties should govern the contract.”).

⁴³ See Willis L.M. Reese, *Contracts and the Restatement of Conflict of Laws, Second*, 9 INT’L & COMP. L.Q. 531, 531 (1960) (identifying himself as “Reporter, Restatement of Conflict of Laws, Second”) [hereinafter Reese, *Contracts*].

⁴⁴ Willis L.M. Reese, *Power of Parties to Choose Law Governing Their Contract*, 54 PROC. AM. SOC’Y INT’L L. 49, 50 (1960); see also Reese, *Contracts*, *supra* note 43, at 534 (“The best way of achieving certainty and predictability in the area of multi-State contracts is to give the parties power within certain limitations to choose the governing law.”).

⁴⁵ See O’Hara O’Connor & Ribstein, *Preemption*, *supra* note 17, at 692; Symeon C. Symeonides, *The Judicial Acceptance of the Second Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1268–69 (1997) [hereinafter Symeonides, *Judicial Acceptance*].

⁴⁶ Under the Second Restatement, the law chosen by the parties may be supplanted where there is no reasonable basis for the parties’ choice, or where the chosen law is contrary to a fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (AM. LAW INST. 1971). Similarly, the Uniform Commercial Code, governing the law of sales and other commercial transactions across the United States, requires that the chosen law “bears a reasonable relation” with the contracting parties. See U.C.C. § 1-301 (AM. BAR. ASS’N, AM. LAW. INST. & UNIF. LAW COMM’N 2008).

⁴⁷ See O’HARA & RIBSTEIN, *LAW MARKET*, *supra* note 9, at 98–100.

and the fundamental policy requirement, on the other hand, reflect the interest analysis scholars' unyielding desire to safeguard the legitimate regulatory interests of states.

A. *The Recent Trend Toward Unconnected Choice of Law*

Notwithstanding the restrictions imposed by the Second Restatement, private entities today can calculatedly increase the chances that their chosen law is enforced by agreeing to resolve disputes in a court that would uphold their contractual stipulation.⁴⁸ The inclusion of a forum selection clause, which contractually binds parties to resolve disputes in a particular court (e.g., the United States District Court for the Southern District of New York) or an arbitration forum (e.g., American Arbitration Association),⁴⁹ sets the stage for the enforcement of a choice-of-law clause because it enables parties to resolve disputes in a forum more likely to enforce their chosen law.⁵⁰ The strategy includes (1) selecting the courts of states that have relaxed the restrictions set forth in the Second Restatement; and (2) funneling cases to private arbitration.

In the past three decades or so, several states—including New York, Delaware, and Texas—have enacted legislation relaxing the Second Restatement's restrictions imposed on the contracting parties' ability to select the legal regime governing their transactions. New York's choice-of-law statute, for instance, allows any entity to select New York law, so long as the transaction is valued at \$250,000 or more.⁵¹ Delaware, similarly, provides that

⁴⁸ Indeed, having negotiated the applicable law, parties are also likely to negotiate and choose the forum. See Linda Silberman & Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong*, 257, 260–61, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (Franco Ferrari & Stephen Kroll eds., 2011); see also Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 651 (2015) (“[A] choice-of-law clause frequently appears together with a forum-selection clause.”). Including a forum selection clause is also one way of ensuring an orderly binding and fair decision. See W. Michael Reisman, *The Diversity of Contemporary International Dispute Resolution: Functions and Policies*, 4 J. INT’L DISP. SETTLEMENT 47, 53–54 (2013) (“In a world of concurrent jurisdictions, one way of ensuring an orderly binding and fair decision in an international commercial transaction is by inserting in the transnational contract a forum-selection clause.”).

⁴⁹ See Clermont, *supra* note 48, at 645 (“Today, parties have significant powers to select a forum, even in advance of dispute. They can do so in a so-called forum-selection clause or agreement, which is a contractual provision establishing a place for specified litigation between them.”).

⁵⁰ See O’HARA & RIBSTEIN, *LAW MARKET*, *supra* note 9, at 73 (“[P]arties . . . funnel their disputes into courts that are more likely to enforce contractual choice of law”). The enforceability of forum selection clauses in federal court is governed by federal common law. The dominant approach, outlined in *Bremen*, is that forum selection agreements will be enforced unless doing so would be “unreasonable and unjust,” or “‘unreasonable’ under the circumstances.” *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972).

⁵¹ See N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2010) (“The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars . . . may agree that the law of this state shall govern their rights and duties in

parties to a contract involving more than \$100,000 may agree to be governed by Delaware law, even if the contractual clause itself is the only connection the parties have with Delaware.⁵² Texas allows parties to choose the law of any state for transactions over \$1,000,000 without regard to the “fundamental policy” of another state, as long as there exists some reasonable relationship to the chosen law.⁵³ Cases from these states are particularly important because they (perhaps not coincidentally) are states that aggressively compete to attract parties to select their laws.⁵⁴ According to a recent empirical study conducted by Professors Theodore Eisenberg and Geoffrey Miller, New York law alone accounts for forty-six percent of all contracts entered into by publicly held companies.⁵⁵

The significance of this development should not be understated. Consider the seminal case of *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*,⁵⁶ adjudicated by New York’s highest court in 2012. The dispute, liti-

whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state.”). Under the statute, the contract must not relate to labor, personal, household or family services, or certain transactions covered by the Uniform Commercial Code. See *id.* § 5-1401(2). For an early scholarly analysis of the statute, see Barry W. Rashkover, *Title 14 New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results*, 71 CORNELL L. REV. 227 (1985).

⁵² See DEL. CODE ANN. tit. 6, § 2708(a) (1993) (“The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties”); *id.* § 2708(c) (“This section shall not apply to any contract, agreement or other undertaking: (1) To the extent provided to the contrary in § 1-301(c) of this title; or (2) Involving less than \$100,000.”).

⁵³ See TEX. BUS. & COM. CODE ANN. § 271.005 (West 2009) (“[T]he law of a particular jurisdiction governs an issue relating to a qualified transaction if: (1) the parties to the transaction agree in writing that the law of that jurisdiction governs the issue, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement; and (2) the transaction bears a reasonable relation to that jurisdiction. . . . The law of a particular jurisdiction governs an issue described by this section regardless of whether the application of that law is contrary to a fundamental or public policy of this state or of any other jurisdiction.”); *id.* § 271.001 (defining “qualified transaction” as “a transaction under which a party: (1) pays or receives, or is obligated to pay or is entitled to receive, consideration with an aggregate value of at least \$1 million; or (2) lends, advances, borrows, or receives, or is obligated to lend or advance or is entitled to borrow or receive, money or credit with an aggregate value of at least \$1 million”).

⁵⁴ See, e.g., DISPUTE RESOLUTION SECTION & INT’L SECTION, N.Y. STATE BAR ASS’N, CHOOSE NEW YORK LAW FOR INTERNATIONAL COMMERCIAL TRANSACTIONS, https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Choose_New_York_Law_For_International_Commercial_Transactions.html [<https://perma.cc/TZN6-Y9G4>]. The pecuniary self-interest of lawyers plays a significant role in this regard. See O’HARA & RIBSTEIN, LAW MARKET, *supra* note 9, at 74–75 (“Lawyers clearly stand to gain or lose legal business on account of the laws of the states in which they are licensed to practice. The more parties that are attracted to a state, its laws, and its courts, the more potential clients are available to lawyers licensed in that state.”).

⁵⁵ See Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 CARDOZO L. REV. 1475, 1478 (2009). The authors examined 2,882 contracts on file with the Securities and Exchange Commission.

⁵⁶ 982 N.E.2d 609 (N.Y. 2012).

gated between corporate entities of Brazil and Uruguay, arose out of a note to raise capital and refinance debt through a fiscal agent in London. In enforcing the parties' stipulation to be governed by New York law, the court felt no need to look beyond the choice-of-law clause because "[i]t strains credulity that the parties would have chosen to leave the question of the applicable substantive law unanswered and would have desired a court to engage in a complicated conflict-of-laws analysis, delaying resolution of any dispute and increasing litigation expenses."⁵⁷

Abetted by this line of jurisprudence, choice-of-law clauses embedded in commercial contracts—intentionally and unintentionally—have transformed into vehicles through which private entities consensually bargain away otherwise applicable claims engendered by domestic regulatory statutes.

Statutory claims are frequently implicated in disputes between contracting parties for at least two important (and related) reasons. First, commercial contractual issues often implicate factual patterns giving rise to non-contractual claims that sound in tort or antitrust law, for example.⁵⁸ Second, parties designate a particular national or local law as the *exclusive* source of law to resolve any dispute that can arise between the parties,⁵⁹ in order to enhance predictability as to which law would apply to the wide array of legal claims that could arise between the contracting parties.⁶⁰ Complex commercial transactions may involve entities of different nationalities with physical operations spanning multiple jurisdictions, and modern conflict-of-laws doctrines yield no easy answers to which law applies.⁶¹ Today, a typical choice-

⁵⁷ *Id.* at 612.

⁵⁸ As the Eleventh Circuit explains, “[c]ommercial contractual issues are commonly intertwined with claims in tort or criminal or antitrust law.” *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1070 (11th Cir. 1987).

⁵⁹ The term “exclusive” is often used in contracts to help ensure that all claims—not just contract claims between the contracting parties—will be governed by the chosen law. Parties often also choose arbitration to resolve disputes to avoid potential bias of a particular local court. See Reisman, *supra* note 48, at 62 (“Parties initially agree to a jurisdiction for their arbitration in order to avoid the potential bias of a particular national court or courts which might have a predilection for its own national or affiliate.”).

⁶⁰ See Alec S. Sweet, *Islands of Transnational Governance*, in *RESTRUCTURING TERRITORIALITY: EUROPE AND THE UNITED STATES COMPARED* 122, 131 (Christopher K. Ansell & Giuseppe Di Palma eds., 2004) (“Transnational actors today consciously work to avoid conflict-of-laws problems in national courts, because such problems generate uncertainty and other costs.”). No contract, however detailed or extensive, may predict all future contingencies, and many national and state laws offer fairly refined bodies of law designed to fill in those gaps in a reasonable manner. This premise, of course, is familiar to modern contract law scholars. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 87–88 (1989); Richard R.W. Brooks, *The Relative Burden of Determining Property Rules and Liability Rules: Broken Elevators in the Cathedral*, 97 *Nw. U. L. REV.* 267, 303–04 (2002). The premise holds true even when parties are sophisticated. See Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 *YALE L.J.* 568, 587 n.43 (2006) (“[C]ontracts are necessarily incomplete, even when written by sophisticated parties.”).

⁶¹ See Symeonides, *Judicial Acceptance*, *supra* note 45, at 1250 (“[A]narchy’ is the word that most often comes to mind when reading contemporary choice-of-law cases.”). One

of-law clause alleviates such concerns by specifying that any dispute “arising under” or “relating to” the contract will be governed by the chosen law.⁶² Choosing the law with no connection to the contracting parties—an increasingly common practice in complex commercial transactions—comes with the added benefit of being governed by law that is not perceived to be biased against any one of the contracting parties.⁶³ Courts almost invariably enforce these provisions,⁶⁴ even when doing so would undermine the prescription of civil liability codified in federal and state statutes.⁶⁵

Sophisticated commercial entities may also (and frequently do)⁶⁶ funnel cases to private arbitration that is said to all but assure that the parties’ in-

measure of this indeterminacy problem can be examined from the cottage industry of legal scholarship produced demonstrating the failure of conflict of laws jurisprudence in predicting applicable law. *See, e.g.*, Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 2 (1991) (“The volume of multistate events generating legal disputes has expanded; the substantive laws of the various states have grown more divergent; the choice of law rules the state courts have applied in the absence of federal command have become chaotic producers of waste and unfairness . . .”).

⁶² *See* BERMANN, *supra* note 2, at 15; George A. Bermann, *The Origin and Operation of Mandatory Rules*, in MANDATORY RULES IN INTERNATIONAL ARBITRATION 1, 2 (George A. Bermann & Loukas A. Mistelis eds., 2011) (“Very often in private international law—and in international arbitration as well—the parties will by contract have designated a choice of law to govern their contractual relationship and the disputes arising out of or related to it . . .”).

⁶³ *See* Giuditta Cordero Moss, *International Arbitration and the Quest for the Applicable Law*, 8 GLOBAL JURIST 1, 4 (2008) (“International contracts often contain a choice-of-law clause, and often the law that is chosen does not belong to the country of either party or of the place of performance, but rather is a neutral, third law. The choice of a neutral governing law is often intended to avoid application of the laws that otherwise might be applicable due to their connection with the legal relationship, be it as the respective law of the parties or the law of the place of performance. Avoiding application of either party’s law, thus preventing the perceived advantageous position that would follow for one party having the contract governed by its own country’s law, is sometimes deemed to be advisable.”).

⁶⁴ As the Third Circuit explains, “where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement of such a bargain” *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983), *overruled on other grounds by* *Lauro Lines v. Chasser*, 490 U.S. 495 (1989).

⁶⁵ Courts disagree on whether certain key words are broad enough to reach non-contractual claims between parties to contractual relationships. While some courts hold that the “arising out of” or “governed by” language is sufficient to cover both contractual and non-contractual claims, some courts insist that the “and related to” language is required for a choice-of-law clause to cover non-contractual claims. *Compare* *Fin. One Pub. v. Lehman Bros. Special Fin.*, 414 F.3d 325, 335 (2d Cir. 2005) (holding that a contractual provision stating that the agreement will be “governed by and construed in accordance with the laws of the State of New York” did not reach a non-contractual claim), *with* *Hugel v. Lloyd’s of London*, 999 F.2d 206, 207 (7th Cir. 1993) (holding that “arising from” language encompasses claims for “breach of contract, breach of fiduciary duty, invasion of privacy, and tortious interference”).

⁶⁶ By one account, ninety percent of international commercial transactions include clauses requiring arbitration. *See* Andreas F. Lowenfeld, *Can Arbitration Coexist with Judicial Review? A Critique of LaPine v. Kyocera*, ADR CURRENTS, Sept. 1998, at 1, 15 n.2. A more recent empirical study conducted by Professors Richard R.W. Brooks and Sarah Sanga found that twenty-three percent of the contracts contained a provision requiring parties to settle disputes in arbitration. *See* Richard R.W. Brooks & Sarah Sanga, *Commercial Arbitration Agreements Between Sophisticated Parties: An Empirical View* (Feb. 24, 2013) (unpublished manuscript), <https://pdfs.semanticscholar.org/7b40/3f9322fde59aa8d7e1ea55da8ec0c787e00d.pdf> [<https://perma.cc/V26X-GK5F>].

tended law will govern.⁶⁷ Arbitration, a form of consensual dispute resolution binding and enforceable in domestic courts,⁶⁸ is already ubiquitous in both domestic and international commercial transactions, offering commercial entities a form of dispute resolution that is touted as predictable, efficient, and confidential—at least relative to litigating in domestic courts.⁶⁹ Arbitration is frequently understood as a “creature of contract,”⁷⁰ bestowing almost complete discretion to private parties when it comes to the rules governing litigation between contracting parties.⁷¹ Owing to this tradition, arbitrators are said to routinely enforce the law selected by the parties.⁷²

⁶⁷ See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 791–94 (2d ed. 2001). Of course, the arbitrator’s willingness to enforce a choice-of-law clause is not the only reason why parties would prefer to resolve disputes in arbitration.

⁶⁸ See 9 U.S.C. §§ 1–16 (2012); see also Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105–08 (2002) (reviewing the legislative history of the Federal Arbitration Act). For an excellent overview of arbitration in the context of cross-border business disputes, see W. MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS, AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* 1–7 (2d ed. 2015).

⁶⁹ See Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1285–86 (2000) (“Among these benefits are the cost savings that stem from the fact that an arbitration clause is, above all, a choice-of-forum clause. It allows the parties to avoid most of the uncertainty and delay involved in identifying the jurisdiction that will handle the case. It also allows the parties to select a mutually convenient forum. Arbitration also provides the benefit of an unbiased forum.”).

⁷⁰ E.I. DuPont de Nemours v. Rhone Poulenc Fiber, 269 F.3d 187, 194 (3d Cir. 2001) (“[A]rbitration is a creature of contract law”); S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT’L L. 915, 915 (1998) (“Arbitration has long been called a creature of contract, a dispute resolution mechanism that has no form or validity outside the four corners of the parties’ arbitration agreement.”).

⁷¹ The discretion is said to be further solidified by the incentive structure underlying the arbitrators resolving disputes. See O’HARA & RIBSTEIN, *LAW MARKET*, *supra* note 9, at 98 (“Parties that desire arbitration are able to choose the arbitration association in their contract. Because the arbitrators’ fees are paid by the parties, the associations seek to ensure that the parties are satisfied with the services that they receive. Although no arbitrator can please both parties to a dispute, an arbitration association can increase the likelihood that contracting parties will choose it by earning a reputation for hiring arbitrators who enforce the parties’ contracts and who render decisions that accord with the spirit of their agreements.”).

⁷² See Ole Lando, *The Law Applicable to the Merits of the Dispute*, in *ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION* 129, 134 (Petar Sarcevic ed., 1991) (“The reported cases show that the arbitrators invariably apply the law selected by the parties.”). Of course, this is not a universal account, and there are vigorous disagreements on whether arbitrators actually enforce (or should enforce) the contracting parties’ stipulated law when it comes to non-contractual disputes (e.g., an antitrust claim between parties that agreed to arbitrate all claims arising under or relating to their contract). The debate is usually framed as a tension between party autonomy and mandatory laws. See George A. Bermann, *Mandatory Rules of Law in International Arbitration*, 325, 326, in *CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION* (Franco Ferrari & Stefan Kröll eds., 2011) (“In international arbitration, as in private international law generally, the parties may by contract have designated a choice of law to govern disputes arising out of or related [to] that contract. The inclusion of a choice-of-law clause in a contract is very much an exercise of party autonomy. . . . When courts disregard the parties’ choice of law in deference to a mandatory rule, they simultaneously do two things: they override both the forum’s ordinary conflict of laws rules (which require respect for the chosen law) and the parties’ underlying agreement on choice of law.”).

According to Dean Symeon Symeonides, “as far as choice of law is concerned, arbitrators get a virtual blank check.”⁷³

The dramatic rise of arbitration as a mode of resolving disputes arising out of cross-border commercial transactions has been aided by deliberate national policies favoring party autonomy to ensure predictability in international trade. In the United States, the background law governing the issue is the Federal Arbitration Act (FAA),⁷⁴ originally enacted in 1925.⁷⁵ The FAA provides that arbitration agreements are enforceable “save upon such grounds as exist at law or equity for the revocation of any contract.”⁷⁶ The United States Supreme Court has interpreted the FAA as setting up “a presumption in favor of arbitration,”⁷⁷ instructing lower courts that they should “rigorously enforce agreements to arbitrate.”⁷⁸ Absent demonstrating that the underlying agreement itself was unconscionable or induced by fraud or duress, it is settled law that agreements to arbitrate will be enforced.⁷⁹ Over the past several decades, the Court has vastly expanded the ambit of claims subject to arbitration,⁸⁰ even when doing so would erode a plaintiff’s otherwise viable cause of action under federal statutes such as the Sherman Act,⁸¹ the RICO Act,⁸² the Age Discrimination in Employment Act of 1967,⁸³ the Clayton Act,⁸⁴ and the Credit Repair and Organizations Act.⁸⁵

⁷³ SYMEONIDES, CHOICE OF LAW, *supra* note 19, at 491.

⁷⁴ Arbitration Act of 1925, Pub. L. 401, 43 Stat. 883 (codified as amended at various portions of 9 U.S.C.).

⁷⁵ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

⁷⁶ 9 U.S.C. § 2 (2012). The statute preempts any inconsistent state laws and operates to the full extent of Congress’s power under the Commerce Clause, which is interpreted broadly. See *Drahozal*, *supra* note 68, at 102.

⁷⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); see also *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

⁷⁸ *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

⁷⁹ In *AT&T Mobility LLC*, the Court observed that the FAA “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” 563 U.S. 333, 339 (2011) (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

⁸⁰ *REISMAN ET AL.*, *supra* note 58, at 189 (“[T]here is a growing judicial predilection to expand the ambit of arbitrability and to hold business managers to their agreements to arbitrate even for matters that were formerly considered non-arbitrable.”).

⁸¹ *Mitsubishi Motors*, 473 U.S. at 624 n.13 (“[I]nsofar as the allegations underlying the [Sherman Act] claims touch matters covered by the [contract], the Court of Appeals properly resolved any doubts in favor of arbitrability.”).

⁸² See *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 236 (1987) (“[T]here is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act.”).

⁸³ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1990).

⁸⁴ See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238–39 (2013).

⁸⁵ See *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012) (“Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms.”).

While federal courts often invoke the availability of judicial scrutiny at the post-award stage to enforce arbitration agreements, the practical reality is that there is no second round review once the arbitration award is rendered. As explained by Dean Symeonides: “[T]he chances of a second round are slim. If the defendant prevails in the foreign arbitration, he will have no reason to seek enforcement of the ‘zero-dollar’ award in the United States. If the plaintiff prevails but the amount is meager, the plaintiff may not seek to vacate the award”⁸⁶

Of course, local jurisdictions may refuse to enforce arbitration decisions.⁸⁷ Indeed, there are a number of well-known cases (largely from Europe) where local courts refuse to recognize arbitration awards at the enforcement stage on grounds that applying parties’ chosen law would violate the mandatory rule of a state.⁸⁸

But challenging arbitration decisions is rarely successful in practice, especially in the United States.⁸⁹ Under jurisprudence interpreting U.S. treaty obligations,⁹⁰ federal courts recognize and enforce arbitration awards absent a showing that enforcing the award would be contrary to the “public policy” of the United States.⁹¹ Even if a federal court discovers that the arbitrators misapplied the law, this does not constitute an error sufficient to vacate the arbitration decision under the highly deferential standard of review that

⁸⁶ SYMEONIDES, CHOICE OF LAW, *supra* note 19, at 485.

⁸⁷ As explained by the Supreme Court, “[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity *at the award-enforcement stage* to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (emphasis added). On this point, the Mitsubishi Court continued: “The Convention reserves to each signatory country the right to refuse enforcement of an award where the recognition or enforcement of the award would be contrary to the public policy of that country.” *Id.* at 638 (internal quotation marks omitted).

⁸⁸ See, e.g., Alan Scott Rau, *The Arbitrator and the “Mandatory Rules of Law,”* in MANDATORY RULES IN INTERNATIONAL ARBITRATION 77, 111 (George A. Bermann & Loukas A. Mistelis eds., 2011) (discussing *Soleimany v. Soleimany*, [1999] QB 785, where the court set aside an arbitration award as unenforceable in England and Wales).

⁸⁹ See, e.g., Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 453 (1999) (“International commercial arbitrations today are virtually lawless, or at least they can be, at the election of the parties or the private arbitrators who serve them.”); Linda Silberman, *International Arbitration: Comments from a Critic*, 13 AM. REV. INT’L ARB. 9, 11 (2002) (“An even more basic flaw of international arbitration is its almost ‘lawless’ character as regards national law. . . . [T]here is no real context for and no real check on arbitrators’ rulings.”).

⁹⁰ See *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 98 (2d Cir. 2016).

⁹¹ See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. IV, June 10, 1958, 21 U.S.T. 2519, T.I.A.S. No. 6997 (New York Convention) (providing that a party may apply “for recognition and enforcement” of an arbitral award subject to the Convention); 9 U.S.C. §§ 204, 207 (2012) (providing that a party may move “for an order confirming [an arbitral] award” in a federal court of the “place designated in the agreement as the place of arbitration if such place is within the United States”); O’HARA & RIBSTEIN, *LAW MARKET*, *supra* note 9, at 100 (“Unlike the standard rules on enforcing contractual choice of law . . . the enforcement of arbitration clauses and awards under the convention does not depend on a connection between the parties or transaction and the designated state.”).

courts must employ in evaluating these challenges.⁹² As observed by the Second Circuit, “[t]he standard is high, and infrequently met.”⁹³

The private ousting of statutory claims is particularly salient in cases that implicate states with vastly different regulatory regimes. This includes both interstate and international cases, with the latter set of cases involving conflict between laws of a state of the United States and a foreign nation or between federal law and the law of a foreign nation. To be sure, leaving applicable law to private choice may be desirable from an efficiency standpoint. Scholars have, for instance, argued that allowing private entities to opt out of federal securities law would be optimal in minimizing capital raising costs.⁹⁴

While the “private choice” model of applicable law holds intellectual appeal in certain areas of the law, private bargaining over statutes designed to vindicate the interest of the public raises important policy concerns. Contracts that allow private actors to opt out of otherwise mandatory regulatory statutes is particularly problematic because the mandatory nature of certain regulatory statutes is an indication that there are externalities to certain private misconduct that the statutes are designed to force private actors to internalize.⁹⁵ Moreover, regulatory statutes can be designed to advance certain social policies, even when it conflicts with overall market efficiency. Below, I examine how choice-of-law provisions implicate the enforceability of Blue Sky Laws (implicating inter-state conflict), the civil RICO Act (implicating international conflict), and copyright infringement law (also implicating international conflict). These cases merely illustrate the range of domestic regulatory law issues at stake.⁹⁶

1. *Blue Sky Laws*

In addition to regulations at the federal level, each state within the United States has its own rules and regulations concerning the sale of securities, known as Blue Sky Laws.⁹⁷ Aimed at protecting shareholders with disclosure and fraud protection, these statutes specify disclosure requirements

⁹² See 9 U.S.C. § 10(a) (2012).

⁹³ *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986).

⁹⁴ See, e.g., Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2399–400 (1998); Daniel Hemel, Comment, *Issuer Choice After Morrison*, 28 YALE J. REG. 471, 471 (2011) (arguing that allowing foreign firms to “opt in” to U.S. securities laws “can create an environment in which issuers choose the legal regime that minimizes their capital-raising costs”).

⁹⁵ See Trachtman, *supra* note 31, at 2–3.

⁹⁶ While I focus here on the under-enforcement of statutes, it is entirely possible that private contracts result in “over-enforcement” of certain regulatory statutes, through private entities choosing foreign laws that provide for greater remedies than otherwise applicable local regulatory law.

⁹⁷ For a historical overview of Blue Sky Laws, see generally Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347 (1991).

for securities transactions within the investors' home states.⁹⁸ Rigorous enforcement of choice-of-law provisions come at the cost of subverting the operation of these state statutes, which rely in part on private litigants to effectuate the law's design to deter securities fraud.

Consider the case of *Mallon Res. Corp. v. Midland Bank*,⁹⁹ a lawsuit brought by a Denver-based oil and gas developer against a bank arising under a credit agreement containing a New York choice-of-law clause.¹⁰⁰ Among other claims, the complaint alleged that Midland Bank failed to act in good faith in determining the value of Mallon's collateral assets. Despite pleading a viable claim under the Colorado Securities Act, the court dismissed the claim at the motion to dismiss stage, reasoning that all claims had to be resolved under New York law.¹⁰¹

The result should be alarming, given that New York is the only state within the United States that does not provide a private right of action for violations of its Blue Sky Laws.¹⁰² Effectively, the choice-of-law provision served as a vehicle through which the bank opted out of Blue Sky Laws, intentionally or not. The case is hardly an anomaly. In the seminal case of *Turtur v. Rothschild Registry Intern., Inc.*,¹⁰³ the Second Circuit held that broadly-worded choice-of-law clauses (e.g., provisions that specify covering claims "arising out of or relating to" the transaction at issue) may cover tort claims as well as contractual claims. This line of jurisprudence essentially enables private parties to determine the scope of justiciable claims, even for claims that have tenuous relationships to the underlying transaction.¹⁰⁴

In other instances, the erosion of Blue Sky Laws claims takes place more subtly. Take *IOP Cast Iron Holdings v. J.H. Whitney Capital Partners*,¹⁰⁵ a lawsuit involving a dispute between Connecticut entities arising out of a Stock Purchase Agreement.¹⁰⁶ Despite bringing a federal securities law claim, the plaintiff did not plead a state securities law claim, explicitly

⁹⁸ See O'Hara & Ribstein, *Efficiency*, *supra* note 10, at 115.

⁹⁹ No. 96-CIV-7458, 1997 WL 403450 (S.D.N.Y. July 17, 1997).

¹⁰⁰ See *id.* at *3.

¹⁰¹ See *id.* at *2 ("Midland contends that the Colorado Securities Act claim should be dismissed because New York law governs the Credit Agreement. . . . Because the choice-of-law provision . . . is broad enough to include statutory fraud claims, the Colorado Securities Law claim is thus dismissed.").

¹⁰² See Adam J. Gana & Michael Villacres, *Blue Skies for America in the Securities Industry . . . Except for New York: New York's Martin Act and the Private Right of Action*, *FORDHAM J. CORP. & FIN. L.* 587, 587 (2014) ("New York is the only state without a private right of action for violations of state securities laws.").

¹⁰³ 26 F.3d 304 (2d. Cir. 1994).

¹⁰⁴ See *id.* at 309–10 ("Here, in contrast, the Turturs agreed to be bound by a choice-of-law provision that covers any controversy 'arising out of or relating to' the subscription. . . . [T]his language is sufficiently broad to cover tort claims as well as contract claims 'arising out of or relating to' the subscription.").

¹⁰⁵ 91 F. Supp. 3d 456 (S.D.N.Y. 2015).

¹⁰⁶ Complaint at 1–2, *IOP Cast Iron Holdings v. J.H. Whitney Capital Partners*, F. Supp. 3d 456 (S.D.N.Y. 2015) (No. 14 CV 00816), 2014 WL 7250084. ("This is an action for breach of contract, securities fraud and common law fraud based on false representations and warranties in a written stock purchase agreement.").

“agreeing” in motion papers that New York law applied to all state law claims pursuant to a New York choice-of-law clause embedded in the Stock Purchase Agreement.¹⁰⁷ This was the case even with the court’s observation that the transaction, which was factually connected to Wisconsin, Delaware, and Connecticut (and thus presumably presenting a potential state securities law claim under at least one of the states’ Blue Sky Laws), had no connection to New York.¹⁰⁸

2. *The Racketeer Influenced and Corrupt Organizations Act (RICO)*

RICO,¹⁰⁹ passed as Title IX of the Organized Crime Control Act in 1970, is a federal statute originally enacted to combat the trend of organized crime controlling legitimate businesses.¹¹⁰ To seasoned litigators, it is also an important statute often pleaded concurrently with an ordinary fraud claim, in the hope of establishing facts that could trigger RICO’s treble damages provision.¹¹¹ The deliberate financial incentive structure designed to deter commercial racketeering, which was modeled after federal antitrust laws,¹¹² is routinely subverted by a well-drafted choice-of-law clause requiring the application of foreign law.

Consider the case of *Suzlon Infrastructure Ltd. v. Pulk*,¹¹³ a dispute between a Texas-based logistics company providing port services and an Indian corporation engaged in shipping certain machinery to the United States.¹¹⁴ The relevant contract between the parties, the Sales and Logistics Services Agreement,¹¹⁵ mandated that “any dispute aris[ing] between the parties out of or in connection with the agreement” would be governed by “English law” in an arbitration proceeding to take place in Singapore.¹¹⁶ The plaintiff, attempting to stay the arbitration proceeding, pleaded with the court that it would not be able to advance a RICO claim in the arbitration

¹⁰⁷ See IOP Cast Iron Holdings, 91 F. Supp. 3d 456, 460 n.1 (“The parties agree that New York law applies to IOP’s state-law claims, despite the lack of any connection between the Aarrowcast transaction and New York.”).

¹⁰⁸ *Id.*

¹⁰⁹ 18 U.S.C. §§ 1961–1968 (2012).

¹¹⁰ See JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY 1–3 (2016).

¹¹¹ See Andrew P. Bridges, *Private RICO Litigation Based Upon ‘Fraud in the Sale of Securities,’* 18 GA. L. REV. 43, 67–69 (1983); see also 18 U.S.C. § 1964(c) (2012) (providing that a successful plaintiff under civil RICO “shall recover threefold the damages he sustains and the cost of the suit”).

¹¹² See Bridges, *supra* note 111, at 68–69 (“The legislative record is filled with references to antitrust laws as models for RICO. . . . The Antitrust policies of preserving free enterprise, fair competition, and consumer choice motivated the legislators to enact the RICO provisions.”).

¹¹³ Civil Action No. H-09-2206, 2010 WL 3540951 (S.D. Tex. Sept. 10, 2010).

¹¹⁴ See *id.* at *1.

¹¹⁵ See *id.* at *7.

¹¹⁶ *Id.* at *1.

proceeding, “because English law does not recognize a RICO cause of action.”¹¹⁷

The court was unpersuaded, reasoning that the availability of other remedies provided under English law was a sufficient reason to foreclose Suzlon’s access to a RICO claim.¹¹⁸ To the court, the private waiver of a statutory claim was not sufficient to establish that the choice-of-law agreement contravened the public policy of the United States.

3. Copyright Infringement

United States copyright law is unusual among copyright laws around the world in that it allows successful plaintiffs to seek the “extraordinary remedy” of statutory damages.¹¹⁹ Statutory damages are unique because they enable successful plaintiffs to recover damages without proof that “(1) the plaintiff suffered any actual harm from the infringement or (2) the defendant profited from the infringement.”¹²⁰ This remedy, deliberately intended in part to discourage the unauthorized use of copyrighted materials,¹²¹ is also up for wholesale private bargain. Take the recent case of *Metal Bulletin Ltd. v. Scepter, Inc.*,¹²² a claim brought by Metal Bulletin, an English publisher of works concerning metal and steel. According to the complaint, a Tennessee-based corporation specializing in aluminum dross and scrap recycling purchased a subscription to Metal Bulletin’s service and, contrary to the terms and conditions of the subscription, allowed employees to access Metal Bulletin’s copyrighted material using a single username and password.¹²³ Notably, the “Law and Jurisdiction” provision found in the subscription agreement provided that “any dispute or claim arising out of or in connection with the terms . . . will be governed by the laws of England and Wales”¹²⁴ Metal Bulletin pleaded with the court to strike down the choice-of-law clause, reasoning that “application of English law would be fundamentally unfair because it lacks the remedies available under United States copyright law.”¹²⁵

¹¹⁷ *Id.* at *9.

¹¹⁸ *See id.* at *10 (“The record shows that while Suzlon may not pursue a RICO cause of action in arbitration, it may pursue claims and remedies arising from the facts it uses as the basis of the RICO claim.”).

¹¹⁹ *See* 17 U.S.C. § 504(c) (2012) (providing statutory damages of up to \$30,000 for each infringed work, and for damages of up to \$150,000 for each willfully infringed work).

¹²⁰ Pamela Samuelson, Phil Hill & Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, But For How Long?*, 60 J. COPYRIGHT SOC’Y U.S.A. 529, 530 (2012).

¹²¹ *See* *Davis v. Gap Inc.*, 246 F.3d 152, 172 (2d Cir. 2001) (“The purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2).”).

¹²² 192 F. Supp. 3d 377 (S.D.N.Y. 2016).

¹²³ *See id.* at 379.

¹²⁴ *Id.* at 379.

¹²⁵ *Id.*

The court was not convinced. Dismissing the copyright infringement claim at the motion to dismiss stage, the court reasoned that “[i]t is not enough for Metal Bulletin to establish that United States copyright law implicates important public policy interests or that enforcing the choice-of-law clause would result in forfeiture of certain statutory remedies.”¹²⁶ Under the court’s reasoning, the availability of the breach of contract claim (presumably under English law, adjudicated in federal court) was a sufficient remedy for Metal Bulletin, notwithstanding the court’s acknowledgement that “those damages are less than the statutory damages that might be available to Metal Bulletin under United States Copyright Law.”¹²⁷ Party sophistication was presumably factored into this analysis, as the court expressly noted that it was Metal Bulletin that drafted the contract.¹²⁸

B. *The Modern Scholarly Account*

The modern jurisprudential embrace of unconnected choice of law reflects the vindication of a fairly old doctrine recognizing that private parties are entitled to choose the law governing their relationships. This notion, which is closely associated with the doctrine of party autonomy in private international law,¹²⁹ emphasizes the inherent freedom of contracting parties to select the terms of their agreement, including the law governing their engagements.

More recently, the doctrine of party autonomy has received intellectual backing from scholars who endorse unconnected choice of law from an efficiency standpoint. Drawing on Ronald Coase’s seminal work on transactional costs,¹³⁰ the influential work of Erin O’Hara O’Connor and Larry Ribstein advocates enforcing “contractual choice-of-law and choice-of-forum clauses irrespective of whether the parties have any contact with the chosen jurisdiction.”¹³¹ This line of thought, which tends to view the law as a bundled product supplied by states,¹³² has gained substantial traction in the literature.¹³³ These scholars—to whom I refer as proponents of the Efficiency

¹²⁶ *Id.* at 382.

¹²⁷ *Id.*

¹²⁸ *See id.* (“Metal Bulletin’s attack on the choice-of-law clause—a clause, it bears mentioning, that Metal Bulletin itself drafted—fails.”).

¹²⁹ *See generally* Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861 (2009).

¹³⁰ *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–19 (1960) (describing transaction costs for legal rules).

¹³¹ O’Hara & Ribstein, *Efficiency*, *supra* note 10, at 1197–98.

¹³² In a widely celebrated book, Ribstein and O’Hara are explicit in referring to the relationship as “the law market.” *See* O’HARA & RIBSTEIN, *LAW MARKET*, *supra* note 9, at 1.

¹³³ *See, e.g., id.*; Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 884–85 (2002); Jonathan Macey & Anna Manasco Dionne, *Offshore Finance and Onshore Markets: Racing to the Bottom, or Moving Toward Efficient?*, in OFFSHORE FINANCIAL CENTERS AND REGULATORY COMPETITION 8, 8–10 (Andrew P. Morriss ed., 2010); O’Hara & Ribstein, *Efficiency*, *supra* note 10, at 1152–57; Erin A. O’Hara, *Economics, Public Choice, and the Perennial Conflict of Laws*, 90 GEO. L.J. 941, 943 (2002); Larry E. Ribstein & Bruce H.

School—base their policy prescription on the principles of wealth maximization and individual choice, reasoning that eliminating restrictions on private contracting will “minimize the costs of contracting for efficient laws or avoiding inefficient ones.”¹³⁴

Permitting parties to choose the applicable law, to Efficiency School scholars, promises several important benefits. First, as in any market in which buyers are exposed to a larger number of sellers, private entities are able to maximize social welfare by avoiding costly and inefficient laws.¹³⁵ Second, contractual freedom encourages jurisdictional competition, incentivizing states to produce efficient rules.¹³⁶ Under this framework, a state’s refusal to enforce privately stipulated law is viewed as a perverse byproduct of interest group pressures that produce inefficient rules governing private transactions.¹³⁷ These scholars focus on the need to depart from a “government interest” analysis to one focusing on individual interest, which requires a complete de-territorialization of the law.¹³⁸

Efficiency School scholars owe their intellectual debt to corporate law, a body of law governing the relation between a firm’s shareholders and managers.¹³⁹ In the United States, corporate law is principally a matter of state law, with corporations given the freedom to incorporate in any state without having physical presence in the state.¹⁴⁰ The “internal affairs rule,” in turn, allows for the law of the state of incorporation to govern the relationship between the shareholders and the managers.¹⁴¹

Kobayashi, *State Regulation of Electronic Commerce*, 51 EMORY L.J. 1, 41–46 (2002); Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 261–64 (1992); Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 134 (2008).

¹³⁴ O’Hara & Ribstein, *Efficiency*, *supra* note 10, at 1152–57 (citing Coase, *supra* note 130, at 15–19).

¹³⁵ See O’HARA & RIBSTEIN, *LAW MARKET*, *supra* note 9, at 21.

¹³⁶ See *id.* at 27–28. Closely related to this idea is the famous Tiebout Model. See Charles E. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–21 (1956). Under Charles Tiebout’s model, the threat of physical exit from the state creates an incentive for state to provide better benefits, including the bundle of laws imposed on its subjects. Legal systems in which parties may “exit” the bundle of domestic rules and regulations through choice-of-law provisions, to Efficiency School theorists, amount to similar pressures on governments. See O’HARA & RIBSTEIN, *LAW MARKET*, *supra* note 9, at 27–28.

¹³⁷ See, e.g., Erin A. O’Hara, *Opting out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1552–53 (2000); Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 247 (1992) (“[S]tates’ refusal to enforce contractual choice of law can be explained by interest group pressures.”).

¹³⁸ See O’Hara & Ribstein, *Efficiency*, *supra* note 10, at 1151–52.

¹³⁹ See ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 1 (1993).

¹⁴⁰ See *id.* at 1–3. This principle is perhaps best documented by Delaware’s preeminent status as the primary supplier of corporate law to major corporate entities in the United States.

¹⁴¹ The internal affairs doctrine “is a conflict-of-laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders” *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

Notwithstanding William Cary's famous indictment accusing Delaware corporate law as facilitating a socially undesirable "race for the bottom,"¹⁴² American corporate law remains largely de-territorialized, in part owing to the dominant belief that jurisdictional competition between states to attract tax revenues generated by corporate charters produces a "race to the top" culminating in efficient laws.¹⁴³ It is no coincidence that Efficiency School theorists explicitly rely on this analogy to corporate law.¹⁴⁴ Pointing to the de-territorialized nature of American corporate law, Efficiency School scholars tend to cast territorial limits on contractual freedom as a result of pro-regulatory interest groups resisting the "competitive pressures of the law market."¹⁴⁵ This approach has gained the support of a number of intellectual leaders of our time, including Professor Roberta Romano, albeit in the limited context of leaving securities law to private choice.¹⁴⁶

To be sure, the growing prevalence of private parties controlling the law and procedure governing private disputes has not completely escaped scholarly criticism. A dominant critique—which I refer to as the Proceduralist Critique—focuses on explaining how privately curated procedural rules erode the substantive rights of weaker parties and undermine democratic participation and transparency.¹⁴⁷

For instance, mass arbitration provisions ubiquitous in standard form contracts threaten the viability of certain lawsuits against sophisticated corporate entities, even when the weaker party could not realistically negotiate over the terms of the contract. The recent Supreme Court case of *American Express v. Italian Colors Restaurant* vividly illustrates this principle.¹⁴⁸ In that case, retail merchants alleged that American Express used its market power to impose a tying arrangement in violation of the Sherman Act.¹⁴⁹

¹⁴² William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) (describing American corporate law as encouraging a "race for the bottom").

¹⁴³ Professor Roberta Romano, in a celebrated work, conceptualizes corporate law as "products, whose producers are states and whose consumers are corporations." ROMANO, *supra* note 139, at 6.

¹⁴⁴ See, e.g., Larry E. Ribstein & Erin A. O'Hara, *Corporations and the Market for Law*, 2008 ILL. L. REV. 661, 661–62.

¹⁴⁵ *Id.* at 667. According to Larry Ribstein, "[b]y facilitating competition among legal regimes, the enforcement of contractual choice of law has efficiency implications in the same way that the 'internal affairs rule' in corporate law has generated interstate competition to provide corporate charters." Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999, 999 (1994).

¹⁴⁶ See Roberta Romano, *Corporate Law as the Paradigm for Contractual Choice of Law*, in THE FALL AND RISE OF FREEDOM OF CONTRACT, 370, 378 (F.H. Buckley ed., 1999).

¹⁴⁷ See, e.g., Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1334 (2012); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 507–08, 523 (2011); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 622–24 (2005).

¹⁴⁸ See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238–39 (2013).

¹⁴⁹ See *id.* at 231–32. According to the Department of Justice, a tying arrangement occurs when "through a contractual or technological requirement, a seller conditions the sale or leases of one product or service on the customer's agreement to take a second product or service."

While the Sherman Act indisputably provided the restaurant with a viable cause of action, the contract contained several provisions that would make it unfeasible to bring an antitrust claim.¹⁵⁰ As Justice Kagan explained in her fiery dissent against the majority opinion enforcing the contract:

“[T]he agreement as applied in this case cuts off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs. Amex has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights.”¹⁵¹

A growing number of prominent legal academics have responded to such line of cases by exposing the far-reaching side effects of liberally enforcing agreements to arbitrate, particularly in the context of unequal bargaining power between contracting parties. Professors Judith Resnik, Margaret Radin, and J. Maria Glover are leading voices in this movement. Critically examining the Supreme Court’s FAA jurisprudence, Professor Glover contends that forms of procedural contracting have had the effect of “eroding substantive law,” explaining that “the shift from public lawsuits to private arbitration now also threatens values and mechanisms of lawmaking.”¹⁵² Professor Resnik assesses that the rise of private arbitration has resulted in an “unconstitutional evisceration of statutory and common law right.”¹⁵³ While arbitration in theory is an efficient way to resolve disputes involving the same substantive law that a court might apply, it has amounted to a system that “strips individuals of access to courts to enforce state and federal rights, strips the public of its right of audience to observe state-empowered decision makers imposing legally binding decisions, and strips the courts of their obligation to respond to alleged injuries.”¹⁵⁴ And in a widely acclaimed book, Professor Radin illustrates how the boilerplate contracts that pervade our society degrade traditional notions of consent.¹⁵⁵

Other exciting voices have joined the movement. Professor David Noll shows how consumer and employment contracts may threaten Congress’s ability to accomplish substantive regulatory objectives.¹⁵⁶ Professor Tal Kastner writes from a literary theory perspective demonstrating how stories told by courts concerning boilerplate consumer contracts further inequity while exacerbating existing disparities in power.¹⁵⁷

U.S. DEP’T OF JUSTICE, *Chapter 5: Antitrust Issues in the Tying and Bundling of Intellectual Property Rights*, in ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION, <https://www.justice.gov/atr/chapter-5-antitrust-issues-tying-and-bundling-intellectual-property-rights> [https://perma.cc/Z6UY-3WT4].

¹⁵⁰ See *Am. Express. Co.*, 570 U.S. at 239 (Thomas, J., concurring).

¹⁵¹ *Id.* at 246 (Kagan, J., dissenting).

¹⁵² Glover, *Disappearing*, *supra* note 13, at 3052.

¹⁵³ Resnik, *Diffusing Disputes*, *supra* note 13, at 2804.

¹⁵⁴ *Id.* at 2811.

¹⁵⁵ See RADIN, *supra* note 14.

¹⁵⁶ See generally Noll, *Regulating Arbitration*, *supra* note 13.

¹⁵⁷ See, e.g., Tal Kastner, “I’m Just Some Guy”: *Positing and Leveraging Legal Subjects in Consumer Contracts and the Global Market*, 23 *IND. J. GLOBAL LEGAL STUD.* 531, 532–33

To a certain extent, the Proceduralist Critique has gained some traction in court decisions that have struck down choice-of-law provisions or forum selection clauses in the name of protecting the weaker party.¹⁵⁸ Perhaps most notably, courts have consistently refused to enforce choice-of-law clauses in the context of franchise agreements and consumer contracts.¹⁵⁹

Notwithstanding these critiques, the doctrine of party autonomy has gained widespread acceptance in both courts and in academic ivory towers when it comes to freely negotiated agreements between sophisticated commercial entities. This should be unsurprising, given that the Proceduralist Critique generally focuses on the lopsided bargaining power resulting in unequal or non-existent negotiation over material terms of the contract, almost exclusively in the domestic law context. Indeed, even the academics most critical of standard form consumer and employment contracts have little to say about commercial agreements between sophisticated commercial entities.¹⁶⁰

Underappreciated in the modern scholarly account is the role that private litigants assume in not only resolving legal disputes, but also activating and enforcing substantive policy embedded in regulatory statutes. Viewed in this light, the jurisprudence protecting the “weaker party” is an incomplete remedy to vindicate the interest of the public codified in a wide range of regulatory statutes. The next Part develops a theoretical framework focused on the rights of the general public in order to unpack the subtle but important

(2016); Tal Kastner, *How 'Bout Them Apples: The Power of Stories of Agreement in Consumer Contracts*, 7 DREX. L. REV. 67, 68–71 (2014).

¹⁵⁸ Besides franchise agreements and consumer contracts, maritime law cases involving employment agreements between ship operators and crewmembers is an area where some (but not all) courts have allowed for a meaningful second review of arbitration awards involving statutory claims. A recent case of note is *Aggarao v. MOL Ship Management Co.*, 675 F.3d 355 (4th Cir. 2012), where a maritime employment agreement between a foreign ship operator and a Filipino crewmember required arbitration in the Philippines under Filipino law, notwithstanding the undisputed fact that the crewmember was severely injured while the ship was docked at an American port. *Id.* at 360. The Fourth Circuit, per usual, compelled arbitration, despite potential erosion of the plaintiff’s federal statutory claims under the Jones Act and the Seaman’s Wage Act. *Id.* at 373 n.16 (reasoning that “[i]t is possible that the Philippine arbitrator[s] will apply United States law.” (emphasis added)). Relying on the choice-of-law clause, however, the arbitrator in the Philippines held that U.S. law was inapplicable and rendered a small award under Filipino law. Upon review of the award, the District Court in Maryland took the unusual step of denying recognition and enforcement of the award, reasoning that it violated the longstanding American public policy of “protecting injured seafarers and providing them special solicitude.” *Aggarao v. MOL Ship Mgmt. Co.*, Civil No. CCB–09–3106, 2014 WL 3894079, at *14 (D. Md. Aug. 7, 2014).

¹⁵⁹ See O’Hara, *supra* note 137, at 1558–69; see also O’Hara O’Connor & Ribstein, *Preemption*, *supra* note 17, at 692 (“States do not uniformly enforce choice-of-law clauses in some contract settings, however, including contracts containing noncompete clauses, franchise contracts, and consumer contracts.”).

¹⁶⁰ See, e.g., Resnik, *Diffusing Disputes*, *supra* note 13, at 2808 (“[T]he focus in my discussion is not on international sovereign debt or trade arbitrations. Rather, my concerns are about mandates applied to hundreds of millions of consumers and employees, obliged to arbitrate not because of choice but because public laws have constructed requirements to use private decision making in lieu of adjudication.”).

roles that private actors assume in constructing and safeguarding the overall regulatory environment.

III. THE NORMATIVE DESIRABILITY OF UNFETTERED CONTRACTUAL PRIVATE ORDERING

On the standard account of American democratic theory, Congress may pass laws that restrict individual freedom and private commerce on grounds that the democratically elected legislature derives its authority from the majoritarian consent of those whom the law seeks to govern.¹⁶¹ The coercive authority of the law is generally based on the theory of consent—more specifically, the subject’s consent (usually tacit or implicit) to abide by the sovereign’s law. Ever since Thomas Hobbes posited that an individual’s self-interest requires consent to governmental authority,¹⁶² political philosophers have advanced various social contract theories to explain why individuals must obey the sovereign’s law.¹⁶³ Owing their theoretical roots to these political philosophers, mainstream legal scholars today understand that the state’s coercive power to impose law is derived from the implicit consent of individuals.¹⁶⁴

¹⁶¹ Although federal judges are unelected, federal courts that interpret and give meaning to those laws are considered legitimate because federal judges are chosen indirectly by the people through the process of voting for elected officials. Or at least that is how the story goes, notwithstanding the ghost of Alexander Bickel’s famous articulation of the counter-majoritarian difficulty. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”).

¹⁶² THOMAS HOBBS, *LEVIATHAN* 71–72 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) (“Feare of oppression, disposeth a man to anticipate, or to seek ayd by society: for there is no other way by which a man can secure his life and liberty.”); see also David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 *YALE L.J.* 620, 636 (2015) (“Hobbes argued that the instability of the state of nature drives individuals to seek civil society by transferring to the political community their natural liberty to judge threats.”). Of course, non-democratic forms of social contract theory date back much further than Hobbes. See Richard Tuck, *Hobbes and Democracy*, in *RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 171, 185 (Annabel Brett & James Tully eds., 2006) (“[W]hereas earlier writers (including Aristotle himself) had taken something like a mixed state to be paradigmatic, and had interpreted democracy as ideally a kind of mixed government, Hobbes took democracy to be paradigmatic, and ruthlessly interpreted all other forms (even monarchy) as like democracy.”).

¹⁶³ Social contract theorists span John Locke to Immanuel Kant and Jean-Jacques Rousseau, and more recently John Rawls and Robert Nozick. John Locke, for instance, famously wrote that residing or remaining in a country, and perhaps even “walking upon the highways” of a sovereign amounting to tacit acceptance of an obligation to obey the law. See JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* § 119 (T. Peardon ed., 1952) (1690).

¹⁶⁴ Lea Brilmayer, *Consent, Contract, Territory*, 74 *MINN. L. REV.* 1, 5 (1989) (“[T]he state’s power is legitimate because the defendant has consented. Consent is implicit: the defendant’s entrance into the state amounts to a tacit voluntary subjection to state authority.”); see also Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 *U. FLA. L. REV.* 293, 305 (1987) (“The rationale underlying Locke’s territorialism was tacit consent. Locke argued, for instance, that walking upon the highways or residing in the territory amounted to a consent to the sovereign’s authority.”). This understanding is also a familiar rationale supplied by semi-

The consent-based reasoning at least partially accounts for the intellectual seduction of party autonomy. Contracting parties' ex ante agreement to abide by the laws of a particular state appears to substantially undercut questions of legitimacy. Choice-of-law provisions, after all, constitute an explicit form of consent by contracting parties to be governed by the chosen jurisdiction's laws. This is especially true in the context of cross-border commercial agreements that are usually entered into by sophisticated commercial entities that have presumably bargained for their joint interests.¹⁶⁵ This line of thinking is also consistent with the adversarial tradition of American civil litigation,¹⁶⁶ since defendants are routinely allowed to abandon a host of procedural safeguards by consent, such as waiving objections to personal jurisdiction.¹⁶⁷ This understanding, indeed, is deeply ingrained in the Supreme Court's jurisprudence governing cross-border private commercial transactions. In the seminal case of *M/S Bremen v. Zapata Off-Shore Co.*,¹⁶⁸ for instance, the Court instructed lower courts to enforce both choice of law and choice of forum clauses in cases of "freely negotiated private international agreement[s]."¹⁶⁹

A closer examination, however, reveals the precarious intellectual foundation underlying this seemingly robust line of modern jurisprudence. Specifically, public law claims that are routinely implicated in private commercial agreements today complicate this analysis because public law claims often entail litigation over laws that are designed to vindicate the interests of the society in general, rather than solely to provide compensation for the plaintiff. The mandatory nature of these laws—that is, private parties may not stipulate to waive or opt out of these claims, regardless of party sophistication or consent¹⁷⁰—may be an indication that these laws are designed to force private parties to internalize certain costs not fully internalized by the private parties.¹⁷¹ Thus, for instance, mandatory laws governing

nal Supreme Court cases on personal jurisdiction. *See, e.g.*, *Hess v. Pawloski*, 274 U.S. 352, 356–57 (1927) (upholding non-resident motorist statute based on implicit consent).

¹⁶⁵ Indeed, party sophistication is often a crucial factor that courts weigh in determining the validity of choice-of-law provisions. *See, e.g.*, *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1153 (Cal. 1992) ("When two sophisticated, commercial entities agree to a choice-of-law clause like the one in this case, the most reasonable interpretation of their actions is that they intended for the clause to apply to all causes of action arising from or related to their contract.").

¹⁶⁶ *See* ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 9–16 (2003).

¹⁶⁷ For an excellent commentary on the range of procedural matters that private parties can draft and assent to before disputes arise, see Davis & Hershkoff, *supra* note 151, at 507–08, 523; *see also* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

¹⁶⁸ 407 U.S. 1 (1972).

¹⁶⁹ *Id.* at 12–13.

¹⁷⁰ For instance, the Securities Act of 1933 and the Securities Exchange Act of 1934 "expressly disables the parties from attempting to avoid their liabilities with direct contractual waivers." O'Hara, *supra* note 137, at 1568.

¹⁷¹ *See* Trachtman, *supra* note 31, at 2–3.

the public disclosure of certain securities products are in place in part to combat negative externalities generated by securities fraud.¹⁷²

Public law, of course, is subject to many competing conceptions.¹⁷³ Public law is perhaps most commonly conceptualized as the categories of rules that govern the relationship between the government and individuals (e.g., taxation, criminal procedure, and constitutional law);¹⁷⁴ to be distinguished from private law, which purports to govern the relationship between individuals (e.g., contracts, torts, property, and corporations).¹⁷⁵ This classic approach has almost been too easy to criticize.¹⁷⁶ If the state attempts to depart from its role of purely facilitating dealings among private parties with directives and restrictions in the name of public good, even contract law—the paradigmatic tenet of private law—appears to cross the line between private and public law.¹⁷⁷ I use the term public law differently, in part to avoid the historical intellectual baggage associated with this private/public law distinction.¹⁷⁸

By public law, I refer to the set of statutory laws—derived from both federal and state statutes—that are designed not only to compensate plain-

¹⁷² See Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1907–08 (2013).

¹⁷³ Randy E. Barnett, *Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267, 271 (1986) (identifying four different ways to distinguish between public law and private law); see also Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1795 (2009) (“By ‘public law’ we mean constitutional and international law—legal regimes that both constitute and govern the behavior of states and state actors.”).

¹⁷⁴ See Barnett, *supra* note 173, at 271. This conception owes its intellectual debt to Roman law, which made a distinction between public law and private law. The former was “concerned with the function of the state, and included in particular constitutional and criminal law; the latter was concerned with relations between individuals.” *Id.*

¹⁷⁵ See *id.* (“Private law subjects would include contract, torts, property, corporations, agency and partnership, trusts and estates, and remedies—subjects defining the enforceable duties that all individuals owe to one another.”). Morton Horwitz dates the emergence of this public-private distinction to the nineteenth century. See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (“One of the central goals of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law—public law—and the law of private transactions—torts, contracts, property, and commercial laws.”).

¹⁷⁶ See, e.g., Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1442–43 (1982).

¹⁷⁷ See Michael Rosenfeld, *Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 INT'L J. CONST. L. 125, 126 (2013); see also Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 764–65 (1983). This debate has been hashed out in many important pieces of legal scholarship, and need not be rehashed here. It merely highlights that disputes taking place pursuant to private agreements, in many instances, involve not just disputes designed to compensate the injured party with sufficient damages, but often disputes that will simultaneously deter socially undesirable activities. See, e.g., Robert Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072, 1073 (1969) (“[I]t is expected that private treble damages litigation in the antitrust field . . . will insure some minimal deterrent against local and not too flagrant violations of law which the public enforcement agencies, because of limited resources, would almost certainly ignore . . .”).

¹⁷⁸ See Stone, *supra* note 176, at 1441.

tiffs for injuries inflicted by defendants, but also simultaneously serve the purpose of effectuating certain public goals envisioned by legislatures.¹⁷⁹ For the purpose of this Article, I focus principally on the deterrence purpose underlying public regulatory statutes that are designed to protect the workings of the market, including the Sherman Act, the Clayton Act, and the RICO Act.

Statutory design, with varying degrees of clarity, reveals particular legislative aims. In the cases of public regulatory statutes, the incentive structure written into the statutes often reflects the legislation's aim to mobilize private litigants.¹⁸⁰ Consider the damages available to plaintiffs under the RICO Act and the Sherman Act. These statutes, as well as several others,¹⁸¹ expressly call for treble damages, meaning that defendants are required to pay three times the injury suffered by the plaintiffs if the plaintiffs prevail. By overcompensating the injured plaintiffs, the damages are designed to discourage other actors from violating antitrust and anti-racketeering laws.¹⁸² Unlike traditional private law remedies, which are generally understood as the state's minimum effort to ensure that agreements between private entities are respected, treble damages are in place for penal and deterrence purposes, aiming to control the expectation and behavior of *non-litigants*.¹⁸³ The mandatory fee shifting rules are another key instrument employed by legislatures to encourage private litigants to activate public regulatory statutes. Plaintiffs who successfully establish injury under the Sherman Act or the

¹⁷⁹ Cf. Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 223 (2001). I focus here on statutory law in part to avoid engaging in the debate over the counter-majoritarian difficulty endemic to certain forms of judicial lawmaking. While I focus on statutory law, remedies provided in common law—especially in the area of tort law—also serve deterrent purposes. See, e.g., Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 352 (2003). While beyond the scope of this project, legal regime shopping via choice-of-law provisions can also alter the types of defenses available to contracting parties, which may play an important part in effectuating important public goals.

¹⁸⁰ For instance, the Clayton Act's statutory framework—including the private right of action, state-enforcement of federal law provision, treble damages, and fee-shifting provision—reveals Congress's intention to deploy private litigants to ensure significant compliance with federal antitrust laws. See Buxbaum, *supra* note 179, at 223.

¹⁸¹ See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 66–68 (2010).

¹⁸² See Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 115–16 (1993).

¹⁸³ For a classic exposition, see JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 200–01 (1948) (1789). See also Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 198–99 (1968); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1205–08 (1985) (providing contemporary accounts). The deterrence rationale underlying punitive damages provisions is widely found in state law jurisprudence, as well. New York law, for instance, makes it possible for plaintiffs to collect punitive damages for claims sounding in tort, fraud, breach of contract, breach of fiduciary duty, and deceptive business practices. See John M. Leventhal & Thomas A. Dickerson, *Punitive Damages: Public Wrong or Egregious Conduct? A Survey of New York Law*, 76 ALB. L. REV. 961, 961 (2013). The controlling question for courts in deciding whether to award punitive damages under New York law is whether plaintiffs can establish "public wrong" or "egregious conduct." See *id.*

RICO Act, for instance, recover, in addition to treble damages, their reasonable attorneys' fees.¹⁸⁴

To be sure, an adverse market condition resulting in economic loss does not necessarily entail a right to legal recourse.¹⁸⁵ In the United States, the standing doctrine precludes plaintiffs tangentially affected by a public harm from suing when the causal link between the statutory violation and the injury suffered is too attenuated.¹⁸⁶ Moreover, regulatory space need not be purely territorial, especially in today's global economy where physical transactions occurring entirely outside of a jurisdiction's borders may have far-reaching consequences for the local economy.¹⁸⁷ Rather, the concept recognizes the implicit principle traceable in our jurisprudence that the general public ought to have some control over how to regulate the market that affects its economic interests.¹⁸⁸

¹⁸⁴ See 15 U.S.C. § 15 (2012) (providing that successful plaintiffs under the Sherman Act "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee"); see also 18 U.S.C. § 1964(c) (2012) (providing that a successful plaintiff under civil RICO "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"). Permutations are endless, in terms of statutes that rely on private litigants to effectuate a particular policy. The civil rights fee shifting statute, for instance, authorizes attorney fees to the prevailing party, incentivizing private litigation to enforce federal civil rights laws. See Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 L. & CONTEMP. PROBS. 233, 233 & n.7 (1984). Other statutes, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), simply permits private parties to recover "necessary costs of response . . . consistent with the national contingency plan," creating a circuit split on whether private parties may recover attorney's fees in cost recovery. See 42 U.S.C. § 9607(a)(4)(B); see also Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 32 (2003).

¹⁸⁵ See John G. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1991) ("One way federal courts ensure that they have a 'real, earnest, and vital controversy' before them is by testing the plaintiff's standing to bring suit. The plaintiff must allege at the pleading stage, and later prove, an injury that is fairly traceable to the defendant's challenged conduct and that is likely to be redressed by the relief sought. If the plaintiff cannot do so, the court must dismiss the case as beyond its power to decide—no matter when in the litigation the flaw is discovered or arises." (internal citations omitted)); see also Buxbaum, *supra* note 179, at 224 ("Standing requirements in antitrust law are designed to bar plaintiffs from asserting public regulatory interests when the injury suffered was in fact remote from the antitrust violation alleged.").

¹⁸⁶ See, e.g., *Blue Shield of Va. v. McCreedy*, 457 U.S. 465, 477 (1982) ("Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.").

¹⁸⁷ Indeed, the effects test developed for many areas of the law—most famously antitrust laws—largely reflects this understanding. See Austen L. Parrish, *Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1474 (2008) ("With the advent of the effects test, however, if foreign conduct substantially affects the United States, then extraterritoriality is now often assumed. Accordingly, courts have employed the effects test to apply federal laws extraterritorially, despite the lack of evidence that Congress intended this reach."). Intangible assets—including debts, wire transfer and intellectual property—also have no particular physical location. See Aaron D. Simowitz, *Siting Intangibles*, 48 N.Y.U. J. INT'L L. & POL. 259, 260 (2015).

¹⁸⁸ Of course, local regulatory interest over transactions involving foreign jurisdictions may be limited by various other doctrines, including international comity. See William Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2093–94 (2015).

Choice-of-law provisions that essentially allow commercial entities to convert otherwise mandatory laws into default laws should be scrutinized especially in light of how we have traditionally limited access to courts through various standing doctrines. In addition to the constitutional standing requirement, which requires litigants to have a “personal stake” in the dispute,¹⁸⁹ regulatory statutes often impose rigorous *statutory* standing requirements. Both requirements work to amplify the effects of contractual choice of law, precluding the already limited pool of litigants from activating relevant statutes.¹⁹⁰

To have standing under federal antitrust laws, for instance, the plaintiff must be “an ‘efficient enforcer’ of the antitrust laws.”¹⁹¹ Employing this standard, “courts have typically limited the types of individuals that may bring an antitrust action to direct competitors or consumers.”¹⁹² It is no coincidence, then, that a significant number of antitrust claims are typically brought by end-consumers¹⁹³ and other parties within pre-existing contractual relationships.¹⁹⁴

Similarly, to bring a RICO claim, the defendant’s violations must be “a proximate cause of the plaintiff’s injury.”¹⁹⁵ The test of proximate cause in turn asks whether the defendant’s acts “are a substantial factor in the sequence of responsible causation,” and whether “the injury is reasonably foreseeable or anticipated as a natural consequence.”¹⁹⁶ It is for this reason that RICO cases are traditionally litigated between parties in pre-existing

¹⁸⁹ Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the ‘Case or Controversy’ Requirement*, 93 HARV. L. REV. 297, 298 (1979) (“The standing doctrine holds that one may not assert the rights of other persons.”).

¹⁹⁰ *See, e.g.*, Denney v. Deutsche Bank AG, 443 F.3d 253, 266 (2d Cir. 2006) (“RICO standing is a more rigorous matter than standing under Article III.”).

¹⁹¹ Gatt Commc’ns, Inc. v. PMC Assocs., 711 F.3d 68, 78 (2d Cir. 2013). There are various academic theories on who qualifies as an “efficient enforcer” of antitrust laws. *See, e.g.*, Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075, 1086 (1980) (describing an account where “the person harmed is the most efficient enforcer of the law”). In case law, the term “efficient enforcer” is often used in unmoored ways to describe the “proper plaintiff” bringing antitrust claims. *See* Paycom Billing Servs., Inc. v. Mastercard Int’l, Inc., 467 F.3d 283, 290 (2d Cir. 2006).

¹⁹² Port Dock & Stone Corp. v. OldCastle Ne., Inc., No. 05 Civ. 4294(DRH)(ARL), 2006 WL 2786882, at *3 (E.D.N.Y. Sept. 26, 2006), *aff’d*, 507 F.3d 117 (2d Cir. 2007); *see also* Solent Freight Servs., Ltd. v. Alberty, 914 F. Supp. 2d 312, 319 (E.D.N.Y. 2012) (quoting George Haug Co. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136, 140 (2d Cir. 1998)) (“Generally, a plaintiff that is ‘neither a consumer nor a competitor in the market in which trade was restrained’ does not have standing to allege an antitrust injury to that market.”).

¹⁹³ *See, e.g.*, In re Universal Serv. Fund Tel. Billing Practices Litig., 300 F. Supp. 2d 1107, 1114 (D. Kan. 2003) (deciding Sherman Act claim arising out of terms of conditions contract between cellular carriers and consumer).

¹⁹⁴ *See, e.g.*, JLM Indus., Inc. v. Stolt-Nielsen SAS, 387 F.3d 163, 167 (2d Cir. 2004) (deciding Sherman Act claim arising out of a standard form contract for shipping transaction).

¹⁹⁵ Standardbred Owners Ass’n v. Roosevelt Raceway Assocs., 985 F.2d 102, 104 (2d Cir. 1993).

¹⁹⁶ *Id.* (quoting Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23–24 (2d Cir. 1990)).

contractual relationships. Indeed, choice-of-law provisions requiring the application of foreign law have precluded RICO claims in a wide range of settings, including disputes arising under distribution agreements,¹⁹⁷ underwriting agreements,¹⁹⁸ fiduciary agreements,¹⁹⁹ and sales and logistics services agreements.²⁰⁰

A hypothetical is useful to further illustrate this point. Imagine that a local bank in Cambridge, Massachusetts purchases investment contracts from a multinational insurance company through the company's headquarters in Boston. The standard form investment contract includes a provision requiring any dispute "arising out of or relating to" the investment agreement be arbitrated in London, with English law governing as the exclusive source of law. The parties get into a dispute over whether the undisclosed and unusual concentration of risks underlying the investment contracts operated as a scam. The local bank wants to bring a federal securities fraud claim and a civil RICO claim, as well as a Massachusetts securities law claim against the multinational insurance company. Any dispute that takes place between these entities, however, would presumably be governed by English law in an arbitration proceeding in London, thereby precluding the local bank from bringing these claims. This is the case even if Massachusetts residents—who presumably gave indirect consent to abide by federal law and Massachusetts law—have in no way consented to abide by English law.²⁰¹ English law is binding upon residents of Massachusetts in the sense that it alters the regulatory space that implicates their economic interests. The fact that the *contracting parties* have consented to abide by English law does not solve this problem.

To be sure, not all private disputes involving public law claims trigger this kind of a legitimacy problem. For instance, the legitimacy problem is harder to see where contracting parties from the same jurisdiction agree to be governed by local law to adjudicate disputes. Imagine that the New York Yankees (based in the Bronx, New York) have a dispute with Stubhub (an event ticket seller based in Times Square, New York) over royalty payments for Yankee ticket resales. A choice-of-law provision requires the application of New York law, and a forum selection provision confers exclusive jurisdiction to the New York state courts. Even if a dispute triggers a public law

¹⁹⁷ See *Olsher Metals Corp. v. Olsher*, No. 01-3212-CIV-JORDAN, 2003 U.S. Dist. LEXIS 27516, at *16–17, *25 (S.D. Fl. Mar. 25, 2003) (applying Italian law).

¹⁹⁸ See *Richards v. Lloyd's of London*, 135 F.3d at 1289, 1291–92 (9th Cir. 1998) (en banc) (applying English law).

¹⁹⁹ See *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1170 (10th Cir. 2009) (applying Swiss law).

²⁰⁰ See *Suzlon Infrastructure, Ltd. v. Pulk*, No. H-09-2206, 2010 WL 3540951, at *1–2 (S.D. Tex. Sept. 10, 2010) (applying English law).

²⁰¹ More broadly, the network of similar private contracts can effectively subvert domestic law aimed at deterring securities fraud and commercial racketeering designed to protect Massachusetts residents. This is the problem of "diagonal relationships," first articulated in Professor Lea Brilmayer's landmark work examining the use of governmental power that affects non-citizens outside of the state's territory. See LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* 84 (1989).

claim (e.g., violation of New York's antitrust law),²⁰² this appears to be unproblematic from a legitimacy standpoint. For one, the parties to the agreement have given explicit consent to obey New York law. While the interests of non-signatories (namely locals in New York) are involved, this does not alter the legitimacy equation because New Yorkers have (at least theoretically) given indirect consent to obey New York law, regardless of the litigation between the Yankees and Stubhub.

The Yankees-Stubhub example, in a sense, reveals an unsung virtue of traditional conflict-of-laws theories. Conventional conflict-of-laws theories share a territorial dimension because they concern whether the subject's connections with a state are such as to make it fair to impose the state's law.²⁰³ Recall that the "vested rights" approach focuses on the physical location of the event creating a cause of action,²⁰⁴ while the interest analysis approach turns on the domicile of the litigants or the overall activities related to the cause of action.²⁰⁵ Limits against unfettered imposition of any given state's laws exist under both theories because people (and corporate entities) have rights against the state.²⁰⁶ The territorially configured logic governing both theories implicitly allows local public law to govern locally-connected activities. This is to say that the connection requirement serves as a proxy, albeit a rough one, to align the interest of the local public with that of private litigants. While there is nothing new about transactions involving entities and events involving more than one jurisdiction, the growing prominence of unconnected choice of law fundamentally deviates from traditional conflict-of-laws principles that promote the enforcement of territorially configured regulatory laws.

The problem, of course, is not equally problematic for every dispute, especially when a particular claim does not implicate the interests of non-litigants. Private contract disputes over sufficiency of performance or excuses for non-performance perhaps best illustrate this principle. Such breach of contract claims, which typically involve private law remedies, do not directly implicate the public.²⁰⁷ It is therefore unsurprising that the existing

²⁰² For New York's antitrust law, see N.Y. GEN. BUS. LAW § 340(5) (McKinney 2018).

²⁰³ See Brilmayer, *Rights*, *supra* note 27, at 1295 ("The central role of political legitimacy in this model is the reason for calling these rights *political* rights. While some political rights are rights that arise within a political relationship, such as a right to fair treatment by one's own government, this view is unnecessarily narrow. Another sort of claim is that the individual *lacks* the necessary political connection with the state to make the exercise of its authority legitimate.").

²⁰⁴ See Katherine Florey, *State Courts, Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1073 (2009).

²⁰⁵ See Brilmayer, *Rights*, *supra* note 27, at 1280–82.

²⁰⁶ See *id.*; see also BRILMAYER, *CONFLICT*, *supra* note 35, at 18. As Larry Ribstein explains, "both the vested rights and interest theories emphasize the political power of states to legislate concerning people and events within their borders." Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 371 (2003).

²⁰⁷ See generally Rosenfeld, *supra* note 177.

accounts' treatments of contractual choice of law—particularly ones offered by the Efficiency School—ideally explains the law's role in mediating disputes over claims that are designed solely to govern the relationship between private entities that do not involve the interest of the public. But there are other functions of the law—namely, promoting the public's interest through private litigation.

At this point, one may wonder whether the ability of private parties to stipulate to applicable law is any different from their right to settle a lawsuit, the latter of which is generally uncontroversial. Plaintiffs typically litigate a garden variety of claims in state or federal court, and non-parties generally have no say in whether litigants decide to settle a lawsuit. The dramatic rise in the settlement of civil claims in the past several decades,²⁰⁸ indeed, has come at the cost of democratic participation, deterrence, and egalitarianism.²⁰⁹

Notwithstanding the well-documented perils of mass settlement most commonly associated with Professor Owen Fiss's celebrated work, *Against Settlement*,²¹⁰ it is no secret that settlement is both widespread and even encouraged by judges as a way to expediently resolve disputes and to alleviate the burden on courts dealing with ever-increasing caseload.²¹¹ Indeed, the frequency of civil settlement at least partially accounts for why private arbitration (and assortments of alternative dispute mechanisms) has been readily embraced in the United States: if we allow (and even encourage) private parties to settle, why not let them resolve their disputes outside of courts, with rules that best suit the mutual needs of the contracting parties?²¹²

The growing prominence of unconnected choice of law magnifies the problem articulated by Professor Fiss. This is because the absence of an enforceable choice-of-law clause generally requires the application of the law of a state with the greatest territorial connection to or the most significant interest in applying its law to the factual circumstance at hand. At that point, whether parties settle or not does not completely subvert the effective functioning of a particular regulatory statute, because the terms of settlement would presumably take into account the risk of damages recoverable under

²⁰⁸ See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 522 (2012) ("Since the 1930s, the proportion of civil cases concluded at trial has declined from about 20% to below 2% in the federal courts and below 1% in state courts.").

²⁰⁹ See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

²¹⁰ See generally *id.*

²¹¹ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982) ("In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes . . .").

²¹² See Alexander K.A. Greenawalt, *Does International Arbitration Need a Mandatory Rules Method?*, 18 AM. REV. INT'L ARB. 103, 106 (2007) ("[T]he parties are free to settle their claims and may even fail to pursue them. From this perspective, a party who receives a bad arbitration award may seem little different from a party who has entered into a disadvantageous settlement award that fails to capture the full value of her claim.").

the applicable law.²¹³ That is, the substantive law would play a significant role in shaping the terms of settlement in a way that will at least partially reflect the substantive aim of the law.²¹⁴

While resembling other forms of procedural contracting, the dramatic rise and acceptance of private entities transcending domestic regulatory law itself represents a significant departure from the role private litigants have assumed from the point of view of the American regulatory state. The next Part elaborates on this point and outlines how courts can police contracts that seek an end-run around domestic regulatory law.

IV. CONTRACTUAL PRIVATE ORDERING AND THE ENFORCEMENT OF DOMESTIC REGULATORY LAW

There is nothing inherently pernicious about the explosive growth of borderless private dispute resolution mechanisms. The contractual private ordering of public law is largely a byproduct of private entities attempting to secure a form of dispute resolution that is efficient, predictable, and confidential.²¹⁵ As repeatedly acknowledged by the United States Supreme Court, “[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”²¹⁶ And in many ways, this type of private governance regime—now a staple of the modern economy—could not have been achieved without the remarkable turn in how courts and scholars alike have come to accept private contractual freedom to stipulate the law governing private transactions.

The operation of private agreements that transcend territorially configured rules and regulations, however, is not completely benign towards domestic regulatory law that relies on both private and public enforcement mechanisms to effectuate its substantive aims. The ubiquity of private entities contracting around domestic regulatory statutes suggests, at minimum, that the phenomenon should factor into re-calibrating the overall regulatory

²¹³ Of course, it can often be unclear which law would apply. Presumably, however, litigants would factor that risk into settlement negotiations.

²¹⁴ Indeed, settlement discussions have been documented to consist “largely of the invocation, elaboration, and distinction of principles, rules, and precedents.” Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 639 (1976).

²¹⁵ See Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1200 (2000) (“[S]tudies of mediation and arbitration continue to demonstrate that these ADR tools provide efficient, low cost dispute resolution, while at the same time providing a high degree of party satisfaction.”).

²¹⁶ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 507 (1974); see also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–14 (1972) (“[A]greeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.”).

design.²¹⁷ This Part begins a normative discussion about how the growing prominence of unconnected choice of law ought to influence the discussion on the enforcement of American regulatory law. This is important because a system of regulation is meaningless without an effective enforcement mechanism underlying the law.²¹⁸

After reviewing the structural role assumed by private litigants in the enforcement of statutory law, I explore whether courts should disregard choice-of-law provisions in the name of vindicating the public interest.

A. *Private Litigants as “Private Attorneys General”*

Modern American regulatory law famously relies on diffuse enforcement mechanisms to effectuate its substantive goals. Public regulatory law ranges from statutes that are exclusively enforced by the state through its centralized public administrative agencies (e.g., immigration and tax) to those that are enforced both by bureaucratic agencies *and* private litigants (e.g., antitrust laws and securities regulation). The latter category of laws traditionally relies on a steady flow of private litigants activating the law to effectively vindicate statutory objectives.²¹⁹ Famously referred to as “private attorney generals” by Judge Jerome Frank,²²⁰ private litigants in the United States play an important role in “detering, detecting, and correcting socially harmful violations of the law.”²²¹

The design, at the federal level, reflects Congress’s role as a legislative body enacting but not enforcing or applying the law.²²² While Congress could rely exclusively on administrative agencies to enforce public law, it instead relies on a hybrid structure consisting of both private litigants and public administrative agencies. According to Professor Glover, “private enforcement has been a consequence of deliberate statutory design, and further, of functional limitations of public regulatory bodies’ ability to achieve

²¹⁷ In administrative law, scholars have vigorously debated whether Congress should authorize private actions to enforce federal statutes or when courts should implicitly read in private right of action to a statute. See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 94–96 (2005). Because scholars have focused on whether private rights of action should be available, the extent to which private litigants actually activate available claims to the degree envisioned by legislatures is largely taken for granted.

²¹⁸ See generally J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) [hereinafter Glover, *Structural*].

²¹⁹ Indeed, some areas, including consumer product safety and Title VII employment discrimination, are identified as bodies of law where private parties serve as the “primary enforcers” of the law. See *id.* at 1153–58.

²²⁰ See *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943) (“[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.”).

²²¹ Stephenson, *supra* note 217, at 96.

²²² See U.S. CONST. art. I, § 1.

regulatory objectives.”²²³ In that sense, interests of the public are fused into the remedy available to private litigants under federal statutes.

At the federal level, enhanced financial incentives provided to litigate various statutory claims primarily reflect Congress’s desire to protect the American public in general. The Sherman Act, for instance, is designed to promote fair competition and to protect consumers from collusive and monopolistic practices of business entities. Private litigants play an integral role in shaping this regulatory space. In the words of the Supreme Court, the “private cause of action [is designed] not solely to compensate individuals, but to promote ‘the public interest in vigilant enforcement of the antitrust laws.’”²²⁴ Similarly, the Supreme Court has long described private securities fraud actions as a “necessary supplement” to actions brought by the SEC.²²⁵

Contracts specifying the legal regime governing private commercial transactions are important because they may preclude the contracting parties from litigating otherwise applicable domestic statutes, thereby erasing the incentive structure written into the statutes that are designed to mobilize private litigants. More specifically, a particular statute may be under-enforced when a substantial number of private agreements require the application of foreign law that (1) provides lower damages than otherwise applicable domestic law; or (2) simply does not recognize a private right of action for the particular cause of action recognized by the otherwise applicable domestic statute. This affects regulatory space at both the state and federal levels.

Below, I explore the normative dimensions to the growing prominence assumed by private actors in public governance, focusing on solutions that may be accomplished in the courts.

B. *Judicial Policing of Sophisticated Commercial Contracts*

Whether the state’s interest in deputizing private entities to vindicate the interests of the public may be sufficient to contravene contractual bargaining of sophisticated private entities is an open debate.²²⁶ Currently, courts almost mechanically enforce choice-of-law provisions, even if doing so would substantially undercut rights afforded under otherwise applicable domestic regu-

²²³ Glover, *Structural*, *supra* note 218, at 1146.

²²⁴ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 241 (2013) (quoting *Lawlor v. Nat’l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955)).

²²⁵ See *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), *abrogated on other grounds by Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

²²⁶ For an excellent commentary highlighting the tension between market principles and democratic processes, see David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 3 (2014) (“Neoliberalism, like classical liberalism before it, is also associated with a kind of ideological expansionism, in which market modeled concepts of efficiency and autonomy shape policy, doctrine, and other discourses of legitimacy outside of traditionally ‘economic’ areas. Democracy, however, makes its own demands, which can prove incompatible with capitalist imperatives and hostile to the conceptions of personhood and politics that the latter imperatives entail.”).

latory law.²²⁷ This approach—which entirely focuses on the bargaining rights of the contracting parties—neglects to factor in the interest of the public, as codified in public regulatory statutes.

To be sure, there are several arguments that counsel against judicial intrusion into autonomous, consensual private bargaining. Importantly, private entities do not have an inherent obligation to bring lawsuits.²²⁸ When sophisticated entities bargain away a right to litigate statutory claims, it is unclear whether the state is obligated to step in to police these transactions, absent suggestions of fraud, duress, or unconscionability.²²⁹ Relatedly, there is an important distinction to be drawn between sophisticated commercial contracts and contracts that result from lopsided power structures. If we conceptualize potential claims as species of property,²³⁰ the coerced erosion of property rights attributable to the inability of one side to bargain over the terms of the agreement can be an important rationale for policing these transactions.²³¹ However, contracts between sophisticated commercial entities require a different paradigm. As a matter of equity, it is questionable whether sophisticated entities that have presumably bargained away statutory claims *ex ante* deserve to have such claims reinstated.

But private disputes arising out of or related to modern day commercial transactions often implicate the interests of the general public. Those interests undoubtedly give enough legitimacy to any given jurisdiction wishing to impose certain regulatory rules on commercial actors and transactions with a sufficient nexus to that jurisdiction.

It is for this reason that judges may and should strike down choice-of-law provisions that have the effect of parties opting out of otherwise applicable mandatory law.²³² I focus on mandatory laws because those laws are often designed to force regulated entities to internalize certain costs on third parties that the regulated entities do not otherwise fully absorb.²³³ For in-

²²⁷ See *supra* Section II.A.

²²⁸ See FARHANG, *supra* note 181, at 7 (“[T]he decision to pursue enforcement litigation will lie with private actors pursuing their own economic interests, not with state officials . . .”).

²²⁹ Fraud, duress, or unconscionability are indeed generally applicable contract defenses that would also invalidate arbitration agreements. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

²³⁰ See Resnik, *Diffusing Disputes*, *supra* note 13, at 2810 (conceptualizing legal claims as “species of property”).

²³¹ See RADIN, *supra* note 14, at 213 (arguing that boilerplate contracts should be “declared invalid in toto”).

²³² To be clear, my normative stance against the enforceability of choice-of-law provisions only applies to mandatory laws, or laws that parties cannot avoid by direct contractual waivers. Claims that do not involve the applicability of mandatory law (for example, much of contract law) may be governed by the law chosen by the parties, so long as there is a valid agreement between the contracting parties.

²³³ See Trachtman, *supra* note 31, at 17 (arguing that the mandatory nature of certain statutes, including antitrust, most securities regulation, and practically all criminal law may exist “where the regulated person does not absorb all of the effects, adverse, or beneficial, of his or her action”).

stance, a plaintiff that could otherwise establish a justiciable claim under the RICO Act should be able to bring the claims, regardless of whether it had a preexisting contract with the defendant agreeing to resolve any and all disputes under foreign law. This is because a defendant's racketeering activity presumably causes harm not only to the plaintiff, but also takes away business from legitimate organizations, thereby undermining the integrity of the market.²³⁴

The public's interest in enforcing particular categories of laws may overwhelm the interest of private bargaining when contracts subvert the ability of the general public to vindicate regulatory interests embedded in positive law. I need not restate here the whole spectrum of literature articulating the obligation that individuals (and corporations) owe to the state by the virtue of having activities in the state.²³⁵ It suffices to review the very factors that compelled legislatures to rely on private litigants in the first place.

At the federal level, scholars have identified several reasons why Congress relies on private litigants (as opposed to exclusively relying on administrative agencies) to effectuate the substantive aims of public regulatory law. For one, private parties are at an informational advantage over public bodies in a wide variety of contexts, given that "the best sources of information about private wrongs are often the parties themselves . . ." ²³⁶ From a practical point of view, public enforcement is often inadequate because of resource constraints endemic in administrative agencies. Under this practical reality, private litigants constitute "a useful supplementary remedy by providing additional enforcement resources."²³⁷

The current jurisprudence almost mechanically enforcing contracts containing choice-of-law provisions unfortunately overlooks the significance of this institutional design. Absent a wholesale restructuring of this institutional design, the interest of the general public in enforcing laws aimed at producing socially beneficial results counsels courts to disregard contractual private stipulations to the extent they prevent litigants from activating otherwise applicable domestic regulatory statutes. Absent intervention, we are in for a dramatic reshaping of how we govern the market, rendering important social policy amendable to private choice.

²³⁴ See Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 845 (1980) ("Although RICO was aimed at organized crime, it encompasses a wide range of criminal activities and consequently applies to many individuals who are not associated with any criminal organization. . . . [T]he stated aim of RICO is to prevent the takeover or use of legitimate businesses by organized crime.").

²³⁵ See, e.g., Brillmayer, *Rights*, *supra* note 27.

²³⁶ Glover, *Structural*, *supra* note 218, at 1154.

²³⁷ Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1214 (1982); see also Mary Frances Derfner, *One Giant Step: The Civil Rights Attorney's Fee Awards Act of 1976*, 21 ST. LOUIS U. L.J. 441, 442 (1977) ("[T]he federal government would be unable to handle all the cases involving [employment] discrimination."). Private litigation, relatedly, also gives individuals a "personal role and stake in the administration of justice." Richard B. Stewart, *Crisis in Tort Law?, The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987).

V. CONCLUSION

The idea that law cannot operate beyond the borders of the state continues to capture the imagination of lawyers and lay people alike, owing to a formalistic tradition that tends to view sovereign powers as territorial in nature. But law today has functionally moved beyond the subject's relationship with the sovereign and its territory. This is especially true given that traditional territorial assumptions about domestic law have been gradually losing their descriptive accuracy, with private entities accreting increasing influence over the public governance of the market.

Contractual private ordering in one sense is a development of efficient rules governing the private system of cross-border business transactions, reminiscent of medieval merchant days in Europe where a voluntarily produced legal regime governed virtually all long-distance trade, entirely outside of preexisting jurisdictions in "the courts of feudal manors, city-states, [and] local guilds."²³⁸ But in another sense, this form of private ordering is the making of a new political community—one that blurs the public/private divide and national/transnational dichotomy, with private actors accumulating more influence over domestic regulatory law, intentionally or not.

It remains to be seen to what extent, and with what consequences to society, public law claims will continue to be subject to private bargaining in the name of efficiency and predictability in private commercial transactions.

²³⁸ See Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627, 629 (2006).