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# ARBITRATION AND ASSIMILATION

STEPHEN J. WARE\*

Arbitration, I argued in a recent article, allows parties to privatize law.<sup>1</sup> This has important benefits. Consider, for example, a hypothetical trade association—the Widget Dealers Association. The Widget Dealers Association could require, as a condition of membership in the Association, that all members agree to arbitrate all their disputes with each other. The arbitrators would be widget dealers, themselves. These arbitrators, unlike judges or jurors, would know and respect the norms and customs of the widget industry. The arbitrators would be inclined to decide cases in accord with these norms and customs and could even be contractually required to do so.<sup>2</sup> Alternatively the Widget Dealers Association might choose to codify some of its norms and customs by creating written rules that would amount to privately-created statutes.<sup>3</sup> The arbitrators could then be contractually required to decide cases in accord with these written rules.

Not only can agreements require arbitrators to apply rules, agreements can require arbitrators to write reasoned opinions. As the Widget Dealers Association arbitrators build a supply of precedents, they can be contractually required to follow precedents in future cases. So the privately-created law consists of not only unwritten norms and/or written rules, but also decisional law. In short, arbitration can produce a sophisticated, comprehensive legal system.

Even better, it can produce many such systems. The law—unwritten norms, written rules and decisional law—of the Widget Dealers Association may differ from the law of the Gadget Dealers Association. Both may differ from the laws of the Sierra Club, the Alabama Baptist Convention, the American Association of Retired People, the Rotary Club, or the Saab Owners Association. Thus emerges privatized law in the fullest sense. There is diversity because

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\* Visiting Professor of Law, The Ohio State University. Professor of Law, Samford University, Cumberland School of Law. J.D. 1990, University of Chicago; B.A. 1987, University of Pennsylvania. Thanks to Ron Krotoszynski, Tom Gallanis, Alan Rau, Chris Drahozal, Mary Ellen O'Connell, Lisa Bernstein, and Gary Spitko.

1. Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Substantive Law Through Arbitration*, 83 MINN. L. REV. 703 (1999).

2. *See id.* at 745-46.

3. *See id.* at n.177 and accompanying text. *See also* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 717-46 (1999).

what is best for some is not best for others. But there is also a process of experimentation in which lawmakers learn from each other and copy laws which seem better. There may even be open competition among different lawmakers to earn money by producing better laws. A market for law develops. This privatized system produces better law than does a system in which government monopolizes lawmaking. The principles animating privatization around the world apply to lawmaking just as they apply to coal mining or mail delivery.<sup>4</sup>

This passage, quoted from my recent article, is merely a quick sketch of privatizing law through arbitration. Much detail remains to be added, especially detail regarding the benefits of pursuing this vision. Some of that detail is provided by Professor Gary Spitko in a recent article that vividly portrays the benefits of privatizing law through arbitration in a particular context. Spitko discusses arbitration in the context of testamentary decisions by gay people and other "abhorrent" (his word) testators.<sup>5</sup> Spitko emphasizes that the decisions of such testators generally receive less respect from judges and juries than do the decisions of other testators.<sup>6</sup> This lack of respect, Spitko says, "arises from one part ignorance, one part fear and one part loathing."<sup>7</sup> Spitko recommends that "abhorrent" testators seek to ensure that disputes arising out of their testamentary decisions be resolved by arbitration, in which one or more of the arbitrators is either a member of the testator's "minority culture" or at least sympathetic to it.<sup>8</sup>

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4. *See id.* at 746-47.

5. E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999).

6. *See id.* at 283-85, 286-90.

7. *Id.* at 288.

8. *Id.* at 294-97, 307-14. While I generally applaud Professor Spitko's article, I am not persuaded by all of it. For instance, Spitko recognizes that current arbitration law enforces arbitration clauses only when the requirements to form a contract have been met, and he anticipates the argument that heirs who have not manifested assent to an arbitration clause are not bound to arbitrate merely because of a clause in the will. *See id.* at 297. Spitko replies that the heirs' rights are derivative of the decedent's right to pass her property to the persons of her choosing. *See id.* at 299-303. But this is not entirely true. For example, testators effectively lack the freedom to leave their spouses anything less than the legally required "forced share." *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 526 (2d ed. 1997). Nevertheless, the "manifestation of assent" objection to Spitko's proposal might be largely solved by the testator, when drafting her will, asking her likely heirs to sign arbitration agreements. For unborn or unascertained heirs this might require the appointment of a guardian ad litem.

Another objection to Spitko's proposal is that statutes confer upon courts exclusive jurisdiction to probate an estate. *See, e.g.*, OHIO REV. CODE ANN. § 2101.24 (West 1993) (granting probate court exclusive jurisdiction to hear and determine actions to contest the validity of wills). Courts may hold that such statutes trump any common law right of private parties, testators, to oust the court's jurisdiction to probate an estate and confer it upon another private party, the arbitrator. In other words,

While largely accepting the points that Professor Spitko and I make, Professor Ron Krotoszynski suggests that we present an incomplete picture.<sup>9</sup> He acknowledges the benefits we attribute to privatizing law through arbitration, but contends that we undervalue the costs of doing so. In particular, he expresses “grave doubts about the wisdom of balkanizing the adjudication of basic legal rights in private courts defined by a common membership in a particular cultural group.”<sup>10</sup> Krotoszynski favors assimilation over separation,<sup>11</sup> and worries that privatizing law through arbitration will impede assimilation. Relatedly, he worries that privatizing law through arbitration “would tend to exacerbate, rather than reduce, the legitimacy problems that the federal and state courts currently face.”<sup>12</sup> As more of a group’s disputes go to arbitration, courts become less skilled at handling that group’s disputes and less sensitive to that group, which in turn further lowers the court system’s reputation with that group.

I will reply to these concerns in this brief article. Before doing so, however, I note that Professor Krotoszynski’s discussion of arbitration is merely a small part of a broader project, an article entitled *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*.<sup>13</sup> That article counsels legal scholars to quit debating what constitutes substantive justice and to start focusing on procedural justice. Because devotees of Critical Legal Studies and Law & Economics, for instance, will never agree on the conclusions judges should reach, Critics and economists should put aside those substantive differences and join together to pursue “a project dedicated to defining *how* judges should go about their task.”<sup>14</sup> In other words, Krotoszynski’s article calls for nothing less than a reversal of the direction legal scholarship has taken for at least a generation. Krotoszynski’s article is ambitious. It is also erudite and witty. It deserves to be read in its entirety and deserves thoughtful consideration by those who can address its vast reach. At this time, however, I am prepared to address only its concerns about privatizing law through arbitration. Krotoszynski

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statutory authorization may be required to effectuate Spitko’s proposal. Current arbitration statutes make enforceable only arbitration clauses in a “contract,” not in a will. *See, e.g.*, 9 U.S.C. § 2 (1994); UNIF. ARB. ACT § 1 (1955).

9. *See* Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH U. L.Q. 993, 1041-42 (2000).

10. *Id.* at 1036.

11. *See id.* at n.169 (citing Martin Luther King’s “I Have a Dream” speech and stating that Spitko’s “call for cultural separatism” is consistent with the “less optimistic” Malcom X and Marcus Garvey who “largely reject integration and assimilation”).

12. *Id.* at 1036.

13. *See id.* at 993.

14. *Id.* at 994.

expresses those concerns in an insightful and even-handed manner. He has the rare ability to take arguments with which he disagrees and present them in their best light. That said, disagreements remain.

### I. CONCERN ABOUT ARBITRATION FURTHER DELEGITIMIZING COURTS

My recently published article on privatizing law through arbitration argued that parties using arbitration benefit from this privatization.<sup>15</sup> And Krotoszynski concedes, at least for the sake of argument, that “from the perspective of an individual litigant, significant benefits attach to exiting the public courts in favor of a private dispute resolution system”.<sup>16</sup> But Krotoszynski objects that:

the overall social costs of such a development are too high to be acceptable. Assuming that conflicts involving members of different guilds or cultural groups will arise and that adjudication of such claims will take place in the public courts, the success of an exit strategy will simply further cripple the ability of the public courts to earn the trust and confidence of particular cultural subgroups within the community. Although the creation of private law systems would enhance the satisfaction of those with the luxury of relying on the private law system with the fairness of adjudication of claims within the [private] system, it would tend to further delegitimize the public courts and increase the dissatisfaction of those forced to litigate their claims within the public law system.<sup>17</sup>

One could respond, as Professor Gary Spitko does, that competition from arbitration might cause government courts to improve themselves, thus increasing their legitimacy.<sup>18</sup> Organizations protected from competition become lazy and unresponsive, so subjecting the courts to increased competition will motivate them to do better. This may be or may not be true. Whether government agencies, including courts, respond to competition in the salutary way private businesses generally do is doubtful.<sup>19</sup> So I reply

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15. Ware, *supra* note 1, at 744-47. Accord Spitko, *supra* note 5, at 294-97, 307-14.

16. Krotoszynski, *supra* note 9, at 1041.

17. *Id.* This argument resembles a common argument against private-school vouchers: the public schools will be even worse if the good students with the motivated parents are able to use private schools.

18. “[T]hose minority-culture litigants who choose arbitration in an attempt to circumvent law that they find dysfunctional for their particular circumstances, inadvertently might also further law reform by providing a model for comparison.” E. Gary Spitko, *Judge Not: In Defense of Minority-culture Arbitration*, 77 WASH. U. L.Q. 1065, 1082 (2000).

19. Competition’s salutary effect on private business derives in part from the fact that private

differently to Professor Krotoszynski's concerns about delegitimizing the court system.

## II. TWO TYPES OF ARBITRATION

Krotoszynski contends that "complete exit from the public courts is simply not feasible."<sup>20</sup> He seems to concede that arbitration of all disputes among members of the same group is feasible, but says that adjudication of "conflicts involving members of different guilds or cultural groups will . . . take place in the public courts."<sup>21</sup> This is not necessarily so. Arbitration can be used to resolve disputes among members of different groups. Indeed, it already is.

Current arbitration can usefully be divided into two types: intra-group arbitration and general arbitration.<sup>22</sup> Intra-group arbitration resolves disputes among members of a small, cohesive group. The best examples of such groups are trade associations.<sup>23</sup> Disputes among merchants within the same industry have been resolved by arbitration for centuries.<sup>24</sup> Countless trade associations arbitrate disputes among their members.<sup>25</sup> In many trade association arbitrations the parties have no lawyers representing them and the arbitrator is not a lawyer.<sup>26</sup> "The arbitrator may have a similar background to the parties, or be engaged in the same business; he is likely, then, to be

businesses go out of business if they become too lazy and unresponsive. In contrast, a lazy and unresponsive government operation can "stay in business" so long as it has political support. Krotoszynski himself recognizes that "the public courts might not respond to the challenge with sufficient alacrity." Krotoszynski, *supra* note 9, at 1042 n.192.

20. *Id.* at 1041.

21. *Id.*

22. Soia Mentschikoff's venerable article on commercial arbitration listed three types of arbitration, two of which correspond to intra-group and general arbitration. Mentschikoff's third type is un-administered arbitration, *i.e.*, naming particular individuals to arbitrate and to administer the proceedings without assistance from an organization like a trade association or the American Arbitration Association. See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961). Unadministered arbitration is, in my terms, intra-group arbitration when the parties share membership in a small, cohesive group and is general arbitration when the parties do not share such membership.

23. See, *e.g.*, Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) [hereinafter *Merchant Law*]; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 148 (1992).

24. See, *e.g.*, William C. Jones, *Three Centuries of Commercial Arbitration in New York: a Brief Survey*, 1956 WASH. U. L.Q. 193.

25. See, *e.g.*, Bernstein, *Merchant Law*, *supra* note 23; Mentschikoff, *supra* note 22.

26. "In maritime arbitration, for example, it is the usual practice to stipulate the arbitrators 'shall be commercial men'—a phrase not meant to exclude women, but definitely meant to exclude lawyers." JOHN S. MURRAY, ALAN SCOTT RAU & EDWARD F. SHERMAN, *PROCESSES OF DISPUTE RESOLUTION* 693 (2d ed. 1996).

familiar with the presuppositions and understandings of the trade.”<sup>27</sup> The received wisdom is that trade association arbitration thrives in part because merchants want disputes resolved by those who know and respect the customs and norms of their trade. Merchants also choose arbitration over litigation because they seek quick, inexpensive, and confidential adjudication.<sup>28</sup>

Trade associations are not the only example of intra-group arbitration. Another example is the Beth Din, “a rabbinical tribunal having authority to advise and pass upon matters of traditional Jewish law.”<sup>29</sup> The majority of cases now heard by these private arbitrators seem to concern divorce matters.<sup>30</sup>

As valuable as intra-group arbitration is for members of the groups involved, it is plainly not designed for disputes involving non-members. If intra-group arbitration was the only arbitration, then I would share Krotoszynski’s belief that many disputes between members of different groups will inevitably be litigated, rather than arbitrated.<sup>31</sup> But intra-group arbitration is not the only form of arbitration. There is also general arbitration.

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27. *Id.* at 504.

28. *See id.* at 503-04.

29. *See Avitzur v. Avitzur*, 459 N.Y.S. 2d 572, 573 (N.Y. 1983) (enforcing agreement to arbitrate before Beth Din); *see generally* Note, *Rabbinical Courts: Modern Day Solomons*, 6 COL. J. LAW & SOC. PROB. 49 (1970).

30. *See* MURRAY, RAU & SHERMAN, *supra* note 26, at 513.

31. Krotoszynski asserts that “a litigant who is not a member of a particular guild or minority group would undoubtedly refuse to consent to the adjudication of a dispute before an adjudicator or panel identified completely with a particular guild or minority group.” Krotoszynski, *supra* note 9, at 1041, n.191. While this might be true when applied to *post*-dispute agreements to arbitrate, it is not true of *pre*-dispute agreements. Non-members of an organization do, in fact, agree to arbitrate their disputes with organization members before arbitrators affiliated with that organization. *See, e.g.*, *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981).

In *Scissor-Tail*, Bill Graham, promoter of legendary rock concerts, contracted with Scissor-Tail, a corporation wholly owned by musician Leon Russell, for Russell’s musical services. The contract obligated the parties to submit every dispute arising out of it “for determination by the International Executive Board of the [American] Federation [of Musicians] . . . and such determination shall be conclusive, final and binding upon the parties.” *Id.* at 168. The American Federation of Musicians is a union of which Russell was a member. In short, Graham and Russell agreed that Russell’s union would be the arbitrator. *See generally* Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 Wake Forest L. Rev. 1001, 1018-19 (1996) (discussing *Scissor-Tail*).

Some would argue that another example of this phenomenon occurs when investors agree to arbitrate disputes with their securities dealers before arbitrators selected by the National Association of Securities Dealers. *Id.* at 1018. One ground for a court to vacate an arbitration award is the arbitrator’s bias, see 9 U.S.C. § 10(a), and the unconscionability doctrine might prevent enforcement of a non-member’s *pre*-dispute agreement to arbitrate before arbitrators affiliated with the member’s organizations. *See* Ware, *supra*, at 1018-22.

General arbitration resolves disputes between parties who share no membership in any small, cohesive group. General arbitration is often administered by the American Arbitration Association or one of its newer rivals, such as the National Arbitration Forum and JAMS/Endispute. On the international level, general arbitration is often administered by organizations like the International Chamber of Commerce and the London Court of International Arbitration.

To reiterate, general arbitration involves parties who share no membership in any small, cohesive group. Contracts in a huge variety of contexts contain clauses requiring the parties to submit disputes to general arbitration. Examples of such contracts include:

- a retail installment contract between an auto dealer and a consumer,<sup>32</sup>
- a home termite protection plan,<sup>33</sup>
- a construction contract between a university and a contractor,<sup>34</sup>
- a homeowners insurance policy,<sup>35</sup> and
- a consumer loan agreement.<sup>36</sup>

Because the disputing parties often have little in common, general arbitration typically lacks a set of norms and customs shared by both parties. In other words, general arbitration lacks an analog to the customs of the merchants in a particular industry or the Judaism of the Beth Din.

Also, general arbitration is usually more "lawyerized" than intra-group arbitration. Lawyers typically represent parties in general arbitration and the arbitrators in general arbitration are more likely to be lawyers than are the arbitrators in intra-group arbitration.<sup>37</sup> As a result, general arbitration is more legalistic than intra-group arbitration. Extra-legal norms like mercantile custom or Judaism, play less of a role, if any. If any extra-legal norms do play a role in general arbitration, they are likely to be the extra-legal norms

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32. See, e.g., *Jim Burke Automotive, Inc. v. Murphy*, 739 So. 2d 1084 (Ala. 1999).

33. See, e.g., *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995).

34. See, e.g., *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

35. See, e.g., *American Bankers Ins. Co. of Florida v. Crawford*, No. 1972246, 1999 WL 553725 (Ala., July 30, 1999).

36. See, e.g., Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995).

37. "Lawyers in fact play a dominant part in many AAA arbitrations. As of 1994, for example, there were 12,600 names on the AAA's construction arbitration panel, and more than 40% of these were attorneys—almost twice as many as the next largest professional category, engineers." MURRAY, RAU & SHERMAN, *supra* note 26, at 693.

that would influence a judge or a jury, such as the Golden Rule or plain common-sense.

The success of general arbitration is what leads me to doubt Professor Krotoszynski's assertion that "conflicts involving members of different guilds or cultural groups will . . . take place in the public courts."<sup>38</sup> The success of general arbitration is part of what leads me to differ with Krotoszynski about the prospects for privatizing law through arbitration. What Krotoszynski calls a "mass exodus"<sup>39</sup> from courts to arbitration is both more feasible and more desirable than Krotoszynski suggests.

### III. MASS EXODUS FROM COURTS TO ARBITRATION

To see how feasible a mass exodus from courts to arbitration is, imagine that all automobile insurance policies had arbitration clauses making all the insurer's other policyholders third-party beneficiaries of the promises to arbitrate.<sup>40</sup>

Then an auto accident involving, for instance, two Allstate customers would go to arbitration, not litigation. If all the insurers contracted with each other, they could extend this arbitration system to accidents involving customers of different insurers. The negligence law of auto accidents could be taken away from judges and juries and produced, instead, by arbitrators. Nor would the arbitration clause in auto insurance policies have to be limited to auto disputes. If the clause was written broadly enough to cover a land dispute between neighbors or a testamentary dispute between devisees, the law in those areas would be privately-created, too. Nor would insurers have to be the only hub of hub-and-spoke arbitration agreements. A magazine could be a hub with spokes connecting all its subscribers. Mastercard could be a hub with spokes connecting all its cardholders. Other hubs might be created for the sole purpose of dispute resolution.

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If arbitration clauses appeared in the contracts of a few major hubs—such as the utilities providing water, electricity or phone service—nearly every American might well agree to arbitrate any

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38. Krotoszynski, *supra* note 9, at 1041.

39. *Id.* at 1035.

40. *See* Ware, *supra* note 1, at 752.

dispute with anyone.<sup>41</sup>

In short, a few simple steps are all it would take to effect a mass exodus from litigation to arbitration.<sup>42</sup>

Demonstrating the feasibility of a mass exodus from litigation to arbitration meets Krotoszynski's test for the desirability of such an exodus. Krotoszynski's concern about privatizing is that, while those in arbitration might benefit, those remaining in litigation would be even worse off.<sup>43</sup> If I am correct that no significant number of disputes need remain in litigation, then Krotoszynski's concern is satisfied. Everyone benefits because everyone is arbitrating.<sup>44</sup>

41. *Id.* Since writing this passage, I have identified a counter-argument which has not, to my knowledge, been addressed by courts or commentators. The Federal Arbitration Act ("FAA") says:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994). Leaving aside maritime transactions, this provision only requires courts to enforce arbitration clauses if the "controversy" "arise[s] out of" the contract containing the clause. Even if the arbitration clause in an automobile insurance policy was written broadly enough to cover land disputes and testamentary disputes, enforcement of the clause with respect to such disputes would not be required by the FAA. Such enforcement would be a matter of state law and such enforcement probably would be required in most states. For example, the Uniform Arbitration Act ("UAA") says:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration *any controversy thereafter arising between the parties* is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. . . .

UNIF. ARB. ACT § 1 (1955) (emphasis added). This language lacks the "arising out of" limitation found in the FAA. The UAA has been enacted in 35 states and 14 other jurisdictions have substantially similar statutes. See REVISED UNIF. ARB. ACT [hereinafter RUAA], Prefatory Note, at 4 (Tentative Draft No. 4, February 19, 1999). For the text of the RUAA see National Conference of Commissioners of Uniform State Laws, Drafts of Uniform and Model Acts (visited Dec. 23, 1999) <[http://law.upenn.edu/bll/ulc/ulc\\_form.htm](http://law.upenn.edu/bll/ulc/ulc_form.htm)>.

42. Why would Mastercard, for example, put in its cardholder agreements an arbitration clause requiring cardholders to arbitrate claims against parties other than Mastercard? Perhaps because those other parties pay Mastercard to do so.

43. See Krotoszynski, *supra* note 9, at 1036.

44. While the feasibility of a mass exodus from litigation to arbitration meets Krotoszynski's test for the desirability of such an exodus, it does not satisfy others' concerns about arbitration. That is because these others hold one or both of two views. The first view is that litigation is better than arbitration for the disputing parties themselves. See, e.g., Geraldine Szott Moohr, *Opting In or Opting Out: The New Legal Process or Arbitration*, 77 WASH U. L.Q. 1087, 1092 (2000) (arbitration "may not produce decisions acceptable to cultural minorities" because of its "limitations" such as lack of evidentiary rules, discovery, reasoned opinions and right to appeal). These are not "limitations" because, as Moohr acknowledges, the parties may contract around them. See generally 3 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW § 32.4 (1995). Indeed, the procedural rules of litigation are more limiting because the parties have less room to structure their adjudication as they wish in court than they do in arbitration.

Professor Krotoszynski, with his penchant for sports metaphors, puts it this way: "creating a 'league of their own' is not objectionable, provided that regularized interleague play takes place."<sup>45</sup> What I am suggesting is that the interleague play can occur in arbitration, rather than in government courts. While intra-group arbitration is a league of their own, general arbitration is interleague play.

#### IV. CONCLUSION

The case for privatizing law through arbitration survives Krotoszynski's challenge. The case for privatizing law through arbitration is largely the case for privatizing generally. Privatizing often appeals to utilitarians as a means to increase efficiency.<sup>46</sup> From a utilitarian perspective, the interesting question is whether adjudication and the production of law are public goods.<sup>47</sup> Addressing this question requires a comparison of "market failure" with "government failure."<sup>48</sup>

More to Krotoszynski's point, privatizing constrains the size and power of

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The view that litigation is better for the disputing parties than arbitration must confront the fact that arbitration only occurs when the parties have chosen it by contract. If the parties have the capacity to contract, *i.e.*, they are sane adults, why not let them choose for themselves whether arbitration or litigation is better for them? The counter-argument denies that arbitration is really "chosen" by employees, consumers, and others presented with take-it-or-leave-it form contracts. This raises a worthy debate that implicates fundamental doctrines of contract law. Compare, *e.g.*, Paul D. Carrington & Paul Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 338; Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 U.M.K.C. L. REV. 449 (1996); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996), with Christopher Drahozal, "Unfair" Arbitration Agreements (forthcoming); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195 (1998); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996).

The second source of concern about arbitration is the view that even if arbitration is better for the disputing parties themselves, litigation serves broader societal interests which should trump the preferences of individual parties. See, *e.g.*, Moehr, *supra* at 1093 ("arbitration is not an appropriate forum in which to decide employment discrimination issues, even when the forum serves the interests of the parties"). Many commentators have made this argument. See Ware, *Employment Arbitration and Voluntary Consent*, *supra*, at n.92 (citing commentators). And I agree that claims (such as employment discrimination claims) arising under mandatory legal rules should not be arbitrable if we are to preserve the mandatory (as opposed to default) character of those rules. See Ware, *supra* note 1, at 727-44.

45. Krotoszynski, *supra* note 9, at 1041.

46. See, *e.g.*, Klaus M. Schmidt, *The Costs and Benefits of Privatization: An Incomplete Contracts Approach*, 12 J.L. ECON. & ORG. 1 (1996). See also BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 235-52 (1990).

47. Compare, *e.g.*, William M. Landes & Richard A. Posner, *Adjudication As a Private Good*, 8 J. LEGAL STUD. 235 (1979), with BENSON, *supra* note 46, at 272-74 & 277-86.

48. See, *e.g.*, BENSON, *supra* note 46, at 271-311.

government, thus furthering core liberal goals of freedom and diversity.<sup>49</sup> Krotoszynski's worry about privatizing law through arbitration is that this freedom and diversity will impede assimilation. Professor Krotoszynski fears the separation of different groups into their own little, isolated cocoons. And intra-group arbitration does permit just that. But people will leave their cocoons even if not forced to do so by a government court monopoly on adjudication.<sup>50</sup> Indeed, much of human history is the story of progress from isolated, warring clans toward a global community in which people, ideas, and goods move freely around the world. On many occasions, the progress of assimilation proceeded faster than the ability of government courts to assert jurisdiction over the inevitable disputes, so those in the vanguard of assimilation used arbitration.<sup>51</sup> In our era, this is exemplified by the "almost universal" use of arbitration in international commercial transactions.<sup>52</sup>

Arbitration is not necessarily antithetical to the assimilation of different groups. While intra-group arbitration allows for various groups to separate into their own cocoons, general arbitration can be the handmaiden of assimilation. Both types of arbitration deserve to flourish.

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49. See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 7-36 (1962).

50. And if those in a particular group, say the Amish, choose to stay in their cocoon, is that really so bad that they should be forced to assimilate? Cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the First and Fourteenth Amendments prevent a state from compelling Amish parents to cause their children, who have graduated from the eighth grade, to attend formal high school to age 16).

51. See generally Tom W. Bell, *Polycentric Law*, 7 *HUMANE STUD. REV.* 1 (Winter 1991/92); BENSON, *supra* note 46, at 11-83.

52. See, e.g., Justice Kerr, *International Arbitration v. Litigation*, *J. BUS. L.* 164, 165, 171 (1980).

