

# STATUTES AND RULES OF LAW AS IMPLIED CONTRACT TERMS: THE DIVERGENT APPROACHES AND A PROPOSED SOLUTION

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— “Th[e] principle is itself one of commonsense; even a person with little legal knowledge would be loathe to think that a contract is not subject to existing laws unless they are expressly incorporated.”<sup>1</sup>

— [The implied incorporation of laws] “can not be accepted as correct,” [because the implied use of statutes and rules of law] “is not a rule of [contract] Interpretation and the statutes and rules of law are certainly not incorporated into the contract.”<sup>2</sup>

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1. Wickman v. Kane, 766 A.2d 241, 248 (Md. Ct. Spec. App. 2011).

2. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 197 (rev. ed. 1960).

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## INTRODUCTION

The great majority of state and federal courts accept the general common law rule that courts in construing contracts shall incorporate relevant, unmentioned laws as implied contract terms.<sup>3</sup> A common formulation is “the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.”<sup>4</sup> Dating back to the early nineteenth century,<sup>5</sup> this principle of contract construction is a “basic legal concept of longstanding and accepted use.”<sup>6</sup>

Despite the doctrine’s pervasive theoretical and practical importance as

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3. See *Armstrong v. Accrediting Council for Continuing Educ. and Training, Inc.*, 168 F.3d 1362, 1368 (D.C. Cir. 1999) (deeming rule a “common law” concept); 11 SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:19 (4th ed. 1999) (collecting authorities).

4. *Von Hoffman v. City of Quincy*, 71 U.S. 535, 550 (1866) (stating also that “[t]his principle embraces alike those [laws] which affect its validity, construction, discharge, and enforcement.”). *Von Hoffman* is still a leading decision. See, e.g., *Acosta v. Tyson Foods*, 800 F.3d 468, 474 (8th Cir. 2016) (noting the standard that current laws of the time and place where a contract is made are incorporated into the contract). Other statements of the principle use different terminology but rest upon the same substantive grounds; *Pan Am. Comput. Corp. v. Data Gen. Corp.*, 562 F. Supp. 693, 696 (D.P.R. 1983) (“State laws in existence at the time a contractual obligation is entered into become an integral part of the contract to the same extent as if literally incorporated therein.”).

5. See *Camfranque v. Burnell*, 4 F. Cas. 1130, 1131 (D. Pa. 1806) (stating that laws are “essentially incorporated with the contract”).

6. *Doe v. Ronan*, 937 N.E.2d 556, 562 n.5 (Ohio 2010). The United States Supreme Court, twelve federal circuits and forty-one states accept the doctrine. See 11 SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:19 (4th ed. 1999) (collecting cases).

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a “silent factor in every contract,”<sup>7</sup> courts have failed to articulate a consistent, convincing policy and doctrinal rationale. Most courts also have overlooked numerous doctrinal deficiencies, gaps, and contradictions and, further, have not acknowledged the decisions restricting or even rejecting the precept. Similarly, no commentator has provided an in-depth treatment even though a Westlaw search reveals nearly 1,200 decisions on this topic.<sup>8</sup>

This Article is the first effort in the literature to undertake a comprehensive descriptive and normative analysis of what will be called the “implied incorporation doctrine.” Replete with presumptions and legal fictions, the principle is an uneasy merger of the rules of statutory and contract construction. This problematic melding of statutory and contractual principles is the main reason for the divergent approaches and doctrinal contradictions. After canvassing the key issues surrounding the principle, I will propose a uniform formulation that better maintains the legal and logical differences between laws and contract.

The Article proceeds as follows: Part II poses some possible justifications for the implied incorporation doctrine and discusses some basic doctrinal concepts. After exploring the connection between the implied

7. Silverstein v. Keane, 115 A.2d 1, 7 (N.J. 1955).

8. WESTLAW, Topic 95, Key Number 167: Existing law as part of contract, WESTLAW [https://1.next.westlaw.com/Search/Results.html?jurisdiction=ALLCASES&saveJuris=False&contentType=CUSTOMDIGEST&querySubmissionGuid=i0ad74036000015e39cff8784f07f00&startIndex=1&tocGuid=I3aef6a39501500a98907e5ad42f43a75&categoryPageUrl=Home%2FWestKeyNumberSystem&searchId=i0ad74036000015e39cff8784f07f00&kmSearchIdRequested=False&simpleSearch=False&isAdvancedSearchTemplatePage=False&skipSpellCheck=False&isTrDiscoverSearch=False&ancillaryChargesAccepted=False&provideEligible=False&transitionType=CustomDigestItem&contextData=\(sc.Default\)](https://1.next.westlaw.com/Search/Results.html?jurisdiction=ALLCASES&saveJuris=False&contentType=CUSTOMDIGEST&querySubmissionGuid=i0ad74036000015e39cff8784f07f00&startIndex=1&tocGuid=I3aef6a39501500a98907e5ad42f43a75&categoryPageUrl=Home%2FWestKeyNumberSystem&searchId=i0ad74036000015e39cff8784f07f00&kmSearchIdRequested=False&simpleSearch=False&isAdvancedSearchTemplatePage=False&skipSpellCheck=False&isTrDiscoverSearch=False&ancillaryChargesAccepted=False&provideEligible=False&transitionType=CustomDigestItem&contextData=(sc.Default)) [https://perma.cc/5EQ3-V8UB] (database last searched Aug. 31, 2017). The only article addressing the canon in any depth, Dolly Wu, *Timing the Choice of Law by Contract*, 9 NW. J. TECH. & INTELL. PROP. 401 (2012), focuses on just one aspect of the doctrine, i.e., the force and effect of statutes enacted after the parties have signed the contract. All other articles found simply cite the precept in passing. See, e.g., Nelson Ferebee Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, 76 N.C. L. REV. 687, 984 n.1099 (1998) (discussing the doctrine in one paragraph in a footnote); Kevin A. Kordana, *Tax Increases in Municipal Bankruptcies*, 83 VA. L. REV. 1035, 1047 n. 61 (1997) (containing only a three sentence statement about the doctrine). In the treatises, the Perillo text (JOSEPH M. PERILLO, CONTRACTS § 3.14, at 145-47 (7th ed. 2014)) devotes a few sentences to this topic, the Farnsworth treatise has a paragraph (2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.16 at 351-52 (3d ed. 2004)), the current and earlier editions of the Corbin treatise each have a single section (5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.26 (Joseph M. Perillo ed., rev. ed. 1998)); 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 (rev. ed. 1960)); the Bruner and O’Connor treatise has a single section (1A PHILIP L. BRUNER & PATRICK J. O’CONNOR JR., CONSTRUCTION LAW § 3:65 (2016), the Murray treatise has no coverage (JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS (4th ed. 2001)), and the current Williston treatise has some sections (11 SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 30:19 to 30:24 (4th ed. 1999)).

incorporation precept and the nature of contract, and considering the enduring problem of incomplete contracts, this Part concludes that the doctrine is best suited under Article Two of the Uniform Commercial Code (U.C.C.) in contracts for the sale of goods. Otherwise, the precept is very much flawed on doctrinal and normative grounds.

In assessing the policies often stated as supporting the doctrine, Part III rejects the courts' undue reliance on the legal fictions that every person knows the law and parties naturally intend to include applicable law as implied contract terms. The Article criticizes courts' heavy reliance on the parties' uncommunicated intent as a basis for relief. This part shows how these presumptions are actually mandatory rules of law that rest upon dubious public policy reasoning and shaky hypothetical bargains. This part further analyzes where the doctrine runs counter to the generally disfavored nature of implied contract terms and it questions whether the doctrine is even a true implied term. This part also explores the relationship between the doctrine and contract as a form of private ordering. Next, this part addresses whether the doctrine can be explained by the common law view that private parties may not abrogate existing laws by way of contract.

Part IV compares the implied incorporation doctrine to other principles of statutory and contractual construction. First, it describes the differing roles and functions of statutes and contracts. Second, it shows how the doctrine contradicts the principles for when a law may be deemed to support a private right of action. To implement a rational policy against the excessive implied incorporation of laws, courts should not routinely construe relevant or applicable laws to provide a free standing contractual right of action or defense. Third, this part shows how courts inappropriately pile one fiction upon another when they reason that a party knows and intends the law to be an implied part of the contract.

After it explores whether parties may properly opt out of the implied incorporation doctrine, Part IV explains why the doctrine is actually an immutable (mandatory) rule under current law and not an interpretive default rule (gap filler) as a number of courts and commentators have concluded. The reason is that default principles pertain to contract interpretation and the implied incorporation doctrine pertains to the different concept of contract construction. The difference is contract "construction" addresses the unexpressed implications of the contract by operation of law whereas "interpretation" assesses the meaning of the words in the contract.<sup>9</sup> The contract interpretation versus contract construction divide is crucial for a proper understanding of this doctrine and the Article addresses this distinction at length. Lastly, Part IV covers the ramifications of parallel

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9. See *infra* Part IV.F.

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contractual and statutory enforcement of applicable laws as well as other canons of contractual construction.

Part V documents a number of cases that push back on the implied incorporation doctrine or reject the precept (even as other cases from these same jurisdictions endorse it). The most problematic jurisdiction is the U.S. Court of Appeals for the Federal Circuit, which has three or four case law versions of the doctrine ranging from full acceptance to almost full rejection.

The last part of the Article (Part VI) offers a major overhaul of the current implied incorporation doctrine. The Article proposes that as a normative matter, courts and lawmakers should simply support the limited policy basis underlying the rule. Unless the parties have sufficiently included the law as an express contract term, the true principle should be that implied incorporation of a law is proper only as dictated by the law maker's intent for the enactment. As under the better view, this view of the precept is a matter of contract construction and not contract interpretation.

Reconciling the disparate strands of the implied incorporation doctrine, a fuller description of my proposed reform is that a law can form the basis for an implied contract right or a contract defense only where: (1) the law in question is for either the joint benefit of the parties or exists for the sole benefit of the moving party, *and* (2) the contract expressly incorporates the particular laws (or parts of laws) as term(s) of the agreement, *or* (3) the law maker's intent for the law (inclusive of laws stemming from the state's police power) requires that a contract contain the law as conveying both a contractual right *and* remedy. A party may waive the protection of a law unless the lawmaker has precluded waiver of such a right.

This scaled-back version of the common law doctrine is a consistent, fully-supported solution commensurate with the true scope and effect of the implied incorporation doctrine. It also comports with the U.S. Supreme Court's and many state high courts' increasingly narrow approach toward distilling private rights from public laws. Therefore, this Article should attract the interest of courts and legislatures willing to reconsider the doctrine.

#### I. THE IMPLIED INCORPORATION DOCTRINE: BASIC ELEMENTS AND POSSIBLE JUSTIFICATIONS

Before delving into a full-fledged critique of current doctrine, Part II of this Article addresses the basic concepts of the current doctrine along with some possible theoretical defenses for this precept.

### A. *Basic Concepts*

The Article will address some concrete examples from the case law showing the actual process of incorporation of rights and remedies, the effect of after-enacted laws, and the definitions of key terms such as “relevant” or “applicable” laws.<sup>10</sup>

#### 1. Examples from the Case Law

The implied incorporation doctrine pervades the contracting process. It covers all types of contracts, be they express or implied, between private individuals or between an individual and a federal or state government agency.<sup>11</sup> Another important aspect of the doctrine is that an aggrieved party can use the doctrine as either a sword or a shield. Some examples follow below.

In *Path to Health, LLP v. Long*,<sup>12</sup> a purchaser sued a real estate broker and his agency, asserting negligence, contract, and fraud claims because the broker allegedly misrepresented the property was zoned for commercial use. Idaho Code section 54–2087 specifies the duties that a brokerage owes its client after a buyer “enters into a written contract for representation in a regulated real estate transaction. . . .” Among other statutory requirements, the brokerage owes duties to: “exercise reasonable skill and care;” “[disclose] to the client all adverse material facts actually known or which reasonably should have been known;” and, “when appropriate, advis[e] the client to obtain professional inspections of the property or to seek appropriate tax, legal and other professional advice or counsel.” Although the parties’ Buyer Representation Agreement did not specifically reference Idaho Code section 54-2087, the Idaho Supreme Court deemed the statute included in the agreement by operation of law: “Existing law becomes part of a contract, just as though the contract contains an express provision to that effect, unless a contrary intent is disclosed.”<sup>13</sup> The Idaho Supreme Court ruled sufficient evidence existed that the defendant breached a duty imposed by Idaho Code section 54–2087 to survive defendant’s motion for summary judgment

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10. See *infra* Part III. The implied doctrine does not apply when the contract expressly includes the law(s) in question because in that situation implication is not necessary. See, e.g., *Pete Lien & Sons, Inc. v. Ellsworth Peck Const. Co.*, 896 P.2d 761, 763 (Wyo. 1995) (declining to presumptively incorporate Wyoming law into a bond because the bond expressly incorporated it).

11. *Stoller v. State*, 105 N.W.2d 852, 858 (Neb. 1960); *Cobbs v. Home Ins. Co.*, 91 So. 627, 629 (Ala. Ct. App. 1920) (stating principle).

12. 383 P.3d 1220 (Idaho 2016).

13. *Path to Health*, 383 P.3d at 1227.

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against plaintiff's claims for relief.<sup>14</sup>

In *Fisher v. State*,<sup>15</sup> the defendant pled guilty to a class B felony where he was found driving a vehicle that contained a methamphetamine lab. A State Police Clandestine Lab Team had to clean up the lab and incurred costs for that effort. The issue on appeal was whether a plea agreement called for defendant's restitution for these costs. The Indiana Court of Appeals acknowledged a conflict between the case law, which provides that restitution may not be ordered unless it is included in the plea agreement, and an Indiana statute, Ind. Code section 35-48-4-17, which requires the trial court to order restitution in methamphetamine cleanup cases. The statute did not, however, specifically require that all plea agreements include a provision for restitution. Notwithstanding these issues, the court of appeals said that, unless expressly excluded by the agreement, a contract (which includes plea agreements) must be construed as having been made in contemplation of applicable law.<sup>16</sup> Accordingly, the court of appeals held that the State could use the statute for the claim that the plea agreement implicitly incorporated the statutory restitution requirement.<sup>17</sup>

## 2. The Effect of After-Enacted Laws

Generally, courts have said that statutes enacted or modified after contract formation have "no bearing" on the parties' rights because parties are not required to foresee changes in legislation.<sup>18</sup> Therefore, in the most important variation on the rule, statutes enacted after the execution of the contract are not generally part of the agreement "[u]nless [the contract's] provisions clearly establish that the parties intended to incorporate subsequent [legislative] enactments into their agreement."<sup>19</sup> This component of the doctrine is an "opt-in" provision as compared with the "opt-out" rule

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14. *Id.* at 1229.

15. 52 N.E.3d 871 (Ind. Ct. App. 2016).

16. *Fisher*, 52 N.E.3d at 873.

17. *Id.*

18. 17A C.J.S. *Contracts* § 440 (2010) (collecting cases). *See also* *Rehbein v. CitiMortgage, Inc.*, 937 F. Supp. 2d 753, 764 (E.D. Va. 2013) (finding that the basic tenet of contract law is that courts impose only those laws existing at contract formation).

19. *Feakes v. Bozyczko*, 369 N.E.2d 978, 980 (Mass. 1977). *See also* *In re Estate of Peterson*, 381 N.W.2d 109, 116 (Neb. 1986) ("Nothing prevents the parties to a contract from agreeing to be bound with references to future laws . . .") (quoting *Bd. of Trs. v. Krizek*, 113 Ill.App.3d 222, 226 (1983)). Another variation is the contracting parties are bound to an after-enacted statute if it has retroactive effect. *See Rockwell v. Rockwell*, 335 S.E.2d 200, 202 (N.C. Ct. App. 1985) (noting this outcome with a repealing statute). Parallel rules exist for regulations. *Cf. Gen. Elec. Co. v. United States*, 610 F.2d 730, 734 (Ct. Cl. 1979) (stating rules of interpretation applicable to statutes are "appropriate tools of analysis" for regulations).

that absent the parties' agreement to the contrary, contracts are governed by applicable law.<sup>20</sup>

The underlying policy for the after-enacted statute component of the implied incorporation doctrine is that unless they elect otherwise, "[p]eople rely upon the stability of the law when ordering their affairs."<sup>21</sup> "Elementary considerations of fairness further dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."<sup>22</sup> In this respect, if the contract makes the parties automatically bound by after-enacted laws but with no time limit for doing so, the promisor could incur extensive and unforeseeable liabilities because "[i]t would be difficult to say at what point [the new laws] must stop [being part of the contract]."<sup>23</sup> An important qualification to all the above is that the state's police power is an inherent element of every contract, which means to this extent, the laws effectuating the state's authority in this area are not governed by the after-enacted limiting principle.<sup>24</sup>

### 3. Definitions of Key Terms

The implied incorporation doctrine has some key terms, some more well-defined than others. Applicable "laws" in this sense are valid, settled and relevant common law doctrines, federal and state constitutional provisions, treaties and international agreements, federal and state statutes, interstate compacts, and federal, state, and local regulations, ordinances, and codes having the force of law.<sup>25</sup> The notion of a "settled law" is a legal principle no longer open to reasonable dispute.<sup>26</sup> Other basic concepts in the

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20. See *infra* Part IV.D.

21. Hill v. Mayall, 886 P.2d 1188, 1191 (Wyo. 1994).

22. Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 315-16 (2001) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 265-66 (1994)).

23. Collins v. Collins Adm'r, 79 Ky. 88, 94 (Ky. 1880).

24. See *infra* notes 146-50 and accompanying text.

25. See 11 SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:19 (4th ed. 1999) (showing the extensive nature of the subcategories of "laws."). See also Hauenstein v. Lynham, 100 U.S. 483, 490 (1880) (stating that the constitution, laws and treaties of the United States are part of state law); Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992) (noting that "valid laws" become part of the contract); Koval v. Peoples, 431 A.2d 1284, 1285 (Del. Super. Ct. 1984) (stating that "This principle applies equally to municipal ordinances."); Green v. Lehman, 544 F. Supp. 260, 263 (D. Md. 1982) (applying the concept to valid regulations); Bd. of Pub. Instruction of Dade Cty. v. Town of Bay Harbor Islands, 81 So. 2d 637, 643 (Fla. 1955) (stating that "The Constitution and laws of this State are a part of every contract."). Whenever this Article uses the term "laws" it refers to the above class of enactments except where the context requires otherwise.

26. See *In re Doctors Hosp. of Hyde Park, Inc.*, 337 F.3d 951 (7th Cir. 2003) (by implication). *But see* Sadler v. Bd. of Educ. of Cabool Sch. Dist. R-4, 851 S.W.2d 707, 713



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doctrine are less clear as discussed below.

First, significant uncertainty surrounds the key elements of “relevancy” or “applicability” in the sense that the implied incorporation doctrine includes all relevant or applicable laws.<sup>27</sup> The meaning of “relevancy,” “applicability,” and like concepts has numerous variations and shadings in the cases (and sometimes even within the same decision).<sup>28</sup> Nevertheless, it will not suffice that the law has a vague connection to the obligations under the contract.<sup>29</sup> Similarly, “[t]he question is not whether the legislative action affects the contract incidentally, or directly or indirectly . . . .”<sup>30</sup> As will be seen below, the challenge is whether the statute addresses a legitimate objective of the contract and if the legislation is a reasonable and appropriate means for conferring a private contractual right and remedy.

The most stringent definition of a relevant law is one that is “so central to the bargained-for exchange between the parties, or to the enforceability of the contract as a whole, that it must be deemed to be a term of the contract.”<sup>31</sup> More commonly, the courts use one or two word adjectives that are vague and subjective. Some decisions simply say “[a] contract incorporates the ‘relevant law’ whether or not it is referred to in the agreement”; these decisions merely repeat the term “relevant” and provide no criteria for the determination.<sup>32</sup> Other cases use the similarly unhelpful descriptions: (1) “[a]ll the laws of the State that ‘may relate’ to the subject matter of the

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(Mo. Ct. App. 1993) (imposing the more stringent requirement of the laws being not just “settled” but being “well-settled”).

27. For a number of cases giving little attention to this issue, *See, e.g.*, *Fisher v. State*, 52 N.E.3d 871, 873 (Ind. Ct. App. 2016) (stating that “[A] contract must be construed as having been made in contemplation of applicable law.”); *Morgan Stanley & Co., Inc. v. Archer Daniels Midland Co.*, 570 F. Supp. 1529, 1542 (S.D.N.Y. 1983) (stating that “It is presumed that the parties had [the relevant] law in contemplation when the contract was made, and the contract must be construed in that light.”) (citing cases) (brackets in original). The dictionary definition of “applicable” is “directly relevant.” *Applicable*, BLACK’S LAW DICTIONARY (10th ed. 2014). Therefore, little, if any, difference should exist between laws that are “relevant” and those that are “applicable.” Generally, however, courts require a higher standard for relevancy to the implication of criminal statutes. *See also United States v. One 1962 Ford Thunderbird*, 232 F. Supp. 1019, 1022 (N.D. Ill. 1964).

28. *Wood v. Lovett*, 313 U.S. 362, 382 (1941) (Black. J., dissenting) (analyzing *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934)).

29. *See Hicks Rd. Corp. v. Marathon Oil Co.*, 1995 U.S. Dist. LEXIS 10795 at \*10 (N.D. Ill. July 28, 1995) (stating that a statute does not create an implied contractual term unless the plaintiff can demonstrate an “adequate connection” between the contract and the law).

30. *See, e.g.*, *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 438 (1934) (examining whether state action that impairs a private contract is valid).

31. *AMFAC Resorts, LLC v. U.S. Dep’t of Interior*, 142 F. Supp. 2d 54, 73-74 (D.D.C. 2001) (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 188-91 (1992)).

32. *See, e.g.*, *State ex rel. Udall v. Colonial Penn Ins. Co.*, 812 P.2d 777, 784 (N.M. 1991) (citing *Montoya v. Postal Credit Union*, 630 F.2d 745 (10th Cir. 1980)).

contract,<sup>33</sup> (2) the statutes “touching upon the subject matter” of the contract,<sup>34</sup> and (3) every law “affecting” the contract is read into the contract.<sup>35</sup>

The notion of relatedness is an unsatisfactory premise for implying absent laws as contract terms. The decisions focusing on the degree these laws relate to the contract have overlooked the analogous issue in constitutional contract clause cases for when laws “relate” to a contract. The Michigan Supreme Court has observed, “[f]or so nearly universal are contractual relationships that it is difficult if not impossible to conceive of laws which do not have either direct or indirect bearing upon contractual obligations.”<sup>36</sup> Accordingly, when courts consider issues of relatedness they should not get too deep into such abstract comparisons.

Some cases do not even mention a relevancy or applicability component. For example, the Florida Supreme Court briefly commented, “[t]he law is a part of every contract made in this State.”<sup>37</sup> Similarly, the Supreme Court of Virginia merely stated, “[s]tatutory or ordinance provisions in effect at the time a contract is executed become as much a part of the contract as if incorporated therein.”<sup>38</sup> Literally construed, the Florida and Virginia cases stand for the proposition that the entire state code is part of every contract. This statement cannot be the law and it is doubtful that these courts intended a literal understanding. These all-encompassing decisions ducking the relevancy concept are also inconsistent with the vast majority of decisions that at least attempt to narrow to some manageable level the laws that can impact a contract.

The major challenge in identifying “relevant” laws is the sheer volume of potential choices that can await the parties or a reviewing court, which is essentially the same problem that exists for deciding the class of “applicable” laws. The U.S. Court of Federal Claims has said:

[P]laintiffs contend that regulations not referenced in the contract may be “applicable regulations.” This proposed interpretation,

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33. *Ayres v. Crowley*, 30 S.E.2d 785, 788 (S.C. 1944).

34. *Ohmes v. Ohmes*, 200 So. 2d 849, 853 (Fla. Dist. Ct. App. 1967).

35. *E.g.*, *State v. Hurley*, 270 N.W.2d 915, 917 (Neb. 1978) (finding the rule applicable to appearance bonds); *Barber Pure Milk Co. of Montgomery v. Alabama State Milk Control Bd.*, 156 So. 2d 351, 355 (Ala. 1963) (requiring the law to be considered a part of a contract once formed).

36. *Lahti v. Fosterling*, 99 N.W.2d 490, 497 (Mich. 1959) (quoting *Wood v. Lovett*, 313 U.S. 362, 382 (1941) (Black, J., dissenting) (arising in the context of implied incorporation). *See also* U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”).

37. *Schekter v. Michael*, 184 So. 2d 641, 641 (Fla. 1966).

38. *Marriott v. Harris*, 368 S.E.2d 225, 233 (Va. 1988) (citing *Maxey v. Am. Cas. Co.*, 23 S.E.2d 221, 223 (1942)).

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however, would seem necessarily to produce considerable indefiniteness as to the parties' respective obligations under the contract. There are literally thousands of HUD [Housing and Urban Development] regulations not mentioned in the contract. . . . This type of inquiry could raise a Pandora's box of potential problems and disagreements.<sup>39</sup>

Suffice it to say, most contracts provide little in the way of standards or criteria by which a party could determine *ex ante* what "relevant" or "applicable" laws a court might apply *ex post*. Unfortunately, most courts do not even mention the challenge of *ex ante* classification and use the terms "relevant" or "applicable" laws and regulations as though the class of these directives were self-evident.<sup>40</sup>

Unraveling the definitional issue of "relevant" or "applicable" laws is one of the most confusing areas of the implied incorporation doctrine. To the extent that a definition is possible, the most serviceable test comes from the U.S. Supreme Court's hotly-contested five-four decision in *Home Building & Loan Ass'n v. Blaisdell*,<sup>41</sup> which addressed both the implied incorporation doctrine and the cognate issue of the reach of the U.S. Constitution's Contract clause. Here, the Court in a few sentences avoided the trap of calculating the relatedness of the contract and a statute.<sup>42</sup> Instead, the Court employed the more useful standard of whether the law addressed a legitimate objective of the contract and if the legislation was a "reasonable and appropriate" means to that end.<sup>43</sup> By focusing on means and ends, and eschewing abstract questions of relatedness, the Court implemented the true point of the implied incorporation doctrine, which is to determine whether a congressional enactment is a proper means for conferring a contractual right and remedy upon a particular class of claimants.

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39. *Nat'l Leased Hous. Ass'n v. United States*, 32 Fed. Cl. 762, 766 (1999) (adding that it would have been valid for the contract to have specified a methodology for determining applicability). *Compare* *Union Pac. Res. Co. v. Texaco, Inc.*, 882 P.2d 212, 222 (Wyo. 1994) (deeming sufficient for purposes of the implied incorporation doctrine a provision that stated, "[t]his agreement shall be subject to all valid and applicable State and Federal laws, rules, regulations and orders, and the operations conducted hereunder shall be performed in accordance with said laws, rules, regulations and orders."), *with* *Dillard & Sons Const., Inc. v. Burnup & Sims Comtec, Inc.*, 51 F.3d 910, 913 (10th Cir. 1995) (approving language that a clause "[r]equired compliance with 'all applicable federal, state, and local safety and electrical codes, and all applicable safety regulations.'").

40. *See supra* notes 25-39 and accompanying text (collecting cases). A line of precedents in the Federal Circuit mention this same concern regarding over-incorporation. *See infra* Part V.

41. 290 U.S. 398 (1934).

42. *Id.* at 438. ("The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.")

43. *Id.*

The question arises whether this ubiquitous implied incorporation doctrine has a sound justification. Putting aside for the moment the explanations commonly associated with the doctrine, addressed in Part III below, an argument does support the implied incorporation doctrine in its current form.

### B. *The Doctrine and the Nature of Contract*

The first possible justification for the implied incorporation doctrine as part of the common law tradition is that it fits well with the inherent nature of contract. A “contract” is a legal relationship that can be enforced where certain functional prerequisites are found, such as intent, offer, acceptance and consideration.<sup>44</sup> The inherent nature of contract requires a fair and efficient process to measure contract formation, performance, and discharge. Contracts also depend on a “[r]egime of common and statutory law for [their] effectiveness and enforcement.”<sup>45</sup> Courts characteristically apply these other traditional rules as a matter of law and no controversy exists that contracts are construed and enforced according to this legal backdrop.

Courts also have said, “[t]he obligation of a contract consists in its binding force . . . . This depends on the laws in existence when it is made. . . .”<sup>46</sup> This judicial statement about contracts being dependent on laws “in existence” at the time of contracting explicitly connects the nature of contract and the implied incorporation precept. In *BJM, Inc. v. Melport Corp.*,<sup>47</sup> a Kentucky federal district court explained how the implied incorporation doctrine fits within this common law tradition:

[I]t is axiomatic that contract enforcement must occur against a backdrop of applicable constitutional, statutory, and common law principles. State law may define the remedies available for breach. It may require that contracts contain specified provisions. Such provisions necessarily form a part of each covered contract whether or not the parties have expressly acknowledged them in writing. The parties may themselves define contractual terms and obligations with reference to specific statutory provisions or definitions. These diverse situations all have been cited in support of the legal proposition that contracts incorporate existing law.

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44. *Home Fed. Bank of Tenn. v. United States*, 62 Fed. Cl. 54, 61 (2004) (quoting *Cal. Fed. Bank, F.S.B. v. United States*, 39 Fed. Cl. 753, 773 (1997)), *aff’d*, 245 F.3d 1342 (Fed. Cir. 2001).

45. *Norfolk & W. Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129-30 (1991).

46. *E.g., Romein*, 503 U.S. at 189 (requiring the law be applicable to the contract to be implied into it); *see also Am. Exp. Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 585 (D.N.J. 2010) (finding the state laws to be unrelated to the contract).

47. 18 F. Supp. 2d 704, 705 n.2 (W.D. Ky. 1998).

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As indicated by *BJM*, it is inconsistent for courts to rely upon the legal backdrop of common law principles regarding contractor formation and performance but to object that a long-standing common law rule within this tradition, the implied incorporation of existing laws, is illegitimate. Indeed, the U.S. Supreme Court has commented that a contract by nature is “a law between the parties.”<sup>48</sup> Notwithstanding the surface appeal of this contention, the remaining parts of this Article will explain why the current common law doctrine as an all-encompassing rule is wanting.

C. *The Doctrine and the U.C.C.*

The implied incorporation doctrine is more defensible in contracts subject to the Uniform Commercial Code (“U.C.C.”), which governs transactions for the sale of goods. Indeed, the U.C.C.’s sales Article (Article Two) is a statutory scheme requiring the inclusion of contract terms covering the gamut of formation and performance.<sup>49</sup>

The U.C.C. directly integrates the implied incorporation doctrine. As the U.S. Court of Appeals for the Seventh Circuit commented in a 2003 decision, “[S]tatutes are a source of implied contractual terms—the Uniform Commercial Code being the most common source . . . .”<sup>50</sup> A second, more complex reason explains the validity of the implied incorporation doctrine under the U.C.C. By necessary inference, the U.C.C. adopts the implied incorporation doctrine. A “contract” under U.C.C. § 1-201(b)(12) is defined as “the total legal obligation that results from the parties’ agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws.” The term “agreement” under UCC 1-201(b)(3) is defined as “the bargain of the parties in fact, as found in their language or inferred from other circumstances . . . .” Because the “contract” under the U.C.C. includes both the written instrument and “applicable laws,” as well as terms found as inferred from the circumstances, the doctrine is a necessary part of any U.C.C.-covered contract.<sup>51</sup> Indeed, a federal district court decision construing the U.C.C. explicitly adopted the general implied

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48. *United States v. Robeson*, 34 U.S. 319, 327 (1835). *See also* *United States v. Lennox Metal Mfg. Co.*, 225 F.2d 302, 313 n.32 (2d Cir. 1955) (Frank, J.) (stating that “A contract has often been regarded as a private statute, made by the parties, governing their relations.”).

49. *See* U.C.C. § 2-102 (“Unless the context otherwise requires, this Article applies to transactions in goods; . . .”).

50. *See In re Doctors Hosp. of Hyde Park, Inc.*, 337 F.3d at 955 (concluding that it is reasonably clear that the Illinois legislature did mean for the Comptroller Act to trump the U.C.C. in a case like this).

51. *See* U.C.C. § 1-102(3); DAVID FRISCH, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 1-103:209 (2009) (noting the continuing role of the common law except as displaced by the U.C.C. itself).

incorporation doctrine.<sup>52</sup> No decision or commentary was found to the contrary regarding the comparison between U.C.C. and non-U.C.C. contracts.

#### D. *The Problem of Incomplete Contracts*

A related defense for the implied incorporation principle is that it enables courts to deal with the enduring problem of contractual incompleteness. Although courts and commentators recognize that “[a]s a practical matter . . . contracting parties are not always precise and frequently leave material provisions out of their contracts,”<sup>53</sup> no requirement exists that contracts address every conceivable contractual right and liability.<sup>54</sup> Instead, the contract will be sufficiently definite and complete if the court is able under common law concepts, including the rules of construction, to determine the terms upon which the parties intended to bind themselves.<sup>55</sup> The policy against pursuit of this unduly burdensome objective is that negotiations would be endless and contracts would be excessively comprehensive with no corresponding benefits.<sup>56</sup>

The argument has been made that the doctrine is a gap-filler for contract omissions in the sense of being a default principle. The law recognizes “a good many gap-fillers and presumptions” because of the difficulty of ascertaining the parties’ “subjective intention[s].”<sup>57</sup> In explaining the use of gap-filling principles to remedy incomplete contracts, the Alaska Supreme Court has observed,

Because contracting parties cannot plan for all contingencies that might arise, a court may fill gaps in contracts to ensure fairness where the reasonable expectations of the parties are clear. . . .

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52. See *Fisherman Surgical Instruments, LLC v. Tri-anim Health Servs., Inc.*, 502 F. Supp. 2d 1170, 1179-80 (D. Kan. 2007) (applying common law version of the implied incorporation doctrine to a U.C.C.-covered contract).

53. *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 668 (Tenn. 2013) (quoting *McClain v. Kimbrough Constr. Co.*, 806 S.W.2d 194, 198 (Tenn. Ct. App. 1990)); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581 (2005) (providing extensive discussion).

54. See *Karetsos v. Cheung*, 670 F. Supp. 111, 113 (S.D.N.Y. 1987) (“A contract need not be fixed with complete and perfect certainty in order to have legal effect.”) (citing *V’Soske v. Barwick*, 404 F.2d 495, 500 (2d Cir. 1968), *cert. denied*, 394 U.S. 921 (1969)).

55. See *Dorsey v. Clements*, 44 S.E.2d 783, 787 (Ga. 1947) (following this principle).

56. See Posner, *supra* note 53 at 1582 (“[P]erfect foresight is infinitely costly, so that, as the economic literature on contract interpretation emphasizes, the costs of foreseeing and providing for every possible contingency that may affect the costs of performance to either party over the life of the contract are prohibitive.”).

57. *Nat’l Union Fire Ins. Co. of Pittsburgh v. Cont’l Ill. Corp.*, 658 F. Supp. 781, 789 (N.D. Ill. 1987).

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“When the conduct or expressions of parties to an agreement indicate a sufficient intent to make a contract, a court has latitude to fill in the gaps . . . [but] the courts should not impose on a party any performance to which he did not and probably would not have agreed.”<sup>58</sup>

A number of decisions have used the implied incorporation doctrine to resolve gaps found with incomplete contracts.<sup>59</sup> Nevertheless, the argument behind this practice is not persuasive. The reason is that gap-filling default rules are matters of interpretation dependent on the intent of the parties, whereas the implied incorporation doctrine is a rule of construction adding terms dependent on the intent of the legislature. Part IV.E explains this difference in greater depth.

The above arguments regarding the relation of the implied incorporation doctrine and the U.C.C. have traction. However, the justification for the implied incorporation doctrine in non-U.C.C. contracts is much more problematic as will be seen in the next part.

## II. THE UNSATISFACTORY JUSTIFICATIONS FOR THE CURRENT DOCTRINE

Despite its established place in the legal firmament, and the existence of some merit especially for U.C.C.-covered contracts, the implied incorporation doctrine has numerous problematic justifications. As will be shown below, the most common justifications — the conclusive presumptions that the parties know the law and the doctrine is an “implied” contract term — are different facets of the same solution for importing laws into a contract. A third rationale, less frequently mentioned, is that this principle precludes contracting parties from abrogating valid laws.

### A. *The Presumption that Every Person Knows the Law*

#### 1. The Basic Standard

Courts rely heavily on the “legal fiction” that every person is presumed to know the law.<sup>60</sup> The canon also applies in the law of contract. The

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58. *Davis v. Dykman*, 938 P.2d 1002, 1007 (Alaska 1997) (citations omitted).

59. *See infra* Part III.B (analyzing decisions).

60. *See Heller v. District of Columbia*, 801 F.3d 264, 285 (D.C. Cir. 2015) (Henderson, J.) (concurring in part and dissenting part) (“[T]his presumption is a legal fiction, not an accurate description of the world.”). *See also* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1459-60, 1478-80 (2007) (citing the maxim that ignorance of the law is no defense as a prime example of a legal fiction).

“fundamental rule” is that parties are “presumed” (and even “conclusively presumed”) to know the law and to contract on that basis.<sup>61</sup> Many decisions use the presumption to justify the implied incorporation doctrine.<sup>62</sup>

In its correct version, the canon is not an affirmative finding that every party has positive knowledge of the law. Instead, the canon is phrased by the “ancient equity maxim, *ignoranti juris non excusat* (ignorance of the law is no excuse).<sup>63</sup> Statutes help to fortify this common law doctrine. By necessity, it is said, all persons have at a minimum constructive notice of statutes duly published in the U.S. Statutes at Large.<sup>64</sup> Similarly, several federal statutes hold that publication of a regulation in the *Federal Register* and in the *Code of Federal Regulations* gives legal notice of their binding effect.<sup>65</sup>

In the main, common law orthodoxy defends the presumption insofar as the law is “definite and knowable.”<sup>66</sup> When courts do enforce this imputed intent, however, they have no illusions that every person actually does know the law. Few, if any, courts could be that naive.<sup>67</sup> Instead, the doctrine that

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61. *E.g.*, *Beckman v. Kan. Dept. of Human Res.*, 43 P.3d 891, 896 (Kan. Ct. App. 2002) (“[A] person is presumed to know the law and that contracts are made in contemplation of existing law which becomes a part of the contract.”); *Gibraltar Factors Corp. v. Slapo*, 125 A.2d 309, 309 (N.J. Super. A.D 1956) (“[I]t is elementary that all persons are conclusively presumed to know the law of the land, and ignorance thereof excuses no one. The law is a silent factor in every contract and the parties are presumed to have contracted with reference to it.”); *Geiger v. Ashley*, 193 S.E. 192, 193 (S.C. 1937) (“In addition, every one is presumed to know the law, and the law becomes a part of every contract.”); *Inter-Ocean Cas. Co. v. Lenear*, 95 S.W.2d 1355, 1358 (Tex. Civ. App. 1936) (“It is a fundamental rule that contracting parties are conclusively presumed to have entered their contract with full knowledge of all of its terms and existing laws upon the subject which may affect the validity, formation, operation, discharge, interpretation, or enforcement thereof.”); *Adams v. Spillyards*, 61 S.W.2d 686, 687 (Ark. 1933) (“[P]arties are conclusively presumed to contract with reference to existing law.”).

62. *See supra* note 61.

63. *Hermes Consol., Inc. v. United States*, 58 Fed. Cl. 409, 414 n.4 (2003) (citing authorities), *rev'd on other grounds*, *Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005); *see also* *Van Aalten v. Hurley*, 176 F. Supp. 851, 857 (S.D.N.Y. 1959) (stating that the presumption that every person knows the law is an “inept expression of the general rule, founded on reasons of public policy, that ignorance of the law excuses no one.”).

64. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Neuser v. Hocker*, 140 F. Supp. 2d 787, 801 (W.D. Mich. 1999) (“Without question, the imputation of knowledge by virtue of publication in the Statutes at Large ‘is something of a fiction . . . [;]’ however, it is a fiction ‘required in any system of law[.]’”) (quoting *United States v. R.L.C.*, 503 U.S. 291, 308 (1992) (Scalia, J. concurring)).

65. *See* *Louis Leustek & Sons, Inc. v. United States*, 41 Fed. Cl. 657, 669 (1999) (citing 44 U.S.C. § 307 (1968) & 44 U.S.C. § 1507 (1968)) (finding that the applicable regulations were published in the Code of Federal Regulations, and as a result, the plaintiff contractor received notice of its opportunity to become involved in the discussions).

66. *Cheek v. United States*, 498 U.S. 192, 199 (1991) (mentioning common law rule).

67. *See, e.g.*, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)



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ignorance of the law is no defense is a substantive rule of law resting upon grounds of public policy so compelling as to override the normal requirements of evidence to prove a claim or a defense.<sup>68</sup> The notion is that as a matter of public policy a legal system could not operate and contractors could not be held accountable if plaintiffs could successfully plead legal ignorance and burden courts with collateral inquiries through readily manipulable evidence on subjective understandings.<sup>69</sup>

## 2. Criticisms of the Presumption

Although courts frequently refer to the implied incorporation doctrine as a “presumption,”<sup>70</sup> the presumption generally is “conclusive,” and not rebuttable.<sup>71</sup> A conclusive presumption is simply a “fiction” whereby a rule of substantive law dons the disguise of a presumption.<sup>72</sup> Conclusive presumptions are not true presumptions because they cannot be overcome by evidence or argument.<sup>73</sup> Nonetheless, this Article will use the “presumption” nomenclature for identification purposes only because the cases still use the “presumption” terminology.

The second criticism is that the maxim that all persons know the law “is a trite, sententious saying” that is “by no means universally true.”<sup>74</sup> In the

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(acknowledging that Idaho farmers had no actual knowledge about the rules in the *Federal Register* on whether crops planted in the spring were insurable under the Federal Crop Insurance Act).

68. See 29 AM. JUR. 2D *Evidence* § 201 (2016); see also *United Cos. Lending Corp. v. Autry*, 723 So. 2d 617, 621 (Ala. 1998) (“[T]he law enters into and defines the obligation of every contract and . . . [a]ll men are charged as a matter of public policy with a knowledge of the law pertaining to their transactions.”).

69. 29 AM. JUR. 2D *Evidence* § 290 (2014) (citing *Provident Bank v. Lewitt*, 852 A.2d 852, 856 (Conn. Ct. App. 2004)).

70. E.g., *Nw. Nat. Gas Co. v. Chase Garden, Inc.*, 933 P.2d 370, 376 (Or. Ct. App. 1997) (describing the rule as “[a] presumption . . .”).

71. See *Snyder v. Zane’s Ind. Sch. Dist.*, 860 S.W.2d 692, 697 (Tex. Civ. App. 1993) (“It is conclusively presumed that the parties to a contract knew the law and contracted with reference to it.”). The asserted reluctance to inquire about a person’s subjective state of mind in this context is not defensible because courts routinely allow evidence of a party’s state of mind in contract cases. See *infra* note 78-79 and accompanying text (citing duress, undue influence, fraud and mistake of law doctrines).

72. *Conclusive Presumption*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also LON L. FULLER, *LEGAL FICTIONS* 40-41 (1967) (“[C]onclusive presumption[s] are generally applied in precisely those cases where the fact assumed is false and known to be false.”).

73. *In re Estate of Zeno*, 672 N.W.2d 574, 577 (Minn. Ct. App. 2003) (citing BLACK’S LAW DICTIONARY 1204 (7th ed. 1999)). See generally Joel S. Hjelmas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 DRAKE L. REV. 427, 433 (1993) (making this characterization of conclusive presumptions).

74. JOSEPH M. PERILLO, *THE LAW OF CONTRACTS*, § 9:18, at 314 n.231 (7th ed. 2014) (quoting *Municipal Metallic Bed Mfg. Corp. v. Dobbs*, 171 N.E. 75, 76 (N.Y. 1930)).

context of the implied incorporation doctrine, some courts denigrate this presumption as perhaps “[t]he biggest legal fiction of all”<sup>75</sup> and that as a “fiction” it “[h]as no place in a search for reality.”<sup>76</sup> The current version of the Williston treatise is especially caustic in criticizing this presumption:

An overstated and legally common utterance, so often pompously pronounced, is that ignorance of the law is no excuse. While that seat-of-the-pants admonition is apropos and should be limited to criminal behavior, in the civil arena, this is a hard saying, much maligned and regularly relaxed in equity. Indeed, this old rule as to ignorance of the law is subject to so many exceptions that it is inapplicable just about as often as it is applicable.<sup>77</sup>

As just indicated, this conclusive presumption under the actual practice in the courts is not always “conclusive” — a better statement would be that “every person knows the law” — except when the law recognizes otherwise.

Whether stated as a basis for affirmative relief or a defense to contract enforcement, the law on an equitable basis may indeed examine a party’s subjective knowledge of the law. Some examples in the law of contracts are allegations of fraud, undue influence, and misplaced confidence; the victim can establish his lack of legal knowledge as an element that the perpetrator exploited in committing the wrongdoing.<sup>78</sup> Mutual mistake of law can also be a basis for relief in contract disputes.<sup>79</sup> Thus, “[the] presumption is [actually] rebuttable varying in force with the facts — strong in the case of a lawyer, or with respect to general laws which are matters of common knowledge, and weak, almost non-existent, in respect to details or to laws

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75. See *Roldan v. Callahan & Blaine*, 161 Cal. Rptr. 3d 493, 498 (Cal. Dist. Ct. App. 2013). See also *In re Mo. Pac. Ry. Co.*, 7 F. Supp. 1, 7 (E.D. Mo. 1934) (calling the “conclusive presumption” a “fiction”).

76. *Phx. Iron & Steel Co. v. Wilkoff Co.*, 253 F. 165, 171 (6th Cir. 1918).

77. See 27 SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 70:125 (4th ed. 1999).

78. *Ryles Homes, Inc. v. Briarwood, Inc.*, 34 Va. Cir. 223, at \*1 (1994) (citing authorities).

79. See *Farrell v. Third Nat. Bank*, 101 S.W.2d 158, 164 (Tenn. Ct. App. 1936):

If both parties to a contract make an honest mistake of law as to its effect, or are ignorant of a matter of law and enter into the contract for a particular object, the result of which would by law be different from what they mutually intended, the court will interfere to prevent the enforcement of the contract, and relieve the parties from the unexpected consequences of it. \*\*\* And a mistake of law on the part of both contracting parties, owing to which the object of their contract cannot be attained, is sufficient ground for setting aside such contract. (citation omitted).

See also RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. b.; *id.* at § 155 (1981); 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 9.2 (3d ed. 2004) (stating that most courts grant relief for mistake of law just as they would for mistake of fact).

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which touch few persons.”<sup>80</sup> Indeed, some long-standing decisions by several state supreme courts disagree that this presumption is conclusive.<sup>81</sup>

The point, of course, is that if courts uphold the implied incorporation doctrine in lieu of examining party subjective understandings, contract law in other areas readily, and even routinely, admits such evidence. The result is a key building block of the implied incorporation doctrine is greatly weakened.

If the current common law doctrine is to be retained (which I do not advocate, per Part VI), my suggestion is that the adage “every person knows the law and intends to contract on that basis” should be transformed into a true rebuttable presumption. As stated above, courts in equity “regularly relax” the rule that “every person knows the law.”<sup>82</sup> In contract cases, equitable principles can favor rejecting the canon. The reason is that binding parties to statutes and regulations physically absent from a contractual text merely because they are “applicable” is unfair to the non-moving party and harmful to the predictability of commercial relationships. The foundation of contract will not buckle from this slight adjustment.

Current doctrine is also unfair to non-moving parties (either promisors or promisees) because it allows the moving party (and a court) ex post to pick and choose among an undue number of laws and regulations as new contract rights or defenses when the parties never considered these laws and regulations ex ante. In so doing, without consideration from the benefiting party, the law adds new rights or obligations that expose the non-moving party to considerable risk and liability “summarily created by mere implication” (and, one could add, “by ambush in litigation”).<sup>83</sup>

The prevailing formulation harms the commercial system rather than safeguards it because the doctrine ex ante injects “considerable indefiniteness about the parties’ respective obligations under the contract” which could open a “Pandora’s box of potential problems and

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80. See 29 AM. JUR. 2D *Evidence* § 290 (2016) (quoting *Schaffer v. Federal Trust Co.*, 28 A.2d 75, 78 (N.J. Ch. 1942)).

81. *Hess v. Culver*, 41 N.W. 994, 994 (Mich. 1889) (“But it has been held by this court in repeated instances that, while a man is, for public reasons, held responsible for his conduct, although ignorant of law, there is no conclusive presumption that he actually knows the law.”); *Hart v. Roper*, 41 N.C. 349, 349 (1849) (“The maxim, “*ignorantia legis neminem excusat*,” is founded upon the presumption that every one, competent to act for himself, knows the law; but the presumption that he knows it is not conclusive, but may be rebutted.”). See also *Hesbol v. Bd. of Educ. of Laraway Cmty. Consol. Sch. Dist. 70-C*, 14 F. Supp. 3d 1101, 1107 (N.D. Ill. 2014) (treating presumption as rebuttable in allowing party to present evidence that he was unaware of applicable law but ruling that the party was aware of the law because the contract referenced it).

82. See *supra* note 77 and accompanying text.

83. See *infra* note 270 and accompanying text.

disagreements.”<sup>84</sup> Accordingly, courts should use their discretion to alter or reject a common law doctrine where, as here, the implied incorporation precept is counter-productive to the goals of a fair and rational legal system.<sup>85</sup>

### B. *The Doctrine as an “Implied” Contract Term*

Courts have said that the doctrine is an implied contract term under the rubric of a “hypothetical bargain” and the case law is quite detailed in this regard. Therefore, this Article will cover the following topics: overview of the hypothetical bargain; uncommunicated party intent and the hypothetical bargain; the disfavored nature of implied contract terms; whether the implied incorporation doctrine is a true implied term; and contracts as private ordering.

#### 1. Overview of the “Hypothetical Bargain”

Ordinarily, the four corners of the contract document set the boundary for the parties’ rights and duties, but the implied incorporation rule is an exception to this principle.<sup>86</sup> As Judge Richard A. Posner commented for the Seventh Circuit in *Selcke v. New England Insurance Co.*, “a contract is the sum of its express and implied terms.”<sup>87</sup> He also said, “statutes are a source of implied contractual terms, . . . .”<sup>88</sup> Therefore, as Judge Benjamin Cardozo observed for the New York Court of Appeals, when courts incorporate laws into the contract by implication, “[t]hey do not change the [contract] obligation. They make it what it is.”<sup>89</sup> Despite their well-deserved place in the legal pantheon, Judges Posner and Cardozo do not sufficiently acknowledge that this doctrine is an elaborate legal fiction, what the courts call a “hypothetical bargain.”<sup>90</sup>

The argument favoring construing laws as implied contract terms in the hypothetical bargain is that courts must understand contracts according to

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84. *Nat’l Leased Housing Ass’n v. United States*, 32 Fed. Cl. 762, 766 (1995), *aff’d*, 105 F.3d 1423 (Fed. Cir. 1997). A line of precedents in the Federal Circuit mention this same concern regarding over-incorporation. *See infra* Part V.

85. 15A AM. JUR. 2D *Common Law* § 13 (2016) (“court[s] should not be bound by an early common-law rule unless it is supported by reason and logic”) (citing cases).

86. *Fox v. Heimann*, 872 N.E.2d 126, 136 (Ill. Ct. App. 2007).

87. 995 F.2d 688, 689-90 (7th Cir. 1993).

88. *Id.* at 689.

89. *People ex rel. City of New York v. Nixon*, 128 N.E. 245, 247 (N.Y. 1920).

90. *See Schortman v. United States*, 92 Fed. Cl. 154, 164 (2010) (using the terms “hypothetical bargain” and “hypothetical model of the bargaining process”).

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the “expectations and understandings”<sup>91</sup> of reasonably intelligent parties<sup>92</sup> wherein the signatories naturally expect and desire to be subject to governing laws<sup>93</sup> (be they municipal, state or federal laws).<sup>94</sup> Thus, so it goes, courts incorporating laws are not reading into the contract terms any different from those intended by the parties, but are faithfully construing the contract in accordance with the parties’ true intent.<sup>95</sup>

The hypothetical bargain construct is so strong that courts can imply terms “even where the contract itself is not ambiguous”<sup>96</sup> and where the contract contains a merger or integration clause, i.e., a clause stating that the written terms of the contract constitute the sole agreement of the parties excluding all extrinsic circumstances.<sup>97</sup> However, this analysis is faulty. The reason is that when they use the “hypothetical bargain” construct in classifying laws as implied terms, courts do so in conclusory fashion with no effort to tie the parties’ contemplation of the law as revealed by trial evidence of the parties’ intent.<sup>98</sup>

Still other courts have no misgivings about the doctrine. A Maryland Court of Special Appeals decision views this legal fiction as so obviously valid and based on “commonsense [that] even a person with little legal knowledge would be loathe to think that a contract is not subject to existing laws unless they are expressly incorporated.”<sup>99</sup>

On a deeper level, the hypothetical bargain construct violates bedrock principles of contract law. Thus, for example, indefinite contracts can be

91. *Md. Cas. Co. v. Turner*, 403 F. Supp. 907, 912 (W.D. Okla. 1975) (explaining that a chief purpose of contract law is to effectuate reasonably induced expectations and understandings).

92. *Lockheed Support Servs., Inc. v. United States*, 36 Fed. Cl. 424, 428 (1996).

93. *See P.R. Dep’t of Labor and Human Res. v. United States*, 49 Fed. Cl. 24, 31 (2001) (claiming that not only are parties presumed to be aware of applicable statutes but are further presumed that they intend to follow them); *accord Ocean View Towers Assocs. v. United States*, 88 Fed. Cl. 169, 176 (2009). *See also* *Resolution Tr. Corp. v. Diamond*, 45 F.3d 665, 673 (2d Cir. 1995) (“When parties enter into a contract, they are presumed to accept all the rights and obligations imposed on their relationship by state (or federal) law.”).

94. *In re Doctors Hosp. of Hyde Park, Inc.*, 337 F.3d at 957 (citing Kansas law); *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 673 (2d Cir. 1995).

95. 11 SAMUEL L. WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 30:19 (4th ed. 1999) (citing *Schiro v. W.E. Gould & Co.*, 165 N.E.2d 286 (Ill. 1960)).

96. *Huang v. BP Amoco Corp.*, 271 F.3d 560, 564-65 (3d Cir. 2001).

97. *See, e.g., Seashore Performing Arts Ctr. v. Town of Old Orchard Beach*, 676 A.2d 482, 484 (Me. 1996) (providing that contracts with an integration clause “may include” an unwritten implied term).

98. *See Fox v. Heimann*, 872 N.E.2d 126, 136 (Ill. Ct. App. 2007) (“The rationale for this rule is that the parties to the contract would have expressed that which the law implies had they not supposed that it was unnecessary to speak of it because the law provides for it.”).

99. *Wickman v. Kane*, 766 A.2d 241, 248 (Md. Ct. Spec. App. 2011).

unenforceable. Courts have acknowledged, “[a] contract cannot be enforced if it is not specific with respect to *all* of the essential terms of a contract.”<sup>100</sup> Notwithstanding these well-established concepts, courts have indicated that no problem exists with regard to the implied incorporation doctrine and definiteness. Their reasoning is the implied term is, and was from the inception, as much a part of the contract as the express terms and so courts say no issues exist regarding indefinite contracts.<sup>101</sup> The counter-argument here is that if it becomes necessary to include a statute by reference then that omission is always sufficiently glaring to render the transaction unenforceable.

Other opposing legal canons are in tension with the above reasoning that the rule comports with the requirement of contractual completeness. For example, courts continually emphasize that they must not “rewrite” a contract.<sup>102</sup> In view of this policy, courts have ruled that before the court may incorporate a new term, the bar must be raised such that the implication must be clear and undoubted, based on legal necessity, but not on simple fairness, wisdom, or prudence.<sup>103</sup> According to this standard, a court will imply a contract term only where the court can plainly determine from the contract that the obligation or duty was necessarily or indispensably included within the contemplation of the parties, such that the parties either deemed it too obvious to need expression, through “sheer inadvertence” failed to

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100. *OfficeMax, Inc. v. Sapp*, 132 F. Supp. 2d 1079, 1085 (M.D. Ga. 2011) (emphasis supplied). *See generally* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641 (2003) (explaining common law rule).

101. *See Linton v. E.C. Cates Agency, Inc.*, 113 P.3d 26, 30 (Wyo. 2004) (stating that “[i]ndefiniteness may also be cured by the addition of such implied terms as will be supplied by law . . .”). *See also* *Top of the Track Assocs. v. Lewiston Raceways, Inc.*, 654 A.2d 1293, 1296 (Me. 1995) (“As a matter of contract law, a term that is implied in a contract has the same legal effect as an express term.”).

102. *See, e.g., Emerson v. Treadway*, 270 S.W.2d 614, 622 (Mo. Ct. App. 1954) (“We are confined to interpretation and enforcement of the contract the parties made for themselves, and we cannot alter or rewrite it under the guise of judicial construction.”); *accord* *In re Yates Development*, 256 F.3d 1285, 1289 (11th Cir. 2001) (“[i]t is never the role of a . . . court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turned out to be a bad bargain.”); *Sw. E & T Suppliers, Inc. v. Am. Enka Corp.*, 463 F.2d 1165, 1166 (5th Cir. 1972) (stating “[c]ourts cannot read into a contract that which is not there.”); *In re UNR Industries, Inc.*, 212 B.R. 295, 305 (Bankr. N.D. Ill. 1997) (explaining that a “strong presumption” exists against rewriting a contract to include provisions that could have been, but were not, included).

103. *See Giessow Restaurants, Inc. v. Richmond Rests., Inc.*, 232 S.W.3d 576, 579 (Mo. Ct. App. 2007); *Birdsong v. Bydalek*, 953 S.W.2d 103, 118 (Mo. Ct. App. 1997); *Weatherly v. Am. Agr. Chem. Co.*, 65 S.W.2d 592, 598 (Tenn. Ct. App. 1933) (indicating that there is a heightened standard to incorporate terms that were not within the contemplation of the parties at the time the contract was initially negotiated). *See also* *Tiegs v. Boise Cascade Corp.*, 922 P.2d 115, 123-24 (Wash. Ct. App. 1996) (providing extensive discussion of implied covenants).

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express it, or the term is necessary to carry out their intentions.<sup>104</sup> While courts have specifically applied this standard to the implied incorporation doctrine,<sup>105</sup> they paint with too broad a brush by saying every relevant law is “indispensable” to satisfy the parties’ intent.

As can be seen, the implied intent doctrine law relies upon one legal fiction - parties are presumed to know and follow the law - to justify another fiction — the contract by necessary implication contains all terms needed to save the contract from being voided for lack of definitiveness.<sup>106</sup> The question arises, however, by what judicial imperative must every dispute have a contractual solution and why is that approach superior to leaving the parties where the court finds them? Many years ago, Corbin pointed out that the mere fact that a contract does not address every potential dispute does not dictate that a court must construe the contract to do so:

Only the least thought is necessary to realize that a “gap” in an agreement should not be filled merely because a gap exists. No promise, or condition of a promise, should be added by either implication or judicial construction, merely because the parties did not put it in their words of agreement . . . A promise that is not there in language, or an unexpressed condition of an expressed promise, should be put in by process of implication only when the conduct of the parties reasonably interpreted already has expressed it. It should be put in by construction of law, in the absence of justified implication, only when justice imperiously demands it under the circumstances that have arisen.<sup>107</sup>

Therefore, extrapolating from Corbin’s position on implied terms, a court may incorporate a law into a contract on a case-by-case basis where the particular parties by their conduct previously expressed a desire to

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104. *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 329 (1927); *Refinery Emps. Union of Lake Charles Area v. Cont. Oil Co.*, 160 F. Supp. 723, 731 (W.D. La. 1958); *Foley v. Eules*, 6 P.2d 956, 958 (Cal. 1931); 11 SAMUEL L. WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 31:7 (4th ed. 1999). Consistent with the rule that courts do not rewrite contracts, some cases say implied terms are proper only when “absolutely necessary” to effectuate the parties’ intent. *E.g.*, *Bishop’s Prop. & Investments, LLC v. Protective Life Ins. Co.*, 255 F.R.D. 619, 625-26 (M.D. Ga. 2009) (explaining that “courts are ‘generally reluctant to make contracts for the parties’ but may imply promises ‘when . . . absolutely necessary to introduce the term to effectuate the intention of the parties.’”). *See also* *Top of the Track Assocs. v. Lewiston Raceways, Inc.*, 654 A.2d 1293, 1296 (Me. 1995) (approving absolute necessity rule).

105. *E.g.*, *Schiro v. W.E. Gould & Co.*, 165 N.E.2d 286, 290 (Ill. 1960); *Fox v. Heimann*, 872 N.E.2d 126, 136 (Ill. Ct. App. 2007).

106. *See* *Linton v. E.C. Cates Agency, Inc.*, 113 P.3d 26, 30 (Wyo. 2004). *See also* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 823 (1992) (“That such implied-in-law terms are based on the parties’ consent has long been thought to be pure fiction.”).

107. 3 ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 569 at 341 (rev. ed. 1960).

include it in the agreement. Otherwise, as stated above, Corbin argues that a court may include a law as a required term only as dictated by an “imperious” sense of justice under the particular circumstances. In other words, the question of implied incorporation for Corbin never occurs in the abstract. Because courts in their decisions do not apply the implied incorporation doctrine on a case by case basis, but treat it as a mandatory rule irrespective of any specific evidence that the parties actually had this intent,<sup>108</sup> the implied incorporation doctrine has faulty underpinnings.

More difficulties lie in wait even if the court ventures forth into the facts to determine this reconstruction of earlier events. If a court adheres to the Corbin formulation that the issue depends on the particular factual circumstances, determining what the parties “would have agreed to” under a hypothetical scenario presents significant problems of proof.

With regard to these evidentiary issues, a hindsight contention of what laws the parties would have included if brought to their attention would be a self-serving effort to gain a litigation advantage. Courts also have ruled that expert testimony on this likely intent also is inadmissible.<sup>109</sup> Therefore, the likelihood is that even as the law allows in theory the post-hoc argument of the parties’ likely intent, the law seemingly cuts off all evidence that could conceivably shed light on the moving party’s theory.

The temptation is ever-present that given the paucity of reliable evidence, the court enforcing a hypothetical bargain would impose the inclusion of laws by implication according to its own conceptions of the just and the right instead of a search for the parties’ mutual commitments.<sup>110</sup> “To supply terms, a legal decision maker must make policy choices, which is well beyond the fiction that the court is merely following the directives of the

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108. See *supra* note 96 and accompanying text. Query whether Corbin himself was being consistent on the validity of the implied incorporation doctrine. In one section of his treatise, he argued that laws are not part of a contract unless agreed to by the parties, 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 202 (rev. ed. 1960), but in another place he accepts promises supplied by law when justice “imperiously demands it under the circumstances,” 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 569 at 341 (rev. ed. 1960).

109. *SR Int’l Bus. Ins. v. World Trade Ctr.*, 222 F. Supp. 2d 385, 391 (S.D.N.Y. 2002) (rejecting expert testimony on the terms the parties ultimately would have selected upon the close of negotiations).

110. See *Martin v. Schumaker*, 417 N.E.2d 541, 543-44 (N.Y. 1981) (recommending, in construing a contract, “a court, in intervening, [should not] impos[e] its own conception of what the parties should or might have undertaken, [but should instead] confin[e] itself to the implementation of a bargain to which they have mutually committed themselves.”). See also *St. Paul Ins. Co. v. Duke Univ.*, 849 F.2d 133, 135 (4th Cir. 1988) (“Were courts free to refuse to enforce contracts as written on the basis of their own conceptions of the public good, the parties to contracts would be left to guess at the content of their bargains, and the stability of commercial relations would be jeopardized.”).



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parties.”<sup>111</sup>

The hypothetical bargain rationale fails insofar as it places the court in the realm of speculation versus the world of the parties’ actual agreement. As Judge Frank Easterbrook commented in an opinion for the Seventh Circuit, the goal of achieving certainty in commercial relationships could be defeated if courts prefer hypothetical bargains “over real ones.”<sup>112</sup> Because the implied incorporation doctrine has been around since at least 1806, this principle and its reliance on a hypothetical bargain will not be carted off the legal landscape any time soon. To confine the doctrine to the extent that it makes sense for the commercial system, the succeeding sections of this part will further analyze this flawed doctrine with the hope that courts and lawmakers will accept a more modest version of it (which proposal is found in Part VI).<sup>113</sup>

## 2. Uncommunicated Party Intent and the Hypothetical Bargain

The preceding section revealed that a number of cases construing the implied incorporation doctrine rely upon the hypothetical bargain solution.<sup>114</sup> A serious problem with the hypothetical bargain standard – by definition an unspoken pact – is that courts must necessarily give weight to the purely subjective understandings of the parties. As will be seen below, courts in contract disputes generally reject evidence of the parties’ uncommunicated intent.

In the related area of contract interpretation, evidence outside the four corners of the document on what one or both parties subjectively “really intended,” but where such intent is undocumented in the contract, is generally “inadmissible to add to or vary the writing.”<sup>115</sup> Under the

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111. See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 733 (1990) (observing that supplying a term on a court’s judgment of what the parties agreed to is a “fictitious” exercise of ascertaining party consent and that “[t]he parties cannot control in advance what they do not even contemplate.”). Notably, the U.C.C. does not fill in a gap on a missing quantity merely because it exists. A good example of where the U.C.C. directs that courts should leave parties where it finds them is under U.C.C. § 2-201, which requires a stated quantity for an enforceable contract. U.C.C. § 2-201 cmt. 1 (AM. LAW INST. 2011-2012) (“The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated.”).

112. See *Cont’l Bank v. Everett*, 964 F.2d 701, 705 (7th Cir. 1992) (stating that there is no implied duty for a bank secured creditor to disclose the riskiness of collateral to a guarantor).

113. See Part VI (providing a proposal for reforming the implied incorporation doctrine).

114. See *supra* Part III.B.1.

115. *W.W.W. Assocs. v. Giacointeri*, 566 N.E.2d 639, 642 (N.Y. 1990). As stated in Part IV.E, contract interpretation is related to, but different from, contract construction, and the

prevailing “objective” standard” for contract interpretation, courts focus on what the parties expressed to each other and not on what they merely thought about the contract. Ordinarily, the law does not give weight to the conflicting, uncommunicated subjective intent of a party.<sup>116</sup> The cases agree: “The status of a document as a contract depends on what the parties express to each other and to the world, not on what they kept to themselves.”<sup>117</sup> “Because [an] . . . approach [giving weight to uncommunicated intent] relies on evidence inaccessible to the promisee, much less to third parties, [the result] would undermine the security of transactions by greatly reducing the reliability of contractual commitments.”<sup>118</sup>

The hypothetical bargain theory cannot stand with other cases disapproving such speculative evidence. This hypothetical device and the reliance on what the parties naturally thought about their deal contradicts the fundamental principle dating back to 1847 that courts should construe a contract without “regard either to the probable intention of the parties contracting, or to the probable changes which they would be made in their contract, had they foreseen certain contingencies.”<sup>119</sup> The U.S. Court of Federal Claims has observed, “resolving the reasonableness inquiry by reference to the parties’ intentions seems misguided, particularly, *since the issue is not one of interpretation*, and, especially, where . . . there is reason to believe that the parties might not have easily reached accord on the critical point.”<sup>120</sup> The court here was adverting to the well-known distinction between contract “interpretation,” which centers on the meaning of the words to the contract, and contract “construction,” which determines the legal effect and operation of the contract.<sup>121</sup> Other courts say in general that the absence of a provision from a contract is actually more probative of the intent to exclude it than to include it.<sup>122</sup>

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implied incorporation doctrine is a matter of contract construction.

116. See generally *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 997 (7th Cir. 2001); *Thornock v. Pacific Corp.*, 379 P.3d 175, 180 (Wyo. 2016); *Iverson v. Iverson*, 762 So. 2d 329, 335 (Miss. 2000); *Kozy v. Werle*, 902 S.W.2d 404, 411 (Tenn. Ct. App. 1999) (refusing to consider the subjective intent of a party).

117. *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814-15 (7th Cir. 1987) (observing that “[i]f unilateral or secret intents could bind, parties would become wary, and the written word would lose some of its power.”).

118. Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 273 (1986).

119. *Nicholson v. United States*, 29 Fed. Cl. 180, 191 (1996) (citing WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS (2d ed. 1847)). But see *Unihealth v. U.S. Healthcare, Inc.*, 14 F. Supp. 2d 623, 633 (D.N.J. 1998) (observing that New Jersey courts broadly search for the “probable common intent of the parties,” the attendant circumstances, and the parties’ objectives to derive a reasonable meaning of the contract terms).

120. *Schortman v. United States*, 92 Fed. Cl. 154, 164 (2010) (emphasis supplied).

121. See *infra* Part IV.F (explaining the conceptual difference).

122. See *Parker Beach Restoration, Inc. v. United States*, 58 Fed. Cl. 126, 130 (2003)

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The irony is that courts unapologetically depart from the objective standard when they rely on the parties' supposed uncommunicated subjective intentions about applicable law. The Illinois Court of Appeals implicitly acknowledged it was approving uncommunicated issues of intent when it said, "[t]he rationale for the rule is that the parties to the contract would have expressed that which the law implies had they not supposed that it was unnecessary to speak of it because the law provides for it."<sup>123</sup>

The better (and prevailing) view is that a party's intent or understanding about the contract, uncommunicated to the other party by word, action, or circumstance, is generally inadmissible as a matter of law.<sup>124</sup> Therefore, if the contract text omits applicable law, but one or even both parties merely subjectively understood the contract to include all applicable laws, this belief lacks binding effect, irrespective of whether the issue is contract interpretation or contract construction.

### 3. The Disfavored Status of Implied Contract Terms

Courts broadly view that assigning an implied contract term is appropriate where the term is "necessary"<sup>125</sup> or "indispensable"<sup>126</sup> to give effect to the intent of the parties. Yet courts also insist they have a difficult task in deriving an implied term and implied terms are disfavored.<sup>127</sup> As a Mississippi Supreme Court case observes,

[U]nless the implication be indispensable or inescapable, courts will be reluctant to embark upon the *dangerous venture* of importing into an agreement, by declaratory resort to implication, what so far as the court may definitely know was not at the moment of the contract actually agreed upon by the parties, and particularly must this be true where, as here, the parties have at much pains and

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(quoting *Azalea Park Utils., Inc. v. Knox-Florida Dev. Corp.*, 127 So. 2d 121, 123 (Fla. Dist. Ct. App. 1961)).

123. *Fox v. Heimann*, 872 N.E.2d 126, 136 (Ill. Ct. App. 2007).

124. See *Thornock v. Pacific Corp.*, 379 P.3d 175, 180 (Wyo. 2016) (stating that a party's subjective intent is not relevant or admissible); *Kozy v. Werle*, 902 S.W.2d 404, 411 (Tenn. Ct. App. 1995) (finding uncommunicated intent non-probative). See also *Iverson*, 762 So. 2d at 335 ("We are 'concerned with what the contracting parties have said to each other, not some secret thought of one [that was] not communicated to the other.'"). For a variation in fraud, duress, and the like, see *supra* note 79-80 and accompanying text.

125. *Foley v. Huntington Co.*, 682 A.2d 1026, 1038 (Conn. Ct. App. 1996).

126. *Alta Vista Props., LLC v. Mauer Vision Ctr., PC*, 855 N.W.2d 722, 727 (Iowa 2014). See also *Del. & Hudson Canal Co. v. Pa. Coal Co.*, 75 U.S. 276, 288 (1868) (leading decision).

127. See *Rote v. Rayco DS Inc.*, 148 F.3d 672, 674 (7th Cir. 1998) (observing that most states disfavor implied terms in lease contracts); *Series AGI West Linn of Appian Group Investors De LLC v. Eves*, 158 Cal. Rptr. 3d 193, 203-04 (Cal. Dist. Ct. App. 2013) (discussing the arguments against implied terms).

in detail undertaken to reduce their agreement to such specific written terms as to evince their purpose to expressly cover every phase of their understanding.<sup>128</sup>

No cases were found where a court performed the necessary fact finding that the parties intended to be bound by applicable law missing from the contract and it was indispensable or inescapable under the facts to incorporate such terms.

#### 4. Is the Doctrine a True “Implied” Term?

Another significant problem with the implied incorporation principle is that if existing laws are truly implied terms then such terms are subject to the general rule that implied terms cannot vary or override the contract’s express terms, do not establish new terms, and can only attach to the performance of a particular contractual obligation. They do not exist as an independent source of contractual rights or obligations.<sup>129</sup>

Another restraint is that a court may not supply an implied term when the parties have either dealt expressly with the matter in the contract or have deliberately left the contract silent on the point (although how courts are supposed to conclude that silence without more can be probative of such intent is unexplained).<sup>130</sup> After diligent research, I found just one jurisdiction applying the general rules of restraint to the implied incorporation doctrine.<sup>131</sup> In the run of cases, however, courts almost invariably (and inappropriately) deem the doctrine to be a free standing basis for supporting

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128. *Goff v. Jacobs*, 145 So. 728, 729 (Miss. 1933) (citations omitted) (emphasis supplied).

129. *See Mem’l Hosp. of Laramie Cty. v. Healthcare Realty Tr. Inc.*, 509 F.3d 1225, 1236 (10th Cir. 2007) (determining that the duty of good faith requires such treatment of contracts); *United States ex. rel. Norbeck v. Basin Elec.*, 248 F.3d 781, 796 (8th Cir. 2001) (stating that good faith should not carry with it new duties); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315-16 (11th Cir. 1999) (finding that courts have been inconsistent in applying the duty of good faith in the franchise context); *Spiegler v. Home Depot U.S.A., Inc.*, 552 F. Supp. 2d 1036, 1053-54 (C.D. Cal. 2008) (requiring that the duty of good faith be flexible to ensure compliance with the contract, but it cannot give rise to duties or limits beyond such compliance). *See also Brown v. Mid-Am. Waste Sys.*, 924 F. Supp. 92, 94-95 (S.D. Ind. 1996) (“The existence of express terms in a valid contract thus precludes the substitution of implied terms regarding matters covered by the contract’s express terms.”); *R.H. Sanders Corp. v. Hayes*, 541 S.W.2d 262, 265 (Tex. Civ. App. 1976) (existing law is incorporated into a contract where it can be done “without doing violence to the contract terms”).

130. *So Good Potato Chip Co. v. Frito-Lay, Inc.*, 462 F.2d 239, 241 (8th Cir. 1972) (“A covenant cannot be implied if the parties have either expressly dealt with the matter in the contract or have left the agreement intentionally silent on the point.”).

131. *See In re Wolfe*, 378 B.R. 96, 102-03 (Bankr. W.D. Pa. 2007) (making the connection explicitly).

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or resisting the existence of a contractual liability.<sup>132</sup>

In truth, most opinions make no serious effort to fit the implied incorporation doctrine within the rubric of the hypothetical bargain approach. Instead, the courts mechanically construe applicable laws as judicially mandated based on the distinct and more malleable concept of “relevancy” or “applicability” to the subject matter of the contract.<sup>133</sup>

### 5. Contracts as Private Ordering

The far-ranging ramifications of the implied incorporation doctrine can rob the contract of its basic nature as a consensual arrangement and a form of “private ordering.”<sup>134</sup> Contracts are discrete documents and not legal encyclopedias in the cloud.<sup>135</sup> A particularly serious danger associated with the implied incorporation doctrine is that when courts construe it too broadly, “it could become an all-embracing statement of the parties’ obligations under contract law, imposing unintended obligations upon parties and destroying the mutual benefits created by legally binding agreements.”<sup>136</sup> Such a non-textual, free standing doctrine creates a sizeable risk that a party could be trapped by a surprise obligation (and likely additional costs) that the party did not consider *ex ante* in the contract’s allocation of duties and responsibilities and the amount of consideration.<sup>137</sup>

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132. See *supra* Part III.B.1.

133. See *supra* notes 27-41 and accompanying text. See also RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981) (noting that these terms “[are] supplied by the court”); 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.16 at 552 (3d ed. 2004) (preferring the term “supplied” as opposed to “implied in law”).

134. See *Martin v. Schumaker*, 417 N.E.2d 541, 543 (N.Y. 1983) (noting the “basic observation” that a contract is a “private ordering”). See also *Isler v. Tex. Oil & Gas Corp.*, 749 F.2d 22, 23-24 (10th Cir. 1984) (stating that the essential nature of contract law is the formation of relationships that allocate duties); *Krug v. Helmerich & Payne, Inc.*, 320 P.3d 1012, 1022 (Okla. 2013) (“The essential principle of contract law is the consensual formation of relationships with bargained-for duties[.]”).

135. The analogy here is to “cloud” computer technology, which refers to a group of connected machines with storage drives and processors that becomes an extension of a local computer. See Balaji Viswanathan, *What is the Cloud? Can it be Explained in Terms that a Non-technical Person Can Understand?*, QUORA (last updated Sept. 2, 2014), <https://www.quora.com/What-is-the-cloud-Can-it-be-explained-in-terms-that-a-non-technical-person-can-understand> [<https://perma.cc/5TSA-TRJE>] (outlining the basic aspects of the cloud computer system).

136. Cf. *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387, 399 (N.J. 2005) (construing the implied duty of good faith and fair dealing).

137. See 1 PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 3:65 (2015) (observing that a common outcome of an implied incorporation dispute in construction contracts is the promisor will incur “more costs than otherwise would have been the case”). Compare *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989) (“[A] primary concern for courts . . . is to avoid

The concept of private ordering draws its strength from the notion that the parties as free agents must manifest their mutual assent. The California Supreme Court has said that this voluntary nature of contracting is essential. In *Robinson Helicopter Co., Inc. v. Dana Corp.*,<sup>138</sup> the court commented that “[W]hen two parties make a contract, they agree upon the rules and regulations which will govern their relationship; the risks inherent in the agreement and the likelihood of its breach.”<sup>139</sup> Clearly, the parties under the implied incorporation doctrine do not voluntarily agree to the inclusion of unmentioned laws; the courts do that for them based on what are flawed justifications.<sup>140</sup> The *Robinson* court further observed:

The parties to the contract . . . create a mini-universe for themselves, in which . . . they define their respective obligations, rewards and risks. Under such a scenario, it is appropriate to enforce only such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive; this is the function of contract law.<sup>141</sup>

Sensitive to this fundamental aspect of contract law, some courts and commentators criticize the parties’ “implied intent” rationale as an obvious legal fiction unmoored to the traditional principles of mutual assent.<sup>142</sup> A court that adds an implied provision in this questionable manner would “make it impossible” for parties to rely on written contract terms addressing their duties and responsibilities.<sup>143</sup> A pervasive theme of this Article is it can never be known *ex ante* which unmentioned law or regulation a party or court may deem *ex post* to be included by operation of law. Rational contractors do not subscribe wholesale to the unknown and frequently unknowable

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trapping parties in surprise contractual obligations that they never intended.”) (quoting *Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987)). A line of precedents in the Federal Circuit mention this same concern regarding over-incorporation. *See infra* Part V.

138. 102 P.3d 268 (Cal. 2004).

139. *Id.* at 275 (quoting *Applied Equip. Co. v. Litton Saudi Arabia*, 869 P.2d 454, 462 (Cal. 1994)).

140. *See supra* Part III.B (analyzing decisions).

141. *Robinson*, 102 P.3d at 275.

142. *See Lloyd v. Cincinnati Checker Cab Co.*, 36 N.E.2d 67, 69 (Ohio Dist. Ct. App. 1941) (stating that doctrine is “obviously, therefore, not a contractual liability involving a meeting of the minds, but a purely statutory obligation. Reading the statute into the contract involves a pure fiction.”); 11 SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:21 (4th ed. 1999) (“rule is obviously artificial” and an “unfortunate fiction”); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 822-23 (1992) (“That such implied-in-law terms are based on the parties’ consent has long been thought to be pure fiction.”).

143. *Rothe v. Reyco D.S., Inc.*, 148 F.3d 672, 675 (7th Cir. 1998).

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catalog of potentially relevant laws.<sup>144</sup> It should therefore come as no surprise that several justices of the United States Supreme Court, which has recognized the implied incorporation doctrine since at least 1827, have acknowledged “it is somewhat misleading” to characterize laws affecting the enforceability of contracts as incorporated terms of a contract.<sup>145</sup>

C. *The Policy Against Abrogation of Existing Laws*

Another rationale that contracts must be subject to existing, relevant laws is that private parties may not abrogate or override laws enacted from public concern.<sup>146</sup> The Texas Court of Civil Appeals has commented,

Statutes are often passed to protect persons against the effects of certain types of contract. The purpose of such statutes would be defeated if their effect could be avoided by contract, and . . . if such is the legislative intent, covenants attempting to avoid the provisions of such statutes are void.<sup>147</sup>

Thus, the doctrine holds that if the parties were to exempt themselves from the operation of law by contract, such an abrogation should be ineffective.

To advance this policy against the abrogation of existing laws, the general rule is that “[o]ne whose rights . . . are subject to state restriction, cannot remove them from the power of the State by making a contract about them.”<sup>148</sup> Every contract has the implied condition, regardless of whether it is included in the contractual text, that the State’s police power is part of the contract as an aspect of sovereignty and this power is “paramount” to the parties’ individual contract rights.<sup>149</sup> The “police power” refers to the state’s right “[t]o protect the lives, health, morals, comfort, and general welfare of

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144. See 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 551 at 197-98 (rev. ed. 1960) (observing that “[w]ith respect to any particular contract most of the statutes and rules are irrelevant; and most of those that are relevant are unknown to the parties.”).

145. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992).

146. See *Church Mut. Ins. Co. v. Klein*, 940 P.2d 1001, 1003 (Colo. Ct. App. 1996) (reasoning that laws crafted to serve the public good cannot be avoided by private contract); *Cary v. Cary*, 675 S.W.2d 491, 493 (Tenn. Ct. App. 1984).

147. *Southlands Life Ins. Co. v. Hopkins*, 219 S.W. 254, 260 (Tex. Civ. App. 1920) (quoting 1 WILLIAM HERBERT PAGE, PAGE ON CONTRACTS § 355, at 550 (1905)), *rev’d on other grounds*, 244 S.W. 989 (Tex. Civ. App. 1922).

148. *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

149. *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 22 (1977); *E. N.Y. Bank v. Hahn*, 326 U.S. 230, 232-33 (1945); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 437 (1934); *Smith v. Commonwealth*, 743 S.E.2d 146, 150 (Va. 2013); *Storck v. Cities Serv. Gas Co.*, 575 P.2d 1364 (Okla. 1977) (holding that the right of the legislature to act under the police power is part of existing law at contract formation).

the people.”<sup>150</sup> Accordingly, the paramount right of the State to intervene in a contractual relationship will prevail over the parties’ rights in their agreements.<sup>151</sup>

Different corollaries to the implied incorporation doctrine contradict the anti-abrogation policy. A strong majority of jurisdictions allow parties to agree that applicable laws are *not* so included. For example, the U.S. Court of Appeals for the Third Circuit observed in construing Maryland law, “the general rule [is] that parties to a contract are presumed to contract mindful of the existing law and that all applicable or relevant laws must be read into the agreement of the parties just as if expressly provided by them, *except where a contrary intention is evident.*”<sup>152</sup> One would also think that in line with U.S. Supreme Court precedent, a party could not evade state law simply by drawing up a contract that makes the law inapplicable.<sup>153</sup> One would further think that even under a broad view of freedom of contract, i.e., the parties’ ability to strike an agreement to protect their own best interests, there is no valid liberty interest for parties to contravene law or public policy by exempting themselves via contract from the statute’s purview.<sup>154</sup>

In a sense, the implied incorporation doctrine is the converse of the rule that a court will not enforce a contract violative of a statute or regulation. Citing numerous precedents, the Tennessee Court of Appeals in *Ledbetter v. Townsend* commented, “[i]t is well settled that [a court] will not enforce obligations arising out of a contract or transaction that is illegal” and ruled that “Tennessee courts will leave the parties to an illegal contract where they are found, refusing to aid either party.”<sup>155</sup> The asserted rationale for non-enforcement of illegal contracts is that it would be “absurd” for a court to enforce a contract that the law says a person must not perform.<sup>156</sup>

In all the cases cited in *Ledbetter*, however, not one of those decisions ruled that the contract was unenforceable because the contract incorporated

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150. *Blaisdell*, 290 U.S. 398 at 437; see also *Quatros, Inc. v. State Farm Life Ins. Co.*, 800 P.2d 184, 191-93 (N.M. 1990) (construing *Blaisdell*).

151. *Sullivan Cty. Harness Racing Ass’n, v. City of Schenectady Off-Track Betting Comm’n*, 351 N.Y.S.2d 56, 60 (N.Y. Sup. Ct. 1973).

152. *Williams v. Stone*, 109 F.3d 890, 896 (3d Cir. 1997) (emphasis supplied); *Path to Health, LLP v. Long*, 383 P.3d 1220, 1227 (Idaho 2016) (“Existing law becomes part of a contract just as though the contract contains an express provision to that effect, *unless a contrary intent is disclosed.*”) (emphasis supplied). See also SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:19 (4th ed. 1999) (collecting cases from numerous jurisdictions).

153. See *supra* note 148 and accompanying text.

154. *Series AGI W. Linn of Appian Group Investors DE LLC v. Eves*, 158 Cal. Rptr. 3d 193, 200 (Cal. Dist. Ct. App. 2013) (“parties may contract as they please so long as they do not violate the law or public policy.”).

155. 15 S.W.3d 462, 464-65 (Tenn. Ct. App. 1999).

156. *Heart v. E. Tenn. Brewing Co.*, 113 S.W. 364, 365 (Tenn. 1908).



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by implication the statute or policy striking down the contract. For example, the *Ledbetter* court relied on *Freeman v. Thompson*,<sup>157</sup> which held that an agreement between a life insurance salesman and the insureds was unenforceable as violative of Tennessee's anti-rebate statutes. Nowhere did the *Freeman* court say the anti-rebate statutes were contract terms in the illicit agreement. Instead, the *Freeman* court applied the independent statutes as the extra-contractual standard against which the court made a finding of illegality.

Courts in other jurisdictions in a similar scenario also apply the law as an independent standard and not as a contract term.<sup>158</sup> Therefore, the statement can be made, if the well-entrenched public policy/illegality rule requires contract *invalidation* with laws being independent from the contract, then the law for purposes of contract *validation* should not enter the contract in defining the parties' legal obligations. Yet, courts do not require the implied incorporation of statutes and regulations for the public policy/illegality doctrine. No cases were found addressing this discrepancy.

### III. THE IMPLIED INCORPORATION DOCTRINE AND OTHER PRINCIPLES OF STATUTORY AND CONTRACTUAL CONSTRUCTION

#### A. *The Differing Roles of Statutes and Contracts*

When a statute specifically or necessarily creates a contract right in a class of beneficiaries for inclusion in their contracts, the implied incorporation doctrine is sound. However, when courts endorse the full breadth of the implied incorporation doctrine, they overlook that contracts are the acts of the parties and statutes are the acts of the legislature. A good example of this questionable principle comes from a California decision: "Outside the contract, the statutes do not lose their identity as statutes. It is like someone who has a day job and a night job."<sup>159</sup> This statement is too clever by half because it obscures the differing roles of contracts and statutes.

Statutes create the relationship between the sovereign and its citizens, imposing public rights and obligations. Statutes stem from the political process and, unless revised, are permanent statements of broad policies that cover as applicable all persons in that jurisdiction. By contrast, contracts establish narrow economic rights and obligations between the parties and

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157. 600 S.W.2d 234, 236 (Tenn. Ct. App.1979) (cited in *Ledbetter*, 15 S.W.3d at 464).

158. See David A. Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U.L. REV. 563 (2012) (describing the question in-depth with no such finding).

159. 300 DeHaro St. Inv'rs v. Dep't of Housing and Cmty. Dev., 75 Cal. Rptr. 3d 98, 111 n.12 (Cal. Dist. Ct. App. 2008).

exist for a prescribed period solely to define and facilitate the relationship in achieving the contractual objectives.<sup>160</sup> Thus, statutes are an imperfect fit to be incorporated into contracts, because they generally are not devised to regulate commercial relationships. The same analysis in this subsection regarding statutes would apply to the other legislative and executive agency pronouncements within the term ‘applicable laws.’

When a court imports a statute into a contract, the incorporation “makes the instrument itself express the full agreement of the parties.”<sup>161</sup> Notably, even if the parties had inserted the missing law expressly into the contract, “it would not have added to the legal force and effect of the contract” because the implied term has equal status with an express term.<sup>162</sup>

The process of transforming a statute into a contract term is not a mechanical or self-evident task. When a court imports a statute into a contract, the process takes a statute from its legislative roots and replants it in contract soil. As a result, the complication is that, “[w]hen statutory language is included in a contract, it assumes a new legal identity: that of contractual language.”<sup>163</sup> The court must go through an often subtle process of reconfiguring the statute into the contract terms and reasonable disagreement could exist on the correct process in so doing.<sup>164</sup> Even if the implied law is construed according to the legislative intent, as mandated by the case law,<sup>165</sup> the insertion of a new material term also can have a ripple effect on the proper interpretation of the existing terms and can cast one or more of those terms in a new light as part of this integration of terms.<sup>166</sup>

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160. See Pa. Dep’t of Pub. Welfare v. United States, 48 Fed. Cl. 785, 791 (2001) (citing U.S. Supreme Court decisions); Mark L. Movesian, *Are Statutes Really “Legislative Bargains?” The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1151 (1998) (providing similar comments).

161. *Wilcox v. Atkins*, 213 So. 2d 879, 882 (Fla. Dist. Ct. App. 1968).

162. *Id.*

163. *300 DeHaro St. Inv’rs*, 75 Cal. Rptr. 3d 98 at 111.

164. See Mark L. Movesian, *Are Statutes Really “Legislative Bargains?” The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1151 (1998) (citing McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 710-11 (1992)) (stating that statutes differ from contracts in that contracts reflect a bargain between two or more parties that can have conflicting interests whereas legislation usually results from bargaining among numerous parties having a wider diversity of purpose).

165. See *infra* Part IV.F.

166. See *Cocke Cty. Bd. of Highway Comm’rs v. Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985) (“It is the universal rule that a contract must be viewed from beginning to end and all its terms must pass in review, for one clause may modify, limit or illuminate another.”).

B. *Legislative Intent to Create a Private Contractual Right and Remedy*

Most of the cases simply state that when courts imply a law as part of a contract, the analysis centers on whether the missing law is “applicable” or “relevant” to the contract.<sup>167</sup> No case was found, however, where courts addressed the interplay between the implied incorporation doctrine and the crucial question of statutory construction — did the legislature intend the particular statute to reflect a private contractual right and remedy?

When courts endow a statute as being part of a contract, they should be construing whether the legislative intent was to create a private contractual right *and* remedy. Without the legislative intent to create such a right and remedy, “[a] ‘cause of action does not exist,’ and [courts] ‘may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.’”<sup>168</sup> Thus, the mere fact that the statute creates a right is an insufficient basis for a private party lawsuit to enforce the statute.<sup>169</sup> The critical question of whether a statute supports a private right of action is if the legislature has identified individual rights and remedies for a described “class of beneficiaries.”<sup>170</sup>

In the last several decades, the Supreme Court has throttled back on the lower federal courts’ ability to devise private rights from public statutes.<sup>171</sup> Under earlier decisions, the Court followed a generous pro-claimant doctrine that “it is the duty of the courts to be alert to provide such remedies as are

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167. See *supra* notes 27-41 and accompanying text.

168. *Dewakuku v. Martinez*, 271 F.3d 1031, 1037-38 (Fed. Cir. 2001) (stating also that Congress must create private right of action to enforce federal law, which intent may be found explicitly or implicitly). Some state courts have agreed with this principle. See, e.g., *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 916 (Minn. Ct. Ap. 2003); *Somerville v. White*, 787 S.E.2d 350, 352-53 (Ga. Ct. App. 2016) (requiring intent of state legislature to create a private right of action).

169. *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 33 (D.D.C. 2002) (analyzing *Alexander v. Sandoval*, 532 U.S. 275, 286-87)(2001) and noting that “the statute must provide not only a private right but also a private remedy”). In applying the doctrine, courts do not always determine that the statute reflects both a right *and* a remedy. See, e.g., *Path to Health*, 383 P.3d at 1227-28 (stating that an Idaho statute created an implied contractual “duty” for real estate brokers to make full disclosures to prospective clients about the properties to be purchased but failing to address whether the statute conferred a remedy on the injured party for culpable non-disclosures) (discussed in *supra* nn. 12-14 and accompanying text).

170. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (explaining that “benefits” are not the same as “rights”). See generally *Mason & Dixon Lines, Inc. v. Steudle*, 761 F. Supp. 2d 6111 (E.D. Mich. 2011) (outlining a good discussion of factors).

171. See *Mallett v. Wis. Div. of Vocational Rehab.*, 130 F.3d 1245, 1249 (7th Cir. 1997) (stating that the Court has retreated from earlier decisions and has focused primarily on the legislative intent for the approach).

necessary to make effective the congressional purpose expressed by a statute.<sup>172</sup> These cases reflect the outmoded view that a court could imply a private right of action simply where consistent with public policy.<sup>173</sup> Later Supreme Court decisions provide,

[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates the legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.<sup>174</sup>

The current legal landscape is that “strong presumptions” exist that statutes “are not contractual”<sup>175</sup> and generally do not authorize a private right of action that benefits a party.<sup>176</sup> In the federal courts, a four part test governs whether a statute creates a cause of action either expressly or by implication; this analysis goes well beyond mere relevance to a cause of action or whether a statutory violation has harmed a plaintiff. The factors are:

- (1) whether the plaintiff is one of a class for whose especial benefit the statute was enacted, i.e., whether the statute creates a right of action on behalf of a plaintiff;
- (2) whether there is any indication of legislative intent to create such a remedy or to deny one;
- (3) whether the underlying purpose of the legislative scheme allows such a remedy; and

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172. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

173. *Id.* (including accompanying text).

174. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original). *See also* *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 833 (2002) (“Our task here is not to determine what would further Congress’s goal . . . but to determine what the words of the statute must be fairly understood to mean.”).

175. *See Nat’l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66 (1985) (stating also that “absent some clear indication that the legislature intends to bind itself contractually, the presumption is that ‘a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.’”); *Chicago & A. R. Ry. Co v. Tranbarger*, 238 U.S. 67, 76 (1915) (“[N]o person has a vested right in any general law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit . . . .”); *Studier v. Mich. Pub. Sch. Emps’ Retirement Bd.*, 698 N.W.2d 350, 361 (Mich. 2005).

176. *Mallett*, *supra* note 171, at 1250 (7th Cir. 1997) (citing decisions from the First, Fifth, and Seventh Circuits and stating also that the maxim “expressio unius est exclusion alterius” can support the exclusion of implied statutory rights of action). Under the *expressio unius* principle, “[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.” *Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)).

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(4) whether the cause of action is traditionally part of state law, such that it would be inappropriate to create a federal cause of action based solely on federal law.<sup>177</sup>

In this vein, the U.S. Supreme Court has said that under federal law, silence in a statute regarding an implied right and remedy for an aggrieved party is probative of the absence of such a legislative purpose.<sup>178</sup>

Nevertheless, courts dealing with the implied incorporation doctrine routinely imply contract rights from statutes applicable to the contract with little or no attempt to reconcile the other competing rules of statutory construction. The prevailing conservative approach restricting the creation of statutory contract rights cannot be reconciled with the liberal, and even routine, creation of contract rights under the implied incorporation doctrine. In a direct contradiction to the current restrictive doctrine on inferring private rights of action from public laws, most cases loosely indicate that absent the parties' contrary intent, the implied incorporation doctrine means that every "applicable" or "relevant" statute creates an implied contractual duty or obligation and a potential right of action.<sup>179</sup> In effect, where courts imply a contract right and remedy on the minimal showing that the law is relevant or applicable, they are reverting to the discarded notion that public policy alone may justify an implied statutory cause of action.<sup>180</sup>

To implement a rational policy against over-inclusive incorporation of existing laws, courts should not routinely construe laws to provide a free standing contractual right of action or defense. This suggestion takes on greater strength where the law in question creates a right and provides a

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177. *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 834-35 (9th Cir. 2004) (applying *Cort v. Ash*, 422 U.S. 66 (1975)); *Alaji Salahuddin v. Alaji*, 232 F.3d 305, 308-10 (2d Cir. 2000) (providing a comprehensive discussion). State courts have approved the first three *Cort* factors regarding a state law based cause of action. *See, e.g.*, *Yedidag v. Roswell Clinic Corp.*, 346 P.3d 1136, 1146 (N.M. 2015); *Shumate v. Drake Univ.*, 846 N.W.2d 503, 508 (Iowa 2014). The second factor on legislative intent is the crucial component. *See Sandoval*, 532 U.S. at 286 (noting that statutory intent is "determinative").

178. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) ("[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise at best.").

179. *See, e.g.*, *Fowler v. State*, 977 N.E.2d 464, 468 (Ind. Ct. App. 2012) (deeming all "applicable" laws as included); *Inverness Vill. v. Enlow*, 328 P.3d 1248, 1251 (Okla. Ct. App. 2014) (deeming a particular "relevant" statute as being included and noting that mere silence in the contract does not overcome the doctrine). Special statutes might impact this determination. *See* LA. CIV. CODE art. 2054 (1985):

When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose.

180. *See supra* note 171 and accompanying text.

special, non-contractual remedy; in that event, the remedy is exclusive.<sup>181</sup> Unlike the creation of contracts, the enactment of legislation is “inherently subject to revision and repeal” which means that equating the contracting process with the legislative process could “limit drastically” the essential powers of a legislature.<sup>182</sup>

Such a view would “ill-advised[ly]” bind the hands of future legislative sessions and impair the ability to repeal or even revise the statute in the public interest.<sup>183</sup> State and federal legislatures are fully capable of including terms in a statute that confer rights on private contracting parties,<sup>184</sup> and the courts should not get ahead of the legislature by enforcing a perceived public policy effect of a statute without a clear legislative imprimatur.

### C. *Undue Reliance on Legal Fictions*

Implied terms in contracts are a common legal fiction.<sup>185</sup> Discerning courts and commentators have observed that courts have piled one fiction (every person knows the law) upon another fiction (parties intend to adopt all applicable laws in their contract).<sup>186</sup> Further, a third fiction could just as easily be added (parties understand all their obligations in the contract).<sup>187</sup> Citing an earlier version of the Williston treatise, the Texas Court of Appeals has shown why this layering of fictions is inappropriate:

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181. See *Ky. v. United States*, 62 Fed. Cl. 445, 459-60 (2004) (citing *United States v. Babcock*, 250 U.S. 328, 331 (1919)). See also *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) (“[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.”).

182. *Nat’l R.R. Passenger Corp.*, *supra* note 176, at 465-66.

183. *N.C. Ass’n of Educators, Inc. v. State*, 786 S.E.2d 255, 262-63 (N.C. 2016). Although the government is precluded from entering a binding agreement that it will not exercise sovereign power, it can agree contractually that if it does so, the government will pay the private party damages for a breach. *Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl. 1967), cited in *United States v. Winstar Corp.*, 518 U.S. 839, 881-82 (1996).

184. See, e.g., *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 508-09 (9th Cir. 2002) (“Congress certainly knows how to create a private right of action when it wants to[.]”).

185. *Seaton v. State*, 998 P.2d 131, 136 (Kan. Ct. App. 2000).

186. *Kierstad v. City of San Antonio*, 636 S.W.2d 522, 528 (Tex. Civ. App. 1982), *rev’d on other grounds*, 643 S.W.2d 118 (Tex. 1982) (quoting 4 SAMUEL L. WILLISTON, WILLISTON ON CONTRACTS § 615, at 605-06 (3d ed. 1961)). See also *T & S Distribs., L.L.C. v. Mich. Bell Tel. Co.*, 2008 WL 724084 at \*9 (Mich. Ct. App. 2008) (citing 11 SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:21 (4th ed. 1999)); *Fed. Land Bank of Omaha v. Houck*, 4 N.W.2d 213 (S.D. 1942) (citing 4 SAMUEL L. WILLISTON, WILLISTON ON CONTRACTS § 615 at 605-06 (3d ed. 1961)).

187. See *McQuiddy Printing Co. v. Hirsig*, 134 S.W.2d 204, 204 (Tenn. Ct. App. 1939) (“parties conclusively [are] presumed to understand their contractual obligations and evidence is inadmissible to show their understanding to have been otherwise”).

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[Williston] points out that to assume that every contracting party knows the law of the state where the contract is made and of the state where it is to be performed and then to assume that each contracting party adopts the provisions of such laws as part of his contract “is, indeed, to pile a fiction upon a fiction, and certainly without any necessity, for where different conclusions are reached by means of the fiction than would be reached without it, they are not preferable to the opposite ones.”<sup>188</sup>

Notwithstanding this cogent criticism, courts have ignored the prevailing rule that a presumption cannot be based on another presumption to support the outcome of the case.<sup>189</sup> The reason is the “prohibition against [juries] piling inference upon inference indicates that at some point along a rational continuum, inferences may become so attenuated from underlying evidence as to cast doubt on the trier of fact’s ultimate conclusion.”<sup>190</sup>

Courts should revisit the concept that a legal fiction, properly applied, “is always consistent with equity.”<sup>191</sup> Professor Lon Fuller cites with disapproval the cynical definition of a fiction as being “a device for attaining desired legal consequences or avoiding undesired legal consequences.”<sup>192</sup> This Article has shown that the implied incorporation doctrine can be inequitable to promisors and detrimental to stable commercial relationships.<sup>193</sup> Because courts have unduly resorted to the dubious practice of pyramiding of legal fictions to achieve a supposedly desired legal outcome, this heavy reliance on legal fictions shows that the implied incorporation doctrine is an under-theorized and ultimately invalid precept of contract law.<sup>194</sup>

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188. See *supra* note 186. See generally W.E. Shipley, Annotation, *Modern Status of the Rules Against Basing an Inference Upon an Inference or a Presumption Upon a Presumption*, 5 A.L.R. 3d 100 (1966 & Supp.) (echoing the principle that case law generally disfavors basing presumptions on presumptions to support an outcome in a case).

189. *United States v. Ross*, 92 U.S. 281, 283 (1875).

190. *Cf. United States v. Michel*, 446 F.3d 1122, 1127-28 (10th Cir. 2006) (outlining rule in criminal cases).

191. *United States v. Coward*, 151 F. Supp. 2d 544, 550 (E.D. Pa. 2001) (citing BLACK’S LAW DICTIONARY 778 (6th ed. 1990)).

192. *Id.* (citing Lon L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 323, 331 (1930) (quoting Oliver R. Mitchell, *The Fictions of Law*, 7 HARV. L. REV. 249, 253 (1893))).

193. See *supra* note 77-80 and accompanying text.

194. The theoretical weaknesses of legal fictions are well-documented. See, e.g., LON L. FULLER, *LEGAL FICTIONS* viii (1967) (“[Legal] fiction[s] represent[ ] the pathology of the law.”); *id.* (“[W]e may liken the [legal] fiction to an awkward patch applied to a rent in the law’s fabric of theory.”).

#### D. *Default Principle or Immutable Rule?*

By definition a “default” rule is one that the parties can contract around by prior agreement and an “immutable rule” is one that “parties cannot change by contractual agreement.”<sup>195</sup> Again, the case law is marked by conflicting decisions on this crucial element of the implied incorporation doctrine.

The majority rule is that courts allow an opt out provision to the implied incorporation principle: “*It is well established that ‘unless the contract provides otherwise, all applicable law in force at the time the agreement is made implicitly forms a part of the agreement without any statement to that effect.’*”<sup>196</sup> Therefore, when they opt out of the implied incorporation doctrine, the parties under many decisions will not be bound by applicable laws as being terms of the agreement.<sup>197</sup>

Another line of decisions, rarely if ever acknowledged by cases following the majority rule, prohibits an opt-out contract term under all circumstances. Thus a leading Rhode Island Supreme Court decision holds, “[t]he statute is as much a part of the contract . . . even though the parties knew nothing of the statute and did not include the provision or even though they knew of the legislation *and expressly agreed upon the exact contrary.*”<sup>198</sup> Some states even go so far to follow both lines of precedent without comment on the split of authority.<sup>199</sup> No cases were found addressing the discrepant opinions, and some decisions deny that any disagreement exists on this point.<sup>200</sup>

This division of authority raises the issue of whether the implied

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195. See *infra* notes 206-11 and accompanying text.

196. See, e.g., *Geller v. Kinney*, 980 N.E.2d 390, 397 (Ind. Ct. App. 2012) (emphasis supplied). See also *Metro. Sports Facilities Comm’n v. Gen. Mills, Inc.*, 460 N.W.2d 625, 629 (Minn. Ct. App. 1990) (“[A]bsent any contrary indication, the laws in existence at the time a contract is executed are presumed by the parties to be part of the contract.”); *In re Estate of Peterson*, 381 N.W.2d 109, 116 (Neb. 1986) (“[E]xisting statutes . . . at the time a contract is made becomes a part of it and must be read into it just as if an express provision to that effect were inserted therein, except when the contract discloses a different intention.”).

197. *S&D Serv., Inc. v. 915-925 W. Schubert Condo. Ass’n*, 478 N.E.2d 478, 483 (Ill. Ct. App. 1985). The analysis here is similar to the analysis on parallel contractual and statutory enforcement. See *infra* Part IV.G.

198. *Sterling Eng’g & Const. Co. v. Town of Burrville Hous. Auth.*, 279 A.2d 445, 447 (R.I. 1971) (emphasis supplied) (citations omitted).

199. Compare *Dolman v. U.S. Tr. Co.*, 138 N.E.2d 784, 787 (N.Y. 1956) (following majority rule) with *In Re Estate of Havemeyer*, 217 N.E.2d 26, 27 (N.Y. 1966) (following minority rule). The Rhode Island Supreme Court so construed the *Havemeyer* decision as following the minority rule. See *Sterling*, 279 A.2d at 726.

200. See *United States v. Essley*, 284 F.2d 518, 520 (10th Cir. 1960) (noting that the authorities “are in agreement” that parties can follow a contrary intention about the implied incorporation doctrine).



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incorporation rule is properly a “default” rule, i.e., a gap filler, or an “immutable” rule, i.e., a mandatory rule. Professor Randy Barnett has explained the quoted concepts:

[D]efault rules are binding in the absence of manifested assent to the contrary—which means that a manifested assent to the contrary will displace the default rule. Any gap-filling rule that cannot be displaced by manifested assent is not properly called a default rule at all, but is what [commentators] have called an “immutable” rule—that is, some other kind of contract law background norm that may fill a gap in assent or may even displace the manifested assent of the parties.<sup>201</sup>

Applying the above default rule/immutable rule distinction, the great majority of jurisdictions in effect hold that the doctrine is a default rule because of the opt out provision. A “default” rule, as stated above, allows the parties to decide whether they wish to exclude terms (here, existing laws) that would otherwise be included in the agreement.<sup>202</sup> As indicated by the Indiana Court of Appeals, courts follow this default approach based on the freedom of contract: “If the parties may, by their conversation and private understanding, make and include as part of their contract a future statute, why may they not, by their private understanding and agreement, exclude from the operation of their contract an existing statute?”<sup>203</sup>

Classifying the rule as a default principle has some prominent supporters. Writing for the U.S. Court of Appeals for the Seventh Circuit, Judge Richard Posner said that “sometimes” the implied incorporation principle is a “legal fiction” but that it has value in serving as an “off the rack” economizing default principle.<sup>204</sup> Similarly, Professor Allan Farnsworth calls the implied incorporation doctrine an “off the rack” default principle.<sup>205</sup> By this usage, Posner and Farnsworth believe that where parties

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201. Randy E. Barnett, *The Sounds of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 825 (1992). See also *Heaton-Sides v. Snipes*, 755 S.E.2d 648, 651 (N.C. Ct. App. 2014) (“In contract law there are generally two types of rules: default rules and immutable rules. Default rules are rules that “parties can contract around by prior agreement. Immutable rules, by comparison, are those rules that “parties cannot change by contractual agreement.”). The U.C.C. itself is largely a set of default rules that fill gaps left by the parties in described circumstances. *Sundram Fasteners Ltd. v. Flexitech, Inc.*, No. 08-CV-13103, 2009 WL 2351763, at \*6 (E.D. Mich. July 29, 2008). Some examples are the parties agree to: (1) a “reasonable price” if the price term is left open (U.C.C. § 2-305); (2) “best efforts” in exclusive dealing contracts unless otherwise agreed (U.C.C. § 2-307); and (3) delivery at the seller’s place of business unless otherwise agreed (U.C.C. 2-308).

202. See *McMahon v. Chi. Mercantile Exch.*, 582 N.E.2d 1313, 11319 (Ill. Ct. App. 1991). See also *supra* note 201 and cases cited.

203. *Mouch v. Ind. Rolling Mill Co.*, 151 N.E. 137, 139 (Ind. Ct. App. 1926) (en banc).

204. *Selcke v. New England Ins. Co.*, 995 F.2d 688, 690 (7th Cir. 1995).

205. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.16, at 352 (3d ed. 2004).

are in a recurring fact pattern, and where the legal principle accords with the expectation of the parties, the parties may rely on the doctrine by implication in making their agreement.<sup>206</sup>

The better view is that this judicial device for supplementing the contract is a mandatory or immutable rule. The U.S. Supreme Court's decisions indicate support for the immutable version. In construing the relation of the Constitution's Contract Clause and an amended statute that impaired pre-existing implied statutory rights, the Court stated in *General Motors Corp. v. Romein*, "[f]or the most part, state laws are implied into private contracts *regardless of the assent of the parties* . . . when those laws affect the validity, construction, and enforcement of contracts."<sup>207</sup> Notably, no case was found where the Court expressly endorsed or mentioned the version of the implied incorporation doctrine that allows opt out provisions. Furthermore, valid required clauses are a mandatory part of the contract even if omitted or if the parties agree otherwise in federal public contracts involving federal statutory obligations and their implementing regulations.<sup>208</sup>

The choice is clear that the doctrine is an immutable rule (as under the minority view) because each premise of the implied incorporation doctrine is itself mandatory. As for those elements, the cases recognize that every person is conclusively presumed to know the law,<sup>209</sup> the doctrine is a mandatory implied term,<sup>210</sup> and parties cannot abrogate existing law.<sup>211</sup> If all the elements are mandatory then the only logical conclusion is that the doctrine itself is mandatory but with one qualification —where the statute itself says parties can vary the effect of the statute by agreement. The best example in this second category comes from the U.C.C., which states that with very few exceptions, such as the non-waivable rule of good faith and fair dealing, parties may waive or modify nearly all of the U.C.C. default rules.<sup>212</sup> Otherwise, where courts accept the premises of the implied incorporation doctrine, they should deem it an immutable principle unless

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206. *Id.*; see also *Moreau v. Harris Cty.*, 158 F.3d 241, 247 (5th Cir. 1998) ("In many situations, an 'untailored default,' a 'single, off-the-rack standard' that provides a satisfactory contractual solution in the run of cases may be preferable" to tailoring a default just for the parties at hand).

207. 503 U.S. at 189 (emphasis supplied).

208. See *United States v. Bills*, 822 F.2d 373, 377 (3d Cir. 1987) (citing *G.L. Christian & Assoc. v. United States*, 320 F.2d 345 (Ct. Cl. 1963)) (analyzed in Part V).

209. See *supra* Part III.A.1.

210. See *supra* Part III.A.2.

211. *Prof'l Prop. Servs., Inc. v. Agler Green Townhouses, Inc.*, 998 F. Supp. 831, 833 (S.D. Ohio 1998) (citing Ohio decisions). See also *Paradissiotis v. United States*, 49 Fed. Cl. 16, 20 (2001) (explaining how a contract will not defeat a lawfully promulgated statute or regulation).

212. See U.C.C. § 1-301 (stating general rule that parties may waive most U.C.C. rules by agreement).

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the legislature permits otherwise.

E. *Choice of Law and Conflict of Laws*

Under the implied incorporation doctrine, parties are also bound by the principles associated with choice of law.<sup>213</sup> Citing the area of conflict of laws, Corbin noted how the implied incorporation doctrine is a poor fit for understanding a contract:

Very difficult problems in the conflict of laws arise, so that the most learned of jurists do not agree as to the law which should be applied. In choosing the applicable law and in determining the results of its application, the court is always doing much more than mere interpretation of the terms of the contract.<sup>214</sup>

Where the contract lacks a valid choice of law provision for deciding which state's substantive law shall govern, American jurisdictions are divided on the proper approach to choice of law. Some states follow the rule of "*lex loci contractus*" —

[T]he validity, nature, construction, and interpretation of a contract are governed by the substantive law of the state where the contract was made, except that where the contract is made in one state and is to be performed in another state, the substantive law of the state where the contract is performed will apply.<sup>215</sup>

By contrast, most states follow the multi-factor balancing test of the *Restatement (Second) of Conflicts*.<sup>216</sup> When courts as a matter of the parties' purported intent determine the choice of law and bind a party from one state to the laws and decisions of another state, the case law stretches the implied incorporation legal fiction to the breaking point. The ordinary person lacks this knowledge and would likely consider it a waste of time to acquire it.

Another logical consequence of the doctrine is the resolution of another choice of law problem, viz., conflicts between federal and state laws on the same subject matter. Under the U.S. Constitution's Supremacy clause,

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213. *Dick Broad. Co., Inc. v. Oak Ridge FM Inc.*, 395 S.W3 653, 668-69 (Tenn. 2013).

214. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 198 (rev ed. 1960).

215. *E.g.*, *Fed. Ins. Co. v. Nat'l Distrib. Co.*, 417 S.E.2d 671, 673 (Ga. Ct. App. 1992) (endorsing *lex loci contractus*).

216. *E.g.*, *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1210-11 (9th Cir. 2001) (endorsing RESTATEMENT (SECOND) OF CONFLICTS). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) (providing that the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS). For additional discussion of choice of law and the implied incorporation doctrine, see 17A C.J.S. *Contracts* § 348 (2012).

applicable federal laws and regulations override or displace conflicting state laws,<sup>217</sup> especially where the subject matter of the contract relates to a federal issue where Congress has enacted all-encompassing legislation.<sup>218</sup> Yet other potential (but supportable) choice of law applications are that the parties necessarily incorporate relevant treaties and international law concepts because treaties and the law of nations are part of domestic law and have the status of federal law.<sup>219</sup> While the cases have yet to address these other ramifications of the implied incorporation doctrine, these other applications are certainly available for use by the parties and the courts.

As Corbin observed about the rules regarding of choice of law, “The parties themselves seldom say, or even think, anything about the matter.”<sup>220</sup> The problem of choice of law and the implied incorporation doctrine thereby illustrates just how far courts are willing to go to uphold public policy choices at the expense of seeking the parties’ intent on these matters.

#### F. *Rule of Interpretation or Construction?*

A confounding issue for the implied incorporation doctrine is whether it is a rule of construction or interpretation (and sometimes cases intermix the two concepts in the same opinion). “Contract interpretation” ascertains the factual meaning of the words in the contract whereas “contract construction” refers to the legal operation and effect of the contract regarding the unexpressed implications.<sup>221</sup> An example of contract construction would be that covenants not to compete as between employers and employees are strictly construed against the employer to avoid undue restrictions on the former employee’s ability to pursue an occupation.<sup>222</sup> An example of

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217. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (stating that Congress has authority to pre-empt, or displace, state law, expressly or impliedly); *Fid. Fed. Sav. and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 157 (1982) (discussing federal pre-emption).

218. *Cornick v. Sw. Iowa Broad. Co.*, 107 N.W.2d 920, 921-22 (Iowa 1991).

219. See *Fidelity Federal Sav. and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 157 (1982) (noting the incorporation of all federal law into the laws of each individual state). See also *Sosa v. Alvarez-Machain*, 542 U.S. 2739, 2764 (2004) (describing how international law is part of domestic law); *Kane v. Winn*, 319 F. Supp. 2d 162, 196 (D. Mass. 2004) (providing a relevant discussion of treaties).

220. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 198 n.34 (rev ed. 1960).

221. *Ram Const. Co., Inc. v. Am. State Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984) (engaging in extensive relevant discussion); *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011); *Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 316 (Minn. Ct. App. 2011) (citing *Deerhurst*, 165 A.2d at 552-53); *In re A.H. Robins Co., Inc.*, 197 B.R. 590, 595 (Bankr. E.D. Va. 1994); 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 200 (rev. ed. 1960).

222. See *Rental Unif. Serv. of Florence, Inc. v. Dudley*, 301 S.E.2d 142, 143 (S.C. 1983) (“Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer.”).

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contract interpretation would be whether the simple reference to a “motor vehicle” in an insurance policy would include a motorcycle.<sup>223</sup>

Corbin reasoned that the implied incorporation principle goes to the “legal operation of a contract, [and is] not one that affects factual interpretation.”<sup>224</sup> For example, Corbin said that when state legislatures enact a law that a specific provision be included in a contract, this statute is a rule of construction because it prescribes the legal operation of the contract and not the factual interpretation of its terms. Therefore, under the Corbin view, it will be the legislature’s intent and not the parties’ intent that will govern contractual construction on the imputed statutes.<sup>225</sup>

Adhering to the notion that interpretation and construction differ significantly, Corbin strongly criticized those courts classifying the implied incorporation rule as a matter of contract interpretation. Applying the traditional understanding, Corbin said the implied incorporation principle “cannot be accepted as correct,” because the implied use of statutes and rules of law “is not a rule of [contract] interpretation” and “are certainly not incorporated into the contract.”<sup>226</sup>

A New Jersey court accurately indicated that Williston and Corbin are essentially in the same camp on this issue.<sup>227</sup> Corbin skillfully showed how the issue does not pertain to the meaning of the individual words. Williston’s major contribution was his “incisive argument [that] successfully exploded the notion that rules of law are always to be considered a part of the contract

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223. Moore v. Life & Cas. Ins. Co., 40 S.W.2d 403, 403 (Tenn. 1931).

224. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 200 (rev. ed. 1960).

225. *Id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. a. (1981) (“The supplying of an omitted term is not technically interpretation[.]”); *Ram Constr. Co.*, 749 F.3d at 1053 (“Construction, which may be usefully distinguished from interpretation, is a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and from a legal policy or policies that are applicable to the situation.”); *Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 316 (Minn. Ct. App. 2011) (explaining that doctrine is one of contract construction and not interpretation).

226. See 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 197-98, 200 (rev. ed. 1960) (indicating that confusion may be understandable because “[t]he processes of interpretation [and construction] are almost always carried on together.”).

227. See *Deerhurst Estates*, 165 A.2d at 552-53 (N.J. Super. A.D. 1960) (citing the Corbin and Williston treatises). Actually, Williston was more equivocal than Corbin on this issue. In an earlier edition of his treatise, Williston wrote, “[d]oubtless, law frequently is adopted by the parties as a portion of their agreement. [Whether it is in] any particular case should be determined by the *same standard of interpretation* as is applied to their expressions in other respects.” Caroline N. Brown, *North Carolina Common Law Parol Evidence Rule*, 87 N.C. L. Rev. 1699, 1737 (2009) (emphasis supplied) (citing 2 Samuel L. Williston, WILLISTON ON CONTRACTS § 615, at 605-06 (3d ed. 1961)). Thus, whether he meant it or not, by using the term “interpretation” Williston undermined his own idea that the doctrine is a principle of construction.

of the parties based on their presumed intention to include them.”<sup>228</sup>

As was true in Corbin and Williston’s day, however, some modern day courts apparently still (incorrectly) characterize the implied incorporation doctrine as a rule of “contract interpretation.”<sup>229</sup> The word “apparently” is used advisedly because the same decision will sometimes intermix the term “construction” with “interpretation” or “the intention of the parties” and it can be difficult to tell whether courts are using the terms synonymously or in their traditional sense.<sup>230</sup> In fact, some authorities declare the distinction between interpretation and construction is too abstract or lacks value, but commentators have persuasively argued the difference is “workable and useful.”<sup>231</sup>

The case law bears out the soundness of the Corbin/Williston position on whether the rule is a matter of statutory construction or contract interpretation. As the Ninth Circuit has commented, “Statutory intent . . . is more relevant to the interpretation of these conditions than are common law contract principles.”<sup>232</sup> Similarly, the Ohio Supreme Court has long recognized, “[t]he liability thus created is obviously, therefore, not a contractual liability involving a meeting of the minds, but a purely statutory obligation.”<sup>233</sup> Along the same lines, the Federal Circuit has observed that

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228. See Brown, *supra* note 227, at 1737 (quoting James H. Chadbourn & Charles T. McCormick, *The Parol Evidence Rule in North Carolina*, 9 N.C. L. REV. 151, 166 (1931)). One issue that cuts across the contract interpretation/statutory construction divide is the applicability of the parol evidence rule, i.e., the principle excluding the admissibility of extrinsic evidence to supplement or contradict terms of a complete and unambiguous contract, absent exceptional circumstances such as ambiguity, fraud or mistake. See *Harris v. Allstate Ins. Co.*, 300 F.3d 1183 (10th Cir. 2002) (stating this rule); *Berg v. Hudesman*, 801 P.2d 222, 229 (Wash. 1990) (stating this rule); *Deerhurst*, 165 A.2d at 152-53 (stating this rule). If one accepts the premise that the implied incorporation doctrine is an issue of contract construction rather than contract interpretation, then it would be clear that the parol evidence rule does not exclude contract terms supplied by law. *Ervco v. Texaco Refining and Mktg., Inc.*, 422 F. Supp. 2d 1084, 1087-88 (D. Ariz. 2006) (explaining that the process of construing contracts means that the parol evidence rule does not preclude references to statutes included by reference); Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 Fordham L. Rev. 35, 44 (1985) (noting that “authorities agree that the parol evidence rule does not exclude obligations imposed by law.”).

229. See, e.g., *Ohio, Pa. & W. Va. Coal Co. v. PanEnergy Corp.*, 120 F.3d 607, 610-11 (6th Cir. 2007) (applying incorrectly the concept of implied incorporation); *Unihealth v. U.S. Healthcare, Inc.* 14 F. Supp. 2d 623, 633 (D.N.J. 1998) (applying incorrectly the concept of implied incorporation).

230. E.g., *Morrell v. Wellstar Health System, Inc.*, 633 S.E.2d 68, 71 (Ga. Ct. App. 2006) (“The cardinal rule of contract construction is to ascertain the intention of the parties. . .”).

231. See Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 837 (1964).

232. *Rendleman v. Brown*, 860 F.2d 1537, 1541-42 (9th Cir. 1988).

233. *Lloyd v. Cincinnati Checker Cab Co.*, 36 N.E.2d 67, 69 (Ohio 1941). Corbin cites the *Lloyd* case for the proposition that when the legislature prescribes the use of a contract

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“[w]here a contract implements or fulfills a statutory requirement, the interpretation of the contract will be guided by the underlying statute.”<sup>234</sup> Parallel rules state that courts construe regulations in contracts to effectuate the intent of the regulators and not the parties.<sup>235</sup>

Another way of looking at this issue is to assess the reasonable expectations flowing from the implied incorporation of laws and regulations. When the contracting parties are bound by a statute, they agree to comply with the law as envisioned by the legislature as a matter of statutory construction and *not* as the parties might have (mis)understood it.<sup>236</sup> By comparison, the primary function of contract interpretation is to do the opposite and enforce the “reasonable expectations of the parties” as expressed at the time of contract formation.<sup>237</sup> Thus, what counts for the implied incorporation doctrine is not discerning the reasonable expectation of the parties but identifying, to the extent possible, the reasonable expectations of the legislature. In the words of the U.S. Court of Appeals for the Sixth Circuit,<sup>238</sup>

We recognize that in construing a contract which rests upon statute, the statute must be read into the contract, and that rules for construing statutes are not those which apply to the construction of contracts. Whereas in a

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provision, the legislature’s intention controls irrespective of how the contractors understood it or even if the parties agree to the contrary. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 197, 200 (rev. ed. 1960). *See also* Kolbe v. BAC Home Loans Servicing, LP, 738 F.3d 432, 443 (1st Cir. 2013) (describing the same).

234. Dalles Irrigation Dist. v. United States, 82 Fed. Cl. 346, 355 (2008). *See also* Gaudet v. Safeco Ins. Co., 593 A.2d 1362, 1365 (Conn. 1991) (noting that where the legislature has dictated the inclusion of terms in a contract, it is appropriate to consider the legislative intent to interpret those terms).

235. Honeywell Inc. v. United States, 661 F.2d 182, 186 (Ct. Cl. 1982).

236. Kolbe, 738 F.3d at 442 (Lynch, C.J., separate opinion) (citing 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.26 at 278 (Joseph M. Perillo ed., rev. ed. 1998); Ramos v. SimplexGrinnell LP, 21 N.E.3d 237, 239 (N.Y. 2014).

237. *See* Spear, Leeds & Kellogg v. Cent. Life Assurance Co., 85 F.3d 21, 28 (2d Cir. 1996) (reasoning that courts ascertain and implement the reasonable expectations of the parties who undertake to be bound by its provisions); Norville v. Carr-Gottstein Foods Co., 84 P.3d 996, 1004 (Alaska 2004) (finding also that courts use the parties’ expectations when considering a contract). Some courts take a third course and state that the parties’ reasonable expectation is that courts will enforce the relevant laws and regulations based on the lawgiver’s intent as part of the agreement. *E.g.*, Madison Ave. Leasehold, LLC v. Madison Bentley Assocs. LLC, 811 N.Y.S.2d 47, 53 (N.Y. App. Div. 2006) (ruling that “[w]ith respect to reasonable expectations, it is axiomatic that the parties to an agreement will interpret the instrument governing their relationship in accordance with existing law . . .”). *Cf.* B.F. Goodrich Co. v. United States, 94 F.3d 1545, 1549 (Fed. Cir. 1996) (stating that, as a court, “we are unaware of any authority or rule of statutory construction which would permit us to give effect to [a party’s] ‘reasonable expectations,’ in contravention of statutory language.”).

238. Pers. Indus. Bankers v. Citizens Budget Co. of Dayton, Ohio, 80 F.2d 327, 328 (6th Cir. 1935) (citation omitted).

contract the intention of the parties may be the controlling element, and their own acts may give meaning to their words, in interpreting statutes ‘the only intent which judicial construction can make certain is the intent of the legislative power.’<sup>239</sup>

### G. *Parallel Contractual and Statutory Enforcement*

When courts imply statutes as contract terms, the judges similarly should import the full catalog of statutory canons of construction. Thus, the Virginia Court of Appeals has stated that:

[W]hen a court must determine whether something is embraced within the terms of a statute, the statute should be construed ‘with reference to its subject matter, and the object sought to be obtained, as well as the legislative purpose in enacting it; and its language should receive that construction which will render it harmonious with that purpose rather than that which will defeat it.’<sup>240</sup>

A similar conclusion applies to the other categories of “laws” for purposes of this Article.

Despite all the cases construing the implied incorporation doctrine, and the asserted rationale that it is essential for the stability and certainty of contracting relationships, the argument can be made that the entire doctrine is superfluous and adds very little to the body of contract law. Statutes exert their full authority over all citizens, irrespective of whether the laws are included in contracts; statutes with their independent force and effect do not need the protection of the implied incorporation doctrine. Regardless of their intent or convenience, private parties may not agree to alter duties imposed by the legislature.<sup>241</sup> Whether the parties have contracted subject to the general law does not mean that courts will excuse them from being subject to a relevant law when the court construes the contract in light of the

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239. *But see supra* note 237 (indicating the reasonable expectation of the parties is to enforce the reasonable expectations of the legislature).

240. *Esparza v. Commonwealth*, 513 S.E.2d 885, 888 (Va. Ct. App. 1999) (citations omitted).

241. *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986) (ruling no reputable court will use its authority to approve an illegal contract). *See also* *Thrifty Oil Co. v. Bank of Am, Nat’l Tr. & Sav. Ass’n*, 322 F.3d 1039, 1059 (9th Cir. 2003) (holding that the applicability of relevant laws to contract is not a matter of the enforceability of the contract but of statutory construction). At least one court has held (incorrectly) that it should avoid the legislature’s intent. *See* *Farouki v. Petra Int’l Banking Corp.*, 63 F. Supp. 3d 84, 88 (D.D.C. 2014), *aff’d*, 608 Fed. Appx. 8 (D.C. Cir. 2015) (per curiam) (ruling that where the case involves only the individual rights of private parties, “‘a court ought to struggle greatly to avoid a construction of the law which would affect the rights of the parties.’”).



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statute.<sup>242</sup>

Indeed, “[i]t is elementary that no valid contract may be made contrary to statute . . . .”<sup>243</sup> which principle finds expression in the equitable maxim, *privatorum conventio juri public non derogat* (the agreements of private individuals will not be allowed to operate as to diminish the effect of a public law).<sup>244</sup> As Corbin observes, irrespective of whether the parties include a statute in a contract, they are bound to the law even if ignorant of the law or whether they know it and expressly agree to the contrary.<sup>245</sup> Simply put, entering a contract is not a safe harbor to violate the law.

Despite the rule that contracts cannot override laws, most authorities have seemingly ignored this rule and hold that parties have the ability to express a contrary intention that the parties are not bound by relevant statutory requirements. A common statement is “parties to a contract are presumed to [be] mindful of the existing law and that all applicable or relevant laws must be read into the agreement . . . *except where a contrary intention is evident.*”<sup>246</sup> Literally construed, parties by contract may decide when a party is exempt from the law. Importantly, these cases hold to the doctrine even when no evidence exists in the court’s opinion that a party made a valid waiver of her statutory or regulatory rights.<sup>247</sup> These holdings without any satisfactory explanation directly contradict Corbin’s above argument and conclusion that parties remain bound by the law.<sup>248</sup> Therefore, the rules allowing parties contractual exemptions from the law should be reconstituted as suggested above.

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242. 11 SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:24 (4th ed. 1999) (stating that parties can exempt themselves from the operation of the law only where the law does not safeguard the public good or morals and where the renunciation does not affect the rights of others).

243. *Agler Green Townhouses, Inc.*, 998 F. Supp. at 833 (citing Ohio decisions). *See also* *Paradissiotis v. United States*, 49 Fed. Cl. 16, 21 (2001) (stating that a contract will not defeat a lawfully promulgated statute or regulation).

244. *Cary*, 675 S.W.2d at 493.

245. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 201 (rev. ed. 1960).

246. *See Williams v. Stone*, 109 F.3d 890, 896 (3d Cir. 1997) (applying Maryland law); *Halderman v. Halderman v. Pennhurst State Sch. & Hosp.*, 901 F.2d 311, 323 (3d Cir. 1990) (applying Pennsylvania law); *McMahon v. Chicago Mercantile Exchange*, 582 N.E.2d 1313, 1319 (Ill. Ct. App. 1991) (applying Illinois law); 11 SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:19 (4th ed. 1999) (citing cases).

247. *See supra* notes 197-98 (including cases cited therein).

248. *See also Kandra v. United States*, 145 F. Supp. 2d 1192, 1201 (D. Or. 2001) (finding that a party’s contract rights are subservient to applicable statutes). The analysis in this section parallels whether the rule is a default or immutable rule. *See supra* Part IV, D.

### H. *Other Canons of Contractual Construction*

The prior section mentioned waiver of statutory/regulatory rights in a contract. No doubt exists that parties generally may waive statutory rights in a contract where intended for their benefit, provided that the waiver “is clear and unmistakable” and there is no contrary legislative intent barring a waiver.<sup>249</sup> Where a valid waiver occurs, the particular laws are no longer part of the particular party’s contract.<sup>250</sup> Indeed, waiver could override much of the implied incorporation doctrine.

Some cases give the impression that waiver of applicable laws is never permissible; for example, the Rhode Island Supreme Court has said that the implied incorporation doctrine applies “even though they knew of the legislation and expressly agreed upon the exact contrary.”<sup>251</sup> Curbing this right of waiver by mandating the inclusion of a statute/regulation in a contract irrespective of the party’s desires to the contrary does not well-serve the commercial law system. For one, long standing precedent allows a party to a contract to waive a constitutional or statutory right or even to change an established rule of law.<sup>252</sup> If courts allow parties to waive constitutional rights, surely it is proper for a party to waive a lesser right of statutory/regulatory construction. No one could argue that such a waiver eradicates the general binding force of the Constitution or duly enacted laws and regulations. This right of waiver is at least equal to the rule approving the implied incorporation doctrine. In fact, undue restrictions on statutory/regulatory waiver can adversely impact the strong public policy of a party’s right of freedom of contract – which enjoys constitutional protection – with no corresponding systemic benefits.<sup>253</sup>

As indicated above, a legislature may make a policy choice forbidding waiver of statutory rights where necessary to preserve congressional intent.<sup>254</sup> In this class of statutes, even where a party expressly purports to

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249. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1992); *Reservation Ranch v. United States*, 39 Fed. Cl. 696, 711 (1997), *aff’d*, 217 F.3d 850 (Fed. Cir. 1999); *Selzer v. Baker*, 65 N.E.2d 752, 753 (N.Y. 1946).

250. *Cycle Dealers Ins., Inc. v. Bankers Ins. Co.*, 394 So. 2d 1123, 1124 (Fla. Dist. Ct. App. 1981).

251. *Sterling Eng’g & Const. Co. v. Town of Burrillville Hous. Auth.*, 279 A.2d 445, 447 (R.I. 1971) (citing decisions).

252. *Wilkes v. Allegan Fruit & Produce Co.*, 206 N.W. 483, 484 (Mich. 1925).

253. *Cf. Ballsteadt v. Amoco Oil Co.*, 509 F. Supp. 1095, 1096 (N.D. Iowa 1981) (noting that the Due Process Clause of the Fifth Amendment protects freedom of contract, which is a “matter of great public concern”); *E. Cent. Okla. Elec. Co-op., Inc. v. Pub. Serv. Co.*, 469 P.2d 662, 664 (Okla. 1970) (reasoning that “[i]t is well settled that freedom to contract, or the right to enter a contract, is protected from arbitrary restraint or interference by the due process clauses of [the] state and federal constitutions.”).

254. *Reservation Ranch v. United States*, 39 Fed. Cl. 696, 711 (1997) (citing U.S.

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waive a statute applicable to a contract, but the statute affects the public interest or the institutional concerns of the legislature, the waiver will be ineffective.<sup>255</sup> An example is that in the federal procurement system, a party may not waive the rights established in the Contract Disputes Act<sup>256</sup> for the resolution of contract disputes between the United States and its contractors.<sup>257</sup> Another example is that a worker protected by the Fair Labor Standards Act (which covers such matters as the federal minimum wage, overtime compensation, and safe working conditions) cannot waive its protections.<sup>258</sup>

The problem with the above canon barring waiver is the difficulty in knowing when the legislative intent forbids a waiver. The standard is whether the state affects the public interest or the institutional concerns of the legislature but all statutes to a greater or lesser degree reflect these concerns. If they did not, the legislature has no business enacting them. Another point of potential confusion is that if the standard is that a court may deem a statute to be non-waivable based on the legislative intent or an affirmative prohibition to this effect, relatively few statutes will self-identify in these categories. As a prominent treatise points out, “[t]he line between statutes which may be waived and those which may not be waived is not clearly defined, and judicial opinions on this matter are inconsistent.”<sup>259</sup>

As shown above, the imprecise standards that characterize much of the implied incorporation doctrine also exist on whether parties have the ability to waive a particular law. When parties are unable to predict with confidence if the implied incorporation doctrine will impact their ability to waive a particular law, the doctrine undermines the established goals for stable contracting relationships in the commercial law system.

#### IV. MODIFICATION OR REJECTION OF THE DOCTRINE

Not all state and federal courts embrace the traditional implied

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Supreme Court and Federal Circuit decisions).

255. *Tesoro Haw. Corp. v. United States*, 58 Fed. Cl. 65, 73 (2003) (citing cases), *rev'd on other grounds*, 405 F.3d 1339 (Fed. Cir. 2005).

256. 41 U.S.C. §§ 7101-7109 (2011).

257. *See Burnside-Ott Aviation Training Ctr. v. Dalton*, 107 F.3d 854, 859 (Fed. Cir. 1997) (permitting the parties to waive the Dispute Act’s procedural protections would “subvert” the federal procurement system).

258. *See Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (reinforcing the Court’s ruling that FLSA rights can be neither waived nor obviated by contract in a way that counteracts the purpose of the statute); *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 (1945) (finding that voluntarily waiving employee wage and hour laws neutralizes the purpose of the FLSA).

259. 2B NORMAN SINGER & SHAMBIE SINGER, *SUTHERLAND ON STATUTORY CONSTRUCTION* § 55:8 (7th ed. 2012).

incorporation doctrine — the gamut runs from minor revisions to outright rejection. As a further reflection of the confusion on this topic, many of these decisions have overlooked other cases from that same jurisdiction approving the conventional viewpoint. Below is a sampling of formulations backing away from the standard implied incorporation doctrine:

(1) Relevant laws can form the context or background for common law contract construction.<sup>260</sup>

(2) Relevant laws are both part of the contract and part of the contemporaneous circumstances surrounding the contract.<sup>261</sup>

(3) “Contracts are presumed to be drafted with reference to existing principles of law, and in general, intent to modify applicable law by contract is effective only where expressly stated.”<sup>262</sup>

(4) Statutes are not implied terms when “a statute is so far afield of

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260. See *Stahl v. U.S. Dept. of Agric.*, 327 F.3d 697, 701 (8th Cir. 2003) (interpreting a contract “in light of” the relevant statutes and regulations); *Patterson v. Dep’t of Interior*, 899 F.2d 799, 807 (9th Cir. 1990) (ruling that interpretation of government contracts is to be made against the backdrop of relevant legislation); *Pioneer Reserve, LLC v. United States*, 125 Fed. Cl. 112, 118 (Fed. Cl. 2016) (ruling that a statute mentioned in passing in the contract was merely “background” information). See also 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 198 (rev. ed. 1960) (arguing that the principle should be limited to laws being part of the surrounding circumstances).

If he meant it in a factual sense, Corbin (and courts following him) overstate the law when they say that “the existing laws are *always* among [the surrounding] circumstances.” 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 24.26 at 271 (Joseph M. Perillo rev. ed. 1998). Many parties negotiating a contract may never reference a statute in the contract or during negotiations and might not even recognize a statute from the books if they saw one. Even if the parties did discuss a law during pre-contract negotiations, evidence of their past probable intent is inadmissible. See *Deerhurst Estates*, 165 A.2d at 550-51 (ruling that the parties, before signing the contract, were “fully aware” of a particular statute because it was a “repeated subject of discussion before the contract was executed,” and excluding evidence of how the parties thought the contract language incorporating the statute was intended to be construed).

Corbin also offered a more accurate, refined statement of the “surrounding circumstances” view when he said that “[r]emedies and ‘obligation’ are created by the law, not the parties; and the interpretation involved is constitutional and statutory interpretation.” 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 551 at 200 (rev. ed. 1960). Corbin’s view here tracks one of the dissenting opinions in *Ogden v. Saunders*, 25 U.S. 313, 325 (1827), where Justice Trimble argued that the law is not part of the contract but is the standard by which courts consider the parties’ contractual rights and obligations. See *infra* note 273 and accompanying text.

261. *P.R. Dep’t of Labor and Human Res. v. United States*, 49 Fed. Cl. 24, 31 (2001). See also *Dart Advantage Warehousing, Inc. v. United States*, 52 Fed. Cl. 694, 702 (2002) (emphasizing the ultimate importance of the words and responsibilities laid out in a contract agreement). *But see Barker v. Palmer*, 8 S.E.2d 610, 612 (N.C. 1940) (noting that a difference exists between statutes being read into a contract versus the contract being entered into in contemplation of applicable law).

262. *Dean Witter Reynolds Inc. v. Variable Annuity Life Ins. Co.*, 373 F.3d 1100, 1108 (10th Cir. 2004).

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matters of normal interest to contracting parties that they would not have thought it would affect the terms of their contract.”<sup>263</sup>

(5) Statutes become an implied contractual term only when the statute is “self-implementing,” i.e., it contains detailed criteria for when a particular contract is covered by the statute<sup>264</sup> and does not require the issuance of regulations to make it fully effective.<sup>265</sup>

(6) “While contracts may incorporate particular laws as contract terms, it must do so with specificity; general choice of law provisions do not accomplish this task.”<sup>266</sup>

(7) “This rule . . . should be limited to those laws which are ‘applicable’ and which affect ‘the validity, construction, discharge, or enforcement of the contract’ and care should be taken that its application is not extended to lengths which approach absurdity.”<sup>267</sup>

(8) “[N]ot all ‘state regulations are implied terms of every contract entered into while they are effective, especially when the regulations themselves cannot be fairly interpreted to require such incorporation.’”<sup>268</sup>

Some other decisions disavow or severely limit the doctrine (even as other cases from the same jurisdiction follow the prevailing rule). A

263. *In re Doctors Hosp. of Hyde Park, Inc.*, 337 F.3d at 958-61 (citations omitted) (deeming “artificial” the presumption that parties contract with knowledge of the law and that when courts imply laws as contract terms they are “merely construing the contract in accordance with the intent of the parties.”).

264. *See Univ. Research Ass’n, Inc., v. Coutu*, 450 U.S. 754, 784 (1981) (holding that the Davis Bacon Act setting wage rates for federal agency construction projects does not support a private right of action for workers to sue employers for back wages); *Niagara Mohawk Power Corp. v. F.E.R.C.*, 162 F. Supp. 2d 101, 107 (N.D.N.Y. 2001) (describing that when a statute is not self-implementing, it is a “regulatory statute” that takes meaning and authority from its attendant regulations); *Success Against All Odds v. Dept. of Pub. Welfare*, 700 A.2d 1340, 1351 (Pa. Cmwith. 1997) (explaining that a statute is self-executing if it is “mandatory in nature and require[s] no further legislative action in order to become effective.”).

RESTATEMENT (SECOND) OF CONTRACTS § 5 cmt. c (Am. Law. Inst. 1981), calls this category of contract terms “statutory contract terms” and proffers the U.C.C. as the most prominent example of statutes mandating these terms. The Restatement here correctly notes that these statutory terms do not require the obligor’s manifested agreement to this type of obligation.

265. *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 559 F. Supp. 2d 424, 429 (S.D.N.Y. 2008); *Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n*, 68 Cal. Rptr. 3d 391, 404 (Cal. Dist. Ct. App. 2007).

266. *Yonkers Sav. and Loan Ass’n*, 396 F.3d 178, 186 (2d Cir. 2005) (citations omitted).

267. *Wing v. Forest Lawn Cemetery Ass’n*, 101 P.2d 1099, 1101 (Cal. 1940) (citations omitted). *But see FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 284-85 (7th Cir. 2002) (“Nonsensical interpretations of contracts . . . are disfavored . . . because people are unlikely to make contracts . . . they believe will have absurd consequences.”).

268. *Am. Exp. Travel Related Servs.*, *supra* note 46, at 370 (quoting *Romein*, *supra* note 46, at 189) (stating that the principle goes no further than the laws affecting the validity, construction, enforcement or discharge of the contract). Query what elements of a contract are left uncovered by the laundry list in the prior sentence.

California decision forbade a private party from enforcing a rural cemetery association statute in private contract litigation because the State, and not private parties, was charged with enforcing this legislative enactment.<sup>269</sup> A Michigan Court of Appeals case rejects the rule because it distorts the principle of party assent.<sup>270</sup> A Connecticut Supreme Court decision said that the contract alone governed the parties' rights and obligations because the contract did not provide for performance in conformity with the statute.<sup>271</sup> Along the same lines as this Connecticut decision, a Pennsylvania<sup>272</sup> case held that an existing law did not bind the parties because the law was not affirmatively stated to be part of the contract. The U.S. Supreme Court in *Ogden v. Saunders* was divided on whether existing law is part of a contract — and two of the brightest luminaries in American legal history, Chief Justice John Marshall and Associate Justice Joseph Story, dissented because they contended that statutes cannot be implied contract terms.<sup>273</sup> In most of the above jurisdictions, however, with no attempt to reconcile the conflicting authority, the same courts in other opinions recognize the standard implied

269. See *Wing, supra*, note 267, at 1101 (interpreting a statute regarding the incorporation of rural cemetery associations). *But see* *Rice v. Downs*, 203 Cal. Rptr. 3d 565, 565-66 (Cal. Dist. Ct. App. 2016) (following the usual implied incorporation principle).

270. See *T & S Distribs., supra* note 18, at \*9 (stating that “Michigan courts [reject] such a principle, and will not read into an agreement terms that have not been placed there by the parties” and also that such laws are only part of the surrounding circumstances). *But see* *LaFontaine Saline, Inc. v. Chrysler Grp.*, 852 N.W.2d 78, 84 (Mich. 2014): “[Statutes] are necessarily referred to in all contracts, and form a part of them, as the measure of obligation to perform them by the one party and right acquired by the other.”

271. *Cronin v Pace*, 73 A. 137, 138 (Conn. 1909); *contra* *Russo v. City of Waterbury*, 41 A.3d 1043, 1047 (Conn. 2012) (“[A] contract must be interpreted in light of the laws that existed at the time the parties entered into the agreement.”).

272. *Meneice v. Camp Kadimah Co.*, 43 A.2d 621, 622 (Pa. Super. 1945) (reasoning that implied incorporation doctrine for a private contract depends on the intent of the parties); *contra* *Petty v. Hosp. Serv. Ass’n of Ne. Pa.*, 23 A.3d 1004, 1012 (Pa. 2011) (“[T]he laws in place at the time of a contract’s execution are incorporated into the contract and become contractual obligations.”).

273. In *Ogden*, writing for himself, Story, and another justice, Justice Marshall observed in a lengthy dissenting opinion,

We have, then, no hesitation in saying that, however law may act upon contracts, it does not enter into them, and become a part of the agreement. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of States, by arresting their power to repeal or modify such laws with respect to existing contracts.

*Ogden v. Saunders*, 25 U.S. 313, 344 (1827) (Marshall J., dissenting). Another justice in the same decision objected that the obligation of contract “consists not in the contract itself, but in a superior external force, controlling the conduct of the parties in relation to the contract; and . . . [i]t is this superior external force, existing potentially, or actually applied, ‘which binds a man to perform his engagements’ . . . .” *Id.* at 325 (Trimble, J., dissenting) (citations omitted).

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incorporation doctrine.<sup>274</sup>

The jurisdiction with the most confusing lines of authority is the United States Court of Appeals for the Federal Circuit and its subordinate tribunals, where some decisions come quite close to repudiating the implied incorporation doctrine, especially when the contract has open-ended language. The Federal Circuit and the subordinate United States Court of Federal Claims have rejected the argument that a contractual term simply providing that a party shall abide by “applicable regulations” — which obligation differs little from the implied incorporation doctrine — would fail to bind a party to every regulation conceivably relevant to the contract.<sup>275</sup> Another Federal Circuit case says that it will be insufficient in this respect for a contract to say that the agreement “is subject to the present regulations of the [agency] and to its future regulations not inconsistent with the express provisions hereof.”<sup>276</sup> The Federal Circuit has emphasized that construing a contract as written in this fashion would create an unfair scenario by which the plaintiff could pick and choose among an undue number of regulations, thereby creating extensive exposure to risk and liability “summarily created by mere implication.”<sup>277</sup>

The Federal Circuit’s concern is that mere passing references to the statute or regulation as a whole are insufficient to achieve “wholesale

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274. See *supra* notes 269-72 and cases cited therein.

275. Nat’l Leased Hous., *supra* note 39, at 766 (stating that the term “applicable regulations” injects “considerable indefiniteness” about the parties’ respective obligations under the contract which could open a “Pandora’s Box . . .”).

276. See *Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988) (doubting it was the agency’s intent to make a “wholesale incorporation of a mass of regulations many of which would probably have nothing to do with the FmHA’s [Farmers Home Administration] transactions with the [plaintiff] . . .”). See also *Northrop Grumman Info. Tech., Inc. v. U.S.*, 535 F.3d 1339, 1344 (Fed. Cir. 2008) (stating that the Federal Circuit “has been reluctant to find that statutory or regulatory provisions are incorporated into a contract with the government unless the contract *explicitly* provides for their incorporation.”) (emphasis in original) (quoting *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1384 (Fed. Cir. 2001)); *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 732 n.19 (Fed. Cl. 2004) (“To read [a] contract . . . as incorporating all future [statutes and regulations] . . . would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns.”) (quoting *Marathon Oil Co. v. United States*, 177 F.3d 1331, 1337 (Fed. Cir. 1998)); *Lurline Gardens Ltd. Hous. P’ship v. United States*, 37 Fed. Cl. 415, 421 n.7 (Fed. Cl. 1997) (“A recital that an agreement is governed or executed pursuant to a set of regulations does not incorporate those regulations into the agreement.”); *Valley Cleaners*, ASBCA No. 10253, 65-1 BCA ¶ 4,720 (Armed. Serv. B.C.A. 1965) (noting the insuperable task for any government contracting official or government contractor to understand *ex ante* the class of applicable regulations regarding a particular contract).

277. *Smithson*, *supra* note 276, at 795 (“This agreement is subject to the present regulations of the secured party [FmHA] and to its future regulations not inconsistent with the express provisions hereof.”).

incorporation” of the statute or regulation.<sup>278</sup> This argument is based on the common law concept that when parties wish to incorporate extrinsic information in the contract, the contract must use “clear and express language of incorporation” evidencing the parties’ desires to make the information more than just merely relevant to the agreement.<sup>279</sup> In fact, precedent from the Federal Circuit’s predecessor court, the United States Court of Claims, could be more restrictive than current law because the Court of Claims rejected contractual liability based on terms implied at law. This earlier precedent, which is still good law in the Federal Circuit, recognizes that absent express incorporation of regulations in the contract, a plaintiff suing for breach “cannot . . . import into the agreement terms outside of those expressly contained in the agreement.”<sup>280</sup>

Other cases from the Federal Circuit follow a diametrically opposed, more liberal, plaintiff-friendly doctrine. In one case, the Federal Circuit has stated without qualification, “The [Federal Acquisition Regulation’s (FAR) predecessor] is law which governs the award and interpretation of contracts as fully as if it were made a part thereof.”<sup>281</sup> In a divergent approach to when regulations physically absent from the contract may confer a remedy, the Court of Federal Claims also has said that it will read a regulation into a contract, and thereby acquire jurisdiction under the Contract Disputes Act, in light of the regulation’s (1) purpose, (2) connection to a Government contract and (3) intended beneficiaries.<sup>282</sup>

Notwithstanding the decisions disclaiming incorporation based on mere general references to statutes or regulations,<sup>283</sup> another Court of Federal Claims decision allows a general reference to regulations as a predicate for

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278. *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 826 (Fed. Cir. 2010); *Northrop Grumman Info. Tech., Inc.*, *supra* note 276, at 1344-45. *See also* *Earman v. United States*, 114 Fed. Cl. 81, 103-04 (2013), *aff’d*, 589 Fed. Appx. 991 (Fed. Cir. 2015) (concluding that the parties did not adequately incorporate the statute in question by reference, as they did not explicitly identify the written material being incorporated; nor did the parties clearly communicate that the reason why they made the reference to the statute was to incorporate it into the contract).

279. *St. Christopher Assocs.*, *supra* note 276, at 1384 (“This court has been reluctant to find that statutory or regulatory provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation.”) (citations omitted).

280. *See* *Tex. v. United States*, 537 F.2d 466, 471 (Ct. Cl. 1976). *See also* *Earman*, *supra* note 278, at 103 (construed in *Tex. v. United States* and noting that a statement that a contract shall be “‘carried out in accordance with all applicable Federal statutes and regulations’” does not incorporate wholesale sections of federal statutory and regulatory law).

281. *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988) (quoting *Chris Berg, Inc. v. United States*, 426 F.2d 313, 314 (Ct. Cl. 1970)).

282. *Todd Constr. v. United States*, 94 Fed. Cl. 100, 106-113 (2010). *See* 52 Gov’t Contractor 288 (Aug. 25, 2010) for further analysis.

283. *See supra* notes 276-79 and accompanying text.



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relief.<sup>284</sup> In a third divergence, several Court of Federal Claims cases say that relevant laws are both part of the contract and part of the contemporaneous circumstances surrounding the contract.<sup>285</sup> A fourth case approves a standard FAR contract clause requiring the private party's compliance with "all applicable Federal, State, and local laws, executive orders, rules and regulations applicable to its performance under the contract."<sup>286</sup> The Federal Circuit has not reconciled the above lines of authority with other binding decisions in that same jurisdiction accepting the standard implied incorporation doctrine.<sup>287</sup>

Lastly, the Federal Circuit follows yet another variation on this theme in federal government contracts cases. The *Christian* doctrine, named after a 1963 U.S. Court of Claims decision (the Federal Circuit's predecessor), holds that "a mandatory contract clause [so designated either by statute or regulation] that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a [federal executive branch government] contract by operation of law," irrespective of its physical presence in the agreement<sup>288</sup> or whether procurement officials have

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284. *Mann v. United States*, 53 Fed. Cl. 562, 565 (2002) (upholding a contract incorporating "all terms, conditions, and requirements of . . . all regulations promulgated by the Secretary of the Interior including, but not limited to, 43 C.F.R. Parts 3000 and 3200 . . ."), *rev'd on other grounds*, 334 F.3d 1048 (Fed. Cir. 2003). Notably, the Federal Circuit here expressly agreed with the Court of Federal Claims that the plaintiff had sufficient constructive notification of the regulatory statute at issue. *Mann*, 334 F.3d at 1050-51.

285. *P.R. Dep't of Labor and Human Res. v. United States*, 49 Fed. Cl. 24, 31 (2001). *See also* *Dart Advantage Warehousing, Inc. v. United States*, 52 Fed. Cl. 694, 702 (2002).

286. *Nilson Van & Storage v. United States*, 99 Fed. Cl. 408, 410 (2011) (citing 48 C.F.R. § 52.212-4(q)).

287. *Compare* *E. Bldg. Corp. v. United States*, 96 Ct. Cl. 399, 406 (1942) ("Laws which subsist at the time and place of the making of a contract enter into and form a part of it, as fully as if they had been explicitly referred to or incorporated in its terms."), *with* *Gen. Eng'g & Mach. Works v. O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993) ("[T]he *Christian* doctrine does not permit the automatic incorporation of every required contract clause.").

288. *S.J. Amoroso Const. Co., Inc. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993). *See also* *O'Keefe*, 991 F.2d at 779 (analyzing *G.L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl. 1963)); *but see* Brian A. Darst, *The Christian Doctrine at 50: Unraveling the Federal Procurement System's Gordian Knot*, 13-11 Government Contractor Briefing Papers 1 (Oct. 2013) (noting that "the *Christian* doctrine is not tied to the intent of the parties" and that the "*Christian* doctrine . . . carries with it a great deal of unpredictability, even where a clause or provision may be mandated by statute or regulation.").

An example of such a clause that the Government relying on *Christian* may invoke is the standard termination for convenience clause which allows the government in its interests to conclude the contractor's performance short of contract completion. *See e.g., Todd Constr., supra* note 282, at 108 (2010). A contractor may invoke the *Christian* doctrine, however, only where the missing clause was written to benefit the private contractor or both the government and the contractor. *Id.* at 108-12 (stating also that a contractor's status as incidental beneficiary of the statute is insufficient).

inadvertently or intentionally substituted one clause for another.<sup>289</sup>

Given the divergent lines of authority, the Federal Circuit's precedents need substantial reconciliation. For one, a respected commentator says that the Federal Circuit's recent reliance on incorporation by reference as the justification for the implied incorporation doctrine is inconsistent with, and inferior to, the *Christian* line of decisions.<sup>290</sup> Another line of discrepant case law is that, as shown above, the Federal Circuit in one line of decisions has said that express incorporation of laws is necessary for a particular law to be controlling but another line of authority provides that a catch-all reference in a contract incorporates all relevant laws.<sup>291</sup>

#### V. THE IMPLIED INCORPORATION DOCTRINE: A SUGGESTED REFORM

A state may freely alter, amend, or abolish common law doctrines, either by legislative<sup>292</sup> or judicial<sup>293</sup> action. This Article advocates that courts perform a significant overhaul of the implied incorporation doctrine. Presently, most cases burden contracts with unstated and even unknowable terms, where parties must guess *ex ante* about the content of their bargain, without an exchange of consideration to support the extra duties or responsibilities.<sup>294</sup> This Article offers the following scaled-back version of the current implied incorporation doctrine:

A law can form the basis for an implied contract right or a contract defense only where: (1) the law in question is for either the joint benefit of the parties or exists for the sole benefit of the moving party, *and* (2) the

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289. *S.J. Amoroso Const. Co.*, *supra* note 288, at 1075.

290. Ralph C. Nash, *Postscript: Incorporation by Reference*, 28 Nash & Cibinic Rep. 19 (Apr. 2014) (analyzing *Earman*, *supra* note 271, and noting that *Christian* "is . . . the correct way to analyze the issue" and also criticizing the incorporation by reference theory because a contractor "will have to review all of the statutes and regulations addressing how a program is to be carried out and insist that the agency put explicit language in its contract incorporating the appropriate statutes and regulations into the contract.").

291. *See supra* note 275 and accompanying text.

292. *Sciranko v. Fid. & Guar. Life Ins. Co.*, 503 F. Supp. 2d 1293, 1316 (D. Ariz. 2007) (citation omitted) ("It is well established that a State may, by legislative enactment, 'freely alter, amend or abolish the common law within its jurisdiction.'").

293. 15A AM. JUR. 2D *Common Law* § 13 (2009) ("Total abrogation, revision, or modification or change of an outmoded common-law rule is within the competence of the judiciary . . .").

294. *Compare Koby v. United States*, 47 Fed. Cl. 99, 103 (2000) (citations omitted) (noting that courts "'will not disturb the agreement into which the parties freely entered and for which consideration was given[.]'" because courts may not "'redistribute the risks'" under a contract), *with United Air Lines, Inc. v. ALG, Inc.*, 916 F. Supp. 793, 795-96 (N.D. Ill. 1996) (citations omitted) (noting that a court's role is to enforce the allocation of "risks and opportunities" that the parties have chosen for their contract).

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contract expressly incorporates the particular laws (or parts of laws) as term(s) of the agreement *or* (3) the law maker's intent for the law (inclusive of laws stemming from the state's police power) requires that a contract contain the law as conveying both a contractual right *and* remedy. A party may waive the protection of a law unless the lawmaker precludes waiver of such a right.

The first question must be the grievant's standing to bring the action because standing is jurisdictional and a complaining party's failure to establish standing would preclude a decision on the merits.<sup>295</sup> No basis exists for a party to complain about the enforceability of an implied statute or regulation intended solely for the benefit of the other party. The proposal also fully credits the waiver doctrine (including the exception).

The proposed reform is also rooted in the true rationale for the doctrine. This Article jettisons the prevailing doctrinal justifications that parties know and intend to follow the law or that the parties' hypothetical bargain dictates the incorporation of relevant or applicable laws and regulations. The proposal gets back to basics by giving a statutory/regulatory solution to a statutory/regulatory problem.

The proposal narrows the categories of cognizable "laws" to statutes, regulations, and the like (inclusive of codes and ordinances) to those enactments with the force and effect of law. Current law is far too liberal by including laws that are merely "relevant" or "applicable" to the contract. This Article also disagrees that the doctrine exists to prevent parties by private contract from overriding legislative enactments. Instead, absent the parties' express inclusion in the contract of particular laws and regulations as support for a right and remedy, the germane inquiry is whether the legislature (or other originating authority) has conferred upon the aggrieved party a private contractual right of action and remedy for the other side's breach of the particular law or other policy. Duly enacted laws and regulations govern the conduct of persons by their own force and no need exists to imply them as a contract term except in accordance with enacting body's intent.

This proposal avoids the pitfalls plaguing the current doctrine. It preserves the distinction between statutes being the acts of the legislature and contracts being the acts of the parties. The current doctrine, as opposed to the proposal, has resorted to the dubious use of legal fictions for much of the rationale for the implied incorporation doctrine. By banking on the legislative intent, the proposal avoids the debate regarding whether the doctrine is an immutable rule or a default principle. This proposal further

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295. *See generally* Media Techs. Licensing, LLC v. Upper Deck Co., 334 F.3d 1366, 1370 (Fed. Cir. 2003) (discussing standing).

tracks with the essential role of courts in disputes about this aspect of contract construction – to effectuate the expectations of the legislature but not the particular commercial expectations of the individual parties. Accordingly, this proposal has strong support from the principles of construction because it recognizes that a party can have no reasonable or settled expectation that a law grants a contract right or remedy absent language clearly permitting this benefit.

Lastly, the doctrine eliminates the unfair aspects of the doctrine where a party fails to incorporate a clause, the other party relies on that omission, and a court unforeseeably raises the statute as a defense to liability. In Part II.A, this Article cited an Indiana case dealing with the implied requirement for restitution in a criminal plea agreement. It was sufficiently clear that the plea agreement had no provision for restitution and the defendant was entitled to rely on the case law rule that unless included in the agreement, the defendant had no restitutionary obligation. Nonetheless, the court unjustly held the statute overrode the contrary case law.

In sum, the proposed solution eliminates the problems associated with implied rules of law serving as traps for the unwary. Instead, the proposal contains the clear rule that the statute must direct the inclusion of a particular term, thereby giving parties fair notice of the role of legislative intent for inclusion of statutory terms.

What are some possible objections to the suggestion that courts fully exercise their common law authority in revising the doctrine? The first objection might be that courts are “particularly loath to indulge in the abrupt abandonment of settled principles and distinctions that have been carefully developed over the years.”<sup>296</sup> The response would be courts may “abandon [an] outmoded and unjust common law doctrine[.]”<sup>297</sup> In the words of the Indiana Supreme Court, “[j]udicial devotion to the doctrine of stare decisis is indeed a justifiable concept to be followed by our courts. However, it cannot and must not be so strictly pursued to the point where our view is opaqued and reality disregarded.”<sup>298</sup> A second objection might be that current law is based on the simpler test of “relevancy” or “applicability” of the statute whereas the proposed test could plunge courts into the complexities of statutory construction. The response would be that this Article has shown that courts have been engulfed with numerous doctrinal deficiencies, gaps, and contradictions and that the “relevancy” standard is a

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296. *State v. Lead Indus. Ass’n*, 951 A.2d 428, 446 (R.I. 2008). *See also* *Anson v. Schroeder*, 671 A.2d 1023, 1027 (N.H. 1995) (stating that changes should be made “sparingly” and “deliberately”); *Falcone v. Middlesex Cty. Med. Soc.*, 170 A.2d 791, 796 (N.J. 1961) (arguing that changes should be “gradual”).

297. *McIntyre v. Balentine*, 833 S.W.2d 52, 56 (Tenn. 1992).

298. *Brooks v. Robinson*, 284 N.E.2d 794, 797 (Ind. 1972).

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major contributor to the confusion. My proposal avoids all these deficiencies.

### CONCLUSION

Although nearly 1,200 state and federal decisions have considered the implied incorporation doctrine, which has been extant at least since 1806, this Article is the first to perform a comprehensive doctrinal, theoretical and policy discussion of this “basic legal concept of longstanding and accepted use.”<sup>299</sup>

After reviewing the numerous strands to the doctrine, and the divergent approaches and unresolved issues, and suggesting new answers to all these thorny problems, my assessment is that an unsuccessful melding of statutory and contractual construction in deducing contract terms is the main reason for the current flawed state of the law.

My proposal retains the doctrine as a useful tool for the efficient operation of applicable agreements only where the parties expressly agree to the particular term or where the enacting body intended that a provision should be part of the bargain. This streamlined version of the common law doctrine comports with the courts’ current outlook in general about distilling private rights from public statutes. Therefore, it should attract the interest of courts and legislatures willing to examine this maxim of construction in a manner consistent with long-held legal policies.

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299. *See supra* at note 8 and accompanying text.