Illiberty of Contract

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THE ILLIBERTY OF CONTRACT

Donald J. Smythe*

It has become customary to discuss many aspects of our problem under the heading of "freedom of contract."... But the phrase also gives rise to misconceptions. In the first place... the question is not what contracts individuals will be allowed to make but rather what contracts the state will enforce.¹

— Friedrich A. Hayek

I. INTRODUCTION

The term “liberty of contract” is usually associated with the

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doctrine that the due process clause of the United States Constitution prohibits or should prohibit the State from regulating contracts between private individuals.\(^2\) It is also often used synonymously with the term "freedom of contract."\(^3\) Many libertarians and free-market advocates embrace the liberty of contract doctrine because they are averse to State interferences with private market transactions.\(^5\) But the term is ironic because a contract is only legally binding if courts will enforce it. Since courts constitute the third branch of government, they are State actors; and contractual enforcement involves the exercise of the State’s powers of coercion.\(^7\) This is problematic because the State’s exercise of coercion

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\(^2\) When a capital “S” is used in the word “State,” it is meant to indicate a reference to government generally, not a state government within the United States.

\(^3\) The United States Supreme Court evinced a presumption against allowing government regulations of private activities during the *Lochner* era in the early twentieth century. But libertarian thought and laissez-faire doctrine did not influence the Court’s jurisprudence at that time. See, e.g., DAVID N. MAYER, LIBERTY OF CONTRACT: Rediscovering a Lost Constitutional Right 1–10 (2011) (discussing court jurisprudence during the *Lochner* era.). Mayer argues that the distinction between substantive due process and procedural due process is an artifact of those who were critical of the Court’s liberty of contract jurisprudence. *Id.* at 11–42.


\(^5\) According to Professor Bernstein, “American courts began to assert that a right to contract free from unreasonable government regulations is protected by the due process clause of the Fourteenth Amendment” by the late nineteenth century. *Id.* Although the protections of the liberty of contract doctrine have waned since then, so much that “freedom of contract is . . . [now] . . . almost entirely unprotected under modern constitutional law,” the doctrine still stands for the normative principle that there should be a right to contract free from government regulation. *Id.*

\(^6\) The United States Supreme Court has generally limited the definition of State action under the “State action doctrine” to acts undertaken by the Executive and Legislative branches. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 507 (Aspen Publishers, 3rd ed. 2006). Nonetheless, “there seems little doubt that judges are government actors and that judicial remedies are [S]tate action.” Erwin Chemerinsky, *State Action*, 618 PRACTICING LAW INSTITUTE, LITIGATION ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES – LITIGATION 183, 209 (1999). This article refers to State action in the literal sense and not in the more limited sense defined by the scope of the State action doctrine.

\(^7\) This is not a novel observation. As the quote under the title of this article indicates, Friedrich Hayek not only understood that contractual enforcement involves the exercise of State coercion, he also thought it should be the starting point for a libertarian theory of contracts. See HAYEK, supra note 1, at 230. In fact, modern libertarian scholars have also sought to justify the use of State coercion in contractual enforcements. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 14–15 (1974); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 15 (1998). The implications for the substance of contract law have yet to be fully explored. See generally Donald J. Smythe, *Liberty at the Borders of Private Law*, 49 AKRON L. REV. 1, 37–58 (2015), for a preliminary effort to explore implications for the substance of contract law.
impinges on liberty.

If the fundamental purpose of the State is to advance liberty, contract law requires justification. The theoretical justification for having contract law is important because it provides a basis for analyzing contract rules and doctrines. A fully developed libertarian theory of contracts should not only explain why contract law is necessary to advance liberty, but should also provide a basis for analyzing how specific contract rules and doctrines should be interpreted and applied to advance liberty. This article attempts to offer such a theory.

One does not have to be a libertarian to appreciate a libertarian perspective on contract law. Most people place great value on their liberty, and even if they would make significant trade-offs between their liberty and other rights that they value, an analysis focused on the relationships between liberty and contract rules and doctrines should help make those trade-offs clearer. Of course, a libertarian theory of contract law may also offer new insights into the ways in which contract rules and doctrines advance or impede liberty.

Much of the libertarian scholarship about contracts seems to overlap so much with utilitarian theories of contract that the libertarian thought often seems indistinguishable from utilitarianism. The most distinctive stream of modern libertarian thought proposes a "title-transfer theory of contracts." The title theory treats contracts as transfers of title rather than as legally enforceable promises, and it regards refusals to perform contractual obligations as thefts of property. The use of State coercion to enforce contracts is therefore justified because it is used to prevent a theft. There are problems, however, with the title theory. Since many libertarians and free market advocates tend to regard private property rights as absolute, the view that a contract is a transfer of title inclines some to believe in the strict enforcement of all voluntary agreements. This is problematic, as proponents of the title theory

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10 As Murray Rothbard explained, "Failure to fulfill contracts must be considered as theft of the other’s property." MURRAY ROTHBARD, *MAN, ECONOMY, AND STATE* 177 (1962). See also, Kinsella, supra note 9, at 21–22.
11 ROTHBARD, supra note 9, at 133. Support for strict enforcement of voluntary agreements is probably much stronger among free market advocates than among libertarians.
themselves have explained. Moreover, the title theory does not justify contractual enforcements of promises, unless the promises effect transfers of property. This is awkward and probably too limiting. Finally, the title theory does not, by itself, help to distinguish which agreements actually transfer title and which agreements do not. This can make the title theory seem confounding and even tautological because an agreement is legally enforceable only if it transfers title, but an agreement cannot transfer title unless it is legally enforceable.

Professor Randy Barnett has made important contributions to the title—or as he puts it, the “entitlement”—approach to contracts by articulating the role of consent in legitimizing entitlement transfers and helping to distinguish those that are contractually enforceable from those that are not. There is no doubt that consent plays an important role in legitimizing modern contractual enforcements, and Professor Barnett’s insights have therefore made important contributions to this article. From the perspective offered here, however, there are limitations to a consent-based theory of contracts. Perhaps most importantly, the consent theory does not explain why a court should use the power of State coercion to enforce a contract at all. If the purpose of the State is to minimize the exercise of coercion, why should the State itself use coercion to enforce a contract? Without more, the consent theory seems to depend on an assumption that the State’s purpose is not simply to minimize the exercise of coercion, but includes something else—at the very least, the purpose of enforcing consensual transfers of entitlements.

This article attempts to offer a more complete and systematic analysis of the relationship between liberty and specific contract rules and doctrines. The article presumes that the sole purpose of the State is to advance liberty, which is tantamount under the definition of liberty it uses to minimizing the exercise of coercion, including coercion by the State. Although consent may make the exercise of State coercion less


12 Murray Rothbard, for example, argues that only contracts under which the failure to enforce would be tantamount to theft should be legally enforceable. ROTHBARD, supra note 9, at 133.

13 *Id.* at 133–39.


15 To be more precise, under the terms used here, the advancement of liberty is
worrisome, this article does not presume that court enforcements of consensual agreements are any less coercive than court enforcements of non-consensual agreements. In that respect, this article attempts to offer a more coherent libertarian analysis. Moreover, since this article draws on a different tradition of libertarian thought, rather than title theory alone, it may also serve to stimulate—or provoke—further libertarian thought.\textsuperscript{16}

Any serious discussion of liberty should begin with a definition of the term. Scholars have debated the virtues of alternative conceptions of liberty, with some favoring narrow—or “negative” conceptions—and others favoring broader—or “positive”—conceptions.\textsuperscript{17} Negative conceptions of liberty typically define it in terms of what individuals enjoy freedom from, whereas positive conceptions of liberty tend to define it in terms of what individuals may enjoy the freedom to do.\textsuperscript{18} Negative conceptions of liberty tend to boil the definition down to what is minimally required for a free society, whereas positive conceptions of liberty are more expansive.\textsuperscript{19} Although prominent libertarian scholars have reasoned from markedly different conceptions of liberty,\textsuperscript{20} there is probably little disagreement among most scholars—and most people—about the desirability of being free from the exercise of coercion by others. It is reasonable to surmise that there is probably the greatest consensus among what liberty most minimally requires.

In the pursuit of the broadest consensus possible, this article defines liberty in a minimalist sense and outlines what might be called a tantamount to minimizing the exercise of coercion subject to the need to respect individuals’ spheres of personal autonomy and privacy.

\textsuperscript{16} This article shares some of the same presumptions and dispositions as those articulated by Professor Bruce Benson. See BRUCE L. BENSON, THE ENTERPRISE OF LAW (1990). Benson’s book drew primarily on economic theory to advance understanding of the possibilities for “privatizing” the law. See id. at 349–78 for a general discussion.

\textsuperscript{17} See, e.g., ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY xxxvi–lxiii (1969), for an overview of some of the controversies. As Berlin observes, neither narrow nor broad conceptions of liberty are either inviolable or sufficient. Id. at lx. Yet he also observes that “those who have ever valued liberty for its own sake believed that to be free to choose . . . is an inalienable ingredient in what makes human beings human.” Id.

\textsuperscript{18} See BERLIN, supra note 17, at xliii (framing the distinction between positive and negative liberty through the questions “Who is master?” and “Over what area am I master?”).

\textsuperscript{19} Id. at xlv (discussing how positive liberty expanded from the concept of negative liberty).

\textsuperscript{20} See, e.g., Daniel B. Klein, Mere Libertarianism: Blending Hayek and Rothbard, 27 REASON PAPERS, Fall 2004, at 7–11 for a comparative analysis of Murray Rothbard and Friedrich Hayek. As Klein observes, almost any conception of liberty is ambiguous and therefore ill-defined. Id. at 7.
minimalist libertarian theory of contracts.\textsuperscript{21} As Friedrich Hayek’s quote at the outset suggests, the article is distinctly Hayekian in motivation and spirit. Thus, following Hayek, the article defines liberty to require that individuals\textsuperscript{22} be as free as possible from the exercise of coercion by others, and that they have a sphere of personal autonomy and privacy within which they are free from intrusions by the State.\textsuperscript{23} Following Hayek again, coercion is defined to mean the control of the environment or circumstances of a person to the extent that she is forced to serve the ends of another. Such coercion can be exercised through the direct use of force or merely the threat of direct force.\textsuperscript{24}

Since contractual enforcements by courts involve the exercise of coercion by the State, it is difficult to justify contract law if the sole objective of the State is to minimize the exercise of coercion.\textsuperscript{25} In fact, modern attempts to justify contract law are often “speculative and rationalistic”\textsuperscript{26} when a more empirical, although perhaps less philosophically coherent, theory is warranted.\textsuperscript{27} Part II critiques the most prevalent modern theories of contract and offers a more empirical, and arguably more compelling, justification—one rooted in an understanding

\textsuperscript{21} The use of the indefinite article is deliberate. The author does not mean to suggest that this article offers the only possible “minimalist” libertarian theory of contracts.

\textsuperscript{22} The term “individual” is used in this article exclusively to mean natural persons, as opposed to corporate persons.

\textsuperscript{23} The first part of this definition of liberty is from Friedrich Hayek’s observation that liberty is “that condition of men in which coercion of some by others is reduced as much as is possible....” \textit{HAYEK, supra} note 1, at 11. The second part is from Hayek’s further observations that

\begin{quote}
[c]oercion... cannot be altogether avoided because the only way to prevent it is by the threat of coercion. Free society has met this problem by conferring the monopoly of coercion on the \textit{S}tate and by attempting to limit this power of the \textit{S}tate.... This is possible only by the \textit{S}tate’s protecting known private spheres....
\end{quote}

\textit{Id.} at 21.

\textsuperscript{24} Hayek defines coercion as “[S]uch control of the environment or circumstances of a person by another that, in order to avoid great evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another” \textit{Id.}

\textsuperscript{25} Since liberty is defined to mean freedom from the exercise of coercion by others, including the State, subject to having a sphere of personal autonomy and privacy that is free from intrusions by the State, stating that the objective of the State is to minimize the exercise of coercion is technically inaccurate. To be precise, the objective of the State is to minimize the exercise of coercion subject to the constraint that the State must respect individuals’ private spheres.

\textsuperscript{26} See \textit{HAYEK, supra} note 1, at 54.

\textsuperscript{27} See Freyfogle, \textit{supra} note 8, at 78–79. Freyfogle argues that most libertarian scholars ultimately depend on consequentialist arguments to justify private laws. Of course, some scholars do so more explicitly than others.
of the role that private law played in primitive legal systems, and was suggested by Hayek himself.\(^\text{28}\) As the discussion elaborates, there is a stronger justification for contractual enforcements in primitive societies than there is in highly developed ones. Modern contract theories, which have narrowed the range of enforceable promises to those that manifest the intent of parties to commit themselves to legally enforceable bargains, have served to limit contractual enforcements and, consequently, the exercise of State coercion. The most important question is whether contract rules and doctrines can be developed and modified to advance liberty even further.

Part III discusses the implications of a minimalist libertarian justification for contracts and provides an analysis of several important contract rules and doctrines. From a minimalist libertarian perspective, contract rules and doctrines should help to minimize the need for contractual enforcements by facilitating "relational agreements," which are agreements that are largely, if not entirely, enforced by the parties themselves. To that end, there is an important role in contract law for the statute of frauds, the parol evidence rule, the use of mercantile practices and customs in interpreting or supplementing ambiguous contracts, and the use of alternative dispute resolution (ADR) methods. Doctrines such as unconscionability, impracticability, and the unenforceability of agreements that are against public policy may also help to militate against the inappropriate exercise of State coercion. Part IV provides a brief conclusion to the article.

II. LIBERTY AND CONTRACT THEORY

A. Liberty, Utility, and Consent

The most common justifications for contractual enforcement are utilitarian. In fact, many libertarian theories of contract seem to be, at heart, utilitarian.\(^\text{29}\) Accordingly, they suffer from the same limitations as the utilitarian theories.\(^\text{30}\) From a utilitarian perspective, contractual

\(^{28}\) Hayek, supra note 1, at 140–41 (discussing recognition of private property as roots of primitive legal system).

\(^{29}\) Freyfogle, supra note 8, at 79. Richard Epstein, a prominent libertarian scholar, argues that rules of private law should be devised to maximize the total value of all property holdings. See Richard Epstein, Design for Liberty 79 (2011).

\(^{30}\) Hayek went to great lengths to denounce utilitarianism, which he characterized as being rooted in the "French rationalist tradition" of social thought founded upon idealistic assumptions of perfectly rational behavior. Hayek, supra note 1, at 56–61. In fact, he
enforcements are justified when the social benefits of the enforcements exceed the social costs associated with the exercise of coercion. The social costs and benefits are typically defined in economic terms. But purely libertarian values are inconsistent with the idea of trade-offs between individuals' liberty and the end values served by their contracts. From a minimalist libertarian perspective, social welfare is always greater when social outcomes are achieved with the minimum exercise of coercion possible than when they are achieved with the exercise of any amount of coercion greater than that, regardless of the ends achieved. Any justification of contract law that is based on utilitarian considerations must assume that the role of the State is not to minimize the exercise of coercion but to maximize utility. Since the minimization of coercion is not equivalent to the maximization of utility, a utilitarian justification of contract law is not libertarian, at least not in a minimalist sense.

Some libertarian scholars justify contractual enforcement on the grounds that the parties to a contract voluntarily assent to subject themselves to the State's power of coercion. To the extent that the parties consent to bind themselves to contractual enforcements, when courts enforce the parties' contract, they merely enforce the parties' intentions and will. By binding themselves to a legally enforceable contract, the parties are able to enjoy even greater freedom, since they can then trade their private property and other rights in return for private property and rights owned by others that are of greater value to them. The consensual justification of contracts is probably an essential element of any modern theory of contract, but from the perspective offered here it is incomplete because it assumes that the purpose of the State is not simply to minimize the exercise of coercion, but includes, in addition, an obligation to enforce the intent and will of parties who consent to bind themselves to a legally enforceable agreement.

In fact, both the utilitarian and the consent justifications are what Hayek referred to as "speculative and rationalistic" rather than...
empirical.\textsuperscript{34} And without some important qualifications, they both imply that the State should enforce many agreements that would undermine the liberty of at least one party to the agreement. For example, both theories imply that courts should enforce a voluntary agreement under which one party sells himself into slavery in return for a payment of money (perhaps to be made to a family member).\textsuperscript{35} They also seem to imply that courts should enforce an agreement between neighbors establishing racially restrictive covenants (in the case of the utilitarian theory, of course, as long as the joint economic surplus earned by the neighbors exceeds the decrease in economic surplus to others).\textsuperscript{36} But any theory of contracts that justifies slavery or racially restrictive covenants seems incongruous with liberty. There is no justification for the use of the State’s coercive powers to enforce a transaction that would result in someone becoming the slave of another and thus subject to the other’s coercion, or for someone to use the State’s coercive powers not only to serve as the instrumentality for racism and discrimination but also to limit the liberty of others by preventing them from engaging in a voluntary transaction for the purchase of real property.\textsuperscript{37}

Both theories raise other, perhaps even more fundamental, problems. The utilitarian justification of contracts, for example, seems to imply that a unilateral promise should be enforced if the costs to the promisor of fulfilling the promise are less than the benefits to the promisee of having the promise fulfilled. It would be onerous—if not impossible\textsuperscript{38}—for courts to engage in such a cost-benefit calculation on a case-by-case basis, and it seems impossible to determine, as a general

\textsuperscript{34} Id. at 54.

\textsuperscript{35} Robert Nozick has argued that people should have the right to sell themselves into slavery. See NOZICK, supra note 7, at 331. Other libertarians typically argue that title to one’s self is inalienable. See, e.g., ROTHBARD, supra note 9, at 135. Unfortunately, their arguments can seem tautological—e.g. an agreement to transfer title to one’s self is not legally enforceable because one cannot legally convey title in one’s self. BARNETT, supra note 7, at 81. Barnett offers an argument that is not tautological, but it seems to make significant qualifications to the consent theory—he argues that a person cannot surrender her right to change her mind in the future about whether to transfer her rights in herself to another. See also Smythe, supra note 7, at 16–18 (arguing that the State prohibiting selling oneself into slavery uses State coercion to interfere with a voluntary private transaction).

\textsuperscript{36} For example, Richard A. Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. CAL. L. REV. 1353, 1368 (1981). This is not to suggest that he would support the enforcement of racially restrictive covenants, but without further qualification or limitation, that appears to be the implication.

\textsuperscript{37} See Smythe, supra note 7, at 16–18, 34–35.

\textsuperscript{38} Hayek was highly skeptical about the capacity of human beings to make such rational calculations. HAYEK, supra note 1, at 54–58.
matter, whether the cost-benefit calculation would be positive or negative.\(^3\) The consent justification of contracts, on the other hand, implies that if a person has the intent and will to make (and fulfill) a promise, then the State should enforce that promise, regardless of whether the promise is unilateral or made in return for consideration. Without further qualification, the consent justification for contracts fails to draw any distinction between a contract and a promise. In that respect, it seems to prove too much. It would imply that courts should enforce many kinds of promises that they do not, such as engagement promises, intra-familial promises, and promises against public policy.

Neither the utilitarian nor the consent justifications of contract alone therefore provide an adequate basis for a minimalist libertarian theory of contracts. In fact, it is doubtful that any ahistorical, philosophically grounded theories can provide an adequate basis for understanding and analyzing contract doctrines that have evolved and adapted to address nuanced, real-world problems in changing social and political contexts. It is ironic that modern libertarian scholars have been drawn to “rationalistic” theories. Hayek, one of the most influential libertarian scholars of the twentieth century, went to great lengths to reject the “French rationalist tradition” in social thought, and advocated instead for the more “empirical British tradition” of classical liberal thought.\(^4\) Hayek believed that law was the product of history and social evolution rather than rational calculation. Given that some of the British political economists who influenced Hayek also influenced the development of modern anthropological thought,\(^4\) the obvious place to look, therefore, for a minimalist libertarian—or Hayekian, if one prefers—theory of contract law, is in anthropological research and scholarship on the role of private law in primitive societies.\(^4\)

\(^3\) Some have argued that an award of damages could be devised to ensure that contracts are only breached when it is efficient for them to be breached, but that argument rests on too many assumptions to persuade most contract scholars. See generally Melvin A. Eisenberg, Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law, 93 CAL. L. REV. 975, 997–1014 (2005).

\(^4\) HAYEK, supra note 1, at 56–61.


\(^4\) Hayek was quite clear about the influence of anthropology on his views. As he wrote, “modern anthropology confirms the fact that ‘private property appears very definitely on primitive levels’ and that ‘the roots of property as a legal principle’... are the very prerequisite of any ordered action...” HAYEK, supra note 1, at 140 (internal quotations omitted).
B. Contract’s Primitive Roots

As it turns out, one does not have to look very far to see why and how anthropological research influenced Hayek. Modern anthropological research instructs us that the earliest forms of government in primitive societies emerged to protect liberty—to resolve conflicts, prevent violence and coercion, and provide peace and security, both within and between social groups.\(^{43}\) It is reasonable to surmise that disputes about failed or dishonored promises and agreements commonly led to interpersonal conflicts in early human societies, and that primitive legal systems evolved in part to help forestall and mitigate the interpersonal and inter-group violence that otherwise might have resulted.\(^{44}\)

Hayek, a remarkably erudite and accomplished scholar, drew on anthropological research on the role of law in primitive societies in formulating his own conceptions of law and liberty.\(^{45}\) It is not surprising, therefore, that his writings share many of the presumptions and perspectives of the anthropological research. For example, as the legal anthropologist Adamson Hoebel explained, “the really fundamental sine qua non of law in any society—primitive or civilized—is the legitimate use of coercion by a socially authorized agent.”\(^{46}\) Hoebel recognized that law and order depended upon the use or threat of coercion by the State, writing: “A legal rule without coercion is a fire that does not burn, a light that does not shine. No matter that often the force need not be unleashed . . . force is still present though latent.”\(^{47}\) Moreover, Hoebel defined legal coercion as the “general social acceptance of physical power, in threat or in fact, by a privileged party, for a legitimate cause, in a legitimate way, and at a legitimate time.”\(^{48}\) Hoebel’s conception of law and his recognition of the need for State coercion coincide almost to the letter with Hayek’s conception of the law,\(^{49}\) which strongly reflects the influence that the emerging field of legal anthropology had on


\(^{44}\) Id.

\(^{45}\) Hayek cited Henry Sumner Maine and Bronislaw Malinowski, influential pioneers in the field of legal anthropology, to support his claims that the institution of property is essential to freedom and that it even appeared in the earliest primitive societies. Hayek, supra note 1, at 140.

\(^{46}\) Hoebel, supra note 43, at 26.

\(^{47}\) Id.

\(^{48}\) Id. at 27.

\(^{49}\) Hayek, supra note 1, at 20–21.
Hayek’s scholarship.\textsuperscript{50}

It is interesting, therefore, that Henry Sumner Maine, a pioneer in the study of the development of law in primitive societies, observed that in the earliest forms of civilization primitive tribunals emerged to resolve disputes legally because the alternative was for the parties or sub-groups involved to resort to violence.\textsuperscript{51} Adamson Hoebel later inferred from detailed case studies that, in primitive societies, private disputes were commonly the source of conflict between group members, and the laws that emerged from early dispute resolution mechanisms were what we would consider today primarily private laws rather than public ones.\textsuperscript{52} Although Henry Sumner Maine theorized that contractual obligations are characteristic of modern societies whereas status-based rules were characteristic of primitive ones, more recent research has concluded that both status-based rules and contractual obligations were present in primitive societies in varying degrees.\textsuperscript{53} It seems reasonable to surmise, therefore, that private transactional disputes caused at least some of the conflicts that gave rise to the potential for violence in primitive societies.

Hoebel describes the function of the law in primitive societies as the disposition of “trouble cases,” by which he seems to mean the resolution of difficult interpersonal conflicts that might lead to violence or threats of violence.\textsuperscript{54} Although most interpersonal disputes in modern, developed societies do not raise the potential for significant social disorder, in primitive societies they created the potential for “social explosions” that might pit one kin group against another and culminate in a “little civil war.”\textsuperscript{55} As Hoebel explains, even a relatively minor

\textsuperscript{50} See generally G. P. O’Driscoll, \textit{supra} note 41 for further evidence. As O’Driscoll observes, the Scottish political philosophers who influenced Hayek—including David Hume, Adam Ferguson, and Adam Smith—were also influential on the development of modern anthropology. \textit{Id.} at 2. Hayek’s knowledge of anthropology shaped his theories about the evolution of social phenomena. \textit{Id.} at 13.

\textsuperscript{51} \textsc{Henry Sumner Maine, Lectures on the Early History of Institutions} 288 (London, John Murray, Albemarle St. 1875) (“There is much reason in fact for thinking that, in the earliest times, ... Courts of Justice existed less for the purpose of doing right universally than for the purpose of supplying an alternative to the violent redress of wrong.”).

\textsuperscript{52} \textsc{Hoebel, supra} note 43, at 28.

\textsuperscript{53} \textit{See Norbert Rouland, Criticism of Maine’s Theory, in Law and Anthropology: A Reader} 22 (Sally Falk Moore ed., Blackwell Publ’g 2005). As Rouland explains, Leopold Frospisil, an influential legal anthropologist, has turned Maine’s theories on their heads, arguing that contractual obligations in primitive legal systems can actually precede status-based rules. \textit{Id.}

\textsuperscript{54} \textsc{Hoebel, supra} note 43, at 280.

\textsuperscript{55} \textit{Id.} ("Most of the trouble-cases do not, in a civilized society, loom large on the social
conflict between two or more individuals might have escalated and resulted in significant violence between their larger kinship subgroups.\textsuperscript{56} Of course, one potential source of such conflicts was from transactional disputes. The resolution of transactional disputes was probably, therefore, much more important to preventing the exercise of coercion in primitive societies than in modern, developed societies today.\textsuperscript{57}

In the most primitive societies, law was enforced by individuals without the need for anything like a modern State.\textsuperscript{58} In fact, the simplest primitive societies consisted of only a few closely related families and the communities were comprised of no more than a small kindred group.\textsuperscript{59} Although such a kindred group might have belonged to a tribe in an ethnological sense, communities were typically autonomous and not subordinate to any form of tribal government.\textsuperscript{60} Social relations were typically personal and economic resources were typically shared by all.\textsuperscript{61} Law and order was maintained primarily through informal mechanisms of social control, facilitated by strong family and kinship ties.\textsuperscript{62} On certain occasions, however, an individual would take action to enforce rights or take retribution against others.\textsuperscript{63} But when an individual acted in accordance with community norms to enforce rights or take retribution against another, that individual exercised coercion to enforce the law, implicitly acting as a public official.\textsuperscript{64} If the community implicitly acknowledged that the exercise of coercion by the wronged individual was in accordance with community norms, and in that sense, "lawful," and restrained the wrongdoer from retaliating, then law and social order prevailed over interpersonal violence.\textsuperscript{65}

There was little need for even rudimentary forms of government in very simple societies in which there were strong interpersonal
relationships between group members and economic resources were commonly shared.\(^\text{66}\) The need for more formal mechanisms of social control increased as primitive societies developed and engaged in more sophisticated, highly organized hunting practices.\(^\text{67}\) In these more advanced societies, kinship groups would come into more contact with one another and frequently consolidated into larger groups, which created the need for a more centralized political structure.\(^\text{68}\) The political leader of the consolidated group would then begin to take on the characteristics of a chief, and the political structure would begin to take on the characteristics of a rudimentary State. The full fruition of the law, however, did not begin until horticultural societies developed. Horticultural societies allowed political leaders to maintain control over wider geographic areas as well as more people, which both facilitated and necessitated further development of the law and legal systems.\(^\text{69}\)

As Hoebel summarized,

> [W]ithin loosely organized tribes in which the local group is autonomous, trouble involving members of different local groups frequently brews physical violence which often leads to feuding; feud marks an absence of law . . . yet it appears that every society has some set procedure for avoiding feud or bringing it to a halt; among the more organized tribes on the higher levels of economic and cultural growth feud is frequently prohibited by the action of a central authority representing the total social interest . . . .\(^\text{70}\)

One can, of course, properly refer to such a central authority as a State. One might worry, however, that although such a central authority might nominally represent the “total social interest,” it might, in fact, be influenced by some social interests more than others.\(^\text{71}\)

Anthropological research thus implies that law and legal enforcement preceded the emergence of the modern State, and it

\(^\text{66}\) HOEBEL, supra note 43, at 294.
\(^\text{67}\) Id. at 309.
\(^\text{68}\) Id.
\(^\text{69}\) Id. at 316.
\(^\text{70}\) HOEBEL, supra note 43, at 330.
\(^\text{71}\) This is one of the inveterate libertarian (and non-libertarian) concerns about vesting a monopoly on the use of coercion in the State. Hayek believed that the rule of law and the concept of a limited government arose during the Middle Ages in England as a check against the newly asserted power of the English Parliament to create laws by statute. HAYEK, supra note 1, at 167–70. Hayek embraced the principles of constitutional government, observing that “no person or body of persons has complete freedom to impose on the rest whatever laws it likes.” Id. at 181. He wrote that, “A free society . . . needs permanent means of restricting the powers of government, no matter what the particular objective of the moment may be.” Id. at 182.
emerged because it was necessary to forestall or mitigate violence or threats of violence resulting from interpersonal conflicts and disputes. Such conflicts probably often arose from disputes about the nature and extent of the parties’ obligations under some agreement, or the failure of one or both parties to meet their obligations under such an agreement. Therefore, the precursor to modern contract law originated from the social need to forestall and/or mitigate the exercise of coercion. When an individual, acting in accordance with community norms, exacted some form of retribution or took some form of compensation from another group member, that individual exercised coercion in a public capacity, and the behavior defined some primitive form of law. As primitive societies developed, so too did the need for more sophisticated forms of social control. Consequently, a rudimentary form of government emerged and a primitive precursor to a State assumed a monopoly over the legitimate exercise of coercion. To the extent that State officials made consistent decisions to resolve such disputes, a rudimentary body of law was defined.

There are some clear implications for the relationship between contract law and liberty. Anthropological research suggests that the use of State coercion to enforce contractual obligations evolved, in part, to prevent the exercise of even greater coercion between the individuals who were parties to private transactional disputes. Thus, the exercise of State coercion to enforce contracts—and other private law—was necessary to minimize the exercise of coercion in society overall. Accordingly, there is really no need for any philosophical justification of contract law—or private law generally—because the original purpose of contract law was to advance liberty directly. Although private disputes are less likely to lead to interpersonal violence in highly developed societies, if the State suddenly declined to adjudicate private transactional disputes there would almost certainly be wide-ranging adverse social consequences. Commerce would be significantly

72 “The privilege of applying force constitutes the official element in law. He who is generally or specifically recognized as rightly exerting the element of physical coercion is a splinter of social authority.” HOEBEL, supra note 43, at 27 (internal quotations omitted).
73 See id. at 26–27 (discussing anthropological research).
74 “[S]ome government coercion might be more than compensated for by the consequent reductions in non-governmental coercion.” Klein, supra note 20, at 17. Klein expresses skepticism about the usefulness of such arguments because they necessitate “the incorporation of theories of—or at least predictions about—social processes, about which we might disagree or in which we simply [do] not have any confidence.” Id.
75 HOEBEL, supra note 43, at 280.
disrupted and interpersonal violence or other forms of coercion would probably rise. A developed society that ceased to enforce contract laws altogether would almost certainly regress, and liberty would be impaired.

C. Adaptive Evolution and Ordered Liberty

Once a body of contract law has been established, individuals will naturally rely on it to advance their own interests. As Hayek observes, when the private legal rules are known and clear, individuals will subject themselves to the possibility of State coercion in order to pursue their own ends. In the enforcement of contract laws, individuals can use State coercion as a means to their own ends rather than allow themselves “to be used for the ends of others.”

Hayek believed that, historically, it was the cumulative growth of social institutions, such as contract law, that allowed human reason and civilization to flourish, because it was “the evolution of well-constructed institutions, where the rules and principles of contending interests and compromised advantages would be reconciled, that had successfully channeled individual efforts to socially beneficial aims.” Thus, Hayek argued, “the indispensable foundation for the argument for liberty” is not to be found in “the Cartesian conception of an independently existing human reason that invented... institutions” but in “the emergence of order as the result of an adaptive evolution.”

This may be why Hayek had so few quibbles with contract law. Hayek viewed contract law as a tool that individuals could use to construct private spheres within which they could enjoy their personal freedoms. As he observed, “[s]ince coercion is the control of the

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76 “Coercion according to known rules, which is generally the result of circumstances in which the person to be coerced has placed himself, then becomes an instrument assisting the individuals in the pursuit of their own ends and not a means to be used for the ends of others.” HAYEK, supra note 1, at 21.
77 Id.
78 Hayek cites Hume, Ferguson, and others for insight into “how institutions and morals, language and law, have evolved by a process of cumulative growth and that it is only with and within this framework that human reason has grown and can successfully operate.” Id. at 57.
79 Id. at 60.
80 HAYEK, supra note 1, at 57.
81 Id.
82 Id. at 59.
83 As Hayek explained:
That other people’s property can be serviceable in the achievement of our aims is due mainly to the enforceability of contracts. The whole network of rights created
essential data of an individual’s actions by another, it can be prevented only by enabling the individual to secure for himself some private sphere where he is protected against such interference.84 Free individuals should have the right to decide what to include within their private spheres.85 Property law largely defines the private spheres that individuals begin with, and contract law enables them to trade with others for property and other rights that they would like to have under their autonomous control.86 To that end, contract law must be applied impartially and with as little judicial discretion as possible.87

Thus, for Hayek, “freedom of contract” meant a kind of ordered liberty. An individual enjoyed freedom of contract as long as she was free from the arbitrary exercise of coercion because contract rules and doctrines were known and applied equally and impartially. As Hayek explained:

Freedom of contract, like freedom in all other fields, really means that the permissibility of a particular act depends only on general rules and not on its specific approval by authority. It means that the validity and enforceability of a contract must depend only on those general, equal, and known rules by which all other legal rights are determined and not on the approval of its particular content by an agency of the government. This does not exclude the possibility of the law’s recognizing only those contracts which satisfy certain general conditions or of the State’s laying down rules for the interpretation of contracts which will supplement the explicitly agreed terms. The existence of such recognized standard forms of contract which, so long as no contrary terms are stipulated, will be presumed to be part of the agreement often greatly facilitates private dealings.88

Thus, contract doctrines that void contract clauses, excuse parties
from obligations, or fill gaps in their writings are consistent with freedom of contract.

D. The Hayekian Project

Although Hayek had few quibbles with contract law, he was emphatically not conservative and would have rejected any suggestion that the law should remain static. As he observed, the problem with conservatism is that

by its very nature it cannot offer an alternative to the direction in which we are moving. It may succeed by its resistance to current tendencies in slowing down undesirable developments, but, since it does not indicate another direction, it cannot prevent their continuance. It has, for this reason, invariably been the fate of conservatism to be dragged along a path not of its own choosing.

Hayek therefore believed that, even though improvements in the law are bound to be slow once the basic parameters of a free society have been established, there is still "ample scope for experimentation and improvement within . . . [the] legal framework" which will enable a free society to become even better. Thus, the central question is not whether contract law can be improved; it is about how contract law can be improved. In other words, it is about the direction of change, not whether change is desirable—change is inevitable because the law cannot remain static. Although Hayek did not himself suggest the direction in which contract law should be taken, the main thrust of his life's work implies that contract law should be refined to make people even freer and thus increase their liberty further.

Given that private transactional disputes are less likely to result in interpersonal violence, the possibility for refinements and improvements in contract law should increase as societies develop. There should be opportunities to lessen the reliance on State coercion to enforce private agreements and arbitrate private transactional disputes. Of course, if the scope of contract law is to be narrowed, there would probably have to be ancillary developments in social philosophy and jurisprudence that help to justify more refined contract rules and doctrines. It would be a

89 See, e.g., Hayek's famous essay, "Why I am not a Conservative," included as a postscript in Id. at 398.
90 Id.
91 Id. at 231.
92 HAYEK, supra note 1, at 231.
mistake to suggest that the development of American contract law has generally been motivated and shaped by libertarian concerns, but it is at least a happy coincidence that, broadly speaking, contract rules and doctrines appear to have been refined in ways that advance liberty in the United States in the modern era.

Principles of equity governed the common law approach to contracts. Promises were generally enforceable, regardless of whether they were made as part of a bargain. In the United States prior to the nineteenth century, these principles manifested themselves in the rule that "a sound price warrants a sound commodity." The sound price rule authorized courts to inquire into the adequacy of consideration, which injected uncertainty into commercial contracts right at the onset of a significant expansion in commercial activity when commercial contracts were becoming more prevalent and complex. In the face of new circumstances and pressures, however, courts eventually began to shift from regulating the equity of commercial transactions to upholding the will of the parties. The doctrine of caveat emptor began to replace the sound price rule and consideration was made pre-requisite to a legally enforceable contract. Modern contract law thus began to revolve around a bargain theory and the parties' intent and will to commit to a mutually beneficial, legally enforceable exchange.

The modern shift in contract jurisprudence to focus on the intent and will of the parties and the requirement that a contract have consideration narrowed the range of promises that courts can enforce. As

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93 At early common law, courts of law would only enforce promises "under seal," regardless of whether they were made as part of a bargain. JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 311–12 (2009). In the face of pressure to enforce unsealed promises, Chancery courts established jurisdiction over contracts and began enforcing them in equity. Id. at 320–22. Promises were broadly enforced in Chancery courts, which followed a simple formula: "promises have to be kept . . . as long as they do not violate the laws of God and reason, that is, unless they are against good conscience themselves." Id. at 311, citing Franz Metzger, The Last Phase of the Medieval Chancery, in LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY 84 (Alan Harding ed., 1980).


95 Courts' reliance on principles of equity mirrored a preindustrial economy in which it was possible to identify "customary prices" for most commodities. As commercial activities expanded and became more complex, contract law began to assume a different role. Id. at 936.

96 Horowitz observed that the turn away from "regulating the equity of agreements" began in England during Lord Mansfield's time and continued throughout the nineteenth century. Id. at 944–45.

97 Id. at 946.

98 Horowitz, supra note 94, at 947.
a result, the shift narrowed the use of State coercion to enforce private transactions. In fact, the intent of the parties and the consideration requirement operate as separate filters, each weeding out from the set of enforceable agreements a subset. The intent and will of the parties is manifest in an offer and acceptance. If there is no offer and acceptance, an agreement will not be enforceable, even if there is consideration. Consideration is manifest in evidence of an exchange, whether it is an exchange of property for a price or an exchange of promises. In the absence of a true bargain, an agreement is not legally enforceable even if the parties did manifest their intentions to be bound. The requirement that the parties intend to make a bargain thus narrows the range of contractually enforceable promises more than either the intent and will requirement or the consideration requirement would by themselves. It may have been through happenstance, but the general drift of modern contract law has been towards limiting the use of State coercion to enforce private transactions.

Of course, the scope of modern contract law remains exceptionally broad. That should not be surprising: although transactional disputes might be less likely to result in violence and disorder in more developed societies, the abolition of contract law would almost certainly cause society to unravel. It would undermine the cornerstones of ordered liberty by forcing people to plan their affairs and make decisions in an uncertain and unstable legal environment. Even from a minimalist libertarian perspective, therefore, there is still a need for contract law in any free society, and innovations in contract law need to be made incrementally to preserve liberty.

But the justification for retaining an established body of contract law does not exempt contract law from the kinds of scrutiny that typically apply to other ways in which the State exercises coercion. In fact, since contract rules and doctrines are created by statutes or case precedents, and since legislatures and courts are State actors, it is only natural to ask, on whose behalf do the rules and doctrines serve? Research and scholarship across a wide range of fields, with diverse political orientations, suggests that the law may reflect a bias in favor of politically powerful and dominant individuals and social groups.  

99 The application of other contract doctrines that make an agreement unenforceable, such as unconscionability or impracticability, may also reflect the absence of intent. See the discussion, infra Part III.

100 A wide range of research and scholarships suggests that vested interests inordinately influence legislatures. For example, William Shughart writes,
Potential biases in the law create the possibility that some individuals could use the State's power to enforce contract laws as a means of exercising coercion against other individuals.

In the spirit of the Hayekian project, one might therefore ask, could liberty be advanced by further limiting the role for courts in enforcing private agreements? Beyond that, if the objective is to advance liberty how should the existing contract rules and doctrines be developed and applied? The next section of this article addresses questions such as these and outlines the broader contours of a minimalist libertarian theory of contracts.

III. CONTRACT RULES AND DOCTRINES

A. Relational Agreements

One of the ways in which contract laws can advance liberty is by reducing the reliance on courts to enforce private agreements. This can be accomplished in part by facilitating relational agreements. A relational agreement is one that is typically enforced and arbitrated by the parties themselves, possibly without the assistance of a contract or recourse to the courts. In fact, relational agreements are quite

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Small, homogeneous groups with strong communities of interest tend to be more effective suppliers of political pressure and political support (votes, campaign contributions, and the like) than larger groups whose interests are more diffuse. The members of smaller groups have greater individual stakes in favorable policy decisions, can organize at lower cost, and can more successfully control the free riding that otherwise would undermine the achievement of their collective goals. Because the vote motive provides reelection-seeking politicians with strong incentives to respond to the demands of small, well-organized groups, representative democracy frequently leads to a tyranny of the minority.

William F. Shughart II, Public Choice, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS 429 (David R. Henderson ed., 2008). For at least a century, scholars have alleged that there are important judicial biases. Over a century ago, Theodore Schroeder argued that judges may be biased by “sympathies instilled by a corporation practice and other schools of privilege...[that make them]... predisposed to favor privileged classes...” Theodore Schroeder, Social Justice and the Courts, 22 YALE L.J. 19, 26 (1912). Scholars continue to allege that the “the privileged socioeconomic status of judges affect[s] their decisions,” but now draw on social science research on implicit biases to support their claims. See, e.g., Michele Benedetto Neitz, Socioeconomic Bias in the Judiciary, 61 CLEV. ST. L. REV. 137, 142–52 (2013).

The discussion here draws a distinction between a relational agreement and a relational contract. As the terms are used here, a “relational agreement” is an agreement of an open-ended, ongoing nature between two or more parties which the parties themselves typically adapt to changed circumstances and unforeseen contingencies as they arise. The term “relational contract,” on the other hand, is a contract between the parties to a relational
common. Relational agreements sometimes arise, for example, in an office supply arrangement in which the buyer communicates his or her needs and the seller supplies goods without either party ever worrying about specifying the details of the agreement in writing. Depending on the manner of their communications, the parties may or may not have a contract; although, even if they did, it would typically be irrelevant to their transaction. In fact, there are costs and risks associated with the execution of a contract, which might incline parties to transact without one. For example, there are often significant costs associated with negotiating and drafting contract terms, and even if the terms have been carefully drafted there are often significant costs associated with litigating disputes, not to mention the risk that a court could hold a party to an obligation that the party did not intend to make. In some cases, therefore, the parties might intentionally prefer not to have a legally enforceable contract. For example, a trade contractor might prefer to rely on its reputation to assure its customers that it will perform the agreed work rather than make any written commitments that could be enforced in court; its customers might be happy to rely on the contractor's agreement. Thus, the parties to a relational agreement may execute a contract to help enforce their agreement even though they generally adapt their obligations to changing circumstances without asserting their formal contract rights. See Donald J. Smythe, The Role of Contractual Enforcement and Excuse: An Economic Analysis, 2 GLOBAL JURIST FRONTIERS 1, 2 (2002) for an overview.

102 See Marianne Jennings, The True Meaning of Relational Contracts: We Don't Care About the Mailbox Rule, Mirror Images, Or Consideration Anymore—Are We Safe?, 73 DENv. U. L. REV. 3, 12-18 (1995), for a discussion of this example, as well as her characterization of four generic types of long-term supplier relationships, ranging from the most informal, that may proceed without a contract, to those in which the parties execute carefully drafted, detailed writings to make their agreements as fully enforceable under contract law as possible.

103 A relational contract is one that is executed for an agreement under which the parties typically have ongoing obligations that are adapted to changing circumstances as the need arises. See Donald J. Smythe, Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts, 13 S. CAL. INTERDISC. L.J. 227, 230-31 (2004). A relational contract is typically incomplete because "the parties are incapable of reducing important terms of the arrangement to well-defined obligations." Charles J. Goetz & Robert E. Scott, Principles of Relational Contracts, 67 VA. L. REV. 1089, 1091 (1981). Although the parties execute a legally enforceable contract, they do so with the understanding that the terms of their contract will be adapted as the transaction unfolds. In that respect, their formal contract provides only a framework within which such adaptations may occur. In some respects, therefore, their formal contract is more like a constitution for the administration of their agreement than a contract in the classical sense. Ian R. MacNeil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 NW. U. L. REV. 854, 894 (1978).

104 Smythe, supra note 103, at 250.
reputation because they expect high quality work for a modest price.

There are a variety of ways in which contract rules and doctrines may facilitate relational agreements. For one thing, the law might establish threshold requirement for courts to use the power of State coercion to enforce private agreements, such as through a statute of frauds requirement or other requirements that make obligations contingent upon evidence of an intent to be bound. The law might also facilitate relational agreements by relaxing rules about the kind of evidence that can be used to interpret contractual obligations. A “soft” parol evidence rule allows oral evidence and evidence about mercantile practices and customs to bear on the interpretation of contract terms; it thus also frees the parties from the need to negotiate and draft detailed written agreements. Not least of all, the law might facilitate relational agreements by supporting the use of ADR.

1. The Statute of Frauds

A purely relational agreement might be in the best economic interests of both parties. More to the point of this article, it would also avoid exposing them to the risk of State coercion in the event of a dispute. It would therefore be a mistake for courts to intervene in agreements that the parties would prefer to be self-enforcing. To that end, the statute of frauds—or other contract rules that require a party to provide evidence that the other party intended to commit itself to the risk that a court might enforce its obligations against it—helps to distinguish agreements that are contractually enforceable from those that are not. By making that distinction, it also limits the scope of the State’s power to exercise coercion in the enforcement of contracts and

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105 The UCC requires that an agreement must provide a reasonably certain basis for giving an appropriate remedy to be legally enforceable. See U.C.C. § 2-204(3) (AM. LAW INST. & UNIF. LAW COMM’N 2015) (“Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”).

106 Id.

107 Id.

108 Of course, this was not the original purpose of the statute of frauds, but merely a fortunate consequence of its enactment. The statute of frauds was originally enacted to prevent fraudulent conveyance of real property by requiring written evidence to support claims that title to land had been conveyed contractually. Philip Hamburger, The Conveyancing Purposes of the Statute of Frauds, 27 AM. J. LEGAL HIST. 354, 372–74 (1983). Many at the time believed that the statute of frauds was first enacted to be an alternative to a centralized system for registering title to lands that the government would have to administer. Id. at 381–82.
therefore advances liberty.\textsuperscript{109} Parties that do not wish the courts to intervene in their transactions can intentionally avoid satisfying the statute of frauds—and/or whatever other rules serve the same purpose—to put their transactions beyond the reach of the courts. This role for the statute of frauds is broader than its historic role, which was to prevent courts from enforcing obligations based on fraudulent claims of an oral contract.\textsuperscript{110} But that historic role also served to protect parties from the errant exercise of State coercion.

The danger of having a rule like the statute of frauds is that it may wreak injustice on the unsophisticated and expose them to the malfeasance of opportunistic transacting partners. For example, a more sophisticated party might ensure that a less sophisticated transacting party signs a writing to make obligations enforceable against the unsophisticated party when the sophisticated party avoids signing a writing that would make obligations enforceable against the sophisticated party. The unsophisticated party might have understood that he would be subject to the risk that the courts would enforce his obligations against him, but he may not have understood that his transacting partner’s obligations would not be enforceable against her.\textsuperscript{111} Such concerns are mitigated, to some extent, by common law exceptions to the statute of frauds that allow enforcement under the doctrines of estoppel or part performance.\textsuperscript{112} For example, if the unsophisticated party had changed his position in reliance on an oral agreement and would suffer a detrimental injury unless the agreement was enforced, a court could enforce the agreement under the doctrine of estoppel even though the statute of frauds was not satisfied.\textsuperscript{113}

Unfortunately, there are risks to applying the exceptions too

\textsuperscript{109} This function is not unrelated to the original purpose of the statute of frauds. Fraudulent claims to title based on spurious claims of oral contracts would involve the exercise of State coercion on behalf of defrauders.

\textsuperscript{110} Hamburger, supra note 108, at 371.

\textsuperscript{111} Critics of the statute of frauds have long claimed that it has been used to prevent the enforcement of otherwise valid contracts much more frequently than it has prevented the enforcement of invalid ones. See, e.g., Lionel Morgan Summers, The Doctrine of Estoppel Applied to the Statute of Frauds, 79 U. PA. L. REV. 440, 442 (1931) (“How many unjust suits have been prevented as a result of the statute cannot be estimated, but the reports are filled with cases where just claims have been defeated by its operation.”)

\textsuperscript{112} Courts carved out significant exceptions to respond to the misuses of the statute. Id. at 458–59. The Restatement (Second) of Contracts includes a doctrine of part performance in Section 129. See David G. Epstein, Ryan D. Starbird & Joshua C. Vincent, Reliance on Oral Promises: Statute of Frauds and Promissory Estoppel, 42 TEX. TECH. L. REV. 913, 930–32 (2010) for a recent overview.

\textsuperscript{113} Summers, supra note 111, at 445–46.
broadly. If the parties intentionally chose not to sign a writing so that
courts could not intervene, the application of the estoppel doctrine might
allow one of the parties to use State coercion against the other
opportunistically. Therefore, exceptions to the statute of frauds should
be construed narrowly.114 In fact, before an exception is applied, courts
should look for evidence that the party seeking to have the exception
applied reasonably did not understand that the failure to satisfy the
statute of frauds would make the other party's obligations unenforceable.115 Such evidence might be provided by 1) the relative
lack of sophistication of the party,116 and/or 2) the absence of any non-
legal methods of enforcing the obligations.117 Examples of such
evidence might be the tit-for-tat interactions inherent in an ongoing,
repeated transactional relationship or the emotional and moral suasion
inherent in a family relationship or close friendship.118 Absent such
evidence, courts should be cautious about applying exceptions to respect
and preserve the ability of parties to opt out of contractual enforcement
in the courts at the outset of their transactions.

The statute of frauds imposes transaction costs on contracting
parties. Even if the writing necessary to satisfy the statute is minimal, in
many transactions, the need to execute a writing in and of itself is an
inconvenience. When the stakes are small, the parties might not bother,
even though they would prefer to have a legally enforceable contract.
Perhaps even more likely, if the stakes are small, the seller might prefer
not to have a legally enforceable contract, even though the buyer would.
For example, in a sale of a small consumer item—a bottle of milk or a

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114 If anything, it seems the exceptions have been applied far too broadly. *Id.* at 448
("[P]resent-day courts are practically unanimous in applying estoppel to validate contracts
unenforceable under the Statute of Frauds.").

115 Conversely, the question is whether the party seeking enforcement understood that the
other party did not intend to commit to contractual enforcement of its obligations.

116 An unsophisticated party might not understand the legal effect of the statute of frauds
whereas a more sophisticated one normally would. A party who knew the legal consequences
of not getting the other to sign a writing that provided evidence of his obligations would be
hard pressed to explain why he thought the other intended to have those obligations enforced
against him in a court of law.

117 A party would be much more likely to transact without the safeguard provided by legal
enforcement if there were ample non-legal methods of ensuring the other party complied with
the agreement.

118 For classic discussions of the non-legal governance options for transactions, see
MacNeil, *supra* note 103, at 856–65; Charles J. Goetz & Robert E. Scott, *Principles of
Relational Contracts*, 67 VA. L. REV. 1089, 1093–94 (1981); Oliver E. Williamson,
can of soda—the buyer might like to have contract remedies against the seller (if she thought about them), but the seller would probably prefer that the buyer not have them. Given the inconvenience, the parties would normally not bother executing a signed document. In such cases, however, it would be best if the statute of frauds did not apply. Since the statute might impose transaction costs disproportionate to the size of the potential surplus that the transaction could generate, most reasonable parties would not want to comply even if they would prefer that their agreements be legally enforceable. An alternative default rule might be appropriate for such transactions. For example, a writing could be required to prove the intent of the parties to opt out of contractual enforcement rather than to opt in.

The analysis has a number of implications that can be summarized as follows: A statute of frauds requirement should 1) not apply to small-stakes transactions; 2) not apply indiscriminately to transactions between a sophisticated party and an unsophisticated one, such as a merchant-consumer sale of goods; and 3) be subject to exceptions, such as the doctrines of estoppel and part performance; but 4) the exceptions should only be applied when the party seeking performance is relatively unsophisticated and there are few, if any, non-legal methods available for the parties to use to enforce their obligations. There are typically only significant non-legal methods for the parties to use to enforce their obligations if they have an ongoing relationship of some kind; this would normally be the case only if they were relational transacting partners or family members.

2. Parol Evidence

Most contract disputes raise questions about the appropriate interpretation of the contract terms. The resolution of the disputes usually depends on which evidence a court will consider in interpreting the contract terms. This can make the application of the parol

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119 As a practical matter, it would not apply. Under the UCC Section 2-201(1) a signed writing is required to enforce a contract for the sale of goods only if the price of the goods is $500 or more. U.C.C. § 2-201(1) (AM. LAW. INST. & UNIF. LAW COMM’N 2015).
120 George Cohen, Interpretation and Implied Terms in Contract Law, in ENCYCLOPEDIA OF CONTRACT LAW AND ECONOMICS 125, 125–26 (Gerrit de Geest ed., 2d ed. 2011).
121 Questions about contract interpretation and the admissibility of extrinsic evidence are often conflated, but they are distinct. See generally Margaret N. Kniffin, Conflating and Confusing Contract Interpretation and the Parol Evidence Rule: Is the Emperor Wearing Someone Else’s Clothes?, 62 RUTGERS L. REV. 75 (2009).
evidence rule dispositive. Some scholars have argued that, when the parties are sophisticated, courts should apply a “hard” parol evidence rule—that is, they should apply the parol evidence rule strictly and rely on the plain meaning of the parties’ writing to interpret the terms of the contract.122 This line of scholarship has been characterized as a neo-formalist123 movement in modern contract scholarship, and is often rooted in neoclassical economic analysis.124 But it is doubtful whether the prescriptions should apply widely enough to be of much practical value.125

The terms of any contract need to be negotiated and agreed upon using a language of some kind. Unfortunately, there are inherent limitations on the use of language that limit the precision of contract terms. There is no such thing as a “private” language.126 In other words, since a language must be shared, it cannot consist of words that have meanings to only the person who uses them.127 The meanings of words are inherently personal and they cannot therefore be understood in precisely the same way by different people. Although the meanings of words must be shared for any true communication to occur, they can only be shared imperfectly and any true communication is necessarily imperfect.128 In fact, it is not even certain that the understandings people have of the language they use at one time will be the same as their understandings of the same language at some later time.129


124 Alan Schwartz and Robert Scott describe the work as part of a larger project, “arguing that the law should pursue the first order goal of maximizing contractual surplus when it chooses rules to regulate merchant-to-merchant contracts.” Schwartz, supra note 122, at 928.

125 See, e.g., STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 68 (2009).


127 Id. at 787.

128 Public language cannot reflect the parties’ private thoughts. Id. at 795.

129 BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 37 (1993) (“Wittgenstein ... has shown that there is no fact of the matter to prove that I mean the same thing by my current use of a word as I did by my former use.”).
The need for the interpretation of contract language creates the need for an "interpreter." Neither of the contracting parties alone could act as the interpreter, and the terms of a contract cannot be self-interpreting. In other words, the parties cannot contract in a definitive way for the interpretation of the terms in the contract. In order to specify how a particular right or obligation should be interpreted, they would have to use additional language, and that language would be subject to the same interpretive problems as the language that needed to be interpreted. Ultimately, a third party that has the authority to impose its interpretation on the parties must interpret the contract. Since the State has a monopoly on the legitimate exercise of coercion, the only third-party with that kind of coercive authority is a court of law. Even the contract interpretations of a private arbiter can only be enforced by a court.

The parol evidence rule limits courts' use of extrinsic evidence in interpreting contract terms. It thus favors the use of evidence provided by a writing. Under the "four corners test," if a writing is unambiguous on its face a court will exclude parol or other extrinsic evidence in interpreting the contract terms. But a court that relied exclusively on the writing to interpret the contract might rule differently than a court that relied exclusively on the parol evidence. And a court that used both the writing and the parol evidence to interpret the contract might rule either way or differently still. This is problematic because, from a purely theoretical perspective, there is no reason why a court should favor certain kinds of language, such as the language used in writing, over other kinds of language, such as verbal statements.

A court needs to first interpret a contract in order to determine whether the parties meant to exclude parol evidence before it can exclude parol evidence solely on the grounds that the contract excluded

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131 Id. at 1726.

132 Of course, this does not mean that a merger clause or other contract term bearing on the interpretation of the contract would be of no value to a judge or arbiter. It merely means that such a contract term could not by itself govern the interpretation of the contract.


134 Ricks, supra note 126, at 803 ("[T]he meaning of contractual language might be clear within the four corners of the document but ambiguous or different outside of that context or when more context is added.").
it. It is illogical for a court to exclude parol evidence in interpreting whether the parties intended the contract to exclude parol evidence. If a court did consider parol evidence, that might raise ambiguities about the interpretation of the contract that were not evident from the writing. Such ambiguities might also raise the possibility that two courts—or even the same court at different times—might reach inconsistent interpretations of the contract, especially if they applied different versions of the parol evidence rule.

The parol evidence rule thus raises questions about the appropriate exercise of State coercion. Since the party with greater economic resources and better legal acumen usually drafts the writing used to provide evidence of the contract terms, a strict parol evidence rule will generally benefit dominant contracting parties at the expense of subordinate ones. In fact, it increases the likelihood that contracts will be ones of adhesion. Even where both parties are merchants and ostensibly sophisticated in contracting matters, the party with more economic and legal resources may use a standard form and the weaker party may be given a take-it-or-leave-it offer. As a general matter, the terms of any writing are more likely to reflect the interests of the stronger party, and a strict parol evidence rule will usually work to the advantage of the stronger party at the expense of the weaker one.

This means that under a strict parol evidence rule, there is a greater risk that the weaker party did not truly assent to the contract terms. The risk implicates liberty interests because when a court enforces the terms of a written agreement it exercises the power of State coercion. If a court enforced contract terms that the weaker party had not truly assented to, then the State’s coercive powers would, in effect, be used against the weaker party on behalf of the stronger party. If, on the other hand, the

135 Loth, supra note 130, at 1732 (“In legal theory it is an accepted proposition that the application of the law, or the identification of a legal proposition, presupposes an interpretation of the law.”).
136 Id. This reasoning appears to have been persuasive on the drafters of the UCC. For example, official comment 1(c) to UCC Section 2-202 rejects the idea that a court needs to find a writing to be ambiguous before it will consider parol evidence. U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM’N. 2015). But many state courts apply a strict—or “hard”—parol evidence rule under the state’s common law. See, e.g., Geoffrey Miller, Bargains Bicoastal: New Light on Contract Theory, 31 CARDOZO L. REV. 1475, 1522 (2010).
137 Application of a stricter parol evidence rule would obviously make the contract interpretation reflect the written language more than any oral language.
139 Id.
140 In fact, courts that are conscious of the imbalance in the bargaining power of parties
court declined to enforce an obligation of the stronger party because of "fine print" in the written instrument that the stronger party drafted, even though the weaker party believed the obligation to have been agreed upon, then the court would, in effect, facilitate a kind of malfeasance perpetrated by the stronger party against the weaker one. 141

Unfortunately, under a strict version of the parol evidence rule, the State's coercive powers would probably be used on behalf of powerful and socially dominant parties and against weak and socially subordinate ones much more commonly than they would be used on behalf of the weak against the powerful. 142

The implication is that liberty would be advanced, in general, if courts applied "soft" parol evidence rules rather than strict—or "hard"—ones. As a general matter, parol evidence should be excluded only if a preponderance of all of the available evidence—including any extrinsic evidence—establishes that both of the parties intended for their agreement to exclude the use of parol evidence in the interpretation of their contract.

In the United States, the Uniform Commercial Code ("UCC") incorporates an important role for mercantile practices and customs—courses of performances, courses of dealings, and usages of trade 143—in the interpretation of commercial contracts. Although it uses different terms, the United Nations Convention on Contracts for the International Sale of Goods ("CISG") incorporates a role for similar kinds of

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141 Courts might try to interpret the contract to satisfy the weaker party's "reasonable expectations." Id. at 637.
142 As Hayek observed:
That other people's property can be serviceable in the achievement of our aims is due mainly to the enforceability of contracts. The whole network of rights created by contracts is as important a part of our own protected sphere, as much the basis of our plans, as any property of our own.
HAYEK, supra note 1, at 141. To the extent that rules of contract interpretation favored the stronger against the weak, they might also implicate the State in helping the stronger parties to usurp the rights of the weaker parties.
143 UCC § 1-303(d) states:
A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.
U.C.C. § 1-303(d)(AM. LAW INST. & UNIF. LAW COMM'N 2015).
The conventional wisdom among most commercial law scholars has commonly been that the use of evidence about the parties’ past and present transactions and industry customs to interpret commercial contracts has a long history in European law, and was incorporated into the common law in part through the opinions of the great English jurist Lord Mansfield and the influence of Blackstone’s Commentaries. In line with that view, commercial law scholars have commonly thought that Mansfield’s opinions and judicial philosophy, including his insistence that mercantile practices and customs should inform the interpretation of commercial contracts, had significant influence on the development of American law after the American Revolution.

The conventional wisdom among commercial law scholars, however, has apparently not been shared by many legal historians. In fact, some legal historians have recently challenged the idea. Emily Kadens has persuasively argued that because medieval customs were inherently unstable and uncertain, medieval merchants frequently wanted legislatures and courts to impose contract rules upon them rather than find the rules governing their transactions in their mercantile practices. Interestingly, however, Kadens acknowledged that mercantile customs still played an important role in medieval

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(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Id.


LANGBEIN ET AL., supra note 93, at 496–500.


Kadens, supra note 147, at 1196–97.
commerce.\textsuperscript{149} As she observed, “custom offered more room for equitable development when the parties were close knit, repeat players who wanted less imposed, enacted law and more reliance on good faith, accommodation, and fair dealing in situations in which the risks were more evenly shared.”\textsuperscript{150} In other words, although there were many contexts in which medieval merchants preferred that legislatures or courts provided rules to govern their contracts, they preferred reliance on mercantile practices and customs in addressing contracts that we would consider relational.

Regardless of whether they influenced medieval law, the use of mercantile practices and customs to interpret commercial contracts would appear to support relational contracting practices. Over half a century ago, Stewart Macaulay’s seminal study of relational agreements revealed that the parties in many ongoing business transactions were much more fluid and flexible about their obligations than classical contract theorists typically assumed.\textsuperscript{151} In fact, Macaulay found that, even though the parties might execute a writing to provide evidence of their obligations at the outset of their agreement, over the course of their transaction their actual behavior would often deviate from the terms in the writing.\textsuperscript{152} Moreover, business firms’ approach to problems and unforeseen contingencies were typically much more cooperative and adaptive than classical contract theory implies; they would rarely, if ever, assert formal legal rights under their contract or threaten litigation.\textsuperscript{153} Macaulay’s early findings helped to influence the development of relational contract theory and undermine rigid formalism

\textsuperscript{149} Id. at 1199.
\textsuperscript{150} Id.
\textsuperscript{152} Macaulay, supra note 151. Interestingly, however, some recent research suggests that parties to relational agreements may learn how to improve their contracting practices as they transact over time. See generally K.J. Mayer & N. Argyles, Learning to Contract: Evidence from the Personal Computer Industry, 15 ORGANIZATIONAL SCI. 394 (2004).
\textsuperscript{153} Macaulay, Non-Contractual Relations, supra note 151, at 61–62.
Relational contract theorists typically believe that the use of mercantile practices and customs to interpret parties’ contracts helps to ensure that the interpretations reflect parties’ actual behavior rather than writings that merely provide a legal framework for their transactions.

Not all theorists agree. Some contract theorists argue that courts should adopt a formalist approach to contract interpretation, even when their agreements are clearly relational. Robert Scott, for example, argues that the parties themselves are free to use flexible rules to govern their non-legal, self-enforcement measures, but that courts should apply strict rules for contract enforcement. Moreover, when Scott argues that courts should apply strict legal rules, he means that they should reject the use of mercantile practices and customs to interpret parties’ contractual obligations and instead apply a “literalistic interpretation” wherein they simply “enforce verifiable express terms” of the parties’ writing. Scott argues that limiting courts to “the enforcement of facially unambiguous express terms will . . . generate better and more accurate interpretations of those portions of disputed contracts that the parties chose to reduce to formal, legal terms.” While he acknowledges that strict formalism would encourage parties to expend more resources drafting written agreements, he argues that strict formalism is justified because courts are not competent to interpret the “contextual” evidence (such as course of performances, usages of trade, etc.) and “leaving contextual and other relational norms to be enforced by extralegal sanctions might actually improve the efficiency of the legal regulation of contracts.”

Recent research supports the claim that courts do not use evidence about mercantile customs and practices well. Lisa Bernstein, for example, has reviewed evidence from recent cases and concluded not only that courts probably make significant errors in evaluating usages of

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156 Id. at 852.

157 Id. at 859.

158 Id. at 860.

159 Scott, supra note 123, at 861.
trade, but also that these errors probably encourage the parties to many commercial contracts to incur higher contract drafting costs than they otherwise would so that they can specify their contract terms expressly and avoid the risks that courts will apply the wrong usages in adjudicating their disputes.\textsuperscript{160} Bernstein’s findings are consistent with her earlier research, in which she studied various trade associations’ attempts to codify their industry customs from the mid-nineteenth to the mid-twentieth century and found that “even in close-knit communities, merchant transactors do not, except within very local spheres or in very general ways, have similar views about the meaning of . . . commercial standards and usages of trade that the . . . [UCC] . . . direct[s] courts to take into account in deciding cases.”\textsuperscript{161}

Professor Scott, together with his coauthors Ronald J. Gilson and Charles F. Sabel, has recently expressed similar concerns about courts’ use of parties’ course of performances and course of dealings to interpret their contractual obligations.\textsuperscript{162} As Gilson et al. explain, “the manifest inability of generalist courts . . . to construe evanescent commercial practices . . . and the growing realization that . . . customary rules do not emerge spontaneously from practice . . . exposes the limitations of the contextualist understanding.”\textsuperscript{163} They argue that a textualist approach does not reject the use of context altogether, but instead allows the parties to “choose the extent to which a court can consider context at the enforcement stage.”\textsuperscript{164} It is, in that respect, less “imperialistic” than the contextual approach.\textsuperscript{165} By that, they seem to mean that courts’ use of mercantile practices and customs in interpreting parties’ contracts interferes with the parties’ autonomy and intrudes into private transactions.\textsuperscript{166} As support for the formalist approach, they observe that “both theory and available evidence suggest that legally sophisticated parties prefer a regime that follows the parties’ instructions specifying when to enforce formal contract terms strictly and when to delegate

\textsuperscript{163} Id. at 96.
\textsuperscript{164} Id. at 43.
\textsuperscript{165} Id.
\textsuperscript{166} In concluding, for example, they observe that for textualists (such as themselves), “the allocation to the parties to decide who chooses the mix of text and context and when that choice is best made is the expression of intent of an autonomous agent.” Gilson et al., \textit{supra} note 162, at 96.
authority to a court to consider surrounding context evidence."\textsuperscript{167} There are several problems with the neo-formalist arguments. To begin with, they offer no persuasive evidence that even legally sophisticated parties prefer courts that take a formalist approach to interpreting their contracts. The only reference that Gilson et al. provide to any empirical evidence that supports their claims is to an article by Geoffrey Miller that provides a detailed comparison of New York and California contract law and asserts that there is a “demonstrated preference of sophisticated contracting parties for the more formalistic New York approach..."\textsuperscript{168} Miller observes that the article actually draws on evidence presented in an earlier article by Theodore Eisenberg and Geoffrey Miller.\textsuperscript{169} Moreover, he observes in a footnote that “[t]he results of the present study are not conclusive ... [and] ... depend in part on the reliability of Eisenberg and Miller’s empirical analysis."\textsuperscript{170} A reading of the Eisenberg and Miller article,\textsuperscript{171} however, raises serious questions about the empirical support for the claim that sophisticated parties prefer formalist rules of contract interpretation.

The Eisenberg and Miller article analyzes choice of law and choice of forum provisions in a sample of 2,865 contracts reported to the Securities and Exchange Commission ("SEC") over several months during 2002.\textsuperscript{172} Since the firms that reported the contracts were subject to SEC reporting requirements they were obviously publicly traded corporations and thus qualify as sophisticated commercial actors. The majority of the contracts addressed financial matters or mergers: slightly over 63% of the contracts covered bond indentures, credit commitments, mergers, pooling and servicing agreements for asset-backed securities arrangements, securities purchases, security agreements, or underwriting agreements.\textsuperscript{173} At the outset, Eisenberg and Miller provide several reasons why the contracts in their sample might specify that New York law should govern: New York has been a hub of commercial activity for many decades and has actually "cultivated its role as the choice of law

\textsuperscript{167} \textit{id.} at 40.
\textsuperscript{169} \textit{id.} at 1477.
\textsuperscript{170} \textit{id.} at 1478 n.11.
\textsuperscript{172} \textit{id.} at 1487.
\textsuperscript{173} Table 1 shows that there were a total of 1,807 contracts of this type in the sample of 2,865. \textit{id.} at 1488.
for commercial matters through early efforts to promote enforceability of arbitration clauses, through legislation, and through the creation of specialized business courts.174 They also observe that New York courts and lawmakers actively attempted to create legal rules that would encourage use of New York law for financial contracts, but none of the rules they mentioned were related to the use of parol evidence.175 In fact, a careful reading of Eisenberg and Miller's results reveals that they have little, if anything at all, to say about the parol evidence rule.

Across all types of contacts in their sample, New York law was chosen in about 46% of the contracts.176 After New York law in order of preference was Delaware law, which was chosen in about 14% of the contracts, and then California law, which was chosen in slightly over 7% of the contracts.177 New York law was the most common choice for ten of the thirteen types of contracts and all six of the financial types of contracts. California law, however, was actually a more common choice for employment contracts, and was almost as common a choice as New York law for licensing, merger, and settlement contracts.178 New York law, therefore, really only appeared to be dominant in financial contracts.179 In a regression analysis that excluded merger contracts and an “other” category, the choice of New York law was only positively and statistically significantly correlated with seven types of contracts, six of which were financial.180 The other type was “asset sales and purchases,” which could also be categorized as financial.181 The choice of New York law was not positively and statistically significantly correlated with any of the other four types of contracts, all of which were nonfinancial.182

In fact, one of the statistically significant results in the Eisenberg and Miller regressions is that firms incorporated in California and firms with places of business in California chose not to contract under New

174 Id. at 1481.
175 Eisenberg & Miller, supra note 171, at 1481.
176 Id. at 1490.
177 Id.
178 Id. at 1490–91. New York law was chosen in 20.41% of the licensing contracts compared to 16.33% for California law, in 16.75% of the mergers compared to 12.38% for California law, and in 17.81% of the settlement contracts compared to 15.07% for California law. Eisenberg & Miller, supra note 171, at 1491.
179 Id. at 1492.
180 Id. at 1501.
181 Id.
182 Eisenberg & Miller, supra note 171, at 1501.
York law. Eisenberg's and Miller's regression results indicate that the choice of New York law was negatively and significantly correlated with contracts reported by firms incorporated in California, and it was also negatively and significantly correlated with contracts reported by firms that had places of business in California. In the aggregate, 82.7% of the contracts reported by firms that were incorporated in California, or had their place of business in California, or used an attorney located in California chose California law and not New York law. And if one adds contracts involving a second party that was either incorporated in California or had a place of business in California, 93.3% chose California law and not New York law. In short, the Eisenberg and Miller results provide no compelling evidence whatsoever that sophisticated Californian firms showed a preference for New York's "hard" parol evidence rule over California's "soft" rule.

On the other hand, other empirical studies since Stewart Macaulay's have essentially corroborated his results and have cast further doubts on the attraction—and even relevance—of a formalist approach to contract interpretation. About ten years after Macaulay's study in the 1970s, Hugh Beale and Tony Dugdale interviewed thirty-three representatives from nineteen engineering manufacturing firms in Britain. They found that, in general, the firms in the study used contracts only for their primary obligations, in part because "within the trade certain terms and customs or unwritten laws were widely accepted." Although some agreements were carefully negotiated and documented, most involved the exchange of inconsistent forms and many were highly informal. Interestingly, the firms were less concerned about forming legally enforceable contracts than they were about reaching a common understanding about the important or problematic terms of their deals. In the vast majority of cases, the respondents would settle disputes quickly and usually without the help of legal counsel. In fact, the respondents were wary of involving

183 Id. at 1502.
184 Id.
185 Id. at 1499.
186 Eisenberg & Miller, supra note 171, at 1499.
188 Id. at 47 (internal quotations omitted).
189 Id. at 49–50.
190 Id. at 50.
lawyers in their transactions, either at the planning stages or in the event of disputes, because they felt lawyers were inflexible and not well informed about commerce. Whether that is true or not, the results of the study are inconsistent with the neo-formalist’s empirical claims.

In the 1990s, Lane Kenworthy, Stewart Macaulay, and Joel Rogers conducted a similar study of contracting relations between major U.S. automobile manufacturers and their suppliers as well as their dealers. They interviewed officials from each of the three major U.S. automobile manufacturers, fifteen suppliers, and several dealers, as well as representatives from state and national dealer associations; they also sent a written survey to 150 suppliers and received a 39% response. They found that the manufacturers had so much bargaining power that their contracts left suppliers with little, if any, legal protection. Although the imbalance in power created tensions, contract litigation between manufacturers and suppliers was “extremely rare.” Suppliers often indicated that transactional disputes were not worth litigating, especially since litigation might sever valuable business relationships. The most salient aspect of the manufacturers’ contractual relations with their dealers was the reliance on mediation and dispute resolution. Although the dealers generally had more leverage with manufacturers than the suppliers, manufacturers put significant effort into maintaining good relations with their dealers and the use of ADR mitigated recourse to litigation. The study suggests that contracting practices in the automobile industry were focused much more on avoiding litigation altogether than on limiting the scope of the evidence that could be used in contract litigation.

Also in the 1990s, Mark Suchman and Mia Cahill conducted a similar study of Silicon Valley attorneys and their role in the region’s high-tech industries and venture capital financing. They interviewed

192 Id. at 59.
194 Id. at 635.
195 Id. at 647, 654.
196 Id. at 652.
197 Kenworthy, Macaulay & Rogers, supra note 193, at 653.
198 Id. at 660-64.
199 Id. at 674.
200 Id. at 666, 674.
roughly 25 “lawyers, venture capitalists, and entrepreneurs, as well as . . . several individuals who . . . played multiple roles over the course of their careers.” 202 They found that Silicon Valley attorneys tended to see themselves as facilitators who help to manage transactional risks without “over-lawyer[ing]” transactions. 203 In fact, they found that the typical venture financing agreement looked less like a “careful apportionment of legal rights” than a group of business founders, investors, and attorneys edging their “way over a cliff.” 204 Interestingly, however, they attributed significant power to the attorneys as “venture capital deal makers,” which the attorneys acquired through their experience in the business. 205 Perhaps most interesting of all, they observed that the attorneys helped to reduce transactional uncertainty by fostering and reinforcing industry norms and promoting a cooperative attitude between parties rather than an adversarial one. 206 By promoting community norms, the attorneys helped to “homogenize” transactions, establish “contractual standards,” and “trade practices” that could help courts interpret ambiguous contract terms. 207 Professor Suchman and Professor Cahill even suggest that the Silicon Valley attorneys may have influenced national legal standards for venture capital financing. 208 In short, their study flatly contradicts any idea that the parties to venture capital financing agreements in Silicon Valley worried about whether strictly formalistic legal rules would apply to their written instruments.

There is no doubt that neo-formalist scholars can point to cases in which one of the parties alleged that the court’s use of mercantile practices and customs distorted the court’s interpretation of a contract. One of the limitations of this kind of empirical observation is that it is inherently biased towards cases that raise the most difficult interpretive problems. Such cases, of course, inevitably reflect only a tiny fraction of the contracts actually formed. The overwhelming majority of contracts, after all, are never litigated. A relatively small number of cases drawn from the billions of commercial contracts executed in a given year is a slender thread upon which to advocate rejecting principles of commercial law that have such deep roots across so many diverse legal

202 Id. at 682 n. 19.
203 Id. at 696–97.
204 Id. at 697.
205 Suchman & Cahill, supra note 201, at 697.
206 Id. at 699–700.
207 Id. at 704–05.
208 Id. at 705–08.
The use of mercantile practices and customs to interpret contract terms may provide great value to the great mass of relational contracting agreements, even if, in a relatively small number of cases, they raise interpretative problems that the courts do not deal with well. In many transactions that are never litigated, the mercantile practices and customs that might be used to interpret the parties’ contract may not be in dispute or at all controversial. Eliminating a role for mercantile practices and customs would force the parties to incur higher drafting costs or perhaps simply to take the risk of having courts adjudicate disputes without them.

In light of the paucity of evidence in support of the neo-formalist analysis and the contrary evidence that other studies provide, the claim that sophisticated parties prefer courts to apply strictly textual interpretations of their contracts lacks sufficient support to justify recommending that courts depart from existing rules and practices. Even if there was sufficient support, the claim that the use of mercantile practices and customs to supplement or interpret contracts should be of any concern to sophisticated parties makes no sense whatsoever in light of the neo-formalists’ own behavioral assumptions about sophisticated parties.

Neo-formalists appear to have overstated the difficulties of excluding courses of performance, courses of dealing, and usages of trade from carefully negotiated contracts. Although there is some

209 There is no question that courts and lawmakers, as far back as the medieval period, in many parts of Europe, looked to mercantile customs in attempting to adjudicate disputes. Kadens, supra note 147, at 1177–83. Kaden alleges that customs were often indeterminate and did not provide a basis upon which to build the law, not that they were unhelpful in resolving disputes. Id. at 1194–95.

210 For example, Bernstein asserts that “the enforceability and effectiveness of a general clause opting out of all trade usages is at best unclear.” Bernstein, supra note 160, at 71. For support, Bernstein cites David V. Snyder, who writes “As custom and conduct are part of the agreement not only by the fiat of the UCC definition but also as a practical matter, the parties will have a rough time banishing them generally.” David V. Snyder, Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct, 54 S.M.U. L. REV. 617, 635 (2001). But in that part of his article, Professor Snyder was rejecting the use of conventional default rule analysis for industry custom and conduct. Id. The problem, as he explained, is that custom and conduct are not gap-fillers like most contract default rules but aids in the interpretation of contract terms. Id. If the contract defines the seller’s quantity as a “load,” for example, usage of trade may help to explain what a load is. Id. at 648. Without any express definition of the term “load”, a clause excluding usage of trade would leave the contract incomplete. Id. Professor Snyder suggests that the clause might be regarded as boilerplate and might thus be disregarded in favor of using industry custom to define the term “load” and complete the contract. Id. at 648–49. But in such a case, the parties’ writing could hardly be described as a complete expression of the terms of their agreement. Id. In fact,
disagreement about whether an integrated merger clause should exclude the use of courses of performance, courses of dealing, and usages of trade to supplement or explain contract terms, the preponderant weight of the primary and secondary authorities suggests that if parties intentionally and specifically exclude them with an express contract clause then courts should abide by their wishes. \(^{211}\) The principle of party autonomy, one of the overarching doctrines of modern contract law, requires courts' deference to a clear, unambiguous exclusion of courses of performance, courses of dealing, and usages of trade. \(^{212}\) Sophisticated parties who are assumed to specify all of their contractual rights and obligations in writing should also be able to draft a clause that expressly

Professor Snyder is actually quite sanguine about the feasibility of excluding courses of performance, courses of dealing, and usages of trade. He observes that "negation of usage of trade and course of dealing can be relatively easy, although it does require attention." \(\textit{Id.}\) at 648. \(^{211}\) Until relatively recently, there was apparently little disagreement about the ability of parties to exclude mercantile practices and customs. \(\textit{See Note, Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law, 55}\) \textit{COLUM. L. REV.} 1192 (1955), in which the author writes,

if it appears from the contract that the parties intended to exclude the usage, the practice will, of course, be rejected. For example, the express provisions of a contract, although making no reference to a trade usage, may preclude its application because it is inconsistent with it, and hence the court will conclude that the parties could not have contracted with reference to it. Also where the usage is specifically excluded in the contract, or the contract excludes trade customs in general, the usage will not be admitted. \(\textit{Id.}\) at 1197. Although the question has not often arisen, some cases corroborate the author's assertions. \(\textit{See, e.g., Kelly-Springfield Tire Co. v. True's Oil Co., 184}\) P.2d 827, 829 (Wash. 1947) (finding that an express term excludes custom when it states, "the above plan shall not be subject to any verbal statements or agreements, or trade customs of any kind or nature"); \(\textit{Iowa Canning Co. v. F.S. Ainsa Co., 267}\) S.W. 540, 542 (Tex. Civ. App. 1924) ("[c]ustom is never admissible, or read into a written instrument, to contradict what is there plainly stated, and especially would that be so where the parties have expressly, or by necessary implication excluded a custom or usage of trade"); \(\textit{Steffner Co. v. Flotill Products, 147}\) P.2d 84, 86 (Cal. Dist. Ct. App. 1944) ("the parties by their contract may evidence an intention not to be bound by the usage"); \(\textit{see also 12 WILLISTON ON CONTRACTS}\) § 34:11 (2015) ("[u]nder the common law, a custom or usage may be excluded from the terms of the contract either expressly or by implication."). Professor Bernstein cites one case in which "a clause excluding usages was included in the written contract, but not mentioned in the court's opinion." Bernstein, \(\textit{supra}\) note 160, at 71 n.29. In that case, however, the court held that "whether usage of trade . . . excluded the implied warranty of merchantability is a genuine issue of material fact and not appropriate for resolution on summary judgment." \(\textit{Leighton Industries, Inc. v. Callier Steel Pipe & Tube, Inc., No. 89C8235, 1991}\) WL 18413, at *4 (N.D. Ill. Feb. 6, 1991). \(^{212}\) The principle has been codified in UCC § 1-302 (AM. LAW INST. & UNIF. LAW COMM'N 2015), as well as the CISG. \(\textit{See Public Notice 1004, U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods, 52}\) FR 6262-02 Art. 6 (March 2, 1987).
excludes the use of courses of performances, courses of dealing, and usages of trade to interpret other contract terms. In fact, if the parties need help, there are many standard contract forms that suggest appropriate language, including at least one that is specifically intended for use in California, a state in which the neo-formalists seem to think the risks of errant contract interpretations are high. If parties are unaware that they can exclude mercantile practices and customs, or incapable of actually doing it, then they are hardly as sophisticated as the neo-formalist analysis assumes.

Even if parties were not able to exclude courses of performance, courses of dealing, and usages of trade with express contract clauses, they could avail themselves of other contracting options to forestall the use of mercantile practices and customs in interpreting their agreements. For example, if they were as perturbed about the risks that a court might misinterpret their agreements as the neo-formalists seem to think, the parties could opt out of contractual enforcement altogether. But even if they were unable or unwilling to opt out of contractual enforcement altogether, they could still opt out of "soft" parol evidence rules that might result in courts using mercantile practices and customs to interpret their agreements. In fact, the evidence that Gilson et al. cite about the purported preference of sophisticated parties for "hard" as opposed to "soft" parol evidence rules suggests that all the parties have to do to opt out of soft parol evidences rules and into hard ones is include, within their (complete and integrated) writing, a choice of law provision. If the parties are concerned that California law might govern their contract because they know California applies a soft parol evidence rule and they would prefer a hard rule like the one applied in New York, they can draft a choice of law clause specifying that New York law should apply. With fifty states, each following its own contract laws, the American legal system offers a large menu of choices.

214 See generally Gilson et al., supra note 162.
215 Lisa Bernstein has argued that, in the diamond industry, that is essentially what diamond traders have done. See generally Lisa Bernstein, Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. LEGAL STUD. 115 (1992).
216 Gilson et al., supra note 162, at 40.
217 According to Geoffrey Miller, "[b]oth New York and California recognize wide latitude of the parties to determine the law applicable to their agreements and the forum in which disputes will be resolved." Miller, supra note 168, at 1508. As he explains, New York law is more receptive to choice-of-law clauses than California, which may invalidate them if they would significantly impair substantial legal rights, but it is debatable whether that makes New York law any more respectful of party autonomy.
The theory and available evidence therefore do not support courts abandoning the use of evidence about mercantile practices and customs in interpreting disputed contract terms. Nor do they support the need for a different set of contract rules for sophisticated parties—or any other parties. If anything, they support courts’ uses of mercantile practices and customs in interpreting ambiguous contract terms or supplementing the express terms of ambiguous contracts, and, in conjunction with the principle of party autonomy, they affirm the capabilities of sophisticated parties to select the contract rules that they believe are most appropriate for their agreements from among the rich menu the American legal system offers. If anything, the neo-formalist criticisms point to the value of refinements and improvements in the use of evidence to prove courses of performances, courses of dealings, and usages of trade, but not to the need to eliminate them from having a role in commercial contract adjudication. The use of mercantile practices and customs in interpreting and supplementing contract terms may not help to develop and improve contract laws, but it will probably help to support relational agreements and ensure that courts’ adjudication of contractual disputes impinges as little as possible on liberty.

3. Alternative Dispute Resolution

The uses of alternatives to conventional litigation often facilitate relational agreements. In fact, many contracts include clauses requiring the use of ADR methods to resolve disputes. Sometimes parties might also agree to use ADR to resolve disputes after they have arisen, even if their contract has no clause requiring them to do so. Whether the parties reach an agreement to use ADR ex ante or ex post, as long as they truly intended to bind themselves to their agreement under the general rules of contract law, courts should enforce their agreement just as they would enforce any other mutually consensual contractual commitments. In fact, since the use of ADR has the great virtue of avoiding the use of the courts and therefore the direct use of State coercion, it is a practice that advances liberty and should be encouraged. It is also a practice that may serve the parties’ economic

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218 See Beale & Dugdale, supra note 187, at 58–59; Kenworthy, Macaulay & Rogers, supra note 193, at 660–64; Suchman & Cahill, supra note 201, at 699–700; Bernstein, supra note 215, at 124.

219 Steven Shavell, Alternative Dispute Resolution: An Economic Analysis, 24 J. LEGAL. STUD. 1, 2–4 (1990) for a discussion of ex ante and ex post ADR agreements as well as the economic motives of the parties who make them.
interests. According to Steven Shavell, for example, ex ante agreements to use ADR probably increase the parties' welfare by improving the resolution of some disputes and avoiding the high costs of litigation.\textsuperscript{220} Although it is less clear that ex post ADR agreements are always mutually beneficial,\textsuperscript{221} if parties truly intended to make a contractually enforceable agreement to bind themselves to ADR, that agreement should be enforced for the same reasons that other consensual contractual commitments should be enforced. Courts should not be responsible for rescuing parties from the consequences of their own bad decisions.

The Federal Arbitration Act ("FAA")\textsuperscript{222} now provides the most important part of the legal framework for the use of arbitration in the United States, even if, as is usually the case, parties contract for the use of arbitration under state contract law.\textsuperscript{223} In Moses H. Cone Memorial Hospital \textit{v.} Mercury Construction Corp., the Supreme Court stated that there is a liberal federal policy favoring arbitration and that any doubts about the scope of arbitral issues should be resolved in favor of arbitration.\textsuperscript{224} Moreover, the FAA is highly deferential to arbitrators, and provides for judicial review of arbitral awards essentially only if the arbitrators were grossly malfeasant or incompetent.\textsuperscript{225} While the

\textsuperscript{220} Id. at 2.
\textsuperscript{221} Id. at 3.
\textsuperscript{223} When the FAA was enacted, its supporters contended that it was a procedural statute. In a series of subsequent decisions, the Supreme Court clarified that the FAA provided substantive federal law with broad preemptive effect over conflicting state laws. See Katherine Van Wezel Stone, \textit{Rustic Justice: Community and Coercion Under the Federal Arbitration Act}, 77 N.C. L. Rev. 931, 943–48 (1999). The FAA therefore now applies in state courts, as well as federal courts. \textit{Id.} Moreover, unless there is a defect in the arbitration clause, the arbitrator must decide state contract law defenses. \textit{Id.}
\textsuperscript{224} Moses H. Cone Memorial Hospital \textit{v.} Mercury Construction Corp., 460 U.S. 1, 24–25 (1983).
\textsuperscript{225} 9 U.S.C. § 10 (1994). The four statutory grounds for vacating arbitral awards are as follows:

(a) Where the award was procured by corruption, fraud, or undue means.
(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

\textit{Id.}
Supreme Court has made it clear that courts should not expand the scope of judicial review of arbitral awards beyond the grounds specified in the FAA, it has not rejected language that allows courts to overturn arbitral awards if they are in "manifest disregard" of the law, and it is not clear exactly what that language means. Unfortunately, it appears that courts have interpreted the language differently, and some still overturn arbitral awards on non-statutory grounds. Some scholars agree with a broader scope for judicial review. Michael LeRoy, for example, argues that "judicial review must be available to correct an arbitrator's intentional flouting of the law" because "no man . . . is above the law."

In spite of the concerns, there is a strong public policy in favor of supporting the finality of arbitral awards and other outcomes of ADR. Part of the purpose of ADR is to avoid litigation costs, and if the scope for reviewing arbitral awards is broadened too far then the potential economies will be lost because an ADR clause will simply add an additional step to the litigation process. If parties truly intend to commit themselves to binding arbitration, with the full knowledge that any arbitral award will be subject to the narrow grounds for judicial review available under the FAA, then courts should enforce any arbitral awards strictly, applying only the grounds for review that the parties impliedly agreed to. If courts broadened the scope of judicial review, they could overturn an award that was consistent with the parties' agreement, potentially abusing the power of State coercion. State coercion would thus be used to interfere with a consensual private agreement rather than to support it. Moreover, since parties with more resources would probably, in general, be better able to use courts to challenge arbitral awards, State coercion would more commonly be used on behalf of socially and economically powerful parties than it would be used on behalf of weaker ones.

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227 In a recent case, the U.S. Supreme Court contributed to the confusion by stating that "manifest disregard" of the law might simply mean in disregard of the standards under the FAA or it might mean an additional, non-statutory standard for reviewing arbitral awards. Hall Street Associates v. Mattel, Inc., 552 U.S. 576, 585 (2008).
228 See Michael H. LeRoy, Are Arbitrators Above the Law? The 'Manifest Disregard of the Law' Standard, 52 B.C. L. REV. 137, 178 (2011) for an empirical study of challenges to arbitral awards comparing pre-Hall and post-Hall success rates. LeRoy observes that Hall actually caused a split among the federal circuits and that state courts continue to interpret the manifest disregard standard differently. Id. at 180–82.
229 Id. at 187.
230 Id. (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).
ADR clauses create problems, however, when it is not clear that both (or all) of the parties truly intended to commit themselves to ADR. If an arbitral award was enforced against a party that had not truly intended to be bound by an arbitral clause, the power of State coercion would be used inappropriately. Unfortunately, when State coercion of any kind is exercised, there is always the possibility that it may be used for the benefit of some and at the expense of others. Since it seems more likely that parties with fewer resources and less acumen might unintentionally become bound to ADR clauses than those who are better financed and more sophisticated, there is a risk that the misuse of State coercion to enforce arbitral awards would most commonly be on behalf of those with the most power and influence.

Fortunately, an arbitral award can still be defeated using general contract defenses targeted specifically at the arbitration clause. Thus, a claim that an arbitration clause is unconscionable could be used to overturn an arbitral award made under the arbitration clause. An aggrieved party might also be able to avail itself of other principles of contract law, such as the one stated in Section 211(3) of the Restatement (Second) of Contracts, which precludes a party from taking advantage of another party's ignorance by enforcing a contract term if he knew that the other party would not have assented to the agreement if she had known about the contract term. In theory, an aggrieved party should be able to challenge an arbitral award using Section 211(3) of the Restatement (Second) of Contracts on the grounds that she did not truly assent to the arbitration clause. In practice, courts may not have been as receptive to the use of Section 211(3) as they should have been, but this is something that the courts can, and probably should, change if they are to avoid misusing their powers.

ADR clauses and binding arbitration facilitate relational agreements

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231 As Stone observes:
Today many arbitration clauses are found not in contracts between equals in a shared community, but rather in contracts of adhesion between insiders and outsiders, such as between a powerful association and a nonmember or between a big corporation and a consumer.
Stone, supra note 223, at 1025.

232 Id. at 948–49.

233 Id. at 1019.

234 The Restatement states: "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981).

235 Stone, supra note 223, at 1024.
and help to avoid the direct use of State coercion, but they can also be abused. If liberty is to be advanced, courts should limit the scope of review of arbitral awards to the grounds that the parties have expressly or impliedly consented to under the FAA. But since more powerful parties can abuse arbitration at the expense of weaker parties, courts should be receptive to challenges against arbitral awards based on claims that 1) the arbitration clauses under which the awards were made were unconscionable or 2) the party seeking to enforce the award knew that the other party would not have assented to the contract if she had known that the writing included the arbitration clause.

B. Unconscionability

Although it may seem counter-intuitive, if the objective is to advance liberty, there is a role in contract law for rules or doctrines that allow courts to void contracts or contract terms. In the United States, the doctrine of unconscionability serves that purpose. The doctrine of unconscionability allows a court to void a contract or terms of a contract if the terms are so unfair that enforcing them would cause oppression and/or unfair surprise. Since that appears to be an interference with a market transaction, scholars who favor liberty and free markets have widely criticized the doctrine of unconscionability. As Robert Hillman has observed, however, there is a fine line between regulating a contract and interpreting it, and guile during the negotiation of an agreement often precedes an overreaching interpretation of contract terms later

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236 The Restatement states:

UNCONSCIONABLE CONTRACT OR TERM

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.


237 The doctrine is most commonly applied today using a two-pronged test that was first proposed by Arthur Leff. See Arthur Allen Leff, Unconscionability and the Code—The Emperor’s New Clause, 115 U. PA. L. REV. 485, 487 (1967). The first prong applies a test for procedural abuse, which is satisfied by evidence of sharp dealing, deceptive bargaining tactics, and unequal bargaining power. See, e.g., CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 155 (1999). The second prong applies a test for substantive abuse, which is satisfied by evidence that the terms are so one-sided and grossly unfair that it would be inequitable to enforce them. Id. As UCC Section 2-302, comment 1 states, “The principle is one of the prevention of oppression and unfair surprise.” U.C.C. §2-302, cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2015).

Unconscionability cases, therefore, can often be understood to be about contract interpretation rather than contract regulation. One could argue that if the terms of an agreement are so unfair that it would be inequitable for a court to enforce them, the terms could not have been truly bargained-for. And, of course, if the terms were not truly bargained-for, then they could not really have been part of any meaningful, consensual agreement.

Unconscionability cases thus raise questions about the appropriate exercise of State coercion. If the terms of a contract are unconscionable, the party against whom enforcement of the terms is sought did not truly consent to the use of State coercion to enforce them. If a court enforced the contract, therefore, it would be using the State’s power of coercion to enforce a claim by the one party against another, even though the other had not consented to subject itself to the exercise of State coercion under such circumstances. The court would, in effect, be serving as an instrument through which one party exercised coercion against the other. Under such circumstances, one could argue that a court would further liberty by using the unconscionability doctrine to void the contractual obligation rather than enforce it.

Of course, the unconscionability doctrine is a double-edged sword and a court could apply it in error. If courts routinely applied the unconscionability doctrine to void contractual obligations in circumstances where the obliged parties did assent to the contract terms, that would undermine the ability of parties, in general, to commit themselves to legally enforceable agreements. Unconscionability, therefore, has an important role to play in advancing liberty, but it can also be abused. The risks to liberty associated with misapplying the doctrine, however, seem less than those associated with the risks of failing to apply it when it should be applied. When a court uses the unconscionability doctrine to void a contractual obligation it merely declines to exercise the State’s coercive powers to bind a party to the

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240 See id. at 129–43; See also Donald J. Smythe, Consideration for a Price, 34 N. Ill. U. L. REV. 109, 126–32 (2013) for a discussion of common law contract cases that are purportedly about unconscionability, but upon careful reading seem to be about contract interpretation.
241 Smythe, supra note 7, at 47.
242 Barnett, supra note 14, at 318.
243 Smythe, supra note 7, at 47.
244 Id.
245 Id.
purported obligation.\textsuperscript{246} That does not involve any exercise of coercion or even interfere with the parties' agreement.\textsuperscript{247} The intent and will of the parties may be undermined when the court allows them to evade obligations to which they truly did intend to commit themselves, but that does not impede their liberty. Nonetheless, the unconscionability doctrine should be applied only in the appropriate circumstances. Those circumstances may be difficult to ascertain and verify and courts will inevitably make mistakes. If the purpose of the State is to advance liberty, however, the doctrine of unconscionability—or some other rule that allows courts to void inequitable, nonconsensual contract terms—should have an important role in modern contract law.

C. Impracticability

Sometimes after a contract has been formed a party seeks to be excused from the performance of an obligation. This has led to the development of a number of doctrines under which courts will grant parties excuses from contractual obligations.\textsuperscript{248} The doctrine of impracticability was the most recent excuse doctrine to emerge from the cases, and it is arguably the most relevant. Under the doctrine of impracticability a party may be excused from performance of its contractual obligations if its performance has become impracticable due to contingencies that were reasonably unforeseen at the time of contracting.\textsuperscript{249} In Mineral Park Land Co. v. Howard, for example, a party had contracted to build a bridge, but discovered that due to...

\textsuperscript{246} Id.

\textsuperscript{247} Smythe, supra note 7, at 47.

\textsuperscript{248} Under the doctrine of impossibility, a party may be granted an excuse from the performance of a contractual obligation if the party's performance has become impossible. Under the frustration of purpose doctrine, on the other hand, a party may be excused from performance of a contractual obligation if the basic purpose of the contract has been frustrated. The doctrine of impracticability is the most recent and broadest excuse doctrine, and, in some cases, it allows a party to be excused when the party's performance would simply cause an economic hardship. See Smythe, supra note 103, at 227–29, for an overview.

\textsuperscript{249} Id. at 227. The UCC has adopted the doctrine, which states:

"Delay in delivery or non-delivery... by a seller who complies with paragraphs (b) and (c) is not a breach of his duty... if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made..."

U.C.C. §2-615(a) (AM. LAW INST. & UNIF. LAW COMM’N 2015). UCC § 2-615, comment 1 explains, “[t]his section excuses a seller... where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.” U.C.C. § 2-615, cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2015).
difficult soil conditions that were unknown at the time of contracting, the construction costs would be several times larger than expected and building the bridge would cause it to suffer severe economic hardship, if not complete financial ruin; under those circumstances, the court excused the party from performance.\textsuperscript{250} The doctrine of impracticability is probably the most important excuse doctrine today since it has been adopted in Section 2-615 of the UCC and arguably also in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods.\textsuperscript{251} It is also the broadest.

As the scope of contractual excuse doctrines has broadened, some scholars have raised concerns, particularly those who fear that parties may be able to use broader excuse doctrines to evade contractual obligations to which they committed themselves to be bound.\textsuperscript{252} This article concurs with their concern. Nonetheless, some scholars may, at times, have misconstrued the courts’ role in adjudicating contractual disputes. For example, some scholars have criticized courts for interfering with the allocation of parties’ risks when they grant contractual excuses.\textsuperscript{253}

When a court grants a party an excuse from performance of a contractual obligation, it does not interfere with the contractual allocation of risks, even if the court has misapplied an excuse doctrine and allowed it to be used opportunistically.\textsuperscript{254} There is an important difference between a court using its coercive powers to change the risk

\textsuperscript{250} Mineral Park Land Co. v Howard, 156 P. 458 (Cal. 1916).
\textsuperscript{253} See, e.g., Triantis, \textit{supra} note 252, at 480 (“[J]udicial reallocation of risk through contract doctrine such as commercial impracticability is an interference with freedom of contract that cannot be justified on grounds of economic efficiency.”); Gillette, \textit{supra} note 252, at 527 (“[T]he existence of a state-imposed, presumptive gap filler that permits excuse may predetermine what allocation will be chosen by the parties.”); Robert E. Scott, \textit{Conflict and Cooperation in Long-Term Contracts}, 75 CAL. L. REV. 2005, 2009 (1987) (“The highly interactive nature of the parties’ response to problems of noncooperation makes the effects of any legally imposed adjustment largely unpredictable. Adjusting losses coercively may sometimes be consistent with the cooperative strategies the parties have developed. But, . . . I conclude . . . that the existing foundation of highly complex social and contractual norms requires broad party autonomy . . .”).
\textsuperscript{254} See \textit{HILLMAN}, \textit{supra} note 239, at 32–36.
allocations in an agreement, and a court declining to use its coercive powers to bind parties to a purported agreement allocating their risks. More to the point of this article, in the former case, the court would undermine liberty because it would use the power of State coercion against at least one of the party’s will; in the latter case the court could never undermine liberty because it would simply be declining to use the power of State coercion. In fact, it would probably be a mistake to presume that courts have run amuck and granted too many excuses when they should not have done so.255

Nonetheless, if parties are concerned about the possibility that courts might misapply an excuse doctrine, they have considerable flexibility to mitigate the risk contractually. Under the principle of party autonomy,256 parties are free to contract around any of the default rules or doctrines that would otherwise apply to their agreement, except, of course, for those such as the doctrine of good faith or fair dealing requirements that are usually considered integral to any reasonable bargain.257 In fact, the implication is that if parties are aware of the rules and doctrines that courts will apply to their agreement and they do not expressly waive or modify them, it is their intention to contract under them.258 The implication is just as strong for excuse doctrines that might apply to the parties’ contract as it is for any other contract rules or doctrines.259 Thus, if a court does apply the doctrine of impracticability to a contract between parties who understood their contractual rights and obligations at the time they made their agreement, the court’s decision is impliedly made under the terms of the parties’ bargain and in accord

255 If anything, courts may be too reluctant to grant contractual excuses. As Robert Scott has observed, “The most curious aspect of the commercial impracticability cases decided over the past 20 years has been the courts’ steadfast refusal to grant excuse for nonperformance despite the apparent invitation to do so in the Uniform Commercial Code and the Second Restatement.” Scott, supra note 253, at 2006 n.1.

256 The principle is reflected in UCC § 1-302 on “Variation By Agreement,” as well as the United Nations Convention on Contracts for the International Sale of Goods, Article 6. U.C.C. § 1-302 (AM. LAW INST. & UNIF. LAW COMM’N 2015); 1 U.N. Convention on Contracts for the Int’l Sale of Goods vi, Ch. 1, Art. 6 (1980) (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”).

257 See, e.g., U.C.C. §1-320(b) (AM. LAW INST. & UNIF. LAW COMM’N 2015) (“The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement.”).


259 Smythe, supra note 103, at 264.
with their intent and will.\textsuperscript{260} Even if courts inadvertently apply an excuse doctrine when they should not, that is a risk that the parties bargained for at the time of contracting. In other words, as long as the parties are sophisticated enough to understand their rights and obligations at the time they contract, courts do not interfere with their contractual allocation of risks by applying a contract excuse doctrine; on the contrary, they actually comply with the parties’ allocation of risks.

In any case, it seems unlikely that courts commonly misapply excuse doctrines. The doctrine of impracticability, for example, is normally applied using a two pronged test.\textsuperscript{261} Under the most persuasive interpretation of the test, courts will grant an excuse only if the circumstances giving rise to the impracticability claim were reasonably unforeseen at the time of contracting and if the party under the obligation would suffer a severe economic hardship if it was required to perform.\textsuperscript{262} If a party succeeds with an impracticability claim under the test, it seems doubtful whether it could have truly intended to commit to any of the excused obligations, at least under the circumstances.\textsuperscript{263} For one thing, it is difficult to understand how a party could have truly agreed to perform an obligation under circumstances that were not reasonably foreseeable at the time of contracting. Moreover, it is equally difficult to understand how a party could have truly agreed to perform an obligation under any foreseeable circumstances that would cause it to suffer such a severe economic hardship, especially since the parties could have waived the application of the impracticability doctrine under those circumstances.

Excuse doctrines are another double-edged sword. On the one hand, if they are applied when they should not be, they allow a party to evade an obligation that it agreed to perform, thus facilitating opportunism; on the other hand, if they are not applied when they should be, then a court enforcing the contractual obligations uses the State’s power of coercion against a party without the party’s consent and against the party’s will. As with the doctrine of unconscionability, however, courts’ errors will have more adverse effects on liberty when they result in mistaken contractual enforcements than when they result in mistaken contractual excuses. When a court grants an excuse to a party it does not thereby exercise State coercion; it merely declines to use the power of State

\textsuperscript{260} Id.
\textsuperscript{261} Id. at 236.
\textsuperscript{262} Id.
\textsuperscript{263} Barnett, \textit{supra} note 14, at 318.
coercion to compel the party to perform. When a court declines to grant an excuse to a party that did not, under the circumstances, truly intend to be bound to its performance, the court does exercise State coercion, and it does so against the party’s will. If the primary purpose of the State is to protect liberty, then there is an important role for the doctrine of impracticability in modern contract law.

D. Public Policy

The analysis in this article is premised on a definition of liberty that includes a respect for individuals’ “private spheres”—that is, realms of personal autonomy and privacy within which individuals should be free from government intrusions. This raises inevitable questions about what rights and freedoms should be included within individuals’ private spheres. Complete answers to those questions are beyond the scope of the article, but the reference to individuals’ spheres of private autonomy here is meant to include at least the rights and freedoms that individuals enjoy under all applicable constitutions and statutes. Of course, there will always be debate about the scope of individual rights and freedoms.\(^{264}\) For the sake of the present analysis, under United States law individual freedoms may be considered to be at least as broad as the full “penumbra” of rights and freedoms that individuals enjoy against the State under federal and state constitutions and statutes, as well as any of the judicial decisions that interpret them.\(^{265}\)

Setting aside debates about the scope of the rights protected within individuals’ private spheres, if one accepts the premise that these are rights the State may not intrude upon, there are some clear implications for contracts. If liberty is to advance, courts should refrain from enforcing agreements that impinge on individuals’ private spheres.\(^{266}\) This means that if an agreement between two parties creates an obligation that impinges on the rights or freedoms within an individual’s private sphere, a court should not enforce the obligation. If a court enforced the obligation it would thereby use the power of State coercion.

\(^{264}\) As a general matter, it seems obvious that any serious libertarian should want individual rights and freedoms to be defined as broadly as possible.


\(^{266}\) See Smythe, supra note 7, at 51–58 for a related discussion of contract with lifestyle covenants.
to impinge on rights and freedoms that, as a matter of law, are supposed to be free from State impingement or interference. As a general matter, court enforcements of contractual rights and obligations are not considered “State action” and are thus usually beyond the reach of constitutional constraints. But if an agreement does create an obligation that impinges on rights or freedoms that an individual should enjoy free from State intrusion, the agreement should not be enforced as a matter of contract law, even though it can be enforced as a matter of constitutional law.

As a general matter, “contracts against public policy” are not enforceable. If the advancement of liberty is to be embraced as the most fundamental purpose of the State, an agreement that would, if enforced by a court, impinge on rights and freedoms that are protected against State intrusion should not be enforced as a matter of public

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267 Id.
268 As Erwin Chemerinsky has observed, the United States Supreme Court has generally limited the definition of State action under the State action doctrine to acts undertaken by the executive and legislative branches. CHEMERINSKY, supra note 6, at 507–27. Thus, actions undertaken by the judicial branch, including court enforcements of private legal rights, are generally not considered State acts under the State action doctrine. Id. The most important exception is Shelley v. Kramer, in which the United States Supreme Court held that “action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment.” Shelley v. Kraemer, 334 U.S. 1, 14 (1948). Shelley, however, was an exceptional case involving a challenge against racially restrictive covenants. The Supreme Court has not followed Shelley in other cases and has generally not treated other court actions in other cases as State action. CHEMERINSKY, supra note 6, at 528.

269 Although courts are usually not considered State actors under the State action doctrine, they are still State actors in the common sense of the term. As Professor Chemerinsky observed, “[T]here seems little doubt that judges are government actors and that judicial remedies are state action.” CHEMERINSKY, supra note 6, at 527.

270 Juliet P. Kostritsky, Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory, 74 IOWA L. REV. 115, 117 n.4 (1988). The term “contracts against public policy” is confusing because a contract is a legally enforceable agreement and an agreement against public policy is not enforceable. The term is nonetheless an established idiom of American legal language. Moreover, it defines an established principle of American contract law. For example, the RESTATEMENT (SECOND) OF CONTRACTS, § 178(1) (AM. LAW INST. 1981) states:

178. When a Term is Unenforceable on Grounds of Public Policy
(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(Emphasis added.) See David Adam Friedman, Bringing Order to Contracts Against Public Policy, 39 FLA. ST. U. L. REV. 563 (2012), for a recent discussion and survey of “contracts against public policy.”
policy. It is easy to provide some examples of agreements that impinge on individual rights and freedoms that are protected against State intrusion:

(1) lifestyle covenants in an employment agreement that forbid a “non-ministerial” employee from having an abortion or marrying a person of the same sex;²⁷¹

(2) an agreement between a gestational surrogate mother and another individual that obligated the mother to have an abortion,²⁷² and

(3) an agreement between neighbors not to post constitutionally permissible political signs during a political campaign.²⁷³

²⁷¹ There is a “ministerial exception” that exempts religious organizations from antidiscrimination statutes that would otherwise prevent them from enforcing many obligations under lifestyle agreements. Since the ministerial exception arises as a matter of constitutional law, it arguably takes certain rights and freedoms outside the scope of individuals’ private spheres. See Bollard v. Cal. Province of the Soc’y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999).

As the term suggests, the ministerial exception applies to an employee who qualifies as a “minister” within the religious organization. See Smythe, supra note 7, at 52 for a discussion of the ministerial exception.

²⁷² Lifestyle covenants and morals clauses have been used in some employment agreements since at least the middle of the twentieth century. They have been prevalent in the sports and entertainment industries. Some important cases arose during the McCarthy era, when film directors, writers, and actors were alleged to have violated morals clauses through their political associations. See, e.g., Scott v. RKO Radio Pictures, Inc., 240 F.2d 87, 87-88 (9th Cir. 1957); Twentieth Century–Fox Film Corp. v. Lardner, 216 F.2d 844, 847–48 (9th Cir. 1954); Loew’s, Inc. v. Cole, 185 F.2d 641, 644–45 (9th Cir. 1950). Some prominent recent cases have involved teachers at religious schools who were terminated for making lifestyle or moral decisions that violated the schools’ religious principles, such as using in vitro fertilization or marrying a person of the same sex. See Smythe, supra note 7, at 51–58.

²⁷³ For a discussion of a recent case, see Katie O’Reilly, When Parents and Surrogates Disagree on Abortion, THE ATLANTIC (Feb. 18, 2016), http://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323. As O’Reilly explains, a “non-gestational” surrogate is one who is also the genetic parent of the child; a “gestational” surrogate, on the other hand, is not the genetic parent of the child and thus serves only as a surrogate for the gestation of the embryo. The legal issues surrounding such cases have not been fully settled, but it seems clear that the surrogate’s sphere of personal autonomy and privacy should include the sole right to decide whether to have an abortion. For a discussion of a case in which the surrogate’s autonomy was initially challenged, see Elizabeth Cohen, Surrogate Offered $10,000 to Abort Baby, CNN (March 6, 2013), http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/.

²⁷⁴ The legal implications of agreements to restrict speech raise many nuances and have not been fully resolved. See Alan E. Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 CORNELL L. REV. 261, 344–45 (1998). As Professor Garfield observes, a constitutional challenge against an agreement to restrict speech is difficult because it first requires proving that the court enforcement would involve State action and then requires proving that the party challenging court enforcement did not waive her First Amendment rights when she made the agreement. Id. at 349–58. There are obviously many agreements to restrict speech that should be enforceable, such as those governing trade secrets
If a government enacted a statute that forbid an individual from having an abortion or marrying a person of the same sex, or required a surrogate to have an abortion, or forbid the posting of a constitutionally permissible political sign, a court would be obligated not only to decline to enforce the statute but also to declare it unconstitutional. As a matter of public policy, courts should decline to enforce an agreement that creates restrictions or obligations that impinge on the rights and freedoms within an individual's private sphere for the same reason that they would decline to enforce a government statute that impinged on the same rights and freedoms.275

This does not mean that the State should prohibit agreements between individuals that create restrictions or obligations that impinge on rights and freedoms within their private spheres. Unless an agreement obligated one or more of the parties to engage in coercion of some kind, making it illegal would implicate the State in using its powers of coercion to restrict liberty.276 As long as courts refrained from enforcing such agreements, parties' compliance with any restrictions or obligations that impinged on their private spheres would be voluntary.277 For example, if a clause in a surrogacy agreement requires the surrogate to have an abortion if the fetus shows signs of Down syndrome, that agreement should not be legally enforceable. A court should not use the power of State coercion to force a woman to have an abortion against her will, even if it was her intent and will to commit herself to having an abortion under those circumstances at the time she made the agreement. But the State has no business enacting a statute that regulates surrogacy agreements between private individuals. Liberty requires that individuals should be free to make whatever private surrogacy agreements they like, even if the agreements are not legally enforceable. If the surrogate voluntarily aborts a fetus with Down syndrome, that is her right; if she

or individuals' privacy, which would normally be exempt from the First Amendment's reach. Id. at 300–03, 360–61. But there are also many agreements to restrict speech that do raise obvious public policy concerns, such as those against revealing crimes. Id. at 307–09. Professor Garfield argues that courts should generally refrain from enforcing agreements that restrict speech, and offers an approach to balancing competing public policy interests. Id. at 312–18, 344–45.

275 If court enforcements of private rights and obligations were generally treated as State action under the State action doctrine there would obviously be no need to apply the public policy exception. But they are not, even though, as Chemerinsky observes, "[T]here seems little doubt that judges are government actors and that judicial remedies are state action." CHEMERINSKY, supra note 6, at 527.

276 Smythe, supra note 7, at 17.

277 Id.
chooses not to abort the fetus that is her right too.

There is thus an important role in contract law for the principle that agreements against public policy will not be enforced. If liberty is to be advanced, courts should refrain from enforcing agreements that impinge on rights or obligations within individuals’ spheres of personal autonomy and privacy. Enforcing such agreements would impinge on liberties that are protected against State action under federal or state constitutions and statutes. While the State action doctrine does not usually extend to court enforcements of private agreements, the public policy rationale for the constraint on the exercise of State coercion does. Of course, the full penumbra of rights and freedoms established under federal and state constitutions and statutes is complex and sometimes uncertain. The logical test for whether the public policy restraint should apply is whether a legislature could use the power of State coercion to force an individual to perform or refrain from performing in exactly the same way that the agreement ostensibly requires. In general, if a legislature could force the individual’s performance or forbearance without violating any constitutional or statutory constraints, then the agreement should be enforced; if the legislature could not force the individual’s performance or forbearance without violating some constitutional or statutory constraint, then the public policy restraint should apply.

IV. CONCLUSION

This article outlines what might be called a minimalist—or Hayekian—libertarian theory of contracts. To that end, it defines liberty to require that individuals be as free as possible from the exercise of coercion by others, and that they have a sphere of personal autonomy and privacy within which they are free from intrusions by the State. Coercion is defined to mean the control of the environment or circumstances of a person to the extent that she is forced to serve the ends of another; that definition obviously includes the use of force or the threat of force. If the fundamental purpose of the State is to advance this minimalist conception of liberty, the most compelling justification for having contract laws at all is because they are necessary to avoid interpersonal conflict and violence. If such is the case, the need for private laws, including contract laws, was greater in primitive societies than it is in highly developed ones like the United States and other developed nations today.

Modern contract theorists have reformulated contract law around
the need to respect the intent and will of autonomous, free individuals and the need to facilitate exchange in a modern, capitalist economic system. For example, both the theory of contractual consent and the consideration requirement serve to advance liberty. Each operates as a separate screen, limiting the range of private agreements that may be enforced using State coercion. The consent theory filters out agreements when parties did not intend to make legally binding commitments and the consideration requirement filters our agreements in which there is no evidence of an exchange. Modern contract theories also imply that courts should respect individuals’ autonomy to make agreements that are not legally enforceable, such as those that are purely relational.

Relational agreements are quite common and parties are often able to enforce them without the use of the courts. To the extent that they limit reliance on the courts and thus the use of State coercion, they should be encouraged. As a general matter, they can be facilitated by contract laws that (1) have a well-defined statute of frauds or other threshold requirements for legally enforceable agreements that makes it easier for parties to opt out of contractual enforcement; (2) allow the use of parol evidence in interpreting ambiguous or incomplete contracts so that parties that wish to rely primarily on relational enforcement mechanisms can still use contractual safeguards without having to go to the expense of negotiating and drafting detailed, written agreements; (3) allow courts to use mercantile practices and customs in interpreting and supplementing parties’ agreements, which also helps parties to avoid unnecessary negotiating and drafting expenses; and (4) strictly enforce ADR clauses that parties clearly intended to commit themselves to, with only a narrow scope for judicial review.

The analysis suggests that other contract doctrines, such as unconscionability and impracticability, may also help militate against the inappropriate exercise of State coercion. The doctrines of unconscionability and impracticability help to prevent contractual enforcements when it is not clear under the circumstances that parties truly intended to commit themselves to a contractual obligation. They thus help to prevent the use of State coercion to force parties to provide performances or engage in forbearances that they did not truly consent to. As a general matter, the most sophisticated party to the transaction—the one with the greatest economic resources and legal acumen—typically drafts the written terms of a contract. Contract doctrines such as unconscionability and impracticability may, therefore, help to prevent the stronger parties in transactions from using the power of State...
coercion against the weaker parties without their consent and against their will.

The doctrine that courts should refrain from enforcing agreements that are against public policy may play a more special role in limiting the inappropriate exercise of State coercion. Even a minimalist conception of liberty, such as the one Hayek provides, recognizes that individuals should have spheres of personal autonomy and privacy within which they are free to speak their minds, associate with whomever they choose, and do whatever they like free from any State interferences or restraints. In the United States, individuals’ private spheres should correspond at the least to all the rights and freedoms that they enjoy under all applicable federal and state constitutions and statutes. In fact, most libertarians would probably prefer to define the full scope of individuals’ rights and freedoms even more broadly than that. Although court enforcements are State action in the literal sense, they are not State action under the State action doctrine for the purpose of applying most constitutional constraints against State interferences with liberty. The “contracts against public policy” doctrine provides a way for courts to constrain themselves by declining to enforce agreements that purport to create individual restraints or obligations that would be unconstitutional if they were created under a government statute.

Since this article began with a quote by Friedrich Hayek, it is fitting that it should also end with one. Many of the most prominent contributions to modern contract theory, including those by some of the neo-formalist scholars that have been discussed in this article, have drawn on conventional economic rationality assumptions to offer normative prescriptions about contract rules and doctrines. This was in stark contrast to Hayek’s approach, which was always to make liberty the cornerstone of his analysis. One wonders what Hayek would have thought about modern contract scholarship, given that he wrote:

[R]ationalistic ... theories ... [are] ... necessarily based on the assumption of the individual man’s propensity for rational action and his natural intelligence ... . It would hardly be unjust to say that the rationalistic approach is ... opposed to almost all that is the distinct product of liberty and gives liberty its value. Those who ... cannot conceive of anything serving a human purpose that has not been consciously designed are almost of necessity enemies of freedom.\(^{278}\)

\(^{278}\) HAYEK, supra note 1, at 60–61.