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## Contract Formation and the Entrenchment of Power

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# Contract Formation and the Entrenchment of Power

*Danielle Kie Hart\**

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## I. INTRODUCTION

Legal scholars and academics draw a distinction between “classical contract” and “modern contract”<sup>1</sup> that, for the most part, turns on the differences between the two systems.<sup>2</sup> For example, the classical

1. Law is cyclical. JAY M. FEINMAN, UN-MAKING LAW 2–3 (2004) [hereinafter FEINMAN, UN-MAKING]. That is, there is usually a period of legitimization, followed by a period of critique/deconstruction, and then a reconstruction, which is legitimized, only to be followed again by critique, etc. Contract law is no different. Schematically, an abbreviated version of the evolution of contract law looks like this: **Legitimization:** Classical Legal Thought (1860s–1930s) → **Critique:** e.g., the Progressives, Legal Realism (1890s–1940s) → **Reconstruction/Legitimization:** Modern Contract Law (1930s–1990s) → **Critique:** e.g., law and economics, Critical Legal Studies, relational contract theory, feminist legal theory, behavioral law and economics (1960s–present) → **Reconstruction/Legitimization:** Post-Modern Contract Law (1990s–present). *But see* Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1193 (1998) [hereinafter Knapp, *Reliance*] (noting different timeframes).

My Article focuses on part of this debate, namely, on the evolution of the classical to modern contract law systems. This is because my claims center on the contract law framework, meaning the background assumptions and rules governing how contracts work that evolved in this time period. I argue that this framework remains in place today, notwithstanding the critiques producing post-modern contract law. Consequently, the claims I make in this Article are as applicable to the post-modern contract law system as they are to the “modern” one that I specifically discuss. Indeed, my claims are probably more cogent as applied to post-modern contract law, given that this system revives much of the classical formalism rejected by modern contract. *See* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 16 (2004) [hereinafter Feinman, *Revival*] (“Under the classical revival, formality reigns at two levels. First, the contract doctrine itself becomes more formal: ostensibly clear, rigid rules are favored over flexible standards. Second, the substance of the rules favors formality in contracting practices.”); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 774 (2002) [hereinafter Knapp, *Private*] (explaining that post-modern contract law “embraced with fervor all the earlier-disdained incidents of classical formalism—the ‘duty to read,’ the ‘plain meaning’ rule, a vigorous parol evidence rule, a high tolerance for ‘puffing,’ etc.—with the effect, intended or not, of reducing or eliminating any constraints on the activities of the drafters of form contracts.” (internal citations omitted)); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1133–34 (1995) (“[T]he 1980s and early 1990s resurrected many of the conceptualist abstractions of classical contract law. . . . By ‘conceptualism,’ I mean a style of legal thought and reasoning that emphasizes definitions, categories, and syllogistic logic.”). For internal consistency and to avoid confusion in nomenclature, however, I will refer to the contract law system that I am critiquing as “modern” contract law.

2. For a discussion of the differences between classical and modern contract law see generally P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); BRUCE W. FRIER & JAMES J. WHITE, *THE MODERN LAW OF CONTRACTS* 306 (2d ed. 2008); Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1749 (2000) [hereinafter Eisenberg, *Dynamic*]; Melvin A. Eisenberg, *The Revocation of Offers*, 2004 WIS. L. REV. 271 (2004) [hereinafter Eisenberg, *Offers*]; Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983) [hereinafter Feinman, *Critical*]; Charles L. Knapp, *An Offer You Can’t Revoke*, 2004 WIS. L. REV. 309 (2004) [hereinafter Knapp, *Offer*]; Knapp, *Reliance*, *supra* note 1 at 1192; Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 897 (1997) [hereinafter Morant, *Race*]; Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254 (1995).

system relies on technical and rigid rules, whereas the modern system has shifted to more flexible standards. Modern contract, unlike the classical system, also attempts to effectuate the norms of fairness and cooperation. And the list goes on.

Conventional wisdom holds that: (1) modern contract law evolved, at least in part, to remedy problems created or left unaddressed by the classical contract law system;<sup>3</sup> (2) modern contract law is different from classical contract law in ways that make the current system work better than the older regime, that is, in ways that attempt to rectify some of those problems;<sup>4</sup> and, therefore, (3) it is the differences between the two systems that are the most important part of the contract evolutionary story.<sup>5</sup> Whether this conventional wisdom is true depends upon whether modern contract has been successful in correcting the problems produced by the classical system. If it has not been successful, then the conventional wisdom is wrong. And if the conventional wisdom is wrong, then one could argue that at least parts of modern contract law are no better than the classical contract system that it replaced, because whatever problems modern contract perceived in the classical system remain. This Article uses modern contract's expanded "policing doctrines" to question the validity of this hypothesis.

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3. Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1108–11 (1984) [hereinafter Eisenberg, *Responsive*]; Feinman, *Critical*, *supra* note 2, at 830–39; Feinman, *Revival*, *supra* note 1, at 12–14; Knapp, *Offer*, *supra* note 2, at 317–19; Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95, 100–01 (2006) [hereinafter Knapp, *Opting*]; Knapp, *Private*, *supra* note 1; Morant, *Race*, *supra* note 2, at 902. Cf. JOHN EDWARD MURRAY, JR., *CONTRACTS: CASES AND MATERIALS* 6 (6th ed. 2006) [hereinafter MURRAY, *CASES & MATERIALS*] (“The principles of contract law evolved from innumerable judicial decisions resolving countless disputes as part of the common law of England. Contract law is, therefore, case law which continuously evolves and sometimes modifies the principles of contract law which trace their roots to the sixteenth century.”) (footnotes omitted); Eisenberg, *Dynamic*, *supra* note 2, at 1753–54 (contrasting the formal reasoning of classical contract law with the substantive reasoning of modern contract law).

4. FEINMAN, *UN-MAKING*, *supra* note 1, at 12–14; Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982) [hereinafter Eisenberg, *Consideration*]; Feinman, *Critical*, *supra* note 2, at 830–39; Knapp, *Offer*, *supra* note 2, at 317–19; Knapp, *Opting*, *supra* note 3, at 110. ACCORD MURRAY, *CASES & MATERIALS*, *supra* note 3, at 126–33 (discussing the transition from the classical to modern treatment of offers to form a unilateral contract and, specifically, theories designed to make offers irrevocable upon part performance); see also CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW* 57 (6th ed. 2007) [hereinafter KNAPP, *CASEBOOK*] (stating that in adopting different rules for unilateral contract formation, “[t]he drafters of the Restatement [(Second) of Contracts] have attempted to ameliorate the harsh results sometimes reached under the classical analysis.”).

5. Feinman, *Revival*, *supra* note 1, at 12–14; Knapp, *Offer*, *supra* note 2, at 316–19; Morant, *Race*, *supra* note 2, at 903; Speidel, *supra* note 2, at 260–61.

More specifically, modern contract law gives expanded recognition to several contract policing doctrines,<sup>6</sup> namely, unconscionability, economic duress, and misrepresentation.<sup>7</sup> Each of these doctrines focuses on some type of bargaining misbehavior that produces a “bad bargain” for one of the parties. All of these doctrines then attempt to address the bargaining misbehavior by making the contract procured as

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6. By “contract policing doctrines,” I am referring to doctrines used by courts to police contracts against, among other things, unfairness and/or bargaining misbehavior in the formation process and inequity in the resulting terms. See generally E. ALLAN FARNSWORTH, *CONTRACTS* §§ 4.1, 4.9 (4th ed. 2004) (discussing the policing of contractual agreements).

7. Unconscionability, duress, and misrepresentation (fraud) were all recognized by the classical legal system, if not before. See, e.g., *Woburn Nat. Bank v. Woods*, 89 A.491, 492 (N.H. 1914) (recognizing fraud); 28 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* §71:1 (4th ed. 2003) (citing works by Pollock & Maitland and Bracton that recognize duress at English common law); Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1070–72 (2006) (detailing the history of unconscionability prior to codification in the Uniform Commercial Code (U.C.C.) and adoption by the Restatement (Second) of Contracts). All of these policing doctrines, however, were given expanded recognition under modern contract law. See, e.g., WILLISTON & LORD, *supra*, § 71:19 nn.9–15 (4th ed. 2003) (citing to numerous cases from 1936 through 2002, i.e., through the modern contract period [1930s–1990s] and beyond, to demonstrate the doctrine of economic duress was recognized throughout the U.S.); DiMatteo & Rich, *supra*, at 1072 (“The major impact of the codification of unconscionability in Article 2 was its transformation from a remedy-limiting device to a substantive doctrine.”); Knapp, *Private*, *supra* note 1, at 771 (unconscionability); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 931 (1969) (unconscionability); see also RESTATEMENT (FIRST) OF CONTRACTS § 470 (1932) (recognizing claim for misrepresentation); STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 435 (2003) (describing that, until the mid-twentieth century, courts followed caveat emptor in a broad sense in contracting and other areas of law but noting that there have since been a number of exceptions that have morphed into modern-day misrepresentation); Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 26–27 (2007) (discussing emergence of economic duress). These doctrines are recognized and expanded upon in modern contract law. See Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925, 928 [hereinafter Morant, *Salience*] (recognizing unconscionability as a modern contract law doctrine); see also RESTATEMENT (SECOND) OF CONTRACTS §§ 161 (nondisclosure as equivalent to misrepresentation), 164 (misrepresentation), 175 (duress), 175 cmt. a (economic duress), 176 (improper threats), & 208 (unconscionability) (1981); accord Larry A. DiMatteo, *Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 281–97 (1999); Michael J. Herbert, *Unconscionability Under Article 2A*, 21 U. TOL. L. REV. 715, 726 (1990) (recognizing misrepresentation as a modern contract law doctrine); Julian S. Lim, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CAL. L. REV. 579, 592 (2003); Kevin M. Teeven, *Consensual Path to Abolition of Preexisting Duty Rule*, 34 VAL. U. L. REV. 43, 67 (1999); Debora L. Thredy, *Labor Disputes in Contract Law: The Past and Present of Alaska Packers’ Ass’n v. Domenico*, 10 TEX. WESLEYAN L. REV. 65, 72 (2003) (recognizing economic duress as a modern contract law doctrine).

a result of the misbehavior voidable<sup>8</sup> or otherwise unenforceable in whole or in part.<sup>9</sup>

While the type of bargaining misbehavior targeted by each of the expanded policing doctrines varies, all can be characterized as a form of “coercion,” meaning that one party is compelled or forced by another to do what her free will would otherwise refuse.<sup>10</sup> So, for example, unconscionability focuses on one party’s improper use of its unequal bargaining power and/or unfair and deceptive tactics;<sup>11</sup> economic duress is directed at conduct where one party causes, or at least takes advantage of, the other party’s financial distress;<sup>12</sup> and misrepresentation addresses situations where one party presents (or withholds) material information to (or from) the other party incorrectly, improperly, and/or fraudulently.<sup>13</sup> In each of these coercive situations, the end result—indeed the objective of the coercive conduct—is to procure a “bad bargain.”<sup>14</sup> Hence, the act to which a party is “compelled or forced by another to do what her free will would otherwise refuse” is agreeing to the bad bargain.

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8. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981) (“If a party’s manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”); see also RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

9. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (“If a contract or term thereof is unconscionable . . . a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term . . .”).

10. BLACK’S LAW DICTIONARY 258 (8th ed. 2004).

11. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”); Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487–88 (1967) (discussing unconscionability and Section 2-302 of the Uniform Commercial Code).

12. See, e.g., *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 926–27 (7th Cir. 1983) (holding that other party must cause the financial hardship); *accord N. Fabrication Co. v. UNOCAL*, 980 P.2d 958 (Alaska 1999). *But see Rich & Whillock, Inc. v. Ashton Dev. Inc.*, 204 Cal. Rptr. 86, 89 (Ct. App. 1984) (finding that it is enough that one party takes advantage of the other side’s financial circumstances). See generally John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947) (discussing the boundaries of common law duress).

13. See RESTATEMENT (SECOND) OF CONTRACTS §§ 164(1) (providing that a contract is voidable if a party’s “manifestation of assent is induced by either a fraudulent or material misrepresentation . . .”), 162(1) (defining a fraudulent misrepresentation), 162(2) (defining material misrepresentation), 161 (non-disclosure as the equivalent of a misrepresentation) (1981).

14. I am defining a “bad bargain” to mean one in which the terms unreasonably favor one party. This definition is traditionally the one used to define substantive unconscionability. See, e.g., *Walker-Thomas Furniture Co.*, 350 F.2d at 449.

Since a bad bargain is a necessary part of the coercion problem, it warrants further explanation. An underlying assumption of this analysis is that the contracting parties came together for some reason: Party B has what Party A wants or needs, whether a good or service, and Party A is willing to pay for it. In other words, neither party was forced to come to the bargaining table under false pretenses.<sup>15</sup> Now, let us assume further that the contract terms are fair and reasonable. Given that Party A wants and/or needs the good or service at issue and came to the bargaining table willingly, why would Party B have to coerce Party A to enter that contract? Absent any coercion on Party B's part, there is clearly no legal claim presented on these facts, given that the contract terms are fair and reasonable and no false pretenses were used. An argument could be made, however, that Party B might want the additional sale to Party A at any cost. To realize on the additional sale to Party A, therefore, Party B might employ sales tactics to persuade Party A to enter into the fair and reasonable contract.

So, let us assume that Party B uses sales tactics that, unbeknownst to Party B, constitute actionable coercion,<sup>16</sup> and that those sales tactics coerced Party A to enter into a fair and reasonable contract. Is a legal problem presented? To be sure, there is always the principle at stake, namely, that people should not be wrongfully induced to enter into a contract. In fact, permitting such a situation to occur would violate a cardinal principle of contract law, specifically, that a contract is a voluntary undertaking. In addition, there is nothing in a claim for economic duress or misrepresentation, for example, that explicitly requires something to be substantively wrong with the contract.<sup>17</sup>

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15. I am distinguishing the scenario I describe in the text from the fraud in the factum situation, where Party A, who only speaks Spanish, is told in Spanish that she is buying a refrigerator, but the written contract, all in English, indicates that she is actually buying a car; or when Party A is told she is signing a letter when the document is actually a mortgage. In cases of fraud in the factum, one party is misled into coming to the bargaining table. Contracts obtained in this fashion are void *ab initio*. In these situations, "the other party neither knows nor has reason to know the character of the proposed agreement," and, therefore, "the effect of such misrepresentation is that there is no contract at all." FARNSWORTH, *supra* note 6, §4.10; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 163 (1981).

16. By "actionable coercion," I am referring to wrongful conduct by one of the parties that would give rise to a legally cognizable contract claim or defense based on one of the policing doctrines I discuss in the text. In other words, under the law, Party B's actions in my hypothetical would be deemed legal coercion. But this is not the same thing as saying Party B knows or even thinks he coerced Party A. If Party B disagrees with Party A's characterization of his actions, you have a legal dispute and a lawyer could take this case without violating any ethical rules.

17. A claim for misrepresentation, for example, includes the following elements: (1) a fraudulent or material misrepresentation; (2) the misrepresentation must have induced the recipient to enter the contract; and (3) the recipient's reliance on the misrepresentation must be justified. RESTATEMENT (SECOND) OF CONTRACTS ch. 7, introductory note (1981). The elements

Legally, therefore, Party A has a claim or, more likely, a defense, against Party B for the latter's coercive conduct.<sup>18</sup> If, however, Party A wants and/or needs the goods or service, and the terms are reasonable and fair, how realistic is it that Party A would end up challenging the contract or not performing her end of the bargain, even in the face of coercive conduct by Party B?<sup>19</sup> More pragmatically, without something substantively wrong with the contract, what attorney would take that case? In either event, it seems highly unlikely that a lawsuit (with Party A as the plaintiff or, more likely, as the defendant) would arise.<sup>20</sup>

The only way coercion presents an actionable problem, therefore, is if it results in a bad bargain. Thus, coercion plus a bad bargain is what the modern contract law system identifies as a problem created, or at least not adequately addressed, by the classical system. This coercion-plus-

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of economic duress are: (1) a wrongful or improper threat; (2) no reasonable alternative but to accede to the threat; and (3) the improper threat induces the making of the contract. RESTATEMENT (SECOND) OF CONTRACTS § 175. cmts. a-c (1981). Although Section 176(2) of the Restatement defines an improper threat to include one where the resulting exchange is not on fair terms, an improper threat is not limited to this situation. In other words, a threat may be improper even if the resulting contract is substantively fair. RESTATEMENT (SECOND) OF CONTRACTS § 176(1) (1981).

18. For example, Party A could sue Party B to challenge the validity of their contract based on Party B's coercion. Or, in the more likely scenario, Party A could simply not perform her contract, force Party B to sue her for breach of contract, and then raise Party B's coercion as a defense.

19. Even assuming Party A prevailed in a lawsuit, what would be Party A's damages? Party A, in other words, could have the contract rescinded based on misrepresentation or duress, or found unenforceable in whole or in part based on unconscionability. Party A would not be filing a breach of contract action or counterclaim, and only a breach of contract claim results in damages. See RESTATEMENT (SECOND) OF CONTRACTS § 346(1) (1981) ("The injured party has a right to damages for any breach by a party against whom the contract is enforceable . . ."); Julien Ross, *A Fair Day's Pay: The Problem of Unpaid Workers in Central Texas*, 10 TEX. HISP. J.L. & POL'Y 117, 137 (2004) ("Generally, the nonbreaching party's remedy for breach of contract is money damages that will put the nonbreaching party in the position it would have enjoyed if the contract had been performed."). Party A would be entitled to restitution damages, see RESTATEMENT (SECOND) OF CONTRACTS § 376 (1981), but I do not think a restitution claim would be filed, because such a claim would be subject to offset by Party B for the reasonable value Party A received as a result of the contract. See RESTATEMENT (SECOND) OF CONTRACTS § 376, illus. 4 (1981).

20. One could argue that if Party A is coerced into a set of terms that is reasonable and fair *but more favorable to Party B*, Party A would have both a subjective reason to challenge (or not perform) the contract and an objective justification to do so. I agree with the general proposition that Party A would have a legal claim or defense against Party B, based on Party B's coercion. My response, however, is a pragmatic one—such a lawsuit, either by Party A or by Party B, would simply not arise because: (1) it is not going to be hard for Party B to prove that a contract was formed, see *infra* Part III.B.3; (2) practically speaking the burden on Party A of trying to prove the coercion, either as part of a claim or a defense, would be almost insurmountable, see *infra* Part III.B.4; and, (3) an attorney would not likely take the case, given that the terms of the contract are reasonable and fair. The more likely outcome, therefore, is that Party A would perform the contract.



bad-bargain problem is what the modern system attempts to remedy via its expanded contract policing doctrines.<sup>21</sup> Absent the gap left by classical contract, there would be no reason for modern contract law to adopt the expanded policing doctrines.<sup>22</sup>

The problem is that modern contract's solution to the coercion/bad bargain problem does not work. In fact, the modern system makes the coercion problem worse because the modern system only partially rejects classical contract while retaining key parts of the older regime. Specifically, modern contract law left the core of classical contract, which is contract formation, completely intact. And contract formation, particularly in the doctrine of mutual assent, is where the power in contracting is created, embedded, and, under modern contract law, largely immunized from effective challenge by the contract policing doctrines. By leaving the core of contract intact, modern contract law has ensured that the expanded policing doctrines it adopted will not alleviate, let alone correct, the coercion problem.

Consequently, conventional wisdom, which says, in part, that modern contract law is different from classical contract law in ways that make the current system work better than the older regime, is wrong. Instead, the ways in which the two systems are the same are more critical, because it is this sameness that determines whether modern contract law will be successful in remedying the problems it identified under the classical system. My examination in this Article of modern contract's

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21. I need to make clear up front that I am just identifying one problem (coercion plus a bad bargain) and the solution that modern contract law came up with to remedy it (i.e., its expanded contract policing doctrines). Other policing doctrines were recognized by classical contract law, i.e., duress, undue influence, minority, and mental incapacity. See WILLISTON & LORD, *supra* note 7, §§ 9:5 n.4 (noting numerous cases from as early as the mid to late 1800s recognizing the minority doctrine in contract law), 10:3 n.7 (using cases from the 1880s to illustrate the rule for mental incapacity); see also *supra* note 12 and accompanying text (duress); Dawson, *supra* note 12, at 258 (discussing development of undue influence and referring to 19th century cases to emphasize his points). The existence of these other (or "traditional") policing doctrines under classical contract law demonstrates that the classical system was aware that coercion existed in contract formation and/or that contracts needed to be policed for other reasons, i.e., the status of one of the parties was entitled to special solicitude. I am not focusing on any of the traditional doctrines, however, for the following reason: conventional wisdom says that *the differences* in modern contract law were supposed to correct the classical contract problems. I am, therefore, only focusing on the policing doctrines to which modern contract gave expanded recognition. The expanded policing doctrines, in other words, are the modern solution to the classical coercion problem. At the same time, because all of the traditional contract policing doctrines are peripheral to the core of contract, which is formation, they would also be subject to the process problem I discuss in detail later in the article; and they, too, will be largely ineffectual in correcting the problems they are intended and/or designed to address.

22. Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 70-71 (1998) [hereinafter Morant, *MLK*].

policing doctrines will show that modern contract will not achieve this remedial goal. So, while an exploration of specific proposals to address this deficiency is outside the scope of this Article,<sup>23</sup> I do advance the proposition that the modern contract law system is not working the way it should be.

In Part II of this Article, I set out the evolution of the classical to modern contract law system. In particular, Part II.A describes classical legal thought in some detail, because understanding this older regime is vital as it provides the backdrop against which my discussion of modern contract law takes place. Part II.B focuses on the modern system and, more specifically, on the conventional wisdom, which holds that the differences between the classical and modern systems are the most important part of the evolutionary story.

In Part III, I argue that the modern contract solution to the coercion problem will fail. Part III.A disputes the conventional wisdom of Part II and argues that the ways in which the two contract law systems are the same are actually more critical to understanding whether the modern system will be successful in solving the coercion problem produced by the classical system. Part III.B sets out in detail my theory that the seat of power in contract is formation, primarily in the element of mutual assent. I argue that mutual assent is key because this is where most material terms are decided. This is also where the critical decision of whether to enter into the contract is made. If the parties assent to enter the contract, then a contract is formed.<sup>24</sup> At that point, the state effectively steps in and says that the parties are bound to the contract. “Being bound” to the contract creates a presumption of contract (and term) validity that the coerced party has the burden of overcoming.<sup>25</sup> Unfortunately, this presumption is extremely difficult to overcome, because of what I identify as the “process problem.”<sup>26</sup> Consequently, satisfying the elements of contract formation means that a coerced party is literally bound to the bad bargain, one that the state, at that point, will compel the coerced party to either pay to get out of or perform.<sup>27</sup> Modern contract law failed to change formation, except to make it easier to form a contract. By making contract formation easier, I argue that the modern system actually expands one party’s capacity to coerce

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23. I will undertake to do so, however, in a later article. In this Article, I am examining the question of whether the modern contract law system is flawed and/or not working well.

24. A contract would be formed upon assent, because consideration is generally present in market transactions. See FARNSWORTH, *supra* note 6, § 2.2; see also *infra* Parts III.B.3 & 4.

25. See *infra* text accompanying notes 162–207.

26. See *infra* text accompanying notes 208–21.

27. See *infra* text accompanying notes 222–23.

her contracting partner. And, by leaving the core (formation) intact, modern contract law also largely immunizes this expanded capacity for coercion from effective challenge by the policing doctrines it ostensibly adopted to remedy it. In other words, modern contract law's failure to change the core of classical contract serves both to increase and protect one party's ability to coerce her contracting partner during contract formation. Ironically, by preserving the core, modern contract law precludes the policing doctrines from protecting the victims of contractual coercion. Thus, the modern system does not adequately solve the coercion problem. It actually makes it worse.

Finally, I briefly conclude in Part IV with what should be obvious even now, namely, that conventional contract wisdom, which focuses on the differences rather than the sameness between classical and modern contract law, is wrong. Because this conventional wisdom expresses our own beliefs about how modern contract law should work, the fact that the wisdom is wrong demonstrates that modern contract simply cannot work in the way that we assert that it should.

## II. THE EVOLUTIONARY STORY<sup>28</sup>

This Part sets out the backdrop for the rest of the Article. That backdrop consists of the classical legal system, discussed in Part II.A, and the contract conventional wisdom that says that the differences between the classical and modern systems are more important than the ways in which the two systems are the same, discussed in Part II.B.

### A. *Classical Legal Thought*

Classical legal thought was formulated in the 1860s and dominated most American legal institutions until the 1930s.<sup>29</sup> It was characterized

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28. This version of the evolution of contract law is not without its critics. Professor Roy Kreitner, for example, argues that the tendency to read the history of contract law as an evolutionary process in which "contract was always about 'individuals creating their own obligations' is 'ahistorical and thus in some sense a distortion' . . . [.]" ROY KREITNER, *CALCULATING PROMISES* 7 (2007). Instead, he states, "a particular view of contract (as individual-centered) and a particular view of the individual (as calculating, calculable, autonomous) are actually mutually reinforcing effects of historical processes." *Id.* at 6. I do not necessarily disagree with Professor Kreitner. But a substantive engagement of his theory is not necessary to my Article. Professor Kreitner himself concedes that the "current frame for the modern discourse of contract . . . is the private ordering paradigm." *Id.* at 3. I do not challenge the existing framework of contract law in this Article. Instead, I accept it as a given and try to determine whether the rules of contract law actually work within that framework, that is, on their own terms.

29. *AMERICAN LEGAL REALISM*, at xi (Fisher, Horwitz & Reed eds., 1993) [hereinafter *LEGAL REALISM*]; see Joseph William Singer, *Legal Realism Now*, 76 *CAL. L. REV.* 465, 478 (1988) [hereinafter *Singer, Realism*] (setting the time period of classical legal thought as 1860–

by abstract, formal, and rigid rules that applied to *all* cases, regardless of subject matter or party.<sup>30</sup> Broad application of these rules to all cases meant that the context within which a transaction took place was largely irrelevant.<sup>31</sup> The classical legal system was also structured around a series of dichotomies,<sup>32</sup> the most important of which was the one between public and private law.<sup>33</sup> The mechanism that the classical legal system used to ensure that the two spheres would remain completely segregated was the idea of a self-regulating market.<sup>34</sup>

The classical legal theorists' model of the market assumed that value was subjective<sup>35</sup> and that everything was capable and, hence, subject to the exigencies of money exchange.<sup>36</sup> Thus, the function of market-based exchange was to maximize the conflicting desires of atomistic individuals seeking to promote their own self-interest.<sup>37</sup> This idea of the self-regulating market was then incorporated into the private half of the public/private dichotomy.<sup>38</sup>

In the private law sphere of private action, individuals exercised rights,<sup>39</sup> and contract law was the core of the private law system.<sup>40</sup> To

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1940). *But see* Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 28 (David Kairys ed., 3d ed. 1998) [hereinafter Mensch, *History*] (setting the time period as 1885–1935).

30. These abstract, formal rules were an attempt to create more predictable “justice.” See LEGAL REALISM, *supra* note 29, at xi–xii; ATIYAH, *supra* note 2, at 402; Eisenberg, *Offers*, *supra* note 2, at 281; Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 501 (1983); Jay M. Feinman, *Contract After the Fall*, 39 STAN. L. REV. 1537 (1987) (book review) [hereinafter Feinman, *Fall*].

31. Clare Dalton, *An Essay in the Deconstruction of Contract Law*, 94 YALE L.J. 997, 1010 (1985); Mensch, *History*, *supra* note 29, at 30.

32. See Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1286 (1990) [hereinafter Feinman, *Theory*] (“For example, the federal government and state governments had separate spheres of authority, as did legislatures and courts.”).

33. *Id.*

34. Elizabeth Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 757 (1981) [hereinafter Mensch, *Ideology*]; Singer, *Realism*, *supra* note 29, at 477–82. See generally ATIYAH, *supra* note 2, at 402 (noting that “the emphasis on contract law as the law of the market was, in England at least, well established by 1870, although in America it may have been a later development.”); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 936–52 (1974) [hereinafter Horwitz, *Foundations*] (discussing the basis for development of modern contract law).

35. Horwitz, *Foundations*, *supra* note 34, at 947.

36. Peter Gabel & Jay Feinman, *Contract Law as Ideology*, in *THE POLITICS OF LAW* 500 (David Kairys ed., 3d ed. 1998).

37. Horwitz, *Foundations*, *supra* note 34, at 947.

38. Cf. FEINMAN, UN-MAKING, *supra* note 1, at 7 (“Society was organized and controlled by two institutions: the market and the state. The market was primary; through it, people could maximize their potential, realize their dreams, and rise or fall on their own merits.”); Singer, *Realism*, *supra* note 29, at 479, 481–82.

39. Singer, *Realism*, *supra* note 29, at 478.

the classical theorists, contract law was a system “conceived of as a field of private ordering in which parties created their own law by agreement,”<sup>41</sup> and within this realm of private agreement, individual freedom was protected from state coercion.<sup>42</sup> In effect, this meant that, within the private law sphere, individuals were free to agree on whatever contract terms they wanted,<sup>43</sup> and the state would ostensibly play no role in regulating the substantive terms of those private relations.<sup>44</sup> This, of course, is the very classical notion of freedom of contract.<sup>45</sup>

Indeed, the role of the courts under the private law system was to enforce the bargain of the parties as made.<sup>46</sup> Courts were to ensure procedural fair play, but nothing more.<sup>47</sup>

The reasons for the minimalist role assigned to the courts, and to the state, were threefold. First, liability could only be voluntarily assumed by the individuals themselves.<sup>48</sup> That is, individuals could not be forced

40. *Id.* at 481.

41. Feinman, *Critical*, *supra* note 2, at 831.

42. Feinman, *Theory*, *supra* note 32, at 1286.

43. ATIYAH, *supra* note 2, at 403; Singer, *Realism*, *supra* note 29, at 479.

44. LEGAL REALISM, *supra* note 29, at 99; Singer, *Realism*, *supra* note 29, at 479.

45. See, e.g., Samuel Williston, *Freedom of Contract*, 6 CORNELL L. REV. 365, 373 (1921).

46. See LEGAL REALISM, *supra* note 29, at 98–99 (explaining the critique of the public/private distinction in American Legal Realism); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1262 (1998) (“[L]aw aims exclusively to give effect to the arrangements and to protect the interests voluntarily created by contracting parties.”); Singer, *Realism*, *supra* note 29, at 479; see also ATIYAH, *supra* note 2, at 404 (According to Atiyah, the court’s only function was to “ensure procedural fair play . . . [.] It is not the Court’s business to ensure that the bargain is fair, or to see that one party does not take undue advantage of another, or impose unreasonable terms by virtue of superior bargaining position.”); Dalton, *supra* note 31, at 1010.

47. LEGAL REALISM, *supra* note 29, at 99; ATIYAH, *supra* note 2, at 404; FEINMAN, UN-MAKING, *supra* note 1, at 111; Dalton, *supra* note 31, at 1014.

[O]ur principal vision of contract law is still one of a neutral facilitator of private volition. We understand that contract law is concerned at the periphery with the imposition of social duties . . . [b]ut we conceive the central arena to be an unproblematic enforcement of obligations voluntarily undertaken . . . . Although we concede that the law of contract is the result of public decisions about what agreements to enforce, we insist that the overarching public decision is to respect and enforce private intention.

Dalton, *supra* note 31, at 1014.

48. ATIYAH, *supra* note 2, at 403 (noting that the fourth principle of classical contract law is that, “the deal is finally struck when the parties agree, or indicate their agreement . . . . The agreement must be ‘freely’ made and ‘without pressure’ but these concepts are very narrowly interpreted, for they must not conflict with the rule of the market place[.]”); Hadfield, *supra* note 46, at 1247 (“Contract law proceeds from the premise that obligation is established by the existence of voluntary and informed choice to enter into a contract.”); Morant, *Race*, *supra* note 2, at 904 (“Consensual arrangements should be enforced if the parties’ entry into the bargain was

to enter into a contract,<sup>49</sup> they were free to contract only if they wished to do so.<sup>50</sup> Second, the individuals themselves were deemed to be roughly equal to each other in terms of bargaining power<sup>51</sup> and access to information;<sup>52</sup> in addition, they bargained at arm's-length<sup>53</sup> and were self-interested.<sup>54</sup> It was assumed, moreover, that each individual was the best judge of his own interests, knew his own circumstances, was able to calculate all risks and future contingencies, and that all of these considerations entered into the making of the contract.<sup>55</sup> In other words, individuals were rational actors.<sup>56</sup> Finally, the classical theorists

truly voluntary.”); Singer, *Realism*, *supra* note 29, at 479 (arguing that the classical theorists “considered three principles to be central to a free contract system[.]” one of which was the principle that a party could not be forced to contract against her will).

49. ATIYAH, *supra* note 2, at 403; Singer, *Realism*, *supra* note 29, at 479.

50. ATIYAH, *supra* note 2, at 408 (“The autonomy of the free choice of private parties to make their own contracts on their own terms was the central feature of classical contract law.”); Hadfield, *supra* note 46, at 1261 (viewing contracts as a form of private ordering means that “individuals are free to choose the structure of their relationships without interference. In this view, law does not judge the formation, performance, or breach of a contract on the basis of external juristic values; law acts only as a surrogate for the values created by the parties themselves.”); Singer, *Realism*, *supra* note 29, at 479.

51. See, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* 429 (3d ed. 1987) (stressing the ethic of self-reliance: “The self-reliance ethic presupposes, as a model, parties who understand the legal consequences of the agreement and who have equal bargaining power or, at least, who are equally free to refuse to bargain unless their terms are met.”).

52. See, e.g., ATIYAH, *supra* note 2, at 403 (The third principal of the classical model of contract law is that “neither party owes any duty to volunteer information to the other, nor is he entitled to rely on the other except within the narrowest possible limits.” Instead, each party must “study the situation, examine the subject matter of the contract, and the general market situation, assess the future probabilities, and rely on his own sources of information. He may take advice, consult experts, buy information from third parties; but if he does not do so, he relies on his own judgment and acts at his peril.”); Speidel, *supra* note 2, at 264 (“At least initially, contemporary contract doctrine assumes, as did classical doctrine, that the parties to an agreement had adequate information and choice . . . [.]”); cf. Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1042 (2003) (“In economic terms, a crucial condition of the ideal contracting environment is that all contracting parties have access to ‘full information about the nature and consequences of [their] choice[s].’”) (footnotes omitted).

53. See, e.g., ATIYAH, *supra* note 2, at 402–03.

The model of contract theory which implicitly underlay the classical law of contract . . . was thus the model of the market. Essentially this model is based on the following principal features. First, the parties deal with each other ‘at arm’s length’ . . . ; this carries the notion that each relies on his own skill and judgment, and that neither owes any fiduciary obligation to the other.

*Id.* Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 808 (2000) [hereinafter Eisenberg, *Relational*] (“[C]lassical contract law was implicitly based on a paradigm of bargains made between strangers transacting in a perfect market.”).

54. Feinman, *Critical*, *supra* note 2, at 832.

55. ATIYAH, *supra* note 2, at 403.

56. Eisenberg, *Relational*, *supra* note 53, at 808.

believed that the self-regulating market was the great neutralizer.<sup>57</sup> They believed that free competition in a self-regulated market, one unencumbered by state interference either in the form of legislation or court imposed obligations,<sup>58</sup> would effectively and fairly mediate the competing and conflicting desires of these self-interested individuals.<sup>59</sup> Implicit in this understanding of the market, therefore, was the assumption that the market itself was neutral, impartial, and perfect.<sup>60</sup>

Under the circumstances just described, the classical theorists were able to conclude that the private law system would produce the “just” result *without* the need for state involvement.<sup>61</sup> Indeed, under this scheme the state was simply not implicated and, therefore, had no role to play “in the processes and outcomes of private life.”<sup>62</sup> Here, free will prevailed against state power.<sup>63</sup> The core values thus given full expression by the private law system, that is to say, by the private law of contracts, were individual autonomy and liberty.<sup>64</sup> But more than this, the classical theorists reasoned that if this interpretation of state power, with all of its limits, was respected, “the state [could not] fairly be held responsible for the distribution of wealth and power in society—that [was] for the outcomes of the voluntary transactions of private parties.”<sup>65</sup>

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Classical contract law was based on a rational-actor model of psychology, under which actors who make decisions in the face of uncertainty rationally maximize their subjective expected utility, with all future benefits and costs discounted to present value. In particular, the rules of classical contract law were implicitly based on the assumptions that actors are fully knowledgeable, know the law, and act rationally to further their economic self-interest.

*Id.*; see also Hadfield, *supra* note 46, at 1236, 1255; *supra* text accompanying notes 39–47 (discussing the sphere of private law).

57. Feinman, *Fall*, *supra* note 30, at 1541.

58. Singer, *Realism*, *supra* note 29, at 479–80.

59. ATIYAH, *supra* note 2, at 404.

60. See also Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 746 (1982) [hereinafter Eisenberg, *Bargain*] (describing the four elements characterizing a perfect market). See generally Eisenberg, *Relational*, *supra* note 53, at 808 (“[C]lassical contract law was implicitly based on a paradigm of bargains made . . . in a perfect market.”); Singer, *Realism*, *supra* note 29, at 477–82 (detailing the history and evolution of the classical conception of the self-regulating market).

61. LEGAL REALISM, *supra* note 29, at 99.

62. Dalton, *supra* note 31, at 1012–13; Singer, *Realism*, *supra* note 29, at 481.

63. Singer, *Realism*, *supra* note 29, at 481.

64. ATIYAH, *supra* note 2, at 408; Dalton, *supra* note 31, at 1010; Feinman, *Fall*, *supra* note 30, at 1543; Mensch, *Ideology*, *supra* note 34, at 753; Morant, *MLK*, *supra* note 22, at 90–91; Morant, *Race*, *supra* note 2, at 902.

65. LEGAL REALISM, *supra* note 29, at 99.

State imposed obligations did continue to exist but classical theorists viewed these obligations as largely peripheral.<sup>66</sup> Consequently, the only arena in which the state was free to act was under the public part of the public/private dichotomy.<sup>67</sup> In this public sphere of government regulation, public officials could exercise state power,<sup>68</sup> and all state imposed obligations, like quasi-contracts, torts, and real property,<sup>69</sup> were relegated to this sphere.<sup>70</sup>

The paradigm transaction under the classical legal system, therefore, was a private law transaction—one unaffected by the context within which it took place.<sup>71</sup> To recap, that transaction was framed by all of the following assumptions:

(1) Contract law was private, meaning it was a private transaction between two private parties;<sup>72</sup>

(2) Parties bargained at arm's length, so they were most likely strangers to one another;<sup>73</sup>

(3) Parties had equal, or roughly equal, bargaining power;<sup>74</sup>

(4) Parties had equal access to information;<sup>75</sup>

(5) Individuals acted as rational actors in the marketplace;<sup>76</sup>

(6) Contracts were the product of voluntary and informed choice;<sup>77</sup>

(7) Contract law was the law of the market—implicit but central to this understanding were the notions that markets were neutral and impartial, and also perfect, self-regulating, and largely outside of state control;<sup>78</sup> and

(8) The role of the state was neutral and minimal.<sup>79</sup>

66. Dalton, *supra* note 31, at 1010; Singer, *Realism*, *supra* note 29, at 479–81.

67. LEGAL REALISM, *supra* note 29, at 99; FEINMAN, UN-MAKING, *supra* note 1, at 11–12; Singer, *Realism*, *supra* note 29, at 478–79.

68. Singer, *Realism*, *supra* note 29, at 478.

69. These two areas of private law were essentially reconceptualized as implicating only state imposed obligations. *Id.* at 480–81.

70. *Id.*

71. See *supra* text accompanying note 31.

72. See *supra* text accompanying notes 40–41.

73. See *supra* text accompanying notes 53–54.

74. See *supra* text accompanying note 51.

75. See *supra* text accompanying note 52.

76. See *supra* text accompanying notes 55–56.

77. See *supra* text accompanying notes 49–50, 55.

78. See *supra* text accompanying notes 57–60.

79. See *supra* text accompanying notes 58, 61, 62; cf. *infra* text accompanying notes 82–86 (arguing that under classical contract law contracts were in fact public due to state enforcement of both individual contracts and market regulation).



Perhaps not surprisingly, all of the classical legal system's assumptions have been the subject of vigorous critiques.<sup>80</sup> The Legal Realists, for example, attacked the public/private distinction upon which much of classical legal thought was based.<sup>81</sup> Specifically, the Realists argued that contracts were not the product of voluntary choice (or assent) between two private parties, but were instead the product of coercion that is ultimately created and permitted by the state.<sup>82</sup> They argued, moreover, that contracts were in fact public, not private, because the state enforced them.<sup>83</sup> The Realists also attacked as myth

80. See Feinman, *Critical*, *supra* note 2, at 832–33 (“Critiques focused on the inescapable presence of policy choices which make contract law as much a realm of social ordering as other areas of law, and the impossibility of realizing a formal rules system . . .”); Feinman, *Theory*, *supra* note 32, at 1283–84 (noting that the perceived crisis in law generated a counter attack held by mainstream scholars and practitioners); Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 738 (2000) [hereinafter Feinman, *Context*] (“The essence of the criticism of classical law . . . was contextualism.”).

81. What follows is an over-simplistic summary of the Legal Realist critique of the classical legal system. For more thorough analyses see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870–1960* chs. 6–8 (Oxford Univ. Press 1992); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933) [hereinafter Cohen, *Contract*]; Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927) [hereinafter Cohen, *Property*]; Dawson, *supra* note 12; Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) [hereinafter Hale, *Coercion*]; Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L. J. 704 (1931); Singer, *Realism*, *supra* note 29; LEGAL REALISM, *supra* note 29, ch. 4.

82. The Realists argued that coercion is ubiquitous and “lies at the heart of every bargain.” Hale, *Coercion*, *supra* note 81, at 470; Mensch, *Ideology*, *supra* note 34, at 764. In fact, every contract involves mutual coercion, because each party is legally entitled to withhold from the other what she owns, whether capital (i.e., land) or labor. Cohen, *Property*, *supra* note 81; Hale, *Coercion*, *supra* note 81, at 472–74; Singer, *Realism*, *supra* note 29, at 486. Coercion, therefore, stems from ownership; and the more one party owns (in terms of quantity and/or value), the more that party will be able to dictate the terms of a contract. Cohen, *Property*, *supra* note 81; Hale, *Coercion*, *supra* note 81, at 472–73; Mensch, *Ideology*, *supra* note 34, at 764; Singer, *Realism*, *supra* note 29, at 486. “Ownership [in turn,] is a function of legal entitlement.” Mensch, *History*, *supra* note 29, at 35. This is because it is the state which creates and protects, for example, the property right. Cohen, *Property*, *supra* note 81; Hale, *Coercion*, *supra* note 81, at 471–72; Singer, *Realism*, *supra* note 29, at 487–88. Consequently, because coercion is a function of ownership and ownership is a creature of the state, the state is deeply embedded in every ostensibly private contract. Contracts are therefore public, not private.

83. There are at least two dimensions to the state enforcement of private contract argument. The first involves the decision as to *which* contracts to enforce. The second involves the use of state force. More specifically, contract law does not enforce *every* promise a person makes, it only enforces some, leaving others to individual conscience or honor. Cohen, *Contract*, *supra* note 81, at 585; Singer, *Realism*, *supra* note 29, at 485. Contract law is therefore public, under this view, because deciding *which* promises should be enforceable and which left to conscience, for example, “necessarily requires” courts and legislatures (to the extent that substantive regulation of contract terms is involved) to make policy choices. Cohen, *Contract*, *supra* note 81, at 585–86; Singer, *Realism*, *supra* note 29, at 485. Once the state (through its judges and legislators) determines which contracts are enforceable, the state will then enforce those state created contract rights by literally putting the sovereign power of the state in the service of one

the idea of the self-regulating market by showing that the “free” market was, in reality, a regulatory structure created by the state.<sup>84</sup> Consequently, since the state was deeply involved in every “private” contract, and because the market was itself a regulated structure created by the state, the Realists argued persuasively that the public/private distinction was an artificial construct.<sup>85</sup> As a result, the role of the state in the distribution of wealth, property, and power in society could in no way be deemed neutral or minimal.<sup>86</sup>

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contracting party against the other. It accomplishes this by compelling one of the parties (through its judges, sheriffs, and other state agents) to either pay or perform. Cohen, *Contract*, *supra* note 81, at 585–86; Singer, *Realism*, *supra* note 29, at 483–85. Contract law is therefore public, under this view, because by choosing to enforce the contract (as opposed to not enforcing it), the state has essentially chosen between two competing moral principles, namely, the right to rely on a promise versus the freedom to change one’s mind about whether to perform the contract. Cohen, *Contract*, *supra* note 81, at 587; Feinman, *Critical*, *supra* note 2, at 841–42; Singer, *Realism*, *supra* note 29, at 484–85.

84. Classical legal theorists assumed that every action within the private sphere they had so painstakingly carved out for individual action was free and voluntary. *See supra* Part II.A.; LEGAL REALISM, *supra* note 29, at 99–100. Consequently, any state action, whether in the form of court decisions or legislation, constituted an unwarranted governmental intrusion into that private sphere of action. *See supra* Part II.A.; LEGAL REALISM, *supra* note 29, at 99–100. The Realists argued that this classical assumption was “fundamentally misguided.” LEGAL REALISM, *supra* note 29, at 99. According to the Realists, our *existing* and developing statutory and common law created a comprehensive network of regulations. *Id.* at 99–100; Joseph William Singer, Bussey Professor of Law, Harvard University: Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society 10–11 (Nov. 7, 2006) (transcript on file with the author), *reprinted in* 2 HARV. L. & POL’Y REV. 139 (2008) [hereinafter Singer, Speech]. This network of legal rules set forth minimum standards for contracting and, in so doing, effectively advantaged certain parties and disadvantaged others. *Id.*; LEGAL REALISM, *supra* note 29, at 99. Regulation, in other words, provided both the foundation and framework upon which the self-regulating, free market was built, operated, and continues to operate. Singer, Speech, *supra*, at 11. In other words, absent the legal structure provided by court and/or state imposed regulation, the self-regulating free market would be unrecognizable as a market at all. *Id.* at 4. Consequently, the Legal Realists argued that the market itself was a regulatory structure. *Id.*

85. LEGAL REALISM, *supra* note 29, at 99–100; Cohen, *Property*, *supra* note 81; Hale, *Coercion*, *supra* note 81, at 471; Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Singer, *Realism*, *supra* note 29, at 482–95.

86. Professor Joseph Singer writes:

Once the state was created, it altered (or was intended to alter) the distribution of power and wealth in society. Indeed, the whole purpose of legal rights was to impose collective limits on individuals’ freedom of action in order to protect the interests of others. Moreover, even by failing to intervene in “private” transactions, the state effectively altered contract relations; it delegated to the more powerful party the freedom to exercise her superior power or knowledge over the weaker party. Thus, the state determined the distribution of power and wealth in society both when it acted to limit freedom and when it failed to limit the freedom of some to dominate others.

Singer, *Realism*, *supra* note 29, at 482; *see also* Cohen, *Property*, *supra* note 81, at 11–13.

The critiques of the classical legal system focused on several things, including the unmistakable presence of policy choices in the ostensibly private law area of contract, “on the impossibility of realizing a formal rules system, and on the considerable gap between the idealized vision of the world and the actual operation of contract law in society.”<sup>87</sup> The classical system was clearly flawed. The real issue, then, was to decide what to do about it.

### *B. Modern Contract and Conventional Wisdom—The Differences Matter*

Academics developed the modern legal system in response to all of the foregoing criticism.<sup>88</sup> Modern law, and particularly modern contract law, is a specific attempt to resolve some of the problems that led to the collapse of classical legal thought.<sup>89</sup>

For example, modern contract law shifts away from formal rules, like offer and acceptance,<sup>90</sup> to legal standards,<sup>91</sup> like reliance, that required courts to derive facts and meaning from the surrounding circumstances.<sup>92</sup> It also recognizes that the market is not perfect<sup>93</sup> and, in fact, contains anomalies in the form of informational asymmetries and other bargaining inequalities.<sup>94</sup> In addition, the context within

87. Eisenberg, *Offers*, *supra* note 2, at 281–82; Feinman, *Critical*, *supra* note 2, at 833 (internal citations omitted); Feinman, *Theory*, *supra* note 32, at 1286–87.

88. *See supra* note 2.

89. *See supra* text accompanying notes 2–22.

90. *See infra* Part III.B.3; Feinman, *Theory*, *supra* note 32, at 1286–87.

91. E. Allan Farnsworth, *Some Prefatory Remarks: From Rules to Standards*, 67 CORNELL L. REV. 634 (1982); Feinman, *Theory*, *supra* note 32, at 1287; Knapp, *Offer*, *supra* note 2, at 318; Speidel, *supra* note 2, at 260.

92. *See* FEINMAN, UN-MAKING, *supra* note 1, at 91–94 (detailing development of the use of reliance as a basis for enforcement of promise); Feinman, *Theory*, *supra* note 32, at 1287–88 (discussing neoclassical contract attempting to balance formal contract structure with communal standards of responsibility such as reliance). *See generally* Knapp, *Reliance*, *supra* note 1 (surveying the history of promissory estoppel); Kevin M. Teeven, *A History of Promissory Estoppel: Growth in the Face of Doctrinal Resistance*, 72 TENN. L. REV. 1111 (2005) [hereinafter Teeven, *History*] (commenting on the legal history of the development of the doctrine of justifiable reliance).

93. Eisenberg, *Bargain*, *supra* note 60, at 750 (“[M]any contracts are made in markets that are highly imperfect.”).

94. Morant, *MLK*, *supra* note 22, at 96 (“Anomalies of the marketplace included opportunism, the lack of perfect information, and bargaining inequity.”) (internal citations omitted); *cf.* Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 583 (1982) (recognizing the development of the decision maker to undertake a careful analysis in terms of the distributive objective and its consistency with freedom of contract); Mensch, *History*, *supra* note 29, at 47 (discussing view that courts should assign right where they are most valuable, mimicking the real world imperfect market).

which the parties form the contract<sup>95</sup> now matters in two different but important ways,<sup>96</sup> namely, in providing interpretation for the agreed-to contract terms<sup>97</sup> and in supplying additional terms.<sup>98</sup>

Modern contract law also attempts to effectuate the norms of fairness and cooperation.<sup>99</sup> Significantly, these modern norms are designed to supplement, not supplant, the classical values of personal autonomy and liberty.<sup>100</sup> Modern contract law emphasizes fairness and cooperation in an effort to mitigate the harshest or most extreme aspects of market exchanges produced under the classical system.<sup>101</sup> Specifically, the concern seems to center around coercion in the formation of contracts.<sup>102</sup> These modern values are embodied in the expanded policing doctrines recognized by modern contract law<sup>103</sup> and the emergence of reliance and restitution as alternatives to the traditional contract.<sup>104</sup>

The expanded policing doctrines include economic duress, misrepresentation, and unconscionability.<sup>105</sup> All of these doctrines focus on the fairness of the bargaining process and sometimes the resulting exchange, as well as on the interdependence of the parties in

95. Professor Eisenberg would characterize “the context within which a contract is formed” to mean that modern contract law has become more individualized and subjective vis-à-vis the classical approach, which was strictly standardized and objective. See, e.g., Eisenberg, *Dynamic*, *supra* note 2, at 1756 (discussing the modern approach to consideration); *id.* at 1756–60 (discussing the modern approach to interpretation).

96. Knapp, *Offer*, *supra* note 2, at 317.

97. Eisenberg, *Dynamic*, *supra* note 2, at 1756–60.

98. Feinman, *Theory*, *supra* note 32, at 1287; Speidel, *supra* note 2, at 260–61.

99. Eisenberg, *Responsive*, *supra* note 3, at 1111–12; Feinman, *Theory*, *supra* note 32, at 1288; Knapp, *Offer*, *supra* note 2, at 318; Morant, *Race*, *supra* note 2, at 902–03.

100. Gabel & Feinman, *supra* note 36, at 497 (“The principle of personal autonomy underlying freedom of contract has been supplemented by modern principles of cooperation and fairness . . .”); Morant, *MLK*, *supra* note 22, at 97 (“While clinging to the notion of contractual freedom and bargaining autonomy, neoclassicists appreciated some of the realities of bargaining differences.”) (internal citations omitted).

101. Feinman, *Theory*, *supra* note 32, at 1309–10; Gabel & Feinman, *supra* note 36, at 497.

102. FARNSWORTH, *supra* note 6, §1.7; Gabel & Feinman, *supra* note 36, at 497–98; Morant, *MLK*, *supra* note 22, at 97–98. This conclusion is also based on modern contract law’s responses to the classical system, namely, the expanded policing doctrines. See *supra* text accompanying notes 6–22.

103. Knapp, *Offer*, *supra* note 2, at 318. The traditional contract policing doctrines include minority, mental incapacity, duress, undue influence, and fraud. Modern contract law continues to recognize them as well. See *supra* note 7; see also RESTATEMENT (SECOND) OF CONTRACTS §§14 (minority), 15 (mental illness or defect), 175 (duress), 177 (undue influence) (1981).

104. Feinman, *Theory*, *supra* note 32, at 1288; Robert Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 103–04 (1988); Knapp, *Offer*, *supra* note 2, at 318; Morant, *MLK*, *supra* note 22, at 97; Speidel, *supra* note 2, at 260–61.

105. See *supra* text accompanying notes 6–7.

contract formation.<sup>106</sup> If argued successfully, these doctrines result in the rescission or unenforceability of coerced bargains.<sup>107</sup>

Reliance and restitution, as alternative bases of contractual obligation,<sup>108</sup> afford relief where a “traditional contract”<sup>109</sup> is not found.<sup>110</sup> Here, the parties either started to perform or prepared to perform what they thought was a traditional contract and, in the process, one party changed position to his detriment or conferred an uncompensated benefit on the other party. Modern contract law deems it unfair under these circumstances to deny relief to the injured party<sup>111</sup> and, therefore, provides an alternative remedy.

Clearly, there are differences, even significant differences, between the classical and modern contract law systems. But the question is, do the differences matter? For the reasons developed in the next Part, I think the answer is no.

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106. RESTATEMENT (SECOND) CONTRACTS §§ 208 cmt. c-d (unconscionability), 176 cmt. d-f (improper threat) (1981); Eisenberg, *Bargain*, *supra* note 60, at 748–85; Eisenberg, *Consideration*, *supra* note 4, at 640–41 (discussing unconscionability).

107. *See supra* text accompanying notes 6–22.

108. *See* MURRAY, *CASES & MATERIALS*, *supra* note 3, at 26 (discussing modern contract law’s recognition of promises supported by consideration and reliance); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *YALE L.J.* 1261, 1262 (1980) (stating that the modern system permits enforcement of a promise using the principles of bargain, detrimental reliance, and unjust enrichment); Joseph M. Perillo, *Restitution in a Contractual Context*, 73 *COLUM. L. REV.* 1208, 1212–15 (1973) (stating that restitution is a substantive basis of contractual liability); Metzger & Phillips, *supra* note 30, at 508–09 (noting that promissory estoppel and unjust enrichment (i.e., restitution) became separate causes of action under the Restatement of Contracts); Judy B. Sloan, *Quantum Meruit: Residual Equity in Law*, 42 *DEPAUL L. REV.* 399, 426 (1992) (observing that quantum meruit [restitution] can be an “alternative contract remedy upon a breach or repudiation of an express contract”).

109. A traditional contract is one that satisfies the classical formation elements of mutual assent and consideration. *See* RESTATEMENT (SECOND) OF CONTRACTS §17(1) (1981) (“[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”).

110. *See, e.g.* Eric G. Anderson, *The Restoration Interest and Damages for Breach of Contract*, 53 *MD. L. REV.* 1, 12 (1994) (stating that restitutionary awards “may provide relief when a contract is or has become unenforceable because it runs afoul of legal restrictions such as the Statute of Frauds”); Teeven, *History*, *supra* note 92, at 1140 (stating that strict adherence to the classical system left parties that detrimentally relied on a promise without remedy).

111. Hillman, *supra* note 104, at 104 (“Although based in part on the principle of freedom of contract, modern contract law is also tempered both within and without its formal structure by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties rather than on parties’ actual agreements.”) (internal citations omitted); Lon L. Fuller and William R. Perdue, Jr., *The Reliance Interest in Contract Damages I*, 46 *YALE L. J.* 52, 53–57 (1936); Teeven, *History*, *supra* note 92, at 1140 (“Strict adherence to traditional doctrine left reliance hardship unremedied. In the interest of fairness, appellate courts began granting commercial reliance relief [in some instances].”).

### III. CONTESTING WISDOM

The discussion in Part II represents the conventional version of the evolutionary story of contract law.<sup>112</sup> In this rendition, it is the differences between the two contract law systems that make it possible, at least theoretically, for the modern system to undo some of the potential harshness produced by classical contract.<sup>113</sup> The differences, in other words, are the most significant part of the story.

But this is where the conventional wisdom is wrong. The ways in which the two systems remain the same are actually more important than their differences. In fact, it is the sameness between the systems that dooms modern contract law to fail<sup>114</sup> in its efforts to address the classical system's coercion problem.<sup>115</sup>

#### *A. Rearticulating the Evolutionary Story—The Sameness is More Important*

Modern contract law is not a complete rejection of the principles underlying the classical legal system—it actually retains key elements of it.<sup>116</sup> Thus, modern contract law represents only a partial, not a total, shift away from classical legal thought.<sup>117</sup>

Under modern contract law, the individual remains the basic unit of social interaction.<sup>118</sup> The individual still acts out of self-interest and her primary goal remains achieving her own ends in the market.<sup>119</sup> It is therefore important to note that, notwithstanding its recognition that the market is not perfect,<sup>120</sup> the modern system, like the classical system

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112. *But see supra* note 28.

113. *See supra* notes 2–5.

114. *See, e.g., Mensch, History, supra* note 29, at 41 (“[T]he vocabulary of modern treatises [like Corbin on contracts] is still the vocabulary of classical doctrine—questions of justice emerge *within* discussions of offer and acceptance . . . . The message is that we can advance beyond the silly stage of formalism while still retaining the basic structure and premises of classical thought.” However, “Corbin . . . leave[s] unresolved the old conflict between formal rules and general standards of substantive justice . . . .”) (emphasis in original) (internal citations omitted).

115. *See supra* text accompanying notes 6–22.

116. Feinman, *Critical, supra* note 2, at 833; Mensch, *History, supra* note 29, at 41–42.

117. Feinman, *Critical, supra* note 2, at 833. Feinman argues that modern contract law can be referred to as “neoclassical” contract law. He writes that, “[t]he word “neoclassical” suggests the partial nature of the accommodation, indicating that neoclassical contract has not so far departed from classical law that a wholly new name is appropriate.” Feinman, *Theory, supra* note 32, at 1285. I agree with Feinman on this point; but, because I have made consistent reference to the “modern” system in this Article, I will continue to use that nomenclature to avoid confusion.

118. Feinman, *Theory, supra* note 32, at 1310.

119. Feinman, *Context, supra* note 80, at 739, 743.

120. *See supra* text accompanying notes 93–94.

before it, continues to rely on the idea of a self-regulated market as the primary means of mediating the competing and conflicting desires of these self-interested individuals.<sup>121</sup> Furthermore, individual liability is still premised on voluntary agreement.<sup>122</sup> Modern contract law thus retains two pivotal assumptions of classical legal thought: (1) private agreement represents a distinct area of social interaction and legal processes; and (2) the fundamental belief that contract law can successfully regulate it.<sup>123</sup> In so doing, modern contract law essentially retains the public/private distinction.<sup>124</sup> And, as with classical legal thought, the heart of the private law system remains freedom of contract.<sup>125</sup>

In effect, therefore, the paradigm under modern law remains the private law transaction.<sup>126</sup> As a result, modern law retains most of the classical legal system's premises, but with a few modifications.<sup>127</sup> Those assumptions are laid out in Table 1:

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211. According to Jay Feinman, there is an "ideology of the market" still regnant in legal education, politics, government, and social thought generally. He writes:

This ideology presents the market as the primary form of social organization, as an empirical fact and a desirable state of affairs. The market effectively enables individuals to achieve their life projects while maximizing social welfare as a whole. It arises and proceeds through a spontaneous order, obviating centralized planning or significant government intervention. All of these virtues require no more than modest correction at the margins, and the job of the law is to maintain the conditions of the market, notably through establishing the ground rules of property and contract, providing legal institutions and mechanisms to facilitate market transactions, and maintaining social order.

Jay M. Feinman, Book Review, 55 J. LEGAL EDUC. 287, 293 (2005).

122. Feinman, *Theory*, *supra* note 32, at 1287.

123. *Id.* at 1292, 1309; Dalton, *supra* note 31, at 1014.

124. Mensch, *History*, *supra* note 29, at 39 ("[M]odern American legal thought continues to be premised on the distinction between private law and public law. Private law is still assumed to be *about* private actors with private rights, making private choices . . .") (emphasis in original).

125. Feinman, *Theory*, *supra* note 32; Morant, *Race*, *supra* note 2, at 902.

126. Feinman, *Fall*, *supra* note 30, at 1538; Mensch, *History*, *supra* note 29, at 39, 41.

127. See *supra* Part II.B (discussing the differences between modern and classical contract law).

Table 1: The Basic Assumptions of the Classical & Modern Systems<sup>128</sup>

<u>Classical System</u>	<u>Modern System</u>
Contract law is private, meaning it is a private transaction between two private parties.	Contract law is private, meaning it is a private transaction between two private parties.
Parties bargain at arm's length, i.e., they are most likely strangers to one another.	Parties bargain at arm's length, i.e., they are most likely strangers to one another.
Parties have equal, or roughly equal, bargaining power.	
Parties have equal access to information.	
Individuals act as rational actors in the marketplace.	Individuals act as rational actors in the marketplace.
Contracts are the product of voluntary and informed choice.	Contracts are the product of voluntary and informed choice.
Contract law is the law of the market. Implicit, but central to this understanding, are the notions that markets are neutral and impartial, and also perfect, self-regulating, and largely outside of state control.	Contract law is the law of the market. Central to this understanding, are the notions that markets are still neutral and impartial, mainly self-regulating and largely outside of state control, but do contain imperfections primarily in the form of information asymmetries and bargaining inequalities. Any imperfections, however, can be remedied with minimal interference from the state, thereby maintaining the integrity of the market.
The role of the state is neutral and minimal.	The role of the state is neutral and minimal.

To summarize the table, there are only three differences in the basic assumptions of the classical system vis-à-vis the modern system.

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128. For the classical assumptions, *see supra* text accompanying notes 72–79; for the modern assumptions, *see supra* text accompanying notes 72–73, 76–79, 93–94.



Specifically, the modern system no longer assumes that the parties have equal, or roughly equal, bargaining power or equal access to information. Instead the modern system recognizes these as types of market failures and, consequently, no longer assumes that markets are perfect. But all the other classical assumptions remain unchanged.<sup>129</sup> The next section explores the specific implications of the sameness between the modern and classical contract law systems.

*B. Power is in the Core, and the Core of Contract is Formation*

In brief, the parts of the classical legal system retained by modern contract law leave the core of classical contract, which is contract formation, completely intact.<sup>130</sup> Formation is the core, because this is where power is centered.<sup>131</sup> Modern contract law kept and continues to keep formation and, therefore, the core of contract, intact.<sup>132</sup> It is, however, easier to form a contract under modern contract law than it was under the classical regime.<sup>133</sup> But, by making it easier to form a contract, the modern system actually expands one contracting party's capacity for coercion because formation is where the party with the capacity to coerce imposes the contract terms that it wants.<sup>134</sup> By leaving formation essentially unaltered, modern contract law not only expands one party's capacity to coerce her contracting partner, but also largely immunizes this coercion from effective challenge by the contract

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129. One could reasonably question whether modern contract law retained the classical assumption that parties bargain at arm's length and are most likely strangers to one another, given Professor Ian Macneil's relational contract theory. In brief, Professor Macneil's theory assumes that parties are often likely to have dealt with each other before and/or are likely to do so again, either in long-term evolving contractual relationships or in repeat transactions of essentially similar nature. Consequently, the parties are not necessarily strangers to one another. See generally Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000). I agree that Professor Macneil's relational contract theory, which he has advanced since the mid-1960s, is a direct challenge to the classical and modern assumption noted above. My argument, and hence my response to the query, however, is that Professor Macneil's theory is a *critique* of modern contract law's continued adherence to the classical assumption that contracts are private and discrete exchanges between strangers. If modern contract law did not adhere to the classical assumption, that is, if modern contract law adopted Professor Macneil's theory, it would be unnecessary to mount the critique, or continue it. Cf. Feinman, *Context*, *supra* note 80, at 743 ("If we think of relational contract as a reaction to [modern] contract, the emphasis on cooperation is a corrective to [modern] law's retention of the core classical position of self-interest.").

130. See *infra* Part III.B.2.

131. See *infra* Part III.B.4.

132. See *infra* Part III.B.2.

133. See *infra* Part III.B.3.

134. See *infra* Part III.B.5.

policing doctrines.<sup>135</sup> This is because a presumption of contract validity is created upon formation of the contract, which is extremely difficult to rebut in practice. Thus, because it leaves the core of contract intact, modern contract law will be unable to mitigate the coercion problem.<sup>136</sup>

### 1. The Core of Classical Contract Law is Formation—Literally, Mutual Assent and Consideration<sup>137</sup>

Formation is the core of classical contract for several reasons. The first reason is the obvious one: formation is where contract law starts. In other words, the rest of contract law flows from formation.<sup>138</sup> With the exception of reliance and restitution,<sup>139</sup> the rest of contract law is implicated only if a “traditional contract,” that is, one formed via mutual assent and consideration, exists.<sup>140</sup>

Second, formation is where both the classical and now modern systems’ assumptions<sup>141</sup> originate and are applied. Formation is the legal space in which two private actors armed with enough information voluntarily come together in their own self-interest and make a rational

135. See *infra* Part III.B.5.

136. See *infra* Part III.B.5.

137. See RESTATEMENT (FIRST) OF CONTRACTS § 19(b)-(c) (1932); Morant, *Race*, *supra* note 2, at 900–01 (“Classical or traditional theory of contract law has as its infrastructure the strict adherence to procedural aspects of bargain formation; . . . parties who conformed to the process . . . , including the requisite elements of mutual assent and consideration, gain security in the axiom that their resultant bargain would be enforced.”) (footnote omitted); *id.* at 904–05 (Classical theorists placed “significant emphasis upon the manifestation of assent and the presence of consideration. If these latter two elements are present, strict enforcement of the resultant agreement must ensue.”) (footnote omitted). See also RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) (“[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”); Morant, *MLK*, *supra* note 22, at 93 (“A basic tenet of traditional, classic contract theory requires that parties steadfastly obey the rules of bargain formation in order to have binding agreements . . . . Those whose agreements manifest mutual assent and contain consideration may expect the enforcement of their resultant agreements, barring some impediment.”) (footnotes omitted).

138. See *infra* Part III.B.2 (documenting that all the other contract doctrines are implicated only if a contract is formed first).

139. As it is, restitution is not a contract at all. There is an entirely separate body of law governing restitution. See, e.g., RESTATEMENT OF RESTITUTION (1937). As for reliance, there is only one reliance-based claim recognized in contract law and that is promissory estoppel. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). While contract law does include provisions for restitution and reliance damages, see RESTATEMENT (SECOND) OF CONTRACTS §§ 349 (reliance damages), 373 (restitution damages in favor of non-breaching party) (1981), the bulk of contract law—formation, interpretation, performance, and breach—all deal with a traditional contract. See generally RESTATEMENT (SECOND) OF CONTRACTS (1981).

140. See *infra* Part III.B.2 (documenting that all the other contract doctrines are implicated only if a contract is formed first).

141. See *supra* Table 1 (listing the classical and modern contract law assumptions).

choice about whether to enter into a contract.<sup>142</sup> It follows, then, that formation is where the classical norms of individual autonomy and liberty are given full effect.

Finally, for reasons that I develop more fully below, formation is the core of classical contract because this is where power is centered.<sup>143</sup>

## 2. Modern Contract Law Continues to Keep the Core—Formation—Intact

Modern contract law made no changes to the elements required to form a contract. Mutual assent and consideration are still all that are needed to form a valid, traditional contract.<sup>144</sup> Indeed, modern contract law leaves the core alone. All of the new or expanded doctrines it recognizes, and its interpretation of existing doctrines, assumes a contract was formed in the first instance. For example, the parol evidence rule applies by definition only to “a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein[.]”<sup>145</sup> In other words, a contract has to exist before the parol evidence rule comes into play. The same is true of the modern approach to contract interpretation,<sup>146</sup> specifically, in deciding whose meaning of disputed contract language prevails<sup>147</sup> and in supplying gap-fillers.<sup>148</sup>

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142. See *supra* Table 1.

143. See *infra* Part III.B.4.

144. See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981).

145. U.C.C. § 2-202 (2003); accord RESTATEMENT (SECOND) OF CONTRACTS §§ 210, 213(a) (1981).

146. Interpretation can involve two different questions. While there is overlap between the two questions, see, e.g., LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 393–95 (8th ed. 2006), I think they determine fundamentally different things. *But see* Eisenberg, *Dynamic*, *supra* note 2, at 1756–60 (combining the contract formation and the contract interpretation questions into a discussion of “contract interpretation” generally). The first question is whether a contract was formed at all. RESTATEMENT (SECOND) OF CONTRACTS §§ 20, 200 cmts. a & b (1981). In this scenario, however, the applicable rules governing that analysis are found in Chapter 3 of the Restatement (Second) of Contracts, Formation of Contracts-Mutual Assent, and primarily in Restatement Sections 17–20. In contrast, the second interpretive question asks whose meaning of disputed contract language prevails.

147. This interpretation question is governed by Restatement (Second) of Contracts § 201. Here, the parties are now disputing what they meant when they manifested their assent to the contract. The court is called upon to decide which party’s meaning prevails through the process of interpretation which, under the modern approach, draws no distinction between interpretation and construction. FARNSWORTH, *supra* note 6, § 7.7, at 440. Consequently, the process of interpretation now determines the meaning to be attributed to disputed contract language and the legal effect of that language. It is true that the process of interpretation may result in a failure of mutual assent. See RESTATEMENT (SECOND) OF CONTRACTS § 201(3) (1981). But this does not negate the argument that the parties were operating under the assumption that a valid contract existed. Absent such a common understanding between the parties, there would be no one

Similarly, if established on the facts, all the contract policing doctrines, like fraud, undue influence, duress, unconscionability, and misrepresentation, either result in a voidable contract or make a contract unenforceable in whole or in part.<sup>149</sup> The same can be said of the risk allocation defenses, like mistake (bilateral or unilateral), impracticability of performance, and frustration of purpose. By definition, they only apply to contracts already in existence.<sup>150</sup> Clearly,

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disputing the meaning of contract language to determine his/her performance obligations. In other words, if the parties did not think they were bound by a contract and, hence, subject to liability for failing to perform, common sense says that no one would be asking a court to determine whose meaning prevailed, i.e., the interpretive question posed by § 201. The existence of a valid contract must therefore be presumed. If not, if they were disputing the very existence of a valid contract, they would (or should) have argued lack of mutual assent under Restatement (Second) of Contracts § 201. Compare Professor Charny's view:

[T]he hypothetical bargain framework is invoked [by courts] . . . to interpret 'ambiguous' language; that is, to apply the language of a contract to a particular contingency which subsequently arises, the court [ ] construe[s] the language . . . so as to give effect to what would have been the intention and agreement of the parties had their attention been drawn to events as they actually were to occur.

David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1816 (1991) (footnote omitted).

148. The same is true for contract gap-fillers, also known as default rules and/or implied terms. They, too, presuppose that a contract is already formed. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 822–24 (1992) (discussing the evolution of the terminology and what he perceives as its significance). There seems to be general agreement that all contracts are incomplete, to one degree or another. *Id.* at 821. Default rules therefore supply the terms that are implied by the courts, or a statute, like the Uniform Commercial Code, to fill in the gaps of incomplete contracts. *Id.* at 822, 825–26; Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 87–88 (1989). Consequently, if default rules provide the terms that fill in the gaps of an incomplete contract, it seems quite clear that a contract has to exist. Absent the existence of a contract, in other words, there would be no need to discuss, let alone impose, a default rule, or gap-filler. There would simply be no one disputing his/her performance obligation under a contract to which a contract term would need to be implied. The existence of a valid contract must therefore be presumed. Also, as Professor Charny writes:

[C]ourts use the [hypothetical bargain] rule as one of 'construction': to supply 'implied duties' in the face of a contingency that no language in the contract addresses . . . . [W]hen supplying terms of an effective but incomplete contract a court properly picks those for which the parties probably would have bargained, had they anticipated the problem.

See, e.g., Charny, *supra* note 147, at 1816 (footnotes omitted).

149. See RESTATEMENT (SECOND) OF CONTRACTS §§ 164, 175, 177, 208 (1981). See *supra* notes 8–9 and accompanying text.

150. For example, the Restatement rule for mutual mistake explicitly states that, "[w]here a mistake of both parties [exists] at the time a contract was made as to a basic assumption on which the contract was made . . . , the contract is voidable . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981) (emphasis added). This language clearly contemplates that a contract was formed by the parties, albeit under a legal mistake. The rule for unilateral mistake contains the same language. See RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981). The rules for impracticability of performance and frustration of purpose are even more explicit. The

only a contract that exists can later be discharged or made voidable or unenforceable. There would simply be no reason to invoke a contract policing doctrine or risk allocation defense if a contract did not exist in the first instance.

### 3. Modern Contract Law Makes It Easier to Form a Contract

One of the hallmarks of classical contract law was its adherence to rigid and technical rules,<sup>151</sup> particularly in the context of contract formation.<sup>152</sup> Parties had to satisfy very specific requirements regarding contract formation and the requirements were either met or they were not; there was no middle ground.<sup>153</sup> Classical contract law thus envisioned the formation process looking something like this:

First, parties engage in a period of preliminary negotiation, exchanging communications of a more or less detailed nature about the type of exchange of performances to which each would be willing to agree. Next, one party (the “offeror”) makes an “offer”—a direct, complete proposal that a contract be entered into, providing for an exchange of defined performances. This has the effect of creating in the party to which that offer is addressed a “power of acceptance.” If that other party (the “offeree”) manifests her “acceptance” of the offer in a legally effective way, then at that moment a contract comes into being. If the initial offer is not acceptable, however, the offeree may respond by making a “counter-offer” of her own, which may in turn be accepted by the original offeror (thus giving rise to a contract different from the one she originally proposed). Of course, a contract may never come into being at all; the offeree may simply reject the offer without making one of her own in return. Or, the offeree may delay too long in accepting, so that the power of acceptance created by the offer has been terminated either by a time limit (explicit or implicit)

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Restatement rule for impracticability, for example, states in pertinent part that, “[w]here, *after a contract is made*, a party’s performance is made impracticable . . . his duty to render that performance is discharged . . .” *Id.* § 261 (emphasis added). The rule for frustration of purposes contains identical language. *See id.* § 265.

151. *See supra* Part II.A.

152. Eisenberg, *Offers*, *supra* note 2, at 271; Knapp, *Offer*, *supra* note 2, at 322; Metzger & Phillips, *supra* note 30, at 481; Morant, *Race*, *supra* note 2, at 900 (“Classical or traditional theory of contract law has as its infrastructure the strict adherence to procedural aspects of bargain formation[.]”).

153. Mensch, *Ideology*, *supra* note 34, at 755–56 (“According to [the classical model of contract formation], only a voluntary exchange of promises (the traditional offer and acceptance) gave rise to contractual obligations. At the moment of exchange (and not a second sooner), a right of expectation sprang into being.”); FEINMAN, UN-MAKING, *supra* note 1, at 112–13; Eisenberg, *Offers*, *supra* note 2, at 271.

contained in the offer itself or by the offeror's withdrawal ("revocation") of his offer.<sup>154</sup>

The classical system's approach to contract formation can be contrasted with the modern system's approach, which has been adopted by Article 2 of the Uniform Commercial Code and the Restatement (Second) of Contracts.<sup>155</sup> Contract formation under both, and therefore under modern contract law, is consciously made much easier.<sup>156</sup> For example, both Article 2 and the Restatement (Second) of Contracts recognize that a contract can be formed by words or conduct<sup>157</sup> and even if the exact moment of mutual assent cannot be identified<sup>158</sup> or is delayed,<sup>159</sup> or the contract lacks material terms.<sup>160</sup> Modern contract law

154. KNAPP, CASEBOOK, *supra* note 4, at 34; *see also*, Mensch, *Ideology*, *supra* note 34, at 755.

155. Knapp, *Offer*, *supra* note 2, at 317.

156. FEINMAN, UNMAKING, *supra* note 1, at 15; Charles L. Knapp, *The Promise of the Future—And Vice Versa: Some Reflections on the Metamorphosis of Contract Law*, 82 MICH. L. REV. 932, 937 (1984) [hereinafter Knapp, *Future*]; Mooney, *supra* note 1, at 1136–38.

157. *See* U.C.C. § 2-204(1) (2003) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."); RESTATEMENT (SECOND) OF CONTRACTS § 19(1) (1981) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by a failure to act.").

158. *See* U.C.C. § 2-204(2) (2003) ("An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."); RESTATEMENT (SECOND) OF CONTRACTS § 22(2) (1981) ("A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.").

159. As the U.C.C. states:

This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement. This Article rejects in these instances the formula that "an agreement to agree is unenforceable" if the case falls within subsection (1) of this section, and rejects also defeating such agreements on the ground of "indefiniteness". Instead this Article recognizes the dominant intention of the parties to have the deal continue to be binding upon both.

U.C.C. § 2-305 cmt. 1 (2003); RESTATEMENT (SECOND) OF CONTRACTS § 27 (1981) ("Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof . . .").

160. *See, e.g.*, U.C.C. § 2-305(1) (2003) ("The parties if they so intend can conclude a contract for sale even though the price is not settled."). Additionally, the Restatement (Second) of Contracts states:

Parties who plan to make a final written instrument as the expression of their contract necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract the terms of which include an obligation to execute subsequently a final writing which shall contain certain provisions.

RESTATEMENT (SECOND) OF CONTRACTS § 27 cmt. a (1981).

thus recognizes that contracts can be formed in stages, rather than only upon the happening of the clearly identified events required by classical contract.<sup>161</sup>

#### 4. Power is in the Core (Formation)

Of the two formation elements,<sup>162</sup> mutual assent is key. This is because power does not emanate from consideration but rather is centered in mutual assent.<sup>163</sup>

Consideration is defined as “[t]he inducement to a contract; the cause, motive, price, or impelling influence which induces a contracting party to enter into a contract.”<sup>164</sup> Much has been written about the element of consideration.<sup>165</sup> I do not argue that consideration is unimportant to contract formation; it remains one of the two elements necessary to form a contract.<sup>166</sup> But modern contract law only recognizes one test for consideration, the bargain-theory.<sup>167</sup> So, if

161. See RESTATEMENT (SECOND) OF CONTRACTS § 27 cmt. a (1981); FARNSWORTH, *supra* note 6, § 3.5; Eisenberg, *Dynamic*, *supra* note 2, at 1796; Knapp, *Offer*, *supra* note 2, at 322 (“Whether one speaks of a ‘contract to bargain,’ an ‘agreement to negotiate,’ or a ‘binding preliminary commitment,’ the lesson is essentially the same: sometimes contracts are formed not by flipping a switch, but by gradually turning up a dimmer.”) (footnotes omitted); see also U.C.C. § 2-305 cmt. 1 (2003).

162. See *supra* text accompanying notes 137, 144.

163. Professor Melvin Eisenberg writes:

The school of classical contract law placed the process of offer and acceptance on center stage. Under the teachings of that school, *contract* was virtually identical to *bargain*, and bargains were conceived to be formed by offer and acceptance . . . . At the instant that a bargain contract is formed by offer and acceptance, a promisor becomes potentially liable for expectation damages even if he changes his mind a nanosecond later. Because the formation of contract has such potent consequences, much can ride on the rules that govern the offer-and-acceptance process.

Eisenberg, *Offers*, *supra* note 2, at 271 (footnote omitted); cf. Knapp, *Future*, *supra* note 156, at 947 (questioning the importance of consideration). But see James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587 (1981) (reconsidering the principle of equality in exchange and arguing that it remains a governing principle in determining the outcome of contract disputes, particularly those involving one-sided bargains).

164. BLACK’S LAW DICTIONARY 161 (5th ed. 1979).

165. See Eisenberg, *Bargain*, *supra* note 60, at 745; Eisenberg, *Consideration*, *supra* note 4, at 640; Melvin Aron Eisenberg, *Contracts and Property Law: The Emergence of Dynamic Contract Law*, 2 THEORETICAL INQUIRIES L. 1, 12–15 (2001); Eisenberg, *Dynamic*, *supra* note 2, at 1754–56; see also Craig Leonard Jackson, *Traditional Contract Theory: Old and New Attacks and Old and New Defenses*, 33 NEW ENG. L. REV. 365 (1999); Peter Linzer, *Teaching Important Contracts Concepts: Consider Consideration*, 44 ST. LOUIS U. L.J. 1317 (2000); Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 845 (1996); Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45 (1993).

166. See *supra* notes 137, 144.

167. See Eisenberg, *Dynamic*, *supra* note 2, at 1754 (“A basic axiom of the classical school,

something is bargained for, consideration is present. To be “bargained for” simply means that “the parties’ manifestations must have reference to each other, i.e., that they be reciprocal.”<sup>168</sup> Using the language of the Restatement (Second) of Contracts, something is bargained for “if it is sought by the promisor in exchange for his promise and is given by a promisee in exchange for that promise.”<sup>169</sup>

Let us now revisit the Party A–Party B example<sup>170</sup> where Party B has something that Party A wants or needs. Assume, for instance, that Party B has a house that he wants to sell. Party A has money that she is willing to part with to get Party B’s house, and Party B is willing to part with his house to get Party A’s money. As you can see in this transaction, Party A and Party B’s manifestations refer to each other—the house for the money. Party A is seeking Party B’s house in exchange for her money, and vice-versa. Consideration, therefore, is present. Indeed, one can usually assume that consideration is present in transactions taking place in the market.<sup>171</sup> In a business context, consideration is often irrelevant because the law will enforce a bargain even in its absence.<sup>172</sup>

In the Party A–Party B hypothetical, even though consideration is clearly present in the sale of the house, the specific *terms* of the sale must still be agreed to by the parties via mutual assent.<sup>173</sup> For example, Party A and Party B have to agree to, among other things, the sale price

however, was that to constitute consideration a promise or performance must be bargained-for—the so-called bargain theory of consideration.”); Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 585 (1998) (“By the late nineteenth century, if not earlier, the most important basis for enforcing promises was the bargain theory of consideration. To be enforceable under the bargain theory, a promise had to be supported by consideration, meaning that the promisor would receive something in exchange for the promise.”) (footnote omitted). FARNSWORTH, *supra* note 6, § 2.2, at 47; Kevin M. Teeven, *Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston’s Restatement*, 34 U. MEM. L. REV. 499, 512, 524 (2004).

168. FARNSWORTH, *supra* note 6, § 3.1, at 108.

169. RESTATEMENT (SECOND) OF CONTRACTS § 71(2) (1981).

170. See *supra* text accompanying note 15.

171. See FARNSWORTH, *supra* note 6, § 2.2, at 48; cf. Knapp, *Reliance*, *supra* note 1, at 1195 (“[B]y stressing the law’s willingness to enforce bargains per se, whatever their terms, Holmesian contract doctrine moved away from earlier equitable notions of ‘just price’ or ‘unconscionability’ toward the proposition that virtually any exchange-based bargain, no matter how lop-sided, could and probably would be upheld as consideration-supported.”).

172. See, e.g., U.C.C. § 2-205 (2003) (creating an option contract without requiring consideration); U.C.C. § 2-209(1) (2003) (making a modification under Article 2 binding without consideration); RESTATEMENT (SECOND) OF CONTRACTS § 89 (a), (c) (1981) (containing exceptions to the pre-existing duty rule that validate modifications obtained without consideration).

173. See *supra* text accompanying notes 137, 144.



of the house, any conditions that would cause the sale to be canceled, and the closing date. And the terms that the parties agree on via mutual assent will ultimately determine whether the bargain is good or bad for one of the parties.<sup>174</sup> Consequently, power in the core of contract is not located in the doctrine of consideration; rather, it is centered in mutual assent.<sup>175</sup>

Mutual assent is key because it is during the assent process that most material terms are decided<sup>176</sup> and the contract boilerplate<sup>177</sup> is added. This is also where the critical decision is made whether to enter into the contract or not. If the parties decide to enter the contract,<sup>178</sup> then the state effectively steps in and binds them to their contract.<sup>179</sup>

Being “bound to the contract” has two important, yet distinct meanings. First, at the point of formation the state creates a presumption that the contract and all of its terms are valid.<sup>180</sup> Second, the state will enforce the rights contained in that contract.<sup>181</sup>

The presumption of contract validity exists by negative implication, because upon formation, the state imposes the burden of overcoming the presumption and proving that the contract or term is invalid on the party challenging the contract or term.<sup>182</sup> Mutual assent provides an excellent illustration of the mechanics of this claim.

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174. See *supra* note 154.

175. Cf. Morant, *Race*, *supra* note 2, at 904 (“To a significant degree, a crucial element in the probability of enforcement of these bargains [i.e., bargains concluded as a result of compliance with the classical contract formation rules] is the reality and genuineness of the parties’ assent.”) (footnote omitted).

176. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 27 (1981).

177. “Boilerplate” is “[l]anguage which is used commonly in documents having a definite meaning in the same context without variation.” BLACK’S LAW DICTIONARY 92 (5th ed. 1979). Common contract boilerplate includes arbitration provisions, choice of law, and choice of forum clauses. See generally Knapp, *Opting*, *supra* note 3, at 95; Knapp, *Private*, *supra* note 1, at 775–76; William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1 (2006).

178. Since consideration is usually present in market transactions, see *supra* text accompanying note 171, contract formation would be complete when the parties expressed their assent to the contract.

179. See *infra* text accompanying notes 222–23.

180. See *infra* text accompanying notes 182–221.

181. See *infra* text accompanying notes 222–23.

182. See *Du Frene v. Kaiser Steel Corp.*, 41 Cal. Rptr. 834, 837 (Ct. App. 1965) (holding that a party must submit evidence to prove the party’s case if seeking the affirmative on an issue or risk defeat); *Patriotti v. Gen. Elec. Co.*, 587 A.2d 231, 232 (Me. 1991) (holding that the party claiming the affirmative defense has the burden of proof); Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1282 (1981) (explaining that generally it is the plaintiff in a civil action who must prove his claim); Ho Cheol Kim, *Burden of Proof and the Whole Prima Facie Case: The Evolving History*

There are several formulations of mutual assent currently espoused by academics and practitioners.<sup>183</sup> All of these formulations attempt to grapple with the practice of modern day contracting, such as the ubiquitous use of standard forms<sup>184</sup> and internet contracting in the form of browse wrap,<sup>185</sup> shrink wrap<sup>186</sup> and click wrap agreements,<sup>187</sup> and rolling contracts,<sup>188</sup> to name a few. While these formulations come from different ideological perspectives, they are all tilted in favor of finding that mutual assent exists. In other words, it is easy to establish mutual assent under modern contract law.<sup>189</sup> This is especially true

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*and Its Application in the WTO Jurisprudence*, 6 RICH. J. GLOBAL L. & BUS. 245, 251 (2007) (stating that the complaining party bears the burden of proof in a civil case).

183. I am not taking a position on whether any of these formulations are right or wrong. I am simply looking for current tests or standards used to determine whether mutual assent is established on a given set of facts.

184. See Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 977 n.51 (2006) (stating that standardized forms are the dominant form of contracting); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983) (defining seven characteristics of a model "contract of adhesion").

185. See *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004) ("[A] browse wrap license is part of the web site [e.g., license terms are posted on a site's home page or are accessible by a prominently displayed hyperlink,] and the user assents to the contract when the user visits the web site.").

186. See *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) ("A shrinkwrap license appears on the screen when the CD or diskette is inserted and does not let the consumer proceed without indicating acceptance."); Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., *Adapting Contract Law To Accommodate Electronic Contracts: Overview and Suggestions*, 26 RUTGERS COMPUTER & TECH. L.J. 215, 243 (2000) ("Commonly used in software packaging, 'shrink-wrap' contracts provide that an offeree accepts all provisions of the sales agreement simply by opening the software package.").

187. See *Oracle USA v. Graphnet, Inc.*, No. C06-05351, 2007 WL 485959, at \*1 (N.D. Cal. 2007) ("The 'click-wrap agreement' requires the potential customer to manifest his or her assent to the terms of a license by clicking a button on a dialog box or pop-up window before the customer can download the software being licensed or before the software media will be shipped to the customer."); *Hotels.com, L.P. v. Canales*, 195 S.W.3d 147, 154-55 (Tex. App. 2006) ("'Click-wrap' agreements require the user to review or scroll through terms and assent to the contractual terms by clicking a button that reads 'I Agree' or manifesting some other means of express assent.").

188. See Stephen E. Friedman, *Improving the Rolling Contract*, 56 AM. U. L. REV. 1, 4 (2006) ("Rolling contracts are contracts formed over time, with the seller presenting the terms in batches. Some terms are provided before or during the purchase or order, while others are provided later. These transactions typically give the buyer a right to return a purchased item or cancel a purchased service to avoid the transaction."); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 681 (2004) ("These arrangements essentially permit parties to reach agreement over basic terms, such as price and quantity, but leave until a later time, usually simultaneous with the delivery or first use of the goods, the presentation of additional terms that the buyer can accept, often by simply using the good, or reject, by returning it.").

189. One could argue that mutual assent may not be as easy to establish as I claim, because modern contract law tries to give effect to the parties' intent. The parties' intent, in turn, will be determined by facts and circumstances, some of which are subjective, that the classical approach

since an objective approach governs any analysis of mutual assent, regardless of the formulation.<sup>190</sup> Significantly, because all of the formulations make it easy to find mutual assent, they all suffer from the same problem,<sup>191</sup> their differing ideologies notwithstanding.

Mainstream modern contract law, as expressed in contract law hornbooks,<sup>192</sup> focuses on the parties' intent to be bound to determine whether mutual assent has been manifested.<sup>193</sup> The test is straightforward; it asks: Did the parties engage in actions (words or conduct) that manifested their assent?<sup>194</sup> If so, did the parties intend to

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to formation simply did not take into account. Professor Melvin Eisenberg argues this approach in his dynamic theory of contract law. See Eisenberg, *Dynamic*, *supra* note 2, at 1749 (proposing that modern contract law largely “consists of principles that are individual, dynamic, multifaceted, and, in appropriate cases, subjective”); see also Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 508 (2005) (suggesting that “dynamic contract law strives to establish ‘the best possible rules’ rather than hewing to formalistic principles”). I agree with the general claim that it is possible under modern contract law to find that mutual assent cannot be established. But I disagree that this is a high burden, for two reasons. First, all the modern formulations are tilted in favor of finding that mutual assent exists and, in several instances, mutual assent is actually presumed. See *infra* text accompanying notes 192–202. Second, I agree that “subjective” elements come into play in determining whether the parties intended to be bound. For example, the court will look to see what *these parties* did by *their* words and/or conduct to manifest their assent. But the test for “intent to be bound” is still an objective one—whether a reasonable person believes that the parties intended to engage in those actions—and strikes me as so minimal that the more usual result is that such an intent would be found. See *infra* text accompanying note 190; see also FARNSWORTH, *supra* note 6, § 3.7, at 117 (describing ways to show intention to be legally bound); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 31(c), at 58–59 (3d ed. 1990) [hereinafter MURRAY, CONTRACTS] (describing the process of interpretation of whether a party intended to be legally bound). Hence, I maintain that mutual assent is easy to establish under modern contract law.

190. FARNSWORTH, *supra* note 6, § 3.6, at 115; MURRAY, CONTRACTS, *supra* note 189, § 30, at 55; Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 511–12 (2002); Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000). To establish mutual assent under an objective approach, the law simply requires an outward and objective manifestation of it by both parties, i.e., through words and/or conduct. FARNSWORTH, *supra* note 6, §§ 3.1, 3.6. For example, where both parties sign the contract, their signatures would be the outward and objective manifestation of their assent to enter into the contract.

191. See *infra* text accompanying notes 202–21.

192. See generally FARNSWORTH, *supra* note 6 (reviewing principles of modern contract law); MURRAY, CONTRACTS, *supra* note 189 (discussing major concepts of modern contract law); JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS (5th ed. 2003) (analyzing modern contract law).

193. See FARNSWORTH, *supra* note 6, § 3.6 (noting that real but unexpressed state of the party's mind is irrelevant); MURRAY, CONTRACTS, *supra* note 189, § 31 (indicating ways to express intent to be legally bound); PERILLO, *supra* note 192, § 2.4 (stating that the parties need not manifest an intent to be contractually bound).

194. FARNSWORTH, *supra* note 6, § 3.6.

engage in those actions?<sup>195</sup> If they did, the parties' assent to the agreement will be legally established, even if they did not intend or even understand the legal consequences of their actions.<sup>196</sup>

Conservative theorists, like Professors Randy Barnett, Clayton Gillette, and Judge Frank Easterbrook posit the following formulations of mutual assent. For example, in the context of form contracts on the internet, Professor Randy Barnett suggests that clicking "I agree" on a website manifests mutual assent. Specifically, he argues that clicking "I agree" expresses intent to be bound by the terms parties have likely read and the terms that the parties have not likely read but which are not unreasonable.<sup>197</sup>

Professor Clayton Gillette proposes that "terms of [rolling contracts] should be considered binding as long as the process through which they emerged was one in which the nonreading, nonparticipating buyer was virtually represented in a manner that satisfies the same objectives as personal assent."<sup>198</sup> He then elaborates on a complex agency theory that would allow us to reach the conclusion that nonreading buyers' interests have been adequately represented by proxies, like sellers, courts, and/or regulators, such that all of the terms of rolling contracts should be considered binding.<sup>199</sup>

Finally, Judge Easterbrook articulated yet another test in *ProCD, Inc. v. Zeidenberg* and *Hill v. Gateway 2000, Inc.* Under Judge Easterbrook's formulation, a contract between a manufacturer and a buyer is formed when the buyer has a chance to review any hidden terms (i.e., hidden because the terms came inside the box with the goods) and assents to them by continued use of the purchased product.

More progressive formulations of mutual assent include the ones proposed by Karl Llewellyn and the Restatement (Second) of Contracts. Under Karl Llewellyn's 1960 proposal for standard forms, he argued that parties assenting to "boilerplate," or standard form, contracts specifically assent to a handful of explicitly negotiated terms and "one thing more," namely, "a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form."<sup>200</sup>

The Restatement (Second) of Contracts' formulation is found in § 211, Standardized Agreements, and is not limited to any particular

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195. *Id.*

196. *Id.* § 3.7; MURRAY, CONTRACTS, *supra* note 189, § 31; PERILLO, *supra* note 192, § 2.4.

197. Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 638 (2002).

198. Gillette, *supra* note 188, at 684.

199. *Id.* at 685–721.

200. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

type of contract. Section (1) provides in pertinent part that “Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing . . . he adopts the writing as an integrated agreement with respect to the terms included in the writing.” In other words, where there is a manifestation of assent to the writing, a valid contract is formed on the terms included therein. The only limitation is expressed in Subsection (3), which states that a term is not included in the contract if “the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained [that] particular term.”<sup>201</sup>

All of these formulations of mutual assent have two things in common. First, they would all find that mutual assent is present and, therefore, a contract is formed.<sup>202</sup> Indeed, mutual assent is presumed under all of these views. All of the formulations, therefore, leave the core of contract, i.e., formation, intact.

Second, because all of the formulations would establish mutual assent, they all suffer from what I call the “process problem.” Obviously, none of the formulations discussed foreclose a challenge to the contract terms and, indeed, several of them contemplate that the mutual assent so established may produce a bad bargain.<sup>203</sup> A challenge, either by way of claim or defense, to the contract terms constituting the bad bargain would be subject to a reasonableness standard.<sup>204</sup> But how is a party supposed to prove the terms are

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201. RESTATEMENT (SECOND) OF CONTRACTS § 211.3 (1981).

202. Recall that consideration is usually present in market transactions. *See supra* text accompanying note 171. Consequently, both elements of contract formation—mutual assent and consideration—would be present.

203. For example, the Barnett and Llewellyn tests each contemplate that unreasonable terms may be present in the contract. *See supra* text accompanying notes 197, 200.

204. A reasonableness standard would govern such a challenge, because (1) two of the formulations provide for such a standard explicitly, see, e.g., the Barnett and Llewellyn tests, *supra* text accompanying notes 197, 200; (2) another formulation suggests a reasonableness standard, see, e.g., the Restatement test, *supra* text accompanying note 201 (explaining that the contract is formed, but a term is not included if one party has reason to believe that the other would not agree to it). But what kind of term is this? It seems plausible to think that one party would have reason to believe that the other would not agree to an “unreasonable” term; and (3) yet another (Gillette’s test) would leave the determination to the courts. *See supra* text accompanying notes 198–99. Gillette acknowledges that some contract terms may just not lend themselves to his theory, like terms that are “sufficiently susceptible to market failures.” Gillette, *supra* note 188, at 722. In those situations, he states that third-party intervenors, i.e., courts and/or regulators, “would be superior proxies for nonreading buyers.” *Id.* Any intervention with respect to terms that cannot be accommodated by Gillette’s theory would have to be relegated to the courts.

Given that “reasonableness” is a standard explicitly and implicitly suggested by the mutual assent formulations, courts are generally familiar with it, and, more importantly, already employ

unreasonable? Essentially, the party faced with the bad bargain has to rely on modern contract law's policing doctrines, like unconscionability, economic duress, and misrepresentation to prove that the terms at issue should not be included in the contract.<sup>205</sup> Coercion in the bargaining process, therefore, has to be present; otherwise these particular policing doctrines are not available.<sup>206</sup> And this is where problems arise because the burden of establishing the relevant policing doctrine is on the complaining party who, in all likelihood, is the coerced party.<sup>207</sup>

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it in contract disputes over terms, it seems credible to suggest it for Gillette's theory and as the applicable standard here as well. *See Ault v. Pakulski*, 520 A.2d 703, 706 (Me. 1987) ("If a contract leaves open a key term, the law invokes the standard of reasonableness, and courts will supply the needed term."); *Leach v. Tingle*, 586 So. 2d 799, 802 (Miss. 1991) ("In ascertaining whether a contract is sufficiently definite to be enforceable, we have accepted that the court may employ a standard of reasonableness."); *see also* Enzo Cassinis, *Employment Law: The Tenth Circuit's Stance on the Evidentiary Scope of a "De Novo" Review in ERISA Benefits Suits*, 80 DENV. U. L. REV. 529, 536 n.72 (2003) ("Courts generally subject the interpretation of the contract to a 'reasonableness standard.'"); Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1999 (2001) ("Under a contractual standard of review, the courts generally subject the interpretation of the contract to a reasonableness standard."); M. Mebane Rash, *The North Carolina Supreme Court Engages in Stealthy Judicial Legislation: Doe v. Holt*, 71 N.C. L. REV. 1227, 1247 (1993) ("Courts are familiar with applying reasonableness standards."); Stephen D. Thill, *Assigning Error to Viar v. North Carolina Department of Transportation and State v. Hart: A Proposal for Revision of the North Carolina Rules of Appellate Procedure*, 85 N.C. L. REV. 1799, 1834 (2007) ("[R]easonableness is a familiar standard that is already applied in many judicial contexts.").

205. Recall that, if established, each of these policing doctrines would make the bad bargain procured as a result of coercion avoidable or otherwise unenforceable in whole or in part. *See supra* text accompanying notes 8–9.

206. *See supra* text accompanying notes 6–22.

207. A bad bargain in the form of one or more bad terms has to be a given, otherwise no one would challenge those contract term(s) using modern contract's expanded contract policing doctrines. Granted, any contract could end up being a bad bargain for one or both contracting parties in retrospect, regardless of which party was responsible for including the term. So, this factor alone is not determinative. But, the party challenging a term(s) cannot, generally speaking, be responsible for the term(s)'s inclusion in the contract, because such a challenge by the including party will probably fail. If the party challenging the term is responsible for its inclusion in the contract, either because it drafted the contract or insisted on the term's inclusion therein, it is extremely difficult to conceive of circumstances that would enable such a challenge to succeed. Under the rules of interpretation, any ambiguity in the contract would be construed against the drafter. *Carter v. Four Seasons Funding Corp.*, 97 S.W.3d 387, 398 (Ark. 2003); *Joyner v. Adams*, 361 S.E.2d 902, 905 (N.C. Ct. App. 1987). In addition, none of the contract policing doctrines would be available to the party responsible for including the term, for fairly obvious reasons. A party usually cannot harm herself, i.e., by including the "bad" terms, and then come into court to ask for help in getting out of the bad bargain she created. Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2 NAFTA: L. & BUS. REV. AM. 82, 102 n.87 (1996) ("As a general rule under the law of contracts, a party with 'unclean hands' may not be released unilaterally from its contract obligations to the detriment of the other party for reasons related to its own wrongdoing."); *see* Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609,

So, this is how the process problem works: the burden is on the coerced party to prove that a contract term(s) is unreasonable using one or more of the expanded contract policing doctrines. But these contract policing doctrines are peripheral to the core (formation) because they are not available to the coerced party until after a contract is formed.<sup>208</sup> At that point, after formation, the effect of the policing doctrines is muted, if not barred, by practical factors, the most important of which are (1) massive litigation costs,<sup>209</sup> (2) boilerplate clauses in standard

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619 (1997) (“The clean hands maxim is most often cited in contract cases. It requires that plaintiffs seeking equitable relief must themselves be free of any unconscionable conduct. Application of the maxim is thus not restricted to illegal, void, or voidable transactions only.”). The contract risk allocation defenses would similarly be unavailable. Mistake, whether mutual or unilateral, could not be argued, because the party responsible for the term’s inclusion is not mistaken as to its existence. See RESTATEMENT (SECOND) OF CONTRACTS §§ 151, 153 (1981). The specific risk allocation elements of impracticability of performance and frustration of purpose, would most likely allocate the risk of the term’s inclusion to the party that was responsible for including it in the contract. RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 265 (1981); Cf. RESTATEMENT (SECOND) OF CONTRACTS §§ 153 cmt. b (“The most obvious case of allocation of the risk . . . is one in which the parties themselves provide for it by their agreement.”), 261 cmt. c (explaining that the determination of whether a party has assumed a greater obligation depends on, among other things, “the degree to which the other party supplied the terms”) (1981). Consequently, because it is highly unlikely that the party responsible for the inclusion of a term(s) could successfully challenge its inclusion in court, I conclude that it is highly unlikely that the including party would be the party subsequently challenging the term.

The task, then, is to determine which party was responsible for including the term(s). We know that coercion in the bargaining process is assumed. But coercion for what purpose? The answer here, as before, is that coercion is employed to procure a bad bargain. In other words, the coercion must lead to the inclusion of the term(s) that create the bad bargain. If this is not the case, query the reason for the coercion at all. So, which party to a contract can insist on including specific terms in the contract? The answer is the party with the ability to coerce. Hence, the party most likely to be challenging the term(s) of a bad bargain using the contract policing doctrines will be the coerced party.

208. See *supra* text accompanying notes 149–50.

209. It is very expensive to bring a lawsuit of any kind, which would obviously include one raising the contract policing doctrines. See Scott Baker & Kimberly D. Krawiec, *Incomplete Contracts in a Complete Contract World*, 33 FLA. ST. U. L. REV. 725, 737 (2006) (“Litigation costs, specifically attorney fees, make it expensive to pursue a contract claim.”); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 326 (2008) (“Lawsuits are expensive and time consuming, and therefore most individuals will not bring a suit that has little or no potential for a damages award.”); Robert Sprague & Karen L. Page, *The Private Securities Litigation Reform Act and the Entrepreneur: Protecting Naïve Issuers from Sophisticated Investors*, 8 WYO. L. REV. 167, 175 (2008) (“Filing a lawsuit initiates a long, complex, and expensive process.”); Michelle A. Travis et al., *Dispute Resolution in Action: Examining the Reality of Employment Discrimination Cases: Proceedings of the 2007 Annual Meeting, Association of American Law Schools, Sections on Employment Discrimination and Alternative Dispute Resolution*, 11 EMP. RTS. & EMP. POL’Y J. 139, 141 (2007) (“After all, lawsuits are lengthy, expensive, and perhaps most importantly, can be psychically damaging to litigants.”); cf. Steven B. Hantler et al., *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1126 n.21 (2005) (“[A] survey of state courts of general jurisdiction in nation’s seventy-five largest counties found that contract cases take 21.5 months to

form contracts,<sup>210</sup> such as merger clauses,<sup>211</sup> mandatory arbitration provisions, forum selection, and choice of law clauses;<sup>212</sup> (3) federally-imposed limits on class actions by private attorneys<sup>213</sup> and legal service

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resolve.”).

210. See generally Knapp, *Opting*, *supra* note 3, at 97 (discussing increased power of form-contract drafters); Knapp, *Private*, *supra* note 1, at 775–76 (discussing judicial deference to the drafter); William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 1 (2006) (analyzing choice-of-law and choice-of-forum clauses in standard form contracts).

211. Merger clauses are commonly found in contract boilerplate. Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 315 n.146 (1985); Jerald Clifford McKinney, II, *Are You Trying to Imply Something?: Understanding the Various State Approaches to Implied Covenants of Continuous Operation in Commercial Leases*, 31 U. ARK. LITTLE ROCK L. REV. 427, 502 (2009); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-For Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 477–78 (2008). A merger clause invokes the parol evidence rule and serves to exclude any evidence outside of the parties’ written agreement. To the extent that a coerced party’s case relies on misrepresentations or statements outside of the writing, those pieces of evidence would very likely be barred. Cf. FEINMAN, UN-MAKING, *supra* note 1, at 94; Knapp, *Opting*, *supra* note 3, at 100–01.

212. All of these clauses have been upheld as valid by the courts. For examples of forum selection clauses see: *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). For examples of choice of law clauses see: *Johnson v. Ventra Group, Inc.*, 191 F.3d 732 (6th Cir. 1999); *Banek, Inc. v. Yogurt Ventures U.S.A., Inc.*, 6 F.3d 357 (6th Cir. 1993); *Wang Labs., Inc. v. Kagan*, 990 F.2d 1126 (9th Cir. 1993); *Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763 (D.C. Cir. 1992); *Interfirst Bank Clifton v. Fernandez*, 853 F.2d 292 (5th Cir. 1988); *Woods-Tucker Leasing Corp. of Ga. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744 (5th Cir. 1981). For examples of arbitration clauses see: *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

213. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 9-12 (codified at 28 U.S.C. § 1332 (2006)). In theory, the 2005 changes to the Class Action Fairness Act (CAFA) were intended to reduce the ability to bring class actions. See Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1606 (2006) (“The effect of CAFA will probably be to reduce the number of multistate class actions, and certainly the number of national class actions.”). Technically, it gave greater federal court jurisdiction over class actions under diversity jurisdiction. See 28 U.S.C. § 1332; Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial*, 59 BAYLOR L. REV. 77, 80 (2007).

According to the sponsors of [CAFA], the purpose of the sections expanding federal subject matter jurisdiction was to prevent the practice used by some lawyers of manipulating the citizenship of the named parties and/or the amount in controversy, which made it impossible for the defendants to remove the cases from state to federal court. This was facilitated by several long-standing interpretations of the diversity statutes by the Supreme Court.

*Id.* (citations omitted). The purpose was to reduce the number of state court actions—some state jurisdictions were very well known for their willingness to certify classes and award large damages. Shapiro, *supra* at 135–36.

One of the purposes of [CAFA] was to end abuses by plaintiffs’ attorneys who brought



providers;<sup>214</sup> and, of course, (4) the practical reality that a private attorney may not be readily available to litigate an individual claim (either for plaintiff or defendant) where the amount at stake is small.<sup>215</sup> Indeed, it is widely understood that courts rarely let parties out of their contracts, regardless of the excuse advanced.<sup>216</sup> Additionally, empirical

large nationwide class action lawsuits in a few state courts which were known to be overly favorable to class actions. By manipulating the named parties, plaintiffs were able to prevent these cases from being removed to federal courts.

*See also* 28 U.S.C. § 1711.

Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—keeping cases of national importance out of Federal court; sometimes acting in ways that demonstrate bias against out-of-State defendants; and making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

*Id.* It also sought to curtail perceived abusive cases that benefited plaintiffs' attorneys, but conveyed minimal benefits to the class (e.g. restricting coupon settlements). *See id.* ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value."); *Id.* § 1712(e) (providing that coupon settlements may be approved only after the court conducts a hearing to determine whether the settlement is "fair, reasonable, and adequate for class members").

214. *See* Elisabeth Smith Bornstein, *From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys*, 2003 U. CHI. LEGAL F. 693, 693–94 (2003) (suggesting that "the class action prohibition is unconstitutional because it represents impermissible viewpoint discrimination"); Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433, 434, 449 (1998) (discussing limitations on kinds of activities that Legal Services attorneys can undertake); Henry Rose, *Class Actions and the Poor*, 6 PIERCE L. REV. 55, 59 (2007) (reviewing legislative history of imposing restriction on the participation of Legal Services Attorneys in class actions).

215. *See* Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1217 (S.D. Fla. 2006) ("[F]ew firms, no matter how large or well financed, will have any incentive to represent the small stake holders in class actions against corporate America, no matter how worthy the cause or wrongful the defendant's conduct."); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1524 (2008) ("Because 'small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights,' plaintiffs with small stakes might each have insufficient reason to hire a lawyer to vindicate their claims, even if the sum of their claims would justify the expense of attorneys' fees." (citing *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))); Hessick, *supra* note 209, at 326 ("Lawsuits are expensive and time consuming, and therefore most individuals will not bring a suit that has little or no potential for a damages award.").

216. Professor Robert Lloyd writes:

We spend so much time on the unusual cases where courts find a way to let people out of their bad deals that students begin to think these cases are the norm. Students are amazed when I tell them that it is virtually unheard of for a sophisticated party, or even a party only moderately sophisticated, to prevail on an unconscionability argument. Yes, you can win an unconscionability case if your client is poor and uneducated, and if the other party is a sleazy organization that preys on poor people, and if you're able to afford an appeal, and if you get Skelly Wright on the bench. But absent these

studies indicate that claims based on the contract policing doctrines are not very successful when they are asserted in court.<sup>217</sup> Consequently, the process problem will prevent a challenge to the contract terms based on the expanded policing doctrines from going to court in the first place<sup>218</sup> and will cause most of these challenges to fail, even if they do make it through the courthouse doors.<sup>219</sup>

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circumstances, the client is going to be stuck with the documents she signs.

Robert M. Lloyd, *Making Contracts Relevant: Thirteen Lessons for the First-Year Contracts Course*, 36 ARIZ. ST. L.J. 257, 267 (2004); see also E. Allan Farnsworth, *Developments in Contract Law in the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 225 (1990) (“[C]ontinued expansion of unconscionability and related doctrines did not occur in the 1980s as expected.”); Knapp, *Private*, *supra* note 1, at 775 (noting that the burden of persuasion with respect to unconscionability claims “is at best difficult, [and] at worst literally impossible to satisfy”) (footnote omitted); Morant, *MLK*, *supra* note 22, at 110 (“The existence of . . . duress, unconscionability, and undue influence cannot, by themselves, sufficiently accommodate marketplace inequities. The very dearth of cases where individuals are successful in obtaining relief through those devices substantiates this point. This result is compounded by the heavy burden of proof placed upon the claimant of such relief.”) (footnotes omitted). Furthermore, the major push for expansion came in connection with commercial, rather than consumer, transactions. Regardless, the push was, on the whole, noteworthy mainly for its lack of success. See Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 STAN. L. REV. 99, 99 (1990) (“Notwithstanding academic writing that reports or urges expansion of the grounds of excuse, courts actually remain extremely reluctant to release parties from their obligations.”) (footnote omitted).

217. See, e.g., DiMatteo & Rich, *supra* note 7, at 1097 (“Data revealed that in only 37.8% (56 out of 148) of the cases sampled unconscionability was found.”); Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 463–65 (2005) (examining published state cases from 1996 through 2003 and finding that in “only nine of the eighty-eight [duress] cases did the court decide the matter in favor of the duress claim”; of those nine cases, an appellate court affirmed a lower court’s finding of duress in only two cases.).

218. This is because of (a) the huge costs of litigation, which are compounded by choice of forum clauses that could very well require litigation in a foreign state; (b) the amended class action rules; and (c) the practical reality that a private attorney probably would not take such small claims, especially if those claims have a low probability of success. Mandatory arbitration provisions would, of course, also prevent such challenges from being litigated in court. These challenges would be heard, however, in the arbitration proceeding. But, because arbitration also suffers from the problems just mentioned (i.e., costs, limited availability of class actions, and unavailability of private attorneys), the result would probably be the same—the challenge would not be brought in arbitration either. See FEINMAN, UN-MAKING, *supra* note 1, at 99–108; Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 814 (2008) (arguing that arbitration costs are the same or even higher than litigation costs); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 638 (1996) (criticizing judicial preference for mandatory binding arbitration); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004) (discussing that majority of standard form contracts impose on consumers arbitration clauses and prohibitions on class actions).

219. This is because of choice of law clauses, which usually adopt the law of a non-consumer friendly state to govern the dispute, and the fact that the empirical studies indicate that challenges based on contract policing doctrines, like duress and unconscionability, usually fail. See William

The practical consequence of all of this is that the presumption of validity that arises upon formation of the contract extends to both the contract and *all* the terms of that contract as well. More specifically, an objective manifestation of mutual assent to all the modern forms of contracting—i.e., standard forms, rolling contracts, click, shrink, or browse wrap contracts, etc.—becomes assent to both the reasonable and unreasonable terms in those contracts. Practically speaking, therefore, “being bound” to the contract in the first sense means that all of the terms of the contract will likely be binding against the coerced party.<sup>220</sup>

“Being bound” to the contract, however, does not end with the presumption of validity; it has a second component. Assuming that the contract is valid, either because the presumption of validity was not challenged or such a challenge failed, the state will enforce the rights expressed in that contract by literally putting the sovereign power of the state in the service of one contracting party against the other.<sup>221</sup> The state accomplishes this by compelling one of the parties (through its judges, sheriffs, and other agents) to either pay to get out of the contract or perform.<sup>222</sup>

Thus, power in contracting is in the core—formation. Power is in the core, because the state binds the contracting parties to the contract upon formation by creating the presumption of contract (and term) validity and then by agreeing to step in to enforce that contract.

##### 5. By Leaving the Core Intact, Modern Contract Law Expands and Then Immunizes Coercion

There are two points worth emphasizing in this last part of my argument, both of which follow from the previous four sections. First, leaving formation completely intact *and* making it easier to form a contract expands one party’s capacity for coercion. This is because formation, particularly mutual assent, is where the party with the capacity to coerce imposes the contract terms that it wants, either through some type of negotiation process or through the use of its

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J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects From Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 11 (2006) (discussing failure of legislature to unify the law regarding “the protective rules different states apply to business relationships that form between businesses and individuals”).

220. Cf. Knapp, *Opting*, *supra* note 3, at 102 (discussing why the “adhering party” would be bound by all the terms of a written agreement, including any applicable default provisions). Knapp’s “adhering party” would be the equivalent of my “coerced party.”

221. See *supra* note 83.

222. See *supra* note 83.

standard form.<sup>223</sup> Then, upon formation, the presumption of contract (and term) validity springs up, to the benefit of the coercing party.<sup>224</sup> The easier it is to form a contract, therefore, the easier it is for the coercing party to obtain the presumption of contract validity. Obtaining this presumption is very important to the coercing party because the burden of rebutting the presumption is then imposed on the coerced party, using one or more of the contract policing doctrines.<sup>225</sup> It is extremely difficult to overcome the presumption of contract validity in practice because of the process problem associated with bringing such a challenge.<sup>226</sup> Consequently, the difficulty faced by the coerced party in disproving the presumption of contract validity could conceivably give the party with coercive capacity greater license (if not perverse incentive) to impose more onerous and/or one-sided terms during contract formation.

Finally, and specifically because the process problem makes it so difficult to rebut the presumption of contract validity in practice, this presumption essentially immunizes the coercion taking place during the bargaining process from effective challenge by modern contract's expanded policing doctrines.<sup>227</sup> This is because a challenge (either by claim or defense) to the contract based on modern contract's expanded policing doctrines would most likely be unsuccessful, either because it was not asserted or because the challenge failed.

Existing consumer credit products,<sup>228</sup> like payday loans,<sup>229</sup> fee harvester cards,<sup>230</sup> refund anticipation loans,<sup>231</sup> generic credit cards,<sup>232</sup>

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223. See *supra* Part II.B (discussing modern contract and conventional wisdom).

224. See *supra* Part II.B.

225. See *supra* Part II.B (discussing modern contract and conventional wisdom).

226. See *supra* Part II.B.

227. See FEINMAN, UNMAKING, *supra* note 1, at 16–17.

The practical consequence of the implementation of [a formalist] vision is that businesses can use contract law more effectively to control relationships with their customers and employees because they can more easily dictate the terms of dealing, avoid being legally bound except on their own terms, avoid review by the courts of the fairness of those terms, and control how disputes are resolved under their contracts.

*Id.*

228. “Credit products” are a species of contract. See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 7 (2008) (“[C]reditors often design dangerous contracts as a strategic response to consumers’ underestimation of the risks that these contracts-products entail.”).

229. A payday loan is a small, short-term loan or cash advance offered at a fee. Bar-Gill & Warren, *supra* note 228, at 44. “In a typical transaction, a consumer might pay a \$30 fee for a two-week \$200 cash advance . . . . In the typical payday loan described above, the \$30 fee corresponds to an annual interest rate of almost 400%.” *Id.*

230. A “fee-harvester card” is a credit card that comes “with enormous fees and tiny credit

and subprime mortgages<sup>233</sup> provide ample evidence that contracts with onerous, one-sided terms, already abound. And to the extent that coercion is present in the formation of any of these contracts, they present a very real problem for the modern contract law system. Unfortunately, they present a problem that modern contract law, at least as presently constructed, will not be able to remedy effectively using its expanded policing doctrines.

#### IV. CONCLUSION

Conventional wisdom says that modern contract law evolved to remedy problems left unaddressed by the classical contract law

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lines;" the fees are incurred upon the credit card holder's first use of the card. *Fee-Harvesters: Low-Credit, High-Cost Cards Bleed Consumers*, NAT'L CONSUMER L. REP., Nov. 2007, at 5–6. The fees essentially "eat up" all of the credit made available on the card. *Id.* at 4. The National Consumer Law Center Report provides the following example of how fee-harvester cards basically work:

[O]ne of the fee-harvester cards featured in this report comes with a credit limit of \$250. However, the consumer who signs up for this card will automatically incur a \$95 program fee, a \$29 account set-up fee, a \$6 monthly participation fee, and a \$48 annual fee—an instant debt of \$178 and buying power of only \$72.

*Id.*

231. A refund anticipation loan ("RAL") is a bank loan secured by a taxpayer's expected tax refund. See Press Release, National Consumer Law Center and Consumer Federation of America, Consumers Urged to Keep More of Their Tax Refunds by Avoiding Quickie Loans (Jan. 21, 2009) (on file with author). Such loans usually last between 7–14 days, until the taxpayer's IRS refund arrives and the taxpayer repays the loan. *Id.* Approximately "8.67 million taxpayers received an RAL in the 2007 tax filing season (for tax year 2006)." *Id.* The typical RAL has several fees built into it, including loan fees (ranging from \$34 to \$134), and add-on fees (ranging from \$25 to several hundred dollars). *Id.* Probably the most shocking cost of an RAL is the effective annual interest rate ("APR") charged by the lenders, which range from approximately 50% to almost 500%. *Id.* If, however, an add-on fee of \$40 is charged and added to the calculation, the effective APRs on a given RAL increases and can range from 85% to almost 1,300%. *Id.*

232. One-sided terms imposed in credit cards include, but are not limited to: universal default provisions, any-time interest rate changes, penalty fees, additional fees (including risk-related, convenience and service fees), and other technical features, including "low (and even negative) amortization rates, compounded interest, pro-issuer payment allocation methods [i.e., payments are allocated first to low APR balances], and balance-computation methods [i.e., two-cycle billing]." Bar-Gill & Warren, *supra* note 228, at 52 (footnotes omitted). The magnitude of these terms can be illustrated by way of a quick example. In 2004, credit card companies collected \$24 billion in fees from U.S. card holders. *Id.* at 47. "[P]enalty fees totaled \$13 billion a year and accounted for 12.5% of issuers' revenues." *Id.* (footnotes omitted).

233. A subprime mortgage is a loan instrument sold to subprime borrowers, which are borrowers who have a heightened perceived risk of default. Studies show that significant percentages of borrowers (with estimates ranging from 35%–60%, depending on the study) were sold subprime mortgages when they could have qualified for prime mortgages. Bar-Gill & Warren, *supra* note 228, at 38–39. As a result, these borrowers overpay, because of fees and interest rates, "on average \$3,370 per subprime loan household per year." *Id.* at 40–41.

system.<sup>234</sup> Thus, modern contract law is different from classical contract in ways that make the current system work better than the older regime.<sup>235</sup> The differences between the two systems are therefore the most important part of the contract evolutionary story.<sup>236</sup> Of course, whether this conventional wisdom is true turns on whether modern contract has been successful in correcting the problems produced by the classical system.

The modern contract law system identified coercion during contract formation that produces a bad bargain as a problem left unaddressed by the classical system; the creation of contract policing doctrines was a solution to this problem.<sup>237</sup> But, as this Article demonstrates, the expanded contract policing doctrines are inadequate to the task set for them. This is because they are peripheral to the core of contract, which is formation; and formation is where power in contracting emanates and then becomes entrenched. Modern contract law will, therefore, be largely unsuccessful in eliminating, or even tempering, the coercion problem it believes was created (or ignored) under the classical system. Indeed, the modern contract law system will also likely make this problem worse.

Consequently, the conventional wisdom, which says that modern contract law is different from classical contract in ways that make the current system work better than the older regime,<sup>238</sup> is wrong. Instead, the ways in which the two systems are the same are more critical because it is the sameness between the two systems that predisposes modern contract law to fail. And, because the conventional wisdom is wrong, one can argue that at least parts of modern contract law are no better than the classical contract system that it ostensibly replaced, because the problems it perceived in the classical system remain.

I am not suggesting that we do away with contract law. I am not sure we could, even if we wanted to. But if conventional contract law wisdom embodies the way we believe contract law works (or should work), the fact that the conventional wisdom is wrong strongly suggests that modern contract law cannot work the way we ourselves assert that

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234. Feinman, *Critical*, *supra* note 2, at 830–39; Feinman, *Revival*, *supra* note 1, at 12–14; Knapp, *Offer*, *supra* note 2, at 317–19; Morant, *Race*, *supra* note 2, at 900; *cf.* Eisenberg, *Dynamic*, *supra* note 2, at 1753–54.

235. Eisenberg, *Dynamic*, *supra* note 2, at 1753–54.

236. FEINMAN, UN-MAKING, *supra* note 1, at 12–14; Knapp, *Offer*, *supra* note 2, at 316–19; Morant, *Race*, *supra* note 2, at 900; Speidel, *supra* note 2, at 260–61.

237. *See supra* text accompanying notes 6–22.

238. *See supra* text accompanying notes 1–5.

it should. And this result should matter.<sup>239</sup> If modern contract law cannot work on its own terms,<sup>240</sup> we either need to change the rules or come up with a different way to explain away or justify this result.

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239. The sentiments Professor Charles Knapp expressed twenty-five years ago still resonate today. He wrote:

[T]here is a deep and unresolved conflict at the heart of what we call "Contract Law," a conflict visible in the variety of views advanced, particularly in recent years, by the Contracts "theorists." At its most fundamental level, this can be described as the divergence between those who see the decision to enforce promissory obligations as primarily an expression of moral values, and those who see it as promoting market efficiency. One might, of course, conclude that (a) either point of view is in any case only a rationalization for the system we have, rather than an explanation of why we have it, or that (b) whether one holds one point of view or the other is really of little importance, since most case outcomes can be defended and/or attacked by persons holding either view. Both of these observations have more than a grain of truth in them. Therefore, does a choice at the theoretical level really matter? Ultimately it does, if only as a symbolic expression of the values of the society which has created, and is served by, "the law."

Knapp, *Future*, *supra* note 156, at 949–50.

240. Mensch, *Ideology*, *supra* note 34, at 770 ("New legal categories do not solve old problems, which lie deep in our structures of economic and political thought. They only express them differently.").